

## **Low-Income Household Water Assistance Program (LIHWAP)** Improper Restrictions on Access for Immigrants

### **LIHWAP was enacted as an Emergency Measure to Address the Nation’s Public Health Crisis**

The LIHWAP program, enacted by Congress to address the public health emergency caused by COVID-19, aims to ensure that low-income households have access to basic water and wastewater services. As ACF recognizes in its [FAQ](#), “Access to safe and affordable drinking water and wastewater services is a fundamental element of health, safety, and well-being for households across America.” The agency notes that “water affordability needs have been significantly exacerbated by the COVID-19 public health crisis, and while water is required to follow the federal guidance from the Centers for Disease Control and Prevention (CDC) advising washing hands frequently in order to reduce the transmission of Covid-19, the pandemic has made it significantly more difficult for individuals and families to pay their home drinking water and wastewater bills.”

Congress recognized that a loss of housing has become a broader public health issue, and that preventing water shutoffs is also crucial to preventing evictions. Congress dedicated significant funding to eviction prevention through the Emergency Rental Assistance Program (ERAP); the LIHWAP program seeks to achieve similar goals.

### **Neither the Statutes nor Regulations Impose Immigration Restrictions in LIHWAP**

The Consolidated Appropriations Act, 2021 signed on December 27, 2020, included funding with instructions for the Administration for Children and Families (ACF) to provide grants to states, territories and tribes to assist low-income households with water and wastewater bills. The American Rescue Plan Act of 2021, enacted in March 2021, appropriated an additional \$500 million to the new LIHWAP effort. Nothing in these [statutes](#) imposes restrictions on this critical program based on a household member’s immigration status. ACF has not issued LIHWAP-specific regulations, and nothing in the generic [regulations](#) it identifies as applicable to LIHWAP imposes any immigration status restrictions. Although Congress explicitly limited eligibility for federal stimulus checks, for example, it did not constrain the ability of states to protect public health by improving access to water.

### **ACF’s FAQ Assumes Erroneously that the Program is Restricted**

ACF’s Frequently Answered Questions ([FAQ](#)) on LIHWAP indicates without analysis that these critical services are “federal public benefits” available only to U.S. citizens and “qualified” immigrants. Although the agency corrected its initial assertion that LIHWAP is a “federal means-tested public benefit” with a five-year waiting period for “qualified” immigrants, it continues to assert that the program is a restricted federal public benefit. See Q 26, referencing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).

### **ACF’s FAQs are inconsistent with HHS’ Longstanding Interpretation of the 1996 law**

- **LIHWAP is not a “Federal Public Benefit” and is not Subject to Restrictions based on Immigration Status**

Following PRWORA’s enactment, HHS set forth a detailed analysis of the term “federal public benefit” [63 FR 41658](#) (Aug. 4, 1998). Under the principles articulated in this notice, the LIHWAP program falls outside of this definition. As HHS explained, to fall within the federal public benefit definition, a program must be enumerated in or “similar” to the programs in [8 USC 1611\(c\)](#) and must be aimed at

serving an individual, family or household, rather than the broader community. HHS clarified that the definition does not include programs that seek to convey benefits across an entire community or to specified sectors of the population (e.g., people with physical conditions, such as a disability or disease; gender; or general age groups, such as youth or seniors).

LIHWAP is neither enumerated in nor “similar” to the benefits listed in [8 USC 1611\(c\)\(1\)\(B\)](#). This critical public health program aims to protect communities and specific population groups, rather than any particular individual, family or household. As the FAQs recognize, water and wastewater services are essential in ensuring that residents can follow CDC protocols to reduce the transmission of COVID-19 and thereby protect the community’s health. Preventing or reversing terminations of water services also allows people to stay in their homes and avoid living in the street or in shelters, which increases the risk of virus transmission. The FAQs further suggest that states prioritize areas of concentrated needs, “hard to reach” populations or particularly at-risk populations such as aging adults, individuals with disabilities or households with young children. The agency underscored that because this is an emergency program, grantees have flexibility to meet the needs of their own communities. LIHWAP seeks to facilitate behavior that aligns with public health guidance. It is precisely the type of program that HHS would exclude from the “federal public benefit” definition under its longstanding policy.

- **LIHWAP is Exempt from Restriction as Short-Term, Non-cash, In-Kind Emergency Disaster Relief**  
Even if the program could fall within the definition of “federal public benefit” it would be exempt from restriction based on immigration status, as *short-term, non-cash, in-kind emergency disaster relief*. LIHWAP was created by disaster relief legislation specifically to address the current public health emergency. It provides short-term in-kind relief, and as noted in the FAQ, “payments of benefits on behalf of eligible households must be made ‘by providing funds to owners or operators of public water systems or treatment works.’”

In addressing services received by “mixed status” households, ACF distinguishes between the lump sum provided to public water systems to restore water service (where one household member must be a citizen or qualified immigrant), and the rates for water service during the disaster (where the amount paid to the company is pro-rated based on the composition of the household). [FAQ Q. 27](#). In both cases, however, the short-term emergency benefits are received in-kind and only during this disaster. Thus, it meets every prong of this exception.

A court considering a similar question found that emergency housing aid provided under the CARES Act was exempt from restriction based on immigration status, as short-term, in-kind, non-cash emergency disaster relief. [Poder in Action v. City of Phoenix](#), 506 F.Supp.3d 725 (D. Ariz. Dec. 9, 2020). The court concluded that it need not determine whether PRWORA applies to this aid, or whether it should be considered a “federal public benefit,” because even if it could apply, the aid would fall within the disaster relief exception.

For a more detailed analysis of how HHS’ definition of “federal public benefit” relates to the programs and funding streams established by the federal COVID relief legislation, see Super, “Immigrants’ Eligibility for Aid From the Fiscal Recovery Fund, The Coronavirus Relief Fund and the Emergency Rental Assistance program” (Georgetown University Law Center, March 19, 2021).

- **LIHWAP is Not Subject to the Requirements in the Ongoing LIHEAP program**

Agency staff may have assumed that PRWORA's restrictions apply to this new emergency program because they plan to adopt some procedures used in the (ongoing) LIHEAP program. But LIHWAP and the context in which it was enacted – as a public health measure under the COVID 19 relief legislation -- is entirely different. In allocating funds to states, territories and tribes to meet local public health needs, Congress did not intend to restrict a state's, territory's or tribe's ability to ensure that water and waste management is available to all households. The FAQ itself notes that “while the terms and conditions are modeled on the LIHEAP statute in order to ensure consistency in processes, procedures, policies, and systems, *LIHWAP funds are not otherwise subject to LIHEAP statutory requirements.*”

The emergency assistance provided to states in this pandemic is different in scope, duration, federal budgetary impact, and rationale. The programs are limited to the duration of the current crisis and their goal is the collective well-being of the community – particularly to help people engage in behavior that limits the coronavirus's spread – rather than benefiting individuals specifically.

**The FAQ and Template for States Must be Revised to Conform with the Laws**

The LIHWAP [template](#) for states similarly anticipates unnecessary questions regarding immigration status and proof of Social Security Number that aren't required or authorized by the statute or regulations. Pp. 17-18. The [sample application](#) states misleadingly that “a household may be eligible for assistance if at least one member is a U.S. Citizen or legal permanent resident” and includes unnecessary requests for a Social Security Number.

The FAQ should be revised to clarify that LIHWAP services, whether provided in a lump sum to restore water service, or via reduced rates during the pandemic, are available without regard to an individual's or household member's citizenship or immigration status. Consistent with the principles in the [Tri-Agency guidance](#), the template and sample application form should be revised to eliminate references to the collection of information about citizenship, immigration status, or Social Security Numbers, and to ensure that any document or identification requirements do not pose barriers for otherwise eligible applicants.