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Special Analysis: Recent Legislative Developments Portend Pervasive Buy America Requirements

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Despite widespread calls within Congress and the administration to expand trade agreements and liberalize access to global markets, requirements mandating the use of U.S.-made products in infrastructure projects continue to proliferate, increasing costs and delaying completion.



Restricting the use of non-American iron and steel in infrastructure projects is nothing new; however, the frequency to which Buy America (BA) mandates appear – and the strength of the provisions – is steadily increasing. Additionally, the broad bipartisan acceptance that such restrictions are necessary and tolerable as a matter of public policy is troubling.

Late last year, Congress enacted both a large [omnibus funding bill](#) and a multiyear [highway bill](#). Both provide near-term certainty and stabilization to key federal infrastructure programs. However, buried within, are provisions that revise and expand American iron and steel (AIS) content requirements for projects. The lack of controversy with the BA provisions indicates a bigger trend: “No strings attached” is not in Washington’s lexicon and protectionism and economic ignorance could stymie the benefits of infrastructure investment.

AIS requirements for water infrastructure projects were once easier to navigate and circumvent. For instance, the 2009 stimulus package was the first time BA provisions were imposed on State Revolving Fund (SRF) programs.¹ Because SRFs like the [Clean Water State Revolving Fund \(CWSRF\)](#) and [Drinking Water State Revolving Fund \(DWSRF\)](#) are the primary source of funding for water infrastructure projects, imposing BA requirements had the potential to significantly increase costs and delay funded plans. However, ACPPA members were able to supply concrete pressure pipe to stimulus-funded projects because the law only required the completed product (i.e., the pipe with its iron or steel components) to be manufactured in the United States.

In 2014, the situation began to change when the economy teetered on the edge of another recession and American steel companies continued to struggle in the global marketplace. In subsequent appropriations bills,² most recently the [Consolidated Appropriations Act of 2016 \(CAA\)](#), at the urging of the American steel

¹ American Recovery & Reinvestment Act, Pub. L. No. 111-5, § 1605, 123 Stat. 115, 303 (2009).

² Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, § 436(a), 128 Stat. 5, 346-47 (2014); Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 424(a), 128 Stat. 2130, 2449-50 (2014).

Court Throws Out FHWA Buy America Guidance

At the end of 2015, the United States District Court for the District of Columbia [held](#) that the Federal Highway Administration's (FHWA) Buy America (BA) Guidance failed to comply with the requirements of the Administrative Procedure Act. In 2012, the FHWA issued a [memorandum](#) seeking to implement a consistent BA policy across the agency's division offices. The memo determined that it was in the public interest to waive BA requirements for non-iron and steel manufactured products. Furthermore, the FHWA determined that for a manufactured product to be considered subject to BA, it must consist of at least 90 percent steel or iron content when it is delivered to the job site for installation.

The court's recent ruling forced the agency to withdraw the memo and the FHWA is evaluating its options. It is too soon to tell exactly what the agency will do, but it is likely that it will institute a rulemaking to formalize the 2012 memo. One concern for industry is that local FHWA division offices will implement BA requirements differently from office to office. The FHWA appears to recognize the importance of a consistent policy, but it was too eager in achieving it.

ACPPA recently joined an [industry letter](#) urging the FHWA to expeditiously resolve the issue.

lobby and ductile iron pipe manufacturers, Congress tightened the strings attached to domestic spending. These spending bills prohibited SRF programs from funding the "construction, alteration, maintenance, or repair" of public water or treatment systems unless specifically enumerated products consisting of "primarily iron or steel" were "produced in the United States."³

Importantly, the Environmental Protection Agency (EPA) issued guidance finding that concrete pressure pipe (including the reinforcing bar or wire) must be produced in the U.S.⁴ The agency reasoned that concrete pipes are "comparable" to "pre-cast concrete," which is expressly covered by the CAA's AIS requirements. As such, ACPPA members have been forced to obtain steel from domestic sources – which is typically more expensive – and cast concrete pressure pipes in the United States in order supply SRF-financed projects.

Surface transportation projects are likewise not immune. The recently approved [Fixing America's Surface Transportation \(FAST\) Act](#), revises the Federal Transit Administration's (FTA) Buy America program. While the FTA requirements won't have a direct impact on ACPPA members, it is indicative of how far lawmakers are willing to go to ensure domestic materials are used in infrastructure projects. The FAST Act increases the content requirements for rolling stock over a four-year period and significantly revises the waiver denial process. Upon denying a waiver of the AIS requirements for a specific product, the FTA must certify in writing that the product is available in sufficient quantity and quality from domestic sources. It even requires the FTA to provide a list of manufacturers where the product can be purchased.

Although the [CAA of 2016](#) and [FAST Act](#) are just two examples, it indicates that increasingly stringent AIS requirements will be pervasive in the future. For instance, in 2015 at least a dozen pieces of legislation were introduced that included some type of AIS provision. Examples include the [Pipeline Revolving Fund and Job Creation Act](#) (natural gas pipelines), [Invest in American Jobs Act of 2015](#), (planes, trains and automobiles), [Dam Rehabilitation and Repair Act of 2015](#) (dams), and the [American Steel First Act of 2015](#)

³ CAA of 2016 § 424(a)(2); CAA of 2015 § 424(a)(2); CAA of 2014 § 436(a)(2).

⁴ EPA Memorandum, Implementation of American Iron and Steel Requirements under the Consolidated Appropriations Act of 2016 (Feb. 3, 2016); EPA Memorandum, Implementation of American Iron and Steel Provisions of Pub. L. No. 113-76 (Mar. 20, 2014).

(transportation and defense programs). Some legislation like the [Support our Steelworkers Act of 2015](#), which prohibits the import of articles containing foreign steel, even threatens to jeopardize trading relationships with other countries.

Congress's BA policy is ill-conceived and short-sighted. The economic theory underlying protectionism has failed to make U.S. steel companies more competitive at home and the current regulatory framework significantly increases the cost of infrastructure projects. Nevertheless, Washington will continue to attach strings to spending projects out of political expediency. Unfortunately, this means the construction industry will spend considerable resources to ensure compliance with the AIS requirements simply to bid on less profitable projects. The result is further delays and increased costs in replacing today's crumbling infrastructure.

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Proposals Introduced to Increase Water Infrastructure Investment

In recent weeks lawmakers have introduced two legislative proposals related to water infrastructure investment.

On February 11, Sen. Ben Cardin (D-Md.) unveiled legislation ([S. 2532](#)) to dramatically increase the Drinking Water State Revolving Fund and the Clean Water State Revolving Fund (SRFs) funding levels. Specifically, the proposal authorizes \$3.13 billion for the Drinking Water program in the first year, increasing to \$5.5 billion by 2020. Similarly, the bill calls for the Clean Water SRF program to be funded at \$5.18 billion and reach \$9.06 billion in 2020. Currently, the Clean Water SRF receives \$1.39 billion and the Drinking Water SRF gets \$863 million.

Meanwhile, Rep. Earl Blumenauer (D-Ore.) introduced bipartisan legislation to create a dedicated funding source for water infrastructure funding. The Water Investment Trust Fund Act ([H.R. 4468](#)) would create a Water Infrastructure Trust Fund funded through a voluntary contribution by businesses (three cents per unit) that choose to place a label on their products indicating their commitment to protecting America's clean water. The proceeds would be distributed through the SRF programs.

ACPPA commends both Sen. Cardin and Rep. Blumenauer for introducing bold initiatives to investment more in water infrastructure.

Obama's Budget Proposal: More Politics than Policy

On Feb. 9, the Obama administration unveiled an FY 2017 budget plan that included, among other things, hundreds of billions of dollars in new infrastructure spending over the next decade. The additional investment, most of which would go to light rail and transit, would be funded in large part by a new \$10 per barrel oil tax. While the



transportation spending in the proposal is nothing new – the administration has favored aggressive spending on “green infrastructure” in the past – the oil tax is.

The plan left many scratching their heads and asking why the administration, after seven years of opposing user fee increases to pay for infrastructure investment, waited until now – several months after the enactment of the new multi-year highway and transit law – to roll out the oil tax idea. And why, for all the talk of new investment, the budget would cut water infrastructure programs (specifically, the Clean Water and Safe Drinking Water SRFs) by more than \$250 million a year and slash the Army Corps of Engineers’ budget by more than 20 percent.

The answer is the Obama budget isn’t about infrastructure; it’s about the administration’s war on fossil fuel. Aside from the oil barrel tax, which would raise an estimated \$319 billion over ten years, the budget plan includes a host of policy and tax proposals targeting the coal and oil industries.

But fossil fuel producers aren’t the only ones in the Obama administration’s crosshairs. Upper earners are also on the menu. The budget also proposes to increase capital gains taxes to bring in \$235 billion for federal coffers over the next ten years and curb “inefficient tax breaks for the wealthy” and close loopholes to raise nearly \$1 trillion in additional tax revenue. On the tax front, the administration is also once again proposing to raise \$81 billion over the next decade by repealing the last-in, first-out (LIFO) inventory accounting method and \$47 billion by modifying like-kind exchange (LKE) rules.

For better or worse, the Obama administration’s FY 2017 budget isn’t going anywhere. It’s a political missive aimed at the president’s base, not a policy document with bipartisan solutions to the real problems of the day. As in the past, GOP leaders on Capitol Hill have declared the budget dead on arrival and now begin the difficult task of crafting federal spending bills to keep the government operating under Obama’s successor.

Stay tuned for more from ACPPA as the spending battle plays out on Capitol Hill in the coming months. In the meantime, to read the president’s budget, [click here](#).

Supreme Court Turns up Heat on EPA, Climate Plan

On Feb. 9, the U.S. Supreme Court [stayed implementation](#) of the White House’s “Clean Power Plan,” voting five to four to delay requirements that coal-fired energy producers plan to transition to cleaner fuel sources.



The president’s initiative seeks to reduce carbon emissions by shifting energy production away from fossil fuels. States would have the option of developing independent plans for this transition or utilizing the recommended structure established by the Environmental Protection Agency (EPA). These plans were to be submitted by September 2016, but that deadline could be extended up to two years on request.

Coal and utility operators, in addition to 29 states, had filed a series of requests to place a hold on the plan. Those filings noted that lead times required for major infrastructure investments – like those needed to

overhaul the operational capacity of a power plant – placed undue burden on energy producers. State governments, for their part, contended that the plan intruded into their right to regulate local industries.

The court's decision does not address the merits of any challenge to the rule, but puts the carbon reduction plan on hold until the U.S. Court of Appeals for the District of Columbia Circuit can complete a judicial review. Even on an expedited schedule, the process could last well into 2017 and the tenure of a new administration.

New EEOC Rule Would Expand Reporting to Target Gender Pay Gap

The Equal Employment Opportunity Commission (EEOC) is proposing to expand employer reporting requirements to target what the Obama administration calls a stubborn and persistent gender pay gap.



Current rules require federal contractors and first-tier subcontractors with more than 50 employees and all companies with more than 100 employees to annually report the number of individuals they employ by job category, race, ethnicity and gender. The new rules, unveiled by President Obama on Jan. 29 and published in the *Federal Register* on Feb. 1, would require these employers to also report the number of hours employees work and how much they are paid.

The administration says the new rule is necessary to help the EEOC enforce equal pay laws and "provide better insight" into the gender pay gap across industries and occupations. Critics charge that the new proposal is overly intrusive, will impose significant new paperwork burdens on businesses and subject employers to unnecessary and time consuming investigations.

More information on the EEOC proposal is located at:

<https://www.federalregister.gov/articles/2016/02/01/2016-01544/agency-information-collection-activities-revision-of-the-employer-information-report-eeo-1-and>.

Comments are due by April 1. The administration plans to roll out the final rule before the end of 2016 and require employers to start providing the additional data in the 2017 reporting cycle.

Pressure Pipe Post

ACPPA's Monthly Source for Industry News

February 2016

To keep members aware of the activities of government and standards organizations, we regularly sweep public databases and publications for the industry-specific terms indicated below. We then provide our members with links to documents identified in the search. Please note that in some cases the URLs may link to subscription-only databases. The purpose of this service is to identify emerging threats and trends as well as opportunities for collective action by ACPPA.

NEWS RESULTS

Water Infrastructure

What the Flint Situation Tells us about Water Investing

01-27-16 <http://seekingalpha.com/insight/dividend-investing/all/article/3838196-flint-situation-tells-us-water-investing>

As headline grabbers, the lead-laced drinking water in the municipality of Flint, Michigan should cause most water utility investors to stand up and take notice. The finger pointing is just starting, and the lawyers are lining up for the pending feeding frenzy.

Water Main Leak Causes Road Closure on Woods Valley Road

02-03-16 <http://www.valleycenter.com/news/2016-02-04/In-The-Area/Water-main-leak-causes-road-closure-on-Woods-Valle.html>

Tuesday evening a leaking water main at the Woods Valley Kampground caused a road closure at Woods Valley Road & Cool Water Ranch Road for several hours. The pipe was a 6 inch asbestos cement pipe. Corrosion to the galvanized elbow caused it to rot off at the brass saddle, which caused the leak.

Hanna Floats New Water Infrastructure Legislation

02-06-16 <http://romesentinel.com/county/hanna-floats-new-water-infrastructure-legislation/QBqpbefdnQ5liNtY0mFi1RTCTtQ/>

A bill to create a dedicated source of funding for the nation's water infrastructure has been introduced by Rep. Richard L. Hanna, R-22, Barneveld, and two other congressmen. The Water Investment Trust Fund Act would provide a deficit-neutral, protected source of revenue to help states replace, repair, and rehabilitate clean and drinking water facilities by creating a voluntary labeling and contributory system, according to Hanna, Rep. Earl Blumenauer, D-Ore., and John Duncan, R-Tenn.

Residents See Utility Rate Increases as City Searches for Sustainable Funding

02-11-16 <http://www.thenewstribune.com/news/local/community/puyallup-herald/ph-news/article59822896.html>

With an aging utility infrastructure and some pipes approaching 100 years old, Puyallup city officials are attempting to work proactively to find sustainable funding to fix the city's infrastructure before it fails. But some residents might not like route the city is taking to get there.

Ideas Worth Stealing: Replace all Lead Pipes

02-11-16 <http://www.newsworks.org/index.php/local/item/90930-ideas-worth-stealing-replace-all-lead-pipes>

In the wake of the news coming out of Flint, Michigan — of lead-tainted water poisoning the city's residents — people in older cities with lead pipes underground have wondered if the same thing can happen in their own towns. While the combination of circumstances in Flint are uncommon, lead pipes are not, and neither are lower levels of contamination.

Clifton Park Suggests a State Funding for Water Infrastructure

02-11-16 <http://www.timesunion.com/local/article/Clifton-Park-suggests-a-state-funding-for-water-6823066.php>

As concern grows over contaminated water in Hoosick Falls, one Capital Region town thinks it's time for state leaders to start awarding annual funding for underground infrastructure improvements the same way it does for highway repairs.

Lead Pipe Timeline Splits Governor, Flint Mayor

02-17-16 <http://fox17online.com/2016/02/17/gov-snyder-announces-reboot-to-study-on-flint-water-infrastructure/>

Michigan Gov. Rick Snyder says it will take an engineering firm a month to identify lead pipes connected to Flint residents' homes, but he wants to see a "very short timeline" for some of the service lines to begin being replaced. Snyder announced this week he will contract Rowe Professional Services, a local engineering company, to update that study focused on finding and replacing the lead pipes.

Flint Firm Starts Work to Find City's Lead Water Pipes

02-22-16 <http://financialcv.com/2016/02/flint-firm-starts-work-to-find-citys-lead-water-pipes/>

It's bad enough that the residents of Flint, Michigan, were drinking water tainted with lead, putting a future generation in jeopardy. He's faced criticism and protests, but has said he's focusing on resolving the crisis.

Sixth Circuit Decides to Hear Water Rule Challenges

02-22-16 <http://financialcv.com/2016/02/flint-firm-starts-work-to-find-citys-lead-water-pipes/>

Challenges to a rule clarifying the regulatory reach of the Clean Water Act will be heard by a federal appeals court under a ruling delivered Feb. 22 by the U.S. Court of Appeals for the Sixth Circuit.

Concrete & Fly Ash

TVA Makes Plans to Permanently Close a Local Coal Ash Pond

01-28-16 <http://www.memphisflyer.com/memphis/tva-makes-plans-to-permanently-close-a-local-coal-ash-pond/Content?oid=4422943>

In August 2014, the Tennessee Valley Authority's (TVA) board voted to retire its Memphis coal plant by December 2018 and replace it with a 1,000-megawatt natural gas plant. That process is underway, and now TVA is focusing on closing one of the two ash ponds on the coal plant's site.

Sierra Club Targets Rockport Plant

02-03-16 <http://news.wnin.org/post/sierra-club-targets-rockport-plant#stream/0>

An environmental group is targeting a power plant near Rockport, saying it's the second most toxic power plant in Indiana. The Sierra Club says the EPA's latest toxic pollution report underscores why the group is targeting the Indiana Michigan power plant in its effort to close aging coal-burning facilities.

Why Not Recycled Concrete?

02-08-16 <https://www.sciencedaily.com/releases/2016/02/160208183451.htm>

From paper towels to cups to plastic bottles, products made from recycled materials permeate our lives. One notable exception is building materials. Why can't we recycle concrete from our deteriorating infrastructure for use as material in new buildings and bridges? It's a question that a team of researchers is examining.

Supreme Court Delays Implementation of Clean Power Plan

02-11-16 <http://www.jdsupra.com/legalnews/supreme-court-delays-implementation-of-11382/>

In a 5-4 vote, the United States Supreme Court stayed the implementation of the Clean Power Plan (CPP) through the ultimate Supreme Court determination on the merits, assuming the inevitable writ of certiorari from the D.C. Circuit opinion is granted. The stay shifts the litigation's timing incentives; now EPA and the other rule supporters are more likely to push for speedy resolution of the matter.

Maryland Takes Virginia to Court over Coal Ash Plan on the Potomac

02-16-16 <http://www.capitalgazette.com/news/environment/bs-md-coal-ash-20160216-story.html>

Fearing a potential threat to the Potomac River and the Chesapeake Bay, Maryland is wading into a water pollution controversy in Virginia, appealing a decision that allows a power company to drain treated water from coal ash ponds into a creek that flows into the Potomac.

Technical Workforce

New Report: Skilled Worker Shortage Costs Equipment Industry Billions Each Year

01-29-16 <http://aedfoundation.org/2016/01/29/the-aed-foundations-workforce-survey/>

The U.S. heavy equipment distribution industry loses at least \$2.4 billion each year as a result of dealers' inability to find and retain technically skilled workers.

Got Job Skills? Michigan Needs You

02-16-16 <http://www.freep.com/story/money/business/michigan/2016/02/14/michigan-economy-jobs-skills-detroit-workforce-training-education/80186212/>

As baby boomers retire in ever increasing numbers, employers throughout Michigan are facing a growing problem finding workers with the education, training and skills needed to fill their jobs.

REGULATORY RESULTS

Water Infrastructure

Department of Justice | Notice | Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

02-09-2016 <https://www.gpo.gov/fdsys/pkg/FR-2016-02-09/pdf/2016-02474.pdf>

On February 2, 2016, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of Utah in the lawsuit entitled United States and State of Utah v. Salt Lake County, Utah, Civil Action No. 2:16cv87BCW.

Department of the Interior | Notice | Quarterly Status Report of Water Service, Repayment, and Other Water Related Contract Actions

02-19-2016 <https://www.gpo.gov/fdsys/pkg/FR-2016-02-19/pdf/2016-03464.pdf>

Notice is hereby given of contractual actions that have been proposed to the Bureau of Reclamation (Reclamation) and are new, discontinued, or completed since the last publication of this notice. This notice is one of a variety of means used to inform the public about proposed contractual actions for capital recovery and management of project resources and facilities consistent with section 9(f) of the Reclamation Project Act of 1939.

LEGISLATIVE RESULTS

Water Supply & Infrastructure

H.R.4438 | Introduced by Rep. Miller, Candice S. [R-MI-10] | Drinking Water Contamination Emergency Supplemental Appropriations Act, 2016

02-02-2016 <https://www.congress.gov/bill/114th-congress/house-bill/4438>

This bill provides \$1 billion in FY2016 supplemental appropriations to the Environmental Protection Agency (EPA) for making a grant to the state of Michigan to replace pipes, pipe fittings, and other drinking water infrastructure that are not lead-free.

H.S.4479 | Introduced by Rep. Kildee, Daniel T. [D-MI-5] | Families of Flint Act

02-09-2016 <https://www.congress.gov/bill/114th-congress/house-bill/4479>

To provide emergency assistance related to the Flint water crisis, and for other purposes.

H.S.4468 | Introduced by Rep. Blumenauer, Earl [D-OR-3] | Water Infrastructure Trust Fund Act of 2016

02-10-2016 <https://www.congress.gov/bill/114th-congress/house-bill/4468>

To establish a Water Infrastructure Investment Trust Fund, and for other purposes.

S.2533 | Introduced by Sen. Feinstein, Dianne [D-CA] | California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act

02-10-2016 <https://www.congress.gov/bill/114th-congress/senate-bill/2533>

To provide short-term water supplies to drought-stricken California and provide for long-term investments in drought resiliency throughout the Western United States.

S.2532 | Introduced by Sen. Cardin, Benjamin L. [D-MD] | A bill to authorize appropriations for the Drinking Water State Revolving Fund and the Clean Water State Revolving Fund.

02-10-2016 <https://www.congress.gov/bill/114th-congress/senate-bill/2532>

To authorize appropriations for the Drinking Water State Revolving Fund and the Clean Water State Revolving Fund.