

Procedures for Implementing Certain Provisions of EPA's Fiscal Year 2010 Appropriation Affecting the Clean Water and Drinking Water State Revolving Fund Programs.

I. PURPOSE

The Fiscal Year (FY) 2010 Appropriations law (P.L. 111-88) included additional requirements affecting both the Clean Water and the Drinking Water State Revolving Fund (SRF) programs for FY 2010. These procedures address the implementation of the new requirements and set forth administration priorities.

II. Administration Priorities

On June 16, 2009, EPA joined with the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Transportation (DOT) to help improve access to affordable housing, more transportation options, and lower transportation costs while protecting the environment in communities nationwide. It is the goal of this partnership to discourage sprawl and encourage or incentivize location efficient investments, smart growth practices, and green infrastructure development.

As a result of this partnership, a set of guiding livability principles have been developed. The Livability Principles can be found at www.epa.gov/smartgrowth/partnership/index.html#livabilityprinciples and include: (1) Provide more transportation choices, (2) Promote equitable, affordable housing, (3) Increase economic competitiveness, (4) support existing communities, (5) Leverage federal investment, and (6) Value communities and neighborhoods. EPA recognizes that the first priority for States is protection of water quality (in the CWSRF) and public health (in the DWSRF). However, in the CWSRF¹ program States should not encourage the expansion of centralized infrastructure to accommodate growth where there are available projects that repair, replace, and upgrade infrastructure in existing communities. As a matter of an administration priority, EPA will increase its emphasis on the importance of directing SRF assistance to projects that support sustainable systems and that help build or maintain the technical, financial, and managerial capacity of the recipient.

¹ Recognizing the explicit prohibition against funding growth in the DWSRF.

III. Application Requirements

A. *Intended Use Plan (IUP)*

A State's Intended Use Plan (IUP) will be submitted as part of its application for a capitalization grant under the FY 2010 Appropriation. For both SRFs, the IUP must contain a description of the intended uses of the Additional Subsidization and the Green Project Reserve (GPR).

The IUP must contain GPR projects whose total SRF assistance is at least equal to 20 percent of the state's FY 2010 capitalization grant. For projects identified as GPR projects, the IUP must indicate which type of GPR project it is, whether it is a categorical GPR project or requires a business case, and how much of the project's cost is applicable to GPR. If a State has insufficient GPR projects to meet this threshold at the time of its submittal for a capitalization grant, the Region may award the grant with the requirement that the State submit an amended project list identifying projects equal to the remaining portion of the GPR requirement at a later date. The amended project list must be submitted prior to the funding of the additional GPR projects. For the DWSRF, any projects added thereafter must also be submitted in a further amended project list. For the CWSRF, all substitutions or changes to projects after an amended project list has been submitted must be identified in the Annual Report². If a State plans to fund CWSRF decentralized wastewater systems projects, then only the activity and the amount need to be identified in the IUP, but the complete list of projects would be included in the Annual Report.

The IUP shall include the criteria the State plans to use in determining the type and amount of additional subsidy that may be made available to assistance recipients listed in the IUP. To the extent practicable, the projects that will receive the additional subsidy and the amount should be shown in the IUP. Any eligible recipient of SRF funds may receive the additional subsidy.

Because the percentage requirements for GPR and the additional subsidy are linked to a single year's appropriation, EPA cannot allow credit for amounts above those percentage requirements to be banked.

² All references to the Annual Report pertain to the CWSRF Annual Report and the DWSRF Biennial Report.

B. Grant Conditions

The FY 2010 Appropriation includes requirements that are not in the rules for either SRF; EPA will ensure implementation of these requirements through terms and conditions that will be applied to the capitalization grant award. Additional clarification is provided in these Procedures and may be provided as needed hereafter, generally through guidance that further explains means of compliance with the terms and conditions. Grant conditions to be included in FY 2010 capitalization grants are attached (Attachment 1).

IV. New 2010 Requirements

A. Green Project Reserve (GPR)

The provision in the Appropriation Bill states that : “*Provided, That* for fiscal year 2010, to the extent there are sufficient eligible project applications, not less than 20 percent of the funds made available under this title to each State for Clean Water State Revolving Fund capitalization grants and not less than 20 percent of the funds made available under this title to each State for Drinking Water State Revolving Fund capitalization grants shall be used by the State for projects to address green infrastructure, water or energy efficiency improvements, or other environmentally innovative activities.” These four categories of projects are the components of the GPR.

Projects meeting GPR criteria will follow the same process as all other SRF projects. Criteria for determining CWSRF and DWSRF GPR eligibility can be found in Attachment 2, “2010 Clean Water and Drinking Water State Revolving Fund 20% Green Project Reserve: Guidance for Determining Project Eligibility”. Projects clearly eligible for GPR are known as categorically eligible projects. A list of categorically eligible projects can be found in the GPR guidance mentioned above. Projects not found to be categorically eligible will need business cases. A business case needs to provide a well documented justification for a project to be considered a GPR project. States must review all business cases to determine GPR eligibility and post them on the State’s website by the end of the quarter in which the loan is made.

The Clean Water Act and the Safe Drinking Water Act articulate different requirements for project ranking systems used by States to prioritize projects in the Clean Water and Drinking Water SRF programs.

State CWSRF systems for ranking projects are based upon achieving optimum water quality management. All Section 212 projects must be ranked using a State's priority setting system. However, while it is common practice to fund projects in priority order, based upon readiness to proceed, States are not required to fund projects in priority order. Section 319 projects and Section 320 projects that do not meet the Section 212 eligibility definition do not need to be ranked. The GPR requirements specified in the FY 2010 Appropriation requires States to use an amount equal to at least 20 percent of the FY 2010 capitalization grant for GPR projects. Consequently, States are required to select GPR eligible projects that equal at least 20 percent of the FY 2010 capitalization grant, regardless of the projects' ranking in the CWSRF State priority setting system.

DWSRF systems for ranking projects must give priority for the use of funds to projects that address the most serious risk to public health, are necessary to ensure compliance with the requirements of the Safe Drinking Water Act (SDWA), and that assist systems most in need on a per household basis according to State affordability criteria. DWSRF programs must assign every project a priority and, to the extent known, an expected funding schedule, which are published in its Intended Use Plan (IUP). Once fundable projects have been identified, they are, to the maximum extent practicable, to be funded in priority order. Departures from the priority ranking are subject to certain program requirements including use of any procedures included in the IUP which would allow a State to bypass projects on the fundable list.

DWSRF projects that are qualified (in whole or in part) for GPR should be ranked on the same State priority list with non-GPR projects, but must be identified as GPR projects on those lists. Once ranked they should be selected separately from non-GPR projects, using the same priority system principles described above, until the total value of executed assistance agreements in qualified GPR projects totals an amount equal to at least 20 percent of the State's capitalization grant for FY 2010. In other words, GPR projects are identified as GPR and are ranked along with all

eligible projects on the priority list but are selected for funding in a separate process for GPR projects only, until the 20 percent requirement is met.

A State will be considered to have met the 20 percent requirement when an amount equal to at least 20 percent of its FY 2010 capitalization grant allotment is in executed assistance agreements for qualifying GPR projects. If a GPR project is underbid and a State has not met the required 20 percent for GPR, the difference between the amount in the executed assistance agreement and the winning bid must be used for another GPR project(s). If upon completion of a GPR project, the invoiced amount is less than the amount in the executed loan agreement, the difference does not have to be used for GPR and may be used for any other SRF project(s).

States that have sufficient qualified projects to meet the GPR do not need to solicit additional projects. States that do not have sufficient projects to meet the GPR requirement must continue to actively solicit and accept applications. States may not decline to consider funding applications for qualified GPR projects unless the 20 percent requirement has been met. Please note that States cannot use State level prohibitions, whether based on State statute, regulation, or policy, on funding the types of projects targeted by the GPR as a justification for insufficient applications.

Waivers

States have sufficient time for the solicitation of eligible GPR project applications to meet the minimum GPR threshold of 20 percent. Accordingly, EPA strongly encourages States to put forth every effort to meet the 20 percent GPR requirement in the 2010 Appropriations Bill.³ However, if at any time, a State determines that it cannot meet the 20 percent GPR requirement and has fully complied with the process identified in attached Term and Condition 4, including a demonstration of compliance with most or all of the actions listed below, they may request a waiver from EPA. Any requests for a waiver from the GPR requirement based on

³ The SRF capitalization grant award and project selection and funding process is well established. States have two years to receive their capitalization grant, including in this instance FY 2010 and 11. Conceivable, as much as three years from the date of allotment could pass before all payments are completed. Once a payment is made, a binding commitment for projects equaling that amount must be entered into within one year. There is no statutory deadline beyond the binding commitments for SRF projects to be under contract or construction. Notwithstanding the above, States are encouraged to expeditiously utilize available funds for high priority water infrastructure projects.

insufficient project applications will be reviewed by EPA Headquarters on a case by case basis. EPA will use the following sample actions as a guide when deciding whether to approve or disapprove a State's request for a waiver from GPR:

- Prominent messages on State SRF and green infrastructure websites;
- Notification clearly soliciting funding applications for projects eligible for GPR sent to all municipalities in the State;
- Targeted meetings with State programs associated with green infrastructure, water and energy efficiency, and other environmentally innovative projects;
- Notification clearly soliciting funding applications for projects eligible for GPR sent to mailing lists used by the aforementioned State programs;
- Targeted meetings with associations, watershed organizations and environmental groups involved in green infrastructure, water and energy efficiency and other environmentally innovative projects;
- Notification clearly soliciting funding applications for projects eligible for GPR sent to mailing lists and members of aforementioned associations, watershed organizations and environmental groups.

If EPA approves a State's request for relief from the GPR requirement, then the portion of the GPR for which there are no qualified applications can be used for other conventional, eligible projects. If EPA does not approve a State's request, then the State must continue trying to solicit projects.

The following describes the roles and responsibilities for States, EPA Regions and EPA Headquarters in meeting the GPR requirement.

- a. **State Roles:** States are responsible for proactively soliciting projects that satisfy the GPR requirement. After projects are ranked and selected, the States will include a list of GPR projects in the IUP that clearly identifies categorically GPR projects and those that require a business case. The business cases for non-categorical GPR projects do not need to accompany the IUP through the public review process nor do they need to be submitted to EPA. States are responsible for reviewing all GPR

business cases and posting them on the State's website. The posting of a business case must occur by the end of the quarter in which the loan is made.

b. EPA Regional Role: EPA reviews the list of GPR projects in the IUP to ensure the projects listed as categorical GPR projects match the 2010 GPR Guidance and to ensure that States are meeting the 20 percent GPR requirement. During the State annual review, Regions will review all business cases and evaluate compliance with the GPR requirement. In addition to reviewing business cases, Regions will select at least one GPR project file for review each year.

c. EPA Headquarters Role: EPA Headquarters will develop 2010 Procedures and GPR Eligibility Guidance that will establish eligibility for use of the GPR and will help States identify GPR projects. EPA Headquarters will review and approve/disapprove all GPR waiver requests.

B. Additional Subsidies

The additional subsidy provision in the Appropriation Bill states that “*Provided further, That not less than 30 percent of the funds made available under this title to each State for Clean Water State Revolving Fund capitalization grants and not less than 30 percent of the funds made available under this title to each State for Drinking Water State Revolving Fund capitalization grants shall be used by the State to provide additional subsidy to eligible recipients in the form of forgiveness of principal, negative interest loans, or grants (or any combination of these), except that for the Clean Water State Revolving Fund capitalization grant appropriation this section shall only apply to the portion that exceeds \$1,000,000,000.*”

EPA recognizes that the first priority for States is protection of water quality (in the CWSRF) and public health (in the DWSRF). However, the additional subsidies provision in the FY 2010 appropriation, as a departure from the historical practice in the base program of both SRFs, raises some challenging issues for States. The resolution of these issues can be usefully informed by the consideration and appropriate application of relevant Livability Principles in the HUD-DOT-EPA Partnership, particularly

Principles 4, 5, and 6. The following discussion draws on these Principles to illuminate the considerations States should address in meeting the additional subsidies requirement of the FY 2010 capitalization grant.

1. Targeting Subsidy

a. The Conference Report language states that “The conferees believe that priority for additional subsidies should be given to projects in communities that could not otherwise afford such projects and directs the Agency and the States to track how these subsidies are used and by what types of communities.” This language applies to both the CWSRF and DWSRF programs.

Any eligible recipient of assistance from a State Revolving Fund may receive additional subsidization. While State programs may adopt their own policies regarding distribution of additional subsidies, the Conference Report and EPA strongly encourage programs to target, as a priority, the additional subsidies to communities that could not otherwise afford an SRF loan. These communities may include, for example, disadvantaged communities or environmental justice communities. The report language requires EPA and the States to track how the subsidies are used.

b. In the base programs, the SRFs are structured to leverage the federal investment, through an expanding Fund that – as it revolves – draws in repayments and interest as well as leveraged bond proceeds (in many States). Under this additional subsidization requirement, where a large amount of base program capitalization grant funds will not revolve, EPA believes that it is prudent to include new specifications in the capitalization agreements with States that ensure that the additional subsidies are funding infrastructure that supports existing communities and is sustainable. However, in the CWSRF⁴ program States should not encourage the expansion of centralized infrastructure to accommodate growth where there are available projects that repair, replace, and upgrade infrastructure in existing communities. As a matter of an administration priority, EPA will increase its emphasis on the

⁴ Recognizing the explicit prohibition against funding growth in the DWSRF.

importance of directing SRF assistance to projects that support sustainable systems and that help build or maintain the technical, financial, and managerial capacity of the recipient.

By providing the additional subsidies only to communities that lack the ability to afford necessary projects to protect public health and the environment, the SRF programs affirmatively value communities in their right to access clean and safe water.

c. Section 602(a) of the CWA and section 1452(a)(3)(A)(i) of SDWA provides the authority to add such new specifications to the capitalization grant. CWA Section 602(a) specifies that the “State shall enter into an agreement with the Administrator which shall include but not be limited to the specifications set forth in subsection (b). . . .” SDWA Section 1452(g)(3)(A) authorizes EPA to publish guidance “to ensure that each State commits and expends funds allotted to the State under this section as efficiently as possible.” Therefore, EPA is adding a grant condition to all FY 2010 CWSRF and DWSRF capitalization grants (see Attachment 1).

The State Annual Report must include an explanation as to how the State did or did not address the provisions of the term and condition on sustainability.

2. Types of Additional Subsidies

a. **Principal Forgiveness.** A SRF may provide assistance in the form of principal forgiveness. Principal forgiveness must be specified at the execution of the loan agreement for the amount forgiven to be counted against the total required to be provided as additional subsidization. The amount counted against the requirement is the amount of principal forgiven.

b. **Negative-Interest Loans.** A SRF may provide assistance in the form of negative-interest loans. A negative-interest loan is a loan for which the rate of interest is such that the total payments over the life of the loan are less than the principal of the loan. The

negative-interest rate must be included in the loan agreement at the time of execution to be counted against the total required to be provided as additional subsidization. The amount counted against the requirement is the difference between the principal of the loan and the total payments expected over the life of the loan.

c. Grants. A SRF may provide assistance in the form of a grant. The grant must be provided at the time of assistance agreement execution to be counted against the total required to be provided as additional subsidization. The amount counted against the requirement is the total grant amount included in the agreement. It should be noted that grant recipients under this provision are considered “subgrantees” for the purposes of EPA’s grant regulations, as detailed below in section 5.

3. Calculation of Additional Subsidization for the CWSRF program.

a. Of the \$2.1 billion provided by the FY 2010 Appropriations Act, \$1,996,915,000 is available for capitalization grants to the 51 CWSRF programs after accounting for the set-asides and territory allocations. The additional subsidization provision only applies to \$996,915,000, or the portion of the \$1,996,915,000 available for capitalization grants that exceeds \$1 billion.

b. Nationally, the maximum amount of additional subsidization that may be provided is \$996,915,000 and the minimum amount that must be provided is \$299,074,500, which is 30 percent of \$996,915,000. The CWSRF programs should refer to the table included in policy memorandum *CWSRF 10-01: Availability of FY 2010 Clean Water Act Title VI Funds* issued on January 15, 2010 for State specific amounts of maximum and minimum additional subsidization. A copy of the table is also attached (Attachment 3).

4. Calculation of Additional Subsidization for the DWSRF program.

Each of the 51 DWSRF programs should multiply their capitalization grant amount by .30 to obtain the 30 percent floor that must be provided as additional subsidization. A table is provided as an attachment (Attachment 4).

5. Laws, Regulations and Requirements for Assistance Agreements that are in the Form of Grants

The 2010 Appropriation contains language that allows States to provide grants to eligible recipients. All EPA grants must comply with certain Federal laws, Executive Orders, and OMB Circulars. A detailed description of these laws, orders and implementing regulations is available through the OGD Grants Intranet website at <http://intranet.epa.gov/ogd/> or on the internet at <http://www.epa.gov/ogd/grants/regulations.htm>.

a. The regulations at 40 CFR Part 31 apply to grants and cooperative agreements awarded to State and local (including tribal) governments. The regulations at 40 CFR Part 30 apply to grants with nonprofit organizations and with non-governmental for-profit entities. Note that the latter grants cannot be made with DWSRF funds except to eligible public water systems.

b. EPA's Assistance Administration Manual 5700 outlines Agency policy on the award and management of subawards, "*Policy on Subawards Under Assistance Agreement*". The policy applies to subaward work under awards and supplemental amendments issued after May 15, 2007. The policy clarifies subrecipient eligibility, addresses subaward competition requirements, and provides guidance regarding the distinctions between procurement contracts and subawards. It also includes special considerations regarding subawards to 501(c)(4) and for-profit organizations, and subawards to foreign/international organizations or any entity performing work in a foreign country. The policy is primarily implemented through an administrative National Term and Condition for Subawards. The subaward policy can be found at <http://intranet.epa.gov/ogd/> (under Update 3) and at <http://www.epa.gov/ogd/grants/regulations.htm>.

6. Grants to Non-Profit Organizations.

Funds appropriated can, under certain circumstances, be used for grants to nonprofit organizations. Such grants to nonprofit organizations cannot be made with DWSRF funds except to eligible

public water systems. Grants cannot be awarded to a nonprofit organization classified by the Internal Revenue Service as a 501(4) organization unless that organization certifies that it will not engage in lobbying activities, even with their own funds (see Section 18 of the Lobbying Disclosure Act, 2 U.S.C.A § 1611).

C. Davis-Bacon Requirements

The provision in the Appropriation Bill states that: “For fiscal year 2010 the requirements of section 513 of the Federal Water Pollution Control Act (33 U.S.C. 1372) shall apply to the construction of treatment works carried out in whole or in part with assistance made available by a State water pollution control revolving fund as authorized by title VI of that Act (33 U.S.C. 1381 et seq.), or with assistance made available under section 205(m) of that Act (33 U.S.C. 1285(m)), or both.”

“For fiscal year 2010 the requirements of section 1450(e) of the Safe Drinking Water Act (42 U.S.C. 300j-9(e)) shall apply to any construction project carried out in whole or in part with assistance made available by a drinking water treatment revolving loan fund as authorized by section 1452 of that Act (42 U.S.C. 300j-12).”

Regarding the assistance agreements affected by this provision, the procedures are found in the EPA memorandum of November 30, 2009, subject: “Application of Davis-Bacon Wage Act Requirements to Fiscal Year 2010 CWSRF and DWSRF Assistance Agreements” (Attachment 5).

EPA is also adding the attached terms and conditions regarding wage rate requirements to all CWSRF and DWSRF FY 2010 capitalization grants. Additional information on compliance with the Davis-Bacon requirements is included in Attachment 6. In FY 2010, EPA will provide, as needed, additional technical assistance.

D. Reporting Requirements

The FY 2010 Appropriation Bill placed new requirements on the SRF programs. The conference report (H. Rpt. 111-316, at 166) directs EPA and the States not only to track how additional subsidies are used, but also “by what types of communities.” States shall report quarterly in the CWSRF

Benefits Reporting (CBR) and DWSRF Project Benefits Reporting (PBR) systems on the use of all SRF funds. This information will also need to be included in the Annual Report. Quarterly reporting shall include use of the funds for the GPR and Additional Subsidization as described in D1 below, as well as information on the environmental benefits of SRF assistance agreements, as described in D2.

1. Data Elements

For both SRFs, the CBR/PBR and the Annual Report must contain information on the progress made in meeting the GPR and Additional Subsidization requirements.

For all projects that receive additional subsidization, the following data elements must be entered quarterly into CBR/PBR and, a list containing the following information must be included in State Annual Reports. (Additional clarification on the items listed below is provided in CBR/PBR.)

- a. Assistance Recipient Name
- b. Total amount of SRF assistance provided
- c. Project name and identification number
- d. Project Location
- e. Type of additional subsidy (grant, principal forgiveness, negative interest).
- f. Amount of additional subsidy
- g. Y/N – Would the recipient have been able to afford a loan without the additional subsidy (Using the States’ own criteria for making this determination, such as use of their SRF loan evaluation criteria)?
- h. Characteristics of the community served by the project - population of communities (based on NIMS categories)

For projects that receive funding under the Green Project Reserve, a list of projects that includes the following information must be included in

the Annual Report and entered into CBR/PBR. (Additional clarification on the items below is provided in CBR/PBR.)

- a. Assistance Recipient Name
- b. Total amount of SRF assistance provided
- c. Project name and identification number
- d. Type of project (green infrastructure, water efficiency, energy efficiency, environmentally innovative).
- e. Amount of SRF funding for GPR portion of the project
- f. Of the total amount of GPR funding, the amount of subsidy provided (if any)
- g. A brief description of the project (i.e., rain garden, renewable energy at POTW, water efficient fixtures).
- h. Population served by the project (not required for CWSRF nonpoint source projects)

2. Environmental Benefits Reporting

In 2005, all 51 CWSRF programs agreed to use a suite of environmental indicators to show how their CWSRF projects impact water quality and public health. The CBR system was developed based on these indicators. Beginning with the receipt of the FY 2010 Appropriation, States shall report quarterly in CBR on the environmental benefits of all assistance agreements. The specific required data elements are listed in Attachment 7.

FY 2010 marks the first time that the DWSRF will collect project level information for the base SRF program. The proposed data elements are identified in Attachment 8. DWSRF is seeking agreement from the EPA Grants Office that the proposed PBR data elements reported on a quarterly basis, will be acceptable in lieu of benefits reporting.

3. Annual Report/ CBR/PBR

The CBR and PBR are the best available means of comprehensively tracking project-level information on a real-time basis. The data elements identified in Section D1 will be added to the existing data elements in the CBR/PBR systems. The CBR/PBR forms must be completed quarterly, starting with the first quarter in which the assistance agreement is made.

The data elements identified in Section D1 and Attachment 5 must also be reported in the Annual Report. Summary reports, compiling the quarterly data, can be generated by CBR/PBR and may be included as an attachment to the Annual Report to meet this reporting requirement.

Attachments