

Clean Water Issues in the 105th Congress

Claudia Copeland
Specialist in Environmental Policy
Environment and Natural Resources Policy Division

Summary

For the 105th Congress, reauthorization of the Clean Water Act may be a priority in the second session. The Act was last amended in 1987 and authorizations expired on Sept. 30, 1990. Clean water was a priority for the last two Congresses, but no legislation was enacted. In the 104th Congress, the House passed a comprehensive reauthorization bill, but during House debate and subsequently, controversies arose over whether and how the Act should be made more flexible and less burdensome on regulated entities. Issues likely to be of interest again in the 105th Congress include funding, overall flexibility and regulatory reform of water quality programs, and measures to address polluted runoff from farms and city streets. Reforming the Act's wetlands permit program, a pivotal and contentious issue in the recent past, also remains on the legislative agenda for many. During the first session, committees with jurisdiction are giving priority to reauthorizing two other laws, Superfund and the Intermodal Surface Transportation Act.

Background and Recent Activity

The Clean Water Act (CWA) is the principal law governing pollution in the Nation's lakes, rivers, and coastal waters and authorizing funds to aid construction of municipal wastewater treatment plants. Originally enacted in 1948 and significantly revised in 1972 (P.L. 92-500), the Act was last amended in 1987 (P.L. 100-4). These amendments are now being implemented by states, cities, the federal government, and regulated industries. The CWA has been viewed as one of the Nation's most successful environmental laws in terms of achieving the statutory goals, which have been widely supported by interest groups and the public, but lately has been criticized over whether the benefits have been worth the costs.

Such criticisms have come especially from industry, which has been the traditional focus of the Act's regulatory programs and which opposes imposition of additional more 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, thus raising concern about regulatory "takings." States and cities have traditionally supported water quality programs and favored reauthorization in order to obtain more funding to carry out the law, but

recently many opposed CWA measures that might impose new unfunded mandates. Environmental groups believe that further fine-tuning to strengthen the Act is needed to maintain progress achieved to date and to address remaining water quality problems.

The Act consists of two major parts: regulatory provisions that impose 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 major parts are supported by research activities, plus permit and penalty provisions for enforcement. In the past, congressional efforts to amend the CWA have dealt with all aspects of the law, with the objective of strengthening water quality programs.

In the 104th Congress, the CWA was one of the first environmental laws to receive congressional attention. A comprehensive reauthorization bill, H.R. 961, was approved by the House Transportation and Infrastructure Committee in April 1995 and passed the House in May. H.R. 961 reflected efforts to make the Act more flexible and less prescriptive and to address regulatory relief issues raised by industries, states, and cities, who had criticized what they view as excessive and prescriptive clean water regulation. The legislation was endorsed by industry, state, and local government groups, but was opposed by environmental groups and the Clinton Administration. Officials of the Environmental Protection Agency (EPA) said that the bill would undermine the existing framework for protecting U.S. waters. During its consideration of the bill, the House adopted more than a dozen amendments but rejected others offered by Democrats and moderate Republicans that sought to modify aspects of the committee's legislation.

The House-passed bill was subsequently labeled by environmentalists as "the Dirty Water Bill," and many observers contended that legislative efforts to reform clean water programs had overreached and resulted in controversy, not consensus. Supporters of the bill disputed the environmentalists' characterization of H.R. 961 and said that they also support strong clean water programs, but favor approaching pollution control in a more collaborative and less commanding way based on better priority-setting, considering costs and benefits of controls, and devolving authority to state and local governments. In the Senate, reauthorization legislation was not introduced, and no hearings on H.R. 961 were held; thus, no CWA amendments were enacted. (For more information, see CRS Issue Brief 97001, *Clean Water Act Reauthorization in the 105th Congress.*)

Broad Issues Affecting Clean Water Act Reauthorization

Legislative prospects for the CWA in the 105th Congress are uncertain, in part because the issues and controversies which were unresolved in the 104th Congress may recur. Some issues are specific to the clean water statute. Others are broader than this law and broader even than other environmental laws. These broader issues include: private property "takings" (federal regulatory actions considered to infringe on property rights and diminish the value of private property holdings) and regulatory reform and risk assessment (defined as whether EPA should be required to conduct risk and cost/benefit analysis in developing regulations or in setting regulatory priorities). Private property takings arise in connection with many regulatory activities which have the potential to restrict an individual's use of property (from zoning to protection of threatened or endangered species). Support for greater consideration of the costs and benefits of regulation is similarly not exclusive to environmental standards and rules.

These issues and a third — unfunded mandates (federal requirements imposed on states and cities without sufficient funding or flexibility to achieve them) — affected consideration of the Clean Water Act since 1993. Along with other reforms, they were included in the House Republican “Contract with America.” The 104th Congress addressed the unfunded mandates issue in a measure (P.L. 104-4) that requires the Senate and House to take a separate, majority vote in order to pass any bill that would impose unfunded mandates of more than \$50 million on states and cities or more than \$100 million on the private sector. Another enactment, P.L. 104-121, authorized congressional review of major federal agency regulations. Both regulatory “takings” and regulatory reform were addressed in the House-passed CWA bill, H.R. 961, and both were included in a broad measure passed by the House to carry out a number of items in the Contract with America (H.R. 9). The Senate did not act on H.R. 9 or other comprehensive regulatory reform legislation (S. 343).

In the 105th Congress, renewed attention to these broad issues is likely, but the form of that attention is uncertain. Congress could approach these issues in comprehensive legislation affecting not just the CWA, not just EPA, but many other programs, departments, and agencies (similar to H.R. 9 in the 104th Congress). Or, the issues might be considered in the context of statute-specific debates, as the 104th Congress did in regulatory reform and risk analysis provisions that were enacted in amendments to the Safe Drinking Water Act (P.L. 104-182) and the Food Quality Protection Act of 1996 (P.L. 104-170).

Clean Water-specific Issues

One reason that reauthorization of the CWA may receive congressional attention is that authorizations for most current programs expired Sept. 30, 1990.¹ If the 105th Congress does take up the Act, a number of specific issues which were debated in the 104th Congress are likely to be the core of clean water legislative activity. Among the issues likely to receive attention are funding; regulatory reform and cost-benefit analysis in the Act; regulation or protection of wetlands; and management of nonpoint source pollution. Also likely is oversight and possible legislation concerning initiatives at EPA that affect water quality programs.

All of the CWA issues likely to receive attention in the 105th Congress (funding, polluted runoff, wetlands protection, and regulatory requirements) have been open for debate for several years, even before Republican majorities were elected to the House and Senate in the 104th Congress. What is at issue is how these issues are framed and whether proposed changes are seen as strengthening or weakening the law.

Wastewater Funding . The 1987 CWA amendments authorized \$18 billion to aid construction of wastewater treatment facilities through FY1994 and established a new program of federal grants to capitalize State Water Pollution Control Revolving Funds, or state loan programs (SRFs). Although authorizations expired, and initial congressional

¹ Rules of the House of Representatives require enactment of an authorization before funds can be appropriated for a federal activity, although that requirement can be and frequently is waived. Thus, even though the authorization for CWA appropriations did expire, programs under the Act do not lapse, and Congress has continued to appropriate funds to carry out the Act.

intent was to phase out federal financial support for this program, Congress has continued to provide grant appropriations to the states, providing an average of \$1.7 billion annually in recent years. The most recent survey by states and the EPA estimates that total national wastewater treatment funding needs are \$137 billion to be spent over the next two decades. Thus, because remaining funding needs are still so large, at issue is how to extend SRF assistance to address those needs and modify the SRF program to aid priority projects. Of particular concern is how to assist small and economically disadvantaged communities that have had the most difficulty in adjusting from the Act's previous categorical grants program to loans.

The House-passed CWA bill in the 104th Congress, H.R. 961, authorized \$11.45 billion for SRF capitalization grants through FY2000. It included a new state-by-state allotment formula for distributing SRF grants and several provisions to assist small and disadvantaged communities (e.g., longer loan repayment, negative interest loans). The funding provisions are a significant aspect of the law as a whole and are of great interest to many stakeholder groups. During recent debates, these provisions have been less controversial than debate over others, such as wetlands reform, because of general agreement on the need to extend funding assistance and address small community concerns. Greater controversy has arisen during Congress' budget and appropriations process, where funding for wastewater infrastructure competes with the need and desire to fund other national programs.

Regulatory Reform: Cost-Benefit Analysis and Risk Assessment. An issue raised often in recent legislative debates is concern over the cost to society and the economy of complying with environmental regulations. EPA has estimated that, by the year 2000, U.S. investments for pollution control for all media could represent nearly 3% of Gross Domestic Product, a level that critics of regulation assert is excessive. Annual water pollution control costs, which have increased steadily over time, are estimated by EPA to be \$58 billion in the year 2000, about 36% of projected total pollution control costs at that time. Reducing the cost and burden of federal regulation has been a theme of regulatory reform legislation.

Technically, it is more difficult to quantify the benefits of regulation than to estimate costs, making the overall policy debate uneven at times, since benefits are often less tangible than costs. As part of the FY1997 omnibus appropriations bill (P.L. 104-208), Congress directed the Office of Management and Budget to submit annual reports beginning Sept. 30, 1997, estimating the total annual costs and benefits of federal regulatory programs, using quantitative and qualitative measures of both. It is hoped that these reports will inform future debate.

In debating the CWA in the 104th Congress, supporters of H.R. 961 argued that policymakers and regulators need information based on sound scientific analyses of the potential risks to public health and the environment and need to be able to weigh the costs of CWA regulations against their benefits. Thus, the House-passed CWA bill sought to insert greater consideration of cost in implementation of the law and sought to make risk assessment a much more prominent element of CWA decisionmaking. Critics of the bill said that risk assessment and risk management tools already are used by EPA, while the bill would impose on EPA a rigid decisionmaking process likely to postpone needed actions. It is likely that momentum for benefit-cost reform will continue in the 105th Congress, as the issue has had bipartisan interest. Basic elements likely to be considered

are providing regulatory flexibility while ensuring no rollback of public health and environmental protection. Environmentalists continue to favor limited use of risk and cost-benefit analysis in rulemaking, while many in industry have sought more prescriptive reforms and more opportunity for judicial review of agency decisions. Some observers believe that regulatory reform proponents will pursue statute-by-statute reform of the CWA and other laws, rather than omnibus legislation.

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 from the U.S. Army Corps of Engineers to carry out activities involving disposal of dredged or fill material into navigable waters of the United States, including wetlands. EPA provides environmental guidance on permitting and can veto a permit, based on environmental impacts. Controversy has grown over the extent of federal jurisdiction, burdens and delay of permit procedures, and roles of federal agencies and states in the permitting process.

Among recent proposals for amending Section 404, a number of issues have been raised, including: whether all wetlands should be treated the same or not and whether some could be accorded less stringent regulatory protection; whether activities or areas covered by federal regulation should be modified; and whether federal and state roles in implementing Section 404 should be revised. Views on each of these issues vary. Many conservationists contend that statutory changes that have been proposed would weaken wetlands protection and that more modest administrative reforms would effectively improve the current program. Many landowners say that changes are needed to make the regulatory program workable again. They also argue that the CWA should compensate landowners whose property is adversely affected by regulatory "takings" due to Section 404 requirements, since an estimated 74% of all remaining wetlands are on private lands.

In the 104th Congress, House-passed H.R. 961 would have significantly amended Section 404. It contained several provisions that contributed greatly to controversy over and opposition to that bill. These included a requirement to compensate landowners if federal agency action under Section 404 diminishes the fair market value of property by 20% or more; a wetlands classification system allowing for differential regulatory procedures and requiring no permits in areas classified as least ecologically valuable; and eliminating EPA's role in the permitting process.

Management of Nonpoint Source Pollution. Surveys by states and EPA report that polluted runoff from agriculture and city streets and storm sewers is the leading cause of water quality impairment in the United States. These nonpoint sources of water pollution, along with runoff from forestry and construction sites, land disposal activities, and atmospheric deposition of air pollution contaminants, are believed to contribute more than 50% of remaining water quality problems in rivers, lakes, and coastal waters. The 1987 CWA amendments established the first comprehensive program in the Act to address nonpoint source pollution through state management programs utilizing technical and financial assistance from EPA. Because the sources of nonpoint pollution are diverse, as are the geographic areas it affects, it is generally agreed that management solutions are best if they are tailored to local conditions, not dictated through national rules and regulations. At issue is whether and how to establish programs in the CWA with minimum

standards to ensure that progress towards water quality goals continues to be made, while providing sufficient state and local flexibility and incentives for sources to manage polluted runoff.

Reinventing Government at EPA - Oversight and Possible Legislation. EPA has been at the center of many of the Clinton Administration's efforts to reinvent government, to create a government that works better and costs less. At EPA, these activities include new flexible funding and regulatory arrangements for states and industries, proposals for alternative compliance strategies, and a great many program-specific initiatives, as well. In the water quality program, EPA is moving away from its traditional regulatory approach which focused on controlling industrial and municipal pollution sources. Many of EPA's water quality initiatives start from one based on a watershed approach to problem-solving. This approach recognizes that remaining water quality problems require attention to diffuse (nonpoint) as well as discrete (point source) pollution sources on the basis of geographic areas defined by natural or hydrologic features, instead of political boundaries. Further, the watershed approach is more community-based than top-down in emphasis and is intended to be a process that involves key government, citizen, and other user groups as full partners in developing solutions. EPA is using the broad watershed approach to address specific water pollution issues, including managing nonpoint sources, stormwater runoff, and sewer system overflows. (For more information, see CRS Report 96-283 ENR, *Reinventing the Environmental Protection Agency and EPA's Water Programs*.)

Congressional oversight of these activities could occur in the 105th Congress, in response to criticism from a wide range of interests that the initiatives are delivering far less than has been expected. Questions may be raised, on the one hand, about whether EPA's implementation of these initiatives reflects a true commitment to regulatory flexibility and, on the other hand, whether the initiatives are promoting flexibility and reduced federal oversight to the extent that core elements of environmental protection programs might be diminished. Some in Congress may propose legislation — possibly in connection with CWA reauthorization — to provide a clear statutory basis for the initiatives and to clarify the scope and direction of EPA's government reinvention activities.