

FLOOD & STORMWATER MANAGEMENT UPDATE



Freshman Rep Named Water Resources Chair

U.S. Representative Bob Gibbs (R-OH) has been selected to chair the Subcommittee on Water Resources and Environment in the U.S. House of Representatives.

During his announcement of the House Transportation & Infrastructure Committee's subcommittee chairs, Committee Chairman John Mica (R-FL) noted that "Congressman Gibbs' experience as a farmer and small business owner makes him particularly suited to chair the subcommittee with oversight of the nation's water resources and clean water regulations."

In his comments, Rep. Gibbs, a newly elected Representative highlighted his goals for the subcommittee: "As Chairman, it will be my responsibility to modernize, reform and cut waste in the programs and agencies we oversee while advocating for common sense policies that ease regulatory burdens. I look forward to working closely with Chairman Mica and Subcommittee members to meet the infrastructure challenges before us."

Chairman Mica named newly elected Rep. Jaime Herrera Beutler (R-WA) vice chair for the subcommittee.

The Water Resources and Environment Subcommittee is one of six subcommittees of the Transportation and Infrastructure Committee, and has jurisdiction over clean water infrastructure; water resources development for navigation, flood protection, and ecosystem restoration; water pollution control; and hazardous waste cleanup. The Subcommittee also conducts oversight of the federal regulation of clean water. Agencies that fall within the Subcommittee's jurisdiction include the Army Corps of Engineers, the Environmental Protection Agency, and the Tennessee Valley Authority.

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Freshman Rep Named Water Resources Chair

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In addition, Democrats have named their members of the Water Resources Subcommittee. The full subcommittee roster is:

★ REPUBLICANS ★

Bob Gibbs (OH), Chairman* (Freshman)
 Don Young (AK)
 John J. Duncan, Jr. (TN)
 Gary G. Miller (CA)
 Timothy V. Johnson (IL)*
 Bill Shuster (PA)
 Shelley Moore Capito (WV)*
 Candice S. Miller (MI)
 Duncan Hunter (CA)*
 Tom Reed (NY)*
 Andy Harris (MD*) (Freshman)
 Rick Crawford (AR)* (Freshman)
 Jaime Herrera Beutler (WA), Vice Chair* (Freshman)
 Chip Cravaack (MN)* (Freshman)
 Larry Bucshon (IN)* (Freshman)
 Jeff Landry (LA)* (Freshman)
 Jeff Denham (CA)* (Freshman)
 James Lankford (OK)* (Freshman)
 John L. Mica (FL), (ex officio)*

★ DEMOCRATS ★

Timothy Bishop (NY), Ranking Member
 Jerry F. Costello (IL)
 Eleanor Holmes Norton (DC)
 Russ Carnahan (MO)
 Donna F. Edwards (MD)
 Corrine Brown (FL)
 Bob Filner (CA)
 Eddie Bernice Johnson (TX)
 Michael E. Capuano (MA)
 Grace F. Napolitano (CA)
 Jason Altmire (PA)*
 Steve Cohen (TN)*
 Laura Richardson (CA)*
 Nick J. Rahall, II (WV), (ex officio)*

* Indicates new member of Water Resources & Environment Subcommittee (Freshman) indicates new member of the House of Representatives

Obama Issues Executive Order to Examine Federal Regulations



On January 18, President Obama issued an Executive Order, calling on federal agencies to examine the impacts of federal regulation.

Along with requiring agencies to take stock of existing regulations, the executive order would lay out principles for future rulemakings. All agencies would need to consider ways to reduce burdens for U.S. businesses when they develop rules, allow more public participation and better follow the scientific integrity guidelines that were released last month after a lengthy delay.

“The administration believes firmly that regulations can both be more effective and consistent with American competitiveness,” a senior White House official said. “It’s not a question of choosing between meeting our responsibilities to protect the public health and the environment or growing the economy and creating jobs. It’s really a question of how to get the balance so we can accomplish both goals most effectively.”

The initiative could signal a desire at the White House to defuse some of the efforts on Capitol Hill to rein in regulations. Republicans and a few moderate Democrats have put forward a slew of bills that would put new checks on agency rulemaking – the Environmental Protection Agency (EPA) is a frequent target of such proposals.

A copy of the Executive Order can be found on the White House’s website: <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>

Sen. Kerry Considers Introducing Infrastructure Bank Bill

Sen. John Kerry's (D-MA) is placing a national infrastructure bank toward the top of his legislative priorities for 2011. An aide for the Massachusetts Democrat said the infrastructure bank has emerged as a top priority for Kerry and such a proposal is expected to dominate his attention this year.

An infrastructure bank is designed to offer federal loans for large-scale projects that have not secured other loans or government grants. The lending institution would distribute funds based on merit and is meant to help large infrastructure development that states or other agencies have been wary to spend on.

The structure and size of Kerry's proposal remain to be seen. In a Senate Banking Committee hearing on innovative financing in September, Sen. Kerry said the bank would finance projects with the expectation of being repaid and that it would lend directly to projects. The model he proposed then would give Congress oversight over the lending program.

Although most of the attention around the infrastructure bank proposals has focused on transportation projects, stakeholders are lobbying to include water resources infrastructure in the proposal.

Similar proposals have received broad support in Congress, though none have made serious traction. A 2007 Senate version from then-Senators Chris Dodd (D-Conn.) and Chuck Hagel (R-Neb.) did not advance, while a House version from Rep. Rosa DeLauro (D-Conn.) did not reach a committee vote last year. President Obama also mentioned an infrastructure bank in a \$50 billion infrastructure proposal last September, and Dodd continued to champion the cause until he left the Senate at the end of 2010.

The infrastructure bank proposal could gain traction as Congress considers a long-term reauthorization of the surface transportation bill. Given the limited funds available in the Highway Trust Fund and a lack of political interest in raising the national gas tax to make up the difference, some lawmakers and transportation advocates have identified the infrastructure bank as a way to close the funding gap. House Transportation & Infrastructure Chairman John Mica (R-Fla.) has expressed his support for a large bank.



EPA Water Administrator Resigns

The Environmental Protection Agency's (EPA) top water official, Pete Silva, announced his resignation, effective February 12. Mr. Silva, the Assistant Administrator for Water since July 2009, traveled to the 2010 NAFSMA Annual Meeting in San Diego to discuss the future of EPA Stormwater Regulations with members.

Nancy Stoner, who came from the Natural Resources Defense Council to become the deputy assistant administrator for the water office, will serve as acting assistant administrator in Silva's absence. Ms. Stoner has been a strong advocate for stricter water quality rules and played a key role in EPA deciding to launch a first-time rulemaking to address stormwater runoff that occurs after construction activities are completed.

Under federal law, Stoner may be able to remain in an acting capacity for months as long as an official nominee for the position is pending before the Senate or the Senate has rejected a nomination.

CEQ finalizes NEPA Guidance for Federal Agencies

The White House Council on Environmental Quality (CEQ) issued final guidance to federal agencies on how to ensure that commitments to mitigate the environmental impacts of federal projects are carried out effectively and transparently (“Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact”).

The guidance, first released in draft form in February, 2010, aims to ensure agencies commit to mitigation in decision documents when they have based environmental approval of projects on such mitigation. Agencies must include the conditions when issuing grants, permits or other agency approvals, and must make funding or approvals for implementing proposed actions contingent on environmental mitigation.

Agencies must also make monitoring information available to the public, preferably through agency websites, and find ways to improve ineffective mitigation.

The guidance also allows the use of adaptive management, which allows an agency to take alternate steps if initial mitigation plans fail to achieve the planned environmental outcomes. Such adaptive management has been used with mixed results by land management



agencies in the West in permitting and monitoring the impacts of oil and gas development on wildlife and their habitats.

The final guidance is part of a four-pronged effort at CEQ to modernize the National Environmental Policy Act (NEPA) on the 40th anniversary of its becoming law. Other recently updated CEQ guidance aims to clarify when and how federal agencies must consider greenhouse gas emissions and climate change in their proposed actions; enhance public tools for reporting on NEPA activities; and clarify the use of categorical exclusions.

The final guidance is available at: <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>

EPA Tells States Wetlands Permitting Delegation Won't Trigger ESA

An EPA decision to delegate Clean Water Act (CWA) wetlands permitting authority to a state is a “mandatory action,” and therefore would not trigger requirements under the Endangered Species Act (ESA) requiring consultation with other federal agencies, EPA told states via a letter to the Environmental Council of the States (ECOS) and the Association of State Wetland Managers (ASWM), potentially removing a barrier that has prevented some states from seeking wetlands permitting authority.

ECOS and ASWM wrote to EPA Dec. 6 seeking clarification on what steps a state can take in order to assume delegated control over wetlands permits, which states are intended to administer under the CWA but that are mostly issued by the U.S. Army Corps of Engineers.

To date, only Michigan and New Jersey have authority to issue their own wetlands dredge-and-fill permits under CWA section 404, and other state efforts to take over the permitting process have been held back over concerns that state delegation would interfere with ESA consultation requirements. Under the ESA, all “discretionary federal actions” are subject to consultation with the U.S. Fish & Wildlife Service (FWS) and/or National Marine Fisheries Service, who are the primary agencies in charge of implementing the ESA, in order to ensure that those discretionary actions do not adversely impact endangered species.

In his response, EPA Assistant Administrator for Water, Peter Silva, states that EPA delegation of section 404 permitting authority is a mandatory action and would not be subject to ESA section 7

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consultations. Silva points to the Supreme Court's 2007 landmark decision in *National Association of Home Builders v. Defenders of Wildlife* to support the position that delegation of section 404 permits does not amount to a discretionary action.

In the ruling, the high court found that ESA's requirements to "insure" endangered species are protected apply only to discretionary EPA actions. The *Defenders of Wildlife* ruling dealt with the question of EPA delegation of section 402 National Pollutant Discharge Elimination System (NPDES) permitting authority, rather than 404 delegation. But Silva says Congress intended states to implement both the section 402 and 404 programs, and the logic the Supreme Court applied in *Defenders of Wildlife* should also apply to 404 delegation actions.

Silva also cited the 1994 Memorandum of Agreement signed between New Jersey, FWS, and EPA that allowed the state to take over section 404 permitting authority from the Corps as a model for other states to follow as they pursue their own section 404 delegation.

States have been pushing EPA for several years to clarify how states can receive delegated 404 permitting authority, with ECOS passing a 2008 resolution that urged EPA to develop clear guidelines on how states could receive delegated 404 permitting authority, as well as calling on Congress to appropriate adequate funding for states with delegated 404 programs and to broaden the eligibility of the existing EPA wetland grant program to cover both the development and implementation of wetlands protection policies.

Stormwater Fee Legislation Becomes Public Law

Although the bill requiring federal facilities to pay local fees to clean up their stormwater has become law (P.L. 111-378), some questions remain at the federal level including whether the government must pay retroactive fees, how to determine if the fees are fairly assessed, and whether the funds for the fees must be secured through a special appropriations process.

According to the law, federal facilities are required to pay a "reasonable" service charge. For a fee to be reasonable it must be based on "some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge from the property or facility)" and the fee must be used to pay for stormwater management.

The government also faces the possibility of paying retroactive fees that it failed to pay before the law was passed, Rep. Cardin (D-MD), the new law's sponsor, noted. Federal facilities will likely pay such retroactive fees on a case-by-case basis, as long as the fees were based on a reasonable standard, Cardin said.

The new law includes language stating that agencies shall not be obligated to pay fees "except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." This language was included to address a budget scoring issue raised by the Congressional Budget Office, a spokeswoman for Cardin's office says. "Because of the peculiar past practice on how stormwater fees were paid in the District of Columbia, we needed to add these provisions or the bill would have violated PAY-GO rules," she says.

During House consideration of the bill late last month, Cardin and House members attempted to dismiss any concern that this language would require Congress to annually pass legislation expressly authorizing appropriations for the fees. "This new language requires that Congress make available, in appropriations acts, the funds that could be used for this purpose," Cardin said in a statement for the record on the day the bill passed the House. "It does not mean that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges. The legislative language doesn't say that, and I want to be perfectly clear that such a restrictive reading is not our intent."

In remarks on the House floor, Del. Eleanor Holmes Norton (D-District of Columbia) echoed Sen. Cardin and noted that the language about appropriations was added to rectify a problem in Washington, DC, where the Treasury Department had been paying some stormwater fees. "The provision simply says that agencies and departments should use their annual appropriated funds to pay for stormwater fees."

NAFSMA will be sending a letter to the Department of Justice laying out the association's position on these critical issues.



EPA Announces Community-Based Environmental Grants



The U.S. Environmental Protection Agency is making \$2 million available in 2011 to reduce pollution at the local level through the Community Action for a Renewed Environment (CARE) program. CARE is a community-based program that works with county and local governments, tribes, non-profit organizations and universities to help the public understand and reduce toxic risks from numerous sources to protect people's health.

EPA will award CARE cooperative agreements in two levels. Level I awards range from \$75,000 to \$100,000 and will help establish community-based partnerships to develop local environmental priorities. Level II awards, ranging from \$150,000 to \$300,000 each, will support communities that have established broad-based partnerships, identified the priority toxic risks in their communities, and are prepared to measure results, implement risk-reduction activities and become self-sustaining.

In 2010, EPA's CARE program distributed \$2 million throughout 14 communities. Among the grant recipients, projects included tackling drinking water and stormwater pollution, solid waste, and toxics issues in Cordova, Alaska; addressing air and water pollution sources, municipal solid waste collection and chemical releases in Ashland, Ky.; targeting pest and solid waste issues in New York, N.Y.; tackling air pollution and land use issues in Detroit, Mich.; focusing on threats from lead in paint, mold, and hazardous household products in Gary, Ind.; and addressing air pollution, greenhouse gas emissions, water pollution, and poor waste management in Kansas City, Kan.

Since 2005, 81 communities in 39 states and territories have used CARE grants to help reduce pollution and protect people's health.

Applications for the CARE grants are due March 22, 2011, 4:00 p.m. EST. EPA will conduct three webcasts to answer questions from prospective applicants about the application process on February 8, February 23, and March 2 from 1:00 p.m. to 3:00 p.m.

More information about the grants and webcasts: <http://www.epa.gov/care>

National Ocean Council Seeks Input on Ocean Strategic Action Plans

The federal interagency National Ocean Council (NOC) was created by Executive Order in July 2010 to strengthen ocean governance and coordination. The Executive Order identifies nine priority actions for the NOC to pursue, and adopts a flexible framework for effective coastal and marine spatial planning to address conservation, economic activity, user conflict, and sustainable use of the ocean, the nation's coasts and the Great Lakes.

The National Ocean Council is seeking public input as it develops strategic action plans for its nine priority objectives. Draft strategic action plans will be released for public review in the summer of 2011, allowing additional opportunity for the public to provide comments. Plans are expected to be completed by the end of 2011.

The NOC is requesting responses to the following questions for each of the nine priority objectives:

- What near-term, mid-term, and long-term actions would most effectively help the Nation achieve this policy objective?
- What are some of the major obstacles to achieving this objective; are there opportunities this objective can further, including transformative changes in how we address the stewardship of the oceans, coasts, and Great Lakes?
- What milestones and performance measures would be most useful for measuring progress toward achieving this priority objective?

To be considered during the development of the draft strategic action plans, comments should be submitted by April 29, 2011.

For more information about the NOC, its nine priority objectives, and a link for submitting comments on the action plans, please see: <http://www.whitehouse.gov/administration/eop/oceans/sap>

Western Court Broadens Options for NEPA Intervenors

A federal appeals court abandoned a legal rule that made it difficult for private interests to intervene in environmental disputes in the Western states.

Under the San Francisco-based 9th U.S. Circuit Court of Appeals' "federal defendant rule," anyone other than the federal government was barred in most instances from defending claims under the National Environmental Policy Act (NEPA), the main legal mechanism for challenging government actions that affect the environment. The rationale behind the rule was that parties seeking to intervene did not have a "significantly protectable" interest because NEPA is a law that only binds the federal government.

But the January 14th opinion in *Wilderness Society v. U.S. Forest Service* following a hearing by an en banc panel of 11 judges, which was required for the court to overturn one of its precedents, means that private parties can now intervene on the defendant's side and, in some cases, argue for particular points that the government would not push.

The rule, unique to the 9th Circuit, was frustrating for business and recreational interests in particular, which thought their voices were not always being heard in cases between environmental groups and the government.

The ruling could have considerable consequences in the environmental context because the 9th Circuit's jurisdiction includes the nine Western states, and its caseload therefore includes a substantial number of environmental cases in which the federal government is the defendant.

Watch for Upcoming Details on NAFSMA's 2011 Annual Meeting

**Don Cesar Hotel, St. Petersburg, FL
Oct 31 - Nov 3, 2011**

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