



# The Washington Report

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## THE WASHINGTON REPORT NOVEMBER 2011

### CONGRESSIONAL SCHEDULE

November highlights included the passage of three of the twelve FY 2012 appropriations bills and the anticipation and failure of the Super Committee to craft a deficit reduction package for long-term savings. Congress returned to Washington the week of November 28 for a three-week session to consider so-called, must-pass legislation before the session ends. While plans for adjournment remain in flux, Senate and House leaders signaled they would like to conclude their work by December 16, the date that the latest Continuing Resolution spending bill is due to expire. Congressional leaders are planning to complete the remaining nine FY 2012 appropriations bills for the fiscal year that began October 1, combining them into one omnibus package if possible.

Congressional leaders also are negotiating a package of expiring tax provisions such as extending the payroll tax credit and unemployment insurance benefits, and providing funds to prevent the Medicare reimbursement rate scheduled cuts for providers. These three provisions are among 60 tax provisions that are set to expire on December 31. The debate surrounds offsets to pay for the extensions.

*For more information, please contact Debra Bryant at [dbryant@tfgnet.com](mailto:dbryant@tfgnet.com).*

### BUDGET, APPROPRIATIONS & FISCAL POLICY

#### **Status of FY 2012 Appropriations**

The leadership of the House of Representatives and Senate, and the House and Senate Appropriators Committees, face the challenge of completing work on FY 2012 appropriations process before the current Continuing Resolution expires on December 16.

To date, only three of the twelve annual appropriations bills have been signed into law. The Agriculture, Commerce-Justice-Science and Transportation-Housing and Urban Development Appropriations bills were combined into a single minibus piece of legislation that was signed into law by the President on November 18, P.L. 112-55. The most likely scenario for completing work on FY 2012 appropriations is the passage of a single omnibus bill combining the remaining nine appropriations measures. Lawmakers in both chambers are eager to avoid a replay of last year's battle over FY 2011 spending, which was not resolved until April 2011. But to do so, the final package would have to resolve several contentious policy disputes and provide just the right amount of spending to avoid losing support from either side of the aisle. Congress will also be working against the backdrop of the deficit reduction committee's inability to reach a deal, a

move that mandates \$1.2 trillion in budget cuts beginning in January 2013 that some in Congress are already looking to reverse.

Conservatives in both chambers have signaled their concerns over backing spending measures that exceed this year's House budget resolution, H. Con. Res. 34. More than 100 House Republicans voted against the three-bill minibuss appropriations measure referenced above to express frustration with the spending levels. Appropriators are using a top line of \$1.043 trillion in discretionary spending for FY 2012 spending bills that was called for by the Budget Control Act (P.L. 112-25), but that amount is more than \$20 billion above the House budget resolution numbers. On the Democratic side of the aisle, some members have expressed concern that non-defense spending has been cut too deeply. Over in the Senate, Senator Tom Coburn (R-OK) has vowed to seek more cuts.

Policy issues could also derail the omnibus spending measure. Opponents of the 2010 health care and financial regulatory overhauls could seek to deny funding for those efforts in the Labor-HHS-Education and Financial Services spending bills. A dispute over the role and reach of the Environmental Protection Agency (EPA) halted House floor work on the Interior-Environment spending bill this summer and could cause problems for the measure again. The State-Foreign Operations measure could prove a battleground regarding foreign policy, including limits on aid to Pakistan, bans on funds for international organizations that promote abortion and dues to the United Nations.

The biggest incentive for passing an omnibus bill would be that it would include funding for the Defense Department, the Department of Homeland Security and Veterans Programs, which remain popular with members of Congress on both sides of the aisle. The Military Construction-Veterans Appropriations bill will become the legislative vehicle for the remaining bills.

Other options to complete the FY 2012 appropriations process include the passage of additional minibuss bills, the completion of individual appropriations bills or approving another long-term Continuing Resolution. However, there may not be enough time to pursue these options if Congress wants to complete appropriations work by the time the Continuing Resolution expires on December 16.

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### **Joint Select Committee on Deficit Reduction Fails to Reach Agreement**

On November 21, the two co-chairmen of the Joint Select Committee on Deficit Reduction (Super Committee), Senator Patty Murray (D-WA) and Representative Jeb Hensarling (R-TX), announced that the panel had failed to come up with an agreement to find \$1.2 trillion in savings over the next 10 years. Created by the Budget Control Act enacted in August, the Super Committee had been charged with delivering a plan to save at least \$1.2 trillion by November 23. The panel was unable to come to an agreement given wide ideological differences between the two parties on the issue of using revenue increases to reduce the deficit.

According to the statute, failure to reach an agreement will result in the adoption of automatic spending caps that will cut \$1.2 trillion in discretionary spending over nine years, starting in January 2013. The cuts will be split 50/50 between defense and non-defense programs. A



number of Senators are preparing separate legislation to reduce the deficit based on proposals from the Simpson-Bowles Commission and others. There also continues to be discussion in Congress about legislation to repeal the automatic cuts, but President Obama has said he would veto such efforts. The fact that the cuts don't take place until January 2013 removed the pressure from the Super Committee.

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## ECONOMIC DEVELOPMENT

### **3% Withholding Repeal Becomes Law**

A measure that was enacted in 2006, with implementation delayed twice since, would have required federal, state and local governments to withhold three percent from all payments for goods and services to contractors. After working as part of a DC-based coalition and on a client-by-client basis to support the repeal of this measure, we are pleased to report that the full repeal of this requirement passed the House of Representatives and Senate and was signed by President Obama into law on November 21. If not repealed, this measure would have been a paperwork burden for cities and counties and would likely have increased the cost of contracts.

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### **Congress Approves FY 2012 Agriculture and Rural Development Appropriations**

On November 18, the FY 2012 Agriculture and Rural Development Appropriations bill became law as part of the Consolidated and Further Continuing Appropriations Act of 2012.

A total of \$137 billion was included in the bill for the Department of Agriculture. Mandatory spending under the measure represented \$116.8 billion, a total of \$11.7 billion, or 11% less than FY 2011 funding levels and \$6.6 billion, or six percent less than the President's budget request. Discretionary spending in the bill totaled \$19.8 billion which is \$387 million, or two percent less than FY 2011 and \$2.5 billion, or 11% less than the President's budget request. An additional \$367 million was also included in the report for emergency spending for disaster relief.

Funding highlights in the bill include the following programs.

- Nearly \$99 billion for food and nutrition programs including the Supplemental Nutrition Assistance Program and child nutrition programs (a 19% increase over FY 2011)
- \$6.6 billion for the Special Supplemental Nutrition Program for Women, Infants and Children (a two percent decrease from FY 2011)
- \$139 million for the administration of nutrition programs (a six percent decrease from FY 2011 levels)
- Distance Learning and Telemedicine
- \$7.7 billion for the Rural Electrification and Telecommunications Loans Program (a one percent decrease from FY 2011)
- \$75 million for the Business and Industry Loan Guarantee program, which will support \$822 million in loan authority for rural businesses

- \$794 million for rural water and waste disposal loans (an 18% decrease from FY 2011)
- \$212 million for broadband telecommunications loans (a 47% decrease from FY 2011)
- \$844 million for conservation programs (a five percent decrease from FY 2011)
- \$123 million in total for emergency conservation, \$28 million for emergency forest restoration, and \$216 million for emergency watershed protection from disasters declared as national emergencies

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### **FY 2012 HUD Appropriations Enacted**

Congress has approved \$37.4 billion for the Department of Housing and Urban Development (HUD), nine percent less than FY 2011. Funding for the Community Development Block Grant (CDBG) program was reduced from \$3.3 billion to \$2.95 billion. Of this amount, up to \$300 million, plus an additional \$100 million is targeted for disaster assistance. The final language does maintain the 20% administrative cap for CDBG. The appropriations bill also reduces the HOME program funding from \$1.6 billion to \$1.0 billion. The final agreement includes \$120 million for HUD's Choice Neighborhood Initiative; the program was not funded in FY 2011. Funding for HOPE VI was eliminated. The agreement includes level funding of \$1.9 billion for homeless assistance grants. It provides \$18.9 billion for Section 8 housing choice vouchers, \$500 million above FY 2011. Of this amount, \$17.2 billion for renewal of current housing vouchers, while \$1.4 billion for program administration. The bill also includes \$75 million for vouchers for homeless veterans, up from the current \$50 million level. The final bill includes \$45 million for HUD's housing counseling program, which was not funded in FY 2011, and \$80 million for the National Foreclosure Mitigation Counseling program. Close to \$6 million was allotted for Section 108 loan guarantees. The appropriations bill also increases the Federal Housing Administration (FHA) higher loan limit up to \$729,750 through December 31, 2013, but not for Fannie Mae and Freddie Mac.

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### **No FY 2012 Funding for HUD Sustainable Communities Initiative**

The recently passed Transportation-HUD Appropriations bill does not include any funding for HUD's Sustainable Communities grants. This program, which had received \$150 million in FY 2010 and \$100 million in FY 2011, provides grants to communities and regions in order to integrate transportation, housing and land use planning efforts. The HUD-DOT-EPA Sustainable Communities Initiative has several prominent critics in the House of Representatives, and the earlier House bill proposed not only the defunding of the program but also prohibiting HUD from participating in any sustainable communities activities, including the administration of already awarded grants. The final bill approved by Congress did not include this provision. Therefore, FY 2010 or FY 2011 Sustainable Communities grantees will not be impacted by the decision to eliminate funding for FY 2012.

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## **Parks and Recreation**

Transportation funding for Transportation Enhancements (TE), Safe Routes to Schools and the Recreational Trails Program appears to have survived another budget cycle given that the Transportation Appropriations bill for FY 2012 has been enacted. The future of these programs remains uncertain until Congress completes a surface transportation reauthorization bill, which has been postponed until next year. The current Senate version, MAP-21, as approved by the Environment and Public Works Committee, eliminates the current 10 percent set aside for Transportation Enhancements, and consolidates all three programs under the Congestion Mitigation and Air Quality Improvement (CMAQ) Program. House leadership also has expressed strong support for eliminating funding for Transportation Enhancements.

The fate of the Land and Water Conservation Fund's (LWCF) State Assistance Program funding for FY 2012 remains less assured. The LWCF funding, as part of the Department of Interior's overall appropriation, will be part of the nine bills remaining for an omnibus appropriations bill that must be passed before the Continuing Resolution expires on December 16. Unless the final bill includes Senate language specifically zeroing out the competitive grant program sought by the Interior Department, the Secretary will have discretion to use whatever funds are provided for State Assistance in a competitive grant distribution instead of the current formula allocations to all states.

The legislation to provide grants for urban park revitalization, H.R. 709, the Urban Revitalization and Livability Communities Act, has not moved through Committee and Representative Albio Sires (D-NJ) is still seeking cosponsors. Currently, there is no Senate companion bill. H.R. 709 will be carried over into the Second Session of the 112 Congress and efforts to find a Senate champion for the bill will continue.

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<b>EDUCATION</b>
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### **Veterans Legislation Enacted**

The VOW to Hire Heroes Act was signed on November 21 and provides resources to veterans to obtain training and employment. The bill assists current service members separating from military service transition their skills into civilian employment opportunities and assists unemployed veterans by providing additional training opportunities and tax incentives.

The VOW Act authorizes a Veterans Retaining Assistance Program. Participants may receive up to 12 months of assistance at the full-time payment rate under the Montgomery GI Bill-Active Duty program. To qualify, a veteran must be between the ages of 36 and 60; be unemployed - there is special consideration for veterans who have been unemployed for over 26 weeks; have an other than dishonorable discharge; not be eligible for any other Veterans Administration (VA) education benefit program; not be in receipt of compensation due to unemployability; and not be enrolled in a federal or state job training program.

Participants must be enrolled in a VA-approved program of education offered by a community college or technical school. Applications will be submitted through the Department of Labor and

benefits paid by the VA. The Department of Labor will provide employment assistance to every veteran who participated upon completion of the program.

The VOW Act also provides tax credits to employers who hire veterans who have been unemployed for more than six months by providing \$5,600 for veterans and \$9,600 for disabled veterans.

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### **STEM Legislation Introduced**

Representative Michael Honda (D-CA) introduced H.R. 3373, the STEM Education Innovation Act of 2011, which amends the Department of Education Organization Act to establish the Office of Science, Technology, Engineering, and Mathematics (STEM) Education to administer STEM education and conduct an independent evaluation of the Department's STEM Education programs at least once every five years. The bill also establishes an Education Innovation Project within the Department to pursue breakthrough research and development in educational technology, and facilitate the effective use of that technology to improve student achievement. The bill directs the Office of STEM Education to award competitive matching grants to consortia of state-based STEM stakeholders that enable each of them to establish a state consortium on STEM education.

The bill requires each state consortium to promote STEM education research and best practices; address deficiencies in state STEM education efforts and communicate state needs to the federal government; support the implementation of rigorous common content standards in mathematics and science education, and the development of innovative STEM assessments based on those standards; promote and develop curriculum tools and training for in-service STEM teachers; develop STEM Career Awareness Programs; and develop STEM-related workforce education and training programs.

Grassroots organizations and state consortium are seeking co-sponsors for the legislation.

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### **ESEA Hearing in Senate**

On November 8, the Senate Health, Education, Labor and Pensions Committee held a hearing for stakeholders to testify on the proposed reauthorization of the Elementary and Secondary Education Act (ESEA), following the October markup of the Chairman's bipartisan bill. The new proposal resets the national goal from students attaining proficiency to ensuring that students graduate from high school prepared for college and a career; closes the comparability loophole and ensuring that Title I schools get their fair share of federal resources. The bill also incentivizes states and districts to develop rigorous teacher and principal evaluation and support systems, with the goal of continuous instructional improvement. The bill provides a laser-like focus on turning around the bottom five percent of schools and our nation's dropout factories, high schools that graduate less than 60 percent of their students, so that real change occurs in these schools, and the students who attend them have their academic trajectory set on a new,



improved course. There are expected to be additional changes to the bill already reported out of committee in order to secure the large number of supporters needed to move the bill to the floor.

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### **High College Tuition Costs Subject of Hearing**

On November 30, the House Subcommittee on Higher Education and Workforce Training held a hearing entitled "Keeping College within Reach: Discussing Ways Institutions Can Streamline Costs and Reduce Tuition." Panelists discussed the reasons why college costs have been increasing and offered ideas on what could be done to help curb the rising cost of tuition while effectively delivering a quality education. Initiatives to ensure affordable college education remains available for students were described and efforts to make the most up-to-date information on tuition and fees available to the public were encouraged by congressional leaders.

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<b>TRANSPORTATION</b>
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### **Rail Strike Averted**

On November 29, the House Republican leadership announced that it would vote on emergency legislation during the week of December 5 to prevent a strike against the major freight railroads. However, on December 1, the freight rail industry settled labor disputes with two of the three final "holdout" unions. The group of more than 30 railroads, including Union Pacific Corporation, CSX Corporation and Burlington Northern Santa Fe, had been trying for more than a year to reach collective bargaining agreements with 13 unions representing about 132,000 workers. Without the agreements, the railway unions could have begun striking as early as December 6, when a federal "cooling off" period was set to expire. The National Railway Labor Conference, which represents the railroads in bargaining talks, said its negotiators would try to reach an agreement with the final union, Brotherhood of Maintenance of Way Employees, before February 8.

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### **FY 2012 Transportation Appropriations Bill Enacted**

On November 18, President Obama signed the FY 2012 Transportation/HUD Appropriations bill containing funding for all of the aviation and surface transportation programs for the fiscal year which began on October 1. Highlights of the funding include:

- \$500 million for the Transportation Investment Generating Economic Recovery (TIGER) grant program;
- \$39.1 billion for the federal-aid highway programs;
- \$8.3 billion in funding for the Federal Transit Administration's formula and discretionary bus grant programs;
- \$1.955 billion for the New Starts Program;

- \$3.35 billion for capital investments at airports;
- \$1.4 billion for Amtrak; and
- \$143 million for essential air service subsidies.

The bill did not include funding for the Transit Investments for Greenhouse Gas and Energy Reduction (TIGGER) grant program or the High Speed Rail program.

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### **Senate Marks Up Highway Portion of Transportation Reauthorization**

On November 9, the Senate Environment and Public Works Committee approved the highway portion of the SAFETEA-LU Reauthorization legislation, known as MAP-21. For more details on what is contained in the Senate bill, please see our side-by-side document [here](#). The Senate Commerce, Science and Transportation Committee has announced that it will markup its title of the reauthorization bill on December 14, continuing the Senate's progress on the bill.

On November 30, House Transportation and Infrastructure Committee Chairman John Mica (R-FL) announced that the House of Representatives, contrary to a pledge made by Speaker John Boehner (R-OH) prior to Thanksgiving, will not proceed on the SAFETEA-LU Reauthorization legislation before the end of the calendar year.

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### **TFG Client Webinar on FHWA Grants**

On Wednesday, December 14 at 1 pm EST, The Ferguson Group will host a webinar for clients on several Federal Highway Administration (FHWA) discretionary grant programs. Twelve FHWA grant programs including the Transportation, Community and System Preservation (TCSP), Interstate Maintenance, Public Lands Highway, and the National Scenic Byways Programs are currently accepting applications for more than \$100 million in FY 2012 road and bridge funding. In the December grants webinar, TFG transportation experts will walk communities through gauging project eligibility for all twelve programs and will provide tips on how to draft competitive applications. If you are interested in participating, you may register for the webinar [here](#).

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<b>WATER AND NATURAL RESOURCES</b>
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### **FY 2012 Energy & Water Development Appropriations Bill**

An amendment by Senator Jim DeMint (R-SC), an outspoken opponent of earmarking, to revise how water resource projects are funded likely won't get floor time in the Senate now that the FY 2012 Energy & Water Development Appropriations bill will not be taken up separately from other funding measures. The amendment is identical to his bill, S. 573, the Corps of Engineers Reform Act which proposes a different approach to authorizing and making funding decisions on

water resource projects. Even though the Senator isn't expected to be able to offer the amendment, he is expected to look for other opportunities to get his non-earmark approach on the floor for a vote.

The DeMint bill has two titles, the first of which is specific to ports. It would create a new harbor maintenance block grant program for states that choose to participate and the second title which would establish a commission to prioritize water resources projects. Arguably the first title is the principal driver for the South Carolina Senator whose Port of Charleston is anxious to have deeper channels in time to be competitive with the other Atlantic ports, especially neighboring Savannah who also is in a race for deeper channels. Ports will be competing in the first years after the Panama Canal's Third Lock system is opened in 2014 for the larger container ships that dominate the Pacific trades, but which have not called in American Gulf and Atlantic ports.

Under the terms of the proposed legislation, the Harbor Maintenance Trust Fund (HMTF) would include a new Harbor Maintenance Block Grant Account, consisting of revenue generated from Harbor Maintenance Tax (HMT) collections in ports of states that choose to participate, as well as a General Account. States could apply to participate in the block grant program and, if approved, would receive funds in proportion to the HMT collections in their states. Block grant funds could be used for maintenance and deepening projects, which would open the HMTF to new construction projects for the first time. The General Account would be made of the HMT collections from non-participating states, plus the current HMTF surplus, for channel maintenance in those ports whose states didn't opt in for the block grant. Those other ports/states would benefit from the revenue collected in ports/states that don't opt for the new program and would be allocated along the current appropriations process through the Corps of Engineers for maintenance per current law.

The second title of the DeMint legislation would establish an eleven-member, geographically diverse Water Resources Commission to develop a process to prioritize Corps of Engineers water resource projects. The Commission would report within one year with a prioritized list of projects that are not carried out under a continuing authorities program. The report would also recommend a process of regularized prioritization assessments that ensures continuity in project prioritization rankings and the inclusion of newly authorized projects, a process to prioritize water resources projects across project type, and a method for doing such analysis as would be needed for recreation and other benefits resulting from Corps of Engineers projects. The report also would include water resource projects authorized for study or construction pre-existing the legislation's enactment. The legislation sets forth criteria for prioritization according to project type (i.e., navigation, flood control, etc.).

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### **National Flood Insurance Program Extended**

The Consolidated and Further Continuing Appropriations Act of 2012, the first minibus appropriations bill, extended the National Flood Insurance Program (NFIP) through December 16. The extension provides Congress with additional time to finalize the reauthorization of the NFIP. The House passed its version of the reauthorization bill, the Flood Insurance Reform Bill, H.R. 1309, in July by a vote of 406-22. The Senate Banking Committee approved the Flood

Insurance Reform and Modernization Act of 2011 on September 8. The text of the bill, S. 1940, was released on December 5. The Senate bill awaits consideration and action on the full floor of the Senate before moving to the House-Senate conference committee, where all differences between the two bills, including a controversial provision in the Senate bill related to mandatory insurance in areas of residual risk, will need to be negotiated.

Senator David Vitter (R-LA) introduced a bill to extend the NFIP through September 30, 2012, or the end of the current fiscal year, in case the full reauthorization stalls. To date, no official action has been taken on the extension legislation.

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### **Endangered Species Act**

The House Natural Resources Committee held a hearing on December 6 on the Endangered Species Act (ESA). Administration officials, landowners and environmental groups testified on ESA-related litigation and settlements and how they affect jobs, economic activity and species recovery. This hearing is the first of several ESA oversight hearings Committee Chairman Doc Hastings (R-WA) has planned for this Congress in an effort to start a conversation about rewriting parts of the law.

Representatives of the environmental advocacy groups WildEarth Guardians and the Center for Biological Diversity provided testimony. These groups are plaintiffs to a large percentage of ESA lawsuits on hundreds of species. Since 2007, environmentalists have petitioned the federal government to list more than 1,000 species -- nearly as many as were listed in the previous 30 years altogether, according to the Fish and Wildlife Service. At question are last summer's comprehensive settlements reached between the Department of the Interior and these groups on many of these lawsuits. The settlements will require the Obama Administration to decide whether to extend federal protection to hundreds of plant and animal species.

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### **EPA Water Quality Standards Rulemaking at OMB for Review**

The White House Office of Management & Budget (OMB) is reviewing an Environmental Protection Agency (EPA) proposal to revamp the agency's 1983 rule governing a wide range of water quality standards issues, aimed at addressing several court decisions and stakeholder concerns. EPA sent its proposed water quality standards regulatory clarifications to OMB on November 30 for review prior to its release and publication in the Federal Register.

Late in 2009, EPA announced plans to review and revise the water quality standards rule, including stricter implementation measures for rules governing pristine waters subject to antidegradation rules, measures to regulate the use of variances in assessing the attainability of standards, and new provisions that could put pressure on states unable to ensure that water bodies meet their designated uses, placing the burden of proof on the states in assuming all waterbodies can attain fishable and swimmable standards.

EPA has stated that the proposed changes are to streamline and revise regulations in response to several factors, including court cases, recurring issues with states and tribes, or resolved issues in need of codification.

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### **Regulatory Relief Bills Pass House**

The House of Representatives has approved on a bipartisan basis two key bills in the Republican Majority's regulatory review agenda. H.R. 3010, which passed 253-167, would provide broad reforms to the Administrative Procedures Act (ADA), including expansion of judicial review of agency rules. H.R. 527, also winning bipartisan support, would expand rulemaking analytic requirements under the Regulatory Flexibility Act.

The House is expected to vote this week on H.R. 10, the REINS Act, which would require both houses of Congress to approve on an up-or-down vote any agency rule determined to cost \$100 million or more annually. All three of these bills have companion bills introduced in the Senate, but none of these are expected to be considered. In addition, the White House has threatened to veto both House-passed bills, as well as the REINS Act.

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### **Clean Water Act Jurisdiction**

The Environmental Protection Agency (EPA) has commenced a formal rulemaking process to codify their draft Clean Water Act (CWA) guidance on jurisdiction over waters of the U.S. issued last April, with a draft rule to be released in January 2012. A proposed rule, once published in the Federal Register for public comment would still be subject to interagency and Office of Management and Budget (OMB) review before being finalized.

Industry groups and Republican lawmakers are calling for EPA to withdraw the draft CWA guidance due to the controversial expansion of CWA jurisdiction over waters of the U.S. There have also been requests from local and municipal governmental groups for formal consultations. EPA has not indicated the fate of the draft guidance at this time, but all indications are the guidance may be adopted in the interim to inform and support the rulemaking process.

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### **Final NPDES General Permit for Pesticide Discharges**

On October 31, the Environmental Protection Agency (EPA) posted the final National Pollutant Discharge Elimination System (NPDES) general permit for pesticide discharges into waters of the U.S. EPA has indicated that it will delay the enforcement of the permit for two months to allow for EPA to focus on compliance assistance and education of the permit requirements rather than enforcement actions for the applicants for the first 120-days the permit is in effect. Under the final permit, pesticide applicators are not permitted to apply for coverage under the general permit if their applications will have an adverse effect on species listed as endangered or



threatened under the Endangered Species Act, and certain procedures must be followed to demonstrate that pesticide applications do not result in those harms.

EPA began working on the permit after the U.S. Court of Appeals for the 6th Circuit ruled in 2009 in *National Cotton Council et al. v. EPA* that pesticide applications on or near regulated waters are point source discharges under the Clean Water Act (CWA), and therefore subject to permitting requirements. Talks in the Senate broke down late last month that, if passed, would have provided a two-year delay in the general permit requirement. Pesticides are already regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but now will require an additional CWA permit for use in and around jurisdictional waters.

Recently, EPA officials announced the agency is continuing to consult with the Fish & Wildlife Service (FWS) over potential effects on endangered species of its recently released general NPDES permit for some pesticide spraying operations. These consultations could force EPA to revise the permit if FWS calls for it to be strengthened to limit harms to protected species.

While EPA issued the controversial first-time permit under court order on October 31, the ESA consultation between the two agencies could continue for years, and highlights ongoing uncertainty about the status of the permit as issued, which industry groups and congressional Republicans have been trying to pre-empt through pending legislative amendments.

Due to the current lack of legislative direction, EPA issued the permit as required by the court and completed its consultation with the National Marine Fisheries Service, as required by Section 7 of the ESA. EPA ended up strengthening the permit to protect species regulated by the fisheries service. But due to court-ordered deadline, the agency did not complete its consultations with FWS prior to issuance of the final permit.

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### **Global and Domestic Water Scarcity Examined**

The Senate Energy and Natural Resources Water and Power Subcommittee will hold a hearing on December 8 on the potential for water scarcity, with experts from academia, government and private industry who have been invited to testify. Peter Gleick, President and Co-founder of the Pacific Institute, a nonprofit Oakland, California based think tank is scheduled to testify. Gleick addressed the flooding side of the coin in a congressional briefing in May, following epic floods along the Mississippi River.

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### **EPA Revised Boiler Rules Could Mean More Support for Bioenergy**

The Environmental Protection Agency's (EPA) revised standards for toxic emissions from boilers and incinerators could portend future support by the agency for biomass power, even though the biomass industry had opposed the previous version of the regulation.

The new proposal broadens the number of biomass materials, including non-hazardous "secondary materials" eligible as fuel, and not waste, which is a win for trash-to-energy sources.

It also sets new emissions limits for particulate matter according to the fuel source, meaning biomass would have a different standard to reach than coal. However, with pending litigation on the boiler proposal still in the courts, the new proposal could be challenged if EPA takes too long to move to a final rule, according to biomass industry sources.

EPA estimates that the cost of implementing these standards is about \$1.5 billion less than the earlier proposed standards. According to EPA, the new proposals are more flexible, and would apply only to the most polluting sources -- less than one percent of operators, virtually none of them biomass-burning plants.

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### **Flexible Water Quality Controls for Nutrient Loading**

The Environmental Protection Agency (EPA) is working with state and regional water officials to provide new flexibilities to regulators to be used in implementing EPA requirements for stricter numeric water quality criteria for nutrient pollution. The agency is requiring states to develop numeric water quality criteria for nutrients rather than use the more subjective narrative standards, but they have been struggling to implement these standards.

The Nutrients Implementation Workgroup has been formed between representatives of EPA's Office of Water, regional water managers and state regulators. According to EPA, the Workgroup will be tasked with evaluating Clean Water Act (CWA) flexibilities to implement existing numeric nutrient criteria and identify opportunities as needed to facilitate and support enforceable but flexible implementation to maximize nitrogen and phosphorus load reductions.

EPA is pushing the states to draft and implement their own numeric criteria for nutrients, rather than let EPA set numeric criteria, as was the case with Florida. In that case, EPA has indicated it may drop their criteria in favor of approving the state's own standards. In some cases, EPA has said it will allow states, few of which have actually embraced numeric criteria at this point, to retain narrative standards but require the states to translate those standards into a numeric limit when issuing permits.

Other provisions that EPA indicates will be acceptable in state criteria include allowing for the adoption of pre-existing total maximum daily loads (TMDLs) as site-specific alternative criteria. EPA included the concept in its own numeric criteria, but was challenged in court by environmental groups.

EPA would also approve state criteria that require a state-prepared biological assessment to determine whether aquatic life is impaired by elevated levels of nutrients before the waterbody is listed as water quality impaired, rather than making a simple exceedence of the numeric nutrient levels the basis of impairment. However, may continue to be a source of disagreement between EPA and environmental groups, potentially slowing down the process.

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