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August 16, 2021

VIA ELECTRONIC MAIL
aloza@WeConservePA.org

Mr. Andy Loza, Executive Director
WeConservePA
610 N. 3rd Street, Suite 301
Harrisburg, PA 17101

Re: HMS Opinion Letter to WeConservePA regarding Eligible Conservation-related
Funding under the American Rescue Plan (ARP)

Dear Mr. Loza:

You have asked us for an opinion and guidance as to the range of conservation-related project¹ expenditures that are eligible for American Rescue Plan (ARP) support along with a risk assessment regarding such expenditures. Our opinion is based upon our review of the United States Department of the Treasury's Interim Final Rule "Coronavirus State and Local Fiscal Recovery Funds" at 31 CFR Part 35 issued and effective May 17, 2021², Treasury's Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions as of July 19, 2021³, PENNVEST's Clean Water State Revolving Fund (CWSRF) page⁴, the Pennsylvania Department

¹ Including projects relating to stream and habitat protection and restoration; land and conservation easement acquisition (whether for parks, preserves, trails, farmland preservation, or other conservation purposes); and park, preserve, and trail development and rehabilitation.

² U.S. Department of Treasury, Coronavirus State and Local Fiscal Recovery Funds, Interim Final Rule, 86 FR 26786, *available at* <https://www.govinfo.gov/content/pkg/FR-2021-05-17/pdf/2021-10283.pdf>.

³ U.S. Department of Treasury, Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions (as of July 19, 2021), p. 11, *available at* <https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf> (FAQs).

⁴ PENNVEST, Clean Water State Revolving Fund (CWSRF), *available at* <https://www.pennvest.pa.gov/Information/Funding-Programs/Pages/Clean-Water-State-Revolving-Fund.aspx>

of Environmental Protection's Nonpoint Source Management Plan - 2019 Update⁵, and conversations with PENNVEST staff.

Background and Summary

As part of ARP, signed by President Joseph R. Biden, the federal government will provide approximately \$6.15 billion in funding to Pennsylvania counties, metropolitan cities, and local government units to support COVID-19 response efforts, replace lost revenue, support economic stabilization for households and businesses, and address systemic public health and economic challenges. All Rescue Act funds must be obligated by the recipient government by December 31, 2024 and expended by December 31, 2026.

Treasury promulgated the IFR to implement the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund established under ARP. The term "conservation" does not appear in the IFR; however, the summary of the ARP contained in the IFR makes it clear that the ARP is intended to provide municipalities with considerable latitude in determining what projects and programs to fund. As stated in the IFR's Part 1.B summary of the ARP at 86 Fed. Reg. 26788:

State, local, and Tribal governments have flexibility to determine how best to use payments from the Fiscal Recovery Funds to meet the needs of their communities and populations

* * *

The interim final rule takes into consideration these disproportionate impacts by recognizing a broad range of eligible uses to help States, local, and Tribal governments support the families, businesses, and communities hardest hit by the COVID-19 public health emergency.⁶

In addition, in its Frequently Asked Questions document, Treasury states:

⁵ Section 319 of the federal Clean Water Act, 33 U.S.C. §319, requires states to produce an updated Assessment Report and Management Plan for the state's non-point source program every five years. The 2019 Plan outlines ongoing efforts and activities to address nonpoint source pollution through 2024. The 2019 Plan may be viewed at http://files.dep.state.pa.us/Water/BWEW/Watershed%20Management/WatershedPortalFiles/NonpointSourceManagement/3000-BK-DEP5316_Nonpoint_Management_Plan_2019_Update.pdf.

⁶ Parts II and III of the IFR, "Eligible Uses" and "Restrictions on Use" (86 Fed. Reg. 26788-26811) expand on this concept.

2.3. If a use of funds is not explicitly permitted in the Interim Final Rule as a response to the public health emergency and its negative economic impacts, does that mean it is prohibited?

The Interim Final Rule contains a non-exclusive list of programs or services that may be funded as responding to COVID-19 or the negative economic impacts of the COVID-19 public health emergency, along with considerations for evaluating other potential uses of Fiscal Recovery Funds not explicitly listed. The Interim Final Rule also provides flexibility for recipients to use Fiscal Recovery Funds for programs or services that are not identified on these non-exclusive lists, but which meet the objectives of section 602(c)(1)(A) or 603(c)(1)(A) by responding to the COVID-19 public health emergency with respect to COVID-19 or its negative economic impacts.

* * *

2.18. Would investments in improving outdoor spaces (e.g. parks) be an eligible use of funds as a response to the public health emergency and/or its negative economic impacts?

There are multiple ways that investments in improving outdoor spaces could qualify as eligible uses; several are highlighted below, though there may be other ways that a specific investment in outdoor spaces would meet eligible use criteria.

First, in recognition of the disproportionate negative economic impacts on certain communities and populations, the Interim Final Rule identifies certain types of services that are eligible uses when provided in a Qualified Census Tract (QCT), to families and individuals living in QCTs, or when these services are provided by Tribal governments. Recipients may also provide these services to other populations, households, or geographic areas disproportionately impacted by the pandemic.

These programs and services include services designed to build stronger neighborhoods and communities and to address health disparities and the social determinants of health. The Interim Final Rule provides a non-exhaustive list of eligible services to respond to the needs of communities disproportionately impacted by the pandemic, and recipients may identify other uses of funds that do so, consistent with the Rule's framework. For example, investments

in parks, public plazas, and other public outdoor recreation spaces may be responsive to the needs of disproportionately impacted communities by promoting healthier living environments and outdoor recreation and socialization to mitigate the spread of COVID-19.

Second, recipients may provide assistance to small businesses in all communities. Assistance to small businesses could include support to enhance outdoor spaces for COVID-19 mitigation (e.g., restaurant patios) or to improve the built environment of the neighborhood (e.g., façade improvements).

Third, many governments saw significantly increased use of parks during the pandemic that resulted in damage or increased maintenance needs. The Interim Final Rule recognizes that “decrease[s to] a state or local government’s ability to effectively administer services” can constitute a negative economic impact of the pandemic.

FAQs at pp. 4-5, 11.

From this review, we conclude that Treasury expressly recognizes the following eligible conservation-related ARP funding uses, as detailed herein:

1. Investments into improving outdoor spaces, specifically including:
 - a. investments in parks, public plazas, and other public outdoor recreation spaces responsive to the needs of disproportionately impacted communities (by, e.g., promoting healthier living environments and outdoor recreation and socialization to mitigate the spread of COVID-19.)
 - b. financial assistance to small businesses that includes support for the development of outdoor spaces to mitigate the spread of COVID-19 (e.g., outdoor patios) and/or to improve the environment of the neighborhood.
 - c. funding to respond to damage or increased maintenance needs resulting from the increased use of parks during the pandemic.
2. Environmental remediation, specifically funding related to the provision of government services directed at environmental remediation to the extent recipients have faced a reduction in revenue.

3. Green Infrastructure Projects, namely, the same types of uses eligible to receive financial assistance through the Environmental Protection Agency's (EPA) Clean Water State Revolving Fund (CWSRF) or Drinking Water State Revolving Fund (DWSRF).

Expenditures Eligible for ARP Support

1. Improving Outdoor Spaces

The Treasury has expressly recognized that “there are multiple ways that investments in improving outdoor spaces could qualify as eligible uses.” FAQs at p. 11. In fact, the Treasury has detailed three specific ways in which “investments in improving outdoor spaces” may be an eligible use of funds. *Id.*

First, investments in “parks, public plazas, and other public outdoor recreation spaces” responsive to the needs of disproportionately impacted communities. As the Treasury explained:

in recognition of the disproportionate negative economic impacts on certain communities and populations, the Interim Final Rule identifies certain types of services that are eligible uses when provided in a Qualified Census Tract (QCT), to families and individuals living in QCTs, or when these services are provided by Tribal governments. Recipients may also provide these services to other populations, households, or geographic areas disproportionately impacted by the pandemic.

These programs and services include services designed to build stronger neighborhoods and communities and to address health disparities and the social determinants of health. The Interim Final Rule provides a non-exhaustive list of eligible services to respond to the needs of communities disproportionately impacted by the pandemic, and recipients may identify other uses of funds that do so, consistent with the Rule's framework. For example, investments in parks, public plazas, and other public outdoor recreation spaces may be responsive to the needs of disproportionately impacted communities by promoting healthier living environments and outdoor recreation and socialization to mitigate the spread of COVID-19.

Id. Second, assistance to small businesses and private non-profit organizations⁷ may include support to enhance outdoor spaces:

recipients may provide assistance to small businesses in all communities. Assistance to small businesses could include support to enhance outdoor spaces for COVID-19 mitigation (e.g., restaurant patios) or to improve the built environment of the neighborhood (e.g., façade improvements).

Id. Third, the Treasury recognizes funding to address “decrease[s to] a state or local government’s ability to effectively administer services” including “damage or increased maintenance needs” resulting from the increased use of parks during the pandemic,” as valid uses of ARP funds:

Third, many governments saw significantly increased use of parks during the pandemic that resulted in damage or increased maintenance needs. The Interim Final Rule recognizes that “decrease[s to] a state or local government’s ability to effectively administer services” can constitute a negative economic impact of the pandemic.

Id. The Treasury further indicated that these three uses are not an exhaustive list and there may be other ways that a specific investment in outdoor spaces would meet eligible use criteria. *Id.*

2. Environmental Remediation

The Interim Final Rule gives recipients broad latitude to use funds for the provision of government services to the extent recipients have faced a reduction in revenue, including the use of funds on government services for the purpose of environmental remediation. FAQs at 15 (“Government services can include, but are not limited to, maintenance of infrastructure or pay-g spending for building new infrastructure, including roads [and] environmental remediation[.]”).

3. Green Infrastructure Projects

The Department of Treasury has indicated that the same types of uses eligible to receive under the financial assistance through the EPA CWSRF or DWSRF “align” with the eligible uses of ARP funds. IFR at 26802; FAQs at p. 27-28. For any project that can be tied into water quality

⁷ Under section 602(c)(3) of the Social Security Act, a State, territory, or Tribal government may transfer funds to a “private nonprofit organization . . . , a Tribal organization . . . , a public benefit corporation involved in the transportation of passengers or cargo, or a special-purpose unit of State or local government.” 42 U.S.C. § 602(c)(3). Similarly, section 603(c)(3) authorizes a local government to transfer funds to the same entities (other than Tribal organizations). *Id.* § 603(c)(3); see FAQs at pp. 3-5.

improvement, our conversations with PENNVEST staff indicate that any project that would be eligible under the CWSRF and/or DEP's CWA Section 319 Management Plan also would be eligible under Treasury's implementation of the ARP.

The Treasury expressly recognizes the following categories of eligible projects under DWSRF as eligible for ARP funding: "treatment, transmission and distribution (including lead service line replacement), source rehabilitation and decontamination, storage, consolidation, and new systems development." FAQs at p. 27. Under the CWSRF, categories of eligible projects include: "construction of publicly-owned treatment works, nonpoint source pollution management, national estuary program projects, decentralized wastewater treatment systems, stormwater systems, water conservation, efficiency, and reuse measures, watershed pilot projects, energy efficiency measures for publicly-owned treatment works, water reuse projects, security measures at publicly-owned treatment works, and technical assistance to ensure compliance with the Clean Water Act." *Id.* at p. 27-28. Eligible costs under the CWSRF include costs expended for acquisition of land and easements in relation to an eligible category.⁸

Additionally, the Treasury "encourages recipients to consider green infrastructure investments and projects to improve resilience to the effects of climate change." IFR at 26803. In particular, the Treasury recognized that "more frequent and extreme precipitation events combined with construction and development trends have led to increased instances of stormwater runoff, water pollution, and flooding." *Id.* As such, the Treasury has determined that ARP funds may be used for "green infrastructure projects that support stormwater system resiliency," which "could include rain gardens that provide water storage and filtration benefits, and green streets, where vegetation, soil, and engineered systems are combined to direct and filter rainwater from impervious surfaces." *Id.*

Recoupment

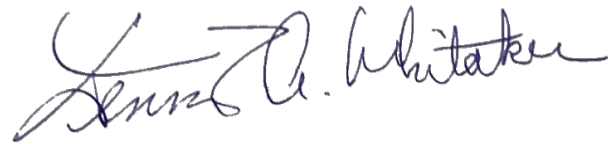
The IFR in Section 35.10 provides that a failure to comply with the use restrictions in the ARP (Section 603(c) for local governments) may result in recoupment of funds. Any effort at recoupment would be based on reporting by fund recipients. The IFR establishes a process involving notice from Treasury and reconsideration based upon additional information submitted by the recipient. Funds must be repaid within 120 days of a final decision by Treasury. However, given the broad latitude established by the ARP and the guidance in the IFR, we believe that the risk of recoupment is minimal for municipalities that plan, develop and justify projects using the rationales in the ARP/IFR, and any complementary or supplemental state program guidance.

⁸ The Pennsylvania Infrastructure Investment Authority Act defines "Eligible costs" to include the cost of "...lands, property, rights and easements, plans... and all other expenses necessary or incident to the acquisition, construction, improvement, expansion, extension, repair or rehabilitation of all or part of a project." 35 P.S. 751.3 (definitions).

Conclusion

Our opinion is a matter of professional judgment and is not a guarantee of result if the matter or question posed is determined in a legal proceeding. We do not undertake, and hereby disclaim, any liability, responsibility, or obligation to advise any person or entity of any change in circumstances or law, any new development, or any additional information that comes to our attention after the date of this letter that may affect the matters addressed or opinion set forth herein. Our opinion is limited to the matter expressly stated herein, no opinion is implied or may be inferred beyond those expressly stated herein, and no expansion of the opinion expressed herein may or should be made by inference, implication or otherwise. We issue this opinion for the sole benefit of WeConservePA in offering guidance to local government officials regarding the range of appropriate conservation-related project expenditures. Our opinion may not be used, circulated, quoted, or otherwise referenced for any other purpose or relied upon by any person or entity without our prior written consent.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dennis A. Whitaker", with a stylized, cursive script.

Dennis A. Whitaker

DAW/jld