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Deep Water Port notes

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Maritime Matters in Washington

by Mr. Paul Bea

Deepwater Port of New Haven, Connecticut

Last time I appeared here I wrote that it "is possible that Congress will complete action on a WRDA bill." Since then the odds of WRDA 2016 making it to a presidential signature have improved greatly. S.2848 was approved 95 to 3, and the House passed H.R.5303 by 399 to 25. Next month, Senate and House negotiators will consider the bill differences and try to agree on a final version to send to the White House.

Two provisions of particular interest in Connecticut and elsewhere in the country pertain to the "Federal standard," a topic of some sensitivity among some ports and states. First, some background.

When planning maintenance dredging the Corps of Engineers determines the preferred disposal option for the dredged material, called the Federal standard, which is least costly and environmentally acceptable. Factors considered include the results of toxicity testing, applicable water quality standards, available management options, and the estimated cost of those options.

The Corps has guarded its authority in setting a Federal standard, which is sometimes challenged by states, ports, and others. The Corps' own guidance, stretching back to 1978, is "predicated on the essential principle that federal funds available for maintenance of federal navigation channels nationwide are limited…" If a state's particular request with respect to sediment placement exceeds the cost of the federal standard and cannot be "accommodated," the state has the option of agreeing "to pay any difference" between the cost of implementing the Federal standard and the cost of the state's requirement." If the state declines the Corps will "ordinarily defer dredging until the state alters its position or agrees to fund the difference."

An October 21, 2015 guidance memorandum from Corps Headquarters to its field offices (and the document quoted here) provides examples of state requirements, such as placement of dredged sand on beaches or sediments for creation of wetlands, and other such "excessive requirements that are manifest through a state's insistence on testing, data or exorbitant amounts of information prior to completion of the review process…"

When the Corps determines, as it did in Ohio with respect to Cleveland Harbor maintenance, that sediment will be placed at an available open water placement site, for which Ohio declines to issue water quality certification, the Corps approach is to stand by its original determination and reject challenges to its authority. In the example, the State of Ohio, whose ban on dredged material disposal in Lake Erie takes effect in 2020, and the Port of Cleveland point to conflicting sediment testing results and insist on Corps decades long practice in the Great Lakes of using confined disposal facilities (CDF). The 2014 Federal standard determination, including the Corps policy that its determination is not reviewable, currently is before the US District Court in Ohio.

That non-Federal sponsors of maintenance projects will be at odds with a Corps determination of the Federal standard is hardly news. Aware of such situations the congressional committees included provisions relating to the Federal standard process. (I will note here that I have been assisting the Port of Cleveland on this matter of the Federal standard.) In what I think is a tentative step in acknowledging

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and addressing challenges occurring in the states, the House WRDA bill includes a provision authorizing the selection of ten "pilot" projects for the beneficial use of dredged sediments "notwithstanding the definition of the term 'Federal standard.'"

The Senate WRDA bill takes a different tack with section 2004, which states that "disposal of dredged material shall not be considered environmentally acceptable for the purposes of identifying the Federal standard…if the disposal violates applicable State water quality standards…" The provision has been associated with the pending Federal action to designate a disposal site in Connecticut waters of the Long Island Sound.

The explanation for the provision by the Senate Environment & Public Works Committee is that it is a restatement of current law. During the debate on the WRDA bill a prepared exchange – called a colloquy – by the committee leaders made the legislative intent more clear. The Corps "must adhere to state water quality standards…" In "some cases…the Corps has not met this legal requirement and instead self-certifies its determination," which the colloquy notes is a concern raised by the Ohio senators. Getting to the nub, "neither party is empowered to make the final decision…should a dispute arise" over the Federal standard. A challenge can be taken to court.

Those statements by the principal authors of the bill were followed by questions from the Connecticut senators as to what the provision does and does not do. The answers confirmed that nothing in the bill "gives any State any new rights with which to impose its own water quality standards on any other State." Nor does the provision "affect the process for approving new dredged material disposal sites."

Senators, states and other parties interested in the Senate provision may be satisfied or disappointed that the wording is not intended to represent new policy but instead is a restatement of current law. And if the provision is in the final, signed version of WRDA 2016, it also will be made law.

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