

Initial Interpretive Guidance for Certain Amendments in the Water Resources Reform and Development Act to Titles I, II, V and VI of the Federal Water Pollution Control Act

Background

On June 10, 2014, President Obama signed into law the Water Resources Reform and Development Act of 2014 (WRRDA). Among its provisions are amendments to Titles I, II, V and VI of the Federal Water Pollution Control Act (FWPCA). This document is intended to provide initial interpretative guidance for those provisions taking effect October 1, 2014. During fiscal year (FY) 2015, we anticipate developing additional interpretative guidance for provisions taking effect October 1, 2015.

Subtitle A: Amended Provisions in Title VI

Sec. 5001. General Authority for Capitalization Grants (Section 601)

Section 601(a)

As amended, the FWPCA section 601(a) now states:

(a) GENERAL AUTHORITY.---Subject to the provisions of this title, the Administrator shall make capitalization grants to each State for the purpose of establishing a water pollution control revolving fund to accomplish the objectives, goals, and policies of this Act by providing assistance for projects and activities identified in section 603(c).

The FWPCA section 601(a) incorporates the expanded list of activities or projects identified in 603(c) as eligible for assistance from a Clean Water State Revolving Fund (CWSRF). States should make certain when selecting projects for funding that the purpose of the project is consistent with the objectives, goals, and policies of the FWPCA.

Section 5002. Capitalization Grant Agreements (Section 602)

Section 602(b)(6)

As amended, the FWPCA section 602(b)(6) now states:

(6) treatment works eligible under this Act which will be constructed in whole or in part with assistance made available by a State water pollution control revolving fund authorized under this title, or section 205(m) of this Act, or both, will meet the requirements of, or otherwise be treated (as determined by the Governor of the State) under sections 511(c)(1) and 513 of this Act in the same manner as treatment works constructed with assistance under title II of this Act;

The FWPCA section 511(c)(1) applies the National Environmental Policy Act (NEPA) to assistance to projects involving the construction of treatment works. The FWPCA section 513 is a prevailing wage provision that requires all laborers and mechanics employed by contractors working on treatment works to be paid prevailing wages as determined by the Secretary of Labor. It is considered a Davis-Bacon related Act.

National Environmental Policy Act Provision

The Environmental Protection Agency (EPA) has consistently interpreted the statement “with assistance made available by a State water pollution control revolving fund authorized under this title” to mean that the specific requirement identified applies to all relevant assistance agreements whether the source of the funding is prior years’ appropriations, state match, bond proceeds, interest earnings, principal repayments, or any other source of funding so long as the project is financed by a CWSRF.¹ Consistent with this prior interpretation, all projects for the construction of treatment works that are funded by a State CWSRF, regardless of source of funding, must comply with the FWPCA 511(c)(1). Any project that is considered a “treatment work” as defined in the FWPCA section 212, regardless of which eligibility under the FWPCA 603(c) is identified as providing funding authority, must comply with this provision.

A State may choose to apply its own “NEPA-like” State environmental review process for complying with the FWPCA section 511(c)(1) provided that the elements in the FWPCA section 35.3140(b)(1) through (5) of the State Revolving Fund Program Implementation Regulations, dated March 19, 1990 are met.

Davis-Bacon Related Act Provision

The FWPCA section 602(b)(6) permanently applies the prevailing wage (Davis-Bacon) provision of the FWPCA section 513 to any projects for treatment works that are funded by a CWSRF. Consistent with EPA’s prior implementation of this provision, application of the Davis-Bacon Act requirements extend not only to assistance agreements funded with capitalization grants, but to all CWSRF-funded projects involving the construction of treatment works regardless of the source of the funding (e.g., prior years’ appropriations, state match, bond proceeds, interest earnings, principal repayments, etc.). Any project that is considered a “treatment work” as defined in the FWPCA section 212, regardless of which eligibility under the FWPCA section 603(c) is identified as providing funding authority, must comply with this provision.

The term and condition that applies to this provision is included in Appendix XX. The contract provision that must be used in all assistance agreements is included in Appendix XX.

Section 602(b)(9)

As amended, the FWPCA section 602(b)(9) now states:

(9) the State will require as a condition of making a loan or providing other assistance, as described in section 603(d) of this Act, from the fund that the recipient of such assistance will maintain project accounts in accordance with generally accepted government accounting standards, including standards relating to the reporting of infrastructure assets;

¹ See *Implementation of Iron and Steel Provisions of P.L.113-76, Consolidated Appropriations Act of 2014* (Appendix XX) and *Procedures for Implementing Certain Provisions of EPA’s Fiscal Year 2012 Appropriations Affecting the Clean Water and Drinking Water State Revolving Fund Programs*

The State must require assistance recipients to maintain project accounts according to Generally Accepted Accounting Principles (GAAP) as issued by the Governmental Accounting Standards Board (GASB). This provision requires assistance recipients to use standards relating to the reporting of infrastructure assets. The most recent applicable standard is GASB Statement No. 34 (GASB 34), issued in June 1999, which details governmental reporting requirements including standards for reporting of infrastructure assets. Further details on the requirements as well as the full text of GASB 34 can be obtained through the GASB.

The State must ensure that assistance recipients use standard contract language requiring that project accounts are GAAP compliant, including GAAP requirements relating to the reporting of infrastructure assets. The State should consult with their State Auditor or equivalent entity to determine whether or not existing CWSRF assistance contract or certification language meets these requirements. Because of the effective date of GASB 34, the State may find that these requirements are already in place through existing State regulation.

Section 602(b)(11)

As amended, the FWPCA now includes section 602(b)(11), which states:

(11) the State will establish, maintain, invest, and credit the fund with repayments, such that the fund balance will be available in perpetuity for activities under this Act;

This provision requires the State to establish that it has a CWSRF fund that is managed in such a way that the funds will be available in perpetuity for activities under the FWPCA. The language provides specific authority for States to “invest” funds so that the fund balance will be available in perpetuity.

Section 602(b)(12)

As amended, the FWPCA now includes section 602(b)(12), which states:

(12) any fees charged by the State to recipients of assistance that are considered program income will be used for the purpose of financing the cost of administering the fund or financing projects or activities eligible for assistance from the fund;

Fees considered to be program income may be deposited into the fund and used for administration and other activities eligible for assistance from the fund (i.e., loans, refinancing, insurance, guarantees, etc). Program income is defined at 40 CFR 31.25(b) as “gross income received by the grantee or subgrantee directly generated by a grant support activity, or earned only as a result of the grant agreement during the grant period.” In the CWSRF program, grant supported activities are those activities funded in an amount equal to the amount of the capitalization grant (i.e., funds directly made available by the capitalization grant). Only funds earned during the grant period are considered program income. The grant period starts with the awarding of the grant and is considered closed once a State submits the final Financial Status Report (FSR) for a particular grant. Fees collected after the submittal of the final FSR are no longer considered program income and may be used for water quality purposes.

Fees deposited into the fund may not be used for State match; however, if fees considered as program income are held outside the CWSRF, they may be used for State match in addition to administration and other activities eligible for assistance from the fund.

If program income generated through fees is added to the fund and used for administration, those fees are not considered part of the limit on administrative costs. See the discussion of Section 603(d)(7), below.

Section 602(b)(13)

As amended, the FWPCA now includes section 602(b)(13), which states:

(13) beginning in fiscal year 2016, the State will require as a condition of providing assistance to a municipality or intermunicipal, interstate, or State agency that the recipient of such assistance certify, in a manner determined by the Governor of the State, that the recipient—

(A) has studied and evaluated the cost and effectiveness of the processes, materials, techniques, and technologies for carrying out the proposed project or activity for which assistance is sought under this title; and

(B) has selected, to the maximum extent practicable, a project or activity that maximizes the potential for efficient water use, reuse, recapture, and conservation, and energy conservation, taking into account—

(i) the cost of constructing the project or activity;

(ii) the cost of operating and maintaining the project or activity over the life of the project or activity; and

(iii) the cost of replacing the project or activity;

Interpretive Guidance for this provision will be developed in FY 2015.

Section 602(b)(14)

As amended, the FWPCA now includes section 602(b)(14), which states:

(14) a contract to be carried out using funds directly made available by a capitalization grant under this title for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services shall be negotiated in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40, United States Code, or an equivalent State qualifications-based requirement (as determined by the Governor of the State).

The State must ensure that all architectural and engineering (A/E) contracts for projects identified as using funds made “directly available by” the capitalization grant (i.e. equivalency projects) and that have contracts executed on or after October 1, 2014, comply with the elements of the procurement processes for A/E services² as identified in 40 U.S.C. 1101 et. sq., or an equivalent State requirement. To the extent possible, the State should identify all equivalency

² E.g., feasibility studies, preliminary engineering, design services, surveying, mapping, construction management, legal and accounting services, etc

projects in its Intended Use Plan. The State should also identify all equivalency projects in its Annual Report and specify the associated dollar amount used for A/E services, if any. Only the contracts for A/E services associated with equivalency projects must comply with this requirement.

The State should also detail in its Intended Use Plan whether it intends to satisfy this requirement through compliance with 40 U.S.C. 1101 et. sq. or through an equivalent State requirement. In the case of the latter, the source of the requirement (e.g., existing State legislation, State or program rule, etc.) must be stated. In order to be considered an equivalent State requirement, the State must ensure that the following critical elements of the procurement process are satisfied:

- each contract requires discussions with no fewer than three firms;
- selection is based on established, publicly available criteria, and is offered to the most qualified firm;
- contract pricing is determined to be fair and reasonable based on the scope, complexity, professional nature, and estimated value of services;
- negotiation begins with the most highly qualified firms, and in the event that a resolution cannot be achieved, continues in order of qualification; and
- all firms are required to submit a statement of qualifications and performance data annually as part of contract terms and conditions.

If the State has an existing and equivalent requirement for qualifications-based procurement that satisfy this requirement, no action is required beyond documenting this compliance. In the event that the State has no existing equivalent qualifications-based requirement for procurement, the State may elect to adopt its own procurement procedure by amending its program regulations.

This requirement applies to new solicitations, significant contractual amendments³, and contract renewals initiated on or after the effective date of October 1, 2014.

Section 5003. Water Pollution Control Revolving Funds (Section 603)

Section 603(c)

As amended, the FWPCA section 603(c) now states:

(c) Projects and Activities Eligible for Assistance.--- The amounts of funds available to each State water pollution control revolving fund shall be used only for providing financial assistance---

The FWPCA section 603(c) provides the project types eligible for CWSRF assistance. Each of the eleven project types is an independent eligibility with its own criteria and requirements. Treatment works projects, as defined in the FWPCA section 212, now incorporated in FWPCA Section 502(25), are subject to the following three requirements, regardless of which eligibility they are funded under:

³ States shall determine what constitutes a significant amendment using best professional judgement to analyze increases to both scope and cost of work.

- the State must agree to conduct an environmental review of the potential environmental impacts of all treatment works projects;
- the State must apply the prevailing wage provision (Davis Bacon) to all treatment works projects; and
- the State must apply American Iron and Steel (AIS) to all treatment works projects.

Examples of projects that are not considered treatment works is included in Appendix XX.

Section 603(c)(1-3) The FWPCA section 603(c)(1-3) states:

- (1) to any municipality or intermunicipal, interstate, or State agency for construction of publicly owned treatment works (as defined in Section 212);*
- (2) for the implementation of a management program established under section 319;*
- (3) for development and implementation of a conservation and management plan under section 320;*

The projects eligible for assistance, as described in the FWPCA sections 603(c)(1), 603(c)(2), and 603(c)(3) remain unchanged.

Section 603(c)(4)

As amended, the FWPCA now includes section 603(c)(4), which states that each CWSRF may provide financial assistance:

- (4) for the construction, repair, or replacement of decentralized wastewater treatment systems that treat municipal wastewater or domestic sewage;*

Decentralized wastewater treatment projects may be publicly or privately owned and may serve public or private purposes. Eligible projects include the construction of new decentralized systems (e.g., individual onsite systems and cluster systems), as well as the upgrade, repair, or replacement of existing systems. Decentralized wastewater treatment systems that serve only residential users, treat domestic sewage; therefore they are not considered treatment works as defined by FWPCA Section 212. Decentralized systems that serve commercial and/or institutional users are treatment works, and as such, are subject to all relevant requirements.

Section 603(c)(5)

As amended, the FWPCA now includes section 603(c)(5), which states that each CWSRF may provide financial assistance:

- (5) for measures to manage, reduce, treat, or recapture stormwater or subsurface drainage water;*

Both municipal and agricultural stormwater projects are eligible. This includes projects that ensure that stormwater flowing off of the land application area of a non-discharging concentrated animal feeding operation remains exempt agricultural stormwater. Urban stormwater projects that directly implement a final National Pollutant Discharge Elimination System permit (i.e.,

projects that are explicitly required in a permit or plan required by the permit) are also eligible. Assistance recipients may be public or private entities.

Section 603(c)(6)

As amended, the FWPCA now includes section 603(c)(6), which states that each CWSRF may provide financial assistance:

(6) to any municipality or intermunicipal, interstate, or State agency for measures to reduce the demand for publicly owned treatment works capacity through water conservation, efficiency, or reuse;

Assistance for water conservation, efficiency, or reuse may be provided to municipalities, intermunicipal, or State agencies. Only the specified public entities are eligible for assistance; however project activities may take place at publicly or privately owned properties, provided the project reduces demand for publicly owned treatment works (POTW) capacity. For example, a city may receive CWSRF assistance to make loans or grants to city residents for the installation of water efficient appliances. Other eligible projects include the installation, replacement, or upgrade of water meters; plumbing fixture retrofits or replacement; gray water recycling; and water efficient landscape irrigation equipment. Water audits and water conservation plans are also eligible. Equipment to reuse effluent (e.g., gray water, condensate, and wastewater effluent reuse systems) is eligible.

Section 603(c)(7)

As amended, the FWPCA now includes section 603(c)(7), which states that each CWSRF may provide financial assistance:

(7) for the development and implementation of watershed projects meeting the criteria set forth in section 122;

Projects that develop or implement a watershed pilot project related to at least one of the six areas identified in section 122 are eligible: watershed management of wet weather discharges, stormwater best management practices, watershed partnerships, integrated water resource planning, municipality-wide stormwater management planning, or increased resilience of treatment works. Assistance recipients may be public or private entities.

Section 603(c)(8)

As amended, the FWPCA now includes section 603(c)(8), which states that each CWSRF may provide financial assistance:

(8) to any municipality or intermunicipal, interstate, or State agency for measures to reduce the energy consumption needs for publicly owned treatment works;

Projects to reduce the energy consumption needs for POTWs are eligible. Only the specified public entities are eligible for assistance; however, project activities may take place at public or private properties, provided the project reduces the energy consumption needs for a POTW. Projects may include the installation of energy efficient lighting, HVAC, process equipment, and

electronic equipment and systems at POTWs. Planning activities, such as energy audits and optimization studies are also eligible.

Section 603(c)(9)

As amended, the FWPCA now includes section 603(c)(9), which states that each CWSRF may provide financial assistance:

(9) for reusing or recycling wastewater, stormwater, or subsurface drainage water;

Projects involving publicly or privately owned wastewater and stormwater treatment up to and including water quality sufficient to meet drinking water or groundwater recharge standards are eligible. Distribution systems to support effluent reuse, including piping the effluent on the property of a privately owned consumer, as well as recharge transmission lines and injection wells, are eligible. Equipment to reuse effluent (e.g., gray water, condensate, and wastewater effluent reuse systems) is eligible. Eligible recipients may be public or private entities.

Section 603(c)(10)

As amended, the FWPCA now includes section 603(c)(10), which states that each CWSRF may provide financial assistance:

(10) for measures to increase the security of publicly owned treatment works;

Security measures for publicly-owned treatment works might include: include: vulnerability assessments, contingency/emergency response plans, fencing, security cameras/lighting, motion detectors, redundancy (systems and power), secure chemical and fuel storage, lab equipment, securing large sanitary sewers, and tamper-proof manholes. The CWSRF cannot fund operations and maintenance (O&M) activities. Therefore, maintaining a human presence (i.e. security guards) and monitoring activities, are not eligible.

Section 603(c)(11)

As amended, the FWPCA now includes section 603(c)(11), which states that each CWSRF may provide financial assistance:

(11) to any qualified nonprofit entity, as determined by the Administrator, to provide assistance to owners and operators of small and medium publicly owned treatment works
(A) to plan, develop, and obtain financing for eligible projects under this subsection, including planning, design, and associated preconstruction activities;
and
(B) to assist such treatment works in achieving compliance with this Act.

Projects to provide assistance to small and medium POTWs are eligible. The definition of small and medium POTWs shall be determined by the State. Assistance recipients must be a nonprofit entity. A nonprofit entity is one which is registered to be tax-exempt under section 501(c)(3) of the Internal Revenue Code. The CWSRF cannot fund ongoing O&M activities; however, planning and design costs for capital projects, as well as broader water quality planning projects, are eligible. The development and initial implementation of training activities are also eligible.

Section 603(d)(1)(A)&(B)

As amended, the FWPCA section 603(d)(1)(A)&(B) now states:

(d) TYPES OF ASSISTANCE.—Except as otherwise limited by State law, a water pollution control revolving fund of a State under this section may be used only-

(1) to make loans, on the condition that-

(A) such loans are made at or below market interest rates, including interest free loans, at terms not to exceed the lesser of 30 years and the projected useful life (as determined by the State) of the project to be financed with proceeds of the loan;

(B) annual principal and interest payments will commence not later than one year completion of any project and loans will be fully amortized upon the expiration of the term of the loan;”

Loan terms may extend up to 30 years, but must not exceed the useful life of the project. Existing CWSRF loans may be restructured to reflect the change to loan terms. For example, an existing 20 year loan with 10 years left to maturity could be restructured to add another 20 years provided the useful life of the project is 30 years or more. For a CWSRF project that has multiple components each with a different useful life, the State may use a weighted average of the components in determining the useful life of the project.

Section 603(d)(1)(E)

As amended, the FWPCA now includes section 603(d)(1)(E), which states:

(E) for a treatment works proposed for repair, replacement, or expansion, and eligible for assistance under subsection (c)(1), the recipient of a loan shall—

(i) develop and implement a fiscal sustainability plan that includes—

(I) an inventory of critical assets that are a part of the treatment works;

(II) an evaluation of the condition and performance of inventoried assets or asset groupings;

(III) a certification that the recipient has evaluated and will be implementing water and energy conservation efforts as part of the plan; and

(IV) a plan for maintaining, repairing, and, as necessary, replacing the treatment works and a plan for funding such activities; or

(ii) certify that the recipient has developed and implemented a plan that meets the requirements under clause (i);

The FWPCA section 603(d)(1)(E) requires a recipient of a loan for a project that involves the repair, replacement, or expansion⁴ of a treatment works to develop and implement a fiscal sustainability plan (FSP) or certify that it has developed and implemented such a plan. This provision applies to all loans with applications submitted on or after October 1, 2014.

⁴ FSPs are not required for new treatment works (unless they are physically replacing an existing treatment works or expanding the treatment capacity of an existing system) or for projects involving an upgrade that does not involve repair/replacement or expand the treatment capacity (e.g. adding advanced treatment).

FSPs should be treated as “living documents” that are regularly reviewed, revised, and expanded. From this perspective, there may be no final deadline for the completion of an FSP; however, it is necessary to set a date for submission of an FSP certification in order to ensure compliance with this provision. For systems that self-certify under the FWPCA section 603(d)(1)(E)(ii), certification is due at the time of loan closing. For systems developing an FSP under the FWPCA section 603(d)(1)(E)(i), the requirement to develop an FSP must be a condition of the loan agreement. CWSRF programs may establish a program-wide deadline or a unique deadline for each project relative to the borrower’s size, ability, and existing experience with fiscal sustainability planning. It is recommended that CWSRFs require FSPs be completed before final payment is made.

The statute requires that FSPs include, at a minimum:

- an inventory of critical assets that are part of the treatment works;
- an evaluation of the condition and performance of inventoried assets or asset groupings;
- a certification that the assistance recipient has evaluated and will be implementing water and energy conservation efforts as part of the plan; and
- a plan for maintaining, repairing, and, as necessary, replacing the treatment works and a plan for funding such activities.

Each CWSRF program must develop specific criteria for the contents of the FSP that meet these minimum requirements (see Appendix XX for examples). CWSRFs may consider taking a phased approach such that the initial FSP covers only the funded project and closely associated components.⁵ This approach should be applied in such a way that a comprehensive and cohesive plan that covers the entire treatment works eventually results as the utility continues to repair, replace, and expand the system. States may also consider creating tiered requirements that scale the level of complexity of the FSP to the size of the municipality or utility (e.g. population served, millions of gallons treated, etc).

At a minimum, CWSRFs must require loan recipients to certify that an FSP has been developed and is being implemented and—if deemed necessary—review the FSP. Such a review could occur during an on-site project evaluation; CWSRFs are not required to collect FSPs, but could document this review process with a memorandum to the file, a letter to the loan recipient, or an evaluation form (e.g. a checklist). An FSP review could include the following elements: ensure the loan recipient develops an FSP, that the FSP has an appropriate level of depth and complexity, and that the recipient is implementing the FSP. Regarding the water and energy efficiency provision, CWSRFs should—at a minimum—ensure the statutorily required certification is included in the FSP. It is recommended that the CWSRFs also evaluate whether the recipient has selected, to the maximum extent practicable, water and energy efficient approaches in the selected project.

⁵ The treatment works should be broken down into logical sections using best professional judgement. For a sewer rehabilitation or replacement project, for example, it may be appropriate to segment a large collection system into areas or zones and create an FSP for the affected area only. On the other hand, for a small system it may be more appropriate to create a plan that covers the entire collection system.

Development of an FSP is an eligible cost. As a best practice, it is recommended that CWSRFs review and accept any FSP developed as a condition of the loan or paid for by the CWSRF, including cases of self-certification where the loan recipient is reimbursed for the cost of developing the equivalent plan.

Section 603(d)(7)

As amended, the FWPCA section 603(d)(7) now states:

(7) for the reasonable costs of administering the fund and conducting activities under this title, except that such amounts shall not exceed 4 percent of all grant awards to such fund under this title, \$400,000 per year, or 1/5 percent per year of the current valuation of the fund, whichever amount is greatest, plus the amount of any fees collected by the State for such purpose regardless of the source.

The maximum annual amount of CWSRF money (less any fees collected that are placed in the fund) that may be used to cover the reasonable costs of administering the fund is the greatest of the following:

- an amount equal to 4 percent of all grant awards received by a State CWSRF less any amounts that have been used in previous years to cover administrative expenses;
- \$400,000; or
- 1/5 percent of the current valuation of the fund.

The current valuation of the fund must be a representation of the equity of the CWSRF that properly takes into account its assets and liabilities. This valuation needs to be verifiable and consistent across the States; therefore, this calculation must be based on the most recent audited financial statements of the CWSRF and must reflect the “Total Net Position,” which is defined by the GASB as the difference between (a) assets and deferred outflows of resources and (b) liabilities and deferred inflows of resources.⁶ If the “Total Net Position” cannot be derived from audited CWSRF financial statements, a State may still provide a calculation of the current valuation of the fund. However, an auditor must certify that this calculation is accurate and consistent with the definition of “Total Net Position.” The EPA will periodically review and update the definition of the current valuation of the fund to reflect future updates by the GASB.

Any fees deposited in the fund and used by a State to pay for administering the fund or conducting activities under this title will not count against the maximum amount of CWSRF money that may be used for such purposes.

Section 603(i)

As amended, the FWPCA now includes section 603(i), which states:

(i) ADDITIONAL SUBSIDIZATION.—

⁶ For more information, please refer to *Statement No. 63 Financial Reporting of Deferred Outflows of Resources, Deferred Inflows of Resources, and Net Position* and other relevant GASB pronouncements.

(1) IN GENERAL.—In any case in which a State provides assistance to a municipality or intermunicipal, interstate, or State agency under subsection (d), the State may provide additional subsidization, including forgiveness of principal and negative interest loans—

(A) to benefit a municipality that—

(i) meets the affordability criteria of the State established under paragraph (2); or

(ii) does not meet the affordability criteria of the State if the recipient—

(I) seeks additional subsidization to benefit individual ratepayers in the residential user rate class;

(II) demonstrates to the State that such ratepayers will experience a significant hardship from the increase in rates necessary to finance the project or activity for which assistance is sought; and

(III) ensures, as part of an assistance agreement between the State and the recipient, that the additional subsidization provided under this paragraph is directed through a user charge rate system (or other appropriate method) to such ratepayers; or

(B) to implement a process, material, technique, or technology—

(i) to address water-efficiency goals;

(ii) to address energy-efficiency goals;

(iii) to mitigate stormwater runoff; or

(iv) to encourage sustainable project planning, design, and construction.

(2) AFFORDABILITY CRITERIA.—

(A) ESTABLISHMENT.—

(i) IN GENERAL.—Not later than September 30, 2015, and after providing notice and an opportunity for public comment, a State shall establish affordability criteria to assist in identifying municipalities that would experience a significant hardship raising the revenue necessary to finance a project or activity eligible for assistance under subsection (c)(1) if additional subsidization is not provided.

(ii) CONTENTS.—The criteria under clause (i) shall be based on income and unemployment data, population trends, and other data determined relevant by the State, including whether the project or activity is to be carried out in an economically distressed area, as described in section 301 of the Public Works and Economic Development Act of 1965 (42 U.S.C. 3161).

(B) EXISTING CRITERIA.—If a State has previously established, after providing notice and an opportunity for public comment, affordability criteria that meet the requirements of subparagraph (A)—

(i) the State may use the criteria for the purposes of this subsection; and

(ii) those criteria shall be treated as affordability criteria established under this paragraph.

(C) INFORMATION TO ASSIST STATES.—The Administrator may publish information to assist States in establishing affordability criteria under subparagraph (A).

(3) LIMITATIONS.—

(A) IN GENERAL.—A State may provide additional subsidization in a fiscal year under this subsection only if the total amount appropriated for making capitalization grants to all States under this title for the fiscal year exceeds \$1,000,000,000.

(B) ADDITIONAL LIMITATION.—

(i) GENERAL RULE.—Subject to clause (ii), a State may use not more than 30 percent of the total amount received by the State in capitalization grants under this title for a fiscal year for providing additional subsidization under this subsection.

(ii) EXCEPTION.—If, in a fiscal year, the amount appropriated for making capitalization grants to all States under this title exceeds \$1,000,000,000 by a percentage that is less than 30 percent, clause (i) shall be applied by substituting that percentage for 30 percent.

(C) APPLICABILITY.—The authority of a State to provide additional subsidization under this subsection shall apply to amounts received by the State in capitalization grants under this title for fiscal years beginning after September 30, 2014.

(D) CONSIDERATION.—If the State provides additional subsidization to a municipality or intermunicipal, interstate, or State agency under this subsection that meets the criteria under paragraph (1)(A), the State shall take the criteria set forth in section 602(b)(5) into consideration.

The FWPCA section 603(i) provides a State with the authority to provide a certain percentage of its total capitalization grant award as additional subsidization under the circumstances outlined in the statute. This authority only applies to capitalization grants made from the FY 2015 and later appropriations; it does not impact any capitalization grant made from the FY 2014 or prior appropriations. Going forward, there is no minimum additional subsidy requirement that States must comply with, but States that have not met the additional subsidy requirements from previous capitalization grants that were subject to minimum subsidization requirements outlined in appropriations acts must still meet those requirements.

The maximum percentage that may be provided as additional subsidization will range from 0% to 30% based on the amount of the total appropriation as follows:

- total appropriation less than or equal to \$1 billion: no additional subsidy authorized;
- total appropriation greater than or equal to \$1.3 billion: additional subsidy up to 30% of the capitalization grant authorized;
- total appropriation greater than \$1 billion, but less than \$1.3 billion: a percentage equal to the percentage by which the appropriation exceeds \$1 billion authorized. For example, if the total annual appropriation is \$1.1 billion, the total amount of additional subsidization available for all States would be \$110 million, with each State able provide up to 10% of its total capitalization grant as additional subsidization.

A State may only provide additional subsidization to a municipality or intermunicipal, interstate, or State agency. Additional subsidy may only be provided to eligible recipients for the following:

- to benefit a municipality that meets the State's affordability criteria as established under the FWPCA section 603(i)(2);⁷
- to benefit a municipality that does not meet the State's affordability criteria but seeks additional subsidization to benefit individual ratepayers in the residential user rate class;⁸ or
- to implement a process, material, technique, or technology that addresses water or energy efficiency goals; mitigates stormwater runoff; or encourages sustainable project planning, design, and construction.

The FWPCA section 603(i)(2) requires States to develop affordability criteria that will assist them in identifying applicants that would have difficulty financing projects without additional subsidization. Criteria must be established by September 30, 2015 after providing notice and an opportunity for public comment.

The FWPCA section 603(i)(2)(A) requires that criteria be based on:

- income;
- unemployment data;
- population trends; and
- other data determined relevant by the State.

Income, unemployment data, and population trends must be reflected in State affordability criteria; however, the statute does not prescribe the weight that must be given to each type of criteria. States have the flexibility to determine which of the required criteria are most relevant to their CWSRF programs and may structure their program's criteria accordingly.

If States have existing affordability criteria that meet the requirements established in section 603(i)(2)(A), they may continue to use those criteria. Existing criteria must also have undergone the appropriate public notice and comment process within their respective States.

If additional subsidization is being used to benefit individual ratepayers in the residential user rate class of a municipality that does not meet the affordability criteria, then the recipient must demonstrate to the State's satisfaction that these ratepayers would otherwise experience a significant hardship from the increase in rates necessary to finance the project or activity for which assistance is being sought. Additionally, the assistance agreement between the State and the recipient must include language indicating that the additional subsidization would be provided to these ratepayers through a user charge rate system or other appropriate method.

Additional subsidization may be provided in the form of principal forgiveness, negative interest loans, or grants. However, additional subsidization provided in the form of grants must comply

⁷ If a State provides additional subsidization to a municipality or intermunicipal, interstate, or State agency that meets the criteria under the FWPCA section 603(i)(1)(A), the State must consider first using all funds in the fund as a result of capitalization grants to assure maintenance of progress, as determined by the Governor of the State, toward compliance with enforceable deadlines, goals, and requirements of this Act, including the municipal compliance deadline, as set forth in section 602(b)(5).

⁸ Ibid.

with certain Federal laws, Executive Orders, and Office of Management and Budget Circulars. A detailed description of these laws, orders and implementing regulations is available through the Office of Grants and Debarment website at <http://www.epa.gov/ogd/grants/regulations.htm>.⁹

Section 5004. American Iron and Steel (Section 608)

As amended, the FWPCA now includes section 608, which states:

SEC. 608. REQUIREMENTS.

(a) IN GENERAL.—Funds made available from a State water pollution control revolving fund established under this title may not be used for a project for the construction, alteration, maintenance, or repair of treatment works unless all of the iron and steel products used in the project are produced in the United States.

(b) DEFINITION OF IRON AND STEEL PRODUCTS.—In this section, the term ‘iron and steel products’ means the following products made primarily of iron or steel: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, construction materials.

(c) APPLICATION.—Subsection (a) shall not apply in any case or category of cases in which the Administrator finds that—

- (1) applying subsection (a) would be inconsistent with the public interest;*
- (2) iron and steel products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or*
- (3) inclusion of iron and steel products produced in the United States will increase the cost of the overall project by more than 25 percent.*

(d) WAIVER.—If the Administrator receives a request for a waiver under this section, the Administrator shall make available to the public, on an informal basis, a copy of the request and information available to the Administrator concerning the request, and shall allow for informal public input on the request for at least 15 days prior to making a finding based on the request. The Administrator shall make the request and accompanying information available by electronic means, including on the official public Internet site of the Environmental Protection Agency.

(e) INTERNATIONAL AGREEMENTS.—This section shall be applied in a manner consistent with United States obligations under international agreements.

(f) MANAGEMENT AND OVERSIGHT.—The Administrator may retain up to 0.25 percent of the funds appropriated for this title for management and oversight of the requirements of this section.

(g) EFFECTIVE DATE.—This section does not apply with respect to a project if a State agency approves the engineering plans and specifications for the project, in that agency's capacity to approve such plans and specifications prior to a project requesting bids, prior to the date of enactment of the Water Resources Reform and Development Act of 2014.

⁹ More information regarding these requirements is also available in the Additional Subsidies section (IV.B.5) of the *Procedures for Implementing Certain Provisions of EPA's Fiscal Year 2012 Appropriations Affecting the Clean Water and Drinking Water State Revolving Fund Programs*.

The FWPCA section 608 codifies a provision that had recently been included in EPA's SRF appropriations that requires assistance recipients, absent a waiver, to use iron and steel products that are produced in the United States for projects for the construction, alteration, maintenance, and repair of treatment works.

Except for applying the provision only to projects for treatment works that are funded by the CWSRF, the AIS language included in the WRRDA is identical to the AIS language used in the FY 2014 appropriation act. Therefore, EPA intends to interpret the language in the same manner as described in *Implementation of Iron and Steel Provisions of P.L.113-76, Consolidated Appropriations Act of 2014*. A copy of that memorandum is attached as Appendix XX.

The effective date for the newly codified provision is the date of enactment of the WRRDA, or June 10, 2014.

Section 5005. Report on the Allotment of Funds

The WRRDA includes the following provision:

(a) Review.--The Administrator of the Environmental Protection Agency shall conduct a review of the allotment formula in effect on the date of enactment of this Act for allocation of funds authorized under title VI of the Federal Water Pollution Control Act (33 U.S.C. 1381 et seq.) to determine whether that formula adequately addresses the water quality needs of eligible States, territories, and Indian tribes, based on—

(1) the most recent survey of needs developed by the Administrator under section 516(b) of that Act (33 U.S.C. 1375(b)); and

(2) any other information the Administrator considers appropriate.

(b) Report.--Not later than 18 months after the date of enactment of this Act, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives and make publicly available a report on the results of the review under subsection (a), including any recommendations for changing the allotment formula.

A review of the CWSRF allotment formula will begin in FY 2015.

Section 5006. Effective date

The WRRDA includes the following provision:

This subtitle, including any amendments made by the subtitle, shall take effect on October 1, 2014.

The amendments to the FWPCA apply to all assistance provided after September 30, 2014 unless otherwise stated elsewhere in this document. States that have not met the statutory requirements in previous capitalization grants must still meet those requirements (e.g., the additional subsidy and green project reserve requirements).

Subtitle B: Amended Provisions in Title I, II, and V

Section 5011. Watershed Pilot Projects (Section 122)

As amended, the FWPCA section 122 now states:

SEC. 122. WATERSHED PILOT PROJECTS.

(a) IN GENERAL.—The Administrator, in coordination with the States, may provide technical assistance and grants to a municipality or municipal entity to carry out pilot projects relating to the following areas:

(1) WATERSHED MANAGEMENT OF WET WEATHER DISCHARGES.—The management of municipal combined sewer overflows, sanitary sewer overflows, and stormwater discharges, on an integrated watershed or subwatershed basis for the purpose of demonstrating the effectiveness of a unified wet weather approach.

(2) STORMWATER BEST MANAGEMENT PRACTICES.—The control of pollutants from municipal separate storm sewer systems for the purpose of demonstrating and determining controls that are cost-effective and that use innovative technologies to manage, reduce, treat, recapture, or reuse municipal stormwater, including techniques that utilize infiltration, evapotranspiration, and reuse of stormwater onsite.

(3) WATERSHED PARTNERSHIPS.—Efforts of municipalities and property owners to demonstrate cooperative ways to address nonpoint sources of pollution to reduce adverse impacts on water quality.

(4) INTEGRATED WATER RESOURCE PLAN.—The development of an integrated water resource plan for the coordinated management and protection of surface water, ground water, and stormwater resources on a watershed or subwatershed basis to meet the objectives, goals, and policies of this Act.

(5) MUNICIPALITY-WIDE STORMWATER MANAGEMENT PLANNING.—The development of a municipality-wide plan that identifies the most effective placement of stormwater technologies and management approaches, to reduce water quality impairments from stormwater on a municipality-wide basis.

(6) INCREASED RESILIENCE OF TREATMENT WORKS.—Efforts to assess future risks and vulnerabilities of publicly owned treatment works to manmade or natural disasters, including extreme weather events and sea-level rise, and to carry out measures, on a systemwide or area-wide basis, to increase the resiliency of publicly owned treatment works.

(b) ADMINISTRATION.—The Administrator, in coordination with the States, shall provide municipalities participating in a pilot project under this section the ability to engage in innovative practices, including the ability to unify separate wet weather control efforts under a single permit.

(c) REPORT TO CONGRESS.—Not later than October 1, 2015, the Administrator shall transmit to Congress a report on the results of the pilot projects conducted under this section and their possible application nationwide.

Under development. [OWOW]

Section 5012. Definition of Treatment Works (Section 212)

As amended, the FWPCA section 212(2)(A) now states:

(2)(A) The term “treatment works” means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 201 of this act, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and acquisition of the land that will be an integral part of the treatment process (including land use for the storage of treated wastewater in land treatment systems prior to land application) or will be used for ultimate disposal of residues resulting from such treatment and acquisition of other land, and interests in land, that are necessary for construction.

The FWPCA section 212(2)(A) expands the definition of treatment works to include land necessary for construction. For treatment works projects funded under section 603(c), the leasing and fee-simple purchase of land, as specified in section 212(2)(A), is eligible. This includes surface and subsurface easements, a place to store equipment and material during construction, land needed to locate eligible treatment or distribution projects, and land for effluent application or recharge basins.

Section 5013. Funding for Indian Programs (Section 518)

As amended, the FWPCA section 518 now states:

(c) RESERVATION OF FUNDS—

(1) FISCAL YEARS 1987-2014.---The Administrator shall reserve each of fiscal years 1987 through 2014 beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one-half of one percent of the sums appropriated under section 1287 of this title.

(2) FISCAL YEAR 2015 AND THEREAFTER.---For fiscal year 2015 and each fiscal year thereafter, the Administrator shall reserve, before allotments to the States under section 604(a), not less than 0.5 percent and not more than 2.0 percent of the funds made available to carry out title VI.

(3) USE OF FUNDS.---Funds reserved under this subsection shall be available only for grants for projects and activities eligible for assistance under section 603(c) to serve---

(A) Indian tribes (as defined in subsection (h));

(B) former Indian reservations in Oklahoma (as determined by the Secretary of the Interior); and

(C) Native villages (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)).

Specific guidance on the FWPCA section 518 program that provides funding for tribal wastewater infrastructure will be included in the forthcoming Clean Water Indian Set Aside program guidance.

DRAFT

Appendix XX
Terms and Conditions

Under development.

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APPENDIX XX

Resources for Implementing the Section 603(D)(1)(E)(i)(III) Requirement

Under Section 603(D)(1)(E)(i)(III) of the Federal Water Pollution Control Act, as amended, a recipient of Clean Water State Revolving Fund (CWSRF) assistance must certify that it has evaluated and will be implementing water and energy conservation efforts as part of its fiscal sustainability plan. As stated in *Initial Interpretive Guidance for Certain Amendments in the Water Resources Reform and Development Act to Titles I, II, V and VI of the Federal Water Pollution Control Act*, the Environmental Protection Agency recommends that the CWSRFs evaluate whether a recipient has selected, to the maximum extent practicable, water and energy efficient approaches in the selected project.

One way for states to conduct the energy evaluation is to use information developed by the recipient through energy assessments and audits. Energy assessments help utilities identify the amount of energy being used in various aspects of its operations. Energy audits, in turn, allow utilities to identify and prioritize projects that will result in operational and capital improvements to their infrastructure and operations, cost savings, and other climate-related benefits like the use of renewable energy and reductions in greenhouse gas emissions.

A similar approach can be used to evaluation water conservation efforts [section under development].

Energy Use Assessments

A number of tools are available to help utilities conduct energy assessments, including:

EPA's Energy Use Assessment Tool—this is a free Excel-based tool that can be downloaded and is specifically designed for small and medium sized wastewater and water utilities. It enables utilities to analyze their current energy bills and analyze energy consumption for major pieces of equipment. It also allows the utility to develop a printable summary report outlining energy consumption and costs, graphs depicting energy use over time, and highlight areas of potential improvement in energy efficiency. It is available at http://water.epa.gov/infrastructure/sustain/energy_use.cfm.

NYSERDA Energy Benchmarking Tool—The New York State Energy Research and Development Agency (NYSERDA) has developed a tool to help wastewater utilities assess and benchmark their current energy usage, along with a number of other useful self-audit checklists, available at <http://www.nyserdera.ny.gov/Energy-Efficiency-and-Renewable-Programs/Commercial-and-Industrial/Sectors/Municipal-Water-and-Wastewater.aspx>.

Energy Audits

Energy audits can be broadly characterized according to the following three levels:

Level 1 (Walk Through Audits)

- Generally last several hours at the facility
- Usually result in suggestions for low cost improvements in areas like HVAC or lighting

Level 2 (Energy Survey and Analysis Audits)

- One or two days in duration, plus additional time to review energy bills, etc
- In addition to HVAC/lighting recommendations, usually result in recommendations for equipment upgrades in existing processes (e.g. Variable frequency drives (VFD), more efficient motors, etc.)

Level 3 (Process Energy Audit)

- One or more days at the facility, time to analyze energy bills and pump curves, and time for additional data gathering
- Audit covers energy use in both existing and alternative processes, potential design modifications, and optimization of processes and equipment
- Audit suggestions covered detailed operational and process suggestions for both short-term and long-term payback periods as well as capital intensive projects that may require outside funding.
- Most likely to result in significant savings

Tools available to help wastewater utilities obtain or conduct energy audits include:

EPA's Energy Use Assessment Tool—described in more detail above. Available at http://water.epa.gov/infrastructure/sustain/energy_use.cfm.

EPRI Energy Audit Manual for Water and Wastewater Facilities—available at www.cee1.org/ind/mot-sys/ww/epri-audit.pdf.

Maine DEP Sample Audit RFP Language—designed to help utilities obtain assistance for Level 3 Audits, available at http://www.maine.gov/dep/water/grants/SRF/2014/model_energy_audit_rfp.pdf.

The Center for Energy Efficiency (CEE) self-audit checklists—available at www.cee1.org/ind/mot-sys/ww/epri-audit.pdf.

Both energy assessments and audits are eligible for funding under the CWSRF. A number of organizations can help utilities with these activities, including:

- State Energy Offices (<http://www.naseo.org/members-states>)
- Electric utilities serving wastewater utilities (<http://www.dsireusa.org/>)
- Technical assistance providers like the National Rural Water Association, RCAP, and others
- Department of Energy Industrial Assessment Centers (<http://energy.gov/eere/amo/industrial-assessment-centers-iacs>).

[Water-related section under development]

Appendix XX
Examples of Projects Not Considered Treatment Works

- Decentralized wastewater treatment systems that serve only residential users
- Agricultural best management practices, such as:
 - livestock waste management systems
 - manure storage basins
 - manure spreaders
 - conservation irrigation equipment
 - conservation tillage equipment
 - windbreaks
 - sediment control basins
 - terraces
 - diversions
 - buffer and filter strips
 - rip-rapping
 - streambank stabilization