

## Financing Water Infrastructure Projects Under WIFIA

***WIFIA establishes an EPA-administered water infrastructure bank providing low-interest, long-term loans and loan guarantees.***

### Key Points:

- EPA has now fully launched the federal water infrastructure bank established by WIFIA.
- WIFIA authorizes EPA to make long-term, low-interest loans and loan guarantees to a broad array of water projects, including public, private, and public-private partnerships.
- Congress thus far has provided funding sufficient for nearly US\$8 billion in loans or loan guarantees, and there is strong, bipartisan support for the program going forward.
- WIFIA offers many attractive features, but prospective borrowers need to understand and navigate the array of regulatory, procedural, and other requirements governing the program.

As the United States faces growing challenges with aging water infrastructure, economic and population growth, water scarcity, flooding, and water quality, there is a massive need for new private investment in the water infrastructure sector. Entities considering water projects should take a close look at the Water Infrastructure Finance and Innovation Act (WIFIA)<sup>1</sup> program, a newly established, federal water infrastructure bank administered by the US Environmental Protection Agency (EPA, or the Agency).

WIFIA authorizes EPA to issue long-term, low-interest loans or loan guarantees to a wide variety of water infrastructure projects. Projects generally must be at least US\$20 million, but communities with fewer than 25,000 inhabitants can use the program for smaller projects (*i.e.*, US\$5 million or more). Public, private, and mixed public-private entities are eligible for financing. With bipartisan Congressional support and Fiscal Year (FY) 2017 and 2018 appropriations sufficient to support close to US\$8 billion in loans, EPA has now fully launched the WIFIA program.

This *White Paper* provides a brief background on the history and structure of the WIFIA program and summarizes key requirements of the statute, relevant regulations, and agency guidance, including eligible borrowers, projects, and costs.

## Background on WIFIA

### Objectives

EPA estimates that more than US\$740 billion in investment will be needed over the next 20 years for drinking water and clean water (wastewater and stormwater) infrastructure. That estimate is likely

underinclusive, and other sources have assessed needed investment at US\$1 trillion or more. The largest source of financing for water infrastructure in the US is the municipal bond market, which provided US\$258 billion in tax-exempt financing for water and sewer infrastructure from 2003 through 2012.<sup>2</sup> In addition, the Clean Water State Revolving Fund and Drinking Water State Revolving Funds (SRFs) — state infrastructure funds that are capitalized by annual Congressional appropriations made through EPA's budget — have provided more than US\$158 billion in low- and zero-interest loans since these programs' inception.<sup>3</sup> Public-private partnerships still play a relatively small role in financing water infrastructure in the US, though there is substantial interest in expanding that role.

In part to address the need for additional low-interest financing for water infrastructure, and particularly for larger projects, Congress enacted WIFIA as part of the Water Resources Reform and Development Act of 2014.<sup>4</sup> WIFIA is modeled on the Transportation Infrastructure Finance and Innovation Act (TIFIA)<sup>5</sup> program administered by the US Department of Transportation, which was established in 1998 and as of January 2017 had provided US\$26.0 billion in credit assistance to 64 projects.<sup>6</sup> The WIFIA program is intended to supplement and complement the existing SRFs, which states directly administer. Congress appropriates funds for the SRFs through EPA's budget, which are passed on to the states through annual capitalization grant. Unlike the SRF programs, WIFIA is directly implemented by EPA at the federal level. Whereas the SRFs generally focus on smaller projects — with average loan amounts of US\$2-3 million — WIFIA is primarily intended to support medium and large projects.

### Credit Subsidy Approach

Like TIFIA and several other federal credit programs, WIFIA is based on a credit subsidy model governed by the Federal Credit Reform Act of 1990.<sup>7</sup> Under this approach, Congressional appropriations are not used directly to make loans or to capitalize a loan fund. Instead, Congress appropriates funds to cover "credit subsidy costs," which are the projected costs to the US Treasury of issuing loans or loan guarantees, considering the risk of default across the program portfolio. In other words, actual loans or loan guarantees are made directly from the Treasury, and appropriated credit subsidy costs function like insurance to keep the Treasury whole in the event of default. The amount of subsidy required to support a given loan is determined by a credit subsidy model, based on the estimated risk of default. The upshot of this approach is that the amount of loans or loan guarantees that EPA can support under WIFIA is roughly 100 times the amount appropriated by Congress, because of the low risk of default for water projects. That is, at a 1% credit subsidy rate, each appropriated dollar can subsidize roughly US\$100 in loans — such that a US\$10 million appropriation can support US\$1 billion in loans.

### EPA Regulations and Guidance

After WIFIA's enactment in 2014, Congress appropriated funds in FY 2015 and 2016 to EPA for hiring, staffing, and preparations needed to implement the program. Since then, EPA has taken several key actions to implement the program:

- In December 2016, EPA promulgated an interim final **WIFIA Implementation Rule**, which outlines the program's administrative framework, eligibility requirements, application process, project selection criteria, and federal requirements for borrowers.<sup>8</sup>
- In June 2017, EPA finalized the **WIFIA Fee Rule**, establishing fees charged to WIFIA applicants to reimburse the agency for the costs of providing credit assistance and retaining financial, engineering, and legal expertise necessary to underwrite loans and administer the overall program effectively.<sup>9</sup>

- EPA has separately published and updated a comprehensive **WIFIA Program Handbook**, designed to provide prospective borrowers with information related to the requirements and procedures for obtaining WIFIA credit assistance.<sup>10</sup>
- Congress first appropriated credit subsidy costs in FY 2017, and EPA issued its first NOFA in January 2017.<sup>11</sup> EPA received 43 Letters of Interest (LOIs) in April 2017, and in July 2017 selected 12 projects to make full applications to the program (for over US\$2.3 billion in loans).<sup>12</sup> The Agency issued its first WIFIA loan in April 2018. For FY 2018, Congress more than doubled the appropriation to the program, providing funds sufficient to support an additional US\$5.5 billion in loans. EPA issued its FY 2018 NOFA in April 2018.<sup>13</sup>

Key elements of the WIFIA framework, established by the WIFIA statute and/or regulations, are summarized in the following sections.

## Eligible Borrowers, Projects, and Costs

**Eligible borrowers** under WIFIA include: corporations; partnerships; joint ventures; trusts; federal, state, local, or tribal government entities; and state infrastructure financing authorities that implement the SRFs — making WIFIA broadly available for public, private, and public-private partnership projects.<sup>14</sup>

**Eligible projects** are defined broadly and include:<sup>15</sup>

- Projects eligible for assistance under the Clean Water SRF (with the proviso that the public ownership requirement under that SRF does not apply to WIFIA)<sup>16</sup>
- Projects eligible for assistance under the Drinking Water SRF<sup>17</sup>
- Enhanced energy efficiency projects at drinking water and publicly owned wastewater facilities
- Repair, rehabilitation, or replacement projects at treatment works, community water systems, or aging water distribution or waste collection facilities
- Brackish or sea water desalination, aquifer recharge, alternative water supply, and water recycling projects
- Projects to prevent, reduce, or mitigate the effects of drought
- Acquisition of real property if it is integral to an already eligible project or will mitigate the environmental impact of a project
- A combination of projects either secured by a common security pledge or submitted to EPA under a single SRF program application

**Eligible project costs** include development-phase activities (e.g., planning, feasibility analysis, environmental review, permitting, and preliminary engineering and design work); construction, reconstruction, rehabilitation, and replacement activities; acquisition of real property; environmental mitigation; equipment; capitalized interest necessary to meet market requirements; reasonably required reserve funds; capital issuance expenses; and carrying costs during construction.<sup>18</sup>

## Other Key Program Features

1. Generally, projects must have eligible project costs of US\$20 million or greater to be eligible for WIFIA credit assistance.<sup>19</sup>
2. Projects serving communities of 25,000 or fewer people with minimum eligible project costs of US\$5 million are also eligible.<sup>20</sup> WIFIA directs EPA to set aside 15% of its funds in any FY to support small projects, provided that if there is not sufficient demand, these funds can be used for larger projects.<sup>21</sup>
3. The maximum portion of eligible project costs that WIFIA can fund generally is 49%, provided that EPA can use up to 25% of its funding in any FY to support a greater proportion of total project costs.<sup>22</sup>
4. Subject to EPA approval, costs incurred and in-kind contributions made prior to receipt of a WIFIA loan may count toward the 51% of project costs to be funded by non-WIFIA dollars.<sup>23</sup>
5. WIFIA and SRF funding can be used to co-finance a project.
6. When EPA receives an application from a project eligible for assistance under an SRF program, EPA must notify and provide the relevant SRF with a time-limited opportunity to finance the project in lieu of WIFIA.<sup>24</sup>
7. Total federal assistance may not exceed 80% of eligible project costs (with limited exceptions in exceptional circumstances subject to EPA discretion).<sup>25</sup>
8. The maximum final maturity date is 35 years from “substantial completion” of a project,<sup>26</sup> defined as “the earliest date on which a project is considered to perform the functions for which the project is designed.”<sup>27</sup>
9. The interest rate must be equal to or greater than the US Treasury rate of a similar maturity at the date of closing,<sup>28</sup> a requirement that EPA implements using the Treasury rate plus a basis point. This rate can be locked in at closing, even if loan disbursement is deferred until later in the process of project implementation.
10. Repayment must commence not later than five years after substantial completion of the project.<sup>29</sup>
11. Projects must be creditworthy and loans or loan guarantees must be repayable, in whole or in part, from dedicated revenue sources that secure project obligations.<sup>30</sup>
12. Projects must comply with WIFIA requirements related to the use of American iron and steel,<sup>31</sup> as well as other relevant federal laws and regulations, including the Davis-Bacon Act, the National Environmental Policy Act, the National Historic Preservation Act, and certain other statutes and Executive Orders.<sup>32</sup>

## Selection Process and Criteria

EPA’s implementation rule establishes a two-step process for applying for WIFIA loans: First, the applicant must submit an LOI within the required timeframe of the NOFA; second, if selected to continue in the application process, the applicant must submit a full application.<sup>33</sup>

In the WIFIA Implementation Rule, EPA set forth 13 criteria for selecting among eligible projects to grant credit assistance — including 11 based on criteria prescribed by the statute<sup>34</sup> and two additional criteria of its own (numbers 12 and 13 below).<sup>35</sup>

1. Projects that are **nationally or regionally significant** with respect to economic and health benefits
2. Projects that are **likely to move forward earlier** than they otherwise would in the absence of WIFIA funding
3. Projects that **use new or innovative approaches**, such as relying on energy efficiency, renewable energy, green infrastructure, or development of alternative sources of drinking water
4. Projects that **protect against extreme weather events and climate impacts**
5. Projects that help **protect the environment or public health**
6. Projects **serving regions with significant potential for energy resource development**
7. Projects **serving regions with significant water resource challenges**, facing significant flood risk, or with water resources of exceptional recreational value or ecological importance
8. Projects addressing **identified municipal, state, or regional priorities**
9. Projects with a demonstrated reasonable **expectation to proceed to construction within 90 days** of receiving a WIFIA loan
10. The extent to which projects **incorporate non-WIFIA public or private financing**
11. The extent to which WIFIA assistance **reduces the need for other federal assistance** to projects
12. The extent to which projects **address needs for repair, rehabilitation, and replacement of aging water systems**
13. The extent to which projects **serve economically stressed communities or economically stressed pockets of rate-payers**<sup>36</sup>

As explained in the WIFIA Implementation Rule, EPA retains broad discretion to make scoring and weighting decisions with respect to these project selection criteria for any given funding round.<sup>37</sup> EPA's approach to scoring for the FY 2018 NOFA is discussed below.

## Fees

EPA has established five separate categories of fees to recover all or a portion of the agency's cost of providing credit assistance and the costs of retaining expert firms to assist in the underwriting and servicing of WIFIA loans.<sup>38</sup> Importantly, in the Water Infrastructure Improvements for the Nation (WIIN) Act, enacted in December 2016, Congress amended WIFIA to clarify that such fees may be financed through a WIFIA loan.<sup>39</sup>

- **Initial Application Fee:** EPA has established an initial application fee of US\$100,000 for eligible large projects, or US\$25,000 for projects serving small communities.

- **Credit Processing Fee:** EPA has established a credit processing fee, due at the time of closing, that it projects will vary significantly among applicants, but which it estimates to be in the range of US\$350,000 to US\$700,000 per project, broken down to cover costs of financial advisory, law firm, and engineering firm services. EPA allows the initial application fee to be credited toward the credit processing fee. If Congress appropriates sufficient additional administrative funds to EPA under WIFIA in the future, EPA may waive portions of credit processing fees, prioritizing projects serving lower-income populations and small communities.
- **Servicing Fees:** EPA will charge servicing fees that it estimates will range from US\$12,000 to US\$15,000 annually per loan.
- **Extraordinary Expenses:** EPA may charge a fee of unspecified amount to cover extraordinary expenses in the event that a borrower experiences difficulty that causes EPA to incur time or expenses “beyond standard monitoring.”
- **Optional Supplemental Fee (“Self Pay” Credit Subsidy Costs):** EPA may allow borrowers to voluntarily “buy down” the credit subsidy amount through an optional supplemental fee, allowing an applicant to proceed to closing despite a lack of otherwise available budget authority. This optional “fee” could provide an opportunity for an applicant to “self pay” credit subsidy costs in the event that Congressional appropriations are inadequate to cover such costs for a given project. EPA has not further elaborated on how this approach would be implemented, but a project applicant not selected to submit a full application to the WIFIA program may wish to consider the possibility of using this approach to secure financing. Notably, however, annual appropriations legislation caps the total amount of loans or loan guarantees that can be issued under the WIFIA program for the relevant FY.

## Conclusion

The WIFIA program, which has received robust funding in FY 2017 and 2018 and which EPA has now fully launched, provides an important new opportunity for water infrastructure project developers. The program offers several attractive and unique features to prospective borrowers, including 35-year terms, low interest rates that can be locked in at closing, and deferred repayment. However, WIFIA financing does involve additional procedural and project requirements (such as compliance with American Iron and Steel requirements, Davis-Bacon, and the National Environmental Policy Act) that may add complexity to the selection and closure process. Prospective borrowers should fully understand the implications of these requirements as they evaluate this option and seek to navigate the WIFIA process.

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**Endnotes**

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- <sup>1</sup> 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 *White Paper* focuses exclusively on the EPA WIFIA program.
  - <sup>2</sup> Credit Assistance for Water Infrastructure Projects, 81 Fed. Reg. 91,822, 91,823 (Dec. 19, 2016) (WIFIA Implementation Rule).
  - <sup>3</sup> See EPA Clean State Revolving Fund Programs 2017 Annual Report at 4 (2017) (since 1988, US\$42 billion in federal capitalization grants has leveraged more than US\$126 billion in total assistance), at [https://www.epa.gov/sites/production/files/2018-03/documents/final\\_2017\\_cwsrf\\_annual\\_report\\_for\\_web2.pdf](https://www.epa.gov/sites/production/files/2018-03/documents/final_2017_cwsrf_annual_report_for_web2.pdf); EPA Drinking Water State Revolving Fund 2016 Annual Report (2016) (since 1996, US\$32.5 billion in loans), at [https://www.epa.gov/sites/production/files/2017-09/documents/2016\\_dwsrf\\_annual\\_report\\_508.pdf](https://www.epa.gov/sites/production/files/2017-09/documents/2016_dwsrf_annual_report_508.pdf).
  - <sup>4</sup> Pub. L. 113-121 (§§ 5021-5035). WIFIA has been amended twice, by the Fixing America’s Transportation (FAST) Act, Pub. L. 114-94, § 1445 (2015) and by the Water Infrastructure Improvements for the Nation (WIIN) Act, Pub. L. 114-322 (2016) (WIIN Act).

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- 5 23 U.S.C. §§ 610-609.
- 6 See US Dep't of Transp., TIFIA Credit Program Overview (updated January 2017), slide 9, <https://cms.dot.gov/sites/dot.gov/files/docs/TIFIA%20Background%20Slides%20%2801-26-2017%29.pdf>.
- 7 2 U.S.C. §§ 661-661f.
- 8 WIFIA Implementation Rule, *supra* note 3.
- 9 Fees for Water Infrastructure Project Applications Under WIFIA, 82 Fed. Reg. 29,242 (June 28, 2017) (WIFIA Fee Rule).
- 10 EPA, WIFIA Program Handbook (April 2018), available at [https://www.epa.gov/sites/production/files/2018-04/documents/program\\_handbook\\_fy18\\_final.pdf](https://www.epa.gov/sites/production/files/2018-04/documents/program_handbook_fy18_final.pdf).
- 11 Notice of Funding Availability (NOFA) for Applications for Credit Assistant Under the Water Infrastructure Finance and Innovation Act (WIFIA) Program, 82 Fed. Reg. 2933 (Jan. 10, 2017).
- 12 Information on the selected projects is available on EPA's website, at <https://www.epa.gov/wifia/wifia-financing-requests#selectedprojects>.
- 13 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>.
- 14 33 U.S.C. § 3903; WIFIA Implementation Rule, 81 Fed. Reg. at 91,824.
- 15 Projects eligible for EPA-administered loans or loan guarantees are addressed here. See 33 U.S.C. §§ 3902(b), 3905(2)-(10); WIFIA Implementation Rule, 81 Fed. Reg. at 91,824. Some additional categories of projects are eligible for Corps support, if the Corps implements WIFIA at some future date. See 33 U.S.C. §§ 3902(b), 3905(1), (8), (10).
- 16 Projects eligible for Clean Water SRF assistance include construction of publicly owned treatment works; implementation of nonpoint source pollution management programs; development and implementation of a national estuary program conservation and management plan; decentralized wastewater treatment systems; stormwater measures; water conservation measures to reduce demand for publicly owned treatment works capacity; certain watershed pilot projects; energy efficiency projects for publicly owned treatment works; water reuse projects; security measures at publicly owned treatment works; and certain technical assistance projects. See 33 U.S.C. § 1383(c); see also EPA, Overview of Clean Water State Revolving Fund Eligibilities (May 2016), at [https://www.epa.gov/sites/production/files/2016-07/documents/overview\\_of\\_cwsrf\\_eligibilities\\_may\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-07/documents/overview_of_cwsrf_eligibilities_may_2016.pdf).
- 17 Projects eligible for Drinking Water SRF assistance include drinking water treatment facilities; transmission and distribution pipes; rehabilitation or development of sources of drinking water; certain water storage tanks; interconnection of two or more water systems; construction of new systems to serve homes with contaminated individual wells and consolidation of existing systems into a new regional water system. See 42 U.S.C. § 300j-12(a)(2); see also EPA, Drinking Water State Revolving Fund Eligibility Handbook (June 2017), at [https://www.epa.gov/sites/production/files/2017-08/documents/dwsrf\\_eligibility\\_handbook\\_june\\_13\\_2017\\_updated\\_508\\_versioni\\_0.pdf](https://www.epa.gov/sites/production/files/2017-08/documents/dwsrf_eligibility_handbook_june_13_2017_updated_508_versioni_0.pdf).
- 18 33 U.S.C. § 3906.
- 19 33 U.S.C. § 3907(a)(2)(A).
- 20 33 U.S.C. § 3907(a)(2)(B).
- 21 33 U.S.C. § 3912(c).
- 22 33 U.S.C. § 3908(b)(2), 3912(d).
- 23 33 U.S.C. § 3908(b)(10).
- 24 33 U.S.C. § 3907(a)(5).
- 25 33 U.S.C. § 3908(b)(9).
- 26 33 U.S.C. § 3908(b)(5). If the useful life of the project is less than 35 years, the final maturity date must not exceed the useful life. *Id.*
- 27 33 U.S.C. § 3901(14).
- 28 33 U.S.C. § 3908(b)(4).
- 29 33 U.S.C. § 3908(c)(2).
- 30 33 U.S.C. § 3907(a)(1), (3) For information on credit policies EPA has established in support of the creditworthiness requirement, see Section 3.2 of the WIFIA Program Handbook, *supra* note 11.
- 31 33 U.S.C. § 3914.
- 32 These requirements are summarized in Section 2.7 and Appendix E of the WIFIA Program Handbook, *supra* note 11.
- 33 WIFIA Implementation Rule, 81 Fed. Reg. at 91,825.
- 34 33 U.S.C. § 3907(b).
- 35 WIFIA Implementation Rule, 81 Fed. Reg. at 91,828.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 91,829.

<sup>38</sup> All of the information in this section is from the WIFIA Fee Rule, 82 Fed. Reg. 29,242 (June 28, 2017).

<sup>39</sup> WIIN Act, *supra* note 5, § 5008(c)(1)(B). Note that EPA and the White House Office of Management and Budget may not interpret this authorization to extend to the Optional Supplemental Fee, and it will be important to secure further clarity on this point for any applicant seeking to “self-pay” credit subsidy costs under the program.