



Environmental Law Bulletin



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Water and Wastewater Infrastructure Economic Stimulus Update

After much debate the House of Representatives and the Senate have reached agreement of the economic stimulus package titled the "American Recovery and Reinvestment Bill of 2009." The bill signed by President Obama provides for \$787 billion in stimulus funds - \$499 billion in spending programs and \$288 billion in tax relief. This article focuses on the Clean Water portion of the bill.

Regardless of which side of the aisle your loyalties may lie, if you are in the water and wastewater industry, one thing is clear – the new administration appears to be committed to increasing available funding for infrastructure. Throughout his candidacy and after his inauguration, President Obama has repeatedly announced that investing in the nation's infrastructure will be a key part of the economic stimulus plan.

The Clean Water portion of the bill is located under the Interior and Environment – Environmental Protection A.5st communities upgrade wastewater treatment systems, drinking water infrastructure, and grants and loans to help rural communities fund their wastewater and drinking water infrastructure.

The Problem That May Be A Solution

Let us begin by discussing how we got to this point. No, we are not going to discuss sub-prime mortgages or securitization. That damage has been done. We need to talk about our nation's water and wastewater infrastructure needs and how our needs in this industry can assist the nation and Ohio pull out of this recession.

Many public owners are experiencing the same pain as private owners – they can't find the money necessary to build their projects. Public owners of water and wastewater infrastructure are not immune to this problem.

For many years, across the nation and right here in the Midwest, residential and commercial developments were booming. Many public owners used the rate of growth as a criterion in projecting the number of taps and corresponding tap fees they would recover from this growth. New sewers and waterlines were constructed to meet the growing demand. Existing sewers and waterlines were upsized. Plants were constructed and expanded.

But then, all those wonderful tap fees we were projecting, and counting on, never materialized the way we had hoped. Even those who were conservative in estimating the amount of tap fees to be recovered are shocked at the slow pace of growth.

Many public entities attempted to sell bonds in order to fund their infrastructure projects. However, the bond market has tightened up, and public owners are having a hard time selling bonds to finance their projects. Many public owners now find themselves with new infrastructure and debt service they are finding hard to keep up with unless things turn around.

At the same time, our nation struggles with deteriorating water and wastewater infrastructure. Public owners are committed to improving their water and wastewater infrastructure; however, this has become hard to do. Incoming funds are being used

to keep up with basic operating and maintenance and paying debt service on the infrastructure that was supposed to be paid off with new service taps. These days, the money to perform replacement or substantial improvements to existing infrastructure is not there.

The United States Environmental Protection Agency estimates that there is a \$388 billion funding gap in our wastewater infrastructure and a \$277 billion funding gap in our water infrastructure. This means that we need a total of \$665 billion to improve our nation's water and wastewater infrastructure to acceptable standards.

For the State of Ohio, the U.S. EPA estimates that \$22 billion is needed over the next 20 years to address water and wastewater infrastructure needs – including \$6.3 billion in sanitary sewer overflow problems and \$10 billion in wastewater treatment problems. It is important to note that, in Ohio, approximately 77 percent of wastewater treatment plants serve rural communities.

Economic Stimulus Efforts in 2008

In September 2008, the House of Representatives passed a stimulus package (H.R. 7110) that included \$6.5 billion for wastewater infrastructure and \$1.0 billion for drinking water infrastructure. The Senate was more conservative. In November 2008, the Senate passed a stimulus package (S. 3689) that included \$1.75 billion for wastewater infrastructure and \$750 million for drinking water infrastructure.

Recently, House Transportation and Infrastructure Committee Chairman James Oberstar (D-Minn.) forwarded an \$85.4 billion public works proposal to Speaker of the House Nancy Pelosi (D-Cali.). Of this total amount, \$14.3 billion is proposed for water infrastructure.

Amount of Funding Being Requested

In October 2008, the U.S. Conference of Mayors asked Congress to include \$18.75 billion for water and wastewater infrastructure. The American Water Works Association (AWWA) and others have requested \$10 billion for drinking water infrastructure projects that are apparently “ready to go.”

Ready-to-Go Projects in Ohio

According to the United States Conference of Mayors' Mainstreet Economic Recovery: “Ready-to-Go” Job and Infrastructure Projects report, Ohio communities participating in that organization have indicated that they require more than \$1.0 billion of funding for water and wastewater projects that are ready-to-go.

In Central Ohio, the Mid-Ohio Regional Planning Commission estimates that communities associated with MORPC are requesting federal funding of approximately \$144.0 million to address water and wastewater infrastructure needs; of which over \$92 million are ready-to-go as early as the summer of 2009. None of the organizations listed in the MORPC report appear to have participated in the United States Conference of Mayors' report.

The Debate Over the Economic Stimulus Package for Water and Wastewater Infrastructure

The goal of many in Congress was to pass an economic stimulus bill by mid-February. The last proposal out of the House of Representatives contained \$6.0 billion for wastewater treatment infrastructure projects and \$2.0 billion for drinking water projects.

In addition, the bill contained \$1.5 billion to increase funding for the Rural Water and Waste Disposal Program. This program is administered through the United States Department of Agriculture and provides grants and loans to communities in rural areas with populations of 10,000 or less for drinking water and wastewater treatment infrastructure. Priority is given to smaller and poorer communities.

The bill had many features to assist communities and pump money into the construction industry. It was structured in such a way to facilitate spending at a faster rate than seen in the past. Recipients of funding would likely be given deadlines to commit to projects. If they do not meet those deadlines, the money will be reallocated to other states that are ready to spend it.

The bill also favored projects that will spend money quickly. Most importantly, the matching requirements typical of such funding mechanisms are waived due to the known financial trouble of many communities.

Under the Federal Water Pollution Control Act, states receiving capitalization grant payments from the federal government are required to deposit 20 percent of the total amount of the federal grant payment into that State's water pollution control revolving fund. In addition, that state is required to enter into binding commitments to provide assistance of 120 percent of the federal capitalization grant payment within 1-year of receiving a grant payment. Under the proposed House bill, these provisions would not be required.

In addition, Section 202 of the Water Pollution Control Act contains federal cost-share limitations ranging from 55-75 percent of the cost of construction. Under the proposed House bill, these provisions also were not required.

The House bill also required that a certain amount of the economic stimulus funding be allocated for financial assistance for water and wastewater projects in the form of subsidization. The bill indicated that 50 percent of the funding for water and wastewater (\$1.0 billion and \$3.0 billion respectively) be used for subsidization, including forgiveness of principle, negative interest loans, and grants to municipalities listed on each states priority list.

If possible, 80 percent of the wastewater projects must meet affordability criteria determined by the governor of each State receiving money, and 20 percent of the projects must address “water efficiency goals, energy efficiency goals, mitigation of storm water runoff, or encourage environmentally sensitive project planning, design, and construction.”

In the House bill, recipients of grants must enter into contracts or other binding commitments to use 50 percent of funds within one year of the passage of the Act, or within nine months of being awarded the grant (whichever is later), and to use 100 percent of the funds within two years of the passage of the Act, or 21 months (whichever is later). The House bill indicated that a certification from the grant recipient that specifies the amounts, planned timing, and purpose of the project will be regarded as a binding commitment.

Where the House indicated a total of \$8.0 billion for water and wastewater infrastructure, the Senate was indicating the total funding should be around \$6.0 billion - \$4.0 billion for wastewater infrastructure and \$2.0 billion for water infrastructure. The Senate’s version also included additional funding of \$1.4 billion for rural water projects.

The Senate version of bill placed strict timeline requirements on qualifying for funding. Under the bill, funding would only be allocated to projects that are ready to proceed to construction within 180 days after the President signs the bill. If there is not a binding commitment to proceed to construction within that timeframe, the Administrator of the U.S. EPA may reallocate the funds to other projects that can readily proceed to construction.

An important distinction from the House bill is the Senate’s exclusion of the 50 percent requirement for financial assistance. The Senate version of the bill indicates that funds may be appropriated for subsidization, including forgiveness of principle and negative interest loans, but did not require that funding be allocated for this purpose.

The Senate version of the bill also contained the same requirements as the House version for green infrastructure, water efficiency improvements or other environmentally innovative projects, and tribal grants.

The Current Bill

After much debate the Senate and House agreed on a stimulus package for water and wastewater infrastructure. The Senate prevailed on the overall funding amount, while the House prevailed on the limitations on the funding.

The total funding is \$6.0 billion - \$4.0 billion for wastewater infrastructure and \$2.0 billion for water infrastructure. There is also an additional \$1.38 billion for rural water projects.

There are no matching or cost sharing requirements placed on the funding. If a project is not under contract or construction within 12 months of the passage of the Act, the Administrator of the U.S. EPA must reallocate funding to where it will be used. Priority for funding will be provided to those projects on a State priority list.

In addition, at least 50 percent of the funding must go towards subsidization in the form of forgiveness of principal or negative interest loans or grants. Funding may also be used to buy, refinance, or restructure debt obligation for projects incurring debt on or after October 1, 2008.

If possible, at least 20 percent of the funds must go towards projects that address green infrastructure, water efficiency, energy efficiency, or other environmentally innovative activities. An additional limitation provides that the funding cannot be used to purchase land or easements.

Now that President Obama has signed the bill into law, the U.S. EPA expects to issue final grant guidance or regulation within days of the President’s signing of the bill. This information will detail what state and local recipients need to do under the economic stimulus plan.

How Will the Money Be Distributed?

In addition to the amount of funding that may come out of the upcoming stimulus package, one question still exists – how will the feds get this money to those who need it? There appears to be a difference of opinion on how it should be done. One possible approach is to provide grants directly to communities in need of water infrastructure improvements. Another approach is to use existing State revolving loan fund programs already in place.

In the separate economic stimulus packages passed by the House and Senate, each intended to use the existing State Revolving Fund program to get the money to communities. The State Revolving Fund distributes money to states based on a statutory formula and this is likely to be the mechanism for distributing funds.

In Ohio, wastewater funding will likely funnel through the Water Pollution Control Loan Fund, and drinking water funding will likely be distributed through the Drinking Water State Revolving Fund. The Ohio EPA Department of Environmental and Financial Assistance manages the WPCLF program, and the Ohio Water Development Authority is the financial manager of the WPCLF.

Over the years, Ohio has generally received approximately 5.6 percent of the overall federal funding from the Clean Water State Revolving Fund for wastewater treatment related projects based on the statutory requirements. Ohio should expect to receive approximately \$225 million in additional funding to the Water Pollution Control Loan Fund.

Likewise, Ohio has generally received approximately 3.2 percent of the overall federal funding from the Drinking Water State Revolving Fund for drinking water related projects based on the statutory requirements. Ohio should expect to receive approximately \$58-65 million in additional funding to Ohio's Drinking Water State Revolving Fund.

Public owners need to act quickly. The Ohio EPA is calling for stimulus project nominations. The Ohio EPA initially established deadlines to submit projects through its website. The deadline for wastewater projects was February 13, 2009. The deadline for drinking water projects is March 15, 2009. However, the Director of the Ohio EPA has since suspended these deadlines and indicated that interested applicants submit their projects through Ohio's economic recovery website. This website is located at <http://recovery.ohio.gov/>.

Competition will be tight, so submit your projects through Ohio's economic recovery website and contact the Ohio EPA to nominate your projects as soon as possible.

Conclusion

The amount of funding needed to improve our water and wastewater infrastructure is vast. Projects are on the books to begin to address this problem. Every indication is that Congress will provide funding to assist communities in their effort to attack this problem. But one thing is clear - the amount of funding that will be available to the water and wastewater industry is far less than that being requested by many industry groups and public owners.

Now more than ever, it is important for public owners to know where the money is, understand their options for obtaining that money, and understand that money will be tight on water and wastewater construction projects for some time – creating a higher risk of contractor claims and a greater need for qualified attorneys who understand the business of water and wastewater infrastructure.

If you have any questions about this ruling or any other employment matter, please contact Michael S. Holman at 614.227. 2348 or mholman@bricker.com, or Desmond Cullimore at 614.227.4837 or dcullimore@bricker.com.

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