CONGRESS WORKING AGGRESSIVELY TO PASS A BIPARTISAN WRDA IN 2016

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Both chambers in Congress are working aggressively to pass bipartisan Water Resources Development Act of 2016 ("WRDA 2016") legislation this year. Now is the time for entities interested in U.S. Army Corps of Engineers ("USACE") waterway and maritime navigation projects, water resources policy, or funding for maritime transportation infrastructure projects to engage with Congress. The K&L Gates policy team continues to be actively involved in congressional action on WRDA 2016 and is prepared to assist our clients.

CURRENT STATE OF PLAY FOR WRDA 2016

On Wednesday, May 25, the House Transportation and Infrastructure ("T&I") Committee approved its bipartisan version of WRDA 2016. Described as a "pamphlet bill" by T&I Chairman Bill Shuster (R-PA), the House's $5 billion WRDA bill is an abbreviated version of prior WRDAs and focuses on traditional WRDA elements such as authorizations for USACE's maritime transportation infrastructure improvement and maintenance projects and support for flood protection and environmental restoration needs.

As a reminder, the Senate Environment and Public Works Committee approved its WRDA bill, S. 2848, by an overwhelming majority on April 28. An overview of the Senate WRDA bill can be found in our previous alert. The House's WRDA bill, unlike its Senate counterpart, does not focus on drinking water and wastewater systems or provide financial assistance to Flint, Michigan.

SIGNIFICANT PROVISIONS IN HOUSE WRDA BILL

The House WRDA bill prioritizes returning to the regular, biannual process of Congress authorizing projects and activities related to the key mission of the USACE, including developing and maintaining the nation's waterway infrastructure and supporting effective and targeted flood protection and environmental restoration needs. The legislation follows the process reforms established in the water resources bill two years ago, the Water Resources Reform and Development Act ("WRRDA") of 2014, and includes provisions on USACE project authorizations, modifications, deauthorizations, and feasibility studies; the Harbor Maintenance Trust Fund; dredging; enhanced partnerships with stakeholders; data and transparency; and water supply issues.

Project Authorizations, Modifications, Deauthorizations, and Feasibility Studies

The House WRDA bill authorizes 28 USACE "Chief's Reports" submitted to Congress since the enactment of WRRDA 2014. Of the 28 projects, seven are navigation projects: Brazos Island Harbor, TX; Calcasieu Lock, LA; Portsmouth Harbor, NH and Piscataqua River, ME; Port Everglades, FL; Little Diomede Harbor, AK; Charleston Harbor, SC; and Craig Harbor, AK. It also authorizes 29 feasibility studies for future civil works projects, modifies previously authorized projects, expedites feasibility studies for eight projects, deauthorizes $5 billion in previously

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authorized projects to offset the newly authorized projects, and sunsets projects authorized by the bill if funds have not been obligated within seven years of the bill's enactment.

The Committee adopted, as part of the Manager's Amendment, a provision prioritizing the WRRDA 2014 requirement under section 1013 that the Secretary contract with the National Academy of Public Administration to review the USACE's process for preparing, negotiating, and approving project partnership agreements and submit the report to Congress.

Harbor Maintenance Trust Fund ("HMTF")

The legislation includes several provisions related to the HMTF. Perhaps most notably, the House bill proposes to take the HMTF out of the annual appropriations process, moving HMTF spending from "discretionary" to "mandatory" starting in 2027. HMTF funds have long been withheld to offset other spending.

The House provision would permit the USACE to use all collected funds for HMTF for their authorized purposes. House T&I Committee Ranking Member Peter DeFazio (D-OR) described this as "a critical provision to ensure that, in the future, funds collected in the Harbor Maintenance Trust Fund will be used for their intended purpose – harbor maintenance." However, it is anticipated that provision could be controversial with leaders of the Budget and Appropriations Committees and may be subject to a point of order on the House floor.

The bill would also make permanent a provision providing for a 10 percent allocation for the operation and maintenance costs of "emerging harbors," which handle less than one million tons of cargo annually, and would modify the definition of a "donor port" from the Donor Port and Energy Transfer Port grant program created by WRRDA 2014, reducing the threshold for annual HMTF collections for donor ports from $15 million to $5 million. The Committee also approved amendments extending the authorization of $50 million in appropriations each fiscal year ("FY") through FY 2020 to support donor and energy transfer ports and authorizing additional appropriations for each of FY 2021 through FY 2025 if the established targets are met between FY 2016 and FY 2020.

Inland Waterway Trust Fund ("IWTF")

Another amendment adopted by the Committee would direct the Government Accountability Office ("GAO") to analyze alternative models for managing the IWTF, including project schedules and fund expenditures for inland waterways projects. The study would consider the costs and benefits of transferring management of the IWTF to a not-for-profit private company or government-owned corporation; the GAO study must be submitted within one year of the bill's enactment.

Dredging

Several provisions also focus on dredging issues. Specifically, the House WRDA bill requires a study on the costs and benefits of expanding, reducing, or maintaining the current federally owned hopper dredge fleet and establishes a maintenance dredging database with data on the volume of dredged material removed, cost, involved parties and vessels, and number and amount of bids. In addition, the Committee adopted an amendment that would permit the USACE to enter into agreements for operation and maintenance costs for alternative projects to maintenance dredging if the alternate project would lower the overall costs of maintaining the channel.

Enhanced Partnership with Stakeholders

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Building off of WRRDA 2014's Section 7001 Report to Congress on Future Water Resources Development, the House's WRDA 2016 asserts that the report will be used "to determine authorization needs and priorities for purposes of water resources development legislation." It also emphasizes the need for stakeholder engagement during the report's preparation, calling for guidance on the process to be provided to stakeholders.

Prior to initiating a feasibility study for a proposed project, the bill calls for stakeholder meetings, if requested, to review a preliminary analysis of the project's federal interest; costs, including a cost estimate for a feasibility study; benefits; and environmental impacts.

Additionally, the legislation provides that non-federal interests may also request technical assistance "relating to any aspect of a feasibility study if the non-federal interest contracts with the Secretary to pay all costs of providing such technical assistance."

Data and Transparency

The House bill includes several provisions to advance initiatives under WRDA 2007 that focused on improving transparency and providing public access to certain data. Section 135 requires the implementation of an electronic system for submitting and tracking permit applications and requests for jurisdictional determinations within two years of the bill's enactment. Section 136 requires all USACE data on "the planning, design, construction, operation, and maintenance of water resources development projects" and "water quality and water management of projects owned, operated, or managed by the Corps of Engineers" to be made publicly available "as quickly as practicable after the data is generated."

Beginning in FY 2018 and biennially thereafter, a report must be submitted, in conjunction with the President's budget submission, to the relevant congressional committees that describes the metrics used in developing the civil works budget and how projects are prioritized.

Water Supply Issues

Although the House WRDA bill does not devote as much attention to water supply issues as the Senate WRDA bill, it does address water supply conservation efforts for areas that are experiencing, or in the past year have experienced, a drought emergency. For these areas, the Secretary is to evaluate whether water supply conservation measures would be appropriate, and, if so, contract with a non-federal interest to provide approved water supply conservation measures such as storm water capture and releases for ground water replenishment, storage, or increased supply. The non-federal interest would be responsible for paying only "separable costs associated with the evaluation, implementation, operation, and maintenance of an approved water supply conservation measure."

As part of the adopted Manager's Amendment, the House T&I Committee also approved a provision that would require integrated water resources planning when conducting feasibility studies for water resources development projects. If local or regional water management plans exist or are under development for the purpose of stormwater management, water quality improvement, aquifer recharge, or water reuse, the Secretary must work with local public entities and non-federal sponsors to incorporate these plans and avoid adversely impacting the plans' purposes.

KEY PLAYERS REMAIN COMMITTED TO PASSING WRDA IN 2016

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With the House and Senate WRDA bills both in play, the Senate and House committee leaders are better positioned to achieve their goal of completing a WRDA bill every two years, which means passing WRDA this year.

The House bill reiterates this objective with the inclusion of statement on the sense of Congress that addresses the importance of passing WRDA bills "on a routine basis [, which] enables Congress to exercise oversight, ensures the Corps of Engineers maintains an appropriately sized portfolio, prevents project backlog, and keeps United States infrastructure competitive." As such, this provision concludes that "Congress should consider a [WRDA] at least once every Congress."

EXPECTED TIMELINE OF WRDA CONSIDERATION

Members of Congress are seeking to pass WRDA 2016 before the summer recess scheduled to begin July 16. With the release of the House WRDA, Chairman Shuster has indicated he hopes the House will consider WRDA by June. The Senate is expected to consider its bill later this summer.

As the House and Senate bills contain significant differences, particularly concerning drinking water and wastewater systems, a conference on the bills will need to reconcile the nontraditional elements of the Senate's WRDA with the House's more traditional approach.

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