



Legislative Options for Financing Water Infrastructure

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Summary

This report addresses several options being considered by Congress to address the financing needs of local communities for wastewater and drinking water infrastructure projects and to decrease or close the gap between available funds and projected needs. Some of the options exist and are well established, but they are under discussion for expansion or modification. Other innovative policy options for water infrastructure have recently been proposed, especially to supplement or complement existing financing tools. Some are intended to provide robust, long-term revenue to support existing financing programs and mechanisms. Some are intended to encourage private participation in furnishing drinking water and wastewater services.

Six options that are reflected in recent legislative proposals, including budgetary implications, are discussed.

- Increase funding for the State Revolving Fund (SRF) programs in the Clean Water Act (H.R. 1877 in the 113th Congress) and the Safe Drinking Water Act (H.R. 5320 in the 111th Congress),
- Create a federal water infrastructure trust fund (H.R. 1877 in the 113th Congress and H.R. 6249 in the 112th Congress),
- Create a “Water Infrastructure Finance and Innovation Act” Program, or WIFIA (S. 601 and S. 335 in the 113th Congress),
- Create a National Infrastructure Bank (H.R. 2804 and H.R. 505 in the 113th Congress),
- Lift private activity bond restrictions on water infrastructure projects (included in the Administration’s FY2014 budget request and S. 939 and H.R. 1802 in the 112th Congress), and
- Reinstate authority for the issuance of Build America Bonds (included in the Administration’s FY2014 budget request and H.R. 535 and H.R. 789 in the 113th Congress).

A number of these issues and options were examined in hearings by the House Transportation and Infrastructure Subcommittee on Water Resources and Environment and by the Senate Environment and Public Works Subcommittee on Water and Wildlife in the 112th Congress.

Consensus exists among many stakeholders—state and local governments, equipment manufacturers and construction companies, and environmental advocates—on the need for more investment in water infrastructure. There is no consensus supporting a preferred option or policy, and many advocate a combination that will expand the financing “toolbox” for projects. Some of the options discussed in this report may be helpful, but there is no single method that will address needs fully or close the financing gap completely. For example, some may be helpful to projects in large urban or multi-jurisdictional areas, while others may be more beneficial in smaller communities. It is unlikely that any of the recently proposed options could be up and running quickly, meaning that, at least for the near term, communities will continue to rely on the existing SRF programs, tax-exempt governmental bonds, and tax-exempt private activity bonds to finance their water infrastructure needs.

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Introduction

This report examines several legislative options to help finance water infrastructure that currently are receiving attention in Congress. The options discussed here are intended to address capital needs for building and upgrading wastewater and drinking water treatment systems and improving water quality in order to meet requirements under federal law.

Localities are primarily responsible for providing water infrastructure services. According to the most recent estimates by states and the Environmental Protection Agency (EPA), funding needs for such facilities total \$633 billion over the next 20 years, while EPA has estimated that the financing “gap” between current capital spending levels and projected needs is \$224 billion over 20 years, or \$11 billion per year, if spread evenly over that period.¹

Some analysts and stakeholders take issue with such estimates. Some say that EPA’s needs estimates are too low because they do not fully reflect types of projects not currently eligible for federal assistance, such as repair and replacement of aging systems, or needs that currently are not well met by existing programs, such as security-related projects; on-site treatment systems in small, dispersed communities; and projects that include mixed elements such as developing and treating new water supply, especially in rural areas. Other estimates much larger than EPA’s have been made by a number of groups. For example, the American Water Works Association recently estimated that investment needs for “buried drinking water infrastructure” total more than \$1 trillion over the next 25 years.²

However, assessing “need” is complicated by differences in purpose, criteria, and timing, among other issues. One of the major difficulties is defining what constitutes a “need,” a relative concept that is likely to generate a good deal of disagreement. In the infrastructure context, funding needs estimates try to identify the level of investment that is required to meet a defined level of quality or service, but this depiction of need is essentially an engineering concept. It differs from economists’ conception that the appropriate level of new infrastructure investment, or the optimal stock of public capital (infrastructure) for society, is determined by calculating the amount of infrastructure for which social marginal benefits just equal marginal costs.³

Whether the estimates made by states and EPA understate or overstate capital needs, communities face formidable challenges in providing adequate and reliable water infrastructure services. Congress is considering ways to help meet those challenges.

¹ EPA’s most recent estimate of capital needs for wastewater infrastructure was published in 2010. See U.S. Environmental Protection Agency, *Clean Watersheds Needs Survey 2008, Report to Congress*, EPA-832-R-10-002, May 2010. The most recent EPA needs estimate for drinking water infrastructure was issued in 2009. See U.S. Environmental Protection Agency, *Drinking Water Infrastructure Needs Survey and Assessment*, EPA-816-R-09-001, February 2009. Also see U.S. EPA, *The Clean Water and Drinking Water Infrastructure Gap Analysis*, EPA-816-R-02-020, September 2002. Estimates in the latter report of the “gap” between needs and current wastewater and drinking spending are very likely to be larger today than when that report was written 10 years ago, because projected needs have increased, while available funds have not.

² American Water Works Association, *Buried No Longer: Confronting America’s Water Infrastructure Challenge*, March 2012, <http://www.awwa.org/files/GovtPublicAffairs/GADocuments/BuriedNoLongerCompleteFinal.pdf>.

³ For additional discussion, see CRS Report RL31116, *Water Infrastructure Needs and Investment: Review and Analysis of Key Issues*, by Claudia Copeland and Mary Tiemann, and CRS Report R42018, *The Role of Public Works Infrastructure in Economic Recovery*, by Claudia Copeland, Linda Levine, and William J. Mallett.

Capital investments in water infrastructure are necessary to maintain high quality service that protects public health and the environment. Capital facilities are a major investment for water and wastewater utilities. Almost all capital projects are debt-financed (not financed on a pay-as-you-go basis from ongoing revenues to the utility). The principal financing tool that local governments use is issuance of tax-exempt municipal bonds—at least 70% of U.S. water utilities rely on municipal bonds and other debt to some degree to finance capital investments. In 2011, bonds issued for water, sewer, and sanitation projects totaled \$29.6 billion, of which \$14.2 billion was new-money financing and the remainder was for refunding to refinance prior governmental bonds.⁴ Beyond municipal bonds, federal assistance through grants and loans is available for some projects, but is insufficient to meet all needs. Finally, public-private partnerships, or P3s, which are long-term contractual arrangements between a public utility and a private company, provide limited capital financing. While they are increasingly used in transportation and some other infrastructure sectors, P3s are uncommon in the water sector, especially for wastewater; most P3s for water infrastructure involve contract operations for operation and maintenance.

Six Policy Options

This report addresses several financing options intended to address overall needs and decrease or close the funding gap. Some of the options exist and are well established, but they are under discussion for extension or modification. Other innovative policy options have recently been proposed in connection with water infrastructure, especially to supplement or complement existing financing tools. Some are intended to encourage private participation in furnishing drinking water and wastewater services. Some are intended to provide robust, long-term revenue to support existing financing programs and mechanisms. This report analyzes six policy options, including budgetary implications, related to financing water infrastructure that are reflected in recent legislation.⁵

- *Increase funding for the State Revolving Fund (SRF) programs in the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA).* Some propose increasing federal appropriations for these existing programs, under which federal capitalization grants are provided to states for the purpose of making loans to communities for water infrastructure and other eligible projects.
- *Create a federal water infrastructure trust fund.* Establishing such a fund could help to provide a dedicated source of federal funding for water infrastructure.
- *Create a “Water Infrastructure Finance and Innovation Act” Program (WIFIA).* Modeled after the existing Transportation Infrastructure Finance and Innovation Act (TIFIA) program, a WIFIA program would provide federal credit assistance in the form of direct loans and loan guarantees to finance water infrastructure projects.

⁴ Thomson-Reuters, *The Bond Buyer 2012 Yearbook*, p. 159.

⁵ This report does not address certain other concepts that have been suggested from time to time to help localities meet financial challenges through better planning and prioritization of water infrastructure. For example, EPA encourages localities to improve management of their infrastructure assets in order to extend current life and reduce need for new infrastructure. Likewise, EPA and municipalities have discussed ways, and EPA issued a policy framework in June 2012, to integrate infrastructure planning and permitting, in order to prioritize investments.

- *Create a National Infrastructure Bank.* This federal entity would provide low-interest loans and other types of credit assistance to stimulate investments by states, localities, and the private sector in a variety of infrastructure projects.
- *Lift private activity bond restrictions on water infrastructure projects.* This proposal would eliminate the limit on the amount of tax-exempt private activity bonds issued by states and localities to provide financing for privately owned water infrastructure facilities.
- *Reinstate authority for the issuance of Build America Bonds (BABs).* BABs are taxable bonds for which the U.S. Treasury pays a direct subsidy of the interest costs to the issuer (a state or local government), thus helping finance capital projects with lower borrowing costs.

In the 112th Congress, a number of these issues and options were examined in hearings by the House Transportation and Infrastructure Subcommittee on Water Resources and Environment (on February 28 and March 21, 2012) and by the Senate Environment and Public Works Subcommittee on Water and Wildlife (December 13, 2011, and February 28, 2012). The House subcommittee held a subsequent hearing on March 13, 2013.

Increase Funding for the SRF Programs

The most prominent source of federal financial assistance for municipal water infrastructure projects is the SRF programs, which can assist a variety of types of projects, including building new and improving existing wastewater treatment and drinking water treatment facilities needed to comply with standards and requirements of the CWA and SDWA. Clean water and drinking water SRFs have been set up in all 50 states, and the programs are widely supported. The programs' principal strengths are that they are well established; project selection criteria are well known; states have considerable flexibility in selecting which projects to assist; and operations and procedures are familiar to stakeholders.

Established by Congress in the 1987 CWA amendments (P.L. 100-4), the clean water SRF program provides seed money to states in the form of capitalization grants, which are matched by states at least by 20%. A state, in turn, uses the combined federal-state monies to provide various types of assistance, including making low- or no-interest loans, refinancing, purchasing or guaranteeing local debt, and purchasing bond insurance. Loan recipients repay assistance to the state, under terms set by the state. In 1996, Congress enacted a similar drinking water SRF program in the SDWA (P.L. 104-182). At the federal level, the SRF programs are administered by EPA, but actual implementation is done by states.

Both programs allow federal, state, and local agencies to leverage limited dollars. According to EPA, because of the funds' revolving nature, the federal investment can result in the construction of up to four times as many projects over a 20-year period as a one-time grant. Further, to the extent that a state uses monies in its SRF to secure bonds and then lends proceeds from the bonds for SRF-eligible activities, loan funding is increased. This financing technique, called leveraging, is used by 28 states and provides funding that exceeds the contribution from federal capitalization grants. In total, leveraged bonds and state contributions have comprised 52% of total SRF investment, while federal capitalization grants have comprised 48%.

From the federal budgetary perspective, the SRF programs are grants, and federal appropriations are fully scored; none of the funds provided to states as capitalization grants are returned to the

U.S. Treasury. However, from the local government or utility's perspective, SRFs are loans, which are repaid to states and are intended to be sources of long-term assistance for water infrastructure projects.

Although the SRF programs are considered to be highly successful in addressing water quality problems, there are several concerns and criticisms of them.

First, although the SRF is a loan program, some communities have long favored grants, which the CWA (but not the SDWA) previously provided. The cost burden per customer of capital projects tends to be greater in small communities, and rural and disadvantaged communities prefer grants because many of them lack the tax base needed to repay a loan. Congress has responded to this concern in several ways, including providing earmarked grants in appropriations acts until recently and authorizing a separate CWA grant program for "wet weather" projects to address sewer overflow problems (although it never received appropriations). Further, Congress specified in recent appropriations acts (such as EPA's FY2012 appropriation, P.L. 112-74) that states shall use a portion of both programs' capitalization grants to provide subsidy in the form of principal forgiveness, negative interest loans, or grants.⁶ Critics of the latter point out that, to the extent SRF assistance is partially subsidized and not fully repaid, the corpus of the state's loan fund is diminished, along with its capacity to make future loans.

Second, the potential for leveraging to increase overall funding is limited, because nearly half of the states do not use that financing technique.

Third, some stakeholders—especially large cities—contend that the SRF programs favor small and medium communities. According to this view, the programs do not benefit large projects, because in many cases assistance to individual projects is limited to \$20 million. However, the general validity of that concern is unclear, because where limits are imposed, this results from state policies, not federal. Neither the CWA nor the SDWA requires a state to limit SRF assistance, and states establish their own criteria for selecting projects, which are identified annually in Intended Use Plans (IUPs). In order to extend aid to more communities, some states may adopt dollar limits by rule or practice, but this is not universally the case.

Fourth, the CWA restricts SRF assistance to municipal, intermunicipal, interstate, and state agencies, thus barring private utilities from the program. Some in the private sector contend that this restriction provides an advantage to publicly owned utilities. Several legislative proposals to allow clean water SRFs to assist non-public entities have been considered, but none has been enacted. Modifying the CWA in that manner would conform the clean water program to its counterpart in the Safe Drinking Water Act. However, critics of providing federal assistance to private utilities contend that the credit subsidies have the potential of offering windfalls to those companies.

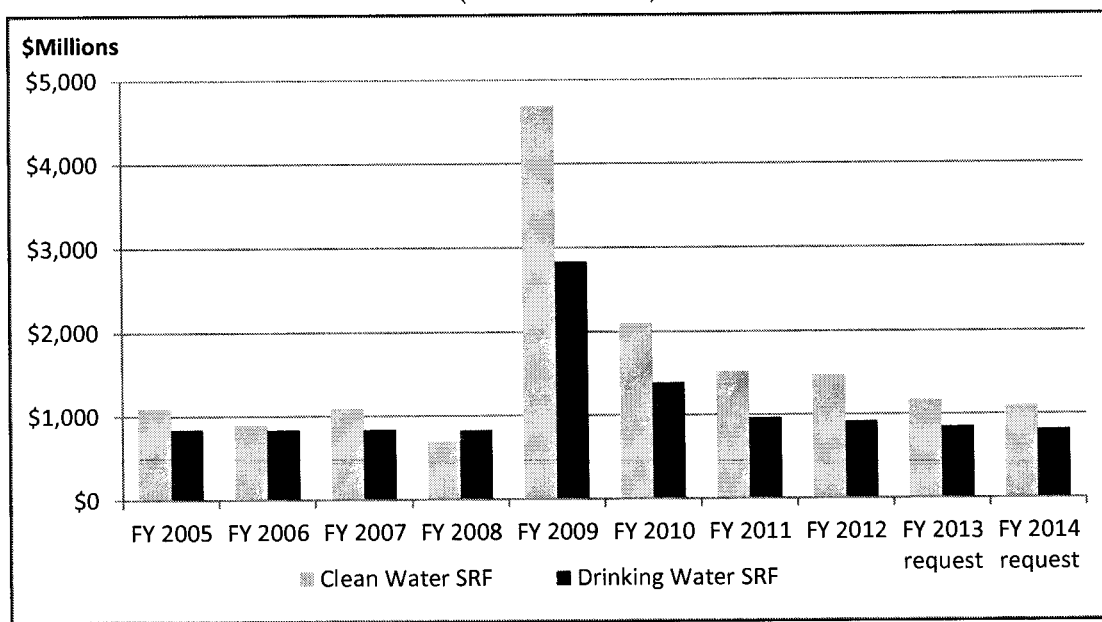
Fifth, some are critical that Congress imposes restrictions on states' use of SRF capitalization grants in order to achieve broad policy objectives beyond clean and safe water. Examples include Buy America or Davis-Bacon prevailing wage requirements. According to this view, by mandating that all funded projects meet certain non-water quality requirements, or that states use a minimum percentage of funds for "green" infrastructure such as energy efficiency projects (a

⁶ The SDWA already allows but does not require states to provide subsidized assistance from drinking water SRFs.

requirement in recent appropriations acts), Congress adds to projects costs and limits state flexibility.

Perhaps the most critical concern is the fact that federal capitalization grants are entirely subject to appropriations, which generally have been flat or declining for more than a decade, as shown in **Figure 1**. The FY2009 exception to this trend reflects temporary funding under the American Recovery and Reinvestment Act (ARRA, P.L. 111-5). The President's FY2013 budget request for capitalization grants for the two SRF programs was 15% below the \$2.38 billion total appropriated in FY2012. The FY2014 request for the two programs totals \$1.9 billion and is nearly 20% below the FY2012-appropriated amount.

Figure 1. SRF Appropriations, FY2005-2014 Request
(millions of dollars)



Source: Compiled by Congressional Research Service from appropriations acts and FY2013 and FY2014 Budget Justifications for EPA.

Notes: FY2009 funding included supplemental appropriations under the American Recovery and Reinvestment Act of \$4.0 billion for the clean water SRF and \$2.0 billion for the drinking water SRF.

Securing SRF appropriations is likely to be more difficult in future years, under general deficit reduction pressures and specific discretionary spending caps imposed by the debt agreement embodied in the Budget Control Act of 2011 (BCA, P.L. 112-25), as amended by the American Taxpayer Relief Act (ATRA, P.L. 112-240).⁷ In a multi-step process, the statute set caps on discretionary budget authority (appropriations) that began in FY2012 and an automatic spending reduction process that began in FY2013, which together will reduce the deficit by roughly \$2.1 trillion over the FY2012-FY2021 period. The spending caps will affect appropriators' decisions

⁷ For full discussion, see CRS Report R42506, *The Budget Control Act of 2011: The Effects on Spending and the Budget Deficit*, by Mindy R. Levit and Marc Labonte.

concerning discretionary spending on clean water and drinking water SRF capitalization grants. Further, the BCA requires that if the appropriations process does not result in spending levels that adhere to the BCA cap levels and the cap levels are breached, a specified enforcement process follows.⁸ In FY2013, the automatic spending reduction is carried out through an across-the-board sequester (cancellation) of previously authorized budgetary resources. Failure to achieve the FY2013 BCA limits did, in fact, trigger the automatic spending reduction process beginning on March 1, 2013. The Office of Management and Budget (OMB) estimated that the FY2013 sequester will reduce non-exempt defense discretionary spending by 7.8% relative to the cap levels and non-defense discretionary spending (such as for clean water and drinking water SRF capitalization grants) by 5.0% relative to the cap levels.⁹

Moreover, while the BCA caps represent the upper limit of spending that will meet the act's deficit reduction targets, some Members of Congress favor even lower levels of spending than the BCA allows and redistributing reductions in order to protect some accounts, especially defense. The FY2014 budget resolution adopted by the House on March 21 (H.Con.Res. 25) cuts nondefense discretionary spending more than \$1 trillion below the level established in the BCA and removes defense discretionary spending from possible sequestration, meaning that nondefense discretionary programs would be affected to a greater degree. Overall, no matter how much support there may be for more SRF spending, Congress faces many competing needs, priorities, and difficult choices.

Authorization of appropriations for clean water SRF capitalization grants expired in FY1994 and for drinking water SRF capitalization grants in FY2003. Congress has considered water infrastructure funding issues several times since the 107th Congress, but no legislation other than appropriations has been enacted. Recent proposals have included provisions for more robustly funded SRFs. In the 113th Congress, H.R. 1877 would reauthorize the clean water SRF program at a total of \$13.8 billion over five years, as would bills that were passed by the House in the 111th (H.R. 1262) and 110th Congresses (H.R. 720). Regarding the drinking water SRF, in the 111th Congress, the House passed a bill to reauthorize that program at a total of \$4.8 billion over three years (H.R. 5320). Also in the 111th Congress, a bill to reauthorize both SRF programs was reported in the Senate (S. 1005); it included \$20.0 billion for the clean water SRF program and \$14.7 billion for the drinking water SRF program, each for five years.

Legislation reported by congressional committees typically is "scored" by the Congressional Budget Office (CBO) for the effects on discretionary and mandatory, or direct, spending and by the Joint Committee on Taxation (JCT) for effects on revenues. Discretionary spending is the part of federal spending that lawmakers generally control through annual appropriation acts. In general, legislation that authorizes future appropriations for discretionary programs, by itself, does not increase federal deficits or decrease surpluses. Any subsequent discretionary

⁸ In addition to the deficit reduction achieved through the statutory caps on discretionary spending, the BCA put in place an automatic process in the event a special joint committee failed to reach an agreement on spending reductions. The BCA "Super Committee" announced in November 2011 that it had failed to reach such an agreement. As a result, an automatic spending reduction process was triggered unless Congress and the President act to eliminate or change the process. The automatic spending reductions affecting defense and non-defense discretionary accounts take place via a sequestration process in FY2013 and a reduction in the original BCA caps in FY2014 and beyond. Although some discretionary programs are exempt from the sequester process in FY2013, the SRF programs are not. Ibid.

⁹ Office of Management and Budget, *Report to the Congress on the Joint Committee Sequestration for FY2013*, March 1, 2013.

appropriation to fund the authorized activity would affect the federal budget and would be subject to spending limits under a budget resolution or the BCA.

Enacting legislation that only *authorizes* future discretionary appropriations would not result in an increase in CBO's projection of federal deficit under its baseline assumptions and would not implicate pay-as-you-go rules or the Statutory Pay-As-You-Go Act (P.L. 111-139), or PAYGO, which generally require that direct spending and revenue legislation not increase the federal deficit or that the spending be offset. However, authorizing legislation that affects direct spending or federal revenues is subject to budgetary rules. Direct spending is provided in or controlled by authorizing laws, generally continues without any annual legislative action, and includes spending authority provided for in such programs as Medicare and unemployment compensation. Direct spending also includes many offsetting collections, such as Medicare premiums, which are treated as negative spending instead of as revenues.

Perspective on how the SRF provisions of H.R. 1877 or similar legislation in the 113th Congress likely would be scored is provided by CBO's report on H.R. 1262 in the 111th Congress, which similarly authorized appropriations totaling \$13.8 billion for clean water SRF capitalization grants. The CBO report stated that certain provisions of the bill would affect direct spending and revenues, and it cited the JCT's estimates that by increasing funds available under the clean water SRF, H.R. 1262 would result in some states leveraging SRF grants by issuing additional tax-exempt bonds to finance water infrastructure projects. The JCT estimated that those additional bonds would result in reductions in federal revenue totaling \$700 million over 10 years.¹⁰ To offset the reduced revenue, H.R. 1262 included offsetting receipts resulting from an increase in per-ton duties imposed on vessels arriving at U.S. ports from foreign ports. These receipts would offset direct spending. H.R. 1877 in the 113th Congress includes similar offsetting receipts. The significance of needing to include the offsetting receipts in the legislation is that, if states were to increase leveraging and issue more tax-exempt bonds—such as might occur if the state volume cap on private activity bonds were lifted (see discussion below)—additional offsetting receipts likely would be required in SRF reauthorization legislation.

Create a Federal Water Infrastructure Trust Fund

One of the most common criticisms of the SRF programs, that capitalization grants are subject to annual appropriations, is the focus of proposals to create a federal water infrastructure trust fund modeled after existing mechanisms for other types of infrastructure such as the airport and airways trust fund and the highway trust fund. A trust fund supported by dedicated revenues would be intended to provide sustainable and reliable long-term financing of water infrastructure projects. Proponents contend that trust fund expenditures would not impact the federal deficit (assuming that revenues are at least as large as program spending), because they would be drawn from collections that are dedicated by law for specified purposes. Whether the mechanism is

¹⁰ See U.S. Congress, House Committee on Transportation and Infrastructure, *Water Quality Investment Act of 2009*, report to accompany H.R. 1262, 111th Congress, 1st session, H.Rept. 111-26, pp. 49-54. Similarly, the JCT estimated that H.R. 5320 in the 111th Congress, authorizing capitalization grants for the drinking water SRF program, would reduce federal revenues by \$337 million over 10 years by increasing the use of tax-exempt bonds by states. Pay-as-you-go procedures would apply because enacting the legislation would affect revenues. See U.S. Congress, House Committee on Energy and Commerce, *Assistance, Quality, and Affordability Act of 2010*, report to accompany H.R. 5320, 111th Cong., 2nd sess., July 1, 2010, H.Rept. 111-524, pp. 20-21.

created as a trust fund per se is not the critical issue,¹¹ but, rather, the critical issue is creation of a dedicated revenue and how it is recorded in the budget.

This idea is not new: Legislation was introduced in the House in 1993 to support clean water infrastructure by creating a fund that would accrue \$6 billion annually in revenues through a combination of user fees and excise taxes. In 1996 EPA issued a report, requested by Congress, on alternative financing options for water infrastructure, including a trust fund, and a 2009 Government Accountability Office (GAO) report, also requested by Congress, similarly assessed options to generate revenue for a clean water trust fund.¹² Legislation has been introduced in several congresses (H.R. 1877 in the current Congress, and H.R. 6249 in the 112th Congress). Issues associated with alternative financing options have been explored by the House Transportation and Infrastructure Water Resources and Environment Subcommittee in several hearings since 2005.

These proposals would create a dedicated revenue source that would be counted as an offsetting receipt or collection and would be recorded in the budget as reducing or netting out outlays for water infrastructure projects.¹³ Proponents contend that the proposal would be deficit-neutral (again assuming that new revenue sources match or exceed program outlays) and would be a consistent and protected source of revenue to help states replace, repair, and rehabilitate critical water infrastructure facilities.¹⁴ Both the 1996 EPA and 2009 GAO reports identified a number of issues that need to be addressed in establishing a clean water trust fund, including how it should be administered, whether it would be used to fund the clean water SRF or a separate program, what type(s) of financial assistance should be provided for projects (grants or loans), and what activities should be eligible for funding. These design issues are necessary, but they are relatively straightforward to resolve legislatively.

The most difficult issues conceptually and politically concern how to generate the revenues. Clean water lacks as clear a basis for charging or taxing a set of users as exists for either the highway or aviation trust funds. As GAO observed, “each funding option poses various implementation challenges, including defining the products or activities to be taxed, establishing a collection and enforcement framework, and obtaining stakeholder support.”¹⁵ Consensus on these issues has been elusive. H.R. 6249 in the 112th Congress proposed to raise at least \$6.5

¹¹ Whether a particular fund is designated in law as a trust fund is, in many cases, arbitrary. In the federal budget, there is no substantive difference between a trust fund (such as the Highway Trust Fund) and a special fund (e.g., the Nuclear Waste Disposal Fund) or a revolving fund (such as the Postal Service Fund). All receive collections that are dedicated by law for specific purposes. Office of Management and Budget, “Budget of the United States Government: Analytical Perspectives, Supplemental Materials Fiscal Year 2013,” p. 455.

¹² U.S. Environmental Protection Agency, *Alternative Funding Study: Water Quality Fees and Debt Financing Issues, Final Report to Congress*, June 1996; and U.S. Government Accountability Office, *Clean Water Infrastructure, A Variety of Issues Need to Be Considered When Designing a Clean Water Trust Fund*, GAO-09-657, May 2009. Hereinafter, 2009 GAO Report.

¹³ Offsetting collections are usually authorized to be spent for specified purposes and generally are available for use when collected, without further action by the Congress. Offsetting receipts may or may not be designated for a specific purpose. If designated for a particular purpose, in some cases the offsetting receipts may be spent without further action by Congress. When not so designated, offsetting receipts are credited to the general fund. See “Analytical Perspectives on the FY2014 Budget, Offsetting Collections and Offsetting Receipts,” <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/receipts.pdf>.

¹⁴ Rep. Earl Blumenauer, “The Water Protection and Reinvestment Act, Updated for the 112th Congress,” August 1, 2012.

¹⁵ 2009 GAO report, p. 13.

billion annually through excise taxes on water-based beverages, pharmaceutical products, and items disposed in wastewater (such as cosmetics and toilet paper). These revenues would be available to fund grants and loans under the clean water SRF program, as well as wastewater technology research, regional water research centers, and other programs. A portion of revenues in the fund also would be used for an innovative financing program modeled after the TIFIA program (see “Create a “Water Infrastructure Finance and Innovation Act” Program (WIFIA),” below). Other revenue options proposed in the past include fees on industrial discharge of toxic pollutants, and an excise tax on the active ingredients of pesticides and fertilizers. In the 113th Congress, Title IV of H.R. 1877 proposes a \$10 billion per year fund, but it defers identifying potential funding mechanisms and funding sources, pending a study by CBO.

From a budgetary perspective, there are no hurdles to enacting legislation to collect revenues for a water infrastructure trust fund. That is, assuming that the policy issues of who or what to tax and at what levels are resolved, budget rules do not prohibit enacting a measure to collect new revenues. However, most programs with dedicated revenues, including most trust funds, are not set up to be spent without authorization or appropriation by Congress, making it difficult to assure that all revenues and interest will be spent each year for water infrastructure purposes. Accomplishing the objectives laid out by proponents of the clean water trust fund would involve complicated steps: creating dedicated revenue that is classified in the budget so that it will net out the outlays, preventing spending on the program from being reduced by the congressional authorization and appropriation process, and setting up the program to ensure that it does not count against congressional budget rules such as PAYGO and discretionary spending caps.

In the past, Congress has sought to create a mechanism to guarantee spending for some existing infrastructure trust funds. For example, since 2000, legislation authorizing appropriations from the Airport and Airway Trust Fund included a provision making it out of order in the House or Senate to consider legislation that fails to use all aviation trust fund receipts and interest annually. The 2012 FAA reauthorization act, P.L. 112-95, modified this guarantee to restrict the amount made available for each fiscal year to 90% of the receipts of the aviation trust fund plus interest credited for the respective year as estimated by the Secretary of the Treasury.¹⁶ Further, since 1998, House rules effectively created funding guarantees for transportation activities within the highway and mass transit categories by making any legislation that would cause spending to be less than the amount authorized subject to a point of order. This rule, in clause 3 of Rule XXI, was amended at the beginning of the 112th Congress to allow an appropriations measure to reduce spending for highway and mass transit activities below the authorized level, as long as those funds were not made available for a purpose not authorized in the surface transportation act.¹⁷ These two examples illustrate the difficulty of assuring that trust fund revenues that are subject to appropriations are spent fully. Moreover, spending guarantees can still be trumped by broader budget policy goals (such as deficit reduction) or by the spending priorities of appropriators—that is, points of order can be waived.

¹⁶ This restriction in the bill was described in the House Transportation Committee’s report, H.Rept. 112-29, pt. 1, as necessary to “mitigate the effect of over-optimistic revenue projections in the future.” The 90% restriction would provide room for error in revenue estimates. Once the actual level of revenues for the trust fund is known, an adjustment would be made in the amount actually made available from the trust fund for that year, according to the committee’s report.

¹⁷ See CRS Report R41926, *House Rules Changes Affecting the Congressional Budget Process Made at the Beginning of the 112th Congress*, by Bill Heniff Jr.

Conceptually, creating a mechanism to protect spending could be done by amending the Balanced Budget and Emergency Deficit Control Act of 1985 to create a separate budget category for water infrastructure programs. Funding from within this category could not be used to, in effect, offset increased spending elsewhere in the budget, thereby removing any incentive for restraining the spending of available trust fund revenues. However, this option reduces the appropriations committees' influence on spending, which they could be expected to vigorously resist, and also would involve amending the Budget Act, thus requiring the acquiescence of the House and Senate budget committees.

Create a “Water Infrastructure Finance and Innovation Act” Program (WIFIA)

One option for supporting investment in water infrastructure is the creation of a program modeled on the Transportation Infrastructure Finance and Innovation Act (TIFIA) Program. As the name suggests, only transportation projects are eligible for TIFIA assistance, but operation of the TIFIA program over the past 15 years has generated interest in creating a similar program for water infrastructure, a so-called Water Infrastructure Finance and Innovation Act (WIFIA) Program.¹⁸

TIFIA, enacted in 1998 as part of the Transportation Equity Act for the 21st Century (TEA-21; P.L. 105-178), was reauthorized in July 2012 in the Moving Ahead for Progress in the 21st Century Act (MAP-21; P.L. 112-141). TIFIA provides federal credit assistance up to a maximum of 49% of project costs in the form of secured loans, loan guarantees, and lines of credit (23 U.S.C. 601 et seq.). Transportation projects costing at least \$50 million (or at least \$25 million in rural areas) are eligible for TIFIA financing.¹⁹ Projects must also have a dedicated revenue stream to be eligible for credit assistance. TIFIA can provide senior or subordinated debt. With the enactment of MAP-21, funding authorized for the TIFIA program has increased from \$122 million annually to \$750 million in FY2013 and \$1 billion in FY2014.

Prior to the enactment of MAP-21, a project seeking TIFIA assistance had to satisfy a number of eligibility criteria such as project cost and planning requirements. Projects were then selected by the Department of Transportation (DOT) from among those eligible based on eight weighted factors: private participation (20%); environmental impact (20%); national or regional significance (20%); project acceleration (12.5%); creditworthiness (12.5%); use of new technologies (5%); reduced federal grant assistance (5%); and consumption of budget authority (5%). MAP-21 eliminates these selection criteria and now provides TIFIA assistance purely on a project's eligibility. One of the key eligibility criteria is the creditworthiness of the project. To be eligible, a project's senior debt obligations and the federal credit instrument must receive an investment-grade rating from at least one nationally recognized credit agency. The TIFIA assistance must also be determined to have several beneficial effects: fostering a public-private partnership, if appropriate; enabling the project to proceed more quickly; and reducing the contribution of federal grant funding. Other eligibility criteria include satisfying planning and

¹⁸ For example, see American Water Works Association, Water Environment Federation and Association of Metropolitan Water Agencies, “A Cost Effective Approach to Increasing Investment in Water Infrastructure, The Water Infrastructure Financing Innovations Authority (WIFIA),” <http://www.awwa.org/portals/0/files/legreg/documents/wifia.pdf>.

¹⁹ The threshold for Intelligent Transportation Systems projects is \$15 million.

environmental review requirements and being ready to contract out construction within 90 days after the obligation of assistance.

Since the beginning of the program in 1998, TIFIA has provided 30 direct loans and one loan guarantee. Loan amounts ranged from \$40 million to \$900 million. Total credit assistance provided over the life of the program amounts to \$10.5 billion. The amount of credit assistance is much larger than the appropriated amount over this period because the appropriated funds need only cover the administrative and subsidy cost of the program (see below for a more detailed discussion of this point). Projects involving TIFIA financing amount to \$42 billion in total costs.²⁰ TIFIA typically provides financing to fill a gap in a much larger financial package that sometimes involves private equity and private debt. For example, the \$2.6 billion IH-635 Managed Lanes project in Dallas, TX, is being financed with \$606 million in private activity bonds, a \$672 million equity contribution from the private sector partner, \$17 million in toll revenues, \$490 million in public funds, and an \$850 million TIFIA loan.²¹

In the 113th Congress, two bills to create a WIFIA program have been introduced. The first, S. 335, would empower the Administrator of the Environmental Protection Agency (EPA) to provide credit assistance to drinking water and wastewater infrastructure projects, much like TIFIA is able to do for transportation projects. WIFIA credit assistance (loans or loan guarantees) would be available directly to sponsors of projects or to state infrastructure financing authorities for a group of projects that are combined for the purpose of receiving credit assistance. The Administrator of EPA would select projects for assistance based on a number of criteria such as creditworthiness; the need for federal assistance; the contribution of non-federal assistance, including from the private sector; and the extent to which the project is of national or regional significance. Credit assistance provided through the program would have to be for projects (individual or grouped by an SRF) totaling not less than \$20 million.

A second measure is S. 601, the Water Resources Development Act of 2013, which the Senate passed on May 15, 2013. Title X of the bill authorizes a five-year WIFIA pilot program. Under the bill, EPA would be authorized to provide credit assistance for drinking water and wastewater projects, and the U.S. Army Corps of Engineers would be authorized to provide similar assistance for water resource projects, such as flood control or hurricane and storm damage reduction. Each agency would be authorized \$50 million annually to provide this assistance. Like S. 335, projects would have to be \$20 million or larger in costs to be eligible for credit assistance.

From the federal perspective, an advantage of TIFIA is that it can provide a large amount of credit assistance relative to the amount of budget authority provided. The volume of loans and other types of credit assistance that TIFIA can provide is determined by the size of congressional appropriations and calculation of the subsidy cost.²² The subsidy cost largely determines the amount of money that can be made available to project sponsors.²³ Currently in the TIFIA

²⁰ Federal Highway Administration, "Projects and Project Profiles: TIFIA Portfolio," http://www.fhwa.dot.gov/ipd/tifia/projects_project_profiles/tifia_portfolio.htm.

²¹ Federal Highway Administration, "TIFIA Project Profiles: IH 635 Managed Lanes," http://www.fhwa.dot.gov/ipd/project_profiles/tx_lbj635.htm.

²² According to the Federal Credit Reform Act of 1990, the subsidy cost is the "estimated long-term cost to the Government of a direct loan or loan guarantee, calculated on a net present value basis, excluding administrative costs" (104 Stat. 1388-610). The Federal Credit Reform Act of 1990 was enacted as part of the Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508).

²³ Douglas J. Elliott, *Budgeting for Credit Programs: A Primer*, Center for Federal Financial Institutions, April 2004, at (continued...)

program, the average project subsidy cost is approximately 10%. Of the \$122 million annual appropriation for TIFIA in FY2012, DOT was able to use approximately \$110 million to cover loan subsidy costs. The rest went for administrative costs and other deductions. DOT estimated that \$110 million would support about \$1.1 billion in TIFIA credit assistance (\$110 million divided by 10% equals \$1.1 billion).²⁴ Proponents of a WIFIA argue that loans for water projects could be even less risky than transportation projects, because water rates are an established repayment mechanism, thus the subsidy cost would be lower and the amount of credit assistance higher (per dollar of budget authority).²⁵ However, analysts note that, even with stable rate mechanisms, some communities and water utilities have recently experienced problems with borrowing and bond repayments, so repayment of a WIFIA loan is not a certainty.²⁶

One of the main benefits of the TIFIA program is that it provides capital at a low cost to the borrower. Moreover, TIFIA financing is often characterized as patient capital because loan repayment does not need to begin until five years after substantial completion of a project, the loan can be for up to 35 years from substantial completion, and the amortization schedule can be flexible. The WIFIA legislation likewise is intended to provide these benefits. As total TIFIA assistance cannot exceed 49% of project costs, it is intended to encourage non-federal and private sector financing. The WIFIA bills, with similar 49% caps on assistance, would likely encourage some non-federal financing, including from the private sector, but how much is unclear.

Another possible benefit of a WIFIA program is that it is intended to not duplicate existing water infrastructure financing tools. Many argue that the SRF program is useful primarily for smaller communities and smaller projects, as discussed previously. This might argue for expanding the SRF program, while keeping the WIFIA solely for larger projects. Arguably, then, the \$20 million minimum threshold for credit assistance contained in S. 335 and S. 601 could be about the right level so as not to duplicate assistance from SRFs.²⁷ Both bills, however, also provide access to WIFIA financing for smaller projects by grouping, or aggregating, them through a SRF to meet the \$20 million threshold. One possible downside of providing smaller projects access to WIFIA financing, grouped or not, is the time and expense of administering the program.

A WIFIA may shift some decision making for financing water infrastructure projects from the state and local level to the federal level, specifically to the EPA (or the Army Corps, under S. 601), a change that concerns some stakeholders. Prior to the enactment of MAP-21, authority to make TIFIA loans and to provide other credit assistance was vested in DOT. MAP-21 makes

(...continued)

<http://www.coffi.org/pubs/Budgeting%20Primer.pdf>.

²⁴ Department of Transportation, "Letters of Interest for Credit Assistance Under the Transportation Infrastructure Finance and Innovation Act (TIFIA) Program," 76 *Federal Register* 68257-68260, November 3, 2011, http://www.fhwa.dot.gov/ipd/pdfs/tifia/NOFA_Published_110311.pdf.

²⁵ U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *Testimony of Aurel Arndt*, Hearing on Innovative Funding of Water Infrastructure of the United States, 112th Cong., 2nd sess., February 28, 2012, <http://republicans.transportation.house.gov/Media/file/TestimonyWater/2012-02-28-Arndt.pdf>.

²⁶ LaShell Stratton-Childers, "Navigating a Rough Terrain," *Water Environment and Technology*, January 2012, pp. 24-29. This article describes the November 2011 bankruptcy filing by Jefferson County, AL, in part resulting from the county's inability to cover debts for wastewater system upgrades.

²⁷ U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *Testimony of Aurel Arndt*, Hearing on Innovative Funding of Water Infrastructure of the United States, 112th Cong., 2nd sess., February 28, 2012, <http://republicans.transportation.house.gov/Media/file/TestimonyWater/2012-02-28-Arndt.pdf>.

DOT's role more administrative, predominantly by making the program based on eligibility. Among other things it is hoped that this will speed the delivery of credit assistance.

Another benefit of the TIFIA program from the federal perspective is that it potentially limits the federal government's exposure to default by relying on market discipline through creditworthiness standards and the encouragement of private capital investment. On the other hand, the Congressional Budget Office argues that the federal government underestimates the cost of providing credit assistance under programs like TIFIA.²⁸ This is because it excludes "the cost of market risk—the compensation that investors require for the uncertainty of expected but risky cash flows. The reason is that the FCRA [Federal Credit Reform Act] requires analysts to calculate present values by discounting expected cash flows at the interest rate on risk-free Treasury securities (the rate at which the government borrows money). In contrast, private financial institutions use risk-adjusted discount rates to calculate present values."²⁹

Enacting a WIFIA program raises another federal budgetary and revenue issue. The initial CBO cost estimate for S. 601, as approved by the Environment and Public Works Committee, concluded that the WIFIA provisions would cost \$260 million over five years. In addition, it would result in certain revenue loss to the U.S. Treasury, thus, pay-as-you-go procedures would apply to the bill. CBO cited the Joint Committee on Taxation's (JCT) estimate that enactment of the bill would reduce revenues by \$135 million over 10 years, because states would be expected to issue tax-exempt bonds in order to acquire additional funds not covered by WIFIA assistance.³⁰ To avoid the pay-as-you-go problem in the bill, the committee added a provision to S. 601 to prohibit recipients of WIFIA assistance from issuing tax-exempt bonds for the non-WIFIA portions of project costs (Section 10009(a)(5) of S. 601). CBO re-estimated the bill and concluded that, because the change would make the WIFIA program less attractive to entities, most of whom rely on tax-exempt bonds for project financing, the cost of the bill would be \$200 million less over five years but would have no impact on revenues, because the demand for federal credit would be lower without the option of using tax-exempt financing.³¹ Thus, the apparent solution to one problem in the legislation—potential revenue loss—raises a different kind of problem for entities seeking WIFIA credit assistance.

Create a National Infrastructure Bank

Another idea for improving the nation's investment in infrastructure is the creation of a national infrastructure bank.³² An infrastructure bank is a government-established entity that provides credit assistance to sponsors of infrastructure projects. An infrastructure bank can take many different forms, such as an independent federal agency, a federal corporation, a government-

²⁸ For more on this topic generally, see Congressional Budget Office, *Fair-Value Accounting for Federal Credit Programs*, Issue Brief, March 2012, http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-05-FairValue_Brief.pdf.

²⁹ Congressional Budget Office, "Estimating the Value of Subsidies for Federal Loans and Loan Guarantees," August 2004, p. 2, <http://www.cbo.gov/ftpdocs/57xx/doc5751/08-19-CreditSubsidies.pdf>.

³⁰ Congressional Budget Office, Cost Estimate for S. 601, Water Resources Development Act of 2013, April 9, 2013, p. 6.

³¹ Congressional Budget Office, Cost Estimate for S. 601, Water Resources Development Act of 2013, April 17, 2013, p. 7.

³² For more on this topic and legislation in the 112th Congress, see CRS Report R42115, *National Infrastructure Bank: Overview and Current Legislation*, by William J. Mallett, Steven Maguire, and Kevin R. Kosar.

sponsored enterprise, or a private-sector, non-profit corporation. Under most infrastructure bank proposals, the bank would be authorized to help finance the construction or reconstruction of infrastructure in several areas including energy, water and wastewater, telecommunications, and transportation.

According to proponents, a national infrastructure bank would provide several major benefits for infrastructure projects, including water and wastewater capital projects. An infrastructure bank might help facilitate water infrastructure projects by providing large amounts of financing on advantageous terms, including low interest rates and long maturities. This might encourage investment that would otherwise not take place, particularly in large, expensive projects whose costs are borne locally but whose benefits are regional or national in scope. On the other hand, an infrastructure bank may not be the lowest-cost means of achieving that goal. The Congressional Budget Office has pointed out that a special entity that issues its own debt would not be able to match the lower interest and issuance costs of the U.S. Treasury.³³

Whether providing financing on advantageous terms by a national infrastructure bank would lead to an increase in the total amount of capital devoted to infrastructure investment is unclear. Another purported advantage of certain types of infrastructure banks is access to private capital, such as pension funds and international investors. These entities, which are generally not subject to U.S. taxes, may be uninterested in purchasing the tax-exempt bonds that are traditionally a major source of project finance, but might be willing to make equity or debt investments in infrastructure in cooperation with a national infrastructure bank. If this shift were to occur, however, it could be to the detriment of existing investment, as the additional investment in infrastructure may be drawn from a relatively fixed amount of available investment funds.

Another putative benefit of a national infrastructure bank is that it might improve project selection. A frequent criticism of current public infrastructure project selection is that it is often based on factors such as geographic equity and political favoritism instead of the demonstrable merits of the projects themselves.³⁴ In many cases, funding goes to projects that are presumed to be the most important, without a rigorous study of the costs and benefits. Proponents of an infrastructure bank assert that it would select projects based on economic analyses of all costs and benefits.³⁵

Selecting projects through an infrastructure bank has possible disadvantages as well as advantages. First, it would most likely direct financing to projects that are the most viable financially rather than those with the greatest social benefits. Unless there were set-asides for particular types of projects, water and wastewater projects would be in competition with infrastructure projects across a wide spectrum of sectors. Second, financing projects through an infrastructure bank might serve to exclude small urban and rural areas because infrastructure banks would likely focus on large, expensive projects that tend to be located in major urban centers. This may be true even without a minimum project cost threshold set in law. A third

³³ Congressional Budget Office, "Issues and Options in Infrastructure Investment," May 2008, p. 28, at <http://www.cbo.gov/ftpdocs/91xx/doc9135/05-16-Infrastructure.pdf>.

³⁴ Everett Ehrlich, *A National Infrastructure Bank: A Road Guide to the Destination*, Policy Memo, Progressive Policy Institute, October 2010, at http://www.progressivefix.com/wp-content/uploads/2010/09/09.2010-Ehrlich_A-National-Infrastructure-Bank.pdf.

³⁵ The extent to which this would be done varies depending on the specific proposal. If Congress were to direct the bank to consider factors such as job creation and poverty reduction, then those requirements might constrain its ability to assist the most economically viable projects.

possible disadvantage is that a national infrastructure bank may shift some decision making from the state and local level to the federal level.

Once established, a national infrastructure bank might help accelerate worthwhile infrastructure projects by bearing more of the financial risk. Large projects are often slowed by funding and financing problems given the degree of risk. These large projects might also be too large for financing from a state infrastructure bank or from a state revolving loan fund. Moreover, even with a combination of grants, municipal bonds, and private equity, mega-projects often need another source of funding to complete a financial package. Financing is also sometimes needed to bridge the gap between construction and when the project generates revenues. Although a national infrastructure bank might help accelerate projects over the long term, it will likely to take several years for a bank to be fully functioning after enactment.

One attraction of national infrastructure bank proposals is the potential to encourage significant non-federal infrastructure investment over the long term for a relatively small amount of federal budget authority. Ignoring administrative costs, an appropriation of \$10 billion for the infrastructure bank could provide \$100 billion of credit assistance if the subsidy cost were similar to that of the TIFIA program (see above).³⁶

The federal government already has a number of programs to support water and wastewater infrastructure projects. But a national infrastructure bank could provide assistance to infrastructure projects that are currently too large to be financed using existing mechanisms. The creation of an infrastructure bank might provide another mechanism for financing drinking water and wastewater projects, but would set those projects in competition with projects in energy, transportation, and telecommunications. A national infrastructure bank is probably most like the existing TIFIA program.³⁷ Hence, the creation of both a national infrastructure bank and a WIFIA would likely be duplicative.

Two bills to establish a national infrastructure bank have been introduced in the 113th Congress—the Partnership to Build America Act of 2013 (H.R. 2084), and provisions of the Balancing Act (sections 765-779 of H.R. 505).³⁸

H.R. 2084 would create a wholly owned government corporation called the American Infrastructure Fund (AIF). It would be headed by an 11-member board of trustees whose mission would be to operate the AIF to be a low cost provider of bond guarantees, loans, and equity investments to state and local governments and non-profit infrastructure providers for non-profit infrastructure projects. The board would only consider projects put forth by state and local governments to assist transportation, energy, water, communications, or educational facilities. At least 25% of its assistance is to be provided to projects for which at least 20% of the project financing comes from private debt or equity. The bank would be initially capitalized with

³⁶ As noted earlier, according to the Federal Credit Reform Act of 1990 the subsidy cost is the “estimated long-term cost to the Government of a direct loan or loan guarantee, calculated on a net present value basis, excluding administrative costs” (104 Stat. 1388-610).

³⁷ U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit, *Testimony of Geoffrey S. Yarema*, Hearing on National Infrastructure Bank: More Bureaucracy and More Red Tape, 112th Cong., 1st sess., October 12, 2011.

³⁸ Another infrastructure bank bill introduced in the 113th Congress is the American Infrastructure Investment Fund Act of 2013 (S. 387). It would create a “fund” within the Department of Transportation to support transportation projects. Similar legislation in the 112th Congress was S. 936.

proceeds from \$50 billion in American Infrastructure Bonds to be issued by the U.S. Treasury. Proponents estimate that the AIF would leverage the \$50 billion at a 15:1 ratio to provide up to \$750 billion in assistance.³⁹

The wholly owned government corporation created by the infrastructure bank provisions of H.R. 505 would be called the American Infrastructure Financing Authority (AIFA). AIFA would be governed by seven presidentially appointed board members. AIFA would be authorized to provide loans and loan guarantees to eligible transportation, water, and energy infrastructure projects. To be eligible for assistance a project would have to cost at least \$100 million, or at least \$25 million in rural areas. The bank would be capitalized with a \$10 billion appropriation. The bank would be permitted to collect fees to cover the administrative costs associated with AIFA.

Several bills to establish a national infrastructure bank also were introduced in the 112th Congress, including the Building and Upgrading Infrastructure for Long-Term Development (S. 652, similar to the infrastructure bank provisions of H.R. 505 in the 113th Congress) and the National Infrastructure Development Bank Act of 2011 (H.R. 402⁴⁰).

Lift Private Activity Bond Restrictions on Water Infrastructure Projects

Water infrastructure can be owned and operated by the private sector, a governmental entity, or through a so-called partnership between a government and a private entity. A partnership could involve a private entity investing in water infrastructure and receiving a market rate of return on that investment. This investment could be an equity share (part ownership) or some other agreement that provides a stream of revenue generated by the facility. Or, the partnership could be the government issuing tax-exempt debt on behalf of the private entity with so-called “private activity bonds.”

Among the options to modify the existing framework for federal assistance for investment in water infrastructure, one option for greater federal involvement includes expanding the availability of tax-exempt financing to private entities, for example, private activity bonds.

Background on Private Activity Bonds

Generally, under current law, privately owned water furnishing and water treatment facilities are not eligible for tax-exempt financing. The tax code, however, does provide that privately owned water furnishing facilities that (1) are operated by a governmental unit or (2) charge rates that are approved by a political subdivision of the host community, can issue qualified private activity

³⁹ Rep. John Delaney, *Information on Rep. Delaney's Infrastructure Bill*, May 6, 2013, <http://delaney.house.gov/information-on-congressman-delaneys-infrastructure-bill>.

⁴⁰ H.R. 402 would create the National Infrastructure Development Bank (NIDB), governed by five presidentially appointed directors. The NIDB would be able to issue public benefit bonds (PBBs) to help finance infrastructure, mainly through loans and loan guarantees. The NIDB would also be able to make grants. The bank would be capitalized by Congress with \$5 billion annually for five years. The total \$25 billion appropriation would be 10% of the total subscribed capital of the bank. Up to 90% of the subscribed capital would be callable by the Treasury Secretary. The total outstanding bonds issued by the NIDB would not be allowed to exceed 250% of the subscribed capital. Among the criteria for evaluating projects for assistance from the NIDB would be the extent to which assistance will maximize private investment in the project while providing a public benefit.

bonds (PABs) which are tax-exempt.⁴¹ Most qualified PABs, including bonds for water furnishing and water treatment facilities, are subject to a state volume limit.⁴² In 2013, the volume cap is the greater of \$95 multiplied by the state population, or \$291,875,000.

The opportunity to use bonds whose interest payments are exempt from federal income taxation confers a considerable subsidy to bond issuers and to investors who buy the bonds. The FY2014 budget estimates that the federal tax expenditure for “water, sewage, and hazardous waste disposal facilities” will be \$3.21 billion over the 2014 to 2018 budget window.⁴³

The private activity bond volume limit noted above originated in the Deficit Reduction Act of 1984 (P.L. 98-369). The limit was implemented because “Congress was extremely concerned with the volume of tax-exempt bonds used to finance private activities.”⁴⁴ The limit and the list of qualified activities were both modified again under the Tax Reform Act of 1986 (TRA 1986, P.L. 99-514). At the time of the TRA 1986 modifications, the Joint Committee on Taxation identified the following specific concerns about tax-exempt bonds issued for private activities:⁴⁵

- the bonds represent “an inefficient allocation of capital”;
- the bonds “increase the cost of financing traditional governmental activities”;
- the bonds allow “higher-income persons to avoid taxes by means of tax-exempt investments”; and
- the bonds contribute to “mounting [federal] revenue losses.”

The inefficient allocation of capital arises from the economic fact that additional investment in tax-favored private activities will necessarily come from investment in other public projects. For example, if bonds issued for water infrastructure did not receive special tax treatment, some portion of the bond funds could be used for other government projects such as schools or other public infrastructure.

The greater volume of tax-exempt private activity bonds then leads to the second Joint Committee on Taxation concern listed above, higher cost of financing traditional government activities. Investors have limited resources; thus, when the supply of tax-exempt bond investments increases, issuers must raise interest rates to lure them into investing in existing government activities. In economic terms, issuers raising interest rates to attract investors is analogous to a retailer lowering prices to attract customers. The higher interest rates make borrowing more expensive for issuers.

The final two points are less important from an economic efficiency perspective but do cause some to question the efficacy of using tax-exempt bonds to deliver a federal subsidy. Tax-exempt

⁴¹ Sections 142(a)(4), 142(a)(5), 142(e), and 146 of the Internal Revenue Code (I.R.C.).

⁴² Two types of private activity bonds are outside the annual volume limit, those issued by 501(c)(3) organizations like hospitals and those issued by private universities. For more on private activity bonds, see CRS Report RL31457, *Private Activity Bonds: An Introduction*, by Steven Maguire.

⁴³ Office of Management and Budget, “Budget of the United States Government: Analytical Perspectives, Fiscal Year 2014,” Table 16-1.

⁴⁴ U.S. Congress, Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2nd sess. (Washington: GPO, 1984), p. 930.

⁴⁵ U.S. Congress, Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986, 100th Cong., 1st sess. (Washington: GPO, 1987), p. 1151.

interest is worth more to taxpayers in higher brackets; thus, the tax benefit flows to higher income taxpayers, which leads to a less progressive income tax regime.

The revenue loss generated by tax-exempt bonds also expands the deficit.⁴⁶ A persistent budget deficit ultimately leads to generally higher interest rates as the government competes with private entities for scarce investment dollars. Higher interest rates further increase the cost of all debt-financed state and local government projects.

Current Proposals

The implicit assumption of several current proposals is that the current cap is binding, preventing the investment in needed water infrastructure projects. Proponents argue that the opportunity for more private entities to meet the requirements for tax-exempt bond financing may induce additional infrastructure investment. What is unclear is how much new investment will be undertaken with PABs if these restrictions were relaxed. Underlying the estimates of potential new investment is demand for new water infrastructure. Following is a discussion of the current use of PABs for water infrastructure.

Demand for the use of PAB capacity for water infrastructure has been relatively low. The Internal Revenue Service (IRS) reports that for the 2008 tax year, new money bonds (in contrast to refunding bonds) were issued for 88 private water furnishing, sewage, and solid waste disposal facilities projects accounting for roughly \$2.6 billion of the \$50.9 billion of volume capacity available.⁴⁷ For comparison, other private activities subject to the cap consumed \$12.3 billion: residential rental facilities (\$4.6 billion), mortgage bonds (\$5.1 billion), small issue bonds (\$1.2 billion), and student loan bonds (\$1.4 billion). The remainder of the cap space was used for other projects, carried forward to the following year, or abandoned.

The IRS data also provide information on the issuance by state. In 2008, 22 states did not commit any volume capacity to water, sewage, and solid waste disposal. In contrast, two states, California (16 projects) and Texas (17 projects), combined for 33 of the projects and \$1.1 billion of the issuance. The limited number of states using PABs may reflect lack of demand for privately owned water infrastructure or may reflect the relative size of water projects limiting the use of PABs. The average PAB amount issued for water, sewer, and solid waste was \$29.3 million, whereas the average PAB new money issuance was smaller at \$21.4 million. The remainder includes mortgage revenue bonds, which typically have a smaller average issue size.

Private entities also invest in water infrastructure beyond the partnership with governments through PABs. For example, the largest investor-owned U.S. water and wastewater utility company, American Water, reported investing \$1 billion in water infrastructure capital in 2008.⁴⁸

⁴⁶ The Joint Committee on Taxation estimated that a provision in highway program legislation approved by the Senate on March 14, 2012, the Moving Ahead for Progress in the 21st Century Act or MAP-21 (S. 1813), which proposed to lift the volume cap on water infrastructure projects for 6 years, would reduce revenues to the Treasury by \$95 million over 6 years, and by \$305 million over 11 years. See <http://www.jct.gov/publications.html?func=startdown&id=4404>. This provision was not included in the enacted surface transportation reauthorization bill (P.L. 112-141).

⁴⁷ Internal Revenue Service, "Tax-Exempt Bonds, 2008," *Statistics of Income Bulletin*, winter 2011, Table 10, p. 147 and Community Development Finance Agencies, 2008 National Volume Cap Report, available at <http://www.cdfa.net/cdfa/volume-cap.nsf/index.html>.

⁴⁸ American Water, 2008 Annual Report, p. 48.

In its 2010 Annual Report, American Water reported \$766 million of capital investment.⁴⁹ Private entities like American Water use a mix of current revenue and debt, including PABs, corporate debt, and equity investment, to finance this capital spending.

The President's FY2014 budget request (like the FY2013 request) supports eliminating the volume cap for PABs for water infrastructure. Treasury estimates that this proposal would result in loss of \$258 million in revenue between 2014 and 2023.⁵⁰

One legislative option discussed in the 112th Congress was H.R. 1802/S. 939, which would permanently exclude water infrastructure from the volume cap. In March 2012, the Senate passed surface transportation legislation (S. 1813) that included a provision to lift the volume cap for six years, but this provision was not included in the enacted bill (P.L. 112-141). As the data above suggest, excluding PABs for water infrastructure from state volume caps would likely generate marginally more investment in water infrastructure. The private entities that already have used PABs in conjunction with other financial tools would likely increase the use of PABs. What is unclear, however, is if the expanded use of PABs would necessarily reflect substantially new infrastructure investment or just change the mix of financing tools employed for already planned projects. If the latter, then the potential revenue loss may not achieve the intended policy objective of increasing investment in water infrastructure.

The proposed PAB expansion may also be a limited success as many communities have chosen government provision of water infrastructure. In 2011, over \$29 billion in governmental bonds were issued for 1,244 water, sewer, and sanitation projects.⁵¹ More than \$14 billion of these bonds were new money bonds. By comparison, for 2010, \$40.4 billion was issued for 1,546 water, sewer, and sanitation projects, and \$24 billion of the total was new money financing. The reliance on government provision may reflect market conditions that make private provision infeasible or public preference for government owned and operated water infrastructure.

Reinstate Authority for Issuance of Build America Bonds (BABs)

Another option under discussion to modify the existing framework for federal assistance for water infrastructure investment is to expand or extend the use of Build America Bonds (BABs).

BABs were created by the American Recovery and Reinvestment Act of 2009 (ARRA).⁵² The volume of BABs was not limited and the purpose was constrained only by the requirement that "the interest on such obligation would (but for this section) be excludible from gross income under section 103."⁵³ Thus, BABs could have been issued for any purpose that would have been eligible for traditional tax-exempt bond financing *other than private activity bonds*, thus they did not allow for private sector participation (unlike PABs). The authority to issue BABs expired on December 31, 2010.

⁴⁹ American Water, 2010 Annual Report, p. 41.

⁵⁰ The Bush Administration also proposed a permanent exemption for water and sewage facilities as part of several budget requests.

⁵¹ Thomson-Reuters, *The Bond Buyer 2012 Yearbook*, p. 159.

⁵² For more, see CRS Report R40523, *Tax Credit Bonds: Overview and Analysis*, by Steven Maguire.

⁵³ 26 U.S.C. § 54AA(d)(1)(A). BAB proceeds that use the direct payment options are to be used only for capital expenditures.

BABs are modeled after the “taxable bond option,” which was first considered in the late 1960s. In 1976, the following was posited by the then president of the Federal Reserve Bank in Boston, Frank E. Morris:

The taxable bond option is a tool to improve the efficiency of our financial markets and, at the same time, to reduce substantially the element of inequity in our income tax system which stems from tax exemption [on municipal bonds]. It will reduce the interest costs on municipal borrowings, but the benefits will accrue proportionally as much to cities with strong credit ratings as to those with serious financial problems.⁵⁴

One benefit of the BAB program was that it tapped into a broader market for investors without regard to tax liability (such as pension funds, which typically do not invest in tax-exempt bonds). Traditional tax-exempt bonds have a narrow class of investors, generally consisting of individuals and mutual funds. BABs offered an issuer a credit equal to 35% of the interest rate established between the buyer and issuer of the bond.⁵⁵ The Treasury Department estimated that the \$181 billion in BABs issued from April 2009 through December 2010 will allow state and local governments to save an estimated \$20 billion in borrowing costs, in present value savings, as compared to issuing traditional tax-exempt bonds.⁵⁶

One option would be to extend BABs to investment in privately owned water infrastructure. Many of the disadvantages cited for PABs identified earlier could be avoided, such as the windfall gain for high-income investors and the economic inefficiency of using a third party to deliver a federal subsidy.⁵⁷ The FY2014 budget suggests that the BAB program potentially “... has a more streamlined tax compliance framework focusing directly on governmental issuers who benefit from the subsidy.”⁵⁸ In the case of PAB-like arrangements, the partner government or water authority would “issue” bonds at the low rate and pass through the value of the subsidy to the private entity. The private entity would own and operate the water infrastructure.

In the 113th Congress, H.R. 535 and H.R. 789 have been introduced to extend and expand a modified version of BABs. The President’s FY2014 budget proposes to reinstate BABs—now to be called America Fast Forward Bonds—at a 28% credit rate. In addition, the President’s FY2014 Budget proposed expanding the eligible uses to Section 501(c)(3) nonprofit entities such as hospitals and universities.

According to CBO, the interest subsidy of BABs would be recorded in the federal budget as outlays, like other payments to state and local governments. At the same time, by substituting taxable for tax-exempt bonds, the program would increase taxable interest income. The Joint Committee on Taxation analyzed a similar proposal in the President’s FY2012 budget and

⁵⁴ Frank E. Morris, “The Taxable Bond Option,” *National Tax Journal*, vol. 29, no. 3, September 1976, p. 356.

⁵⁵ Note that the issuer credit is an outlay of the federal government. This simple example does not consider issuance and underwriter fees.

⁵⁶ U.S. Department of the Treasury, “Treasury Analysis of Build America Bonds Issuance and Savings,” May 16, 2011, p. 11, <http://www.treasury.gov/initiatives/recovery/Documents/BABs%20Report.pdf>.

⁵⁷ Researchers have determined that the federal government subsidy for BABs “... disadvantages individual U.S. taxpayers, who are the main holders of municipal bonds, and benefits new entrants in the municipal bond market.” New entrants would include international investors and pension funds. See Ang, Andrew, Vineer Bhansali, and Yuhang Xing, “Build America Bonds,” *National Bureau of Economic Research, Working Paper 16008*, May 2010.

⁵⁸ U.S. Department of the Treasury, “General Explanations of the Administration’s Fiscal Year 2014 Revenue Proposals,” April 2013, p. 109.

estimated that it would boost outlays by \$76 billion over 10 years and raise revenues by \$70 billion, with a net effect of increasing the cumulative deficit by \$6 billion.⁵⁹

Conclusion

Consensus exists among many stakeholders—state and local governments; equipment manufacturers, construction companies, and engineers; and environmental advocates—on the need for more investment in water infrastructure. Many in these varied groups support one or more options for doing so. There is no consensus supporting a preferred option or policy, and many advocate a combination that will expand the financing “toolbox” for projects. Some of the options discussed in this report may be helpful in addressing financing problems, but there is no single method or “silver bullet” that will address needs fully or close the financing gap completely. For example, some such as a WIFIA or a national infrastructure bank may be helpful to projects in large urban or multi-jurisdictional areas, while others such as expanded SRF programs may be more beneficial in smaller communities. It is unlikely that any of the recently proposed options such as a WIFIA or a trust fund could be enacted and up and running quickly, meaning that, at least for the near term, communities will continue to rely on the existing SRF programs, tax-exempt governmental bonds, and available tax-exempt private activity bonds to finance their water infrastructure needs.

The Obama Administration’s views on some of these issues are largely unknown for now, except for supporting the SRFs, excluding water infrastructure PABs from the state volume cap, and reinstating Build America Bonds, as reflected in its budget requests.

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⁵⁹ U.S. Congressional Budget Office, *Preliminary Analysis of the President’s Budget for 2012*, March 18, 2011, p. 7.