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**FROM:** MIKE McINTYRE

**SUBJECT:** JULY/AUGUST MONTHLY LEGISLATIVE UPDATE

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## MONTHLY LEGISLATIVE UPDATE

The July/August Monthly Legislative Update provides information on the following topics:

- FY 2019 Budget and Appropriations
- Water Resources Development Act
- National Flood Insurance Program Extension
- Release of Waters of the United States Supplemental Proposed Rule
- Release of Infrastructure Package Draft Legislation
- FEMA Proposal to Remove CBRS Unit Boundaries from Flood Maps
- Corps and EPA Encouraging States to Assume Certain Section 404 Permitting Responsibilities
- Resignation of Top U.S. Fish and Wildlife Service Appointee

### **FY 2019 Budget and Appropriations**

For the first time in two decades, the Senate has outpaced the House on approving annual appropriations bills, passing more spending bills before September than the lower chamber. So far, the Senate has approved seven of the 12 annual appropriations bills for Fiscal Year (FY) 2019 and is expected to pass another “minibus” including the Defense bill and Labor, Health and Human Services, and Education bill in August, bringing the Senate’s total to nine. Meanwhile, the House has approved a total of six bills, and will not be back in session until September 4.

Over the last decade, the Senate has passed an average of two appropriations bills ahead of the September 30 deadline. In comparison, the House has finished an average of more than six appropriations bills on time.

### **Water Resources Development Act**

Progress on the Water Resources Development Act (WRDA) has slowed in the last month. A vote on the Senate WRDA bill, the *America’s Water Infrastructure Act of 2018* (S. 2800), was expected to occur in recent weeks but was delayed, mostly due to an attempt by Senator Richard Burr to attach a provision to the bill permanently authorizing the Land and Water Conservation Fund program. It is now unclear when the Senate will vote on S. 2800. Even though Congress has until the end of the year to pass a WRDA bill, the committees of jurisdiction are anxious to move to final negotiations on bill. “We’ve got 99 people ready to vote,” said Senate Environment and Public Works Committee Chairman John Barrasso (R-WY).

As you know, the House passed its WRDA bill, the *Water Resources Development Act of 2018* (H.R. 8), on June 6 by a commanding vote of 408-2. The House bill is much narrower in scope than the Senate bill, and therefore, it is expected that significant negotiations will need to occur by the end of the year in order to get both chambers to agree on a final bill.

### **National Flood Insurance Program Extension**

On July 31, President Trump signed the *National Flood Insurance Program Extension Act of 2018* (Public Law 115-225) into law, which extends the National Flood Insurance Program's (NFIP's) authorization through November 30, 2018. The House passed the bill on July 25 by a vote of 366-52 and the Senate passed it on July 31 by a vote of 86-12. The passage and signing of the bill prevented a lapse in the NFIP's authorization, which was set to expire at midnight on July 31.

Since the NFIP's multi-year authorization expired on September 30, 2017, Congress has passed seven short-term NFIP extensions with little bipartisan agreement over moves to reform the program. Last November, the House passed the *21<sup>st</sup> Century Flood Reform Act* (H.R. 2874), a package of seven bills approved last summer by the House Financial Services Committee to reform and reauthorize the NFIP. However, the Senate has yet to move seriously on any bill related to NFIP reauthorization. While several bills have been introduced in the Senate, none have received consideration. Congress will need to reach an agreement on NFIP reform and reauthorization issues prior to November 30, 2018, or another short-term extension will be needed to keep the program from lapsing.

### **Release of Waters of the United States Supplemental Proposed Rule**

In late June, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) [released a 93-page “supplemental” proposed rule](#) on the Administration's waters of the United States (WOTUS) repeal and replace plans. The supplemental proposed rule is meant to provide more details on the [supplemental proposed rule](#) released last summer, which was only 11 pages long. By providing more details on their repeal and replace plans, the Administration is hoping to fend off some expected legal challenges.

Specifically, the supplemental proposed rule adds legal and pragmatic reasons to support the move and goes far beyond the brief justification for scrapping the rule that the agencies offered in their original proposal a year ago. In the proposal, EPA and the Corps say they now believe that their predecessors exceeded the scope of the landmark Supreme Court opinion the agencies used as the basis for the 2015 rule, that being Justice Anthony Kennedy's concurrence in the 2006 4-4-1 case *Rapanos, et ux., et al., v. United States, et al.* Justice Kennedy held that wetlands and tributaries with a “significant nexus” to downstream navigable waters can be jurisdictional under the Clean Water Act (CWA), but the new proposal makes a case that the Obama Administration took that language far beyond Kennedy's intent.

The WOTUS repeal is the first of two steps the Trump Administration is taking to redefine CWA jurisdiction, as it plans to also soon propose a replacement WOTUS jurisdiction rulemaking that EPA has

said will be based on a narrower test for the CWA's scope established by the late Justice Antonin Scalia's separate opinion in *Rapanos*.

### **Release of Infrastructure Package Draft Legislation**

On July 23, Chairman Bill Shuster (R-PA) of the House Transportation and Infrastructure Committee released a legislative discussion draft outlining his plan to invest in the nation's infrastructure, mostly focused on transportation and water infrastructure. Draft bill language, a section-by-section outline, and other information on the draft legislation can be found on the House Transportation and Infrastructure Committee's [website](#).

In a "vision statement" from Chairman Bill Shuster that accompanied the release of the draft, the Chairman states, "This discussion draft is intended to further the national conversation about the current state of America's infrastructure and highlight some of the major roadblocks to funding and improving our transportation network...However, it does not attempt to solve every issue facing our infrastructure, nor does it pretend to provide all of the answers. Instead, it serves as a framework and a new starting point..." The draft includes provisions of interest to both Republicans and Democrats, but some observers say it is the Chairman's draft only and not a bipartisan package. While the bill is unlikely to move through the committee structure during the remainder of this Congress, it is likely to move the infrastructure financing discussion forward.

Some of the provisions in the draft bill that may be of interest to TISPC include:

- Several sections related to accelerating project delivery, including the establishment of a pilot program on the use of innovative practices for environmental reviews and project financing.
- Reauthorization of the Water Infrastructure Finance and Innovation Act (WIFIA) program, which also allows the Corps of Engineers to enter into an agreement with the EPA to service loans for the Corps' WIFIA program, among other program improvements.
- Establishment of a specific budgetary mechanism to allow revenue deposited in the Harbor Maintenance Trust Fund to be appropriated and expended to address the maintenance dredging needs of U.S. commercial harbors.
- Increase in the federal user fees on gasoline and diesel fuel by 15 cents per gallon and 20 cents per gallon, respectively. These increases are phased in over a period of three calendar years. Once the phase-in is complete, the new user fees are indexed to inflation. On September 30, 2028, the rates for these user fees become zero.

### **FEMA Proposal to Remove CBRS Unit Boundaries from Flood Maps**

On August 7, the Federal Emergency Management Agency (FEMA) [announced](#) a proposal to remove CBRS information from FEMA mapping products, including Flood Insurance Rate Maps (FIRMS). CBRS unit boundaries and Otherwise Protected Areas (OPAs) are currently drawn on FIRMS to specify areas that are not eligible for federal flood insurance. FEMA states that the update is being done in collaboration with the U.S. Fish and Wildlife Service (FWS) to remove potentially outdated CBRS information from FEMA maps and instead switch to using the updated digital CBRS boundaries provided by FWS. Instead of

of providing CBRS unit and OPA boundary information directly on FIRM panels, each FIRM panel would state:

“Coastal Barrier Resources System (CBRS) areas and “otherwise protected areas” (OPAs) are no longer shown on these map panels, but still may be present in this community. Current information on these areas are provided by the U.S. Fish & Wildlife Service (FWS). NFIP flood insurance is not available within CBRS areas for structures that are built or substantially improved on or after the dates indicated by FWS. Users should reference the most up-to-date information provided by FWS to determine NFIP insurance eligibility. The official maps and additional information regarding CBRS areas are provided on the FWS website at <http://www.fws.gov/ecological-services/habitatconservation/coastal.html>.”

Although this is not being considered a significant change, it could potentially cause confusion for property owners and others looking at FIRMS to determine if they are covered by the NFIP.

FEMA is accepting comments on the proposed change through September 5. Comments may be submitted via email to [FEMA.GS@riskmapcfs.com](mailto:FEMA.GS@riskmapcfs.com). All comments received prior to this date will be reviewed before the proposed change is finalized in February 2019.

### **Corps and EPA Encouraging States to Assume Certain Section 404 Permitting Responsibilities**

On August 7, the Army Corps of Engineers released a [memo](#) (dated July 30, 2018) that seeks to clarify when the Corps and the EPA can grant states the power to issue permits under Section 404 of the CWA in an attempt to encourage states to take over certain Section 404 permitting responsibilities. The Corps and EPA, which jointly enforce the CWA, are allowed to give states authority over waterways like streams and wetlands for permitting, subject to continued federal oversight. States cannot oversee permitting for major waterways like rivers and ports. Therefore, the Corps should retain authority over most waters covered by the Rivers and Harbors Act (RHA) Section 10 (navigable waters), excluding waters that have only had historical navigation use, and including wetlands adjacent to Section 10 waters from the high-water mark of the water landward to an administrative boundary agreed upon by the state or tribe and the Corps.

States have been allowed to assume the permitting responsibility since the CWA was enacted in 1972, but only New Jersey and Michigan have done so. The new memo is meant to encourage more states to apply for authority to assume responsibility over Section 404 permitting. Letters were sent to all 50 governors and tribal leaders for all the federally-recognized tribes encouraging them apply for this authority. It is unclear at this time if North Carolina is considering assuming some Section 404 permitting responsibilities.

### **Resignation of Top U.S. Fish and Wildlife Service Appointee**

Mr. Greg Sheehan, Principal Deputy Director of the FWS, is leaving his position and returning home to Utah. Family priorities were given as a major reason for his departure. A 1986 graduate of Utah State University, Mr. Sheehan formerly headed Utah's Division of Wildlife Resources for about four years before

joining the Trump Administration. He also worked for the Utah wildlife agency for a number of years before becoming its director.

The move will create another vacancy in a department still maneuvering around several other unfilled slots, as the Trump Administration has yet to nominate anyone to serve as director of the FWS or as Assistant Secretary for Fish, Wildlife and Parks. Last week, the Department of Interior designated Ms. Andrea Travnicek, Deputy Assistant Secretary for Water and Science, to oversee FWS and the National Park Service as the acting Assistant Secretary for Fish, Wildlife and Parks. She replaces Ms. Susan Combs, who will now become acting Assistant Secretary for Policy, Management and Budget, the position for which she was nominated by President Trump and is awaiting Senate confirmation.

## UPDATE ON 2018 TISPC FEDERAL ADVOCACY PRIORITIES

The current status of priority agenda items are outlined below. The meetings referenced are meetings that were held in Washington, DC, on July 17, at which Congressman McIntyre of Poyner Spruill and Stephanie Missert of The Ferguson Group were present to advocate for TISPC priorities.

Meetings/discussions were held with the following offices:

- Office of Senator Richard Burr
- Office of Senator Thom Tillis
- Office of Congressman Walter Jones
- Office of Congressman David Rouzer

### **1. North Topsail Beach – Continue to facilitate changes to the CBRA maps**

On July 17, we discussed the status of the North Topsail Beach CBRA legislation with staff from Senator Burr's, Senator Tillis' and Congressman Jones's offices, and reiterated the importance of their bosses speaking directly to Secretary Zinke about H.R. 4692/S. 1745.

On July 18, the day after we met with Senator Burr's staff to ask that the Senator discuss the North Topsail Beach issue with Secretary Zinke, Senator Burr called Secretary Zinke and discussed North Topsail Beach. We were told that the discussion was positive and that Secretary Zinke agreed to further look into the issue. Senator Burr's staff is currently following up with the Secretary's staff and working with Senator Tillis' office on coordinating efforts and facilitating further discussion.

Senator Tillis' staff informed us that they have elevated their staff-level discussions from the FWS level to Secretary Zinke's office. However, they also informed us that Senator Tillis was unable to directly discuss the North Topsail Beach legislation with Secretary Zinke while he was visiting North Carolina in early July, as was previously the plan, due to a very tight trip itinerary. However, staff told us that the staff-to-staff discussions with Secretary Zinke's office have been positive and could potentially aid in moving the bill through the committee process in the Senate. We also discussed potential legislative vehicles to move the bill by the end of this Congress, which include WRDA, CBRA-related legislation, and as a stand-alone bill. Senator Tillis' staff plan to further discuss these options with the Senate Environment and Public Works Committee.

Congressman Jones's staff also informed us that they are working to schedule a call between the Congressman and Secretary Zinke to discuss North Topsail Beach. They are encouraged by the efforts in the Senate and will continue to support any effort to move the legislation forward this Congress.

### **2. Topsail Beach – Support legislation that would allow the use of sand from inlet CRBA areas for beach nourishment**

Over the last two months, there have been efforts to introduce an amendment to the Senate WRDA bill—when it comes to the floor for consideration—that would resolve the CBRA sand borrowing issue. (The proposed amendment language is language we drafted for consideration by TISPC's congressional

delegation and the relevant congressional committees.) These efforts, however, have stalled due to a lack of bipartisan support for the amendment. We hope that our continued discussions with the National Audubon Society produce positive results and eventually help secure bipartisan support for a legislative solution.

**3. Island-wide – Obtain federal funding for approved federal beach nourishment projects (Surf City/North Topsail Beach & Topsail Beach)/remove the 7-year sunset clause**

We have been working diligently with TISPC and TISPC’s congressional delegation to ensure all possible actions are taken to position the Surf City and North Topsail Beach WRRDA Project to successfully secure a construction new start in the Corps’ FY 2019 Work Plan. Over the past couple of months, this has unfolded as a two-track effort:

**1. Meeting with the South Atlantic Division**

As you know, we are currently working to confirm a meeting in Atlanta, GA, on September 11 with the Division Commander and Regional Business/Programs Director for the Corps’ South Atlantic Division (SAD) to advocate for and secure SAD’s support for the Surf City and North Topsail Beach Project. SAD’s support for the project will help push Corps Headquarters to provide the project with a new start.

**2. Secure Needed New Starts Language in FY 2019 Appropriations**

As you know, we have been working to include language in the FY 2019 Energy and Water Development (E&W) appropriations bill that would provide the Corps with the proper authority to fund a coastal storm damage reduction project in the FY 2019 Work Plan, language which we successfully secured in FY 2018. After significant cooperation and discussion by us with the Corps, the congressional delegation and committee staff throughout mid- to late-July, it was determined that the Surf City and North Topsail Beach Project is the only coastal storm damage reduction project that is ready to compete for a new start in FY 2019. It is encouraging to know that the Surf City and North Topsail Beach Project is at the top of the Corps’ list of coastal storm damage reduction projects. Unfortunately, coastal storm damage reduction new start language cannot be added to the E&W bill directing the Corps to provide a new construction start to a coastal storm damage reduction project because it would be considered an earmark. As you know, special appropriations projects, commonly called “earmarks,” are currently banned in Congress. In order for there to be specific coastal storm damage reduction new starts language, there would need to be more than one competitive project ready.

We were told at a meeting with the Corps in March 2017 that there were approximately 4–6 coastal storm damage reduction protection projects ready. The Corps has not provided any information as to why the number of coastal storm damage reduction projects ready to receive a new start decreased significantly between now and then.

The Surf City and North Topsail Beach Project is still eligible to compete for a new start; however, the project will have to compete with other flood risk management projects for new start funding in the FY 2019 Work Plan rather than just against other coastal storm damage reduction projects.

We expect that the FY 2019 E&W bill will provide the Corps with at least three flood risk management construction new starts to allocate in the Corps' FY 2019 Work Plan. We will know exactly how many construction new starts are provided in FY 2019 once the House and Senate negotiate and pass a final FY 2019 E&W bill, which we expect to occur sometime in September. The Corps will be required to release its FY 2019 Work Plan at least 60 days after passage of the bill.

Given these recent developments, we are requesting a meeting with SAD in Atlanta. Be advised that we are working diligently to confirm this meeting. The congressional delegation is also prepared to help in any way they can, including sending support letters to the Corps emphasizing the importance of the project.