Order Code RS20770
January 5, 2001

Clean Water Issues in the 107th Congress: An Overview

Claudia Copeland
Specialist in Resources and Environmental Policy
Resources, Science, and Industry Division

Summary

Key water quality issues that may face the 107th Congress include: actions to implement existing provisions of the Clean Water Act, whether additional steps are necessary to achieve overall goals of the Act, and the appropriate federal role in guiding and paying for clean water activities. This Act is the principal law that deals with polluting activity in the nation's lakes, rivers, and coastal waters and authorizes funds to aid construction of municipal wastewater treatment plants. Legislative prospects for comprehensively amending it have been stalled over whether and exactly how to change the law.

If clean water issues receive attention in the 107th Congress, attention could focus on water infrastructure funding, implementation of current programs for developing total maximum daily loads (TMDLs) to restore pollution-impaired waters, and impacts of agricultural activities on water quality. The Act's wetlands permit program, a contentious issue in the past, also remains on the legislative agenda for some Members. Consideration of specific issues will depend in part on the CWA policy agenda of the new Bush Administration and on priorities of the key committees that have major jurisdiction over the Act. This report will be updated as developments warrant.

Background

The Clean Water Act (CWA) is the principal law that governs pollution in the nation's lakes, rivers, and coastal waters. Originally enacted in 1948 and significantly revised in 1972 (P.L. 92-500), the Act was last comprehensively amended in 1987 (P.L. 100-4). These amendments are now being implemented by states, cities, regulated industries, and the federal government. Since 1972, application of pollution control technology by industries and cities has led to significant water quality improvements: about 60% of waters surveyed by states are clean enough to support basic uses such as fishing and swimming, while about 40% of surface waters fail to meet standards. Forty-seven states now have some form of fish-consumption advisory in effect (including 100% of Great Lakes waters), and one-third of shellfishing beds are closed or restricted, due to water pollution problems.

Authorizations for most current program funding expired Sept. 30, 1990, but Congress has continued to appropriate funds to carry out the Act. The Act has been viewed as one of the most successful environmental laws in terms of achieving the statutory goals, which have been widely supported by interest groups and the public, but lately some have questioned whether actions to achieve further benefits are worth the costs.

Such criticisms have come especially from industry, which has been the long-standing focus of the Act's regulatory programs and which often opposes imposition of additional stringent and costly requirements. Criticism also has come from developers and property rights groups who contend that federal regulations (particularly the Act's wetlands permit program) are a costly intrusion on private land-use decisions. States and cities have traditionally supported water quality programs and federal funding to assist them in carrying out the law, but recently many have opposed CWA measures that they fear might impose new unfunded mandates. Many environmental groups believe that further fine-tuning to strengthen the Act is needed to maintain progress achieved to date and to address remaining water quality problems.

The Act consists of two major parts: regulatory provisions that impose stringent requirements on industries and cities to abate pollution; and provisions that authorize federal financial assistance for municipal wastewater treatment plant construction. Both major parts are supported by research activities, plus permit and enforcement provisions. In the past, congressional efforts to amend the CWA have dealt with all aspects of the law, with the objective of strengthening water quality programs.

Recent activity. Following enactment of amendments in 1987, no major CWA legislative activity occurred until the 104th Congress, when the CWA was one of the first environmental laws to receive attention. The House approved a comprehensive reauthorization bill, H.R. 961, in May 1995. It would have amended many of the regulatory and standards provisions of the law, required the Environmental Protection Agency (EPA) to use extensive new risk assessment and cost-benefit analysis procedures, and increased flexibility with regulatory relief from current clean water programs. However, the proposals in H.R. 961 were very controversial, and the Senate did not take up that bill or other CWA legislation during the 104th Congress.

In the 105th Congress, congressional committees did not initiate legislative activity on clean water issues. Committee leaders, especially in the House, said they would do so only if presented with consensus proposals that did not raise controversies like those associated previously with H.R. 961 ("House Staff Initiate Effort to Find Consensus on Clean Water Issues," *Inside EPA*, May 30, 1997: 9). Likewise, in the 106th Congress, committees did not pursue comprehensive reauthorization legislation, but action was taken on bills dealing with specific water quality issues. Congress passed a bill to strengthen protection of coastal recreation waters through upgraded water quality standards and coastal waters monitoring programs (P.L. 106-284). Congress also passed a bill reauthorizing several existing CWA programs (i.e., Chesapeake Bay, clean lakes, and the National Estuary Program, in P.L. 106-457). Further, Congress passed a bill to authorize CWA grant funding for wet weather sewerage projects (included as a provision of the FY2001 Consolidated Appropriations bill, P.L. 106-554).

During this time, the Clinton Administration did not offer proposals to reauthorize the CWA. Instead, EPA began a number of agency-wide and program-specific reforms focusing on flexibility and "common sense" approaches to regulation, many of which affect implementation of water quality programs. In February 1998, the Administration released a multi-agency Clean Water Action Plan intended to build on the environmental successes of the Act and address many of the nation's remaining water quality challenges. Its purpose is to coordinate federal efforts to achieve three goals: enhanced protection against public health threats posed by water pollution, more effective control of polluted runoff, and promotion of water quality protection on a watershed basis. Components of the plan, more than 100 actions, consist mainly of existing programs that were proposed to receive increased funding or be accelerated with performance-specific deadlines.

President Clinton's FY1999 budget identified the Clean Water Action Plan as a high priority for environmental programs in the budget. It requested a total of $2.5 billion (33% over 1998 base funding levels) for activities under the Plan. However, in the appropriations process, where the Plan has primarily been considered, congressional support was mixed. FY1999 funding bills provided $2.0 billion, including less than 10% of the increased funding that had been sought. Similarly, for FY2000, the Administration requested $2.45 billion for the Plan. Appropriations bills provided $2.17 billion–$128 million more than in FY1999, but $322 million less than was requested. While EPA has received close to full funding for its activities, other agencies and departments involved in the Plan received no or only small increases to support their activities. For FY2001, the President's budget requested $2.76 billion for the Plan, a 27% increase over FY2000. Final FY2001 appropriations have not been calculated. (For additional information, see CRS Report 98-150, *Clean Water Action Plan: Background and Early Implementation*.)

Issues in the 107th Congress

Key water quality issues that may face the 107th Congress include: actions to implement existing provisions of the Clean Water Act, whether additional steps are necessary to achieve overall goals of the Act, and the appropriate federal role in guiding and paying for clean water activities. Legislative prospects for comprehensively amending the Act have for some time been at an impasse over whether and exactly how to change the law. Many issues that might be addressed 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.

Some observers speculate that, rather than taking up comprehensive CWA reauthorization legislation as it has traditionally done, Congress might consider only narrow bills to extend or modify selected CWA programs, as was the case in the 106th Congress. If broader clean water issues receive attention in the 107th Congress, topics that might be of interest include water infrastructure funding, implementation of current programs for developing total maximum daily loads (TMDLs) to restore pollution-impaired waters, and impacts of agricultural activities on water quality. The Act's wetlands permit program, a pivotal and contentious issue in the recent past, also remains on the legislative agenda for some Members.

Consideration of specific issues will depend in part on the policy agenda of the Bush Administration. The new Administration's views on clean water topics are not well

known, as these issues were not prominent in the 2000 Presidential campaign. Specific legislative issues also will be guided by priorities of the key committees that have major jurisdiction over the Act (Senate Environment and Public Works, House Transportation and Infrastructure). Because of provisions of House rules adopted in 1995 that limit committee leaders to three consecutive terms, new full committee and subcommittee chairmen will direct the activities of the Transportation and Infrastructure Committee.

Water Infrastructure Funding. The 1987 CWA amendments authorized $18 billion to aid construction of public wastewater treatment facilities and established a new program of federal grants to capitalize State Water Pollution Control Revolving Funds (SRFs), or state loan programs for water infrastructure. Authorizations for SRF grants expired at the end of FY1994. Since 1972 Congress has provided $73 billion to assist wastewater treatment construction, but 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. Research by others estimates that needs are much higher, perhaps as much as $1 trillion over the next 20 years. Because remaining funding needs are large, at issue is whether and how to extend assistance to meet needs, how to allocate funds among states, and how to prioritize projects and funding. Of particular concern is assisting small and poor communities that have had the most difficulty in adjusting from the Act's previous categorical grants program to SRF loans. (For additional information, see CRS Report 98-323, *Wastewater Treatment: Overview and Background*.)

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 waterbody can receive without violating water quality standards. If a state fails to do so, EPA is required to develop the list of impaired waters and make its own TMDL determination. Most states have lacked the resources to do TMDL analyses, which involve complex assessments of water quality problems, pollution sources, and needed pollution reductions, and EPA has been both reluctant to override states and has also lacked resources to do so. Thus, there has been little implementation of the provision, which Congress enacted in 1972.

Since the late 1980s, citizen groups have filed more than 40 lawsuits in 38 states against EPA and states for failure to fulfill the TMDL requirements of the Act. Of the suits tried or settled to date, 19 have resulted in court orders requiring expeditious development of TMDLs. In 1999, EPA proposed regulatory changes to strengthen the TMDL program. EPA's proposal was widely criticized for its costs and possible new pollution controls that might be imposed on industries, cities, farmers, and others. On July 11, 2000, EPA issued a final rule to revise the program, stimulating more controversy. The rule, which is scheduled to take effect Oct. 31, 2001, builds on the current TMDL regulatory program and adds details, specific requirements, and deadlines that require states to implement plans to clean up polluted waters.

Congressional interest has been high: committees held 13 oversight hearings during the 106th Congress, and bills to modify or delay the proposal were introduced. The FY2001 appropriation bill with funds for EPA (P.L. 106-377) includes report language mandating studies by the National Academy of Sciences on the scientific basis of the July final rule and by EPA on the potential costs to states and businesses of implementing the

revised TMDL program. Congressional oversight is likely to continue in the 107th Congress; legislation is possible. (For additional information, see CRS Report 97-831, *Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants*.)

Agricultural Impacts on Water Quality. A key element of the Clinton Administration's Clean Water Action Plan was to minimize public health and environmental impacts of runoff from animal feeding operations (AFOs), which are agricultural facilities that confine 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. However, if not managed properly, it can pose risks to water quality and public health, contributing pollutants such as nutrients, pathogens, sediment, and ammonia to the environment.

Existing EPA regulations, issued in the 1970s, require CWA discharge permits for the largest AFOs (about 6,600 out of 450,000 total facilities nationwide). However, EPA acknowledges that compliance and enforcement of these permit rules are poor, and the regulations themselves are outdated. In March 1999, EPA and the Department of Agriculture issued a national strategy intended to improve compliance and strengthen existing regulations, obtain better information through data collection and research on water quality impairments due to AFOs, and together with other federal agencies and states, coordinate activities related to AFOs. The strategy consists of multiple elements and is based on a national performance expectation that all AFO owners and operators — regardless of the size of their operations — will develop and implement site-specific Comprehensive Nutrient Management Plans (CNMPs) by 2009. With the exception of large AFO operations that already are subject to CWA requirements, the agencies expect that the vast majority of CNMPs will be developed and implemented voluntarily.

As part of the national AFO strategy, EPA currently is working with states on a 2-phase approach for issuing permits for animal feedlot operations: requiring coverage of large-scale operations by permits by 2005, and revising existing regulations by 2002. In December 2000, EPA proposed rules to increase the number of AFOs required to obtain CWA permits and to restrict land application of animal wastes. Issues that Congress has addressed and is likely to continue reviewing include impacts and costs imposed on the agricultural sector; how the proposed combination of regulatory and incentive-based measures will achieve control of agricultural runoff that adversely affects water quality; and whether legislation is needed to define national rules and policies regarding animal waste management. (For additional information, see CRS Report RL30437, *Water Quality Initiatives and Agriculture*.)

While the AFO strategy focuses mainly on large facilities which are subject to CWA permit requirements, other activities also are of interest. State and EPA survey data report that uncontrolled polluted runoff from agriculture and city streets and storm sewers is the leading cause of water quality impairment in the United States. EPA's most recent National Water Quality Inventory Report finds that these nonpoint sources of water pollution, along with runoff from forestry and construction sites, land disposal activities, and deposition of air pollution contaminants, contribute more than 50% of remaining water quality problems in rivers, lakes, and coastal waters. Agriculture is believed to be responsible for the largest portion of today's water quality impairments due to polluted runoff–70% of impaired rivers and streams and 49% of impaired lakes, according to EPA.

Scrutiny of nonpoint pollution problems, including from agriculture, may occur as policymakers assess additional steps to continue progress towards water quality goals.

Regulatory Protection of Wetlands. Restoring and protecting wetlands was a key feature of the Clinton Administration's Clean Water Action Plan. One of its goals has been to achieve a net gain of 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 been one of the most contentious environmental policy issues, especially in the context of the CWA which contains a key regulatory tool, the wetlands permit program in Section 404. It requires landowners or developers to obtain U.S. Army Corps of Engineers permits to carry out activities involving disposal of dredged or fill material into navigable waters of the United States, including wetlands. EPA provides environmental guidance on permitting and can veto a permit, based on environmental impacts. Controversy has grown over the extent of federal jurisdiction and impacts on private property, burdens and delay of permit procedures, and roles of federal agencies and states in issuing permits.

Recent legislative proposals to modify Section 404 have raised a number of issues, including whether all wetlands should be treated the same or whether some could be accorded less stringent regulatory protection; whether activities or areas covered by federal regulation should be modified; and whether federal and state roles in implementing Section 404 should be revised. Views on each of these issues vary. Many conservationists contend that statutory changes that have been proposed would weaken wetlands protection and that more modest administrative reforms would effectively improve the current program. Many landowners say that changes are needed to lessen burdens of the regulatory program. 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.

Legislative proposals for comprehensive reform of wetlands regulatory programs have been controversial, leading some to focus instead on narrower revisions. Specific issues that could draw congressional attention include the Corps' implementation of the nationwide permit program, which is intended to minimize the burden of regulation but has been widely criticized, and a federal court ruling that overturned a regulation (called the Tulloch rule) issued by the Corps and EPA which had extended the scope of wetlands regulation to certain landclearing and excavation activities that previously had not been regulated. Interest has grown in creating "mitigation banks," in which wetlands are created, restored, or enhanced in advance to serve as "credits" that may be used or acquired by permit applicants when they are required to mitigate impacts of their activities. Numerous public and private banks have been established, and federal policy and guidance support the concept. However, controversy exists over whether it is possible to restore or create wetlands with ecological and other functions equivalent to or better than those of natural wetlands that have been lost over time and, thus, whether reliance on mitigation banks is appropriate. Legislation to establish statutory requirements for mitigation banks has been proposed and could receive attention in the 107th Congress. (For additional information, see CRS Issue Brief IB97014, *Wetlands Issues*.)