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Clean Water Act Issues in the 109th Congress

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SUMMARY

Legislative initiatives to comprehensively amend the Clean Water Act (CWA) have stalled for some time as interested parties have debated whether and exactly how to change the law. Congress has recently focused legislative attention on narrow bills to extend or modify selected CWA programs, rather than taking up comprehensive proposals. For example, the 108th Congress enacted one bill amending the CWA: legislation to reauthorize the National Estuary Program (H.R. 4731, P.L. 108-399).

For several years, the most prominent water quality issue has concerned financial assistance for municipal wastewater treatment projects. It is likely to be prominent in the 109th Congress as well. At issue is how the federal government will assist states and cities in meeting needs to rebuild, repair, and upgrade wastewater treatment plants, especially in light of capital costs that are projected to be as much as $390 billion over the next two decades. This issue received attention in the 108th Congress. In October 2004, the Senate Environment and Public Works Committee reported legislation to authorize $41.25 billion in funding for water infrastructure projects, including $20 billion for clean water facilities (S. 2550). In July 2003, a House Transportation and Infrastructure subcommittee also approved a water infrastructure financing bill (H.R. 1560). No further action on either bill occurred.

Several other Clean Water Act issues could receive congressional attention. Programs that regulate activities in wetlands, especially CWA Section 404, 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. These groups are concerned about a 2001 Supreme Court decision that narrowed regulatory protection of wetlands, as well as recent administrative actions that they believe will likewise diminish protection.

Also among the topics of interest is whether and how the Administration will revise the current program for restoration of pollution-impaired waters (the Total Maximum Daily Load, or TMDL, program), in view of controversy and continuing disagreement among states, cities, industry, and environmental advocates about program effectiveness and efficiency.

MOST RECENT DEVELOPMENTS

Water infrastructure funding legislation received attention in the 108th Congress because of recent estimates by the Environmental Protection Agency that as much as $390 billion will be needed over the next two decades to rebuild, repair, and upgrade the nation's wastewater treatment plants. In October 2004, the Senate Environment and Public Works Committee reported a bill (S. 2550, S.Rept. 108-386) to provide $41.25 billion in federal funds over five years for local wastewater and drinking water infrastructure programs. In July 2003, a House Transportation and Infrastructure Committee subcommittee approved a bill to authorize $20 billion over five years for the Clean Water Act's program that assists municipal wastewater treatment projects (H.R. 1560), but no further action on the legislation occurred. The 108th Congress did enact H.R. 4731, amending the Act to extend the National Estuary Program through FY2010 (P.L. 108-399).

BACKGROUND AND ANALYSIS

Introduction

Although much progress has been made in achieving the ambitious goals established 30-plus years ago to restore and maintain the chemical, physical, and biological integrity of the nation's waters, problems persist. The types of remaining water quality problems are diverse, ranging from pollution runoff from farms and ranches, city streets, and other diffuse or "nonpoint" sources, to metals (especially mercury) and organic and inorganic toxic substances discharged from factories and sewage treatment plants.

The principal law that deals with polluting activity in the nation's streams, lakes, estuaries, and coastal waters is the Federal Water Pollution Control Act (P.L. 92-500, enacted in 1972), commonly known as the Clean Water Act, or CWA (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 plant 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 CWA programs through standard-setting, permitting, and enforcement.

The objective declared in the 1972 Act of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters 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 from urban, suburban, and agricultural areas, for example), are more recent, given the earlier emphasis on "point source" pollution (discharges from industrial and municipal wastewater treatment plants). Overall, data reported by EPA and states indicate that 39% of river and stream miles assessed by states and 45% of assessed lake acres do not meet applicable water quality standards and are impaired for one or more desired uses. Approximately 95,000 lakes and 544,000 river miles in the United States are under fish-consumption advisories (including 100% of the Great Lakes and their connecting waters), due to chemical contaminants in lakes, rivers, and coastal waters, and one-third of shellfishing beds are closed or restricted, due to toxic pollutant contamination. For mercury — a contaminant of growing concern — as of 2003, 45 states had issued partial or statewide fish or shellfish consumption advisories.

The most recent major amendments were enacted in 1987 (P.L. 100-4); this was the first comprehensive revision to the law in a decade. Authorizations for a number of programs, such as general grant assistance to states, research, and general EPA support authorized in that law, expired in FY1990 and FY1991. Authorizations for wastewater treatment funding expired in FY1994. None of these programs has lapsed, however, as Congress has continued to appropriate funds to implement the Act. (For further information, see CRS Issue Brief IB89102, *Water Quality: Implementing the Clean Water Act*, by Claudia Copeland.)

The Clean Water Act has been viewed as one of the most successful environmental laws in terms of achieving its statutory goals, which have been widely supported by the public, but lately some have questioned whether additional actions to achieve further benefits are worth the costs. Criticism has come from industry, which has been the long-standing focus of the Act's regulatory programs and often opposes imposition of new 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.

Legislative Activity Since P.L. 100-4

Following enactment of amendments in 1987, no major CWA legislative activity occurred until the 104th Congress (1995). The House approved a comprehensive reauthorization bill, H.R. 961, that was opposed by environmentalists and the Clinton Administration, which they said would undermine the existing framework for protecting U.S. waters. The Senate did not take up H.R. 961 or other CWA legislation.

In the 105th and 106th Congresses, no comprehensive reauthorization legislation was introduced, but action was taken in the 106th Congress 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 (P.L. 106-457) that reauthorized several existing CWA programs (i.e., Chesapeake Bay cleanup, clean lakes, and the National Estuary Program), and 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). (For additional information on congressional activity, see CRS Report RL30908, *Clean Water Act: Issues and Legislation in the 106th Congress*, by Claudia Copeland.)

During its tenure, the Clinton Administration did not offer legislation to reauthorize the CWA, but rather initiated a number of agency-wide and program-specific reforms focusing on flexibility and what were termed "common sense" approaches to regulation.

The 107th Congress focused legislative attention on one of the key programs of the Act, provisions concerning financial assistance for municipal wastewater treatment projects. House and Senate committees approved bills to extend the Act's State Revolving Fund (SRF) program through FY2007 (H.R. 3930, S. 1961). Neither bill received further action, in large part due to controversies over application of the Davis-Bacon Act, which requires that contractors, engaging in certain federal contract construction, pay workers on such projects not less than the locally prevailing wage for comparable work, and over the formula for allocating SRF grants among the states.

The single water quality measure enacted by the 107th Congress was the Great Lakes Legacy Act (P.L. 107-303). It amended existing Great Lakes provisions of the CWA (Section 118) to authorize $50 million annually for FY2004-FY2008 for EPA to carry out projects to remediate sediment contamination in the Great Lakes. The bill also reauthorized CWA provisions concerning the Lake Champlain Basin Program. Miscellaneous provisions revived a number of CWA reports to Congress that had been discontinued under a previously passed "sunset" law (P.L. 104-66) and allowed states to use CWA Section 319 grant funds for stormwater management projects in FY2003.

In the 108th Congress, attention again focused on water infrastructure financing issues, although no bill was enacted (see below). However, there was some action on bills to reauthorize existing, mostly geographic-specific programs in the Clean Water Act. Before recessing for the 2004 election, the House and Senate passed H.R. 4731, to reauthorize the National Estuary Program through FY2010. The President signed this bill on October 30, 2004 (P.L. 108-399). The National Estuary Program, authorized by the 1987 CWA amendments, is directed at improving the quality of estuaries of national importance. Also in September, the House Transportation and Infrastructure Committee reported three other bills. They were (1) H.R. 784, to reauthorize section 221 of the Act and provide $1.5 billion over six years for sewer overflow projects (H.Rept. 108-675); (2) H.R. 4470, to extend the Lake Pontchartrain Basin Restoration Program in Section 121 through FY2010 (H.Rept. 108-676); and (3) H.R. 4688, to reauthorize the Chesapeake Bay Program through FY2010 (H.Rept. 108-677). The House passed H.R. 4470 on October 7, but no further action occurred. Also on October 7, the House passed H.R. 4794, to amend and reauthorize the Tijuana River Valley Estuary and Beach Sewage Cleanup Act (P.L. 106-457) in order to address treatment of sewage from Tijuana, Mexico, that impacts the San Diego border region. The Senate passed this bill on November 16, and the President signed it on November 30 (P.L. 108-425). (P.L. 108-425 does not amend the CWA.) (For information, see CRS Issue Brief IB10108, *Clean Water Act Issues in the 108th Congress*, by Claudia Copeland.)

Wastewater Security. Since the September 11, 2001 terrorist attacks in the United States, congressional attention has focused on security, preparedness, and emergency response issues. Among the topics of interest are protection of the nation's water infrastructure facilities (both drinking water and wastewater) from possible physical damage, biological/chemical attacks, and cyber disruption. (For information, see CRS Report RL32189, *Terrorism and Security Issues Facing the Water Infrastructure Sector*.)

Policymakers have examined a number of legislative options in this area, including enhanced physical security, communication and coordination, and research. In October 2002, the House passed legislation to authorize $200 million in grants for security activities at wastewater treatment plants (H.R. 5169). It also authorized $15 million in technical assistance for small treatment plant facilities and $5 million to EPA for improved vulnerability assessment tools. Similar legislation was introduced in the Senate (S. 3037), but no further action occurred. Congress did enact legislation authorizing $160 million in grants for drinking water utilities to conduct vulnerability assessments (P.L. 107-188).

In the 108th Congress, legislation similar to H.R. 5169 was approved by the House Transportation and Infrastructure Committee in February 2003 (H.R. 866, H.Rept. 108-33) and was passed by the House on May 7, 2003. It would authorize $200 million in grants to wastewater utilities to conduct vulnerability assessments and an additional $20 million for technical assistance and improved assessment tools. The Senate Environment and Public Works Committee approved a similar bill (S. 1039, S.Rept. 108-149) on May 15, 2003. No further action occurred, due in part to concerns expressed by some that the legislation does not mandate vulnerability assessments and require that they be submitted to EPA, as is the case with drinking water assessments required by P.L. 107-188.

Issues in the 109th Congress

The year 2002 marked the 30th anniversary of passage of the Clean Water Act and 15 years since the last major amendments to the law. While, as noted, there has been measurable clean water progress as a result of the Act, observers and analysts agree that significant water pollution problems remain. However, there is less agreement about what solutions are needed and whether new legislation is required. Several key water quality issues exist: evaluating actions to implement existing provisions of the law, assessing whether additional steps are necessary to achieve overall goals of the Act that have not yet been attained, and defining the appropriate federal role in guiding and paying for clean water infrastructure and other activities. For some time, efforts to comprehensively amend the Act have stalled as interests have debated 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.

These factors partly explain why Congress has recently favored focusing legislative attention on narrow bills to extend or modify selected CWA programs, rather than taking up comprehensive proposals. Other factors also are at work. These include a general reluctance by most Members of Congress to address controversial environmental issues in view of the slim majorities held by political parties in the House and the Senate; lack of presidential initiatives on clean water issues (neither the Clinton nor the Bush Administration proposed

CWA legislation); and since the terrorist attacks of September 11, 2001, a more prominent congressional focus on security and terrorism issues than on most other topics, including environmental protection.

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. It is likely to be the prominent CWA issue in the 109th Congress, as it has been for several years, although controversies have stymied enactment of new legislation. Since 1972, Congress has provided a total of $75 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 more stringent treatment 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. In addition to CWA programs, other sources of federal funding are administered by the U.S. Department of Agriculture and the Department of Housing and Urban Development (for information, see CRS Report RL30478, *Federally Supported Water Supply and Wastewater Treatment Programs*).

Nevertheless, funding needs remain very high: an additional $181 billion nationwide for all types of projects eligible for funding under the Act, according to the most recent Needs Survey estimate by EPA and the states, completed in August 2003 (available at [http://www.epa.gov/owm/mtb/cwns/2000rtc/toc.htm]. In September 2002, EPA released a study, called the Gap Analysis (available at [http://www.epa.gov/owm/gapreport.pdf]), that assessed the difference between current spending for wastewater infrastructure and total funding needs (both capital and operation and maintenance). EPA estimated that, over the next two decades, the United States needs to spend nearly $390 billion to replace existing wastewater infrastructure systems and to build new ones (including for some projects not currently eligible for CWA funds, such as system replacement, which are not reflected in the EPA-state Needs Survey). Funding needs for operation and maintenance, which are not currently eligible for federal aid, are an additional $148 billion, the agency estimates. According to the Gap Analysis, if there is no increase in investment, there will be about a $6 billion gap between current annual capital expenditures for wastewater treatment ($13 billion annually) and projected spending needs. The study also estimated that, if wastewater spending increases by 3% annually, the gap would shrink by nearly 90% (to about $1 billion annually). Outside groups, including a coalition called the Water Infrastructure Network, have offered proposals that have attracted some congressional interest for a multibillion dollar investment program in wastewater and drinking water infrastructure. (For additional information, see CRS Report RL31116, *Water Infrastructure Funding: Review and Analysis of Current Issues*, by Claudia Copeland.)

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 must provide 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 was that states would have greater flexibility to set priorities and administer funding in exchange for ending federal aid after FY1994. (For additional information, see CRS Report 98-323, *Wastewater Treatment: Overview and Background.*)

All states have established the mechanisms to administer the new loan programs and have been receiving SRF capitalization funds under Title VI for several years. Many have complained that the SRF program is unduly complicated by federal rules, even though Congress had intended that states were to have greater flexibility. Congressional oversight has examined the progress toward reducing the backlog of wastewater treatment facilities needed to achieve the Act's water quality objectives, while newer estimates of future funding needs have drawn increased attention to the role of the SRF program in meeting such needs.

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 construction 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 the 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 provide 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 (SDWA) 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. Bush Administration officials have said that infrastructure funding needs go beyond what the federal government can do on its own. 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. Additionally, there is concern about the adequacy of SRF or other funding specifically for projects dealing with problems of overflows from municipal combined and separate sewers which can release partially treated or untreated wastewaters that harm public health and the environment. EPA estimates that the cost of projects to control sewer overflows, from combined and separate sanitary sewer systems, is nearly $140 billion nationwide. And more recently, wastewater utilities have sought assistance to assess operational vulnerabilities and upgrade physical protection of their facilities against possible terrorist attacks that could threaten water infrastructure systems.

Legislative Responses. The 107th Congress considered but did not pass legislation to address infrastructure funding issues. House and Senate committees approved bills to extend the Act's SRF program through FY2007 and increase federal assistance (H.R. 3930, S. 1961), but neither bill received further action, in large part due to controversies over

application of prevailing wage requirements of the Davis-Bacon Act and over the formula for allocating SRF grants among the states.

In the 108th Congress, four bills to reauthorize the Clean Water Act SRF program were introduced (S. 170, S. 2550, H.R. 20, H.R. 1560). In addition, separate bills to reauthorize funding for sewer overflow grants (CWA Section 221) were introduced (H.R. 784, S. 567).

On October 7, 2004, the Senate Environment and Public Works Committee reported legislation (S. 2550, S.Rept. 108-386) authorizing $41.25 billion over five years for wastewater and drinking water infrastructure programs, including $20 billion for the clean water SRF program. The bill included a new formula for state-by-state allocation of clean water SRF grants, renewal of the Clean Water Act's sewer overflow grant program, and provisions such as extended loan repayments and subsidies for disadvantaged communities.

On July 17, 2003, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment approved H.R. 1560, legislation similar to H.R. 3930, the bill approved by that committee in 2002. H.R. 1560 would have authorized $20 billion for the clean water SRF program for FY2004-FY2008. It included several provisions intended to benefit economically disadvantaged and small communities, such as allowing extended loan repayments (30 years, rather than 20) and additional subsidies, including principal forgiveness and negative interest loans, for communities that meet a state's affordability criteria. It includes provisions to require communities to plan for capital replacement needs and to develop and implement an asset management plan for the repair and maintenance of infrastructure that is being financed. (For information, see CRS Report RL32503, *Water Infrastructure Financing Legislation: Comparison of S. 2550 and H.R. 1560*, by Claudia Copeland and Mary Tiemann.)

The issue of the applicability of the prevailing wage requirements of the Davis-Bacon Act to SRF-funded projects has affected consideration of water infrastructure legislation both in the 107th and 108th Congresses, because that act has both strong supporters and critics in Congress. Critics of Davis-Bacon say that it unnecessarily increases public construction costs and hampers competition, while supporters say that it helps stabilize the local construction industry by preventing competition that would undercut local wages and working conditions. The bill approved by the House subcommittee in July 2003 did not include language specifying that the Davis-Bacon Act shall apply to SRF-funded projects, while the bill approved by the Senate Environment and Public Works Committee did include such a requirement. Other factors that clouded the bills were Administration opposition to funding levels in S. 2550 and H.R. 1560 and dispute over funding allocation formulas.

Other Clean Water Act Issues

Several other CWA issues could receive congressional attention.

Regulatory Protection of Wetlands. 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. 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 how to address criticism of the Section 404 regulatory program while achieving desired goals of wetlands protection. (For additional information, see CRS Issue Brief IB97014, *Wetlands Issues*, by Jeffrey Zinn and Claudia Copeland.)

Unlike the rest of the Act, the permit aspects of Section 404 are administered by the U.S. Army Corps of Engineers, rather than EPA, although the Corps uses EPA environmental guidance. Other federal agencies including the U.S. 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.

The Supreme Court's SWANCC Decision. One issue involving long-standing controversy and litigation is whether isolated waters are properly within the jurisdiction of Section 404. Isolated waters that are wetlands which are not physically adjacent to navigable surface waters often appear to provide only some of the values for which wetlands are protected, such as flood control or water purification, even if they meet the technical definition of a wetland. On January 9, 2001, the Supreme Court ruled on the question of whether the CWA provides the Corps and EPA with authority over isolated waters. The Court's 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (531 U.S. 159 (2001)) held that the Corps' denial of a 404 permit for a disposal site on isolated wetlands solely on the basis that migratory birds use the site exceeds the authority provided in the Act.

The full extent of impacts on the regulatory program resulting from this decision remains unclear for now. Environmentalists believe that the Court misinterpreted congressional intent on the matter, while industry and landowner groups welcomed the ruling. Policy implications of how much the decision restricts federal regulation depend on how broadly or narrowly the opinion is applied. Some federal courts have interpreted *SWANCC* narrowly, thus limiting its effect on current permit rules, while a few read the decision more broadly. The government's current view on this key question was expressed in EPA-Corps guidance (see [http://www.epa.gov/epahome/headline2_011003.htm]) issued on January 15, 2003. It provides a legal interpretation essentially based on a narrow reading of the Court's decision, thus allowing federal regulation of some isolated waters to continue, but it calls for more headquarters review in disputed cases. Administration press releases say that the guidance demonstrates the government's commitment to "no-net-loss" wetlands policy. However, it is apparent that the issues remain under discussion, because at the same time, the Administration issued an advance notice of proposed rulemaking (ANPRM) seeking comment on how to define waters that are under jurisdiction of the regulatory program. The ANPRM did not actually propose rule changes, but it indicated possible ways

that Clean Water Act rules might be modified to further limit federal jurisdiction, building on *SWANCC* and some subsequent legal decisions.

The government received more than 133,000 comments on the ANPRM, most of them negative, according to EPA and the Corps. Environmentalists and many states opposed changing any rules, saying that the law and previous court rulings call for the broadest possible interpretation of the Clean Water Act (and thus a narrow interpretation of *SWANCC*), but developers sought changes to clarify interpretation of the *SWANCC* ruling. On December 16, 2003, EPA and the Corps announced that the Administration will not pursue development of rule changes concerning federal regulatory jurisdiction over isolated wetlands (see [http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument]). The EPA Administrator said that the Administration wanted to avoid a contentious and lengthy rulemaking debate over the issue. Environmentalists and state representatives expressed relief at the announcement. Interest groups on all sides have been critical of confusion in implementing the 2003 guidance, which constitutes the main tool for interpreting the reach of the *SWANCC* decision. Environmentalists remain concerned about diminished protection resulting from the guidance, while developers said that without new regulations, confusing and contradictory interpretations of wetland rules will continue.

Congressional Actions. In September 2002, the House Government Reform Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs held a hearing on the government's response to the *SWANCC* decision and to press the government to clarify its interpretation of the Court case. Committee Members and public witnesses indicated that a lack of guidance has led to inconsistent regulatory decisions by Corps officials in individual regions of the country, and subsequent judicial decisions by other federal and state court have been mixed. At the hearing, Corps and EPA officials testified on their efforts to develop guidance, which subsequently was released in January 2003. Concern about lingering confusion over the *SWANCC* decision and its implementation by the Corps was the topic of an oversight hearing by the Senate Environment and Public Works Committee in June 2003. Developers and others in the regulated community criticized the Corps and EPA, saying that the January 2003 guidance document had not clarified the reach of federal jurisdiction. A House Transportation and Infrastructure subcommittee also held a hearing on post-*SWANCC* issues on March 30, 2004.

While it continues to be difficult to fully assess how regulatory protection of wetlands will be affected as a result of the *SWANCC* decision and other possible changes, the remaining responsibility to protect affected wetlands falls on states and localities. (For additional information, see CRS Report RL30849, *The Supreme Court Addresses Corps of Engineers Jurisdiction Over 'Isolated Waters': The SWANCC Decision*, by Robert Meltz and Claudia Copeland.) Legislation to overturn the decision by providing a broad definition of "waters of the United States" was introduced in the 108th Congress (H.R. 962, S. 473). In addition, other legislation to narrow the definition of "waters of the United States" also was introduced (H.R. 4843). No further action occurred on any of these bills.

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. A TMDL is essentially a plan to allocate responsibility for implementing

pollution control measures within an area or watershed in order to remedy water quality impairments. Until recently, there had been little implementation of the TMDL provision (Section 303(d)), which Congress enacted in 1972. Since the early 1990s, environmental groups have filed lawsuits in 40 states to pressure EPA and states to meet the law's requirements. Of the suits tried or settled to date, more than half have resulted in court orders requiring expeditious development of TMDLs, thus driving the program that had previously received little attention. At issue today are controversies over implementation of the existing TMDL program and regulatory revisions that EPA issued in July 2000, partly in response to the lawsuits to strengthen the program. That rule was highly controversial (and never went into effect) 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 directly subject to CWA regulations. Because of those controversies, the Clinton Administration delayed the effective date of the 2000 rule until October 2001.

In the FY2001 appropriations act funding EPA, P.L. 106-377, Congress requested a study by the National Academy of Sciences (NAS) on the scientific basis of the TMDL program. The NAS report was issued in June 2001 (National Research Council, NAS, *Assessing the TMDL Approach to Water Quality Management*). It did not specifically analyze the July 2000 revised regulations. The NAS panel concluded that scientific knowledge exists to move forward with the TMDL program and recommended that EPA and states use adaptive implementation for TMDL development. In many cases, the report said, water quality problems and solutions are obvious and should proceed without complex analysis. In other cases, solutions are more complex and require a different level of understanding and something like phased implementation. In addition, the General Accounting Office (now the Government Accountability Office) concluded in a report that inconsistent monitoring, data collection, and listing procedures used by states to identify impaired waters have hindered efforts to develop effective TMDL programs (*Water Quality: Inconsistent State Approaches Complicate Nation's Efforts to Identify Its Most Polluted Waters*, GAO-02-186).

In October 2001, the Bush Administration announced that it would delay the rule for 18 months (until May 2003) to allow EPA officials time to review the rule and the NAS report. This action came after a federal court approved the Administration's request for a similar suspension of litigation that is challenging the regulation (nearly a dozen interest groups have sued EPA over various parts of the TMDL rule). In the interim, existing rules and requirements and court-sanctioned TMDL schedules (affecting approximately 22 states) remain in place. (For additional information, see CRS Report 97-831, *Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants*, by Claudia Copeland.)

On March 19, 2003, EPA withdrew the July 2000 TMDL rule. EPA officials said that implementation of the existing TMDL program will continue in the meantime, but that additional time beyond May 2003 is needed to decide whether and how to revise the current program. EPA is considering initiating an entirely new rule or other options, but no further timeframe or proposal has been announced. Recent congressional attention to these issues has been limited to oversight hearings held by the House Transportation and Infrastructure Subcommittee on Water Resources in June and November 2001. The 109th Congress may examine implementation of existing TMDL requirements and possible regulatory changes,

if issued, in view of continuing disagreement among states, cities, industry, and environmental advocates about program effectiveness and efficiency.

Other Implementation Issues. Of potential interest are the impacts of recent court rulings in several cases concerning implementation of existing provisions of the law and involving questions of whether certain activities require a Clean Water Act discharge permit. A fundamental element of the Act is the requirement that the "discharge of a pollutant" from a point source shall be pursuant to a permit authorized by the National Pollutant Discharge Elimination System (NPDES) program under Section 402 of the law. In the last term, the Supreme Court held that the transfer of polluted water from one waterbody to another requires a permit, notwithstanding that no new pollutant is added in the process of transfer (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004)). (For information, see CRS Report RL32569, *The Supreme Court Revisits the Environment: Seven Cases Decided or Accepted in the 2003-2004 Term*, by Robert Meltz.) The decision has raised concerns in agricultural areas where such transfers often occur in supplying irrigation water, presently without a permit.

Also, decisions of federal courts in two cases have held that aerial application of a pesticide over and into U.S. waters requires a CWA permit, even when the pesticide use meets other requirements of federal law, especially the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). These decisions drew the attention of many pesticide applicators, including public health entities such as mosquito control districts, concerned with how the rulings might affect their need to control mosquito populations associated with diseases such as the West Nile Virus. In July 2003, EPA issued interim guidance attempting to resolve the conflict over the regulatory scope of the CWA and FIFRA related to pesticide use, in light of the recent litigation, but EPA's statements have failed to halt the controversy. Congress has examined these issues in oversight hearings, one by a House Transportation and Infrastructure subcommittee in October 2002 and another by a House Government Reform subcommittee in October 2004.

LEGISLATION

(As bills relevant to clean water issues are introduced, they will be listed in this section in future updates.)

FOR ADDITIONAL READING

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U.S. Congressional Budget Office. *Future Investment in Drinking Water and Wastewater Infrastructure.* Washington, November 2002. 58 p.

U.S. Environmental Protection Agency. *The National Water Quality Inventory: 2000 Report*. Washington, September 2002. "EPA-841-R-2-001." 207 p.

——*The Clean Water and Drinking Water Infrastructure Gap Analysis*. Washington, September 2002. "EPA-816-R-02-020." 50 p.

——*Clean Watersheds Needs Survey 2000, Report to Congress*. Washington, August 2003. "EPA-832-R-03-001." 1 vol.

U.S. Government Accountability Office. *Key EPA and State Decisions Limited by Inconsistent and Incomplete Data.* (GAO/RCED-00-54) March 2000. 73 p.

——*Water Infrastructure: Information on Financing, Capital Planning, and Privatization*. (GAO-02-764) August 2002. 79 p.

CRS Issue Briefs and Reports

CRS Issue Brief IB89102. *Water Quality: Implementing the Clean Water Act*, by Claudia Copeland.

CRS Issue Brief IB97014. *Wetland Issues*, by Jeffrey Zinn and Claudia Copeland.

CRS Report RL30030. *Clean Water Act: A Summary of the Law*, by Claudia Copeland.

CRS Report 97-831. *Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants*, by Claudia Copeland.

CRS Report 98-323. *Wastewater Treatment: Overview and Background*, by Claudia Copeland.

CRS Report 96-647. *Water Infrastructure Financing: History of EPA Appropriations*, by Claudia Copeland.

CRS Report RL31116. *Water Infrastructure Funding: Review and Analysis of Current Issues*, by Claudia Copeland and Mary Tiemann.