

Bond Case Briefs

Municipal Finance Law Since 1971

Congress Provides Substantial Funding for Variety of Water Projects in Infrastructure Law With Emphasis on Low Income Communities.

The Infrastructure Investment and Jobs Act (IIJA) contains significant water-related provisions, amounting to \$82.5 billion in spending.[1] Areas addressed by these provisions include drinking water safety, clean water more generally, access to water, and research.

Background

America faces many serious problems involving water. People in rural areas remain dependent on often unreliable wells, and the water infrastructure of many U.S. cities has deteriorated as many existing pipes remain contaminated by lead. Meanwhile, from 1996 to 2018, the cost of water and wastewater has increased at annual rates of 5.09% and 5.64%, respectively, compared to an annual increase in the Consumer Price Index of only 2.1%. [2]

In Flint, Michigan, the city's drinking water was contaminated with lead in 2014, beginning a crisis that lasted until at least 2019. Between 6,000 and 12,000 children were exposed to high levels of lead.[3] The Flint disaster provides examples of many of the problems the water provisions of the IIJA seek to confront: environmental injustice, the continued use of lead service pipes, and failures of local, state, and federal governments.

Threats to clean drinking water go beyond lead, however, and in many ways, regulation has failed to keep up with new risks. For example, the Environmental Protection Agency has not issued National Primary Drinking Water Regulations for new contaminants since 1996, although it announced its final determination to regulate perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) in March 2021.[4] PFOS, PFOA, and other per- and polyfluoroalkyl substances (PFAS) have contaminated water supplies in many places across the country, and because they remain in the environment for a long time and do not easily degrade, pose particular problems to remediate.

These water-related problems were part of a broader set of infrastructure-related problems the IIJA sought to address. The law grew out of the \$2.3 trillion American Jobs Plan announced by President Biden on March 31, 2021, amounting to \$4 trillion in combination with the American Families Plan announced in April.[5] The plans' "human infrastructure" provisions were split off into the still-unpassed Build Back Better Act to seek bipartisan support for the IIJA, and the IIJA itself was cut considerably. The final version of the IIJA authorizes a total of \$1.2 trillion in spending over several years. The bill finally became law on November 15, 2021.

Safe Drinking Water

The largest category of water-related investments in the Act involves improvements in drinking water safety and sanitation, including around \$24 billion in grants to states over five years under the existing Safe Drinking Water Act and Federal Water Pollution Control Act. The Infrastructure Investment and Jobs Act also provides \$15 billion for projects to replace lead water pipes and service

lines, and \$9 billion for addressing PFAS and other “emerging contaminants.”[6] Section 50101’s amendments to the Safe Drinking Water Act, in addition to authorizing new spending, clarify that SDWA grants “to assist in responding to and alleviating any emergency situation” can include responses to cybersecurity events and heightened lead exposure. (Section 50113 also concerns cybersecurity support for public water systems.) These amendments also provide that “State-based nonprofit organizations that are governed by community water systems” are eligible for technical assistance under Section 1442(e).

Section 50102 reauthorizes the Safe Drinking Water Act’s Drinking Water State Revolving Loan Funds and appropriations for their capitalization grants. It also amends SDWA Section 1452(d) to give states more ways of subsidizing projects serving disadvantaged communities: “grants, negative interest loans, other loan forgiveness, and through buying, refinancing, or restructuring debt.”

Section 50103 authorizes appropriations for the SDWA’s source water quality protection partnership petition program and allows counties to form such partnerships on behalf of unincorporated areas.

Section 50104 expands the projects eligible for grants to small and disadvantaged communities under the Safe Drinking Water Act to include “the purchase of point-of-entry or point-of-use filters and filtration systems that are certified by a third party using science-based test methods for the removal of contaminants of concern.” (This is the only reference to point-of-use systems in the IIJA.) It also requires the EPA to “establish a competitive grant program” through which eligible entities would “assist eligible individuals in covering the costs incurred by the eligible individual in connecting the household of the eligible individual to a public water system.”

Section 50105 includes several measures to reduce lead in drinking water. It increases and extends appropriations for lead reduction grants, and allows them to be used to replace privately-owned lead service lines, “with priority for disadvantaged communities based on the affordability criteria established by the applicable State under [SDWA] section 1452(d)(3), low-income homeowners, and landlords or property owners providing housing to low-income renters.” It also requires water systems to replace privately-owned lead service lines without cost to low-income customers, and to notify state governments of planned lead service line replacements.

Section 50110 requires the EPA to “establish a voluntary school and child care program lead testing, compliance monitoring, and lead reduction grant program” and to publish school lead testing guidance for public water systems. It also reauthorizes appropriations for SDWA Section 1464(d)’s existing Voluntary School and Child Care Program Lead Testing Grant Program.

Another grant program, for state responses to contaminants, authorized by SDWA section 1459A(j), is expanded by IIJA section 50114 beyond its previous definition of “underserved communities” to include, for example, communities “with a population of less than 10,000 individuals that the Administrator determines does not have the capacity to incur debt sufficient to finance a project or activity.”[7]

Water Systems

Section 50106 requires the EPA to establish a grant program for “Operational Sustainability of Small Public Water Systems,” while section 50107 requires it to establish a “Midsize and Large Drinking Water System Infrastructure Resilience and Sustainability Program.” Section 50109 requires the EPA to establish another grant program “to assist qualifying households with need in maintaining access to drinking water and wastewater treatment,” based on the results on a study required by Section 50108. The Indian Reservation Drinking Water Grant Program will be expanded under section 50111 to include wastewater system improvements as well as drinking water system

improvements.

Research

The law funds water-related research by several entities – both scientific research into new technologies and studies of social problems. Section 50201 provides \$75 million annually through fiscal year 2026 for research, investigations, training, and information grants, including to state water pollution control agencies and nonprofit organizations. Section 50222 revises the Federal Water Pollution Control Act to provide “funding to carry out groundwater research on enhanced aquifer use and recharge in support of sole-source aquifers” to state, local, and tribal governments jointly with research institutions. Section 50115 requires the EPA to conduct annual studies on the prevalence of boil water advisories, while section 50112 requires it to report on advanced drinking-water-related technologies. Section 50108 requires it to conduct a “Needs assessment for nationwide rural and urban low-income community water assistance,” while 50216 requires it to “identify historical distributions of funds to small and disadvantaged communities and new opportunities and methods to improve on the distribution of funds under” the Clean Water State Revolving Funds and Drinking Water State Revolving Funds.

Section 50213 requires the EPA to establish a competitive grant pilot program for the sharing of water data. The EPA is directed by section 50217 to establish “centers of excellence for stormwater control infrastructure technologies” at universities, other research institutions, and nonprofit organizations (as well as grants to state, local, and tribal governments for stormwater infrastructure projects involving new technologies). Under section 50218, the EPA must establish a Water Reuse Interagency Working Group “to develop and coordinate actions, tools, and resources to advance water reuse across the United States, including through the implementation of the February 2020 National Water Reuse Action Plan.”

Sections 50219 and 50220 require studies by the EPA of advanced clean water technologies and capital improvement needs for Clean Water State Revolving Fund-eligible projects, respectively. Section 50221 funds the Water Resource Research Act’s Water Resource Research Institutes but puts tighter controls on the funding, such as Department of the Interior evaluations of each Institute every five years. Finally, section 50222 directs the EPA to “provide funding to carry out groundwater research on enhanced aquifer use and recharge in support of sole-source aquifers.”

Clean Water

Beyond drinking water provisions, other provisions of the IIJA concern wastewater and other clean water issues. Section 50202 establishes the Wastewater Efficiency Grant Pilot Program for publicly-owned treatment works, while Section 50203 funds the Clean Water Act’s Pilot Program for Alternative Water Source Projects and makes stormwater projects eligible for it. Similarly, section 50204 funds Sewer Overflow and Stormwater Reuse Municipal Grants and expands their scope to include “notification systems to inform the public of combined sewer or sanitary overflows that result in sewage being released into rivers and other waters.” Sections 50205 through 50209 create new grant programs: the Clean Water Infrastructure Resiliency and Sustainability Program; the Small and Medium Publicly Owned Treatment Works Circuit Rider Program; the Small Publicly Owned Treatment Works Efficiency Grant Program; Grants for Construction and Refurbishing of Individual Household Decentralized Wastewater Systems for Individuals with Low or Moderate Income; and, finally, a program of grants to publicly-owned water treatment works (POTWs) and nonprofit entities, to cover the cost of connecting low-income individuals to POTWs.

The next few sections revise and fund existing programs. Section 50210 funds the Clean Water State Revolving Funds at a rate of \$2.40 billion for FY2020, \$2.75 billion for FY2023, \$3.00 billion for

FY2024, and \$3.25 billion for each of FY2025 and FY2026. Section 50211 funds the Innovative Water Infrastructure Workforce Development program and expands the use of grants under the program. Section 50212 funds grants to Alaska to improve sanitation in rural and native villages. Section 50215 reauthorizes Water Infrastructure Finance and Innovation Act (WIFIA) funding, while section 50214 requires WIFIA loan applicants to submit only one final rating option letter instead of two.

Water Rights

Section 70101 establishes the \$2.5 billion Indian Water Rights Settlement Completion Fund to pay for “obligations identified by the Secretary of the Interior, under an Indian water settlement approved and authorized by an Act of Congress before the date of enactment of this Act.”

Conclusion

The IIJA greatly expands funding for, and revises rules regarding, such areas as lead pipe replacement, filtration systems, and general water and sewer infrastructure. It remains to be seen whether even this additional spending is sufficient for the nation’s water problems.

[1] https://pacinst.org/wp-content/uploads/2021/11/US_Infrastructure_Brief.pdf.

[2] <https://www.awwa.org/AWWA-Articles/awwas-2019-water-and-wastewater-rate-survey-reveals-increasing-utility-costs-boosting-rates>.

[3] <https://web.archive.org/web/20160203004456/http://www.wnem.com/story/30995770/united-way-estimates-cost-of-helping-children-100m>.

[4] 86 FR 12272.

[5] <https://www.politico.com/news/2021/05/24/infrastructure-talks-near-collapse-490637>.

[6] https://pacinst.org/wp-content/uploads/2021/11/US_Infrastructure_Brief.pdf.

[7] SDWA § 1459A(c)(2) (42 U.S.C. 300j-19a).

Sullivan & Worcester LLP

Jeffrey M. Karp

December 27 2021