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- 1) Heading of the Part: Procedures for Issuing Loans from the Water Pollution Control Loan Program
- 2) Code Citation: 35 Ill. Adm. Code 365
- 3)

<u>Section Numbers</u> :	<u>Proposed Actions</u> :
365.110	Amendment
365.210	Amendment
365.220	Amendment
365.240	Amendment
365.350	Amendment
365.620	Amendment
- 4) Statutory Authority: Implementing and authorized by 19.1 through 19.9 of the Environmental Protection Act [415 ILCS 5/19.1 through 19.9].
- 5) A Complete Description of the Subjects and Issues Involved: The Agency proposes to make the following changes: Amend the language in Sections 365.210, 365.220, and 365.240 to allow 30-year loans to all loan recipients, in alignment with the current standard under the Federal Water Pollution Control Act. Add the definition of the Build America Buy America Act (BABA Act) to Section 365.110 and BABA Act language to Section 365.350 and 365.620 to clarify that loan applicants will need to comply with the requirements of the BABA Act, as applicable.
- 6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None
- 7) Will this proposed rulemaking replace an emergency rule currently in effect? No
- 8) Does this rulemaking contain an automatic repeal date? No
- 9) Does this proposed rule contain incorporations by reference? No
- 10) Are there any other proposed rulemakings pending on this Part? No
- 11) Statement of Statewide Policy Objectives: This rulemaking will not create or expand a State mandate under the State Mandates Act [30 ILCS 805].

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- 12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to submit comments on the proposed rules may submit them in writing by no later than 45 days after publication of this Notice to:
- Stephanie Flowers
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P. O. Box 19276
Springfield, Illinois 62794-9276
- Phone: (217) 782-5544
Email: stephanie.flowers@illinois.gov
- Rebecca Strauss
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P. O. Box 19276
Springfield, Illinois 62794-9276
- Phone: (217) 557-1451
Email: rebecca.strauss@illinois.gov
- 13) Initial Regulatory Flexibility Analysis:
- A) Types of small businesses, small municipalities and not for profit corporations affected: This rulemaking may affect small businesses, small municipalities and not for profit corporations that seek to fund water improvement projects in that it may be easier for them to afford.
- B) Reporting, bookkeeping or other procedures required for compliance: None
- C) Types of professional skills necessary for compliance: None
- 14) Small Business Impact Analysis: This rulemaking may affect small businesses, small municipalities and not for profit corporations that seek to fund water improvement projects in that it may be easier for them to afford.

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- A) Types of businesses subject to the proposed rule:
- 22 Utilities
 - 23 Construction
- B) Categories that the agency reasonably believes the rulemaking will impact, including:
- ii. regulatory requirements
 - iii. record keeping
- 15) Regulatory Agenda on which this rulemaking was summarized: July 2023

The full text of the Proposed Amendments begins on the next page:

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TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE C: WATER POLLUTION
CHAPTER II: ENVIRONMENTAL PROTECTION AGENCY

PART 365
PROCEDURES FOR ISSUING LOANS FROM THE WATER
POLLUTION CONTROL LOAN PROGRAM

SUBPART A: INTRODUCTION

Section	
365.105	Purpose
365.110	Definitions
365.120	Clean Water Act Requirements
365.130	Projects and Activities Eligible for Assistance
365.140	Uses of the Water Pollution Control Loan Program
365.150	Other Federal Requirements (Repealed)
365.160	Application Process
365.170	Waiver of Procedures

SUBPART B: FINANCING TERMS

Section	
365.210	Fixed Loan Rate
365.220	Loan Repayment Period
365.240	Restructuring
365.250	Additional Subsidization
365.260	Limitations on Loan Assistance

SUBPART C: LOAN APPLICATION PROCESS

Section	
365.310	Funding Nomination Form
365.320	Project Plan
365.330	State Environmental Review
365.340	Project Priority List
365.345	Loan Priority Score
365.350	Loan Application and Other Documentation
365.355	Letter of Commitment

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SUBPART D: LOAN ISSUANCE, AUDITING, AND RECORDKEEPING

Section

365.410	Loan Issuance
365.420	Post-Loan Issuance Construction Contract Requirements
365.430	Loan Eligible Costs
365.440	Disbursement and Use of Loan Funds
365.450	Initiation of Loan Repayment
365.460	Loan Closing and Issuance of Final Loan Amendment
365.470	Ongoing Auditing and Monitoring of Financial Capability

SUBPART E: DELINQUENT LOAN REPAYMENTS AND NONCOMPLIANCE

Section

365.510	Delinquent Loan Repayments
365.520	Noncompliance with Loan Procedures
365.530	Stop-Work Order
365.540	Termination

SUBPART F: REQUIREMENTS APPLICABLE TO SUBAGREEMENTS

Section

365.610	Requirements for Subagreements
365.620	Construction Contracts
365.630	Contracts for Personal and Professional Services
365.640	Compliance with Procurement Requirements for Construction Contracts
365.650	Disputes
365.660	Indemnity
365.670	Covenant Against Contingent Fees

AUTHORITY: Implementing and authorized by Sections 19.1 through 19.9 of the Environmental Protection Act [415 ILCS 5].

SOURCE: Adopted at 13 Ill. Reg. 7351, effective May 1, 1989; amended at 16 Ill. Reg. 15073, effective September 21, 1992; recodified at 19 Ill. Reg. 11450, effective August 11, 1995; amended at 20 Ill. Reg. 788, effective January 1, 1996; amended at 30 Ill. Reg. 15590, effective September 18, 2006; emergency amendment at 33 Ill. Reg. 8546, effective June 2, 2009, for a maximum of 150 days; amended at 33 Ill. Reg. 15450, effective October 28, 2009; emergency

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amendment at 34 Ill. Reg. 8325, effective June 10, 2010, for a maximum of 150 days; emergency expired November 6, 2010; amended at 34 Ill. Reg. 17582, effective November 8, 2010; amended at 40 Ill. Reg. 6577, effective April 1, 2016; former Part repealed at 41 Ill. Reg. 7980 and new Part adopted at 41 Ill. Reg. 7983, effective July 1, 2017; amended at 42 Ill. Reg. 14442, effective July 20, 2018; amended at 43 Ill. Reg. 11141, effective October 1, 2019; amended at 47 Ill. Reg. _____, effective _____.

SUBPART A: INTRODUCTION

Section 365.110 Definitions

- a) Unless specified otherwise in subsection (b), all terms shall have the meanings set forth in the Environmental Protection Act (Act) [415 ILCS 5] and the regulations adopted under that Act (35 Ill. Adm. Code: Subtitle C) and the federal Clean Water Act (CWA), as amended (33 USC 1251 et seq.).
- b) For the purposes of this Part, the following definitions apply:

Act – The Environmental Protection Act [415 ILCS 5].

Addenda – Documents issued by the loan applicant after advertisement for bids, which modify or interpret the contract documents, drawings, and specifications, by additions, deletions, clarifications or corrections.

Agency – *Illinois Environmental Protection Agency*. [415 ILCS 5/19.2(a)]

Asset Management Plan – Any system-wide plan that contains the information on asset conditions, service levels, customer needs, and financial resources to ensure the loan applicant can conduct planned maintenance and repair and replace and upgrade capital assets to reliably provide quality service for the foreseeable future.

[BABA Act – The portion of the BIL Act at Sections 70901-52 \(Public Law 117-58, Secs. 70901-52\) also known as the Build America Buy America Act.](#)

[BIL Act – The Bipartisan Infrastructure Law \(Public Law 117-58\) also known as the Infrastructure Investment and Jobs Act of 2021 or IJA.](#)

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Binding Commitment – A legal obligation between the Agency and the loan recipient to provide financial assistance from the WPCLP to the loan recipient, specifying the terms and schedules under which assistance is provided. The loan agreement will be considered a binding commitment.

Capitalization Grant – The actual federal funds received by the Agency for deposit into the WPCLP as a result of the capitalization grant agreement with USEPA.

Capitalization Grant Agreement – The agreement entered into each federal fiscal year between the Agency and USEPA for the purpose of providing a grant to capitalize the WPCLP and enable the Agency to provide assistance for WPCLP projects.

Change Order – A written order by the loan recipient to the contractor authorizing an addition, deletion or revision in the work within the general scope of the contract documents, or authorizing an adjustment in the contract price or contract time.

Compliance Project – A project that consists of construction, expansion, or upgrading of a treatment works necessary to meet State and federal requirements as specified in 35 Ill. Adm. Code: Subtitle C and the CWA, respectively.

Construction – Any one or more of the following which is undertaken for a public purpose: preliminary planning to determine the feasibility of the treatment works, engineering, architectural, legal, fiscal or economic investigations, or studies, surveys, designs, plans, working drawings, specifications, procedures or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement or extension of treatment works, or the inspection or supervision of any of the foregoing items. [415 ILCS 5/19.2]

Contract Documents – The contract, including but not limited to advertisement for bids, information for bidders, bid, bid bond, agreement, payment bond, performance bond, notice of award, notice to proceed, change order, drawings, specifications, and addenda.

CWA – The Clean Water Act, as amended (33 USC 1251 et seq.).

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Dedicated Source of Revenue – The type of security and the basis of legal authorization that are dedicated by legislative enactment or other appropriate authority, along with the applicable revenue source pledged for repayment and recorded in an account for the purpose of loan repayment, which is sufficient to repay the principal and interest on the loan.

Design – All administrative, legal, and engineering tasks, subsequent to Project Plan approval but prior to advertisement for bid proposal, associated with receiving approval of a loan application. This must include the following: surveys, designs, plans, working drawings, specifications, soil investigations and any other tests or process determinations required to establish design criteria, and development of user charge systems and sewer use ordinances.

Director – Director of the Illinois Environmental Protection Agency.

Energy Efficiency – The use of improved technologies and practices to reduce the energy consumption of water quality projects, including projects to reduce energy consumption or produce clean energy used by a treatment works.

Environmentally Innovative Projects – Projects that demonstrate new and/or innovative approaches to managing water resources in a more sustainable way, including projects that achieve pollution prevention or pollutant removal with reduced cost and projects that foster adaptation of water protection programs and practices to climate change.

Facilities – Equipment or operating systems that are constructed, installed or established to serve the particular purpose of mitigating the impacts of sewerage, industrial waste or non-point sources of pollution in a watershed. Facilities may involve stand-alone projects or be involved as component pieces of treatment works. Facilities in the context of the Green Project Reserve will address green infrastructure, water and energy efficiency improvements and other environmentally innovative activities.

Fixed Loan Rate – The simple annual fixed rate on the loan, which includes an interest rate portion and a loan support rate portion. The fixed loan rate shall be determined on an annual basis by the procedures defined in Section 365.210.

Interest Rate – The interest rate is a portion of the Fixed Loan Rate and shall not be less than one-half of the Fixed Loan Rate rounded to the

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nearest 0.01%. The monies generated by the interest rate portion of the Fixed Loan Rate shall be deposited in the WPCLP receipt account within the Fund.

Loan Support Rate – The loan support rate is a portion of the Fixed Loan Rate and shall not exceed one-half of the Fixed Loan Rate rounded to the nearest 0.01%. The monies generated by the loan support rate portion of the Fixed Loan Rate shall be deposited in the Loan Support Program receipt account within the Fund.

Fund – The Water Revolving Fund as authorized by Section 19.3 of the Act, consisting of the Water Pollution Control Loan Program, the Public Water Supply Loan Program, and the Loan Support Program. [415 ILCS 5/19.2(b)]

Green Infrastructure – Includes a wide array of practices at multiple scales that manage and treat stormwater and that maintain and restore natural hydrology by infiltrating, evapotranspiring and capturing and using stormwater. On a regional scale, green infrastructure is the preservation and restoration of natural landscape features, such as forests, floodplains and wetlands, coupled with policies that reduce overall imperviousness in a watershed. On a local scale, green infrastructure consists of site- and neighborhood-specific practices, such as bioretention, trees, green roofs, porous pavements, and cisterns.

Green Project Reserve – The portion of funded projects, as required by the Capitalization Grant, identified by the Agency in its Intended Use Plan and Annual Report that address green infrastructure, water and energy efficiency improvements, and other environmentally innovative activities as directed by federal law.

Infiltration – Water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connection, or manholes.

Inflow – Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross-connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash water, or drainage.

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Initiation of Loan Repayment Period – The date in a loan agreement or amendment that establishes the beginning point of the loan repayment period.

Initiation of Operation – The date specified by the loan agreement on which use of the project began operation for the purposes that it was planned, designed, and constructed.

Intended Use Plan – A plan which includes a description of the short and long term goals and objectives of the Water Pollution Control Loan Program, project categories, discharge requirements, terms of financial assistance and the loan applicants to be served. [415 ILCS 5/19.2(e)]

Interstate Agency – An agency of two or more states established by or pursuant to an agreement or compact approved by the US Congress, or any other agency of two or more states, having substantial powers or duties pertaining to the control of pollution as determined and approved by USEPA.

Iron and Steel Products – The following products made primarily of iron or steel: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials.

Loan – A loan made from the Water Pollution Control Loan Program to an eligible applicant as a result of a contractual agreement between the Agency and such applicant. [415 ILCS 5/19.2(c)]

Loan Agreement – The contractual agreement document between the Agency and the loan recipient that contains the terms and conditions governing the loan issued from the WPCLP.

Loan Applicant – The person that has applied for a loan from the WPCLP under this Part.

Loan Procedures – The procedures for issuing loans from the WPCLP as set out in this Part.

Loan Recipient – The person that has been provided a loan from the WPCLP under this Part.

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Loan Support Rate – The loan support rate is a portion of the fixed loan rate and shall not exceed one-half of the fixed loan rate rounded to the nearest 0.01%. The monies generated by the loan support rate portion of the fixed loan rate shall be deposited in the Loan Support Program receipt account within the Fund.

Local Government Unit – A county, municipality, township, municipal or county sewerage or utility authority, sanitary district, public water district, improvement authority or any other political subdivision whose primary purpose is to construct, operate and maintain wastewater treatment facilities, including storm water treatment systems, or public water supply facilities or both. [415 ILCS 5/19.2(g)]

Market Interest Rate – The mean interest rate of the 20 General Obligation Bond Buyer Index, from July 1 through June 30 of the preceding year, rounded to the nearest 0.01%.

Median Household Income or MHI – The median household income is the American Community Survey 5-year estimate from the United States Department of Commerce, Bureau of the Census.

Municipality – A city, town, county, village, district, utility authority, sanitary district, public water district, not-for-profit association or other political subdivision whose responsibilities include construction, operation and maintenance of treatment works.

Operating Agreement – The agreement between the Agency and USEPA that establishes the policies, procedures and activities for the application and receipt of federal capitalization grant funds for capitalization of the WPCLP.

Person – Any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns. [415 ILCS 5/3.315]

Principal – The total amount of funds distributed to loan recipients for eligible project costs.

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Project – The activities or tasks the Agency identifies in the loan agreement for which the loan recipient may expend loan funds.

Project Priority List – An ordered listing of projects developed in accordance with the priority system described in 35 Ill. Adm. Code 366 that the Agency has determined are eligible to receive financial assistance from the WPCLP.

Public Loan Applicant – A loan applicant that is a municipality, intermunicipal agency, interstate agency, or local government unit that has applied for a loan under the WPCLP.

Public Loan Recipient – A loan recipient that is a municipality, intermunicipal agency, interstate agency, or local government unit that has been provided a loan under the WPCLP.

Responsible Bid – A bid that demonstrates the apparent ability of the bidder to successfully meet all the requirements specified in the contract documents. Information necessary to demonstrate responsibility may be corrected or submitted after bid opening.

Responsive Bid – A bid that complies with all meaningful or material aspects of the contract documents. The bid must constitute a definite and unqualified offer to meet the material requirements of the contract documents including any terms that affect price, quality, quantity or time of delivery, or are clearly identified in the contract documents to be complied with at the risk of bid rejection for nonresponsiveness. Bid defects resulting in a nonresponsive bid may not be corrected after the bid opening.

Service Population – The number of people served by the public loan applicant.

Subagreement – A written agreement between the loan recipient and another party, and any tier of agreement under that written agreement, to furnish services, supplies, or equipment necessary to complete the project for which a loan is provided, including construction contracts, contracts for personal and professional services, and purchase orders.

Treatment Works – *Treatment works, as defined in section 212 of the federal Water Pollution Control Act (33 USC 1292), including, but not limited to, the following:*

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any devices and systems owned by a local government unit and used in the storage, treatment, recycling, and reclamation of sewerage or industrial wastes of a liquid nature, including intercepting sewers, outfall sewers, sewage collection systems, pumping power and other equipment, and appurtenances;

extensions, improvements, remodeling, additions, and alterations thereof;

elements essential to provide a reliable recycled supply, such as standby treatment units and clear well facilities;

any works, including site acquisition of the land that will be an integral part of the treatment process for wastewater facilities; and

any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems as those terms are defined in the Federal Water Pollution Control Act. [415 ILCS 5/19.2(f)]

Unemployment Rate – The annual average unemployment rate calculated by the Illinois Department of Employment Security, Economic Information and Analysis Division.

Useful Life – The estimated period during which a treatment works is intended to be operable, as certified by the project's consulting licensed professional engineer.

USEPA – The United States Environmental Protection Agency.

User Charge – A charge levied on the users of a treatment works to produce adequate revenues for the operation, maintenance and replacement of the treatment works.

WPCLP – The Water Pollution Control Loan Program as authorized by Section 19.3 of the Act.

(Source: Amended at 47 Ill. Reg. _____, effective _____)

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SUBPART B: FINANCING TERMS

Section 365.210 Fixed Loan Rate

The interest rate of the loan agreement shall be a fixed loan rate and shall be established as follows:

- a) Base ~~30~~20 Year Rate – Loan agreements with a repayment period not to exceed ~~30~~20 years shall have a fixed loan rate equal to 50% of the market interest rate (mean interest rate of the 20 General Obligation Bond Buyer Index, from July 1 through June 30 of the preceding State fiscal year rounded to the nearest 0.01%).
- b) Small Community Rate – Public loan applicants with a service population less than 25,000 that also meet any one of the following three criteria qualify for a fixed loan rate equal to 75% of the Base ~~30~~20 Year Rate:
 - 1) The median household income of the public loan applicant's service population is less than the statewide average.
 - 2) The unemployment rate of the public loan applicant's service population is greater than the statewide average.
 - 3) The public loan applicant's annual user charge, based upon the average monthly bill of the public loan applicant's residential customers, is greater than 1.0% of the median household income of the public loan applicant's service population.
- c) Hardship Rate – Public loan applicants with a service population less than 10,000 that also meet any one of the following three criteria qualify for a fixed loan rate of 1.0%:
 - 1) The median household income of the public loan applicant's service population is below 70% of the statewide average.
 - 2) The unemployment rate of the public loan applicant's service population is at least 3.0 percentage points greater than the statewide average.
 - 3) The public loan applicant's annual user charge, based upon the average monthly bill of the public loan applicant's residential customers, is greater

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than 1.5% of the median household income of the public loan applicant's service population.

- d) Environmental Impact Discount – When at least 50% of the eligible project costs fund any of the following components, the loan applicant shall receive a 0.2% discount from the rates established in subsection (a), (b), or (c):
- 1) new projects for the collection or treatment of unsewered communities;
 - 2) projects involving nutrient removal or nutrient loss reduction;
 - 3) green infrastructure projects;
 - 4) projects lowering water demand; or
 - 5) projects reducing energy demands at a wastewater treatment facility.

(Source: Amended at 47 Ill. Reg. _____, effective _____)

Section 365.220 Loan Repayment Period

- a) Except as provided in subsections (b) and (c), the loan repayment period cannot exceed the lesser of ~~30~~²⁰ years beyond the initiation of operation date, ~~30~~²⁰ years beyond the initiation of the loan repayment period, or the projected useful life of the project to be financed with proceeds of the loan.
- ~~b) For public loan applicants that qualify for the Small Community Rate or Hardship Rate as defined in Section 365.210, the loan repayment period cannot exceed the lesser of 30 years beyond the initiation of operation date, 30 years beyond the initiation of the loan repayment period, or the projected useful life of the project to be financed with proceeds of the loan.~~
- be) The Agency may require a loan repayment period term of less than the maximum. In evaluating the appropriateness of alternative loan terms, the Agency shall consider such factors as the scope of the proposed project, the impacts of alternative loan terms on user fees, and the overall cost of the project.

(Source: Amended at 47 Ill. Reg. _____, effective _____)

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Section 365.240 Restructuring

All restructuring shall be consistent with the objectives of the CWA and shall meet the requirements of this Part.

- a) A written request for the restructuring of the loan obligation must be submitted in writing to the Agency. Each written request for restructuring shall contain all of the following:
 - 1) The name of the applicant and the Agency loan number;
 - 2) A statement explaining when it was determined that restructuring was needed;
 - 3) A statement explaining all remedial measures taken prior to the determination that restructuring was needed;
 - 4) A statement explaining why restructuring is in the best interest of the State and the applicant;
 - 5) A description of the financing terms desired and the facts that the applicant believes warrant the Agency's approval of the restructuring; and
 - 6) A description of the applicant's financial capability and dedicated source of revenue for repayment of the restructured loan in accordance with Section 365.350(a)(9) through (a)(13).
- b) The Agency will approve restructuring based on financial and economic considerations that may include, but are not limited to, the following:
 - 1) the loan recipient's ability to repay the loan;
 - 2) circumstances beyond the control of the applicant; and
 - 3) the financial hardship the existing loan imposes on the loan recipient.
- c) Restructured loan agreements shall have a fixed loan rate equal to the lesser of the fixed loan rate in the original loan agreement or the current appropriate fixed loan rate under Section 365.210.

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- d) ~~The~~ Except as provided in subsection (e), the loan repayment period for a restructured loan cannot exceed the lesser of 20 years beyond the initiation of operation date, 20 years beyond the initiation of the loan repayment period established by the original loan agreement, or the projected useful life of the project to be financed with proceeds of the original loan.
- e) ~~For public loan applicants that qualify for the Small Community Rate or Hardship Rate as provided in Section 365.210, the loan repayment period for a restructured loan cannot exceed the lesser of 30 years beyond the initiation of operation date, 30 years beyond the initiation of the loan repayment period established by the original loan agreement, or the projected useful life of the project to be financed with proceeds of the original loan.~~

(Source: Amended at 47 Ill. Reg. _____, effective _____)

SUBPART C: LOAN APPLICATION PROCESS

Section 365.350 Loan Application and Other Documentation

Before the Agency will issue a loan agreement, the loan applicant must submit the following documents:

- a) An application, on forms prescribed by the Agency, which must include the following documents:
- 1) Loan Program Certifications;
 - 2) Certification Regarding Debarment, Suspension and Other Responsibility Matters;
 - 3) Certification of Intent Regarding National Flood Insurance;
 - 4) Certification Regarding Project Site, Rights-of-Way, Easements and Permits;
 - 5) Authorization of a Representative to Sign Loan Documents;

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- 6) An Engineering Service Procurement Report that certifies whether the contracts for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services were negotiated in the same manner as a contract for architectural and engineering services under 40 USC 1101 et seq.;
- 7) For a treatment works proposed for repair, replacement, or expansion, and eligible for assistance under Section 365.130(a), the public loan recipient shall certify in writing that the public loan recipient will develop and implement a fiscal sustainability plan that includes:
 - A) an inventory of critical assets that are a part of the treatment works;
 - B) an evaluation of the condition and performance of inventoried assets or asset groupings;
 - C) a certification that the recipient has evaluated and will be implementing water and energy conservation efforts as part of the plan; and
 - D) a plan for maintaining, repairing, and, as necessary, replacing the treatment works and a plan for funding the activities;
- 8) Any other executed legal agreements, including, but not limited to, intergovernmental agreements necessary for project implementation;
- 9) Proof of authority to incur debt for:
 - A) Public loan applicants: a certified copy of the enacted ordinance authorizing the bonds, notes or other evidence of indebtedness to be delivered to the Agency, and proof the ordinance was adopted in accordance with State law, including publication and notice requirements when applicable; or
 - B) Loan applicants that are not public loan applicants: documents such as, but not limited to, a copy of board resolutions to incur the debt, Articles of Incorporation, By-laws, Partnership Agreements,

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or a legal opinion stating that the loan applicant has the authority to incur debt;

- 10) Documentation to support the loan applicant's ability to repay all principal and interest of the loan:
 - A) A financial capability demonstration shall be submitted to the Agency for approval and shall contain:
 - i) detailed project costs;
 - ii) 5 year projected estimates of revenues;
 - iii) 5 year projected estimates of operation and maintenance costs;
 - iv) 5 year projected estimates of local capital costs; and
 - v) the most recent completed annual audited financial statements of the loan applicant;
 - B) A user charge system, when a user charge system is the dedicated source of revenue, shall be submitted to the Agency and shall:
 - i) be enacted and enforceable before the first loan disbursement (when applicable, approval of the rate increase by the Illinois Commerce Commission will be required);
 - ii) generate sufficient revenue to offset the cost for operation, maintenance and replacement required to be provided by the loan recipient for all projects authorized under this Part;
 - iii) be incorporated in one or more municipal legislative enactments or other appropriate authorizations. If the project is for a regional treatment works accepting wastewaters from treatment works owned by others, then the subscribers receiving wastewater treatment services from the loan recipient shall have adopted user charge

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systems. The user charge systems shall also be incorporated in the appropriate municipal legislative enactments, intergovernmental or service agreements or other appropriate authorizations; and

- iv) provide the average monthly cost of service for a residential customer based upon the average monthly water usage for a residential customer, or the appropriate average monthly residential cost of service based upon the methodology established within the loan applicant's system of user charges. If the loan applicant has substantial industrial and/or commercial customers, the loan applicant must provide similar monthly user charge information for the customers within those rate classes. In addition, provide the number of billed residential and industrial or commercial accounts;
- C) A dedicated source of revenue adequate to make loan repayments for the term of the loan. If the dedicated source of revenue is pledged in a subordinate position, the loan applicant must establish a reserve account that provides the Agency with the equivalent coverage and reserves as the senior lien holders. At a minimum, the reserve account shall be equal to the annual principal and interest payment funded within 2 years after the loan award;
- D) For nonpublic loan applicants, appropriate legal documents will be provided to enable the Agency to perfect its security interest in the revenues of the loan applicant and other personal properties offered as security by filing the necessary information under the Uniform Commercial Code [810 ILCS 5];
- E) For nonpublic loan applicants, approval from the Illinois Commerce Commission to incur debt, if applicable;
- F) Upon request by the Agency, any other documentation necessary to demonstrate the loan applicant's ability to repay all principal and interest of the loan including, but not limited to, a credit report;

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- 11) A legal opinion from the loan applicant's legal counsel with respect to the validity and enforceability of the loan applicant's obligations and the absence of conflicts with other agreements, bonds or ordinances;
 - 12) A Tax Exemption Certificate and Agreement;
 - 13) A project completion schedule;
 - 14) An active Data Universal Number System Identification (DUNS No.) registered in the federal System for Award Management Systems; and
 - 15) Certification that the loan applicant will comply with the American iron and steel requirements as required by USEPA.
 - 16) [Certification that the loan applicant will comply with the requirements of the Build America Buy America Act \(BABA Act\) at Public Law 117-58, Sections 70901-52, as applicable.](#)
- b) Any contract or contract amendments for personal or professional services in accordance with Section 365.630 if financing is being requested for these specific costs.
 - c) A construction permit or "authorization to construct" from the Agency, pursuant to 35 Ill. Adm. Code 309.154 and 309.202, whichever is applicable, whenever such permit is necessary to comply with the Act.
 - d) Pre-bidding plans and specifications with certification form prescribed by the Agency, which includes a draft of all documents required by Section 365.620.
 - e) After the bids are opened and evaluated by the loan applicant, a bidding evaluation and certification, on forms prescribed by the Agency, including documentation showing compliance with Section 365.620.

(Source: Amended at 47 Ill. Reg. _____, effective _____)

SUBPART F: REQUIREMENTS APPLICABLE TO SUBAGREEMENTS

Section 365.620 Construction Contracts

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The following procedures shall apply to construction contracts (subagreements) awarded by loan recipients for the construction phase only. They shall not apply to personal and professional service contracts.

- a) Each construction contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with Section 365.610(i).
- b) The bid advertisement shall notify the bidders that the procurement will be subject to the following requirements:
 - 1) this Part;
 - 2) the Davis-Bacon Act (40 USC 3141 through 3148) and regulations adopted under that Act by the US Department of Labor;
 - 3) the Employment of Illinois Workers on Public Works Act [30 ILCS 570];
 - 4) the use of American iron and steel as required by Sec. 608 of the federal Clean Water Act (33 USC 1388);
 - 5) the Participation by Disadvantaged Business Enterprises in United States Environmental Protection Agency Programs (40 CFR 33); ~~and~~
 - 6) [the Build America Buy America Act \(BABA Act\) at Public Law 117-58, Sections 70901-52, as applicable; and](#)
 - ~~7) any applicable federal or State Executive Orders.~~
- c) A complete set of bidding documents shall be maintained by the loan recipient and shall be available for inspection and copying. Bidding documents shall include:
 - 1) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule;
 - 2) The terms and conditions of the contract to be awarded;
 - 3) A clear explanation of the method of bidding, the method of evaluation of bid prices, and the basis and method for award of the contract;

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- 4) The statement that any contract awarded in response to the bid is expected to be funded in part by a loan from the WPCLP, and that neither the State of Illinois nor any of its departments, agencies or employees is or will be a party to this bidding or any resulting contract;
- 5) Responsibility requirements or criteria that will be used in evaluating bidders, provided that an experience requirement or performance bond may not be used unless adequately justified by the loan recipient;
- 6) A proposal form, to be used by all bidders, that includes the following language:
 - A) By submission of the bid, each bidder certifies, and in the case of a joint bid, each party to the joint bid certifies, as to his or her own organization, that in connection with the bid:
 - i) the prices in the bid have been arrived at independently, without consultation, communication, or agreement with any other bidder or with any competitor, for the purpose of restricting competition, as to any matter relating to the prices;
 - ii) unless otherwise required by law, the prices quoted in the bid have not knowingly been directly or indirectly disclosed to any other bidder or to any competitor prior to opening; and
 - iii) no attempt has been made or will be made by the bidder to induce any other person or firm to submit or withhold a bid for the purpose of restricting competition. Also, each bidder shall submit a certification regarding compliance with Article 33E-11 of the Illinois Criminal Code of 2012 [720 ILCS 5/33E-11];
 - B) Each person signing the bid shall certify that:
 - i) he or she is the person in the bidder's organization responsible for the decision as to the prices being bid and

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that he or she has not participated, and will not participate, in any action contrary to subsection (d)(6)(A); or

- ii) he or she is not the person in the bidder's organization responsible for the decision as to the prices being bid, but that he or she has been authorized to act as agent certifying that the persons determining the prices have not participated, and will not participate, in any action contrary to subsection (d)(6)(A), and as the bidder's agent shall so certify. He or she shall also certify that he or she has not participated, and will not participate, in any action contrary to subsection (d)(6)(A).
- d) If the loan applicant wishes to amend any part of the bidding documents (including drawings and specifications) during the period when bids are being prepared, the loan applicant shall send written addenda to all firms who have obtained bidding documents in time to be considered prior to the bid opening. When appropriate, the time period for submission of bids shall be extended. All addenda to the bidding documents shall be submitted to the Agency for approval.
- e) Awarding the Contract
- 1) After bids are opened, they shall be evaluated by the loan applicant in accordance with the methods and criteria set out in the bidding documents.
 - 2) The loan applicant shall submit a bid evaluation to the Agency that contains the following:
 - A) a copy of the newspaper ad and the certificate of publication or equivalent;
 - B) the bid tabulations;
 - C) any addenda issued by the loan applicant, if applicable;
 - D) an analysis of the bids and recommendations for the award of the bids;
 - E) a copy of the loan applicant's notice of intent to award;

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- F) selected bidder's proposal and bid bond or cashier's check for not less than 5% of the bid amount;
 - G) a summary of the evidence that the selected bidder has met the disadvantaged business enterprise requirements pursuant to 40 CFR 33;
 - H) a copy of the selected bidder's certification regarding the use of American iron and steel products;
 - D) [a copy of the selected bidder's certification regarding the compliance with the BABA Act.](#)
- 3) The loan applicant may reserve the right to reject all bids if it has documented sound business reasons. Unless all bids are rejected, award shall be made to the low, responsive, responsible bidder after the Agency issues the loan agreement or provides other written permission; and
- 4) If the award is intended to be made to a firm that did not submit the lowest bid, prior to any award the loan applicant shall submit to the Agency a written statement explaining why each lower bidder was deemed not responsive or not responsible.
- f) Each construction contract shall include the following provisions:
- 1) Audit; Access to Records
 - A) The contractor shall maintain books, records, documents and other evidence directly pertinent to performance on loan work in accordance with generally accepted accounting principles. The contractor shall also maintain the financial information and data used by the contractor in the preparation or support of any cost submissions required under Section 365.420(b)(2) and a copy of the cost summary submitted to the owner. The Illinois Auditor General, the owner, the Agency, or any of their authorized representatives shall have access to the books, records, papers, documents, and other evidence for purposes of inspection, audit,

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examination, excerpts, transcriptions, and copying. The contractor shall provide facilities for access and inspection.

- B) For a formally advertised, competitively awarded, fixed price contract, the contractor shall include access to records as required by subsection (a)(1)(A) for all negotiated change orders and contract amendments in excess of \$25,000 that affect the contract price. In the case of all other prime contracts, the contractor shall agree to include access to records required by subsection (a)(1)(A) in all contracts and all tier subcontracts or change orders in excess of \$25,000 that are directly related to project performance.
- C) Audits shall be in accordance with auditing standards generally accepted in the United States.
- D) The contractor shall agree to the disclosure of all information and reports resulting from access to records required by subsection (a)(1)(A). When the audit concerns the contractor, the auditing agency shall afford the contractor an opportunity for an audit exit conference and an opportunity to comment on the pertinent portions of the draft audit report. The final audit report shall include the written comments, if any, of the audited parties.
- E) The records required by subsection (a)(1)(A) shall be maintained and made available during performance of the work under the loan agreement and for 3 years after the date of final loan audit. In addition, records that relate to any dispute or litigation or the settlement of claims arising out of any performance, costs or items to which an audit exception has been taken shall be maintained and made available for 3 years after resolution of the dispute, appeal, litigation, claim, or exception.
- F) The right of access will generally be exercised with respect to financial records under:
 - i) negotiated prime contracts;

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- ii) negotiated change orders or contract amendments in excess of \$25,000 affecting the price of any formally advertised, competitively awarded, fixed price contract; and
 - iii) subcontracts or purchase orders under any contract other than a formally advertised, competitively awarded, fixed price contract.
- G) The right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective price competition. In any event, the right of access shall be exercised under any type of contract or subcontract:
- i) with respect to records pertaining directly to contract performance, excluding any financial records of the contractor; and
 - ii) if there is any indication that fraud, gross abuse, or corrupt practices may be involved in the award or performance of the contract or subcontract.
- 2) **Covenant Against Contingent Fees**
The contractor shall warrant that no person or selling agency has been employed or retained to solicit or secure the contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee. For breach or violation of this warranty, the owner shall have the right to annul the contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of the commission, percentage, brokerage, or contingent fee.
- 3) **Wage Provisions**
The contractor shall pay prevailing wages in accordance with the Davis-Bacon Act (40 USC 3141 through 3148), as defined by the US Department of Labor.
- 4) **Disadvantaged Business Enterprise Requirements**
The contractor shall provide evidence that the contractor has taken affirmative steps in accordance with 40 CFR 33 to assure that disadvantaged business enterprises are used when possible as sources of

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supplies, equipment, construction, and services, consistent with the provisions of the Agency's Operating Agreement with USEPA.

- 5) **Debarment and Suspension Provisions**
The contract shall require the successful bidders to submit a Certification Regarding Debarment, Suspension and Other Responsibility Matters (EPA Form 5700-49) showing compliance with federal Executive Order 12549.
- 6) **Nonsegregated Facilities Provisions**
The contractor shall be required to submit a certification of nonsegregated facilities on forms provided by the agency.
- 7) **American Iron and Steel**
The contractor shall be required to use American iron and steel, if required by USEPA for that fiscal year.
- 8) **Build America Buy America**
If applicable, the contractor shall be required to comply with the requirements of the BABA Act.
- ~~98~~) **A clause that provides:**

"No contractor or subcontractor shall discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor or subcontractor shall carry out applicable requirements of 40 CFR 33 in the award and administration of contracts awarded under the WPCLP. Failure by the contractor or subcontractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies."
- g) **Subcontracts Under Construction Contracts**
The award or execution of all subcontracts by a prime contractor and the procurement and negotiation procedures used by the prime contractor shall comply with:
 - 1) all applicable provisions of federal, State, and local law;

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- 2) all provisions of this Part regarding fraud and other unlawful or corrupt practices;
 - 3) all provisions of this Part with respect to access to facilities, records and audit of records; and
 - 4) all provisions of subsection (a)(5) that require a Certification Regarding Debarment, Suspension, and Other Responsibility Matters (EPA Form 5700-49) showing compliance with any controlling federal Executive Orders.
- h) Contractor Bankruptcy
In the event of a contractor bankruptcy, the loan recipient shall notify the Agency and shall keep the Agency advised of any negotiations with the bonding company, including any proposed settlement. The Agency may participate in those negotiations and will advise the loan recipient of the impact of any proposed settlement to the loan agreement. The loan recipient shall be responsible for assuring that every appropriate procedure and incidental legal requirement is observed in advertising for bids and re-awarding a construction contract.
- i) Every contract entered into by the loan recipient for construction work, and every subagreement, shall provide Agency representatives with access to the work. The contractor or subcontractor shall provide facilities for the access and inspection.

(Source: Amended at 47 Ill. Reg. _____, effective _____)