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Water Act A "WIIN" For Infrastructure.

Last month, in a strong display of bipartisanship in an otherwise tense post-election political climate, Congress passed the Water Infrastructure Improvements for the Nation Act ("WIIN" or the "Act").¹ President Obama signed the bill into law on December 16, 2016.²

The success of WIIN was fueled by bipartisan consensus for the improvement of the nation's water infrastructure and the need to provide federal support to Flint, Michigan and similar communities that have recently been affected by water contamination crises.

This client alert is an update to our two-part article published last October outlining the financing options for US water infrastructure improvements, Funding and P3s for Water Infrastructure Projects³, which described the bills passed by the Senate and the House of Representatives that formed the basis for WIIN. WIIN was the result of the conference committee between the two houses that followed the presidential election.

Below we provide a brief summary of certain provisions of the Act that may be of particular interest to private sector entities pursuing investments in the water sector, including investments through public-private partnerships (or P3s).

WIFIA

As discussed in our October article, the Water Infrastructure Finance and Innovation Act ("WIFIA") was passed in 2014 and authorized as a five-year pilot program. However, no appropriations were provided for WIFIA other than amounts to fund start-up costs at the US Environmental Protection Agency ("EPA"), which will administer the program.

The new law changes that - WIIN includes \$20 million in budget authority to WIFIA, with a corresponding appropriation being made in a subsequent continuing resolution passed by Congress in December.⁴ No more than \$3 million of such amount may be used for administrative purposes. While this amount is less than the \$70 million amount originally proposed by the Senate in its bill (which itself reflected only part of the \$80 million authorized for the program over its first three years under the 2014 legislation), it is nonetheless significant because funds are now available to be loaned out by EPA for eligible projects. EPA estimates that its \$17 million in budget authority could support more than \$1 billion in credit assistance and more than \$2 billion in water infrastructure investment.⁵

The new law makes other changes and clarifications to the WIFIA program that could be useful to eligible borrowers, which include governmental entities such as municipal water authorities as well as private sector entities. WIIN expands WIFIA eligibility to projects that prevent, reduce, or mitigate the effect of drought. The Act further specifies that financing fees can be covered under loan amounts and clarifies that project costs incurred before a WIFIA loan is received can be credited towards the 51 percent of project costs that must be provided by sources other than WIFIA loans.

The Act also clarifies that Congress intends for WIFIA appropriations to be in addition to, and not instead of, those made to the Clean Water State Revolving Fund (the “CWSRF”) and the Drinking Water State Revolving Fund (the “DWSRF” and, together with the CWSRF, the “SRFs”). This statement, along with the additional appropriations to the SRFs described below, should help assuage the fear of stakeholders who have expressed the concern that WIFIA funding would result in the downsizing of the revolving loan funds. Finally, consistent with the Act’s focus on Flint aid (described further below), it states explicitly that WIFIA eligible projects may include those to address lead and other contaminants in drinking water systems.

Flint Aid

A critical motivating factor for WIIN’s passage was the desire among lawmakers on both sides of the political aisle to support Flint and other communities affected by contaminated drinking water problems. These problems, which the Flint crisis made more visible in 2016, have focused attention on the poor condition of the nation’s water infrastructure. In response, the Act authorizes \$100 million in capitalization grants to the DWSRFs to fund improvements for public water systems with lead exposure and other drinking water emergencies. An additional \$50 million is authorized for various lead-related health programs. These amounts were appropriated in the December continuing resolution.

In order to mitigate future drinking water contamination issues, WIIN authorizes \$150 million annually over the next five years for various grant programs to help local public water systems and communities with lead reduction projects and related assistance.

“Buy America”

WIIN maintains a one-year “Buy America” provision for iron and steel on public water system projects funded by the SRFs, consistent with existing law. In the run-up to passage, several prominent Democrats fought unsuccessfully to make such provisions permanent.[6] The Democratic position may nevertheless have support from the incoming Trump administration, which has espoused a “Buy American and hire American” policy since the November election.

Army Corps of Engineers Projects

Since passage of the last water legislation in 2014, the Army Corps of Engineers (“ACE”) has made recommendations to Congress for water infrastructure investment projects across the country. Consistent with the proposals of both the Senate and the House of Representatives, WIIN authorizes ACE to carry out certain of these recommendations, which total 30 new projects, as well as eight modifications to existing projects. These projects, which are subject to future appropriation, range across ACE’s major mission areas, including navigation, flood risk management, hurricane and storm damage risk reduction, and ecosystem restoration. Seeking to address the backlog in ACE projects, the Act also deauthorizes inactive projects that have not received funding and deauthorizes portions of other active projects that are no longer needed. WIIN also authorizes ACE to conduct feasibility studies for 30 proposed new water projects.

California Drought Aid

In addition to degraded systems, communities across the country—both coastal and inland—have significant water scarcity issues, spurred by both human and natural conditions such as overuse or drought. California, for instance, is in its sixth straight year of drought⁷ and, by at least one account, has its worst drought conditions in 1,200 years.⁸

WIIN directs the Departments of Commerce and the Interior to help increase the water supply by expediting review of proposed projects and drought reduction measures, while regulating the amount of water that can be diverted to farms and homes so as not to damage salmon stocks and other wildlife. The Act also authorizes the use of funds from the prepayment of federal water contracts for the expansion of water storage facilities and authorizes other amounts to be applied to water desalination projects and a recycling grant program.

Conclusion

WIIN is a significant development for water industry stakeholders. The bipartisan support for the passage of the Act, and President-elect Trump's prioritization of national infrastructure improvements, suggest that WIIN will not be threatened by the upcoming change in administration.

The Act's political legacy will likely be shaped by the impact of Flint aid and the related lead reduction programs. From an investor's perspective, the appropriation of funds to WIFIA is an important step forward, as it unlocks a program which essentially has been stillborn since its establishment two-and-one-half years ago. Similar to TIFIA in the transportation sector, WIFIA's low-cost, long term financing is likely to attract interest from local water authorities, and private entities contracting with them, seeking to finance greenfield or brownfield water infrastructure projects. To the extent WIFIA funding remains available over the longer term, it could also foster the development of new projects. In this regard, it will be important for the program to demonstrate some early successes in 2017 in order to lay the groundwork for further appropriations.

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Footnotes

1 Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322 (2016). The Senate vote, on December 10, 2016, was 78-21 and the House vote two days earlier was 360-61.

2 Statement by the President on the Water Infrastructure Improvements for the Nation (WIIN) Act (Dec. 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/12/16/statement-president-water-infrastructure-improvements-nation-wiin-act>.

3 Paul J. Epstein, Funding and P3s for Water Infrastructure Projects, Law360 (Oct. 17-18, 2016), <http://www.shearman.com/en/newsinsights/publications/2016/10/epstein-authors-article-funding-partnerships-water>.

4 Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254 (2016).

5 US Environmental Protection Agency, Learn About the WIFIA Program, <https://www.epa.gov/wifia/learn-about-wifia-program> (last visited Jan. 2, 2016).

6 Brody Mullins & Kristina Peterson, Bill's 'Buy America' Provision Sets Up Potential Clash for GOP, Donald Trump, Wall St. J. (Dec. 2, 2016), <http://www.wsj.com/articles/water-bills-buy-american-provision-sparks-some-gop-concerns-1480709387>.

7 Paul Rogers, 2016 in Review: California drought eased, but it's not over, Mercury News (Dec. 26, 2016), <http://www.mercurynews.com/2016/12/26/fire-and-rain-california-drought-eased-but-not-over/>.

8 Angela Fritz, Study: California drought is the most severe in at least 1,200 years, Washington Post (Dec. 4, 2014), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2014/12/04/study-california-drought-is-the-most-severe-in-at-least-1200-years/>.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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