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# **Water Infrastructure Financing: The Water Infrastructure Finance and Innovation Act (WIFIA) Program**

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## Summary

In recent years, policymakers have considered several legislative options to help finance water infrastructure projects, including projects to build and upgrade wastewater and drinking water treatment systems. This report examines one particular option, a “Water Infrastructure Finance and Innovation Act” (WIFIA) program, which Congress included in the Water Resources Reform and Development Act of 2014 (WRRDA, P.L. 113-121).

The WIFIA concept is modeled after a similar program that assists transportation projects, the Transportation Infrastructure Finance and Innovation Act (TIFIA) program. Proponents of the WIFIA approach, including water utility organizations, cite several potential benefits:

- WIFIA could provide credit assistance to large water infrastructure projects that otherwise have difficulty obtaining financing.
- WIFIA would access funds from the U.S. Treasury at Treasury rates, thus lowering the cost of capital for borrowers.
- WIFIA assistance would have much less of a federal budgetary effect than conventional project grants that are not repaid, because only the subsidy cost of a loan (representing the presumed default rate on loans) would be scored. Thus, if only an average 10% subsidy cost is charged against budget authority, a \$20 million budgetary allocation theoretically supports \$200 million in loans.
- To be eligible for assistance, projects must be determined to be creditworthy with a revenue stream for repayment, thus limiting the federal government’s exposure to default and also encouraging private capital investment.

On the other hand, opponents of the WIFIA approach, including organizations that represent state environmental agency officials, have cited several concerns:

- Under WIFIA, decisionmaking for financing of water infrastructure projects shifts from the state and local level to federal officials.
- Federal funding for a WIFIA program could have a detrimental effect on federal support for established and successful State Revolving Fund (SRF) programs that provide the largest source of water infrastructure assistance today.
- While WIFIA is intended to assist large and costly projects, the majority of water infrastructure needs are for smaller projects. If WIFIA funding resulted in a decrease in SRF assistance, these smaller projects would face significant financing challenges.
- The Congressional Budget Office has warned that the costs of a WIFIA program to the federal budget may be underestimated.

For each of FY2015 and FY2016, Congress appropriated \$2.2 million for EPA to design and stand up the WIFIA program. In the Further Continuing and Security Assistance Appropriations Act, 2017 (P.L. 114-254) in December 2016, Congress appropriated the first funds to cover the subsidy cost of the program. Using the \$20 million in that act, the Environmental Protection Agency (EPA) expects to issue its first WIFIA loans in 2017.

WIFIA has also been considered as a model for other infrastructure financing programs. Several bills in the 114<sup>th</sup> Congress proposed to establish a WIFIA-type program for water reclamation and reuse projects in western states. None of these proposals, which were included in S. 176/H.R. 291, S. 1837, S. 1894, S. 2533/H.R. 5247, and H.R. 6022, were enacted.

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## Introduction

Water infrastructure issues, particularly funding concerns, continue to receive attention from Members of Congress and a wide array of stakeholders. Policymakers have recently considered several legislative options to help finance water infrastructure projects, including projects to build and upgrade wastewater and drinking water treatment facilities. This report examines one particular option, a “Water Infrastructure Finance and Innovation Act” (WIFIA) program, which was included in the Water Resources Reform and Development Act of 2014 (WRRDA, P.L. 113-121). Title V, Subtitle C, of that legislation created a five-year WIFIA pilot program.<sup>1</sup>

Localities are primarily responsible for providing water infrastructure services, which includes both drinking water and wastewater infrastructure. According to the most recent estimates by states and the Environmental Protection Agency (EPA), funding needs for such facilities total \$655 billion over a 20-year period.<sup>2</sup> While some analysts and stakeholders debate these estimates and whether they understate or overstate capital needs, most agree that communities face formidable challenges in providing adequate and reliable water infrastructure services.

Capital investments in water infrastructure are necessary to maintain high quality service that protects public health and the environment, and capital facilities are a major investment for local governments. Almost all capital projects are debt-financed (i.e., they are not financed on a pay-as-you-go basis from ongoing revenues to the water utility). The principal financing tool that local governments use is the issuance of tax-exempt municipal bonds—at least 70% of U.S. water utilities rely on municipal bonds and other debt to some degree to finance capital investments.<sup>3</sup> In 2016, bonds issued for water, sewer, and sanitation projects totaled over \$47 billion.<sup>4</sup> Beyond municipal bonds, federal assistance through grants and loans is available for some projects but is insufficient to meet all needs. Finally, public-private partnerships, or P3s, which are long-term contractual arrangements between a public utility and a private company, currently provide only limited capital financing in the water sector. While they are increasingly used in transportation and some other infrastructure sectors, especially P3s that involve private sector debt or equity investment in a project, most P3s for water infrastructure involve contract operations for operation and maintenance. In contrast to the wastewater sector where facilities generally are municipally owned, numerous drinking water utilities are privately owned and make significant private capital investments in water infrastructure.<sup>5</sup>

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<sup>1</sup> WIFIA is one of several legislative approaches to help finance water infrastructure that have been proposed. For discussion of WIFIA and several other options, see CRS Report R42467, *Legislative Options in the 114th Congress for Financing Water Infrastructure*, by Claudia Copeland, Steven Maguire, and William J. Mallett.

<sup>2</sup> EPA’s most recent estimate of capital needs for wastewater infrastructure was published in 2016. See EPA, *Clean Watersheds Needs Survey 2012, Report to Congress*, EPA-830-R-15005, January 2016. The most recent EPA needs estimate for drinking water infrastructure was issued in 2013. See EPA, *Drinking Water Infrastructure Needs Survey and Assessment*, EPA-816-R-13-006, April 2013.

<sup>3</sup> Testimony of Aurel Arndt (American Water Works Association), in U.S. Congress, Senate Committee on Environment and Public Works, “The Federal Role in Keeping Water and Wastewater Infrastructure Affordable,” 114<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 7, 2016.

<sup>4</sup> Thomson-Reuters, *The Bond Buyer 2016 in Statistics*, February 2017, p. 12A.

<sup>5</sup> The National Association of Water Companies, representing private water companies, estimates that “its six largest members alone are collectively investing nearly \$2.7 billion each year in their water systems—and these six companies provide service to about six percent of the U.S. population.” Testimony of Martin A. Kropelnicki, National Association of Water Companies, before House Committee on Energy and Commerce, Subcommittee on Environment, *Reinvestment and Rehabilitation of Our Nation’s Safe Drinking Water Delivery Systems*, 115<sup>th</sup> Cong., 1<sup>st</sup> sess., March 16, 2017, p. 2.

## Creation of a WIFIA Program

The WIFIA approach for supporting investment in water infrastructure is modeled after the Transportation Infrastructure Finance and Innovation Act (TIFIA) program, which was established in 1998. As the name suggests, only transportation projects are eligible for TIFIA assistance, but operation of the TIFIA program generated interest in creating a similar program for water infrastructure.<sup>6</sup>

TIFIA was enacted as part of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21; P.L. 105-178) and was reauthorized in 2012 in the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21; P.L. 112-141). TIFIA provides federal credit assistance up to a maximum of 49% of project costs in the form of secured loans, loan guarantees, and lines of credit (23 U.S.C. 601 et seq.). Transportation projects costing at least \$50 million (or at least \$25 million in rural areas) are eligible for TIFIA financing.<sup>7</sup> Projects must also have a dedicated revenue stream to be eligible for credit assistance. TIFIA can provide senior or subordinated debt. With the enactment of MAP-21, funding authorized for the TIFIA program increased from \$122 million annually to \$750 million in FY2013 and \$1 billion in FY2014 and FY2015. However, the Fixing America's Surface Transportation Act (FAST Act, P.L. 114-94), enacted in December 2015, reduced the amount available to support TIFIA loans and other credit assistance. Under the FAST Act, the annual amount is \$275 million in each of FY2016 and FY2017, \$285 million in FY2018, and \$300 million in each of FY2019 and FY2020.

Prior to the enactment of MAP-21, a project seeking TIFIA assistance had to satisfy a number of eligibility criteria, such as project cost and planning requirements. The Department of Transportation (DOT) then selected projects from among those eligible based on eight weighted factors.<sup>8</sup> MAP-21 eliminated these selection criteria, and TIFIA now provides assistance based purely on a project's eligibility. One of the key eligibility criteria is the creditworthiness of the project. To be eligible, a project's senior debt obligations and the federal credit instrument must receive an investment-grade rating from at least one nationally recognized credit agency. The TIFIA assistance must also be determined to have several beneficial effects: fostering a public-private partnership (if appropriate), enabling the project to proceed more quickly, and reducing the contribution of federal grant funding. Other eligibility criteria include satisfying planning and environmental review requirements and being ready to contract out construction within 90 days after the obligation of assistance.

Since TIFIA's beginning in 1998, it has provided assistance to 67 projects, mostly in the form of direct loans.<sup>9</sup> Loan amounts have ranged from \$42 million to \$1.9 billion. Total credit assistance provided over the life of the program amounts to approximately \$26 billion. The amount of credit assistance is much larger than the appropriated amount over this period because the appropriated funds need only cover the administrative and subsidy cost of the program. (See below for a more

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<sup>6</sup> For example, see American Water Works Association, Water Environment Federation, and Association of Metropolitan Water Agencies, "A Cost Effective Approach to Increasing Investment in Water Infrastructure, The Water Infrastructure Financing Innovations Authority (WIFIA)," <http://www.awwa.org/portals/0/files/legreg/documents/wifia.pdf>.

<sup>7</sup> The threshold for Intelligent Transportation Systems projects is \$15 million.

<sup>8</sup> The eliminated factors included private participation, environmental impact, national or regional significance, project acceleration, creditworthiness, use of new technologies, reduced federal grant assistance, and consumption of budget authority.

<sup>9</sup> Federal Highway Administration, "Projects Financed by TIFIA," <http://www.transportation.gov/tifia/projects-financed> (accessed March 14, 2017).

detailed discussion of this point.) Projects involving TIFIA amount to approximately \$96 billion in total project costs. TIFIA typically provides financing to fill a gap in a much larger financial package that sometimes involves private equity and private debt. For example, the \$2.6 billion IH-635 Managed Lanes project in Dallas, TX, is being financed with \$615 million in private activity tax-exempt bonds, a \$664 million equity contribution from the private sector partner, \$17 million in toll revenues, \$490 million in public funds, and an \$850 million TIFIA loan.<sup>10</sup>

## **WIFIA Pilot Program**

In the 113<sup>th</sup> Congress, the Water Resources Reform and Development Act of 2014 (WRRDA) established a five-year WIFIA pilot program.<sup>11</sup> The act authorizes (1) EPA to provide credit assistance (secured/direct loans or loan guarantees) for a range of drinking water and wastewater projects and (2) the U.S. Army Corps of Engineers (the Corps) to provide similar assistance for water resource projects, such as flood control or hurricane and storm damage reduction.

In order to provide credit assistance, the act authorizes appropriations of \$175 million over five years to both EPA and the Corps (beginning with \$20 million for each agency in FY2015 and increasing to \$50 million in FY2019). Project costs must be \$20 million or larger to be eligible for credit assistance. In rural areas (defined as populations of 25,000 or less), project costs must be \$5 million or more. WIFIA credit assistance is available to state infrastructure financing authorities for a group of projects and individual project sponsors, which may include:

- a corporation;
- a partnership;
- a joint venture;
- a trust; or
- a federal, state, local, or tribal government (or consortium of tribal governments).

In the case of projects carried out by private entities, such projects are to be publicly sponsored. To meet this requirement, the legislation allows a project applicant to demonstrate to the Corps or EPA that the affected state, local, or tribal government supports the project. To ensure that ownership of the water project does not become private (which would limit availability of some other sources of federal financing), the maximum amount of a loan is 49% of eligible project costs, but the legislation authorizes EPA or the Corps to make available up to 2% of available funds each year for credit assistance in excess of 49% of project costs. Except for certain projects in rural areas, the total amount of federal assistance (i.e., WIFIA and other sources) may not exceed 80% of a project's cost.

Activities eligible for assistance under the WIFIA pilot program include project development and planning, construction, acquisition of real property, and carrying costs during construction. Categories eligible for assistance by the Corps include:

- flood control or hurricane and storm damage reduction projects,

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<sup>10</sup> Federal Highway Administration, "IH 635 Managed Lanes," <http://www.transportation.gov/tifia/financed-projects/ih-635-managed-lanes>.

<sup>11</sup> The President signed the bill into law on June 10, 2014 (P.L. 113-121). A standalone measure to create a WIFIA program was also introduced in the 113<sup>th</sup> Congress. S. 335 proposed to empower the EPA Administrator to provide credit assistance to drinking water and wastewater infrastructure projects. It was not a pilot program, as in P.L. 113-121.

- environmental restoration,
- coastal or inland harbor navigation improvement, or
- inland and intracoastal waterways navigation improvement.

Categories eligible for assistance by EPA include:

- wastewater treatment and community drinking water facilities;
- enhanced energy efficiency of a public water system or wastewater treatment works;
- repair or rehabilitation of aging wastewater and drinking water systems;
- desalination, water recycling, aquifer recharge, or development of alternative water supplies to reduce aquifer depletion;
- prevention, reduction, or mitigation of the effects of drought;<sup>12</sup> or
- a combination of eligible projects.

The Secretary of the Army or EPA administrator, as appropriate, determines eligibility based on a project's creditworthiness and dedicated revenue sources for repayment. Selection criteria include:

- the national or regional significance of the project,
- extent of public or private financing in addition to WIFIA assistance,
- use of new or innovative approaches,
- the amount of budget authority required to fund the WIFIA assistance,
- the extent to which a project serves regions with significant energy development or production areas, and
- the extent to which a project serves regions with significant water resources challenges.

Responding to concerns from some groups that WIFIA could impair and diminish support for clean water and drinking water State Revolving Fund (SRF) programs under the Clean Water Act and Safe Drinking Water Act (see discussion below), the legislation included language requiring the EPA administrator, when the agency receives applications for WIFIA assistance, to give state infrastructure financing authorities a "right of first refusal" to assist the project through SRF monies.

WIFIA-assisted projects must use American-made iron and steel products ("Buy America" provisions), and wastewater treatment works projects must comply with the prevailing wage requirements of the Davis-Bacon Act in the same manner that they would under the SRF provisions of the Clean Water Act.

In addition, the act directs EPA and the Corps to provide information on a website concerning applications and projects that have received assistance, and the Government Accountability Office must report to Congress (four years after enactment) on the pilot programs and provide recommendations for continuing, changing, or terminating the WIFIA program.

The following sections provide a discussion of selected WIFIA issues.

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<sup>12</sup> The WIIN Act, P.L. 114-322, expanded WIFIA eligibility to include projects involving aquifer recharge; development of alternative water supplies to reduce aquifer depletion; and prevention, reduction, or mitigation of the effects of drought.

## Subsidy Amount for Credit Assistance

From the federal perspective, an advantage of the WIFIA and TIFIA programs is that they can provide a large amount of credit assistance relative to the amount of budget authority provided. In federal budgetary terms, WIFIA (or TIFIA) assistance has much less of an impact than a grant, which is not repaid to the U.S. Treasury.

The volume of loans and other types of credit assistance that the programs can provide is determined by the size of congressional appropriations and calculation of the subsidy amount. WIFIA defines the “subsidy amount” as follows:

The amount of budget authority sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, as calculated on a net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays in accordance with the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).<sup>13</sup>

The subsidy amount, which is often expressed in percentage terms or as a ratio (i.e., subsidy rate), largely determines the amount of money that can be made available to project sponsors.<sup>14</sup> For example, if a project’s subsidy rate is 10% and is the only charge against available budget authority, a \$20 million budgetary allocation theoretically supports \$200 million in loans. A lower subsidy rate would support a larger loan amount. The Office of Management and Budget (OMB) identified TIFIA subsidy rates for direct loans as 6.85% in FY2016 and 6.73% in FY2017.<sup>15</sup>

Proponents of WIFIA have argued that loans for water projects could be even less risky than transportation projects, because water rates provide an established repayment mechanism; thus the subsidy cost would be lower and the amount of credit assistance higher (per dollar of budget authority).<sup>16</sup> Adding caution, however, analysts note that, even with stable rate mechanisms, some communities and water utilities have recently experienced problems with borrowing and bond repayments, so repayment of a WIFIA loan is not a certainty.<sup>17</sup>

In the Obama Administration’s FY2017 budget proposal, OMB estimated a 1.53% subsidy rate for WIFIA.<sup>18</sup> This equates to a 1:65 ratio. At this subsidy rate, a \$10 million appropriation could support a direct loan (or loans) totaling \$650 million. However, subsidy rates are project-specific.<sup>19</sup> EPA stated:

The current ratio, 1:65, is used for budgetary purposes and provides an estimate for what will be available for loans each year based on the anticipated riskiness of the future loan

<sup>13</sup> 33 U.S.C. §3901(13).

<sup>14</sup> Douglas J. Elliott, *Budgeting for Credit Programs: A Primer*, Center for Federal Financial Institutions, April 2004, <http://www.coffi.org/pubs/Budgeting%20Primer.pdf>.

<sup>15</sup> OMB, *Budget of the United States Government, FY2017*, Supplemental Materials, Direct Loans: Subsidy Rates, Obligations, and Average Loan Size, <https://obamawhitehouse.archives.gov/omb/budget/Supplemental>.

<sup>16</sup> Testimony of Aurel Arndt, in U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, hearing on Innovative Funding of Water Infrastructure of the United States, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., February 28, 2012, <http://republicans.transportation.house.gov/Media/file/TestimonyWater/2012-02-28-Arndt.pdf>. Hereinafter, Testimony of Aurel Arndt.

<sup>17</sup> LaShell Stratton-Childers, “Navigating a Rough Terrain,” *Water Environment and Technology*, January 2012, pp. 24-29. This article describes the November 2011 bankruptcy filing by Jefferson County, AL, in part resulting from the county’s inability to cover debts for wastewater system upgrades.

<sup>18</sup> OMB, *Budget of the United States Government, FY2017*, Analytical Perspectives, Table 20-3, <https://www.gpo.gov/fdsys/pkg/BUDGET-2017-PER/pdf/BUDGET-2017-PER.pdf>.

<sup>19</sup> 33 U.S.C. §3980(a)(2).



portfolio. The actual ratio will be determined for each project at the time of loan obligation. Project A with a higher credit quality would consume less of the credit subsidy than Project B with a lower credit quality, even if the projects are otherwise identical. Each applicant will be scored independently.<sup>20</sup>

## Potential Benefits of WIFIA Funding

One of the main benefits of the TIFIA program is that it provides capital at a low cost to the borrower, because even though the interest on 30-year Treasury securities is taxable, Treasury rates can be less expensive than rates on traditional tax-exempt municipal debt. Moreover, TIFIA financing is often characterized as patient capital, because loan repayment does not need to begin until five years after substantial completion of a project, the loan can be for up to 35 years from substantial completion, and the amortization schedule can be flexible. In addition, there is less perceived investment risk, because the project has been determined to be creditworthy (i.e., there is a revenue stream for repayment). Policymakers crafted the WIFIA program to provide these benefits as well.

Another perceived benefit of the TIFIA program from the federal perspective is that it potentially limits the federal government's exposure to default by relying on market discipline through creditworthiness standards and encouraging private capital investment. WIFIA supporters see the same benefit from the WIFIA program. On the other hand, the Congressional Budget Office (CBO) has argued that the federal government underestimates the cost of providing credit assistance under programs such as TIFIA.<sup>21</sup> This is because it excludes

the cost of market risk—the compensation that investors require for the uncertainty of expected but risky cash flows. The reason is that the [Federal Credit Reform Act] requires analysts to calculate present values by discounting expected cash flows at the interest rate on risk-free Treasury securities (the rate at which the government borrows money). In contrast, private financial institutions use risk-adjusted discount rates to calculate present values.<sup>22</sup>

In an effort to encourage nonfederal and private sector financing, TIFIA funding assistance cannot exceed 49% of project costs. The WIFIA program has a similar 49% cap on federal funding assistance (and limits on all sources of federal assistance to no more than 80% of a project's cost). This cap would likely encourage some nonfederal financing, including from the private sector, but how much is unclear.

## Interaction with Existing Water Financing Programs

Some have argued that a possible benefit of the WIFIA program is that it is designed not to duplicate existing water infrastructure financing tools, because, in general, the WIFIA program can support projects with costs exceeding \$20 million. Many have argued that the principal federal programs that assist local wastewater and drinking projects—SRF programs under the Clean Water Act and Safe Drinking Water Act—are useful primarily for smaller communities and smaller projects. However, WIFIA financing can also potentially support smaller projects by grouping, or aggregating, them through an SRF to meet the \$20 million threshold. In addition,

<sup>20</sup> EPA WIFIA website, Frequent Questions, <https://www.epa.gov/wifia/learn-about-wifia-program#questions>.

<sup>21</sup> For more on this topic generally, see CBO, *Fair-Value Accounting for Federal Credit Programs*, March 2012, [http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-05-FairValue\\_Brief.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-05-FairValue_Brief.pdf).

<sup>22</sup> CBO, “Estimating the Value of Subsidies for Federal Loans and Loan Guarantees,” August 2004, p. 2, <http://www.cbo.gov/ftpdocs/57xx/doc5751/08-19-CreditSubsidies.pdf>.

policymakers set a lower funding threshold (\$5 million) for projects in rural areas. One possible downside of providing smaller projects access to WIFIA financing, grouped or not, is the time and expense of administering the program.

A major source of debate among opponents and proponents has been and continues to be potential adverse impacts of WIFIA on funds for the Clean Water Act and Safe Drinking Water Act SRF programs. Several groups representing state environmental officials opposed the establishment of a WIFIA program (in the 113<sup>th</sup> Congress). They argued that WIFIA funding could result in reduced spending on the SRF programs, which are capitalized by federal appropriations. States are concerned that WIFIA would likely be funded (through congressional appropriations) to the detriment of the SRF programs.<sup>23</sup> On the other hand, water utility groups that support WIFIA have argued that it would complement, not harm, existing SRF programs. In their view, WIFIA will provide a new funding opportunity for large water infrastructure projects that are unlikely to receive SRF assistance.<sup>24</sup> As described above, in part to address concerns about impacts of WIFIA on the SRF programs, the enacted legislation gave state infrastructure financing authorities a “right of first refusal” to provide SRF funds for a project when EPA receives an application for WIFIA assistance. Nevertheless, some states and environmental advocacy groups remain concerned that WIFIA will compete with SRFs for congressional funding and that WIFIA will not prioritize public health or affordability, as the SRFs can. Enacted in December 2016, the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114-322) includes a “sense of the Congress” that WIFIA funding should be in addition to robust funding for the SRFs.<sup>25</sup>

The WIFIA program may shift some decisionmaking for financing water infrastructure projects from the state and local level to the federal level, specifically to the EPA or the Army Corps, a change that raised concerns with some stakeholders. Indeed, in a letter to the conferees managers, the Obama Administration expressed concerns with the WIFIA proposal in S. 601 (113<sup>th</sup> Congress) during Senate consideration of that bill, asserting that it “would expand the Environmental Protection Agency’s and the Corps’ role in local water infrastructure projects and not provide Federal assistance in the most efficient manner.”<sup>26</sup>

## **Potential Federal Revenue Loss from Tax-Exempt Bonds**

Enacting the WIFIA program raised a federal budgetary and revenue issue. Legislation reported by congressional committees is typically scored by the CBO for the effects on discretionary and mandatory, or direct, spending and by the Joint Committee on Taxation (JCT) for effects on revenue. The initial CBO cost estimate for S. 601, as approved by the Environment and Public Works Committee in April 2013, concluded that the WIFIA provisions would cost \$260 million over five years. In addition, it would result in certain revenue loss to the U.S. Treasury; thus, pay-as-you-go procedures would have applied to the bill.<sup>27</sup> CBO cited the JCT estimate that enactment

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<sup>23</sup> Letter from Association of Clean Water Administrators, Association of State Drinking Water Administrators, Environmental Council of the States et al. to Honorable Bill Shuster, Chairman, Committee on Transportation and Infrastructure, and Honorable Nick J. Rahall II, ranking Member, Committee on Transportation and Infrastructure, October 24, 2013.

<sup>24</sup> Letter from American Water Works Association, Association of Metropolitan Water Agencies, and Water Environment Federation to Honorable Barbara Boxer, Chairman, Committee on Environment and Public Works, September 9, 2013.

<sup>25</sup> P.L. 114-322, Section 5008(d).

<sup>26</sup> Letter from Jo-Ellen Darcy, Assistant Secretary of the Army, Civil Works, to Senator Barbara Boxer, Senator David Vitter, Representative Bill Shuster, and Representative Nick J. Rahall II, December 11, 2013.

<sup>27</sup> “Pay-as-you-go,” or PAYGO, is a budget rule requiring that, relative to current law, any tax cuts or entitlement and (continued...)

of the bill would reduce revenues by \$135 million over 10 years, because states would be expected to issue tax-exempt bonds for water projects in order to acquire additional funds not covered by WIFIA assistance.<sup>28</sup> To avoid the pay-as-you-go problem in the bill, the committee added a provision to S. 601 to prohibit recipients of WIFIA assistance from issuing tax-exempt bonds for the non-WIFIA portions of project costs. CBO re-estimated the bill and concluded that, because the change would make the WIFIA program less attractive to entities, most of which rely on tax-exempt bonds for project financing, the cost of the bill would be \$200 million less over five years. CBO also said that the bill would have no impact on revenues, because the demand for federal credit would be lower without the option of using tax-exempt financing.<sup>29</sup> P.L. 113-121 retained the bar on tax-exempt financing for WIFIA-assisted projects. Thus, the apparent solution to one problem in the legislation—potential revenue loss to the U.S. Treasury—raised a different kind of problem for entities seeking WIFIA credit assistance, because tax-exempt municipal bonds are the principal mechanism used by local governments to finance water infrastructure projects.

The restriction was widely criticized by potential users of WIFIA assistance. In their view, the bond financing restriction in WRRDA, together with the provision that caps WIFIA assistance at 49% of project costs, would make it very difficult to finance needed projects. Congressional interest in addressing the tax-exempt bond restriction was soon evident. For example, H.R. 1710 in the 114<sup>th</sup> Congress proposed to make an exception from the limitation on use of tax-exempt bonds for WIFIA loans made to finance water infrastructure projects in states in which the governor has issued a state of drought emergency declaration.

More generally, in July 2015, the Senate passed H.R. 22, a bill to reauthorize highway and transportation programs for six years. It included repeal of the provision in P.L. 113-121 that limits any project receiving federal credit assistance under the WIFIA program from being financed with tax-exempt bonds. However, repeal of the provision raised similar revenue questions to those that arose in connection with P.L. 113-121. CBO's report on S. 1647 (the Senate Environment and Public Works Committee's bill, which was the basis of Senate-passed H.R. 22)<sup>30</sup> stated that the Joint Committee on Taxation (JCT) estimated that repealing the WIFIA limitation would increase states' issuance of tax-exempt bonds for water projects and would decrease federal revenues by \$17 million over the FY2016-FY2025 period. Further, CBO estimated that the change would increase demand for federal credit under the WIFIA program, resulting in additional spending stemming from the appropriation levels authorized in P.L. 113-121. Consequently, CBO estimated that implementing the WIFIA program would cost \$146 million over the FY2016-FY2025 period.<sup>31</sup>

The problem of identifying offsets, or “pay-fors,” for the estimated federal revenue loss was apparently solved in the conference agreement on H.R. 22, the FAST Act (P.L. 114-94). CBO estimated that the conference agreement included offsets to fully cover the cost of the bill by

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(...continued)

other mandatory spending increases must be paid for by a tax increase or a cut in mandatory spending. See CRS Report RL31943, *Budget Enforcement Procedures: The Senate Pay-As-You-Go (PAYGO) Rule*, by Bill Heniff Jr.

<sup>28</sup> CBO, Cost Estimate for S. 601, Water Resources Development Act of 2013, April 9, 2013, p. 6.

<sup>29</sup> CBO, Cost Estimate for S. 601, Water Resources Development Act of 2013, April 17, 2013, p. 7.

<sup>30</sup> U.S. Congress, Senate Committee on Environment and Public Works, *Developing A Reliable and Innovative Vision for the Economy (DRIVE) Act*, Report to accompany S. 1647, 114<sup>th</sup> Cong., 1<sup>st</sup> sess., July 15, 2015, S.Rept. 114-80 (Washington: GPO, 2015), pp. 27-33.

<sup>31</sup> CBO, Cost Estimate for S. 1647, Developing a Reliable and Innovative Vision for the Economy Act, July 14, 2015, p. 3.

reducing spending or raising revenues.<sup>32</sup> Thus, the conference report retained the provision from Senate-passed H.R. 22 repealing the tax-exempt bond financing restriction on WIFIA assistance.

## EPA Implementation of WIFIA

EPA began preparing for implementation of the WIFIA program, including through a series of public listening sessions in several U.S. cities in 2014. The intended audience was municipal, state, and regional water utility officials, private sector financing professionals, and other interested organizations and parties. The purpose was to discuss project ideas, potential selection and evaluation criteria, and numerous other implementation issues. Funding uncertainty was one of several implementation challenges that were quickly identified. Another initial concern over the law's provision that barred cities from supplementing WIFIA funds with money from tax-exempt municipal bonds was addressed in the FAST Act, as described above. Nevertheless, some observers believe that while WIFIA financing may be helpful in limited instances, tax-exempt bonds will continue to be the principal financing tool used by municipalities for water infrastructure projects, along with low-interest SRF loans, where available.

Early in 2016 EPA officials began work on two rules intended to explain and clarify some provisions of the program and establish guidelines for the application process. Both rules were issued in mid-December. One is an interim final rule that sets guidelines for the application and selection of projects, defines the requirements for credit assistance, and defines reporting requirements and the fee collection structure.<sup>33</sup> In this rule, EPA said that it initially will give funding priority to four types of projects: adaptation to extreme weather and climate change; enhanced energy efficiency of wastewater treatment works and public water systems; green infrastructure; and repair, rehabilitation, and replacement of infrastructure and conveyance systems. The second is a proposed rule that addresses the fee structure for WIFIA (application fee, credit processing fee, and servicing fee).<sup>34</sup> It states EPA's intention to require a non-refundable fee for each project that is invited to submit a full WIFIA application. The proposed application fee is \$100,000, or \$25,000 for projects serving small communities. The fee would not be required in connection with submission of letters of interest, but would be required for projects that EPA expects might reasonably proceed to closing.

Although the two rules are intended to clarify many aspects of EPA's implementation of WIFIA, other implementation challenges presented by provisions of the law itself—such as the 49% cap—would need to be resolved in new legislation.

## WIFIA Appropriations and Legislation

For FY2015 and FY2016, Congress provided funding (\$2.2 million) for EPA to hire staff and design the new program. Implementation of WIFIA (i.e., making project loans) can now occur following enactment of the Further Continuing and Security Assistance Appropriations Act, 2017

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<sup>32</sup> Letter from Keith Hall, Director, CBO, to Honorable Bill Shuster, Chairman, and Peter DeFazio, Ranking Member, House Transportation and Infrastructure Committee, December 2, 2015, [https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr22\\_1.pdf](https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr22_1.pdf).

<sup>33</sup> U.S. Environmental Protection Agency, "Credit Assistance for Water Infrastructure Projects, interim final rule; request for public comments," 81 *Federal Register* 91822-91839, December 19, 2016. An interim final rule is one that is adopted without prior public comment and which is made effective immediately, although federal agencies typically request comments and can alter the interim rule if warranted by public comments.

<sup>34</sup> U.S. Environmental Protection Agency, "Fees for Water Infrastructure Project Applications Under WIFIA," 81 *Federal Register* 91890-91894, December 19, 2016.

(P.L. 114-254) in December 2016, providing the first appropriation of funds to cover the subsidy cost of the program. P.L. 114-254 appropriates \$20 million to EPA to begin making loans and allows the agency to use up to \$3 million of the total for administrative purposes. Under the legislation, these funds are available to subsidize obligations not to exceed \$2.1 billion in WIFIA assistance. EPA began accepting loan applications in January 2017. Congress has not yet appropriated funds (nor have any been requested) that would enable the Army Corps to begin preparations or begin making WIFIA loans under the authority in the 2014 statute.

As authorized in WRRDA in 2014, WIFIA is a pilot program that is scheduled to expire after FY2019. Several bills in the 114<sup>th</sup> Congress included provisions that would eliminate the “pilot” designation of the program and make it permanent. The Senate passed one such bill, S. 2848, in 2016. S. 2848 also proposed other changes to WIFIA. In December 2016, Congress enacted the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114-322); it carried forward many of the provisions of Senate-passed S. 2848, including several WIFIA provisions. Specifically, the WIIN Act adds eligibility for certain types of desalination, water recycling, and drought mitigation projects. It allows communities to pay loan fees from the WIFIA loan itself and allows in-kind contributions and project costs incurred prior to receiving a loan to count toward the nonfederal share of project costs. Also as proposed in S. 2848, the WIIN Act included “sense of the Congress” language that appropriations to support WIFIA should supplement not replace SRF funding under the CWA and Safe Drinking Water Act. The “pilot” status of the WIFIA program was not changed.

Interest in using WIFIA as a model for other infrastructure financing programs has been apparent. For example, several bills in the 114<sup>th</sup> Congress proposed to establish a WIFIA-type program for water reclamation and reuse projects in western states. These proposals, sometimes referred to as “Reclamation for WIFIA,” or RIFIA, were included in S. 176/H.R. 291 (the Water in the 21<sup>st</sup> Century Act), S. 1837 (Drought Recovery and Resiliency Act), S. 1894 (the California Emergency Drought Relief Act of 2015), S. 2533/H.R. 5247 (California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act), and H.R. 6022 (the New WATER Act). None of these bills were enacted.

Most stakeholders in the debate about water infrastructure financing acknowledge that there is no single solution or alternative that will fit needs for all communities and all types of projects. Most also recognize that financing is not new revenue. Investment via a particular financing tool, such as WIFIA, could simply displace existing mechanisms rather than increase total investment in water infrastructure. Whatever the source of funds for a project, communities and other sponsors must still identify a stream of revenue to repay whatever debt is incurred for a given investment. One of the challenges going forward is to ensure that financing is available for all needed projects. The federal role in addressing that challenge continues to be debated.

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