



July 15, 2021

Office of the Undersecretary for Domestic Finance
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Attn: Katherine Richards
Senior Advisor
Office of Recovery Programs
Department of the Treasury

RE: Docket ID: TREAS-DO-2021-0008
Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule Comments

Dear Ms. Richards:

The Association of Metropolitan Water Agencies (AMWA) is an organization made up of the largest publicly owned drinking water utilities in the United States. AMWA's membership serves more than 156 million people – from Alaska to Puerto Rico – with safe drinking water. The association represents the interests of these water systems by working with Congress and federal agencies to ensure federal laws and regulations protect public health and are cost-effective. We appreciate the opportunity to comment on the Department's Interim Final Rule to implement the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Recovery Fund established under the American Rescue Plan Act of 2021 (P.L. 117-2).

AMWA supported provisions in the American Rescue Plan Act that made federal funding available to provide essential workers with premium pay during the pandemic, and which listed "necessary investments in water, sewer, or broadband infrastructure" as allowable uses of Coronavirus relief funds received by state, local, or Tribal governments. Our comments therefore focus on one question posed in the Interim Final Rule that seeks to define essential critical infrastructure sectors whose workers are eligible for this premium pay, and four questions that seek to define the bounds of drinking water and wastewater infrastructure projects that may be paid for with Coronavirus relief funds.

In sum, our comments ask Treasury to recognize that:

- Drinking water utility personnel who are responsible for providing continuous vital water services should be considered essential critical infrastructure workers. While we believe

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the Interim Final Rule may indirectly include these workers in the definition of those who are eligible to receive premium pay from the Recovery Funds, this eligibility should be more clearly spelled out to avoid any confusion during implementation.

- Local officials are best equipped to identify the most important drinking water and wastewater infrastructure needs in their own cities and towns. We therefore agree with Treasury’s specified intent for the Interim Final Rule to provide recipients with “wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities.”
- Some worthwhile water infrastructure projects could be prevented from accessing the new Coronavirus relief funds if the only projects eligible for funding are those that qualify for aid through Environmental Protection Agency’s (EPA) Drinking Water State Revolving Fund (DWSRF) and Clean Water State Revolving Fund.

To address the premium pay issue, AMWA urges Treasury to amend the Interim Final Rule to explicitly define the water sector as an essential critical infrastructure sector, and water utility employees as essential workers who are eligible for premium pay funded through the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Recovery Fund (hereafter referred to as the “Fund” or “Funds”).

On the issue of water infrastructure financing, we note that EPA and the U.S. Department of Agriculture also operate several targeted funding assistance programs beyond the SRFs that are dedicated to addressing specific water and wastewater infrastructure needs – such as those related to climate resilience, cybersecurity improvements, and lead service line replacement – which are likewise specified as priorities of the Interim Final Rule. Our comments therefore encourage Treasury to explicitly expand the allowable use of grant funds to include the defined project eligibility of other water infrastructure programs dedicated to these needs, to ensure that no worthwhile project is left without an opportunity to benefit from this significant funding opportunity.

Background

AMWA’s comments focus on the ability of water utility workers to receive premium pay through the Funds based on the Interim Final Rule’s definition of “eligible workers,” which reads as follows:

Eligible workers means workers needed to maintain continuity of operations of essential critical infrastructure sectors, including health care; emergency response; sanitation, disinfection, and cleaning work; maintenance work; grocery stores, restaurants, food production, and food delivery; pharmacy; biomedical research; behavioral health work; medical testing and diagnostics; home and community-based health care or assistance with activities of daily living; family or child care; social services work; public health work; vital services to Tribes; any work performed by an employee of a State, local, or Tribal government; educational work, school nutrition work, and other work required to operate a school facility; laundry work; elections work; solid waste or hazardous materials management, response, and cleanup work; work requiring physical interaction with patients; dental care work; transportation and warehousing; work at hotel and commercial lodging facilities that are used for COVID–19 mitigation and containment; work in a mortuary; work in critical clinical research, development, and testing necessary for COVID–19

response.

(1) With respect to a recipient that is a metropolitan city, nonentitlement unit of local government, or county, workers in any additional sectors as each chief executive officer of such recipient may designate as critical to protect the health and well-being of the residents of their metropolitan city, nonentitlement unit of local government, or county; or

(2) With respect to a State, Territory, or Tribal government, workers in any additional sectors as each Governor of a State or Territory, or each Tribal government, may designate as critical to protect the health and well-being of the residents of their State, Territory, or Tribal government.

We believe that drinking water sector workers should be considered among those workers “needed to maintain continuity of operations of essential critical infrastructure sectors” referenced at the outset of this definition. But because neither the rule text nor the preamble references drinking water sector workers outright, we recommend inserting additional language to ensure that they are covered.

Additionally, AMWA’s comments discuss types of drinking water infrastructure projects that could benefit from assistance through the Funds established by that statute. These include projects that may not be captured within the Interim Final Rule’s defined eligibility of “projects or activities of the type that would be eligible under ... section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j-12).”

Within 42 U.S.C. 300j-12, Section 1452(a)(2)(B) of the Safe Drinking Water Act (SDWA) specifies that DWSRF funding:

[M]ay be used by a public water system only for expenditures (including expenditures for planning, design, siting, and associated preconstruction activities, or for replacing or rehabilitating aging treatment, storage, or distribution facilities of public water systems, but not including monitoring, operation, and maintenance expenditures) of a type or category which the Administrator has determined, through guidance, will facilitate compliance with national primary drinking water regulations applicable to the system under section 300g-1 of this title or otherwise significantly further the health protection objectives of this subchapter.

Section 1452(a)(2)(C) additionally allows a public water system to use DWSRF funds as a source of revenue or security for payment of the principal and interest on general obligation bonds issued by the State to provide required matching funds to its DWSRF allotment, and Section 1452(a)(2)(E) allows for funding to be used for the acquisition from a willing seller of real property integral to a project eligible for DWSRF aid.

Through Sec. 35.3520 of the Code of Federal Regulations, EPA has provided additional specificity by defining eligible drinking water projects as those:

[T]hat address present or prevent future violations of health-based drinking water standards ... These include projects needed to maintain compliance with existing national primary drinking water regulations for contaminants with acute and chronic health effects. Projects to replace aging infrastructure are eligible for assistance if they are needed to maintain compliance or further the public health protection objectives of the Act.

The regulations go on to describe types of water treatment, transmission and distribution, source, storage, consolidation, and new-system creation projects that EPA has determined to be eligible to receive DWSRF funding. However, 42 U.S.C. 300j-12 also includes other limitations that, if strictly interpreted, could pose obstacles to allowing states and communities to most widely use Fund dollars for drinking water infrastructure projects. These obstacles, and potential solutions, are addressed in our responses to the following questions posed in the Interim Final Rule.

Question 10: Are there additional sectors beyond those listed in the interim final rule that should be considered essential critical infrastructure sectors?

AMWA believes that the intent of Treasury's Interim Final Rule is to include the drinking water sector as one of the "essential critical infrastructure sectors" whose workers are eligible to receive premium pay via the Funds. However, because Interim Final Rule's definition of "eligible workers" does not specifically reference water sector workers, it leaves the question open to some interpretation, and may actually exclude some essential water utility staff who are not directly employed by a state, local, or tribal government. AMWA therefore urges Treasury to revise the Interim Final Rule to leave no question as to the status of essential water sector workers.

The preamble to the Interim Final Rule notes that Sections 602(g)(2) and 603(g)(2) of the statute define an "eligible worker" to include those "needed to maintain continuity of operations of essential critical infrastructure sectors." The preamble goes on to explain that the Interim Final Rule's definition of "eligible workers" both "incorporates [the Section 602(g)(2) and 603(g)(2) definitions] and provides a list of industries recognized as essential critical infrastructure sectors." This is followed by a footnote (104) that explains, "The list of critical infrastructure sectors provided in the Interim Final Rule is based on the list of essential workers under The Heroes Act, H.R. 6800, 116th Cong. (2020)."

There are several points of unclarity here. First, it is left unspecified precisely which "list of essential workers under The Heroes Act" is the basis for the Interim Final Rule's definition. Though much of the Interim Final Rule's definition mirrors the definition of "essential work" in Section 170101 of the Heroes Act, that section does not specifically cite workers in the water sector. However, another part of H.R. 6800 – Section 191203 – defines "essential critical infrastructure labor or services" as being based upon the Department of Homeland Security's "Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response." This document does specifically reference water and wastewater sector employees as critical infrastructure workers, but is not part of a "list" of essential workers that may be found in the legislation. In sum, the preamble does not offer meaningful assistance in determining the status of drinking water workers under the Interim Final Rule.

As discussed above, the Interim Final Rule's actual definition of "eligible workers" likewise fails to clearly and directly address the status of drinking water sector workers. While it should be clear that drinking water sector workers should be considered among those workers "needed to maintain continuity of operations of essential critical infrastructure sectors" referenced at the

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outset of this definition, without mentioning them explicitly some critical workers at certain water systems could fall through the cracks.

While employees of many publicly-owned drinking water systems have an avenue to be made eligible through the definition's inclusion of "any work performed by an employee of a State, local, or Tribal government," this option is not available to water sector workers employed by a regional or county authority, or a special utility district. Moreover, water utility workers employed by a state, city or county could be made eligible to receive premium pay if the "chief executive officer of such" local or state government designates them "as critical to protect the health and well-being of the residents" of their community. But it would be patently unfair for the workers tasked with delivering clean and safe drinking water during a pandemic to have to rely on this secondary designation, while the Interim Final Rule makes so many other professions directly and clearly eligible for premium pay without such intervening action by a state or local official. And it could still exclude water utility workers employed by special utility districts.

In sum, there should be no argument that water represents a critical infrastructure sector, and that the drinking water utility personnel who are responsible for providing continuous and vital water services across the country should be entitled to receive premium pay through the Funds for their service during the pandemic. AMWA believes this is the intent both of Congress, and of Treasury, but we strongly encourage that the Interim Final Rule be revised to leave no room for question on this matter.

Question 18: What are the advantages and disadvantages of aligning eligible uses with the eligible project type requirements of the DWSRF and CWSRF? What other water or sewer project categories, if any, should Treasury consider in addition to DWSRF and CWSRF eligible projects? Should Treasury consider a broader general category of water and sewer projects?

Aside from the eligible project types specified in SDWA and the Code of Federal Regulations, Section 1452(b)(1) of the statute requires each state receiving a DWSRF capitalization grant to "annually prepare a plan that identifies the intended uses of the amounts available to the State loan fund" of that state. Section 1452(b)(3)(A) then requires each state's intended use plan to provide priority for the use of funds on projects that address the most serious risk to human health, are necessary to ensure compliance with the requirements of SDWA, or which assist water systems in most need on a per-household basis under that State's affordability criteria. Finally, Section 1452(b)(3)(B) requires each state to "publish and periodically update a list of projects in the State *that are eligible for assistance* under this section, including the priority assigned to each project" [emphasis added].

Because the Interim Final Rule allows the Funds to be used on projects or activities "of the type" that would be eligible under SDWA Sec. 1452, and that same section of the statute requires eligible projects to be prioritized and published as part of an intended used plan produced by the state, the Interim Final Rule could be interpreted to prevent a drinking water infrastructure

project from receiving assistance through the Funds if it does not appear on the intended use plan of its state. AMWA believes it would be misguided to limit the universe of drinking water infrastructure projects that are eligible for aid through the Funds to only those projects listed on a state's intended use plan. This is especially true when considering that large communities often do not attempt to have certain drinking water projects included on the state's intended use plan, since those plans are required to prioritize projects that carry a direct public health benefit and therefore are not as hospitable to infrastructure projects that may not correlate with a direct and measurable public health improvement in the near term. Additionally, largescale drinking water projects that are unlikely to obtain a meaningful level of assistance through a state's limited amount of available DWSRF funding are often left off of an intended use plan altogether.

As a result, if the Interim Final Rule's "of the type" test is interpreted to mean only drinking water projects that are eligible for DWSRF assistance by virtue of their placement on a state's intended use plan, then a significant number of vitally important projects from coast to coast would be excluded from the opportunity to receive Fund aid. AMWA therefore urges clarification of the "of the type" provision to make clear that projects and activities themselves that are listed in Sec. 1452(a)(2) of SDWA, or within Sec. 35.3520 of the Code of Federal Regulations, are eligible for assistance. With this change, states and communities would have assurance that they could spend Fund dollars on drinking water infrastructure projects that may not meet every administrative criterion for obtaining DWSRF funding that is specified in the entirety of 42 U.S.C. 300j-12.

This concern could also be addressed by expanding the Interim Final Rule to confer eligibility for Fund dollars on drinking water infrastructure projects that are eligible for programs beyond the DWSRF as construed in 42 U.S.C. 300j-12. For example, EPA's Water Infrastructure Finance and Innovation Act (WIFIA) program was created by Congress in 2014 to deliver low-cost loan assistance to a wide range of drinking water and wastewater infrastructure projects, including those that may be too large to receive meaningful assistance through a state's SRF program (and as a result may not appear on a state's intended use plan). Congress intentionally crafted project eligibility for EPA's WIFIA program to both include any project that is eligible for funding through the Drinking Water or Clean Water SRF, but to also go beyond these projects. Specifically, additional projects eligible for WIFIA loans through EPA include (pursuant to 33 U.S.C. 3905):

- A project for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works;
- A project for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation);
- A brackish or sea water desalination project, including chloride control, a managed aquifer recharge project, a water recycling project, or a project to provide alternative water supplies to reduce aquifer depletion;
- A project to prevent, reduce, or mitigate the effects of drought, including projects that enhance the resilience of drought-stricken watersheds; and

- Acquisition of real property or an interest in real property that is integral to an eligible project.

While some of these projects may also be eligible for assistance through an SRF program, Congress' separate delineation of them in the WIFIA statute strongly suggests that this may not always be the case. AMWA therefore encourages revision of the Interim Final Rule to include eligibility for a drinking water or wastewater project that is eligible for EPA WIFIA assistance under 33 U.S.C. 3905. This represents a broad category of projects that could benefit from aid through the Funds.

Question 19: What additional water and sewer infrastructure categories, if any, should Treasury consider to address and respond to the needs of unserved, underserved, or rural communities? How do these projects differ from DWSRF and CWSRF eligible projects?

While the Drinking Water and Clean Water SRF are effective at directing funding to unserved, underserved, and rural communities, there are also a number of other programs in SDWA and other statutes that are dedicated to providing assistance to small drinking water systems. AMWA recommends revising the Interim Final Rule to encompass project eligibilities that are defined in these other programs.

For example, the Agriculture Department's Water and Waste Disposal Loan and Grant Program provides aid to states, Tribes, and local governments to support drinking water and wastewater infrastructure projects in eligible rural areas – generally communities with populations below 10,000. Among other uses, recipients may spend funds on drinking water sourcing, treatment, storage and distribution projects, and in some cases may use them for related activities including legal and engineering fees, land acquisition and water rights, and start-up operations and maintenance. These should all be explicitly recognized as valid expenditures of dollars provided by the Fund.

Additionally, Treasury could effectively achieve its stated objective of allowing the Funds to be used for improving water systems' cybersecurity practices and their replacement of lead service lines by amending the Interim Final Rule to recognize existing EPA programs that exist for these purposes. For example, Sec. 1433(g) of SDWA houses a Drinking Water Infrastructure Risk and Resilience Program that is intended to help drinking water systems prepare for and respond to a variety of physical security threats. Among other uses, program funds may be used by a drinking water system for "improvements to electronic, computer, financial, or other automated systems and remote systems." Explicitly allowing Fund dollars to be used for these purposes would remove any doubt about the ability of a water system to use the Fund to improve its cybersecurity posture.

Sec. 1459B of SDWA similarly offers grant funding for defined "lead reduction projects" that include "replacement of publicly owned lead service lines" and "providing assistance to low-income homeowners to replace lead service lines" on their private property. While EPA has administratively determined that public and private lead service line replacement is an acceptable

use of DWSRF dollars, Treasury could also borrow the “lead reduction project” definition from Sec. 1459B to highlight the eligibility of lead service line replacement projects for money received through the Fund. When incorporating the “lead reduction project” definition into the Interim Final Rule, Treasury may choose to modify it to allow water systems to use Fund dollars to replace privately-owned lead service lines even in cases where the homeowner is not low-income.

Question 20: What new categories of water and sewer infrastructure, if any, should Treasury consider to support State, local, and Tribal governments in mitigating the negative impacts of climate change? Discuss emerging technologies and processes that support resiliency of water and sewer infrastructure. Discuss any challenges faced by States and local governments when pursuing or implementing climate resilient infrastructure projects.

Again, AMWA believes that Treasury should look to the definitions of projects eligible to receive targeted water infrastructure assistance from EPA when fully defining the range of uses of Fund dollars. In the area of climate change, in 2018 Congress established the Drinking Water System Infrastructure Resilience and Sustainability Act under Sec. 1459A(l) of SDWA. This is the first program dedicated to helping drinking water systems adapt their infrastructure to withstand the effects of climate change and extreme weather. Specifically, funding may be used “to assist in the planning, design, construction, implementation, operation, or maintenance of a program or project that increases resilience to” climate-related threats to projects supporting:

- The conservation of water or the enhancement of water use efficiency;
- The modification or relocation of existing drinking water system infrastructure made, or that is at risk of being, significantly impaired by climate change, including risks related to flooding;
- The design or construction of desalination facilities to serve existing communities;
- The enhancement of water supply through the use of watershed management and source water protection;
- The enhancement of energy efficiency or the use and generation of renewable energy in the conveyance or treatment of drinking water; or
- The development and implementation of measures to increase the resilience of the drinking water system to hazards associated with climate change or extreme weather.

While some of these climate resilience projects could likely be funded through the DWSRF, defining each of them separately as eligible projects under the Interim Final Rule would remove any confusion about whether a given project must be listed on a state’s intended use plan as a prerequisite for receiving assistance through the Fund. This would ensure that the widest range of projects would have an opportunity to benefit from this assistance.

Question 21: Infrastructure projects related to dams and reservoirs are generally not eligible under the CWSRF and DWSRF categories. Should Treasury consider expanding eligible infrastructure under the Interim Final Rule to include dam and reservoir projects?

Discuss public health, environmental, climate, or equity benefits and costs in expanding the eligibility to include these types of projects.

While dam and reservoir projects are generally not eligible for funding through the DWSRF program, several other EPA programs discussed previously in these comments – such as WIFIA and the Drinking Water System Infrastructure Resilience and Sustainability Program – allow funds to be spent on projects to reduce or mitigate the effects of drought or to address hazards related to climate change. Through these allowable uses, funding can be available for projects to improve dams or reservoirs. Therefore, by aligning the eligible uses of Fund dollars with the wide range of water infrastructure projects eligible assistance through the variety of programs that exist beyond only the SRFs, Treasury could provide a pathway for Fund dollars to be spent on necessary dam and reservoir projects without having to cite those projects separately in a revised Interim Final Rule.

Conclusion

AMWA appreciates the opportunity to share these comments on the Interim Final Rule to implement the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Recovery Fund. The \$350 billion that the Funds will distribute to states, counties, localities, and Tribes will provide essential assistance to help all levels of government recover from the economic impacts of the COVID-19 pandemic and offers a unique opportunity to make a substantial investment in the nation’s water infrastructure.

We believe that the personnel tasked with keeping our nation’s drinking water infrastructure operational during the pandemic should be clearly and indisputably eligible to receive premium pay supported by the Funds. The Interim Final Rule currently lacks the necessary specificity to ensure this is the case for all essential water sector workers, so we urge Treasury to clearly and directly recognize the eligibility of these critical workers.

Additionally, we believe that Treasury utilized a reasonable starting point in the Interim Final Rule by allowing states and communities to use Fund dollars on water infrastructure projects that are eligible for assistance through EPA’s Drinking Water and Clean Water State Revolving Funds. However, due to the presence of a variety of other authorized water infrastructure funding programs that each serve to aid specific types of projects, as well as uncertainty over whether a water project “of the type” that is eligible for SRF assistance must also appear on a state’s intended use plan for SRF projects, AMWA strongly encourages Treasury to revise the Interim Final Rule to allow states and communities to spend Fund dollars on any water infrastructure project that aligns with an allowable use of funds under one of the other existing programs referenced in these comments. This represents the most effective way to achieve Treasury’s stated goal of providing funding recipients with “wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities” – and would be particularly helpful in ensuring that climate resilience, cybersecurity, and lead abatement projects are fully eligible to receive Fund dollars.

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Again, we appreciate the opportunity to comment on the Interim Final Rule. If you have questions about any of these comments, please contact Dan Hartnett, AMWA's Chief Advocacy Officer for Legislative and Regulatory Affairs, at hartnett@amwa.net.

Sincerely,



Diane VanDe Hei
Chief Executive Officer
Association of Metropolitan Water Agencies

Cc: Radhika Fox, Assistant Administrator, Office of Water