Order Code IB10069

Clean Water Act Issues in the 107th Congress

Updated January 10, 2001

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CONTENTS

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SUMMARY

Key water quality issues that may face the 107th Congress include: actions to implement existing provisions of the Clean Water Act (CWA), 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 stalled over whether and exactly how to change the law. If clean water issues receive attention in the 107th Congress, 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.

In the 106th Congress, no comprehensive activity on reauthorizing the CWA occurred, although a number of narrower bills related to clean water were enacted. One is intended to strengthen protection of coastal waters; one reauthorized several existing CWA programs; and one authorized grants for wet weather sewerage projects. (For additional information, see CRS Issue Brief IB10001, *Clean Water Act Issues in the 106th Congress*).

CWA amendments in 1987, the last comprehensive act, 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 an important issue for Congress.

Congress is likely to review implementation of 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. Rules issued by EPA in July 2000 to strengthen the TMDL program have been very controversial. Requirements, deadlines, and costs have drawn congressional attention.

Also likely to be of interest are actions by EPA and the Department of Agriculture during the Clinton Administration to better manage waste discharges from animal feeding operations, which can pollute waterways. Congress has been examining impacts on agricultural producers and how the programs will be funded.

Programs that regulate activities in wetlands, such as Section 404 of the CWA, have been criticized by landowners for intruding on private land-use decisions and imposing excessive economic burdens. Environmentalists 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.

Monitoring data have identified wet weather discharges to rivers and lakes (including urban stormwater and sewer overflows) as a serious threat to water quality. Clean water programs are now focusing on solving these wet weather pollution problems. At issue is whether and how to specify wet weather programs in the Act and how to pay for related pollution control projects.

MOST RECENT DEVELOPMENTS

The 106th Congress passed several bills dealing with specific water quality issues that amend the Clean Water Act (CWA). One is 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 cleanup 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 P.L. 106-554, the FY2001 Consolidated Appropriations bill). In addition to the enacted measures, a number of bills dealing with individual water quality issues passed the House or the Senate, and several other bills were reported by committees. Most of the congressional focus on water quality issues during the 106th Congress dealt with oversight of implementation of current law and Clinton Administration water quality initiatives, especially regulations implementing the law's Total Maximum Daily Load (TMDL) program.

BACKGROUND AND ANALYSIS

Introduction

The principal law that deals with polluting activity 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.

The objective declared in the 1972 Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 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 been fully 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.

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, termed nonpoint source pollution (rainfall runoff, for example) have only recently begun, following the traditional focus on point source pollution (discharges from industrial and municipal wastewater treatment plants). 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 funding of wastewater treatment assistance expired in FY1994. None of these programs has lapsed, however, as Congress has continued to appropriate funds to implement 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.

Recent Legislative and Administration 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 congressional 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. The proposals in H.R. 961 were among the early efforts of the Republican majority in the 104th Congress to make changes in environmental laws and regulations and engendered extensive controversy. 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, and no comprehensive reauthorization legislation was introduced. 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 and Senate subcommittee hearings were held on water infrastructure and wetlands issues, but no further congressional activity occurred.

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 cleanup, clean lakes, and the National Estuary Program, in P.L. 106-457). 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). Further, the House and Senate also included limitations in appropriations laws intended to restrict implementation of the Act's Total Maximum Daily Load program (see discussion below, **TMDLs and State Water Quality Standards**). (For additional information, see CRS Issue Brief IB10001, *Clean Water Act Issues in the 106th Congress*.)

During its tenure, the Clinton Administration did not offer proposals to reauthorize the CWA. EPA Administrator Carol Browner was quoted in press reports as saying that the agency did not plan 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 Clinton Administration's environmental protection principles. 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 Clinton 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 was 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 110 actions, consist mainly of existing programs that were proposed to receive increased funding or be accelerated with performance-specific deadlines. Besides EPA, other involved agencies are the Departments of Agriculture, Commerce, Interior, and the U.S. Army Corps of Engineers.

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 involve 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 reflected 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.

Complementing the Plan, President Clinton's FY1999 budget submission identified it as a high priority. The Administration 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 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 acts 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. As of January 2001, final FY2001 appropriations for all programs in the Plan have not yet been calculated by the Office of Management and Budget. (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 stalled 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 for implementing the law.

Some observers speculate that, rather than taking up comprehensive 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, 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 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. Leadership changes on the Senate Environment and Public Works Committee also are possible.

Water Infrastructure Funding

The Act's program of financial aid for municipal wastewater treatment plant construction is a central feature of the law. At issue today is how the federal government will assist states and cities, especially in view of the high projected funding needs that exist. Since 1972 Congress has provided $73 billion to assist cities in constructing projects to achieve the Act's requirements for secondary treatment of municipal sewage (equivalent to 85% reduction of wastes), or higher where required by local water quality conditions. The CWA does not authorize funds for operation or maintenance of completed projects. State and local governments have spent more than $25 billion of their own funds for construction, 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. EPA is currently compiling 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.

The 1987 amendments initiated a program of grants to capitalize State Water Pollution Control Revolving Funds (SRFs), or loan programs. This program in Title VI of the Act 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 borrowing communities 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 Congress had intended that states were 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.

While initial intent was to phase out federal support for this program, Congress has continued to appropriate SRF capitalization grants to the states, providing an average of $1.35 billion annually in recent years. 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 prioritize projects and funding. 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 SRF loans. There also is interest in availability and adequacy of SRF funding for projects dealing with combined and separate sewer overflow problems (discussed below). In the 106th Congress, several SRF reauthorization bills were introduced and hearings were held, but no further action on these proposals occurred.

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 involves 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. At issue today is controversies over implementation of the existing TMDL program and regulatory revisions that EPA issued in July 2000 to strengthen that program.

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 lawsuits tried or settled to date, 19 have resulted in court orders requiring expeditious development of TMDLs under timeframes ranging from 8-1/2 to 13 years. The lawsuits have increased public attention to the TMDL program and led EPA to seek ways to re-focus EPA's and states' resources on TMDL activities, rather than litigation. In August 1999, EPA proposed regulatory changes to strengthen the existing program. The proposal set forth criteria for states, territories and Indian tribes to identify impaired waters and establish all TMDLs within 15 years. It would require more comprehensive waterway assessments, cleanup plans, and timetables for implementation.

The 1999 proposal became highly controversial because of issues such as potential 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 drew congressional attention, and 13 congressional hearings were held by the House and Senate Agriculture committees, the House Transportation and Infrastructure Committee, and Senate Environment and Public Works Committee during the 106th Congress. Committees and many Members expressed concern about details of the TMDL requirements and deadlines and adequacy of resources for states to develop TMDLs and related assessments. Several legislative proposals to modify the Clean Water Act by exempting agriculture and forestry from the TMDL program or to delay the rule were introduced. EPA attempted to respond to the widespread criticism and signal flexibility on some of the most contentious points. In July 2000, EPA issued a final revised rule, but controversies persist. The final rule 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. It retains the basic elements of the 1999 proposal for more comprehensive identification of impaired waters, schedules and minimum elements for

TMDLs, and new public participation requirements. (For additional information, see CRS Report 97-831, *Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants*.)

TMDL issues were addressed in FY2001 appropriations bills. Prior to the July 4th, 2000, congressional recess, the House and Senate approved a FY2001 Military Construction and emergency supplemental appropriations bill (H.R. 4425, H.Rept. 106-710) that includes a provision to prevent EPA from spending any funds in FY2000 or FY 2001 to finalize or implement new TMDL rules. President Clinton signed the bill on July 13, in spite of the TMDL provision, which the Administration opposed (P.L. 106-246). However, EPA Administrator Browner signed the new TMDL rules two days earlier, on July 11, but delayed the effective date until October 2001 when the limitation in P.L. 106-246 is due to expire. In the interim, current program requirements under existing regulations and court-sanctioned TMDL schedules remain in place. In addition, the FY2001 appropriation act providing funds for EPA, P.L. 106-377, signed on October 27, included report language mandating studies by the National Academy of Sciences and EPA on the scientific basis of the TMDL rule and on the potential costs to states and businesses of implementing the revised TMDL program. Congressional oversight based on these reports, due in mid-2001, is anticipated.

Other legislative activity occurred after EPA's promulgation of the final rule. EPA's actions to sign the rule before the appropriations limitations took effect led to more criticism, and joint resolutions to disapprove the new rule (pursuant to the Congressional Review Act) were introduced. Under procedures in the Review Act, similar joint resolutions could be reintroduced in the 107th Congress. If such a resolution passed both Houses of Congress and was signed by the President, the rejected rule would be deemed not to have had any effect at any time, and current TMDL regulations would remain in effect.

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 livestock feeding activities, thus concentrating animal populations and waste. 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 risks to water quality and public health, contributing pollutants such as nutrients, sediment, pathogens, and ammonia to the environment. At issue today are controversies over programs and rules issued by the Clinton Administration seeking to better control adverse environmental impacts of agricultural activities.

Existing EPA rules, 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 have been poor (less than one-third of covered facilities actually have permits) and that the regulations themselves are outdated. In March 1999, EPA and USDA issued a national AFO 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. It proposed 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 implement voluntary 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 issuing permits to 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, which for the most part is not regulated by the Clean Water Act or other EPA programs; how the proposed combination of regulatory and incentive-based measures will achieve the goal of minimizing water pollution from confinement facilities and land application of manure; the adequacy of agriculture's relevant programs to support implementation; and whether legislation is needed to define national rules and policies regarding animal waste. (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 also was a key feature of the Clinton Administration's Clean Water Action Plan. One element of the plan was 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 had 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. It requires landowners or developers to obtain permits for disposal of dredged or fill material that is generated by construction or similar activity into navigable waters of the United States, including wetlands. 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. At the same time, its implementation has come to be seen as intrusive and burdensome to those whose activities it regulates. At issue today is addressing criticism of the Section 404 regulatory program while achieving desired goals of wetlands protection. (For additional 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 environmental guidance. Other federal agencies including the Fish and Wildlife Service (FWS) and Natural Resource Conservation Service (NRCS) have 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. 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 presented 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 these issues vary. Many wetland protection advocates contend that statutory changes that have been proposed would weaken current protection efforts 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" when application of Section 404 limits desired property use, 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 a 1998 federal court ruling that overturned a regulation (called the Tulloch rule) issued by the Corps and EPA in 1993 that had expanded the scope of wetlands regulation to certain landclearing and excavation activities that previously had not been regulated. Another issue of interest is the Corps' implementation of the nationwide permit program, which is intended to minimize the burden of regulation. In the most recent comprehensive revision of these permits (in 1996), the Corps made changes to strengthen the environmental restrictions on one of the permits that has been most controversial, Nationwide Permit 26 (NWP 26), which authorized activities in isolated areas. The changes to this permit pleased wetland protection advocates who believed that NWP 26 allowed for environmental harm of fragile wetlands but were opposed by development and commercial interests who contended that permitting would be more burdensome. Further, in March 2000, the Corps issued six new permits to entirely replace NWP 26 and resolve controversies about it; these permits took effect June 7, 2000. 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. Industry groups have challenged the replacement permits in court.

An even more recent issue of interest is impacts of a January 2001 Supreme Court decision that ruled that the Corps regulatory authority does not extend to isolated wetlands, areas which have been among the most controversial in terms of Section 404 jurisdiction

(Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178, decided January 9, 2001).

While Congress has not been able to agree on how to address regulatory questions, it has supported programs to restore wetlands and to provide incentives for setting them aside. For example, 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 was proposed in the 106th Congress and could receive attention in the 107th Congress.

Other Issues: Wet Weather Pollution Problems

In recent years, as projects for treating traditional municipal pollution have been identified and successfully addressed, water quality officials have turned their attention to stormwater discharges and overflows from municipal sewer systems. These water quality problems, which are most often associated with wet weather events during which rain or snowmelt overwhelm the capacity of sewerage collection systems, and untreated wastes are discharged directly into waterways, have received little attention in the past and have been largely uncontrolled. Wet weather discharges, unlike discharges from industrial facilities, are intermittent and variable and present regulatory challenges for policymakers. 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. The 107th Congress may examine policy and funding questions raised by efforts to address wet weather pollution problems.

Stormwater. Stormwater discharge systems are the pipes and sewer lines that carry rainwater or snowmelt (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. Under the regulatory program developed by EPA, industrial facilities and cities with populations of 100,000 were required to seek stormwater permits by May 1993. Under the provision in the 1987 amendments, smaller cities were to comply with rules that EPA was to issue by October 1993, but those rules were not issued until October 1999. Under those 1999 rules, permit applications are due in March 2003. (For 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. In the 106th Congress, several bills dealing with local government stormwater programs were introduced, but no further

action occurred. Those bills proposed to limit and clarify local governments' liability for certain 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. Properly designed, sized, and maintained combined sewers can be an acceptable part of a city's water pollution control infrastructure. Normally (under dry-weather conditions), the combined wastes are conveyed to a municipal sewage treatment plant. 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 many years, 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 normal flows that exceed the capacity of 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 January 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 because they transport sanitary wastes but not 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 has estimated that there are 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. On January 5, 2001, EPA finalized regulations that

will improve the operation of municipal sanitary sewer collection systems, reduce the frequency and occurrence of overflows, clarify the existing CWA prohibition on SSO discharges, and clarify circumstances appropriate for enforcement action.

Funding for CSO and SSO projects is a major concern of states and cities. In June 1999, a House Transportation and Infrastructure subcommittee held a hearing on the need for additional federal funding (in addition to that which is available through the CWA SRF program) to help municipalities address CSO, SSO, and related wet weather issues. At the end of the 106th Congress, legislation was enacted which amends the CWA to codify EPA's 1994 CSO policy on sewer overflows (discussed above) and create a $1.5 billion grant program to reduce wet weather flows from municipal sewer systems. The text of this bill was included in the FY2001 Consolidated Appropriations bill, enacted in December (P.L. 106-554; Division B, Title I of H.R. 5666, Section 112).

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