

# Addressing Collusion Risk in Federally Financed Cost-Shares

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## The Issue

- Locally funded cost sharing in major federally involved water infrastructure projects reduces federal outlays while improving both local and national outcomes. The practice is a ‘win-win’ that should be encouraged by policymakers.
- But when a locally funded cost share is federally financed, there is a risk that an otherwise qualified applicant to a federal loan program and the federal agency involved in the project may collude in ways that are not anticipated by current law and regulation.
- The WIFIA Loan Program explicitly provides eligibility for non-federal cost-shares (33 U.S.C. 3908(b)). However, the eligibility requirement of a non-federal source of repayment is, while necessary, not sufficient.
- The possibility of collusion may also invalidate FCRA treatment of WIFIA loans for cost shares in federally involved projects. While FCRA law is silent on the matter, collusion would be inconsistent with the fundamental principles outlined in Chapter 5 of the 1967 Budget Commission Report. The 2020 WIFIA FCRA Criteria partly reflected this concern.

## The Solution

- The WIFIA statutory framework should be amended to expand the eligibility requirements of 33 U.S.C. 3908(b) by (1) adding a definition of a ‘Non-Federal Borrower’ that requires an applicant to demonstrate that the planned cost share is in its own interest and was freely decided on, and (2) limiting eligibility under of 33 U.S.C. 3908(b) to Non-Federal Borrowers, as determined by the Program. An amendment bill is also an opportunity to include other economic amendments that will improve WIFIA. *See Attachment 1*
- An amended WIFIA statutory framework should prompt a conforming revision of the 2020 WIFIA FCRA Criteria. Such a revision would also be an opportunity for the WIFIA Program, OMB and CBO to work together to add procedural detail on collusion risk and other important oversight matters. A Congressional Directive may be useful to this process. *See Attachment 2*
- A WIFIA FCRA Criteria revision can start by modifying existing language to reflect the amendment and associated 1967 Budget Report principles. *See Attachment 3*

# Attachment 1: Improving WIFIA for Dam Safety and Flood Control Infrastructure Act

## A BILL

To amend the Water Infrastructure Finance and Innovation Act of 2014 with respect to improving oversight and effectiveness of certain amounts of financial assistance to dam safety and flood control infrastructure projects, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Improving WIFIA for Dam Safety and Flood Control Infrastructure Act”.

### SEC. 2. CLARIFICATION OF NON-FEDERAL BORROWER DEFINITION.

Section 5022 of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3901) is amended by inserting the following:

#### “(16) Non-Federal borrower

The term “non-Federal borrower” means an obligor of a secured loan under section 3908 of this title that is:

- (A) not a Federal entity, agency, or instrumentality;
- (B) obligated to repay the principal and interest of the secured loan exclusively from non-Federal sources, and such sources are explicitly identified in rating opinion letters under section 3907 (a)(1)(D) of this title;
- (C) able to demonstrate that the measurable value it expects to receive from the non-Federal share of the project paid for by the proceeds of the secured loan is commensurate with the secured loan repayment obligation associated with that non-Federal share;
- (D) able to demonstrate that the decision to enter into an obligation to repay the secured loan was made (i) on an arms-length basis consistent with its normal procedures for financing major capital expenditures, (ii) independently of any Federal participant in the project, and (iii) with respect solely to the value it expects to receive from the project; and
- (E) deemed to be consistent with the meaning of a “non-Federal borrower” as that term is used in the definition of a “direct loan” in Section 502 (1) of the Federal Credit Reform Act of 1990 (2 USC 661a).”

### **SEC. 3. CLARIFICATION OF NON-FEDERAL SHARE ELIGIBILITY**

Section 5029(b) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3908(b)) is amended by striking paragraph (8) and inserting the following:

#### **“(8) Non-Federal share**

The proceeds of a secured loan under this section may be used to pay any non-Federal share of project costs required if the Administrator or the Secretary, as applicable, determines that the obligor of the secured loan is a non-Federal borrower.”

### **SEC. 4. MATURITY DATE FOR DAM SAFETY AND FLOOD CONTROL INFRASTRUCTURE PROJECTS WITH A USEFUL LIFE OF MORE THAN 35 YEARS.**

Section 5029(b)(5) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3908(b)(5)) is amended—

(1) in subparagraph (B), by striking “The final maturity date” and inserting “Notwithstanding subparagraphs (A) and (B), the final maturity date”;

(2) by redesignating subparagraph (B) as subparagraph (C); and

(3) by inserting after subparagraph (A) the following:

“Notwithstanding subparagraph (A), for a dam safety and flood control infrastructure projects with a useful life of more than 35 years (as determined by the Secretary or the Administrator, as applicable) the final maturity date of a secured loan under this section shall be not later than the earlier of –

“(i) the date that is 55 years after the date of substantial completion of the relevant project (as determined by the Secretary or the Administrator, as applicable); and

“(ii) if the useful life of the project is less than 55 years, the useful life of the project.”

## **Attachment 2: Congressional Directive to Revise WIFIA FCRA Criteria**

### **WATER INFRASTRUCTURE FINANCE AND INNOVATION PROGRAM ACCOUNT**

*...Provided further,* That the Administrator, together with the Secretary of the Army and the Director of the Office of Management and Budget, shall jointly review and modify the criteria published in the Federal Register on June 30, 2020 (85 FR 39189) pursuant to the fourth proviso under the heading “Water Infrastructure Finance and Innovation Program Account” in division D of the Further Consolidated Appropriations Act, 2020 (Public Law 116–94) to conform with amendments to the Water Infrastructure Finance and Innovation Act of 2014 enacted by this Act; and the Administrator, the Secretary and the Director shall, not later than [120] days after the date of enactment of this Act, publish such modified criteria in the Federal Register.

*...Provided further,* That, in reviewing and modifying the criteria, the Administrator, the Secretary, and the Director, shall consult with the Director of the Congressional Budget Office.

*...Provided further,* That the requirements of section 553 of title 5, United States Code, shall apply to the development and publication of such criteria.

## **Attachment 3: Revised Water Infrastructure Finance and Innovation Act Program (WIFIA) Criteria Pursuant to the Further Consolidated Appropriations Act, 2020**

**AGENCY:** Environmental Protection Agency (EPA), Office of Management and Budget (OMB), and Department of the Treasury (Treasury).

**ACTION:** Notice.

### **SUMMARY:**

The U.S. Environmental Protection Agency (EPA), the Office of Management and Budget (OMB), and the Department of the Treasury (Treasury) are providing potential applicants to the Water Infrastructure Finance and Innovation Act (WIFIA) Program with information about **revised** budgetary screening criteria that will be applied to projects in accordance with the Further Consolidated Appropriations Act, 2020. **The criteria are revised from, and replace, those previously published in the Federal Register on June 30, 2020 (85 FR 39189).**

**DATES:** The effective date of the contents of this notice is **[September 30, 2025]**.

**FOR FURTHER INFORMATION CONTACT:** **[Updated contact list]**

### **SUPPLEMENTARY INFORMATION:**

#### **I. Statutory Requirement**

The following **revised** criteria are published pursuant to the Water Infrastructure Finance and Innovation Program Account (WIFIA Program) heading in the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94). Proviso 4 under the WIFIA Program heading requires the publication of criteria that “limit Federal participation in a project consistent with the requirements for the budgetary treatment provided for in section 504 of the Federal Credit Reform Act of 1990 [(FCRA; 2 U.S.C. 661c)] and based on the recommendations contained in the 1967 Report of the President's Commission on Budget Concepts [(1967 Report)].” Proviso 7 under the WIFIA Program heading requires “the use of direct loans or loan guarantee authority under [the WIFIA Program] heading for direct loans or commitments to guarantee loans for any project shall be in accordance with the criteria published pursuant to this Act.”

## II. Background

The Federal budget is presented on a cash basis. This is driven by many considerations, among which is a need to reflect the statutory requirement that the Federal Government records full cost at the time an obligation is entered into, as required by 31 U.S.C. 1501, known as the recording statute. If an activity is determined to be Federal in nature, then, consistent with 31 U.S.C. 1501, Federal obligations are recorded in the budget at the full value of the activity. The question of whether or not to include a project or asset in the budget hinges on whether the project or asset in question is Federal or non-Federal in nature. **A WIFIA loan is clearly a Federal activity and as such is duly recorded in the Federal budget. However, when a WIFIA loan is made to a non-Federal borrower to finance non-Federal share of project costs (as permitted, if the loan is repayable from non-Federal funds, by 33 U.S.C. 3908(b)(8))<sup>1</sup>, correct budget recording requires further clarification with respect to the nature of the WIFIA loan's outgoing and incoming cash flows, as described below.**

The most significant statutory exception to the cash basis of the Federal budget is section 504 of FCRA, 2 U.S.C. 661c, which requires the budgetary treatment of direct loans and loan guarantees provided by the Government to a non-Federal borrower to be recorded using net present value. Regardless of the identity of the borrower **or the source of loan repayment, however**, requiring that a WIFIA loan be recorded in the budget on a net present value basis would be inconsistent with FCRA law and the principles **outlined in Chapters 3 and 5 of the 1967 Report if the repayment of the WIFIA loan was "within the Federal sector"**.<sup>2</sup> WIFIA loan repayment will fall within the Federal sector if the Federal government exercises its sovereign power to require the non-Federal borrower to enter into and repay a WIFIA loan from the borrower's own resources.<sup>3</sup> While this is generally true for all Federal loans, it is a specific concern for WIFIA loans intended to finance non-Federal cost-shares in projects with significant Federal involvement.<sup>4</sup> Therefore, to "limit Federal participation in a project consistent with the requirements for the budgetary treatment provided for in section 504 of [FCRA] and based on the recommendations contained in the [1967 Report]," as required by Proviso 4 under the WIFIA Program heading in Public Law 116-94, only non-Federal **borrowers who can demonstrate that their decision to enter into and repay a WIFIA loan was made independently and not as the result of the exercise of Federal sovereign power** are eligible for WIFIA loans and loan guarantees.

## III. Federal Asset Screening Criteria and Process

The following **revised** criteria are published pursuant to Proviso 4 under the WIFIA Program heading in Public Law 116-94 and apply only to loans and loan guarantees issued under the Water Infrastructure Finance and Innovation Act of 2014 (Public Law 113-121, title V, subtitle C (33 U.S.C. Chapter 52)). The **revised** criteria and procedures identified in this notice **will** apply to any Notices of Funding Availability (NOFA) published by the WIFIA Program prior to the publication of this notice, **but not to those published prior to June 30, 2020**. In order to comply with Proviso 7 under the WIFIA heading in Public Law 116-94, a proposed WIFIA-financed activity will be evaluated using **the two criteria and sixteen screening questions** listed below as a guide. The **two** criteria will be considered cumulatively and

individually when evaluating project eligibility. In addition to the criteria listed below, the U.S. Environmental Protection Agency (EPA) and the Office of Management and Budget (OMB) will consider any additional information that may bear on the Federal Government's current and future expected involvement in a WIFIA project. Finally, as required by the Proviso 10 of Public Law 116-94, none of the direct loans or loan guarantee authority made available under Public Law 116-94 shall be available for any project unless the Administrator and the Director of OMB have certified in advance in writing that the direct loan or loan guarantee, as applicable, and the project comply with the **revised** criteria developed and published pursuant to Public Law 116-94.

EPA will continue to implement existing elements of the WIFIA program consistent with **standard** practice **and statutory eligibility**, supplemented by the criteria and procedures provided in this notice. EPA will publish a NOFA that will include the Administrator's targeted priorities for each new round of WIFIA financing and will invite prospective borrowers to submit letters of interest to EPA. EPA will review those letters for statutory eligibility and, in coordination with OMB, apply the **revised** screening criteria and procedures provided in the NOFA and this notice to determine funding eligibility before formally inviting prospective applicants to apply for WIFIA funding.

Prospective projects will be evaluated by EPA based on the selection process articulated in each NOFA. EPA will then engage with OMB to review how the **revised** criteria in this notice were applied to the potential projects. EPA and OMB must reach preliminary agreement that each of **the applicants is a non-Federal borrower** before EPA formally invites such projects to apply for WIFIA financing.

EPA will also inform OMB of any new information or changes to this preliminary assessment of the screening questions and **the two** criteria listed below for individual **loan applications** that are progressing through the full WIFIA evaluation process following receipt of complete project financing applications and will terminate the process if projects are determined not to comply with FCRA based on that new information.

EPA and OMB encourage prospective WIFIA Program borrowers to evaluate the screening questions and **revised** criteria in this notice and provide sufficient information in letters of interest and formal applications that address any federal asset questions or concerns, including the type of project seeking WIFIA funding under 33 U.S.C. 3907(b) and whether or not the loan will satisfy EPA's template term sheet and standard loan agreement provisions.

#### **IV. The Revised Criteria**

**(A) The applicant is able to demonstrate that the measurable value it expects to receive from the non-Federal share of the project paid for by the proceeds of the secured loan is commensurate with the secured loan repayment obligation associated with that non-Federal share, and;**

(B) The applicant is able to demonstrate that the decision to enter into an obligation to repay the secured loan was made (i) on an arms-length basis consistent with its normal procedures for financing major capital expenditures, (ii) independently of any Federal participant in the project, and (iii) with respect solely to the value it expects to receive from the project.

## V. Non-Federal Borrower Screening Questions

### Structure of the Project

1. To what degree does the Federal Government comprise the WIFIA project's user base? If the Federal Government compromises a sole or substantial part of the project's user base, explain how this is consistent with Criteria (A) above.

2. Does the repayment of the loan, or the decision to enter into it, involve the use of the Federal Government's sovereign power (excluding, e.g., National Environmental Policy Act (NEPA) review)?

3. Does the WIFIA project require the construction or acquisition of an asset for the special purpose of or use by the Federal Government? If so, explain how this is consistent with Criteria (A) above.

4. To what degree does the Federal Government direct the contracting process for the WIFIA project? If the degree is significant, explain how this is consistent with Criteria (A) above (e.g., how the expected value of the non-Federal share of the project to the non-Federal borrower is contractually ensured).

5. Is there a specific authority provided to the WIFIA project by an Act of Congress without which the WIFIA project could not proceed? If so, explain how no requirement of such Act will be inconsistent with Criteria (B) above.

6. What is the Federal Government's role in the governance of the project? In other words, what is the role of the Federal Government in selecting management or overseeing the project (including, but not limited to, approval of contract scope and step-in rights, or as a member of a board of directors), both during construction as well as in terms of operations and ongoing maintenance? As in Question 4 above, the context is consistency with Criteria (A) above (e.g., how the expected value of the non-Federal share of the project to the non-Federal borrower is contractually ensured).

7. Is this project part of a larger Federally authorized project (not limited to but consistent with the initial screening criteria) and if so, does the project under consideration for a loan or loan guarantee constitute a useful segment—either a planning segment or a useful asset—as defined in the Capital

Programming Guide (supplement to OMB Circular A-11)? **If so, explain in the context of Criteria (A) above.**

### **Financing of the Project**

8. Does the Federal Government **directly** provide resources for the WIFIA Federal loan repayment?

9. Will the WIFIA **loan** meet the non-subordination requirement provided in 33 U.S.C. 3908(b)(6)?

10. Does the **credit quality of the WIFIA loan** depend on the Federal Government making other in-kind contributions (land, real estate, right-of-way, etc.)? **How are these contractually ensured?**

11. Is **taxable or tax-exempt** non-Federal financing available for the **non-Federal share that the WIFIA loan will finance**? **If tax-exempt financing is not available due to IRC § 149 (b), explain this in the context of Question 8 above.**

12. If the project is required to obtain an investment-grade rating opinion letter, per 33 U.S.C. 3901(4) and 3908(a)(3), to what extent does the rating opinion letter consider **direct** Federal **credit** support of **the WIFIA loan** as a credit enhancement?

### **Project Liabilities**

13. To what degree will the Federal Government bear **project liabilities unrelated to the WIFIA loan** not otherwise **duly authorized and** appropriated by Congress? **Is WIFIA loan repayment contingent on the repayment of unauthorized Federal liabilities?**

14. Is the **default** risk for the Federal Government low relative to private sector **debt sources with respect to counter-party risk and funding commitments in a WIFIA loan financing of the non-Federal share of the project?**

15. To what degree does the Federal Government own or is the Federal Government contractually obligated to complete, maintain, or repair damage to the WIFIA project? **If such factors are present, explain in the context of consistency with Criteria (A)**

16. Is the Federal Government liable for unforeseen costs (e.g., environmental impacts, damage from natural disasters, or cost overruns) either before, during, or after completion of the WIFIA project? **Is WIFIA loan repayment contingent on performance of such contractual liabilities?**

## VI. Certification

The Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94) requires that the Administrator of EPA, the Secretary of the Treasury, and the Director of OMB certify that **revised** criteria developed for project eligibility for direct loans and loan guarantees authorized by the Water Infrastructure Finance and Innovation Act of 2014 are compliant with the first paragraph found under the “Water Infrastructure Financing and Innovation Program Account” heading in the Further Consolidated Appropriations Act, 2020. The Administrator, the Secretary, and the Director certify that the criteria developed meet the aforementioned requirement.

[Signatures]

## Footnotes

1. WIFIA authorizes loans to support local cost-sharing requirements. See 33 U.S.C. 3908(b)(8) (“The proceeds of a secured loan under this section may be used to pay any non-Federal share of project costs required if the loan is repayable from non-Federal funds.”).
2. [The 1967 Report of the President's Commission on Budget Concepts, Chapter 3 ‘Coverage of the Budget’](#)
3. [Ibid, Chapter 5 ‘Federal Credit Programs’](#)
4. [See 2017 Congressional Budget Office Report, ‘How CBO Determines Whether to Classify an Activity as Governmental When Estimating Its Budgetary Effects’](#)