



August 9, 2022

ATTN: Docket ID: COE-2022-0004

Re: Credit Assistance and Related Fees for Water Resources Infrastructure Projects

The American Society of Civil Engineers (ASCE) and the Association of State Dam Safety Officials (ASDSO) are pleased to offer the following comments to the proposed rule offered by the U.S. Army Corps of Engineers (USACE) pertaining to the implementation of the Corps Water Infrastructure Finance Program (CWIFP). The comments presented below are in response to the proposed rule published on June 10, 2022 in the Federal Register for the public comment period ending on August 9, 2022.

Founded in 1852, ASCE is the country's oldest civil engineering organization. Representing more than 150,000 civil engineers from private practice, government, industry, and academia, ASCE is dedicated to the advancement of the science and practice of engineering. ASDSO, founded in 1984, represents more than 3,000 members from all levels of government, dam owners, manufacturers and suppliers, and academia. ASDSO's mission is to improve the safety and condition of the nation's dams, use education to reduce the consequences associated with dam incidents, supporting state dam safety programs, and fostering a unified dam safety community. Our organizations are committed to advancing policy at all levels that enhance the safety and resilience of the nation's dams, and that supports the development of effective tools to provide communities and dam owners with the means to rehabilitate faltering dams and guard against the loss of life or destruction of property that would result from dam failure.

As the effects of climate change continue to place increasing strain on infrastructure systems, programs like those established under the Water Infrastructure Finance and Innovation Act (WIFIA) are becoming exponentially more important. More intense and frequent storms will continue to affect the overall structural integrity of dams, levees, and wastewater and drinking water systems. Increased precipitation levels will not only stretch the capacity of these systems, but the increased flood risks they create will continue to increase risk and exacerbate financial burdens on communities. Ensuring access to credit tools for repair, upgrades and maintenance will be critical to rehabilitating deficient systems, protecting against loss of life and property

damage, and allowing communities to flourish by supporting economic development and improving overall quality of life.

As USACE moves forward with implementation of its finance program, we encourage the agency to give consideration to the concerns outlined in the following comments. It is our hope that going forward, USACE will be able to expand the scope of the program to support greater rehabilitation efforts for more dams and other infrastructure systems, make the application process more efficient and less of a financial strain, and help to improve the overall resilience of projects approved by USACE for assistance. Addressing these concerns will increase the overall effectiveness of the program, provide greater protection to downstream communities, and improve the overall condition of the nation's dams and overall infrastructure.

Background

In 2014, WIFIA was enacted under the Water Resources Reform and Development Act (P.L. 113-121). WIFIA authorized the establishment of two finance programs within the U.S. Environmental Protection Agency (EPA) and the USACE. EPA's WIFIA program supports drinking water and wastewater capital improvement projects in order to support local economies and protect public health.¹ USACE's WIFIA program, the Civil Works Infrastructure Finance Program (CWIFP) was authorized to provide credit assistance to water infrastructure projects which support "flood damage reduction, hurricane and storm damage reduction, environmental restoration, coastal or inland harbor navigation improvement, or inland and intracoastal waterways navigation improvement" which are determined to be "technically sound, economically justified, and environmentally acceptable."²

The Consolidated Appropriations Act of FY 2021 (P.L. 116-260) formally established a CWIFP funding account under the Energy and Water Development division of the law. The law provided \$14.2 million in FY 21 appropriations, including \$12 million for financial assistance for non-federally owned projects. In the law, Congress also clarified its intent that financial programs authorized under WIFIA applied to all non-federal projects.³ In 2021, the Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58) appropriated an additional \$75 million for CWIFP, and it also limited those funds to assistance for non-federal dam safety projects, in contradiction to the clarifying language in the FY 21 Consolidated Appropriations Act.⁴

Project and Applicant Eligibility

As noted previously, when WIFIA was first authorized in 2014, USACE was authorized to provide assistance through CWIFP to a wider range of water infrastructure projects which fall under the agency's purview. Ensuing legislation funding the program limited the use of funds to a much smaller pool of projects. Essentially, assistance may only be provided to small subset of

¹ Congressional Research Service, *WIFIA Program: Background and Recent Developments*, June 2, 2020.

² Water Resources Reform and Development Act of 2014 (P.L. 113-121).

³ Consolidated Appropriations Act, 2021 (P.L. 116-260), Joint Explanatory Statement, Division D- Energy and Water Development and Related Agencies Appropriations Act, 2021.

⁴ Infrastructure Investment and Jobs Act of 2021 (P.L. 117-58).

dams nationwide which meet the criteria outlined under WIFIA, the Consolidated Appropriations Act of FY 2021, and IJA. This leaves more than 69,000 of the nation's 92,000 dams whose primary purposes is not flood damage reduction ineligible for assistance from this program. This includes dams which support water supply storage, irrigation, and recreational activity, among other purposes. It is worth noting, however, a failing dam- regardless of its specific function- would result in downstream flooding. As such, treating such projects as flood damage reduction projects could expand the number of dam projects which may be eligible under CWIFP. We encourage USACE to utilize this interpretation of current law.

Additionally, current laws prohibit the provision of assistance for other types of flood damage reduction projects which may fall under the purview of USACE. These include, but are not limited to, levees, channels, and flood walls. As CWIFP continues to develop following implementation of a final rule, we encourage USACE to work with Congress to expand the pool of projects which may be eligible for assistance as originally put forward in the Water Resources Reform and Development Act of 2014.

In addition to eligible projects, entities eligible to apply for WIFIA assistance are defined under the Water Resources Reform and Development Act. Those entities include the following: 1) a corporation; 2) a partnership; 3) a joint venture; 4) a trust; 5) a State, or local governmental entity, agency, or instrumentality; 4) a tribal government or consortium of tribal governments; or 7) a State infrastructure financing authority. The law further states that eligible projects carried out by non-State or local government entities must be publicly sponsored. More than half of all dams nationwide are privately owned, with rehabilitation and repair costs falling on dam owners.⁵ Dam owners may be any number of various entities. Many dam owners fall under the defined category of eligible entities, including public and private companies, and state and local government entities. However, many dam owners are also private individuals who may not fit specifically under any of the listed eligible entities. This, however, does not change the fact that these individuals bear financial responsibility for dam maintenance, and thus the overall safety of the dams they own. In the event of a dam failure, dam owners not only lose a valuable asset but also bear responsibility for reconstruction efforts and for damages to downstream communities.⁶

Given these factors, it is clear that private individual dam owners, as well as the communities downstream of said dams, would benefit significantly from access to credit instruments under CWIFP. However, the proposed rule is unclear as to whether such individual dam owners would be able to seek such assistance. We strongly encourage USACE to clarify how individuals would be treated under the "Borrower Eligibility" section of the proposed rule. We also ask that USACE clarify whether state and local government entities may apply for assistance on behalf of private individual dam owners in accordance with the Water Resources Reform and Development Act.

⁵ American Society of Civil Engineers, *2021 Report Card for America's Infrastructure*, pg. 28. https://infrastructurereportcard.org/wp-content/uploads/2020/12/National_IRC_2021-report.pdf

⁶ Association of State Dam Safety Officials, *Ownership Responsibility and Liability*, <https://damsafety.org/dam-owners/ownership-responsibility-and-liability>

Project Cost Eligibility

The average age of the nation's dams is 57 years old.⁷ Over the course of nearly six decades, several factors can impact the overall safety or hazard potential of a given dam. These include, but are not limited to, expanded development of downstream communities, changes to ecosystems, increased levels of precipitation, and the increased frequency and intensity of other weather events caused by climate change. These factors, combined with increased age, can significantly impact a given dam's resilience and thus increase the chances of dam failure.

Many dams require rehabilitation to meet current design and safety standards.⁸ Under law, eligible project costs which may be paid for using WIFIA assistance include the cost of development phase activities, which includes "preliminary engineering and design work." Since the majority of dams are, on average, 57 years old, it is clear that the majority of dams have not been built to current standards. Current standards are in place to increase resiliency and protect increasingly developed communities downstream.⁹ Given these factors, we strongly urge USACE to specify that "preliminary engineering and design work" includes assessing requirements for incorporating current design, construction, and safety standards into a dam rehabilitation project receiving assistance through CWIFP. This will help to ensure that dams that receive CWIFP resources are more able to withstand the increasingly severe effects of climate change, help to reduce future operations and maintenance costs, and ensure the longer service life of dams.

Proposed Fees

USACE is authorized to collect user fees from applicants to assist in covering costs of administering CWIFP. Collection of fees is a valuable tool to generate revenue for the program. This can increase the value of annual appropriations, providing an opportunity for more projects to receive assistance and thus enhancing the overall effectiveness of the program. It is understandable that fees must exist to support the administrative costs of the program. Cost sharing is necessary to ensure that non-federal entities and local beneficiaries play a critical role in project development and decision-making.¹⁰

We have concerns, however, that the fees set forth in the proposed rule may adversely impact the ability of some dam owners to access these resources. Fees proposed by USACE include a non-refundable \$25,000 application fee, transaction processing fees of up to \$300,000, and annual servicing fees in the range of \$10,000 to \$50,000. We are concerned that the amount of the proposed fees would effectively price out owners from applying--owners of smaller dams, private individual dam owners, and other smaller entities that may have limited to no financing options outside of CWIFP.

⁷ Ibid., American Society of Civil Engineers.

⁸ American Society of Civil Engineers, *Policy Statement 280- Dam Safety, Repair, Retrofit, and Rehabilitation*, <https://www.asce.org/advocacy/policy-statements/ps280---dam-safety-repair-retrofit-and-rehabilitation>

⁹ Ibid., American Society of Civil Engineers.

¹⁰ American Society of Civil Engineers, *Policy Statement 302- Cost Sharing in Water Resources Infrastructure Programs*, <https://www.asce.org/advocacy/policy-statements/ps302---cost-sharing-in-water-resources-infrastructure-programs>

The proposed rule notes circumstances in which certain fees may be waived, including application fee waivers for public projects serving small or economically disadvantaged communities. While this will help to ensure that such communities can have greater access to this assistance, we strongly encourage USACE to explore ways in which it may expand its waiver authority so that private individuals who own dams that may pose a hazard to downstream communities can also have access to financing.

Project Prioritization

The proposed rule outlines a number of criteria for how projects will ultimately be selected to receive assistance from CWIFP. Many of these criteria have been pre-defined in the Water Resources Reform and Development Act, however the proposed rule adds additional criteria which evaluates the extent to which a project services economically disadvantaged communities and to which it would spur economic opportunity for disadvantaged communities and populations. The proposed rule further specifies that projects which serve “small, rural communities and economically disadvantaged communities and projects serving Tribal communities” will be prioritized. The WIFIA program as a whole clearly has great potential to transform communities with aged and deficient water infrastructure systems, and to spur economic development.

The proposed rule is not clear, however, as to what extent this prioritization will inform project selection. It is not specified how projects that may not specifically meet the proposed rule’s definition of “economically disadvantaged community” will be treated in terms of prioritization by USACE. Communities which may not fall specifically under this definition may still require assistance for a project to rehabilitate a non-federal dam which may pose a high risk to said community if rehabilitation efforts are not made. However, it may not be advantageous to apply for such resources if they will be given little to no priority, especially given the proposed \$25,000 application fee. This makes the decision about how to expend already limited resources that much more difficult. In order to assist communities and dam owners in making decisions that best suit their needs, we strongly urge USACE to provide more clear and precise guidance as to how projects will be prioritized. This should specifically include a clear description of how projects which do not specifically serve “economically disadvantaged communities,” as defined under the proposed rule, will be treated in the application process.

Conclusion

We would like to thank USACE for providing the opportunity to submit public comment on this critical issue. CWIFP, like its EPA counterpart, has the potential to be an invaluable tool for making needed improvements to the nation’s water infrastructure. CWIFP can play a critical role in improving the overall safety of the nation’s dams by extending their service life and increasing dam efficacy in protecting communities and serving their needs. We look forward to working with USACE on efforts to ensure CWIFP is as effective as it can be, and we encourage you to utilize the knowledge and expertise of our professionals as you continue to develop this vital program.