

Decentralized Wastewater Projects and the Clean Water State Revolving Fund: Federal Cross-Cutter Applicability

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DISCLAIMER

This document's development was funded by the US Environmental Protection Agency (USEPA) through a cooperative agreement with the Environmental Finance Center at California State University, Sacramento (EFC at Sacramento State). Note that considerations presented herein are based on currently available, published documents and references, as well as discussions with USEPA staff and the best professional judgment of the EFC staff. However, any presumed recommendations or determinations have not officially been vetted with the USEPA Office of Regional Counsel. States will ultimately need independently determine the applicability of federal cross-cutters to wastewater projects.

INTENT AND CONTENT

This document provides considerations for interpreting which federal cross-cutter requirements apply to decentralized wastewater treatment projects funded by the Clean Water State Revolving Fund (CWSRF) program. The document includes some background on the CWSRF program and federal cross-cutters, a discussion of decentralized wastewater treatment projects and their eligibility for CWSRF, and a discussion of federal cross-cutter applicability for decentralized wastewater treatment projects. A table and flow chart summarizing federal cross-cutter applicability are also included, followed by references.

CWSRF AND FEDERAL CROSS-CUTTER BACKGROUND

Created by the 1987 amendments to the Clean Water Act¹ (CWA), the CWSRF program is a financial assistance program for a wide range of publicly or privately owned water infrastructure projects. Using a combination of federal and state funds, state CWSRF programs provide loans to eligible recipients to construct municipal wastewater facilities, control nonpoint sources of pollution, build decentralized wastewater treatment systems, create green infrastructure projects, protect estuaries, and fund other water quality projects. Through the CWSRF program, USEPA provides grants to all 50 states plus Puerto Rico to capitalize state/territory CWSRF loan programs. States/territories contribute an additional 20 percent to match the federal capitalization grants (USEPA 2023a).

The 1987 CWA amendment did not specifically state that projects involving decentralized wastewater treatment systems were eligible for CWSRF funding. This was changed in 2014 through the Water Resources Recovery and Development Act, which expanded CWSRF eligibility to include construction, repair, or replacement of private or public decentralized wastewater treatment systems that treat municipal wastewater or domestic sewage.

Projects funded by the CWSRF program, including decentralized wastewater treatment projects, may be subject to cross-cutting federal authorities, which are essentially requirements of federal laws and executive orders that apply to federal financial assistance programs. Such federal cross-cutters include “environmental laws such as the Endangered Species Act, the National Historic Preservation Act, and executive orders on the protection of wetlands and flood plains, social policy authorities such as executive orders on equal employment opportunity in federally assisted programs, and economic authorities such as rules implementing executive orders on the debarment and suspension of persons who have engaged in misconduct” (USEPA 2003).

¹The Federal Water Pollution Control Act of 1948 was the first major US law to address water pollution. Growing public awareness and concern for controlling water pollution led to sweeping amendments in 1972. As amended in 1972, the law became commonly known as the Clean Water Act (CWA) (USEPA 2023b).

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Regarding when federal cross-cutters apply to projects funded through the CWSRF program, USEPA noted that “requirements of cross-cutting federal authorities apply to projects and activities whose cumulative SRF funding equals the amount of the capitalization grant. Generally, projects and activities funded with monies in amounts greater than the capitalization grant amount are not subject to these requirements. However, all programs, projects, and activities undertaken in the SRF programs are subject to federal anti-discrimination laws, including the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 13 of the Federal Water Pollution Control Act Amendments of 1972, and Executive Order 11246 on affirmative action in federal contracting” (USEPA 2003).

DECENTRALIZED WASTEWATER TREATMENT DEFINITIONS AND CWSRF ELIGIBILITY

Decentralized wastewater treatment can be an on-site² or clustered³ system used to collect, treat, and disperse or reclaim wastewater from a small community or service area (e.g., septic systems, cluster systems, lagoons). In addition to support from the CWSRF programs, states can receive funding for non-point source (NPS) projects through CWA Section 319(h) as long as the state has a NPS management plan. Decentralized wastewater treatment projects that are eligible for CWSRF support include upgrade (e.g., nutrient removal), repair, or replacement of existing systems; construction/installation of new systems; costs associated with the establishment of a responsible management entity (RME) (e.g., permitting fees, legal fees, etc.); and septage treatment works and pumper trucks to support the proper maintenance of decentralized systems. In particular, CWSRF financial assistance may be provided to:

- Any borrower for decentralized wastewater treatment projects if the projects implement (i.e., are consistent with) a state’s section 319 NPS management program. This includes privately owned decentralized systems that treat non-municipal, non-domestic sewage to correct an existing NPS problem (e.g., direct pipe from residence to waterbody, cesspool) (CWA Section 603(c)(2)).
- Any borrower for the portion of a centralized wastewater treatment works project that is associated with the collection and treatment of effluent from properties with failing decentralized systems or properties where no active treatment system is in place (e.g., cesspools), including the house lateral to connect such homes to a centralized treatment works, if the project implements a section 319 NPS management program (CWA Section 603(c)(2)).
- Any borrower for decentralized wastewater treatment projects if the projects implement (i.e., are consistent with) a CWA Section 320⁴ Comprehensive Conservation and Management Plan (CCMP). This includes privately owned decentralized systems that treat non-municipal, non-domestic sewage (CWA Section 603(c)(3)).
- Any borrower for decentralized wastewater treatment projects treating municipal or domestic sewage (CWA Section 603(c)(4)).
- Any municipality or municipal entity for efforts of municipalities and property owners to develop or implement watershed partnerships to address NPS pollution (CWA Section 603(c)(7)).

² An on-site system is a system relying on natural processes and/or mechanical components to collect, treat, and disperse or reclaim wastewater from a single dwelling or building (USEPA 2016).

³ A clustered system is a wastewater collection and treatment system under some form of common ownership that collects wastewater from 2 or more dwellings or buildings and conveys it to a treatment and dispersal system located on a suitable site near the dwellings or buildings (USEPA 2016).

⁴ CWA section 320 refers to projects that fall under the National Estuary Program. Subsection (k) outlines definitions: “Estuaries are further defined in section 104(n)(3) of the CWA, though the term ‘estuarine zone’ also includes associated aquatic ecosystems and those portions of tributaries draining to the estuary up to the historic height of migration of anadromous fish or the historic head of tidal influence, whichever is higher [CWA section 320(k), 184].”

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FEDERAL CROSS-CUTTER APPLICABILITY CONSIDERATIONS

Over a dozen federal cross-cutter requirements exist, and determining which apply to each type of project can be daunting. To figure out which federal cross-cutters apply to wastewater projects funded by the CWSRF program, sorting projects into categories is helpful. Table 1 shows the applicability of various cross-cutters depending on whether the project is a wastewater treatment works project (as defined in CWA Sections 212(2)(A)⁵ and (2)(B)⁶) or a decentralized treatment project, as well as whether or not it is a federal equivalency project. The table assumes that the state has determined that decentralized systems do not meet the treatment works definition. If this is not the case—that is, the state has decided that decentralized systems do meet the treatment works definition—the applicability of federal cross-cutters as noted in the table may not be correct and the state should re-evaluate the determinations.

As Table 1 shows, all federal cross-cutters apply to some project categories (e.g., treatment works, equivalency projects) while only a limited number apply to others (e.g., non-equivalency projects, or decentralized wastewater projects when they are not considered by the state to be treatment works projects). Figure 1 provides a flow chart that summarizes federal cross-cutter applicability for the various project categories.

Because decentralized projects often involve residential or other small property owners, including those with limited income, making funding applications as simple as possible is helpful. This is especially so given the huge environmental impact decentralized systems have on water sources, ecosystems, and public health. Developing a CWSRF policy that reduces the federal cross-cutter requirements for such projects is a key strategy for efficiently addressing water quality and public and environmental health. To achieve this, the state may implement the following elements as part of their CWSRF programs:

- 1) Deem decentralized wastewater treatment projects as NOT treatment works projects (per CWA Sections 212(2)(A) and (2)(B)).
- 2) Identify decentralized projects as non-equivalency projects.

Higher-cost CWSRF applications, typically submitted by larger, more established water systems, could then be claimed as federal equivalency projects.

⁵ “(A) The term “treatment works” means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 1281 of [the CWA], or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their 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; and acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or will be used for ultimate disposal of residues resulting from such treatment and acquisition of other land, and interests in land, that are necessary for construction (CWA section 212 (2)(A), 80).”

⁶ “(B) In addition to the definition contained in subparagraph (A) of this paragraph, “treatment works” means 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. Any application for construction grants which includes wholly or in part such methods or systems shall, in accordance with guidelines published by the Administrator pursuant to subparagraph (C) of this paragraph, contain adequate data and analysis demonstrating such proposal to be, over the life of such works, the most cost efficient alternative to comply with sections 1311 or 1312 of [the CWA], or the requirements of section 1281 of this title (CWA section 212 (2)(B), 80–81).”

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Table 1. *Applicability of federal requirements based on project category*

Federal Cross-Cutter Requirement	Title II, 212 Wastewater Treatment Works* Equivalency** Projects	Title II, 212 Wastewater Treatment Works* Non-Equivalency Projects	Decentralized*** Wastewater Treatment Equivalency Projects	Decentralized*** Wastewater Treatment Non- Equivalency Projects
1. Environmental, social, and economic federal cross-cutting authorities - application of other federal authorities excluding the super cross-cutters Civil Rights laws (Application of other federal authorities; USEPA 2003)	Yes	No	Yes	No
2. Super cross-cutters: Civil Rights laws (Title VI of the Civil Rights Act of 1964; CWA Section 13; Rehabilitation Act of 1973, Section 504; The Age Discrimination Act 1975; Executive Order 11246; Application of other federal authorities)	Yes	Yes	Yes	Yes
3. Davis Bacon wage rates (CWA Section 603(c); (USEPA 2015)****	Yes	Yes	No	No
4. American Iron and Steel (AIS); (CWA Section 603(c); USEPA, 2015)****	Yes	Yes	No	No
5. Environmental Review (Environmental review requirements; CWA Section 603(c); USEPA 2015)	Yes	Yes	No	No
6. Single Audit Act (USEPA 1990, Section III.B.9.1)	Yes	No	Yes	No
7. (USEPA 1990; USEPA 2003; USEPA 2015; USEPA 2016; USEPA, 2020)	Yes	No	Yes	No
8. Architectural and Engineering (A & E) procurement (CWA Section 602(b)(14); USEPA 2015)	Yes	No	Yes	No
9. Federal Funding Accountability and Transparency Act (FFATA) reporting (Federal Funding Accountability and Transparency Act of 2006; USEPA 2011)	Yes	No	Yes	No
10. Build America, Buy America Act (BABAA) (Infrastructure Investment and Jobs Act; USOMB 2022)	Yes	No	Yes	No
11. Disadvantaged Business Enterprise (DBE) (USEPA 1998)	Yes	No	Yes	No
12. Prohibition on certain telecommunication and video surveillance services or equipment (Prohibition on certain telecommunications and video surveillance services or equipment)	Yes	No	Yes	No

Notes:

* As defined in the Clean Water Act Title II provision, Section 212 (CWA Title II, Section 212).

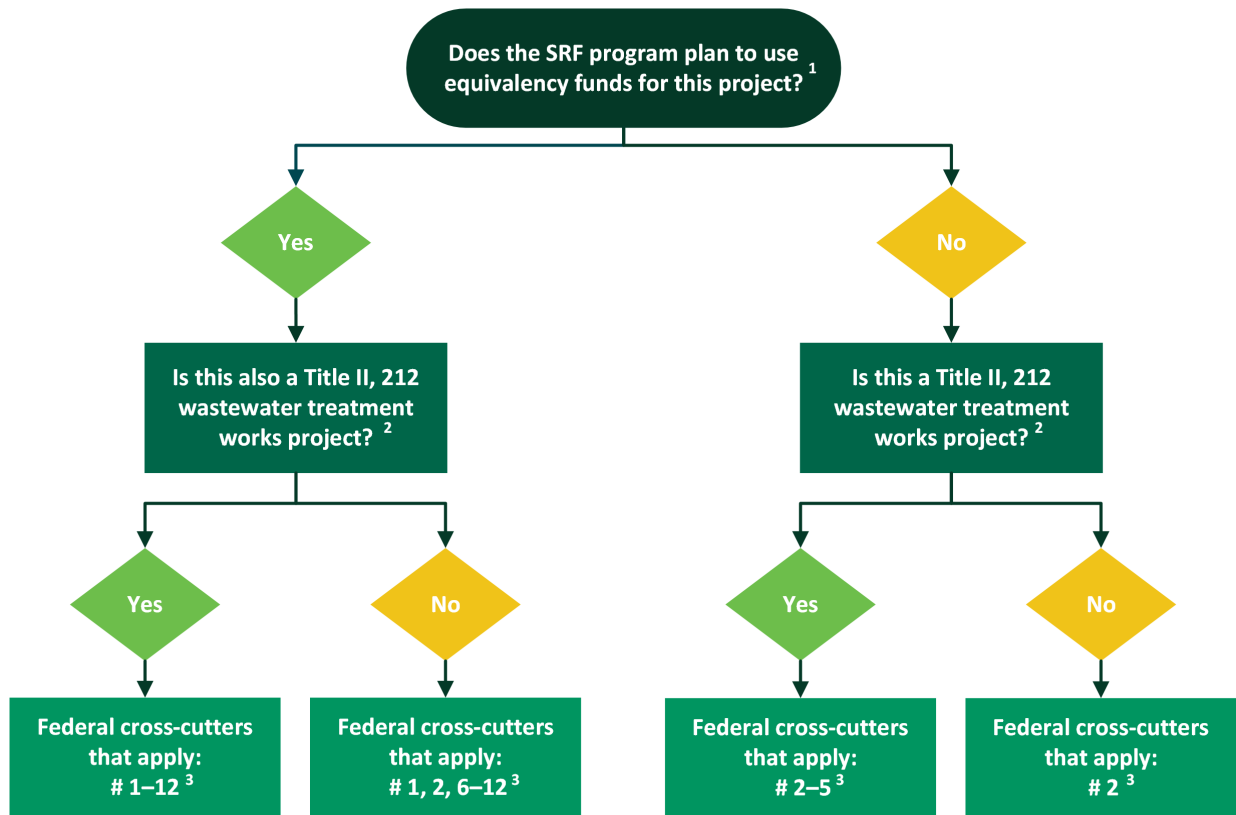
**Equivalency projects are determined by the state finance authority. Equivalency projects match state funds with the amount drawn from the capitalization grant.

***Decentralized wastewater treatment projects must be identified as part of the state's section 319 nonpoint source (NPS) management program.

****Davis Bacon, AIS, and Environmental Reviews are not equivalency requirements. They apply to all treatment works projects. Likewise, these requirements apply to any NPS project (CWA Section 319; Water Quality Act of 1987) that is also a treatment works project.

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Figure 1. Applicability of federal cross-cutters for projects funded through the CWSR



Footnotes:

¹ States determine what projects count as "equivalency projects". If a project applicant is interested in what federal cross-cutters will apply to their project if approved for funds in a certain fiscal year, then the project applicant can check with an SRF representative in their state to determine whether their project will be considered as an equivalency project in that year.

² Decentralized wastewater treatment works are defined in sections 212(A) and 212(B) of the Clean Water Act. Refer to Footnotes 5 and 6 on page 3 of the accompanying report for excerpts of these sections.

³ Refer to Table 1 of the accompanying report for the name of each federal cross-cutter, as well as citations to laws and memorandums that declare whether a federal cross-cutter is applicable to a certain type of fundable CWSRF project.

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