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Environmental Protection Agency
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The Association of Metropolitan Water Agencies (AMWA) appreciates the opportunity to comment on the interim final rule, “Credit Assistance for Water Infrastructure Projects,” which will facilitate implementation of the Water Infrastructure Finance and Innovation Act (WIFIA) program. As an organization of the nation’s largest publicly owned drinking water utilities, AMWA strongly supported Congress’ establishment of WIFIA in 2014 as well as subsequent improvements to the program that were enacted in 2015 and 2016. AMWA actively participated in the series of listening sessions convened by EPA in 2014 to help the agency collect initial feedback on the framework of WIFIA, and we also took part in the agency’s information sessions on program implementation that were held during the fall of 2016. With funding from Congress now in place, our water utility members across the country are eager for the WIFIA program to become operational and begin offering low-cost loan assistance this year.

We recognize and appreciate that this interim final rule closely reflects the WIFIA framework assembled by Congress through Public Law 113-121, and AMWA generally supports the framework of the rule as proposed by EPA. However, we are pleased to offer the following comments and suggestions on several specific components within the rule with the goal of ensuring WIFIA operates as smoothly and effectively as possible.

§ 35.10015: Application Process

The rule as proposed by EPA outlines a two-step application process for entities seeking WIFIA loan assistance. Any eligible entity interested in obtaining a WIFIA loan would complete and submit to EPA an initial letter of interest that provides an overview of the project details. EPA would then evaluate these letters of interest against several factors, including selection criteria discussed later in the rule. EPA would then invite certain interested parties to submit a formal WIFIA application. AMWA supports this process as described, which will encourage the greatest number of communities to explore financing options through WIFIA.

AMWA believes the rule as proposed could benefit from additional clarity regarding precisely which

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materials an entity must submit to EPA as part of the letter of interest. In particular, the proposed rule specifies that a letter of interest submission may be required to include “Notification of state infrastructure financing authority.” However, P.L. 113-121 includes no requirement that a potential WIFIA applicant itself must deliver any notification regarding a possible WIFIA application to any state agency; instead Section 5028(a)(6)(A) of the law directs EPA to notify “the applicable State infrastructure financing authority of the State in which the project is located that such application has been submitted.”

EPA’s preamble to the proposed rule explains EPA’s intent to require the potential applicant to acknowledge that *EPA* will notify the relevant state infrastructure financing authority of the receipt of the letter of interest. This approach appears much more reasonable and in line with congressional intent. AMWA therefore recommends that § 35.10015 be clarified to make explicitly clear that an interested entity must only include as part of its letter of interest an acknowledgement that EPA will notify the relevant state infrastructure financing authority of the letter of interest, as required by P.L. 113-121.

Additionally, AMWA recommends that EPA should consider sharing an initial, nonbinding draft term sheet with entities at the same time when the agency sends them a formal invitation to apply for a WIFIA loan. This would allow entities an opportunity to review the potential terms of a WIFIA loan and identify any significant issues prior to submitting an application and a \$100,000 application fee.

§ 35.10026: Federal Flood Risk Management Standard

This section addresses the Federal Flood Risk Management Standard, which applies to infrastructure projects that receive federal funding. The final rule should make clear how interpretation of the FFRMS would proceed if there were more than one federal agency involved in a project. P.L. 113-121 permits WIFIA funding to account for up to 49 percent of a project’s total cost, and further stipulates that up to 80 percent of total project costs may come from federal sources. This means that other federal programs may account for a substantial portion of the overall cost of a project supported by a WIFIA loan. Given this opportunity for additional federal funding, it is imperative that the WIFIA program include a plan to address potential conflicting standards between federal agencies and/or programs. AMWA also encourages the adoption of a uniform policy throughout the EPA with regard to compliance with the Federal Flood Risk Management Standard. At the very least, the policies of the State Revolving Funds and other EPA grants should align with WIFIA standards.

The WIFIA handbook has been released as a final document but draws its language from this draft rule, which is not final. AMWA recommends that, until this rule is finalized, the handbook be designated as “interim final.”

In addition, the interim final rule language related to critical actions should also be revised for clarity. The rule first lists the floodplain standards for non-critical and critical actions but then states in a subsequent paragraph that rules followed under WIFIA will be critical actions unless otherwise designated. The latter statement should be the first item addressed in the rule when critical and non-

critical actions are discussed. AMWA further recommends that the final rule include an option for grant recipients to appeal a critical action designation.

§ 35.10050: Use of Existing Financing Mechanisms

This section reflects Congress' goal, reflected in P.L. 113-121, of preserving the function of the Drinking Water and Clean Water State Revolving Fund programs by prohibiting the award of WIFIA funding to any project for which a state infrastructure financing authority "intends to commit funds ... in an amount that is equal to or greater than the amount requested under the [WIFIA] application," subject to specified deadlines and financing terms. AMWA believes the actual language of this section of the interim final rule needs a revision to be brought in line with EPA's described intent in the rule's preamble.

According to § 35.10050 of the interim final rule, EPA shall notify the relevant state infrastructure financing authority "within 30 days of receipt of an *application* for a project" (emphasis added). But the preamble to EPA's proposal suggests that this notification is intended to be carried out within 30 days of EPA's receipt of the initial *letter of interest*, in order to "provide additional time for SRF programs to communicate with the prospective borrower, for the prospective borrower to apply to the SRF program, for funding decisions to be made, and for a formal declaration of the intent to fund the project with a SRF loan to be made."

Because the terms "letter of interest" and "application" describe two separate and distinct components of the overall WIFIA application process as envisioned by EPA, they should not be used interchangeably in the rule text, and it is critical that the rule include the utmost clarity when referring to one or the other. Specifying in § 35.10050 that EPA must notify a state within 30 days of receiving an "application" could be interpreted to mean that the notice would only occur once a formal application (rather than an initial letter of interest) had been received. This would substantially delay the notice to state infrastructure financing authorities and runs counter to EPA's intent for this section as described in the preamble, which is to give states the earliest possible notice of an entity's plans to seek WIFIA funding. It would also waste EPA resources by leading agency staff to evaluate letters of interest from projects that may not be able to receive funds at the end of the process. Finally, it holds the potential to deny WIFIA funding to an interested party that had been invited by EPA to apply, had submitted a non-refundable application fee to the agency, and had devoted a significant amount of time and effort to working through the application process.

AMWA recommends that § 35.10050 be revised to make clear that EPA will notify a relevant state infrastructure financing authority within 30 days of receipt of a *letter of interest*, thereby triggering the start of the state's statutory 60 day review period at the earliest possible time. Because P.L. 113-121 does not require separate letter of interest and application submissions, we believe it is appropriate and reasonable to consider the initial letter of interest as proposed by EPA as the start of the overall application process envisioned by Congress. Therefore specifying that EPA will conduct the required

notice upon receipt of the letter of interest will actually ensure that EPA fulfills its statutory requirement to notify the state within 30 days of its first receipt of a statutory “application” for WIFIA funding.

In terms of what content should be included within the notice that EPA delivers to states, AMWA understands that P.L. 113-121 requires nothing more than a simple advisory that an application has been received from a particular community. While it would be useful for EPA to supplement this notice with some basic information about the project and the potential applicant, we believe an entity’s full letter of interest should not be forwarded to the state unless the entity has provided explicit authorization for EPA to do so. To administer this option, perhaps EPA could include a checkbox on the letter of interest materials where an entity may authorize EPA to share the complete letter of interest materials with the state.

Additionally, it is important for potential applicants to be kept aware of when EPA has carried out its notification to the state pursuant to this section. AMWA believes the simplest way to achieve this is for EPA to simultaneously send a copy of the notification that is issued to the state infrastructure financing authority to the potential applicant as well.

§ 35.10055: Selection Criteria

This section incorporates eleven selection criteria mandated by Congress through P.L. 113-121, which EPA must weigh against each other when evaluating potential WIFIA projects. In addition, it adds two additional selection criteria not found in the statute: the extent to which the project addresses water infrastructure repair, rehabilitation and replacement needs; and the extent to which the project serves economically distressed communities, or portions thereof. AMWA supports the inclusion of both additional selection criteria, as they each promote the WIFIA program’s overriding goal of helping communities obtain affordable financing for necessary water infrastructure improvements.

AMWA appreciates that EPA has proposed expanding upon the selection criteria mandated by Congress to recognize the needs of water and wastewater systems in building infrastructure resilience to the impacts of extreme weather and climate change. In particular, we support the expanded Selection Criteria #4, which prioritizes projects that help utilities adapt to climate change as well as extreme weather events. We also support the addition of public health protection objectives to Selection Criteria #5, thus expanding these criteria beyond considering only the project’s value in protecting the environment. As drinking water infrastructure is a means to advance public health goals, it is important for the selection criteria to recognize this alongside environmental protection objectives.

AMWA understands that EPA intends to assign specific weights to the various selection criteria upon release of each WIFIA Notice of Funding Availability, and that the agency may adjust the weighting in subsequent releases in order to prioritize different types of projects during different rounds of project solicitations. While AMWA does not object to this approach in principle, and believes that certain mandated selection criteria are worthy of greater weighting than others, we urge EPA to refrain from over-weighting particular criteria to the extent that it would become difficult or impossible for a

“traditional” water infrastructure project to reasonably compete for loan assistance in response to a given NOFA.

For example, the preamble to the interim final rule explains that EPA’s initial NOFA will give greatest weight to projects that address extreme weather and climate change adaptation and resiliency (Selection Criteria #4); promote enhanced energy efficiency in treatment works and public water systems (Selection Criteria #3); incorporate green infrastructure (also Selection Criteria #3); and enable the repair, rehabilitation, and replacement of water infrastructure (Selection Criteria #12). While this NOFA will clearly favor climate response and other “green” projects, the inclusion of Selection Criteria #12 will aid the competitiveness of water and wastewater projects that are appropriate for WIFIA assistance but which may not have a direct climate adaptation or green infrastructure component. Going forward, as EPA releases additional NOFAs for subsequent rounds of WIFIA funding, AMWA believes that Selection Criteria #12 (regarding the repair, rehabilitation, and replacement of water infrastructure) should always be included as one of each solicitation’s highest-weighted priorities, so that water infrastructure projects without unique green components will not be put at a blanket disadvantage during any particular round of WIFIA project solicitations.

§ 35.10075: Reporting Requirements

This section proposes requiring all recipients of WIFIA loans to submit an annual project performance report and audited financial statements to EPA within 180 days of the end of the fiscal year within which the recipient’s obligation to the federal government remains in effect. AMWA agrees with the importance of conducting this oversight, but believes the 180-day deadline could impose significant burdens on some recipients, and could deter some entities from pursuing WIFIA loans. AMWA recommends allowing recipients at least 240 days after the end of their fiscal year to fulfill these reporting requirements.

Conclusion

Again, AMWA appreciates the opportunity to comment on the interim final rule, “Credit Assistance for Water Infrastructure Projects.” AMWA will also submit separate comments on the proposed “Fees for Water Infrastructure Project Applications Under WIFIA.”

We hope you find these comments constructive, and we look forward to the successful implementation of WIFIA as soon as possible.

Sincerely,



Diane VanDe Hei
Chief Executive Officer