For the first time since 2007, the Congress appears ready to enact comprehensive water resources legislation by the end of the year. By an overwhelming 417-3 vote, the House of Representatives passed H.R. 3080, the Water Resources Reform and Development Act of 2013. The vote was the culmination of a months-long effort by House Transportation and Infrastructure Committee Chairman Bill Shuster and Ranking Member Nick Rahall, working with the Water Resources Subcommittee Chairman, Bib Gibbs and Ranking Member Tim Bishop, to craft bipartisan legislation to address critical water resources needs in a fiscally restrained environment.

Since the beginning of the year, the Committee has held a series of meetings, roundtable discussions and hearings.

Inland Waterways Reforms

Both the House WRRDA and the Senate WRDA include provisions to reform the project delivery process for construction and major rehabilitation navigation projects on inland and intracoastal waterways. Both bills would similarly enhance the role of the Inland Waterways Users Board, requiring at least semiannual meetings and providing for a user board representative to serve on project development teams.

Neither bill addresses the fuel tax increase needed for the solvency of the inland waterways trust fund, but both bills provide some relief by adjusting the traditional cost-share requirement for the long-overdue and over-budget Olmsted project. The Senate bill would federalize the remainder of the project, while the House bill would provide for a 75-25% cost share.

A variety of reports would be required by the two bills. Both call for a report setting forth a 20-year capital investment program, based on the application of objective, national project selection prioritization criteria. Similarly,
As NWC convened in the charming and historic city of Savannah, Georgia for its 53rd Annual Meeting, all attention was focused on the recently passed House WRRDA bill, the necessity of advancing this critical legislation aptly demonstrated by the massive container ships traversing the Savannah River.

Hosted by the Georgia Ports Authority, home to the nation’s 4th-busiest container port, this year’s meeting focused on the urgency of investing in our critical water resources infrastructure. The program agenda kicked off with an overview by the senior leaders of the U.S. Army Corps of Engineers, including the Deputy Commanding General for Civil and Emergency Operations, Major General Michael Walsh; Director of Civil Works, Steve Stockton, and the Director of Program Integration, Mark Mazzanti. The Corps’ overview included a sobering account of the state of the nation’s infrastructure and the parallel challenge of securing adequate funding in the foreseeable future. To address those challenges, Mr. Stockton provided an update on the Corps’ Civil Works Transformation, and Mr. Mazzanti discussed the parallel goal of moving to a watershed approach for budgeting in order to expedite projects and address problems associated with inefficient funding.

Highlights of the House-passed WRRDA were provided by John Anderson, Staff Director of the House Transportation and Infrastructure Water Resources and Environment Subcommittee. Anderson described the reform-focused aspects of the bill, along with the new approach to project authorizations in the no-earmark environment. Speakers on the afternoon panel provided an overview of regional issues, and the Corps’ Savannah District Commander, Col. Tom Tickner, elaborated on the multiple authorized purposes of the Savannah River Basin. That set the stage for the harbor cruise aboard the Savannah River Queen, and a narrated tour provided by Jamie McCurry, the Ports Authority’s Senior Director of Administration and Government Affairs, of the Savannah Harbor Expansion Project.

Friday morning’s keynote address was provided by LTG Thomas Bostick, 53rd Chief of Engineers and the Commanding General of the Corps of Engineers. The Chief offered a historical look at the Corps’ role in developing and building the nation’s infrastructure; in the face of the stark fiscal realities facing the nation today, he stressed the need to address core competencies to ensure a strong infrastructure in the future. In an engaging and somewhat lively discussion period, the Chief acknowledged stakeholder frustration with some of the ongoing strategic changes and stressed the importance of communication and collaboration, as reflected by the USACE-NWC partnership agreement.
Congratulations to NWC’s New Officers and Directors Elected at the Annual Meeting

Elected to serve as Officers for 2013-2014

Chairman of the Board
Jim Oliver, Tarrant Regional Water District

Vice Chairman
Jamie McCurry, Georgia Ports Authority

President
Amy Larson, National Waterways Conference, Inc.

First Vice President
Tim Feather, CDM Smith

Vice President
Randy Richardson, Port of Memphis

Counsel
Steven Burns, Balch & Bingham, representing Alabama Power

Treasurer
Cline Jones, Tennessee River Valley Association

Secretary
Evelyn Suarez, Williams Mullen

To serve on the Executive Committee for 2013-2014

Larry Dowdy, Little River Drainage District
Mindy Poldberg, Iowa Corn Growers Association
Tom Ray, Texas Water Conservation Association
Steve Taylor, Johnston’s Port 33
Mark Hommrich, Volunteer Barge

Jeff Florin, Virginia Port Authority
Rich Brontoli, Red River Valley Association
Jim Weakley, Lake Carriers Association
Rob Rash, St. Francis Levee District

Elected to the Board of Directors, for a term ending in 2016

Representing Associations
Andre McDonald, Fort Bend Flood Management Association
Kristin Meira, Pacific Northwest Waterways Association
Blake Roderick, Pike and Scott County Farm Bureaus
David White, Virginia Maritime Association
Dave Mohre, National Rural Electric Cooperative Association

To fill a seat for a term ending in 2014

Representing Public Members
Jamie McCurry, Georgia Ports Authority
Jack Peterson, Harris County Flood Control District
Todd Walton, North Carolina State Ports Authority
Dennis Wilmsmeyer, America’s Central Port
Kevin Ward, Trinity River Authority

To fill a seat for a term ending in 2015

Meagan Kaiser, Upper Mississippi, Illinois & Missouri Rivers Association

Representing Corporate Members
Jorge Romero, K&L Gates
Branson Williams, Power South Cooperative
Dan Mecklenborg, Ingram Barge
Mona Phegley, The Celtic Group
Tim Feather, CDM Smith

Welcome New Members!

Port Everglades
Ft. Lauderdale, FL
Steven M. Cernak

Southeastern Federal Power Customers, Inc.
Alan Williford

We welcome your suggestions and ideas for the National Waterways Conference at info@waterways.org
Bipartisan Effort to Delay Massive Rate Hikes

Bipartisan efforts are underway in both the House and the Senate to ensure that reforms to the National Flood Insurance Program enacted as part of last year’s surface transportation reauthorization bill are implemented in an affordable manner.

S. 1610 and H.R. 3370, both entitled The Homeowners Flood Insurance Affordability Act, would delay implementation of certain provisions of the Biggert-Waters Flood Insurance Reform Act until FEMA completes a required affordability study and provides a framework to address affordability issues.

Lead sponsors of the Senate measure are Senators Robert Menendez (D-NJ) and Johnny Isakson (R-GA). The House effort is being championed by Rep. Maxine Waters (D-CA).

Industry Events

November 6-8, 2013
Mississippi Water Resources Association
Vicksburg, MS
www.mswater.org

November 21-22, 2013
Atlantic Intracoastal Waterway Association
Charleston, SC
www.atlintracoastal.org

December 5-7, 2013
Mississippi Valley Flood Control Association
New Orleans, LA
www.mvfca.org

December 8-11, 2013
National Association of Flood and Stormwater Management Agencies
San Francisco, CA
www.nafsma.org

2014 Events

February 11-13, 2014
Waterways Council, Inc.
Washington, DC
www.waterwayscouncil.org

March 9-13, 2014
Pacific Northwest Waterways Association
Washington, DC
www.pnwa.net

March 24-25, 2014
American Association of Ports Authorities
Washington, DC
www.aapa-ports.org

April 1-3, 2014
American Waterways Operators
Washington, DC
www.americanwaterways.com

June 1-5, 2014
PIANC World Congress
San Francisco, CA
2014congress.pianc.us

July 15-18, 2014
International Association of Maritime Economists
Norfolk, VA

October 14-17, 2014
International Propeller Club Convention
Louisville, KY
www.propellerclubhq.com

2014 Events

Upcoming NWC Events

***Please note NEW date***

March 24-26, 2014
Legislative Summit
The Loews Madison
Washington, DC
CEQ Moving Forward with Development of Interagency Guidelines

As the Council on Environmental Quality forges ahead with its effort to revise the Principles & Guidelines for Water & Land Related Resources Implementation Studies, the agency is hosting a roundtable discussion about the Interagency Guidelines currently under consideration.

NWC President Amy Larson has been invited to participate in the invitation-only discussion, along with other industry stakeholders, experts and field practitioners to provide insight into how to implement key concepts and achieve improvements for federal water resources project planning.

The final Principles and Requirements document was released in March 2013. A draft of the Interagency Guidelines was released for public review and comment until June 27, 2013. All the public comments received can be found here: http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG/comments.

NWC’s comments, which express serious concerns about the Final P&R, can be viewed on our website at www.waterways.org

WRDA: New Levee Safety Bureau at the Army Corps

By Dan Delich

Vastly different approaches on levee safety are included in each of the Senate and House water resources development bills. Both bills include a directive to the Army Corps and FEMA to establish new federal guidelines prescribing safe levees. The Senate, however, goes well beyond the House by establishing a National Levee Safety Program that:

• installs new Federal inspection, risk classification, safety guideline, and funding assistance eligibility authority for Corps and non-Corps program levees;
• creates a new Army Corps program office and Levee Safety Administrator with “such staff as is necessary”;
• mandates formation of state and tribal levee safety programs (mandated for federal assistance eligibility);
• mandates new local floodplain management and hazard mitigation plans accounting for “all levee risks” (mandated for federal assistance eligibility);
• directs establishment of an undefined levee Hazard Potential Classification System pegging localities as “safe” or “unsafe” without regard for local property value and other economic considerations and without requirement for public input;
• authorizes $600 million of an overall $900 million in levee safety program funds for government growth, non-Federal levee inspections, guideline promulgation, education and outreach; and
• forms a 14-member Levee Safety Advisory Board with 4 standing committees to help ensure nationwide compliance with the program’s flood risk management directives and to make recommendations on floodplain management, environmental protection, and environmental permitting.

When comparing levee safety programs in the two bills, the big picture takeaways are:

(a) The House does not include programmatic funding to match local repair costs on federally built flood infrastructure — but it also leaves out significant government growth; and
(b) The Senate authorizes token funding for flood infrastructure ($30 million/year over ten years [with a $10 million/project limit])

continued on page 6
— but it approved twice that amount ($600 million) to fuel increased federal agency growth with new, unchecked authorities and administrative requirements.

The Senate legislation, in particular, furthers major levee-related actions taken by the Corps in recent years. Since the 2005 flood-related tragedies associated with Hurricane Katrina, the Corps has:

• revised its Inspection of Completed Works (ICW) protocols such that hundreds of federally built projects have been found “Unacceptable”— while local sponsors are left to pursue design, funding, and construction of federally-approvable (33 USC § 408) remedies;
• terminated its decades-long practice of providing levee certification for federally built projects — while local sponsors are left with significant unforeseen technical, liability, and cost issues;
• modified the USACE Levee Design Manual to incorporate new risk-based concepts into levee design — while local sponsors are left to interpret the evolving, nationally inconsistent, and more costly procedures;
• reinvigorated enforcement of section 408 permits (33 USC § 408) for proposed modifications to federal projects — while local sponsors idle repair plans awaiting Federal review; and
• developed the Levee Safety Action Classification “LSAC” system to peg individual communities within a 5-tier range of vulnerability — while local sponsors are left to manage a range of life safety and socioeconomic consequences triggered by their Federal project partner’s assessment.

Widespread federal divestiture of bricks and mortar flood infrastructure, and the lives and treasures they imperfectly protect, however, is not an available option.

Faced with declining budgetary support for the civil works mission, while at the same time the nation is searching for better ways to limit Katrina, Rita, middle-America riverine, and Sandy-like loss and suffering, the pending water resources legislation provides an opportunity for progress, not simply more process. The Senate’s 2:1 programmatic funding ratio in favor of more government vs. infrastructure doesn’t tell the whole story, but it does help to quantify that bill’s priority-setting.

Title VI of S.601 (which partially tracks the 2009 National Levee Safety Committee recommendations) reads very much as if “building strong” is risky, controversial, unaffordable, and “out,” unless the funding is included in a disaster supplemental. Meanwhile, assessing, monitoring, managing, advising, coordinating and communicating are safer plays, more cost-effective in the short term, and “in.” Pervasive underfunding and inattention to the agency and its core civil works missions have led to interminable agency reformation initiatives and, regrettably, the Corps’ need to “do less with less.” At some point, everyone is aware that that great old agency and its uniquely professional, patriotic public servants just cannot do more with less.

There is a time, now, and a place, in most of coastal and riverine America, to be smarter about the financial and social imperative to genuinely integrate structural and non-structural flood risk reduction approaches. Moreover, the Feds can’t be in the position of helping to create “attractive nuisances” in the form of projects which induce people to put themselves in harm’s way. Carrots and a stick or two will be needed to prevail on these matters. Widespread federal divestiture of bricks and mortar flood infrastructure, and the lives and treasures they imperfectly protect, however, is not an available option. A National Academies committee chaired by Dr. Gerald E. Galloway issued an important report earlier this year indicating that by supporting flood hazard reduction grant programs and floodplain management efforts, the NFIP estimates that more than $1.7 billion in flood-related losses are avoided annually. The same report shared that during the record-setting floods in 2011, the levee system on the Lower Mississippi River was credited by the Mississippi River Commission
with preventing over $110 billion dollars in flood-related losses.

A comprehensive levee safety program built upon the concept of “Shared Risks-Shared Solutions” and that provides a long-term approach to better protect human life, property, and natural resources should be driven by a small handful of key principles —

(1) Explicitly state, in law and policy, the clear federal and local roles, such that: (a) USACE project involvement is driven chiefly by economic return (NED benefits) in interstate situations; and (b) state and local actors maintain plenary responsibility for life safety and/or landside risk reduction measures such as evacuation, land use practices, building codes, and risk communication. There are overlaps, but those can and should be clarified and explained;

(2) To be able to execute non-federal item (1)(b) above, establish well-conceived, functioning regional or state (non-federal) levee safety programs as a pre-condition for federal participation in newly authorized and/or appropriated levee rehabilitation and improvement. The MR&T is a different animal altogether, and this too should be clarified and explained;

(3) Consistent with the House approach, ensure that the Corps can offer assistance in the following areas: developing and maintaining an inventory of levees; providing technical assistance to levee owners at their request; developing models for levee “safety” programs that states and/or local governments might choose to adopt; and certifying levees as an adjunct to the Corps’ regular periodic inspection program when the levee owner so requests; and,

(4) Institute cost-shared funding for prioritized levee rehabilitation and improvement projects, including verifiable remedial design and construction modifications at federally built projects.

We welcome your suggestions and ideas for the National Waterways Conference at info@waterways.org

Dan Delich is the Director of the National Levee Issues Alliance (LIA). For more information on how to join or support LIA, please contact Dan at 214-707-8772 or dan.delich@sbcglobal.net.

Karin Jacoby Joins Husch Blackwell

Karin M. Jacoby, P.E. has joined Husch Blackwell as Senior Counsel in its Kansas City, Mo., office. Jacoby will concentrate her practice on Levee & Flood Control matters as a member the firm’s Real Estate, Development & Construction industry group. She brings 25 years of experience in water resources and public works, as well as national-level policy expertise.

Ms. Jacoby has served on NWC’s Board of Directors, in her capacity as the Executive Director of the Missouri and Associated Rivers Coalition (MOARC), a post she has held since 2001. She currently serves on NWC’s Legislative Policy Committee. She is a member of the National Committee on Levee Safety; has served on the National Academy of Sciences levee committee that authored the recently released report for the Federal Emergency Management Agency (FEMA), Levees and the National Flood Insurance Program: Improving Policies and Practices; and is the founder of Spica Consulting LLC, an engineering and flood-risk management firm.

A professional engineer registered in both Missouri and Illinois, Jacoby received her B.S. in Civil Engineering from the University of Missouri-Rolla, now known as Missouri University of Science and Technology. She earned her J.D. from the University of Missouri-Kansas City School of Law and her Master’s in Public Administration from the University of Missouri-Kansas City.
Corps’ Changes

After a distinguished Army career, including 17 years in Civil Works, Major General Michael Walsh has retired. Replacing him as the Deputy Commanding General for Civil and Emergency Operations is MG John Peabody, most recently Commander of the Mississippi Valley Division. New MVD Commander is Brigadier General Duke DeLuca, who most recently served at Fort Leonard Wood, Mo., where he was the Commandant of the United States Army Engineer School, United States Army Maneuver Support Center of Excellence.

Save the Date for the 2014 Congressional Reception:
March 25, 2014
Jointly hosted by the National Waterways Conference and Mississippi Valley Flood Control Association
USACE Infrastructure Strategy Report Examines Alternative Funding Options

The Institute for Water Resources has published a report on “Potential Alternative Funding & Finance for USACE Civil Works Missions” that examines funding and finance challenges and explores alternative financing and delivery mechanisms. Information in the report was garnered from a series of Alternative Finance Workshops with Civil Works leadership and outside experts in project finance.

The study examined a number of options to increase revenues, leverage existing resources, shift lower priority assets, reduce cost, and deliver projects through alternative means. Key long-term funding strategies identified by workshop participants for further study include revenue enhancement, trust fund dedication, value capture, asset sales and transfers or disposition.

Key financing strategies identified include infrastructure banks, federal loans and credit enhancement, and bonding options.

Various pilot programs identified for possible consideration include: discretionary use of the Harbor Maintenance Trust Fund; a partnership between USACE and state infrastructure banks in the Great Lakes region; public-private partnership solutions for Allegheny Locks and Dams for funding and finance, and expansion of nonprofit partnerships at the USACE District level for recreation and environmental restoration.

The report represents part of Phase II of the IWR initiative, with Phase III to include the development of formal implementation plans for pilot programs. Continued outreach and coordination with key stakeholders will be an important element of the implementation of these strategies.

The report is available on the IWR website at:


"Water Resources Legislation", continued from page 1

focused on the need to invest in the nation’s water infrastructure. The Committee also turned to social media to get out the message that the nation’s global competitiveness depends upon maintaining the nations’ ports and waterways.

Key provisions of the bill will:

• Authorize projects recommended by the Chief of Engineers.

• Establish a new process for future authorizations, allowing local stakeholders to request specific projects.

• Accelerate project delivery and streamline environmental reviews,

• Deauthorize inactive projects that were authorized prior to WRDA 2007, and

• Increase the ability of non-federal interests to contribute funds and participate in project development and delivery.

Upon passage of the House bill, Chairman Shuster stated. “WRRDA is the most policy and reform focused legislation of its kind in the last two decades... Fundamentally, this bill is about jobs. Not just the jobs in constructing these improvements to our infrastructure, but current and future jobs that will depend on a modern, efficient transportation system that will allow American businesses to compete and prosper in a global marketplace.”
Benteler Steel/Tube Breaks Ground on $975M Project at the Port of Caddo-Bossier

In mid-September, Benteler International AG Chief Financial Officer Boris Gleissner and LA Governor Bobby Jindal broke ground on the first phase of a $975 million steel manufacturing project under construction at The Port of Caddo-Bossier in Shreveport.

The Benteler Steel/Tube division will create 675 new direct jobs with the project, with an average salary of $50,000, plus benefits. A Louisiana State University economic impact analysis estimates an additional 1,540 indirect jobs will result, for a total of more than 2,200 new jobs. An estimated 1,000 construction jobs will be created by the Benteler Steel/Tube project, and LSU estimates the project will result in $2.7 billion in total new earnings and a cumulative economic impact of $16.2 billion for the Northwest Louisiana region over the next two decades.

The regional partners contributing to infrastructure improvements for the project at the port include the Red River Waterway Commission, The Port of Caddo-Bossier and the Caddo Parish Commission.

"Inland Waterways Reform", continued from page 1

both would require a study by the Comptroller General on the efficiency of collecting the fuel tax for the Inland Waterways Trust Fund. The House bill seeks input on the feasibility of issuing federal tax-exempt bonds secured against the available proceeds of the Inland Waterways Trust Fund, as well as a report on potential users’ fees from other sources, that when combined with the current fuel tax, would be sufficient to support one-half of the annual construction expenditures from the trust fund. Non-navigation beneficiaries of the waterways would be required to be consulted. The House bill also calls for a roundtable of inland waterways stakeholders, including shippers, suppliers, and state and Federal water managers, to consider alternatives to address funding options for the inland waterways system.
MRC Call to Action

The Mississippi River Commission has issued a Call to Action calling for:

A strong national vision based on systemic science based watershed approaches, and a determined and persistent commitment to invest in high value transportation infrastructure;

Exploring alternative funding mechanisms and efficient management techniques to optimize current infrastructure, and prioritize resources on the aspects of our infrastructure systems that deliver the most value; and

Streamlining water resource development processes, which would require changes in law, policies, and regulations.

The Call to Action, developed after numerous discussions with partners and stakeholders over the past few years, identifies key challenges the nation faces and offers specific areas of focus upon which to develop solutions. These critical challenges include an expected explosion in global population and wealth, which will place greater demands on food, energy, water and trade; increasing transportation infrastructure demands, including a recognition that our global competitors are investing enormous capital in infrastructure, in contrast to U.S. under-investment; cumbersome and outdated laws, policies and regulations; and the recent extreme natural events which have demonstrated that existing infrastructure in inadequate.

The Call to Action can be viewed at: http://www.mwd.usace.army.mil/Portals/52/docs/MRC/MRC%20Statement%20-%20Call%20to%20Action%20FINAL%20for%20web.pdf

NWC Board Member Contributes to New Shipping Book

Jorge Romero, a member of NWC’s Board of Directors, along with K&L Gates lawyers Jeffrey S. King and Julius H. Hines, co-authored the United States chapter in the recently published Getting the Deal Through — Shipping 2014. Presented in a question-and-answer format, the chapter addresses topics including new-building contracts, ship registration and mortgages, judicial sale of vessels, and jurisdiction and dispute resolution. The complete chapter can be viewed at http://www.klgates.com/files/Upload/SH2014_Untited_States.pdf

Congratulations to the Boston Red Sox, 2013 MLB World Series Champions!

We welcome your suggestions and ideas for the National Waterways Conference at info@waterways.org
Four Super Post-Panamax Cranes Start Work at Port of Savannah

All four of the super post-Panamax ship-to-shore cranes that arrived at the Port of Savannah in June are now fully operational at Georgia Ports Authority’s Garden City Terminal. Each new crane can lift up to 65 tons.

The cranes arrived on a specialized vessel June 5. After the cranes were offloaded, crews began raising the booms, and the electrical and machinery housings roughly 100 feet to their proper position. Additional on-site work included elevator installation and final wiring connections.

“Our new cranes, coupled with the pending harbor deepening and superior road and rail connections beyond our gates, mean the Port of Savannah is poised to take advantage of the next evolution in global commerce,” said GPA Executive Director Curtis Foltz.

The Port of Savannah was the second busiest U.S. container port for the export of American goods by tonnage in FY2011. It also handled 8.7 percent of the U.S. containerized cargo volume and 12.5 percent of all U.S. containerized exports in FY2011.

PNWA Advocates for Navigation During Review of the Columbia River Treaty

By Kristin Meira

The economic vitality of many communities in the Pacific Northwest depends on the Columbia Snake River System. Over 42 million tons of international trade moved on this waterway in 2010, valued at over $20 billion. A conservative estimate of the jobs directly tied to the deep draft navigation channel finds that 40,000 rely on this waterway for their livelihood. Substantial federal investments have been made in both the deep draft Lower Columbia River as well as the inland bargeing channel and locks.

This waterway is a national transportation asset, and any potential changes that may impact its efficiency should be thoroughly evaluated. As a result, the review process for the Columbia River Treaty is of significant interest to navigation stakeholders. The Columbia River Treaty was implemented by the United States and Canada in 1964 to govern Columbia River flows for flood control and power generation. After nearly 50 years, both nations are examining its future. The Treaty states that either nation can terminate most of its provisions beginning September 16, 2024, with a minimum 10 years’ written notice.

The U.S. Entity, comprised of the Bonneville Power Administration and U.S. Army Corps of Engineers Northwestern Division, will provide a regional recommendation to the U.S. Department of State by late 2013.

continued on page 13
Pacific Northwest Waterways Association (PNWA) has been advocating for transportation, trade, and energy interests throughout the Treaty review process. PNWA represents over 130 public and private sector member organizations including public ports, navigation, transportation, trade, tourism, agriculture, forest products, energy and local government interests. PNWA's membership has participated in public outreach meetings as well as more targeted meetings with U.S. Entity staff to discuss the significant concerns of energy, navigation and other potentially impacted sectors. PNWA's most recent comments call for significant expansion of the draft recommendation to highlight the impacts to federally maintained navigation projects and safe navigation which will occur with changes to existing flood risk and flow regimes, including:

- Concern with proposed higher flows in the spring and summer, and lower flows in the fall and winter. The “ecosystem flows” proposed in the document lack scientific explanation and may have significant impact on navigation on the Columbia River System, as well as the efficiency of barging in the federal navigation channel.
- The U.S. Entity must consider that fluctuating flows may impact the costs of existing federal navigation programs for dredging and maintenance of federal infrastructure.
- Future flood risk management studies must also incorporate impacts to other federally-authorized uses, including federal navigation projects, which could be impacted significantly by changes to the Treaty.
- Irrigated agriculture should be fully recognized in the final regional recommendation for the value it brings to the regional and national economy, and its reliance on the Columbia River for its viability.
- Utility members of PNWA have also submitted comments calling for an equitable distribution of power benefits between the two nations, and to ensure that proposed changes to the Treaty take into account and do not adversely affect existing programs to protect fish and wildlife resources.

PNWA and other regional trade groups will continue to work with the U.S. Entity to advocate for inclusion of these considerations in the final recommendation, which will be submitted to the U.S. Department of State in mid December. Click here to view PNWA's most recent comment letter.

For more information, contact Kristin Meira, Executive Director of PNWA. Meira serves on NWC's Board of Directors.

Federal Regulatory Reach — The Need for a Collaborative Response

By Tom Ray

The continued expansion of federal regulation related to water resources, particularly into areas that were traditionally controlled by the states and local governments, demands a coordinated, collaborative response by the water community. As will be discussed, the regulatory intrusion into traditional water resources management is evident from the federal actions that are current today. Taken together, the current federal actions are a clear indication that the control of water management in this country is shifting. This shift will result in more federally mandated controls and less state and local oversight on the development and use of water. In some cases, like those that involve the Endangered Species Act and federal action under the Lacey Act, state primacy itself is being jeopardized.

The nature of water-related projects is complex. Those local agencies that develop and operate water projects best understand these complexities. There is a need for...
local managers to have input to the states and federal regulators vis-a-vis the impact of regulations on those operations. Back in 1957, relatively early in progression of federal water-related regulations, Professor Engelbreck recognized that the complex nature of federal involvement in water projects called for collaboration:

“In no other arena are the complex aspects of federalism so starkly presented as in water resources. Their development epitomizes, perhaps better than any other function, the need for intergovernmental cooperation” Earnest A. Engelbert, 1957.

Today, with significant increase in federal law and regulation, the need for intergovernmental collaboration has increased proportionately. The importance of coordinated efforts to collaborate with Congress and federal agencies involved is critical. The National Waterways Conference is a leader enabling effective collaboration; the NWC-USACE Partnering Agreement is a recent and important example. Through a formal Memorandum of Understanding, the NWC is promoting collaboration with USACE on behalf of its diverse membership. The effort, through periodic meetings and other communication, addresses today’s complex issues involving oversight by the USACE and promotes mutual goals, recognizing the national interests of a robust civil works program and sustainable water resources infrastructure.

This approach makes sense for addressing other regulatory issues that have emerged. However, before we discuss the latest federal regulatory issues, a brief history of the shift in federal versus state and local control is pertinent. The federal government’s authority over water resources stems from several basic powers granted by the Constitution, notably its powers over commerce on navigable streams, its proprietary powers over its own lands and property, and its powers to appropriate funds to provide for the nation’s general welfare (Engelbert, 1957). The states in general retained control of the use of water, responsibility for the distribution and use of water locally.

These distinct roles emerged from several actions dating back to the early 19th Century. The commerce powers of the federal government were recognized by the Supreme Court in the 1820’s decision that navigation \(^1\) was a federal responsibility. The federal government then retained the responsibility and authority to protect and improve waterways (River and Harbors Act of 1899). In the 1920s, the Federal Power Act established federal control over hydropower, which required a license to construct and operate hydropower facilities.

Although conflicts between federal and state law did arise in this early period, it was not until the period after World War II with economic and population growth and the need for water resources projects to provide navigation and water supply to meet these

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\(^1\) At this time, “Navigation” was defined as “ordinary conduits” used for commerce. In 1870, the Supreme Court defined navigable waters as those that “are used, or are susceptible of being used, in their ordinary condition, as highways of commerce.” By 1940 this definition had been broadened to include waterways that could be used if “reasonable improvements” were made. Moreover, the Court had determined that federal authority could extend to non-navigable reaches if downstream navigability were affected (L. MacDonnell, 1980).
demands, and notably with Congressional enactment of the series of environmental laws in the 1970s that those conflicts became prominent in water resources development and management (Figure 1). By this time, the constitutional authority of Congress to displace state water laws with federal law was established. However, Congress continued to defer to state law in areas of water allocation, distribution, and use. “Numerous so-called ‘savings clauses’ or policy statements have been included in federal legislation in which Congress indicates its intention not to interfere with state water laws” (L. MacDonnell, 1980).

With the growth of federal regulations, the key question that has emerged and is very much pertinent in efforts to collaborate with federal agencies is not whether Congress has the authority but whether Congress intended to supplant state law. With the environmental laws, Congress expected major provisions to be implemented irrespective of state law. When conflicts arose, Congress urged “cooperation” and called on state and local governments to work out issues in a way that would serve local interests and still achieve federal objectives (Figure 2). Congress, in establishing mandates under these laws, also established, at least indirectly, the need for federal-state-local government collaboration.

As we examine a few current examples of federal regulatory concerns, the question of Congressional intent often underlies the conflict, but ironically resolving this question may be the pathway for effective collaboration.

- **Principles & Requirements, Interagency Guidelines (PR&G)**

In one sense, the PR&G is a good place to start because these affect all types of water resource projects throughout the nation. On the other hand, it is not a good example of productive collaboration with a federal agency. All federal resource agencies are now included under the PR&G. Unfortunately, the P&R do not provide a clear, workable framework for federal agencies to use in considering water resources projects. National interests are shifted away from economic benefits and public welfare toward environmental mandates, often without a clear statement of associated benefits. The NWC has led the charge attempting to collaborate through meetings, written comments, and participation in roundtable discussions with the Council on Environmental Quality (CEQ). Although the response from CEQ has been disappointing, the NWC is continuing to pursue much needed changes.

- **Clean Water Act (CWA) Rulemaking**

This fall the EPA dismissed its draft guidance interpreting the

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2 For an important example, the Wallop amendment in the Clean Water Act and its 1977 amendments, recognized the role of states in these areas of water control, but the law was passed without regard to state law. Congress expected that its substantive provisions would be implemented without regard to state law.
jurisdictional scope of the Clean Water Act and published a notice soliciting public comment on a new draft science report titled: “Connectivity of Streams and Wetlands to Downstream Waters.”

At stake is the federal expansion of waters under the jurisdiction of the CWA. Here the question of Congressional intent is very much at the forefront. In fact, Congress failed in the 111th Congress to pass a bill to expand jurisdictional waters and to delete the term “navigable” from the CWA.

Although Rulemaking is probably preferred to issuing “Guidance,” in this case EPA submitted the draft rule to OMB and concurrently solicited comments on the Science Advisory Board’s report on “connectivity” of waters, ostensibly to justify the rule. It would appear that EPA drafted the rule before vetting the science. The Chairman of the House Science, Space and Technology Committee has recently questioned the potential outcome of EPA’s action, and questions about the process are widespread.

• EPA Water Transfer Rule
This is an opportunity for the water community to support an EPA position. At stake is the ability to make water releases and transfer water in natural channels without being required to obtain a Section 402, NPDES, permit. The rule was promulgated in 2008 and has been challenged a number of times in District court. A recent Supreme Court ruling not to hear an EPA appeal on the Circuit Court’s jurisdiction over the Rule could result in District courts having first cut at challenges to it and effectively overturning the Rule on a case by case basis. The result for the water community is the potential for NPDES permits to be required for the release and transfer of water supply. Congress did not intend for Section 402 of the CWA to be used in this way. If the District courts strike down the Water Transfer Rule, then NWC in collaboration with other water associations, states, and local agencies will need to work with Congress to clearly assert the actual intent of Section 402.

• Invasive Species, USFWS Proposed Rule and Intent of the Lacey Act
The last example is certainly not the one with the least potential to disrupt water resources projects and operations. In what would be considered “good intentions,” that is to stop the spread of aquatic invasive species like zebra and quagga mussels, the USFWS has been aggressive in its regulatory responsibilities under the Lacey Act. Most recently, the USFWS proposed a rule change that would allow the use of Categorical Exclusions (CE) to add invasive species to the Lacey Act. The problem is that the Lacey Act prevents the interstate transfer of invasive species. The impact on water transfers, particularly those that cross state lines, is an aggressive response by USFWS to stop the water transfers—even if invasive species are already present.

The use of CE may be appropriate in many cases and needed, but in any case where aquatic invasive species are associated with a water supply transfer, it should be considered an “extraordinary circumstance” under NEPA and the full NEPA process followed.

These are only a few examples of the current federal regulations and issues, but the history of regulatory expansion and the current regulatory examples cited above show the critical need for ongoing collaboration. We know that federal regulations will continue to grow and that conflicts will continue to emerge; we must be prepared to be persuasive on questions of Congressional intent and to effectively argue the questions of national benefit. Your participation in National Waterways Conference will help get that done.

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