

APWA *Washington* REPORT

October 2006

UTILITIES & PUBLIC RIGHTS-OF-WAY

Communications Act

SENATE COULD ACT ON COMMUNICATIONS BILL IN LAME DUCK SESSION

The Senate may consider controversial telecommunications legislation during a lame duck session planned after the November elections. The Communications, Consumer's Choice and Broadband Deployment Act of 2005 (HR 5252), passed by Senate Commerce, Science and Transportation Committee in June, would pre-empt local taxing authority and change the local franchising process for companies interested in providing video services.

Of concern to local governments are provisions which would extend indefinitely the Internet Tax Freedom Act, which prohibits local governments from levying taxes or fees on Internet access, and provisions placing a moratorium on cell phone-specific taxes.

The bill was revised late last spring to correct a number of areas of concern to local governments. Although local government organizations do not consider the bill ideal and still have significant concerns with major provisions, important improvements include: preserving local control and authority to manage public rights-of-way; ensuring the courts, rather than the Federal Communications Commission, have the jurisdiction over rights-of-way disputes; and clarifying the timeframe from 75 days to 90 days for action on video franchises by local governments.

A number of controversial issues, including 'net-neutrality' provisions, universal service fund, absence of build-out provisions to ensure broad access to video services and tax issues, leave the bill's future unclear.

The House of Representatives passed a narrower version of the bill in June, the Communications, Opportunity, Promotion and Enhancement Act of 2006, COPE (HR 5252). APWA and local government organizations oppose the House bill because it would strip local governments of their authority to franchise the use of their rights-of-way for video/cable services and would give that authority to the Federal Communications Commission (FCC) in Washington, D.C.



Image courtesy of Jim Martin Public Works Photo Library at www.apwa.net.

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TRANSPORTATION



Mary E. Peters, newly confirmed Secretary of the United States Department of Transportation. Image courtesy of www.fhwa.dot.gov.

DOT Secretary Confirmed

FORMER FHWA ADMINISTRATOR CONFIRMED DOT SECRETARY

The Senate confirmed Mary Peters as Secretary of the United States Department of Transportation (DOT) on September 30, less than a month after her nomination by President George W. Bush. Peters is the second woman to hold the position of Transportation Secretary and the first Arizonan. She replaces acting Secretary Maria Cino, who served in the position immediately following former Secretary Norman Mineta's resignation in July.

Peters served as head of the Federal Highway Administration (FHWA) from 2001 to 2005 and was most recently National Director for Transportation Policy for HDR, Inc., in Phoenix, Ariz. Before leading FHWA, Peters was Director of the Arizona Department of Transportation.

In her confirmation hearings, Senators praised Peters' qualifications and expertise as a competent and effective administrator. APWA President Bill Verkest sent a letter of congratulations following the confirmation and said, "During her time as Federal Highway Administrator, Secretary Peters displayed leadership on transportation issues, commitment to public service and clear understanding of the federal-state-local relationship in delivery of multi-modal transportation services."

SAFETEA-LU

TECHNICAL CORRECTIONS BILL ON HOLD UNTIL LAME DUCK SESSION

For the second time this year, the U.S. House of Representatives passed a SAFETEA-LU technical corrections bill (HR 6233). The bill, approved by voice vote on September 29, was modified to include provisions from the Senate. Earlier in September, the Senate Environment and Public Works Committee approved its version of a technical corrections bill (HR 5689).

Like the House bill, the Senate bill would provide a legislative fix to address research programs whose funding fell short of supporting certain authorized activities. It was not brought to the Senate floor before Congress recessed for the elections and will need to be taken up in a lame duck session scheduled for November.

Both bills extend the authorization of the National Surface Transportation Policy and Revenue Study Commission by six months. Authorized under SAFETEA-LU, the commission is studying the needs and financing options for the future of the transportation system and is required to present a report to Congress by July 2007.

Both the House and Senate bills would provide an additional \$37 million annually to research programs under Title V of SAFETEA-LU, and would move the Strategic Highway Research Program from Title V to Title I, where it will be funded from a takedown of highway programs. The bills also make a number of technical corrections, such as adjusting the descriptions of projects in the law.

Environmental Restoration

GUIDANCE ADDRESSES ELIGIBILITY OF SAFETEA-LU FUNDS

The Federal Highway Administration (FHWA) has issued guidance which discusses the expanded eligibility of Federal-aid funds for environmental restoration and pollution abatement as authorized by section 6006 of SAFETEA-LU.

Section 6006 of SAFETEA-LU includes a provision that makes certain environmental restoration and pollution abatement activities to retrofit existing transportation projects, including stand-alone projects,

eligible for Federal-aid funds under the National Highway System (NHS) and the Surface Transportation Programs (STP).

Prior to Section 6006 of SAFETEA-LU, the Transportation Equity Act for the 21st Century established an eligibility for retrofits to address environmental restoration and pollution abatement, more commonly referred to as stormwater treatment measures, under the STP program. This eligibility was limited to a total of 20 percent of the total cost of transportation projects undergoing reconstruction, rehabilitation, resurfacing or restoration. STP funds have also been available under the Transportation Enhancements Program for environmental mitigation to address water pollution due to highway runoff.

SAFETEA-LU added NHS fund eligibility for retrofits to projects undergoing reconstruction, rehabilitation, resurfacing or restoration, and provided that both NHS and STP funds could be used for stand-alone projects for retrofits to address water pollution or environmental degradation caused “wholly or partially by a transportation facility.”

The guidance is available at: <http://www.fhwa.dot.gov/hep/envrestore.htm>.

Bridges

MATERIALS REPORT ON BRIDGE CONSTRUCTION, REHAB AVAILABLE

The Federal Highway Administration (FHWA) has produced a report that summarizes the types of construction materials used in new bridge construction and bridge rehabilitation projects, as required by SAFETEA-LU.

Data on Federal-aid and non-Federal-aid highway bridges are included in the report for completeness. The December 2005 National Bridge Inventory (NBI) dataset was used to identify the material types for bridges that were new or replaced within the defined time period. FHWA’s Financial Management Information System (FMIS) and the 2005 NBI were used to identify the material types for bridges that were rehabilitated within the defined time period. Currently, preventative maintenance projects are included in the rehabilitation totals.



Image courtesy of Jim Martin Public Works Photo Library at www.apwa.net.

The report is available at <http://www.fhwa.dot.gov/bridge/britab.htm>. For more information, contact at Ann Shemaka, FHWA Office of Bridge Technology, HIBT-30, (202) 366-2997, or Thomas Everett, FHWA Office of Bridge Technology, HIBT-30, (202) 366-4675.

Planning and Environmental Linkages

FHWA WEB SITE A RESOURCE FOR PLANNING, ENVIRONMENT LINKAGE

The Federal Highway Administration (FHWA) has launched a new Web site to assist in strengthening transportation planning and environment linkages.

Planning and environment linkages represent an approach to transportation decision-making that considers environmental, community and economic goals early in the planning stage and carries them through project development, design and construction. This can lead to a seamless decision-making process that minimizes duplication of effort, promotes environmental stewardship and reduces delays in project implementation.

Information on the Planning and Environment Linkages Web site, <http://environment.fhwa.dot.gov/integ/index.asp>, includes:

- The benefits of using a Planning and Environment Linkages approach
- Some first steps for getting started
- Effective practices from states nationwide, including case studies and FHWA-sponsored workshops
- Additional resources that are related to planning and environment linkages

- Relevant SAFETEA-LU provisions
- Contacts to receive more information from FHWA

Surface Transportation Environment and Planning

STEP COOPERATIVE RESEARCH PROGRAM STRATEGY ON WEB

In an earlier notice and request for comments, the Federal Highway Administration (FHWA) announced the creation of an FHWA Web site to provide information regarding the Surface Transportation Environment and Planning Cooperative Research Program (STEP) and solicited public input on the implementation strategy for this program.

Based on the review and analysis of the comments received in response to the notice, FHWA has finalized and posted the implementation strategy for the STEP on the STEP Web site at <http://www.fhwa.dot.gov/hep/step/index.htm>. In addition, FHWA has posted information on the STEP Web site soliciting comments on proposed STEP research activities.

For more information contact Felicia Young, Office of Interstate and Border Planning, (202) 366-1263, Felicia.young@fhwa.dot.gov.

ENVIRONMENT

Water Security

WATER AND WASTEWATER AGENCIES EXCLUDED FROM DHS RULES FOR CHEMICAL PLANT SECURITY

Just before adjourning to campaign for mid-term elections, the House and Senate passed legislation funding the Department of Homeland Security (DHS) for fiscal year 2007 (HR 5441). The legislation included a provision, inserted by an amendment introduced by Senator Robert C. Byrd (D-WV), requiring DHS to issue interim final regulations for high-risk chemical plants to implement security measures. The Byrd amendment was broadly written and included water and wastewater agencies in the new regulatory regime.

APWA joined several other organizations representing water and wastewater systems, including among others, American Water Works Association, National Association of Clean Water Agencies, Water Environment Federation, National Association of Water Companies and Association of Metropolitan Water Agencies, to work for inclusion of consensus language on chemical facility security in the homeland security appropriations bill that included a specific exemption for water and wastewater utilities. The consensus language recognized that water and wastewater agencies have been active and full participants in Environmental Protection Agency's water sector security program activities and that inclusion of these systems in the DHS program would place water utilities under dual jurisdictional regulatory regimes and force utilities to comply with duplicative and potentially conflicting regulations. Moreover, inclusion of water and wastewater agencies in the coverage of the bill would have imposed another unfunded mandate on local governments at a time when they are all ready financially strapped.

House and Senate negotiators agreed to the consensus language giving DHS authority to require compliance with new security requirements, including the authority to audit and inspect facilities and to close facilities for non-compliance. Under the compromise, the Secretary of DHS would have six months to enact interim final regulations establishing risk-based chemical plant security performance standards, vulnerability assessments and development and implementation of site security plans. Senate Homeland Security Committee Chairwoman Susan M. Collins (R-ME) and House Homeland Security Committee Chairman



APWA member expert **Bruce Florquist**, a public works professional with more than 40 years working with water, water resources, water law and water/wastewater management, discussed the implications of the Chemical Facility Anti-Terrorism Act (HR 5695/S 2145) during a congressional staff briefing on Aug. 22 in Washington, D.C.

Peter King (R-NY) worked to develop the consensus language ultimately included in the final version of the appropriations bill.

On October 4, 2006, the President signed the legislation, which provides \$34.8 billion for DHS in fiscal year 2007. This represents an increase of \$2.3 billion above the fiscal year 2006 appropriation and is \$2.7 billion above the White House's initial budget request.

APWA and its partners harnessed the power of their respective membership bases and used phone calls and letters to Congressional appropriators to encourage support of the consensus language excluding water and wastewater agencies from coverage of the program. Thank you to all who took the time to contact their representatives urging them to support the consensus language.

Drinking Water

DRAFT GUIDANCE AVAILABLE TO HELP SYSTEMS COMPLY WITH MULTIPLE REGULATIONS

The Environmental Protection Agency (EPA) released draft guidance to help drinking water systems comply simultaneously with multiple regulations while avoiding potential adverse health effects. The guidance, *New Guidance to Help Public Water Systems Evaluate Treatment Changes*, is designed to aid public water systems in making operational changes to comply with regulations on microbials and disinfection products, including the Stage 2 Disinfection Byproducts Rule (Stage 2 Rule). A copy of the Draft Guidance is available at <http://www.epa.gov/water/waternews/waternews.htm#1>.

EPA also intends to hold a public meeting to discuss the purpose and organization of the draft document. The public meeting will be held on Thursday, October 26, from 1-5 p.m. EST. The meeting will be held on the first floor of the East Building of EPA Headquarters in Room 1153. Additional information on the public meeting is available by contacting Sarah Bahrman at (202) 564-2335 or bahrman.sarach@epa.gov.

Water Infrastructure

PAYING FOR SUSTAINABLE WATER INFRASTRUCTURE: INNOVATIONS FOR THE 21ST CENTURY CONFERENCE IN MARCH 2007

The Environmental Protection Agency (EPA) and Georgia Environmental Facilities Authority are hosting "Paying for Sustainable Water Infrastructure: Innovations for the 21st Century," March 21-23, 2007, in Atlanta, Ga. This conference will bring together stakeholders from all levels of government and the private sector to explore creative methods to pay for sustainable water infrastructure today and into the future. The conference is designed to integrate the two fundamental dimensions of paying for sustainable water infrastructure: increasing investment in cost-effective systems and reducing capital, operation, and maintenance costs. Additional information is available at <http://www.payingforwater.com>, or on the APWA Web site at

<http://www.apwa.net/Advocacy/AdvocacyNews/index.asp?HotID=969&MODE=ALL&HotLocator=GOV>.

Hazardous Waste

STANDARDIZED HAZARDOUS WASTE MANIFEST FORM NOW IN USE

As of September 5, hazardous waste generators and haulers are required to begin using the Environmental Protection Agency's (EPA) standardized manifest form to keep track of shipments. The new form eliminates or reduces many of the variables in various state requirements and allows multi-state waste handlers to register and use their own manifest forms everywhere they do business. The forms provide check boxes and add fields that allow for better tracking of complicated shipments, such as container residues, rejected wastes and interstate shipments. Each form carries a unique printed manifest tracking number.

The new form is a necessary first step in the development of an electronic manifest system. In order to develop an electronic manifest system, or e-Manifest, EPA would need statutory authority from Congress. Senator John R. Thune (R-SD) has introduced legislation giving EPA the authority it needs. The Hazardous

Waste Manifest Establishment Act, S. 3871, would amend the Solid Waste Disposal Act to require EPA to develop an electronic tracking system within three years of enactment. The authorizing legislation is needed to allow EPA to have a computer vendor pay the up-front costs of developing an electronic system. Under the bill, the system would be voluntary and a company could choose to stay with the current hazardous waste manifest system, using multiple paper copies, or use the computerized system and pay user fees to reimburse the vendor for development of the electronic system.

In addition to saving money an e-Manifest system would provide better quality data and more timely information on hazardous waste shipments, the availability of nearly real-time tracking capabilities, one-stop reporting of manifest data and enhanced inspection and enforcement capabilities. Senator Thune hopes to see the legislation passed this year.

Solid Waste

SUPREME COURT AGREES TO REVIEW FLOW-CONTROL ORDINANCES CASE

The U.S. Supreme Court has agreed to review whether two flow-control ordinances requiring delivery of local solid waste to a publicly owned processing facility violates the Commerce Clause of the U.S. Constitution. The Commerce Clause prohibits states and localities from passing protectionist statutes that unduly burden interstate commerce.

In *United Haulers Association v. Oneida-Herkimer Solid Waste Authority*, 438 F.3d 150 (2nd Cir. 2006), the Second Circuit held that any burden imposed by the ordinances on interstate commerce is “insubstantial” and not excessive in relation to local benefits and therefore did not violate the Commerce Clause. Oneida and Herkimer counties established flow-control solid waste ordinances requiring area waste to be taken only to assigned county facilities. Waste haulers failing to comply with the local ordinances were fined and could face imprisonment and the revocation of their waste hauling permits.

The United Waste Haulers Association filed suit alleging that the tipping fee charged by the county facilities was monopolistic and higher than necessary. The lower court found that the ordinances did not discriminate against interstate commerce and that the ordinances did not impose an excessive burden on interstate commerce. On appeal, the Second Circuit affirmed the lower court’s ruling and found that it did not need to address the finding of whether the ordinances actually burdened interstate commerce because the Association failed to establish that any burden imposed was clearly excessive in relation to the local benefits received from the ordinances. According to the court, counties have a constitutional power to monopolize the local marketplace in waste disposal services and hold a substantial interest in regulating waste disposal. The burden on interstate commerce from preventing county waste from being exported for processing did not meet the clearly excessive standard established by the Supreme Court in previous cases. The Second Circuit interpreted the excessive burden test by holding that the flow control to a government-owned facility imposes only an insubstantial burden on interstate commerce and it serves a minimal local benefit.

The Association is asking the Supreme Court to clarify whether flow control ordinances requiring delivery to a publicly controlled facility rather than privately controlled facilities violates the Commerce Clause.

EMERGENCY MANAGEMENT/DISASTER MITIGATION

FEMA

HOUSE AND SENATE REACH COMPROMISE ON FEMA LEGISLATION

After months of debate and jurisdictional disputes between the various committees charged with oversight of the Federal Emergency Management Agency (FEMA), the House and Senate have finally managed to pass comprehensive legislation that will strengthen the agency in the FY07 Department of Homeland Security (DHS) appropriations bill, H.R. 5441.

The bill was signed by the President on October and will provide \$34.8 billion in discretionary appropriations for DHS operations for the fiscal year that runs from Oct. 1 until Sept. 30, 2007.

The legislation focuses on an “all-hazards” approach to dealing with disasters, and will authorize FEMA to work more closely with local communities and first responders to assist in their efforts to prepare for, respond to and recover from disasters in the future. The bill also strengthens FEMA’s management by sustaining the programs that are vital to public works through increased operational support of federal, state and local governments in times of devastation.

In the wake of the devastation caused by Hurricanes Katrina, Rita and Wilma, APWA has been working closely with House and Senate authorizers to ensure that FEMA is given the tools necessary for success. We are confident that the legislation will significantly strengthen the agency in its ability to prepare for and recover from future catastrophes.

During last year’s response to Hurricane Katrina, FEMA management was heavily criticized for its administrative shortfalls. As a result, APWA suggested several policy recommendations that were included in the final compromise bill and signed by President George W. Bush:

- Elevates the standing of FEMA within DHS by promoting the Administrator of FEMA to the level of Deputy Secretary;
- Requires that the Administrator be an experienced emergency manager;
- Clarification of the relationship between the Administrator and the President during times of national disaster;
- The integration of the agency’s emergency preparedness, protection, response, recovery and mitigation responsibilities to confront effectively the challenges of a natural disaster or act of terrorism.
- The creation of a National Advisory Council that includes public works officials and other first responders that would support a comprehensive all-hazards preparedness system;
- The protection of the Agency’s budget, personnel and resources using a firewall method similar to that employed by the US Coast Guard that would limit the transfer of FEMA functions to other areas within DHS;
- The authorization of an increase for the Emergency Management Assistance Compact (EMAC) to \$4 million annually;
- Strengthening the Stafford Act by restoring the Hazard Mitigation Grant Program to 15% and lifting the repair and replacement caps;
- The strengthening of FEMA regional offices;
- Authorizing the Emergency Management Performance Grant at \$175 million over the FY2007 appropriated amount;
- Limiting the authority of the Principle Federal Official (PFO);
- Enhancing the training and exercises available to first responders and state and local officials.

While this legislation is not perfect, it makes great strides in the direction needed to ensure this nation is able to recover from disasters – both natural and man-made – in a more timely and efficient way in the future. APWA continues to work with the House and Senate to ensure that public works is considered in all future revisions of this and similar legislation.

Note: While the Homeland Security Appropriations bill has been signed by the President, a series of Continuing Resolutions, or “CR’s,” attached to the Defense Appropriations bill will fund the remaining federal programs and agencies, including the U.S. Department of Transportation and the Environmental Protection Agency, through November 17, or until Congress can pass the remaining appropriations bills after returning to a “lame duck” post-election session – whichever comes first.

Security Grants

DHS ANNOUNCES \$399 MILLION IN GRANTS TO SECURE CRITICAL INFRASTRUCTURE

Department of Homeland Security (DHS) Secretary Michael Chertoff and Under Secretary for Preparedness George Foresman announced grants to U.S. ports, transit and intercity bus systems to strengthen the nation's ability to prevent, protect against, respond to and recover from terrorist attacks, major disasters and other emergencies. The announcement provides awards to three competitive grant programs: the Port Security Grant Program, the Transit Security Grant Program and the Intercity Bus Security Grant Program.

In July, funding was directly allocated to four programs within the Infrastructure Protection Program (IPP): the Buffer Zone Protection Program, the Chemical Buffer Zone Protection Program, the Intercity Rail Transit Program and the Trucking Security Program. In total, \$399 million is being awarded for the FY2006 IPP grants to protect critical infrastructure throughout the United States.

Both Chertoff and Foresman underscored the risk-based approach DHS has taken to making grant awards to regions, cities and localities across the country. Both pledged that the department would do a better job in getting guidance out to potential applicants earlier in the year and to provide an opportunity to discuss their proposals with the department.

A press release and fact sheet regarding this announcement is available at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_1008.xml.

Pandemic Flu

FEMA HOLDS EXERCISES TO INCREASE PANDEMIC INFLUENZA PREPAREDNESS

The Federal Emergency Management Agency's (FEMA) Office of National Security Coordination successfully launched "Determined Accord," a tabletop exercise to increase the federal, state, tribal and local continuity of operations (COOP) readiness for a pandemic event. The interactive sessions were conducted throughout August and September in the National Capital Region, and include participants from a wide cross-section of federal departments and agencies and state organizations.

Exercise "Determined Accord" is designed to help identify gaps or weaknesses in pandemic planning in organization COOP plans, policies and procedures and is based on pandemic COOP guidance developed by FEMA and an interagency pandemic steering committee that includes representatives from across the executive branch. While all COOP elements are explored, the exercise encouraged participants to give special consideration to ensuring the health and safety of employees and providing essential government functions and services with high absence rates.

"The Determined Accord COOP exercise provides departments, agencies and their components a comprehensive tool kit for use in preparing all levels of the organization with the knowledge necessary to mitigate effects of a pandemic," said Charles Hopkins, FEMA's Director of ONSC. "The training materials provided will help emergency coordinators facilitate discussion sessions for senior leadership in passing along vital information."

INTERGOVERNMENTAL

APWA Advocacy

APWA BOARD APPROVES ADVOCACY PRIORITIES FOR 2006-07

The APWA Board of Directors adopted a new set of Association advocacy priorities for the remainder of 2006 and 2007 during September's APWA International Public Works Congress and Exposition in Kansas City. The new priorities maintain a continued focus on national issues of greatest concern to public works, including transportation; environmental protection and public health; water infrastructure investment; homeland security and emergency preparedness; and local control of public rights-of-way. They were recommended to the Board of Directors by the Government Affairs Committee.

Full Funding for Transportation

Objective: Increase federal investment in transportation infrastructure and programs; protect the integrity of transportation trust funds and the framework of SAFETEA-LU.

Environmental Protection and Public Health

Objective: Support legislative and regulatory issues that encourage sustainable environmental protection and public health.

Wastewater and Drinking Water Infrastructure Funding

Objective: Increase the federal investment in clean water and drinking water infrastructure.

Water Resources Development Act

Objective: Support full funding and programming of the Water Resources Development Act.

Comprehensive Stormwater Management and Funding

Objectives: Support solutions that promote a comprehensive approach to stormwater management that recognizes the quality of life benefits associated with such actions. Support funding for the research pilot projects that support the development of best management practices.

Homeland Security Priorities:

1. Disaster Assistance

Objective: Achieve increased funding for local agencies, encourage initiatives at the federal level that support an efficient and effective all hazards approach to disaster management and mitigation, more rapid disbursement and more flexibility of funding and quicker response in pre- and post disaster events.

2. Security of Public Facilities and Utility Systems

Objective: Support implementation and funding of reasonable security measures necessary to protect public facilities and utility systems.

3. Emergency Response Support

Objective: As first responders, assure that public works is fully integrated in a comprehensive, interdisciplinary, emergency response and recovery, and secure the necessary funding and resources to meet that demand.

Local Control of Public Rights-of-Way

Objective: Protect local control over public rights-of-way. Air Quality Standards

Objective: Support solutions that protect air quality and promote the efficient and cost-effective delivery of public works services.

The priorities are posted on APWA's Web site, www.apwa.net/advocacy.

APWA Washington Report contributors include Julia Anastasio, Jim Fahey, Dan Jensen and Elizabeth Kelsey. Becky Wickstrom is editor of the Report.