

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

310 CMR 45.00: DEP SELECTION, APPROVAL AND REGULATION OF DRINKING WATER PROJECTS RECEIVING FINANCIAL ASSISTANCE FROM THE STATE REVOLVING FUND

Section

- 45.01: ~~Authority and Effective Date~~Introduction
- 44.02: Purpose and ~~Applicability~~Authority
- 45.03: Definitions
- 45.04: Eligible Projects
- 45.05: Priority System
- 45.06: Project Selection Criteria
- ~~45.07:~~ Financing Criteria
- ~~45.08:~~ Eligible Project Costs
- ~~45.09:~~ Project Evaluation Report
- ~~45.10:~~ Environmental Review and Federal Cross-Cutter Requirements
- ~~45.11:~~ Affirmative Action and Minority/Women Business Enterprise Requirements
- ~~45.12:~~ Project Approval and Regulation

~~45.01:~~ Authority and Effective DateIntroduction

~~310 CMR 45.00 et seq. has been adopted pursuant to St. 1998, c. 78, M.G.L. c. 29C, M.G.L. c. 21, § 27A, and M.G.L. c. 111, §160, and shall take effect upon promulgation.~~ The Massachusetts Drinking Water State Revolving Fund (“DWSRF”) Program is a federal-state partnership that provides low-cost financing to help community public water suppliers comply with federal and state drinking water requirements. The DWSRF Program is jointly administered through the Clean Water Trust by the Commissioner of the Department of Environmental Protection (“Department”), the State Treasurer, and the Secretary of Energy and Environmental Affairs pursuant to M.G.L. c. 29C, §2. Financial assistance is available for engineering, design, and construction of drinking water projects, including new wastewater treatment facilities that protect public health and strengthen compliance with federal and state drinking water regulations. Every summer, the Department solicits projects from Massachusetts municipalities and community water systems (with at least 15 residential connections) to be considered for subsidized loans. After evaluating the project requests submitted in response to the annual solicitation, the Department develops a list of projects eligible to receive financial assistance. From this annual list, and on the basis of projects’ readiness to proceed and priority rating, the Department assigns projects to a fundable list called the Intended Use Plan Project Listing (“IUP”). Projects placed on the IUP are eligible to apply for financing in the coming year, with the total cost of all projects on the IUP not to exceed the amount of funding available for that year. To qualify for placement on the IUP, a project must have a high enough ranking, have received a local funding appropriation or be scheduled for funding appropriation by June 30 of the coming year, and the applicant must be able to file a complete loan application no later than October 15 of the coming year.

45.02: Purpose and Applicability

310 CMR 45.00 implements the DWSRF Program. Under federal and state law, the DWSRF Program’s goals are to protect public health and strengthen compliance with drinking water requirements, while addressing the Commonwealth’s drinking water needs. The DWSRF Program incorporates affordability and watershed management priorities. 310 CMR 45.00 sets forth the Department's authority and responsibilities to select, approve and regulate drinking water projects receiving financial assistance from the ~~Drinking Water State Revolving Fund (the “DWSRF”).~~

310 CMR 45.00 does not apply to the use of set-asides by the Department and the Trust, which is addressed in the pertinent portion of the ~~Intended Use Plan (“IUP”)~~ submitted by the Department and the Trust to EPA on an annual basis after public review and comment. In the event that the set-aside portion of the IUP allocates funding for loans to systems to acquire land or conservation easements or to implement source water protection measures or to implement recommendations in source water quality protection partnership petitions submitted to the Department, the project selection criteria for such loans will also be subject to public review and comment as a component of the ~~Intended Use Plan~~IUP. The Department, reserves, ~~however,~~ the right to use relevant requirements and procedures contained in 310 CMR 45.00 in its selection, approval and administration of projects receiving loans pursuant to the set-aside portion of the IUP.

310 CMR 45.00 et seq. has been adopted pursuant to St. 1998, c. 78, M.G.L. c. 29C, M.G.L. c. 21, § 27A, and M.G.L. c. 111, §160, and shall take effect upon promulgation. The Department may issue supplemental policies, guidelines, guidance documents and/or administrative

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

procedures to assist in its implementation and administration of 310 CMR 45.00 and its use of set-asides.

45.03: Definitions

For the purposes of 310 CMR 45.00 *et seq.*, the following terms shall have the meaning set forth in 310 CMR 45.00 unless the context clearly requires otherwise.

Act: St. 1998, c. 78, and as it may be further amended from time to time.

Best Management Practices and (“BMPs”): Schedules of activities, prohibitions of practices, maintenance procedures, and other management practices consistent with the New England Water Works Association’s and Massachusetts Water Works Association’s *Toolbox of BMPs for Water Resource Management* dated May 20, 2008.

Community Water System: As defined in 310 CMR 22.02 of the Department's Drinking Water Regulations, a community water system is a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

Cost: Any or all costs, whenever incurred, approved by the Department in accordance with M.G.L. c. 21, § 27A, of carrying out a drinking water project, including, without limiting the generality of the foregoing: the costs for planning, preparation of studies and surveys, design, construction, facilities, improvement and rehabilitation, acquisition of real property, personal property, materials, machinery or equipment, start-up costs, demolitions and relocations, reasonable reserves and working capital, interest on loans, local governmental obligations and notes in anticipation of thereof prior to and during construction of such project or prior to the date of such loan, if later, administrative, legal and financing expenses, and other expenses necessary or incidental to the aforesaid.

Department: The Massachusetts Department of Environmental Protection.

Drinking Water Project: Any project of a type or category which the Department has determined, consistent with guidance issued by EPA in accordance with the SDWA, will facilitate compliance with national primary drinking water regulations under section 1412 of the SDWA or otherwise significantly further the health protection objectives of the SDWA or the Department's Drinking Water Regulations at 310 CMR 22.00.

Drinking Water Regulations or 310 CMR 22.00: The Department's regulations governing the approval, use and operation of drinking water sources and public water systems in compliance with M.G.L. c. 111, § 160 and other applicable state laws.

Eligible Borrower: Any ~~local governmental unit~~ LGU or other community water system which is authorized to own, operate, finance or otherwise implement a drinking water project.

EPA: The U.S. Environmental Protection Agency.

Federal Cross-Cutters: Federal laws and authorities that apply by their own terms to projects receiving federal financial assistance such as the federal SRF. Such federal cross-cutters include, but are not limited to, environmental laws and authorities such as the Clean Air Act, Safe Drinking Water Act, Clean Water Act, Endangered Species Act, Coastal Zone Management Act, Wild and Scenic Rivers Act and the National Historic Preservation Act of 1966, and economic and miscellaneous authorities such as the procurement and contractor requirements associated with financial assistance programs under the Safe Drinking Water Act, Clean Water Act and Clean Air Act.

Grant Equivalency or Financial Equivalent of a Grant: The standard measure used by the Department and the Trust to determine the amount of subsidy applicable to the eligible costs of a project under the loan in accordance with St. 1998, c. 78.

Intended Use Plan or IUP: An annual plan submitted by the Trust to EPA which identifies the intended use of the amounts available to the Fund as determined from time to time by the Trust and derived from the federal capitalization grant, state match amounts, loan repayments, investment earnings and any other moneys deposited by the Trust available to fund projects eligible for funding under St. 1998, c. 78. The IUP includes a listing of projects to receive financial assistance from the Fund, the distribution and use of the funds for set-aside activities, and a description of the short and long term goals for the use of project and set-aside funds.

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

Intended Use Plan Project Listing: Those projects identified by the Department for inclusion on the fundable portion of the calendar year priority list pursuant to 310 CMR 45.05(2).

Loan: Any form of financial assistance subject to repayment, in whole or in part, which is provided by the Trust to an eligible borrower. A loan may provide for planning, construction, bridge or permanent financing.

Loan agreement: Any agreement entered into between the Trust and an eligible borrower pertaining to a loan or the purchase and delivery of local governmental obligations or other instruments evidencing or securing a loan.

Loan commitment: A written commitment by the Trust to make a loan to a LGU or public water system to finance a project approved by the Department on terms consistent with the Department's Project Approval Certificate.

Local government Government unit Unit ("LGU"): Any town, city, district, commission, agency, authority, board or other instrumentality of the Commonwealth or of any of its political subdivisions, including any regional local governmental unit as defined in M.G.L. c. 29C, § 1, which is responsible for the ownership or operation of a drinking water project and is authorized by a bond act to finance all or any part of the cost thereof through the issue of bonds.

Maximum Contaminant Level (MCL): The maximum permissible level of a contaminant in water which is delivered to any user of a public water system.

MEPA: The Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, and as may be further amended from time to time.

Project Approval Certificate: The certificate issued by the Department to the Trust approving the project and certifying those costs of the project determined by the Department to be eligible for assistance by a loan and those costs eligible for financial assistance pursuant to St. 1998, c. 78.

Project Regulatory Agreement: An agreement between the Department and an eligible borrower, executed and delivered to the Trust on or prior to the date of a loan from the Trust to the eligible borrower to finance a project approved by the Department, which contains provisions relating to the Department's regulation and supervision of the project in accordance with 310 CMR 45.00.

Public Water System: A system for the provision to the public of piped water for human consumption, as defined in 310 CMR 22.02 of the Department's Drinking Water Regulations. A public water system includes a community water system.

Safe Drinking Water Act or SDWA: Title XIV of the Federal Public Health Service Act, commonly known as the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*, as amended.

Set-asides: The use of DWSRF federal capitalization grant funds and matching state funds, as applicable, for a range of specific activities identified in § 1452 of the SDWA to encourage source water protection and other Department drinking water program activities.

Small System: A public water system which regularly serve fewer than 10,000 persons.

Trust: The Massachusetts Clean Water ~~Pollution Abatement~~ Trust established by M.G.L. c. 29C.

45.04: Eligible Projects

(1) Any drinking water project of an eligible borrower is eligible to receive financial assistance from the Trust pursuant to St. 1998, c. 78 and 310 CMR 45.00. The Department has determined that such eligible projects include, but are not limited to:

- (a) Projects to address or prevent violations of the public health standards in 310 CMR 22.00 and the SDWA, including projects to come into or maintain compliance with MCLs and other requirements for contaminants with acute health effects (*e.g.*, the Surface Water Treatment Rule, the Total Coliform Rule, and nitrate standards) and for contaminants with chronic health effects (*e.g.*, the Lead and Copper Rule and the Disinfection Byproducts Rule), including the costs of system activities determined by the Department to constitute an effective alternative to providing treatment to come into or maintain compliance with 310 CMR 22.00 and the SDWA;
- (b) Projects to replace aging infrastructure, if such projects are needed to maintain compliance or further the public health goals and requirements in 310 CMR 22.00 and the SDWA, including projects to rehabilitate or develop sources to replace contaminated sources, install or upgrade treatment or storage facilities, and install or replace

transmission and distribution pipes to prevent contamination or improve water pressure to safe levels;

(c) Projects to consolidate and/or restructure a public water system (*e.g.*, to address a system with contaminated water supply or when a system is in noncompliance or lacks adequate technical, managerial and financial capability to maintain compliance);

(d) Land acquisition, but only if the Department determines that such land is integral to a project and necessary to meet or maintain compliance and further the protection of public health (*e.g.*, land needed to locate eligible treatment or distribution projects);

(e) The planning and/or design for any eligible project; ~~and~~

(f) Any eligible project which uses a single contractor to design, build and/or operate the project facilities, provided the procurement and use of such contractor is authorized by law, the project conforms with the state constitutional requirements governing the use of Commonwealth funds for public purposes, and the project otherwise meets the requirements of 310 CMR 45.00. The operation and maintenance costs of such projects shall be ineligible for DWSRF assistance;

(g) Projects that use regional water resources to offset, by at least 100 per cent, the impact of water withdrawals on local water resources in the watershed basin of the receiving community;

(h) Projects that are intended to provide public water supply to consumers whose groundwater or public or private wells are impacted by contamination that poses an unacceptable health risk, as determined by the Department;

(i) Innovative water projects that utilize new technology and which improve environmental or treatment quality, reduce costs, increase access and availability of water, conserve water or energy or improve management of drinking water; provided, that the technology has not been commercially deployed, other than as a pilot project, previously in the Commonwealth;

(j) Projects that are necessary to connect an LGU to a facility of the Massachusetts Water Resources Authority, if the LGU has paid or committed to pay the entry fee; and

(k) Projects that are a direct result of a disaster affecting the service area that is the subject of a declaration of emergency by the Governor.

(2) Unless otherwise determined by the Department consistent with the definition of "drinking water project" in 310 CMR 45.03, the following projects and activities are not eligible to receive financial assistance pursuant to 310 CMR 45.00:

(a) The construction, rehabilitation or maintenance of dams;

(b) The purchase of water rights, unless the water rights are owned by a public water system that is being purchased by an eligible borrower through consolidation as part of the eligible borrower's capacity development strategy;

(c) Reservoirs, except for finished water reservoirs and those reservoirs that are part of the treatment process and are located on the treatment facility property;

(d) Laboratory fees for monitoring;

(e) Operation and maintenance costs;

(f) Projects needed primarily for fire protection;

(g) Projects for systems which the Department determines lack adequate technical, managerial and financial capability, unless the Department determines that financial assistance from the DWSRF will ensure compliance over the long term;

(h) Projects for systems in significant noncompliance, as determined by the Department, unless the Department determines that the project will enable the system to return to compliance and that the system will maintain an adequate level of technical, managerial and financial capability to maintain compliance; and

(i) Projects primarily intended solely to serve future growth.

45.05: Priority System

(1) Establishment of Calendar Year Priority List.

(a) Prior to the beginning of each calendar year, the Department shall establish a single, annual list of projects prioritized to receive financial assistance pursuant to 310 CMR 45.00.

(b) In establishing the priority list, the Department may require eligible borrowers to submit any information deemed necessary by the Department for project evaluation, including but not limited to, information which addresses the proposed project's compliance with the ~~Intended Use Plan~~IUP Project Listing criteria in 310 CMR 45.05(2) and the Project Selection Criteria in 310 CMR 45.06. The Department may establish a reasonable deadline for its receipt of such information, and may decline to evaluate and prioritize a project if the Department determines that the eligible borrower has failed to provide sufficient information.

(c) Prior to adopting the priority list, the Department shall conduct a public hearing to receive and consider public comment on the proposed list. The Department will ensure

that notice of the public hearing will be published in one or more newspapers of general circulation 30 days prior to the date of the hearing.

(2) Intended Use Plan Project Listing.

(a) Eligible projects which the Department finds are ready to proceed and for which funds are available in the calendar year in which the priority list is established shall be placed on the ~~Intended Use Plan~~IUP Project Listing portion of the priority list. The Department reserves the right to establish an ~~Intended Use Plan~~IUP Project Listing that contains fewer projects than would use the total amount of funding available in the relevant calendar year, or, alternatively, to expand the ~~Intended Use Plan~~IUP Project Listing during the course of the relevant calendar year based on an additional allocation of available funding.

(b) The eligible borrower proposing the project must show in its application that its project meets each of the following criteria in order for the Department to place the project on the ~~Intended Use Plan~~IUP Project Listing:

1. As determined by the Department, the project's benefits to public health and/or drinking water quality, as evidenced by its ranking on the priority list, are sufficiently high to warrant its funding as a priority in the relevant calendar year;
2. The eligible borrower has already obtained its local funding authorization or otherwise committed funding for the project, or has provided a specific schedule to obtain such funding authorization or funding commitment by June 30th of the relevant calendar year; and
3. The eligible borrower demonstrates to the Department's satisfaction that its project is sufficiently advanced in its implementation such that the ~~local governmental unit~~LGU or public water system will file a complete loan application with the Department for the project by October 15th of the relevant calendar year.

A complete application includes, as applicable, approvable plans and specifications for the project and evidence that the eligible borrower has, at a minimum, filed applications for any permits or environmental reviews applicable to the project. As provided in 310 CMR 45.124(1)(b), the Department may deny any application which it determines to be incomplete.

(c) In the event that a project placed on an ~~Intended Use Plan~~IUP Project Listing fails during the course of the calendar year to meet one or more of the criteria in 310 CMR 45.05(2)(b), the project may be removed from the ~~Intended Use Plan~~IUP Project Listing and returned to the applicable priority level on the priority list. In such event, the Department reserves the right to raise one or more project(s) which are determined by the Department to be of the highest priority and which meet the criteria in 310 CMR 45.05(2)(b), consistent with available funding, to the ~~Intended Use Plan~~IUP Project Listing, provided the Department shall raise a small system project which meets the criteria in 310 CMR 45.05(2)(b) before an otherwise higher ranked project if the funding of such small system project is needed to meet the 15% allocation of funds for small systems, as provided in the SDWA. Subject to the availability of funding and the project's priority, the Department further reserves the right to restore any project removed from the ~~Intended Use Plan~~IUP Project Listing for failure to meet the criteria in 310 CMR 45.05(2)(b) if the project thereafter meets those criteria prior to the end of the relevant calendar year.

(d) The implementation of some projects on the ~~Intended Use Plan~~IUP Project Listing will take place over two years or more. For such multi-year projects, the Department will limit the amount of actual funding reserved for the project on each annual ~~Intended Use Plan~~IUP Project Listing to the amount needed to fund the project for one year. In the event that a multi-year project receives a project approval certificate from the Department by the end of the relevant calendar year, the Department will reserve another annual increment(s) of funding for the project on subsequent calendar year ~~Intended Use Plan~~IUP Project Listings, subject to the availability of funding, and provided the project is implemented in accordance with the schedule in the project approval certificate, as determined by the Department. The limitation on financial assistance in 310 CMR 45.05(3) shall apply to any amounts reserved as annual increments of funding for a multi-year project on subsequent calendar year ~~Intended Use Plan~~IUP Project Listings.

(3) Limitation on Financial Assistance.

(a) No eligible borrower shall receive Department approval for financial assistance from the Trust for a project or projects in a calendar year in any amount in excess of 25% of the total financial assistance authorized on the ~~Intended Use Plan~~IUP Project Listing portion of the priority list in that calendar year, including any amounts reserved as annual increments of funding for a multi-year project on subsequent calendar year ~~Intended Use Plan~~IUP Project Listings.

(b) The Department reserves the right to waive the limitation on financial assistance set forth in 310 CMR 45.05(3)(a), in whole or in part, if the Department determines that one or more projects on the Intended Use Plan IUP Project Listing portion of the applicable priority list has failed or will fail to meet the criteria in 310 CMR 45.05(2)(b) by October 15th in the relevant calendar year, or if the Department allocates additional available funding to the Intended Use Plan IUP Project Listing during the course of the relevant calendar year.

45.06: Project Selection Criteria

(1) Except as provided in 310 CMR 45.06(2), (3) and (4), the Department will use the evaluation criteria set forth below to determine a project's placement on the calendar year priority list. The Department, through written guidance, will assign a numerical point range to each of the evaluation criteria in 310 CMR 45.06(a) which will be used to further determine a project's placement on the priority list. Such Department guidance may also address tie breakers for projects with the same point score rating.

(a) Public Health Criteria.

1. The extent to which the project will eliminate or mitigate a serious risk to public health. Relevant factors to consider may include but are not limited to:
 - a. The severity of the public health problem the project is intended to address (*e.g.*, the nature and frequency of MCL violations).
 - b. The size and character of the population threatened or negatively impacted by the identified risk to public health (*e.g.*, the number of children, the elderly or persons with pre-existing health risks served by the system), and the extent to which the project will eliminate or mitigate the public health risk to the identified population.
 - c. The extent to which the project demonstrably eliminates or mitigates the identified serious risk to public health in an effective and timely manner.

(b) Compliance Criteria.

1. The extent to which the project is needed to come into or maintain compliance with 310 CMR 22.00, the SDWA or other required or related federal and/or state permit(s), approvals, regulations and requirements, and the effect of compliance on public health and drinking water quality. Relevant factors to consider may include but are not limited to:
 - a. The extent to which the project is needed to ensure compliance with an existing federal or state court or administrative order.
 - b. The extent to which the project is needed to come into or maintain compliance with 310 CMR 22.00, the SWDA, or other required or related federal or state permit or approval, including the Department's approval of a new drinking water source.
 - c. The extent to which the project's maintenance of compliance with 310 CMR 22.00, the SDWA, or other required or related federal or state order, permit, approval demonstrably benefits or protects drinking water quality and/or public health (*e.g.*, projects which upgrade or rehabilitate water treatment or distribution facilities and are designed to keep a system in compliance on an ongoing basis).

(c) Affordability Criteria.

1. The extent to which DWSRF financial assistance for the project will assist systems whose service area consists of users with median household income ("MHI") of 80% or less of the state median household income for non-metropolitan areas or as otherwise established by the Trust.
2. The extent to which the cost of the project will result in increased water rates to users of the system of an eligible borrower. Relevant factors to consider may include, but are not limited to, whether the annual user charges will fall within a range of 1% to 1.75% of such users' MHI.

(d) Other Program and Implementation Criteria.

1. Whether the project is to consolidate and/or restructure a public water system (*e.g.*, to address a system with a contaminated water supply or when a system is in noncompliance or lacks adequate technical, managerial and financial capability to maintain compliance).
2. The extent to which the project implements or is consistent with one or more current watershed management plans (*e.g.*, DEP basin plans) and/or watershed protection plans (*e.g.*, local Zone II land use controls, comprehensive conservation management plans), or otherwise effectively addresses a watershed priority, as determined by the Department.
3. The extent to which the project is consistent with local and regional growth and/or infrastructure plans, and promotes the rehabilitation and revitalization of

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

infrastructure, structures, sites, and areas previously developed and still suitable for economic (re)use, as provided in Executive Order 385 (Growth Planning).

4. Whether the project constitutes or is a component of a multi-community or regional approach to addressing the identified public health or drinking water quality problem.

(2) Since certain of the Project Selection Criteria in 310 CMR 45.06(1) do not apply to eligible planning and/or design projects, the Department will limit its evaluation of such projects to the relevant criteria.

(3) In establishing the calendar year priority list pursuant to 310 CMR 45.04(1), the Department may:

- (a) identify project categories and/or watersheds as funding priorities in a particular calendar year, consistent with the Project Selection Criteria in 310 CMR 45.06(1); and
- (b) modify and/or further specify the factors or point system to be used to evaluate the extent to which a project meets the Project Selection Criteria in 310 CMR 45.06(1), including any project or program priorities identified by the Department as a funding priority in a particular calendar year pursuant to 310 CMR 45.06(3) and (4).

(4) Before finally adopting any substantial modification to the Project Selection Criteria and/or the related point system, the Department will notice such modifications in the Environmental Monitor and to the regulated community and provide an opportunity for public comment for a period of not less than thirty days, including conducting a minimum of one public hearing.

45.07: Financing Criteria

(1) In general. The Trust is authorized to structure the debt service costs on loans and other forms of financial assistance for Eligible Projects that provide the financial equivalent of a loan made at an interest rate equal to two per cent. Notwithstanding the foregoing, subject to the limits on contract assistance provided in M.G.L. c. 29C, § 6, the Trust may provide additional financial assistance that is the financial equivalent of a loan made at an interest rate less than two per cent, as determined by the Trust, for Qualifying Designated Projects, as provided in 310 CMR 45.07(2).

(2) Qualifying Designated Projects. Subject to the limits on contract assistance provided in M.G.L. c. 29C, § 6, a LGU applying for financial assistance for a Qualifying Designated Project on the IUP for calendar year 2017 or later, unless otherwise authorized by the Legislature, is eligible for additional financial assistance in accordance with 310 CMR 45.07(2) that may include loans and other forms of financial assistance at the financial equivalent of a loan made at an interest rate less than two per cent or other additional subsidies such as principal forgiveness, as determined by the Trust, if the LGU demonstrates to the Department's satisfaction that it meets all of the following criteria:

- (a) the project is an eligible project described in 310 CMR 45.04(1)(g) through (1)(k), inclusive;
- (b) the project is consistent with the current priorities established by the Trust, as set forth in the Department's annual project solicitation;
- (c) the project implements Best Management Practices; and
- (d) the LGU meets the Trust's affordability criteria and is consistent with the Trust's guidelines for best management practices in water management, including, without limitation, the practice of full cost pricing, sound financial management, the use and protection of enterprise funds, the coordination of intra-municipal and inter-municipal projects involving inter-related infrastructure, the adoption of an asset management plan and a plan for leak detection.

45.078: Eligible Project Costs

(1) Costs which the Department determines are necessary for the completion of the project are eligible for financing in the loan and to receive a subsidy under the loan.

(2) Costs which the Department determines are not necessary for completion of the project are ineligible for financing in the loan.

(3) Project costs incurred by an eligible borrower prior to the date of issuance of the Department's project approval certificate are not eligible for a subsidy under the loan, except as follows:

- (a) project design, including preliminary engineering and a project evaluation report, project construction or related professional services may be approved by the Department

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

prior to the issuance of a project approval certificate as project costs eligible for subsidy if:

1. The eligible borrower has submitted a written and adequately substantiated request for approval;
2. The Department's written approval is obtained before initiation of the project and award of any loan for the project; and
3. The project is included and maintains its status on the current calendar year Intended Use Plan Project Listing.

(b) The Department's prior approval of costs in accordance with 310 CMR 45.0708(3)(a) does not constitute a commitment to approve financial assistance for any project. Instead, such costs will be considered eligible project costs only if a loan is made by the Trust for the project. Accordingly, an eligible borrower receiving the Department's prior approval of costs in accordance with 310 CMR 45.0708(3)(a) proceeds at its own risk.

(4) Costs incurred in excess of the approved project costs are not eligible for financing by the loan unless the project approval certificate and the loan are both amended to include the cost increase.

(5) As a loan recipient, an eligible borrower shall exercise its best efforts to accomplish the work program set forth in the loan within the loan amount. Whenever a loan recipient reasonably believes that its project costs will exceed or be substantially less than the approved loan amount, it must promptly notify the Department in writing. The loan recipient must submit revised cost estimates for the project to the Department as soon thereafter as practicable. Neither the Department nor the Trust is under any obligation to approve costs in excess of the amount previously approved in the project approval certificate and loan.

(6) The final eligible project costs shall be the eligible costs approved by the Department upon completion of the project, unless audited. If such project costs are audited, the final eligible costs shall be the eligible costs approved by the Department at the completion of the audit.

45.0809: Project Evaluation Report

(1) Unless otherwise determined by the Department, the planning information required for projects receiving financial assistance pursuant to 310 CMR 45.00 shall be contained in a Project Evaluation Report.

(2) The Department will determine the required scope of a Project Evaluation Report based on the nature and duration of the proposed project. Unless otherwise determined by the Department, a complete Project Evaluation Report generally must include:

- (a) A description of the proposed project;
- (b) An analysis of the cost-effectiveness of the project and the alternatives considered;
- (c) For the selected alternative, a concise description which addresses, at a minimum, the following areas:
 1. the relevant design parameters for the project;
 2. the estimated capital construction and operation and maintenance costs of the project (identifying possible federal, state, local, and other shares), and a description of the manner in which costs will be financed;
 3. the cost impacts on users of the system; and
 4. the institutional, financial, legal and management arrangements necessary for successful implementation of the project.
- (d) A public participation program that includes, at a minimum:
 1. a public informational meeting to discuss the project alternatives and their environmental impact; and
 2. a subsequent public hearing on the selected proposed project, including its environmental impact.

45.0910: Environmental Review and Federal Cross-Cutter Requirements

(1) Environmental Review Requirements. All projects approved by the Department to receive a loan from the Trust shall, at a minimum, comply with the requirements of MEPA and the regulations promulgated thereunder at 301 CMR 11.00. In addition, a public hearing shall be held on the project if the Department determines that the project is controversial, or if the Department otherwise determines that a hearing is in the public interest. The Department may also require the eligible borrower to consider project alternatives and to provide the public an opportunity to comment on such alternatives.

(2) Federal Cross-Cutter Requirements. All projects to be funded by funds directly made available by federal capitalization grants shall comply with all federal cross-cutters applicable to

the project, as determined by the Department. The Department may require any other project to comply with one or more of the federal cross-cutters deemed applicable to the project by the Department.

45.4011: Affirmative Action and M/WBE Requirements

(1) Eligible borrowers receiving financial assistance from the Trust shall comply with applicable federal and state anti-discrimination laws and requirements, including the Department's requirements in the areas of Affirmative Action in employment and ~~Minority and Women Disadvantaged~~ Business Enterprise ("~~M/W~~DBE") use in contracting.

(a) In the area of Affirmative Action, such eligible borrowers shall adopt, for use in all contracts for \$50,000 or more, an adapted version of the Commonwealth of Massachusetts' "Supplemental Equal Employment Opportunity Anti-discrimination and Affirmative Action Program." The contracts may include minority workforce percentages greater than those required for the geographical locations of the construction project as set forth in the Supplemental Program.

(b) In the area of ~~M/W~~DBE utilization, eligible borrowers shall make positive efforts to use ~~M/W~~DBEs for use in all construction, service and supply subagreements for the project financed by the loan.

1. Such efforts should achieve the applicable federal and/or state goals established for ~~MD~~BE participation ~~and WBE participation~~, but, at a minimum, should allow ~~M/W~~DBEs the maximum feasible opportunity to compete for project subagreements.

(2)- An eligible borrower receiving a loan from the Trust shall promptly notify the Department in writing when it has good reason to believe that its positive efforts to use ~~M/W~~DBEs in the subagreements for the project will not achieve one or both of the applicable ~~M/W~~DBE utilization goals.

45.4112: Project Approval and Regulation

(1) Application.

(a) An eligible borrower whose project is on the ~~Intended Use Plan~~IUP Project Listing portion of the calendar year priority list must first apply to the Department to receive a loan from the Trust to finance costs of the project. The eligible borrower must file a complete application with the Department containing the following information and documentation:

1. General Information which must include evidence of a funding authorization or commitment by the eligible borrower sufficient to cover the project cost, and, as applicable, certification of the authority of the eligible borrower to file the application.

2. Financial Information pertinent to the Trust's evaluation of the eligible borrower's ability to repay the loan.

3. Project Information which demonstrates to the Department's satisfaction that the project is sufficiently advanced in its implementation, including, as applicable:

- a. approvable plans and specifications for the project;
- b. evidence that the eligible borrower has, at a minimum, filed applications for any permits or environmental reviews applicable to the project; and
- c. a project schedule that demonstrates to the Department's satisfaction that the project will commence no later than six months from the expected date of issuance of a project approval certificate, assuming the Department determines that the project is approvable.

4. Supplemental Information such as title to the project site or evidence of some other appropriate property interest in the project site, any necessary intermunicipal agreements, documentation related to the user charge system, *etc.*

5. Applicant Certification as to the completeness of the application in accordance with the Department's application form and requirements, and as to the accuracy and completeness of the information provided by the eligible borrower in its application.

(b) The Department may deny any application which it determines to be incomplete. Prior to taking final action on an application, the Department may request the eligible borrower to clarify and/or supplement information contained in its application, or to attend an informal conference(s) with the Department to discuss the application.

(2) Project Approval Certificate.

(a) The Department's approval of an applicant's project shall be contained in a Project Approval Certificate issued to the Trust. The Department's issuance of a Project

Approval Certificate is a necessary prior condition to the award of a loan by the Trust to finance the costs of a project.

(b) The Department shall not approve a project for a loan from the Trust unless the eligible borrower adopts a user charge system which is designed to provide adequate revenues required for operation and maintenance, including replacement, of the project, and is based on a flat or on an ascending unit rate per volume. This requirement does not apply to any project for which a user charge system is inapplicable, as determined by the Department.

(c) In addition to approving the project, the Project Approval Certificate shall certify those costs of the project determined by the Department to be eligible for assistance from a loan, and those costs determined to be eligible for a subsidy under the loan. The Project Approval Certificate shall also identify the level of subsidy applicable to the project in accordance with M.G.L. c. 29C and, as applicable, any additional subsidy applicable to the project authorized by special law. Subsidy is expressed as a grant equivalency percentage in the Project Approval Certificate.

(d) The Project Approval Certificate may also contain such other conditions and limitations as the Department deems necessary to ensure compliance by an eligible borrower with 310 CMR 45.00 and with all other federal and state statutes and regulations applicable to the construction and operation of the project. Such conditions shall include, but are not limited to, a project completion schedule which shall require the eligible borrower to initiate the project, as determined by the Department, no later than six months from the date of the Department's issuance of the Project Approval Certificate.

(e) The Department shall issue the Project Approval Certificate to the Trust for its action and concurrently forward a copy of such certificate to the eligible borrower. The Trust shall thereafter enter into a loan commitment with an eligible borrower consistent with the terms of the Project Approval Certificate. Following entry into a binding loan commitment, the Trust shall prepare and deliver a loan agreement for execution by the eligible borrower, consistent with the terms of the Project Approval Certificate as incorporated into the Department's Project Regulatory Agreement.

(3) Project Regulatory Agreement.

(a) On or prior to the date of a loan from the Trust for a project approved by the Department, the eligible borrower and the Department shall execute and deliver to the Trust a Project Regulatory Agreement relating to the Department's regulation and supervision of the project in accordance with 310 CMR 45.00. The Project Regulatory Agreement shall be in form and substance satisfactory to the Department. The Project Regulatory Agreement shall be incorporated by reference in the Trust loan agreement and failure by the ~~local governmental unit~~ LGU or public water system to comply with the Project Regulatory Agreement shall constitute an event of default under the loan agreement.

(b) The Project Regulatory Agreement shall contain provisions consistent with the Project Approval Certificate. In addition to incorporating pertinent conditions in the Project Approval Certificate, the Project Regulatory Agreement may also contain such other conditions and limitations as the Department deems necessary for its regulation and supervision of the project in accordance with 310 CMR 45.00, including but not limited to:

1. the schedule for disbursement of loan proceeds;
2. the payment requisition requirements and procedures;
3. the requirements and procedures for the Department's audit of payment requisitions;
4. covenants by the eligible borrower related to the project, including a covenant to comply with all federal and state statutes and regulations applicable to the eligible borrower's construction and operation of the project;
5. the measures available to the Department to remedy a default by the eligible borrower under the Project Regulatory Agreement;
6. any requirements regarding certification of a project's performance in accordance with the Department's approval; and
7. compliance with the Department's guidance on the use of and requirements for professional subagreements.

REGULATORY AUTHORITY