



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 35**

**[EPA-HQ-OW-2016-0569; FRL-9979-90-OW]**

#### **Previously-Incurred Costs in the WIFIA Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Interim final rule.

**SUMMARY:** With this interim final rule Environmental Protection Agency (EPA) is amending the Water Infrastructure Finance and Innovation Act (WIFIA) regulations to clarify the process for, and conditions under which, a recipient of WIFIA credit assistance can include costs incurred, and the value of integral in-kind contributions made, before receipt of assistance in the calculation of total eligible costs, and can be reimbursed for certain of those costs by WIFIA loan proceeds. This interim final rule pertains to a matter involving a federal loan and loan guarantee program and is therefore exempt from the rulemaking requirements of the Administrative Procedure Act. As such, EPA is issuing this rule as interim final.

**DATES:** This rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments must be received on or before **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA 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. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**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](mailto:dorfman.jordan@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

#### **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 promulgated regulations to implement this program. A list of eligible entities and eligible projects can be found at 33 U.S.C. 3904 and 3905 and the Interim Final Rule at 40 CFR 35.10005.

#### **B. What Should I Consider as I Prepare My Comments for EPA?**

*Submitting Confidential Business Information (CBI).* Do not submit this information to EPA through [regulations.gov](https://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk, CD-ROM, or flash drive that you mail to EPA, mark the outside of the disk, CD-ROM, or flash drive as CBI and then identify electronically within

the disk, CD-ROM, or flash drive the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

*Tips for preparing your comments.* When submitting comments, remember to:

- Identify the document by docket ID number and other identifying information (subject heading, Federal Register date and page number).
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

## **II. Background**

### **A. What Action is the Agency Taking?**

Section 5008(c)(2) of the Water Infrastructure Improvements for the Nation Act, P.L. 114-322, added section 5029(b)(10) (33 U.S.C. 3908(b)(10)) to the WIFIA authorizing legislation. This section requires that any eligible project costs incurred, and the value of any

integral in-kind contributions made, before receipt of assistance be credited toward the 51 percent of project costs to be provided by sources of funding other than a WIFIA loan. 33 U.S.C. 3908(b)(10). This section provides WIFIA borrowers the opportunity to include costs incurred prior to receipt of assistance and the value of integral in-kind contributions made before receipt of assistance, in the calculation of total eligible costs in order to calculate the size of the loan. However, it does not address what costs can be reimbursed. The size of the project is important in determining the amount of funding that may be awarded to the WIFIA borrower (“size of the loan”) because the statute, at 33 U.S.C. 3908(b)(2)(A), limits the size of the loan to 49 percent of the total reasonably anticipated eligible costs for the project. Instead of addressing the reimbursement of costs, 33 U.S.C. 3908(b)(10) uses the term “credited” and directs that certain costs be credited toward a category of costs, the 51 percent to be provided by a non-WIFIA source. Importantly, the statute does not prohibit the use of a WIFIA loan to reimburse eligible costs incurred prior to receipt of assistance. The WIFIA loan can therefore be used to reimburse any eligible cost, whether or not incurred prior to the receipt of assistance, except for the value of in-kind contributions which do not represent out-of-pocket costs to a borrower and are not costs for which a borrower would typically seek reimbursement or payment.

For these reasons, EPA is clarifying current regulations by adding to 40 CFR 35.10010(c) the clause “value of any integral in-kind contributions made” to allow these costs to be included in the calculation of eligible project costs and by changing “prior to a project sponsor’s submission of an application for credit assistance” to “before receipt of credit assistance” to ensure that all such costs and integral in-kind contributions are included. EPA is also adding the clause, “such costs, excluding the value of any integral in-kind contributions, are payable from the proceeds of the WIFIA credit instrument” to ensure that such costs may be reimbursed from

WIFIA loan proceeds.

Crediting prior costs and the value of integral in-kind contributions to the project increases the size of the project and, by extension, may increase the size of the WIFIA loan. For example, if a borrower has incurred \$110 million in costs prior to the receipt of assistance, and anticipates incurring \$90 million in costs after receipt of assistance, the size of the project would be \$200 million. Looking at 33 U.S.C. 3908(b)(2)(A) in isolation, EPA could potentially fund up to 49 percent of that \$200 million, or \$98 million. However, by further directing that the costs incurred and contributions made prior to receipt of assistance be credited toward the 51 percent of project costs to be provided by sources of funding other than WIFIA, 3908(b)(10) serves to limit the size of the loan if the borrower has completed a substantial portion of the overall project. In this example project, the size of the loan would be limited to \$90 million because the \$110 million of costs incurred prior to receipt of assistance must be credited to the 51 percent category of costs to be provided by non-WIFIA sources of funding, leaving only \$90 million to be funded by WIFIA.

Costs and in-kind contributions must be directly related to the development or execution of the project including, for example, preliminary design, right-of-way acquisition, National Environmental Policy Act (NEPA) compliance related costs, and construction related costs. The WIFIA program retains the right to ask for appropriate documentation as evidence of such costs and in-kind contributions for sizing of the WIFIA loan and, in the case of incurred costs, for reimbursement.

In addition, 40 CFR 35.10010(c) is amended by removing “[i]n addition, applicants shall not include application charges or any other expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter) among

the eligible project costs.” This sentence is redundant because 40 CFR 35.10005 provides a definition of eligible project costs from which the determination of eligibility of a cost can be determined. It causes confusion because it implies that fees charged by the WIFIA program cannot be included as an eligible project cost even though they are specifically allowed to be financed as part of a WIFIA loan by statute at 33 U.S.C. 3908(b)(7)(B). Furthermore, EPA has determined that the cost of obtaining rating opinion letters is eligible under 33 U.S.C. 3906(4) which states that “capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction” are eligible costs.

#### **B. What is the Agency’s Authority for Taking this Action?**

This interim final rule is issued under the authority of 33 U.S.C. 3908(b)(10) and 3911.

### **III. 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. Executive Order 13771*

This rule is not an EO 13771 regulatory action because this rule is not significant under EO 12866.

#### *C. Paperwork Reduction Act*

This action does not impose an information collection burden under the PRA because this rule merely establishes the process for, and conditions under which, a recipient of WIFIA credit assistance can include costs incurred, and the value of integral in-kind contributions made, before receipt of assistance in the calculation of total eligible costs, and can be reimbursed for

certain of those costs by WIFIA loan proceeds.

*D. 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. With this interim final rule, the EPA is amending the WIFIA regulations to clarify the process for, and conditions under which, a recipient of WIFIA credit assistance can include costs incurred, and the value of integral in-kind contributions made, before receipt of assistance in the calculation of total eligible costs, and can be reimbursed for certain of those costs by WIFIA loan proceeds. This interim final rule does not impose costs on small entities applying for a WIFIA loan. I have therefore concluded that this action will have no net regulatory burden for all directly regulated 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 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.

*H. 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.

*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 establishes the process for, and conditions under which, a recipient of WIFIA credit assistance can include costs incurred, and the value of integral in-kind contributions made, before receipt of assistance in the calculation of total eligible costs, and can be reimbursed for certain of those costs by WIFIA loan proceeds.

*J. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*K. 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.

*L. 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 - 4370). This rulemaking simply establishes the process for, and conditions under which, a recipient of WIFIA credit assistance can include costs incurred, and the value of integral in-kind contributions made, before receipt of assistance in the calculation of total eligible costs, and can be reimbursed for certain of those costs by WIFIA loan proceeds; therefore, by itself, this rulemaking will not have any effect on the quality of the environment.

**List of Subjects in 40 CFR Part 35**

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

Dated: June 18, 2018.

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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. Amend § 35.10010 by revising paragraph (c) to read as follows:

**§ 35.10010 Limitations on assistance.**

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(c) 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 Administrator. 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 § 35.10005. In addition, such costs, excluding the value of any integral in-kind contributions, are payable from the proceeds of the WIFIA credit instrument and shall be considered incurred costs for purposes of paragraph (f) of this section. Capitalized interest on the WIFIA credit instrument is not eligible for calculating eligible project costs.

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