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BEFORE THE SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE  
OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
HEARING ON IMPLEMENTATION OF DRINKING WATER AND WASTEWATER  
PROVISIONS OF THE INFRASTRUCTURE ACT  
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Chair Duckworth, Chairman Carper, Ranking Member Lummis, Ranking Member Capito, and members of the Subcommittee, thank you for the invitation to testify today on the implementation of the drinking water and clean water provisions of the Infrastructure Investment and Jobs Act (P.L. 117-58). I am currently a partner with the firm Earth & Water Law. I have worked on EPA's drinking water and clean water programs while serving on the staff of this Committee. I also worked on EPA's clean water programs while working on the staff of the House Transportation and Infrastructure Committee.

My goal today is to help the Subcommittee understand allocation and project selection for the \$43 billion in funds appropriated in the Infrastructure Bill to the Clean Water and Drinking Water State Revolving Loan Funds (SRFs) as well as the \$5 billion in funds appropriated in the Infrastructure Bill to the Safe Drinking Water Act (SDWA) Small and Disadvantaged Communities grant program. I also will discuss some of challenges states and funding recipients will face. Finally, I will make some recommendations to both Congress and EPA.

For background and context, appended to this testimony is an overview of the Clean Water and Drinking Water SRFs and a summary of the funding provided in the Infrastructure Bill.

Implementation of the historic amount of funding provided in the Infrastructure Bill will present a challenge to states and communities. In addition, as I explain below, EPA’s approach to the implementation of the Infrastructure Bill funding is somewhat schizophrenic. For funding that is appropriated to the Clean Water and Drinking Water State Revolving Fund (SRF) programs EPA appears to be trying to direct the priorities and projects even though Congress granted that authority to states when it authorized the SRFs. Yet, for funding that is appropriated to the Safe Drinking Water Act’s Small and Disadvantaged Communities grant program, EPA has refused to take on the responsibility to direct the funding to where it is needed most, instead distributing funds through an allocation process.

These observations are based on the implementation guidance for Infrastructure Bill funds appropriated to the SRFs that EPA released on March 8, 2022,<sup>1</sup> as well as EPA’s 2021 guidance on the use of funds appropriated under the Safe Drinking Water Act’s Small and Disadvantaged Communities grant program.<sup>2</sup>

### Timing of Expenditures

EPA’s implementation guidance says that “States must make commitments (i.e., they must sign assistance agreements, such as loans, with eligible recipients) within one year after the receipt of each capitalization grant payment from EPA. States must make effort to draw down (expend) funds within two years of capitalization grant award.” These are the general rules that apply to SRF funds and the Clean Water Act (CWA) and in the SDWA regulations. However, these

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<sup>1</sup> [https://www.epa.gov/system/files/documents/2022-03/combined\\_srf-implementation-memo\\_final\\_03.2022.pdf](https://www.epa.gov/system/files/documents/2022-03/combined_srf-implementation-memo_final_03.2022.pdf)

<sup>2</sup> [https://www.epa.gov/system/files/documents/2021-08/updated\\_sudc\\_implementation\\_document\\_508-compliant.pdf](https://www.epa.gov/system/files/documents/2021-08/updated_sudc_implementation_document_508-compliant.pdf)

general statutory and regulatory requirements for expenditure of SRF funds will be difficult to meet given the increased amount of funding. Narrow time limits may undermine Congress' intent that states allocate funding to where it is most needed. In fact, it likely will undermine efforts to help the very small, disadvantaged communities that Congress intended to target for assistance. This is particularly true if EPA takes back funds from a state with many small communities and then gives it to a state with large cities that are prepared to quickly enter into SRF assistance agreements.

### Priorities and Projects Selected

For the SRF funds (which comprise \$43 billion of the amount appropriated under the Infrastructure Bill) EPA's guidance acknowledges that Congress established the SRF programs as state run programs and both priorities and projects are selected by states. Despite that acknowledgment of the statutory structure, however, EPA's guidance appears to attempt to direct state priorities and projects.

For example, EPA is suggesting that states change their Intended Use Plans that identify projects that states will fund using the Infrastructure Bill monies. EPA appears to want the opportunity to review state priorities against EPA's own priorities. Yet, both the CWA and the SDWA leave the development of state priority lists and Intended Use Plans to the states.

EPA's implementation guidance requires states to develop new Intended Use Plans to identify projects eligible for funding under the Infrastructure Bill. That requirement is not in the Infrastructure Bill and it does not appear to be necessary unless the state's plan does not include

enough projects eligible for the increased amount of funding. Adopting an intended use plan is a public process. If the existing plan is sufficient then it appears that EPA's requirement will only delay the distribution of funds to communities. This delay could be very harmful to states and communities because a state must sign assistance agreements within one year of receiving funds from EPA and the SRF money must be used within two years.

If states must update their Intended Use Plans to expand the list of projects identified, EPA should review the plans against the statutory and regulatory requirements only, not administration priorities.

#### Identification of Disadvantaged Communities

EPA's implementation guidance also says that EPA expects states to revise and submit to EPA for review their affordability criteria established under the CWA and their definition of disadvantaged community under the SDWA. EPA's stated goal is for the Infrastructure Bill funding to be used to meeting the administration's objective established on January 21, 2021, in Executive Order 14008 of sending 40% of federal funding to disadvantaged communities. The Infrastructure Bill already requires as much as 49% of SRF funds to be used in disadvantaged communities. However, the Infrastructure Bill does not use or reference the administration's definition of disadvantaged communities, which may be evolving. Both the CWA and the SDWA make affordability a state decision. This is appropriate given the very different demographic profiles that exist in different states and in rural and urban areas.

Neither the CWA nor the SDWA gives EPA the authority to approve or disapprove the state's criteria. EPA's role is limited to providing information that may assist a state. Appendix E of EPA's Infrastructure Bill implementation guidance provides such additional information.

However, it goes further and states that: "The information in this memo is one step in an ongoing EPA effort to analyze criteria and adjust them as needed to ensure that the definitions used are compliant with the CWA and SDWA as well as meet the community affordability needs within states." *That is not EPA's role.* They have no authority to decide for a state what its community affordability needs are.

Despite this fact, the guidance also sets out the expectation that states "evaluate and revise, as needed, the DWSRF disadvantaged community definition and CWSRF affordability criteria." EPA cannot mandate a revision and any attempt to do so would simply delay the ability of states to get funding out to communities.

### Lead Service Line Funds

Congress chose to appropriate \$15 billion for lead service line replacement to the Drinking Water SRF program. That means that the funding will be allocated based on the formula established based on drinking water needs generally, not the presence of lead service lines. This may result in a misallocation of funds. Currently, the Lead and Copper Rule requires water systems to inventory their lead service lines by October 2024. After public water systems complete their inventories of lead service lines Congress may wish to direct EPA to allocate these funds based on those inventories even if the reallocation would apply to only the last two years of Infrastructure Bill funding.

The Infrastructure Bill also requires a utility to replace both publicly owned and privately owned lead service lines. This condition helps protect public health. However, a community may need to change its laws to allow a water utility to carry out work on private property. EPA and Congress should take that potential delay into account.

EPA's implementation guidance explains how EPA interprets the statutory requirement that the lead service line funding in the Infrastructure Bill be used for lead service line replacement projects and "associated activities directly connected to the identification, planning, design, and replacement of lead service lines." According to EPA, non-routine lead sampling (not for compliance purposes) as part of a lead service line removal project is eligible for funding.

While \$15 billion over 5 years a very large sum, this Committee knows that it will take a very long time to replace all lead service lines in this country. Public health can be protected in the interim by carefully monitoring the drinking water and ensuring that appropriate pH levels are maintained and corrosion control treatment is deployed where needed. However, we all have seen the consequences when communities fail to get the chemistry right and lead in pipes leaches into drinking water. EPA should consider whether investment in non-routine monitoring technologies, before as well as during lead service line replacement, should be considered directly connected to the identification of lead service lines and planning for replacement. Such technology can help identify priorities and protect public health before replacement is achieved.

#### Allocation of SDWA Small and Disadvantaged Community Funds

The Infrastructure Bill appropriates \$5 billion for the SDWA Small and Disadvantaged Community grant program that was enacted in 2016 as part of the Water Infrastructure Improvements for the Nation (WIIN) Act, for the purpose of addressing emerging contaminants in those communities.

The Small and Disadvantaged Community grant program in section 1459A of the SDWA was drafted as direct EPA grants for small and disadvantaged communities, with a priority for communities lacking basic infrastructure. This section of the SDWA authorizes grants to states only where a state will carry out a project on behalf of an underserved community or on behalf of a disadvantaged or small community to address an imminent and substantial endangerment. Rather than follow the authorization that was developed by this Committee, EPA chose to send all funds appropriated for this program to states under an allocation formula.

That decision avoids a workload for EPA but it undermines the intent of the program, which was to focus funds on the neediest communities. It also fails to implement the statutory priority for underserved communities and dilutes the impact of the funding. Given its focus on environmental justice, EPA should reconsider whether it is appropriate to invest its FTE resources to ensure that funds are directed to these communities.

#### Technical Assistance

The Infrastructure Bill appropriately sets aside some of the funding for technical assistance, including assistance to small communities to help them gain access to funding. These provisions will be very important to ensure that funding reaches needy communities.

### Cross-Cutting Federal Requirements

Some of the cross-cutting federal requirements may make it difficult for smaller communities to access funding under the Infrastructure Bill. This may be particularly true of the application of the Brooks Act to Clean Water SRF capitalization grants. Under the Brooks Act an entity carrying out a project paid for with federal funds must select engineering design services from the three most highly qualified firms. That means funds from the capitalization grants cannot be used for design-build projects. This requirement may not be appropriate for small projects that need not be divided between design contractor and construction contracts. In fact, large design firms do not typically even bid on projects in small towns. It also undermines the goal of promoting local hiring.

The Infrastructure Bill added a requirement that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” OMB has not yet provided guidance to agencies on how this requirement or waivers of this requirement will be implemented. This delay may exacerbate the timing issues identified above.

In its implementation guidance EPA appears to suggest that additional cross-cutting requirements should be added. Davis-Bacon already applies to projects financed with SRF funding. However, EPA’s guidance goes further and suggests that states should require funding recipients to employ union workers under project labor agreements. That is not a requirement



under the Infrastructure Bill, the CWA, or the SDWA and EPA should refrain from telling states they should make it a condition of receipt of SRF funds.

### Recommendations

#### *For EPA*

- EPA should refrain from attempting to condition the receipt of Infrastructure Bill funding on requirements that are not found in that law or the underlying CWA or SDWA. EPA review of priorities and policies that are committed by law to the discretion of a state will only delay the delivery of benefits from this legislation. And there is no requirement to tell communities to use project labor agreements.
- EPA should consider whether investment in technology to monitor lead in drinking water, not for compliance but for the interim protection of public health and identifying priorities, should be considered eligible for lead service line funding.
- EPA should carry out Congressional intent and carry out the SDWA Small and Disadvantaged Communities grant program as direct EPA grants.

#### *For Congress*

- Congress should consider whether states and communities will need additional time to deploy the historic amount of funding provided in the Infrastructure Bill. It may not be possible for states to enter into agreements for the use of all of the funds within 12 months after those funds are received from EPA.

- Congress should consider directing EPA to establish a separate allocation formula for lead service line funding, after inventories are developed by communities.
- If EPA believes that the Infrastructure Bill does not authorize use of some of the lead service line funding to invest in technology that can provide interim public health protection before lead lines are replaced, Congress should consider modifying the eligibilities in future appropriations bills.
- Congress should conduct oversight to ensure the SDWA Small and Disadvantaged Communities grant program is implemented as intended.
- Congress should consider amending section 602(b)(14) of the CWA to set a project cost threshold before the Brooks Act condition takes effect.

## Appendix A

### An Overview of the State Revolving Loan Funds

#### Clean Water SRF

In 1972, Congress established a construction grants program to help communities meet the new mandate to upgrade treatment facilities. Congress provided \$43 billion in federal grants to municipalities between 1972 to 1984. In 1987, Congress authorized the Clean Water SRF program to replace the construction grants program. Initially, federal assistance was available only for publicly owned treatment works. However, Congress has expanded eligible projects over time. For the construction of treatment works, the loan recipient must be a public entity. Recipients of funding for nonpoint source, decentralized wastewater treatment, National Estuary Program, and stormwater projects may be private or nonprofit entities as well.

The theory behind the Clean Water SRF program was to eventually get EPA out of the business of providing infrastructure funding assistance by using federal dollars to capitalize state-managed revolving loan funds that would exist in perpetuity. The expectation was that federal capitalization grants would end and funding for water infrastructure would continue as loans are repaid and the funds revolve. That point of view is still held by the Office of Management and Budget, which perennially seeks to reduce SRF appropriations. The reality, however, is that the need for capital investment in infrastructure is so large that it cannot be paid for with on-going revenues; it must be debt financed. Not all communities have access to the municipal bond market. As a result, the demand for infrastructure funding exceeds the funds available for loans in the Clean Water SRFs, leaving a gap. Accordingly, Clean Water SRF capitalization grants have continued.

The Clean Water SRF program is an example of cooperative federalism. Congress established the eligible recipients and eligible projects and set some parameters to ensure that the funds existed in perpetuity. Otherwise, the SRFs are intended to be run by states, with limited federal oversight.

For example, the CWA requires states to develop Intended Use Plans annually, after public comment, to identify projects to be funded each year. That plan describes the intended uses of the state's Clean Water SRF, including a list of those projects for construction of publicly owned treatment works on the State's priority list and a list of nonpoint source and National Estuary Program activities, short and long-term goals and objectives, and information of activities to be supported, financial terms, and communities served. A state does not need to fund project in rank order. However, while a project must be on the IUP, a state is free to change the priority of projects within the IUP. EPA reviews the plan only for compliance with the statute and regulations. EPA reviews the plan only for compliance with the statute and regulations. EPA cannot second-guess a state's priorities. As stated in section 216 of the CWA, "the determination of the priority to be given each category of projects for construction of publicly owned treatment works within each State shall be made *solely* by that State."

Under the CWA, additional subsidies are based on a state's affordability criteria that identifies municipalities that would experience a significant hardship raising the revenue necessary to finance a project or activity if additional subsidization is not provided. A state's criteria must 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.

Over time, Congress has added more strings and conditions to the SRFs, while also expanding the eligibilities. For example, initially only the capitalization grants were considered federal funds subject to cross-cutting federal requirements. Funds in the SRF from the 20 percent state matching funds, interest revenue, and loan repayments were not federal dollars. Eventually, however, appropriations bills imposed a requirement that all SRF loan recipients pay Davis-Bacon prevailing wage rates. Appropriations bills also required a percentage of the Clean Water SRF capitalization grants to be used to provide additional subsidies.

In 2014, the Water Resources Reform and Development Act of 2014 (WRRDA 2014) amended the Clean Water SRF program to make a number of requirements applicable to all funds from an SRF, not just the capitalization grants. The expanded cross-cutting federal requirements included Davis Bacon, NEPA, and American iron and steel content. In addition, for the capitalization grants only, WRRDA 2014 added a requirement that loan recipients comply with the Brooks Act, which means that engineering design services must be selected from the three most highly qualified engineering design firms. That means funds from the capitalization grants cannot be used for design-build projects. WRRDA 2014 also authorized additional subsidies (grants) from the Clean Water SRF, based on affordability criteria established by the state.

Despite the expansion of federal requirements, state decision-making related to priorities and selection of projects funded remains a bedrock principle behind the Clean Water SRF.

### Drinking Water SRF

Congress authorized the Drinking Water SRF program in 1996 and modeled it after the Clean Water SRF. Before that date, EPA had no program for providing funding assistance for drinking water infrastructure. Given that many water systems that serve the public are privately owned, private as well as publicly owned systems are eligible for funding from the Drinking Water SRF. Many drinking water systems are very small so Congress also authorized states to use part of their SRF capitalization grant (now 35%) to provide additional subsidies for disadvantaged communities, as defined by the states. Like the Clean Water SRFs, appropriations bills require Drinking Water SRF funding recipients to pay prevailing rates under Davis-Bacon. As amended in the 2018 America's Water Infrastructure Act, projects receiving funding from the Drinking Water SRF also must use American iron and steel through 2023.

Under the SDWA, the state also prepares its Intended Use Plan annually and that plan is a list of the projects to be funded in the first fiscal year that begins after the date of the plan, including a description of the project, the expected terms of financial assistance, and the size of the community served, the criteria and methods established for the distribution of funds, and a description of the financial status of the State loan fund and the short-term and long-term goals of the SRF. For the SDWA, Congress requires a state's Intended Use Plan to "provide, to the maximum extent practicable, that priority for the use of funds be given to projects that-

- (i) address the most serious risk to human health;
- (ii) are necessary to ensure compliance with the requirements of this subchapter (including requirements for filtration); and
- (iii) assist systems most in need on a per household basis according to State affordability criteria."

EPA reviews the plan only for compliance with the statute and regulations.

Under the SDWA, affordability criteria also are established by states. A state's criteria are not subject to EPA review. The SDWA explicitly states that: "With respect to affordability, the determination of the Administrator shall be limited to whether the variances granted by the State comply with the affordability criteria developed by the State." The SDWA defines disadvantaged community as "the service area of a public water system that meets affordability criteria established after public review and comment by the State in which the public water system is located."

## **Appendix B**

### Appropriations in the Infrastructure Bill and Special Rules

#### *General SRF Programs*

The Infrastructure Bill appropriated \$11.7 billion for each of the general Clean Water SRF program and the general Drinking Water SRF program. For each SRF program, the funds are distributed to states as follows: \$1.9 billion in FY 2022, \$2.2 billion in FY 2023, \$2.4 billion in FY 2024, \$2.6 billion in 2025, and \$2.6 billion in FY 2026. These funds are in addition to the funding received through regular appropriations, which added \$1.64 billion to the Clean Water SRF and \$1.12 billion to the Drinking Water SRF in FY 2022. The President's FY 2023 budget request seeks the same amounts for the respective SRFs for FY 2023.

For the funding provided by the Infrastructure Bill to both SRFs, in FY 2022 and FY 2023 only, the state match is reduced to 10%. After that it reverts to the normal 20%.

For both SRFs, 49% of the capitalization grant from the Infrastructure Bill must be used for additional subsidies in the form of grants or 100% principal forgiveness. The underlying statutes provide the rules for additional subsidization. For the Clean Water SRF, eligibility is based on the state's affordability criteria. For the Drinking Water SRF, eligibility is based on the state definition of disadvantaged community.

#### *Clean Water Emerging Contaminants*

The Infrastructure Bill appropriated \$1 billion to the Clean Water SRF for projects to address emerging contaminants, such as PFAS. These funds are distributed as follows: \$100 million in FY 2022, \$225 million in FY 2023, \$225 million in FY 2024, \$225 million in 2025, and \$225 million in FY 2026.

For this funding there is no state match and 100% must be used for additional subsidies in the form of grants or principal forgiveness. There is no specific authorization in Clean Water SRF program for emerging contaminants so that term is not defined.

#### *Drinking Water Emerging Contaminants*

The Infrastructure Bill appropriated \$4 billion to the Drinking Water SRF for projects to address emerging contaminants, with a focus on PFAS. In each of fiscal years 2022 to 2026 \$800 million of these funds will be distributed to states. For this funding there is no state match and 100% must be used for additional subsidies in the form of grants or principal forgiveness. Under the SDWA, at least 25 percent of the funds provided for emerging contaminants under the



Drinking Water SRF program must be used to help disadvantaged communities or public water systems serving fewer than 25,000 persons.

#### *Lead Service Line Replacement*

The Infrastructure Bill appropriated \$15 billion to the Drinking Water SRF for lead service line replacement projects and associated activities directly connected to the identification, planning, design, and replacement of lead service lines. In each of fiscal years 2022 to 2026 \$3 billion of these funds will be distributed to states.

For this funding there is no state match and 100% must be used for additional subsidies in the form of grants or principal forgiveness.

#### *Small and Disadvantaged Communities Emerging Contaminants*

The Infrastructure Bill appropriated \$5 billion over 5 years for grants to small and disadvantaged communities, \$1 billion of which is to be distributed each year. The bill also waives the 45% match requirement for these funds. Disadvantaged communities are identified based on the state definition. Small communities are those with a population of less than 10,000 individuals.

Section 1459A also requires that priority be given to underserved communities. However, the appropriations language removes that priority for this pot of funding. In addition, EPA has changed the program from a direct grant program to a state implemented program with the states receiving funding based on an allocation formula. EPA merely requires that states provide some funding go to underserved communities, rather than giving those communities a priority.