

April 2012

Stormwater Rule Delayed Again

The US Environmental Protection Agency (EPA) announced in late march that the agency needed additional time to develop a revised schedule for the release of the proposed changes to the national stormwater program. The short term extension now pushes the release of a new rulemaking schedule until April 27, 2012 so that the agency and the Chesapeake Bay Foundation can continue to negotiate a new schedule.

Per the original court-ordered agreement, EPA was to publish a proposed rule making changes to the national stormwater program by September 2011 and issue a final rule by December 2012. Delays throughout the process have led the agency to miss several deadlines for issuing the proposed rule. Once the revised schedule is agreed to, EPA will continue its analysis to support the proposed rule changes.

At that point, the proposal will undergo an interagency review process that is led by the Office of Management and Budget (OMB). OMB gets 60 days to review the proposal before it can be published in the *Federal Register*. As a result of this process, the proposed rule is not likely to be released before this fall.

Unanimous Supreme Court Holds EPA Compliance Orders Subject to Judicial Review

In a unanimous opinion, the United States Supreme Court ruled that administrative compliance orders issued by the Environmental Protection Agency (EPA) under the Clean Water Act (CWA) are judicially reviewable prior to initiation of any EPA action to enforce the order. (*Sackett v. EPA* (566 U.S. ___)(2012)). In *Sackett* the Court reversed the lower court decision which held that the Sacketts could not obtain pre-enforcement judicial review of a compliance order issued under the CWA. The holding marks a significant change in the choices that potential compliance order recipients have when considering how to respond to EPA.

The case began over five years ago when EPA issued a compliance order to the Sacketts when the couple filled in wetlands on their property without first obtaining a permit from the Corps of Engineers under the CWA section 404. The compliance order directed the couple to restore the property to pre-construction conditions and warned that failure to comply would result in penalties of \$37,500 per day.

The Sacketts maintained that the property did not contain wetlands and asked for hearing on that issue and on the appropriateness of the compliance order. The request for a hearing was denied and the Sacketts sued in federal court. After hearing the case, the lower court and the appeals court denied the Sacketts their claims and held for EPA. The Supreme Court disagreed with the lower courts' holdings in the matter and unanimously ruled in favor of the Sacketts.

According to the lower court decisions, the parties receiving compliance orders have two courses of action under the CWA. The parties can choose to comply with the order or refuse to comply, risk accruing significant civil and criminal penalties and wait for EPA to sue to enforce the order. Now, under the new rule established by the Supreme Court, parties receiving compliance orders have a third option – the right to challenge those orders in court. Parties can now challenge EPA in court to contest an EPA order without risking civil and criminal penalties for refusing to comply. While the *Sackett* case focused on compliance orders issued under the CWA, the decision will likely apply to orders under various environmental statutes.

APWA Water Resources Management Committee Meets with Key Federal Officials

The members of the APWA Water Resources Management Committee (WRMC) held their spring meeting in Washington, DC in late March. While in DC, the members of the WRMC participated in meetings with key committee staff from the House Transportation and Infrastructure Water Resources and the Environment Subcommittee and counsel from the Senate Environment and Public Works Water and Wildlife Subcommittee to discuss APWA's advocacy priorities, including increased funding and new innovative funding mechanisms for water and wastewater infrastructure, requiring a stronger linkage between US Department of Agriculture conservation programs and nutrient pollution reduction strategies and the legislative outlook for the remainder of this year's session.

The WRMC members also met with their local congressional delegations to advocate on behalf of APWA's legislative priorities as they relate to water and wastewater issues. Finally, the WRMC members participated in a meeting with key EPA Office of Water staff to discuss several important issues, including the anticipated changes to the national stormwater program, the "waters of the US" guidance (see related story), and the new integrated permitting and planning for stormwater and wastewater utilities initiative.

CBO to Study Revenue Sources for Clean Water Trust Fund

Representatives Timothy Bishop (D-NY), Earl Blumenauer (D-OR), and Steve LaTourette (R-OH) have directed the Congressional Budget Office (CBO) to complete an analysis on potential funding mechanisms and revenue sources to support a broad-based, equitable clean water trust fund. The letter cited several recent studies that indicate the federal, state, and local funding sources will be insufficient to meet the growing demand for wastewater infrastructure projects.

These three Congressional leaders serve on key committees -- Transportation and Infrastructure, Ways and Means and Appropriations, respectively -- that will play a role in the design and passage of any new clean water trust fund. The study will be completed by January 2013. This is at least the second such study that Congressional leaders have asked for as they consider creating a trust fund to fund water and infrastructure projects.

Senator Introduces Bill to Stop the Release of the "Waters of the US" Guidance

A bill prohibiting the US Environmental Protection Agency (EPA) and the Army Corps of Engineers from moving forward with the "waters of the United States" guidance was introduced in the Senate with the support of over half the chamber's members. The *Preserve the Waters of the U.S. Act* would stop the proposed guidance on identifying waters protected by the Clean Water Act (CWA) from being issued and implemented. In addition to the introduced legislation, key leaders from both the House and Senate sent a letter to the director of the Office of Management and Budget (OMB), requesting that the guidance not be finalized.

The proposed guidance was issued in April 2011 and seeks to clarify what waters fall under the jurisdictional scope of the CWA by modifying the definition of "waters of the United States" in the Act. APWA has opposed the issuance of the new guidance because it will significantly expand the scope of CWA jurisdiction and because using guidance to implement this change was improper.

The final version of the guidance was sent to the OMB for review in late February. Once OMB has completed its review, the guidance would then be published and take effect. The agency has signaled its intention to undertake a formal rulemaking process on how to identify waters protected by the CWA, but it is unclear when the agency would begin this process.

Transportation Programs Extended by Three Months

Before departing for a two-week recess March 29, the House and Senate approved legislation providing a 90-day extension of federal surface transportation programs. The President signed the bill into law the next day, one day prior to the March 31 deadline.

This latest extension is the ninth since SAFETEA-LU expired more than two and a half years ago. It continues funding for federal highway and public transportation programs and extends authority to collect federal motor fuel taxes through June 30.

Congressional approval of the 90-day extension capped a week when the House attempted twice to approve separate 60-day and 90 day-extensions under suspension of the rules before arranging to have the 90-day extension brought up again under normal House procedures. Suspension of the rules requires a 2/3 majority for passage.

House leaders say the House will consider a long-term reauthorization bill shortly after the chamber returns from a two-week recess the week of April 16.

The Senate approved a two year, \$109 billion transportation reauthorization bill, MAP-21, on March 14. House and Senate Democrats have been calling for the House to pass the Senate bill. Consideration of a five-year, \$260 billion bill in the House was suspended in February due to insufficient support for passage. House leaders are reworking the House bill and intend to have a bill brought to the House floor shortly after returning from the recess.

House Budget Would Reduce Transportation Funding

The House of Representatives approved a fiscal year 2013 budget that would cut transportation funding by more than one-third, from \$88.6 billion this fiscal year to \$57.1 billion next fiscal year. The vote was 228-191.

The budget, however, includes a reserve fund for transportation to provide current levels of funding for highway and transit programs through 2022 if Committees identify a deficit-neutral revenue source to maintain funding from the Highway Trust Fund.

The House budget is not expected to pass in the Senate. The President's fiscal year 2013 budget proposed \$74 billion for US Department of Transportation programs.

New Report Shows Transportation Investment Gap

A report on the state of the nation's transportation infrastructure shows a sizeable gap between current spending and projected levels of investment needed to maintain highway and transit systems.

The US Department of Transportation's (USDOT) latest report on transportation conditions, *2010 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance*, projects that \$101 billion, plus increases for inflation, would be needed annually over the next 20 years from all levels of government - local, state and federal - to keep the highway system in its current state. It also identifies significant opportunities for investments to improve the current state of highways and bridges that could total up to \$170 billion a year. The report shows that in 2008, all levels of government spent a combined total of \$91.1 billion on highway capital improvements, a 48.4 percent increase over 2000.

The *Conditions and Performance* report projects that between \$20.8 billion and \$24.5 billion will be needed annually over the next 20 years to attain a state of good repair for the nation's transit systems and to accommodate expected transit ridership growth. In contrast, all levels of government combined spent only \$16.1 billion on transit capital improvements in 2008.

The *Conditions and Performance* is a biennial report to Congress that provides information on the physical and operating characteristics of the highway, bridge and transit components of the nation's surface transportation system. More information is available at www.fhwa.dot.gov.

FTA Seeks Comment on Proposal to Streamline Environmental Reviews for Transit Projects

The Federal Transit Administration (FTA) has issued a notice of proposed rulemaking (NPRM) proposing changes to the joint Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) regulations that implement the National Environmental Policy Act (NEPA). Comments must be received by May 14, 2012.

FTA has embarked on an initiative to update the categorical exclusions (CEs) for particular types of proposed transit projects and other FTA proposed actions. The proposed categorical exclusions are described in the NPRM. They would apply to FTA and improve the efficiency of the NEPA environmental reviews by making available the least intensive form of review for those actions that typically do not have the potential for significant environmental effects and therefore do not merit additional analysis and documentation associated with an Environmental Assessment or an Environmental Impact Statement.

The regulation proposed for revision is a joint FTA and FHWA regulation, but nearly all of the proposed revisions are written such that they would apply to actions by FTA. The proposed revisions that change FHWA's NEPA implementing regulations are a minor, non-substantive, revision to a footnote discussing supplementary guidance and two spelling corrections. The remaining proposed revisions, including ten proposed categorical exclusions (CEs), apply to FTA.

For more information, visit the March 15 *Federal Register* under Federal Transit Administration, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR>.

APWA Emergency Management Committee Meets in D.C.

On March 21 and 22, The APWA Emergency Management Committee held its annual Spring meeting in Washington, D.C. March 21-22 and met with Federal Emergency Management Agency (FEMA) and White House Resilience Directorate personnel.

Committee members discussed emergency management/homeland security grant programs, National Flood Insurance Program reauthorization and reform and public assistance reimbursement for emergencies with staff members representing the Federal Emergency Management Agency (FEMA). Committee members also reviewed the FEMA-APWA Memorandum of Understanding, and how APWA and FEMA can foster a closer working relationship. The current MOU expired in 2010, and APWA will be working with FEMA on drafting a new MOU to be completed by the end of this year.

The Committee also met with the Director and Senior Director of Preparedness Policy for the White House's Resilience Directorate. The discussion focused on the Administration's intention to re-write Homeland Security Presidential Directive 7 (which pertains to critical infrastructure

protection) and what the Administration has done to address medical countermeasures should the nation experience a biological terrorist attack or another pandemic. Committee members conveyed their experiences as public works directors, emphasizing the vital role public works serves on the state and local level, and including public works through multi-jurisdictional representation in all aspects of emergency management policymaking.

APWA Attends National Mitigation Alliance Meeting

The National Mitigation Alliance March 30 held its semi-annual strategy meeting to discuss ways in which the Alliance can grow in membership and visibility among member organizations. Alliance members identified communication gaps between Federal, State and local mitigation stakeholders which will assist the Federal Emergency Management Agency (FEMA) in leveraging stakeholder involvement. The Alliance members also discussed the importance of holding a field meeting in order to discover mitigation successes and lessons learned from communication strategies implemented by states and locals that promote community involvement in mitigation.

Formally established on September 10, 2010 by FEMA, the National Mitigation Alliance brings together stakeholders dedicated to creating a more disaster resistant nation through collaboration and coordination of ideas and innovations that will encourage the development of safer environments for the American public. APWA is a founding member of the National Mitigation Alliance. For additional information, go to <http://www.nemaweb.org/>.

APWA Comments on National Frameworks

APWA submitted informal comments to the Federal Emergency Management Agency (FEMA) on its four working drafts of the National Frameworks which are part of Homeland Security Presidential Policy Directive 8 (HSPPD-8). APWA's comments, filed April 2, emphasized the vital role that public works plays in safeguarding communities and maintaining critical infrastructure systems across the country.

Released March 5, the National Frameworks, which focus on prevention, protection, mitigation, response and recovery, clearly define key preparedness roles and responsibilities for the entire community. The final version of each framework will be drafted by the end of April in which an interagency review will take place in May. A status report on HSPPD-8 is due to President Obama by June 25.

FEMA released the National Preparedness Goal and the National Disaster Recovery Framework in September 2011. The National Preparedness Goal outlines the vision for preparedness—that it is a shared nationwide responsibility—and identifies core capabilities and capability targets necessary to achieve across five mission areas: prevention, protection, mitigation, response and recovery. The National Disaster Recovery Framework is a guide that provides recovery support to disaster-impacted States, Tribes, Territorial and local jurisdictions.

The Administration released HSPPD-8 on March 30, 2011, replacing Homeland Security Presidential Directive-8 and Homeland Security Presidential Directive-8 Annex I, released under

the Bush Administration. APWA was one of 24 national stakeholders that worked closely with the White House's National Security Staff in developing the policy directive by providing comments on national preparedness, interagency coordination, response capabilities and state and local resilience to natural and man-made emergencies.

For additional information, go to www.fema.gov/ppd8.

Senate Approves Two-Year Transportation Bill

The Federal Emergency Management Agency (FEMA) on April 4 released the Comprehensive Preparedness Guide (CPG) 201: Threat and Hazard Identification and Risk Assessment (THIRA). The THIRA process builds on the Homeland Security Presidential Directive 8's National Preparedness Goal and the National Preparedness System. CPG 201 describes a way to assess risks communities face, while also identifying actions and resources needed to strengthen national security.

The THIRA can be used by all states, localities, tribes and territories, and is a five-step process:

- 1) Identify the threats and hazards of concern to the community based on past experience, forecasting, expert judgment, and available resources.
- 2) Give the threats and hazards context that shows how those threats and hazards may affect the community.
- 3) Examine the core capabilities described in the National Preparedness Goal using the threats and hazards to identify impacts to the community.
- 4) Set capability targets in the context of each core capability, coupled with a jurisdiction's desired outcomes.
- 5) Apply the results by planning for the ability to deliver the targeted level of capability with either community assets or through mutual aid, identify mitigation opportunities, and drive preparedness activities.

Throughout the process, a jurisdiction will identify data and information they should check regularly and keep up to date in order to best understand changes to threats and hazards.

For additional information on CPG 201, go to <http://www.fema.gov/government/grant/>