

Disadvantaged Communities, Water Justice & The Promise of The Infrastructure Investment and Jobs Act

*Misbah Husain**
*Melissa K. Scanlan***

- I. INTRODUCTION 1514
- II. WATER INFRASTRUCTURE NEED..... 1515
- III. DRINKING WATER..... 1518
 - A. The Infrastructure Law Prioritizes Disadvantaged Communities for Funding Through the Drinking Water State Revolving Fund Program 1518
 - B. The Infrastructure Law Expands Funding Opportunities to Disadvantaged Communities with Compliance Problems..... 1519
- IV. CLEAN WATER 1520
 - A. The Infrastructure Law Increases Flexibility to Provide Subsidies Through the Clean Water State Revolving Funds and its Clean Water Infrastructure Risk and Resiliency Program 1520
- V. DEFINING “DISADVANTAGED COMMUNITIES” 1521
 - A. The Infrastructure Law Leaves It to States, Tribes, and Territories to Establish Criteria for Identifying Disadvantaged Communities 1521
 - B. EPA Guidance & Tools Offer Insight to Define Disadvantaged Communities 1522
 - C. Each Jurisdiction Must Submit an Annual Intended Use Plan to the Federal Government to Participate in the State Revolving Fund Program 1524

* Misbah Husain is a Water Policy Specialist at the Center for Water Policy, University of Wisconsin-Milwaukee School of Freshwater Sciences.

** Melissa K. Scanlan is the Lynde B. Uihlein Endowed Chair in Water Policy, Director of the Center for Water Policy, Professor, University of Wisconsin-Milwaukee School of Freshwater Sciences, Affiliate Faculty UW Law School.

The authors thank Sherif Halaweish for research support.

1514	<i>SETON HALL LAW REVIEW</i>	[Vol. 52:1513
	1. Wisconsin’s Latest IUPs Outline Affordability Criteria and Ranking Systems for Principal Forgiveness	1525
VI.	TITLE VI OF THE CIVIL RIGHTS ACT & ENVIRONMENTAL JUSTICE	1528
	A. Title VI Protections Apply to Water Infrastructure Funding	1528
VII.	CONCLUSION	1530

I. INTRODUCTION

On January 27, 2021, President Biden issued Executive Order 14,008, known for its establishment of the “Justice40 Initiative,” a government-wide effort to channel 40 percent of the overall benefits of federal investments to “disadvantaged communities.”¹ This order acknowledges the historic over-burdening of disadvantaged communities nationwide, and outlines a plan to correct it in consultation with members of these communities.² In keeping with the spirit of this initiative, the 2021 Infrastructure Investment and Jobs Act (“the Infrastructure Law”) prioritizes disadvantaged communities when allocating more than \$50 billion over five years to finance water infrastructure projects nationwide—the single largest amount ever invested for this purpose.³

The Infrastructure Law aims to bolster the nation’s water infrastructure by reauthorizing funding for existing programs such as the State Revolving Fund (“SRF”) program, directing the creation of new grant programs for waste and storm water infrastructure, and adjusting program requirements to expand opportunities to further support disadvantaged communities.⁴ Pursuant to this law, the federal Environmental Protection Agency (“EPA”) will disburse nearly \$43.5 billion to states, tribes, and territories to support their SRF programs.⁵ Over the next five years, the EPA will distribute these funds to support

¹ Exec. Order No. 14,008, 86 Fed Reg. 7619, 7631–32 (Jan. 27, 2021).

² *Id.*

³ U.S. ENV’T PROT. AGENCY, BIPARTISAN INFRASTRUCTURE LAW: A HISTORIC INVESTMENT IN WATER 1 (2021) [hereinafter HISTORIC INVESTMENT], <https://www.epa.gov/system/files/documents/2021-11/e-ow-bid-fact-sheet-final.508.pdf>.

⁴ *See id.*; ELENA H. HUMPHREYS & JONATHAN L. RAMSEUR, CONG. RSCH. SERV., R46892, INFRASTRUCTURE INVESTMENT AND JOBS ACT (IIJA): DRINKING WATER AND WASTEWATER INFRASTRUCTURE 13 (Jan. 4, 2022), <https://crsreports.congress.gov/product/pdf/R/R46892>.

⁵ U.S. ENV’T PROT. AGENCY, BIPARTISAN INFRASTRUCTURE LAW: ENVIRONMENTAL PROTECTION AGENCY 2022 STATE REVOLVING FUND (SRF) GRANTS TO STATES, TRIBES, AND TERRITORIES BY PROGRAM 2 (2021) [hereinafter SRF ESTIMATED ALLOTMENTS], <https://www.epa.gov/system/files/documents/2021-12/fy-2022-bil-srfs-allotment-summary-508.pdf>.

2022]

DISADVANTAGED COMMUNITIES

1515

clean water and safe drinking water programs.⁶ The Infrastructure Law requires 49 percent of “supplemental funding” for clean and drinking water infrastructure be given as forgivable loans and grants to disadvantaged communities.⁷ The EPA will be working with states, tribes, and territories to evaluate and revise their affordability criteria and definitions of “disadvantaged communities,” as needed.⁸

Although these reforms offer golden opportunities to promote environmental justice across the country, a key question remains: Which communities are considered “disadvantaged” and are thus eligible for funding priority?⁹ This Article contextualizes this discussion through an overview of environmental justice concerns related to water infrastructure, outlines the ways that the Infrastructure Law supports the development of water infrastructure, and discusses the interpretation of the term “disadvantaged communities” as utilized in the Infrastructure Law to inform how funding might be prioritized for water infrastructure programs. Lastly, it explains how Title VI of the Civil Rights Act may be used by disadvantaged communities to secure additional funding as the Infrastructure Law is implemented. Under Title VI, the EPA is responsible for ensuring that federal funds are “not being used to subsidize discrimination based on race, color, or national origin.”¹⁰

II. WATER INFRASTRUCTURE NEED

The Justice40 Initiative is the latest government policy to focus on the plight of communities that have been denied opportunities, support, and agency to avoid having to shoulder the disproportionate burden of environmental harms. Such a policy is long overdue, arriving over twenty-five years after President Clinton’s 1994 executive order directed federal agencies to develop a strategy for securing environmental justice.¹¹ Since that time, advocates and members of affected communities—such as the Standing Rock Sioux Tribe; residents

⁶ *See id.*

⁷ U.S. ENV’T PROT. AGENCY, FACT SHEET: BIPARTISAN INFRASTRUCTURE LAW: STATE REVOLVING FUNDS IMPLEMENTATION MEMORANDUM 1 (2022) [hereinafter FACT SHEET: STATE REVOLVING FUNDS], <https://www.epa.gov/system/files/documents/2022-03/bil-srf-memo-fact-sheet-final.pdf>. The EPA has \$11.713 billion for supplemental clean water funding, \$11.713 billion for supplemental drinking water funding, and \$15 billion for lead service line replacement, all of which require 49 percent allocated to disadvantaged communities. *Id.* at 3.

⁸ *Id.* at 1.

⁹ 42 U.S.C § 300j-12(d); *see also* SRF ESTIMATED ALLOTMENTS, *supra* note 5.

¹⁰ FACT SHEET: STATE REVOLVING FUNDS, *supra* note 7, at 3.

¹¹ Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).

of Flint, Michigan; and many more—have ceaselessly struggled for justice in securing clean water.¹² All share a common objective: to correct the historic injustices that disproportionately concentrate environmental burdens upon them and shift power and environmental benefits away.

There are multiple factors that contribute to a community being “disadvantaged” with regards to environmental justice. Such socioeconomic factors include—but are not limited to—race, poverty, language isolation, educational attainment, and geographic location.¹³ These factors can correlate with a community’s water infrastructure need. For example, in over two-thirds of states, areas with communities of color have a greater proportion of unmapped flood risk.¹⁴

According to the EPA’s assessment, U.S. water infrastructure requires over \$473 billion dollars of funding to adequately maintain its function over the twenty years from January 2015 to 2035.¹⁵ Targeted investments toward developing wastewater, storm water, and drinking water infrastructure in disadvantaged communities are vital to reducing potential damage—particularly as climate change exacerbates the water stress placed on infrastructure.¹⁶

¹² Lisa Friedman, *Standing Rock Sioux Tribe Wins a Victory in Dakota Access Pipeline Case*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/climate/dakota-access-pipeline-sioux.html>; Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html>; *We’ve Made History: Flint Water Crisis Victims to Receive \$626m Settlement*, GUARDIAN (Nov. 10, 2021, 8:00 PM), <https://www.theguardian.com/us-news/2021/nov/10/weve-made-history-flint-water-crisis-victims-to-receive-626m-settlement>.

¹³ Daniel Krewski et al., *Overview of the Reanalysis of the Harvard Six Cities Study and American Cancer Society Study of Particulate Air Pollution and Mortality*, 66 J. TOXICOLOGY & ENV’T HEALTH 1507, 1547 (2003); Lemir Teron, *Sustainably Speaking: Considering Linguistic Isolation in Citywide Sustainability Planning*, 9 SUSTAINABILITY 289, 294 (2016); Jennifer Ailshire et al., *Neighborhood Social Stressors, Fine Particulate Matter Air Pollution, and Cognitive Function Among Older U.S. Adults*, 172 SOC. SCI. & MED. 56, 58–59 (2017); Francesca Mataloni et al., *Morbidity and Mortality of People Who Live Close to Municipal Waste Landfills: A Multisite Cohort Study*, 45 INT’L J. EPIDEMIOLOGY 806, 813 (2016).

¹⁴ Christopher Flavelle et al., *New Data Reveals Hidden Flood Risk Across America*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/interactive/2020/06/29/climate/hidden-flood-risk-maps.html>.

¹⁵ OFF. OF WATER, U.S. ENV’T PROT. AGENCY, DRINKING WATER INFRASTRUCTURE NEEDS SURVEY AND ASSESSMENT: SIXTH REPORT TO CONGRESS 13 (2018), https://www.epa.gov/sites/default/files/2018-10/documents/corrected_sixth_drinking_water_infrastructure_needs_survey_and_assessment.pdf.

¹⁶ Flavelle et al., *supra* note 14.

2022]

DISADVANTAGED COMMUNITIES

1517

Prior to 1987, Congress funded the construction of municipal wastewater treatment systems through federal grant programs established under the Clean Water Act (“CWA”).¹⁷ By the mid-1980s, the Reagan administration, seeking to slash the budget, targeted these programs on the basis that their primary purpose—eliminating sewage treatment needs for most of the nation’s municipalities—had been completed.¹⁸ Irrespective of the fact that some projects for small, rural communities had not been completed, these grants were replaced by the State Water Pollution Control Revolving Loan Fund program, which is still in force today.¹⁹ Similarly, Congress established a revolving fund under the Safe Drinking Water Act (“SDWA”) to build communities’ financial capacity to comply with the growing requirements of drinking water infrastructure.²⁰ The Infrastructure Law appropriates \$43.5 billion in water infrastructure funding to these programs over the next five years.²¹

In March 2022, the EPA released a memorandum outlining how it will work with states, tribes, and territories to distribute these funds.²² The EPA highlighted that the Infrastructure Law requires 49 percent of “supplemental” funds provided for drinking water infrastructure and replacing lead pipes be given, as grants and forgivable loans, to “disadvantaged communities” or public water systems serving fewer than 25,000 people.²³ Similarly, 49 percent of supplemental funds for clean water must be given as grants and forgivable loans to communities that meet the state’s affordability criteria.²⁴ To understand what this means, the following Parts offer an overview of drinking water and clean water funding mechanisms.

¹⁷ Claudia Copeland, *Water Infrastructure Financing: History of EPA Appropriations*, in *WATER INFRASTRUCTURE ISSUES* 59, 60 (James D. Haffner & Elizabeth M. Gennady eds., 2011).

¹⁸ *Id.*

¹⁹ *Id.* at 60–61.

²⁰ *Id.* at 61–62.

²¹ See *HISTORIC INVESTMENT*, *supra* note 3.

²² Memorandum from Radhika Fox, Assistant Adm’r, U.S. Env’t Prot. Agency, to EPA Regional Water Division Directors, State SRF Program Managers, on Implementation of the Clean Water and Drinking Water State Revolving Fund Programs of the Bipartisan Infrastructure Law (Mar. 8, 2022) [hereinafter Radhika Fox Memorandum] (on file at https://www.epa.gov/system/files/documents/2022-03/combined_srf-implementation-memo_final_03.2022.pdf).

²³ *FACT SHEET: STATE REVOLVING FUNDS*, *supra* note 7, at 1.

²⁴ *Id.*

III. DRINKING WATER

A. *The Infrastructure Law Prioritizes Disadvantaged Communities for Funding Through the Drinking Water State Revolving Fund Program*

The Federal Drinking Water State Revolving Fund program (“Drinking Water Fund”) provides funding to individual states, territories, and tribes to improve drinking water infrastructure.²⁵ The Infrastructure Law makes appropriations to the Drinking Water Fund to support a variety of projects, including those related to lead reduction, emerging contaminant reduction, and promotion of drinking water infrastructure resilience.²⁶ States distribute these resources in the form of reduced interest loans or grants to municipalities, counties, or other eligible entities.²⁷ The EPA has expressed that one of its primary objectives in distributing this drinking water funding is to target resources to disadvantaged communities that have “historically struggled to access” funding.²⁸ This priority is reflected in a statute that directs the EPA administrator to give funding priority to eligible entities that “the Administrator determines, based on affordability criteria established by the State . . . to be a disadvantaged community.”²⁹

Unfortunately, even low-interest loans can pose too great a financial burden for impoverished water systems with many low-income water rate payers.³⁰ The Drinking Water Fund provides an opportunity to address this concern by requiring states to provide additional subsidization to disadvantaged communities (e.g., loan forgiveness, refinancing debt, etc.).³¹ The Infrastructure Law enhances this protection in two ways. First, it requires that the total amount of supplemental subsidization be 49 percent of the amount received from the federal government to fund the jurisdiction’s Drinking Water Fund

²⁵ See SRF ESTIMATED ALLOTMENTS, *supra* note 5.

²⁶ 42 U.S.C. § 300j-12, 19a.

²⁷ *How the Drinking Water State Revolving Fund Works*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/dwsrf/how-drinking-water-state-revolving-fund-works#tab-1> (last visited Mar. 18, 2022).

²⁸ Sample Letter from Michael S. Regan, Adm’r, U.S. Env’t Prot. Agency, to Governors (Dec. 2, 2021) (on file at <https://www.epa.gov/system/files/documents/2021-12/governors-bil-letter-final-508.pdf>).

²⁹ 42 U.S.C. § 300j-19b(b)(3).

³⁰ NAT’L ENV’T JUST. ADVISORY COUNCIL, EPA’S ROLE IN ADDRESSING THE URGENT WATER INFRASTRUCTURE NEEDS OF ENVIRONMENTAL JUSTICE COMMUNITIES 22 (2018) https://www.epa.gov/sites/default/files/2019-05/documents/nejac_white_paper_water-final-3-1-19.pdf.

³¹ 42 U.S.C. § 300j-12(d).

2022]

DISADVANTAGED COMMUNITIES

1519

that year.³² Second, it excludes low-interest or interest-free loans from contributing toward satisfying the additional subsidization requirement.³³ In other words, states must provide some form of principal forgiveness, debt restructuring, or grant to satisfy this requirement.³⁴

B. The Infrastructure Law Expands Funding Opportunities to Disadvantaged Communities with Compliance Problems

The Infrastructure Law further expands opportunities for disadvantaged communities to receive funding through various grant programs. The Assistance for Small and Disadvantaged Communities program provides grants to “underserved communities” who are served by a public water system that violates a requirement of the nation’s primary drinking water regulations.³⁵ The Infrastructure Law not only reauthorizes funding for this program, but also decreases the non-federal cost contribution requirement of the grant from 45 percent to 10 percent and allows the EPA to waive this requirement entirely.³⁶

Lastly, the Infrastructure Law expands eligibility for the State Response to Contaminants program to allow disadvantaged communities to receive funding; previously, only “underserved communities” were eligible through this program.³⁷ Federal law defines an “underserved community” as “a political subdivision of a State that [the EPA determines to have] an inadequate system for obtaining drinking water.”³⁸ This includes political subdivisions that the EPA determines do not have household drinking water services, wastewater services, or is serviced by a public water system that violates a requirement of a national primary drinking water regulation.³⁹ The difference between “underserved” communities and “disadvantaged” communities is that the federal EPA exclusively determines which communities are “underserved,” while individual states set their own affordability criteria to determine whether a community is “disadvantaged.”⁴⁰

³² Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 443, 1399-1400 (2021).

³³ 42 U.S.C § 300j-12(d).

³⁴ *Id.*

³⁵ *Id.* § 300j-19a.

³⁶ *Id.* § 300j-19a(g)-(h).

³⁷ *Id.* § 300j-19a(j)(1).

³⁸ *Id.* § 300j-19a(a)(1).

³⁹ 42 U.S.C. § 300j-19a(a)(2)(A)(B).

⁴⁰ *Id.* § 300j-12a(d)(3); *Id.* § 300j-19a(a)(1).

IV. CLEAN WATER

A. *The Infrastructure Law Increases Flexibility to Provide Subsidies Through the Clean Water State Revolving Funds and its Clean Water Infrastructure Risk and Resiliency Program*

The Clean Water State Revolving Funds pay for the construction of municipal wastewater facilities, creating green infrastructure projects, and controlling nonpoint sources of pollution.⁴¹ States utilize this funding to provide a combination of below market-rate interest loans and grants.⁴² Like with the Drinking Water Funds, states are required to provide 49 percent of the funding they receive as additional subsidization.⁴³ As before, low interest and interest-free loans cannot be utilized to satisfy this requirement.⁴⁴ Unlike with the Drinking Water Funds, the Infrastructure Law does not use the term “disadvantaged communities” when describing groups that should be eligible to receive these subsidies.⁴⁵ Instead, the federal Clean Water Act directs states to develop affordability criteria to “assist in identifying municipalities that would experience a significant hardship raising the revenue necessary to finance” eligible projects.⁴⁶

This affordability criteria is referred to and utilized similarly to the determination of “disadvantaged communities” in the sections of the Safe Drinking Water Act that the Infrastructure Law amended. For example, the Clean Water Infrastructure Risk and Resiliency program allocates funds for projects to increase the resiliency of Publicly Owned Treatment Works (“POTWs”) against natural hazards and cybersecurity threats.⁴⁷ The percentage of a project’s cost that may be covered by these grants rises from 75 to 90 percent if the project serves a community that meets the aforementioned affordability criteria.⁴⁸

Despite this, the term “disadvantaged communities” is still used in a few parts of the “Clean Water” section of the Infrastructure Law. The Infrastructure Law lists “disadvantaged communities” as one of the

⁴¹ 33 U.S.C. § 1383(c); *see also* U.S. ENV’T PROT. AGENCY, OVERVIEW OF CLEAN WATER STATE REVOLVING FUND ELIGIBILITIES 13 (2016), https://www.epa.gov/sites/default/files/2016-07/documents/overview_of_cwsrf_eligibilities_may_2016.pdf.

⁴² 33 U.S.C. § 1383(d)(1)(A).

⁴³ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 443, 1399–1400 (2021).

⁴⁴ 33 U.S.C. § 1383(i).

⁴⁵ *Id.* § 1383(i)(2)(A)(i).

⁴⁶ *Id.*

⁴⁷ 33 U.S.C. § 1302a(c).

⁴⁸ *Id.* § 1302a(e).

2022]

DISADVANTAGED COMMUNITIES

1521

eligible recipients for the “Small Publicly Owned Treatment Works Efficiency Grant Program,” a grant awarded to improve the water or energy efficiency of small POTWs.⁴⁹ The Infrastructure Law also directs the EPA to give priority to applicants for its competitive Stormwater Control Infrastructure Grants who apply to the EPA on behalf of “disadvantaged communities.”⁵⁰

V. DEFINING “DISADVANTAGED COMMUNITIES”

A. *The Infrastructure Law Leaves It to States, Tribes, and Territories to Establish Criteria for Identifying Disadvantaged Communities*

The Infrastructure Law does not introduce an explicit definition for “disadvantaged communities,” instead providing different directions to understand the term depending on whether it is used with regards to Drinking Water Funds or Clean Water Funds. With regards to Drinking Water Funds, the bill refers to Section 1452(d)(3) of the Safe Drinking Water Act, which defines “disadvantaged community” as “the service area of a public water system that meets affordability criteria established after public review and comment by the State in which the public water system is located.”⁵¹ The subchapter generally defines public water systems as follows: “system[s] for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.”⁵²

With regards to Clean Water Funds, the term “disadvantaged community” is not defined by statute. States are instead directed to establish “affordability criteria” that the state will use to identify “municipalities that would experience a significant hardship raising the revenue necessary to finance a project or activity eligible for assistance”⁵³ These affordability criteria are based on “income and unemployment data, population trends, and other data determined relevant” by the recipient states to make this determination.⁵⁴ Though income, unemployment data, and population data must be factored into

⁴⁹ *Id.* § 1302c(b).

⁵⁰ *Id.* § 1302f(c)(4)(A)(ii).

⁵¹ 42 U.S.C. § 300j-12(d)(3).

⁵² *Id.* § 300f(4)(A).

⁵³ 33 U.S.C. § 1383(i)(2)(A)(i).

⁵⁴ *Id.* § 1383(i)(2)(A)(ii).

this determination, there is no statutory requirement to assign a minimum weight to these factors.⁵⁵

B. EPA Guidance & Tools Offer Insight to Define Disadvantaged Communities

Guidance and tools from the federal EPA offer some insight on the preferred criteria defining “disadvantaged communities.” Executive Order 14,008 directs the development of a Climate and Economic Justice Screening Tool to provide transparency into and a resource for the federal EPA’s evaluation of whether specific communities are “disadvantaged.”⁵⁶ The Climate and Economic Justice Screening Tool is intended to provide a “uniform whole-of-government definition” for federal agencies to focus Justice40 investment benefits to achieve the goals of the program.⁵⁷ Consequently, the methodology and indicators utilized by the Climate and Economic Justice Screening Tool suggest the federal government’s position on the definition for disadvantaged communities.

As of March 2022, the Climate and Economic Justice Screening Tool was in its beta form and subject to change following a public comment period.⁵⁸ The tool utilizes an array of factors to assess whether a specific census-tract meets criteria to be classified as “disadvantaged,” including but not limited to poverty, Median Household Income (“MHI”), proximity to wastewater discharge, language isolation, housing cost burden, and educational attainment.⁵⁹ Race, despite widespread acknowledgement as a predictive factor for marginalization/overburdening, is notably absent from the list of screening factors.⁶⁰ The tool is limited to utilizing data with national applicability; states may find the tool useful in developing their own

⁵⁵ Radhika Fox Memorandum, *supra* note 22, at 41.

⁵⁶ Exec. Order No. 14,008, 86 C.F.R. § 7619 (2021).

⁵⁷ WHITE HOUSE, *Climate Justice and Economic Justice Screening Tool: Frequently Asked Questions* (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/CEJ-ST-QandA.pdf>.

⁵⁸ COUNCIL ON ENV’T QUALITY, *Climate and Economic Justice Screening Tool: Methodology* (2022), <https://screeningtool.geoplatform.gov/en/methodology>; Request for Information on the Climate and Economic Justice Screening Tool Beta Version, 87 Fed. Reg. 10176 (Feb. 23, 2022).

⁵⁹ COUNCIL ON ENV’T QUALITY, *supra* note 58.

⁶⁰ Associated Press, *Race Excluded as WH Rolls Out Climate Justice Screening Tool*, U.S. NEWS & WORLD REP. (Feb. 18, 2022, 4:51 PM), <https://www.usnews.com/news/politics/articles/2022-02-18/race-excluded-as-wh-rolls-out-climate-justice-screening-tool>.

mapping tools and definitions utilizing the more detailed, region-specific data accessible by state agencies.⁶¹

In addition to the Climate and Economic Justice Screening Tool, the EPA's Division on Water, in March 2022, issued a memorandum explaining its position on identifying disadvantaged communities for water infrastructure programs.⁶² EPA "strongly encourage[d]" states, tribes, and territories to go beyond the minimum factors for affordability criteria that are required by statute: income, unemployment, and population data.⁶³

A common metric used to categorize communities is MHI.⁶⁴ For example, a state might compare the MHI of a target community to some threshold percentage of the statewide average MHI, classifying as "disadvantaged" those communities whose MHI falls below the percentage.⁶⁵ States may elect to utilize different criteria, such as the ratio of a household water user's rate charge to their MHI.⁶⁶ The National Environmental Justice Advisory Council, an advisory committee to the EPA, recommends adopting criteria based on more than MHI, as this metric alone fails to account for masked costs that may burden a community.⁶⁷ For example, a "working poor" family may not qualify for income-based assistance but still struggle to meet their basic needs.⁶⁸ In addition to MHI and household user rate, states have

⁶¹ WHITE HOUSE, *supra* note 57.

⁶² Radhika Fox Memorandum, *supra* note 22, at 40.

⁶³ *Id.*

⁶⁴ NAT'L ENV'T JUST. ADVISORY COUNCIL, *supra* note 30, at 28.

⁶⁵ See KATY HANSEN ET AL., ENV'T POL'Y INNOVATION CTR. & UNIV. OF MICH. SCH. FOR ENV'T & SUSTAINABILITY, DRINKING WATER EQUITY: ANALYSIS AND RECOMMENDATIONS FOR THE ALLOCATION OF THE STATE REVOLVING FUNDS 28–29 (2021), https://static1.squarespace.com/static/611cc20b78b5f677dad664ab/t/614ce18c71125612978901b5/1632428438124/SRF_s_Drinking-Water-Analysis.pdf.

⁶⁶ U.S. ENV'T PROT. AGENCY, *The Drinking Water State Revolving Fund Program: Case Studies in Implementation III. Disadvantaged Communities* (Aug. 2000), <https://nepis.epa.gov/Exe/ZyNET.exe/901V0700.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2000+Thru+2005&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C00thru05%5CTxt%5C00000011%5C901V0700.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL>.

⁶⁷ NAT'L ENV'T JUST. ADVISORY COUNCIL, *supra* note 30, at 28.

⁶⁸ *Id.* at 28–29.

incorporated other metrics into their affordability criteria, such as population size or outstanding debt, but not race or ethnicity.⁶⁹

In the EPA's March 2022 Memorandum, it described the Infrastructure Law as offering a "unique opportunity" to direct water infrastructure funding to communities "that have too often been left behind – from rural towns to struggling cities."⁷⁰ The EPA indicated it would be working with states, tribes, and territories to develop affordability criteria and definitions of disadvantaged communities, consistent with Title VI of the Civil Rights Act of 1964.⁷¹ Per the EPA's interpretation of federal law, states have the discretion to review their criteria to allow Drinking Water and Clean Water Funds to be used for disadvantaged "neighborhoods with affordability concerns within larger communities."⁷² This allows for larger urban areas to carve out subsets within their service areas that have particular needs for greater subsidization in order to benefit from water infrastructure improvements.

C. Each Jurisdiction Must Submit an Annual Intended Use Plan to the Federal Government to Participate in the State Revolving Fund Program

Each state, tribe, or territory participating in the revolving fund program must submit an annual Intended Use Plan that explains their priority system and their short and long term goals for the program.⁷³ For the state's Drinking Water Fund, the Intended Use Plan must also explain the state's affordability criteria to define "disadvantaged communities."⁷⁴ EPA regulations explain that the agency intends to extend states a great degree of flexibility in choosing how to implement the State Revolving Funds.⁷⁵ The EPA's March 2022 Memorandum provides guidance to states developing their affordability criteria.⁷⁶ The public has an opportunity to comment on the definitions when the state, tribe, or territory releases them in their Intended Use Plans, which the EPA encourages all of them update to ensure they reflect current issues

⁶⁹ HANSEN ET AL., *supra* note 65.

⁷⁰ Radhika Fox Memorandum, *supra* note 22, at 25.

⁷¹ *Id.* at 25–26.

⁷² *Id.* at 26.

⁷³ 40 C.F.R. § 35.3555(c) (2022).

⁷⁴ *Id.* § 35.3555(c)(7).

⁷⁵ *Id.* § 35.3500(c).

⁷⁶ U.S. ENV'T PROT. AGENCY, DRINKING WATER STATE REVOLVING FUND: PROGRAM OPERATIONS MANUAL: PROVISIONAL EDITION (2006), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockkey=P1007ZKN.txt>; *see also* Radhika Fox Memorandum, *supra* note 22, at 26.

2022]

DISADVANTAGED COMMUNITIES

1525

within each jurisdiction.⁷⁷ The EPA may prescribe corrective action or suspend payments in the event that it determines that the recipient state has not complied with the statute or failed to manage the Drinking Water Funds in a “financially sound manner.”⁷⁸

1. Wisconsin’s Latest IUPs Outline Affordability Criteria and Ranking Systems for Principal Forgiveness

Here we show how one state has implemented the concepts prior to the Infrastructure Law. Wisconsin’s State Revolving Fund program offers an opportunity to understand how a state’s unique criteria for “disadvantaged communities” could affect its citizens. In 2022, the EPA will provide \$142.7 million to Wisconsin to fund its State Revolving Fund program.⁷⁹ Consistent with what was outlined above for the nation, Wisconsin implements this through two separate programs: the Clean Water Fund Program and Safe Drinking Water Loan Program.⁸⁰ These two programs are financed through a combination of federal and state funding.⁸¹ Wisconsin has released their FY2021 Intended Use Plans for these programs, which detail their goals, sources and uses of funding, and their interest structure for program loans.⁸²

Wisconsin’s Safe Drinking Water Intended Use Plan defines “disadvantaged communities” as those with a population of less than 10,000 and MHI below or equal to 80 percent of the statewide MHI.⁸³ The Wisconsin Department of Natural Resources (“WDNR”) establishes these financial eligibility criteria through rulemaking, though the specific interest rates for loans issued through the Safe Drinking Water

⁷⁷ Radhika Fox Memorandum, *supra* note 22, at 26.

⁷⁸ 40 C.F.R. § 35.3585(a) (2022).

⁷⁹ Letter from Michael Regan, Adm’r, Env’t Prot. Agency, to Wisconsin Governor Tony Evers (Dec. 2, 2021) <https://www.epa.gov/system/files/documents/2021-12/governors-bil-letter-final-508.pdf>.

⁸⁰ WIS. DEP’T NAT. RES., *Environmental Loans Program* (Dec. 2021), <https://dnr.wi.gov/files/PDF/pubs/cf/CF0037.pdf>.

⁸¹ Eric Helper, *Environmental Improvement Fund*, WIS. LEGIS. FISCAL BUREAU (Jan. 2021), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2021/0069_environmental_improvement_fund_informational_paper_69.pdf.

⁸² WIS. DEP’T NAT. RES., *State of Wisconsin Clean Water Fund Program State Revolving Fund Intended Use Plan for EPA FFY 2021 Capitalization Grant for Funding During State Fiscal Year 2022* (Jan. 2022) [hereinafter *Wisconsin Clean Water Fund*], https://dnr.wi.gov/aid/documents/EIF/news/CWFP_SF2022_FINAL_IUP.pdf.

⁸³ WIS. DEP’T NAT. RES., *State of Wisconsin Safe Drinking Water Loan Program Intended Use Plan for FFY 2021 Funds for the SFY 2022 Funding Cycle 14* (Sept. 2021) [hereinafter *Wisconsin Safe Drinking Water*], https://dnr.wi.gov/Aid/documents/EIF/news/SDWLP_SF2022_IUP.pdf.

Loan Program are set by statute.⁸⁴ Communities meeting these qualifications are eligible to receive loans at 33 percent of the state's market loan interest rate as well as principal forgiveness.⁸⁵ Communities that do not meet these qualifications may still apply for funding but are ineligible for principal forgiveness and only eligible for loans at 55 percent of the state's market loan interest rate.⁸⁶ Thus, the WDNR could update its rules for financial eligibility for Safe Drinking Water Funds to reflect broader factors of disadvantaged communities.

Statute further provides that the purpose of the Safe Drinking Water Loan Program is to serve "local government units," defined as a "city, village, town, county, town sanitary district, public inland lake protection and rehabilitation district, joint local water authority . . . or municipal water district."⁸⁷ But the Wisconsin Joint Committee on Finance may approve an interest rate change upon request from both the WDNR and Wisconsin Department of Administration.⁸⁸ Qualifying communities are assigned a priority score based on their population size and MHI, with higher scores assigned for smaller populations and lower MHI.⁸⁹ The score range for an eligible community dictates the percentage of principal forgiveness they will be eligible to receive.⁹⁰

Wisconsin's Clean Water Intended Use Plan offers slightly different affordability criteria. Similar to the Safe Drinking Water Loan program, "municipalities" with a population of less than 10,000 and MHI below or equal to 80 percent of the statewide MHI are eligible to receive loans at 33 percent of the state's market loan interest rate.⁹¹ In addition, "municipalities" with a population of less than 1,000 and an MHI below or equal to 65 percent of the statewide MHI are eligible to receive interest-free loans.⁹² Wisconsin statute explicitly prescribes loan interest rates for the Clean Water Fund program, and defines a "municipality" as any "city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district."⁹³

⁸⁴ Wis. Stat. § 281.61(11)(a) (2022); WIS. ADMIN. CODE NR § 166.13(1) (2022).

⁸⁵ *Wisconsin Safe Drinking Water*, *supra* note 83, at 14.

⁸⁶ *Id.*

⁸⁷ Wis. Stat. §§ 281.61(2); 281.61(1)(am) (2022).

⁸⁸ Wis. Stat. §§ 13.101(11); 281.611(11)(b) (2022).

⁸⁹ *Wisconsin Safe Drinking Water*, *supra* note 83, at 14–15.

⁹⁰ *Id.*

⁹¹ *Wisconsin Clean Water Fund*, *supra* note 82, at 4; Wis. Stat. § 281.58(12)(a) (2022);

⁹² *Wisconsin Clean Water Fund*, *supra* note 82, at 4.

⁹³ Wis. Stat. §§ 281.58(12)(a); 281.01 (2022).

2022]

DISADVANTAGED COMMUNITIES

1527

The WDNR, however, establishes criteria through rulemaking for eligibility to receive “financial assistance” through the Clean Water Fund program.⁹⁴ “Financial assistance” is defined by regulation to include grants and principal forgiveness in addition to interest rate subsidies.⁹⁵ Principal forgiveness for this program is based on a scoring system utilizing similar criteria to the Safe Drinking Water program, with more points assigned as population and MHI decrease.⁹⁶ Additional criteria are also considered in the priority score calculation, such as whether a community is projected to lose 10 percent or more of its population over twenty years, or whether the county’s unemployment rate is greater than the entire state’s.⁹⁷

Affordability criteria for both the Drinking and Clean Water funds incorporate a population limit, thus barring communities in a significant proportion of Wisconsin’s municipalities from receiving additional subsidization through its State Revolving Fund program. Cities like Milwaukee and Racine, Wisconsin, contain the lion’s share of the state’s racial diversity,⁹⁸ and many communities within them exhibit several factors that are understood to contribute to environmental injustice.⁹⁹ In fact, approximately 45 percent of the census tracts in Milwaukee county and 22 percent of the census tracts in Racine County are identified as “disadvantaged” using the aforementioned Climate and Economic Justice Screening Tool.¹⁰⁰ Despite this, the affordability criteria’s population cap prevents racial minority communities and low-income communities within these larger cities from receiving the maximum amount of financial assistance through the State Revolving Fund.¹⁰¹

⁹⁴ Wis. Stat. § 281.58(7)(a) (2022).

⁹⁵ WIS. ADMIN. CODE NR § 162.003(28) (2022).

⁹⁶ *Wisconsin Clean Water Fund*, *supra* note 82, at 3–4, 9.

⁹⁷ *Id.* at 9–10.

⁹⁸ U.S. CENSUS BUREAU, *Wisconsin Population Increased 3.6% Since 2010* (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/wisconsin-population-change-between-census-decade.html>.

⁹⁹ See COUNCIL ON ENV’T QUALITY, *Climate and Economic Justice Screening Tool Beta* (last updated Feb. 18, 2022), <https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5>; see also COUNCIL ON ENV’T QUALITY, *supra* note 58.

¹⁰⁰ See sources cited *supra* note 99. Calculations were made utilizing the dataset for the Climate and Economic Justice Screening Tool. This tool identifies a census tract as “disadvantaged” if it is above a defined threshold for at least one environmental indicator and socioeconomic indicator such as proximity to wastewater discharge or low income.

¹⁰¹ See U.S. CENSUS BUREAU, *QuickFacts: Milwaukee City, Wisconsin; Racine City, Wisconsin* (Apr. 1, 2020), <https://www.census.gov/quickfacts/fact/table/milwaukee>

However, in EPA's March 2022 Memorandum, the EPA is encouraging states to revisit these definitions and will allow carve outs for disadvantaged neighborhoods within larger population centers, which offers a new opportunity for cities like Milwaukee and Racine, among others.¹⁰² The EPA interprets the Clean Water Act as "specifically" allowing "additional subsidization to communities that do not meet a state's affordability criteria," but where a "residential user rate class . . . will experience a significant hardship . . ."¹⁰³ In fact, the "EPA expects states to evaluate their affordability criteria to determine whether it can be crafted broadly to include neighborhoods with affordability concerns within larger communities."¹⁰⁴ Similarly, the EPA interprets the Safe Drinking Water Act as allowing states to define "disadvantaged community" to include a sub-set of the service area.¹⁰⁵ Since the WDNR sets affordability criteria for the Clean Water Funds by administrative rule, it could revise affordability criteria for these programs to evaluate applicants' eligibility based on population size or MHI at the census tract level, as opposed to the city level.¹⁰⁶ The WDNR may also add or modify priority scoring criteria in the annual Intended Use Plan, which it puts out for public comment and submits to the EPA.¹⁰⁷ Thus, the WDNR could update the criteria to allow urban neighborhoods with high concentrations of poverty, among other factors, to obtain principle forgiveness and favorable loan rates.

VI. TITLE VI OF THE CIVIL RIGHTS ACT & ENVIRONMENTAL JUSTICE

A. *Title VI Protections Apply to Water Infrastructure Funding*

Title VI of the Civil Rights Act ("Title VI") prohibits any recipient of federal funding from discriminating on the basis of race, color, or national origin in the delivery of services or benefits.¹⁰⁸ The EPA has affirmed its commitment to "fully enforce civil rights" in recent guidance and cited Title VI specifically, underscoring the importance of understanding how this legislation intersects with the Infrastructure

citywisconsin,racinecitywisconsin/POP010220; see also *Wisconsin Clean Water Fund*, *supra* note 82.

¹⁰² Radhika Fox Memorandum, *supra* note 22, at 26.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 26–27.

¹⁰⁶ Wis. Stat. § 281.61(11)(a) (2022).

¹⁰⁷ WIS. ADMIN. CODE NR § 162.50(5) (2022); *Id.* § 166.23(7).

¹⁰⁸ U.S. DEP'T OF JUST., C.R. DIV., TITLE VI LEGAL MANUAL (2021) [hereinafter TITLE VI LEGAL MANUAL], <https://www.justice.gov/crt/book/file/1364106/download>.

2022]

DISADVANTAGED COMMUNITIES

1529

Law.¹⁰⁹ States like Wisconsin may expect to see an increase in the number of Title VI agency complaints and actions being initiated in the aftermath of the Infrastructure Law's enactment.

Title VI prohibitions extend to any program or activity receiving federal funding.¹¹⁰ State agencies administering Revolving Loan Fund Programs that are funded, even in part, by federal dollars must take steps to ensure that their activities/programs do not discriminate based on race, color, or national origin.¹¹¹ Although a given community may be disadvantaged through factors beyond race, color, or national origin, Title VI strictly applies only to discrimination on the basis of these three.¹¹²

Actions under Title VI may be brought by individuals, the federal funding agency, or the U.S. Department of Justice.¹¹³ But individuals may only bring private suit in situations where they allege "intentional discrimination."¹¹⁴ By contrast, federal agencies may establish regulations outlining their procedures for receiving and investigating complaints that may have a "disparate impact."¹¹⁵ The EPA's Office of Civil Rights is the division that processes Title VI complaints.¹¹⁶ Though historically this process has been criticized as anemic, the current EPA administration has reaffirmed its intention to prioritize the investigation and prosecution of viable Title VI claims.¹¹⁷

The Infrastructure Law's water infrastructure programs are subject to Title VI compliance. As outlined earlier, the Infrastructure Law directs the EPA to deliver support in the form of capitalization grants to states and direct grants to applicants.¹¹⁸ Should the federal EPA's commitment to effectively enforce Title VI ring true, it may offer a viable strategy for advocates of disadvantaged communities should states refrain from reforming their water infrastructure affordability criteria to adequately target those most in need.

¹⁰⁹ Radhika Fox Memorandum, *supra* note 22, at 7.

¹¹⁰ U.S. ENV'T PROT. AGENCY, *Title VI and Environmental Justice* (Feb. 22, 2022), <https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice#titlevi>.

¹¹¹ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-2000d-7.

¹¹² *Id.*

¹¹³ See TITLE VI LEGAL MANUAL, *supra* note 108, at 1; *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)).

¹¹⁴ *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001).

¹¹⁵ *Id.* at 281.

¹¹⁶ 40 C.F.R. § 7.20 (2022).

¹¹⁷ Radhika Fox Memorandum, *supra* note 22, at 7.

¹¹⁸ 42 U.S.C. § 300j-12; 33 U.S.C. § 1383.

VII. CONCLUSION

Though the Infrastructure Law is filled with extensive reference to disadvantaged communities, it does not clearly define the term. States, tribes, and territories may independently develop their own definitions when securing funding for water infrastructure, with opportunity for the EPA and the public to review their methodology submitted in their annual Intended Use Plans. The EPA's memorandum to guide spending under the Infrastructure Law indicates the EPA will be working with recipients of funds to update their definitions of disadvantaged communities, so the funds reach their intended goal of bringing clean water to all communities. The Infrastructure Law significantly expands the ability of states, tribes, and territories to provide subsidies for disadvantaged communities. The question of which projects will be prioritized will likely be highly dependent on the individual affordability criteria set by each jurisdiction, and public oversight of this process will be critical to ensure it complies with Title VI of the Civil Rights Act and meets the goals of the Infrastructure Law.