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Clean Water Act Reauthorization

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Claudia Copeland
Resources, Science, and Industry Division

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Clean Water Act Reauthorization

SUMMARY

In the 105th Congress, legislation to reauthorize the Clean Water Act was not introduced, and no major House or Senate committee activity occurred. In the 104th Congress, the House passed a comprehensive reauthorization bill, but controversies arose and the Senate did not take up the House-passed bill. The Act could present issues for the 106th Congress; whether and how it will be considered is unclear at this time. No major activity occurred in the first session, and none has been scheduled in the second session, although action on a number of individual clean water bills has occurred.

Likely to be of interest if Congress does consider the Act are pending regulatory actions by EPA and the Department of Agriculture to strengthen management of waste from animal feeding operations. How the proposals will be funded and impacts on agricultural producers could be addressed.

Congress also could review an existing provision of the Act that requires states to set "total maximum daily loads" (TMDLs) of pollution to ensure that water quality standards are attained. There has been little implementation of the provision, up until the recent filing of numerous lawsuits against EPA and states for failing to comply with its requirements. TMDL requirements and costs facing states and others to implement this provision have drawn considerable attention.

EPA and states' water quality inventories have identified wet weather flows (including agricultural runoff, urban stormwater, and sewer overflows) as the largest remaining threat to water quality. EPA's clean water programs are now focusing to a large extent on solving wet weather pollution problems. These issues may be addressed legislatively, as well. At issue is whether and how to detail wet weather programs in the Act versus allowing flexibility that recognizes the site-specific nature of intermittent wet weather pollution.

Programs that regulate activities in wetlands, such as Section 404 of the Act, have been criticized by landowners for intruding on private land-use decisions and imposing excessive economic burden. Yet, environmentalists and conservationists view these programs as essential for maintaining the health of wetland ecosystems. Because of continuing wide disagreement about the nature of needed reforms, it has been difficult for policymakers to reach consensus.

Clean Water Act amendments in 1987 initiated a program of grants to capitalize State Water Pollution Control Revolving Funds, or SRF loan programs, for wastewater treatment construction. States were to have flexibility in exchange for a phaseout of federal assistance after FY1994. However, difficulties that some states and small towns have had in implementing the SRF program, coupled with financing needs that are estimated to exceed $130 billion nationwide, have made wastewater treatment funding another element of the reauthorization debate.

Other issues have been debated recently, such as reforming the law to provide regulatory relief for industry, states and cities, and individual landowners. The debate over many of these issues highlights differing views of the Act and its implementation by some who seek to strengthen existing requirements and others who believe that costs and benefits should be more carefully weighed before additional control programs are mandated.

MOST RECENT DEVELOPMENTS

Neither House nor Senate committees have scheduled major legislative activity on the Clean Water Act, and no comprehensive reauthorization bills have been introduced in the 106th Congress. However, a number of bills dealing with individual water quality issues have passed the House or the Senate, including H.R. 673, H.R. 999, H.R. 1106, H.R. 1237, H.R. 2328, H.R. 2957, H.R. 3039, H.R. 3313, and S. 835, and several other bills have been reported by committees. House and Senate committees have held several oversight hearings on implementation of current law and Administration water quality initiatives. Whether these oversight hearings will lead to broader legislative activity is unclear.

In October 1997, Vice President Gore directed federal agencies to develop a Clean Water Initiative to improve and strengthen the nation's water pollution control efforts. A multi-agency Plan was released in February 1998 which identifies more than 100 actions. Most are existing activities, now labeled as part of the Initiative. It did not include legislative proposals to reauthorize the Act. The President's FY1999 budget requested $2.5 billion for five departments and agencies to fund the Initiative. Final appropriations for FY1999 to fund the Initiative were $2.0 billion and provided less than 10% of the budgetary increases sought by the Administration. For FY2000, the Administration requested $2.5 billion to fund the Initiative, including $450 million in increases above FY1999 levels. FY2000 appropriations bills provide about $2.2 billion of the total requested. For FY2001, the budget requests $2.8 billion, a 27%increase above FY2000 levels. On May 13, 1999, the Senate Environment and Public Works Committee held the first congressional oversight hearing on the Initiative.

BACKGROUND AND ANALYSIS

Introduction

The principal law governing pollution in the nation's streams, lakes, and estuaries is the Federal Water Pollution Control Act (P.L. 92-500, enacted in 1972), commonly known as the Clean Water Act (amended by P.L. 95-217 in 1977, P.L. 97-117 in 1981, and P.L. 100-4 in 1987). It consists of two major parts: regulatory provisions that impose progressively more stringent requirements on industries and cities to abate pollution and meet the statutory goal of zero discharge of pollutants; and provisions that authorize federal financial assistance for municipal wastewater treatment construction. Both parts are supported by research activities, plus permit and enforcement provisions. Programs at the federal level are administered by the Environmental Protection Agency (EPA); state and local governments have major responsibilities to implement those programs. (Note: A summary of the Act with details and "hot links" to sections of the U.S. Code can be found in the online version of this issue brief, which is available on the CRS Home Page/Full Text of CRS Online Products.) Prior to the 104th Congress, congressional efforts to amend the Act dealt with all of these aspects, with the objective of strengthening water quality programs. Legislation passed by the House in 1995, but not enacted (H.R. 961), also was comprehensive but had the primary objective of making the law more flexible and less prescriptive.

The objective declared in the 1972 Act is to restore and maintain the chemical, physical, and biological integrity of the nation's water. That objective was accompanied by statutory goals to eliminate the discharge of pollutants into navigable waters by 1985 and to attain, wherever possible, waters deemed "fishable and swimmable" by 1983. While those goals have not yet been achieved, considerable progress has been made, especially in controlling conventional pollutants (suspended solids, bacteria, and oxygen-consuming materials) discharged by industries and municipal sewage treatment plants. Nearly 75% of assessed waters comply with standards for these pollutants. Progress has been mixed in controlling discharges of toxic pollutants (heavy metals, inorganic and organic chemicals), which are more numerous and can harm human health and the environment even when present in minute amounts — at the parts-per-billion level. Moreover, efforts to control pollution from diffuse sources (rainfall runoff, for example) have only recently begun. Overall, data reported by EPA and states indicate that 40% of waters surveyed by states fail to meet water quality standards. Forty-seven states now have some form of fish-consumption advisory in effect (including 100% of Great Lakes waters and a large portion of the nation's coastal waters), due to water pollution problems, and one-third of shellfishing beds are closed or restricted, due to toxic pollutant contamination.

In 1987 Congress passed major amendments, the first comprehensive revision to the law in a decade (P.L. 100-4). (For further information, see CRS Issue Brief IB89102, *Water Quality: Implementing the Clean Water Act*.) Authorizations for a number of the provisions expired in FY1990 and FY1991, for programs such as general grant assistance to states, research, and general EPA support. Authorizations for wastewater treatment assistance expired in FY1994. None of these programs lapsed, however, as Congress has continued to appropriate funds to implement the Act.

Legislative Activity in the 104th Congress. In the 104th Congress, the Clean Water Act was one of the first environmental laws to receive congressional attention. A House Committee on Transportation and Infrastructure subcommittee held oversight hearings on clean water issues in February and March 1995. Committee Chairman Shuster introduced a comprehensive reauthorization bill, H.R. 961, on February 15. It was approved by the full Committee on April 6 (H.Rept. 104-112). On May 16, 1995, the House passed H.R. 961 (240-185). (For additional information, see CRS Report 95-427, *Clean Water: Summary of H.R. 961, As Passed.*)

H.R. 961 reflected efforts to make the CWA more flexible and less prescriptive and to address a number of regulatory relief issues of concern to many — industries, states, and cities, in particular — who criticized what they viewed as excessive and prescriptive clean water regulation. These reform efforts were evident in the bill's amendments to the standards and regulatory requirements and wetlands permit provisions of current law. The legislation was endorsed by a number of industry groups, as well as state and local government groups, but was opposed by environmental groups and the Clinton Administration. EPA officials said that the bill would undermine the existing framework for protection of U.S. waters.

In the Senate, reauthorization legislation was not introduced, and no hearings on H.R. 961 were held. However, a Senate Environment and Public Works subcommittee held three hearings in 1995 on S. 851, legislation to revise the CWA Section 404 dredge and fill permit program that was similar to wetlands reforms included in H.R. 961, and a hearing on wetlands mitigation banking issues in 1996. In December 1995, the Committee held a hearing on CWA

issues affecting municipalities, including funding and implementation of regulatory programs to manage stormwater and combined sewer overflows.

The 105th Congress. Congressional committees did not undertake any legislative activity on clean water issues in the 105th Congress, and no comprehensive reauthorization legislation was introduced. During the first session, committees that have jurisdiction over the Act (Senate Environment and Public Works and House Transportation and Infrastructure) gave priority to two other bills, reauthorization of Superfund and the Intermodal Surface Transportation Efficiency Act (ISTEA). However, in April 1997, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment began oversight hearings on issues that could assist in developing reauthorization legislation. One hearing, concerning clean water and drinking water infrastructure needs, was followed by another on regulatory and judicial developments affecting wetlands. A Senate subcommittee held a similar hearing on wetlands issues in June 1997. No further congressional activity occurred.

The Administration's Clean Water Action Plan. In October 1997, on the 25th anniversary of the CWA, Vice President Al Gore announced an initiative intended to build on the environmental successes of the Act and to address the nation's remaining water quality challenges, especially nonpoint source pollution. The Vice President directed EPA and USDA to coordinate the work of other federal agencies to develop an action plan to improve and strengthen water pollution control efforts. The purpose of the plan is to coordinate federal efforts to achieve three goals: enhanced protection from public health threats posed by water pollution, more effective control of polluted runoff, and promotion of water quality protection on a watershed basis.

President Clinton and Vice President Gore released the action plan in February 1998. Components of the plan, nearly 100 actions, consist mainly of existing programs, including some planned regulatory actions that agencies have had underway, now to be enhanced with increased funding or accelerated with performance-specific deadlines. (The text is available at [http://www.cleanwater.gov/].) The individual elements of the plan are built on four concepts: utilizing collaborative watershed-based partnerships to clean up impaired waters; maintaining strong federal and state standards; calling on federal natural resource and conservation agencies to assist in restoring and protecting watersheds; and ensuring that citizens and officials have improved information for decisionmaking.

Complementing the plan, the President's FY1999 budget identified the Clean Water Initiative as a high-priority for environmental programs. It requested a total of $2.5 billion, a $609 million, or 33%, increase over FY1998 base levels, to fund activities in five departments and agencies, plus interagency funds. Almost one-half of the increases, $265 million, was designated as assistance to states and localities or to individual landowners.

The action plan was not accompanied by legislation to reauthorize the CWA. In Congress, it was considered primarily through the appropriations process, rather than authorizing committee activity. Funding to support the plan is contained in several separate appropriations bills, including the Omnibus Consolidated and Supplemental Appropriations Act (P.L. 105-277) passed just before the 105th Congress adjourned. In those bills, congressional support for the action plan was quite mixed. Appropriators funded few budgetary elements of the Action Plan, citing reasons such as difficulty in supporting new initiatives, on top of existing priorities. Overall, the bills provided less than 10% of the

increased funds requested by the Administration. While EPA received close to full funding for the requested action plan activities contained in its budget, other agencies and departments received no or only small increases to support the plan.

The FY1999 increases for EPA totaled $121 million and consisted of $95 million more for grants to states to manage nonpoint source pollution (a 95% increase for CWA Section 319 grants); $20 million more for grants for state administration of water quality programs (a 20% increase for Section 106 grants); and $7 million for various EPA water quality activities, including development of water quality criteria for nutrients and updated regulations for animal feeding operations, other grants for watershed restoration and wetlands protection, and EPA actions to reduce the need for fish advisories. Other involved departments include USDA, the Departments of Interior and Commerce, and the U.S. Army Corps of Engineers.

In the President's FY2000 budget request, the Administration sought an additional $450 million ($2.5 billion total) for Clean Water Action Plan activities. Appropriations to fund federal activities under the Plan were passed in four FY2000 bills which provided $2.2 billion of the total requested. EPA and USDA officials say that the Plan will be implemented, even though funds have been less than requested. Implementation will occur, they say, because they believe that the Plan's many actions are the only way to achieve the Clean Water Act's water quality goals. For FY2001, the budget requests $2.8 billion, a 27% increase above FY2000 levels.

(For further information, see CRS Report 98-150, *The Clean Water Action Plan: Background and Early Implementation*, and CRS Report 98-745, *The Clean Water Action Plan: Budgetary Initiatives*.)

On May 13, 1999, the Senate Environment and Public Works Committee held the first congressional oversight hearing on the Plan. The Committee heard from federal and state government representatives, as well as members of the public. Agency witnesses addressed how the Plan and its implementation are involving the public, states and localities, and federal agencies in intergovernmental partnerships. Other witnesses and some Committee members questioned the degree to which the Plan actually reflects state, local, public, and congressional input and whether federal agencies have the legal authority to be taking some of the contemplated actions. Questions also were raised about the scientific basis of the Plan, because of inadequate national water quality data. Testimony from the hearing is available at [http://www.senate.gov/~epw/stm1_106.htm#5-13-99].

The 106th Congress. Neither House nor Senate committees have scheduled major legislative activity on the CWA, and no comprehensive reauthorization bills have been introduced. However, bills dealing with a number of individual issues have received attention, particularly in the House, which passed several measures in April and May, 2000. On April 12, the House passed two bills. One, H.R. 2328 (H.Rept. 106-560), would reauthorize the clean lakes program (CWA §314) at a level of $50 million per year through FY2005. A second bill, H.R. 3039 (H.Rept. 106-550), would expand federal and interstate efforts that currently exist through the CWA for restoration of the Chesapeake Bay (CWA §117). In May, the House passed H.R. 2957 (H.Rept. 106-594), authorizing $108 million for a Lake Pontchartrain Basin restoration program. It also authorizes $100 million for an inflow and infiltration project in New Orleans. The House also passed H.R. 673 (H.Rept. 106-592),

authorizing EPA to make infrastructure improvement grants to improve water quality in the Florida Keys marine ecosystem, and H.R. 1106 (H.Rept. 106-593), authorizing EPA to make grants on a cost-shared basis for alternative water source projects to enhance water supplies. Finally, in May, the House also passed H.R. 1237 (H.Rept. 106-596) to reauthorize the National Estuary Program (CWA sec. 320) and H.R. 3313 (H.Rept. 106-597) to reauthorize funding for the Long Island Sound estuary program (CWA sec. 119) and to establish a system for trading nitrogen credits within the Long Island Sound watershed. (For additional information, see CRS Report 97-644, *National Estuary Program*.)

On April 22, 1999, the House approved a bill, the Beaches Environmental Assessment, Cleanup, and Health Act (H.R. 999, H.Rept. 106-98), addressing concerns that some have raised about lack of uniformity of coastal water quality monitoring activities and failure of states to adopt stringent water quality criteria for coastal recreational waters. The bill would require states to adopt EPA water quality standards for bacteria within 3-1/2 years and to monitor coastal recreation areas. It authorizes grants up to $30 million per year to assist states and localities in meeting the requirements. Similar legislation has been introduced in the Senate (S. 522), and the Senate Environment and Public Works Committee held a hearing on these bills in July 1999. On April 13, 2000, the Senate committee approved both H.R. 999 and S. 522.

On March 30, the Senate passed S. 835, the Estuary Habitat Restoration Act (S.Rept. 106-189). It would establish a federal interagency council to develop a national strategy for selecting and prioritizing estuary habitat restoration projects and authorizes $315 million over 5 years for such projects. Earlier that month, the House Transportation and Infrastructure Committee approved a companion bill, H.R. 1775 (H.Rept. 106-561, pt. 1).

The Senate Environment and Public Works Committee held hearings in October 1999 on several clean water bills, including an October 7 hearing on proposals dealing with clean water infrastructure funding (S. 914, S. 968, and S. 1699) and an October 13 hearing on a bill concerning federal facility compliance with the CWA (S. 669), a bill to extend SRF assistance to water conservation projects (S. 188), and legislation to amend the stormwater provisions of the CWA (S. 1706). Also in October, the Committee approved legislation authorizing appropriations for the Long Island Sound estuary cleanup program (S. 1632, S.Rept. 106-182) and a bill modifying provisions of the Act concerning cleanup of Chesapeake Bay (S. 492, S.Rept. 106-181).

The Senate and House also have passed separate versions of legislation to continue several reports to Congress authorized under the Clean Water Act (S. 1730, S.Rept. 106-190; H.R. 4052, H.Rept. 106-555). The Federal Reports Elimination and Sunset Act of 1995 (P.L. 104-66) authorized the elimination of numerous agency reports to congressional committees at the end of 1999 unless Congress acted to continue specific reports. Congress extended the deadline until May 15 in the Consolidated Appropriations Act for FY2000 (P.L. 106-113). S. 1730 would continue two CWA reports; H.R. 4052 would continue 12 reports.

Issues in the 106th Congress

Prospects for reauthorization of the entire Act in the 106th Congress are dim, as attention is focusing, instead, on individual programs within the Act (discussed above). Comprehensive

reauthorization issues that might be addressed are not, for the most part, easily amenable to straight-forward, consensus solutions. Many involve making difficult tradeoffs between impacts on different sectors of the economy, taking action when there is technical or scientific uncertainty, and allocating governmental responsibilities for implementing the law. (For additional information, see CRS Report 98-946, *Clean Water Act Issues in the 106th Congress*.) EPA Administrator Carol Browner has been quoted in press reports as saying that the agency is not planning to propose any major environmental legislation in the 106th Congress, preferring to focus on achieving regulatory advances under existing law, out of concern that congressional action could weaken the Administration's environmental protection principles.

Managing Animal Waste

A key element of the Clean Water Action Plan is to minimize public health and environmental impacts of runoff from animal feeding operations (AFOs), which are agricultural facilities that confine livestock feeding activities, thus concentrating animal populations and manure. Animal waste is frequently applied to land for disposal and to utilize the nutrient value of manure to benefit crops. If not managed properly, it can pose a number of risks to water quality and public health, contributing pollutants such as nutrients, sediment, pathogens, and ammonia to the environment. Agricultural runoff has been linked to dangerous toxic microorganisms such as *Pfiesteria piscicida*, which is widely believed to be responsible for major fish kills and disease events in several mid-Atlantic states.

Existing EPA regulations, issued in the 1970s, require CWA discharge permits for the largest AFOs (about 6,000 out of 450,000 total facilities nationwide). However, EPA acknowledges that compliance and enforcement of these permit rules is poor (less than one-third of covered facilities actually have permits) and that the regulations themselves are outdated. In September 1998, EPA and the Department of Agriculture jointly proposed a draft strategy containing a number of steps to improve compliance and strengthen existing regulations, obtain better information through data collection and research on water quality impairments, and coordinate federal and state activities. The agencies solicited public comment on the draft strategy and held 11 "listening sessions" around the country to gather further comments that will form the basis of a final joint strategy later this year.

EPA and USDA issued a final national AFO strategy March 9, 1999. It proposes that all AFOs, regardless of size, should develop and implement comprehensive nutrient management plans by 2009. The plans would include manure handling and storage, application of manure to land, recordkeeping, feed management, land management, and other manure-use options. Officials estimate that 95% of all AFOs will be encouraged to voluntarily implement nutrient management plans, while 15,000 to 20,000 large-scale operations will be required to develop the plans as part of CWA discharge permits. Also, EPA will work with states on a 2-phase approach for permitting animal feedlot operations: requiring coverage of large-scale operations by permits by 2005; and revising existing regulations by 2002. Issues that Congress may address include impacts and costs imposed on the agricultural sector, which for the most part is not regulated by the Clean Water Act or other EPA programs; how the anticipated combination of regulatory and incentive-based measures will achieve the goal of minimizing water pollution from confinement facilities and land application of manure; and whether legislation is needed to define national rules and

policies regarding animal waste. (For additional information, see CRS Report 98-451, *Animal Waste Management and the Environment: Background for Current Issues*.)

TMDLs and State Water Quality Standards

The CWA requires states to identify pollution-impaired water segments and develop "total maximum daily loads" (TMDLs) that set the maximum amount of pollution that a water body can receive without violating water quality standards. If a state fails to do so, EPA is required to develop a priority list for the state and make its own TMDL determination. Most states have lacked the resources to do TMDL analysis, which involve complex assessments of water quality problems, pollution sources, and needed pollution reductions, and EPA has both been reluctant to override states and has also lacked resources to do so. Thus, there has been little implementation of the provision (Section 303(d)), which Congress enacted in 1972.

Since 1995, citizen groups have filed more than 30 lawsuits against EPA and states for failure to fulfill CWA TMDL requirements. The lawsuits have increased public attention to the TMDL program. Of the suits tried or settled to date, 11 have resulted in court orders forcing EPA to oversee the establishment of TMDLs. In July 1998, EPA received recommendations from an advisory group on regulatory and administrative changes to strengthen and clarify the TMDL program (the text is available at [http://www.epa.gov/owow/tmdl/advisory.html]). These recommendations formed the basis of program changes that EPA proposed in August 1999; final rules are expected later in 2000. The proposal sets forth criteria for states, territories and Indian tribes to identify impaired waters and establish all TMDLs within 15 years. It would require more comprehensive assessments of waterways, detailed cleanup plans, and timetables for implementation.

The August 1999 proposal has become highly controversial because of issues such as burdens on states, industries, cities and others to implement a revised TMDL program and potential impacts on some agriculture and forestry sources which are not now subject to CWA regulations. The controversies also have drawn congressional attention. Eight congressional hearings have been held, so far. In October 1999, a House Agriculture subcommittee held an oversight hearing on impacts of the TMDL program and other recent Administration water quality initiatives on agriculture (see [http://commdocs.house.gov/committees/ag/hag10640.000/hag10640_0f.htm]). The Senate Agriculture Committee also held a hearing on TMDL program changes on February 23 [http://www.senate.gov/~agriculture/Hearings/2000_Hearing/wl00223.htm]. A House Transportation and Infrastructure subcommittee held two days of oversight hearings in February, as well [http://www.house.gov/transportation/ctisub5.html], and a subcommittee of the Senate Environment and Public Works Committee held hearings on March 1, March 23, May 6, and May 18 (see [http://www.senate.gov/~epw/stm1_106.htm]). A House Agriculture subcommittee held a field hearing in North Carolina on May 22.

TMDL issues that have drawn recent congressional interest include details of the TMDL requirements and deadlines and adequacy of resources for states to develop TMDLs and related assessments. Several legislative proposals have been introduced, including H.R. 3609, H.R. 3625, S. 2041, and S. 2139, bills which would exempt agriculture and forestry activities from CWA permit requirements. Another bill, S. 2417, would increase authorizations for two CWA grant programs (nonpoint source management and state implementation funds) to assist in TMDL development. This bill also would delay

implementation of new TMDL rules for up to 18 months, pending a study by the National Academy of Sciences. A similar bill, H.R. 4502, also would delay implementation of final TMDL rules, pending an NAS study. (For additional information, see CRS Report 97-831, *Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants* and CRS Report RL30422, *EPA's Total Maximum Daily Load (TMDL Program: Highlights of Proposed Changes and Impacts on Agriculture*.)

Regulatory Protection of Wetlands

Restoring and protecting wetlands is a key features of the Administration's Clean Water Action Plan. One element of the plan is a goal of achieving a net gain of as many as 100,000 acres of wetlands annually by the year 2005. Even before this specific policy goal was declared, how best to protect the nation's remaining wetlands and regulate activities taking place in wetlands has become one of the most contentious environmental policy issues, especially in the context of the CWA, which contains a key wetlands regulatory tool, the permit program in Section 404. Section 404 has evolved through judicial interpretation and regulatory change to become one of the principal federal tools used to protect wetlands, although that term appears only once in Section 404 itself and is not defined there. (For further information, see CRS Issue Brief IB97014, *Wetlands Issues*.)

Unlike the rest of the Act, the permit aspects of Section 404 are administered by the U.S. Army Corps of Engineers, using EPA guidance. Other federal agencies including the Fish and Wildlife Service (FWS) and Natural Resource Conservation Service (NRCS) have significant but more limited roles in the Corps' permitting decisions. Tension has existed for many years between the regulation of activities in wetlands under Section 404 and related laws, on the one hand, and the desire of landowners to develop property that may include wetlands, on the other hand. The conflicts over wetlands regulation have for the most part occurred in administrative proceedings, as Congress has not amended Section 404 since 1977, when it provided exemptions for categories of routine activities, such as normal farming and forestry.

Pressure to revise Section 404 and wetlands regulation in general has grown. In January 1989, the four federal agencies that regulate wetlands activities adopted and issued a federal manual to provide a uniform definition and method for delineating wetland areas. While the manual was intended to provide consistency among the Corps, EPA, FWS, and NRCS, one result was a perception in some regions that areas not previously regulated now are considered wetlands and are subject to permit requirements. Developers and other groups contend that wetlands regulatory programs have been extended to areas with little or no resource value, yet at great cost to the landowner.

In August 1993 the White House announced new federal policies in an effort to reconcile conflicting interests in wetlands issues. The policies embody several principles and a large number of regulatory, administrative, and legislative details. Some were implemented by the Administration quickly (such as designating the NRCS as the lead agency for wetlands determinations on agricultural lands), while others are not yet complete (such as establishing a new administrative appeals process for review of wetlands permit decisions). Nonetheless, many critics of federal wetlands programs contend that these administrative changes do not provide the full extent of reform that they believe is needed.

Among recent proposals for amending Section 404, a number of issues have been raised, including whether all wetlands should be treated the same or not and whether some could be accorded less stringent regulatory protection, whether activities or areas covered by regulation should be modified, and whether the institutional arrangements for implementing Section 404 (at federal and state levels) should be revised. Views on each of these issues vary. Many conservationists and environmentalists contend that any changes would weaken wetlands protection, while many landowners say that changes are needed to make the regulatory program workable again. Some also argue that the CWA should compensate landowners whose property is adversely affected by regulatory "takings" due to Section 404 requirements, since an estimated 74% of all remaining wetlands are on private lands. During the last three Congresses, the continuing focus on Section 404 effectively overshadowed congressional consideration of other portions of the Act and was a key reason why no action on comprehensive reauthorization legislation occurred.

Two developments have pushed wetlands onto the congressional agenda recently. One is a January 1997 Federal District Court decision, upheld by an appeals court in June 1998, that voided the so-called "Tulloch" rule, issued by the Corps in 1993, which expanded the scope of regulation to include certain landclearing and excavation activities (*American Mining Congress v. U.S. Army Corps of Engineers*, No. 93-1754, Jan. 23, 1997 (D.D.C.)). Corps officials view the ruling as a major setback for the regulatory program, as do environmentalists. Industry groups support the decision. For now, the ruling leaves unsettled the scope of the Corps' authority to regulate certain activities. The second development was the Corps' reissuance in December 1996 of nationwide permits, which are a key means by which the Corps minimizes the burden of its regulatory program. In the 1996 revisions, the Corps made changes to strengthen the environmental restrictions on one of the permits that has been most controversial, Nationwide Permit 26 (NWP 26). The changes to this permit pleased wetland protection advocates but were opposed by development and commercial interests who contend that permitting will now be more burdensome. Further, in March 2000, the Corps issued six new permits to entirely replace NWP 26, which will take effect June 7. The replacement permits have been criticized both by developers, who say the new permits would be of little benefit to them, and environmentalists, who say the permits are too expansive and would result in environmental damage to wetlands. (For more information, see CRS Report 97-223, *Nationwide Permits for Wetlands Projects: Permit 26 and Other Issues and Controversies*.)

Wetlands policy issues were addressed in P.L. 106-60, the FY2000 Energy and Water Development appropriations bill. As approved by the House in July 1999, this bill (H.R. 2605) included two provisions. One would have required the Corps to modify a recently-established administrative appeals process for certain Corps regulatory decisions to allow unsuccessful appellants to directly challenge the decisions in court (prior to a final permit decision). The Administration opposed this provision, saying that it would impose excessive burdens on the Corps and the courts, while landowner and developer groups favor it. The final bill included language providing that $5 million in additional funds for the Corps' regulatory program in FY2000 shall be used to establish an administrative process for appeals of jurisdictional determinations by the Corps but deleted the House provision that would have made such decisions directly appealable to federal courts.

The House-passed bill also included a provision to require the Corps to submit a study on the workload impact and compliance costs of replacement permits for NWP 26, but no

later than December 30. Landowner and developer groups supported the House-passed provision, contending that the costs and impacts should be better identified before revised permits are issued, but the Administration opposed it, saying that the study was unnecessary and, even with a December 30 deadline, would increase wetlands loss in the nation by delaying issuance of replacement permits. The final bill modified the House language by directing the Corps to study the workload impacts and costs of compliance of the proposed replacement permits, but dropped language that would have required submission of a report to Congress before publication of final permits.

Management of Nonpoint Source Pollution

Nonpoint source pollution is diffuse runoff of pollutants from farm lands, forests, city streets, construction sites, mines, and other areas. As the more traditional point sources of pollution (from industry and sewage treatment plants) are controlled, nonpoint source pollution represents a larger and more pervasive portion of total water quality problems. EPA estimates that nonpoint sources are responsible for more than 50% of water quality standard violations and that agricultural sources contribute 80% of the violations from nonpoint sources. Pollutants vary widely and include sediments and other conventional (e.g., nutrients) and toxic wastes that degrade water quality. In broad terms, EPA views nonpoint source pollution and similar types of pollution that are intermittent in nature and are related to wet weather events (such as urban stormwater runoff and sewer overflows, discussed below) as the largest remaining threat to water quality nationwide.

The 1987 amendments established the first comprehensive program to address nonpoint source pollution problems in a new Section 319 of the Act. While the Act previously had provided for state and regional planning to address all sources and types of pollution, nonpoint sources have been viewed as so diverse and site-specific that they are not amenable to national standards or controls. Moreover, controlling nonpoint sources typically requires controlling individual actions associated with land use, decisions generally made by state and local governments. Nonpoint source controls are difficult because the diffuse and intermittent nature of the sources makes it hard to quantify individual contributions and because regulatory authority for implementing and enforcing controls relies on local authority. Nevertheless, Section 319 reflects a widespread recognition that failure to manage nonpoint sources will prevent achieving the nation's overall water quality objectives.

Section 319 consists of three elements. First, states were required to assess the extent of nonpoint source-related water quality impairments. Second, they were to develop and implement plans for managing nonpoint sources. Third, Section 319 authorized $400 million in grants to states for plan implementation. After several years of implementing the 319 program, EPA and states began discussions on how to make administrative changes that would result in more effective control of nonpoint source pollution. EPA wanted states to review and revise their programs to achieve specific elements and goals, while states desired more flexibility and relief from oversight. In May 1996, EPA issued revised program guidance, based on negotiations with states, that is intended to streamline the 319 program and to make it more effective and responsive. States that meet criteria in the guidance can be designated as leadership or Tier I states, making them eligible for incentives such as multi-year grants, reduced reporting, and self-assessment by states themselves.

The approach embodied in Section 319 reflects belief that, because the sources of nonpoint pollution are diverse, as are the geographic areas it affects, management solutions are best if they are tailored to local conditions, not dictated through national rules and regulations. Nonetheless, Congress and others have been reviewing the adequacy of EPA and state activity to implement Section 319 and the possible need for program modification. Pressure to address nonpoint pollution issues more expressly in the Act has grown for several reasons. First, increased public scrutiny of impaired waters and the TMDL provisions of the Act (discussed above) focuses attention on what controls states might necessarily impose on both nonpoint and point sources to achieve standards in waters that remain polluted. Second, the Administration's pending strategy to address animal waste problems (also discussed above) envisions using incentive-based and voluntary measures by the agricultural sector to achieve greater control of agricultural runoff that adversely affects water quality. Greater scrutiny of nonpoint pollution, including agricultural contributions, may occur as this strategy is developed and implemented. In a CWA reauthorization initiative, Congress may address agricultural pollution problems specifically. In addressing nonpoint pollution issues, a key question is whether and how to establish programs in the CWA with minimum standards to continue progress towards water quality goals, while providing flexibility and incentives for sources to manage polluted runoff.

Funding Municipal Wastewater Treatment

The Act's program of financial aid for municipal wastewater treatment plant construction is a central feature of the law. Since 1972 Congress has provided $69 billion to assist cities in achieving requirements for secondary treatment of municipal sewage (equivalent to 85% reduction of wastes), or higher where required by local water quality conditions. State and local governments have spent more than $25 billion of their own funds, as well. Nevertheless, funding needs remain very high: an additional $139.5 billion nationwide over the next 20 years for all types of projects eligible for funding under the Act, according to the most recent estimate by EPA and the states completed in 1996 (the report is available from EPA via [http://www.epa.gov/owm/toc.htm]). EPA is currently completing a new study, called the Gap Analysis, to assess the difference between current federal funding for CWA programs and total funding needs. Drafts of this analysis reportedly indicate that, over the next two decades, the United States needs to spend $300 billion to replace existing water infrastructure systems and to build new ones. According to the new data, by the year 2020, the United States will need to spend $21 billion per year to meet capital expenditures for wastewater treatment, compared with about $9.4 billion being spent annually now. At issue has been how to assist states and cities, especially in view of such high projected funding needs.

The 1987 amendments initiated a program of grants to capitalize State Water Pollution Control Revolving Funds (SRFs), or loan programs. This new Title VI program replaced the previous categorical grants program, under which the federal share was 55% of project costs and localities were not obligated to repay federal funds that they received. Under the revolving fund concept, monies used for construction will be repaid by loan recipients to the states, to be recycled for future construction in other communities, thus providing an ongoing source of financing. States are required to deposit a 20% match of the federal amount. The intent of the 1987 amendments was that federal contributions to SRFs would assist in making a transition to full state and local financing by FY1995. The essential tradeoff embodied in these provisions was that states would have greater flexibility to set priorities and administer

funding in exchange for an end to federal aid after FY1994. (For additional information, see CRS Report 98-323, *Wastewater Treatment: Overview and Background.*)

All states have established the legal and procedural mechanisms to administer the new loan programs and are now eligible to receive SRF capitalization funds under Title VI. Some with prior experience using similar financing programs moved quickly, while others had difficulty in making a transition from the previous grants program to one that requires greater financial management expertise for all concerned. Moreover, many states have complained that the SRF program is unduly complicated by federal rules — some contained in the statute, others in EPA guidance — even though states were intended to have greater flexibility. Congressional oversight since 1987 has examined the progress towards reducing the backlog of wastewater treatment facilities needed to achieve the Act's water quality objectives, but newer estimates of future funding needs, discussed above, are drawing increased attention from Members of Congress and others.

Small communities and states with large rural populations have experienced the largest share of problems with the SRF program. Many small towns did not participate in the previous grants program and consequently are likely to require major projects to achieve compliance with the law. Yet these communities often lack an industrial tax base and thus face the prospect of very high per capita user fees, if their citizens are required to repay the full capital cost of sewage treatment projects. (For additional information, see CRS Report 98-64, *Rural Water Supply and Sewer Systems: Background Information.*)

The General Accounting Office has identified several factors affecting states' ability to lend their SRF funds, including (1) lack of experience in some states in managing such programs; (2) financial factors, such as the inability of small communities to afford SRF loans, and the ability of larger cities to borrow at lower rates directly from the bond market; and (3) various state-specific factors. Some Members of Congress have expressed concern that states have been unable to make loans fast enough to keep pace with congressional appropriations, leading to suggestions that the SRF program should be restricted. States are strong supporters of the SRF program and contend that inexperience plus other factors, such as resistance by some communities to the shift from grants to a loan program, contributed to initial delays in some states.

While initial intent was to phase out federal support for this program, Congress has continued to appropriate grants to the states, providing an average of $1.6 billion annually in recent years. Recently, the SRF provisions have been less controversial than others in the Act, such as wetlands reform, because of apparent general agreement on the need to extend funding assistance (as reflected in continued appropriations). The CWA's SRF provisions also were a model for similar provisions added to the Safe Drinking Water Act in 1996 (P.L. 104-182). However, because remaining clean water funding needs are still so large, at issue is whether and how to extend SRF assistance to address those needs, how to allocate SRF funds among the states, and how to modify the program to aid priority projects. Of particular concern is assisting small and economically disadvantaged communities that have had the most difficulty in adjusting from the Act's previous categorical grants program to loans. There also is interest in availability and adequacy of SRF funding for projects dealing with combined and separate sewer overflow problems (discussed below). Several SRF reauthorization bills have been introduced (H.R. 2720, S. 188, S. 1699) and hearings have been held, but no further action on these proposals has occurred.

Other Issues

Other issues could receive attention as part of the water quality agenda.

Stormwater. Stormwater discharge systems are the pipes and sewer lines that carry rainwater or snow melt (but not sanitary wastes) away from urban areas and commercial and industrial facilities. Although stormwater is discharged from pipes, it is intermittent and weather-dependent. Thus, it has characteristics of both point and nonpoint pollution.

Although stormwater can transport significant amounts of pollutants, it had been largely unregulated until the 1987 amendments directed EPA to implement a specific permit program for stormwater discharges from industrial sources and municipalities. Delays in issuing regulations, coupled with high compliance costs (especially for some cities), have been frustrating and controversial. Industrial facilities and cities with populations of 100,000 or more are in the process of obtaining and complying with permits under EPA's current regulations. Smaller cities were to comply with rules that EPA was to have issued by October 1993. However, EPA missed that deadline and subsequently the agency worked with an advisory committee of stakeholders to develop rules for regulating smaller stormwater dischargers. Draft rules were proposed in December 1997, and final rules were issued in October 1999. (For further information, see CRS Report 97-290, *Stormwater Permits: Status of EPA's Regulatory Program.*) Questions of how small sources will be regulated and the general complexity of the permit program have brought stormwater back as a legislative issue. Modifying current law to provide regulatory relief, particularly to municipalities, was a legislative issue in the 104th Congress. In the 106th Congress, bills dealing with local government stormwater programs have been introduced (H.R. 3294, S. 1706). These bills would limit and clarify local governments' liability for certain types of stormwater discharges.

Combined and separate sewer overflows. Nearly 1,200 municipalities have combined sewers where domestic sanitary sewage, industrial wastes, infiltration from groundwater, and stormwater runoff are collected and treated together. These systems serve approximately 40 million persons, mainly in older urban and coastal cities. Normally (under dry-weather conditions), the combined wastes are conveyed to a municipal sewage treatment plant.

Properly designed, sized, and maintained combined sewers can be an acceptable part of a city's water pollution control infrastructure. However, combined sewer overflow (CSO) occurs when the capacity of the collection and treatment system is exceeded due to high volumes of rainwater or snowmelt, and the excess volume is diverted and discharged directly into receiving waters, bypassing the sewage treatment plants. Often the excess flow that contains raw sewage, industrial wastes, and stormwater is discharged untreated. Many combined sewer systems are found in coastal areas where recreational areas, fish habitat and shellfish beds may be contaminated by the discharges.

For a long time, CSOs were not considered a high regulatory or permitting priority for EPA or states. There are no express provisions in the Act dealing with CSOs, except to the extent that they are subject to permit requirements and deadlines as are other point sources. Congress has recognized the impacts of CSO discharges, however, and legislative options to address the CSO issue directly have been discussed.

In both the 103rd and 104th Congresses, consensus began to emerge on modifying the CWA to endorse EPA's current permitting strategy which was developed in 1994 after negotiations with key stakeholder groups. As a first priority, EPA's strategy calls for eliminating overflows from combined sewers that occur even in the absence of rainfall (due to overcapacity of the sewers) and then calls for states and cities to address CSOs based on impacts on water quality and human health. Cities also were to implement nine minimum controls by Jan. 1, 1997 (e.g., proper operation and maintenance programs for sewer systems and pollution prevention programs). The EPA strategy does not contain a deadline for issuance of permits or for controlling CSOs. Deadlines will be contained in plans developed by permitting authorities. Controls are available and generally are based on combinations of management techniques (such as temporary retention of excess flow during storm events) and structural measures (ranging from screens that capture solids to construction of separate sewer systems). EPA officials stated in May 1998 that only about one-half of the cities with combined sewers have implemented the minimum measures called for in the 1994 strategy. EPA is now working with states to remind cities of their obligations to address CSO problems. However, a formal enforcement strategy is not contemplated.

A more recent issue of concern to some cities is the problem of overflows from municipal separate sanitary sewers (SSOs) that are not CSOs and do not transport stormwater. Discharges of untreated sewage from these sewers occur from manholes, broken pipes and deteriorated infrastructure, and undersized pipes, and can occur in wet or dry weather. EPA estimates that there are approximately 18,000 municipalities with separate sanitary sewers, all of which can, under certain circumstances, experience overflows. No explicit EPA or statutory control policy currently exists. In 1995, EPA convened a stakeholders' group to discuss how to address those overflows that pose the highest environmental and public health risk first. Agency officials are working on a document that will detail regulatory priorities and circumstances appropriate for enforcement action.

Funding CSO and SSO projects is a major concern of states and cities. On June 22, 1999, a House Transportation and Infrastructure subcommittee held a hearing on CSO, SSO, and related wet weather issues. The subcommittee heard testimony on the need for additional federal funding to help municipalities address wet weather-related problems. A number of witnesses and subcommittee members criticized the Administration's FY2000 budget for clean water infrastructure, which requested 40% less than was appropriated for FY1999 (see CRS Issue Brief IB89102, *Water Quality: Implementing the Clean Water Act*). Witnesses addressed two legislative proposals (H.R. 828 and a bill introduced after the hearing, H.R. 3570, advocated by a coalition of municipal and technical organizations) which would authorize CWA grant funding for wet weather sewerage projects and allow regulatory flexibility for such projects. Witnesses from municipalities and several other interest groups endorsed these proposals, but an EPA witness opposed them, objecting to creation of new grant programs and to provisions which EPA believes would delay correcting CSO and SSO problems. Testimony is available at [http://www.house.gov/transportation/ctisub5.html]. Senate legislation similar to H.R. 828 has been introduced (S. 914) and was discussed at an October 1999 Senate Environment subcommittee hearing.

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