A WIIN FOR WATER INFRASTRUCTURE

Date: 27 December 2016

Maritime Alert

By: James A. Sartucci

On December 16, 2016, the President signed into law the Water Infrastructure Improvements for the Nation ("WIIN") Act (S. 612), legislation negotiated by both parties, and overwhelmingly passed by Congress on December 10th, to provide for critical water infrastructure improvements. The WIIN Act is comprehensive legislation to address the needs of America's harbors, locks, dams, flood protection, and other water resources infrastructure. It includes the Water Resources Development Act ("WRDA") of 2016, which supports the critical missions of the U.S. Army Corps of Engineers ("USACE") in overseeing the nation's water infrastructure. In addition, the WIIN Act includes provisions aimed at improving drinking water infrastructure around the country, addressing control of coal combustion residuals, and improving water storage and delivery to help drought stricken communities. The K&L Gates policy team and the authors of this alert are available to answer any specific questions you may have and are prepared to assist clients on water infrastructure issues.

WATER INFRASTRUCTURE RECEIVES CRITICAL SUPPORT THROUGH WRDA

WRDA 2016 authorizes nearly $16 billion in federal funding for USACE activities. Specifically, the law authorizes 30 USACE "Chief Reports" submitted to Congress since the enactment of the 2014 bill. The law authorizes eight new navigation projects: Brazos Island Harbor, TX; Calcasieu Lock, LA; Portsmouth Harbor and Piscataqua River, NH/ME; Port Everglades, FL; Little Diomede Harbor, AK; Charleston Harbor, SC; Craig Harbor, AK; and Upper Ohio, PA; and authorizes a modification of the Houston Ship Channel, TX.

Additionally, it authorizes 30 feasibility studies for future civil works projects, including 6 navigation related projects: Ouachita-Black Rivers, AR/LA; Brunswick Harbor, GA; Cayuga Inlet, Ithaca, NY; Corpus Christi Ship Channel, TX; Gulf Intracoastal Waterway, Brazoria and Matagorda Counties, TX; and Port of Bay City, TX; and modifications to two navigation feasibility studies: Arctic Deep Draft Port development and Mississippi River Ship Channel, Gulf to Baton Rouge, LA. WRDA 2016 also authorizes a study on the feasibility of deepening the Mississippi River Ship Channel, Gulf to Baton Rouge, LA, and expedites feasibility studies for three navigation-related projects: St. George Harbor, AK, Mobile Harbor, AL and Mississippi River Ship Channel, LA.

WRDA HELPS PORTS AND UPDATES HARBOR MAINTENANCE TRUST FUND ("HMTF")

WRDA 2016 contains several provisions that support various port interests and updates the HMTF to support a 21st century infrastructure to keep American globally competitive.

©2005-2026 K&L Gates LLP. All Rights Reserved.

WRDA 2016 affirms HMTF reforms from the Water Resources Reform and Development Act of 2014 that created an 11-year deadline for dedicating 100 percent of harbor tax revenues to maintenance dredging and requires the agency to allocate HMTF funding accordingly. Specifically, the new law ensures that the amount of harbor tax revenues dedicated to the HMTF will be at least 3 percent higher than the previous year's allotment until 100 percent of the tax is dedicated to the HMTF in 2025. This means that even if the revenues collected from the harbor maintenance tax decline, the amount appropriated from the HMTF will be at least 103 percent of the prior year's appropriation.

In light of increasing vessel sizes, which require deeper harbors to accommodate such vessels, WRDA 2016 supports a key port priority by updating the cost-sharing formula for harbor deepening projects.

The federal government now has responsibility for 75 percent of the dredging costs for projects that deepen the harbor up to 50 feet, instead of the prior threshold of 45 feet.

The law makes permanent the 10 percent allocation of HMTF appropriations for "emerging harbors" that was established in the 2014 bill, and permanently authorizes priority HMTF appropriations for underserved harbors and Great Lakes projects, which are currently authorized through FY 2024. This ensures that underserved harbor projects will continue to receive at least 5 percent of priority HMTF appropriations and Great Lakes projects receive at least 10 percent of priority HMTF appropriations.

WRDA 2016 also modestly expands eligibility for the Donor Port and Energy Transfer Port grant program, without expanding the program's $50 million authorization limit, and extends the authorization for this program from 2022 to 2025.

WRDA 2016 CONTINUES FOCUS ON EFFICIENCY, STREAMLINING, AND TRANSPARENCY

WRDA 2016 follows the strong bipartisan reforms included in the Water Resources Reform and Development Act of 2014, and adheres to the process Congress established in the 2014 law for oversight, review, and consideration of proposed water resources development activities of the USACE. It is also fiscally responsibly by fully offsetting new authorizations, eliminating unnecessary projects, and sunsetting inactive projects to prevent future backlogs.

Under WRDA 2016, the government may enter into an agreement with a non-Federal interest to carry out maintenance activities for an authorized navigation project, or a separable element of the project. The government may reimburse the non-Federal interest for maintenance activities directly benefitting an authorized project, including costs associated with maintenance dredging. Another provision of the law also permits the government to enter into an agreement with a non-Federal interest to cover the operation and maintenance costs of a federal navigation channel if the costs of this alternative are less than the costs of the USACE maintaining such channel.

WRDA 2016 also builds on prior permitting reforms by accelerating infrastructure project permitting processes and by requiring timely approvals for non-federal modifications to USACE projects. Reform examples include making available on a website all USACE water resource data and the development and implementation of an electronic system for permit applications and requests for jurisdictional determinations.

©2005-2026 K&L Gates LLP. All Rights Reserved.

In addition, WRDA 2016 requires the creation of a publicly available database on maintenance dredging activities, including data on the volume of dredged material removed, the USACE's initial cost estimate, total cost, the party and vessel carrying out the work, and the number of private contractor bids received and the bid amounts.

WRDA EXCLUDES BUY AMERICA PROVISION AND KEEPS HMTF ON BUDGET

The new law does not include a provision that would have required that U.S. iron and steel be used for projects assisted by the Drinking Water State Revolving Fund. Given President-elect Trump's focus on investing in the nation's infrastructure using U.S. products, several senior Democrats including Senators Chuck Schumer (D-NY), Dick Durbin (D-IL), and Patty Murray (D-WA), have voiced their displeasure that the Buy America provision was not included in the bill.

Notably, a provision that would have taken the HMTF "off budget," moving HMTF spending from "discretionary" to "mandatory" starting in 2027 to ensure that HMTF funds were used for their intended purpose instead of being diverted to offset other spending, was not included in WRDA 2016.

WATER AND WASTE ACT OF 2016

The WIIN Act also makes changes to the Safe Drinking Water Act and the Solid Waste Disposal Act in an effort to help communities, and in particular economically distressed ones, pursue better quality drinking water and obtain certainty for protecting a community's economic, environmental, and public health well-being.

The Water and Waste Act of 2016 provisions seek to empower and equip communities to improve drinking water supplies, reduce lead concentrations in drinking water, and conduct water quality testing. It also requires public water systems to notify customers when their water's lead content exceeds federal levels. The new law includes an authorization for $100 million in Drinking Water State Revolving Fund Capitalization Grants for communities that are under the Stafford Act. Funding was provided for this program in the end of the year Continuing Resolution passed by Congress, along with $20 million for the Water Infrastructure and Finance and Innovation Act program and $50 million for expanded healthcare programs, including the Childhood Lead Poisoning Prevention Program, Healthy Start Program, and money to create a lead exposure registry.

OTHER PROVISIONS ADDRESS CALIFORNIA DROUGHT AND INDIAN WATER RIGHTS DISPUTES

Under the WIIN Act, drought relief is provided to California by expediting water storage and delivery and providing flexibility to capture more water in existing reservoirs in California.

The law also addresses water infrastructure for Indian communities, expediting repairs to irrigation projects, improving flood mitigation and dam safety needs, and resolving water rights disputes.

RETURN TO A 2-YEAR CYCLE FOR WRDA

With the passage of WRDA 2016, Congress returned to its regular, two-year cycle of addressing the nation's

©2005-2026 K&L Gates LLP. All Rights Reserved.

water infrastructure needs. This means that Congress may start working on a WRDA for 2018, especially since this year's WRDA took most of 2016 to complete. There will also be new leadership in the 115th Congress with Senator John Barrasso (R-WY) serving as the new Chair of Senate Environment and Public Works Committee, and Senator Tom Carper (D-DE) replacing retired Senator Barbara Boxer (D-CA) as Ranking Member. Other factors impacting work on a WRDA 2018 bill include the potential for a significant infrastructure package pushed by the new Trump Administration. The incoming President's focus on infrastructure and the recent bipartisan commitment to keep WRDA on a two-year cycle open the door for additional investments in America's water infrastructure.

KEY CONTACTS



JAMES A. SARTUCCI
GOVERNMENT AFFAIRS COUNSELOR

WASHINGTON, DC
+1.202.778.9374
JIM.SARTUCCI@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.