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Congress explores innovate water infrastructure financing

With mounting budget deficits and the Clean Water and Drinking Water State Revolving Fund programs facing more cuts, lawmakers are looking to alternative means to finance water infrastructure projects.

Rep. Bob Gibbs (R-Ohio), chairman of the Transportation & Infrastructure Committee's Water Resources & Environment Subcommittee recently held [two hearings](#) on innovative financing approaches for community water infrastructure projects. The focus of the hearings was on draft water infrastructure legislation that Gibbs is expected to introduce in the near future.

The draft bill, known as the Water Infrastructure Financing & Innovation Act (WIFIA), would provide federal credit assistance in the form of direct loans and loan guarantees to finance significant water and wastewater infrastructure projects. WIFIA credit assistance could provide improved access to capital markets, flexible repayment terms, and potentially more favorable interest rates. The WIFIA concept is modeled after a similar, highly successful program used to leverage private sector funding for surface transportation projects ([TIFIA](#)). ACPPA has been pushing for this important legislation as a member of the Sustainable Water Infrastructure Coalition's (SWIC) steering committee.

Additionally, the draft legislation is expected to include a provision to lift the state volume cap on private activity bonds (PABs) for water and wastewater infrastructure projects, a top ACPPA priority. Estimates are that doing so could bring in \$5 billion annually in private investment. A similar provision was included in the Senate-passed highway bill (MAP-21).

Water infrastructure investment is a win-win for everyone, including the government. If the financing comes from the private sector, it's an even better situation. According to a [recent study](#) by the College of William and Mary's [Thomas Jefferson Program in Public Policy](#), investing \$1.00 in sewer systems and water infrastructure generates \$2.03 in tax receipts (\$1.35 for the federal government) over 20 years.

To urge lawmakers to make water infrastructure investment at top priority visit www.ACPPA-Action.org.

ACPPA Attends AWWA Washington Fly-In

On March 7, ACPPA President Rick Lawhun and Daniel Fisher, senior legislative associate at Obadal, Filler, MacLeod & Klein, attended the American Water Works Association 2012 "Water Matters!" Fly-In. AWWA staff briefed attendees on the association's top legislative priorities, including WIFIA legislation (see above). Congressman Gibbs also discussed the importance of water infrastructure investment and the need to find alternative financing mechanisms to fund water projects.

For ACPPA members interested in attending a Washington fly-in and getting personally involved in our advocacy efforts, NUCA is holding their [Washington Summit May 8-10](#). Please contact [Christian Klein](#), managing member at Obadal, Filler, MacLeod, & Klein, if you would like to participate.

President Obama plays politics with Keystone again

On March 21, President Obama announced that his administration will expedite approval for construction of the southern leg of the Keystone XL pipeline, reaching from Cushing, Okla. to petroleum refineries near the Gulf of Mexico in Texas. The 485-mile stretch known as the "Gulf Coast Project" is merely 41 percent of the proposed 1179 mile pipeline, which begins at the Canadian oil sands of Alberta.

Construction on the small segment of the pipeline is a step in the right direction. Yet, by only agreeing to expedite the southern portion, which did not require presidential approval, many are wary of the politics involved. The president's support of a small share of the pipeline is an attempt to have it both ways; appeasing environmental groups that oppose the entire project, while also claiming credit for creating jobs in pursuit of an "all of the above" energy policy and satisfying the concerns of his union allies.

The [State Department announced](#) in November that it would delay a final decision on the Keystone XL pipeline by more than a year. In January, [President Obama denied approval](#) for the project after Congress mandated a shortened review period. The project is estimated to create up to 13,000 construction industry jobs and generate 830,000 barrels of domestically refined oil.

ACPPA scores important victory as Senate approves highway bill

On March 14, the Senate approved its highway bill, Moving Ahead for Progress in the 21st Century (MAP-21) ([S.1813](#)), 74-22, handing ACPPA and its construction industry allies a major victory. Twenty-two Republicans joined a united Democratic caucus in support of the bill.

MAP-21 maintains critical investment levels and will help create and sustain millions of jobs, while its sweeping program reforms will accelerate project delivery and enhance the private sector's role in national infrastructure development. The legislation authorizes investment for surface transportation programs for two years at current levels (plus an adjustment for inflation). The bill would also streamline the project delivery process and make it more difficult to divert road money to projects with little transportation value.

The Senate's approval of a new highway bill is a step in the right direction and offers a glimmer of hope to a construction industry plagued by Congress' inability to provide certainty to federal transportation programs. After more than two and a half years since the expiration of the nation's last long-term surface transportation bill, concrete pipe manufacturers are grateful to see action to restore certainty to transportation programs and construction markets.

Of critical significance for ACPPA, MAP-21 also includes our association's top legislative priority for the year: the elimination of the cap on private activity bonds for water infrastructure projects. ACPPA has been working in lockstep with NUCA and other trade associations to build support on the Hill for the PAB provision. We'll be keeping up the pressure to ensure the language stays in the final bill.

By passing MAP-21, senators recognized an important difference between wasteful government spending and critical investments to our transportation networks that will fuel economic growth. There is no better

investment than improving our nation's infrastructure. ACPPA applauds Environment & Public Works Committee Chairman Barbara Boxer and Ranking Member Jim Inhofe, as well as Majority Leader Harry Reid and Republican Leader Mitch McConnell for putting partisan politics aside for the good of the American people.

To see if your senators voted in favor of MAP-21, visit the Key Vote chart on ACPPA-Action.org.

House inaction necessitates another extension

While ACPPA cheered Senate passage of the highway bill, inaction in the House necessitated the ninth extension of surface transportation programs.

Despite a bipartisan chorus calling on the lower chamber to consider the Senate bill, GOP leadership in the House declined to take up MAP-21. Even securing an extension proved difficult in the House, with Republican leaders twice forced to delay votes to round up necessary support from conservatives wary of continuing the federal highway program at current investment levels.

Faced with a fast approaching March 31 expiration of operating authority for federal transportation programs, Congress cleared a three-month extension on March 29 (through June 30, 2012).

While the situation in the House is still fluid, it appears that the chamber will take up a five-year, \$260 billion bill upon its return from the spring recess. The decision seemingly puts the House back where it started months ago. However, unlike the prior House plan, the current five-year proposal is said to continue funding transit projects through the Highway Trust Fund, an important concession to moderate Republicans representing suburban districts.

To keep the heat on lawmakers to support a multiyear, fully funded highway bill, visit ACPPA-Action.org.

Bipartisan depreciation bonus extension introduced in House

Rep. Patrick Tiberi (R-Ohio) and a bipartisan group of lawmakers introduced legislation ([H.R. 4196](http://H.R.4196)) to extend 100 percent depreciation bonus through 2012, one of ACPPA's top legislative priorities for the year.

Tiberi's bill is similar to the depreciation bonus language passed by the House during the payroll tax cut extension debate at the end of 2011.

The legislation brings companies several benefits, including:

- Extending 100 percent depreciation bonus through 2012;
- Removing restrictions to allow more corporate Alternative Minimum Tax credits for capital reinvestment that would otherwise qualify for the depreciation bonus; and,
- Allowing companies that use the "percentage of completion" accounting method to take advantage of the depreciation bonus.

While there is a growing base of bipartisan support on Capitol Hill for extending the depreciation bonus, it is critical that you add your voice to those urging support. Visit ACPPA-Action.org to ask your lawmakers to join the effort to extend this important investment incentive through 2012.

Court upholds NLRB posting requirement

A new poster will be coming soon to a company wall near you (probably).

On March 2, the U.S. District Court for the District of Columbia ruled ([Docket No. 11-1629](#)) that the National Labor Relations Board (NLRB) has sufficient rulemaking authority under the National Labor Relations Act (NLRA) to require most private sector employers to post workplace notices that inform employees of their rights under the NLRA. The effective date for compliance with the NLRB rule, originally November 14, 2011, has been postponed to April 30, 2012 pending court review. Several business organizations, including the [Coalition for a Democratic Workplace](#) (CDW), of which ACPWA is a member, challenged the rule and its enforcement provisions in court on various grounds.

The court found that Congress, in enacting the NLRA, did not preclude the NLRB from requiring employers to post workplace notices informing employees of their labor rights. Nor does this mandate violate an employer's First Amendment right as compelled speech, according to the court.

However, the court did invalidate several enforcement sanctions in the rule. First, the NLRB does not have any authority to "make a blanket advance determination that an employer's failure to post [the notice] will always constitute an unfair labor practice." Instead, the NLRB must make a specific finding based on the evidence and circumstances in an individual case that the failure to post actually interferes with employee rights under the NLRA.

Second, the NLRB has no authority to extend the time period (generally six months) set by Congress for filing unfair labor practice charges against an employer simply because the employer has not posted the notice. The court declared each provision void and unenforceable.

Finally, the court declared "valid" a part of the rule that allows the NLRB to consider an employer's willful refusal to comply with posting requirements as evidence of unlawful motive. In the court's opinion, the complaint brought by the CDW and others did not "specifically challenge" this provision.

Both sides will likely appeal this divided ruling. In the meantime, more information, including the poster itself (in more than 20 languages), is available [here](#).

Supreme Court ruling enhances judicial scrutiny of EPA, other agencies

The Supreme Court has ruled in favor of property owners and against the Environmental Protection Agency (EPA) in a case with important implications for the construction industry and beyond.

At issue in [Sackett v. EPA](#) was a compliance order issued by the agency to an Idaho couple building a house on property deemed by EPA to include wetlands. The order stated that the couple had violated the Clean Water Act by filling in a portion of their lot and demanded the Sacketts restore the site. EPA subsequently denied the Sacketts' request for a hearing to challenge the order. The Sacketts sued EPA, alleging a denial of their property rights without due process in violation of the Fifth Amendment. Two lower courts [determined](#) that even though EPA refused to hold a hearing to reconsider the matter, the order wasn't a final agency action subject to judicial review and the Sacketts had no basis to sue the agency.

But in a unanimous decision issued on March 21, the Supreme Court overturned the lower courts and sided with the Sacketts. Writing for the Court, Justice Antonin Scalia said the property owners were entitled to

bring suit to challenge the compliance order. The Court concluded that “the compliance order in this case is final agency action for which there is no adequate remedy other than [Administrative Procedure Act] review, and that the Clean Water Act does not preclude that review.”

While the [decision](#) is an important victory for the Sacketts, their case is still far from resolved. Effectively, the Supreme Court’s decision starts the litigation all over again. The difference this time is that the lower courts now have explicit authority to scrutinize and, as appropriate, overturn, EPA’s order.

“In the final analysis, the case is one small step for the Sacketts and an important leap for property owners and others seeking to harness an out of control federal bureaucracy,” said Christian A. Klein, managing member of Obadal, Filler, MacLeod, and Klein.