EPIC supports EPA's Bipartisan Infrastructure Law State Revolving Fund Implementation

EPA released its anticipated guidance on the implementation of the Bipartisan Infrastructure Law (BIL) to invest in water through the Clean Water and Drinking Water State Revolving Funds (SRFs). The outlined priorities demonstrate a firm commitment to advancing equity by allocating funding to the communities that need it most. We appreciate the EPA's proactive approach and encourage states to do the same. With the EPA's guidance in hand, states can now move forward on implementation.

We highlight five key takeaways in this statement:

1. Equitable allocation of principal forgiveness is essential.
2. Success hinges on meaningful public engagement.
3. States must invest more in direct technical assistance.
4. Rapid progress on lead service line replacement is a moral imperative.
5. Climate resilience must be enhanced.

Through ensuring the funds reach disadvantaged communities (DACs),[1] meaningful public engagement, technical assistance, and focusing on lead service line replacement and resilient projects, we expect that the BIL implementation will increase the number of disadvantaged communities that benefit from SRF funds. Success will turn on how well EPA can explain not only what states must do to deliver outcomes but also how they can do it, including by sharing best practices. We look forward to EPA's on-going collaboration with the states to ensure that the equity and resilience goals of the BIL are fully realized.

[1] "Disadvantaged communities can include those with environmental justice concerns that often include low-income people and communities of color."

1. Equitable allocation of principal forgiveness is essential.

EPA's commitment to actively work with states to ensure that disadvantaged communities benefit "to the maximum extent possible" from federal investment in water infrastructure is critical to advance equity. Achieving this goal requires more outreach and shifting the type of assistance states provided. As noted in the memo, EPA can support states to host "presentations or other marketing events to municipal and utility officials, targeted outreach to distressed water systems or those with substantial infrastructure needs, workshops and webinars, [and] in-person training programs."

The BIL also requires that states issue substantial portions of the supplemental SRF funding as principal forgiveness. To achieve the BIL's clear equity and resilience goals, states will need to evaluate and revise state policies that determine how principal forgiveness is allocated. It is clear that EPA will work hard to extend the reach of these programs to forward equity and resilience by:

- Aligning EPA guidance, assistance, and oversight to achieve the BIL's bipartisan equity and resilience goals.
- Encouraging states to use flexibility to reach DACs.
- Encouraging states to revise their definitions of DACs, affordability criteria, and ranking criteria.

The required analysis to "identify historical distribution of funds to small and disadvantaged communities and new opportunities and methods to improve the distribution of funds" will provide a good baseline and roadmap to measure progress towards these aims. As the memo notes, "[t]here is significant variation across the country in the amount of assistance directed to disadvantaged communities."

Aligning EPA guidance, assistance, and oversight to achieve the BIL's equity and resilience goals

The memo demonstrates EPA's understanding of Congress's bipartisan commitment to use the water infrastructure funding in the BIL to advance equity and resilience. Congress's intent that the SRF funds appropriated in the BIL should be used to achieve equity and resilience goals is clearly evidenced by the BIL's requirement that states to issue 49% of supplemental DWSRF funds as principal forgives to disadvantaged communities. Similarly, 49% of supplemental CWSRF funding from the BIL must be issued as principal forgiveness prioritized to address affordability and resilience needs. Communities that meet states' affordability criteria are more vulnerable to resiliency risks–so building resiliency should also point more funds to these communities, albeit indirectly.

Achieving the BIL's equity and resilience goals will turn on whether states evaluate, revise, and use DAC definitions, affordability criteria, ranking criteria and other policies that determine which communities benefit from principal forgiveness in line with these goals. EPA should continue to provide proactive guidance to states on these issues, not only explaining what states need to do, but also by sharing best practices across states and otherwise demonstrating how states can use their flexibility to accomplish the desired outcomes. It will also be very important for the

EPA to exercise robust oversight over states' utilization of supplemental SRF funding from the BIL, particularly in reviewing state Intended Use Plans (IUPs).

We look forward to EPA's continued proactive collaboration with states to ensure the BIL's equity and resilience goals are fully realized. The following sections further detail the kinds of collaboration needed to ensure success.

Encouraging states to use flexibility to reach DACs

The memo highlights the flexibility states have with regard to their implementation of SRF programs. Importantly, EPA underscores the BIL's requirement that states exercise this flexibility in line with Congress' intent that these historic investments in water infrastructure benefit disadvantaged communities, so that no community is left behind. This means that state SRF policies must be directed towards ensuring that communities which are otherwise unable to finance needed drinking water infrastructure projects receive principal forgiveness and other assistance sufficient to enable these projects.

To achieve these ends, each state will need to evaluate and revise policies in its Intended Use Plans (IUPs), which set out how the state will allocate SRF assistance, including principal forgiveness, to communities across the state. States have broad discretion over how they define DACs and affordability criteria as well as other policies in the IUP that determine how principal forgiveness is allocated, and this discretion must be exercised in a manner that serves the equity and resilience goals of the BIL. This will require states to not only review and revise the policies in their IUPs, but also to adopt flexible policies that reach for equity and resilience with clarity and ambition. We are pleased to see EPA assert its strong intent to extend states' reach to achieve the BIL's equity and resilience goals, both through building states' capacity to understand how these issues can be addressed and through robust scrutiny of and feedback on state IUPs.

In encouraging states to be ambitious in reaching for equity and resilience when evaluating and revising IUPs, the EPA should consider how states incorporate DAC definitions or affordability criteria existing in state statutes or administrative rules into their IUPs. Many states have adopted statutes or regulations that define DACs or affordability criteria for the purpose of project ranking or interest rate discounts. How principal forgiveness is distributed is generally determined in the annual IUPs, however, and state laws typically grant the state agency charged with administering the state's SRFs broad discretion over the IUP, including how principal forgiveness will be distributed. Accordingly, DAC definitions or affordability criteria set out in state statutes or regulations for the purpose of project prioritization and/or interest rate discounts might not be controlling over how states define DACs or affordability for the purpose of allocating principal forgiveness. Notwithstanding existing DAC definitions or affordability criteria elsewhere in the state's policy framework for SRFs, state administrators may have discretion to devise DAC definitions and affordability criteria in the IUP that would better achieve the BIL's equity and resilience goals. It appears that many state SRF administrators believe that their discretion is constrained if DAC definitions or affordability criteria appear anywhere in the

state statutes or regulations relevant to SRFs. Therefore, EPA guidance on how to parse these issues could be helpful.

Encouraging states to revise definitions, caps on principal forgiveness, and ranking

Definitions

States establish their own definition of disadvantaged communities for the DWSRF program and affordability criteria for the CWSRF program. The Clean Water Act (CWA) requires states to consider income, unemployment data, and population trends when determining their affordability criteria. However, states have discretion to decide how the required criteria are weighted. States are also permitted to include other criteria they deem relevant. EPA will evaluate and strongly encourage states to revise disadvantaged community definitions for DWSRF programs and affordability criteria for CWSRF programs. EPA oversight of revisions, slated according to the memo for the capitalization grant process and annual review, is important to improve these definitions and criteria. The memo helpfully explains why and how states should revise their definitions of DACs and affordability criteria.

We would add some additional points:

- Economic indicators. EPIC recommends including poverty rates in state definitions of DACs to better target communities that would benefit most from access to SRFs, including by targeting principal forgiveness to communities facing the greatest financial hardship. Most states use MHI or population size as the primary criteria for identifying DACs during the application process. While these are valuable metrics to assess a drinking water system's capacity, they do not always capture communities with the greatest level of need where affordability and access are likely to be compromised if providers raise water rates.

- Community size. Many states use community size as a key criteria to define disadvantaged communities and affordability criteria, favoring small communities for principal forgiveness. Certainly small communities have unique–and sometimes severe–constraints in financing water infrastructure, and should accordingly be prioritized to receive principal forgiveness. But size should not be used in a manner that excludes larger communities which might also be disadvantaged as indicated by poverty levels, water rate burdens, and various social determinants of health. Rather, community size is just one factor to be considered when assessing disadvantage and affordability in the SRF context.

- Spatial boundaries. Many states apply their definitions of disadvantaged communities and affordability criteria to the entire area served by a water system. Many large metropolitan systems serve neighborhoods with high poverty rates as well as relatively affluent communities, however. When economic or other indicators to assess disadvantage or affordability are averaged out across the entire area served by a water system, it can have the inequitable effect of excluding underserved urban communities from benefiting from SRF assistance. These are often communities living in neighborhoods served by some of the oldest water systems in need of repair. At the

same time, residents in underserved neighborhoods are least able to afford increased water rates to repay SRF loans. Some states employ a more flexible definition of DACs and affordability criteria to identify and direct assistance to underserved communities within a larger water system. We applaud EPA's recognition that this practice is consistent with the definition of “disadvantaged community” at 42 U.S.C. §1452(d)(3) and encouragement to states to also consider this approach when defining affordability criteria for their CWSRFs.

Caps on Principal Forgiveness

Many states include low caps on the amount of additional subsidy each applicant can receive, in an effort to distribute principal forgiveness funds across as many communities in the state as possible. This may take the form of a low flat cap (e.g., a maximum $500,000 per community per year, regardless of community size or project costs) or a percentage of project costs (e.g., 20%). While a desire to distribute principal forgiveness broadly may be understandable, states should instead ensure that principal forgiveness funds are strategically allocated to ensure that communities unable to afford loans to finance needed projects receive the level of principal forgiveness necessary to enable them to address urgent water infrastructure needs. We hope the EPA engages on this point in the near future.

Ranking

To increase investment in disadvantaged communities, the memo says EPA expects states to “[e]valuate the SRFs’ priority point system for project ranking commensurate with need.” In our review of many states' scoring system, a number of important criteria are given too little weight. As noted in the memo, some ranking criteria act as a barrier to funding for DACs.

EPA rightly encourages states to include DAC factors in their formulae for prioritizing projects on project priority lists (PPL). PPLs should aim to rank projects for which SRF assistance is sought in terms of the severity of the water quality concern the proposed project is intended to address. As noted in the memo, project priority systems can “support the goal of reaching disadvantaged communities.” Because DACs are often more vulnerable to the environmental, economic, and health impacts of water problems, it is appropriate to weigh DAC factors for project priority ranking. We echo the call that “[s]tates should review their SRF priority setting system to ensure they adequately address these priorities.”

We also note, however, that assessing the severity of the water quality concern is somewhat different from assessing a community’s capacity to pay for the proposed project. A community’s capacity to pay for needed projects should be assessed through how it scores in relation to the state’s DAC definitions and affordability criteria. For this reason, we recommend that EPA encourage states to issue principal forgiveness to communities according to how they score in relation to the state’s DAC or affordability criteria, rather than how they rank on the PPL. Projects ranking high on the PPL for communities that can afford to finance their projects with SRF loans will still be prioritized for loan assistance.

Ranking projects and principal forgiveness separately allows each ranking system to do what it does best, without conflation. PPLs identify projects that address the most severe and important water quality concerns. Ranking for the distribution of principal forgiveness identifies communities that will not be able to implement needed projects without substantial additional subsidies.

2. Success hinges on meaningful public engagement.

The residents of the community must be involved in project planning, design, and construction. Meaningful engagement is grounded in trust, with active outreach, clear communications, shared information, and support to build relationships with the community and develop an understanding of their needs. The lessons from the allocation of American Recovery and Reinvestment Act (ARRA) funds show that "early and frequent communication among stakeholders, with regularly scheduled meetings and webinars that began before ARRA was even passed, helped to form solid working relationships."

EPA emphasizes several important practices to facilitate meaningful public engagement in SRF implementation, including:

- Developing relationships with residents and organizations in disadvantaged communities. As noted, it is especially important to "reach beyond traditional stakeholder organizations and engage neighborhood and other organizations." EPA continues with a helpful list of suggestions including "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 SRF process." States can look to those organizing around adjacent aims–such as labor, housing, or immigration–to extend the reach of SRF programs.

- Establishing a sound process and clearly explaining components of the Intended Use Plan to be reviewed and commented on by the public. States must explain the state disadvantaged community definition and affordability criteria. We strongly agree that states should "(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 SRF 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 SRFs; (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 has set out some really good guidance and criteria here for what constitutes good public review and comment on IUPs. States need to be proactive on these issues. It will be important for EPA to use these standards to evaluate the state's performance as a condition of their approval of the IUP. The memo notes “EPA will review IUPs with particular focus on whether the state has meaningfully engaged an inclusive spectrum of community interests.” As for other issues, EPA could go even further in showing states how to engage the public, by lifting up best practice examples and sharing these across states.

3. States must invest more in direct technical assistance.

EPA is right to underscore the need for direct technical assistance (TA) for communities that “lack the financial, managerial, and technical capacity to access the SRF program.” As noted, substantial technical assistance will facilitate faster progress towards Justice40. TA reduces the burden that communities must shoulder by helping SRF applicants complete needs assessments, engage stakeholders, develop project plans, and complete applications. We strongly support EPA in their intention to launch a substantial technical assistance program and look forward to ongoing collaboration on this. Proactive TA is fundamental to ensure a more equitable distribution of SRF awards.

We strongly endorse EPA’s commitment to support states to be proactive in identifying, recruiting, and providing technical assistance to disadvantaged communities. Without proactive efforts, the neediest communities will likely be left out. Helping states identify disadvantaged communities that have not previously received support will be beneficial.

We were also heartened to see the emphasis on the importance of grants and predevelopment funds to disadvantaged communities for planning and design. As noted, development costs are a significant barrier to communities. Support is vital to assessing which problems to tackle, meaningfully involving the community in the decision-making, developing projects, completing paperwork, and submitting applications. We strongly agree that states should “offer and expand pre-development and pre-construction funding to seed project development for small and disadvantaged communities.”

The expectation for states to use more set-aside for TA is necessary. EPA expects states to use set-aside funds–2% of the DWSRF capitalization grant for small system technical assistance and the newly available 2% of the CWSRF capitalization grant technical assistance funds–to provide assistance to water and wastewater systems, particularly in disadvantaged communities. In addition, federal statute allows states to use up to 4 percent of their annual capitalization grant for program administration and technical assistance for both the Drinking Water SRF and Clean Water SRF. On average, states do not fully utilize these set-asides. In addition to the guidance, EPA should also encourage states to set aside more of the DWSRF capitalization grant for public water system supervision (PWSS) programs and to develop and implement a capacity development strategy. Through PWSS and capacity development, states provide technical assistance to small and disadvantaged communities for engineering, needs assessments, and asset planning, among others.

Similar to the oversight role on ensuring additional subsidies reach DACs, EPA's review of the use of set-asides to support DACs to apply for funding is pivotal. Requiring that states include the amount and type of technical assistance provided in the IUP, Annual Report, and SRF Reporting System will improve transparency and help track this work. We support amending the annual review checklist to include questions about additional subsidization, capacity development, and technical assistance.

4. Rapid progress on lead service line replacement is a moral imperative.

Quickly deploying the $15 billion appropriated in the BIL for the "identification, planning, design, and replacement of lead service lines" is crucial. We strongly support EPA's commitment to share guidance and build capacity to effectively and equitably replace lead service lines, the primary source of lead in drinking water.

Since many of the 11,000 communities across the country with lead service lines do not know how many or where their lead lines are, it becomes difficult to move forward and finance lead service line replacement. Many communities EPIC works with do not know the final count–or importantly price tag on lead service line replacement–which often becomes a barrier to applying for funds and conducting the necessary planning. EPA's emphasis, therefore, on lead service line identification, through inventories, as part of the mandate under the Lead and Copper Rule Revisions, is critically important. The direction to states to use set-asides for this purpose is also well-advised, since these resources can potentially be allocated more rapidly and can ensure the majority of resources go to actual replacement costs.

EPA's guidance says that "Any project funded under this appropriation involving the replacement of a lead service line must replace the entire lead service line, not just a portion, unless a portion has already been replaced or is concurrently being replaced with another funding source. To address household affordability concerns to minimize adverse health effects, we encourage states to fund the private portion of service line replacement at no additional cost to the homeowner." By replacing "encourage" with "mandate," this language could have been much stronger, and ultimately, more equitable. Without a clear and unequivocal mandate to fund private side lead service line replacement with these appropriations, we believe that there is a risk of a slowed rate of replacement in disadvantaged communities–and homeowners who cannot afford to replace pipes on their own may ultimately be left out. That said, given the 100 percent subsidy from the federal government for these costs in disadvantaged communities, it would be a mistake for states and water systems to not ensure full service line replacement, including private side lead lines, in these appropriations. Litigation is already ongoing for jurisdictions that are not covering full costs, such as in Providence, RI.

While we had hoped that EPA could expand the definition of lead pipes in the Lead and Copper Rule Revisions to include all connectors and galvanized pipes, as states like New Jersey have already done, we are glad to see the replacement of "lead goosenecks, pigtails, and connectors as eligible expenses, whether standalone or connected to a lead service line." We believe that lead connectors and galvanized steel that has ever been downstream of a lead pipe - which can be up to several feet in length - also must be replaced, since they can also pose a danger to

drinking water. In addition, since we want to ensure the funds are reserved for lead service line replacement costs, we appreciate further clarification on eligibility, e.g. the fact that water meter projects are not eligible under the lead service line appropriation but instead under the DWSRF base program.

Since many of the 11,000 communities around the country may not have the enormous number of pipes like we see in big cities (e.g. 400,000 lead pipes in Chicago) and may in fact have a much smaller number of pipes, we had hoped to see more guidance from the EPA on contract and procurement mechanisms that could make it easier for communities to self-aggregate under one SRF application. This guidance is missing, and we encourage EPA to enable states to make multi-system applications eligible and accessible so that entities can self-aggregate to replace pipes under one SRF loan/grant, which would create efficiencies of scale and save funds in the long run.

While EPIC is making plans to try to track the lead service line funding from BIL, we urge EPA to ask states to track their own costs for inventories and replacement per pipe for each SRF project and to make this information publicly available in each state.

Finally, we know that some states bear a heavier burden of lead in drinking water than others, and in fact have a higher concentration of lead pipes than others. We also know that some of these states are asking for a revised formula for the lead appropriations to match the scale of their lead pipe problem. For example, according to an NRDC national survey of lead service lines, there are at least 360,000 lead pipes statewide in New York (the fourth largest number in the country). At a DWSRF allocation of 4.08 percent, New York State is currently projected to receive $577 million for lead pipe replacement over the five-year period covered by the Infrastructure Act, representing approximately 20 percent of the projected statewide cost of $2.9 billion based on a cost of replacement of $8,000 per pipe (since estimates in many New York cities range from $8,000 to 10,000 per pipe). Federal funding for lead service line replacement should be proportional to the need of states, and on that basis, New York should instead receive approximately 5.9 percent of the national total. Using this formula, New Jersey could be receiving 5.7 percent rather than 1.7 percent. States in the Great Lakes region, the Upper Midwest, and other lead-burdened states face a similar discrepancy. We urge the EPA to consider this disparity across states, and re-design the allocation formula for the lead service line funds, in particular, to match the need. This will ensure an equitable distribution of these funds to the states who need them most.

5. Climate resiliency must be enhanced.

We strongly agree with the recommendation to make water systems more resilient. It is promising to see that EPA acknowledges resilient water infrastructure and the One Water approach to addressing climate change and natural disasters. Green and natural infrastructure provide an array of localized co-benefits including promoting social and economic sustainability. States can do more to incorporate resilience criteria into their prioritization of SRF funding.

EPA has the opportunity to align resilience with Justice40 goals to serve vulnerable communities facing adverse impacts of climate change. This work must center and build the capacity of communities. The memo misses directly linking efforts to make water systems more resilient to the capacity of communities to respond to threats.

Providing TA to support the development of green and natural infrastructure projects is crucial. EPIC recommends strengthening the GPR requirement, providing TA, and awarding additional subsidization to ensure that resiliency projects are actually funded. Many communities do not have the knowledge, resources, or capacity to identify and apply for funds to support such projects. EPA should incentivize state programs to identify projects as well as provide TA to communities to help identify applicable green projects and support applications for funds. Natural infrastructure should remain priorities by ensuring that states allocate 10 percent of CWSRF funds towards the Green Project Reserve (GPR), as emphasized in a letter to EPA on January 14, 2022 from dozens of advocates. This emphasis was not included in EPA's guidance.

Similar to LSLR work, EPA should help track investments in natural infrastructure. Green projects are often broad and vaguely described, which makes it difficult to evaluate the types of projects that states finance, who receives benefits, and how funds are distributed. With more guidance on resilience criteria and better reporting categories, states can track progress towards enhancing climate resilience more consistently.

Next steps

EPA and states are committed to advancing equity by allocating funding to the communities that need it most. This is an all-hands-on-deck moment to make the most of the opportunity of the BIL SRF funds through effective implementation.

EPA should continue to provide guidance and directly engage with states and communities. The memo underscores the importance of increasing internal and external outreach about SRF programs and the BIL funding. States likely need additional support as they extend their support to communities that have not previously benefited from SRFs.

We support EPA's intention to showcase program successes, innovations, and best practices. As noted, EPA could also strengthen partnerships with community groups and philanthropic organizations to host webinars, workshops, and training programs that feature SRF leaders and highlight best practices in state legislation. Lifting up examples and lessons will help other states understand and replicate innovative practices.