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Water Quality Issues in the 110th Congress: Oversight and Implementation

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Summary

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

There is little agreement among stakeholders about what solutions are needed and whether new legislation is required to address the nation's remaining water pollution problems. 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, ensuring that progress made to date is not lost through diminished attention to water quality needs, 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 CWA have stalled as interests have debated whether and exactly how to change the law. Congress has instead focused legislative attention on enacting narrow bills to extend or modify selected CWA programs, but not any comprehensive proposals.

For several years, the most prominent legislative water quality issue has concerned financial assistance for municipal wastewater treatment projects, and it is an early focus in the 110th Congress: the House has passed three bills dealing with wastewater infrastructure financing (H.R. 720, H.R. 700, and H.R. 569). 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.

Also likely to be of interest are programs that regulate activities in wetlands, especially CWA Section 404, which has 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, and they are concerned about court rulings that narrowed regulatory protection of wetlands and about related administrative actions. Many stakeholders desire clarification of the act's regulatory jurisdiction, but they differ on what solutions are appropriate.

Other issues discussed in this report that also could receive congressional attention, possibly through oversight or legislation, include implementation of current programs to manage stormwater discharges and nonpoint sources of pollution, as these are major contributors to water quality impairments across the country; implementation of rules governing discharges of wastes from large animal feeding operations; and implications of a number of court rulings concerning the scope of the act's discharge permit requirements.

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Introduction

Although much progress has been made in achieving the ambitious goals that Congress established 30-plus years ago to restore and maintain the chemical, physical, and biological integrity of the nation's waters, long-standing problems persist, and new problems have emerged. Water quality problems are diverse, ranging from pollution runoff from farms and ranches, city streets, and other diffuse or "nonpoint" sources, to "point" source discharges of metals and organic and inorganic toxic substances 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. 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.[1]

The water quality restoration objective declared in the 1972 act 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 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 very small 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

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[1] For further information, see CRS Report RL30030, *Clean Water Act: A Summary of the Law*, by Claudia Copeland.

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. Mercury is a contaminant of growing concern — as of 2003, 45 states had issued partial or statewide fish or shellfish consumption advisories.

The last major amendments to the law were the Water Quality Act of 1987 (P.L. 100-4). These amendments culminated six years of congressional efforts to extend and revise the act and were the most comprehensive amendments since 1972. Authorizations of appropriations for some programs provided in P.L. 100-4, 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 them. EPA, states, industry, and other citizens continue to implement the 1987 legislation, including meeting the numerous requirements and deadlines in it.

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 many have opposed CWA measures that they fear might impose new unfunded mandates. Many environmental groups believe that further fine-tuning is needed to maintain progress achieved to date and to address remaining water quality problems.

Congressional Activity after 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. H.R. 961 would have amended many of the regulatory and standards provisions of the law, required EPA to use extensive new risk assessment and cost-benefit procedures, and increased flexibility with regulatory relief from current clean water programs. Critics said that the bill would undermine the existing framework for protecting U.S. waters. The Senate did not take up H.R. 961 or other CWA legislation; thus, no legislation was enacted.

In the 105th and 106th Congresses, no comprehensive reauthorization legislation was introduced, but beginning in the 106th Congress, a number of bills dealing with specific water quality issues and programs in the law were enacted. 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).

The 107th Congress enacted the Great Lakes Legacy Act (P.L. 107-303). It amended existing Great Lakes provisions (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 (Section 120).

The 108th Congress enacted legislation amending the act to extend the National Estuary Program (NEP, CWA Section 320) through FY2010 (P.L. 108-399). The NEP, authorized by the 1987 CWA amendments, is directed at improving the quality of estuaries of national importance.

The 109th Congress enacted two CWA measures. In December 2005, Congress passed H.R. 3963 (H.Rept. 109-293), authorizing $40 million per year to extend the Long Island Sound program in Section 119 of the act for six years (through FY2010). President Bush signed it on December 22, 2005 (P.L. 109-137). In November 2006, Congress passed H.R. 6121, a bill to reauthorize the Lake Pontchartrain Basin program in Section 121 of the act through FY2011. President Bush signed it on December 12 (P.L. 109-392).

Since the 107th Congress, the dominant CWA issue has been water infrastructure financing — i.e., extension and modification of provisions of the act authorizing financial assistance for municipal wastewater treatment projects. House and Senate committees have approved bills, but none has been enacted, because of varied controversies (see "Authorization of Wastewater Infrastructure Funding," below). In addition to the enacted legislation described here, throughout this period since the 1987 amendments, a number of bills dealing with other specific CWA programs have been reported by House and Senate committees; some of these were passed by one house of the Congress, but were not enacted. (For additional information, see CRS Report RL33465, *Clean Water Act: A Review of Issues in the 109th Congress*, by Claudia Copeland.)

Legislative Issues in the 110th Congress

The year 2007 marks the 35th anniversary of passage of the Clean Water Act and 20 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, ensuring that progress made to date is not lost through diminished attention to water quality needs, 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, more prominent congressional focus on security, terrorism, and Iraq war issues than on many other topics, including environmental protection.

As a result of the 2006 mid-term elections and changed congressional leadership, many observers anticipate that the 110th Congress will pursue oversight of clean water and other environmental programs. A likely legislative focus is water infrastructure financing legislation, specifically reauthorization of the act's financial aid program. Also likely is consideration of the geographic reach of the Clean Water Act over the nation's waters and wetlands, in light of court rulings — including two Supreme Court decisions — that have narrowed the law's regulatory jurisdiction, but in ways that are somewhat unclear. A number of other issues also could receive congressional attention, possibly through oversight or legislation. These include implementation of current programs to manage stormwater discharges and nonpoint sources of pollution, as these are major contributors to water quality impairments across the country; implementation of rules governing discharges of wastes from large animal feeding operations; and implications of a number of court rulings concerning the scope of the act's discharge permit requirements.

Authorization of Water Infrastructure Funding

Meeting the nation's needs to build, upgrade, rebuild, and repair wastewater infrastructure is a significant element in achieving the Clean Water Act's water quality objectives. The act's program of financial aid for municipal wastewater treatment plant construction is a key contributor to that effort. Since 1972 Congress has provided more than $77 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. State and local governments have spent more than $25 billion of their own funds for construction, as well.

Still, 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, published in August 2003.[2] In

[2] U.S. Environmental Protection Agency, *Clean Watersheds Needs Survey 2000, Report to* (continued...)

September 2002, EPA released a study called the Gap Analysis that assesses the difference between current spending for wastewater infrastructure and total funding needs (both capital and operation and maintenance).[3] In that report, 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. Funding needs for operation and maintenance (not eligible for Clean Water Act funding) are an additional $148 billion, the agency estimated. 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 of approximately $19 billion. The study also estimated that, if wastewater spending increases by 3% annually, the gap would shrink by nearly 90% (to about $1 billion annually). At issue has been what the federal role should be in assisting states and cities, especially in view of such high projected funding needs.

Debate over the nature of the nation's efforts regarding wastewater infrastructure was a central and controversial part of the 1987 amendments to the act. The amendments extended through FY1990 the traditional Title II program of grants for sewage treatment project construction, under which the federal share was 55% of project costs. The 1987 law initiated a program of grants to capitalize State Water Pollution Control Revolving Funds (SRFs), which are loan programs, in a new Title VI. States are required to deposit an amount equal to at least 20% of the federal capitalization grant in the Fund established under Title VI. Under the revolving fund concept, monies used for wastewater treatment construction would be repaid by loan recipients to the states (repayment was not required for grants under the Title II program), to be recycled for future construction in other communities, thus providing an ongoing source of financing. The expectation in 1987 was that the federal contributions to SRFs would assist in making a transition to full state and local financing by FY1995. Although most states believe that the SRF is working well, early funding and administrative problems have delayed the anticipated shift to full state responsibility. Thus, SRF issues have been prominent on the Clean Water Act reauthorization agenda in recent Congresses.[4]

SRF monies may be used for certain types of financial activity, including loans for as much as 100% of project costs (at or below market interest rates, including interest-free loans), to buy or refinance cities' debt obligation, or as a source of revenue or security for payment of principal and interest on a state-issued bond. SRF monies also may be used to provide loan guarantees or credit enhancement for localities. Loans made by a state from its SRF are to be used first to assure progress towards the goals of the act and, in particular, on projects to meet the standards and enforceable requirements of the act. After states achieve those requirements of the act, SRF monies also may be used to implement nonpoint pollution management and national estuary programs.

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[2] (...continued)
Congress, Washington, August 2003, EPA 832-03-001, 1 vol.

[3] U.S. Environmental Protection Agency, *The Clean Water and Drinking Water Infrastructure Gap Analysis*, September 2002, EPA 816-R-02-020, 50 p.

[4] For further information, see CRS Report 98-323, *Wastewater Treatment: Overview and Background*, by Claudia Copeland.

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. Although there has been some criticism of the SRF program, and debate continues over specific concerns, the basic approach is well supported. Congress used the clean water SRF as the model when it established a drinking water SRF in 1996 (P.L. 104-182).[5]

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. **Table 1** summarizes wastewater treatment funding under Title II (traditional grants program) and Title VI (capitalization grants for revolving loan programs) since the 1987 amendments.[6]

One issue of continuing interest is impacts on small communities. These entities in particular have found it difficult to participate in the SRF loan program, since many are characterized by narrow or weak tax bases, limited or no access to capital markets, lower relative household incomes, and higher per capita needs. They often find it harder to borrow to meet their capital needs and pay relatively high premiums to do so. Meeting the special needs of small towns, through a reestablished grant program, other funding source, or loan program with special rules, has been an issue of interest to Congress.

Because remaining clean water funding needs are still so large nationally, 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. Additionally, there is concern about the adequacy of SRF or other funding specifically for high-cost 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.[7]

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[5] For further information, see CRS Report RS22037, *Drinking Water State Revolving Fund: Program Overview and Issues*, by Mary Tiemann.

[6] *Note:* Table 1 does *not* include appropriations for special project grants in individual cities. Issues associated with special project grants are discussed in CRS Report RL32201, *Water Infrastructure Project Earmarks in EPA Appropriations: Trends and Policy Implications*, by Claudia Copeland.

[7] For additional information on many of these issues, see CRS Report RL31116, *Water Infrastructure Needs and Investment: Review and Analysis of Key Issues*, by Claudia Copeland and Mary Tiemann.

Table 1. Wastewater Treatment Funding

(billions of dollars)

	Authorizations		Appropriations	
Fiscal Year	**Title II**	**Title VI**	**Title II**	**Title VI**
1986	$2.4	—	$1.800	—
1987	2.4	—	2.360	—
1988	2.4	—	2.300	—
1989	1.2	1.2	0.941	0.941
1990	1.2	1.2	0.967	0.967
1991	—	2.4	—	2.100
1992	—	1.8	—	1.950
1993	—	1.2	—	1.930
1994	—	0.6	—	1.220
1995	—	—	—	1.240
1996	—	—	—	2.070
1997	—	—	—	0.625
1998	—	—	—	1.350
1999	—	—	—	1.350
2000	—	—	—	1.345
2001	—	—	—	1.350
2002	—	—	—	1.350
2003	—	—	—	1.341
2004	—	—	—	1.342
2005	—	—	—	1.091
2006	—	—	—	0.887
2007	—	—	—	1.084

Bush Administration officials have said that infrastructure funding needs go beyond what the federal government can do on its own. While saying that federal and state funding can help water utilities meet future needs, EPA's principal water infrastructure initiative has been to support other types of responses to help ensure that investment needs are met in an efficient, timely, and equitable manner. In particular, since 2003 EPA has promoted strategies that it terms the Four Pillars of Sustainable Infrastructure, based on concepts of better management, full-cost pricing, efficient water use, and watershed approaches to protection.[8] EPA is pursuing a Sustainable Infrastructure Leadership Initiative in partnership with water utilities to promote the Four Pillars. The purpose of the initiative is to identify new and better ways of doing business in the water and wastewater industries and promote them widely, and thus ensure sustainability of water systems. For example, EPA is working to encourage rate structures that lead to full cost pricing and will support water metering and other conservation measures. EPA also is encouraging

[8] U.S. Environmental Protection Agency, *Sustainable Water Infrastructure for the 21st Century*. See [http://www.epa.gov/waterinfrastructure].

consumers to use water-efficient products (e.g., residential bathroom products), with the intent of reducing national water and wastewater infrastructure needs by reducing projected water demand and wastewater flow, thus allowing deferral or downsizing of capital projects.

Legislative Responses. Congress has actively considered water infrastructure funding issues since the 107th Congress, when House and Senate committees approved bills to extend the act's SRF program and increase federal assistance (H.R. 3930; S. 1961, S.Rept. 107-228). A report on H.R. 3930 was not filed. 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. The issue of the applicability of the Davis-Bacon Act to SRF-funded projects has affected consideration of water infrastructure legislation for some time, 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. Under the original SRF program authorization enacted in 1987, the Davis-Bacon Act applied to so-called "first use" monies provided by a state from its SRF (that is, loans made from initial federal capitalization grants, but not subsequent monies provided from repayments to the SRF). When that authorization expired at the end of FY1994, Davis-Bacon requirements also expired. Thus, the recent issue has been whether to restore the applicability of those requirements.

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). In October 2004, the Senate Environment and Public Works Committee reported legislation authorizing $41.25 billion over five years for wastewater and drinking water infrastructure programs, including $20 billion for the clean water SRF program (S. 2550, S.Rept. 108-386). 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.

Prior to the Senate committee's action, in July 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 the 107th Congress), but no further action occurred. H.R. 1560 did not include language specifying that the Davis-Bacon Act shall apply to SRF-funded projects, while S. 2550 did include such a requirement. Other factors that clouded these bills were Administration opposition to authorization levels in both bills and disputes over funding allocation formulas.

In the 109th Congress, the Senate Environment and Public Works Committee approved S. 1400, the Water Infrastructure Financing Act, in July 2005 (S.Rept. 109-186). The bill was similar to S. 2550 in the 108th Congress; it would have authorized $20 billion for grants to capitalize the Clean Water Act SRF program and $15 billion for Safe Drinking Water Act SRFs through FY2010. As approved by the committee,

S. 1400 would have revised the CWA formula for state-by-state allocation of SRF monies and also specified that the prevailing wage requirements of the Davis-Bacon Act shall apply to all projects financed from an SRF (as similarly provided in the committee's bill in the 108th Congress). No further action on this bill occurred.

For some time, interest has been growing in identifying and developing new mechanisms to help localities pay for water infrastructure projects, beyond federal grants or SRFs, which appear insufficient to fully meet funding needs. In June 2005, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment held hearings on alternative means to fund water infrastructure projects in the future. At the first hearing, witnesses focused on one way to increase funding for water infrastructure that has recently been advocated by some groups, creating a national clean water trust fund that would conceptually be similar to trust funds that exist for highway and aviation projects. Witnesses and subcommittee members discussed difficulties in identifying potential revenue sources that would be deemed fair and equitable. The second hearing addressed other financing options, such as expanded use of tax-exempt private activity bonds, and more efficient management techniques, such as asset management programs and sustainable infrastructure initiatives. In December 2005, legislation was introduced to establish a $7.5 billion federal trust fund for wastewater infrastructure improvements. This bill, H.R. 4560, proposed to use a concept for funding such projects that has been promoted by wastewater treatment industry officials, other stakeholders, and some environmentalists, who argue it could provide a new source of money for necessary system upgrades amid dwindling federal funds. The bill contemplated a system of user fees to create the fund, but the source of revenue was not specified in the bill. Congress did not act on this legislation.

110th Congress. Wastewater infrastructure financing is receiving early attention in the 110th Congress: in March the House approved three bills addressing the following issues.

- H.R. 720, the Water Quality Financing Act of 2007, was passed by the House on March 9. It is substantially similar to legislation that the House Transportation and Infrastructure Committee's Water Resources and Environment Subcommittee approved in the 108th Congress (H.R. 1560).[9] It would authorize $14 billion for the clean water SRF program for FY2008-FY2011.[10] It includes several provisions intended to benefit economically disadvantaged and small

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[9] For background information on this earlier legislation, see CRS Report RL32503, *Water Infrastructure Financing Legislation: Comparison of S. 2550 and H.R. 1560*, by Claudia Copeland and Mary Tiemann.

[10] The original version of H.R. 720, approved by the Transportation and Infrastructure Committee on February 7, authorized $20 billion over FY2008-FY2012 for the SRF program. In order to comply with budget compliance rules of the House, the committee approved a substitute version of the bill on March 1 with a lower authorization level over a four-year period. The substitute also includes a provision restoring vessel tonnage duties that were in effect from 1990 to 2002 on certain cargo-carrying vessels that enter or depart from U.S. ports; the additional tonnage duties are intended to offset the cost of H.R. 720.

communities, such as allowing extended loan repayments (30 years, rather than 20) and additional subsidies (e.g., 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. One key difference between this bill and the earlier legislation is the specification in H.R. 720 that the Davis-Bacon Act prevailing wage requirement shall apply to all projects financed in whole or in part through an SRF. This issue was extensively debated during subcommittee and full committee markups of the bill, and amendments to delete the requirement and to request a GAO study of impacts of the Davis-Bacon Act were defeated. H.R. 720 includes provisions requesting that GAO prepare a report for Congress on alternative public and private mechanisms to fund water infrastructure, and a report on potential funding mechanisms for a clean water trust fund. During debate on the bill, the House rejected an amendment that would have deleted the Davis-Bacon requirements in the bill and adopted several other amendments, including one directing EPA to study U.S. and Canadian wastewater discharges to the Great Lakes and another directing states to give funding priority to existing needs before investing in projects for additional wastewater treatment capacity.

- H.R. 569 would reauthorize CWA Section 221 to authorize for projects to correct municipal sewer overflows (H.Rept. 110-16). It is similar to legislation approved by the Transportation and Infrastructure Committee in the 109th Congress (H.R. 624). The House passed this bill on March 7. As passed, the bill would provide $1.7 billion over five years.

- H.R. 700 would reauthorize CWA Section 220 to extend a pilot program to develop alternative water source projects (H.Rept. 110-15). It would authorize a total of $125 million for Section 220. The House passed this bill on March 9.

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 is protection of the nation's water infrastructure facilities (both drinking water and wastewater) from possible physical damage, biological/chemical attacks, and cyber disruption.[11]

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). Similar legislation

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[11] For information, see CRS Report RL32189, *Terrorism and Security Issues Facing the Water Infrastructure Sector*, by Claudia Copeland.

was introduced in the Senate (S. 3037), but no further action occurred. Congress did enact legislation directing medium and large drinking water utilities to assess their vulnerabilities to terrorist attack and authorizing $160 million in grants for these utilities to conduct assessments (P.L. 107-188).

Following on those new requirements affecting drinking water utilities, in the 108th Congress, the House passed legislation that would have authorized $200 million in grants to wastewater utilities to conduct vulnerability assessments and an additional $20 million for technical assistance and improved assessment tools (H.R. 866). The Senate Environment and Public Works Committee approved a similar bill (S. 1039) in May 2003. No further action occurred, due in part to concerns expressed by some that the legislation would not mandate vulnerability assessments and would not require that they be submitted to EPA, as is the case with drinking water assessments required by P.L. 107-188.

Wastewater security issues again received attention in the 109th Congress. In May 2006, the Senate Environment and Public Works Committee approved S. 2781 (S.Rept. 109-345). It was similar to S. 1039 in the 108th Congress in that it would have encouraged wastewater utilities to conduct vulnerability assessments and would have authorized $220 million to assist utilities with assessments and preparation of site security plans. It also included provisions responding to a March 2006 GAO report that found that wastewater utilities have made little effort to address vulnerabilities of collection systems, which may be used by terrorists to introduce hazardous substances or as access points for underground travel to a potential target.[12] S. 2781 would have authorized EPA to conduct research on this topic. During committee consideration of the bill, an amendment was rejected that would have required, rather than encouraged, treatment works to conduct vulnerability assessments and also would have required high-risk facilities to switch from using chlorine and similar hazardous substances to other chemicals that are often referred to as "inherently safer technologies." No further action occurred on this bill.

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

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[12] U.S. Government Accountability Office, *Securing Wastewater Facilities, Utilities Have Made Upgrades but Further Improvements to Key System Components May Be Limited by Costs and Other Constraints,* GAO-06-390, March 2006, 64 pp.

address criticism of the Section 404 regulatory program while achieving desired goals of wetlands protection.[13]

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.

Judicial Proceedings Involving Section 404. One issue involving long-standing controversy and litigation is whether isolated waters are properly within the jurisdiction of Section 404. Isolated waters — 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, even five years after the ruling, in part because of different interpretations of *SWANCC* reflected in subsequent federal court cases. 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.[14] 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.

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[13] For additional information, see CRS Report RL33483, *Wetlands: An Overview of Issues*, by Jeffrey Zinn and Claudia Copeland.

[14] 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.

The government's current view on this key question was expressed in EPA-Corps guidance issued in January 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 remained under review, 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.[15] 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 *SWANCC*. In December 2003, EPA and the Corps announced that the Administration would not pursue rule changes on federal regulatory jurisdiction over isolated wetlands. 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.

Federal courts continue to have a key role in interpreting and clarifying the *SWANCC* decision. On February 21, 2006, the Supreme Court heard arguments in two cases brought by landowners (*Rapanos v. United States*; *Carabell v. U.S. Army Corps of Engineers*) seeking to narrow the scope of the CWA permit program as it applies to development of wetlands. The issue in both cases had to do with the reach of the CWA to cover "waters" that were not navigable waters, in the traditional sense, but were connected somehow to navigable waters or "adjacent" to those waters. (The act requires a federal permit to discharge dredged or fill materials into "navigable waters.") Many legal and other observers hoped that the Court's ruling in these cases would bring greater clarity about the scope of federal jurisdiction.

The Court's ruling was issued on June 19 (*Rapanos , v. United States*, 126 S.Ct. 2208 (2006)). In a 5-4 decision, a plurality of the Court, led by Justice Scalia, held that the lower court had applied an incorrect standard to determine whether the wetlands at issue are covered by the CWA. Justice Kennedy joined this plurality to

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[15] U.S. Department of Defense, Department of the Army, Corps of Engineers and U.S. Environmental Protection Agency, "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States' and Joint Memorandum," 68 *Federal Register* 1991-1998, Jan. 15, 2003.

vacate the lower court decisions and remand the cases for further consideration, but he took different positions on most of the substantive issues raised by the cases, as did four other dissenting justices.[16] Early judgments by legal observers suggest that the implications of the ruling (both short-term and long-term) are far from clear. Because the several opinions written by the justices did not draw a clear line regarding which wetlands and other waters are subject to federal jurisdiction, one likely result is more case-by-case determinations and continuing litigation. There also could be renewed pressure on the Corps and EPA to clarify the issues through an administrative rulemaking.

Congressional Actions. In September 2002, a House Government Reform subcommittee held a hearing on the government's response to the *SWANCC* decision. Committee Members and public witnesses indicated that a lack of guidance from the government clarifying its interpretation of the case had 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 Corps implementation 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 in March 2004.

Controversies persist about the 2003 *SWANCC* guidance. In response, on May 18, 2006, the House adopted an amendment to a bill providing FY2007 appropriations for EPA (H.R. 5386). The amendment (passed by a 222-198 vote) would bar EPA from spending funds to implement the 2003 policy guidance. Supporters of the amendment said that the guidance goes beyond what the Supreme Court required in *SWANCC*, has allowed many streams and wetlands to be unprotected from development, and has been more confusing than helpful. Opponents of the amendment predicted that it would make EPA's and the Corps' regulatory job more difficult than it already is. Congress adjourned *sine die* in December 2006 without taking final action on H.R. 5386.

Legislation to overturn the *SWANCC* decision by providing a broad definition of "waters of the United States" was introduced in the 109th Congress (H.R. 1356/S. 912, the Clean Water Authority Restoration Act of 2005). Other legislation to narrow the definition of "waters of the United States" also was introduced (H.R. 2658, the Federal Wetlands Jurisdiction Act of 2005).[17] No further action occurred on either bill. For now, it is unclear whether the more recent decision in the *Rapanos* and *Carabell* cases will accelerate congressional interest in these or other proposals

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[16] For additional information, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: Rapanos and Carabell*, by Robert Meltz and Claudia Copeland.

[17] For additional information and discussion of similar legislation in the 108th Congress, see CRS Report RL33483, *Wetlands: An Overview of Issues*.

to address uncertainties about federal jurisdiction over wetlands and other waters. On August 1, 2006, a Senate Environment and Public Works subcommittee held a hearing on the Court's *Rapanos* decision. While some witnesses urged Congress to clarify the jurisdictional issues, others urged EPA and the Corps to issue new guidance and/or initiate a rulemaking to change applicable regulations. Administration witnesses said that EPA and the Corps are working on new guidance for their regulatory staffs, but have not yet decided whether a rulemaking is needed.

Other Clean Water Act Issues

Several other issues affecting efforts to achieve the goals and objectives of the Clean Water Act could draw attention during the 110th Congress through oversight or legislation.

Stormwater Discharges. EPA has struggled since the 1970s to regulate industrial and municipal stormwater discharges in a workable yet comprehensive manner. For many years, it was generally believed that stormwater was largely clean, or uncontaminated. However, studies have shown that this type of discharge carries with it large amounts of organic and toxic pollutants that can harm water quality, including oil and grease, heavy metals, pesticides, soil, and sediment. In P.L. 100-4, Congress established firm deadlines and priorities for EPA to require permits for discharges of stormwater that are not mixed or contaminated with household or industrial waste. EPA issued rules in November 1990 (21 months after the statutory deadline) that addressed Phase I of the program, detailing the process of applying for stormwater permits for industries, medium and large municipalities, and construction sites larger than 5 acres. The agency worked with an advisory committee of stakeholders beginning in 1994 to develop rules for regulating smaller stormwater dischargers, which were not covered by the 1990 rules. Rules for smaller dischargers (unregulated industries, small construction sites, and small cities), Phase II of the program, were issued in October 1999. The burden of complying with the rules continues to be an issue with many affected industries and municipalities, especially small cities, which faced compliance deadlines beginning in March 2003.[18]

Stormwater issues were addressed in one provision of omnibus energy legislation in the 109th Congress. As the March 2003 compliance deadline for Phase II small construction sites to comply with existing stormwater permit rules approached, EPA proposed a two-year extension of those rules for small oil and gas construction sites to allow the agency to assess the economic impact on that particular industry. In March 2005, EPA again extended the deadline, until June 2006. During this time, Congress considered a legislative solution which it enacted in Section 323 of H.R. 6, the Energy Policy Act of 2005. It provides a permanent exemption from stormwater runoff rules for the construction of exploration and production facilities by oil and gas companies or the roads that service those sites.

Industry officials said that EPA's original stormwater rule created costly permitting requirements, even though the short construction period for drilling sites

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[18] For further information, see CRS Report 97-290, *Stormwater Permits: Status of EPA's Regulatory Program*, by Claudia Copeland.

carries little potential for stormwater runoff pollution. The provision in H.R. 6 makes EPA's temporary delay permanent and makes it applicable to construction activities at all oil and gas development and production sites, regardless of size, including those covered by an earlier Phase I of the stormwater program. Opponents argued that the provision did not belong in the energy legislation and that there was no evidence that construction at oil and gas sites causes less pollution than other construction activities. Congress passed the conference report on H.R. 6, with the oil and gas stormwater provision, in July 2005. President Bush signed it into law on August 8 (P.L. 109-58). In June 2006, EPA promulgated a rule to conform the CWA to these provisions of P.L. 109-58.[19]

Combined and Separate Sewer Overflows. A total of 772 municipalities have combined sewers where domestic sanitary sewage, industrial wastes, infiltration from groundwater, and stormwater runoff are collected. These systems serve approximately 40 million persons, mainly in older urban and coastal cities. Normally (under dry-weather conditions), the combined wastes are conveyed to a municipal sewage treatment plant.

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

In 1994, following negotiations with key stakeholder groups, EPA issued a CSO permitting strategy. Cities were to implement nine minimum controls by January 1, 1997 (e.g., proper operation and maintenance programs for sewer systems and pollution prevention programs). Controls 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 1998 that only about one-half of the cities with combined sewers 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 concerning some cities is the problem of overflows from municipal separate sanitary sewers (SSOs) that are not CSOs because they transport only sanitary wastes. Discharges of untreated sewage from these sewers can occur from manholes, broken pipes and deteriorated infrastructure, and undersized pipes,

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[19] U.S. Environmental Protection Agency, "Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations, or Transmission Facilities," 71 *Federal Register* 33628, June 12, 2006.

and can occur in wet or dry weather. EPA estimates that there are about 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, the Clinton Administration proposed regulations to 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. The Clinton proposal was not finalized by the Bush Administration, which reportedly is continuing to consider SSO policy issues.

Funding for CSO and SSO projects is a major concern of states and cities. The most recent clean water needs survey found that the largest needs category, totaling $51 billion, is to address CSOs. EPA estimated that costs to restrict SSOs are $88.5 billion. In December 2000, Congress passed legislation, the Wet Weather Water Quality Act, authorizing a two-year $1.5 billion grants program to reduce wet weather flows from municipal sewer systems, both CSOs and SSOs. This bill was included in the FY2001 Consolidated Appropriations bill (Section 112 of Division B, P.L. 106-554), which codified EPA's CSO policy on sewer overflows (discussed above). Congress provided no appropriations for these wet weather grants during the two years of authorization (FY2002-FY2003). As described above, on March 7, the House passed legislation to reauthorize this grant program (H.R. 569).

Nonpoint Pollution Management. Prior to the 1987 CWA amendments, the act's requirements focused primarily on controlling pollution from "point" sources, that is, discharges from wastewater treatment plants and industrial facilities. Yet, as industrial and municipal sources have abated pollution, uncontrolled nonpoint sources have become a relatively larger portion of remaining water quality problems — perhaps contributing as much as 50% of the nation's water pollution. Nonpoint pollution is rainfall or snowmelt runoff from farm and urban areas, as well as contruction, forestry, and mining sites. In 1987 Congress added a new Section 319 to the act to strengthen the law regarding this major contributor to water pollution by requiring states to develop and implement programs to control nonpoint sources of pollution. States were required to identify waters not expected to meet water quality standards because of nonpoint source pollution and to implement plans for managing pollution from runoff. Federal grants totaling $400 million were authorized to cover as much as 60% of the costs of implementing a state's management plan.

At issue today is what progress is being made to manage nonpoint source pollution and what additional efforts may be needed involving Section 319 or other public and private activities. Several concerns have been raised about the program, such as whether state plans have comprehensively addressed their nonpoint pollution problems. Some observers are critical of the largely voluntary nature of the Section 319 program, consisting of "all carrot but no stick," while others argue that the types of individual land management decisions that are needed to manage nonpoint source pollution cannot be regulated in the same ways that industrial sources are controlled.

Funding has become an important issue as states moved from assessment and plan development to management, since Congress intended that Section 319 funds

be used primarily to implement nonpoint pollution controls on the ground. Precise estimates of management costs are not available, because so much depends on the site-specific nature of problems and solutions. However, in 1994 EPA estimated that current and planned spending by private sources, states, and cities under provisions of current law is between $750 million and $1.1 billion per year. Without adequate funding to implement state management plans, it is doubtful that much will be achieved under Section 319 to control nonpoint source pollution.

Because agricultural activities are known to be a significant source of nonpoint pollution nationwide, the adequacy of efforts to address these sources has received much attention. Questions have been raised about the 319 grant program's efficacy and overlap with farm bill conservation funding. In particular, the White House Office of Management and Budget (OMB) found that EPA had not demonstrated results under the program and has urged the agency to shift its focus away from implementing projects in agricultural areas and toward implementing plans in impaired waters. State officials have been concerned that OMB is not fully aware of the extent to which Section 319 funds address a range of nonpoint pollution control needs beyond the agricultural sector.

Strategy Concerning Animal Feeding Operations. As noted previously, EPA's water quality reports identify agricultural activities as the leading contributor to water quality impairments nationwide. Animal feeding operations (AFOs) are only a subset of the agriculture category, but because more than one-half of the states specifically identify AFOs as contributing to impairments, public and policy attention has increased on how to minimize public health and environmental impacts of runoff from them. AFOs are agricultural facilities that confine livestock and their 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, however, it can pose risks to water quality and public health, contributing pollutants such as nutrients, sediment, pathogens, and ammonia to the environment.

Clean water regulations issued in the 1970s required discharge permits for the largest AFOs, termed confined animal feeding operations (CAFOs). However, EPA acknowledged that compliance and enforcement of these permit rules was poor (less than one-third of covered facilities actually have permits) and that the regulations themselves were outdated. In December 2002, EPA issued revised rules to regulate waste discharges from CAFOs. Among the key elements, the rules include requirements for development of nutrient management plans to better manage land application of manure. EPA estimated that 15,500 CAFOs would be regulated by the rule, at an annual compliance cost of $335 million. Farm groups said that the regulations are generally workable and consistent with environmental initiatives in the 2002 farm bill (P.L. 107-171), but environmental groups criticized the rule for inadequately addressing animal waste runoff problems.[20] A January 2003 GAO report concluded that the rules will be ineffective unless EPA increases its oversight

[20] For additional information, see CRS Report RL31851, *Animal Waste and Water Quality: EPA Regulation of Concentrated Animal Feeding Operations*, by Claudia Copeland.

of state regulatory programs, which have primary responsibility for ensuring compliance by feedlot operators.[21]

In February 2005, a federal court issued a ruling in a set of challenges to the CAFO rule (*Waterkeeper Alliance, American Farm Bureau, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005)). The litigation involved challenges to the permitting scheme of the rule, the type of discharges subject to regulation, and the effluent limitations established in the rules. The court upheld major parts of the EPA rule, held in favor of some of industry's challenges, held in favor of several of environmentalists' challenges, and in some cases directed EPA to explain more fully why it did or did not do certain things with regard to specific provisions of the rule. In June 2006, EPA proposed revisions to the CAFO rules in response to the court's decision and expects to promulgate revised regulations by June 2007.[22]

Other Implementation Issues. Also of legislative interest are the impacts of 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 carried out pursuant to a permit authorized by the National Pollutant Discharge Elimination System (NPDES) program under Section 402 of the law. In 2004, 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)).[23] The decision raised concerns in agricultural areas where such transfers often occur in supplying irrigation water, presently without a permit. Congress did not hold oversight hearings on impacts of the Court's decision, and legislation that might have addressed the ruling was not introduced.

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, including the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). These and related 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 pests associated with diseases such as the West Nile virus. In November 2006, EPA finalized a rulemaking seeking to resolve the conflict over the regulatory scope of the CWA and FIFRA related to pesticide use, in light of the recent litigation, by promulgating regulations to clarify circumstances under which a CWA permit is or is not required for activities carried out pursuant to FIFRA. Congress examined

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[21] U.S. Government Accountability Office, *Increased EPA Oversight Will Improve Environmental Program for Concentrated Animal Feeding Operations*, GAO-03-285, January 2003, 42 p.

[22] For additional information, see CRS Report RL33656, *Animal Waste and Water Quality: EPA's Response to the "Waterkeeper Alliance" Court Decision on Regulation of CAFOs*, by Claudia Copeland.

[23] 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.

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 intended to affirm that a CWA permit is not required for use of FIFRA-approved pesticides was introduced in the 109th Congress, the Pest Management and Fire Suppression Flexibility Act (H.R. 1749, S. 1269). A House Transportation and Infrastructure subcommittee held a hearing on H.R. 1749 on September 29, 2005. No further action occurred.[24]

Finally, concerns have been expressed about a court ruling on regulation of ballast water, which is used by tankers, bulk cargo carriers, and cruise ships to stabilize vessels during transport. Ballast water is often taken on in the coastal waters of one region and discharged at the next port of call, as cargo is off-loaded or added. Clean Water Act rules currently exempt ballast water discharges from CWA permit requirements. Because of the growing problem of the introduction of invasive species into U.S. waters via ballast waters, environmental groups sued EPA to force the agency to rescind the regulatory exemption. In March 2005, a federal district court ruled in favor of the groups, and in September 2006, the court remanded the matter to EPA with an order that the challenged regulation be set aside by September 30, 2008, and requiring the agency to issue CWA permits after that date (*Northwest Environmental Advocates v. EPA*, No. C 03-05760 SI (N.D.Cal, Sept. 18, 2006)). Significantly, the court's ruling applies fully to all types of vessel discharges that are covered by the regulatory exemption, including sewage, gray water, and bilge water. EPA and the shipping industry have appealed the ruling; some observers argue that legislative clarification of this issue is needed, because an appeal might not be resolved before the deadline mandated by the district court.

Continuing Issue: Appropriations

Although the 1987 Clean Water Act amendments dealt extensively with financial aid issues, funding questions have continued to arise and be addressed in the context of appropriations.[25]

FY2007. The President's FY2007 budget requested $687.6 million for clean water State Revolving Fund capitalization grants, 22% less than in FY2006 and 37% below the FY2005 funding level. As in recent budgets, the Administration proposed no funding for congressionally designated water infrastructure grants, but it did seek a total of $40.6 million for Administration priority projects in Puerto Rico, Alaska Native Villages, and at the U.S.-Mexico border. Advocates of the SRF program (especially state and local government officials) contended that the cuts will impair their ability to carry out needed municipal wastewater treatment plant improvement projects. Administration officials said that cuts for the SRF in FY2007 were necessary because Congress boosted funds above the requested level in FY2005 and

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[24] For background, see CRS Report RL32884, *Pesticide Use and Water Quality: Are the Laws Complementary or In Conflict?* by Claudia Copeland.

[25] For additional information, see CRS Report 96-647, *Water Infrastructure Financing: History of EPA Appropriations*, by Claudia Copeland.

2006. A group of state officials contended that the budget unfairly targeted state and local environmental grants.

On May 18, 2006, the House passed H.R. 5386 (H.Rept. 109-465), providing the requested level of $687.6 million for clean water SRF grants. The Senate Appropriations Committee approved the same funding level for clean water SRF grants when it reported H.R. 5386 on June 29 (S.Rept. 109-275). However, the Senate did not act on this bill before the 109th Congress adjourned in December 2006, thus delaying final action until early 2007. The amount in both bills for these clean water grants is significant because, if enacted at that level in a final FY2007 measure, it would be first time since FY1997 that Congress has not appropriated more than was requested in the President's budget. However, both bills included funds for congressionally earmarked water infrastructure project grants not requested by the Administration ($200 million in the House bill, $210 million in the Senate bill).

The House-passed bill included $29.6 million for cleanup of contaminated sediments in the Great Lakes ($20 million less than requested), $204 million for Section 319 grants ($10 million more than requested), and $221.7 million for Section 106 state program administration grants (as requested). The Senate-reported bill included slightly different amounts for these programs: $30.6 million for cleanup of contaminated sediments in the Great Lakes, $200 million for Section 319 grants, and $218.7 million for Section 106 grants.

When the 109th Congress adjourned in December 2006, it had not completed action on appropriations legislation to fund EPA (or on other appropriations bills covering the majority of domestic discretionary agencies and departments). Congress enacted a continuing resolution (CR), P.L. 109-383 (the third such CR since the start of the fiscal year on October 1), providing funds for EPA and the other affected agencies and departments until February 15, 2007. Funding levels provided under this CR follow a "lowest level" concept for individual programs, that is, the lowest level under House-passed FY2007 appropriations, Senate-passed appropriations, or the FY2006 funding. For clean water SRF grants, the resulting appropriation under this resolution was $687.6 million, as in House-passed H.R. 5386.

Returning to these issues in 2007, in mid-February, Congress passed H.J.Res. 20, a continuing appropriations resolution that provides funding for EPA and the other affected agencies through the end of FY2007. As passed, this full-year resolution holds most programs and activities at their FY2006 appropriated levels. However, clean water SRF capitalization grants are one of the few programs that receive a funding increase under the resolution: these grants will receive $1.08 billion ($197 million more than in FY2006, and $396 million more than the President requested for FY2007). The resolution further prohibits project grants for congressional earmarks. (Water infrastructure project earmarks totaled $281 million in EPA's FY2006 appropriation.) President Bush signed H.J.Res. 20 on February 15 (P.L. 110-5).

FY2008. The President's FY2008 budget request was presented to Congress on February 5, before finalization of the FY2007 appropriations. The budget seeks $687.6 million for clean water SRF grants, the same amount requested for FY2007. The budget seeks reduced funding for several other water quality programs below

levels enacted for FY2007 in P.L. 110-5, including nonpoint pollution management grants (proposed 5% cut), grant funding for states for watershed protection (proposed to be eliminated), and funds for the National Estuary Program (proposed 28% cut). Other water quality programs would receive increased funding under the proposal, including cleanup of contaminated sediments in the Great Lakes (proposed 21% increase), funds for the Chesapeake Bay program (30% increase), and grants to states for water quality monitoring (3% increase).