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Billing Code: 3720-58

DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

33 CFR Part 386

[Docket Number: COE-2022-0004]

RIN 0710-AB31

Credit Assistance and Related Fees for Water Resources Infrastructure Projects

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Proposed rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is publishing for public comment a proposed rule to implement a program authorized under Subtitle C of Title V of the Water Resources Reform and Development Act of 2014 (WRRDA), often referred to as the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA). The program was provided funding and further statutory direction in Division D Title 1 of the Consolidated Appropriations Act of 2021 and Division J Title III of the Infrastructure Investment and Jobs Act. WIFIA authorizes the Corps to provide secured (direct) loans and guaranteed loans to eligible water resources infrastructure projects. The only eligible project type - under Division D Title 1 of the Consolidated Appropriations Act of 2021 and Division J Title III of the Infrastructure Investment and Jobs Act are: “....safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private: Provided, That no project may be funded with amount provided under this heading for a dam that is identified as jointly owned in the National Inventory of Dams and where one of those joint owners is the Federal Government.....” – and this rule would limit implementation to only those project types listed in the Acts. WIFIA authorizes the Corps to charge fees to recover all or a

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portion of the Corps' cost of providing credit assistance and all costs of conducting engineering reviews and retaining expert firms, including financial and legal services, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments. WIFIA also authorizes the borrower to pay part or all of the credit subsidy cost and this authority would be implemented under this rule. Projects will be evaluated and selected by the Secretary of the Army (the Secretary) based on the requirements and the criteria described in this rule. Following the selection of projects, individual credit agreements will be developed through negotiations between the borrowers and the Corps. The Corps is soliciting comments on a proposed rule implementing a new credit assistance program consistent with the funding provided for safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility or private and the process by which the Corps will administer such credit assistance including the assessment of fees. The proposed rule sets forth the policies and procedures that the Corps will use for receiving, evaluating, approving applications, and servicing and monitoring direct loans and loan guarantees.

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 Number COE-2022-0004, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The Corps 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.

FOR FURTHER INFORMATION CONTACT: Aaron Snyder, Corps Water Infrastructure Financing Team, 441 G. Street NW CECW-I Attn: Aaron Snyder 3K87, Washington, DC 20314; telephone number: (612) 518-0355; email address: CWIFP@usace.army.mil. The phone number above may also be reached by

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individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Relay Service's teletype service at 800-877-8339.

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I. Background

Congress enacted the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA) (Public Law 113-121) as part of the Water Resources Reform and Development Act of 2014, as amended by section 1445 of Public Law 114-94, section 5008 of Public Law 114-322, and section 4201 of Public Law 115-270 (see 33 U.S.C. 3901–3914). These amendments were minor changes primarily focused on the Administrator of the Environmental Protection Agency (EPA) and other changes regarding State Infrastructure Financing Authorities, removing limitations on use of tax exempt funding sources, changes to project eligibility for the EPA, and allowance of fees as an eligible cost which is included elsewhere in this proposed rule. Title I, Division D of the Consolidated Appropriations Act, 2021 provided \$12 million in budget authority for the cost of direct loans and guaranteed loans (“credit subsidy cost”) for safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private. Title 1, Division D also provided that the \$12 million credit subsidy appropriation, is available to subsidize gross obligations for the principal amount of direct loans, including capitalized interest, and total loan principal, including capitalized interest, any part of which is to be guaranteed not to exceed \$950,000,000. Division J Title III of the Infrastructure Investment and Jobs Act provided for an additional amount for Water Infrastructure Finance and Innovation Program Account, \$75,000,000, to remain available until expended: “Provided, That of the amounts provided under this heading in this Act, \$64,000,000 shall be for the cost of direct loans and for the cost of guaranteed loans, for safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private: Provided further, That no project may be funded with amounts provided under this heading for a dam that is identified as jointly owned in the National Inventory of Dams and where one of those joint owners is the Federal Government: Provided further,

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That of the amounts provided under this heading in this Act \$11,000,000 shall be for administrative expenses to carry out the direct and guaranteed loan programs, notwithstanding section 5033 of the Water Infrastructure Finance and Innovation Act of 2014.” The U.S. Army Corps of Engineers (Corps) is proposing to establish its new WIFIA program limited to safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private.

A primary objective for Federal credit programs is to help correct a capital market imperfection. Municipal, regional, state-level and other infrastructure project sponsors generally do not market debt sales used to fund infrastructure projects beyond 30-year terms through public bond markets due to existing market conventions. Proceeds from bond sales are available immediately, not according to cash flow needs during project construction. In addition, debt sold through multiple issuances during an infrastructure project’s construction period exposes project sponsors to debt interest rate risk. Congress provided the Corps WIFIA program the legal authority to help address these factors that otherwise may impede affordable infrastructure investment through the prospective terms of WIFIA credit assistance.

WIFIA, authorized the Corps to provide both loans and loan guarantees to eligible entities: corporations; partnerships; joint ventures; trusts; State or local governmental entities, agencies, or instrumentalities; tribal governments or consortiums of tribal governments; or State infrastructure finance authorities.

While WIFIA authorizes the Corps to provide for a wide variety of eligible projects this draft proposed rule is implementing a credit assistance program for safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private (referred to here after as “non-federal dams”). As applied to credit assistance for non-federal dam projects under Title 1, Division D or the Consolidated Appropriations Act, 2021, Division J Title III of the Infrastructure Investment and Jobs Act, Sections 3902, 3905, and 3907 of

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Title 33 of the U.S. Code, describe the conditions that govern a project’s eligibility. Projects must have eligible costs of not less than \$20 million. 33 U.S.C. 3907(a)(2)(A). Eligible borrowers, eligible projects, and other statutory requirements are further described in detail in the sections below and summarized in 33 CFR 386 and 85 FR 39189. As used throughout the Supplementary Information section and Part 386 of the rule, “borrower” is synonymous with “obligor”. WIFIA defines an “obligor” as “an eligible entity that is primarily liable for payment of the principal of, or interest on, a Federal credit instrument.” 33 U.S.C. 3901(7). “Obligor” is used in place of “borrower” whenever “obligor” appears in a corresponding section of WIFIA.

II. Water Resources Infrastructure Needs

The American Jobs Plan estimates that in 2020, weather and climate disasters cost the United States \$95 billion in damages to homes, businesses, and public infrastructure.¹ The Administration has made investment in U.S. infrastructure a priority to increase resiliency in the face of such threats.

Non-federal dams account for roughly 87,000 of the 90,580 dams as reported in the National Inventory of Dams. Over 14,000 non-federal dams are now classified as “high hazard potential,” meaning that they would likely result in loss of life if they were to fail.² According to a 2019 cost estimate conducted by the Association of State Dam Safety Officials (ASDSO), the cost to rehabilitate (repair, replace or remove) all non-federal dams is estimated at over \$66 billion with high hazard potential dams accounting for over \$20 billion.³ Funding requirements are only projected to increase as infrastructure continues to age, risk awareness progresses, and design standards evolve.⁴

¹ The White House Briefing Room. “FACT SHEET: The American Jobs Plan” at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan>. March 13, 2021.

² U.S. Army Corps of Engineers, “National Inventory of Dams,” at <https://nid.usace.army.mil>. 2020 partial update.

³ Association of State Dam Safety Officials (ASDSO), “The Cost of Rehabilitating Our Nation’s Dams: A Methodology, Estimate, and Proposed Funding Mechanisms.” revised 2019.

⁴ Congressional Research Service, “Dam Safety Overview and the Federal Role,” October 24, 2019.

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While almost half of the states have created a state-funded grant or low-interest revolving loan program to assist dam owners with repairs, the ASDSO indicates that these programs vary significantly in the financial assistance available.⁵ Another Federal infrastructure financing program, WIFIA, administered by the EPA provides credit financing for non-federal water and wastewater infrastructure project. Similar to the Corps WIFIA program, the maximum portion of eligible project costs are 49% or 80% for small communities. The EPA WIFIA program can finance dam projects however those projects compete against a wide range of water and wastewater type projects. In FY 2021 the EPA WIFIA program had an appropriation of \$55 million, allowing WIFIA to lend approximately \$5.5 billion. In 2021, the EPA made it possible for dam projects to receive funding under the Federal Drinking Water State Revolving Fund (DWSRF), administered by the EPA, provided that the dam's primary purpose is for drinking water supply and that the dam must be owned by the public water system. Through the DWSRF program the EPA will make available \$1.8 billion in capitalization grants for drinking water infrastructure needs, a portion of which could go towards drinking water supply dam projects, depending on the priorities of the states. The Federal Watershed Rehabilitation Program administered by the Natural Resources Conservation Service (NRCS) helps project sponsors rehabilitate aging dams that are reaching the end of their design lives. This rehabilitation addresses critical public health and safety concerns. Division J Title I of the Infrastructure Investment and Jobs Act provides \$118M for projects under the Watershed Rehabilitation Program. The Federal Rehabilitation of High Hazard Potential Dam (HHPD) Program, administered by Federal Emergency Management Agency (FEMA), provides grants for repair, removal, or rehabilitation of eligible non-federal, high hazard potential dams. Projects can receive a maximum grant of the lesser of \$7.5 million or 12.5% of the total appropriated amount. The program was appropriated \$10 million in both FY 2019 and FY 2020, \$12 million in FY 2021, and \$585 million in Division J Title V of the Infrastructure Investment and Jobs Act (\$75 million of which

⁵ ASDSO, "The Cost of Rehabilitating"

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must go to dam removal projects). Despite these programs and their funding capacity, the available funding for dam safety infrastructure falls short of the \$66 billion need cited by ASDSO. The Corps WIFIA program helps to bridge that gap by providing non-federal entities with an additional means to invest in dam safety infrastructure, which will help communities withstand future weather and climate events. As communities become more resilient, all else being equal, this is expected to assist in limiting Federal disaster spending associated with such events.

III. Program Information

A. Funding

The Federal Credit Reform Act of 1990 (FCRA), Title V of Public Law 101-508, codified at 2 U.S.C. 661–661f, requires that agencies estimate the long-term cost of providing direct loans and loan guarantees on a net present value basis and requires that agencies have the necessary budget authority appropriated before entering into an obligation for a loan. To date, \$76 million in appropriations have been provided to the Corps for the cost of credit assistance for non-federal dams under WIFIA.

B. Borrower Eligibility

Section 3904 of Title 33 of the U.S. Code, defines entities that are eligible for WIFIA assistance. To be eligible under this program, a borrower must be one of the following:

1. A corporation;
2. A partnership;
3. A joint venture;
4. A trust;
5. A State, or local governmental entity, agency, or instrumentality;
6. A tribal government or consortium of tribal governments; or

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7. A State infrastructure financing authority.

While Section 3904(5) includes “Federal” entities in the list of entities that are eligible to receive assistance, this program will not issue credit assistance to “Federal” entities or activities because recording credit assistance to a Federal entity or activity on a net present value basis would be inconsistent with 31 U.S.C. 1501, existing Government-wide guidance, and a cash budget. As required by Title 1, Division D of the Consolidated Appropriations act of 2021 and Division J Title III of the Infrastructure Investment and Jobs Act, the credit assistance program covered by this proposed rule must be administered in accordance with the WIFIA criteria published on June 30, 2020 (85 FR 39189). Please review the criteria published at 85 FR 39189 for additional background and information regarding project eligibility.

C. Project Eligibility

Section 3905 of Title 33 of the U.S. Code, defines projects eligible for assistance. To be eligible under this program, a project must fall under one of the following four categories:

1. Safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private; and which meet the statutory requirements of Title 1, Division D of the Consolidated Appropriations Act 2021 and be in accordance with the criteria outlined in 85 FR 39189.
2. Any project that meets the criteria under C.1. above must also be a project for flood damage reduction, hurricane and storm damage reduction, environmental restoration, coastal or inland harbor navigation improvement, or inland and intracoastal waterways navigation improvement that the Secretary determines is technically sound, economically justified, and environmentally acceptable, including –

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- a. A project to reduce flood damage;
 - b. A project to restore aquatic ecosystems;
 - c. A project to improve the inland and intracoastal waterways navigation system of the United States; and
 - d. A project to improve navigation of a coastal inland harbor of the United States, including channel deepening and construction of associated general navigation features.
3. Acquisition of real property or an interest in real property for a project that meets the criteria under C.1. above—
- a. If the acquisition is integral to a project eligible for WIFIA credit assistance; or
 - b. Pursuant to an existing plan that, in the judgment of the Secretary, would mitigate the environmental impacts of water resources infrastructure projects that are otherwise eligible for WIFIA credit assistance.
4. A combination of projects, each of which is eligible for WIFIA credit assistance, for which a single application is submitted and which is secured by a common security pledge.

Title I, Division D of the Consolidated Appropriations Act, 2021 and Division J Title III of the Infrastructure Investment and Jobs Act limited use of the appropriated funding to safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams. Dam removal is an eligible project under this authorization.

In addition, as noted above, Title I, Division D of the Consolidated Appropriations Act, 2021 stipulates that “none of the direct loans or loan guarantee authority made available under this heading shall be available for any project unless the Secretary and the Director of the Office of Management and Budget have certified in advance in writing that the direct loan or loan guarantee, as applicable, and the project comply with the criteria...” published in the Federal Register on June 30, 2020 (85 FR 39189).

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The Corps will closely coordinate with the EPA on overlapping project eligibility to ensure proposed borrowers utilize the program best suited for their project considering agency technical expertise. The Corps agrees to partner closely with EPA during the project selection process for eligible projects and to work together to ensure that funding allocated either by EPA or Corps WIFIA programs will use the most appropriate program relative to the project's scope, purpose, and benefits. The Corps solicits public comment on how best to assist applicants to utilize the program best suited for a project in such instances.

D. Project Cost Eligibility

Section 3906 of Title 33 of the U.S. Code, defines eligible activities with respect to eligible projects as the following four types of project costs:

1. The cost of 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 pre-construction activities.
2. The cost of construction, reconstruction, rehabilitation, and replacement activities.
3. The cost of 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, construction contingencies, and acquisition of equipment; and
4. The cost of capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.

In addition to the statutory project cost eligibility requirements listed above, the Corps program allows for fees associated with obtaining WIFIA funds to be considered as part of eligible project costs,

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as authorized by 33 U.S.C. 3908(b)(7), limited to the Application, Transaction Processing, and Servicing fees as described below in Section III.H (Fees). Proceeds from the WIFIA credit assistance shall not be utilized to provide cash contributions to the Corps for project-related costs, except for such fees as allowed by 33 U.S.C. 3908(b)(7). The “Optional Credit Subsidy Fee” is not an eligible cost. The Corps solicits public comment on whether additional clarification is needed on project cost eligibility, such as whether a list of what costs are expressly ineligible would be helpful or whether that may result in additional confusion as opposed to limiting the list to only include those which are eligible, as proposed.

E. Statutory Requirements

WIFIA contains the following requirements, as paraphrased below, which are restated in the proposed rule:

- Public or private applicants for credit assistance would be required to submit applications to the Corps in order to be considered for approval (33 U.S.C. 3903).
- Project financing would be required to 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; to 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 (33 U.S.C. 3908 (b)(3)).
- 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 would be required to be publicly sponsored. Public sponsorship means that the obligor can demonstrate, to the satisfaction of the Secretary, 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

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such government supports the proposed project. Support could 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 (33 U.S.C. 3907(a)(4)).

- To be eligible for financing, a prospective borrower would be required to have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life (33 U.S.C. 3907(a)(6)).

Additionally, projects receiving WIFIA credit assistance would not be able to use that assistance for operations and maintenance activities.

F. Application Process

For each fiscal year that Congress appropriates funds for credit assistance under this program, the Corps will provide detailed instructions for submitting preliminary applications and applications, as well as the due dates for submissions. It will advise prospective borrowers of the estimated amount of funding available to support Federal credit instruments and information required in a preliminary application and application not detailed in this rule.

The application process has two steps. The first step requires the submission of a preliminary application. No fees are established for this preliminary application step. The Corps will review these preliminary applications and determine which applicants will be invited to continue in the application process and submit applications. An invitation to submit an application does not imply an obligation by the Corps to enter into a Loan Agreement or Loan Guarantee Agreement. Those applicants that choose to submit an application will be required to include an application fee, if applicable. Consequently, the Corps anticipates that the fees established in this rule will only apply to those projects. See Paragraph III.H. below for more information on fees.

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The purpose of the preliminary application is to provide the Corps with the information necessary to determine whether a given project is eligible under the WIFIA statute, appropriations, and regulations. This serves to provide the Corps with sufficient information to evaluate preliminary applications and to invite prospective borrowers to submit applications.

The purpose of the application is to provide the Corps with materials necessary to underwrite the proposed WIFIA assistance. The application will require similar information to the preliminary application, but with a greater level of detail and more fully developed information in support of the applicant's proposal.

The application must include sufficient information to allow the Secretary to make the determination required by 33 U.S.C. 3905(1) that the project is technically sound, economically justified, and environmentally acceptable. The information required to support this determination will depend on various factors, including but not limited to the purpose and scope of the activity proposed for WIFIA assistance. Applicants for WIFIA assistance should refer to any prior analysis that could assist the Corps in confirming the determination required by 33 U.S.C. 3905(1). The Corps does not expect the application to provide the level of analysis required for traditional Corps feasibility studies. Applicants should provide information to enable the Corps to determine that the project will meet all applicable engineering, safety, and other technical standards; that it is economically justified; and that it will satisfy all necessary environmental requirements to include requirements associated with the Corps Programmatic Environmental Assessment prepared for this rule under the National Environmental Policy Act (NEPA). In addition, the application must include a description of the extent to which the project financing plan includes any other form of Federal assistance (including grants), in addition to WIFIA credit assistance. This information directly relates to the total Federal risk exposure across all Federal programs and will require information on all possible sources of Federal support. The Corps will also be coordinating with other Federal agencies, such as the Federal Emergency Management Agency

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(FEMA), on other Federal programs that may be used to fund or finance projects under this rule.

Additional information regarding the requirements for an applicant's submittal would be described in the application materials.

The application also should address any connection between the proposed WIFIA assistance and other Federal activities. In order for non-federal flood risk management projects to be eligible for future Federal repair or rehabilitation assistance following storm events under 33 U.S.C. 701n, applicants would need to satisfy requirements from that program. Applicants can consult with the Corps WIFIA office to assist in understanding whether activities proposed for WIFIA assistance might implicate other Federal authorities and funding.

G. Creditworthiness

As provided in WIFIA, the Secretary must determine that every funded project is creditworthy. 33 U.S.C. 3907(a)(1). 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 acceptable to the Corps. Therefore, the WIFIA program will evaluate applications for financial assistance based on credit risks over the repayment period of the WIFIA credit assistance. As required by 33 U.S.C. 3907 (a) (1), 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 upon which the project is based; and
- Financial soundness and credit history and outlook of the borrower.

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H. Fees

Sections 3908(b)(7), 3909(b), and 3909(c)(3) of 33 U.S.C. allow the Corps to collect user fees from applicants to cover some or all of the costs associated with administering the program. The Corps is proposing to establish fees associated with the provision of Federal credit assistance under the WIFIA program. As specified under 33 U.S.C. 3908(b)(7), 3909(b), and 3909(c)(3), Congress authorizes the Corps to charge fees to recover all or a portion of the Corps' cost of providing credit assistance and the costs of conducting engineering reviews and retaining expert firms, including financial and legal services in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments. The Corps is proposing to establish an application fee, transaction processing fee, annual servicing fee, optional credit subsidy fee, and enhanced monitoring fee to cover these costs to the extent not covered by Congressional appropriations. As described in greater detail below, the types of fees the Corps is proposing to establish are consistent with other Federal credit programs.

The rationale for establishing fees associated with the provision of credit assistance is to cover the Corps' cost of administering the program to the extent these costs are not covered by appropriations. To effectively administer the program, the Corps will incur both internal administrative costs (staffing, program support contracts, and other costs) as well as costs associated with conducting engineering reviews and retaining expert firms, including financial and legal services in the field of municipal and project finance, to assist in the underwriting of the Federal credit instrument.

The Water Infrastructure Improvements for the Nation Act of 2016, Pub. L. 114-332, in section 5008(c), amended WIFIA to allow, at the request of an applicant, the financing of some fees as eligible costs as defined below. Borrowers are permitted to finance eligible fees as part of the WIFIA credit assistance. The Corps is soliciting public comment on all aspects of the fees discussed below as well as the associated assumptions.

1. Application Fee

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The Corps will require a non-refundable application fee for each project that is invited to submit an application (second step following submission of a preliminary application) for credit assistance under WIFIA, if applicable. The application fee will be due upon submission of the application. This application fee supports the Corps' planning efforts by helping to ensure that the program invites only the appropriate number of applicants that it has the capacity to fund. In the event that the prospective borrower has not completed and submitted a full application within one-year of the Corps' invitation to apply for credit assistance, the prospective borrower must submit to the Corps a request for extension prior to the expiration year that sets forth the prospective borrower's rationale for an extension, summarizes the prospective borrower's progress achieved on the project to date, and provides an updated schedule of project development activities, including submission of the WIFIA application. The Corps may grant this extension after evaluating the progress of the prospective borrower's application and its readiness to apply.

The application fee will be waived for applications from public entities for projects serving small communities or economically disadvantaged communities. See Paragraph III.I. below for the definitions of small communities and economically disadvantaged communities for the purpose of this credit assistance program. For all other project applications, the application fee is \$25,000. This \$25,000 application fee represents an amount equal to 0.125 percent of the minimum threshold project cost (\$20 million, 33 U.S.C. 3907(a)(2)(A)), which the Corps considers to be sufficient to begin the financial, engineering, and legal analysis of the project while providing assurance that the applicant intends to proceed to closing. The Corps will undertake significant costs to evaluate applications and hire expert firms for underwriting and considers an application fee essential for applicants to show good faith in applying for credit assistance, to help cover the agency's administrative costs in processing applications, and to ensure effective administration of the program. The application will not be reviewed without fee payment. The Corps will only invite projects to submit an application and application fee if the Corps

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believes there is a reasonable expectation that the project could receive financing. However, an invitation to submit an application does not guarantee that a project will proceed to financial close.

2. Transaction Processing Fees

For projects invited to submit an application, the Corps will require payment of transaction processing fees at the time of closing, or at the time the application is withdrawn or denied (in the event the project does not proceed to closing). The proceeds of any such fees will be used to pay the remaining portion of the Corps' cost of processing the application for credit assistance, including the costs of conducting engineering reviews and retaining expert firms to assist in underwriting, drafting and negotiating the terms of the Federal credit instrument. In procuring the services of third-party firms, the Corps may issue task orders with \$0 funding (i.e., no Federal funds). In such situations, at the direction of the Corps, payments to the contractor for services will be paid (i) by or on behalf of the Corps or (ii) directly by the applicant for services rendered in accordance with the terms of a sponsor payment letter/agreement executed by the applicant (or its affiliate) and the contractor. In all instances, when a contractor is engaged to represent the Corps or its representative on a WIFIA matter and is paid by the applicant (or its affiliate), the Corps or its representative, as applicable, will remain the client of the contractor.

The Corps estimates these costs would generally be in the range of approximately \$125,000 to \$300,000 per project, with the expectation that more complex projects could exceed this range. However, prior to the transaction processing fees being incurred, the Corps will develop a more precise estimate based on its understanding of the project and associated financial and legal structure. The application fee described above will be credited to the transaction processing fee. For example, if the total transaction processing fees are \$300,000 and the applicant pays \$25,000 with the application, \$275,000 will be due at closing, or earlier if the project does not proceed to closing, *e.g.*, if the application is withdrawn or denied. The total transaction processing fee for each project will be set

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based on the costs incurred by the Corps for that specific project. Due to the nature of the transaction processing, the amount is expected to vary among applicants. This variation reflects the amount of time taken to process a loan, which may not directly correlate with the size of the loan. More complex transactions with lengthy negotiations will have higher costs.

The Corps may waive a portion of the fee for public applicants if appropriations are available to pay for the Corps' cost of administering the WIFIA program and to pay for loan processing. Funds appropriated to the program may pay for the administration of the program, including internal administrative costs of staffing, program support contracts (separate from the expert services described previously), and other internal administrative needs.

To the extent appropriations are available in excess of those needed for the Corps' internal administrative costs, the Corps may use the remaining available administrative allowance (less any amount needed for future years' administration) to reduce fees. The Corps may allocate additional administrative funds by reducing fees by an equal amount per loan for those projects serving economically disadvantaged communities, with public applicants. If additional administrative funds remain, the Corps may reduce fees by an equal amount for each remaining loan, with public applicants.

3. Servicing Fee

The Corps will charge an annual servicing fee after closing of the loan. The fee will be dependent upon the costs of servicing the credit instrument (*e.g.*, collecting and processing loan principal and interest payments) as determined by the Secretary. Such fees will be set at a level to enable the Corps to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments and will be determined at the time of closing. The Corps expects such fees to range from \$10,000 to \$50,000 annually per loan and to be adjusted for inflation.

4. Optional Credit Subsidy Fee

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The Corps may charge a fee, with agreement of the applicant, to reduce the budget authority required to fund the credit instrument. The Corps anticipates scenarios where assessing such a fee will provide flexibility to allow an applicant to “buy down” the budget authority required for the credit instrument. This could allow an applicant to proceed to approval if sufficient budget authority would not otherwise be available. Such a fee will only be charged upon agreement by an applicant and shall not be considered an eligible project cost. Utilization of this fee will only be in rare instances.

5. Enhanced Monitoring Fee

The Corps may charge a fee to cover extraordinary expenses if a borrower experiences difficulty relating to technical, financial, or legal matters or other events (*e.g.*, engineering failures or financial workouts) that require the Corps to incur time or expenses beyond standard monitoring. The Corps will be entitled to payment in full from the borrower of additional fees in an amount determined by the Corps and of related fees and expenses of its independent consultants and outside counsel that are incurred directly by the Corps and not paid directly by the borrower. Such fees shall not be considered an eligible project cost.

I. Credit Assistance

Two types of credit instruments are permitted under WIFIA secured (direct) loans and loan guarantees. The second credit instrument under 33 USC 3908 (e), referred to as loan guarantees are defined under the Federal Credit Reform Act of 1991 as a binding agreement by a Federal agency to make a loan guarantee when specified conditions are fulfilled by the borrower, the lender, or any other party to the guarantee agreements.

Statutory requirements applicable to this credit instrument appear at 33 U.S.C. 3908 and 3909. Additional Terms and conditions for loans and loan guarantees will be negotiated between the Corps and successful applicants.

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In general, WIFIA limits the amount of credit assistance that may be provided to a project to 49% or less of reasonably-anticipated eligible project costs. However, the statute authorizes the Corps to use up to 25% of its budget authority to provide credit assistance to one or more projects of up to 80% (statutory cap on Federal participation) of the total costs of any given project. The 80% statutory cap on Federal participation would be determined by adding the total loan proceeds, direct appropriations, grants, or other applicable Federal funding. Following credit assistance issuance, future direct appropriations, grants, or other applicable Federal funding may be modified to maintain compliance with the 80% statutory cap. Note, however, that projects receiving direct federal appropriations or other Federal funding may not be eligible to receive WIFIA credit assistance based on the eligibility criteria outlined in this rule as well as at 85 FR 39189, as they may be determined to be Federal in nature. The Corps would limit its budget authority to extending credit assistance to eligible entities for those entities' use in directly carrying out activities eligible for assistance under 33 U.S.C. 3906. The Corps would not extend credit assistance or allow loan proceeds to be used by any entity to provide cash contributions to the Corps for project related costs, except for such fees as allowed by 33 U.S.C. 3908(b)(7). The Corps would generally use its budget authority to provide credit assistance for greater than 49% of eligible project costs to projects serving economically disadvantaged communities that would otherwise not be able to obtain WIFIA credit assistance. For the purposes of this program, the Corps is proposing to preliminarily define economically disadvantaged communities as those that experience low-income, persistent poverty, or high unemployment. The implementation of this definition may be modified as appropriate in response to updated tools and resources as they become available. The Corps is soliciting comment on whether this is the most appropriate criteria to use to identify economically disadvantaged communities.

Additionally, the Corps may use its budget authority to provide credit assistance for greater than 49% of eligible project costs when a project would be unable to proceed to closing without such

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additional assistance due to unforeseen events. 33 U.S.C. 3912. Unforeseen events that could prevent a project from going to closure may include: unexpected loss of other sources of financing, increased cost of capital, or acts of nature. In such an event, the Corps would reexamine the creditworthiness of the project and only provide funding if the project can still meet all requirements of the program.

Costs incurred, and the value of any integral in-kind contributions made before receipt of credit assistance may be considered in calculating eligible project costs upon approval of the Secretary. Such costs and integral in-kind contributions must be directly related to the development or execution of the project and must be eligible project costs per 33 U.S.C. 3907(a)(2). In addition, such costs, excluding the value of any integral in-kind contributions, are payable from the proceeds of the Federal credit instrument and would be considered incurred costs. Capitalized interest on the Federal credit instrument would not be eligible for calculating eligible project costs.

The Corps would 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 NEPA.

The credit agreement would include the anticipated schedule for loan disbursements. However, actual disbursements would be based on costs incurred in accordance with the approved construction plan. This requirement would protect the Corps in the event of non-performance.

As required by section 3908(b)(4) of Title 33 of the U.S. Code., the interest rate on a secured loan would 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 would 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.

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As allowed by statute at 33 U.S.C. 3908(c)(2), scheduled loan repayments of principal and interest on a secured loan or loan guarantee shall commence not later than 5 years after the projected date of substantial completion of the project at the time of execution of the Loan Agreement or Loan Guarantee Agreement, as determined by the Secretary. However, scheduled loan repayments of principal and interest on a secured loan or loan guarantee to a State infrastructure financing authority would commence not later than 5 years after the date on which amounts are first disbursed. The final maturity of the credit agreement shall be in no instance later than 35 years after the projected date of substantial completion of the project at the time of execution of the Loan Agreement or Loan Guarantee Agreement.

As required by section 3908(b)(5) of Title 33 of the U.S. Code., the final maturity date of a secured loan would be the earlier of the date that is (1) 35 years after the date of substantial completion of the project, as determined by the Secretary, or (2) the useful life of the project, as determined by the Secretary. However, the final maturity date of a secured loan to a State infrastructure financing authority would 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 Federal credit instrument, the Secretary would consider the useful economic life of the asset(s) being financed, as required under OMB Circular A-129.⁶

As required by statute, the Corps' Federal credit instrument may have a junior claim to other debt issued by the obligor in terms of its priority interest in the project's pledged security. However, the Corps' claim on pledged security would not be subordinated to the claims of any holder of the project obligations in the event of a bankruptcy, insolvency, or liquidation of the obligor of the project. The Corps' interest may include collateral other than pledged revenues.

⁶ At the time of publication of this rule, the OMB circular may be accessed electronically at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A129/a-129.pdf>.

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J. Rating Requirement

The Corps, as required by 33 U.S.C. 3907(a)(1)(D)(i), would require each applicant to furnish a preliminary rating opinion letter as part of the application process. The applicant would be responsible for identifying and approaching one or more Nationally Recognized Statistical Rating Organizations (NRSROs) to obtain such a letter. This letter must indicate that the applicant project's senior obligations (which may be the Federal credit instrument), have the potential of attaining an investment-grade rating. As required by Section 3907 (a)(1)(D)(ii) of the WIFIA, 33 U.S.C. §3901 et seq., the Corps would require each applicant to provide, prior to final acceptance and financing of the project, final rating opinion letters from at least two rating agencies indicating that the senior obligations of the project have an investment-grade rating. If the Federal credit instrument is the project's senior obligation, these ratings must apply to all project obligations with claims at parity to that of the Federal credit instrument on the security pledged to the Federal credit instrument, including the Federal credit instrument. The Corps would also require as a matter of policy, prior to final execution of the loan agreement or loan guarantee agreement, that the applicant provide at least one final rating opinion letter which provides a credit rating on the final negotiated direct loan or loan guarantee that does not include consideration of the full faith and credit of the United States of America.

K. Federal Requirements

Recipients of WIFIA credit assistance would be required to comply with Federal requirements applicable to all Federally-financed projects. The proposed rule provides a non-exhaustive list of these requirements in Statutory and Executive Order Reviews Section IV.

L. American Iron and Steel Requirements

Recipients of WIFIA credit assistance would be required to comply, per 33 U.S.C. 3914(a), with American Iron and Steel (AIS) requirements, which requires that if any WIFIA assistance is provided for

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construction, alteration, maintenance, or repair of a project, all of the iron and steel products used in the project must be produced in the United States. These products include 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. 33 U.S.C. 3914(b). This requirement applies to all iron and steel products used in the project, not only those paid for with proceeds from the WIFIA credit assistance.

M. Labor Standards (Davis-Bacon Act of 1931)

The WIFIA 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. 33 U.S.C. 3909(h) (cross-referencing Title VI of the Federal Water Pollution Control Act); 33 U.S.C. 1372. 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 credit assistance.

N. Reporting Requirements

The Corps proposes to require, at a minimum, that any recipient of WIFIA credit assistance must make available to the Corps an annual project performance report and audited financial statements to the Corps within the time period stated in the credit agreement following the recipient's fiscal year-end for each year during which the recipient's obligation to the Federal Government remains in effect. The Corps proposes that they may conduct periodic financial and compliance audits of the recipient, as determined necessary by the Corps. The specific credit agreement between the recipient of credit assistance and the Corps may contain additional reporting requirements. This would be a necessary and important requirement in order to allow the Corps to provide proper and sufficient oversight of Federally-financed projects.

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O. Selection Criteria

Congress enacted WIFIA with the goal of accelerating investment in our nation's water infrastructure by providing credit assistance to creditworthy projects of major importance to the water sector. Only eligible projects will be selected. The project priorities as proposed under this rule are as follows: Projects serving small, rural communities and economically disadvantaged communities and projects serving Tribal communities.

The program's goal is to enable local investment in projects that enhance community resilience to flooding, while supporting the Corps' policy initiatives by prioritizing the projects listed above.

Section 3907(b)(2) of Title 33 of the U.S. Code establishes 11 criteria, at a minimum, for selecting among eligible projects to receive credit assistance, but does not prohibit the Corps from identifying additional selection criteria and requirements. As such, the Corps is proposing the following 12 selection criteria.

1. The extent to which the project is nationally or regionally significant, with respect to the generation of public benefits, such as—
 - a. The reduction of flood risk;
 - b. The improvement of water quality and quantity, including aquifer recharge;
 - c. The protection of drinking water, including source water protection;
 - d. The support of domestic and international commerce; and
 - e. The restoration of degraded aquatic ecosystem structures.
2. The extent to which the project financing plan includes public or private financing, in addition to WIFIA credit assistance.
3. The likelihood that WIFIA credit assistance would enable the project to proceed at an earlier date than the project would otherwise be able to proceed.

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4. The extent to which the project uses new or innovative approaches.
5. The amount of budget authority required to fund the WIFIA Federal credit instrument.
6. The extent to which the project—
 - a. Protects against extreme weather event, such as floods or hurricanes; or
 - b. Helps maintain or protect the environment.
7. The extent to which a project serves regions with significant clean energy exploration, development, or production areas.
8. The extent to which a project serves regions with significant water resource challenges, including the need to address—
 - a. Water quality concerns in areas of regional, national, or international significance;
 - b. Water quantity concerns related to groundwater, surface water, or other water sources;
 - c. Significant flood risk;
 - d. Water resource challenges identified in existing regional, State, or multistate agreements; or
 - e. Water resources with exceptional recreational value or ecological assistance.
9. The extent to which the project addresses identified municipal, State, or regional priorities.
10. 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 not later than 90 days after the date on which a Federal credit instrument is obligated for the project under WIFIA.
11. The extent to which WIFIA credit assistance reduces overall Federal contributions to the project.
12. The extent to which the project serves economically disadvantaged communities and spurs economic opportunity for, and minimally adversely impacts, disadvantaged communities and their populations.

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Criterion (5) is directly related to a project's creditworthiness, financial viability, and the Corps' capacity to make a loan. This criterion would be used to assess projects separate from the assessment under the other selection criteria. In particular, it would inform the Corps' ability to provide funding in an equitable manner to prospective borrowers seeking financing. The amount of budget authority used by a project would 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 would be at the discretion of the Secretary who may decide that a project that uses a disproportionately high level of budget authority provides essential public safety benefits and deserves greater consideration.

The Corps added criterion (12) to reflect the Corps' intention to address the needs of economically disadvantaged communities where obtaining financing for critical water resources infrastructure presents additional difficulties and to further current Administration priorities as expressed in E.O. 13985, E.O. 13990, and E.O. 14008⁷. While the creditworthiness requirement, as well as the requirement to obtain an investment-grade rating on senior obligations, may be a challenge for economically disadvantaged communities, the flexibility and low interest rates of the Federal credit instrument may improve overall financial feasibility and burden to the community.

⁷ Executive Order 13985 of January 20, 2021. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.

Executive Order 13990 of Jan 20, 2021. Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis.

Executive Order 14008 of January 27, 2021 Tackling the Climate Crisis at Home and Abroad.

IV. Statutory and Executive Order Reviews

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

Improving Regulation and Regulatory Review

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” require that significant regulatory actions be submitted for review to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). These orders also direct agencies to assess the costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has been determined significant under Executive Order 12866. In accordance with Executive Order 12866 and Executive Order 13563, this significant regulatory action was submitted to OMB for review. The costs to the public of implementing the Corps WIFIA program include: the fees charged to applicants and loan recipients, as well as any remaining costs of administering the program that are not fully covered by the user fees and instead require support by Federal appropriations. The benefits of implementing the Corps WIFIA program include: (1) the value of the benefits provided by non-federal dam safety projects enabled by future the Corps WIFIA credit assistance (for example, flood damages prevented by dam safety improvement projects), and (2) the savings realized by the borrowers from the lower lending rates of the Corps WIFIA credit assistance.

B. Executive Order 11988: Floodplain Management

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 Order 11988, which directs Federal agencies to avoid, to the extent possible, long-and short-term adverse impacts associated with

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the occupancy and modification of the floodplain as well as to avoid direct and indirect support of floodplain development wherever there is a practicable alternative.

All projects under this rule are considered Federal actions under E.O. 11988 and thus, project applicants shall determine whether the proposed project will occur in the floodplain. If the project is located within the floodplain, the applicant must determine whether the action is critical or not and what floodplain standard to follow. Further guidance on implementation of E.O. 11988 can be found in the Corps Engineer Regulation 1165-2-26 (30 March 1984).

C. Paperwork Reduction Act (PRA)

The information collection activities in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). Per the PRA, the agency cannot collect any information until the information collection request has been approved by OMB.

D. Regulatory Flexibility Act (RFA)

The RFA requires Federal agencies to consider the impact of regulations on small entities (small businesses, small organizations, or small government jurisdictions) in developing the proposed and final regulations. The RFA applies to the Corps WIFIA program rule since notice and comment are required as part of this rulemaking process.

Congress has provided authority and funding required for the Corps to make direct loans and loan guarantees for safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private. The Corps is proposing to establish its new WIFIA program within the limitations set by Congress. The proposed rule sets forth the policies and procedures that the Corps will use for receiving, evaluating, approving applications, and servicing and monitoring direct loans and loan guarantees.

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Small entities that would be impacted by this rule will be non-federal dam owners who own dams that require loans in excess of \$20,000,000. This includes small government jurisdictions and organizations who voluntarily submit a preliminary application and are subsequently invited to submit a full application. The Corps will only invite potential borrowers to submit an application and application fee if the Corps believes there is a reasonable expectation that the project could receive financing. The application fee will be waived for small communities and economically disadvantaged communities. Based on data derived from the EPA’s WIFIA program since its implementation in 2017, the Corps anticipates receiving approximately 50 preliminary applications each year from eligible entities per year, and of these entities, the Corps estimates five will be considered small entities.

There are approximately 87,000 non-federally owned dams in the US (some of which are owned by the same entity). Of the NAICS classifications, the most applicable industry classification for these entities is the “Water Supply and Irrigation Systems” industry subsector. Information on this industry is provided in the tables below. Based on the Small Business Administration’s (SBA) Size Standard/Small Entity Threshold and the average annual receipts, the Water Supply and Irrigation Systems industry has 684 firms that qualify as small entities.

NAICS Code	Industry Subsector Description	SBA Size Standard/ Small Entity Threshold (Average Annual Receipts)	Total Small Businesses
221310	Water Supply and Irrigation Systems	\$36.0 M	684

Enterprise Size (\$1,000)	Firms	Establishments	Employment	Annual Payroll (\$1,000)	Receipts (\$1,000)
01: Total	3,334	4,131	36,836	2,346,769	11,712,605
02: <100	684	684	1,088	9,494	35,768
03: 100-499	1,30	1,300	3,420	87,118	336,983
04: 500-999	569	570	2,676	106,172	402,485
05: 1,000-2,499	448	455	3,492	165,793	694,133
06: 2,500-4,999	143	151	1,968	104,614	482,800
07: 5,000-7,499	54	67	1,208	67,701	322,787

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Enterprise Size (\$1,000)	Firms	Establishments	Employment	Annual Payroll (\$1,000)	Receipts (\$1,000)
08: 7,500-9,999	29	38	705	40,656	219,741
09: 10,000-14,999	25	40	1,035	58,494	277,199
10: 15,000-19,999	12	17	416	29,630	166,138
11: 20,000-24,999	9	19	501	25,101	99,781
12: 25,000-29,999	5	14	424	27,005	84,788
13: 30,000-34,999	5	9	282	15,409	117,611
14: 35,000-39,999	5	30	701	36,112	123,970
15: 40,000-49,999	6	11	678	60,553	179,170
16: 50,000-74,999	8	68	1,605	96,580	392,037
17: 75,000-99,999	5	24	904	76,175	303,054
18: 100,000+	27	634	15,733	1,340,162	7,474,160

Eligible small entities that qualify for WIFIA credit assistance and plan to utilize debt financing such as bank loans, bonds, or a WIFIA credit assistance to fund an eligible project, will incur compliance costs associated with any such debt instrument. As such, the compliance costs to obtain a WIFIA credit assistance noted below in most instances represents a meaningful savings compared to alternative capital market debt financing options. WIFIA compliance costs likely include the following:

- Fees:** The WIFIA application fee of \$25,000 will be waived for small and/or disadvantaged communities. All WIFIA credit assistance recipients will be charged a transaction processing fee, likely between \$125,000 and \$300,000, at the time of loan closing to cover the costs incurred by the Corps for the processing each loan. The cost of the fee will depend on the complexity of the transaction (more complex transactions will have higher transaction processing fees). If administrative funds are available, this fee may be refunded to the borrower(s). Additionally, all WIFIA credit assistance recipients will be charged an annual servicing fee, likely between \$10,000 and \$50,000. This cost of this fee will depend on the costs of servicing the credit instrument. The transaction processing fee and the annual servicing fee will be determined at the time of loan closing. To facilitate access to the funding, all applicants have the option to use loan proceeds to pay for all consulting reports

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and application fees. This amount is less than the underwriting fees incurred for alternative debt financings, which are usually 1.0% of the borrowed amount.

- **Rating letters:** The Corps WIFIA program will require borrowers to provide credit rating letters before closing on the WIFIA credit assistance. Credit ratings typically cost approximately \$50,000 to obtain. Credit ratings are a standard practice for alternative debt financings and as such, the cost to obtain one for Corps financing does not materially change the costs for small entities.
- **Reading the regulation:** The regulation other related documents are not expected to take more than a typical 8-hour workday to read and comprehend. Assuming an average hourly rate of \$100/hour, reading the regulation would cost approximately \$1,600 for 2 employees to read the regulation.
- **Consulting fees:** Consultants are not required to participate in the WIFIA program. However, eligible entities may opt to utilize support from consultants to prepare financial, legal, and technical documents required to support an application. The Corps estimates that should an entity opt to utilize such support, the cost is anticipated to be less than \$75,000. This amount is less than the consulting fees incurred for alternative debt financings, which are usually in excess of \$100,000.
- **Reporting:** WIFIA requires that borrowers submit financial audit or financial condition reports, so that the program can monitor the status of the project and identify any changes to the credit risk posed to the Federal Government. These reports are already produced regularly by borrowers, so the added cost to borrowers is anticipated to be less than \$5,000 per year.
- **Record-keeping:** It is anticipated that record-keeping costs for WIFIA credit assistance will not exceed \$5,000 per year.

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The estimated costs to small business associated with the program are summarized in the table below.

Fees	\$125,000 - \$350,000 plus \$10,000 - \$50,000 annually
Rating letters	\$50,000
Loan interest	Based on loan amount and duration.
Reading the regulation	\$800 - \$1,600
Consulting fees	\$0 - \$75,000
Reporting	\$0 - \$5,000
Record-keeping	\$5,000 annually
Total	\$175,800 - \$481,600 Plus \$15,000 - \$55,000 annually

These costs do not represent a significant economic impact. The only reason entities would proceed with the program is if there is a benefit compared to other alternative debt financings. The total estimated costs are anticipated to be between approximately \$175,000 and \$500,000, plus an annual cost between \$10,000 and \$50,000. For the affected industries, the maximum of these costs represents less than 2% of the revenue threshold for small entities. Further, participation in the WIFIA program is voluntary and the Corps anticipates inviting approximately 5 small, non-federal entities to apply for federal credit assistance through the program.

Because 1) participating in the program is voluntary and undertaken by small entities to affordably finance eligible projects, and 2) the cost of obtaining a WIFIA credit assistance is likely lower than the alternative forms of debt financing necessary to undertake a project, of the small entities that seek a WIFIA credit assistance through the program, none will experience a significant economic impact. Further, because the WIFIA program expects to invite approximately five small entities per year to apply

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for Federal credit assistance through the program, the rule is not anticipated to have a significant or adverse impact on small entities.

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 E.O. 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 and Safety Risks

This action is not subject to E.O. 13045 because it is not economically significant as defined in E.O. 12866, and because this action does not address environmental health or safety risks. This rulemaking provides the procedure to apply for credit assistance and establishes the fees related to the provision of Federal credit assistance under the WIFIA. The selection criteria used for evaluating and selecting among

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eligible projects to receive credit assistance contained in the Supplementary Information section of the preamble includes the extent to which the project generates public safety 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 and establishes the fees related to the provision of Federal credit assistance under the Corps WIFIA program.

J. National Technology Transfer and Advancement Act of 1995 (NTTAA)

This action is not subject to the NTTAA, Public Law 104-113, because it does not establish an environmental health or safety standard.

K. National Environmental Policy Act (NEPA)

This action of promulgating this rule will not have a significant effect on the human environment. Each project obtaining assistance under this program is required to adhere to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 et seq.). These requirements apply at the time of application for assistance. The Corps has completed a Programmatic Environmental Assessment and associated Finding of No Significant Impact in support of this rule. These documents are available at <https://www.usace.army.mil/Missions/Civil-Works/Infrastructure/revolutionize/CWIFP/>.

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

Executive Order 12898 directs Federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations. This action does not cause disproportionately high and adverse human health environmental effects on minority or low-income populations.

M. Congressional Review Act (CRA)

This action is subject to the CRA, and the Corps will submit a rule report to each House of the Congress and to the Comptroller General of the United States. Pursuant to the CRA (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a "major rule", as defined by 5 U.S.C. § 804(2).

List of Subjects in 33 CFR Part 386

Administrative practice and procedure, Intergovernmental relations, Waterways.

33 CFR Chapter II

For the reasons stated in the preamble, the Corps proposes to amend 33 CFR chapter II as follows:

PART 386— CREDIT ASSISTANCE FOR WATER RESOURCES INFRASTRUCTURE PROJECTS

1. Add part 386 to read as follows:

PART 386— CREDIT ASSISTANCE FOR WATER RESOURCES INFRASTRUCTURE PROJECTS

Sec.

386.1 Purpose and scope.

386.2 Definitions

386.3 Limitations on assistance

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386.4 Application process

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386.12 Term sheets and approvals

386.13 Closing on the Loan Agreement or Loan Guarantee Agreement

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386.15 Fees

Authority: 33 U.S.C. 3901 et seq.

§ 386.1 Purpose and scope.

The Water Infrastructure Finance and Innovation Act of 2014 (WIFIA) authorized a new Federal credit program for water resources infrastructure projects to be administered by the U.S. Army Corps of Engineers (Corps). Title 1, Division D of the Consolidated Appropriations Act, 2021, and Division J Title III of the Infrastructure Investment and Jobs Act limits the program to safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams with a primary owner type of state, local government, public utility or private.

§ 386.2 Definitions

The following definitions apply to this part:

(a) *Application* means the form and attachments submitted by prospective borrowers that have been selected to apply for credit assistance after the review of letters of interest.

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(b) *Borrower* means any entity that enters into a direct loan or loan guarantee agreement with the Corps that is primarily liable for payment of the principal or interest on a Federal credit instrument. “Borrower” is synonymous with “obligor.” “Obligor” is used in place of borrower in *this part whenever “obligor” appears in a corresponding section of WIFIA.*

(c) *Clean energy* means systems, processes, and best practices for producing, converting, storing, transmitting, distributing, and consuming energy that avoid, reduce, or sequester the amount of greenhouse gas (GHG) emitted to, or concentrated in, the atmosphere. .

(d) *Community* means a collection of people in a geographic area having one or more characteristic in common. *The geographic area may be contained within or cross political subdivisions of states.*

(e) *Credit assistance* means a secured loan or loan guarantee under 33 U.S.C. § 3908.

(f) *Credit agreement* means a contractual agreement (or agreements) between the Corps and a borrower (and the lender, if applicable) establishing the terms and conditions, rules, and requirements of a secured loan or loan guarantee.

(g) *Credit subsidy* 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 Loan Agreement or Loan Guarantee Agreement is executed. The credit subsidy cost for a given project is the net present value, at the time the Loan Agreement or Loan Guarantee Agreement is executed of the following estimated cash flows, discounted to the point of disbursement: 1) payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments, less 2) payments to the Government including origination and other fees, penalties, and recoveries including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender, or other Holder of an option included in a Loan Agreement or Loan Guarantee Agreement.

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(h) *Economically disadvantaged community* refers to a community that experiences low-income, persistent poverty, or high unemployment.

(i) *Economically justified* means that the anticipated benefits to the community(ies) will exceed the costs.

(j) *Eligible entity* means one of the following:

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

(k) *Eligible project costs* means the amounts, which are paid by, or for the account of, a borrower 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 pre-construction activities.

(2) Construction, reconstruction, rehabilitation, and replacement activities.

(3) Acquisition of real property or an interest in real property (including water rights, land relating to the project, and improvements to land), environmental mitigation, 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 Federal credit instrument is not an eligible project cost.

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(l) *Environmentally acceptable* means the project satisfies all necessary environmental requirements, including requirements associated with the Corps Programmatic Environmental Assessment prepared for this rule under the National Environmental Policy Act (NEPA).

(m) *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.

(n) *High unemployment* means the unemployment rate in a community is, for the most recent 24-month period for which data is available, at least 1% greater than the national average unemployment rate.

(o) *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.

(p) *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.

(q) *Low-income community* means a community in a geographic area that meets any of the following criteria:

(1) Individuals whose household income is at or below 200 percent of the poverty line, as defined by the Bureau of the Census, constitute more than 50 percent of the population;

(2) The percentage of individuals whose household income is at or below 200 percent of the poverty line, as defined by the Bureau of the Census, in the community is twice that as the county or state as a whole; or

(3) The community or territory has a per capita income of 80 percent or less of the national average.

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Note: For U.S. territories for which Bureau of the Census American Community Survey data is not available, *low-income community* means a community in a geographic area that is located within a territory that has a poverty rate greater than 20%.

(r) *Loan guarantee* means any guarantee or other pledge by the Secretary to pay all or part of the principal of and interest on a loan or other debt obligation issued by a borrower and funded by a lender.

(s) *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.

(t) *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. 78c.

(u) *Non-federal* means an organization that is not an agency or instrumentality of the Federal government, including State, interstate, Indian tribal, or local government, as well as private organizations.

(v) *Persistent poverty* means that 20% or more of the population has been living in poverty over the prior two decennial censuses for which data is available and the most recent Small Area Income and Poverty Estimates.

(w) *Preliminary application* means the form and attachments prospective borrowers submit to the Corps to be considered for credit assistance following the announcement of available funding.

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(x) *Project* means:

(1) Safety projects to maintain, upgrade, and repair dams (including dam removal) identified in the National Inventory of Dams with a primary owner type of state, local government, public utility, or private; and which meets the statutory requirements of Title 1, Division D of the Consolidated Appropriations Act 2021 and will be in accordance with the criteria outlined in 85 FR 39189.

(2) Any project that meets the criteria in paragraph (1) above must also be a project for flood damage reduction, hurricane and storm damage reduction, aquatic environmental restoration, coastal or inland harbor navigation improvement, or inland and intracoastal waterways navigation improvement that the Secretary determines is technically sound, economically justified, and environmentally acceptable, including –

(i) A project to reduce flood damage;

(ii) A project to restore aquatic ecosystems;

(iv) A project to improve the inland and intracoastal waterways navigation system of the United States; and

(v) A project to improve navigation of a coastal inland harbor of the United States, including channel deepening and construction of associated general navigation features.

(3) Acquisition of real property or an interest in real property for a project that meets the criteria under (1) above –

(i) If the acquisition is integral to a project eligible for WIFIA credit assistance; or

(ii) Pursuant to an existing plan that, in the judgment of the Secretary, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for WIFIA credit assistance.

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(4) A combination of projects secured by a common security pledge, each of which is eligible for WIFIA credit assistance, for which an eligible entity, or a combination of eligible entities, submits a single application.

(y) *Project obligation* means any note, bond, debenture, or other debt obligation issued by a borrower in connection with the financing of a project, other than a Federal credit instrument.

Prospective borrower means an eligible entity seeking credit assistance.

(z) *Projected Substantial Completion Date* means the expected date as determined by the Secretary, at which 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 designated portion thereof can be used for its intended use.

(aa) *Publicly sponsored* means the obligor can demonstrate, to the satisfaction of the Secretary, 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.

(bb) *Secured loan* means a direct loan or other debt obligation (including a note, bond, debenture, and sale or lease financing arrangement) issued by a borrower funded by the Secretary in connection with the financing of a project under 33 U.S.C. 3908.

(cc) *Small community* means a community of not more than 25,000 individuals.

(dd) *State* means any of the fifty states, the District of Columbia, Puerto Rico, or any other territory or possession of the United States.

(ee) *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

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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).

(ff) *Subsidy amount* means the dollar amount of budget authority that is 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 the governmental receipts or outlays in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 *et seq.*).

(gg) *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 designated portion thereof can be used for its intended use.

(hh) *Technically sounds* means the project will meet all applicable engineering, safety, and other technical standards.

(ii) *Term sheet* means a contractual agreement between the Corps and the borrower (and the lender, if applicable) that sets forth the key business terms and conditions of a Federal credit instrument.

(jj) *Territory* means each of the commonwealths, territories, and possessions of the United States established in Title 48 of the U.S. Code.

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

(ll) *WIFIA* means the Water Infrastructure Finance and Innovation Act of 2014 (Public Law 113-121), as amended.

§ 386.3 Limitations on assistance

(a) The total amount of credit assistance offered to any project under this part shall not exceed 49% of the reasonably anticipated eligible project costs, or, if the secured loan does not receive an

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investment grade rating, the total amount of credit assistance shall not exceed the amount of the senior project obligations of the project (33 U.S.C. 3908(b)(2)(B)).

(b) Notwithstanding paragraph (a) of this section, the Secretary may offer credit assistance in excess of 49% of the reasonably 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, per 33 U.S.C. 3912(d).

(1) Use of the authority to offer credit assistance in excess of 49% of the anticipated eligible project costs shall be considered on a case by case basis.

(2) In the event this authority is used, all other criteria and requirements described in this part must be met and adhered to.

(c) For each project receiving credit assistance, total Federal assistance may not exceed 80% of the total project costs, except for 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%, and in accordance with 85 FR 39189.

(d) Proceeds from the credit assistance shall not be utilized to provide cash contributions to the Corps for project related costs, except for such fees as allowed by 33 U.S.C. 3908(b)(7), limited to the Application, Transaction Processing, and Servicing fees as described below.

(e) Costs incurred, and the value of any integral in-kind contributions made, before receipt of credit assistance may be considered in calculating eligible project costs only upon approval of the Secretary. Such costs and integral in-kind contributions must be directly related to the development or execution of the project and must be eligible project costs as defined in § 386.2. In addition, such costs, excluding the value of any integral in-kind contributions, are payable from the proceeds of the Federal

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credit instrument and shall be considered incurred costs for purposes of paragraph (h) of this section.

Capitalized interest on the Federal credit instrument is not eligible for calculating eligible project costs.

(f) No costs financed internally or with interim funding may be refinanced under this part later than a year following substantial completion of the project.

(g) The Secretary 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.

(h) The Secretary 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 invoices or other documentation acceptable to the Secretary.

(i) 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 Federal credit instrument, per U.S.C 3908(b)(4).

(j) 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 Secretary and identified in the credit agreement, or if the useful life of the project, as determined by the Secretary, is less than 35 years, the useful life of 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

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maturity date of the Federal credit instrument, the Secretary will consider the useful economic life of the asset(s) being financed.

(k) 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 borrower of the project (33 U.S.C. 3908(b)(6)).

(l) The Corps will establish a repayment schedule for a secured loan or loan guarantee based on the projected cash flow from project revenues and other repayment sources. Scheduled loan or loan guarantee repayments of principal and interest on a secured loan or loan guarantee will commence not later than 5 years after the projected date of substantial completion of the project at the time of execution of the Loan Agreement or Loan Guarantee Agreement, as determined by the Secretary 33 U.S.C. 3908(c)(A); however, scheduled loan or loan guarantee repayments of principal and 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. The final maturity of the credit agreement shall be in no instance later than 35 years after the projected date of substantial completion of the project at the time of execution of the Loan Agreement or Loan Guarantee Agreement.

§ 386.4 Application process

(a) Each fiscal year for which budget authority is made available by Congress, the Corps shall publish a solicitation to announce the availability of credit assistance. It will specify how to electronically submit a preliminary application, the estimated amount of funding available to support Federal credit instruments, contact name(s), and other details for submissions and funding approvals.

(b) Prospective borrowers seeking credit assistance under this part will be required to follow an application process requiring submission of the preliminary application as designated in the solicitation to announce the availability of credit assistance. In addition, the extent to which the project financing plan includes any other form of Federal assistance (including grants), in addition to WIFIA credit assistance, will be required to be provided in the application.

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(c) Following approval of the term sheet, and/or negotiation of satisfactory terms and conditions of the Federal credit instrument, the prospective borrower will proceed to closing, as described in section 386.13.

§ 386.5 Federal requirements

All projects receiving credit assistance under this part shall comply, where applicable, 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;
- (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.

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(b) Economic and miscellaneous authorities:

(1) Debarment and Suspension, Executive Order 12549, 51 FR 6370, February 21, 1986;

(2) New Restrictions on Lobbying, 31 U.S.C. 1352;

(3) 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

(4) 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 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;

(4) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.; and

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

§ 386.6 Federal flood risk management standard

(a) In making WIFIA funding decisions under this rule, the Corps will follow the requirements of Executive Order (E.O.) 11988 and the Engineering Regulation (ER) for Implementation of E.O. 11988 on Floodplain Management. Applicants shall submit information regarding the project that is sufficient for the Corps to determine that the project is in compliance with the requirements of this Executive Order and ER.

(b) 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 E.O. 11988.

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(c) All projects under this rule are considered Federal actions under E.O. 11988 and thus, project applicants shall determine whether the proposed project will occur in the floodplain. If the project is located within the floodplain, the applicant must determine whether the action is critical or not and what floodplain standard to follow. Further guidance on implementation of E.O. 11988 can be found in the Corps ER 1165-2-26 (30 March 1984).

§ 386.7 American iron and steel

(a) All projects receiving credit assistance under this part for construction, alteration, maintenance, or repair of a project shall use only iron and steel products produced in the United States, unless waiver of this requirement is granted by an official authorized to do so.

(b) Consistent with 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 that does not become part of the project is not an “iron and steel product” for the purpose of this section.

§ 386.8 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.

§ 386.9 Investment-grade ratings

(a) At the time a prospective borrower submits an application, the Corps shall require a preliminary rating opinion letter. The 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, which may include, or be limited to, the Federal credit instrument to achieve an investment-grade rating, and address the rating of obligations similar to

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those proposed for the Federal credit instrument when the Federal credit instrument is not a senior debt obligation. This requirement may be met, on a case-by-case basis, by accepting a recent credit rating of obligations that have a lien on the revenues pledged for repayment. This rating should be based on an unenhanced analysis of the underlying pledged source of repayment and not give any credit to any prospective loan guarantee provided by the U.S. Government.

(b) Consistent with 33 U.S.C. 3907(a)(D)(ii), the full funding of a Federal credit instrument shall be contingent on the assignment of investment-grade ratings by NRSROs to all project obligations that have a lien on the pledged security senior to that of the Federal credit instrument on the pledged security, or (ii) in the event that the Federal credit instrument is (1) a senior debt obligation, (2) pari passu with the senior project obligations, or (3) a general obligation of the prospective borrower, to the Federal credit instrument. The applicant must provide at least one final rating opinion letter which provides a credit rating on the direct loan or the unenhanced Federal credit instrument. This rating should be based on an unenhanced analysis of the underlying pledged source of repayment and not give any credit to the loan or loan guarantee provided by the U.S. Government.

(c) Neither the preliminary rating opinion letter nor the final ratings should reflect the effect of bond insurance, unless that insurance provides credit enhancement that secures WIFIA obligation.

§ 386.10 Threshold criteria

(a) To be eligible to receive Federal credit assistance under this part, a project shall meet the following threshold criteria:

(1) The project and prospective borrower shall be creditworthy.

(2) A project shall have eligible project costs that are reasonably anticipated to equal or exceed \$20 million.

(3) A Federal credit instrument (a) 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

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the project; (b) shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and (c) may have a lien on revenues subject to any lien securing project obligations.

(4) 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.

(5) The prospective borrower shall have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life. If the borrower is a State infrastructure financing authority, it shall have ensured and will ensure that its borrowers have a plan for the eligible projects they are undertaking that identifies adequate revenues to operate, maintain and repair such projects during the useful life of such projects. This requirement may be met through the development of a written plan or a financial model.

(b) With respect to paragraph (a)(3) of this section, the Secretary 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 Secretary shall not accept a pledge of Federal funds, regardless of source, as security for the Federal credit instrument.

(c) 33 U.S.C. 3907(c) provides that nothing in that section (which includes eligibility requirements and selection criteria for projects and entities receiving WIFIA assistance) is intended to supersede the applicability of other requirements of Federal law, including regulations.

§ 386.11 Selection criteria

The following twelve 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 benefits, such as—

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- (i) The reduction of flood risk;
 - (ii) The improvement of water quality and quantity, including aquifer recharge;
 - (iii) The protection of drinking water, including source water protection;
 - (iv) The support of domestic and international commerce; and
 - (v) The restoration of degraded aquatic ecosystem structures.
- (2) The extent to which the project financing plan includes public or private financing, in addition to WIFIA credit assistance.
- (3) The likelihood that WIFIA credit assistance would enable the project to proceed at an earlier date than the project would otherwise be able or likely to proceed.
- (4) The extent to which the project uses new or innovative approaches.
- (5) The amount of budget authority required to fund the WIFIA Federal credit instrument.
- (6) The extent to which the project—
- (i) Protects against an extreme weather event, such as a flood or hurricane; or
 - (ii) Helps maintain or protect the environment.
- (7) The extent to which a project serves regions with significant clean energy exploration development, or production areas.
- (8) The extent to which a project serves regions with significant water resource challenges, including the need to address—
- (i) Water quality concerns in areas of regional, national, or international significance;
 - (ii) Water quantity concerns related to groundwater, surface water, or other water sources;
 - (iii) Significant flood risk;
 - (iv) Water resource challenges identified in existing regional, State, or multistate agreements; or
 - (v) Water resources with exceptional recreational value or ecological assistance.

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(9) The extent to which the project addresses identified municipal, State, or regional priorities.

(10) 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 not later than 90 days after the date on which a Federal credit instrument is obligated for the project under WIFIA.

(11) The extent to which WIFIA credit assistance reduces the overall Federal contributions to the project.

(12) The extent to which the project serves economically disadvantaged communities and spurs economic opportunity for, and minimally adversely impacts, economically disadvantaged communities and their populations.

§ 386.12 Term sheets and approvals

(a) The Corps, after review and evaluation of an application, and all other required documents submitted by a prospective borrower, may offer to such prospective borrower a written term sheet and/or a credit agreement, including detailed terms and conditions that must be met.

(b) The issuance of a term sheet, upon execution by the Secretary, does not constitute a commitment by the Secretary to enter into the loan agreement or loan guarantee agreement. Execution of the loan agreement or loan guarantee agreement represents obligation by the Secretary.

§ 386.13 Closing on the Loan Agreement or Loan Guarantee Agreement

(a) Only a Loan Agreement or Loan Guarantee Agreement executed by the Secretary can obligate the Corps to issue a loan or loan guarantee. The Corps is not bound by oral representations. Each Loan Agreement or Loan Guarantee Agreement shall contain the following requirements and conditions, and shall not be executed until the Corps determines that the following requirements and conditions are satisfied:

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(1) 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 the Corps relating to the WIFIA program; however, proceeds of the Federal credit instrument may be used to pay for such administrative or other fees but may not be used to pay an “Optional Credit Subsidy Fee”.

(2) At closing, the Corps will ensure that the following requirements and conditions are or will be satisfied pursuant to the credit agreement or otherwise:

(i) The project qualifies as an eligible project under WIFIA;

(ii) The face value of the credit agreement is limited to no more than 49 percent of reasonably anticipated eligible project costs, or if credit assistance in excess of 49 percent has been approved, no more than the percentage of eligible project costs agreed upon, not to exceed 80 percent of total project costs;

(iii) 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;

(iv) The amount of the credit agreement, when combined with other funds, will be sufficient to carry out the project, including adequate contingency funds;

(v) The borrower is pledging collateral and/or providing a general obligation pledge, determined by the Corps to be necessary to secure the repayment of the credit agreement;

(vi) 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;

(vii) 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;

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(viii) 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, as allowed under State or local law;

(ix) The Corps or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;

(x) The Corps and the applicant agree as to the information that will be made available to the Corps and the information that will be made publicly available;

(xi) The applicant will file or 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;

(xii) 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;

(xiii) Loan proceeds provided under the agreement shall not be utilized by the applicant to provide cash contributions to the Corps for project related costs, except for such fees as allowed by 33 U.S.C. 3908(b)(7), limited to the Application, Transaction Processing, and Servicing fees as described below;

(xiv) Costs incurred with loan proceeds under the agreement shall not be eligible for reimbursement or for the transfer of credit toward the non-federal cost share of another Federally authorized project;

(xv) The credit agreement and related agreements contain such other terms and conditions as the Corps 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

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and other intercreditor arrangements as, in each case, the Corps deems reasonable and necessary to protect the interests of the United States; and

(3) The credit agreement must contain audit provisions which provide, in substance, as follows:

(i) 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

(ii) The Corps 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.

(4) OMB has reviewed and approved the Corps calculation of the Credit Subsidy Cost of the Loan or Loan Guarantee.

(b) The Corps will set a closing date. By the closing date, the prospective borrower must have satisfied all of the detailed terms and conditions required by the Corps and all other contractual, statutory, and regulatory requirements. In addition, the prospective borrower must have provided at least one final rating opinion letter which provides a credit rating on the final negotiated direct loan or loan guarantee agreement that does not take into account the full faith and credit of the United States of America. The prospective borrower must submit this final credit rating letter to the Corps prior to closing. If the prospective borrower has not satisfied all such terms and conditions by the closing date, the Secretary may set a new closing date or reject the application.

(c) The execution of a Loan Agreement or Loan Guarantee shall represent approval of the application for credit assistance and shall represent the legal obligation of budget authority.

§ 386.14 Reporting requirements

The borrower will provide annual audited financial statements, a public benefits report, and other reports to the Corps in the form and manner agreed upon in the credit agreement. These other reports

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may include, but are not limited to, an updated financial model and construction reports. The Corps may conduct periodic financial and compliance reviews or audits of the borrower and its project, as determined necessary by the Corps.

§ 386.15 Fees

(a) *Application Fee.* The Corps will require a non-refundable application fee for each project applying for credit assistance under the WIFIA program. The application fee will be due upon submission of the application. For public applicants with projects serving small communities or economically disadvantaged communities, the total application fee will be \$0. For all other applications, the total application fee will be \$25,000. The total application fee will be credited to the transaction processing fee required under paragraph (b) of this section.

(b) *Transaction processing fee.* Except as otherwise provided in paragraph (f) of this section, the Corps will require an additional transaction processing fee for projects selected to receive WIFIA assistance upon closing, or if the project does not proceed to closing, *e.g.*, if the application is withdrawn or denied. The proceeds of any such fees will be used to pay the remaining portion of the Corps' cost of providing credit assistance and the costs of conducting engineering reviews and retaining expert firms, including financial and legal services, to assist in the underwriting of the Federal Credit instrument.

(c) *Servicing fee.* The Corps will require borrowers to pay a servicing fee for each credit instrument approved for funding. Separate fees may apply for each type of credit instrument (*e.g.*, a secured loan with a single disbursement, or a secured loan with multiple disbursements), depending upon the costs of servicing the credit instrument as determined by the Secretary. Such fees will be set at a level sufficient to enable the Corps to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments.

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(d) *Optional credit subsidy fee.* If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive assistance under WIFIA, the Corps and the approved applicant may agree upon a supplemental fee to be paid by or on behalf of the approved applicant at the time of execution of the term sheet to reduce the subsidy cost of that project. No such fee may be included among eligible project costs.

(e) *Reduced fees.* To the extent that Congress appropriates funds in any given year beyond those needed to cover internal administrative costs, the Corps may utilize such appropriated funds to reduce fees for a State or local governmental entity, agency, or instrumentality, a tribal government or consortium of tribal governments that would otherwise be charged under paragraph (c) of this section.

(f) *Enhanced monitoring fee.* The Corps may require payment in full by the borrower of additional fees, in an amount determined by the Corps, and of related fees and expenses of its independent consultants and outside counsel, to the extent that such fees and expenses are incurred by or on behalf of the Corps and to the extent such third parties are not paid directly by the borrower, in the event the borrower experiences difficulty relating to technical, financial, or legal matters or other events (*e.g.*, engineering failure or financial workouts) which require the Corps to incur time or expenses beyond standard monitoring. No such fee may be included among eligible project costs.

Dated:

Approved by: _____

Michael L. Connor

Assistant Secretary of the Army (Civil Works)