



NACWA Preliminary Guidance to Members on Stimulus Bill Implementation

February 20, 2009

I. Introduction

President Obama signed the *American Recovery and Reinvestment Act of 2009* (ARRA) into law Feb. 17 providing \$787 billion to stimulate the economy. The new law contains significant funding for infrastructure, including money that can be accessed by the clean water community to address their infrastructure needs. Title VII of the Appropriations section in the ARRA provides \$4 billion for the Clean Water State Revolving Fund (CWSRF) and \$2 billion for the Drinking Water State Revolving Fund (DWSRF). NACWA is issuing this document to its member agencies and affiliates to detail the specific provisions of the law and to provide guidance on how clean water communities can obtain funding for their projects.

The new law revises some of the regulatory provisions of the SRF programs in order to facilitate getting the funding to communities as quickly and efficiently as possible. Congress, recognizing the huge stakes involved in passing such a large stimulus package, has vowed aggressive oversight to ensure the law achieves its stated goal of creating or supporting some 3.5 million jobs working to shore up the nation's infrastructure. As part of this oversight, congressional staff encourages states and communities to identify and report barriers to accessing these funds for their ready-to-go projects.

Revisions to SRF Program

Language in the ARRA was incorporated to help streamline the process for obtaining funding through the SRF. The law waives the mandatory 20 percent state matching requirements that would normally apply to both SRFs. Funds will be allocated to the states using the existing SRF percentages under Clean Water Act (CWA) Section 205. A state-by-state table prepared by EPA can be found [here](#).

In order to ensure that the funds are used expeditiously to create jobs, two important limitations are included. First, EPA is directed to reallocate SRF monies where projects are not “under contract or construction” within 12 months of the date of enactment. This requirement reflects a compromise between the Senate version of the bill, which had included a 180-day deadline, and the House version, which had allowed up to two years to use the funds. Where the 12-month deadline is not met, EPA is required to “reallocate” those funds. Second, the bill states that “priority” for the appropriated funds shall be given to projects on state priority lists that are ready to proceed to construction within 12 months of enactment. This emphasis on “shovel-ready” projects is consistent with earlier versions of the bill, but it is not an absolute restriction on how the funds must be allocated.

In line with NACWA's advocacy, the bill includes language to require that “not less than” 50 percent of the capitalization grants each state receives shall be used to provide assistance for additional subsidization in the form of forgiveness of principal, negative interest loans, or grants, or any combination of these. This provision is a significant improvement over the House version of the bill, which

would have set 50 percent as the maximum amount so used and the original Senate version which contained no minimum amount for additional subsidization and the Senate version which would have given states complete discretion on whether to provide additional subsidization. Furthermore, language in the conference report directs the EPA “to strongly encourage the States to maximize the use of additional subsidies and to work with the States to ensure expedited award of grants under the additional subsidy provisions,” while continuing to implement their base loan programs funded through the annual appropriations bill.

Similarly, as urged by NACWA and its members, the ARRA does not include language proposed by the House that would have restricted additional subsidization to communities that meet state affordability criteria. However, language in the conference report suggests that Congress expects the states to “target, as much as possible, the additional subsidized monies to communities that could not otherwise afford an SRF loan.”

The final bill, reflecting NACWA’s collaborative efforts with other nonprofit organizations community, also requires that, to the extent there are sufficient eligible applications, “not less than” 20 percent of each SRF shall be used for projects to address to green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The conference report expands on this requirement by stating that States must certify to the Agency that they lack sufficient, eligible applications for these types of projects prior to using funds for conventional projects.

Finally, language was included in the bill to prohibit the use of both revolving funds for the purchase of land or easements and to prohibit other set asides that do not directly create jobs. To ensure that funds are used to create jobs, the bill also prohibits the use of the Revolving Funds to buy, refinance or restructure debt unless it was incurred after Oct. 1, 2008.

II. Administrative Requirements

The “General Provisions” section in Title XVI of the ARRA contains several important language that will affect the use of all the funds that are appropriated under the act.

In addition to the specific “use it or lose it” requirements contained in the SRF provisions, Title XVI, Section 1602 (“Preference for Quick-Start Activities”) states that, in using funds made available for infrastructure investment, recipients shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of enactment. They shall also use grant funds in a manner that maximizes job creation and economic benefit.

Title XVI, Section 1606 of the final bill (the “Buy American” provision) mandates that none of the funds appropriated or otherwise made available by the stimulus law may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. This section contains a provision allowing EPA to grant exceptions, based on formal written findings that it would be inconsistent with the public interest, sufficient American goods are not available, or inclusion of such goods would increase costs by more than 25 percent. EPA has not yet determined how this authority might be exercised, but the bill requires that a “detailed written justification” would have to be published in the Federal Register for each exemption.

Title XVI, Section 1606 (“wage rate requirements”) further provides that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the stimulus funding shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.

This provision will be particularly troublesome in states that do not currently enforce similar requirements in their existing SRF programs, calling for the drafting of new language in their standard assistance agreement forms.

III. Additional Sections of Interest

The stimulus law contains a variety of other provisions that provide funds for water quality-related spending by state and federal agencies. In addition, Division B (the tax provisions section) of the ARRA provides a number of important incentives designed to enhance the attractiveness and viability of local government bonds.

Division A – Appropriation Provisions

1. Title I – Department of Agriculture – Natural Resources Conservation Service

An additional amount of \$290 million is appropriated for “Watershed and Flood Prevention Operations,” of which \$145 million is for necessary expenses to purchase and restore floodplain easements. Another \$50 million is allocated for the “Watershed Rehabilitation Program.”

2. Title I – Department of Agriculture – Rural Utilities Service – Rural Water and Waste Disposal Program Account

The final bill includes \$1.38 billion in budget authority for loans and grants for rural water and waste disposal facilities. According to the conference report,

the amount of funding provided by the conference agreement will support \$3.788 billion in loans and grants for water and waste disposal facilities in rural areas. Of this amount, \$2.82 billion is for direct loans and \$968 million is for grants. At least 10 percent of the funds must be allocated for assistance in persistent poverty counties (counties with 20 percent of more of the population living in poverty over the last 30 years).

Although these funds will not apply to most NACWA members, the fact that they are included in the bill effectively argues against the need for redirection of a substantial portion of the CWSRF funds to rural wastewater systems.

3. Title IV – Energy and Water Development – Department of Defense-Civil – Department of the Army – Corps of Engineers

A total of \$4.6 billion is allocated to the Army Corps of Engineers (ACOE), with \$2 billion for “construction,” and not less than \$200 million for “water-related environmental infrastructure assistance.” Wastewater infrastructure projects have been included in previous ACOE funding bills that have passed Congress, providing an opportunity to have these funded through the stimulus package.

4. Title IV – Energy and Water Development – Department of the Interior – Bureau of Reclamation – Water and Related Resources

\$1 billion is allocated to the Bureau of Reclamation for “Water and Related Resources,” of which not less than \$126 million shall be for water reclamation and reuse projects authorized under title XVI of the *Reclamation Projects Authorization and Adjustment Act of 1992*, and not less than \$60 million shall be used for rural water projects and expended primarily on water intake and treatment facilities of such projects.

5. Title VII – Interior, Environment, and Related Agencies – Department of Agriculture – Forest Service

The law provides \$650 million for “Capital Improvement and Maintenance” for priority road, bridge and trail maintenance and decommissioning, including “related watershed restoration and ecosystem enhancement projects.” According to the conference report, this provides flexibility to the agency in determining the allocation of this funding among various program activities, including “watershed enhancement projects.”

Division B – Tax, Unemployment, Health, State Fiscal Relief, and Other Provisions

1. Title I – Tax Provisions – Subtitle F – Infrastructure Financing Tools

The ARRA contains a number of provisions designed to stimulate market demand for tax-exempt bonds, as well as new tax-favored bond provisions. Among other

things, the law authorizes new tax credit “Build America Bonds” in 2009 and 2010, which could be issued as tax-exempt governmental use bonds, but for which the issuer has elected to forgo the tax exemption of interest and to allow either (a) the holders to receive tax credits equal to 35 percent of the interest payments on the bonds or (b) if eligible, the issuer to receive credits in the form of payments from the U.S. Treasury on that amount. NACWA affiliate Squire, Sanders & Dempsey L.L.P. has prepared [this](#) detailed summary of these provisions.

IV. EPA’s Draft Guidance

EPA has created a prepared formal written guidance to the states on the implementation of the ARRA, which the Agency hopes to release within the near future. A preliminary draft of this guidance, dated Feb. 13, 2009, contains the following key elements:

- Before grants will be awarded, EPA will require each state to prepare an Intended Use Plan (IUP), which is required by CWA § 606(c) and 40 CFR § 35.3150, that contains a list of all publicly owned treatment works (POTWs) on the state’s priority list that are eligible for assistance, as well as all non-point source and estuary protection activities. The IUP must describe the intended uses of the 50-percent additional subsidization reserve and the 20-percent green infrastructure set aside.
- The final IUP must also describe the status of the state loan fund; **describe the means** by which the state will choose those projects that are ready to proceed to construction; and **include a declaration** that the state has or will have by a date certain the authority to provide the forms of additional subsidization required for the 50-percent reserve. Example IUPs will be attached to the final guidance.
- States will be required to **report no less than monthly** on the uses of the funds provided by the ARRA.
- Consistent with language in the conference report, EPA interprets the 20-percent green infrastructure set aside to require the states to make a **timely and concerted solicitation** for projects, to determine within 120 days after enactment which projects to include in their IUPs. If, after 120 days, any portion of the 20-percent reserve is not accounted for in the IUP, states must **certify in writing** to EPA that they lack sufficient eligible applications before they can use the funds for other projects.
- EPA “anticipates” that many grant awards will be made within 60 days of enactment.
- Every assistance applicant must provide a **signed certification** that contracts have been signed in an amount equal to the full value of their

assistance agreement within 12 months of the date of enactment. EPA will **immediately deobligate** funds from awarded grants that have not been committed to construction contracts within 12 months of enactment. All reporting on contracts must be completed within 14 days after that deadline.

- If funds are deobligated, they will be **realloted by EPA** using the same formula by which the original allotment was made, but none of the realloted funds will be available to any state that was subject to reallotment. To be eligible for reallotment, a state must certify by an amendment to its IUP that any additional funds will be committed to contracts for construction within 120 days. States are urged to identify such additional projects as soon as possible.
- Principal forgiveness and negative interest loans must be granted and the relevant loan amounts must be specified at the time of execution of the loan agreement. For accounting purposes, with a principal forgiveness loan the **amount forgiven** is counted against the subsidization total; for negative interest loans the amount counted is the **difference between the principal and the total payments**.
- Within 12 months after enactment, states must have committed the full 50 percent of the additional subsidization requirement.
- Funds that are disbursed in the form of grants must comply with a long list of **federal laws and executive orders** that apply to all EPA grants. A list of **28 cross-cutting federal authorities** is attached to the guidance. Grants to state and local (including tribal) governments must comply with the requirements in 40 CFR Part 30 (EPA's Uniform Administrative Requirements for Grants), which include both pre-award and post-award requirements for financial and program management, standards for management and disposition of property, procurement standards, reports and recordkeeping requirements, and provisions relating to grant termination and enforcement.

To the extent the final guidance from EPA differs from the information in the draft version summarized above, NACWA will provide this updated information.

V. Challenges to Implementation of the SRF Provisions

Even before the stimulus package was finalized, state officials and other stakeholders expressed concerns that the CWSRF program was simply not designed to accommodate the ambitious goals and timing of the stimulus plan. The CWSRF was originally created by Title VI of the 1987 Clean Water Act Amendments. Administered by the states and overseen by EPA, the CWSRF normally provides financial assistance other than grants to public and private entities for projects that

protect and restore water quality, including POTWs, nonpoint source pollution control, and estuary management. Under the existing CWSRF program, EPA provides annual grants directly to the states; states match these grants at a minimum of 20 percent and distribute the funds to public and private entities for water quality projects in accordance with state-prepared priority lists. The most common form of financial assistance has been loans with interest rates that vary from zero interest to market rate, with repayment periods of up to 20 years.

Statutory requirements governing the CWSRF are contained in CWA Sections 601 through 607. Those sections are implemented by EPA in accordance with regulations set forth in 40 C.F.R. Part 35, Subpart K (§§ 35.3100 through 35.3170). In addition, under CWA § 604 and 40 CFR § 35.3130, in order to receive and distribute CWSRF funds, each state must enter into capitalization grant agreements with EPA that include a specific list of commitments by the state.

At the state level, the SRF program may be administered by the state's environmental protection agency, by a separate state finance agency (e.g. Arizona, Indiana) or a combination of both (e.g. Iowa, New York, New Jersey). A complete listing of the relevant agencies is provided [here](#). In each state, enabling statutes and implementing regulations further specify how the CWSRF is administered in that state. Consequently, existing state law may establish specific interest rates, affordability criteria, and other limitations that would present obstacles to the distribution of stimulus funds in the form of grants, principle-forgiveness loans or zero-interest loans as intended by the ARRA. Emergency legislation or rulemaking may be needed in those states to eliminate these impediments. Illinois EPA has already announced that emergency rulemaking would be needed just to provide zero interest loans under its current SRF program, let alone the other forms of additional subsidization required by the ARRA, and that it expects to file those rules within 30 days after passage.

Aside from these obstacles, the basic procedural structure of the CWSRF program poses some challenges to the quick distribution of stimulus funds. CWSRF funds must be awarded on the basis of a state's project priority list and IUP. Consequently, the Indiana Finance Authority, at the direction of the state's governor, announced Feb. 5 that it had already turned to its existing priority list in order to identify 12 projects totaling \$36 million that would be eligible for interest-free loans when the stimulus package was passed.

Although the final ARRA waived certain basic provisions of the CWSRF program, such as the 20-percent state matching requirement and the requirement to distribute CWSRF funds only in the form of low-interest loans, the law also adds several new layers of complexity in the 20-percent green infrastructure set aside, the 12-month reallocation deadline, the "Buy American" requirements and the prevailing-wage provision. Furthermore, early concerns over the inherent limitations of the CWSRF program have now been significantly compounded by EPA's determination, in its draft guidance, that additional subsidization in the

form of grants must comply with a host of federal statutory requirements, as well as the procedural complexities of EPA's consolidated grant regulations. That being said, there may be methods to overcome these obstacles, such as through 100-percent principal subsidy, negative interest loans, etc. As a result, it is likely that many state agencies will choose to avoid the grants option in favor of the principal forgiveness or negative-interest loan approaches, potentially achieving the same effect as grant funding.

VI. Recommendations

A. Get on the List

If you have not already done so, it is imperative to establish immediate contact with your state implementing agency and identify the projects that you believe may be eligible for stimulus funds. Even before the Stimulus Bill was passed, many states had sent notification letters, established websites and scheduled webinars to discuss potential procedures for implementation of the Stimulus Bill. [A sampling of such notice letters is attached in Appendix C.] There is no uniform approach to the application process; it will vary from state to state, and it will continue to be a moving target until the EPA guidance is finalized and the state agencies have prepared the necessary revisions to their IUPs.

Nevertheless, members interested in obtaining stimulus funds cannot afford to wait for clarification. By way of example, Ohio EPA has established a website and instructed stakeholders in a Jan. 29, 2009, letter that applications should be submitted electronically by Feb. 13, 2009 (this deadline was subsequently suspended, in a Feb. 13, 2009, letter from the agency). The North Carolina Department of Environment and Natural Resources has requested that letters describing eligible projects be submitted by Feb. 20, 2009. Illinois EPA has announced that new or revised pre-applications for inclusion on the priority list should be filed by March 31, 2009. The Michigan Department of Environmental Quality has announced that final project plans must be submitted on or before July 1, 2009 in order to be included in the state's next priority list and IUP. The California State Water Resources Control Board has created an informational web page and asked that project descriptions be submitted via email, with no specific deadline being identified.

Most states already have more than enough projects on their existing priority lists to use all of their stimulus fund allocations several times over. The key to gaining access to the additional subsidization amounts in the ARRA, therefore, will be to submit projects that are given a relatively higher priority than others on the list. As mentioned above, Title VII of the ARRA specifically states that priority "shall be given" to projects on stat lists that are "ready to proceed to construction" within 12 months of enactment. Furthermore, the general provisions section in Title XVI directs that states "shall give preference" to activities that can be started and completed "expeditiously," with a goal of using 50 percent of the funds for

activities that can be initiated within 120 days after enactment. To the extent that your projects can meet these ready-to-go standards, you will be in a good position to receive priority consideration for funding.

B. Get Involved in the Process

Along with immediately identifying eligible projects and getting those projects on their state priority lists, members should be actively engaged with their state agencies in the development of criteria by which the projects will be prioritized. Members will also want to lobby their state agencies to take advantage of the opportunity afforded by the ARRA to provide more than 50 percent in the form of grants, negative interest, and principal forgiveness loans. In support of this goal, members can point to the language in the conference report stating that Congress expects EPA to “strongly encourage” the states to “maximize the use of additional subsidies.” Members will also want to ensure that their state agencies do not inequitably allocate funds to rural or small communities, especially since the ARRA provides separate funding through other agencies for such systems. Revisions or amendments to the state’s existing affordability criteria may be needed if the state currently uses such criteria to allocate SRF funds under its existing program.

As noted above, the draft EPA guidance would specifically require each state to provide “a description of the means by which the state will choose those projects that are ready to proceed to construction” as a part of the final IUP it must submit before the ARRA funds are awarded to the state. EPA has recommended that states submit these plans within 30 days after enactment. It is imperative, therefore, that interested parties monitor the process and coordinate with their state agencies as these selection criteria are drafted and included in their final IUPs.

C. Participate in Eliminating Roadblocks

Members will also need to work with their respective state agencies and legislatures to ensure that the state has the necessary legal authority to issue the types of grants, negative interest, and principal forgiveness loans called for under the 50 percent “additional subsidization” provisions of the stimulus package. Even though the new law explicitly waives the requirement in CWA § 603(d) that SRF funds may be used only to make loans, at terms not to exceed 20 years, many state enabling statutes and implementing regulations contain similar limitations that will have to be corrected by emergency legislation or rulemaking at the state level. Even if a state chooses to forego the use of grants, some states have established fixed rates of interest under state law that would preclude the use of negative interest and principal forgiveness loans unless those restrictions are modified. EPA has indicated in its draft guidance that it will require each state to include in its final IUP a declaration that the state has, or will have by a date certain, the authority to provide the form of additional subsidization funding required to be provided for the 50-percent portion of its stimulus grant.

Similarly, although affordability requirements were not included in the final stimulus package, many states have such requirements built into their state SRF programs, providing, for example, that low interest or zero interest loans are only available to certain classes of municipalities based on service area, population or income levels. To the extent that these state-level requirements are embodied in statute or regulation they may have to be amended in order to accommodate the forms of assistance contemplated by the new law.

D. Think Green

Because many states may be focusing on their existing priority lists to provide the majority of eligible projects, the best opportunities to obtain funding for new projects may be in the area of green infrastructure. As noted above, the stimulus package requires the states to devote 20 percent of their allocations to green infrastructure, water or energy efficiency improvements, or other environmentally innovative activities, provided that there are sufficient eligible project applications. EPA has indicated that it will require each state to “make a timely and concerted solicitation” for such projects, and, after 120 days following enactment of the bill, to certify in writing that it lacks sufficient eligible applications prior to using funds for conventional projects. The draft EPA guidance also contains, in Attachment 7, an extensive list of the types of projects that might be appropriate for the “green infrastructure reserve.” Specific examples of green infrastructure projects include:

- Implementation of comprehensive street tree or urban forestry programs
- Implementation of green streets (combinations of green infrastructure practices in transportation rights-of-ways)
- Implementation of water harvesting and reuse programs or projects
- Implementation of wet weather management systems for parking areas such as porous pavement, bioretention, trees, green roofs, and other practices that mimic natural hydrology
- Establishment and restoration of riparian buffers, floodplains, wetlands and other natural features
- Downspout disconnection to remove stormwater from combined sewers and storm sewers
- Comprehensive retrofit programs designed to keep wet weather out of all types of sewer systems

Examples of environmentally innovative projects include:

- Green infrastructure/low impact development stormwater projects
- Decentralized wastewater treatment and/or reuse projects that reduce energy consumption, recharge aquifers and reduce water withdrawals and treatment costs
- Projects that preserve or restore site hydrologic processes through sustainable landscaping and site design
- Projects that use water balance approaches (water budgets) that preserve site, local or regional hydrology
- Projects that demonstrate the energy savings and climate change implications of sustainable site design practices to manage stormwater and CSOs
- Projects that demonstrate the differential uses of water based on the level of treatment
- Projects that identify and quantify the benefits of using integrated water resources management approaches

VII. NACWA Next Steps

In addition to holding its valuable web seminar this week where the perspectives of Congress, EPA, states, and municipalities were aired regarding stimulus package implementation, NACWA will be at the center of stimulus package issues as they unfold. The Association is setting up a website where member and non-member utilities can share their experiences, difficulties, and successes regarding the stimulus package to benefit the entire clean water community. NACWA will also gather this vital information to learn the lessons of the stimulus package and apply them to the ongoing effort to create a long-term, sustainable local-state-federal investment partnership, including a clean water trust fund, while also being prepared for other clean water funding efforts whether it is CWSRF funding or a potential second stimulus package.

NACWA encourages all of its members to share your experiences with us regarding with the stimulus package. We have worked hard as a community to obtain this much-needed funding but we recognize this as only the first step.