

Calendar No. 264

112TH CONGRESS }
2d Session }

SENATE

{ REPORT
112-124

ST. CROIX RIVER CROSSING PROJECT AUTHORIZATION ACT

JANUARY 13, 2012.—Ordered to be printed

Filed, under authority of the order of the Senate of December 17, 2011

Mr. BINGAMAN, from the Committee on Energy and Natural
Resources, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 1134]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1134) to authorize the St. Croix River Crossing Project with appropriate mitigation measures to promote river values, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

On page 2, after line 10, add the following:

SEC. 3. OFFSET.

To provide an offset for the funds made available to carry out this Act, there is rescinded from the Department of the Interior franchise fund authorized under section 113 of division A of title I of Public Law 104-208 (31 U.S.C. 501 note; 110 Stat. 3009-181) \$8,000,000.

SEC. 4. BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go-Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the Senate Budget Committee, provided that such statement has been submitted prior to the vote on passage.

PURPOSE

The purpose of S. 1134 is to authorize the head of any Federal agency or department to authorize and assist in the construction of a bridge over the St. Croix River along the Minnesota-Wisconsin border, if certain mitigation requirements are satisfied.

BACKGROUND AND NEED

The St. Croix River stretches approximately 160 miles from its headwaters in northwestern Wisconsin to its confluence with the Mississippi River south of Minneapolis. The lower 125 miles of the river form the boundary between Minnesota and Wisconsin.

In 1968, a portion of the St. Croix River was designated as one of the original components of the National Wild and Scenic Rivers System. In 1972, Public Law 92-560 added 52 miles of the Lower St. Croix River to the system, with the upper 27 miles administered by the Secretary of the Interior and the lower 25 miles to be designated upon application by the Governors of Minnesota and Wisconsin, which occurred in 1976. The first 10 miles of the Lower St. Croix are administered as a "scenic" river under the Wild and Scenic Rivers Act, and the downstream 42 miles, including the segment that would be affected by S. 1134, are administered as "recreational." The National Park Service administers the designated rivers, along with a tributary, the Namekagon River, as the St. Croix National Scenic Riverway.

Several bridges cross the St. Croix and Lower St. Croix rivers, including the Stillwater Lift Bridge, which connects the towns of Stillwater, Minnesota and Houlton, Wisconsin. The bridge was built in 1931 and includes a 140-foot vertical lift span which can be raised to accommodate river traffic. The bridge, which is listed on the National Register of Historic Places, accommodates only two lanes of traffic, and during busy travel periods is the source of lengthy backups.

In 1995 the Federal Highway Administration (FHWA), along with the Minnesota and Wisconsin Departments of Transportation, proposed construction of a new four-lane bridge that would cross the river about a mile south of the Stillwater Lift Bridge.

In response to a legal challenge to the proposal, the National Park Service prepared a section 7 evaluation. Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278(a)) precludes any department or agency of the United States from assisting "by loan, grant, or otherwise, in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was designated, as determined by the Secretary charged with its administration."

The National Park Service completed its evaluation in December 1996 and concluded that the proposed bridge would have a direct and adverse impact on the scenic and recreational values of the Lower St. Croix River, and that no mitigation package could adequately offset the negative impact.

After an unsuccessful appeal of the section 7 evaluation, the FHWA and the Wisconsin and Minnesota Departments of Transportation developed a new proposal, following consultation with interested parties. In August 2004 the FHWA and state agencies identified new bridge proposals as part of a supplemental environ-

mental impact statement process. One of the proposals included construction of a four-lane highway bridge south of the 1995 proposal.

In October 2005, the National Park Service prepared another section 7 evaluation. This evaluation concluded that the proposed bridge would have a direct and adverse impact on the river's recreational and scenic values, but found that those impacts could be offset with a mitigation package, which were described in a 2006 memorandum of understanding signed by the FHWA and National Park Service. In November 2006 the FHWA issued a Record of Decision, with the proposed bridge as its selected alternative. The decision was subsequently challenged in Federal court.

In March 2010, the United States District Court for the District of Minnesota concluded that the Park Service's 2005 section 7 evaluation was arbitrary and capricious in that it ignored its 1996 evaluation which came to an opposite conclusion and did not explain how it came to a different conclusion in the subsequent evaluation.

Following that decision, the Park Service revised its section 7 evaluation in October 2010 and found, consistent with the first evaluation, that the proposed bridge would have a direct and adverse effect on the river's recreational and scenic values. The Park Service also concluded that no mitigation package could offset the direct and adverse impact. The National Park Service letter to the FHWA noted that while the Park Service did not believe a mitigation package could be effective, it strongly supported the inclusion of the previous mitigation package if the bridge was ultimately authorized.

As a result of the Federal court decision and subsequent determination of direct and adverse effect by the National Park Service, legislation is necessary to allow construction of the new bridge to proceed. S. 1134 would authorize the FHWA and other appropriate Federal agencies to assist in the construction of the proposed bridge, notwithstanding section 7 of the Wild and Scenic Rivers Act, if the mitigation items described in the 2006 memorandum of understanding are included as enforceable provisions.

LEGISLATIVE HISTORY

S. 1134 was introduced by Senators Klobuchar, Franken, Kohl, and Johnson of Wisconsin on May 26, 2011. The Subcommittee on National Parks held a hearing on S. 1134 on July 28, 2011. At its business meeting on November 10, 2011, the Committee on Energy and Natural Resources ordered S. 1134 favorably reported with an amendment.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on November 10, 2011, by a voice vote of a quorum present, recommends that the Senate pass S. 1134, if amended as described herein. Senators Bingaman, Udall, Cantwell, and Sanders asked to be recorded as opposing the measure.

COMMITTEE AMENDMENT

During its consideration of S. 1134, the Committee adopted an amendment adding two new sections to the bill. Section 3 would

provide an offset for the funds made available to carry out the Act by rescinding \$8 million from the Department of the Interior franchise fund account authorized under section 113 of division A of title I of Public Law 104–208. (Although the Committee had not received a cost estimate from the Congressional Budget Office at the time S. 1134 was ordered reported, the CBO cost estimate for H.R. 850, the House companion measure, indicated enactment of that bill would increase direct spending by \$8 million over the 2012–2021 period).

The amendment also adds a new section 4 which provides how budgetary effects of the bill should be determined.

SECTION-BY-SECTION ANALYSIS

Section 1 contains the short title, the “St. Croix River Crossing Project Authorization Act.”

Section 2 states that, notwithstanding section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278(a)), the head of any Federal department or agency may authorize and assist in the construction of a new extradosed bridge crossing the St. Croix River at a location approximately six miles north of the existing I–94 bridge, if certain mitigation items described in a 2006 Memorandum of Understanding signed by the National Park Service and the Federal Highway Administration are included.

Section 3 provides that \$8,000,000 is rescinded from the Department of the Interior franchise fund authorized under section 113 of division A of title I of Public Law 104–208 to provide an offset for the funds made available to carry out this Act.

Section 4 contains standard language directing how budgetary effects of the bill should be determined.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office estimate of the costs of this measure has been requested but was not received at the time the report was filed. When the Congressional Budget Office completes its cost estimate, it will be posted on the Internet at www.cbo.gov.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 1134.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 1134, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 1134, as ordered reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

The testimony provided by the National Park Service at the July 28, 2011, Subcommittee on National Parks hearing on S. 1134 follows.

STATEMENT OF PEGGY O'DELL, DEPUTY DIRECTOR,
NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman, thank you for the opportunity to present the views of the Department of the Interior (Department) regarding S. 1134, a bill to authorize the St. Croix River Crossing Project with appropriate mitigation measures to promote river values. This bill would allow construction of a new extradosed bridge crossing the St. Croix River if the mitigation items are included as enforceable conditions.

The Department cannot support this legislation, as the NPS determined that the St. Croix River Project would have a direct and adverse impact to the river and that these impacts cannot be mitigated, as documented in its Section 7(a) Wild and Scenic Rivers Act evaluation of October 15, 2010. We are very concerned about the precedent that such legislation would establish given that the Department found the bridge project would have a direct and adverse effect on the designated river. In its May 4, 2011 testimony NPS did not support a similar bill—H.R. 850, which would facilitate a proposed project in the Lower St. Croix National Scenic Riverway. S. 1134 differs from H.R. 850 with the inclusion of mitigation measures for the project.

This bill requires that the mitigation items described in paragraph 9 of the 2006 St. Croix River Crossing Project Memorandum of Understanding for Implementation of Riverway Mitigation Items, signed by the Federal Highway Administration on March 28, 2006, and by the National Park Service on March 27, 2006, are included as enforceable conditions.¹ It also states that any subsequent amendments to the Memorandum of Understanding are included as enforceable conditions.

The Lower St. Croix National Scenic Riverway (Riverway) received protection as a “study river” with passage of the Act in 1968. Congress subsequently designated the upper 27-mile segment of the Lower St. Croix River as a Wild and Scenic River in 1972 and provided that if the Governors of the States of Minnesota and Wisconsin submit an application for the lower 25-mile segment, the Secretary of the Interior upon his approval shall designate that segment. The Governors did submit an application and the Secretary designated the lower segment in 1976. The Act established a method for providing Federal protection for some of our country’s remaining free-flowing rivers, preserving them and their immediate environments

¹A copy of the Memorandum of Understanding may be found at <http://www.dot.state.mn.us/metro/projects/stcroix/pdfs/Memounder/Riverway%20MOU%204-11-06.pdf>.

for the use and enjoyment of present and future generations.

In Section 7(a) of the Act, Congress expressed the clear intent to protect river values. The Act prohibits Federal agencies from assisting in the construction of any water resources project that would have a direct and adverse effect on the values of a designated river. Section 7(a) states:

. . . no department or agency of the United States shall assist by loan, grant, license or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration . . .

Pursuant to that statute, if the Department determines a direct and adverse impact would occur, the project cannot proceed absent congressional action.

The Riverway is administered by the states of Minnesota and Wisconsin for 25 miles and the National Park Service (NPS) for 27 miles. However, the Department of the Interior, through the NPS, has responsibility for evaluation of proposed Federal projects for the entire 52 miles of the designated river. The NPS is responsible for evaluating water resources projects under Section 7(a) of the Act to determine whether those Federal projects, including bridges, will have a direct and adverse effect on the Riverway's free-flowing condition, water quality, and outstandingly remarkable values. Each water resources project is evaluated independently on its own merits.

The Riverway runs fast over sections of exposed bedrock, slow and deep over great depositional sediments left by the last glaciers, and throughout its course to the Mississippi River, the river carves through steep forested bluffs and rich valley bottomlands. Although solitude in natural settings is increasingly rare so close to a major metropolitan area, the Riverway offers natural solitude and abundant recreation.

In 1995, the Federal Highway Administration (FHWA) released a Record of Decision to construct a new bridge over the Lower St. Croix National Scenic Riverway and in June 1996, the Sierra Club and Voyageurs Region National Park Association commenced a lawsuit against the United States Department of Transportation, the Federal Highway Administration, the Department and the NPS to enjoin construction of the project. They alleged that the Department had violated Section 7(a) of the Act by failing to determine whether the new bridge would have a direct and adverse effect upon the values for which the Riverway was established. In September 1996, the FHWA and its lead partner—the Minnesota Department of Transportation (MnDOT)—applied for a Section 10/404 permit to place fill in the waters of the United States for bridge construction. Subsequently, the NPS prepared a Section 7(a) evaluation and determined that the project would have a

direct and adverse effect on the Riverway's scenic and recreational values because of its visual impacts and that no available mitigation measures could significantly reduce the negative effects of the proposed bridge. Therefore, permits could not be issued and the bridge project could not go forward. MnDOT, the Wisconsin Department of Transportation (WisDOT) and the City of Stillwater, Minnesota, intervened in the lawsuit as defendants. They alleged that the 1996 NPS Section 7(a) determination was arbitrary, capricious, and in excess of statutory authority. The court upheld the 1996 NPS Section 7(a) determination, establishing case law that bridges are water resources projects subject to Section 7(a) of the Wild and Scenic Rivers Act.

In 1998, after discussions with legislators and other interested parties, the FHWA, MnDOT and WisDOT decided to revisit the issue of a river crossing near Stillwater. MnDOT facilitated a consensus-building process for a new bridge crossing of the Riverway. This process resulted in a new bridge alignment and design as well as a mitigation package.

In 2000, the NPS prepared a Draft Section 7(a) evaluation for inclusion in FHWA's Environmental Impact Statement (EIS). This evaluation determined that the proposed bridge would have a direct and adverse effect on scenic and recreational values; however, the adverse effects were adequately offset by the mitigation package developed by the stakeholders.

In 2001, the FHWA suspended that EIS process short of a final decision, citing insufficient funds for the implementation of the mitigation measures.

In 2002, the FHWA and its two state partners again re-initiated a St. Croix River Crossing EIS process. A "Stakeholders Group," made up of 28 representatives of diverse interests was formed to provide input to the transportation agencies in their decision-making process. This process resulted in a new proposed bridge alignment (similar to the original 1996 alignment), a bridge design, and a mitigation package.

In 2005, the NPS prepared an updated Section 7(a) evaluation that determined that the proposed crossing, when taken along with its mitigation package, would not have a direct and adverse effect on the scenic and recreational values, provided that the mitigation package remained intact.

In 2006, the FHWA issued a new record of decision to allow the bridge to be built. The Sierra Club again sued the Secretaries of Transportation and the Interior, alleging violations of the National Environmental Policy Act, Section 4(f) of the Department of Transportation (DOT) Act of 1966 (40 U.S.C. 1653(f)), and the Wild and Scenic Rivers Act.

On March 11, 2010, the U.S. District Court of Minnesota found the 2005 NPS Section 7(a) evaluation "arbitrary and capricious" and vacated it.

On April 6, 2010, the FHWA requested that the NPS prepare a new evaluation in response to the court's decision. The NPS released its latest Section 7(a) evaluation on October 15, 2010. The evaluation determined that, due to visual impacts, the St. Croix River Crossing Project would have a direct and adverse impact to the river and that those impacts cannot be mitigated.

The NPS transmitted the 2010 Section 7(a) evaluation to the FHWA, stating that, "While the NPS believes the mitigation measures are not sufficient to eliminate the direct and adverse effects of the Project on the Lower St. Croix National Scenic Riverway's designated scenic and recreational values, the NPS strongly supports their implementation if Congressional action is taken to allow the Project to move forward. The mitigation measures are essential to meet the requirements of Section 4(f) of the DOT Act of 1966 and help the states of Minnesota and Wisconsin protect and enhance river values under Section 10(a) of the Act."

Mr. Chairman, that concludes my testimony. I would be pleased to answer any questions from members of the committee.

ADDITIONAL VIEWS OF SENATORS BINGAMAN, UDALL,
AND CANTWELL

If there had been a roll call vote to report S. 1134, we would have voted against reporting the bill. S. 1134 waives the Wild and Scenic Rivers Act to allow construction of large bridge over the Lower St. Croix River, which has been designated as a component of the National Wild and Scenic Rivers System. If this bill is enacted, it will mark the first time that Congress has chosen to waive the Wild and Scenic Rivers Act to allow construction of a bridge which the National Park Service has determined would have a direct and adverse effect on the river.

We appreciate the frustration of the bill's sponsors that the debate over a new bridge has dragged on for many years, and understand their desire to bring this issue to a close. But we're also mindful of former Vice President Mondale's statement to this Committee that he and former Senator Gaylord Nelson sponsored the legislation to protect the St. Croix River under the Wild and Scenic Rivers Act precisely to guard against future incompatible projects on the river.

One of the fundamental assumptions we make in protecting important natural areas is that those areas will remain protected forever. In our opinion, waiving the protections of the Wild and Scenic Rivers Act for the Lower St. Croix River is bad policy and sets a dangerous precedent.

JEFF BINGAMAN.
MARK UDALL.
MARIA CANTWELL.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 1134, as ordered reported.

