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## Title 33 — Navigation and Navigable Waters

### Chapter II — Corps of Engineers, Department of the Army, Department of Defense

#### Part 386 Credit Assistance for Water Resources Infrastructure Projects

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## PART 386—CREDIT ASSISTANCE FOR WATER RESOURCES INFRASTRUCTURE PROJECTS

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

**Source:** 88 FR 32675, May 22, 2023, unless otherwise noted.

### § 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. The purpose of this rule is to establish the process by which the Corps will administer such credit assistance, including the assessment of fees, and to set forth the policies and procedures that the Corps will use for receiving, evaluating, approving applications, and servicing and monitoring direct loans and loan guarantees.

## § 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.
- (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 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.
- (f) **Credit assistance** means a secured loan or loan guarantee under 33 U.S.C. 3908.
- (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.
- (h) **Economically disadvantaged community** refers to a community that meets one of the following criteria:
  - (1) Low-income;
  - (2) Unemployment rate above national average;
  - (3) Indian country as defined in 18 U.S.C. 1151 or in the proximity of an Alaska Native Village;
  - (4) U.S. Territories; or
  - (5) Identified as disadvantaged by the Climate and Economic Justice Screening Tool (developed by the Council on Environmental Quality).<sup>[1]</sup>
- (i) **Economically justified** means that the anticipated benefits will exceed the costs.

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<sup>[1]</sup> Currently available at <https://screeningtool.geoplatform.gov>.

(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.

(l) **Environmentally acceptable** means the project will satisfy all applicable and necessary environmental requirements to include those identified in Sec. 386.5(a), such as 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) **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.

(o) **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.

(p) **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;
- (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; and

(3) The Federal Financing Bank.

(q) **Loan guarantee** means any guarantee or other pledge by the Secretary of the Army (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.

(r) **Low income** means the area has a per capita income of 80 percent or less of the national average.

(s) **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.

(t) **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.

(u) **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.

(v) **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, meet the criteria outlined in 85 FR 39189 (see division D of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94)).

(2) Any project that meets the criteria in paragraph (v)(1) of this section 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;

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

(iv) 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 paragraph (v)(1) of this section—

(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.

(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.

(w) **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.

- (x) **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.
- (y) **Prospective borrower** means an eligible entity seeking credit assistance.
- (z) **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.
- (aa) **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.
- (bb) **Small community** means a community of not more than 25,000 individuals.
- (cc) **State** means any of the fifty States, the District of Columbia, Puerto Rico, or any other territory or possession of the United States.
- (dd) **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 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).
- (ee) **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.).
- (ff) **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.
- (gg) **Technically sound** means the project will meet all applicable engineering, safety, and other technical standards.
- (hh) **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.
- (ii) **Territory** means each of the commonwealths, territories, and possessions of the United States established in Title 48 of the U.S.C.
- (jj) **Treatment works** has the meaning given the term in section 212 of the Federal Water Pollution Control Act (33 U.S.C. 1292).
- (kk) **Unemployment rate above national average** means the area has an unemployment rate that is, for the most recent 24-month period for which data are available, at least 1 percent greater than the national average unemployment rate.
- (ll) **WIFIA** means the Water Infrastructure Finance and Innovation Act of 2014 (Pub. L. 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 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 (see division D of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94)).
- (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 in § 386.15.
- (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 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 in the form of a loan or loan guarantee for a project prior to:
  - (1) To issuance of a determination that the Federal action is eligible for a Categorical Exclusion;
  - (2) Issuance of a Finding of No Significant Impact; or
  - (3) Issuance of a 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 33 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 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.
- (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 § 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, 3 CFR, 1994 Comp., p. 859;
- (9) Floodplain Management, Executive Order 11988, as amended by Executive Order 13690;
- (10) Protection of Wetlands, Executive Order 11990, 3 CFR, 1977 Comp., p. 121, as amended by Executive Order 12608, 3 CFR, 1987 Comp., p. 245;
- (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, 54 U.S.C. 300101 *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.*

(b) ***Economic and miscellaneous authorities.***

- (1) Debarment and Suspension, Executive Order 12549, 3 CFR, 1986 Comp., p. 189;
- (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, 3 CFR, 1971-1975 Comp., p. 799; 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, 3 CFR, 1964-1965 Comp., p. 339;
- (3) Section 504 of the Rehabilitation Act, 29 U.S.C. 794, supplemented by Executive Orders 11914, 3 CFR, 1976 Comp., p. 117, and 11250, 3 CFR, 1964-1965 Comp., p. 351; and
- (4) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*

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



## § 386.6 Floodplain management.

- (a) In making WIFIA funding decisions under this part, the Corps will follow the requirements of Executive Order (E.O.) 11988, as amended by E.O. 13690, and Engineering Regulation (ER) 1165-2-26, "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 E.O. 11988 and ER 1165-2-26.
- (b) Projects funded under this part will meet or exceed applicable State, local, Tribal, and territorial standards for flood risk and floodplain management, as well as E.O. 11988.
- (c) All projects under this part 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. The Corps will implement the Federal Flood Risk Management Standard (FFRMS), where appropriate, which is a flood standard established by E.O. 13690, that aims to build a more resilient future through the encouragement of consideration of current and future risk when Federal investments are used to build or rebuild near floodplains. The Corps will ensure unwise uses are avoided, where possible, including the increase or transfer of flood risks, resulting in adverse impacts to human health, safety, welfare, property, natural resources, or functions of floodplains. Further guidance on implementation of E.O. 11988 can be found in the Corps ER 1165-2-26 (30 March 1984). Further information on FFRMS can be found at <https://www.iwr.usace.army.mil/Missions/Flood-Risk-Management/Flood-Risk-Management-Program/About-the-Program/Policy-and-Guidance/Federal-Flood-Risk-Management-Standard/>.

## § 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 the requirement in this paragraph (a) 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 those proposed for the Federal credit instrument when the Federal credit instrument is not a senior debt obligation. The

requirement of this paragraph (a) 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:
  - (1) 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
  - (2)
    - (i) In the event that the Federal credit instrument is:
      - (A) A senior debt obligation;
      - (B) Pari passu with the senior project obligations; or
      - (C) A general obligation of the prospective borrower, to the Federal credit instrument.
    - (ii) 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:
    - (i) 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 the project;
    - (ii) Shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and
    - (iii) 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. The requirement in this paragraph (a)(5) 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) The provision at 33 U.S.C. 3907(c) provides that nothing in section 3907(c) (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 selection criteria in paragraphs (a) through (i) of this section will be used for evaluating and selecting among eligible projects to receive credit assistance:

- (a) The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public benefits, such as—
  - (1) The reduction of flood risk;
  - (2) The improvement of water quality and quantity, including aquifer recharge;
  - (3) The protection of drinking water, including source water protection;
  - (4) The support of domestic and international commerce; and
  - (5) The restoration of degraded aquatic ecosystem structures.
- (b) The extent to which the project financing plan includes public or private financing, in addition to WIFIA credit assistance.
- (c) 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.
- (d) The extent to which the project uses new or innovative approaches.
- (e) The amount of budget authority required to fund the WIFIA Federal credit instrument.
- (f) The extent to which the project—
  - (1) Protects against an extreme weather event, such as a flood or hurricane; or
  - (2) Helps maintain or protect the environment.
- (g) The extent to which a project serves regions with significant clean energy exploration development, or production areas.
- (h) The extent to which a project serves regions with significant water resource challenges, including the need to address—
  - (1) Water quality concerns in areas of regional, national, or international significance;
  - (2) Water quantity concerns related to groundwater, surface water, or other water sources;

- (3) Significant flood risk;
- (4) Water resource challenges identified in existing regional, State, or multistate agreements; or
- (5) Water resources with exceptional recreational value or ecological assistance.
- (i) The extent to which the project addresses identified municipal, State, or regional priorities.
- (j) 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.
- (k) The extent to which WIFIA credit assistance reduces the overall Federal contributions to the project.
- (l) 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:
  - (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;
  - (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 in § 386.15;
  - (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:
    - (A) Such collateral and other credit support for the credit agreement; and
    - (B) Such collateral sharing, priorities and voting rights among creditors 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 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.

- (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.