



March 29, 2022

The Honorable Paul Tonko
Chairman
Environment and Climate Change Subcommittee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable David McKinley
Ranking Member
Environment and Climate Change Subcommittee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Tonko and Ranking Member McKinley:

The Association of Metropolitan Water Agencies (AMWA) appreciates the opportunity to submit comments for the record of the subcommittee’s hearing on “Trusting the Tap: Upgrading America’s Drinking Water Infrastructure.” It is well established that the nation’s drinking water systems face hundreds of billions of dollars’ worth of investment needs over the coming decades, to maintain current levels of service and to provide Americans with continued confidence in the quality of the water that comes from the tap. AMWA commends the subcommittee for holding this hearing on this important topic.

Last year AMWA supported passage of the Bipartisan Infrastructure Law (BIL), also known as the Infrastructure Investment and Jobs Act, because of its landmark investments in drinking water infrastructure that will begin to make progress toward addressing these needs. It is AMWA’s hope that the BIL will be implemented in a manner that is reflective of congressional intent and consistent with the needs of water systems across the country, both large and small.

AMWA greatly appreciates the work EPA has done to date to prepare for the task of distributing the \$48.4 billion in drinking water and wastewater infrastructure funds that will be made available through the BIL. The agency’s implementation memorandum issued earlier this month will guide how states and communities can put these funds to work addressing priorities like the replacement of lead service lines, remediating PFAS and other emerging contaminants, and building resilience to a wide range of threats.¹ Especially considering that the Biden Administration has identified increased investment in disadvantaged communities as a key priority of the BIL, AMWA is eager to see the law implemented in a

¹ U.S. EPA, *Implementation of the Clean Water and Drinking Water State Revolving Fund Provisions of the Bipartisan Infrastructure Law*, March 8, 2022. https://www.epa.gov/system/files/documents/2022-03/combined_srf-implementation-memo_final_03.2022.pdf.

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manner that maximizes benefits to low-income water ratepayers across the country, regardless of where they reside.

While the BIL is major legislation with countless critical components, AMWA believes careful attention must be paid to three areas that directly affect drinking water systems and their customers: the distribution of additionally subsidized State Revolving Fund (SRF) dollars, funding to support lead service line replacement projects, and the application of expanded “Buy America” mandates. We also have several other policy suggestions to help ensure clean and safe drinking water for all Americans now and into the future.

Additional subsidization of SRF dollars

As the infrastructure law is implemented, AMWA believes EPA should maximize the opportunities for states and municipalities to spend funds in a way that delivers the most benefit to low-income households and communities. However, AMWA has some concern that EPA’s implementation memorandum suggests that the agency is not prepared to use the full scope of authority granted by Congress to ensure that additionally subsidized SRF dollars reach low-income communities, no matter where they are.

Division J, Title VI of the BIL specifies that 49% of the Drinking Water and Clean Water SRF appropriations provided through the measure for qualifying public health projects and lead service line replacements, and all of Drinking Water SRF appropriations provided to address emerging contaminants, must go to “eligible recipients” in the form of additional subsidy delivered as grants or 100% principal forgiveness loans. The BIL does not define the term “eligible recipients,” but does specify that section 1452(d)(2) of the Safe Drinking Water Act (SDWA) – which limits the amount of additional loan subsidy that states may award to state-defined disadvantaged communities to no more than 35 percent – shall not apply to the BIL funds. Importantly, this language does not require any baseline amount of the BIL funds to be devoted exclusively to communities defined by states as disadvantaged under SDWA, and the intent of Congress appears to be for these funds to support water and wastewater projects in any low-income community or neighborhood.

However, on page 3 of EPA’s implementation memorandum the agency states:

The BIL mandates that 49% of funds provided through the DWSRF General Supplemental Funding and DWSRF Lead Service Line Replacement Funding must be provided as grants and forgivable loans to *disadvantaged communities* [emphasis added]... The SDWA requires states to establish a definition of disadvantaged communities that can receive this additional subsidization.

This interpretation is inconsistent with a plain reading of the text of the BIL, which makes the additionally subsidized SRF funds available to “eligible recipients.” Under the statute, these “eligible recipients” do not necessarily represent the same universe of water systems as those formally designated by states as “disadvantaged communities” pursuant to section 1452(d)(3) of SDWA.²

² “(3) DEFINITION OF DISADVANTAGED COMMUNITY.—In this subsection, the term “disadvantaged community” means the service area of a public water system that meets affordability criteria established after public review and

To maximize considerations of equity and the provision of assistance to a wide range of low-income communities and ratepayers, AMWA wrote to EPA on February 11 to encourage the agency to interpret “eligible recipients” to be any community water system that is eligible to receive SRF aid, and which will use these grants or principal forgiveness loans on projects that will significantly benefit low-income populations in their service area.³ This would deliver benefits to low-income areas that do not fall within traditionally defined “disadvantaged communities,” but would not preclude those communities from receiving any portion of those funds.

Conversely, limiting the additionally subsidized SRF dollars to state-defined “disadvantaged communities,” as EPA has recommended through the implementation memorandum, would wall off nearly half of the BIL’s SRF funding from large metropolitan water systems across the country that serve significant low-income populations. This is because in practice, many states define “disadvantaged communities” under SDWA in such a way as to focus on small and rural water systems with relatively uniform income demographics, as opposed to metropolitan water systems whose entire service area includes a combination of both low-income neighborhoods as well as more affluent areas.

In short, Congress gave EPA the ability to allow additionally subsidized SRF dollars provided through the BIL to reach a wider range of low-income communities than may be reached through regular SRF appropriations, so AMWA believes EPA should take advantage of this opportunity. This could be achieved by requiring any water system that receives additionally subsidized SRF funding through the BIL to spend those funds on projects that directly benefit low-income communities or low-income ratepayers within their service area.

Lead service line replacement funding

AMWA enthusiastically supported the BIL’s inclusion of \$15 billion over five years in additional Drinking Water SRF funding dedicated to addressing lead in drinking water. Specifically, the BIL allows the funds to be used “for lead service line replacement projects and associated activities directly connected to the identification, planning, design, and replacement of lead service lines.” We appreciate that EPA’s implementation memorandum clarifies that these funds may also be spent on the replacement of lead goosenecks, pigtails, and connectors that are not part of the service line itself.

But we have several questions about EPA’s interpretation of the lead service line replacement funding that we hope will be addressed. First, like the general SRF funds provided through the BIL, EPA’s implementation memorandum specified that 49% of each state’s share of the capitalization grant for lead projects must be provided as additional subsidization to state-defined “disadvantaged communities,” rather than “eligible recipients” as stated in the statute. We urge EPA to revise this interpretation to better

comment by the State in which the public water system is located. The Administrator may publish information to assist States in establishing affordability criteria.”

³ <https://www.amwa.net/letter/amwa-letter-bipartisan-infrastructure-law-implementation-guidance>.

allow metropolitan water systems that serve low-income residents to take advantage of these additionally subsidized funds for projects that benefit urban in-need populations.

Second, the implementation memorandum states that EPA “encourage[s] states to fund the private portion of service line replacements at no additional cost to the homeowner.” While some community water systems do offer to replace the privately-owned portion of a lead service line at no cost to any homeowner, others prefer to stretch their limited resources by asking homeowners to pay for some portion of the pipe replacement – especially in the case of homeowners that are not low-income. While full lead service line replacement at every property is the ultimate goal, AMWA believes that, given the statute’s lack of direction on the topic, each individual water system should have the authority to decide whether to use their portion of the BIL funds to pay for the replacement of privately-owned lead service lines.

EPA’s implementation memorandum further states the following:

Any project funded under this appropriation involving the replacement of a lead service line must replace the entire [emphasis original] lead service line, not just a portion, unless a portion has already been replaced or is concurrently being replaced with another funding source.

AMWA agrees that it is a best practice to fully replace lead service lines, and to avoid only partial replacements whenever possible. However, there are some limited scenarios where a partial replacement may be necessary, such when a homeowner refuses to give consent for the water system to access their property to replace the private side of the line concurrent with the replacement of the public side. But because the text of the BIL does not appear to require the lead service line replacement funds to be used exclusively on full replacements, AMWA would appreciate additional clarity from EPA on how the agency arrived at the determination that these funds “must replace the entire lead service line,” and how this requirement will be enforced when homeowner refusal becomes a barrier.

It is also notable that as approved by Congress, the BIL directs EPA to distribute the lead service line replacement funds as capitalization grants to states using the same needs-survey-based formula that governs the distribution of annual Drinking Water SRF dollars. This is the case even though the most recently completed Drinking Water Needs Survey and Assessment does not account for lead service line replacement costs, and that a state’s allocation under the Drinking Water SRF distribution formula does not necessarily align with its relative lead service line replacement need. AMWA recognizes that states may use their share of these funds to complete required lead service line inventories, but encourages EPA to promptly reallocate any unused and leftover lead remediation funds to other states that will be able to put the funding to good use.

Expanded “Buy America” mandates

Another topic of interest in the BIL is the expansion of existing American Iron and Steel requirements that apply to the SRF program. EPA’s implementation memorandum notes that Title IX of the BIL expanded these requirements to include construction materials and manufactured goods, consistent with

Build America, Buy America (BABA) domestic sourcing requirements that were also applied to other federal infrastructure financing programs. While we understand that EPA intends to issue a separate memorandum related to BABA after the Office of Management and Budget publishes guidance on the topic, AMWA nevertheless urges EPA to be mindful of the fact that water infrastructure projects can be heavily dependent on manufactured technologies and equipment, both to achieve regulatory compliance and to advance innovative projects for water quality treatment, emissions reductions, resource recovery, and energy efficiency. Many of these specialized components are not produced domestically, so EPA should make the waiver process as simple and seamless as possible so that water systems are not impeded in their ability to quickly move ahead with infrastructure investments to benefit public health.

On January 3, AMWA and other water sector organizations asked EPA to grant the water sector a general applicability waiver based for manufactured products based upon the public interest criterion in section 70914(b)(1) of the BIL.⁴ This would reduce the risk of innovative approaches and utility system upgrades being slowed because of delays related to navigating the law's BABA requirements. AMWA and others in the water sector would welcome the opportunity to work with EPA to precisely identify these specialized water infrastructure products and components that are unavailable from domestic sources, and which therefor should be subject to a BABA waiver.

Fiscal Year 2023 appropriations

AMWA understands that this hearing is being held just one day after the Biden Administration's release of its budget request for the 2023 Fiscal Year. AMWA strongly supports funding several new and expanded EPA programs at their full levels authorized in the BIL. These include:

- \$2.75 billion for the Drinking Water SRF;
- \$50 million for the Water Infrastructure Finance and Innovation Act (WIFIA) program;
- \$100 million for Reducing Lead in Drinking Water grants;
- \$50 million for the Midsize and Large Drinking Water System Infrastructure Resilience and Sustainability Program;
- \$10 million for the Lead Inventorying Utilization Grant Pilot Program; and
- \$5 million for Water Infrastructure and Workforce Investment grants.

AMWA also urges Congress to provide permanent authorization and sufficient funding for EPA's new Rural and Low-Income Water Assistance Pilot Program, which will offer a limited number of grants to support municipal drinking water and wastewater affordability programs across the country. Just as there are long-established federal programs to help needy families meet nutritional needs and cover home heating costs, AMWA believes this new pilot program will demonstrate how the federal government can most effectively help qualifying households maintain essential water service.

⁴ <https://www.amwa.net/letter/letter-buy-america-mandates-infrastructure-investment-and-jobs-act>.

Additional steps to protect drinking water quality

Beyond implementation of the BIL and the provision of robust appropriations in FY23, AMWA has several suggestions for steps Congress can take to help the nation's water systems continue to provide clean and safe drinking water.

First, while AMWA recognizes that the \$15 billion for lead remediation provided through the BIL represents a landmark investment, it will only pay for a fraction of the total cost of removing all lead service lines nationwide.⁵ Understanding that water systems will have to draw upon other resources to make progress toward this goal, earlier this month AMWA strongly endorsed the Financing Lead Out of Water (FLOW) Act when it was introduced by Rep. Dan Kildee as H.R. 6985. The legislation would streamline the ability of drinking water systems to pay for lead service line replacement projects using tax-exempt bond proceeds, without navigating burdensome red tape from the IRS.

This issue was brought to AMWA's attention last year by Denver Water, which was undertaking a project to fully replace all publicly and privately owned lead service lines in its service area, paid for by the utility with tax-exempt bonds. However, because the federal tax code imposes limitations on the amount of tax-exempt bond proceeds that can support improvements on private property, Denver Water had to document whether each property in the replacement program was a rental property, or the location of a home-based business. If such properties exceeded a certain threshold, Denver Water's bond issuance could no longer be tax-exempt – thus increasing financing costs for the utility's ratepayers. Denver Water successfully navigated this hurdle, but it added months of administrative work and expense to the project.

In response, the FLOW Act would allow community water systems to use tax-exempt financing for lead service line replacement projects, without going through this burdensome documentation process. Given the Biden Administration's well-publicized goal of eliminating lead service lines nationwide, this legislation would give water systems another tool in the toolbox to get the job done as quickly and efficiently as possible, especially when federal funding assistance is not available. AMWA strongly supports the FLOW Act and urges its passage as soon as possible.

AMWA also urges Congress to act on legislation to protect drinking water systems from incurring liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) related to the cleanup of PFAS that have been legally disposed of by the water system, after they are filtered out of source water supplies. The problem is that even if a water system follows all applicable laws in storing, transporting, and treating water containing PFAS, and properly disposes of PFAS retained in solids resulting from water treatment, and in media used in the treatment process, the utility and its ratepayers could still be held liable for environmental cleanup costs under CERCLA,

⁵ EPA estimates there to be as many as 10 million lead service lines across the U.S. (<https://www.epa.gov/ground-water-and-drinking-water/lead-service-line-replacement>), with an average replacement cost of approximately \$4,700 (https://www.epa.gov/sites/default/files/2019-10/documents/strategies_to_achieve_full_lead_service_line_replacement_10_09_19.pdf).

should the disposal location ever be designated as facility subject to CERCLA.⁶ This would effectively require water system ratepayers to pay twice to clean up the PFAS pollution they did not cause – once when filtered out of the water, and again at the disposal site – thus shielding the actual polluters who are responsible for putting these contaminants into the environment in the first place.

This is particularly concerning for water systems because CERCLA liability is not only joint and several, but it is also strict, meaning that any one potentially responsible party (PRP) may be held liable for the entire cleanup of a site (when the harm caused by multiple parties cannot be separated), and a PRP cannot simply say that it was not negligent or that it was operating according to industry standards. Instead, under CERCLA if a PRP sent some amount of the hazardous substances found at the site, that party is liable.⁷ Therefore, a water system that sends any amount of PFAS to a site could be held responsible under CERCLA for the costs of cleaning up all the PFAS from that site, even if the majority of the site's pollution came from other sources.

Given these severe and potentially financially crippling consequences that would ultimately impact water system ratepayers, AMWA strongly believes that drinking water systems that have no choice but to remove PFAS from their source water supplies should be protected from CERCLA liability when they store, transport, and treat water containing PFAS from third party sources and then dispose of these water treatment byproducts containing PFAS. Just as Congress has explored CERCLA liability protections for airports that had no choice but to use firefighting foam containing PFAS, AMWA is eager to work with the committee on legislation that provides the necessary and appropriate scope of these liability protections for water systems as well.

Finally, AMWA reiterates its support for the contaminant regulatory process that Congress has required EPA to follow since enactment of the 1996 SDWA Amendments. This statute instructs EPA to rely on the best available peer-reviewed science and data collected by accepted methods to carry out a health risk reduction and cost analysis of regulatory options. Ultimately, any drinking water regulation finalized by EPA must present a meaningful opportunity for health risk reduction for persons served by public water systems, and must be developed following opportunities for stakeholder involvement. This ensures that ratepayer dollars spent on regulatory compliance are well spent and will result in public health improvements. While AMWA will always be open to discussing ways this regulatory process could be improved upon, we believe the current statute rests upon a strong foundation that appropriately considers economic and technological feasibility, including taking compliance costs, analytical capabilities, treatment options, and public health benefits into account.

AMWA thanks the subcommittee for the opportunity to submit these comments for the record of this important hearing. The association supported passage of the Bipartisan Infrastructure Law, and we are grateful for the hard work EPA has put into developing the implementation memorandum to begin

⁶ CERCLA liability is triggered if: (1) hazardous substances are present at a facility; (2) there is a release (or a possibility of a release) of these hazardous substances; (3) response costs have been or will be incurred; and (4) the defendant is a liable party. (<https://www.epa.gov/enforcement/superfund-liability>).

⁷ <https://www.epa.gov/enforcement/superfund-liability>.

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Page 8 of 8

the process of distributing SRF funding to states. AMWA is eager to continue working with the agency and members of Congress on this topic, as well as other initiatives that will help Americans feel a greater level of confidence in the water that comes from their taps.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Michael Arceneaux', with a long horizontal flourish extending to the right.

Michael Arceneaux
Acting Chief Executive Officer