

Is Water Resources Policy Spinning out of Balance in Washington, DC?

A sweeping array of legislative and policy proposals being considered today in Washington, when examined together, portend the most significant changes in water resources policy in this country in decades. These seemingly separate and independent proposals actually work in concert to cover nearly all aspects of water resources policy and law. Their combined direction includes two very clear objectives: 1) expanded Federal control over water resources – and especially including expanded control by the executive branch, and 2) the primacy of environmental considerations at the expense of economic and human uses. Following is a summary of the main proposals:

- **The Sustainable Watershed Planning Act** has been drafted by the majority staff of the House Transportation and Infrastructure Committee to create a White House water resources “czar,” a new (Federally led) water resources council and Federally dominated regional watershed planning boards. The bill would give the new water czar control over all Federal water resources programs including new project proposals, the regulatory programs of the Corps and the operations of existing Federal projects. Existing Federal projects would be operated to “maximize ecological benefits.” Economic well-being is not even recognized as a co-equal objective and the goals appear to encompass Federal land use regulation and control through Federal planning and regulatory jurisdiction over all the watersheds in the US. Under the Act, all water resource decisions would be based on “increasing water efficiency, improving water quality, and improving ecological health and resiliency.” These criteria exclude economic and human uses such as navigation, flood control, irrigation, and municipal and industrial water supply.
- **An Executive Order on Flood Plan Management** to revise Jimmy Carter’s EO 11988 is pending with the Council on Environmental Quality. The new Order would expand Federal regulation of the nation’s floodplains to stringently limit state and local land use choices and restrict economic uses of the flood plain. The order would de-emphasize traditional flood control projects in favor of non-structural measures like permanent evacuation of the flood plain. Ecological goals would be given priority. Water supply, navigation, hydropower and structural flood control projects, along with certain agricultural practices and communities located in floodplains would be disadvantaged. Every project would have to undergo a stringent alternatives analysis, probably precluding the use of Nationwide 404 permits in flood plains. Avoiding the flood plain altogether and non-structural alternatives are preferred and all flood plain uses must avoid adverse effects which are defined to mean cumulative direct or indirect harm or detriment to “the natural resources and functions of flood plains,” again elevating environmental and ecological considerations over economic and human uses. The E.O. revision is taking place behind closed doors, without notice and comment, even though the revised E.O will create binding obligations that will significantly affect the rights and responsibilities of the public.
- **Revised Principles and Guidelines** for water resources planning are being written at the Council on Environmental Quality (CEQ). Congress gave this task to the Secretary of the Army (and the Corps) in the Water Resources Development Act (WRDA) 2007. CEQ took this effort away from the Secretary causing the New York Times to recently

report that environmentalists had won a significant victory in wresting control of this revision from the Corps. Although WRDA 2007 includes the maximizing economic development in its statement of policy, one probable scenario is that CEQ will have the President first sign the revised Executive Order on Floodplain Management discussed above and force the new Principles and Guidelines to comply with the Order's new emphasis on ecological goals at the expense of economic and human well-being.

- The proposed **Clean Water Restoration Act (CWRA)** is back on the Congressional agenda with increased chances for enactment. It is proposed under the premise of resolving confusion following several Supreme Court decisions that restricted Federal wetlands regulation to waters having a significant navigation nexus. But, in proposing to resolve the jurisdictional "confusion," the CWRA would, for the first time, impose Federal regulation on all waters of the United States, by removing not only the nexus to navigation, but also any nexus to interstate commerce. Indeed, if enacted, not only all water, but also all land where rain falls would potentially be subject to Federal regulation, with the goal of protecting the water cycle, not ensuring availability of clean water for human and economic uses.
- **H.R. 2454, the American Clean Energy and Security Act of 2009**, appears to coerce states (through Federal budgetary policies) and require Federal agencies to develop and implement climate adaptation plans. The Federal policy and strategy provisions may impact regulatory decision-making by Federal agencies if states don't develop and abide by acceptable plans. As stated in the bill, the goal is "to use all practicable means and measures to protect, restore, and conserve natural resources to enable them to become more resilient, adapt to, and withstand the impacts of climate change and ocean acidification." Federal agencies, such as EPA and the Corps, would be required to "consider the impacts of climate change...on...natural resources" in every decision made by the agency, and every decision would need to "protect, restore and conserve natural resources, again to the exclusion of human and economic uses. On the floor, managers added a program for adaptation of traditional water resources infrastructure such as flood control and water supply but explicitly made such adaptations subordinate to the ecological goals of Federal agency and state natural resources adaptation plans. H.R. 2454 passed the House on June 26, 2009. The Senate is now drafting companion legislation.
- The President has directed drafting of a "**National Policy for the Oceans, Our Coasts, And the Great Lakes.**" A task force, under CEQ's leadership, was formed to develop recommendations leading to this new Federal policy. The stated goal is "a national policy that ensures the protection, maintenance, and restoration of the health of ocean, coastal, and Great Lakes ecosystems and resources, enhances the sustainability of ocean and coastal economies, preserves our maritime heritage, provides for adaptive management to enhance our understanding of and capacity to respond to climate change, and is coordinated with our national security and foreign policy interests." In developing this policy, Agencies are directed to "prioritize upholding our stewardship responsibilities," again to the exclusion of economic and human uses.
- Congress has passed the **Omnibus Public Land Management Act of 2009** (PL 111-11, 123 Stat. 991) which includes such things as a Department of the Interior/NOAA joint

effort to assess “each effect and risk resulting from global climate change with respect to the quantity of water resources located in the service area,” a requirement for the Department of Energy to assess hydroelectric power and power plants, a DOI/NOAA/Corps/Agriculture assessment of climate change on freshwater resources and aquatic ecosystems, authorization of a National Streamflow Information Program to oversee Corps activity in the areas of flood hazards, hydrologic, hydropower, navigation, and water activities, and establishment of a National Water Availability and Use Assessment to provide accurate information about water resources in the country.

- **The Surface Transportation Authorization Act of 2009.** Congress and others are rushing a dubious integration of ports and waterways with surface transportation. The highway trust fund is currently insolvent and Congress has been forced to use general revenues to sustain the current highway investment program. Some transportation advocates see the Harbor Maintenance Trust Fund and Inland Waterways Trust Fund as revenue sources that could be tapped to lessen the problem. This bill, recently proposed by the House Transportation and Infrastructure Committee, would initiate the integration of ports into the US surface transportation system. A new Undersecretary of Transportation and Office of Intermodal Transportation would assume new leadership roles for the nation’s ports. Port planning would be integrated into state and national transportation plans. However, this rush to transportation integration overlooks the reality of the socio-political viability of major port and navigation improvements – which are dependent on multiple-objective planning to address related water resources needs. Nearly all recent major port projects have depended on integrated ecosystem restoration components. The same is true for major inland navigation projects. The likely outcome of moving ports and navigation projects to DOT control would be that such projects never move up in priority. In short, for a growing number of ports and navigation projects, the prospective benefits of transportation integration will vanish in diseconomies and efficiency losses associated with severing navigation from other water resources considerations.
- **HR 2355 - Making Opportunities Via Efficient and More Effective National Transportation Act of 2009 or the MOVEMENT Act of 2009.** This bill would establish a “National Goods Movement Improvement Fund” to provide funding for infrastructure projects, designed to improve the movement of goods, mitigate environmental damage caused by the movement of goods, and enhance the security of transported goods. The legislation would redirect use of, and more than triple the harbor maintenance tax, to fund projects “near” the ports to facilitate the movement of freight. If enacted, the proposal would likely cause an adverse reaction from the World Trade Organization, as our international trading partners have had long-standing concerns about the HMT.
- **Levee inspections, certifications and FEMA map modernization.** The world is changing quickly as it relates to levees. The Corps has recently begun enforcing its 1995 criteria for periodic inspections of levees in a much more rigorous manner (and has issued clarifying guidance to that effect), resulting in decertification of many miles of levees in the US. Local sponsors of even the most well-maintained levees have been stunned by the changes – and their new, unsatisfactory ratings. Concurrently, FEMA is going ahead with its map modernization program which is producing new digital flood insurance rate maps, further unsettling levee sponsors.

- As promised in the President's budget request, the Administration has now sent a legislative proposal to the Congress recommending that a **lock usage fee be enacted to (over time) replace the current fuel tax and correct funding shortfalls in the Inland Waterway Trust Fund**. In summary, this legislation would 1) institute lock use fees; 2) replace, over time, the fuel tax; 3) permit the Secretary to make periodic adjustments in the lock usage fee amounts based on the balance remaining in the IWTF; 4) allow for congestion fees at crowded locks; and 5) expand lock fees to current non-taxed waterways. So far, the proposal has gained little traction in the Congress, and probably won't until the Users' Board offers its recommended solution to the IWTF funding problems. However, if adopted this proposal would generate major problems along the inland system and should be carefully monitored. Additionally, there are proposals now being offered which would combine several transportation trust funds, especially including the IWTF, the HMTF and the highway trust fund (which is also suffering from shortfalls). Of concern, if that were done, the navigation funds would almost certainly come up short in priority battles with highway proponents, leaving even less available for navigation infrastructure improvements.