



MEMORANDUM

TO: Rebecca Long

FROM: Eric Sapirstein

DATE: November 18, 2019

SUBJECT: Washington Update

Congress and the White House continue to discuss a path forward on finalizing fiscal year 2020 spending bills, to avoid a governmental shutdown on November 21 when the stopgap spending bill expires. An apparent agreement has been reached that would extend governmental operations through December 20, providing House and Senate leadership about three weeks to strike a compromise with the White House to finalize a spending blueprint for all federal agencies for the remaining nine months of the fiscal year. In addition to the focus on spending decisions, congressional leaders made incremental progress on water infrastructure policymaking and are working to break the gridlock on Per- and polyfluoroalkyl substances (PFAS/PFOA) cleanup mandates as part of the National Defense Authorization Act. The following summarizes these and other matters of interest.

Finalizing Fiscal Year 2020 Spending Decisions Likely to Extend into December

Earlier in the month, the Senate approved the first of several “minibus” spending packages. The Senate passed the Interior and Environment Appropriations bill (H.R. 3055) by 84-9. The bill funds the U.S. Environmental Protection Agency (USEPA) as well as the Department of the Interior. The action puts the minibus in a position to be conferenced with the House-passed version of the bill. However, this effort is now likely to be rolled into a massive omnibus spending agreement.

Regardless of the overall effort to strike a deal that includes funding of the border wall project, funding of water infrastructure programs like the State Revolving Loan (SRF) Program and Water Infrastructure Finance and Innovative Act (WIFIA) are expected to be near record levels with the SRF funded at almost \$1.8 for clean water projects. In addition, USEPA's budget is likely to contain funding for the agency to continue studies into PFAS chemicals and how best to regulate these chemicals to protect human health and clean up contaminated groundwater basins. However, as detailed below, efforts to include provisions mandating liability for PFAS contamination under Superfund is unlikely this year.

The Energy and Water Development Appropriations bill (H.R 2740), that provides funding for water recycling projects and related studies, is wrapped into a second "minibus" that is awaiting consideration by the Senate. Along with the Energy and Water Development bill, the second "minibus" also includes the Defense of Department and Homeland Security budgets, and this has stymied progress, because these spending bills would include funding for the border wall project. Nonetheless, it appears increasingly likely that an agreement to provide funding, with a prohibition on the transfer of defense program funding, to increase construction assistance will be fashioned to allow for Senate passage of the "minibus" as part of the overall spending bill that we anticipate in late December. Failing an agreement, it becomes more likely that Congress would settle upon a third and final stopgap spending bill, carrying fiscal year 2019 spending levels into the remaining months of fiscal year 2020. In a worst-case scenario, water recycling funding assistance would remain at approximately \$30 million instead of about \$60 million as contemplated in the proposed fiscal year 2020 spending measures.

House and Senate Committees Remain At Loggerheads on PFAS Issues

The House and Senate Conference Committee that is working to finalize the National Defense Authorization Act (NDAA—H.R. 2500/S. 1790) remain at an impasse as to how to legislate cleanups of groundwater PFAS contamination. As noted in last month's update, the House position is unyielding in its demands to designate PFAS as a hazardous substance under Superfund. The Senate opposes this position, because of concerns that such designation could impose substantial liability on water agencies that simply are delivering water that might contain PFAS. Under Superfund, for example, an agency that conveys contaminated water or disposes of biosolids containing PFAS could be named as a responsible party, triggering legal actions for cleanup contributions. The Senate NDAA version provides for USEPA to develop monitoring and treatment standards under the Safe Drinking Water Act, sidestepping the liability debate.

The intractable nature of the PFAS debate between the House and Senate conference committee members, coupled with a White House veto threat of the House-approved PFAS language in its version of the NDAA, has caused Senator Jim Inhofe (R-OK), who is serving as the conference committee chair, to call for passage of a scaled back NDAA. His approach does not include any PFAS language.

Should this occur, any effort to address PFAS cleanup needs would fall to USEPA to issue its findings on the nature and extent of the PFAS threats and then detail its plans and timetable to regulate the monitoring, treatment and disposal of PFAS contaminants. If this is the outcome, we expect that the PFAS issue and Superfund liabilities will resurface next year. Assuming this occurs, speculation exists that congressional proponents of PFAS Superfund liability would seek to attach PFAS liability provisions to a Water Resources Development Act of 2020.

Clean Water State Revolving Fund Infrastructure Bill Advances in House

The House Committee on Transportation & Infrastructure approved, on a bipartisan basis, the Water Quality Protection and Job Creation Act of 2019 (H.R. 1497). The bill is notable as it is the first substantive step to address clean water and water recycling infrastructure needs. It also provides for a prescriptive approach to secure National Pollutant Discharge Elimination System (NPDES) permits for periods of up to ten years but would eliminate administrative extensions for five-year permits. In the absence of extensions, a state either completes a renewal in a timely manner or it would lose the authority to renew the permit in question and USEPA would assume responsibility. If this were to occur, the permittee would be held harmless during such an event so that it would not be in violation of operating without an NPDES permit. As noted in our prior update, the Senate is unlikely to adopt similar language to eliminate the authority of a state to issue an administrative extension of a five-year permit.

Under the measure, the Clean Water SRF would be authorized at \$14 billion over five years, grants to agencies to construct water recycling projects would be authorized at \$150 million and a series of setaside spending mandates would be provided to support workforce training, green infrastructure and enhanced subsidies for disadvantaged communities to construct water infrastructure.

House floor debate and votes on H.R. 1497 could occur in December, but more likely early next year. The Senate Committee on Environment and Public Works has indicated that any water infrastructure policymaking will not occur outside of its consideration of a Water Resources Development Act of 2020. The committee hopes to begin formal consideration of such a bill in February, but this could be delayed by other Senate business.

Administrative-Related Activities

A handful of notable non-legislative matters occurred over the past month. First, the Administration, acting through USEPA, formally repealed the contentious Waters of the U.S. (WOTUS) rule that the Obama Administration issued. This action means that the application of Clean Water Act mandates returns to the 1990's standard where defining which waters are subject to regulation is made on a case-by-case basis.

OCS D should not experience any adverse impacts, since the existing regulatory exemption for wastewater agencies being subjected additional mandates remains in place. USEPA is expected to issue a new WOTUS rule within the next few months. It is not expected to adversely impact OCS D regulatory compliance activities.

The U.S. Supreme Court also heard oral arguments over a Maui, HI decision that the disposal approach of discharging treated wastewaters through land application that

migrates through groundwater into surface waters is subject to securing an NPDES permit. The court heard arguments from Maui (friend of the court filings, including CASA) that the Clean Water Act reserves such authority to the states and that if the federal government wishes to impose management of groundwater, it cannot be through an NPDES program given the fact that this program is reserved for “point source discharges”. While it is never a certainty on how the Court might rule, it seems that a decision to ensure that groundwater regulation remains a state primacy will prevail given the arguments before the Court’s Justices.