

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #6

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MAY 20 1 29 PM '99

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: WV Infrastructure & Jobs Development Council TITLE NUMBER: 167

AMENDMENT TO AN EXISTING RULE: YES X, NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 1

TITLE OF RULE BEING AMENDED: Infrastructure and Jobs Development Council

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

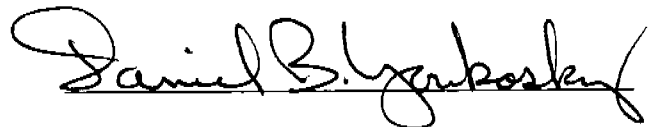
TITLE OF RULE BEING PROPOSED:

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) Senate Bill 269

SECTION 64-9-17, PASSED ON March 12, 1999

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON
THE FOLLOWING DATE: Thursday, May 20, 1999



\$4.60

TITLE 167

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SERIES 1
INFRASTRUCTURE AND JOBS DEVELOPMENT COUNCIL
COMMONWEALTH OF VIRGINIA
SECRETARY OF STATE

§ 167-1-1. General.

1.1. Scope and Purpose. -- This legislative rule establishes guidelines to be used by the Council in evaluating any request by a project sponsor for funding assistance for the planning, design, acquisition, or construction of water and waste water projects and the funding of all or any part of such projects through the Infrastructure Fund.

1.2. Authority. -- W. Va. Code §§ 31-15A-4, 31-15A-5 and 31-15A-10.

1.3. Filing Date. -- August 4, 1998

1.4. Effective Date. -- May 20, 1999

§ 167-1-2. Definitions.

2.1. "Act" means the Infrastructure and Jobs Development Act, W. Va. Code § 31-15A-1 et seq.

2.2. "Cost" means, as applied to any project to be financed in whole or in part with infrastructure revenues or funds otherwise provided pursuant to the Act, the cost of planning, acquisition, improvement and construction of the project; the cost of preliminary design and analysis, surveys, borings; the cost of environmental, financial, market and engineering feasibility studies, assessments, applications, approvals, submissions or clearances; the cost of preparation of plans and specifications and other engineering services; the cost of acquisition of all land, rights-of-way, property rights, easements, franchise rights and any other interests required for the acquisition, repair, improvement or construction of the project; the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which buildings or structures may be moved; the cost of excavation, grading, shaping or treatment of earth, demolishing or removing any buildings or structures; the cost of constructing any buildings or other improvements; the cost of all pumps, tanks, vehicles, apparatus and other machinery, furnishings and equipment; loan or origination fees and all finance charges and interest incurred prior to and during the construction and for no more than six months after completion of construction; the cost of legal services and expenses; the cost of all plans, specifications, surveys and estimates of cost; all working capital and other expenses necessary or incident to determining the feasibility or practicability of acquiring, repairing, improving or constructing any project; the cost of placing any project in operation; and all other costs and expenses of any kind or nature incurred or to be incurred by the project sponsor developing the project that are reasonable and necessary for carrying out all works

and undertakings necessary or incident to the accomplishment of any project: *Provided*, That costs shall not include any amounts related to the ongoing operations of the owner or operator, depreciation thereof or any other cost which the Council or the Water Development Authority has not determined to be consistent with the purposes and objectives of the Act.

2.3. "Council" means the West Virginia Infrastructure and Jobs Development Council created pursuant to Section 3 of the Act.

2.4. "Crisis Situation" means a recent incident such as an act of God (drought, freeze, flood, storm or landslide), or an act of man (chemical spill or vandalism), resulting in an outage or a significant decline in quality or quantity of potable water or the treatment of waste water which poses a serious and immediate threat or endangerment to health for which local funds are not available to resolve: *Provided*, That a crisis situation caused by an act of man shall not include occurrences resulting from the lack of maintenance; negligence; normal replacement of operating parts, pumps, or systems; or upgrades to achieve compliance with existing or new regulatory standards.

2.5. "Division of Environmental Protection" means the Division of Environmental Protection established under W. Va. Code §22-1 et seq. or any successor to all or any substantial part of its powers and duties.

2.6. "Division of Health" means the Division of Health created in W. Va. Code §16-1 et seq. or any successor to all or any substantial part of its powers and duties.

2.7. "Economic Development Authority" means the Economic Development Authority established under W. Va. Code §31-15 et seq. or any successor to all or any substantial part of its powers and duties.

2.8. "Governmental agency" means any county; municipality; watershed improvement district; assessment district; soil conservation district; sanitary district; public service district; drainage district; regional governmental authority and any other state governmental agency, entity, political subdivision or public corporation or agency authorized to acquire, construct or operate water or waste water facilities or infrastructure projects.

2.9. "Housing Development Fund" means the West Virginia Housing Development Fund established under W. Va. Code §31-18 et seq. or any successor to all or any substantial part of its powers and duties.

2.10. "Infrastructure Fund" means the West Virginia Infrastructure Fund established in accordance with Section nine of the Act.

2.11. "Infrastructure project" means a project in the State which the Council determines is likely to foster and enhance public health, economic growth and development in the area of the State in which the project is developed, for commercial, industrial, community improvement or preservation or other proper purposes. Infrastructure projects

include but are not limited to tourism and recreational housing, land, air or water transportation facilities and bridges, industrial or commercial projects and facilities, mail order, warehouses, wholesale and retail sales facilities and other real and personal properties, including facilities owned or leased by this state or any other project sponsor, and includes, without limitation (1) the process of acquiring, holding, operating, planning, financing, demolition, construction, improving, expanding, renovation, leasing or otherwise disposing of the project or any part thereof or interest therein, and (2) preparing land for construction and making, installing or constructing improvements on the land, including water or waste water facilities or any part thereof, steam, gas, telephone and telecommunications and electric lines and installations, roads, bridges, railroad spurs, buildings, docking and shipping facilities, curbs, gutters, sidewalks, and drainage and flood control facilities, whether on or off the site.

2.12. "Infrastructure revenue" means all amounts appropriated by the Legislature; all amounts deposited into the Infrastructure Fund; any amounts received, directly or indirectly, from any source for the use of all or any part of any project completed pursuant to this Act; and any other amounts received by the State Treasurer, the Council or the Water Development Authority for the purposes of the Act.

2.13. "Need of the project sponsors" means there is a public need for a project. The Council shall construe a population increase evidenced by the last two decennial censuses in a county in which a project is proposed, as a factor supporting the conclusion that a need exists for projects in that county.

2.14. "Project" means any waste water facility or water facility project, or any combination thereof, constructed or operated or to be constructed or operated by a project sponsor.

2.15. "Project sponsor" means any person or governmental agency, or any combination thereof, including, but not limited to, any public utility, which intends to plan, acquire, construct, improve or otherwise develop a project or infrastructure project.

2.16. "Public Service Commission" means the Public Service Commission of West Virginia created and established under W. Va. Code §24-1-3 or any successor to all or any substantial part of its powers and duties.

2.17. "Person" means any individual, corporation, partnership, association, limited liability company or any other form of business organization.

2.18. "Public utility" means any person or persons, or association of persons, however associated, whether incorporated or not, including, without limitation, any governmental agency, operating a waste water facility or water facility as a public service, which is regulated by the Public Service Commission as a public utility or which is required to file its tariff with the Public Service Commission.

2.19. "State Development Office" means the West Virginia Development Office established under W. Va. Code §5B-2 et seq. or any successor to all or any substantial part of its powers and duties.

2.20. "State infrastructure agency" means the Division of Health, Division of Environmental Protection, Housing Development Fund, Public Service Commission, State Development Office, Water Development Authority, Economic Development Authority and any other state agency, division, body, authority, commission, instrumentality or entity which now receives or in the future may receive applications for the funding of, and provides funding or technical assistance for, the planning, acquisition, construction or improvement of a project.

2.21. "Waste water facility" means all public facilities, land and equipment used for or in connection with treating, neutralizing, disposing of, stabilizing, cooling, segregating or holding waste water, including, without limitation, facilities for the treatment and disposal of sewage, industrial wastes or other wastes, waste water, and the residue thereof; facilities for the temporary or permanent impoundment of waste water, both surface and underground; and sanitary sewers or other collection systems, whether on the surface or underground, designed to transport waste water together with the equipment and furnishings therefor or thereof and their appurtenances and systems, whether on the surface or underground including force mains and pumping facilities therefor.

2.22. "Water Development Authority" means the West Virginia Water Development Authority established under W. Va. Code §22C-1 et seq. or any successor to all or any substantial part of its powers and duties.

2.23. "Water facility" means all public facilities, land and equipment used for or in connection with the collection and/or storage of water, both surface and underground, transportation of water, storage of water, treatment of water and distribution of water for the purpose of providing potable, sanitary water suitable for human consumption and use.

§ 167-1-3. Projects.

3.1. Project Review. Prior to applying for or receiving any loan, loan guarantee, grant or other funding assistance for a project from any State infrastructure agency, a project sponsor must submit a preliminary application on the Council's form and must receive the Council's recommendation.

3.1.1. If a project sponsor believes that a project is outside the review of the Council, then the project sponsor shall complete only the appropriate sections of the preliminary application form and shall request an exemption from review.

3.2. Exemption from Review. The Council shall exempt a project from the preliminary application review process:

3.2.1. Any project sponsor which either had received acceptable bids for the project or had all funding in place on July 1, 1994.

3.2.2. Any funding from a State infrastructure agency where the recipient of the funding is designated by state or federal law or regulation.

3.2.3. Any funding from any state agency determined by the Council not to be a State infrastructure agency.

3.2.4 Any funding from the governor's civil contingent fund with regard to projects or infrastructure projects.

3.2.5. Any activity funded by a State infrastructure agency determined by the Council to be outside the scope of the definition of project.

3.2.6. Any action taken by the Economic Development Authority pursuant to the authority established in W. Va. Code §31-15 et seq.

3.2.7. The North Fork Hughes River project described in Section 8(d) of the Act.

3.3. Preliminary Application Filing. A project sponsor may file a preliminary application with the Council, at the offices of the Water Development Authority, at any time: Provided, that the preliminary application will not be formally accepted until such preliminary application is presented to the Council at the next regularly scheduled Council meeting, at which time the thirty-day review period shall begin. The Water Development Authority may, but is not required to, circulate the preliminary application to Council members or Council committees in advance of such meeting.

3.4. Preliminary Application Review. Within thirty days of the Council's formal acceptance of a complete preliminary application from a project sponsor, the Council shall either recommend that the project sponsor seek funding or that the project sponsor not seek funding for the project or request additional information if necessary to make a determination.

3.5. Approval. If the Council determines that the project is consistent with the Act, it shall make a written recommendation for the project financing stating: (i) the loan, loan guarantee or grant, or any combination thereof, for which the project sponsor should apply; (ii) the amount or amounts of said loan, loan guarantees or grant; (iii) the source or sources of such funding and (iv) which State infrastructure agency or agencies should consider funding the project, including funding from the Infrastructure Fund.

3.6. Funding of Project. The Council may provide that if the recommended funding sources have not or cannot dedicate money for the project, the project sponsor shall

submit a supplement to its preliminary application to the Council for consideration of alternate funding from another funding source or the Infrastructure Fund.

3.7. Denial. If the Council determines that the project is not eligible for funding assistance from any State infrastructure agency, or that the project is not otherwise an appropriate or prudent investment of State funds, it shall recommend that the project sponsor not seek funding from any State infrastructure agency.

3.8. Recommendations. The Council shall provide a copy of its recommendation, together with a copy of the preliminary application, if not previously provided, to all State infrastructure agencies which are listed in the recommendation as recommended funding sources.

§ 167-1-4. Review Guidelines.

4.1. Determination of Eligible Projects. When evaluating any request for funding assistance to plan, acquire, construct, improve or otherwise develop a project, the Council and other State infrastructure agencies shall consider the following:

- 4.1.1. The public health benefits;
- 4.1.2. The economic development benefits;
- 4.1.3. The degree to which the project will correct deficiencies involving compliance of water systems or sewage treatment facilities with State or federal laws, regulations or standards;
- 4.1.4. The degree to which the project encourages effective and efficient consolidation of water or sewage treatment systems consistent with the comprehensive plan developed pursuant to Section six of the Act;
- 4.1.5. The cost effectiveness of the project as compared with alternatives which achieve substantially the same public health or economic development benefits, including the consideration of system operation and maintenance requirements and providing maximum feasible fire protection;
- 4.1.6. The availability of alternative sources of funding which could finance all or a part of the project, and the need for the assistance of the Council to finance the project or attract other sources of funding;
- 4.1.7. The applicant's ability to operate and maintain the system if the project is approved;

4.1.8. The degree to which the project achieves other State or regional planning goals;

4.1.9. The estimated date upon which the project could commence if funding were available and the estimated completion date of the project;

4.1.10. Such other considerations as the Council may consider necessary or appropriate to accomplish the purpose and intent of the Act.

4.2. Waste Water Guidelines. When evaluating a request for funding a project which will include the construction, improvement, or development of a waste water facility or system, the Council and other State infrastructure agencies shall consider the following:

4.2.1. The improvement of public health by addressing direct human impact due to system malfunctions or inadequately treated sewage; the severity of individual or public water supply contamination; the degree of impact on public bathing areas; and the severity of safety hazards from deteriorated facilities.

4.2.2. The enhancement of economic development by encouraging directly or indirectly development activity and job creation or retention.

4.2.3. The facilitation of enforcement compliance by reducing existence of overload conditions, damage to fish and aquatic life, loss of boating and recreation opportunity, impact on industrial water supply uses, impact on crop irrigation and degradation of streams used for stock watering.

4.2.4. The adequacy, efficiency and social impact; the extent that reorganization or consolidation of facilities will be accomplished; whether the population will be directly affected; the ongoing ability of the applicant to operate and maintain the project facilities and system; an increase in the reliability of service; and efficiency of the proposed solution when compared with other alternatives.

4.2.5. The enhancement of the State goal of providing waste water treatment in developing or developable but currently unserved areas.

4.3. Water Guidelines. When evaluating a request for funding of a project which will include the construction, improvement, or development of a water facility or system, the Council and other State infrastructure agencies shall consider the following:

4.3.1. The effect on public health; the elimination of an ongoing public health hazard; the elimination of a periodic or potential public health hazard; and the preventive maintenance related to health hazards.

4.3.2. The enhancement of economic development activity and job creation or retention resulting directly or indirectly from the project; the opportunity to use other State programs; and the degree of local distress in the area where the project is located.

4.3.3. The effect on compliance and improvement in water system design, treatment, service, operation and compliance.

4.3.4. The ongoing ability of the applicant to operate and maintain the project facility and system.

4.3.5. The beneficial environmental and social impacts; beneficial environmental impact only; and beneficial social impact only.

4.3.6. The adequacy and efficiency of the water facility or system; the increase in availability of water, water conservation or improvement in aesthetic water quality; the increase in the reliability of service; and the efficiency of the proposed solution when compared with other alternatives.

4.3.7. The enhancement of the State goal of providing potable water in developing but currently unserved areas.

§ 167-1-5. Infrastructure Fund Administration.

5.1. Administration of Infrastructure Fund. The Water Development Authority shall administer amounts in the Infrastructure Fund.

5.2. Sources of Money for Fund. The Infrastructure Fund shall consist of infrastructure revenues; any appropriations, grants, gifts, contributions, loan proceeds or other revenues received by the Infrastructure Fund from any source, public or private; amounts received as payments on any loans made by the Water Development Authority from the Infrastructure Fund to pay for the cost of a project or infrastructure project; insurance proceeds payable to the Water Development Authority or the Infrastructure Fund in connection with any infrastructure project or project; all income earned on moneys held in the Infrastructure Fund; all funds deposited in accordance with the Act; and all proceeds derived from the sale of bonds issued pursuant to W. Va. Code §31-15B et seq.

5.3. Use of Moneys in the Fund. Upon the written recommendation of the Council, and subject to the restrictions set forth in the Act, including but not limited to the restrictions set forth below, the Water Development Authority shall use money in the Infrastructure Fund to make loans, loan guarantees or grants, or any combination thereof, and to provide financial, technical or other assistance as necessary to finance all or part of the costs of infrastructure projects or projects to be undertaken by a project sponsor.

5.4. Council Determination. Prior to the Water Development Authority's making any loan, loan guarantee, grant or other assistance, the Council shall determine that the loan, loan guarantee, grant or other assistance and the manner in which it will be provided are necessary or appropriate to accomplish the purposes and intent of the Act.

5.5. Eligible Grant Recipients. The Council shall not authorize the Water Development Authority to make grants for any project to any project sponsor (i) which is not a governmental agency or a not-for-profit corporation, or (ii) where the project, if funded, will provide subsidized services to certain users in the service area of the project.

5.6. Grant Requirements. The Water Development Authority may make a grant to a project sponsor for a project if the Council in its sole discretion determines and finds that (1) the level of rates for the users would otherwise be an unreasonable burden given the users' likely ability to pay; or (2) the absence of a sufficient number of users prevents funding of the project except through grants. Prior to awarding any infrastructure grant money to a project sponsor, the Council must determine that no other funding is available for the proposed grant portion of the project.

5.7. Grant Criteria. In determining whether a grant should be offered, and, if so, what proportion of the financial assistance offered should constitute a grant and what portion should constitute a loan or other loan assistance, the Council will consider the ultimate effect that financing a project's costs will have on the rates that users will be required to pay.

5.7.1. In performing this assessment, the Council shall review the mandatory minimum end user utility rate that must be met by the project sponsor before grant assistance may be awarded. This mandatory minimum end user utility rate shall be based upon a uniform statewide percentage of the median household income as determined and published by the United States Department of Commerce, Bureau of the Census, for the geographic area which the project will serve and upon an average customer usage of 4,500 gallons per month. The uniform percentage rate shall be .6% of the median household income. The Council shall base its determination on the median household income for the Bureau of Census established minor civil division (MCD) most closely related to the geographic boundaries of the project sponsor as established by law. The minor civil divisions and the median household incomes extracted from the 1990 Bureau of Census report are set forth in Appendix A attached hereto and incorporated herein by reference. If the project sponsor provides service to two or more MCD's but does not serve an entire county or if a municipal project sponsor serves outside its corporate boundaries, then the Council shall compute the minimum end user utility rate in accordance with the formula set forth in Appendix A. When determining median household income of a geographic area of the project to be served, the Council shall also consider any surveys of the income of the households that will be served by the project.

5.7.2. The Council may further consider factors including, but not limited to, the financial condition of the applicant, including revenues, expenses, debt structure, reserve balances, available collateral and financial condition of the project sponsor, and the inability of the project sponsor to secure grant funding from other sources.

5.8. Limit on Grant Amount. Any moneys disbursed from the Infrastructure Fund in the form of grants shall not exceed twenty percent of the total funds available for the funding of projects. The Council may limit individual grant awards to whatever amount it deems desirable to advance the intent and purposes of the Act: Provided, That no project sponsor shall receive infrastructure grant money in an amount in excess of fifty percent of the total cost of the project.

5.9. Terms of Grant. Where a project sponsor has received infrastructure grant money to fund a project, and such project is thereafter sold then to the extent that proceeds are available, the project sponsor shall reimburse the infrastructure fund the amount of the infrastructure grant. In the alternative, the council may allow repayment of the grant by converting the grant into a loan from the infrastructure fund. The proceeds from the repayment of any such grant or grant which has been converted to a loan shall retain their character as proceeds available for grants. The amount of repayment may be reduced by the applicable share of accumulated depreciation of the project or the applicable share of accumulated accelerated depreciation of the project as determined by the Council. The infrastructure council shall review any agreement between the project sponsor and the person or entity purchasing the project to determine whether the agreement was structured so that no proceeds would become available for the repayment of the grant funds. If the infrastructure council finds that the transaction was structured by the parties to intentionally preclude the availability of proceeds for the repayment of the infrastructure grant funds, then the council may require the project sponsor to repay the full amount of any infrastructure grant. The Council shall prepare a report listing those projects which received infrastructure grant money and are sold. The report shall include a description of the terms by which the infrastructure grant will be repaid. The report shall be provided on or before the tenth day of January each year to the Joint Committee on Government and Finance.

5.10. Loans. The Council shall authorize the Water Development Authority to make loans or loan assistance from the Infrastructure Fund on a case-by-case basis based on the need of the project sponsor and upon such terms and conditions as the Council shall recommend. No loan or loan assistance will be authorized where the project, if funded, will provide subsidized services to certain users in the service area of the project.

5.11. Limit on Loan Amount. The Council may limit loans to project sponsors to whatever amount it deems desirable to advance the intent and purposes of the Act.

5.12. Limit on Loan Interest Rate. The interest rate on any loan to governmental, quasi-governmental, or not-for-profit project sponsors for projects made pursuant to the Act

shall not exceed three percent per annum. Loans made to for profit entities shall bear interest at the current market rates which shall be the equivalent of the prime rate published as such in the Wall Street Journal, or similar publication, on the date of the loan commitment.

5.13. Financial Assistance from the Fund. Each loan, loan guarantee, grant or other assistance made or provided by the Water Development Authority shall be evidenced by a loan, loan guarantee, grant or assistance agreement between the Water Development Authority and the project sponsor to which the loan, loan guarantee, grant or assistance shall be made or provided, which agreement shall include, without limitation and to the extent applicable, the following provisions:

5.13.1 The estimated cost of the infrastructure project or project, the amount of the loan, loan guarantee or grant or the nature of the assistance, and in the case of a loan or loan guarantee, the terms of repayment and the security therefore, if any;

5.13.2. The specific purposes for which the loan or grant proceeds shall be expended or the benefits to accrue from such loan guarantee or other assistance, and the conditions and procedure for disbursing loan or grant proceeds;

5.13.3. The duties and obligations imposed upon the project sponsor regarding the acquisition, construction, improvement or operation of the project or infrastructure project; and

5.13.4. The agreement of the project sponsor to comply with all applicable federal and state laws, and all rules and regulations issued or imposed by the Council or other state, federal or local bodies regarding the acquisition, construction, improvement or operation of the infrastructure project or project and granting the Water Development Authority the right to appoint a receiver for the project if the project sponsor should default on any terms of the agreement.

5.13.5. Each project sponsor who receives assistance from the Infrastructure Fund for a project must certify to the Council that it will construct any building required for public use with a roof sloped sufficiently to allow for the proper drainage of water.

5.13.6. Funding assistance made from the proceeds of any general obligation bonds and revenue bonds issued after the fifteenth day of March, one thousand nine hundred ninety-eight, after transfers required to make the State match for the water and wastewater revolving loan programs pursuant to article two, chapter twenty-two-c and article thirteen-c, chapter sixteen of the Code, shall be provided by the Council on a pro rata basis divided equally among the congressional districts of the State as delineated in accordance with section three, article two, chapter one of the Code. Infrastructure projects shall not be subject to pro rata distribution.

5.14. Advance Funding Assistance. If the Council determines that the engineering studies and requirements for the pre-application process would impose an undue hardship on a project sponsor, the Council may provide funding assistance to the project

sponsor to defray the expenses of such process from moneys available in the Infrastructure Fund: Provided, That such funding assistance is limited to an amount equal to five thousand dollars or fifty percent of the total pre-application cost, whichever amount is greater. If the project is ultimately approved for a loan by the Council, the amount of such funding assistance shall be included in the total amount of the loan to be repaid by the project sponsor. If the project is not ultimately approved by the Council, the amount of such funding assistance shall be considered a grant by the Council, and the total amount of the assistance shall be forgiven. In no event may the amount of advance funding assistance provided to all project sponsors exceed, in the aggregate, one hundred thousand dollars annually, as determined on a State fiscal year basis.

5.15. Crisis Situation Funding Assistance. The Water Development Authority, upon recommendation of the Council or designated committees of Council, shall make funding available to provide assistance to restore or safeguard water or waste water treatment service following a crisis situation which is an immediate threat or endangerment to the public health, provided, that the project sponsor must notify the Council as soon as reasonably possible following the incident and make application for funding in writing within 30 days of the incident.

5.16. Other Assistance. The Authority, at the discretion of the Council, may provide other forms and methods of assistance in addition to loans and grants, including, but not limited to, bond and loan guarantees and the purchase of insurance for the bonds.

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