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# **EPA and the Army Corps' Proposed "Waters of the United States" Rule: Congressional Response and Options**

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## Summary

In April 2014, the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) jointly proposed to amend the existing rules that define the scope of waters protected under the Clean Water Act (CWA). Discharges to waters under CWA jurisdiction, such as the addition of pollutants from factories or sewage treatment plants and the dredging and filling of spoil material through mining or excavation, require a CWA permit. The rule was proposed in light of Supreme Court rulings in 2001 and 2006 that created uncertainty about the geographic limits of waters that are and are not protected by the CWA. The rule would replace EPA-Corps guidance that has governed permitting decisions since the Court's rulings.

According to EPA and the Corps, their intent was to clarify CWA jurisdiction, not expand it. Nevertheless, the proposal has been extremely controversial, especially with groups representing property owners, land developers, and agriculture, who contend that it represents a massive federal overreach beyond the agencies' statutory authority. Most state and local officials are supportive of clarifying the extent of CWA-regulated waters, but some are concerned that the rule could impose costs on states and localities as their own actions become subject to new requirements. Most environmental advocacy groups welcomed the proposal, which would more clearly define U.S. waters that are subject to CWA protections, but beyond that general support, some in these groups favor an even stronger rule.

Some in Congress favor halting EPA and the Corps' current approach to defining "waters of the United States." To do so legislatively, there are at least four options available to change the agencies' course.

- **The Congressional Review Act.** If Congress passes a joint resolution disapproving a covered rule under procedures provided by the act, and the resolution becomes law, the rule cannot take effect or continue in effect. The agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.
- **Appropriations bill limitations.** A provision in an appropriations bill can be a mechanism to block or redirect an agency's course of action by limiting or preventing agency funds from being used for the rule.
- **Targeted legislation.** Other legislation can take several forms, such as a bill similar to limits in an appropriations bill to prohibit EPA and the Corps from finalizing, implementing, or enforcing the proposed rule. Another approach could be legislation to address substantive aspects of the proposed rule that have been criticized.
- **Broad amendments to the Clean Water Act.** Legislation to affirm or clarify Congress's intention regarding CWA jurisdiction would have broad implications for the CWA, since questions of jurisdiction are fundamental to all of the act's regulatory requirements.

These options and related legislative activity are discussed in this report. Each option faces a steep path to enactment, because President Obama likely would oppose legislation to halt or weaken a major regulatory initiative of the Administration such as the proposed "waters of the United States" rule. To become law, the President must sign a bill or allow it to become law without his signature, or two-thirds of the House and Senate must vote to override his veto.

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## Introduction

In April 2014, the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) jointly proposed to amend the existing rules that define the scope of waters protected under the Clean Water Act (CWA).<sup>1</sup> Discharges to waters under CWA jurisdiction, such as the addition of pollutants from factories or sewage treatment plants and the dredging and filling of spoil material through mining or excavation, require a CWA permit. The rule was proposed in light of Supreme Court rulings that created uncertainty about the geographic limits of waters that are and are not protected by the CWA.

More than 1 million public comments on the proposed rule were received during the comment period, which closed November 14, 2014. The agencies have completed revisions to the proposal and submitted a final rule to the Office of Management and Budget (OMB) on April 3. The OMB review is usually the last step before a federal agency releases a rule. EPA and Corps officials have said that they expect to publish a final rule in the spring of 2015.

According to EPA and the Corps, the agencies' intent was to clarify CWA jurisdiction, not expand it. Nevertheless, the proposal has been extremely controversial, especially with groups representing property owners, land developers, and the agriculture sector, who contend that it represents a massive federal overreach beyond the agencies' statutory authority. Most state and local officials are supportive of clarifying the extent of CWA-regulated waters, but some are concerned that the rule could impose costs on states and localities as their own actions (e.g., transportation or public infrastructure projects) become subject to new requirements. Most environmental advocacy groups welcomed the proposal, which would more clearly define U.S. waters that are subject to CWA protections, but beyond that general support, some in these groups favor even a stronger rule.

Many critics in Congress and elsewhere have urged that the proposed rule be withdrawn, but EPA and Corps officials have not indicated that they will do so. Some in Congress favor halting the agencies' current approach to defining "waters of the United States." This report discusses several options that Congress could consider.

## Background<sup>2</sup>

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas."<sup>3</sup> Waters need not be truly navigable to be subject to CWA jurisdiction. The act's single definition of "navigable waters" applies to the entire law, including the federal prohibition on pollutant discharges except in compliance with the act (§301), permit requirements (§§402 and 404), water quality standards and measures to attain them (§303), oil

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<sup>1</sup> Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Definition of 'Waters of the United States Under the Clean Water Act, Proposed Rule,'" *79 Federal Register* 22188-22274, April 21, 2014.

<sup>2</sup> The CWA and the proposed rule are more fully discussed in CRS Report R43455, *EPA and the Army Corps' Proposed Rule to Define "Waters of the United States,"* by Claudia Copeland. It includes a table that compares the current regulatory language that defines "waters of the United States" with language in the proposed rule.

<sup>3</sup> CWA §502(7); 33 U.S.C. §1362(7).

spill liability and oil spill prevention and control measures (§311), and enforcement (§309). The CWA gave the agencies the authority to define the term "waters of the United States" in regulations, which EPA and the Corps have done several times, most recently in 1986. While EPA is primarily responsible for implementing the CWA, EPA and the Corps share implementation of the dredge and fill permitting program in Section 404.

The courts, including the Supreme Court, generally upheld the agencies' implementation until Supreme Court rulings in 2001 and 2006 (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, (SWANCC) 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 716 (2006), respectively). Those rulings interpreted the regulatory scope of the CWA more narrowly than the agencies and lower courts were then doing, and created uncertainty about the precise effect of the decisions.<sup>4</sup>

In 2003 and 2008, the agencies issued guidance intended to lessen confusion over the Court's rulings. The non-binding guidance sought to identify, in light of those rulings, categories of waters that remain jurisdictional, categories not jurisdictional, and categories that require a case-specific analysis to determine if CWA jurisdiction applies. The Obama Administration proposed revised guidance in 2011; it was not finalized, but it was the substantive basis for the 2014 proposed rule. In proposing now to amend the regulatory definition of "waters of the United States" rather than issue another guidance document, EPA and the Corps were not only acting to reduce the confusion created by *SWANCC* and *Rapanos*. They also appear to be picking up on the suggestion of several of the justices in *Rapanos* that an amended rule would be helpful.

The proposed rule retains much of the structure of the agencies' existing definition of "waters of the United States."<sup>5</sup> It focuses particularly on clarifying the regulatory status of waters located in isolated places in a landscape and streams that flow only part of the year, along with nearby wetlands—the types of waters with ambiguous jurisdictional status following the Supreme Court's rulings. Like the 2003 and 2008 guidance documents, it proposes categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation.

- Under the proposed rule, all tributaries to the nation's traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be jurisdictional *per se*. All of these waters are jurisdictional under existing rules, but the term "tributary" is newly defined in the proposal.
- Waters, including wetlands, that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be jurisdictional by rule. By including all *adjacent waters*—not simply *adjacent wetlands*, as in existing rules—the proposal is more inclusive than current rules in finding bordering or neighboring waters to be categorically jurisdictional (i.e., no case-specific evaluation would be required).

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<sup>4</sup> For discussion of the legal background, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

<sup>5</sup> The definition of "waters of the United States" is found at 33 C.F.R. §328.3 (Corps) and 40 C.F.R. §122.2 (EPA). The term is similarly defined in other EPA regulations, as is the term "navigable waters."

- Some waters—but fewer than under current practice—would remain subject to a case-specific evaluation of whether or not they meet the legal standards for federal jurisdiction established by the Supreme Court.
- The proposal identifies a number of types of waters to be excluded from CWA jurisdiction. Some are restatements of exclusions under current rules (e.g., prior converted cropland); some have been excluded by practice and would be expressly excluded by rule for the first time (e.g., groundwater, some ditches). The proposal makes no change and does not affect existing statutory exclusions: permit exemptions for normal farming, ranching, and silviculture practice and for maintenance of drainage ditches (CWA §404(f)(1)), as well as for agricultural stormwater discharges and irrigation return flows (CWA §402(l)).

The agencies' intention was to clarify questions of CWA jurisdiction, in view of the Supreme Court's rulings and consistent with the agencies' scientific and technical expertise. Much of the controversy since the Court's rulings has centered on the many instances that have required applicants for CWA permits to seek a time-consuming case-specific evaluation to determine if CWA jurisdiction applies to their activity, due to uncertainty over the geographic scope of the act. In the proposed rule, the Corps and EPA intended to clarify jurisdictional questions by clearly articulating categories of waters that are and are not protected by the CWA and thus limiting the types of waters that still require case-specific analysis. However, critical response to the proposal, coming from industry, agriculture, many states, and some local governments, is that the rule is vague and ambiguous and could be interpreted to enlarge the regulatory jurisdiction of the CWA beyond what the statute and the courts allow.

Industries that are the primary applicants for CWA permits and agriculture groups have raised numerous objections over how broadly they fear that the proposed rule would be interpreted. Many have urged that it be withdrawn. The proposal would add new definitions of key terms, such as "tributary" and "significant nexus." Because definitions often are key to interpreting statutory law and regulations, critics contend that the proposed new definitions are ambiguous and would lead to broader assertion of CWA jurisdiction than is consistent with law and science. Agriculture has been concerned that the proposal would modify existing CWA exemptions for agricultural practices. The agencies have said that the rule does not affect these exclusions, but the farm community is skeptical.

Some local governments also have criticized the proposal. They point out that localities own and maintain public infrastructure including roadside ditches, flood control channels, and stormwater management structures. Because the proposed rule would define some ditches as "waters of the United States" if they meet certain conditions, while excluding other ditches, these local governments contend that the proposal potentially increases the number of locally owned ditches under federal jurisdiction. Permit requirements are not an issue, they say, but obtaining permits can be time-consuming and expensive. EPA and Corps officials believe that the proposed exclusion of most ditches actually decreases federal jurisdiction, but the issue remains controversial.

Many states and state environmental agencies have expressed support for a rule to clarify the scope of CWA jurisdiction, but there is no state consensus on the Corps-EPA proposal or on whether it should be withdrawn. Some are generally supportive, but others believe that the agencies did insufficient consultation with the states prior to proposing the rule. States, they point out, are co-regulators of the CWA with EPA, making determinations of federal jurisdiction equally important to states as to industry.

Environmental groups defend the agencies' efforts to protect U.S. waters and reduce frustration resulting from unclear jurisdiction of the CWA. Still, beyond this general support for the rule, some of them argue that it should be strengthened, for example, by designating additional categories of waters and wetlands such as prairie potholes and vernal pools as categorically jurisdictional, rather than requiring site-specific analysis.

Officials of the Corps and EPA have vigorously defended the proposed rule. They believe that it is consistent with scientific understanding of connections between small streams and downstream waters, but does not exceed the CWA's coverage and would not enlarge jurisdiction beyond what is consistent with the Supreme Court's current reading of jurisdiction. But they acknowledge that the proposal raised questions that will have to be clarified in the final rule. Agency officials have conducted extensive outreach to discuss the rule, but they seemingly have had limited success in abating criticism. In an April 2015 blog post, the EPA Administrator and the Assistant Secretary for the Army said that the agencies have responded to criticisms of the proposal with changes that are reflected in the final rule, which was submitted to OMB on April 3. The blog post says that the final rule makes changes such as: defining tributaries more clearly; better defining how protected waters are significant; limiting protection of ditches to those that function like tributaries and can carry pollution downstream; and preserving CWA exclusions and exemptions for agriculture.<sup>6</sup>

Many critics in Congress and elsewhere have urged that the proposed rule be withdrawn. EPA and Corps officials point out that doing so would leave in place the status quo—with determinations of CWA jurisdiction being made pursuant to existing regulations, coupled with non-binding agency guidance, and many of these determinations involving time-consuming case-specific evaluation. The agencies' intention has been to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. Some industry and agriculture groups that criticized the status quo in the past now seemingly prefer it to the proposed rule, which they believe is ambiguous and overly broad.

Congressional interest in the proposed rule has been strong since it was announced in 2014. On February 4, 2015, the Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee held a joint hearing on impacts of the proposed rule on state and local governments, hearing from public and EPA and Corps witnesses. Other hearings have been held by Senate and House committees in the 114<sup>th</sup> Congress. The proposal also was discussed at House committee hearings during the 113<sup>th</sup> Congress. As described below, a number of bills have been introduced, most of them intended to prohibit the agencies from finalizing the 2014 proposed rule.

## Congressional Options

As noted earlier, some in Congress favor halting EPA and the Corps' current approach to defining "waters of the United States." To do so legislatively, there are at least four options available to change the agencies' course: a resolution of disapproval under the Congressional Review Act, appropriations bill provisions, targeted legislation, and broad amendments to the Clean Water Act.

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<sup>6</sup> Gina McCarthy and Jo-Ellen Darcy, "Your Input is Shaping the Clean Water Rule," *EPA Connect, The Official Blog of EPA's Leadership*, April 6, 2015, <http://blog.epa.gov/epaconnect/2015/04/your-input-is-shaping-the-clean-water-rule/#more-3470>.

## Congressional Review Act<sup>7</sup>

The Congressional Review Act (CRA), enacted in 1996, establishes special congressional procedures for disapproving a broad range of regulatory rules issued by federal agencies.<sup>8</sup> Before any rule covered by the act can take effect, the federal agency that promulgates it must submit it to both houses of Congress and the Government Accountability Office (GAO). If Congress passes a joint resolution disapproving the rule under procedures provided by the act, and the resolution becomes law,<sup>9</sup> the rule cannot take effect or continue in effect. Also, the agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.<sup>10</sup>

The CRA applies to major rules, non-major rules, final rules, and interim final rules. The definition of "rule" is sufficiently broad that it may define as "rules" agency actions that are not subject to traditional notice and comment rulemaking under the Administrative Procedure Act, such as guidance documents and policy memoranda. A joint resolution of disapproval must be introduced within a specific time frame: during a 60-days-of-continuous-session period beginning on the day the rule is received by Congress.<sup>11</sup>

The path to enactment of a CRA joint resolution is a steep one. In the nearly two decades since the CRA was enacted, only one resolution has ever been enacted.<sup>12</sup> The path is particularly steep if the President opposes the resolution's enactment, which would almost certainly be the case with a resolution disapproving an EPA-Corps rule to define "waters of the United States." The Obama Administration has fully supported the agencies' regulatory proposal. Thus, many have concluded that legislation restricting their authority to act, if passed by Congress, would encounter a presidential veto. Overriding a veto requires a two-thirds majority in both the House and Senate.<sup>13</sup>

The potential advantage of the CRA lies primarily in the procedures under which a resolution of disapproval can be considered in the Senate. Pursuant to the act, an expedited procedure for Senate consideration of a joint resolution of disapproval may be used at any time within 60 days of Senate session after the rule in question has been submitted to Congress and published in the

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<sup>7</sup> This section, discussing the effect of the Congressional Review Act, the procedures under which a disapproval resolution can be taken up in the Senate, floor consideration in the Senate, and final congressional action, is adapted from CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth; and CRS In Focus IF10023, *The Congressional Review Act (CRA)*, by Alissa M. Dolan, Maeve P. Carey, and Christopher M. Davis.

<sup>8</sup> 5 U.S.C. §§801-808. The CRA applies to a "rule," as defined in 5 U.S.C. §804(3).

<sup>9</sup> For the resolution to become law, the President must sign it or allow it to become law without his signature, or Congress must override a presidential veto.

<sup>10</sup> The CRA has been much discussed as a tool for overturning EPA's regulatory actions on greenhouse gas emissions. See CRS Report R41212, *EPA Regulation of Greenhouse Gases: Congressional Responses and Options*, by James E. McCarthy.

<sup>11</sup> Days-of-continuous-session periods count every calendar day, including weekends and holidays, and only exclude days that either chamber (or both) is gone for more than three days, that is, pursuant to an adjournment resolution.

<sup>12</sup> See P.L. 107-5 (2001) (disapproving an Occupational Safety and Health Administration rule regarding ergonomics published at 65 *Federal Register* 68261).

<sup>13</sup> In addition to the one disapproval resolution that has been enacted since 1996, the Senate has considered such a resolution fewer than 15 times. A few of these passed the Senate, but none was enacted. In the other instances, the Senate debated the question of calling up the resolution or the resolution itself, and rejected the question.



*Federal Register*. The expedited procedure provides that, if the committee to which a disapproval resolution has been referred has not reported it by 20 calendar days after the rule has been received by Congress and published in the *Federal Register*, the committee may be discharged if 30 Senators submit a petition for that purpose. The resolution is then placed on the Senate Calendar.

Under the expedited procedure, once a disapproval resolution is on the Senate Calendar, a motion to proceed to consider it is in order. Several provisions of the expedited procedure protect against various potential obstacles to the Senate's ability to take up a disapproval resolution. The Senate has treated a motion to consider a disapproval resolution under the CRA as not debatable, so that this motion cannot be filibustered through extended debate. After the Senate takes up the disapproval resolution itself, the expedited procedure of the CRA limits debate to 10 hours and prohibits amendments.<sup>14</sup>

The act sets no deadline for final congressional action on a disapproval resolution, so a resolution could theoretically be brought to the Senate floor even after the expiration of the deadline for the use of the CRA's expedited procedures. To obtain floor consideration, the bill's supporters would then have to follow the Senate's normal procedures, however.

There are no expedited procedures for initial House consideration of a joint resolution of disapproval. A resolution could reach the House floor through its ordinary procedures, that is, generally by being reported by the committee of jurisdiction (in the case of CWA rules, the Transportation and Infrastructure Committee). If the committee of jurisdiction does not report a disapproval resolution submitted in the House, a resolution could still reach the floor pursuant to a special rule reported by the Committee on Rules (and adopted by the House), by a motion to suspend the rules and pass it (requiring a two-thirds vote), or by discharge of the committee (requiring a majority of the House [218 Members] to sign a petition).

The CRA establishes no expedited procedure for further congressional action if the President vetoes a disapproval resolution. In such a case, Congress would need to attempt an override of a veto using its normal procedures for doing so.

As noted above, if a joint resolution of disapproval becomes law, the rule at issue cannot take effect or continue in effect, and neither that rule nor a substantially similar one may be promulgated, except under authority of a subsequently enacted law. While that outcome would please most critics of the proposed "waters of the United States" rule, it also would leave the regulated community in the situation that many of them have faulted—subject to 1986 rules that are being interpreted pursuant to non-binding agency guidance that frequently requires case-specific evaluation to determine if CWA jurisdiction applies.

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<sup>14</sup> These provisions help to ensure that the Senate disapproval resolution will remain identical, at least in substantive effect, to a House joint resolution disapproving the same rule, and that no filibuster is possible on the resolution itself. In addition, once the motion to proceed is adopted, the resolution becomes "the unfinished business of the Senate until disposed of," and a non-debatable motion may be offered to limit the time for debate further. Finally, the act provides that at the conclusion of debate, the Senate automatically proceeds to vote on the resolution.

## **Appropriations Bills**

Including a provision in an appropriations bill is a second option for halting or re-directing the proposed "waters of the United States" rule by limiting or preventing agency funds from being used for the rule. Congress has considered legislation to do so in the recent past, but no such restrictions have been enacted.

In the 114<sup>th</sup> Congress, on May 1 the House approved the FY2016 Energy and Water Appropriations bill (H.R. 2028) with a provision that would bar the Corps from developing, adopting, implementing, or enforcing any change to rules or guidance pertaining to the CWA definition of "waters of the United States."

Similar legislation was considered in the 113<sup>th</sup> Congress. H.R. 4923, the FY2015 Energy and Water Appropriations Act, passed the House on July 10, 2014. Like the language approved by a House Appropriations subcommittee on April 15, 2015, H.R. 4923 included a provision to restrict new rules to redefine "waters of the United States." Also, the FY2015 Interior and Environment Appropriations Act, providing funds for EPA and other agencies (H.R. 5171), contained a provision to similarly block EPA action on the "waters" rule. The House Appropriations Committee approved H.R. 5171 in July 2014. However, neither of these provisions was included in legislation that provided full-year funding for EPA and the Corps, the Consolidated and Omnibus Appropriations Act, 2015, enacted in December 2014 (P.L. 113-235).

Similarly, in 2012 and 2013, the House passed appropriations bills with restrictions to prohibit the Corps from finalizing revised "waters of the United States" guidance that the Corps and EPA had proposed in 2011, which also was controversial with many stakeholder groups (H.R. 5325, providing FY2013 appropriations; and H.R. 2609, for FY2014 funds). In 2012, the House Appropriations Committee reported H.R. 6091, FY2013 Interior and Environment Appropriations, which included a provision to bar EPA from finalizing the same revised guidance. None of these limitations was enacted.

In comparison to a CRA resolution of disapproval, addressing an issue through an amendment to an appropriations bill may be considered easier, since the overall appropriations bill to which it would be included would presumably contain other elements making it "must pass" legislation, or more difficult for the President to veto. EPA and the Corps anticipate promulgating a final "waters of the United States" rule in the spring, probably May or June 2015 (a final rule was submitted to OMB on April 3), and likely before enactment of FY2016 appropriations bills. After that occurs, a funding prohibition included in an FY2016 appropriations bill would not halt finalizing the rule, but it still could attempt to block funds for implementation. Depending on how such a restriction might be worded, questions could still arise. For example, if an appropriations bill were to prohibit the Corps from making jurisdictional determinations pursuant to the final rule, how would the Corps be able to process and issue permit requests from applicants?

In recent years, controversies over a variety of environmental issues have led to inclusion of provisions in bills reported by the House Appropriations Committee or passed by the House to restrict funds for particular EPA programs, among other agencies. Few of these environmental provisions have been enacted, however, in part due to opposition in the Senate.<sup>15</sup> Some observers foresee a somewhat easier path for congressional consideration of such restrictions in the 114<sup>th</sup>

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<sup>15</sup> See CRS Report R43709, *Environmental Protection Agency (EPA): FY2015 Appropriations*, by Robert Esworthy.

Congress, with Republican majorities in both the House and Senate. However, a bill would still need the President's signature, or the votes of two-thirds majorities in both chambers to override his veto.

## **Targeted Legislation**

A third option is targeted legislation to re-direct development of a "waters of the United States" rule, either by amending the CWA or in a free-standing bill. Such a bill could be similar to a limitation in an appropriations bill with provisions to bar or prohibit EPA and/or the Corps from finalizing, adopting, implementing, or enforcing the proposed "waters of the United States" rule, the 2011 proposed revised guidance, or any similar rule. One such bill has been introduced in the 114<sup>th</sup> Congress (H.R. 594).<sup>16</sup> It also would direct the Corps and EPA to consult with state and local officials on CWA jurisdiction issues and develop a report on results of such consultation. In the 113<sup>th</sup> Congress, similar legislation was introduced in the Senate (S. 2496).<sup>17</sup>

In the 114<sup>th</sup> Congress, H.R. 1732, the Regulatory Integrity Protection Act, was approved by the House on May 12, 2015.<sup>18</sup> It would require EPA and the Corps to develop a new rule, taking into consideration public comments on the 2014 proposal and supporting documents, and, in doing so, to provide for consultation with state and local officials and other stakeholders. Under the bill, when proposing a new rule, the agencies would have to describe the consultations in detail and explain how the new proposal responds to public comments and consultations. During markup of the bill, supporters said that they believe wide criticism of the current proposed rule means it is essential for the agencies to restart the rulemaking process. Opponents of the bill said that doing so now would foreclose the opportunity for Congress and the public to see how the final rule, which the agencies sent to OMB on April 3, responds to those criticisms. Opponents also pointed out that Congress will have the opportunity to nullify the final rule through procedures under the CRA (see "Congressional Review Act"). During debate on the measure, the House adopted an amendment that would give states two years to come into compliance with a new rule without losing authority over their state permitting programs. The Obama Administration opposes H.R. 1732 and has said that the President would veto the bill.

In the Senate, the Federal Water Quality Protection Act (S. 1140) was introduced April 30. Like H.R. 1732, this bill would require the agencies to develop a new rule. EPA and the Corps would be required to take into consideration public comments on the 2014 proposal and to ensure that procedures established under executive orders and laws such as the Regulatory Flexibility Act, Unfunded Mandates Reform Act, and others are followed during the rulemaking. Unlike the House bill, S. 1140 identifies certain principles that must be adhered to in developing a new rule, especially identifying waters that should be included in defining "waters of the United States" (e.g., reaches of streams with surface hydrological connection to traditional navigable waters with flow in a normal year of sufficient volume, duration, and frequency that pollutants in the stream would degrade water quality of the traditional navigable water) and waters that should not be so included (e.g., groundwater, isolated ponds, and prior converted cropland). The principles in the

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<sup>16</sup> Another 114<sup>th</sup> Congress proposal that includes a provision similar to H.R. 594 as part of a larger measure is S. 791/H.R. 1487.

<sup>17</sup> Also in the 113<sup>th</sup> Congress, several non-appropriation bills would have restricted EPA and the Corps from finalizing the guidance document that was proposed in 2011 but not issued (it was, however, the substantive basis for the 2014 proposed rule). Bills included H.R. 1829, H.R. 5077, S. 861, S. 1006, and S. 1514. There was no action on any of them.

<sup>18</sup> The House passed a similar bill in the 113<sup>th</sup> Congress, H.R. 5078.

bill reflect an overall narrow interpretation of the extent of CWA jurisdiction—for example, setting the jurisdictional limits of a stream's reach to waters that have a continuous surface hydrologic connection sufficient to deliver pollutants that would degrade the water quality of a traditional navigable water, as proposed in S. 1140, generally follows the test of jurisdiction stated by Justice Scalia in the *Rapanos* case.<sup>19</sup> Under the legislation, the agencies must make best efforts to publish a final rule by December 31, 2016. A rule not adhering to principles in the bill would have no force or effect. A Senate Environment and Public Works subcommittee held a hearing on this bill on May 19.

Another approach is reflected in S. 1178. It would require EPA and the Army Corps to establish a commission, with membership appointed by the agencies and the Senate and House, to develop criteria for defining whether a waterbody or wetland has a significant nexus to a traditional navigable water. It would bar the agencies from developing, finalizing, implementing, or enforcing the 2014 proposed rule or a substantially similar rule prior to receiving a report from the commission. This bill responds in part to criticism that the science underlying the proposed rule was not thoroughly peer-reviewed and subject to public comment before the rule was announced in April 2014. (For discussion, see CRS Report R43455, *EPA and the Army Corps' Proposed Rule to Define "Waters of the United States."*)

The obstacles for targeted bills are similar to those for an appropriations bill, but with the additional complication of needing to be included in non-appropriations legislation that is "must pass" or difficult for the President to veto, or that can receive two-thirds votes in both chambers to override a veto.

Targeted legislation might seek to address substantive aspects of the proposed rule that have been widely criticized. For example, many stakeholder groups contend that key definitions in the proposal—such as "tributary," "floodplain," and "significant nexus"<sup>20</sup>—are ambiguous, and other terms—such as "upland," "gullies," and "rills"—are entirely undefined. Ambiguities could lead to agency interpretations that greatly expand the regulatory scope of CWA jurisdiction, critics say. However, such criticisms of the proposed rule for the most part have been general in nature, rather than specific as to precise language that would clarify terms and definitions. For Congress to legislate solutions and codify remedies in the CWA likely would require technical expertise that legislators generally delegate to agencies and departments, which implement laws.<sup>21</sup>

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<sup>19</sup> See CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

<sup>20</sup> The concept of significant nexus is critical because courts have ruled that, to establish CWA jurisdiction of waters, there needs to be "some measure of the significance of the connection for downstream water quality," as Justice Kennedy stated in the 2006 *Rapanos* case.

<sup>21</sup> Another legislative option that is sometimes raised in consideration of changing major policy is budget reconciliation, which is a budget enforcement tool under the Congressional Budget Act of 1974. Its chief purpose is "to enhance Congress's ability to change current law in order to bring revenue and spending levels in conformity with the policies of the budget resolution." (See CRS Report RL30458, *The Budget Reconciliation Process: Timing of Legislative Action*, by Megan S. Lynch.) Generally reconciliation has been used to enact spending reductions in order to reduce the deficit, but occasionally for revenue increases and to increase spending in particular areas. The reconciliation process for the most part has applied to mandatory spending programs, not discretionary programs. Reconciliation legislation has been used in the past as a vehicle for enacting significant policy legislation that has budgetary implications. (See CRS Report R40480, *Budget Reconciliation Measures Enacted Into Law: 1980-2010*, by Megan S. Lynch.) The challenge for using budget reconciliation in the context of the "waters of the United States" issue is that the rule has limited budgetary implication, beyond agency resources to develop, implement, and enforce regulations (e.g., the Corps' regulatory budget in FY2015 is \$200 million), making it difficult to identify the rule as a (continued...)

## Other Clean Water Act Amendments

A fourth option could be legislation to amend the Clean Water Act more broadly. The statute has not been comprehensively amended since 1987 (the Water Quality Act of 1987, P.L. 100-4). Since the 2001 *SWANCC* and 2006 *Rapanos* rulings of the Supreme Court, many stakeholders have argued that what is needed is legislative action to affirm Congress's intention regarding CWA jurisdiction, not guidance or new rules. This type of legislation would have broad implications for the CWA, since questions of CWA jurisdiction are fundamental to all of the act's regulatory requirements.

Bills to address CWA jurisdictional issues, but taking different approaches, have been introduced in several Congresses since 2001. Versions of one proposal (the Clean Water Authority Restoration Act) were introduced in the 107<sup>th</sup>, 108<sup>th</sup>, 109<sup>th</sup>, 110<sup>th</sup>, and 111<sup>th</sup> Congresses. It would have provided a broad statutory definition of "waters of the United States"; would have clarified that the CWA is intended to protect U.S. waters from pollution, not just maintain their navigability; and would have included a set of findings to assert constitutional authority over waters and wetlands. In the 111<sup>th</sup> Congress, one of these bills was reported in the Senate (S. 787), but no further action occurred.

Other legislation intended to restrict regulatory jurisdiction was introduced in the 108<sup>th</sup> and 109<sup>th</sup> Congresses (the Federal Wetlands Jurisdiction Act, which was H.R. 2658 in the 109<sup>th</sup> Congress). It would have narrowed the statutory definition of "navigable waters," which is the key statutory term for determining jurisdiction. It would have defined certain isolated wetlands that are not adjacent to navigable waters, or non-navigable tributaries and other areas (such as waters connected to jurisdictional waters by ephemeral waters, ditches or pipelines), as not being subject to federal regulatory jurisdiction. There was no legislative action on these bills.

In the 114<sup>th</sup> Congress, legislation titled the Defense of Environment and Property Act has been introduced (S. 980). This bill would clarify the term "navigable waters" in the CWA by defining the term so as to be consistent with Justice Scalia's plurality opinion in the 2006 *Rapanos* decision, which was the narrowest of the three major opinions in the case.<sup>22</sup> Similar bills were introduced in the 112<sup>th</sup> and 113<sup>th</sup> Congresses; there also was no legislative action on them.

Enacting legislation to either broaden or restrict CWA jurisdiction would likely require EPA and the Corps to issue new regulations, leading to another lengthy rulemaking process and potentially to more legal challenges in the future.

So far, congressional consensus on legislation to redefine CWA jurisdiction has been elusive. While the President might sign a bill such as the Clean Water Authority Restoration Act introduced in the past, passage of such legislation by the Senate and House in the 114<sup>th</sup> Congress is unlikely. On the other hand, if the House and Senate were to pass legislation to narrowly define

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source for large budgetary savings. Moreover, spending for these activities is discretionary, not mandatory. For more information on the content constraints of reconciliation legislation, see CRS Report R43885, *Points of Order Limiting the Contents of Reconciliation Legislation: In Brief*, by James V. Saturno.

<sup>22</sup> Under this bill, CWA jurisdictional waters are waters that are navigable-in-fact or are permanent, standing, continuously flowing waters that connect to navigable-in-fact waters. See CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland, for discussion of Justice Scalia's opinion in *Rapanos*.

CWA jurisdiction, the President likely would veto it. As with the other options previously discussed, a bill would need the President's signature, or the votes of two-thirds majorities in both chambers to override his veto.

## **Conclusion**

This report has discussed four legislative options that Congress could consider to halt or redirect EPA and the Corps' proposed "waters of the United States" rule: the Congressional Review Act, appropriations bill limitations, targeted legislation, and broad amendments to the Clean Water Act. Each option faces a steep path to enactment.

Finally, it is noteworthy that some of the options—a CRA resolution and some current forms of targeted legislation—would not only block EPA and the Corps from adopting, implementing or enforcing the proposed rule, but also would prohibit the agencies from developing a similar rule. As described previously, blocking both the proposed rule and future action (e.g., H.R. 594) or requiring the agencies to restart the rulemaking process (e.g., H.R. 1732 and S. 1140) would leave in place the status quo, with determinations of CWA jurisdiction being made pursuant to existing regulations, non-binding agency guidance issued in 2003 and 2008, and jurisdictional determinations done by 38 separate Corps district offices that in many cases require time-consuming, case-specific evaluation by regulatory staff.

Stakeholder groups involved in the "waters of the United States" issue find agreement on few aspects of the issue. Some support the proposed rule, some prefer the status quo rather than a rule that they consider unclear, and some have concerns with the proposed rule but do support clarifying the extent of CWA-regulated waters. Whether or how the views of these stakeholders might change is unknown for now.

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