



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[EPA-HQ-OW-2016-0568; FRL-9964-19-OW]

RIN 2040-AF64

Fees for Water Infrastructure Project Applications under WIFIA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this rule EPA establishes fees related to the provision of federal credit assistance under Subtitle C of the Water Resources Reform and Development Act of 2014 (WRRDA), which is referred to as the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA). WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects and to charge fees to recover all or a portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal services, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments.

DATES: *Effective date:* **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Jordan Dorfman, Water Infrastructure Division, Office of Wastewater Management, Mail Code 4201C, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460; telephone number: (202)564-0614; email address: dorfman.jordan@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Does this Action Apply to Me?

This action only applies to entities seeking credit assistance under the WIFIA program for the development and construction of a water infrastructure project. EPA has published an interim final rule to implement this new credit assistance program. A list of eligible entities and eligible projects can be found in the Interim Final Rule entitled, “Credit Assistance for Water Infrastructure Projects.” This interim final rule is available at Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>.

B. What Action is the Agency Taking?

EPA is establishing fees associated with the provision of federal credit assistance under the WIFIA program. WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects. EPA has published an Interim Final Rule entitled, “Credit Assistance for Water Infrastructure Projects” to establish procedures for the implementation of the WIFIA Program. As specified under 33 U.S.C. 3908(b)(7), 3909(b), and 3909(c)(3), Congress in WIFIA authorizes EPA to charge fees to recover all or a portion of the Agency’s cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal services, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments. EPA is establishing an application fee, credit processing fee, servicing fee, optional supplemental fee, and fee for extraordinary expenses to cover these costs to the extent not covered by congressional appropriations.

C. What is the Agency's Authority for Taking this Action?

This final rule is issued under the authority of 33 U.S.C. 3908(b)(7), 3909(b), 3909(c)(3), and 3911.

D. What Fees are Being Established?

In the Interim Final Rule entitled, “Credit Assistance for Water Infrastructure Projects,” EPA established an application process for WIFIA credit assistance that is divided into two steps. The first step requires the submission of a letter of interest. No fees are established for the letter of interest step. Projects selected to continue in the application process will then be invited to submit an application at which time the application fee must be paid. For this second step, EPA will only select those projects that it expects might reasonably proceed to closing. For more information on this process, please refer to the WIFIA Implementation Rule at 40 CFR part 35 subpart Q or in Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>. Consequently, EPA anticipates that the fees established in this rule will apply only to projects EPA expects are likely to proceed to closing. Detailed application information is contained in a program guide developed by EPA and posted on the WIFIA website at: <http://www.epa.gov/wifia>. This two-step process limits the time, cost, and effort required to be expended by prospective borrowers prior to having a reasonable expectation of funding by WIFIA.

As described in greater detail below, the types of fees EPA is establishing are consistent with other Federal Credit programs. In particular, the WIFIA program was designed by Congress to resemble the Transportation Infrastructure Finance and Innovation Act program, commonly known as TIFIA. Accordingly, to the extent practicable, the WIFIA program has been crafted by EPA to be implemented in a similar manner as the Department of Transportation implements the TIFIA program. The rationale for establishing these fees is to cover EPA’s costs of administering the program to the extent these costs are not covered by congressional appropriations. To effectively administer the program, EPA will incur both internal administrative costs (staffing,

program support contracts, and other costs) as well as the costs of retaining expert firms, including legal, engineering, and financial 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 fees as part of the loan. While not reflected in this rule, the ability to finance fees as part of a WIFIA loan is an option available to applicants. EPA will publish additional information or guidance, as necessary, on its website at: <http://www.epa.gov/wifia>.

Application Fee

EPA will require a non-refundable application fee for each project that is invited to submit an application (second step following submission of letter of interest) for credit assistance under WIFIA. The application fee will be due upon submission of the application. For fiscal year 2017, the application fee is \$25,000 for applications for projects serving small communities (population of not more than 25,000 people). For all other project applications, the application fee is \$100,000. These application fees represent an amount equal to 0.5 percent of the minimum threshold project cost (\$5 million for small communities and \$20 million for larger communities, 33 U.S.C. 3907(a)(2)), which EPA 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, and therefore costs incurred by EPA may be recovered. EPA 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 assistance, to help cover the agency's administrative costs in processing applications, and to ensure effective administration of the program. These fees will be required at the time of submission of the

application, and the application will not be reviewed without fee payment. Because EPA will only invite projects to submit an application and application fee if the project is reasonably expected to proceed to closing, no applicant would pay a fee without a reasonable expectation that the project could receive funding.

For fiscal years 2018 and beyond, EPA may need to adjust the amount of the application fee based on early program implementation experience. A change in the application fee will not change the total fees charged, only the initial fee which is credited to the final fee at closing, or in the event that the project does not proceed to closing, at withdrawal or denial of the application.

Credit Processing Fee

EPA will require a credit processing fee at the time of closing, or in the event that the project does not proceed to closing, e.g., if the application is withdrawn or denied, for projects selected to submit an application. The proceeds of any such fees will be used to pay the remaining portion of EPA's cost of providing credit assistance and the costs of retaining expert firms, including legal, engineering, and financial services, in the field of municipal and project finance to assist in the underwriting of the Federal credit instrument. The initial application fee described above will be credited to the credit processing fee. For example, if the total credit processing fee is \$400,000 and the applicant pays \$100,000 with the application, \$300,000 will be due at closing, or in the event that the project does not proceed to closing, e.g., if the application is withdrawn or denied. The total credit processing fee for each project will be set based on the costs incurred by EPA for that specific project. Due to the nature of credit processing, the amount is expected to vary among applicants. This variation is a reflection of the amount of time taken to process a loan, which may not directly correlate with the size of the loan. More complicated transactions with lengthy negotiations will have higher costs. EPA estimates these costs could be in the range

of approximately \$350,000 - \$700,000 per project, broken down as follows:

- Financial advisor: \$100,000 to \$250,000 per project;
- Law firm: \$200,000 to \$350,000 per project; and
- Engineering firm: \$50,000 to \$100,000 per project.

EPA may waive a portion of the fee charged to an applicant in the event that Congress appropriates resources adequate to pay for EPA's cost of administering the WIFIA program as well as additional funding to pay for loan processing. WIFIA currently provides that EPA may retain \$2.2 million annually from funds appropriated to the program to 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 Congress appropriates administrative funds in excess of those needed for EPA's internal administrative costs, EPA may use the remaining available administrative allowance (less any amount needed for future years' administration) to reduce fees. EPA will allocate additional administrative funds by reducing fees by an equal amount per loan for those projects that serve a population with a median household income that is 80 percent or less of the state median household income. If additional administrative funds remain, EPA will reduce fees by an equal amount per loan for those projects serving a population of not more than 25,000. If additional administrative funds still remain, EPA will reduce fees by an equal amount for each remaining loan.

Servicing Fee

EPA will charge an annual servicing fee during repayment of the loan. The fee will be dependent on the costs of servicing the credit instrument (e.g. collecting and processing loan

principal and interest payments) as determined by the Administrator. Such fees will be set at a level to enable the Agency 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. EPA expects such fees to range from \$12,000 to \$15,000 annually per loan.

Optional Supplemental Fee

EPA may charge a fee, with agreement of the applicant, to reduce the budget authority required to fund the credit instrument. Although EPA considers it unlikely that a scenario will arise under which it would assess such a fee, the Agency sees benefit in establishing the flexibility to allow an applicant to “buy down” the budget authority required for the credit instrument. This could allow an applicant to proceed to closing in the event that sufficient budget authority would not otherwise be available. Such a fee will only be charged upon agreement by an applicant.

Extraordinary Expenses Fee

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

III. Summary of Public Comments and EPA Responses

The Agency received comments from eight commenters on the proposed rule. The comments, including the Agency’s responses, are included in the docket for this rulemaking. Responses to the most significant comments are included in this section. This section addresses

comments regarding the rationale used to establish the application fee amount and the method by which EPA will reduce fees in the event additional sufficient resources are available for such a purpose.

A. Rationale for Establishing Application Fee

With respect to the establishment of the application fee, and the lower fee level set for projects serving small communities of under 25,000, one commenter suggested that EPA establish more than two levels for the application fee. The commenter stated that as proposed, the application fee for a community of 50,000 would be the same as for a large metropolitan area. The commenter also suggested an alternative to setting fee levels by population by basing the fee levels on project size.

EPA appreciates the commenters suggestions but will not adopt the suggestions. The application fee was established at \$100,000 in order to allow the Agency to begin the financial and legal analysis of the project while providing assurance that the applicant intends to proceed to closing, and therefore costs incurred by the Agency may be recovered. The reduced fee was established based on the statutory allowance for project serving communities of under 25,000 to apply for loans where total eligible costs are at least \$5 million, as opposed to the minimum of \$20 million required of all other applicants. The reduced application fee allows small communities with fewer resources to begin the application process. Creating a reduced application fee for such communities logically follows the statutory allowance for reduced project size for such communities. Setting application fee levels by project size does not correlate to the ability of an applicant to pay the application fee. Small communities with large projects would struggle to pay a much higher application fee, while large metropolitan areas that can easily pay the application fee might see a reduced fee.

Another commenter stated that in order to not discourage applications for projects serving low-income communities, WIFIA application fees should be waivable or greatly reduced for those projects that serve a population with a median household income that is at least 80 percent or less of the state median household income. The commenter proposes that economically stressed communities regardless of size be eligible for application fee waivers or substantial application fee reduction.

EPA appreciates the commenters proposal, but will not adopt the proposal. As previously stated, the application fee was established at \$100,000 in order to allow the Agency to begin the financial and legal analysis of the project while providing assurance that the applicant intends to proceed to closing, and therefore costs incurred by the Agency may be recovered. A reduction or waiver of the application fee would remove the incentive for communities to proceed to closing by eliminating the risk of losing the application fee. EPA expects fewer small community applicants entitled to the reduced fee than applicants that can show economic stress. If a significant number of applicants receive an application fee waiver or reduction, EPA will be unable to begin the financial and legal analysis required for each project applicant due to limited resources. As previously stated, if sufficient resources exist for EPA to reduce fees, such resources will be used to reduce the fees of applicants that serve a population with a median household income that is at least 80 percent or less of the state median household income.

B. Methodology to Reduce Fees in the Event Additional Sufficient Resources Are Available

In paragraph (f) of the final rule language, EPA has the authority to reduce the credit processing fee established under paragraph (c), to the extent that Congress appropriates funds in any given year beyond those sufficient to cover internal administrative costs. In the proposed rule, EPA proposed three alternative methods by which the Agency could allocate additional

administrative funds to reduce fees:

- By reducing fees by an equal amount per loan in the relevant year;
- By reducing fees by an equal amount per loan for those projects serving a population of not more than 25,000; or
- By reducing fees by an equal amount per loan for those projects that serve a population with a median household income that is 80 percent or less of the state median household income.

Alternatively, EPA could allocate such fee reductions through a combination of these three methods. EPA requested comment on each of these potential options or other potential approaches. EPA received three comments related to this request.

The first commenter suggested that a combination of the three methods should be used and that EPA should first reduce or eliminate credit processing fees charged to applicants for projects that primarily serve a population with a median household income of 80 percent or less of the state median household income. The commenter's rationale is that this approach will target fee relief toward communities that are likely facing some of the most significant water affordability challenges, and whose residents could most benefit from both low-cost financing and fee relief. The commenter suggested that any remaining funding available after eliminating credit processing fees in these low-income communities should be used to reduce the credit processing fees for all of that year's remaining applicants by a pro-rata percentage of the total credit processing fees paid by the applicant. Any forgiveness of credit processing fees should be calculated on the balance of these fees after the credit for payment of an application fee has been applied.

The second commenter suggested that EPA should first reduce the credit processing fee

for communities for whom the fees would impose the greatest financial hardship. The commenter stated that EPA should reduce applicant fees by an equal amount per loan for those projects that serve a population with a median household income that is 80 percent or less of the state median household income. Once fees have been reduced for hardship communities, any remaining funds should be used to reduce credit processing fees by an equal amount per loan for projects serving communities with populations of under 25,000.

The third commenter suggested that EPA reduce fees on a pro-rata share based on loan size.

EPA appreciates the comments received on this important issue and agrees with the first and second commenters that a combination of methods should be used to reduce the credit processing fees of applicants to the extent that Congress appropriates funds in any given year beyond those sufficient to cover internal administrative costs. The Agency agrees that the most important use of these additional funds is to reduce the impact of the fees on the neediest applicants. In order to reduce the impact of fees on those applicants most in need, EPA will reduce the credit processing fee, to the extent possible, by an equal amount per loan, on a dollar basis, for those projects that serve a population with a median household income that is 80 percent or less of the state median household income. If funds remain, EPA will then reduce fees by an equal amount per loan, on a dollar basis, for those projects serving a population of not more than 25,000. If funds still remain, EPA will reduce fees by an equal amount per loan, on a dollar basis, for all remaining loans. EPA cannot reduce fees as a percentage of the credit processing fee paid by an applicant because the total credit processing fee for each loan will not be known until loan closing.

EPA appreciates the third commenter's suggestion, but will not adopt the suggestion.

The credit processing fee is not determined by loan size. The estimated range of the credit processing fee is based on the complexity of the underlying transaction and the difficulty or length of time of negotiations. Therefore, between two applicants, one with a greater loan size may have a smaller fee. Providing greater relief to applicants charged a smaller fee, irrespective of need, does not align with the Agency's desire to provide relief to the neediest applicants.

IV. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the PRA because this rule merely establishes fees associated with a previously promulgated rule.

C. Regulatory Flexibility Act

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. Participation in the WIFIA loan program is voluntary. While many projects serving small communities are potentially eligible for WIFIA loans, we anticipate only one to two small community applications per year as small communities have access to below market rate loans and other subsidies through the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund, and other funding sources. A small community will only

apply and undertake a WIFIA loan in cases where the WIFIA loan provides positive economic benefits relative to other potential funding sources, based upon consideration of relevant economic factors, including loan rate, loan terms, fees and other transaction costs. I have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. 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.

E. 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.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 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.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because it is not economically

significant as defined in Executive Order 12866, and because environmental health or safety risks are not addressed by this action.

H. 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 imposes fees required to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

This action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

K. National Environmental Policy Act

Each project obtaining assistance under this program is required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.). This rulemaking simply imposes fees required to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the quality of the environment.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action **is not** a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 35

Environmental protection, Reporting and recordkeeping requirements, and Water finance.

Dated: June 19, 2017.

E. Scott Pruitt,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 35 is amended as follows:

PART 35--STATE AND LOCAL ASSISTANCE

1. The authority citation for part 35 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Pub. L. 104-134, 110 Stat. 1321, 1321-299 (1996); Pub. L. 105-65, 111 Stat. 1344, 1373 (1997), 2 CFR 200.

2. Add §35.10080 to read as follows:

§35.10080 Fees.

- (a) *Application fee.* EPA will require a non-refundable application fee for each project applying for credit assistance under the WIFIA program. An application fee will be due upon submission of the complete application. For applications for projects serving small communities (population of not more than 25,000 people), this application fee will be \$25,000. For all other applications, this application fee will be \$100,000. The initial application fee will be credited to the credit processing fee required under paragraph (c) of this section.
- (b) *Adjustment of application fee.* For each application and approval cycle, EPA may adjust the amount of the application fee described in paragraph (a) of this section based on program implementation experience and cost expectations. EPA will publish this amount in each Federal Register solicitation for letters of interest.
- (c) *Credit processing fee.* Except as otherwise provided in paragraph (f) of this section, EPA will require an additional credit processing fee for projects selected to receive WIFIA assistance upon closing, or in the event that 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 Agency's cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal services, in the field of municipal and project finance, to assist in the underwriting of the Federal credit instrument. All of, or a portion of, this fee may be waived.

- (d) *Servicing fee.* EPA 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 loan guarantee, a secured loan with a single disbursement, or a secured loan with multiple disbursements), depending on the costs of servicing the credit instrument as determined by the Administrator. Such fees will be set at a level sufficient to enable the EPA to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments.
- (e) *Optional supplemental 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, EPA 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.
- (f) *Reduced fees.* To the extent that Congress appropriates funds in any given year beyond those sufficient to cover internal administrative costs, EPA may utilize such appropriated funds to reduce fees that would otherwise be charged under paragraph (c) of this section.
- (g) *Extraordinary expenses.* EPA may require payment in full by the borrower of additional fees, in an amount determined by EPA, and of related fees and expenses of its independent consultants and outside counsel, to the extent that such fees and expenses are incurred directly by EPA and to the extent such third parties are not paid directly by the borrower, in

the event that a borrower experiences difficulty relating to technical, financial, or legal matters or other events (e.g., engineering failure or financial workouts) which require EPA to incur time or expenses beyond standard monitoring.

[FR Doc. 2017-13438 Filed: 6/27/2017 8:45 am; Publication Date: 6/28/2017]