



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[EPA-HQ-OW-2016-0569; FRL-9953-24-OW]

RIN 2040-AF63

Credit Assistance for Water Infrastructure Projects

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule; request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is issuing an interim final rule to implement a new program authorized under Subtitle C of the Water Resources Reform and Development Act of 2014 (WRRDA), which is referred to as the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA). WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects. Projects will be evaluated and selected by the Administrator of the EPA based on criteria set out in this rule using weightings established in a separate Notice of Funding Availability (NOFA). Following project selection, individual credit agreements will be developed through negotiations between the project sponsors and EPA. EPA is soliciting comments on an interim final rule that establishes the guidelines for the new credit assistance program for water and infrastructure projects and the process by which EPA will administer such credit assistance. The interim final rule primarily restates and clarifies statutory language while establishing approaches to specific procedural issues left to EPA's discretion. This interim final rule pertains to a matter involving a federal loan and loan guarantee program and is therefore exempt from the rulemaking requirements of the Administrative Procedure Act. As such, EPA is issuing this rule as interim final.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa.dockets>.

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I. Background

Congress enacted the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA) as part of the Water Resources Reform and Development Act of 2014, as amended by sec. 1445 of Pub. L. 114-94¹ and codified at 33 U.S.C. 3901-3914. WIFIA establishes a new federal credit program for water infrastructure projects to be administered by EPA.

Congress authorized EPA to provide federal credit assistance through WIFIA in the form of loans or loan guarantees to eligible entities: corporations; partnerships; joint ventures; trusts; Federal, State, or local governmental entities, agencies, or instrumentalities; tribal governments or consortiums of tribal governments; or State infrastructure finance authorities.

WIFIA authorizes EPA to provide assistance for a wide variety of projects. Eligible projects, as defined in 33 U.S.C. 3905, include²:

¹ Section 1445 of P.L. 114-94 amends WIFIA by deleting 33 U.S.C. 3907(a)(5) which prohibited EPA from providing credit assistance to a project financed (directly or indirectly) by the proceeds of a tax-exempt obligation.

² Projects described by 33 U.S.C. 3905(1) are not eligible for purposes of the WIFIA program as operated by EPA. Section 3902(b)(2) specifies that EPA can provide WIFIA assistance to all eligible projects categories except for (1).

- Projects eligible under the Clean Water and Drinking Water State Revolving Fund Programs (SRFs);
- Projects for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works;
- Projects for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation);
- Brackish or sea water desalination projects;
- Managed aquifer recharge or water recycling projects;
- Acquisition of real property or an interest in real property if the acquisition is integral to an already eligible project or pursuant to an existing plan that, in the judgment of the Administrator, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for assistance; and
- A combinations of projects submitted to EPA by an SRF program under a single application; and
- A combination of projects secured by a common security pledge for which there is a single application.

Sections 3902, 3905, and 3907 of title 33, U.S.C., describe the conditions that govern a project's eligibility under WIFIA. Generally, projects must have eligible costs of not less than

The Army Corps of Engineers is responsible for establishing a WIFIA program that provides assistance to such projects.

\$20 million. However, for projects eligible for assistance under categories (1) or (2) below (i.e., SRF eligible projects), that serve a community of not more than 25,000 individuals, eligible project costs must be no less than \$5 million. The types of projects eligible for assistance are listed in 33 U.S.C. 3905 and are also summarized below in 40 CFR 35.10005(m).

II. Water Infrastructure Needs and Current Sources of Financing

In the United States, localities are primarily responsible for providing water infrastructure services and funding these services through user fees. Today, some communities face formidable challenges in providing adequate and reliable water infrastructure services. Existing water infrastructure in some of these communities is aging, and investment is not always keeping up with the needs. As described in greater detail below, EPA estimates the national funding need for capital improvements for such facilities totals approximately \$660 billion over the next 20 years.³ In many cases, meeting these needs will require significant increases in capital investment.

Water infrastructure capital projects are typically funded with pay-as-you-go or debt financed through the municipal bond market. The U.S. Conference of Mayors estimates that in 2008, local governments invested \$93 billion in their water systems, of which 40% went to capital investments, with the remainder for operations and maintenance.⁴ In 2014, municipal bond issuance for water and sewer projects totaled \$31.9 billion according to the Securities Industry and Financial Markets Association (SIFMA). Total municipal bond issuance in 2014 was \$314.9 billion, of which \$282.8 billion was tax-exempt.⁵ From 2003 through 2012, tax-

³ EPA. “Clean Watersheds Needs Survey 2012: Report to Congress,” 2012, and “Drinking Water Infrastructure Needs Survey: Fifth Report to Congress,” 2011.

⁴ U.S. Conference of Mayors – Mayors Water Council. “Trends in Local Government Expenditures on Public Water and Wastewater Services and Infrastructure: Past, Present and Future.” February 2010. <http://www.usmayors.org/publications/201002-mwc-trends.pdf>

⁵ SIFMA. “Research Report - Municipal Bond Credit Report: Fourth Quarter 2014”

exempt financing for water and sewer facilities totaled \$258 billion.⁶ While a summary of bond ratings for water and sewer debt is not available, a 2014 analysis of outstanding municipal market debt shows that 19 percent of issues were rated BBB or below, or were unrated.⁷ As such, the potential market for lower-rated investment-grade municipal borrowers, which could benefit most from WIFIA, is significant.

After pay-as-you-go and bonds, the next largest source of water infrastructure financing are the Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) programs. The SRFs are state-operated finance programs that receive capitalization grants from EPA. These capitalization grants, combined with required state match and loan repayments with interest, allow the SRFs to provide a far greater amount of assistance annually than the amount appropriated for the programs. The SRFs provided \$7.9 billion in assistance to projects across the country in 2015.⁸ In addition, communities also received water infrastructure funding through at least two other federal agencies in 2015. The Department of Housing and Urban Development authorized \$333.4 million in block grants to communities for water infrastructure projects, and the United States Department of Agriculture (USDA) approved \$1.5 billion in grants and loans for small communities.

EPA's 2012 Clean Watersheds Needs Survey (CWNS)⁹ estimated that the total capital wastewater and stormwater treatment and collection needs for the nation are \$271 billion as of January 2012. The CWNS does not represent all needs for the 20-year period from January 2012 through December 2031. Because states often do not have documentation that demonstrates needs that far into the future, nearly all needs included in the CWNS are for projects that will be

⁶ <http://www.naco.org/sites/default/files/documents/Protecting-Bonds-to-Save-Infrastructure-and-Jobs-2013.pdf>

⁷ SIFMA. "Research Report - Municipal Bond Credit Report: Fourth Quarter 2014"

⁸ July 1, 2014 – June 30, 2015. EPA SRF National Information Management Systems.

⁹ EPA. "Clean Watersheds Needs Survey 2012: Report to Congress." 2012.

completed within 5 years (i.e., 2012–2017) and are documented in capital improvement plans and other short term planning documents. Needs without existing independent documentation are not included in the CWNS. In addition, the CWNS does not include information about privately owned wastewater facilities, projects on tribal lands, and operations and maintenance needs. Stormwater management needs are also underestimated due to not all states reporting in this category. For these reasons, actual 20 year needs are likely to be significantly higher.

EPA’s 2011 Drinking Water Infrastructure Needs Survey (DWINS)¹⁰ estimates a total capital drinking water infrastructure need of \$384.2 billion for the 20-year period from January 2011 through December 2030. This estimate includes needs for American Indian and Alaska Native Village systems. Like the CWNS, this figure does not represent all of the needs. The scope of the survey is limited to those needs eligible to receive DWSRF assistance – thus excluding some capital projects, including projects related primarily to future population growth. Moreover, needs for which no independent documentation exists are represented in the DWINS by default values which are conservative. The DWINS does not include operations and maintenance needs.

Other studies report significantly larger estimates of needs. For example, the American Society of Civil Engineers estimates approximately 240,000 water main breaks annually.¹¹ The American Water Works Association estimates that \$1 trillion is needed to restore existing distribution system pipe at the end of its useful life and to expand pipe networks to meet growing population needs between 2011 and 2035.¹²

¹⁰ EPA. “Drinking Water Infrastructure Needs Survey: Fifth Report to Congress.” 2011.

¹¹ American Society of Civil Engineers. “2013 Report Card for America’s Infrastructure.” 2013.

¹² American Water Works Association. “Buried No Longer: Confronting America’s Water Infrastructure Challenge.” <http://www.awwa.org/Portals/0/files/legreg/documents/BuriedNoLonger.pdf>

The Administration has pointed to an increased need for infrastructure financing through its Build America Initiative. In its initial report, the Department of Treasury noted that “increasing fiscal pressures at all levels of government have led to reduced commitments for infrastructure and a greater reliance on debt financing, which, in turn, has contributed to increased debt ratios and reduced debt service coverage levels for certain issuers. At the same time, stagnant economic growth and absence of support for new or increased user fees have curtailed increased debt capacity among many issuers.”¹³ The Build America Initiative aims to make infrastructure financing more affordable and to encourage innovative financing and public-private partnerships.

As suggested by the estimated size of national water infrastructure needs, currently available funding sources are not sufficient. SRF programs under the Clean Water Act and Safe Drinking Water Act are designed to primarily provide a benefit to smaller projects, typically under \$100 million, in communities that often have limited access to funding. There is a large segment of need associated with projects that the SRFs cannot fund due to project size or ownership. The average CWSRF wastewater treatment project is \$3.5 million, while the average DWSRF project is \$2.4 million. According to the most recent data, states issued only 180 CWSRF loans over \$50 million, and 35 of those were over \$100 million, out of over 14,000 loans issued since 2004. Since 2009, states issued only 20 DWSRF loans over \$50 million, and ten of those were over \$100 million, out of over 6,700 loans.¹⁴ Private wastewater treatment facilities are not eligible for most CWSRF financing.

Bond-financing requires strong debt service coverage to benefit from low interest rates and long tenors. In addition, private entities generally cannot access the tax-exempt bond market.

¹³ U.S. Department of the Treasury Office of Economic Policy. “Expanding our Nation’s Infrastructure through Innovative Financing.” September 2014.

¹⁴ Collection of project specific data began in 2004 for the CWSRF program and 2009 for the DWSRF program.

Finally, grant funding and USDA loans are targeted at specific underserved sectors and are generally less applicable to large projects.

Similar to large-scale transportation projects, the financing of large water infrastructure projects can be addressed through the use of several financing tools and techniques that, when combined, can result in a highly efficient capital structure that minimizes the financial impact on system users. WIFIA will assist in delivering on these needs in the water sector. It is in a position to promote the use of public-private partnerships in this area by reducing the cost of private participation. At the same time, WIFIA will have limited impact on the municipal bond market. Total municipal bond issuance was \$314.9 billion in 2014, of which water infrastructure accounted for 10%. Even if WIFIA is able to provide \$1 billion annual assistance, it will account for approximately 3% of the market for water infrastructure bonds such that the program is not expected to impact the municipal bond market.

III. Program Information

A. Funding

The Federal Credit Reform Act of 1990 (FCRA) requires agencies to estimate the long-term cost of providing a direct loan or loan guarantee on a present value basis, and requires that an agency have the necessary budget authority appropriated to the agency before entering into an obligation for a loan or loan guarantee. Section 3912(a) of WIFIA authorizes annual amounts to be appropriated for the cost of loans or loan guarantees in FY2015 through FY2019. However, to date no annual appropriations have been provided for the cost of loans or loan guarantees under WIFIA. EPA will not know the amount of budget authority that will be available until it is appropriated.

B. Applicant Eligibility

Section 3904 of title 33, U.S.C., defines entities that are eligible for WIFIA assistance. To be eligible, an applicant must be one of the following:

1. A corporation;
2. A partnership;
3. A joint venture;
4. A trust;
5. A federal, state, or local governmental entity, agency, or instrumentality;
6. A tribal government or consortium of tribal governments; or
7. A state infrastructure financing authority.

C. Project Eligibility

Section 3905 of title 33, U.S.C., defines projects eligible for assistance. To be eligible, a project must fall under one of the following categories:

1. One or more activities that are eligible for assistance under section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)), notwithstanding the public ownership requirement under paragraph (1) of that subsection.
2. One or more activities described in section 1452(a)(2) of the Safe Drinking Water Act (42 U.S.C. 300j-12(a)(2)).
3. A project for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works.

4. A project for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation).
5. A brackish or sea water desalination project, a managed aquifer recharge project, or a water recycling project.
6. Acquisition of real property or an interest in real property—
 - a. If the acquisition is integral to a project described in paragraphs (1) through (5); or
 - b. Pursuant to an existing plan that, in the judgment of the Administrator, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for assistance under this section.
7. A combination of projects, each of which is eligible under paragraph (1) or (2), for which a State infrastructure financing authority submits to the Administrator a single application.
8. A combination of projects secured by a common security pledge, each of which is eligible under paragraph (1), (2), (3), (4), (5), or (6), for which an eligible entity, or a combination of eligible entities, submits a single application.

D. Threshold Criteria Required by Statute

The WIFIA statute contains the following requirements, as paraphrased below, that do not require interpretation and are restated in the rule without further explanation:

- Public or private applicants for credit assistance will be required to submit applications to EPA in order to be considered for approval.

- Project financing shall be repayable, in whole or in part, from State or local taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the project; shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and may have a lien on revenues subject to any lien securing project obligations;
- In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, or a tribal government or consortium of tribal governments, the project that the entity is undertaking must be publicly sponsored. Public sponsorship means that the recipient can demonstrate, to the satisfaction of the Administrator, that it has consulted with the affected state, local, or tribal government in which the project is located, or is otherwise affected by the project, and that such government supports the proposed project. Support can be shown by a certified letter signed by the approving municipal department or similar agency, mayor or other similar designated authority, local ordinance, or any other means by which local government approval can be evidenced.
- To be eligible for financing, a prospective borrower must have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life.

Further detail will be available in a program handbook that will be posted on the WIFIA program public website.

E. Application Process

For each fiscal year for which credit assistance is made available by Congress, EPA will publish a NOFA in the Federal Register to solicit letters of interest for credit assistance. EPA will also publish the NOFA on the WIFIA program web site, at www.epa.gov/wifia. The notice will provide detailed instructions for submitting letters of interest and applications, as well as the respective due dates for submissions. It will advise prospective borrowers of the estimated amount of funding available to support WIFIA credit instruments and information required in a letter of interest and application.

The application process has two steps. The first step requires the submission of a letter of interest prior to the deadline set out in the NOFA. Then, projects selected by EPA to continue in the application process will be invited to submit an application. EPA will only select those projects that it expects might reasonably proceed to closing.

The Letter of Interest has four primary purposes: (i) validate the eligibility of the prospective borrower and the proposed project, (ii) perform a preliminary creditworthiness assessment, (iii) perform a preliminary engineering feasibility assessment, and (iv) evaluate the project against the selection criteria and identify which projects EPA will invite to submit applications. The Letter of Interest addresses the WIFIA eligibility criteria, WIFIA selection criteria, and identifies other specific information that must be provided to EPA to be considered for credit assistance. This serves to familiarize EPA with basic information relating to the project and the prospective borrower.

The Letter of Interest will require items such as:

1. **Prospective Borrower Information:** The Letter of Interest should describe the proposed obligor's organizational structure, identify the entity that will serve as the applicant, list other significant members of the project team, describe the proposed obligor's relationship to subsidiaries or affiliates, if any, and provide a web site link where additional information can be found.
2. **Project Plan:** The Letter of Interest should describe the project, including its location, population served, purpose, design features, estimated capital cost, and development schedule. The prospective borrower will also describe how the project fits into one of the eight project types eligible for assistance under WIFIA. The Letter of Interest also requests inclusion of any other relevant information that could affect the development of the project, such as community support, pending legislation, or litigation. The Project Plan section will also serve to summarize the status of the project's environmental review, engineering report, and other approvals necessary to the project.
3. **Project Operations and Maintenance Plan:** The Letter of Interest should describe the project's plan for operating, maintaining, and repairing the project post-completion, and discuss sources of revenue used to finance these activities.
4. **Financing Plan:** The Letter of Interest should include the proposed sources and uses of funds for the project and state the type and amount of credit assistance to be sought from EPA. The discussion of proposed financing should also identify the source(s) of revenue or other security that would be pledged to the WIFIA assistance. Additionally, this section should describe the credit characteristics of the project and how the senior obligations of the project will achieve an investment-grade rating. The Letter of Interest

should also include a summary financial pro forma and up to three years' audited financial statements, if available.

5. **Selection Criteria:** The Letter of Interest should describe the potential benefits to be achieved through the use of WIFIA assistance with respect to each of the WIFIA selection criteria.
6. **Contact Information:** The Letter of Interest should identify the point of contact with whom EPA should communicate regarding the Letter of Interest. For the purpose of completing its evaluation, EPA staff may contact a prospective borrower regarding specific information in the Letter of Interest.
7. **Certifications:** The prospective borrower will certify that it will abide by all applicable laws and regulations.
8. **Notification of State Infrastructure Financing Authority:** The interested party will acknowledge that EPA will notify the appropriate State infrastructure financing authority in the State in which the project is located that the prospective borrower submitted this letter of interest; and provide the submitted letter of interest and source documents with it to that State infrastructure financing authority.

Selected interested parties will be invited to submit an application to EPA. The purpose of the application is to provide EPA with materials necessary to underwrite the proposed WIFIA assistance. The application will require items such as:

1. **Detailed Applicant Information:** The applicant will submit information identifying and describing the applying organization, including the applicant's organizational structure, and the applicant's legal authority to apply for WIFIA credit assistance and undertake the

project. The applicant will also have to demonstrate its ability to execute the project through past experiences and qualifications of its personnel.

2. **Detailed Project Information:** Materials submitted under this section will detail the applicant's plan for project construction, projected over several years, to include a description of the facility to be built, including design features, and the intended purpose. The applicant will also submit a project management and compliance monitoring plan, including the project construction timeline, and an assessment of the costs expected at each point in the timeline. The applicant will also submit an analysis of the risks that may be encountered during construction, and steps that will be undertaken to minimize those risks. The applicant will also submit draft or final bid documents.
3. **Detailed Operations and Maintenance Plan:** In this section, the applicant will submit materials supporting the applicant's plan to operate the project after construction. This plan should include an operation and maintenance plan for the tenor of the WIFIA assistance, including an estimate of the associated costs. The applicant should also submit materials describing contractual arrangements that the applicant has already made, or plans to make.
4. **Comprehensive Financing Plan:** The applicant will need to submit a comprehensive plan describing how the project will be financed, and how financing will be repaid over the tenor of the requested WIFIA assistance. This will include a detailed financial model, the sources and seniority of other financing, a description of the dedicated sources of repayment, rate covenants, and security for the proposed credit assistance. The applicant will also submit a preliminary rating letter indicating the possibility of the project's senior obligations obtaining an investment-grade rating from a NRSRO.

5. Final Certifications: The applicant will certify that it will abide by all applicable laws and regulations.

This two-step process limits the time, cost and effort required by prospective borrowers prior to having a reasonable expectation of potential WIFIA funding. EPA plans to develop detailed application information contained in a program handbook and will post it on the WIFIA program public website at the time of solicitation for letters of interest. EPA welcomes comment on this application process.

F. Creditworthiness

By statute, at 33 U.S.C. 3907(a)(1), the Administrator must determine that every funded project is creditworthy. Therefore, an overarching goal of the creditworthiness determination process is to ensure that each project that is ultimately offered credit assistance advances the WIFIA Program's mission while providing a level of risk exposure that is suitable to EPA. To that end, the WIFIA Program will evaluate applications for financial assistance based on prudent lending practices for the long-term holding of an illiquid asset. The creditworthiness determination will be based on a review of the following:

- Terms, conditions, financial structure, and security features of the proposed financing;
- Dedicated revenue source(s) securing the financing;
- Financial assumptions surrounding the proposed project;
- Financial soundness and credit history and outlook of the borrower; and
- Technical merits and engineering risks of the proposed financing.

Further information will be available in the WIFIA program handbook.

G. Coordination with SRF Programs

In order to promote coordination between the SRF programs and the WIFIA program, the statute includes procedures on the use of existing funding mechanisms. The statutory procedure requires notification by EPA to the relevant state SRF program of the receipt of applications for SRF-eligible projects. Such notification must occur within 30 days of the receipt of an application submitted to the WIFIA program office. Under the statute, the notified SRF program has 60 days to formally declare an intent to fund the project in the program's intended use plan, in place of EPA in an amount equal to or greater than the amount requested in the WIFIA application. If such a declaration is made, EPA may not provide assistance to the project under WIFIA unless the SRF program fails to provide assistance within 180 days from the date of notification or the terms are less favorable than those offered by the WIFIA program.

Those administering SRF programs have expressed concern that the amount of time within which they must receive and review SRF applications and make funding decisions regarding these applications is too short. EPA will therefore provide notice to SRF programs within 30 days of the receipt of a letter of interest. Such notice will include the letter of interest and supporting documentation provided by the prospective borrower. The letter of interest includes a notice to interested parties explaining the notification procedure and allows the prospective borrower to request that EPA not share the letter of interest with the SRF program, though the SRF program will still be notified of the submission, as required by statute. Providing initial notification within 30 days of the receipt of a letter of interest, as opposed to the application, will provide additional time for SRF programs to communicate with the prospective borrower, for the prospective borrower to apply to the SRF program, for funding

decisions to be made, and for a formal declaration of the intent to fund the project with a SRF loan to be made.

EPA welcomes comment on providing notification to SRF programs at an earlier time than required by the statute. Though not addressed through this implementation rule, EPA also welcomes suggestions on the content of the notification to SRF programs.

H. Fees

Sections 3908(b)(7), 3909(b), and 3909(c)(3) of 33 U.S.C., allow EPA to collect user fees from applicants to defray some or all of the costs associated with administering the program. A separate proposed rule governing applicant fees can be found in the docket for the rule at EPA-HQ-OW-2016-0568. While each rule has a separate process for comments, EPA is aware that the similar timelines for comment and the relationship between the two rules may cause confusion. Therefore, in the event that comments are received for this rule under the heading of the fee rule, or vice versa, EPA will consider all comments and respond accordingly. EPA will not be able to collect user fees until the user fee rule is finalized.

I. Credit Assistance

Two types of credit instruments are permitted under WIFIA: secured (direct) loans and loan guarantees. General rules concerning the terms governing these credit instruments appear at 33 U.S.C. 3908 and 3909. More specific terms will be determined on a project-specific basis during negotiations between EPA and successful applicants.

In general, WIFIA limits the amount of credit assistance that may be provided to a project to not more than 49% of reasonably anticipated eligible project costs. However, the statute authorizes EPA to use up to 25% of its budget authority appropriated through Fiscal Year 2019

to provide credit assistance to one or more projects of up to no more than 80% (statutory cap on federal participation) of the total costs of any given project. EPA will use its budget authority to provide credit assistance greater than 49% of eligible project costs (i.e., up to 80% of the total project costs) only in extraordinarily exceptional circumstances, such as where a project would be unable to proceed to closing absent such additional assistance due to unforeseen events.

Unforeseen events that could prevent a project from going to closure may include, but are not limited to: unexpected cost revisions, unexpected loss of other sources of financing, increased cost of capital, or acts of nature. In such an event, EPA will reexamine the creditworthiness of the project and only provide funding if the project can still meet all requirements of the program. Such a limitation is necessary because the amount of budget authority that may be used for such purposes is limited and the use of such authority reduces the agency's ability to support other projects. EPA will not entertain requests for use of this authority in a letter of interest or application.

Costs incurred prior to a project sponsor's submission of an application for credit assistance may be considered in calculating eligible project costs only upon approval by EPA. Prospective borrowers may not include application charges or any other expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter, as discussed below) in the total project cost, as these expenses are not eligible activities per 33 U.S.C. 3906. No costs financed internally or with interim funding may be refinanced later than 1 year following substantial completion of the project.

EPA will not obligate funds for a project that has not received an environmental Categorical Exclusion, Finding of No Significant Impact, or Record of Decision under the National Environmental Policy Act (NEPA).

For planning purposes, and as is standard in construction loan agreements, the credit agreement will include the anticipated schedule for loan disbursements. However, actual disbursements will be based on costs incurred in accordance with the approved construction plan, as evidenced by paid invoices. This requirement protects EPA in the event of non-performance and is typical of most federal loans and grants.

As required by statute, the interest rate on a secured loan will be equal to or greater than the yield on U.S. Treasury securities of comparable maturity on the date of execution of the credit agreement. The base interest rate can be identified through use of the daily rate tables published by the Bureau of the Fiscal Service for the State and Local Government Series (SLGS) investments. The WIFIA program will estimate the yield on comparable Treasury securities by adding one basis point to the SLGS daily rate with a maturity that is closest to the weighted average loan life of the WIFIA credit assistance, measured from first disbursement.

As allowed by statute at 33 U.S.C. 3908(c)(2), scheduled loan repayments of principal or interest on a secured loan will commence not later than 5 years after the date of substantial completion of the project. However, scheduled loan repayments of principal or interest on a secured loan to a State infrastructure financing authority will commence not later than 5 years after the date on which amounts are first disbursed.

As required by statute, the final maturity date of a secured loan will be the earlier of the date that is 35 years after the date of substantial completion of the project, or if the useful life of the project is less than 35 years, the useful life the project. However, the final maturity date of a secured loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed. In determining the useful life of the project, for the purposes of establishing the final maturity date of the WIFIA credit instrument, the

Administrator will consider the useful economic life of the asset(s) being financed, as required under OMB Circular A-129.

As required by statute, EPA's Federal credit instrument may have a junior claim to other debt issued for the project in terms of its priority interest in the project's pledged security. However, EPA's claim on assets will not be subordinated to the claims of other creditors in the event of a default leading to bankruptcy, insolvency, or liquidation of the obligor. The EPA's interest may include collateral other than pledged revenues. EPA welcomes comment on its restricted use of the authority to provide credit assistance greater than 49% of eligible project costs and policy on reimbursing project costs financed internally or through interim funding.

J. Small Community Set-aside

Each fiscal year for which budget authority is made available by Congress, as required by statute, EPA will set aside at least 15% of its appropriated budget authority for projects that serve communities of no more than 25,000 individuals. The statute requires that set-aside budget authority be obligated to small communities prior to the first day of June each year, after which the budget authority will be made available to all other projects. Small communities are eligible for financing regardless of the set-aside.

K. Rating Requirement

EPA, as required by statute at 33 U.S.C. 3907(a)(1)(D)(i), will require each applicant to furnish a preliminary rating opinion letter as part of the application process. This is required with the submission of the application, not the letter of interest. The applicant is responsible for identifying and approaching one or more Nationally Recognized Statistical Rating Organizations (NRSROs) to obtain such letter. This letter must indicate that the applicant project's senior obligations have the potential of attaining an investment-grade rating and opine on the default

risk of the WIFIA credit instrument. This letter will allow EPA to evaluate the application and execute a term sheet upon which funds are obligated. The disbursement of any funds will be contingent upon the execution of a formal credit agreement between EPA and the project sponsor and the receipt of two formal investment-grade ratings on the project's senior obligations. These ratings must apply to all project obligations with claims senior to that of the Federal credit instrument on the security pledged to the Federal credit instrument. In addition, the ratings must specifically refer to the default risk of the WIFIA instrument itself. If the Federal credit instrument is the project's senior obligation, these ratings must apply to the Federal credit instrument as well as all project obligations with claims at parity to that of the Federal credit instrument on the security pledged to the Federal credit instrument.

EPA will require the credit rating to mention the default risk of the WIFIA loan. Given the WIFIA statutory mandate that the Federal interest will not be subordinated in the event of bankruptcy, insolvency, or liquidation of the project, EPA understands that this analysis would already be imbedded in the rating agency review of the senior debt obligations. Therefore, adding the requirement that the credit rating mentions the default risk of the WIFIA loan primarily serves to clarify EPA's expectations that the rating letters should specifically reference the WIFIA credit as well as the project's senior obligations.

L. Tax Status of Loan Guarantees

Section 103(a) of the Internal Revenue Code (IRC), 26 U.S.C. 103(a), provides that "gross income" does not include interest on any state or local bond, with certain exceptions. Section 149(b) of the IRC, 26 U.S.C. 149(b), however, provides that the section 103(a) exclusion from gross income "shall not apply to a state or local bond if such bond is federally guaranteed." Section 149(b) in effect converts tax exempt debt to taxable debt when such debt is guaranteed

by the Federal government. WIFIA did not amend the provisions in section 149(b) of the Internal Revenue Code that prohibit the use of direct or indirect Federal guarantees of tax-exempt obligations. Accordingly, the interest income on any project loan that is directly or indirectly federally guaranteed under WIFIA is not exempt from Federal income taxation.

M. Federal Requirements

Recipients of WIFIA credit assistance must comply with Federal requirements applicable to all Federally-funded projects. The rule provides a non-exhaustive list of these requirements in Supplementary Information Section V.

N. American Iron and Steel

Recipients of WIFIA credit assistance must comply, by statute at 33 U.S.C. 3914, with American Iron and Steel (AIS) requirements, which requires that if any WIFIA assistance is provided to a project for construction, alteration, maintenance, or repair, all of the iron and steel products used in the project must be produced in the United States. The language in the statute is identical to AIS language applicable to the SRF programs. This requirement applies to all iron and steel products, not only those paid for with proceeds from the WIFIA assistance agreement. A waiver may be issued for a case or category of cases where EPA finds (1) that applying these requirements would be inconsistent with the public interest; (2) iron and steel products are not produced in the US in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron and steel products produced in the US will increase the cost of the overall project by more than 25%.

The WIFIA program is adopting all AIS guidance applicable to the SRF programs. Due to the identical nature of the statutory language for each program, as well as the need for consistency between two infrastructure programs administered by EPA, this requirement should

be applied to both programs in the same manner. Additionally, the WIFIA program will adopt all relevant national waivers issued by EPA's SRF programs. These waivers allow recipients to purchase certain products from non-American sources. The rationale for these waivers applies equally to both programs. AIS guidance and waivers can be found on EPA's website. EPA welcomes comment on the implementation of AIS requirements.

O. Labor Standards

The statute, at 33 U.S.C. 3909(e), requires recipients of WIFIA credit assistance to pay all laborers and mechanics employed by contractors or subcontractors wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor. This is commonly referred to as Davis-Bacon wage requirements. This requirement applies to all laborers and mechanics working on a project, not only those paid from proceeds of the WIFIA assistance agreement. Further guidance will be made available on EPA's WIFIA website.

P. Reporting

EPA requires, at a minimum, any recipient of WIFIA credit assistance to submit an annual project performance report and audited financial statements to EPA within 180 days following the recipient's fiscal year-end for each year during which the recipient's obligation to the Federal Government remains in effect. EPA may conduct periodic financial and compliance audits of the recipient, as determined necessary by EPA. The specific credit agreement between the recipient of credit assistance and EPA may contain additional reporting requirements. This is a necessary and important requirement in order to allow EPA to provide proper and sufficient oversight of federally-funded projects and conforms to the requirements of other federal programs. EPA welcomes comment on this requirement.

Q. Selection Criteria

Section 3907(b)(2) of the statute establishes 11 criteria for selecting among eligible projects to receive credit assistance, but allows EPA to identify additional selection criteria. EPA is proposing the following thirteen selection criteria. Eleven are criteria prescribed by the statute (as paraphrased below), and EPA further proposes to supplement certain of those criteria. EPA added criteria (12) and (13) below:

1. The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public health benefits;
2. The likelihood that assistance under this subtitle would enable the project to proceed at an earlier date than the project would otherwise be able to proceed;
3. The extent to which the project uses new or innovative approaches such as the use of energy efficient parts and systems, or the use of renewable or alternate sources of energy; green infrastructure¹⁵; and the development of alternate sources of drinking water through aquifer recharge, water recycling or desalination;
4. The extent to which the project protects against extreme weather events, such as floods or hurricanes, as well as the impacts of climate change;
5. The extent to which the project helps maintain or protect the environment or public health;

¹⁵ Green infrastructure includes a wide array of practices at multiple scales that manage wet weather and that maintains and restores natural hydrology by infiltrating, evapotranspiring and harvesting and using stormwater. On a regional scale, green infrastructure is the preservation and restoration of natural landscape features, such as forests, floodplains and wetlands, coupled with policies such as infill and redevelopment that reduce overall imperviousness in a watershed. On the local scale, green infrastructure consists of site- and neighborhood-specific practices, such as bioretention, trees, green roofs, permeable pavements and cisterns.

6. The extent to which a project serves regions with significant energy exploration, development, or production areas;
7. The extent to which a project serves regions with significant water resource challenges, including the need to address water quality concerns in areas of regional, national, or international significance; water quantity concerns related to groundwater, surface water, or other resources; significant flood risk; water resource challenges identified in existing regional, state, or multistate agreements; and water resources with exceptional recreational value or ecological importance;
8. The extent to which the project addresses identified municipal, state, or regional priorities;
9. The readiness of the project to proceed toward development, including a demonstration by the obligor that there is a reasonable expectation that the contracting process for construction of the project can commence by not later than 90 days after the date on which a Federal credit instrument is obligated for the project under this subtitle;
10. The extent to which the project financing plan includes public or private financing in addition to assistance under this subtitle;
11. The extent to which assistance under this subtitle reduces the contribution of Federal assistance to the project;
12. The extent to which the project addresses needs for repair, rehabilitation or replacement of a treatment works, community water system, or aging water distribution or wastewater collection system; and

13. The extent to which the project serves economically stressed communities, or pockets of economically stressed rate payers within otherwise non-economically stressed communities.

EPA supplemented criteria (3) by adding examples to define EPA's expectations for innovation. These examples align this criterion with the particular innovative projects listed as eligible in the statute at 33 U.S.C. 3905 (4) and (6).

EPA added "as well as the impacts of climate change" to the end of criterion (4) in order to reflect the Administration's priorities as well as align the criteria with the specific priority project type, "adaptation to extreme weather and climate change including enhanced infrastructure resiliency, water recycling and reuse, and managed aquifer recovery," which is discussed below.

EPA added "or public health" to the end of criterion (5) in order to reflect essential objectives in the public interest under both the Clean Water Act and the Safe Drinking Water Act.

EPA added criterion (12) in order to align project criteria with statutorily defined project eligibilities and to provide credit to those projects that meet the growing need for repair, rehabilitation, or replacement of treatment works, community water systems, or aging water distribution or wastewater collection systems. Addressing these needs is an Agency priority.

EPA added criterion (13) in order to reflect the Agency's continuing efforts to address the needs of economically stressed communities where access to financing for critical infrastructure is often lacking or difficult to obtain. While the creditworthiness requirement, as well as the requirement to obtain an investment-grade rating on senior obligations, may be a high bar for access to the WIFIA program by economically stressed communities, there are some options that

may allow such communities to meet such requirements. For instance, an economically stressed community may seek a guarantee from a State that would bring the required rating up to an investment-grade level. A community may also seek the participation of an SRF program where the SRF program applies for a WIFIA loan and uses its resources as security in order to meet WIFIA's creditworthiness requirements. The SRF program can then provide funding to the community and as a result take on a level of risk that EPA is statutorily barred from assuming under WIFIA. EPA welcomes comment on the additions and modifications to the default statutory criteria.

EPA is not assigning weights to these priorities in this rule, but rather will make weighting decisions in the first Notice of Funding Availability and adjust such weights as needed in subsequent notices. Assigning criteria weights in the Notice of Funding Availability, rather than through regulation, allows EPA flexibility to adapt to changing circumstances and priorities in an efficient and timely manner. In addition, the Administrator may include in the notice additional criteria in order to further reflect the Administrator's priorities. EPA proposes to provide notice and response to comments prior to the issuance of the second Notice of Funding Availability, and subsequent notices thereafter if necessary, in order to allow for public input on additional criteria or changes to non-statutory criteria. EPA will publish a draft NOFA, when necessary to provide public notice of potential criteria changes or additions, in the Federal Register and respond to comments on these changes in the final NOFA. This flexibility will allow the Agency to encourage applications that focus on a particular selection criterion for a given funding cycle, e.g., projects that respond to extreme weather events, focus on climate resiliency, serve economically stressed communities, or address other selection criteria priorities. EPA welcomes comment on the decision to apply weights to criteria in the Notice of Funding

Availability rather than by regulation. EPA also wishes to ensure that the public has the opportunity to provide input in the development of additional criteria and changes to non-statutory criteria and welcomes comment on the proposal to provide informal notice and comment prior to issuance of the second Notice of Funding Availability and subsequent notices if necessary. EPA also welcomes other ideas that may provide the opportunity for such input while also allowing EPA to efficiently manage the program and provide assistance in a timely manner.

In addition to the criteria set forth above, the statute includes one additional selection criterion, which is directly related to a project's creditworthiness, financial viability, and EPA's capacity to make a loan: "The amount of budget authority required to fund the Federal credit instrument made available under this subtitle." This criterion will be used to assess projects separate from the assessment under the previous thirteen criteria. In particular, it will inform EPA's ability to provide funding in an equitable manner to prospective borrowers seeking financing. The amount of budget authority used by a project will be an important consideration when selecting projects. The greater the budget authority used by a project, which is a function of both project size and creditworthiness, the less budget authority is available to finance other projects. Selecting projects will be at the discretion of the Administrator who may decide that a project that uses a proportionally high level of budget authority provides essential environmental or public health benefits and deserves greater consideration.

IV. Priorities

Criteria weights will be assigned in the first Notice of Funding Availability, and may be adjusted in subsequent notices to address changing circumstances and priorities. This discussion

highlights important factors that will inform EPA’s decision-making process prior to issuance of the first criteria weights.

Congress enacted WIFIA with the goal of accelerating investment in our nation’s water infrastructure by providing supplemental credit assistance to creditworthy projects of major importance to the water sector. While the list of projects eligible for funding under WIFIA is expansive, EPA has identified the following project priorities for the first Notice of Funding Availability:

- Adaptation to extreme weather and climate change including enhanced infrastructure resiliency, water recycling and reuse, and managed aquifer recovery¹⁶;
- Enhanced energy efficiency of treatment works, public water systems, and conveyance systems, including innovative, energy efficient nutrient treatment;
- Green infrastructure; and
- Repair, rehabilitation, and replacement of infrastructure and conveyance systems.

EPA’s project priorities for the WIFIA program reflect water sector challenges that require innovative tools to assist municipalities in managing and adapting to our most pressing public health and environmental challenges. They are consistent with EPA’s Strategic Plan, which points to the need for the agency to drive innovation in addressing water quality and EPA’s “Blueprint for Integrating Technology Innovation into the National Water Program,” which builds on the strategic plan and calls for the Agency to promote innovation in energy

¹⁶ Managed aquifer recovery: Storage of excess supply to be used during peak periods of demand, drought, or other conditions.

reduction and treatment facilities, nutrient recovery, greening the nation's infrastructure, water reuse, and resiliency, among other priorities.¹⁷

A. Adaptation to extreme weather and climate change including enhanced infrastructure resiliency, water recycling and reuse, and managed aquifer recovery

The capital and operations and maintenance costs associated with extreme weather and climate change are estimated to be between \$448 and \$994 billion for water and energy utilities through 2050.¹⁸ This estimate includes the costs associated with adapting to changes in runoff quantity and timing, seawater intrusion, temperature changes, drought, rising sea levels, increased flood events, changes in precipitation quantity and timing, reduction in source water availability and quantity, and other types of changes associated with climate change. Utilities have a suite of options that can be used to adapt to these changes, including investments in resiliency, recycling and reuse, and aquifer recovery.

Enhanced infrastructure resiliency can include moving essential infrastructure to higher ground, installing backup power sources, and other measures to harden the utility against storms. In other areas, droughts will become more frequent and severe. Water recycling and reuse and managed aquifer recovery are some of the adaptation strategies for such extreme events. Aquifer recharge and aquifer storage and recovery are tools to augment water resources and address climate change, including drought, and increased demand on water supplies related to development. With Superstorm Sandy and extreme droughts in the western states occurring since these costs were estimated, the current needs can reasonably be expected to be significantly

¹⁷ EPA. "Blueprint for Integrating Technology Innovation into the National Water Program." March 27, 2013. Available at <https://www.epa.gov/sites/production/files/2014-04/documents/blueprintv1.pdf>

¹⁸ National Association of Clean Water Agencies (NACWA) and Association of Metropolitan Water Agencies (AMWA). "Confronting Climate Change: An Early Analysis of Water and Wastewater Adaptation Costs." October 2009.

higher. As communities are increasingly feeling the effects of extreme weather and climate change, demand for projects to adapt to these changes is expected to be significant.

B. Enhanced energy efficiency of treatment works, public water systems, and conveyance systems including innovative, energy efficient nutrient treatment

Drinking water and wastewater systems account for approximately 3 – 4% of energy use in the United States, adding over 45 million tons of greenhouse gases annually. Further, drinking water and wastewater plants are typically the largest energy consumers of municipal governments, accounting for 30-40% of total energy consumed. Energy as a percent of operating costs for drinking water systems can also reach as high as 40% and is expected to increase 20% in the next 15 years due to population growth and tightening drinking water regulations. As a result, energy efficiency and alternative energy projects are increasingly being pursued by water systems. Investments in energy efficiency will also help reduce the impacts of climate change.

For example, municipalities face increased costs to upgrade wastewater treatment in order to remove nutrients (nitrogen, phosphorous) to an extent sufficient to protect receiving waters. Nutrients are a significant water quality concern throughout the United States, with 25% of all water body impairments believed to be due to nutrient-related causes. This human-induced nutrient pollution comes from point and non-point sources, such as urban stormwater runoff, wastewater discharges, Animal Feeding Operations (AFOs) and Concentrated Animal Feeding Operations (CAFOs), agriculture, and atmospheric deposition. The costs of biological nutrient removal vary based on the quality of the source water (for drinking water) and receiving waters (for uses designated in state water quality standards), flows, and whether it is for a new facility or upgrades. Nutrient-induced formation of harmful algal blooms is an additional complicating factor for drinking water treatment. Operations and maintenance costs, particularly energy costs,

are one of the primary drivers of the costs associated with nutrient removal. WIFIA can help reduce these costs by driving the development of innovative, energy efficient tools to treat nutrients and assist in their dissemination throughout the country.

While estimates of total energy efficiency needs in treatment works and public water systems are not currently available, recent experience points to a significant demand for these types of projects. SRF programs committed \$1.7 billion of funding received under the American Recovery and Reinvestment Act to Green Project Reserve projects, well above the 20% requirement; 45% of this amount went towards energy efficiency projects.¹⁹ From 2009 through 2015, CWSRF and DWSRF programs have funded \$1.8 billion in energy efficiency projects. As more utilities seek out energy efficiency improvements, WIFIA can be on the forefront of making these projects come to fruition by reducing the cost of implementing innovative projects.

C. Green infrastructure

The EPA's CWNS 2012 documented needs of \$48.0 billion for combined sewer overflow (CSO) correction, of which \$4.2 billion was reported for green infrastructure, and \$19.2 billion for stormwater management, of which \$2.8 billion was reported for green infrastructure. Because only 21% of regulated municipal separate storm sewer systems (MS4) submitted data, the actual stormwater needs are likely significantly higher. In 2011, EPA issued a memorandum entitled "Achieving Water Quality through Integrated Municipal Stormwater and Wastewater Plans,"²⁰ which among other options, encourages the integration of green infrastructure in CSO long term control plans. An increasing number of communities are choosing to invest in green infrastructure to manage CSOs and wet weather and to decrease costs and improve livability.

¹⁹ U.S. EPA. "Implementation of the American Recovery & Reinvestment Act of 2009: Clean Water & Drinking Water State Revolving Fund Programs." May 2011 (EPA-832-K-11-001). Available at nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100BEEI.TXT.

²⁰ Available at: https://www.epa.gov/sites/production/files/2015-10/documents/memointegratedmunicipalplans_0.pdf

Twenty-year investment needs in green infrastructure can reasonably be expected to substantially top the \$7 billion projected by the CWNS 2012.

D. Repair, rehabilitation, and replacement of infrastructure and conveyance systems

The EPA's CWNS and DWINS estimate needs of approximately \$660 billion for up to twenty years. The vast majority of that need, 90% or \$591 billion, is for repair, rehabilitation, and replacement of existing infrastructure.

Actual needs in this area are likely even higher than reported to EPA. To calculate water systems' distribution system replacement needs, DWINS applies a default replacement benchmark of 0.5% per year. - This default benchmark percentage reflects current replacement rates and assumes water mains have a life expectancy of 200 years though actual life expectancies can be significantly shorter. However, relatively few surveyed systems document needs in excess of the default. Further, the American Water Works Association estimates the total need between 2011 and 2035 for replacement of distribution system is approximately \$526 billion.²¹ This figure does not include the repair, replacement, and upgrade of wastewater collection systems, nor of drinking water and wastewater treatment facilities.

Additionally, the repair, rehabilitation, and replacement of aging infrastructure can support climate change adaptation – for instance, by improvements to increase the flood resilience of facilities and components, including helping to assure the accessibility, uninterrupted operations, and maintaining public services during and following extreme weather events. Other examples include measures to reduce water loss from leaking drinking water distribution systems in communities where the availability of surface or ground water supplies to meet demand is a significant concern. Distribution system projects can similarly support energy

²¹ American Water Works Association. "Buried No Longer: Confronting America's Water Infrastructure Challenge." Available at <http://www.awwa.org/Portals/0/files/legreg/documents/BuriedNoLonger.pdf>

efficiency since loss of water that has previously been treated and pumped is in effect energy lost.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review & Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. This rule has been determined significant because it affects the rights and obligations of recipients of a loan program and raises novel legal or policy issues arising out of a legal mandate. Any changes made in response to OMB recommendations have been documented in the docket.

B. Executive Orders 11988 and 13690 and the Federal Flood Risk Management Standard

In order to help ensure enhanced resiliency of federally funded projects against floods, and to ensure that those projects do not exacerbate flood risk upstream, downstream, to adjacent properties, or to populations relying on facility services, projects funded under this rule will meet or exceed applicable State, local, Tribal, and Territorial standards for flood risk and floodplain management, as well as Executive Orders 11988 and 13690, the Federal Flood Risk Management Standard, and the Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (Guidelines) . This rule applies to projects funded by the WIFIA program. Other EPA programs may have other approaches to compliance with these Executive Orders.

Under this rule, projects involving new construction, substantial improvement, or to address substantial damage to structures and facilities will use the expanded floodplain standard

described in E.O. 13690. Substantial improvement and substantial damage include projects equaling or exceeding 50 percent of the value of the structure or facility. These project applicants shall determine whether the proposed project will occur in the floodplain using any of the approaches provided in section 6(c) of E.O. 11988, as amended. Applicants for proposed projects that are not new construction, substantial improvement, or to address substantial damage will use, at a minimum, the base 100-year floodplain standard for non-Critical Actions, and the 0.2%-annual chance floodplain for Critical Actions.

The Guidelines include an Eight-Step Decision-Making Process for identifying and addressing flood risks. Through that decision-making process, applicants will consider alternatives, including those that would avoid the floodplain, whenever practicable. Applicants will identify potential impacts, and if the project would result in harm to or within the floodplain, take actions to minimize that harm and restore and protect the natural floodplain environment. Under this rule, projects funded under WIFIA will be considered Critical Actions, as that term is defined in E.O.11988, unless the Administrator provides written notification to the applicant that the particular project is not considered to be a Critical Action.

Specific procedures and additional information are laid out in the program handbook, to be made available on the WIFIA program website. EPA welcomes comment on rule requirements related to Executive Orders 11988 and 13690 and the Federal Flood Risk Management Standard.

C. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that the

EPA prepared has been assigned EPA ICR number 2549.01. You can find a copy of the ICR in the docket for this rule.

The collection of information is necessary in order to receive applications for credit assistance pursuant to section 5024 of the Water Infrastructure Finance and Innovation Act (WIFIA) of 2014, 33 U.S.C. 3903. The purpose of the WIFIA program is to provide Federal credit assistance in the form of direct loans and loan guarantees to eligible clean water and drinking water projects.

WIFIA requires that an eligible entity shall submit to the Administrator an application at such time, in such manner, and containing such information, as the Administrator may require to receive assistance under WIFIA. In order to satisfy these requirements, EPA must collect a letter of interest and an application from entities seeking funding. This collection is necessary to determine whether each proposed project meets creditworthiness and other Federal requirements to receive WIFIA credit assistance. The content of the letter of interest and application are set out in 40 CFR 35.10015(c)(1) and (2), respectively. EPA solicits comments on the information required to be included in this collection.

EPA estimates 25 respondents per year, for a total estimated burden of 1,500 hours (per year) and cost of \$3,064,593.90 (per year) (includes no annualized capital or operation and maintenance costs). This estimate includes the burden for 20 unduplicated respondents for the letter of interest and 5 unduplicated respondents for the application. For the letter of interest, EPA estimates 1,000 annual burden hours and the annualized cost of those hours is \$40,107. EPA used the following median hourly wages from the May 2015 National Occupational Employment and Wage Estimates United States (http://www.bls.gov/oes/current/oes_nat.htm) from the U.S. Bureau of Labor Statistics to calculate the cost of the estimated burden hours:

Lawyers= \$55.69; Management= \$47.38; Engineers= \$43.30; and Office and Administrative Support= \$15.96. For the application, EPA estimates 500 annual burden hours and the annualized cost of those hours is \$19,487. EPA estimates 50 legal hours, 55 management hours, 285 technical hours, and 110 clerical hours. As noted, EPA used the median wages from U.S. Bureau of Labor Statistics to calculate the cost of the estimated burden hours.

In addition to the burden hours of compiling the letter of interest and application, EPA estimated that respondents will be charged two fees. An application fee will be due upon submission of the application. The application fee acts as "earnest money" to ensure applicants are committed to closing the WIFIA credit assistance. This application fee is credited toward the cost of expert services. For applications for projects serving small communities (population of not more than 25,000 people), this application fee is estimated to be \$25,000. For all other applicants, this application fee is estimated to be \$100,000. EPA assumes five applicants, with one being a small community. The annual combined application fee for all five applicants is estimated to be \$425,000.

A credit processing fee will be due at the time of closing for projects selected to receive assistance. The proceeds of any such fees would be used to pay for all or a portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including legal, engineering, and financial advisory services. The fee for each project is directly attributable to the costs incurred by EPA for that project. EPA intends to fund all entities that are invited to apply for WIFIA credit assistance. If the credit agreement is not executed, the applicant must reimburse EPA for costs incurred in negotiating the credit agreement.

The amount for expert firms varies between applicants depending on the complexity of the project. EPA estimates these costs may range from \$350,000 to \$700,000. For the purpose of

estimating burden, EPA estimates the cost will be approximately \$400,000. A portion of the credit processing fee may be waived at the discretion of the EPA. EPA will calculate a specific credit processing fee for each project. This credit processing fee will be equal to the cost of expert firms minus the application fee. For example, if the cost of expert firms is \$400,000 and the applicant paid a \$100,000 application fee, a \$300,000 credit processing fee will be due at closing. The total credit processing fee for five applicants will be approximately \$1,575,000.

The cost of general expenses for submitting an application, such as supplies, delivery charges, mailing, copying, and telecommunications, will be \$1,000. The total general expenses will be \$5,000.

WIFIA also requires that an eligible entity shall submit to the Administrator a preliminary rating opinion letter. By statute, applicants are required to submit a preliminary rating letter at the time of application and two (2) final rating letters at the time of closing that indicate that the senior obligation of the project has an investment grade rating. These rating letters must be from a rating a bond rating agency identified by the Securities and Exchange Commission as a nationally recognized statistical rating organization (NRSRO). The cost of these rating letters vary based on the size and complexity of the project. Based on bond rating agency estimates and industry research, EPA estimates that the final rating letters will cost approximately \$100,000 per letter and that the initial preliminary rating letter is included in the cost of one of the final letters. The total cost for five applicants will be \$1,000,000.

EPA solicits comment on the accuracy of the estimated level of burden of collecting this information and the validity of the assumptions used. EPA also solicits comment on the utility and clarity of the information to be collected and ways EPA can minimize the information collection burden on respondents.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 C.F.R. are listed in 40 C.F.R. part 9. When OMB approves the ICR, the Agency will announce that approval in the Federal Register and publish a technical amendment to 40 C.F.R. part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule pertains to loans and loan guarantees, which the APA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C.553(a)(2). Moreover, the Water Infrastructure Finance and Innovation Act (sec. 1445 of P.L. 114-94) does not require notice and comment rulemaking to take this action.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175.

While a tribal government, or a consortium of tribal governments, may apply for WIFIA credit assistance, this action does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

H. Executive Order 13045: Protection of Children from Environmental Health & Safety Risks

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because this action does not address environmental health or safety risks. This rulemaking provides the procedure to apply for credit assistance; the selection criteria used for evaluating and selecting among eligible projects to receive credit assistance contained in the Supplementary Information section of the preamble includes the extent to which the project generates public health benefits.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rulemaking simply provides the procedure to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the supply, distribution or use of energy.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 Fed. Reg. 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

L. National Environmental Policy Act

Each project obtaining assistance under this program is required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.). These requirements apply at the time of application for assistance. This rulemaking simply provides the procedure to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the quality of the environment.

M. Congressional Review Act

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 35

Environmental protection, Reporting and recordkeeping requirements, and Water finance.

Dated: December 6, 2016.

Gina McCarthy,

Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 35 as follows:

PART 35—STATE AND LOCAL ASSISTANCE

1. The authority citation for part 35 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Pub. L. 104-134, 110 Stat. 1321, 1321-299 (1996); Pub. L. 105-65, 111 Stat. 1344, 1373 (1997), 2 CFR 200.

2. Add Subpart Q to read as follows:

Subpart Q---Credit Assistance for Water Infrastructure Projects

Sec.

- 35.10000 Purpose.
- 35.10005 Definitions.
- 35.10010 Limitations on assistance.
- 35.10015 Application process.
- 35.10020 Small community set-aside.
- 35.10025 Federal requirements.
- 35.10026 Federal flood risk management standard.
- 35.10030 American iron and steel.
- 35.10035 Labor standards.
- 35.10040 Investment-grade ratings.
- 35.10045 Threshold criteria.
- 35.10050 Use of existing financing mechanisms.
- 35.10055 Selection criteria.
- 35.10060 Term sheets and approvals.
- 35.10065 Closing on the credit agreement.
- 35.10070 Credit agreement.
- 35.10075 Reporting requirements.

Subpart Q---Credit Assistance for Water Infrastructure Projects

§35.10000 Purpose.

This part implements a Federal credit assistance program for water infrastructure projects.

§35.10005 Definitions.

The following definitions apply to this part:

Community water system has the meaning given the term in section 1401 of the Safe Drinking Water Act (42 U.S.C. 300f).

Credit assistance means a secured loan or loan guarantee under 33 U.S.C. 3908.

Credit agreement means a contractual agreement between the EPA and the project sponsor (and the lender, if applicable) that formalizes the terms and conditions established in the term sheet (or conditional term sheet) and authorizes the execution of a secured loan or loan guarantee.

Credit subsidy cost shall have the same meaning as “cost” under section 502(5) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)), which is the net present value at the time the obligation is entered into. The credit subsidy cost for a given project is calculated by EPA in consultation with OMB. The credit subsidy cost must be less than the unobligated subsidy amount that has been appropriated by Congress to date.

Eligible project costs mean amounts, substantially all of which are paid by, or for the account of, an obligor in connection with a project, including the cost of:

- (1) Development-phase activities, including planning, feasibility analysis (including any related analysis necessary to carry out an eligible project), revenue forecasting,

- environmental review, permitting, preliminary engineering and design work, and other preconstruction activities;
- (2) Construction, reconstruction, rehabilitation, and replacement activities;
 - (3) The acquisition of real property or an interest in real property (including water rights, land relating to the project, and improvements to land), environmental mitigation (including acquisitions pursuant to section 5026(7)), construction contingencies, and acquisition of equipment; and
 - (4) Capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.
- Capitalized interest on the WIFIA credit instrument is not an eligible project cost.

Federal credit instrument means a secured loan or loan guarantee authorized to be made available under 33 U.S.C. 3901-3914 with respect to a project.

Investment-grade rating means a rating category of BBB minus, Baa3, bbb minus, BBB (low), or higher assigned by a nationally recognized statistical rating organization (NRSRO) to project obligations offered into the capital markets.

Iron and steel products means the following products made primarily of iron or steel: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials.

Lender means any non-Federal qualified institutional buyer (as defined in 17 CFR 230.144A(a)), known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Securities Act of 1933 (15 U.S.C. 77a et seq.), including:

- (1) A qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986, 26 U.S.C. 4974(c)) that is a qualified institutional buyer; and
- (2) A governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986, 26 U.S.C. 414(d)) that is a qualified institutional buyer.

Loan guarantee means any guarantee or other pledge by the Administrator to pay all or part of the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

Nationally recognized statistical rating organization (NRSRO) means a credit rating agency identified and registered by the Office of Credit Ratings in the Securities and Exchange Commission under 15 U.S.C. 78o-7.

Obligor means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation; partnership; joint venture; trust; Federal, State, or local governmental entity, agency, or instrumentality; tribal government or consortium of tribal governments; or a State infrastructure finance authority.

Project means:

- (1) One or more activities that are eligible for assistance under section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)), notwithstanding the public ownership requirement under paragraph (1) of that subsection;

- (2) One or more activities described in section 1452(a)(2) of the Safe Drinking Water Act (42 U.S.C. 300j-12(a)(2));
- (3) A project for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works;
- (4) A project for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation).;
- (5) A brackish or sea water desalination project, a managed aquifer recharge project, or a water recycling project;
- (6) Acquisition of real property or an interest in real property—
 - (i) If the acquisition is integral to a project described in paragraphs (1) through (5) of this definition; or
 - (ii) Pursuant to an existing plan that, in the judgment of the Administrator, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for assistance under this section;
- (7) A combination of projects, each of which is eligible under paragraph (1) or (2) of this definition, for which a State infrastructure financing authority submits to the Administrator a single application; or
- (8) A combination of projects secured by a common security pledge, each of which is eligible under paragraph (1), (2), (3), (4), (5), or (6) of this definition, for which an eligible entity, or a combination of eligible entities, submits a single application.

Project obligation means any note, bond, debenture, or other debt obligation issued by an obligor in connection with the financing of a project, other than a Federal credit instrument.

Project sponsor, for the purposes of this part, means an applicant for WIFIA assistance or an obligor, as appropriate.

Publicly sponsored means the obligor can demonstrate, to the satisfaction of the Administrator, that it has consulted with the affected state, local, or tribal government in which the project is located, or is otherwise affected by the project, and that such government supports the proposed project. Support can be shown by a certified letter signed by the approving municipal department or similar agency, mayor or other similar designated authority, local ordinance, or any other means by which local government approval can be evidenced.

Secured loan means a direct loan or other debt obligation issued by an obligor and funded by the Administrator in connection with the financing of a project under 33 U.S.C. 3908.

State means any one of the fifty states, the District of Columbia, Puerto Rico, or any other territory or possession of the United States.

State infrastructure financing authority means the State entity established or designated by the Governor of a State to receive a capitalization grant provided by, or otherwise carry out the requirements of, title VI of the Federal Water Pollution Control Act (33 U.S.C. 1381 et. seq.) or section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j-12).

Subsidy amount means the dollar amount of budget authority sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, calculated on a net present value basis, excluding administrative costs and any incidental effects on

governmental receipts or outlays in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

Substantial completion means the stage in the progress of the project when the project or designated portion thereof is sufficiently complete in accordance with the contract documents so that the project or a portion thereof can be used for its intended use.

Term sheet means a contractual agreement between the EPA and the project sponsor (and the lender, if applicable) that sets forth the key business terms and conditions of a Federal credit instrument. Execution of this document represents a legal obligation of budget authority.

Treatment works has the meaning given the term in section 212 of the Federal Water Pollution Control Act (33 U.S.C. 1292).

WIFIA means the Water Infrastructure Finance and Innovation Act of 2014, Pub. L. 113-121, 128 Stat, 1332, codified at 33 U.S.C. 3901-3914.

§35.10010 Limitations on assistance.

- (a) The total amount of credit assistance offered to any project under this part shall not exceed 49% of the anticipated eligible project costs, as measured on an aggregate cash (year-of-expenditure) basis, or, if the secured loan does not receive an investment-grade rating, the total amount of credit assistance shall not exceed the amount of the senior project obligations of the project.
- (b) Notwithstanding paragraph (a) of this section, the Administrator may offer credit assistance in excess of 49% of the anticipated eligible project costs as long as such excess assistance

combined for all projects does not require greater than 25% of the subsidy amount made available for the fiscal year.

- (1) Credit assistance may not exceed 80% of the total project costs due to a statutory restriction on the maximum extent of federal participation in a project, except in the case of certain rural water projects authorized to be carried out by the Secretary of the Interior that includes among its beneficiaries a federally recognized Indian tribe and for which the authorized Federal share of the total project costs is greater than 80%.
 - (2) Use of the authority to offer credit assistance in excess of 49% of the anticipated eligible project costs shall be considered only under extraordinarily exceptional circumstances.
 - (3) In the event this authority is used, all other criteria and requirements described in this part must be met and adhered to.
- (c) Costs incurred prior to a project sponsor's submission of an application for credit assistance may be considered in calculating eligible project costs only upon approval of the Administrator. In addition, applicants shall not include application charges or any other expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter) among the eligible project costs. Capitalized interest on the WIFIA credit instrument is not eligible for calculating project costs.
- (d) No costs financed internally or with interim funding may be refinanced under this part later than a year following substantial completion of the project.

- (e) The Administrator shall not obligate funds for a project that has not received an environmental Categorical Exclusion, Finding of No Significant Impact, or Record of Decision under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq.
- (f) The Administrator shall fund a secured loan based on the project's financing needs. The credit agreement shall include the anticipated schedule for such loan disbursements. Actual disbursements will be based on incurred costs, and in accordance with the approved construction plan, as evidenced by paid invoices.
- (g) The interest rate on a secured loan will be equal to or greater than the yield on U.S. Treasury securities of comparable maturity on the date of execution of the credit agreement as identified through use of the daily rate tables published by the Bureau of the Fiscal Service for the State and Local Government Series (SLGS) investments. The yield on comparable Treasury securities will be estimated by adding one basis point to the SLGS daily rate with a maturity that is closest to the weighted average loan life of the WIFIA credit instrument, measured from first disbursement.
- (h) The final maturity date of a secured loan will be the earlier of the date that is 35 years after the date of substantial completion of the project, as determined by the Administrator and identified in the assistance agreement, and if the useful life of the project, as determined by the Administrator, is less than 35 years, the useful life the project; however, the final maturity date of a secured loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed. In determining the useful life of the project, for the purposes of establishing the final maturity date of the WIFIA credit instrument, the Administrator will consider the useful economic life of the asset(s) being financed.

- (i) A secured loan will not be subordinated to the claims of any holder of project obligations in the event of bankruptcy, insolvency, or liquidation of the obligor of the project.
- (j) EPA will establish a repayment schedule for a secured loan based on the projected cash flow from project revenues and other repayment sources. Scheduled loan repayments of principal or interest on a secured loan will commence not later than 5 years after the date of substantial completion of the project as determined by the Administrator; however, scheduled loan repayments of principal or interest on a secured loan to a State infrastructure financing authority will commence not later than 5 years after the date on which amounts are first disbursed.

§35.10015 Application process.

- (a) Each fiscal year for which budget authority is made available by Congress, the EPA shall publish a Federal Register notice to solicit letters of interest for credit assistance called a Notice of Funding Availability. Such notice will specify the relevant due dates, the estimated amount of funding available to support WIFIA credit instruments for the current and future fiscal years, contact name(s), and other details for submissions and funding approvals.
- (b) Public and private applicants for credit assistance under this part will be required to submit letters of interest to the EPA in order to be selected by the Administrator to submit an application.
- (c) The application process is divided into two steps: letter of interest and application.
 - (1) The letter of interest provides enough information for EPA to make a project selection and invite prospective borrowers to submit applications. Such information may include, but is not limited to:

- (i) Prospective borrower information;
- (ii) Project plan;
- (iii) Preliminary project operations and maintenance plan;
- (iv) Proposed financing plan and audited financial statements;
- (v) Contact information;
- (vi) Written responses addressing selection criteria;
- (vii) Certifications; and
- (viii) Notification of state infrastructure financing authority.

(2) The application provides all relevant information for EPA to provide credit assistance. Submission of an application does not guarantee that EPA will award credit assistance to a given applicant. At a minimum, such applications shall provide, in addition to the information provided in the letter of interest:

- (i) Detailed applicant information;
- (ii) Detailed project information;
- (iii) Detailed project operation and maintenance plan;
- (iv) Comprehensive financing plan; and
- (v) Complete certifications.

- (d) Following successful submission and approval by EPA of the application, EPA will offer the applicant a term sheet, as described in section 35.10060. The applicant may accept or negotiate terms in the term sheet.
- (e) Following acceptance of the term sheet, the applicant will proceed to closing, as described in section 35.10065.
- (f) An application for a project located in or sponsored by more than one entity shall be submitted to the EPA by just one entity. The sponsoring entities shall designate a single obligor for purposes of applying for, receiving, and repaying WIFIA credit assistance.

§35.10020 Small community set-aside.

- (a) Each fiscal year for which budget authority is made available by Congress, EPA shall set aside at least 15% of budget authority for projects that serve communities of not more than 25,000 individuals.
- (b) Any set-aside budget authority remaining unobligated on June 1 of the fiscal year for which the budget authority is set aside shall be made available for projects other than small community projects.

§35.10025 Federal requirements.

All projects receiving credit assistance under this part shall comply with:

- (a) Environmental authorities:
 - (1) The National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq.;
 - (2) Archeological and Historic Preservation Act, 16 U.S.C. 469-469c;

- (3) Clean Air Act, 42 U.S.C. 7401 et seq.;
- (4) Clean Water Act, 33 U.S.C. 1251 et seq.;
- (5) Coastal Barrier Resources Act, 16 U.S.C. 3501 et seq.;
- (6) Coastal Zone Management Act, 16 U.S.C. 1451 et seq.;
- (7) Endangered Species Act, 16 U.S.C. 1531 et seq.;
- (8) Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 12898, 59 FR 7629, February 16, 1994;
- (9) Floodplain Management, Executive Order 11988, 42 FR 26951, May 24, 1977, as amended by Executive Order 13690, 80 FR 6425, February 4, 2015;
- (10) Protection of Wetlands, Executive Order 11990, 42 FR 26961, May 25, 1977, as amended by Executive Order 12608, 52 FR 34617, September 14, 1987;
- (11) Farmland Protection Policy Act, 7 U.S.C. 4201 et seq.;
- (12) Fish and Wildlife Coordination Act, 16 U.S.C. 661-666c, as amended;
- (13) Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq.;
- (14) National Historic Preservation Act, 16 U.S.C. 470 et seq.;
- (15) Safe Drinking Water Act, 42 U.S.C. 300f et seq.; and
- (16) Wild and Scenic Rivers Act, 16 U.S.C. 1271 et seq.

(b) Economic and miscellaneous authorities:

- (1) Debarment and Suspension, Executive Order 12549, 51 FR 6370, February 21, 1986;
- (2) Demonstration Cities and Metropolitan Development Act, 42 U.S.C. 3301 et seq., as amended, and Executive Order 12372, 47 FR 30959, July 16, 1982;
- (3) Drug-Free Workplace Act, 41 U.S.C. 8101 et seq.;
- (4) New Restrictions on Lobbying, 31 U.S.C. § 1352;
- (5) Prohibitions relating to violations of the Clean Water Act or Clean Air Act with respect to Federal contracts, grants, or loans under 42 U.S.C. 7606 and 33 U.S.C. 1368, and Executive Order 11738, 38 FR 25161, September 12, 1973; and
- (6) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 et seq.

(c) Civil Rights, Nondiscrimination, Equal Employment Opportunity Authorities:

- (1) Age Discrimination Act, 42 U.S.C. 6101 et seq.;
- (2) Equal Employment Opportunity, Executive Order 11246, 30 FR 12319, September 28, 1965;
- (3) Section 13 of the Clean Water Act, Pub. L. 92-500, codified in 42 U.S.C. § 1251;
- (4) Section 504 of the Rehabilitation Act, 29 U.S.C. 794, supplemented by Executive Orders 11914, 41 FR 17871, April 29, 1976 and 11250, 30 FR 13003, October 13, 1965;
- (5) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.; and

(6) Participation by Disadvantaged Business Enterprises in Procurement under Environmental Protection Agency (EPA) Financial Assistance Agreements, 73 FR 15904.

(d) Other Federal and compliance requirements as may be applicable.

§35.10026 Federal flood risk management standard.

(a) In making WIFIA funding decisions under this rule, EPA will follow the requirements of Executive Orders 11988 and 13690, the Federal Flood Risk Management Standard, and the Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (Guidelines). Applicants shall submit information regarding the project that is sufficient for EPA to determine that the project is in compliance with the standards and requirements of these Executive Orders and Guidelines.

(b) Projects funded under the WIFIA program implemented through this rule must also demonstrate that they will meet or exceed applicable State, local, Tribal, and Territorial standards for flood risk and floodplain management.

(c) As a condition of funding projects involving new construction, substantial improvement, or to address substantial damage to structures and facilities, the project sponsor must demonstrate to EPA that it will use the expanded floodplain standard described in E.O. 13690. Projects involving substantial improvement or addressing substantial damage include projects equaling or exceeding 50 percent of the value of the structure or facility. With regard to projects meeting this definition, the project applicant shall determine whether the

proposed project will occur in the floodplain using any of the approaches provided in section 6(c) of Executive Order 11988, as amended. Applicants for proposed projects that are not new construction, substantial improvement, or projects to address substantial damage shall use at minimum, the base 100-year floodplain standard for actions that are not “critical actions” as defined in Executive Order 11988 Section 6(d) and the 0.2%-annual chance floodplain for critical actions.

(d) For purposes of this section, projects funded under WIFIA will be considered Critical Actions as defined in Executive Order 11988, as amended, unless the Administrator determines and provides written notice to the applicant that the particular project is not considered to be a Critical Action.

(e) All applicants shall follow the Guidelines, including the Eight-Step Decision-Making Process described in the Guidelines, as a means of compliance with the requirements of section 2(a) of Executive Order 11988, as amended. EPA shall provide oversight to ensure that project applicants have complied with this process.

(f) The Administrator will not allow WIFIA funding for new construction, substantial improvement, or to address substantial damage to structures and facilities sited in or encroaching on a Floodway or a Coastal High Hazard Area/V-Zone, except for a functionally dependent use or to facilitate an open space use. The Administrator will make the determination of whether a proposed project is a functionally dependent use or a structure that facilitates an open space use. In addition to compliance with paragraphs (a) through (e) of this section, applicants for projects sited in these zones must include engineering plans demonstrating that the facility will be accessible and operational to the elevation of the applicable level, including elevation or floodproofing of buildings, electronics, and mechanical components.

§35.10030 American iron and steel.

- (a) All projects receiving credit assistance under this part for the construction, alteration, maintenance, or repair of a project shall use only iron and steel products produced in the United States.
- (b) By statute, at 33 U.S.C. 3914(b), “iron and steel products” means the following products made primarily of iron or steel: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials. Equipment employed in construction but does not become part of the project is not an “iron and steel product” for purpose of this section.
- (c) EPA may issue a waiver for a case or category of cases where EPA finds:
- (1) That applying these requirements would be inconsistent with the public interest;

- (2) Iron and steel products are not produced in the US in sufficient and reasonably available quantities and of a satisfactory quality; or
- (3) Inclusion of iron and steel products produced in the US will increase the cost of the overall project by more than 25%.
- (d) All guidance developed for compliance with American Iron and Steel requirements for EPA's State Revolving Fund programs shall apply to projects receiving credit assistance under this part. Such guidance can be found on EPA's website.
- (e) All national waivers issued by EPA in accordance with section 436(b) of Pub. L. 113-76, 128 Stat. 346, 2014, Consolidated Appropriations Act, 2014, shall apply to projects receiving credit assistance under this part in the same manner as they apply to projects receiving assistance under the Clean Water and Drinking Water State Revolving Fund programs, unless such waiver addresses the timing of the submission of engineering plans and specifications as the submission relates to Congressional appropriations for either the Clean Water or Drinking Water State Revolving Fund programs.

§35.10035 Labor standards.

All laborers and mechanics employed by contractors or subcontractors on projects receiving credit assistance under this part shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor.

§35.10040 Investment-grade ratings.

- (a) At the time a project sponsor submits an application, the EPA shall require a preliminary rating opinion letter. This letter is a conditional credit assessment from a NRSRO that provides a preliminary indication of the project's overall creditworthiness and that specifically addresses the potential of the project's senior debt obligations (those obligations having a lien senior to that of the WIFIA credit instrument on the pledged security) to achieve an investment-grade rating and the default risk of the WIFIA loan.
- (b) The full funding of a secured (direct) loan or loan guarantee shall be contingent on the assignment of an investment-grade rating by two NRSROs to all project obligations that have a lien senior to that of the Federal credit instrument on the pledged security along with commentary on the default risk of the WIFIA loan.
- (c) Neither the preliminary rating opinion letter nor the formal credit ratings should reflect the effect of bond insurance, unless that insurance provides credit enhancement that secures the WIFIA obligation.

§35.10045 Threshold criteria.

- (a) To be eligible to receive Federal credit assistance under this part, a project shall meet the following six threshold criteria:
 - (1) The project and obligor shall be creditworthy;
 - (2) The project sponsor shall submit a project application to the Administrator;
 - (3) A project shall have eligible project costs that are reasonably anticipated to equal or exceed \$20 million, or for a project eligible under paragraphs (2) or (3) of 33 U.S.C.

3905 serving a community of not more than 25,000 individuals, project costs that are reasonably anticipated to equal or exceed \$5 million;

(4) Project financing shall be repayable, in whole or in part, from State or local taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the project; shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and may have a lien on revenues subject to any lien securing project obligations;

(5) In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, or a tribal government or consortium of tribal governments, the project that the entity is undertaking shall be publicly sponsored.

(6) The applicant shall have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life.

(b) With respect to paragraph (a)(4) of this section, the Administrator may accept general obligation pledges or general corporate promissory pledges and will determine the acceptability of other pledges and forms of collateral as dedicated revenue sources on a case-by-case basis. The Administrator shall not accept a pledge of Federal funds, regardless of source, as security for the WIFIA credit instrument.

§35.10050 Use of existing financing mechanisms.

(a) Within 30 days of receipt of an application for a project eligible under 33 U.S.C. 3905(2) or (3), EPA shall notify the State infrastructure financing authority in the State in which the applicant's project is located that such an application has been received.

(b) EPA may not provide assistance under this chapter if within 60 days of receipt of a notification described in paragraph (a) of this section, the State infrastructure financing authority notifies EPA that it intends to commit funds in an amount equal to or greater than the amount requested in the application to the applicant for the project, as evidenced by an amendment to the State revolving fund program's intended use plan described in § 35.3150 or § 35.3555 unless:

- (1) By the date 180 days after receipt of the notification described in paragraph (a) of this section, the State infrastructure financing authority fails to enter into an assistance agreement with the applicant; or
- (2) The financial assistance to be provided by the State infrastructure authority will be at rates and terms that are less favorable than the rates and terms of the assistance agreement to be provided under this chapter.

§35.10055 Selection criteria.

(a) The Administrator shall assign weights to selection criteria in the first Notice of Funding Availability published in accordance with section 4(a), and adjusted weights in future Notices of Funding Availability to address changing circumstances and priorities. The following thirteen selection criteria will be used for evaluating and selecting among eligible projects to receive credit assistance:

- (1) The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public health benefits;
- (2) The likelihood that assistance under this subtitle would enable the project to proceed at an earlier date than the project would otherwise be able to proceed;

- (3) The extent to which the project uses new or innovative approaches such as the use of energy efficient parts and systems, or the use of renewable or alternate sources of energy; green infrastructure; and the development of alternate sources of drinking water through desalination, aquifer recharge or water recycling;
- (4) The extent to which the project protects against extreme weather events, such as floods or hurricanes, as well as the impacts of climate change;
- (5) The extent to which the project helps maintain or protect the environment or public health;
- (6) The extent to which a project serves regions with significant energy exploration, development, or production areas;
- (7) The extent to which a project serves regions with significant water resource challenges, including the need to address water quality concerns in areas of regional, national, or international significance; water quantity concerns related to groundwater, surface water, or other resources; significant flood risk; water resource challenges identified in existing regional, state, or multistate agreements; and water resources with exceptional recreational value or ecological importance;
- (8) The extent to which the project addresses identified municipal, state, or regional priorities;
- (9) The readiness of the project to proceed toward development, including a demonstration by the obligor that there is a reasonable expectation that the contracting process for construction of the project can commence by not later than 90

days after the date on which a Federal credit instrument is obligated for the project under this subtitle; and

- (10) The extent to which the project financing plan includes public or private financing in addition to assistance under this subtitle;
- (11) The extent to which assistance under this subtitle reduces the contribution of Federal assistance to the project;
- (12) The extent to which the project addresses needs for repair, rehabilitation or replacement of a treatment works, community water system, or aging water distribution or wastewater collection system; and
- (13) The extent to which the project serves economically stressed communities, or pockets of economically stressed rate payers within otherwise non-economically stressed communities.

(b) The Administrator may include additional weighted criteria in the Notice of Funding Availability to address changing circumstances and priorities.

(c) In addition, 33 U.S.C. 3907(a)(1)(D)(i) conditions a project's approval for credit assistance on receipt of a preliminary rating opinion letter indicating that the project's senior debt obligations have the potential to attain an investment-grade rating.

§35.10060 Term sheets and approvals.

(a) EPA, after review and evaluation of the application, and all other required documents submitted by the applicant, may offer to an applicant a written Term Sheet signed by the

Administrator, including detailed terms and conditions that must be met. The issuance of this Term Sheet represents approval of the application for credit assistance.

- (b) To proceed to closing, the applicant must sign the Term Sheet before the expiration date on which the terms offered will expire unless the Administrator agrees in writing to extend the expiration date.

§35.10065 Closing on the credit agreement.

- (a) Subsequent to the signing of the Term Sheet by the applicant, EPA will set a closing date for execution of a credit agreement, and provide documents articulating the conditions precedent to closing to the applicant.
- (b) By the closing date, the applicant must have satisfied all of the detailed terms and conditions required by EPA and all other contractual, statutory, and regulatory requirements. If the applicant has not satisfied all such terms and conditions by the closing date, the Administrator may set a new closing date or rescind the approval of the application.
- (c) If at any point following the issuance of the Term Sheet by EPA and prior to the closing date, the terms and conditions of the financing arrangements or the financial status of the obligor change in a material manner from the information used to evaluate the application, the applicant must notify EPA within the time period specified by the Administrator, at which point the Administrator may update the Term Sheet accordingly or rescind the approval of the application.
- (d) The Credit Agreement and related documents will include detailed definitions, terms, and conditions necessary and appropriate to protect the interest of the United States over the life of the credit assistance and in the case of default, and will be executed at closing only after

EPA has ensured that all requirements and conditions articulated in this rule, the statute, and other relevant laws and regulations have been satisfied.

§35.10070 Credit agreement.

- (a) Only a credit agreement executed by the Administrator can contractually obligate EPA to provide assistance under WIFIA.
- (b) EPA is not bound by oral representations made during the letter of interest step, or application step, or during any negotiation process.
- (c) Except if explicitly authorized by an Act of Congress, no Federal funds, proceeds of Federal loans, or proceeds of loans guaranteed by the Federal Government, may be used by a borrower to pay for credit subsidy costs, administrative fees, or other fees charged by or paid to EPA relating to the WIFIA program.
- (d) Prior to the execution by EPA of a credit agreement, EPA must ensure that the following requirements and conditions are satisfied:
 - (1) The project qualifies as an eligible project under WIFIA;
 - (2) The face value of the credit agreement is limited to no more than 49 percent of total eligible project costs, or if credit assistance in excess of 49% has been approved, no more than the percentage of eligible project costs agreed upon, not to exceed 80% of eligible project costs;
 - (3) The applicant is obligated to make full repayment of the principal and interest on the credit instrument over a period of up to the lesser of 35 years or the useful life of the project, after substantial completion; however, the final maturity date of a secured

loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed.

- (4) If the credit instrument is a loan guarantee, the loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;
- (5) The amount of the credit agreement, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds;
- (6) The applicant has pledged project assets and other collateral or surety, including non-project-related assets, determined by EPA to be necessary to secure the repayment of the credit agreement;
- (7) The credit agreement and related documents include detailed terms and conditions necessary and appropriate to protect the interest of the United States in the case of default;
- (8) The credit agreement is not subordinate to any loan or other debt obligation in the event of bankruptcy, insolvency, or liquidation of the obligor of the project;
- (9) There is satisfactory evidence that the applicant is willing, competent, and capable of performing the terms and conditions of the credit agreement, and will diligently pursue the project;

- (10) The applicant has taken and is obligated to continue to take those actions necessary to perfect and maintain liens on assets which are pledged as security for the credit agreement;
 - (11) EPA or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;
 - (12) EPA and the applicant have reached an agreement as to the information that will be made available to EPA and the information that will be made publicly available;
 - (13) The applicant has filed applications for or obtained any required regulatory approvals for the project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, State, and local regulatory requirements;
 - (14) The applicant has no delinquent federal debt, including tax liabilities, unless the delinquency has been resolved with the appropriate federal agency in accordance with the standards of the Debt Collection Improvement Act of 1996;
 - (15) The credit agreement and related agreements contain such other terms and conditions as EPA deems reasonable and necessary to protect the interests of the United States, including without limitation provisions for (i) such collateral and other credit support for the credit agreement, and (ii) such collateral sharing, priorities and voting rights among creditors and other intercreditor arrangements as, in each case, EPA deems reasonable and necessary to protect the interests of the United States; and
- (e) The credit agreement must contain audit provisions which provide, in substance, as follows:

- (1) The applicant must keep such records concerning the project as are necessary to facilitate an effective and accurate audit and performance evaluation of the project; and
- (2) EPA and the Inspector General, or their duly authorized representatives, must have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the applicant. Examination of records may be made during the regular business hours of the applicant, or at any other time mutually convenient.

§35.10075 Reporting requirements.

At a minimum, any recipient of Federal credit assistance under this part shall submit an annual project performance report and audited financial statements to EPA within no more than 180 days following the recipient's fiscal year-end for each year during which the recipient's obligation to the Federal Government remains in effect. EPA may conduct periodic financial and compliance audits of the recipient of credit assistance, as determined necessary by EPA. The specific credit agreement between the recipient of credit assistance and EPA may contain additional reporting requirements.

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