

Congress Considers Big Changes to New Federal Water Infrastructure Bank

As EPA announces US\$5.5 billion for new water infrastructure loans, Congress is debating establishing a new lending “window” for State Revolving Funds.

Key Points:

- Under WIFIA, EPA can issue long-term, low-interest loans or loan guarantees to a broad array of water infrastructure projects.
- EPA recently announced funding for US\$5.5 billion in additional loans for FY 2018, and solicited Letters of Interest from project proponents by July 31, 2018.
- Congress is currently considering legislation that would extend WIFIA's authorization and establish a separate new “window” under the program, which would lend exclusively to state revolving loan funds.

The newly launched Water Infrastructure Financing and Innovation Act (WIFIA) program has become an important financing option for water infrastructure projects in the United States. This *Client Alert* briefly summarizes the key elements of the WIFIA program, provides an update on the selection criteria weighting for the current round of funding under the program, and discusses Congressional action on significant potential changes to the WIFIA program.

How WIFIA Works

WIFIA,¹ first enacted in 2014, established a federal water infrastructure bank administered by the US Environmental Protection Agency (EPA, or the Agency). (The statute grants the Army Corps of Engineers the same authority with regard to certain project types, but thus far, Congress and the Corps have made no moves to fund or implement that portion of the program. As such, this *Client Alert* focuses on the EPA program.) Under the program, EPA can issue long-term, low-interest loans or loan guarantees to a broad array of water infrastructure projects. WIFIA utilizes a credit subsidy model, under which Congress appropriates “credit subsidy costs” that operate like insurance against default on loans or loan guarantees made by the US Treasury. Because of the low risk of default for water projects, this model allows up to US\$100 in loans or loan guarantees for every dollar that Congress appropriates.

WIFIA is intended to complement the existing Clean Water State Revolving Fund and Drinking Water State Revolving Fund (SRF) programs, which states directly administer. The SRFs are funded through Congressional appropriations to EPA's budget, which are passed on to the states through annual capitalization grants. Unlike the SRF programs, WIFIA is directly implemented by EPA at the federal level.

Whereas the SRFs generally focus on smaller projects — with an average loan amount of US\$2-3 million — WIFIA is primarily intended to support medium and large-scale projects.

Key features of the WIFIA program include:

- Public, private, and mixed public-private entities can apply.
- Projects generally must be at least US\$20 million, but communities with 25,000 or fewer inhabitants can use the program for smaller projects (US\$5 million or more).
- WIFIA loans or guarantees generally can cover a maximum of 49% of eligible project costs.
- WIFIA covers a very broad set of water infrastructure project types.
- Loan terms up to 35 years from substantial completion of the project are available.
- Interest rates are set at the Treasury rate plus a basis point for loans of a similar maturity.
- Loan repayment can be deferred until up to five years after substantial completion of the project.

The WIFIA selection process encompasses two stages: a Letter of Interest, followed by a full application. After receiving Congressional funding, EPA issues a Notice of Funding Availability (NOFA). Prospective borrowers must submit Letters of Interest to EPA by a deadline specified in the NOFA. EPA evaluates these Letters and selects a subset of projects to submit a full application, including payment of application fees. The selected projects are likely to obtain financing at the conclusion of the process. EPA bases its selection decisions on 13 criteria, including 11 that were established by the WIFIA statute and two that were added by the Agency's December 2016 Implementation Rule.² In each successive NOFA, EPA announces the respective weights these criteria will receive, as well as any priority areas for the Agency for that round of funding.

For FY 2017, the first year for which Congress appropriated funds to support loans under WIFIA, EPA selected 12 projects to submit full applications for approximately US\$2.3 billion in loans. The Agency issued its first WIFIA loan in April 2018 (US\$134.5 million for a wastewater treatment project in King County, Washington).

For a more detailed summary of WIFIA's requirements and the selection process, please see [Latham & Watkins' May 2018 White Paper](#).

FY 2018 Funding Announcement and Selection Criteria

In March 2018, as part of the Consolidated Appropriations Act, 2018 (the FY 2018 omnibus), Congress appropriated US\$55 million in credit subsidy costs (along with US\$8 million in EPA administrative costs) for the WIFIA program.³ EPA estimates that this appropriation will be sufficient to support approximately US\$5.5 billion in loans or loan guarantees. On April 12, 2018, EPA published a Notice of Funding Availability (NOFA) announcing these funds and soliciting Letters of Interest from project proponents — with a deadline of July 31.⁴

The FY 2018 NOFA identifies two “strategic objectives” that EPA intends to prioritize for this round of funding. According to the NOFA, this round of funding is intended to:

- “(i) Provide for clean and safe drinking water: EPA is working to strengthen its implementation of the Safe Drinking Water Act to ensure we protect and build upon the enormous public health benefits achieved through the provision of safe drinking water throughout the country. The Agency's highest priorities include reducing exposure to lead in the nation's drinking water systems, ensuring continuous compliance with contaminant limits, responding quickly to emerging concerns, and improving the nation's aging and insufficient drinking water infrastructure.”

- “(ii) Repair, rehabilitate, and replace aging infrastructure and conveyance systems: Many communities face formidable challenges in providing adequate and reliable water and wastewater infrastructure services. Existing water and wastewater infrastructure in some of these communities is aging, and investment is not always keeping up with the needs. EPA estimates the national funding need for capital improvements for such facilities totals approximately \$740 billion over the next 20 years. In many cases, meeting these needs will require significant increases in capital investment.”⁵

In addition, the NOFA includes EPA’s scoring rubric for this round of funding, which is summarized in the following table.⁶ The criteria correspond to versions of the 13 selection criteria mentioned above.

Category	Criterion	Points
Project Impact	National or regional significance	15
	New or innovative approaches	5
	Protects against extreme weather events or helps protect the environment	5
	Serve energy exploration, development, or production areas	5
	Serves regions with significant water resource challenges	10
	Addresses identified municipal, state, or regional priorities	10
	Addresses need for repair, rehabilitation, or replacement	20
	Serves economically stressed communities or ratepayers	10
	Reduces exposure to lead or ensures compliance with contaminant limit	20
Project Readiness	Readiness to proceed	50
	Preliminary engineering feasibility analysis score	50
Borrower Creditworthiness	WIFIA enables project to proceed earlier	10
	Financing plan includes non-WIFIA public or private financing	10
	Reduces need for other federal assistance	10
	Required budget authority	10
	Preliminary creditworthiness assessment score	60
Total Score		300

This scoring rubric differs substantially from the FY 2017 NOFA, including a significantly increased emphasis on creditworthiness and project readiness, as well as increased weights for projects that reduce exposures to lead, ensure compliance with drinking water contaminant limits, or address aging infrastructure through repair, rehabilitation, or replacement.

EPA has stated that it expects to select a subset of applicants to submit full applications by this fall. According to the Agency, those selected are likely to be approved for loans or loan guarantees.

Pending Legislative Proposals – WIFIA Reauthorization and the SRF WIN Act

Even as EPA moves forward with the implementation of WIFIA, Congress is considering significant changes. On May 22, 2018, the Senate Committee on Environment and Public Works unanimously approved the America’s Water Infrastructure Act of 2018 (S. 2800) — the short title for this year’s Water Resources Development Act — sending the bill on for the full Senate’s consideration. S. 2800 would extend WIFIA’s authorization (which currently ends in FY 2019) to FY 2021, while removing the program’s current designation as a “pilot.” The bill would also require a study of the impediments to the Army Corps of Engineers’ implementation of a WIFIA program, as well as a Government Accountability Office study

on how to improve access to WIFIA for small communities, disadvantaged communities, and tribal communities.⁷

Much more importantly, however, S. 2800 includes an amended version of S. 2364, the Securing Required Funding for Water Infrastructure Now Act (the SRF WIN Act) sponsored by Senator John Boozman (R-AR), Senator Cory Booker (D-NJ), Senator Jim Inhofe (R-OK), and Senator Dianne Feinstein (D-CA). These provisions, as adapted and incorporated into S. 2800, would amend the WIFIA statute to establish a new, separate “window” under WIFIA for SRF programs. Some of the key features of the legislation include:

- SRFs could borrow from WIFIA to support any projects on their Intended Use Plans, under the existing Clean Water and Drinking Water SRF programs, respectively.
- SRFs in states that received less than 2% of SRF funding in the most recent FY (which currently includes approximately 35 states), or in states that have experienced a major disaster since January 1, 2017 (provided the loan is for infrastructure damaged by such a disaster), could borrow from WIFIA at interest rates 20-50% below Treasury rates. EPA must ensure that all SRF applicants meeting these criteria will receive financing, and EPA must allocate funding “based on need, as determined by [the EPA] Administrator.”)
- SRFs using this new window would not be charged fees (which can be several hundred thousand dollars per loan under the existing WIFIA program).
- Within 180 days of receipt of a complete application, EPA would be required either to approve a loan or loan guarantee, or to provide “detailed guidance and an explanation of any changes to the application necessary for approval.”
- SRFs could apply for a loan or loan guarantee under either the existing WIFIA program or the newly created SRF-specific window, but could only borrow from one of the programs.
- The new SRF-specific program would be authorized for US\$100 million for each of FY 2019 and 2020, which the legislation estimates would support US\$5.425 billion in loans each FY.

A number of organizations, including the US Chamber of Commerce and the National Association of Clean Water Agencies, expressed support for incorporating the SRF WIN Act into S. 2800.⁸ However, the American Water Works Association, the Association of Metropolitan Water Agencies, and the Water Environment Federation — which played a key role in the enactment of the WIFIA statute — opposed the SRF WIN Act on the grounds that it is unnecessary (as SRFs already can borrow from the WIFIA program) and would establish preferential treatment for SRFs generally and for certain states in particular. These organizations also assert that the legislation would create an additional demand for scarce Congressional appropriations, while providing a significantly lower ratio of Congressional appropriations to loans than the current WIFIA program provides.⁹

On the other side of Capitol Hill, the House Committee on Transportation and Infrastructure on May 23, 2018, approved the Water Resources Development Act of 2018 (H.R. 8), the companion to S. 2800. The House bill, which the full House may take up as early as June, differs significantly from S. 2800 and does not include any provisions addressing WIFIA. The Senate sponsors of S. 2800 have stated their hope that the full Senate will consider that bill before the July 4 recess.

Conclusion

Whether Congress will proceed with the significant additions to the WIFIA program that the Senate is now considering remains to be seen. Furthermore, how those potential changes may affect the funding and implementation of the program as it currently exists is difficult to tell. Congressional appropriations would determine how future WIFIA funding would be allocated between the existing program and the new SRF-

specific provisions in the Senate bill, and EPA would be charged with integrating the new lending window into its implementation of the fledgling program.

But regardless of Congress' next steps, the immediate opportunity remains the same for many entities that are active in the infrastructure space. Now that EPA has launched WIFIA, and now that Congress has significantly expanded funding, the program provides an attractive opportunity for private, public, and public-private partnership sponsors seeking to finance large water infrastructure projects.

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Endnotes

- ¹ 33 U.S.C. §§ 3901-3914. In addition to EPA, WIFIA also authorizes the Secretary of the Army (presumably through the US Army Corps of Engineers) to implement the statute for a subset of eligible project categories. Congress has not appropriated funds to the Corps for WIFIA, however, and the Corps has taken no action to implement the program. This *Client Alert* focuses exclusively on the EPA WIFIA program.
- ² Credit Assistance for Water Infrastructure Projects, 81 Fed. Reg. 91,822, 91,828 (Dec. 19, 2016).
- ³ Pub. L. 115-141, Title II—Environmental Protection Agency, Water Infrastructure Finance and Innovation Program Account and § 430(c).
- ⁴ EPA, Notice of Funding Availability (NOFA) for Applications for Credit Assistance Under the Water Infrastructure Finance and Innovation Act (WIFIA) Program, 83 Fed. Reg. 15,828 (April 12, 2018) (“FY 2018 NOFA”). The original deadline was July 6, 2018, but EPA extended this to July 31. See Press Release, <https://www.epa.gov/newsreleases/epa-extends-deadline-apply-wifia-water-infrastructure-loan>.
- ⁵ 83 Fed. Reg. at 15,832 (emphasis added). EPA’s priorities for the FY 2017 NOFA were adaptation to extreme weather and climate change, enhanced energy efficiency, green infrastructure, and repair, rehabilitation and replacement of infrastructure and conveyance systems. 82 Fed. Reg. at 2937.
- ⁶ 83 Fed. Reg. at 15,833; chart from EPA, Letter of Interest Submission & Project Selection Webinar (April 23, 2018).
- ⁷ The bill is cosponsored by Senators Jim Inhofe (R-OK) and Cardin (D-MD), the Chairman and Ranking Member, respectively, of the Transportation and Infrastructure Subcommittee. The text of the bill is available on the website of the Senate Committee on Environment and Public Works, <https://www.epw.senate.gov/public/>.
- ⁸ Letter of Support for Inclusion of the SRF WIN Act in America’s Water Infrastructure Act, May 15, 2018, at https://www.boozman.senate.gov/public/_cache/files/5/e/5edb9645-27c2-427c-8ca9-b86f9d0a1568/5F674FCDFE0D0CFD30DED5AEFA395608.support-letter-srf-win-act---america-s-water-infrastructure-act.pdf.
- ⁹ Letter to Chairman Barrasso and Ranking Member Carper, May 10, 2018, at <https://www.awwa.org/portals/0/files/legreg/documents/051018srfwinletter.pdf>.