

(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 preconstruction activities;

(2) construction, reconstruction, rehabilitation, and replacement activities;

(3) the acquisition of real property or an interest in real property (including water rights, land relating to the project, and improvements to land), environmental mitigation (including acquisitions pursuant to section 3905(8) of this title), 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.

(Pub. L. 113–121, title V, § 5027, June 10, 2014, 128 Stat. 1335; Pub. L. 114–322, title IV, § 5008(b)(2)(C), Dec. 16, 2016, 130 Stat. 1897.)

Editorial Notes

AMENDMENTS

2016—Par. (3). Pub. L. 114–322 substituted “section 3905(8)” for “section 3905(7)”.

§ 3907. Determination of eligibility and project selection

(a) Eligibility requirements

To be eligible to receive financial assistance under this chapter, a project shall meet the following criteria, as determined by the Secretary or Administrator, as applicable:

(1) Creditworthiness

(A) In general

The project and obligor shall be creditworthy, which shall be determined by the Secretary or the Administrator, as applicable.

(B) Considerations

In determining the creditworthiness of a project and obligor, the Secretary or the Administrator, as applicable, shall take into consideration relevant factors, including—

(i) the terms, conditions, financial structure, and security features of the proposed financing;

(ii) the dedicated revenue sources that will secure or fund the project obligations;

(iii) the financial assumptions upon which the project is based; and

(iv) the financial soundness and credit history of the obligor.

(C) Security features

The Secretary or the Administrator, as applicable, shall ensure that any financing for the project has appropriate security features, such as a rate covenant, supporting the project obligations to ensure repayment.

(D) Rating opinion letters

(i) Preliminary rating opinion letter

The Secretary or the Administrator, as applicable, shall require each project ap-

plicant to provide, at the time of application, a preliminary rating opinion letter from at least 1 rating agency indicating that the senior obligations of the project (which may be the Federal credit instrument) have the potential to achieve an investment-grade rating.

(ii) Final rating opinion letters

The Secretary or the Administrator, as applicable, shall require each project applicant to provide, prior to final acceptance and financing of the project, a final rating opinion letter from at least 1 rating agency indicating that the senior obligations of the project have an investment-grade rating.

(E) Special rule for certain combined projects

The Administrator shall develop a credit evaluation process for a Federal credit instrument provided to—

(i) a State infrastructure financing authority for a project under section 3905(9) of this title, which may include requiring the provision of a final rating opinion letter from at least one rating agency; or

(ii) an entity for a project under section 3905(10) of this title, which may include requiring the provision of a final rating opinion letter from at least two rating agencies.

(2) Eligible project costs

(A) In general

Subject to subparagraph (B), the eligible project costs of a project shall be reasonably anticipated to be not less than \$20,000,000.

(B) Small community water infrastructure projects

For a project described in paragraph (2) or (3) of section 3905 of this title that serves a community of not more than 25,000 individuals, the eligible project costs of a project shall be reasonably anticipated to be not less than \$5,000,000.

(3) Dedicated revenue sources

The Federal credit instrument for the project shall be repayable, in whole or in part, from dedicated revenue sources that also secure the project obligations.

(4) Public sponsorship of private entities

(A) In general

If an eligible project is carried out 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 shall be publicly sponsored.

(B) Public sponsorship

For purposes of this chapter, a project shall be considered to be publicly sponsored if the obligor can demonstrate, to the satisfaction of the Secretary or the Administrator, as appropriate, that the project applicant 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.

(5) Use of existing financing mechanisms

(A) Notification

For each eligible project for which the Administrator has authority under paragraph (2) or (3) of section 3902(b) of this title and for which the Administrator has received an application for financial assistance under this chapter, the Administrator shall notify, not later than 30 days after the date on which the Administrator receives a complete application, the applicable State infrastructure financing authority of the State in which the project is located that such application has been submitted.

(B) Determination

If, not later than 60 days after the date of receipt of a notification under subparagraph (A), a State infrastructure financing authority notifies the Administrator that the State infrastructure financing authority intends to commit funds to the project in an amount that is equal to or greater than the amount requested under the application, the Administrator may not provide any financial assistance for that project under this chapter unless—

- (i) by the date that is 180 days after the date of receipt of a notification under subparagraph (A), the State infrastructure financing authority fails to enter into an assistance agreement to provide funds for the project; or
- (ii) the financial assistance to be provided by the State infrastructure financing authority will be at rates and terms that are less favorable than the rates and terms for financial assistance provided under this chapter.

(6) Operation and maintenance plan

(A) In general

The Secretary or the Administrator, as applicable, shall determine whether an applicant for assistance under this chapter has developed, and identified adequate revenues to implement, a plan for operating, maintaining, and repairing the project over the useful life of the project.

(B) Special rule

An eligible project described in section 3905(1) of this title that has not been specifically authorized by Congress shall not be eligible for Federal assistance for operations and maintenance.

(b) Selection criteria

(1) Establishment

The Secretary or the Administrator, as applicable, shall establish criteria for the selection of projects that meet the eligibility requirements of subsection (a), in accordance with paragraph (2).

(2) Criteria

The selection criteria shall include the following:

(A) The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public benefits, such as—

- (i) the reduction of flood risk;
- (ii) the improvement of water quality and quantity, including aquifer recharge;
- (iii) the protection of drinking water, including source water protection; and
- (iv) the support of international commerce.

(B) The extent to which the project financing plan includes public or private financing in addition to assistance under this chapter.

(C) The likelihood that assistance under this chapter would enable the project to proceed at an earlier date than the project would otherwise be able to proceed.

(D) The extent to which the project uses new or innovative approaches.

(E) The amount of budget authority required to fund the Federal credit instrument made available under this chapter.

(F) The extent to which the project—

- (i) protects against extreme weather events, such as floods or hurricanes; or
- (ii) helps maintain or protect the environment.

(G) The extent to which a project serves regions with significant 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—

- (i) water quality concerns in areas of regional, national, or international significance;
- (ii) water quantity concerns related to groundwater, surface water, or other water sources;
- (iii) significant flood risk;
- (iv) water resource challenges identified in existing regional, State, or multistate agreements; or
- (v) water resources with exceptional recreational value or ecological importance.

(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 by not later than 90 days after the date on which a Federal credit instrument is obligated for the project under this chapter.

(K) The extent to which assistance under this chapter reduces the contribution of Federal assistance to the project.

(3) Special rule for certain combined projects

For a project described in section 3905(9) of this title, the Administrator shall only consider the criteria described in subparagraphs (B) through (K) of paragraph (2).

(c) Federal requirements

Nothing in this section supersedes the applicability of other requirements of Federal law (including regulations).

(Pub. L. 113–121, title V, § 5028, June 10, 2014, 128 Stat. 1335; Pub. L. 114–94, div. A, title I, § 1445, Dec. 4, 2015, 129 Stat. 1437; Pub. L. 114–322, title IV, § 5008(b)(2)(D), Dec. 16, 2016, 130 Stat. 1897; Pub. L. 115–270, title IV, § 4201(a)(2), Oct. 23, 2018, 132 Stat. 3877; Pub. L. 117–58, div. E, title II, § 50214, Nov. 15, 2021, 135 Stat. 1173.)

Editorial Notes

AMENDMENTS

2021—Subsec. (a)(1)(D)(ii). Pub. L. 117–58 substituted “a final rating opinion letter from at least 1 rating agency” for “final rating opinion letters from at least 2 rating agencies”.

2018—Subsec. (a)(1)(E). Pub. L. 115–270 amended subpar. (E) generally. Prior to amendment, text read as follows: “The Administrator shall develop a credit evaluation process for a Federal credit instrument provided to a State infrastructure financing authority for a project under section 3905(9) of this title or an entity for a project under section 3905(10) of this title, which may include requiring the provision of a final rating opinion letter from at least 2 rating agencies.”

2016—Subsec. (a)(1)(E). Pub. L. 114–322, § 5008(b)(2)(D)(i), substituted “section 3905(9)” for “section 3905(8)” and “section 3905(10)” for “section 3905(9)”.

Subsec. (b)(3). Pub. L. 114–322, § 5008(b)(2)(D)(ii), substituted “section 3905(9)” for “section 3905(8)”.

2015—Subsec. (a)(5) to (7). Pub. L. 114–94 redesignated pars. (6) and (7) as (5) and (6), respectively, and struck out former par. (5). Prior to amendment, text of par. (5) read as follows: “No project receiving Federal credit assistance under this chapter may be financed (directly or indirectly), in whole or in part, with proceeds of any obligation—

“(A) the interest on which is exempt from the tax imposed under chapter 1 of title 26; or

“(B) with respect to which credit is allowable under subpart I or J of part IV of subchapter A of chapter 1 of title 26.”

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

“SECRETARY” DEFINED

Secretary means the Secretary of the Army, see section 2 of Pub. L. 113–121, set out as a note under section 2201 of this title.

§ 3908. Secured loans

(a) Agreements

(1) In general

Subject to paragraphs (2) and (3), the Secretary or the Administrator, as applicable, may enter into agreements with 1 or more obligors to make secured loans, the proceeds of which shall be used to finance eligible project costs of any project selected under section 3907 of this title.

(2) Financial risk assessment

Before entering into an agreement under this subsection for a secured loan, the Secretary or the Administrator, as applicable, in consultation with the Director of the Office of Management and Budget and each rating agency providing a rating opinion letter under section 3907(a)(1)(D) of this title, shall deter-

mine an appropriate capital reserve subsidy amount for the secured loan, taking into account each such rating opinion letter.

(3) Investment-grade rating requirement

The execution of a secured loan under this section shall be contingent on receipt by the senior obligations of the project of an investment-grade rating.

(b) Terms and limitations

(1) In general

A secured loan provided for a project under this section shall be subject to such terms and conditions, and contain such covenants, representations, warranties, and requirements (including requirements for audits), as the Secretary or the Administrator, as applicable, determines to be appropriate.

(2) Maximum amount

The amount of a secured loan under this section shall not exceed the lesser of—

(A) an amount equal to 49 percent of the reasonably anticipated eligible project costs; and

(B) if the secured loan does not receive an investment-grade rating, the amount of the senior project obligations of the project.

(3) Payment

A secured loan under this section—

(A) shall be payable, 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 relevant project;

(B) shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and

(C) may have a lien on revenues described in subparagraph (A), subject to any lien securing project obligations.

(4) Interest rate

The interest rate on a secured loan under this section shall be not less than the yield on United States Treasury securities of a similar maturity to the maturity of the secured loan on the date of execution of the loan agreement.

(5) Maturity date

(A) In general

The final maturity date of a secured loan under this section shall be the earlier of—

(i) the date that is 35 years after the date of substantial completion of the relevant project (as determined by the Secretary or the Administrator, as applicable); and

(ii) if the useful life of the project (as determined by the Secretary or Administrator, as applicable) is less than 35 years, the useful life of the project.

(B) Special rule for State infrastructure financing authorities

The final maturity date of a secured loan to a State infrastructure financing authority under this section shall be not later than 35 years after the date on which amounts are first disbursed.

(6) Nonsubordination

A secured loan under this section shall not be subordinated to the claims of any holder of