



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

May 24, 2023

MEMORANDUM

SUBJECT: Award and Implementation of the 2023 Drinking Water State Revolving Fund City of Jackson-Supplemental Appropriation (COJ-SA)

FROM: Jennifer McLain, Director
Office of Ground Water and Drinking Water

TO: Denisse Diaz, Acting Water Division Director
Region IV

I. BACKGROUND

On December 29, 2022, the President signed Public Law 117-328, the Consolidated Appropriations Act, 2023, (“the Act”) into law. Division N of the Act appropriates \$450 million in disaster supplemental funding for the Drinking Water State Revolving Fund (DWSRF), available only to states or territories in Environmental Protection Agency (EPA) Region 4 in areas where the President declared an emergency in August of fiscal year 2022 pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121 et seq.). The President’s emergency declaration dated August 30, 2022, applies to Hinds County, Mississippi, but was necessitated by the water crisis impacting the City of Jackson’s public water systems. Therefore, the City of Jackson’s public water systems (PWS ID No. MS0250008 and PWS ID No. MS0250012) are the nation’s only public water systems eligible for these funds. The Act authorizes EPA to retain up to \$1 million of the funds for administrative management and oversight.

For ease of reference, EPA will refer to this supplemental appropriation as the City of Jackson-Supplemental Appropriation (COJ-SA).

This memorandum describes how EPA will award and administer COJ-SA capitalization grant(s) to the State of Mississippi (“the State”). Nothing in this document is meant to conflict with or supersede the 2023 Consolidated Appropriations Act, Office of Management and Budget guidance, or any capitalization grant term and condition.

Funds will remain available for obligation to the State for the fiscal year in which they are appropriated and the following fiscal year, per the Safe Drinking Water Act (SDWA).¹ Therefore, the State must apply for and receive COJ-SA capitalization grant award(s) from EPA by the end of fiscal year 2024 (September 30, 2024). EPA strongly encourages the State to apply in the first fiscal year of availability. A state is not eligible for reallocation of funds if they have not already applied for and received their full allotment by September 30, 2024; thus, if funds are not awarded by that date they will no longer be

¹ 42 U.S.C. § 300j-12(a)(1)(E).

available to Mississippi. The State must make commitments (i.e., they must sign assistance agreements with eligible recipients) within one year after the receipt of each capitalization grant payment from EPA.² Once EPA obligates the capitalization grants to the State, the funds will be available to the State pursuant to grant regulations.

The State of Mississippi will administer the COJ-SA funds through the existing State of [Mississippi DWSRF program](#). DWSRF requirements and procedures apply to the COJ-SA funds. General DWSRF program information is located at www.epa.gov/dwsrf.

II. APPLICATION REQUIREMENTS FOR COJ-SA CAPITALIZATION GRANT(S)

EPA strongly encourages that the State submit capitalization grant applications as soon as possible through www.grants.gov. The Mississippi Department of Health may apply for COJ-SA in multiple capitalization grants. The State must submit an Intended Use Plan (IUP) and Project Priority List (PPL) for the COJ-SA funding. The IUP and PPL must meet existing DWSRF requirements. Because of the COJ-SA's particular purposes, and to be consistent with existing grants regulations and reporting requirements, the State must submit separate grant application(s) for the COJ-SA appropriation from the other DWSRF capitalization grant applications in www.grants.gov.

To accelerate grant awards and ensure funds are awarded by the deadline of September 30, 2024, EPA encourages Mississippi to apply to the EPA for conditional grant(s) based on a draft Intended Use Plan (IUP). With conditional awards, if the State and Region have completed negotiations for part of the IUP the Region may conditionally approve the IUP and obligate the full amount of the award placing appropriate drawdown/payment restrictions for the portion of the IUP not yet approved. This does not prohibit work from beginning on approved projects and activities. All projects and activities must meet State and federal DWSRF regulations. Mississippi may also apply to the EPA for partial grants if the State does not currently have a project list with costs totaling at least the amount of funds available under the COJ-SA. The EPA will only make a partial award to the State for an amount equal to the total cost of the project list.

To receive COJ-SA funding, the State must submit the following documents to EPA:

A. INTENDED USE PLAN

Section 1452(b) of the SDWA requires the states to prepare a plan identifying the intended uses of the funds in the DWSRF and describing how those uses support the goals of the DWSRF. Under SDWA section 1452(b)(3)(B) and 40 CFR Part 35.3555 an IUP will be required for EPA's approval of a capitalization grant award and release of awarded funds.

1. **List of Projects:** States have flexibility to fund a wide variety of drinking water projects. Under SDWA section 1452(b)(3)(B), IUPs must contain a fundable list of projects (i.e., a PPL) expected to receive assistance from funds designated for use in the current IUP and a comprehensive list of projects expected to receive assistance in the future. This list must include: the name of the public water system, a description of the project, the priority assigned to the project, the expected terms of financial assistance, and the size of the community served.

² 40 CFR § 35.3550(e).

The IUP must contain a fundable list of projects for which the total cost of assistance requested is at least equal to the amount of the grant being applied for. A state may combine the fundable and comprehensive project lists into one list, provided that projects which are expected to receive assistance from COJ-SA are identified.

2. **Priority Setting:** The IUP must include a priority system for ranking individual projects for funding that provides sufficient detail for the public and EPA to readily understand the criteria used for ranking. The priority for the use of funds should address the most serious risks to public health and ensure compliance with SDWA.
3. **Public Review and Comment:** The IUP must contain a statement of how the state met the requirement of SDWA section 1452(b)(1) for meaningful public review and comment on the preparation of the IUP. When seeking public review, the state should include a diverse set of potential interested parties, including community groups, neighborhood associations, environmental organizations, environmental justice organizations, and public health groups, that represent a broad spectrum of community interests and extend beyond those on existing mailing lists and traditional participants in the DWSRF process. In addition, states should strive to achieve the following objectives when seeking public review: (1) assure that the public has the opportunity to understand official programs and proposed actions, and that the state fully considers the public's concerns; (2) assure that the state does not make any significant decision on any DWSRF activity without consulting interested and affected segments of the public; (3) assure that the state action is as responsive as possible to public concerns; (4) encourage public involvement in implementing the DWSRF programs; (5) keep the public informed about significant issues and proposed project or program changes as they arise; (6) foster a spirit of openness and mutual trust between the state and the public; and (7) use all feasible means to create opportunities for public participation, and to stimulate and support public participation. EPA will review the IUP with particular focus on whether the State has meaningfully engaged an inclusive spectrum of community interests.
4. **Draft IUP for Purposes of Conditional Grant(s):** The State may need additional time to complete public review or approval of an IUP by boards or the State government and have the flexibility to request conditional grant(s) to facilitate expeditious use of funds upon final public review and/or approval. To receive a conditional grant, a draft IUP must be ready for public review and/or consideration by the state and include the information shown above. Conditional award(s) will contain a grant condition stating that funds may not be drawn until an IUP has completed the review process. States must submit an IUP that has completed the public review process and satisfied the term and condition of the grant before funds may be drawn. This option provides additional flexibility to states to accelerate the grants process.
5. **IUP for Purposes of Partial Grant(s):** If the State has not identified projects in an amount equal to the funds they are eligible to receive under COJ-SA, they have the flexibility to apply for a partial award. The IUP for a partial award must include the information shown above. EPA will only make a partial award for an amount equal to the total cost of projects on the PPL. An amended IUP including projects in an amount equal to the remaining funds available to the State under COJ-SA must be submitted by the State to EPA before the grant is amended to award the remaining funds. This includes a revised grant application package through

www.grants.gov. Certain requirements (e.g., additional subsidization and green project reserve) are calculated based on a percentage of the capitalization grant *awarded*. Per statute, states may not apply exclusively for the set-asides portion of the capitalization grant.

B. OTHER APPLICATION COMPONENTS

1. SF-424 Application for Federal Assistance, with original signature, including:
 - a. SF-424A, Budget by categories and indirect cost rate
 - b. SF-424B, Assurances for non-construction programs
2. Certification regarding lobbying and SF-LLL (applicable if EPA funds are over \$100,000)
3. EPA Form 4700-4 pre-award compliance review report
4. Detailed itemized budget
5. Copy of negotiated indirect cost rate agreement
6. Key contacts form
7. Attorney General's opinion, as required in 40 CFR § 35.3545(d)
8. If applicable, workplans for set-asides that the state plans to take

III. SUMMARY OF COJ-SA PROVISIONS

All provisions promulgated through statute, guidance, or regulations issued by EPA for the implementation of the DWSRF program remain in effect (e.g., American Iron and Steel, Davis-Bacon related prevailing wage requirements) unless they are inconsistent with the COJ-SA, capitalization grant conditions, or the requirements contained in this document. Below are COJ-SA-specific implementation elements:

A. **Funding Amount:** Congress appropriated \$450 million to the DWSRF for the COJ-SA. Per the Act's authority, EPA will retain \$1 million for administrative management and oversight. The remaining \$449 million is available for additional capitalization grants to the State pursuant to SDWA section 1452.

B. **Eligible Recipient:** The Act contains the following provision:

"Provided, That notwithstanding section 1452(a)(1)(D) of the Safe Drinking Water Act, funds appropriated under this paragraph in this Act shall be provided to States or Territories in EPA Region 4 in amounts determined by the Administrator in areas where there the President declared an emergency in August of fiscal year 2022 pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.)"

This language overrides the statutory DWSRF allotment formula. Only the State of Mississippi's DWSRF program meets the eligibility requirements for these capitalization grant funds, and only the City of Jackson's public water system may apply for these funds from the State.

C. **Eligible Use of Funds:** All DWSRF-eligible projects and activities may be funded from the COJ-SA appropriation. If the State chooses to take DWSRF set-asides, those set-asides must be used to administrate this capitalization grant and/or be used to benefit of the City of Jackson's public water system. The state cannot take the Small System Technical Assistance (aka 2%) Set-Aside since the City is not a small system.

The Act authorizes “other loan forgiveness” and “buying, refinancing, or restructuring of debt” as additional subsidization options for states to consider offering to assistance recipients. States may only purchase, refinance, or restructure debt and provide “other loan forgiveness” for projects that were DWSRF-eligible and met DWSRF requirements. An audit of existing debt may be helpful to sufficiently document whether debt is eligible under these terms, and that audit could be funded through set-asides for this appropriation.

D. Additional Subsidization: The Act contains the following provision:

“Provided further, That notwithstanding the requirements of section 1452(d) of the Safe Drinking Water Act, for the funds appropriated under this paragraph in this Act, each State shall use 100 percent of the amount of its capitalization grants to provide additional subsidization to eligible recipients in the form of forgiveness of principal, grants, negative interest loans, other loan forgiveness, and through buying, refinancing, or restructuring debt or any combination thereof”

The Act requires the State to provide all COJ-SA funds, net set-asides taken, as additional subsidization to eligible assistance recipients.

E. State Match: The Act contains the following provision:

“Provided further, That the funds provided under this paragraph in this Act shall not be subject to the matching or cost share requirements of section 1452(e) of the Safe Drinking Water Act”

This language waives the requirement of section 1452(e) of the SDWA for the state to provide match for the COJ-SA capitalization grant(s).

F. Transfer of Funds: Under Section 302 of P.L. 104-182 (42 U.S.C. § 300j-12 note), a State is authorized to transfer up to 33 percent of the amount of a fiscal year’s DWSRF program capitalization grant to the Clean Water State Revolving Fund (CWSRF) program or an equivalent amount from the CWSRF program to the DWSRF program. However, the Act only appropriated COJ-SA funds to the DWSRF and did not appropriate funds to the CWSRF for the same purpose. Therefore, COJ-SA funds may not be transferred from the DWSRF to the CWSRF.

IV. OTHER APPLICABLE PROVISIONS

A. Equivalency: All COJ-SA funds are federal funds and therefore all equivalency requirements apply to projects funded by COJ-SA capitalization grant(s). Projects funded through the base or other DWSRF programs cannot be used to meet the equivalency requirements of the COJ-SA capitalization grant(s).

B. Reporting: Transparency and consistency is of the utmost importance to ensure that the COJ-SA funds are being used effectively and efficiently. The State must use EPA’s SRF Data System to report key COJ-SA project characteristics and milestone information no less than quarterly. EPA recommends that project data be entered into the reporting systems as soon as assistance agreements are signed with the COJ. Additional reporting may be required through the terms and conditions of the capitalization grant award.

The Federal Funding Accountability and Transparency Act of 2010 (FFATA) requires DWSRF programs to report on assistance recipients that received federal dollars in the FFATA Subaward Reporting System (www.fsr.gov). FFATA reporting must exactly equal the capitalization grant amount.

- C. **Cash Draws:** Disbursements for projects funded by the COJ-SA must not be drawn from other open DWSRF capitalization grants unless the projects are jointly funded by the COJ-SA and other DWSRF funding sources.

D. Laws, Regulations, and Requirements for Assistance Agreements in the Form of Grants:

The COJ-SA allows state DWSRF programs to provide grants to eligible assistance recipients. States should be aware that “grant” recipients are legally considered “subrecipients” for the purposes of Office of Management and Budget’s (OMB’s) grant regulations at 2 CFR Part 200 *et. seq.* In other words, assistance recipients receiving additional subsidization in the form of a grant are subject to additional cross-cutting federal requirements than those receiving other forms of additional subsidization. EPA’s [subaward policy](#) establishes the requirements and procedures for Grants Management Offices and Program Offices in making determinations regarding subrecipient eligibility, overseeing pass-through entity monitoring and management of subawards, and authorizing fixed amount subawards under 2 CFR 200.331, 200.332, and 200.333 (“the applicable regulations”).

Note that the use of a “grant” as an additional subsidization instrument does not change the established DWSRF cash draw rules.³ COJ must first incur a cost associated with an executed assistance agreement for the state DWSRF to have the authority to draw capitalization grant funds from the Department of the Treasury and disburse those funds to COJ.

E. Federal Civil Rights Responsibilities, Including Title VI of the Civil Rights Act of 1964:

In 1994, [Executive Order 12898](#)⁴ was issued to direct Federal agencies to incorporate achieving environmental justice into their mission. The Presidential Memorandum⁵ accompanying that Executive Order required in part, that consistent with Title VI of the Civil Rights Act of 1964, each Federal agency “...ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.”⁶

EPA has a responsibility to ensure that recipients and subrecipients of federal financial assistance from EPA comply with federal civil rights laws that prohibit discrimination on the basis of race,

³ 40 CFR § 35.3565(a)(1).

⁴ Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994.

⁵ Presidential Memorandum on Executive Order for Federal Actions to Address Environmental Justice In Minority Populations and Low-Income Populations, available at: https://www.epa.gov/sites/default/files/2015-02/documents/clinton_memo_12898.pdf.

⁶ *Id.*

color, national origin (including limited English proficiency), disability, sex and age, including Title VI of the Civil Rights Act of 1964.⁷

EPA's implementing regulation generally prohibits discrimination in any programs, activities and services receiving federal financial assistance. 40 C.F.R. § 7.30. In addition, EPA's implementing regulations at 40 C.F.R. § 7.35 states that programs or activities receiving EPA assistance "shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, or national origin...":

- Subject a person to segregation or separate treatment;
- Deny a person or group the opportunity to participate as members of any planning or advisory body;
- Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program;
- Use criteria or methods of administration "which have the effect of subjecting individuals to discrimination;" or
- Choose a site or location of a facility with "the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination," among other things.

EPA's nondiscrimination regulation at 40 C.F.R. Parts 5 and 7 also contain longstanding procedural requirements applicable to applicants for and recipients (including sub-recipients) of EPA financial assistance.⁸ These requirements include having a notice of nondiscrimination, nondiscrimination coordinator, grievance procedures, a process for collecting and maintaining nondiscrimination compliance information, and pursuant to Title VI and the Rehabilitation Act of 1973, developing policies and procedures for ensuring meaningful access to programs and activities for individuals with limited-English proficiency and individuals with disabilities. In addition, recipients' public participation processes must also be implemented consistent with the federal civil rights laws.⁹

⁷ Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d) et seq. (Title VI); Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C., 29 U.S.C. § 794, Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681 et seq.; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 et seq.; Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92 500 § 13, 86 Stat. 903 (codified as amended at 33 U.S.C. § 1251 (1972)); 40 CFR. Parts 5 and 7.

⁸ EPA's nondiscrimination regulation at 40 CFR Parts 5 and 7 requires recipients to establish and implement their own nondiscrimination programs. *See* 40 CFR §§ 7.80-7.100.

⁹ *See* Title VI, 42 U.S.C. 2000(d) et seq.; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 CFR § 7.35(a). *See also* U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf); U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207 (March 21, 2006) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf); U.S. EPA, Procedural Safeguards Checklist for Recipients, at https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf (rev. Jan. 2020) (which provides a more detailed explanation of nondiscrimination obligations and best practices); U.S. EPA, Disability Nondiscrimination Plan Sample, at

EPA intends to carefully evaluate the implementation of DWSRF funding under the COJ-SA to ensure compliance with civil rights laws by assistance recipients of EPA funding and to ensure that no portion of a community is excluded from receiving or denied benefit of DWSRF funding based on race, color, national origin (including limited English proficiency), age, disability or sex. EPA expects the state to review program activities to ensure compliance with Title VI of the Civil Rights Act of 1964 and make an affirmative statement documenting the review and commitment to Title VI requirements in IUPs. Further, financial award agreements and contracts must include appropriate Title VI nondiscrimination language.

For more information about the federal civil rights laws enforced by EPA, including Title VI, please visit: <https://www.epa.gov/ocr/title-vi-laws-and-regulations> and <https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi>.

- F. Build America, Buy America:** The Build America, Buy America (BABA) Act requirements do not apply to COJ-SA funding due to the exception under Section 70912(4)(B), which states that BABA does not apply to “expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.” As per the OMB’s April 18, 2022 memorandum M-22-11 “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure,” “pre and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are (1) authorized by statutes other than the Stafford Act, 42 U.S.C. §§ 5121 et seq., and (2) made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, id. § 5122(1), (2).

V. EPA Oversight

To fulfill EPA’s critical programmatic and fiduciary oversight responsibilities for the DWSRF programs, EPA Region 4 will provide oversight of the COJ-SA funds. Oversight will include COJ-SA project file and transaction reviews in addition to the reviews of the base DWSRF files and transaction tests. During the on-site reviews, EPA Region 4 will discuss ongoing implementation of COJ-SA funding with the State. COJ-SA observations, findings, and/or corrective actions will be documented in the Program Evaluation Report (PER).