



CSAC WASHINGTON BRIEFS

THIRD QUARTER 2012

With the November elections in sight, the focus on Capitol Hill largely shifted from legislating to campaigning in the third quarter of 2012. Accordingly, congressional leaders opted to delay a number of high-profile decisions until after the elections, hoping that voters will deliver a clear message about what they want from Washington. Later this fall, lawmakers are expected to convene a lame-duck session during which time they will be faced with the unenviable task of attempting to address a potential year-end "fiscal cliff" of expiring tax cuts, automatic spending reductions, and other fiscal deadlines.

Despite the political posturing, Democrats and Republicans were able to agree on a stopgap funding measure (PL 112-175) to keep the government operating past September 30. However, the agreement was only necessary because Congress has not been able to finalize any of the fiscal year 2013 appropriations bills. For its part, the House Appropriations Committee has approved 11 of the 12 annual spending bills, with seven measures passed by the full House. In the Senate, the full chamber has yet to consider any of the nine spending bills cleared by the Appropriations Committee.

The temporary funding measure, also known as a Continuing Resolution (CR), will fund the government through March 27, 2013, using the \$1.047 trillion discretionary spending limit agreed to in last year's deficit reduction law (PL 112-25). It should be noted that this is up slightly from the \$1.028 trillion spending limit that the House approved earlier this year. House conservatives accepted the higher spending limit in exchange for a promise that the resolution would not include any contentious policy items.

In other budget-related developments, the Obama administration released a report to Congress this past quarter detailing the impact of the automatic spending cuts – otherwise known as budget sequestration. The impending cuts, which are slated to begin on January 2, are a result of the failure of the Joint Select Committee on Deficit Reduction to propose, and Congress to enact, a plan to reduce the deficit by \$1.2 trillion, as mandated by the *Budget Control Act (BCA) of 2011*.

According to the report, the spending reductions would be "deeply destructive" to national security, domestic investments, and core government functions. With regard to nondefense

programs, the report concludes that sequestration would undermine investments vital to economic growth, threaten the security of the American people, and cause harm to programs that benefit the middle-class, seniors, and children.

All told, the automatic cuts would reduce expenditures across more than 1,200 federal accounts, trimming defense by nearly \$54.7 billion and domestic discretionary spending by \$38 billion. In addition, sequestration would cut Medicare by \$11 billion and other mandatory spending programs by roughly \$5 billion. In terms of percentages, most major county government discretionary spending programs would be cut by either 8.2 percent or 7.6 percent under the sequester.

Additionally, the following major programs have been identified by the Obama administration as exempt from the impending cuts: Temporary Assistance for Needy Families; Foster Care (Title IV-E); Child Support Enforcement; Medicaid; the Supplemental Nutrition Assistance Program; mandatory funding under the Child Care and Development Fund; child nutrition programs; the Children's Health Insurance Program; the Commodity Supplemental Food Program; family support programs; Supplemental Security Income; the vast majority of the federal-aid highway program; the federal transit formula program; Social Security benefits; and, all programs administered by the Department of Veterans Affairs.

As expected, Republicans and Democrats publicly denounced the potential impact of the reductions on defense and domestic programs, while deriding each other's plans to override the cuts. Although both parties acknowledge that the reductions need to be modified, they remain far apart on how to revise them. Republicans generally support spending cuts, with some modifications, while many Democrats argue that additional revenue must be part of any potential solution.

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

The U.S. Department of Justice (DOJ) announced in mid-September that it was postponing for one year a recent policy change aimed at eliminating State Criminal Alien Assistance Program (SCAAP) payments to jurisdictions for the costs of incarcerating inmates whose immigration statuses are "unknown." The decision marks a major win for CSAC, which lobbied heavily to prevent the policy change from being implemented. A number of key members of the California congressional delegation joined CSAC in advocating against the ill-advised policy.

Pursuant to DOJ's announcement, the Agency will continue in fiscal year 2012 the practice of providing reimbursement payments to jurisdictions for the cost of detaining individuals whose immigration statuses are unable to be confirmed by the Department of Homeland Security (DHS). It should be noted that so-called "unknown" inmates are classified as such because they have not had prior contact with federal immigration authorities and therefore are not included in the DHS database.

If DOJ's policy had been implemented for the current fiscal year, California's counties likely would have seen their SCAAP payments cut by roughly half. For the 2010 Solicitation Year (the year for which the most recent DOJ vetting data is available), California counties' SCAAP allocations would have been reduced from \$40.8 million to \$21.9 million, a decrease of over 46 percent. Conversely, the state of California and most other states would have seen their SCAAP allocations significantly increase under the policy shift. The reason for the state-county discrepancy is that states house a much lower percentage of "unknown" inmates in their correctional facilities in relation to county jails.

Because DOJ is expected to reissue the policy of eliminating reimbursements for the unknown category of SCAAP inmates next year, CSAC is once again poised to oppose it. The association will be closely monitoring the Agency's actions, and will continue to work with its congressional delegation on the issue.

On the budget front, SCAAP is currently funded at \$240 million. Under the BCA, SCAAP is subject to an 8.2 percent budget cut beginning in January of 2013, meaning the program would be reduced by nearly \$20 million if Congress does not act to modify the sequester.

NATIVE AMERICAN AFFAIRS

This past quarter, the Senate Indian Affairs Committee held an oversight hearing entitled "Addressing the Costly Administrative Burdens and Negative Impacts of the *Carcieri* and *Patchak* Decisions." In *Carcieri v. Salazar*, the Court ruled that the secretary of the Interior's trust land acquisition authority is limited to those tribes that were under federal jurisdiction at the time of the passage of the Indian Reorganization Act (IRA) of 1934. In *Match-E-Be-Nash-She-Wish Band of Potawatami Indians v. Patchak*, the Court ruled that a private landowner could sue to challenge the Interior secretary's decision to acquire land in trust.

Among other things, witnesses for the Obama administration and tribal interests testified that the aforementioned decisions have profound financial impacts on Indian tribes as they risk building on trust property that could later be shut down if a lawsuit is filed. Witnesses also urged Congress to pass legislation (S 676/HR 1291/HR 1234) that would overturn the *Carcieri* decision. The Indian Affairs Committee, which has approved S 676 on two separate occasions, did not invite a local government representative to testify at the hearing.

For its part, CSAC submitted an official statement for the record in conjunction with the Indian Affairs Committee's oversight hearing. The statement urges members of Congress to address the impacts of the *Carcieri* decision as part of a trust reform package that provides clear and enforceable standards that would need to be followed as a condition of land being taken into trust. Additionally, the statement recommends changes that would ensure that affected governments receive timely notice of fee-to-trust applications for tribal development projects and have adequate opportunity to provide meaningful input.

Looking toward the lame-duck session of Congress, it is possible that key lawmakers, particularly in the Senate, may attempt to reach a deal on a *Carciari* fix bill. Such a proposal would likely restore the secretary of Interior's authority to take land into trust while providing for other key reforms in the IRA and potentially the Indian Gaming Regulatory Act.

MAP-21

With a new two-year transportation reauthorization bill signed into law (PL 112-141) in early July, attention turned this past quarter toward implementation of the Act. The U.S. Department of Transportation (DOT) has been busy issuing implementation materials, various reports, and state funding announcements, as many of the policy provisions of the law, dubbed MAP-21, took effect on October 1. The guidance documents, along with other information on implementation, can be found on the Federal Highway Administration's (FHWA) [website](#). The documents give an overview of the new National Highway Performance and Surface Transportation programs. Additionally, the materials provide information on the Congestion Mitigation and Air Quality program, Metropolitan Planning, and the Highway Safety Improvement program.

Under MAP-21, transportation funding is maintained at fiscal year 2012 levels, with modest annual inflationary adjustments. It should be noted, however, that the recently enacted CR funds most DOT programs at fiscal year 2012 funding levels and does not account for the Act's inflationary increase. In response, transportation advocates and their supporters in Congress - including Senate Environment and Public Works (EPW) Committee Chairwoman Barbara Boxer (D-CA) - are urging congressional leaders to address the discrepancy when lawmakers convene for a post-election session.

With regard to budget sequestration, the across-the-board cuts will not impact programs that are funded through contract authority from the Highway Trust Fund. Programs supported from the General Fund, on the other hand, will be reduced by 8.2 percent. Notably, the vast majority of the \$40.2 billion federal-aid highway program is exempt from the sequester - only \$56 million in highway funding is subject to the across the board cuts. Transit formula and bus grants also are exempt from the sequester.

In other developments, Transportation Secretary Ray LaHood announced on August 17 the release of \$473 million in unspent transportation funding to states. The funding, which was announced as part of an infrastructure initiative called "We Can't Wait," is comprised of unobligated highway earmarks that were appropriated between fiscal years 2003 and 2006.

In California, there was more than \$43 million in "idle" funds from 71 earmarked projects that were eligible for redistribution. Pursuant to the announcement, state DOT's were required to identify projects to receive funding by October 1 and to obligate the funds by December 31. If the funds are not obligated by the December deadline, they will be proportionally redistributed to states that did meet the target date. In other words, should California be successful in

obligating the entire \$43 million by December 31, the state would be eligible for a proportional redistribution of other states' unobligated funds in 2013.

Caltrans announced that its first step was to contact project sponsors to provide them with the first opportunity to use the funds on the original earmark. Following that process, there was \$21 million available for other projects within the state. Regions were given first choice on the remaining funds. Each region came forward with projects to fully use the reprogrammed amount, and the California Transportation Commission (CTC) took action at its September 27 meeting to approve those projects.

REAUTHORIZATION OF THE SECURE RURAL SCHOOLS ACT

This past quarter, CSAC and other advocates from across the country continued to call for a long-term reauthorization of the *Secure Rural Schools and Community Self-Determination Act* (SRS). Although lawmakers in the House and the Senate have introduced legislation (S 1692; HR 3599; HR 4019) that would provide for a multi-year reauthorization of the program, those bills have yet to advance.

In the meantime, and in a victory for California's forest counties, Congress approved a one-year extension of both SRS (through fiscal year 2012) and the Payments-in-Lieu-of-Taxes (PILT) program (through fiscal year 2013). Counties can expect to receive their fiscal year 2012 SRS payments sometime between November and January, but unless Congress reauthorizes the program, these will be the final payments.

In a recent development, the Government Accountability Office (GAO) released a report (GAO-12-775) that criticizes the way previous SRS payments have been spent, specifically Title III funds. Title III funds help pay for county projects related to wildfire preparedness (such as community wildfire protection plans) and reimburses counties for the costs associated with emergency services on public lands. According to GAO's audit, some counties spent their Title III funds in ways that appear inconsistent with the intent of the law. GAO also noted that some counties failed to notify the public or seek public input on Title III expenditures.

If Congress chooses to reauthorize SRS, GAO recommends that the law be amended to make explicit which types of expenditures are allowable and which are not. In the interim, GAO suggests that the U.S. Forest Service and the Bureau of Land Management issue regulations or clear guidance specifying the types of allowable county uses of Title III funds.

ARMY CORPS OF ENGINEERS LEVEE VEGETATION REMOVAL POLICY

There was no significant regulatory or legislative action this past quarter relative to the U.S. Army Corps of Engineers' levee vegetation removal policy. However, stakeholders and members of Congress continued to discuss options for addressing the Corps' policy, which generally requires local flood control agencies to remove woody vegetation from levees in order to allow for easier inspections and to reduce any potential weakening of, or damage to,

levees from root growth and overturned trees. Levees that the Corps deems to be out of compliance with its vegetation standards would no longer be eligible for federal disaster assistance. Incidentally, in advancing its policy, the Corps cites no documentation that links actual levee failures to the presence of woody vegetation.

Earlier this year, Representative Doris Matsui (D-CA) introduced legislation (HR 5831) that would require the secretary of the Army to undertake a comprehensive review of the Corps' policy guidelines on vegetation management for levees. The bipartisan bill, entitled the *Levee Vegetation Review Act*, is cosponsored by 30 members of the California congressional delegation.

Under HR 5831, the secretary would be required to take into account several key factors when undertaking the policy review process, including the varied interests and responsibilities in managing flood risks, such as the need to provide the greatest safety benefit with limited resources. The bill also would require the secretary to consider factors that promote and allow for variances from the national guidelines on a regional or watershed basis. Additionally, the legislation would require the secretary to solicit and consider the views of the National Academy of Engineering as part of the review process.

On a related matter, the Senate's fiscal year 2013 Energy and Water Appropriations legislation (S 2465) includes language drafted by CSAC and championed by Senator Dianne Feinstein (D-CA) that states that the Corps' initial research on levee vegetation indicates that minimal data exists on the scientific relationship between woody vegetation and levees. The language also urges the Corps to continue to conduct additional scientific research on the topic and encourages the Corps to clarify how it will apply Endangered Species Act considerations in its final vegetation policy.

Finally, the Senate EPW Committee held a hearing on the Water Resources Development Act (WRDA) this past quarter. According to Senator Boxer, she would like for a WRDA reauthorization measure to be considered on the floor in a post-election session of Congress. The WRDA reauthorization will provide an opportunity for members to seek various modifications and reforms to Army Corps' programs and policies, including potential changes to the Corps' levee vegetation removal policy.

CLEAN WATER ACT – SECTION 404 PERMITTING

Discussions continued this past quarter in the House Transportation and Infrastructure Committee regarding the prospects for legislation that would provide for a series of amendments to the Clean Water Act (CWA). Accordingly, CSAC continued to promote Representative Gary Miller's (R-CA) bipartisan legislation that would streamline the CWA's Section 404 permitting process. The bill, entitled the *Flood Control Facility Maintenance Clarification Act* (HR 2427), would provide a narrow permitting exemption for maintenance removal of sediment, debris, and vegetation from flood control channels and basins.

On a related matter, House Republicans continued their efforts aimed at limiting the Obama administration's ability to issue regulations in the energy and natural resource arenas. In late September, the House approved legislation (HR 3409) that would prevent the Department of Interior from issuing regulations under the Surface Mining Control and Reclamation Act. House Republicans included within the text of HR 3409 four other bills, including a measure (HR 2018) that would grant states more authority to make determinations with respect to their water quality standards.

Specifically, HR 2018 would restrict EPA's ability to revoke or delay a state's permitting and water quality decisions under the CWA once it has approved a state's program. In addition, the legislation would place limits on EPA's ability to veto dredge and fill permits issued by the Corps and would give states more flexibility to administer permitting programs.

The House also adopted a separate amendment to HR 3409 that would prohibit the EPA from retroactively vetoing Section 404 permits.

PROPERTY ASSESSED CLEAN ENERGY (PACE) PROGRAM

On June 15, the Federal Housing Finance Agency (FHFA) published a Notice of Proposed Rulemaking (NPR) regarding PACE programs. According to the proposed rule, the Agency continues to maintain that residential PACE programs pose safety and soundness concerns to Fannie Mae and Freddie Mac. Therefore, the NPR prohibits Fannie Mae and Freddie Mac from buying mortgages subject to PACE liens.

FHFA did, however, propose three alternative means of mitigating the financial risks to Fannie Mae and Freddie Mac. Under the first alternative, FHFA would consent to a first-lien PACE obligation if a qualified insurer covers 100 percent of any net loss in the event of a foreclosure. The second alternative would require a rigorous set of protective standards that borrowers must meet in order to qualify. Lastly, the third alternative would allow Fannie Mae and Freddie Mac to purchase mortgages subject to a PACE assessment, as long as the underwriting standards are modeled after pending legislation - the *PACE Assessment Protection Act* (HR 2599).

In response to the proposed rule, CSAC joined with a broad coalition of PACE supporters to submit a joint comment letter to FHFA. The letter clarifies the coalition's objections to the agency's proposal and recommends adopting a revised rule that would permit Fannie Mae and Freddie Mac to purchase mortgages with PACE liens, if certain conditions are met. Specifically, the coalition is recommending that the Agency consider a modified approach that would combine the first and third alternatives.

While the fate of residential PACE programs is still in doubt, commercial PACE programs across the country are expanding. The California Statewide Communities Development Authority (CSCDA), a product of the CSAC Finance Corporation, recently launched the nation's largest PACE financing program for commercial property owners in 14 California counties and 126

cities. The program, which is called CaliforniaFIRST, will permit commercial property owners to use municipal bonds to finance energy efficiency, water efficiency, and renewable energy upgrades.

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES REAUTHORIZATION

The CR approved this quarter includes a six-month extension of the Temporary Assistance for Needy Families (TANF) program. Notably, the TANF program will be exempt from sequestration.

Earlier this quarter, the U.S. Department of Health and Human Services (HHS) issued a state TANF Information Memorandum announcing that it would consider state or county applications to waive certain federal work participation requirements if such alternative programs achieved TANF's goals of moving families into self-sufficiency. As is the case with federal waivers, counties would have to go through the state to apply for a sub-state waiver.

Congressional Republicans immediately denounced the move and introduced legislation to block HHS's effort, contending that the department does not have the authority to grant such waivers. Furthermore, Republicans argue the administration's effort would eliminate any requirement for TANF participants to engage in work or related activities. In response, Democrats have stated that the HHS guidance would require a state's waiver application to set work participation standards that are higher than is written in the TANF law.

The House bill, *Preserving Work Requirements for Welfare Programs Act of 2012* (HR 6140), has 108 Republican cosponsors and has become a rallying point for the GOP on the campaign trail. Senate Finance Committee Ranking Member Orrin Hatch (R-UT) has introduced a companion bill (S 3397) with 17 Republican cosponsors. Neither measure, however, has moved through the legislative process.

For its part, GAO has ruled that the administration was required to formally notify Congress of its waiver announcement. GAO also found that the announcement amounted to a "rule" for purposes of the Congressional Review Act, which gives Congress 60 days to disapprove the administration's policy. The House passed a resolution (H J Res 118) in September disapproving the HHS action. The Senate may consider the measure during the lame duck session, but it is unlikely to pass. President Obama is expected to veto the resolution if it reaches his desk.

We hope this information is useful to California county officials. If you have any questions or comments, please feel free to contact us.