



MEMORANDUM

July 12, 2011

To: Honorable Timothy H. Bishop
Attention: Mark Copeland

From: Claudia Copeland, Specialist in Resources and Environmental Policy, 7-7227
Robert Meltz, Legislative Attorney, 7-7189

Subject: **H.R. 2018, the Clean Water Cooperative Federalism Act of 2011**

This memorandum responds to your request for an overview of provisions of the Clean Water Act (CWA) that would be affected by H.R. 2018, the Clean Water Cooperative Federalism Act of 2011, as approved by the House Transportation and Infrastructure Committee. The Water Resources and Environment Subcommittee of Transportation and Infrastructure held oversight hearings on certain policy issues addressed in the legislation.¹ The full committee ordered the bill reported on June 22. To meet the time constraints of your request, this memorandum does not constitute an in-depth legal analysis of the bill.

Initially, it is important to recognize that the CWA, like other major federal environmental laws, is built on the concept of shared federal-state responsibilities, in which the federal government establishes the overall framework of goals and objectives and states generally have the major responsibility for day-to-day implementation of the law (such as establishing water quality standards, issuing permits, conducting inspections, and enforcing the law). The federal government—that is, the Environmental Protection Agency (EPA)—retains the responsibility to oversee and back up the states' actions.

Some observers in Congress and elsewhere believe that EPA has recently over-reached in its statutory oversight/backup role in several specific instances, particularly in promulgation of numeric nutrient water quality standards for the State of Florida and actions concerning permits for surface coal mining operations in Appalachia.²

H.R. 2018 apparently is a response to those concerns. It seeks to restrict EPA's authority to provide oversight of states' implementation of several parts of the CWA. Each of the provisions in the legislation would apply to EPA's interactions with all states as they implement the CWA, not just to those that are central to the controversies that gave rise to H.R. 2018. Further, it is intended to be prospective—it would

¹ The Subcommittee held hearings on "EPA Mining Policies: Assault on Appalachian Jobs" on May 5 and May 11 and a hearing on "Running Roughshod Over States and Stakeholders: EPA's Nutrients Policies" on June 24. The latter hearing was held after the full Committee's action on H.R. 2018. The committee did not hold a legislative hearing on the bill, which was reported on July 8 (H.Rept. 112-139).

² The background and details of events concerning the Florida numeric nutrient standards and Appalachia surface coal mining controversies are beyond the scope of this memo. For some discussion, see CRS Report R41594, *Water Quality Issues in the 112th Congress: Oversight and Implementation*.

not reach back to alter actions taken before the date of enactment, including those affecting Florida water quality standards and Appalachian coal mining activities.

Beyond the recent specific examples, it noteworthy that the federal-state partnership for implementing environmental laws has not always been harmonious. There is ample history of friction between the desire of states to implement national programs flexibly according to their own priorities, versus EPA's responsibility to oversee national programs and account for federal funds provided for states, as well as compliance of state programs with the goals and objectives of federal laws. While Congress has regularly registered concerns with regulatory initiatives of EPA and other federal agencies and sometimes considers legislative proposals to alter or de-fund an agency's ability to implement a particular regulatory program, it is highly unusual for Congress to advance legislation that would broadly alter the federal-state partnership in order to address dissatisfaction with specific actions by EPA or another agency.

Provisions of H.R. 2018

Section 1 is the Short Title of the bill, the Clean Water Cooperative Federalism Act of 2011.

Section 2 of the bill includes four subsections that would amend separate CWA provisions. The first amendment, Section 2(a), would modify CWA section 303, which requires states to adopt water quality standards for particular waterbodies. A state's water quality standards specify the designated uses of a stream or lake (e.g., for public water supply or recreation), pollutant limits necessary to protect the designated uses,³ and policies to ensure that existing water uses will not be degraded by pollutant discharges. Under current law, states are responsible for developing standards, but it also provides an oversight role for EPA to determine whether states have carried out these requirements in compliance with the law. The CWA allows EPA to review state standards and to adopt its own standards if the agency determines that the state has failed to meet the requirements of section 303.

Section 2(a) of H.R. 2018, titled State Water Quality Standards, would modify current law to allow EPA to promulgate a water quality standard in lieu of a standard previously submitted to and approved by EPA only if the state concurs that a new or revised standard is necessary. This amendment would effectively eliminate EPA's oversight of state water quality standards in the covered situation. Under current law, EPA's basis for acting is its determination that a state has failed to adopt standards that meet the act's requirements. Under the amendment, that state would have to concur that it had failed to meet the law's requirements before EPA could act. This is likely to occur only rarely, since if a state agrees that its standards do not comply with the law, it presumably would correct any flaws itself.

Section 2(b), titled Federal Licenses and Permits, would modify CWA section 401. This provision of current law requires an applicant for a federal license or permit that may result in a discharge to waters of the United States to provide the federal agency with a water quality certification. The certification, usually made by the state in which the discharge originates, declares that the discharge will comply with applicable provisions of the CWA, including water quality standards. Section 401 effectively provides states with two distinct powers: (1) the power indirectly to deny federal permits or licenses by withholding certification; and (2) the power to impose conditions upon federal permits by placing limitations on certifications. Many states view section 401 as an important tool in their overall programs to protect the physical and biological, as well as the chemical, integrity of their waters. Participation by

³ Pollutant limits may be expressed in either numeric or narrative form.

states in section 401 certification is optional (they may waive the authority if they choose to do so), and if a state agency lacks legal authority to make the required certification, the EPA Administrator shall do so.

Section 2(b) would modify section 401 to prohibit EPA from taking “any action to supersede the determination” of a state that a particular discharge will comply with applicable provisions of the CWA, including water quality standards. The purpose and effect of this provision of the bill are unclear, because under current law EPA does not have explicit veto or conditioning authority over a state’s 401 certification. Section 401 involves a relationship between a state and a federal licensing or permitting agency,⁴ such as the Federal Energy Regulatory Commission, but generally not EPA.⁵ As such, it is unclear to what type of EPA action Section 2(b) of the bill refers in prohibiting EPA from “tak[ing] any action to supersede” the state’s determination.

Section 2(c), titled State NPDES Permit Programs, would modify CWA section 402. Under the CWA, it is unlawful to discharge any pollutant from a point source to waters of the United States except as authorized by the statute, specifically pursuant to a permit authorized by section 402 or section 404. Section 402, the National Pollutant Discharge Elimination System (NPDES), is the principal discharge permit program in the law.⁶ An NPDES permit specifies pollutant discharge limitations needed to assure that water quality standards are not violated, along with procedures such as monitoring and reporting requirements. The permit is the key enforcement mechanism in the CWA. Permits are issued for up to five years and must be renewed thereafter. Under the law, EPA has principal responsibility to issue NPDES permits, but the agency can delegate this responsibility to a qualified state which demonstrates, for example, that it has adequate authority to issue and enforce permits which assure compliance with the CWA. Currently, 46 states are authorized to issue NPDES permits.⁷ The CWA allows EPA to withdraw federal approval of a state’s NPDES authority if the agency determines that the state is not administering the program in accordance with requirements of section 402. EPA is required to notify the state of the reasons for the proposed withdrawal and to give the state opportunity to take corrective action.

Section 2(c) of H.R. 2018 would prohibit EPA from withdrawing approval of a state’s NPDES program authority or limiting federal financial assistance for the state program⁸ based on disagreement over the implementation of an EPA-approved water quality standard or over implementation of federal guidance concerning interpretation of the state’s water quality standards. The authority in current law to withdraw program approval provides a certain deterrent to a state implementing an NPDES program in a manner that fails to meet the law’s requirements. Historically, however, EPA has been reluctant to revoke delegation and has preferred to work with states to correct program deficiencies, rather than to take back a program that would then be EPA’s responsibility to administer. CRS is not aware of EPA ever having withdrawn NPDES program approval based on concerns over a state’s water quality standards or having proposed to do so.

⁴ See, for example, *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Engineers*, 526 F.Supp. 1063, 1074 (C.D. Pa. 1981) (“State certification under the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government”), affirmed, 707 F.2d 1392 (3d Cir. 1982) (table entry).

⁵ CRS is mindful that there may be situations in which EPA is the permitting authority and may determine that a state’s 401 certification is clearly erroneous. Generally, this would be the case if the certification sought more stringent conditions than provided in the EPA permit. In that case, EPA may choose to disregard the certification.

⁶ CWA section 404, concerning permits for discharges of dredged or fill material, is the second permit program in the law. Sections 3 and 4 of H.R. 2018, also discussed in this memorandum, would modify aspects of section 404.

⁷ EPA is the permitting authority in Idaho, Massachusetts, New Hampshire, New Mexico, and the District of Columbia.

⁸ CWA section 106 authorizes grants to states and interstate agencies to carry out programs for pollution prevention and abatement.

Section 2(d) is related to section 2(c) and also would modify CWA section 402. While section 402 allows EPA to delegate the NPDES permit program to qualified states, under the law EPA retains the right to review a state's actions, including each proposed permit.⁹ If EPA determines that a state-proposed permit is outside guidelines and requirements of the Act, the Administrator may object to the permit. If the state does not revise the permit to meet EPA's objections, the Administrator may revise and issue the permit.

Section 2(d), titled Limitation on Authority of Administrator To Object to Individual Permits, would prohibit EPA from objecting to a state's issuance of a NPDES permit based on disagreement over interpretation of an EPA-approved state water quality standard, such as a narrative standard, or over implementation of federal guidance concerning interpretation of the state's water quality standards. This provision, if enacted, would greatly reduce EPA's ability to carry out a key federal oversight responsibility under the CWA, that is, to assure consistency of state-issued permits with water quality standards.

Sections 3 and 4 of H.R. 2018 would modify aspects of section 404, the CWA's dredge and fill permit program. The intent of section 404 is to protect U.S. waters, including wetlands, from adverse environmental effects due to discharges of dredged or fill material that are generated by construction or similar activity. It requires landowners or developers to obtain permits from the Army Corps of Engineers (the Corps) to dispose of dredged or fill materials into waters of the United States, including wetlands. The Corps and EPA share responsibility for administering the section 404 program: the Corps issues permits using EPA environmental guidance. EPA's role in the 404 permitting process reflects its statutory mission to assure adequate consideration of the water quality effects of a discharge; the Corps' mission is to evaluate a particular permit based on a net effect balancing of all relevant public interest factors.

Under section 404(c), EPA retains the right to prohibit the issuance of a 404 permit (that is, effectively to veto the permit) if the agency determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Although the Corps authorizes thousands of disposal activities under 404 every year, EPA has exercised the full 404(c) veto authority 13 times since the provision was enacted in 1972, most recently in January 2011 in connection with a Corps-issued permit for a surface coal mining operation in West Virginia.

Section 3(a) of H.R. 2018 would bar EPA from vetoing a 404 permit without concurrence of the state where the discharge will originate.¹⁰ Although EPA has rarely used the 404(c) authority, it would not be unusual if the agency's and a state's views were not identical by the time EPA determines that a veto is necessary because of environmental harm resulting from the proposed disposal. By such time, the state may have issued a 401 certification and other required permits, thus providing state-level authorization for the activity. In some cases, there may be downstream impacts that occur in another state, while the economic benefits of a project are realized primarily in the upstream state, thereby creating an interstate conflict over the discharge. Thus, to require concurrence by the state where the discharge originates for an EPA veto would potentially restrain EPA's ability to carry out its statutory role in preventing environmental degradation of U.S. waters, including the possibility of an EPA veto, which can influence a project's design.

Section 3(b) of H.R. 2018 would modify CWA section 404(g), which authorizes states to assume many of the Corps' permitting responsibilities under section 404. Two states have done this: Michigan (in 1984)

⁹ The Administrator also may waive the opportunity to object to issuance of any permit application.

¹⁰ The bill's language, prohibiting an EPA veto of the corps permit where the state "does not concur," is unclear. For example, does the veto bar require a formal act by the state, or if the state remains silent, would inaction constitute nonconcurrence?

and New Jersey (in 1992). Reasons cited for other states not joining these two include the complex process of assumption, the anticipated cost of running a program, and the continued involvement of federal agencies because of statutory limits on waters that states could regulate. Regarding the latter concern, currently a state may obtain authorization to issue permits for discharges into certain categories of waters, while the Corps retains authority for other waters.

Section 3(b) of H.R. 2018 would amend CWA section 404(g) to permit delegation of the 404 permit program “for some or all of the discharges,” thus potentially giving states incentive to seek partial program delegation for some discharges. This provision of H.R. 2018 is unlikely to be particularly controversial.

Section 4 of H.R. 2018 is intended to accelerate CWA section 404 permit decisions by limiting the time available for EPA and other agencies to comment on a permit application.¹¹ It would first modify CWA section 404(m), which concerns time allowed for the U.S. Fish and Wildlife Service (FWS) to comment to the Corps on a permit application. Under current law, FWS is to submit comments on a permit application or proposed permit within 90 days; the bill would modify this time frame to 30 days (or 60 days, if additional time is requested). Second, section 4 of the bill would modify CWA section 404(q), which concerns procedures for interagency review of a permit application by EPA, FWS, and other agencies; currently it provides that the agencies shall attempt, to the maximum extent practicable, to assure that a permit decision on an individual permit (under section 404(a)) be made within 90 days after receipt of an application. Section 4 of H.R. 2018 would provide further that commenting agencies must submit any comments on an individual permit application or a general permit application (under section 404(e)) within 30 days (or 60 days, if additional time is requested) after the application is received.

In the case of the first modification proposed by Section 4, a shorter time frame allowed for comments by the FWS could constrain that agency’s ability to analyze and comment on potential impacts on fish and wildlife resources, thus potentially limiting, but not eliminating, that agency’s contribution to a permit decision. In the second case, neither current law nor the proposed modification would bind agencies to reaching a permit decision within the specified time, so the practical effect would be modest. Further, the proposed modification contains no language that would prohibit the Corps from considering EPA or other agency comments submitted beyond the specified time limit. When controversies arise over issuing a 404 permit, it is generally due to substantive concerns over the project, not the time allotted for agency reviews.

Finally, as noted above, the legislation is intended to be prospective—Section 5 states that the amendments would only apply to actions taken after the date of enactment. Thus, it would not have the effect of reaching back to earlier EPA regulatory actions involved in recent controversies that are central to the legislation, including those affecting Florida water quality standards and Appalachian coal mining activities.

¹¹ EPA is the only agency authorized by the CWA to veto a Corps permit, but other federal agencies may submit comments to the Corps.