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Updated August 15, 2017

Water Quality Issues in the 115th Congress: A Brief Overview

The Clean Water Act (CWA) of 1972 declared its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Much progress has been made in 45 years toward this objective. Significant water quality problems persist, however, and there is little consensus among stakeholders about what solutions are appropriate—including whether legislation is required to address remaining problems or whether existing regulatory authorities should be revised. In the 115th Congress, interest in several ongoing issues has continued: defining the scope of waters regulated under the CWA, addressing the nation's wastewater infrastructure needs, and determining what (if any) actions should be taken to address controversies over CWA permitting requirements.

Legislative and Oversight Issues

Defining "Waters of the United States"

Under Section 404 of the CWA, landowners or developers must obtain permits to discharge dredged or filled material into "navigable waters," defined in the act as "waters of the United States, including the territorial seas" (CWA Section 502(7)). The Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA), which share implementation of the Section 404 permitting program, have defined this term more fully through regulations, as authorized by the CWA. Supreme Court rulings in 2001 and 2006 interpreted the scope of the term more narrowly than the Corps and EPA had defined it in carrying out their duties under the CWA.

In an effort to respond to the Court's rulings and reduce uncertainty about the scope of waters under CWA jurisdiction, including waters subject to Section 404 permitting requirements, the Corps and EPA issued guidance and the Clean Water Rule—or "Waters of the United States (WOTUS) Rule." The final rule, published in June 2015, has been controversial. The Corps and EPA then asserted that the rule does not expand the jurisdiction of regulated waters but rather that it clarifies the definition of types of waters with ambiguous jurisdictional status. Some stakeholders—such as landowners, developers, and agricultural interests—criticized the rule for expanding CWA jurisdiction beyond what Congress intended. States and localities supported efforts to clarify the scope of waters covered, but some were concerned about compliance costs. Environmental groups generally supported the rule, but some asserted that the scope should be more inclusive.

Industry groups, more than half the states, and several environmental groups filed lawsuits in multiple federal district and appeals courts to challenge the rule. An appeals court ordered a nationwide stay of the rule in October 2015 and later ruled that it had jurisdiction to hear consolidated challenges to the rule. In January 2017, the Supreme Court granted a petition to decide whether federal district or appellate courts are the proper venue for challenges to the rule. Oral arguments are not expected until the fall of 2017. Meanwhile, the Corps and EPA are using guidance and regulations that were in place prior to the 2015 rule to determine CWA jurisdiction, which stakeholders have asserted is ambiguous and often leads to time-consuming case-by-case determinations.

In February 2017, President Trump issued an executive order directing the Corps and EPA to review and rescind or revise the rule. A proposed rule, published on July 27, 2017 (82 *Federal Register* 34899), would "initiate the first step in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States' consistent with the Executive Order." The first step proposes to rescind the 2015 rule and re-codify the regulatory definition of "waters of the United States" as it existed prior to the rule.

In the 115th Congress, bills have focused on repealing the rule (H.R. 1105) or replacing it with a narrower statutory definition of waters subject to CWA jurisdiction (H.R. 1261). Members of the House and Senate have proposed resolutions expressing the sense that the rule should be withdrawn or vacated (H.Res. 152 and S.Res. 12). The Energy and Water Development Appropriations Act, 2018 (included in the FY2018 National Security Consolidated Appropriations Act), and the Interior, Environment, and Related Agencies Appropriations Act, 2018 (H.R. 3354), as reported, contain provisions that would allow withdrawal of the rule "without regard to any provision of statute or regulation that establishes a requirement for such withdrawal" (e.g., the Administrative Procedure Act).

Clean Water Infrastructure Funding

According to the most recent *Needs Survey* estimate by EPA and the states, $271 billion is needed to ensure that the nation's wastewater treatment facilities meet the CWA's water quality objectives. The Clean Water State Revolving Fund (CWSRF) program assists states in financing a wide range of water quality infrastructure projects. Through annual appropriations, EPA provides grants to states to capitalize SRFs. States use funds primarily to provide subsidized loans to municipalities for eligible projects. Loan recipients repay the funds to the states to be used for future projects, providing an ongoing source of funding. Congress has appropriated an average of $1.45 billion annually in recent years for the CWSRF program. Also, the Water Infrastructure Finance and Innovation Act (WIFIA) program is a new source of potential financing for water infrastructure. It authorizes EPA to provide credit assistance for projects with costs over $20 million. For FY2017, Congress appropriated $30 million to EPA, which is expected to begin issuing loans in 2017. According to EPA,

the appropriations for subsidy costs will allow the agency to lend approximately $1.5 billion for water infrastructure projects.

Congressional interest in wastewater infrastructure funding remains steady. Issues include how to allocate SRF funds among the states, how to help municipalities prioritize projects and funding, and how to assist small communities that may have difficulty participating in the SRF program.

General Permits

Under the CWA, EPA and states use National Pollutant Discharge Elimination System (NPDES) permits to authorize and regulate discharges of pollutants into the nation's waters. There are two basic types of NPDES permits: (1) individual permits for a specific discharger, and (2) general permits covering categories of point sources that have common elements and discharge the same waste types. General permits allow the permitting authority to allocate resources efficiently—especially when there is a large number of permittees—and to provide timely permit coverage. Initially, permitting efforts focused on individual permits for larger industrial and municipal sources. Over time, the scope of permitted sources expanded to include less traditional sources. Litigation from environmental groups in the 1990s challenging EPA's practice of not requiring permits for certain types of discharges (i.e., incidental discharges from vessels and approved pesticide applications) resulted in courts requiring EPA to regulate such discharges. The vessel general permit and the pesticide general permit have been controversial, generating congressional interest to address concerns with the permits or to exclude the sources from CWA permit requirements.

Vessel General Permit (VGP)

Although the CWA explicitly includes vessels as a point source subject to the act's requirements, in 1973 EPA excluded discharges incidental to the normal operation of vessels, including ballast water, from CWA permitting requirements. Decades later, environmental groups challenged the regulation over concerns including the introduction of aquatic nuisance species through ballast water discharges. In 2005, a federal court ruled that the 1973 regulation contradicted the intention of Congress to regulate discharges from vessels under the CWA and later issued an order revoking the regulatory exclusion. In response, EPA issued a VGP in 2008 covering incidental discharges into U.S. waters from commercial vessels greater than 79 feet in length and for ballast water from commercial vessels of all sizes. Upon expiration, EPA replaced it with the 2013 VGP, which establishes requirements for 27 discharge categories. Similar to the 2008 permit, the 2013 VGP includes best management practices and recordkeeping requirements for ballast water. However, it further specifies ballast water numeric discharge limits, which are identical to standards set by the International Maritime Organization as well as U.S. Coast Guard standards finalized in 2012.

Although stakeholders agree on the need for measures to control discharges, key issues remain. Maritime industry groups have raised concerns that EPA's permit overlaps with Coast Guard rules, making implementation costly and confusing. They also object to conditions that some states attach to EPA's VGP under CWA Section 401, which they assert creates a patchwork of requirements that puts them in a difficult regulatory position. Many states, however, oppose proposals to preempt such state action. Some states and environmental groups favor more stringent numeric standards to eliminate aquatic nuisance species invasions and protect water quality. See CRS Report R42142, *EPA's Vessel General Permits: Background and Issues*.

In the 115th Congress, related bills (S. 168, H.R. 1154), if enacted, would establish a single federal ballast water management standard that would supersede state standards or permits and current EPA requirements. The bills would also make the moratorium for small commercial vessels permanent. The Senate Committee on Commerce, Science, and Transportation has reported S. 168 (S.Rept. 115-16).

Pesticide General Permit (PGP)

For decades after enactment of the CWA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), there was little apparent conflict between the two laws. EPA's practice was that pesticides used in compliance with FIFRA did not require regulatory consideration under the CWA. In 2006, EPA formalized its long-standing position that pesticides applied in a manner consistent with FIFRA did not require NPDES permits. It also clarified that pesticide applications in violation of FIFRA *would be* subject to the CWA and permitting requirements. The rule prompted multiple lawsuits by industry and environmental groups. The Sixth Circuit vacated the rule in 2009. In 2011, EPA issued a PGP, which covered discharges of biological and chemical pesticides that leave a residue. It required permittees to minimize pesticide discharges through pest management measures and to monitor and report adverse incidents. EPA renewed the permit in 2016, largely keeping the same requirements.

Critics of the PGP assert, among other concerns, that CWA requirements are duplicative of FIFRA and burdensome, particularly when using pesticides to combat public health threats, such as mosquito-borne diseases. Supporters side with court rulings stating that FIFRA and CWA have different purposes and that complying with FIFRA does not obviate the need to obtain a CWA permit. See CRS Report RL32884, *Pesticide Use and Water Quality: Are the Laws Complementary or in Conflict?*

Over the past several congresses, Members have introduced many bills on the issue, including efforts to nullify the 2009 ruling, amend the CWA or FIFRA to exclude pesticide applications from CWA permitting requirements, and clarify congressional intent regarding the regulation of pesticide use in or near U.S. waters. In the 115th Congress, House-passed H.R. 953 and a related Senate bill (S. 340) would, with some exceptions, prohibit EPA or a state from requiring NPDES permits for discharges of pesticides from point sources into navigable waters if the discharges are approved under FIFRA.

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