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Mayer Brown: New US Water Infrastructure Legislation Passed Today: Will WIFIA Repeat The Success Of TIFIA?

The US Department of Transportation's TIFIA (Transportation Finance & Innovation Act) credit support program is by far the most successful federal program providing financial support for surface transportation public-private partnerships (P3). Few major P3 transportation projects in recent years would have been possible, and few P3s in the pipeline will go forward, without TIFIA assistance. Now, Congress has set out to try to repeat the success of TIFIA with a similar program—just substituting a "W" for the "T" in the acronym—to support major water infrastructure projects.

The new WIFIA (Water Infrastructure Finance and Innovation Act) program is part of the Water Resources Reform and Development Act (WRRDA) that passed the House on May 21 and the Senate on May 22, and is expected to be signed by the President shortly.

WRRDA authorizes funding for the construction and repair of waterway and port projects across the United States. It also allows Congress to authorize the Army Corps of Engineers to spearhead the development, maintenance and support of vital US port and waterways infrastructure, as well as supporting targeted flood protection and environmental restoration needs.

Consciously building on the increased use of public-private partnerships for the financing, construction and operation of major surface transportation infrastructure, WRRDA encourages P3s for development of major water infrastructure projects. Specifically, the legislation establishes WIFIA in order to provide credit assistance for drinking water, wastewater and water resources infrastructure projects. WIFIA is designed to leverage federal funds by attracting substantial private or other non-federal investments to promote increased development of critical water infrastructure and to help speed construction of local projects.

WIFIA is very closely modeled on the USDOT TIFIA program and has many similar elements, including interest rate (tied to long-term Treasury rates) and maximum maturity (35 years); maximum percentage of eligible project cost that can be financed (generally 49 percent, although in contrast in TIFIA program, WIFIA legislation provides that up to 25 percent of each year's financing assistance can be made be available for loans exceeding 49 percent of project cost); deferral of loan repayment for up to five years after substantial completion; credit rating requirements; and non-subordination/ "springing parity lien" in the event of bankruptcy.

Also consistent with the initial authorization of TIFIA program, WIFIA is established as a five-year "pilot" program, with the Comptroller General directed to report to Congress prior to the end of this period on status of program implementation and with recommendations for improvements, continuation authorization or termination.

The most significant difference between TIFIA and WIFIA is in the level of authorized spending. Authorized spending for the WIFIA program starts at $20 million in the first year and increases to $50 million in the fifth year. If "scored" for federal budget purposes similar to the scoring for the

TIFIA program, this would provide for approximately $200 million in financing in the first year, increasing to approximately $500 million in the fifth year. That compares to TIFIA's current funding level under MAP-21 legislation of $1 billion (which allows credit support of for loans of approximately $10 billion). By way of further comparison, the first year (1999) appropriation for the TIFIA program was $80 million. Given that the nation's water infrastructure needs are, by most estimates, even larger in total than its transportation needs, this is clearly a "pilot" program—with a very small "p."

WRRDA directs the Army Corps of Engineers and the Environmental Protection Agency to implement and manage the WIFIA program. The Army Corps of Engineers is authorized to carry out projects for flood damage reduction, environmental restoration, coastal or inland harbor navigation improvement, and inland and intracoastal waterways navigation improvement. The Environmental Protection Agency is authorized to carry out projects that are eligible for assistance under the Federal Water Pollution Control Act or the Safe Drinking Water Act in addition to projects that enhance energy efficiency or that repair, rehabilitate or replace public water systems or publicly owned treatment works. Amounts appropriated for WIFIA financing assistance are allocated jointly to the Corps of Engineers and the EPA, possibly with subsequent implementing regulations to clarify the specific amounts to be made available to each agency.

Given USDOT's successful implementation and management of the TIFIA program, supporters of P3 can hope the Corps of Engineers and EPA learn from USDOT's experience with the TIFIA program and build on established and now well-understood policies and program guidelines.

WRRDA has one other notable provision supporting the use of P3 approaches to water infrastructure projects. It establishes a Water Infrastructure Public-Private Partnership Program, authorizing the Corps of Engineers to enter into agreements with state and local governments and private entities to finance construction of at least 15 water resources development projects, including coastal harbor improvement, channel improvement, inland navigation, flood damage reduction, aquatic ecosystem restoration and hurricane and storm damage reduction.

To identify these projects, the Corps of Engineers must consider the extent to which the project is significant to the US economy, leverages federal investment by encouraging non-federal contributions to the project, employs innovative project delivery and cost-savings methods, has received federal funds in the past and experienced delays or missed scheduled deadlines, has unobligated Corps of Engineers funding balances and has not received federal funding for recapitalization and modernization since the project was authorized. The Corps of Engineers must then, in consultation with the non-federal applicant, develop a detailed project management plan.

To qualify for participation in the Water Infrastructure Public-Private Partnership Program, each project must also have specific Congressional authorization provided by subsequently enacted legislation. Projects qualifying for the Public-Private Partnership Program will benefit from potential waiver from or modification of applicable federal regulations as well as technical assistance from the Corps of Engineers.

As an initial project that might be implemented under this new Public-Private Partnership Program, Alaska Congressman Don Young is expected shortly to introduce House Resolution 4668 designed to promote a P3 framework for the privately financed development of a major new port facility in Alaska's Seward Peninsula.

The final version of WRRDA does not change the existing requirements for issuance of private activity bonds (PABS) for water infrastructure projects. During the multi-year consideration of this legislation, various stakeholder groups advocated in particular for eliminating the state volume cap

on water and wastewater infrastructure PABS and instead providing that they be treated in the same manner as PABS for airports, ports and certain solid waste disposal projects. This change would have allowed local communities to more effectively leverage the municipal capital markets and, in combination with other finance mechanisms, was estimated would have leveraged an additional $2 billion to $6 billion annually in private investment in water infrastructure projects.

WRRDA is further evidence of the strong and bipartisan support in Congress for the use of P3 structures for major US infrastructure projects. The next question will be how far and how fast states and localities, and the federal government itself, will partner with the private sector to take advantage of these new incentives.

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