

**REGULATIONS OF THE
CAPE COD AND ISLAND WATER PROTECTION FUND
MANAGEMENT BOARD**

[DRAFT OUTLINE]

1.0 Introduction and Purpose.

The Cape Cod and Islands Water Protection Fund Management Board adopts these regulations pursuant to its authority under M.G.L. c. 29C, §§ 19 and 20. The Board¹ was established by the Enabling Act, which added two sections – §§ 19 and 20 – to M.G.L. c. 29C. The Enabling Act creates the Water Protection Fund and makes the Board responsible for determining the method for allocating subsidies from the fund, including an equitable distribution among participating municipalities. The Board also is responsible for ensuring that the fund is spent only for the purposes set forth in M.G.L. c. 29C, § 19.

The Board's regulations govern the manner in which the Board awards a subsidy to a water pollution abatement project, as defined in the Department of Environmental Protection's regulation at 310 CMR 44.03. The Board's regulations are to be construed and applied in conjunction with the Clean Water State Revolving Fund (SRF) Program established by M.G.L. c. 29C and 310 CMR 44.00 (DEP Selection, Approval and Regulation of Water Pollution Abatement Projects Receiving Financing Assistance from the State Revolving Fund).

The Board can only use the Water Protection Fund to award subsidies to Participating Local Government Units, *i.e.*, Local Government Units who are members of the Water Protection Fund under the Enabling Act. These subsidies are in addition to, not in place of, any financial assistance awarded under the SRF Program. The Water Protection Fund can be expended only with the Board's approval and only for projects that have obtained all other approvals required by M.G.L. c. 29C.

A broad array of projects are eligible for financing under the SRF Program and thus for subsidies from the Water Protection Fund. These projects include, but are not limited to, the use of innovative strategies and alternative septic system technologies, the completion and update of water quality and wastewater management plans, the construction of sewer collection systems and wastewater treatment plants, and the implementation of drainage improvements and water treatment programs to improve water quality in fresh water ponds. The Board

¹ Capitalized terms in Section 1.0 (Introduction and Purposes) have the meaning set forth in Section 2.0 (Definitions).

may keep “Information Releases” regarding the projects that have been awarded subsidies to help guide future projects.

2.0 Definitions.

As used in these regulations, capitalized terms have the meanings set forth below. Where a definition is followed by a citation to 310 CMR 44.03, the definition is substantially the same as set forth in 310 CMR 44.03.

“Board” means the Cape Cod and Island Water Protection Fund Management Board established by the Enabling Act, specifically M.G.L. c. 29C, §§ 19 and 20.

“Calendar Year Allocation” means the amount of the Water Protection Fund that is conditionally committed to (a) Subsidies for Qualified Projects first appearing on the Intended Use Plan Project Listing published in the same calendar year as the year in which the Board makes conditional commitments to subsidize these Qualified Projects, (b) Subsidies for Qualified Projects previously approved and awarded subsidy from the Fund, and (c) Pre-existing Projects considered in that same calendar year.

“Clean Water Act,” or “CWA” means the Federal Water Pollution Control Act, Public Law 92-500, 33 USC § 1251, *et seq.* (310 CMR 44.03)

“Clean Water Trust” or “Trust” means the Massachusetts Clean Water Trust established by M.G.L. c. 29C. The Trust administers the Commonwealth’s SRF programs, which are authorized by federal legislation – the Water Quality Act of 1987 for the clean water SRF and the Safe Water Drinking Water Act of 1996 for the drinking water SRF – to provide financial assistance to borrowers for wastewater projects and drinking water projects. (310 CMR 44.03)

“Department” means the Massachusetts Department of Environmental Protection. (310 CMR 44.03)

“Eligibility Notice” means a written notice from the Board, acting through the Cape Cod Commission, informing a Participating Local Government Unit that a Qualified Project or Pre-existing Project is eligible for a Subsidy.

“Enabling Act” means Chapter 337 of the Acts of 2018, as amended by Chapter 5 of the Acts of 2019.

“EPA” means the United States Environmental Protection Agency. (310 CMR 44.03)

“Intended Use Plan” means the annual plan submitted by the Trust to EPA pursuant to § 606(c) of the CWA which identifies the intended use of the amounts available to the Water Pollution Abatement Revolving Fund as determined by the Trust and derived from the federal capitalization grant, state match amounts, loan

repayments, investment earnings and any other moneys deposited by the Trust available to fund projects eligible for funding under Title VI of the CWA. The Intended Use Plan includes a project listing, a description of short and long term goals for the use of the funds, information on the activities to be supported, assurances for meeting certain Title VI requirements, and the criteria and method for the distribution of funds. (310 CMR 44.03)

“Intended Use Plan Project Listing” means a listing of those projects identified by the Department for inclusion on the fundable portion of the Project Priority List pursuant to 310 CMR 45.05(2). (310 CMR 44.03)

“Loan Agreement” means an agreement entered into between the Trust and a Local Governmental Unit pertaining to a loan or local governmental obligations. (310 CMR 44.03)

“Loan Commitment” means a written commitment by the Trust to make a loan to a Local Governmental Unit to finance a project approved by the Department on terms consistent with the Department's Project Approval Certificate. (310 CMR 44.03)

“Local Government Unit” or “Local Governmental Unit” means any town, city, district, commission, agency, authority board or other instrumentality of the commonwealth or of any of its political subdivisions, including any regional local government unit defined in M.G.L. c. 29C, which is responsible for the ownership or operation of a Water Pollution Abatement Project and is authorized by a bond act to finance all or any part of the costs thereof through the issuance of bonds. (310 CMR 44.03)

“Participating Local Government Unit” means a Local Government Unit that is or is part of a municipality that is a member of the Water Protection Fund pursuant to M.G.L. c. 29C, §§ 19 and 20.

“Pre-existing Debt” means debt incurred prior to the enactment of the Enabling Act in connection with a Project apart from the Trust by a Participating Local Government Unit that is or is part of the towns of Nantucket, Edgartown, Tisbury, Oak Bluffs, Falmouth, Chatham and Provincetown, or is or is part of the city of Barnstable.

“Pre-existing Project” means a project financed through Pre-existing Debt.

“Project Approval Certificate” means the certificate issued by the Department to the Trust certifying that a project is approved for financing by the Trust and that the costs of the project are eligible for financial assistance pursuant to M.G.L. c. 29C, § 6. (310 CMR 44.03)

“Project Approvals” mean all approvals required for a Qualified Project by M.G.L. c. 29C, including the Loan Commitment, Loan Agreement, Project Approval Certificate, and Project Regulatory Agreement.

“Project Priority List” means the annual list of projects prioritized to receive financial assistance pursuant to 310 CMR 44.00, as described in more detail in 310 CMR 44.05.

“Project Regulatory Agreement” means an agreement between the Department and a Local Government Unit, executed and delivered to the Trust on or prior to the date of a loan from the Trust to the Local Governmental Unit to finance a project approved by the Department, which includes a disbursement schedule, procedures for approval and payment of requisitions, conditions related to the borrower’s compliance with the Department’s regulations and other federal and state statutes and regulations applicable to the construction and operation of the project, and provision for the Department’s supervision of the project in accordance with 310 CMR 44.00. (310 CMR 44.03)

“Qualified Project” means a Water Pollution Abatement Project undertaken by a Participating Local Government Unit and identified on the Intended Use Plan Project Listing after the enactment of the Enabling Act.

“State Revolving Fund (SRF) Program” means the financial assistance program for water pollution abatement projects authorized under M.G.L. c. 21, § 27A, and the CWA, including the Clean Water State Revolving Fund Program established pursuant to M.G.L. c. 29C, the Department’s related authority and responsibilities set forth in M.G.L. c. 21, § 27A, and elsewhere in M.G.L. c. 21, and the Water Pollution Abatement Revolving Fund established pursuant to M.G.L. c. 29, § 2L. (410 CMR 44.03)

“Subsidy” means a grant awarded by the Board to a Qualified Project or a Pre-existing Project to be paid using funds in the Water Protection Fund.

“Uncommitted Funds” mean the available funds for the current year within the Water Protection Fund that are not committed to be paid for the current year to a Participating Local Government Unit for a Qualified Project previously approved for subsidy from the Fund or for a Pre-existing Project through a contingent commitment or final approval granted in a prior year.

“Water Pollution Abatement Project” or “Project” means any abatement facilities, including without limitation rehabilitation of abatement facilities to remove, curtail or otherwise mitigate infiltrations and inflow, collection system, treatment works and treatment facilities as defined in M.G.L. c. 21, § 26A, and any eligible facilities for implementation of a nonpoint source pollution control management program or estuary conservation and management plan pursuant to the CWA. (310 CMR 44.03)

“Water Protection Fund” means the Cape Cod and Islands Water Protection Fund established by G.L. c. 21C, § 19.

“Withdrawal Notice” means a written notice from a Participating Local Government Unit withdrawing its Qualified Project or Pre-existing Project from consideration for a Subsidy from the Water Protection Fund.

3.0 Form of Subsidy.

3.1 Grants Only. All Subsidies shall take the form of grants. The Board shall not use the Water Protection Fund to make loans to Participating Local Government Units for Qualified Projects or Pre-existing Projects.

3.2 Terms of Subsidy.

- **Options [For Discussion]:** The Board could limit its use of the Water Protection Fund to granting Subsidies for Qualified Projects in either of the following ways (but not both):
 - (a) Principal Reduction Model: A one-time upfront subsidy that reduces the principal amount borrowed by the Participating Local Government Unit for the Qualified Project by up to [__%] or [\$__], whichever is less **[NOTE: This results in funds being noted on the Trust’s debt service schedule; the funds would be paid directly to the Trust; because the Subsidy is not spread out over a number of years, this could result in a decrease of funds available for each calendar year.]**
 - (b) Debt Service Model: An annual payment of up to [____] of the annual debt service on the principal amount borrowed by the Participating Local Government Unit for a Qualified Project. **[NOTE: this would result in funds being paid directly to the municipality; the municipality would be responsible for using the funds appropriately to reduce debt service; requires further discussion.]**

4.0 Qualifications for Subsidy.

4.1 Application. Consideration for a Subsidy does not require a formal application. The Board will rely on the expertise of the Department and the Trust and their evaluations of a proposed Project under the SRF Program.

4.2 Water Protection Funding Qualification. When a Qualified Project first appears on the Intended Use Plan Project Listing, it shall automatically be eligible for a Subsidy, except as set forth in this section. Within 30 days

of the Department's publication of the Intended Use Plan, the Board, through the Cape Cod Commission, shall send an Eligibility Notice to all Participating Local Government Units with a Qualified Project on the Intended Use Plan Project Listing. The Participating Local Governmental Unit may opt out of consideration for a Subsidy by sending the Board a Withdrawal Notice within 30 days of receiving the Eligibility Notice. Unless the Board receives a Withdrawal Notice, the Qualified Project shall remain eligible for a Subsidy so long as it meets the requirements set forth in Section 6.0. **[NOTE: According to the Trust, the numbers that appear on the Intended Use Plan Project Listing at this stage are not final costs.]**

5.0 Board Meeting to Determine Subsidy Allocation.

- 5.1 Annual Meeting. The Board shall meet no less than once annually to allocate Subsidies. The annual meeting will be held no sooner than 60 days and no later than 120 days after the Department's publication of the Intended Use Plan Project Listing. At the annual meeting, the Board's Chair, in his or her discretion, may schedule additional meetings.
- 5.2 Commitments of Subsidies. At the annual meeting, or at a subsequent meeting or at subsequent meetings called by the Chair, the Board shall make a contingent commitment to award a Subsidy for each Qualified Project first appearing on the Intended Use Plan Project Listing in that calendar year, unless the Board has received a Withdrawal Notice within the time frame required by Section 4.2. The commitment shall be contingent on the Qualified Project satisfying the requirements set forth in Section 6.0 of these regulations.
- 5.3 Amount of Subsidy Awarded for Qualified Projects. The Subsidy for each Qualified Project shall be as follows:
- Option 1 [For Discussion]: The available funds shall be distributed equally among all Qualified Projects that will be subsidized for that year.
 - Option 2 [For Discussion]: An amount equal to the "Pro Rata Percent" times the Calendar Year Allocation. The Pro Rata Percent is the percent calculated by dividing (x) a numerator that is the cost of the Qualified Project to be subsidized, by (y) a denominator that is the total cost of all Qualified Projects to be subsidized. **[NOTE: In this case, under the Debt Service Model, the funds are committed but paid on a cash flow annual basis in equal amounts spread out over the 20-year SRF loan period]**

- **Option 3 [For Discussion]: [If Debt Service Model]** The Debt Service Pro Rata Percent times the Calendar Year Allocation. The Debt Service Pro Rata Percent is the percent calculated by dividing (x) a numerator that is the debt service to be paid on the Qualified Project to be subsidized, by (y) a denominator that is the total debt service to be paid on all Qualified Projects to be subsidized.

[Note: The Trust says that the numbers in the Intended Use Plan Project Listing are not final costs. If the Board makes commitments based on these numbers, it will have to decide whether to revise the final Subsidy amount based on the actual numbers at the time of final approval; further discussion with the Trust is necessary to make this work.]

5.4 Subsidies for Pre-existing Projects.

- 5.4.1. Participating Local Government Units Only. The Board shall not award a Subsidy for a Pre-Existing Project unless (a) loan payments are ongoing at the time the Board considers making a commitment to grant a Subsidy; and (b) the debtor is a Participating Local Government Unit.
- 5.4.2. Timing of Commitment. In the first calendar year in which it makes contingent commitments to subsidize Qualified Projects, the Board also shall consider Subsidies for Pre-existing Projects for debtors who are then Participating Local Government Units. The Board shall consider Subsidies for other Pre-existing Projects in the first calendar year after the debtor becomes a Participating Local Government Unit. The Board, through the Cape Cod Commission, shall notify Participating Local Government Units with Pre-existing Projects of their eligibility for a Subsidy at the same time and in the same manner as set forth in Section 4.2, and the Participating Local Government Unit likewise shall send a Withdrawal Notice within the time required by Section 4.2 if it does not wish to be considered for a Subsidy. At the written request of the Participating Local Government Unit, the Board, in its complete discretion, may defer consideration of a Subsidy for a Pre-existing Project to a subsequent calendar year.
- 5.4.3. Amount of Subsidy. The Board shall consider Subsidies for Pre-existing Projects on equal footing with Qualified Projects appearing on the Intended Use Plan Project Listing in the same calendar year. Subsidies for Pre-existing Projects shall be allocated in the same manner as for Qualified Projects appearing on the Intended Use Plan Project Listing, provided however, that the debt considered for subsidy shall be based only upon the

amount of outstanding principal owed at the time of consideration by the Board, not the original amount of the loan taken by the Participating Local Governmental Unit.

- 5.4.4. Nature of Commitment. Commitments made for Subsidies for Pre-existing Projects shall not be contingent on final approval under Section 6.1, but shall be subject to the funding condition set forth in Section 7.2. Subsidies for Pre-existing Projects shall be paid as of the calendar year in which the Board commits to the Subsidy.

6.0 Subsidy Commitment and Approval.

- 6.1. Contingent Commitment. For Qualified Projects eligible for a Subsidy, the Board shall issue a contingent commitment in the first calendar year in which the Project appears on the Intended Use Plan Project Listing, unless the Board has received a Notice of Withdrawal for the Project. A contingent commitment means that the Subsidy is contingent upon the receipt of an executed Project Regulatory Agreement for the Project.
- 6.2. Final Approval. For a Qualified Project receiving a contingent commitment, the Board shall issue a final approval upon receipt of a fully executed Project Regulatory Agreement by the Cape Cod Commission. Final approval shall be an administrative matter handled by the Board, through the Cape Cod Commission, and shall be granted or denied solely on the basis of whether the Participating Local Government Unit has obtained the Project Regulatory Agreement.

7.0 Conditions for Subsidy; Breach of Conditions.

- 7.1 No Agreement. The Board shall not require a Participating Local Government Unit to enter into an agreement with the Board. By accepting a Subsidy payment, the Participating Local Government Unit agrees that the terms of the Subsidy are governed by these regulations, as they may be amended from time to time, for the entire duration of the Subsidy.
[NOTE: if the Board opts for the Principal Reduction Model, this section will need to be revised.]
- 7.2 Funding Condition. **[If Debt Service Model]** Each contingent commitment and each Subsidy is a commitment of future revenues from the Water Protection Fund solely to the extent available. The Board retains discretion to discontinue, reduce or suspend subsidies if the Uncommitted Funds in the Water Protection Fund are insufficient to meet the total subsidy commitments – both ongoing obligations for subsidies awarded in prior years and new awards. When deciding to discontinue, reduce or suspend subsidies, the Board shall treat all Qualified Projects and Pre-existing Projects as equally as practicable.

7.3 Breach of Conditions of Project Approvals.

- **[If Debt Service Model]** The Board will suspend or discontinue a Subsidy if the Participating Local Government Unit has breached any of the conditions of the Project Regulatory Agreement or Loan Agreement in a manner that causes the Trust to call back the loan, suspend the Participating Local Government Unit's ability to draw down the loan funds, or require that the Participating Local Government Unit repay any loan funds previously provided. The Board will not compel a Participating Local Government Unit to pay back any Subsidy already provided. The Board may, in its discretion, reinstate the Subsidy if the Participating Local Government cures its breach of the Project Regulatory Agreement or Loan Agreement in a manner that causes the Trust to reinstate the loan.
- **[If Principal Reduction Model, will Board compel repayment of some or all of the subsidy for a breach of the Project Approvals?]**

8.0 Management of Use of Water Protection Fund.

8.1 Prior Year Allocation. Each calendar year, prior to determining the amount of the Fund that will be used to subsidize Qualified Projects first appearing on the Intended Use Plan Project Listing for that calendar year and to subsidize Pre-existing Projects in that same year, the Board shall set aside sufficient funds to pay the subsidies already committed to Qualified Projects and Pre-existing Projects in prior calendar years if those subsidies may be paid or will be paid out during the same calendar year for which the Board is considering making contingent commitments to new Projects.

8.2 Reserve Fund. In the first calendar year in which the Board makes contingent commitments to subsidize Projects, the Board shall establish a reserve fund in an amount that the Board, in its complete discretion, determines is sufficient to ensure that the Fund does not become insolvent due to variability in annual deposits to the Fund. In each calendar year after the reserve fund has been established, prior to determining the Calendar Year Allocation, the Board, in its complete discretion, shall decide whether to set aside additional funds for the reserve fund.

[As drafted, Sections 8.1 and 8.2 assume a debt service model. If the Board opts for the principal reduction model, Section 8.1 is not necessary. A reserve fund could still be established but not in the way suggested by Section 8.2.]

8.3 Calendar Year Allocation. Each calendar year, the Board shall consider the amount of deposits into the Fund, the amounts required to maintain sufficient reserves per Section 8.2 above, and amounts required to meet

prior year allocations per Section 8.1 above to determine and establish the amount of any uncommitted funds. The Board, in its complete discretion, shall determine the portion of the Uncommitted Funds to be committed for the Calendar Year Allocation to be awarded to Participating Local Government Units for Qualified Projects first appearing on the Intended Use Plan Project Listing for that year.

9.0 Withdrawal from Water Protection Fund.

- 9.1 Withdrawal of Eligible Local Government Unit. If a Participating Local Government Unit obtains final approval of a Subsidy for a Qualified Project or is granted a Subsidy for a Pre-existing Project, it may not withdraw from the Water Protection Fund for a period commencing with the date on which the Board makes the first Subsidy payment and continuing through the date on which the Participating Local Government Unit pays off its loan under the SRF Program .
- 9.2 Reentry to the Water Protection Fund. A Local Government Unit that has withdrawn from the Water Protection Fund may rejoin the Water Protection Fund at any time after satisfying the requirements of M.G.L. c. 29C, §§ 19 and 20. In accordance with M.G.L. c. 29C, § 19, the Board shall not grant any subsidies to a Local Government Unit that returns to the Water Protection Fund (thus becoming a Participating Local Government Unit) for a period of two years from the date on which the legislative body of the Local Government Unit voted to return to the Water Protection Fund.

Tabled for Future Discussion and Potential Amendment of Regulations: The board, subject to a memorandum of understanding with the department of environmental protection, may direct the comptroller to transfer a specified amount not to exceed 10 per cent of the annual revenue deposited into the fund to the department for the department to contract with a regional planning agency, institution of higher education or non-profit corporation to evaluate and report on the efficacy of adaptive management measures to reduce nitrogen pollution of coastal waterways undertaken pursuant to an area wide wastewater management plan or a suitable equivalent plan, to monitor the water quality and watersheds of areas subject to the study and to support further assessment and water quality modeling to further refine area wide wastewater management plans or suitable equivalent plans in Barnstable and Nantucket counties and the county of Dukes County. *See M.G.L. c. 29C, § 19.*