

## MEMORANDUM

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**To:** American Water Works Association  
**From:** Patton Boggs LLP  
**Date:** May 19, 2014  
**Subject:** The Water Infrastructure Finance and Innovation Act (WIFIA)

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Last week, House and Senate negotiators completed work and filed the Conference Report on the Water Resources Reform and Development Act (WRRDA). The House is expected to act on WRRDA this week. The Senate will act on it shortly as well, and the President is expected to sign the bill into law within the next several weeks. WRRDA contains a brand new low-cost loan program for water infrastructure known as the Water Infrastructure Finance and Innovation Act (WIFIA) that is modeled on the highly successful TIFIA transportation loan program. WIFIA was initially developed and advocated for by the American Water Works Association and American Beverage Association and was supported by a broad coalition including the Association of Metropolitan Water Agencies, the Water Environment Federation, the U.S. Conference of Mayors, the U.S. Chamber of Commerce, and local governments and utilities nationwide.

WIFIA will provide low-cost, long-term loans to lower the cost of water infrastructure projects and accelerate water infrastructure investment. WIFIA interest rates will be based on US Treasury rates, and loan terms can be up to 35 years, with no repayment obligation until five years after substantial completion of the project. WIFIA authorizes loans for clean water and drinking water projects as well as water resources projects (*e.g.*, flood control and navigation). The EPA will administer the loan program for clean water and drinking water projects, and the Army Corps of Engineers will administer the loan program for water resources projects. WIFIA is focused on large projects over \$20 million as projects above this amount are generally unable to secure financing through the Clean Water and Drinking Water State Revolving Fund (SRF) programs, enabling WIFIA to fill a critical gap in current water infrastructure finance.

The Conference Report authorizes an initial appropriation of \$20 million each for EPA and the Army Corps to cover the subsidy cost of WIFIA loans in FY2015 (for a total authorization of \$40 million). The authorization then increases every year to reach \$50 million for each agency in FY2019. Based on prior Congressional Budget Office (CBO) projections, each dollar authorized and appropriated for EPA clean water and drinking water projects can support up to 30 times that amount in loans – meaning that the initial \$20 million authorization could potentially support over \$600 million in loans, and the \$50 million authorization for the final year could potentially support over \$1.5 billion in loans.

One of the primary issues for local government and utility advocates during the WRRDA debate was increasing the maximum loan amount from 49% of total project costs as included in the Senate bill. The 49% limitation follows the TIFIA program, but advocates argued that water infrastructure finance is different as there is no direct federal grant assistance for drinking water and clean water projects and all costs are ultimately paid by local users. Based on this successful advocacy, the Conference Report includes language providing that up to 25% of the overall appropriation may be used for loans in excess of 49% of total project costs. The Conference Report does maintain the provision in the Senate-passed bill that caps overall federal assistance in a project at 80% of project costs. Again, this provision follows the TIFIA program.

In response to a Joint Committee on Taxation (JCT) scoring issue, the Conference Report continues a provision from the Senate bill prohibiting project sponsors from combining WIFIA with tax-exempt debt. JCT has taken the view that low-cost federal loan programs like WIFIA “induce” greater use of tax exempt bonds to complete project financing packages, and JCT scores this as a revenue loss to the federal government that has to be offset. Without any viable offset, the Conferees continued the prohibition on combining WIFIA with tax exempt bonds. This is mitigated, however, by the greater ability in the final bill to utilize WIFIA to cover more than 49% of project costs.

Other key features of the new WIFIA program are summarized below:

- **Eligible Applicants:** Eligible applicants include local government entities and instrumentalities, state infrastructure financing authorities, and private entities. If the applicant is a private entity, it must demonstrate that the project is publicly sponsored or supported.
- **Eligible Projects:** Eligible projects under EPA include (1) projects that can receive assistance through the Clean Water and Drinking Water State Revolving Funds (SRFs), but expanded to include projects at investor owned utilities; (2) projects to repair or rehabilitate aging community water systems, treatment plants, and transmission lines, which is broader than SRF eligibility and makes assistance available for infrastructure upgrades and not solely environmental compliance; (3) projects to increase the energy efficiency of a water system; and (4) desalination projects. On the Army Corps side, WIFIA assistance can be utilized to support the construction of (1) flood damage reduction projects, (2) ecosystem restoration projects, (3) inland water ways projects, and (4) coastal and harbor navigation projects, including channel deepening. To be eligible for WIFIA assistance, Army Corps project must have successfully completed the Feasibility Phase.
- **Focus on Large Projects, With Set Asides for Small Projects:** A project must have an estimated total cost of at least \$20 million to be eligible for WIFIA assistance. However, State Infrastructure Financing Authorities and other entities are allowed to aggregate smaller projects to meet the minimum cost threshold. In addition, in communities with fewer than 25,000 residents, the threshold is lowered to \$5 million. The Administrator and Secretary are also directed to set aside not less than 15% of the appropriation for Small Community Water

Infrastructure Projects in these communities. If those funds are not obligated by June 1<sup>st</sup> of the fiscal year for which they were set aside, they become available to all projects.

- **Need for WIFIA Assistance:** Sets up a process, with fixed deadlines, to give the SRF the opportunity to provide the assistance in lieu of WIFIA so as to ensure that WIFIA credit assistance is needed. Requires EPA to notify the SRF for the state in question within 30 days of receiving an application. If the SRF in turn notifies EPA within 60 days that it intends to provide a loan for the amount requested and at the same or better terms, EPA cannot provide a WIFIA loan to the project. If the SRF does not then execute the assistance agreement within 180 days, the project can receive a WIFIA loan.
- **Creditworthiness Requirements:** Provides that the WIFIA loan must be repayable from dedicated revenue sources. Requires a Preliminary Rating Opinion Letter from at least one rating agency stating that the project has the potential to achieve an investment grade rating; and before award, requires two Final Rating Opinion Letters stating that the Project's senior obligation has an investment grade rating. Following TIFIA, WIFIA also includes a non-subordination or "springing lien" clause stating that the federal loan (which can otherwise be in a junior position) cannot be subordinated to other claims in the event of bankruptcy, liquidation or default.
- **Selection Criteria:** Includes (1) the extent to which the project is regionally or nationally significant, based on its economic impacts and public benefits; (2) the extent to which the project includes public or private financing in addition to WIFIA assistance; (3) the extent to which WIFIA will allow the project to move forward more quickly and at lower cost; (4) the use of new or innovative approaches; (5) whether the project affords protection against extreme weather events; (6) the extent to which the project serves regions with significant water resource challenges, including water quality and quantity concerns; (7) the extent to which the project serves regions with significant energy exploration and development areas; (8) the extent to which the project addresses identified municipal, state, or regional priorities; (9) project readiness; and (10) the extent to which the WIFIA assistance reduces other federal assistance. Several of these are targeted towards Army Corps of Engineers projects which, for example, have other forms of federal assistance available.
- **Flexible Payment Terms:** As with TIFIA, provides that repayment does not have to begin until (5) years after substantial completion; and establishes a process for deferred payments in the event revenues are insufficient to match debt obligations.
- **Buy America(n):** For projects receiving WIFIA assistance, requires that a specific list of items made primarily of iron or steel must be "produced in the United States."