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Water Quality Issues in the 114th Congress: An Overview

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Summary

Much progress has been made in achieving the ambitious goals that Congress established in 1972 in the Clean Water Act (CWA) to restore and maintain the chemical, physical, and biological integrity of the nation's waters. However, long-standing problems persist, and new problems have emerged. Water quality problems are diverse, ranging from pollution runoff from farms and ranches, city streets, and other diffuse or "nonpoint" sources, to toxic substances discharged from factories and sewage treatment plants.

There is little agreement among stakeholders about what solutions are needed, whether legislation is required to address the nation's remaining water pollution problems, or whether regulatory authorities should be reduced. For some time, efforts to comprehensively amend the CWA have stalled as interests have debated whether and exactly how to change the law. Congress has instead focused legislative attention on enacting narrow bills to extend or modify selected CWA programs, but not comprehensive proposals.

Programs that regulate activities in wetlands have been of particular interest recently, especially CWA Section 404, which has been criticized by landowners for intruding on private land-use decisions and imposing excessive economic burdens. Environmentalists view this regulatory program as essential for maintaining the health of wetland ecosystems, and they are concerned about court rulings that have narrowed regulatory protection of wetlands. Many stakeholders desire clarification of the act's regulatory jurisdiction, but they differ on what solutions are appropriate. In 2015, the Environmental Protection Agency (EPA) and the Army Corps of Engineers finalized a rule intended to clarify jurisdictional issues in light of two key Supreme Court rulings, but the rule, which has been stayed by a federal court, remains controversial inside and outside of Congress.

Another prominent water quality issue for some time has concerned financial aid for municipal wastewater treatment projects. House and Senate committees have approved bills to reauthorize CWA assistance on several occasions, but, for various reasons, no legislation other than appropriations was enacted. At issue has been the role of the federal government in assisting states and cities in meeting needs to rebuild, repair, and upgrade wastewater treatment systems, especially in light of capital costs that are projected to be more than $270 billion over the next 20 years. The 113th Congress enacted legislation that created a pilot program to provide federal credit assistance for water infrastructure projects (P.L. 113-121). In December 2016, the program received initial appropriated funds, and EPA expects to begin making loans in 2017. P.L. 113-121 also revised certain of the water infrastructure funding provisions of the CWA.

A number of other water quality issues have been the subject of congressional oversight and legislation for some time, with some legislators highly critical of EPA's recent regulatory initiatives and others more supportive. In several cases, policymakers have sought to curtail water quality protection initiatives under the CWA following court rulings that expanded the regulatory scope of the law. Among the topics of particular interest has been regulation of surface coal mining activities in Appalachia. Congressional interest in this and other topics has been reflected in specific legislative proposals and debate over policy provisions of bills providing appropriations for EPA. Members from both parties have raised questions about the cost-effectiveness of some of EPA's actions and whether the agency has exceeded its authority. In the 114th Congress, scrutiny of EPA initiatives continued to be intense.

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Introduction

Much progress has been made in achieving the ambitious goals that Congress established more than 40 years ago to restore and maintain the chemical, physical, and biological integrity of the nation's waters. However, long-standing problems persist, and new problems have emerged. Water quality problems are diverse, ranging from pollution runoff from farms and ranches, city streets, and other diffuse or "nonpoint" sources, to "point" source discharges of metals and organic and inorganic toxic substances from factories and sewage treatment plants.

The principal law that deals with polluting activity in the nation's streams, lakes, estuaries, and coastal waters is the Federal Water Pollution Control Act (P.L. 92-500, enacted in 1972), commonly known as the Clean Water Act, or CWA. It consists of two major parts: regulatory provisions that impose requirements on industries and cities to abate pollution and meet the statutory goal of zero discharge of pollutants; and provisions that authorize federal financial assistance for municipal wastewater treatment plant construction. Both parts are supported by research activities, plus permit and enforcement provisions. Programs at the federal level are administered by the Environmental Protection Agency (EPA); state governments have primary day-to-day responsibilities to implement CWA programs through standard-setting, permitting, enforcement, and administering financial assistance programs. Local governments also have important roles in implementing water quality protection programs, such as building and operating municipal wastewater treatment plants and regulating local pollution sources.[1]

The water quality restoration objective declared in the 1972 act was accompanied by statutory goals to attain, wherever possible, waters deemed "fishable and swimmable" by 1983 and to eliminate the discharge of pollutants into navigable waters by 1985. Although those goals have not been fully achieved, considerable progress has been made, especially in controlling conventional pollutants (suspended solids, bacteria, and oxygen-consuming materials) discharged by industries and sewage treatment plants.

Progress has been mixed in controlling discharges of toxic pollutants (e.g., heavy metals, inorganic and organic chemicals), which are more numerous and can harm human health and the environment even when present in very small amounts—at the parts-per-billion level. Moreover, efforts to control pollution from diffuse sources, termed nonpoint source pollution (rainfall runoff and snowmelt from urban, suburban, and agricultural areas, for example), are more recent, given the earlier emphasis on "point source" pollution (discharges from industrial facilities and municipal wastewater treatment plants). Overall, data reported by EPA and states indicate that 44% of river and stream miles assessed by states and 64% of assessed lake acres do not meet applicable water quality standards and are impaired for one or more desired uses.[2]

Over the last decade, working with states and tribes, EPA has conducted a series of national aquatic resource assessments, to gather information on the ecological condition of the nation's waters. In 2006 EPA issued an assessment of streams and small rivers, reporting that 67% of U.S. stream miles are in poor or fair condition and that nutrients and streambed sediments have the largest adverse impact on the aquatic species in these waters.[3] A similar assessment of the health of the nation's lakes, issued in 2016, found that 31% have degraded benthic macroinvertebrate

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

[2] U.S. Environmental Protection Agency, *National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle*, EPA 841-R-08-001, January 2009, http://water.epa.gov/lawsregs/guidance/cwa/305b/2004report_index.cfm.

[3] U.S. Environmental Protection Agency, *Wadeable Streams Assessment: A Collaborative Survey of the Nation's Streams*, EPA 841-B-06-002, December 2006, http://www.epa.gov/owow/streamsurvey/.

communities, which include small aquatic creatures like snails and mayflies. It found that nutrient pollution is a widespread problem across the county. About one in three lakes (35%) has excess nitrogen, and two out of five lakes (40%) have excess phosphorus.[4] Approximately 95,000 lakes and 544,000 river miles in the United States are under fish-consumption advisories (including 100% of the Great Lakes and their connecting waters), due to chemical contaminants, and one-third of shellfishing beds are closed or restricted due to toxic pollutant contamination. Mercury is a contaminant of growing concern—in 2010, approximately 16.3 million lake acres and 1.14 million river miles were under fish or shellfish consumption advisory because of elevated mercury levels. Mercury concentrations in game fish exceed health-based limits in about half of U.S. lakes.[5]

A 2016 EPA report found that the condition of coastal waters is a mix of fair and good health, with about one-third of waters rated as good. In most coastal waterbodies, the sediment quality and biological condition were judged to be good, but fish tissue samples from species in most coastal waters showed contamination from various pollutants.[6] A fourth survey assessment, also issued in 2016, evaluated the ecological condition of tidal and non-tidal wetlands. Plant presence, abundance, and trait information are used to assess biological condition of wetlands, and EPA reported that less than half of wetland areas nationally have healthy plant communities. Physical disturbances to wetlands and surrounding habitat, such as surface hardening and vegetation removal or loss, are the most widespread problems, EPA said.[7]

The last major amendments to the CWA were the Water Quality Act of 1987 (P.L. 100-4). That legislation culminated six years of congressional efforts to extend and revise the act and was the most comprehensive amendments since 1972. Authorizations of appropriations for some programs provided in P.L. 100-4, such as funding for research and general EPA support, expired in FY1990 and FY1991. Authorizations for wastewater treatment project funding expired in FY1994. None of these programs has lapsed, however, as Congress has continued to appropriate funds to implement them. EPA, states, industry, and other citizens continue to implement the 1987 legislation.

The Clean Water Act has been viewed as one of the most successful environmental laws in terms of achieving its statutory goals, which have been widely supported by the public. Lately, however, some have questioned whether additional actions to achieve further benefits are worth the costs. Criticism has come from industry, which has been the long-standing focus of the act's regulatory programs and often opposes imposition of new stringent and costly requirements. Criticism also has come from developers and property rights groups who contend that federal regulations (particularly the act's wetlands permit program) are a costly intrusion on private land-use decisions. States and cities have traditionally supported water quality programs and federal funding to assist them in carrying out the law, but many have opposed CWA measures that they fear might impose new unfunded mandates. Many environmental groups believe that strengthening of the law is needed to maintain progress achieved to date and to address remaining water quality problems.

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[4] U.S. Environmental Protection Agency, Office of Water and Office of Research and Development, *National Lakes Assessment 2012, A Collaborative Survey of the Nation's Lakes*, EPA-841-R-16-113, December 2016.

[5] Ibid.

[6] U.S. Environmental Protection Agency, *National Coastal Condition Assessment 2010*, EPA 841-R-15-006, January 2016.

[7] U.S. Environmental Protection Agency, *National Wetland condition Assessment 2011: A Collaborative Survey of the Nation's Wetlands*, EPA-843-R-15-005, May 2016.

Legislative and Oversight Issues

October 2012 marked the 40th anniversary of passage of the Clean Water Act and 25 years since the last major amendments to the law were enacted. While there has been measurable clean water progress as a result of the act, observers and analysts agree that significant water pollution problems remain. However, there is less agreement about what solutions are needed and whether new legislation is required. Several key water quality issues exist: what additional actions, if any, should be taken to implement existing provisions of the law; whether additional steps are necessary to achieve overall goals of the act that have not yet been attained; how to ensure that progress made to date is not lost through diminished attention to water quality needs; whether existing regulatory authorities should be reduced; and what is the appropriate federal role in guiding and paying for clean water infrastructure and other activities. For some time, efforts to comprehensively amend the act have stalled as interests have debated whether and exactly how to change the law. Many issues that might be addressed involve making difficult tradeoffs between impacts on different sectors of the economy; taking action when there is technical or scientific uncertainty; and allocating governmental responsibilities among federal, state, local, and tribal entities for implementing the law.

These factors partly explain why Congress has recently focused legislative attention on narrow bills to extend or modify selected CWA programs, rather than taking up comprehensive proposals. Other factors also have been at work. These include a lack of legislative initiatives by the Administration on clean water issues (neither the Clinton nor the Bush Administration proposed CWA legislation, nor has the Obama Administration), and the high economic cost of addressing water infrastructure issues.

In recent years, congressional attention turned significantly to oversight and legislation focused on criticism of EPA regulatory activities—particularly in the House, which has passed a number of bills to limit EPA's regulatory authority. The Senate did not act on these measures. The 112th Congress enacted two bills that amend the CWA. One extended the moratorium for CWA permitting of certain vessels for an additional year, until December 18, 2014 (P.L. 112-213), and the other extended authorization of funds for the Lake Pontchartrain Basin program in Section 121 of the act through FY2017 (P.L. 112-237). The 113th Congress enacted several bills with CWA provisions:

- Provisions of water resource legislation with some amendments to CWA Title VI, plus a pilot program for water infrastructure financing (see "WIFIA Pilot Program and SRF Amendments in P.L. 113-121" below);
- As part of the 2014 farm bill, legislation exempting most silviculture activity from requiring a CWA permit;[8]
- Legislation providing an additional three-year moratorium for CWA permitting of certain vessels;[9] and
- A bill eliminating a number of statutorily required reports to Congress, including one CWA report (P.L. 113-188).

[8] For discussion, see CRS Report R42883, *Water Quality Issues in the 113th Congress: An Overview*, by Claudia Copeland.

[9] See CRS Report R42142, *EPA's Vessel General Permits: Background and Issues*, by Claudia Copeland.

In the 114th Congress, one CWA bill (other than appropriations, discussed below) was enacted. It is P.L. 114-162, providing a five-year authorization of appropriations (through FY2021) for the National Estuary Program in CWA Section 320.

Two CWA issues that have been the focus of much of legislators' interest in recent Congresses and are likely to be prominent in the 115th Congress, as well—regulatory protection of wetlands, in relation to the scope of the regulatory jurisdiction of the CWA, and water infrastructure financing—are discussed next.

Regulatory Protection of Wetlands and CWA Regulatory Jurisdiction

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. Much of the debate has focused on the CWA, which contains a key wetlands regulatory tool. The permit program in CWA Section 404 requires landowners or developers to obtain permits for disposal of dredged or fill material that is generated by construction or similar activity into navigable waters of the United States, including wetlands. Section 404 has evolved through judicial interpretation and regulatory change to become one of the principal federal tools used to protect wetlands, although that term appears only once in Section 404 itself and is not defined there. At the same time, its implementation has come to be seen as intrusive and burdensome to those whose activities it regulates. At issue today is how to address criticism of the Section 404 regulatory program while achieving goals of wetlands protection in the context of meeting the objectives of the CWA.[10] Recently, the issue of wetlands management and protection has been central to controversy surrounding an Obama Administration rule to define "waters of the United States," that is, which surface waters and wetlands are subject to the CWA's regulatory requirements and protection (see "2015 Revised Rule" below).

Unlike the rest of the act, the permit aspects of Section 404 are administered by the U.S. Army Corps of Engineers, rather than EPA, although the Corps uses environmental guidance jointly developed with EPA to evaluate permit applications. Also, the act authorizes EPA to veto a 404 permit that does not meet the law's requirements. Other federal agencies, including the Fish and Wildlife Service (FWS) and Natural Resource Conservation Service (NRCS), have more limited roles in the Corps' permitting decisions. Tension has existed for many years between the regulation of activities in wetlands under Section 404 and related laws, on the one hand, and the desire of landowners to develop property that may include wetlands, on the other hand. The conflicts over wetlands regulation have for the most part been addressed in administrative and judicial proceedings, as Congress has not amended Section 404 since 1977, when it provided exemptions for categories of routine activities, such as normal farming and forestry. Controversy has grown over the extent of federal jurisdiction and impacts on private property, burdens and delay of permit procedures, and roles of federal agencies and states in issuing permits.

Judicial Proceedings Involving Section 404

One issue involving long-standing controversy and litigation is whether isolated waters are properly within the jurisdiction of Section 404. Waters and wetlands that appear to be isolated—for example, they are not physically adjacent to navigable surface waters—or streams that are wet only for portions of the year may appear to provide only some of the values for which wetlands

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

are protected, such as flood control or water purification, even if they meet the technical definition of a wetland.[11] Questions about whether such waters and wetlands are jurisdictional for CWA purposes have been extensively litigated.

SWANCC *and* Rapanos

In 2001, the Supreme Court ruled on the question of whether the CWA provides the Corps and EPA with authority over isolated waters. The Court's 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*[12] held that the Corps' denial of a 404 permit for a disposal site on isolated wetlands solely on the basis that migratory birds use the site exceeded the authority provided in the act.

In 2006, the Supreme Court revisited issues related to the extent of CWA jurisdiction in two consolidated cases brought by landowners (*Rapanos v. United States*; and *Carabell v. U.S. Army Corps of Engineers*) seeking to narrow the scope of the 404 permit program as it applies to development of wetlands. The issue in both cases had to do with the reach of the CWA to cover "waters" that were not navigable waters in the traditional sense, but were connected somehow to navigable waters or "adjacent" to those waters. (The act requires a federal permit to discharge dredged or fill materials into "navigable waters.") Many legal and other observers hoped that the Court's ruling in these cases would bring greater clarity about the scope of federal jurisdiction.

The Court's ruling on the two cases was issued in June 2006.[13] In a 5-4 decision, a plurality of the Court, led by Justice Scalia, held that the lower court had applied an incorrect standard to determine whether the wetlands at issue are covered by the CWA. Justice Kennedy joined this plurality to vacate the lower court decisions and remand the cases for further consideration, but he took different positions on most of the substantive issues raised by the cases, as did four other dissenting Justices.[14] Because the several opinions written by the Justices did not draw a clear line regarding which wetlands and other waters are subject to federal jurisdiction, one result has been more case-by-case determinations and continuing litigation. There also has been pressure on the Corps and EPA to clarify the issues through an administrative rulemaking.

The full extent of impacts on the regulatory program resulting from these decisions has remained somewhat unclear, in part because of different interpretations of both rulings reflected in subsequent federal court cases. While it continues to be difficult to fully assess how regulatory protection of wetlands has been affected as a result of the decisions and other possible changes, the remaining responsibility to protect affected wetlands falls on states and localities. Environmentalists believe that the Court misinterpreted congressional intent on the matter, while industry and landowner groups welcomed the rulings. Policy implications of how much the decisions restrict federal regulation depend on how broadly or narrowly the opinions are applied. Most federal courts have interpreted *SWANCC* and *Rapanos* narrowly, thus limiting effects on existing permit rules, while a few have read the decisions more broadly, resulting in a more restrictive interpretation of regulatory jurisdiction.

[11] Scientists generally agree that the presence of a wetland can be determined by a combination of soils, plants, and hydrology. See the discussion in CRS Report RL33483, *Wetlands: An Overview of Issues*, by Claudia Copeland.

[12] 531 U.S. 159 (2001).

[13] Rapanos v. United States, 547 U.S. 715 (2006).

[14] For additional information, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Claudia Copeland and Alexandra M. Wyatt.

Corps/EPA Guidance

Following both the *SWANCC* and *Rapanos* rulings, EPA and the Corps issued guidance in 2003 and 2008 to enable their field staffs to make CWA jurisdictional determinations in light of the decisions. Environmental groups criticized the guidance, saying that the agencies were substantially limiting the scope of waters that are protected by the CWA. Industry groups such as developers remain frustrated by what they see as inconsistencies and delays in obtaining needed permits.

The Obama Administration entered this debate in 2011, when EPA and the Corps proposed new guidance, which was intended to clarify regulatory jurisdiction over U.S. waters and wetlands, consistent with the Supreme Court decisions and agency regulations. Like previous guidance documents, the Obama draft examined current regulatory definitions of waters that are subject to CWA jurisdiction, such as interstate waters, and tributaries (at 33 C.F.R. §328.3 and 40 C.F.R. §230.3), in light of the Supreme Court's rulings to determine which waters are clearly subject to the CWA, which waters are not, and which waters require a case-specific analysis in order to determine jurisdiction.

The 2011 proposed guidance quickly generated substantial controversy. Some critics argued that the guidance represented over-reaching by the agencies, beyond authority provided by Congress. Others faulted the continued reliance on federal guidance, which is not binding and lacks the force of law, yet can have significant impact on regulated entities. For various reasons, the 2011 draft guidance was not finalized, and in 2013, EPA and the Corps announced that the document had been withdrawn from interagency review and also announced that revised regulations to define "waters of the United States" were being developed. In March 2014, the agencies released a proposed rule that was intended to clarify CWA jurisdiction, but the proposal was extremely controversial. Groups representing property owners, land developers, and the agriculture sector contended that it was 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 were 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 intent of the proposal to more clearly define U.S. waters that are subject to CWA protections, but beyond that general support, some favored even a stronger rule.

2015 Revised Rule

On May 27, 2015, EPA and the Corps issued a final rule revising their regulations that define the scope of waters protected under the CWA. The revised rule became effective on August 28, 2015, 60 days after publication in the *Federal Register*.[15] The rule was immediately challenged in federal courts by multiple stakeholders, as described below, and in October 2015, a nationwide stay of the rule was issued while legal proceedings play out.

The 2015 revised rule retains much of the structure of the agencies' existing definition of "waters of the United States."[16] It focuses particularly on clarifying the regulatory status of surface 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

[15] Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015.

[16] 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."

Court's rulings. Like the 2003 and 2008 guidance documents and the 2014 proposal, it identifies 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 final 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 rule.
- Waters—including wetlands, ponds, lakes, oxbows, and similar waters—that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be jurisdictional by rule. The final rule for the first time puts some boundaries on what is considered "adjacent."
- 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 final rule establishes two defined sets of additional waters that will be a "water of the United States" if they are determined to have a significant nexus to a jurisdictional water.
- The final rule 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). Some exclusions were added to the final rule based on public comments (e.g., stormwater management systems and groundwater recharge basins). The rule 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 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 from industry, agriculture, many states, and some local governments was that the rule was vague and ambiguous and could be interpreted to enlarge the regulatory jurisdiction of the CWA beyond what the statute and the courts allow.

Officials of the Corps and EPA vigorously defended the proposed rule. But they acknowledged that it raised questions that required clarification in the final rule. In an April 2015 blog post, the EPA Administrator and the Assistant Secretary for the Army said that the agencies responded to criticisms of the proposal with changes in the final rule, which was then undergoing interagency review. The blog post said that the final rule would make 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.[17] The 2015 final rule does reflect a number of changes from the proposal, especially to provide more bright line boundaries and simplify definitions that identify waters that are protected under the CWA.[18] The agencies' intention was to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. While some stakeholders believe that the agencies largely succeeded in that objective, others believe that they did not.

Legal challenges to the 2015 rule were filed in multiple federal courts soon after it was announced. These lawsuits, filed by industry groups, more than half of the states, and several environmental groups (nearly 90 plaintiffs in all), will test whether the agencies' interpretation of CWA jurisdiction is consistent with the Supreme Court's rulings and whether the rule complies with substantive and procedural requirements of the CWA and other laws.

Because of uncertainty about the correct judicial venue for challenging the rule,[19] petitions for review were filed both in federal district courts and appellate courts. The petitions for review in courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit. On October 9, 2015, a three-judge panel of the Sixth Circuit placed a nationwide stay on the rule, pending further developments. In June 2016, this court set the initial briefing schedule in the litigation; the court's schedule likely would lead to oral arguments in February 2017 or later. Other legal complexities remain, however, including continuing district court cases over the rule in other circuits and pending decisions on the same issue in appeals before other federal appellate courts.[20]

As a result of the Sixth Circuit's rulings and ongoing judicial review of the regulation, the Corps and EPA are again making CWA jurisdictional determinations based on the 2008 guidance, as they did before promulgation of the 2015 rule.

Legislative Responses

Congressional committees have held oversight hearings on both the *SWANCC* and *Rapanos* decisions, seeking clarification of interpretations and impacts of the rulings. But the uncertainties about federal jurisdiction over wetlands and other waters raised by the rulings remain highly controversial. In response, legislation to overturn the decisions by providing a broad definition of "waters of the United States" has been introduced regularly since the 107th Congress, and one

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[17] 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.

[18] See CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*, by Claudia Copeland.

[19] The judicial review section of the CWA, Section 509, vests exclusive, original review jurisdiction over enumerated EPA actions under the act in the federal courts of appeals. The initial issue with Section 509 is that none of the listed EPA actions clearly cover the Clean Water Rule. Indeed, in the preamble to the final rule, EPA and the Corps acknowledge that "[t]he Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509," and offers no opinion of its own as to review of the Clean Water Rule. If a court finds that the rule is not covered by Section 509, review jurisdiction presumably will lie in the district courts pursuant to the federal question statute. That statute, applicable where no more specific statute provides otherwise, gives the district courts original jurisdiction over "all civil actions arising under the ... laws ... of the United States." (28 U.S.C. §1331) See CRS Legal Sidebar WSLG1369, *The EPA/Corps Clean Water Rule: What Court or Courts Get to Rule on the Legal Challenges?*.

[20] For further analysis, see CRS Legal Sidebar WSLG1503, *UPDATED: Sixth Circuit Will Hear Challenges to EPA's Clean Water Act Jurisdiction ("Waters of the United States") Rule, but Litigation Uncertainties Remain Unresolved*, by Alexandra M. Wyatt.

such bill was reported by a Senate committee in the 111th Congress.[21] Legislation that instead would narrow the definition of "waters of the United States" also was introduced.

Stakeholders with different perspectives seemingly agree on one point—that Congress must clarify the important issues left unsettled by the Supreme Court's 2001 and 2006 rulings and by the Corps/EPA guidance—but they disagree on what that would entail. Environmental advocates argue that legislation is needed to "reaffirm" what Congress intended when the CWA was enacted in 1972 and what EPA and the Corps have subsequently been practicing until the two Supreme Court rulings, in terms of CWA jurisdiction. But critics questioned the constitutionality of legislation that was proposed and asserted that it would expand federal authority, thus likely increasing confusion, rather than settling it. Indeed, many developer and other groups that have been critical of EPA and the Corps favor greater restrictions on waters and wetlands that are considered to be "jurisdictional" for CWA regulatory purposes.

EPA's and the Corps' efforts to develop revised *Rapanos* guidance and revised regulations have been controversial and received congressional attention. Legislative provisions to prohibit the agencies from funding activities related to the 2011 draft guidance and the proposed "waters" rule were included in appropriations bills since the 112th Congress.

Congressional interest has continued to be strong in the 114th Congress. 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 2014 proposed rule on state and local governments, hearing from public and EPA and Corps witnesses. Hearings also have been held by other congressional committees. As well, a number of bills were introduced, most of them intended either to prohibit the agencies from finalizing the 2014 proposed rule or to detail procedures for a new rulemaking to replace the 2015 rule. Bills have been of several types.[22]

- Joint resolutions of disapproval under the Congressional Review Act. The Senate and House passed such a resolution (S.J.Res. 22), but President Obama vetoed the joint resolution on January 19, 2016, and the Senate subsequently failed to invoke cloture on a motion to proceed to override the veto.
- Appropriations bill limitations. Bills with limitations were reported in the Senate and House in 2015, but the FY2016 Consolidated Appropriations Act (P.L. 114-113) contained no such provisions. FY2017 funding bills for EPA and the Corps included similar provisions, but none of the limitation language has been enacted.
- Standalone targeted legislation. The House passed one such bill (H.R. 1732). Similar legislation was reported in the Senate, but failed to advance (S. 1140).
- Broad amendments to the CWA to affirm or clarify Congress's intention regarding CWA jurisdiction, including such bills as S. 980 and S. 2705.

None of these bills was enacted, but congressional interest in halting or modifying the "waters of the United States" rule remained high in 2016 and is likely to continue in 2017.

Authorization of Clean Water Infrastructure Funding

Meeting the nation's needs to build, upgrade, rebuild, and repair wastewater infrastructure is a significant element in achieving the CWA's water quality objectives and an issue of continuing

[21] For information, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Claudia Copeland and Alexandra M. Wyatt.

[22] For additional discussion, see CRS Report R43943, *EPA and the Army Corps' "Waters of the United States" Rule: Congressional Response and Options*, by Claudia Copeland.

interest to policymakers. The act's program of financial aid for municipal wastewater treatment plant construction is a key contributor to that effort. Since 1972, Congress has provided more than $94 billion to assist local governments in constructing projects to achieve the act's requirements for secondary treatment of municipal sewage (equivalent to 85% reduction of wastes), or more stringent treatment where required by local water quality conditions. State and local governments have spent more than $25 billion of their own funds for construction, as well. Federal funds can only be used for construction purposes (i.e., new plants or upgrades), but not for operation and maintenance of facilities, which are funded from local sources.

Still, funding needs remain very high: an additional $271 billion over the next 20 years, according to the most recent Needs Survey estimate by EPA and the states, as of January 2012.[23] This estimate includes $198 billion for wastewater treatment and collection systems, which represent nearly 73% of all needs; $48 billion for combined sewer overflow corrections; $19.2 billion for stormwater management; and $6.1 billion to build systems to distribute recycled water. Compared with the previous survey (data as of 2008), documented wastewater infrastructure needs decreased 20%. States reported declining needs for several reasons, including completion of major projects, difficulty for some states in obtaining acceptable documentation to substantiate the costs of projects (particularly for small communities and for stormwater management projects), and decisions by some states to limit their level of effort on the survey. The largest decreases were associated with secondary treatment needs, CSO correction needs, and stormwater management needs.[24]

While water infrastructure investments are made and projects are built, new funding needs also are identified. In the 2012 survey, EPA reported increased funding needs for some categories. Needs for conveyance system repair increased slightly—$3.8 billion, or an 8% increase; while in the recycled water distribution category, needs increased significantly—$1.1 billion, or a 21% increase. In the latter case, EPA said that the increase was due to recognition of the positive benefits of wastewater reuse. The estimates do not explicitly include funding needed to address security issues, or funding possibly needed for treatment works to adapt to climate change impacts.

Several states reported large increases in needs between 2008 and 2012, including Colorado, Georgia, Kentucky, Missouri, and New Mexico, while several other states (Illinois, New Jersey, Michigan, Pennsylvania, and Utah) reported needs decreasing by 50% or more compared with 2008.

Debate over the nation's efforts regarding wastewater infrastructure was a central part of the 1987 CWA amendments. The amendments extended through FY1990 the traditional Title II program of grants for sewage treatment project construction, under which the federal share was 55% of project costs. The 1987 law initiated a program of grants to capitalize State Water Pollution Control Revolving Funds (SRFs), which are loan programs, in a new Title VI. Under the revolving fund concept, monies used for wastewater treatment construction are repaid by loan recipients to the states (repayment was not required for grants under the Title II program), to be used for future construction in other communities, thus providing an ongoing source of financing. The expectation in 1987 was that the federal contributions to SRFs would assist in making a transition to full state and local financing by FY1995. Although most states believe that the SRF

[23] U.S. Environmental Protection Agency, *Clean Watersheds Needs Survey 2012, Report to Congress*, Washington, January 2016, http://www.epa.gov/sites/production/files/2015-12/documents/cwns_2012_report_to_congress-508-opt.pdf.

[24] Ibid., pp. 2, 11.

is working well, continuing large funding needs have delayed the anticipated shift to full state responsibility. Thus, SRF issues have been prominent on the Clean Water Act reauthorization agenda in recent Congresses.[25]

SRF monies may be used for specified activities, including making loans for as much as 100% of project costs (at or below market interest rates, including interest-free loans), to buy or refinance cities' debt obligations, or as a source of revenue or security for payment of principal and interest on a state-issued bond. SRF monies also may be used to provide loan guarantees or credit enhancement for localities. Loans made by a state from its SRF are to be used first to assure progress toward the goals of the act and, in particular, on projects to meet the standards and enforceable requirements of the act. After states achieve those requirements, SRF monies also may be used to implement national estuary programs and nonpoint pollution management. Since the SRF program began, states have used about 4% of clean water SRF funds to assist nonpoint management projects and estuary projects.

All states have established the mechanisms to administer the loan program and have been receiving SRF capitalization funds under Title VI. Congressional oversight has examined the progress toward reducing the backlog of wastewater treatment facilities needed to achieve the act's water quality objectives, while estimates of future funding needs have drawn increased attention to the role of the SRF program in meeting such needs. Although there has been some criticism of the SRF program, and debate continues over specific concerns, the basic approach is well supported. Congress used the clean water SRF as the model when it established a drinking water SRF program in 1996 (P.L. 104-182).[26]

The initial intent was to phase out federal support for this program, but Congress has continued to appropriate SRF capitalization grants to the states—a total of $41 billion since the 1987 amendments, providing an average of $1.45 billion annually in recent years. **Table 1** summarizes recent Administration budget requests and enacted appropriations for SRF capitalization grants.[27] This table does not include appropriations for congressionally directed special project grants in individual cities (that is, congressional earmarks), which for several years represented about 15% of water infrastructure funds.[28]

Table 1. Clean Water SRF Capitalization Grants, FY2008-FY2017 request

(millions of dollars)

Fiscal Year	President's Request	Appropriations
2008	687.6	1,083.8
2009	555.0	4,689.1[a]
2010	2,400.0	2,100.0
2011	2,000.0	1,522.0

[25] For further information on the clean water SRF program, see CRS Report 98-323, *Wastewater Treatment: Overview and Background*, by Claudia Copeland.

[26] For additional information, see CRS Report RS22037, *Drinking Water State Revolving Fund (DWSRF): Program Overview and Issues*, by Mary Tiemann.

[27] For additional information, see CRS Report R43871, *Funding for EPA Water Infrastructure: A Fact Sheet*, by Claudia Copeland.

[28] Issues associated with special project grants are discussed in CRS Report RL32201, *Water Infrastructure Projects Designated in EPA Appropriations: Trends and Policy Implications*, by Claudia Copeland. Since FY2011, Congress has placed a moratorium on earmarks, but some policymakers favor restoring the practice.

Fiscal Year	President's Request	Appropriations
2012	1,550.0	1,466.5
2013	1,175.0	1,376.1
2014	1,095.0	1,448.9
2015	1,018.0	1,448.9
2016	1,116.0	1,393.9
2017	979.5	
TOTAL	**12,576.1**	**16,529.2**

Source: Compiled by CRS.

a. FY2009 appropriations include $4.0 billion in supplemental appropriations as part of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5).

One issue of continuing interest is impacts of paying for water infrastructure projects on small communities, many of which have found it difficult to participate in the SRF loan program. This is due to a number of factors. Many are characterized by narrow or weak tax bases, limited or no access to capital markets, lower relative household incomes, higher per capita needs, and limited ability to demonstrate economies of scale. They often find it harder to borrow to meet their capital needs and pay relatively high premiums to do so. Meeting the special needs of small towns, through a reestablished grant program, other funding source, or loan program with special rules, has been an issue of interest to Congress.

Because remaining clean water funding needs are still so large nationally, at issue is whether and how to extend SRF assistance to address those needs, how to allocate SRF funds among the states, and how to prioritize projects and funding. Additionally, there is concern about the adequacy of SRF or other funding specifically for high-cost projects dealing with problems of overflows from municipal combined and separate sewers which can release partially treated or untreated wastewaters that harm public health and the environment. EPA estimates that the cost of projects to control sewer overflows and manage stormwater runoff is nearly $64 billion nationwide—more than one-fifth of all needs estimated in the most recent Needs Survey. Wastewater utilities also have sought assistance to assess operational vulnerabilities and upgrade physical protection of their facilities against possible terrorist attacks that could threaten the water infrastructure system.[29]

In 2010 EPA issued a "Clean Water and Drinking Water Infrastructure Sustainability Policy" addressing management and pricing of infrastructure funded through SRFs to encourage conservation and provide adequate long-term funding for future capital needs. EPA is working with water utilities to promote planning processes that reflect not only public health and water quality, but also conservation of natural resources and innovative treatment. Further, EPA is working with states to target SRF assistance to projects that focus on system upgrade and replacement in existing communities, reflect full life cycle costs of infrastructure assets, and conserve natural resources or use alternative approaches. In 2015, EPA established a Water Infrastructure and Resiliency Finance Center to help communities identify financing approaches and to provide guidance on financing the planning, design, and construction of projects. The center is not a source of funding or financing; rather, it is intended to provide financial guidance

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

and technical assistance, including providing connections with private sector entities that could assist local governments.

Issues Affecting Legislative Efforts

Congress had considered water infrastructure funding issues several times since the 107th Congress, but no legislation other than appropriations was enacted until P.L. 113-121, discussed next. Despite specific issues that have stalled legislation, the act's water infrastructure program is widely supported both inside and outside Congress. However, because the House and Senate have focused extensively on reducing federal spending and deficit reduction recently, proposals concerning new or expanded federal spending for water infrastructure investments have not advanced. Throughout this period, several factors contributed to difficulties in moving bills through the legislative process. They included Bush Administration opposition to higher authorization levels, controversies over application of prevailing wage requirements of the Davis-Bacon Act to water infrastructure projects, and disputes over the formula for allocating clean water SRF grants among the states.

The issue of the applicability of the Davis-Bacon Act to SRF-funded projects has been especially controversial, because that act has both strong supporters and critics in Congress and elsewhere. It requires, among other things, that not less than the locally prevailing wage be paid to workers employed, under contract, on federal construction work "to which the United States or the District of Columbia is a party." Critics of Davis-Bacon say that it unnecessarily increases public construction costs and hampers competition, while supporters say that it helps stabilize the local construction industry by preventing competition that would undercut local wages and working conditions. Under the original SRF program authorization enacted in 1987, the Davis-Bacon Act applied to so-called "first use" monies provided by a state from its SRF (that is, loans made from initial federal capitalization grants, but not to subsequent monies provided from repayments to the SRF). When that authorization expired at the end of FY1994, Davis-Bacon requirements also expired. Thus, the recent issue has been whether to restore the applicability of those requirements.[30] While authorizing committees have debated this issue for some time, Davis-Bacon requirements have been attached to use of SRF funds through appropriations acts since 2009.

A second issue that has complicated enactment of legislation is the method of allocating SRF capitalization grants among the states. CWA Section 205(c)(3) contains a table that identifies each state's percentage share of appropriated funds. Changing the formulation of how funds are distributed matters to every state, because inevitably it results in "winners" and "losers." But because the existing statutory allotment has not been revised since 1987, while needs have changed considerably, the issue is important to considering clean water infrastructure legislation.[31]

WIFIA Pilot Program and SRF Amendments in P.L. 113-121

Most policymakers acknowledge that communities face formidable challenges in providing and paying for adequate and reliable water infrastructure services for their citizens, and Congress has long considered ways to help meet those challenges. Several policy options have been discussed, including some that exist and are well established—such as the SRF program—while some are

[30] For information, see CRS Report R41469, *Davis-Bacon Prevailing Wages and State Revolving Loan Programs Under the Clean Water Act and the Safe Drinking Water Act*, by Gerald Mayer and Jon O. Shimabukuro.

[31] For additional information on the current statutory formula, see CRS Report RL31073, *Allocation of Wastewater Treatment Assistance: Formula and Other Changes*, by Claudia Copeland.

newer—such as creating a national infrastructure bank. Some are intended to provide long-term revenue to support infrastructure financing programs, and some are intended to encourage private participation in providing wastewater services. At this point, there is no consensus favoring a single policy, and many advocate a combination of options to expand the financing "toolbox."

One particular option that has been debated is a "Water Infrastructure Finance and Innovation Act," or WIFIA, program, and legislation to create a WIFIA pilot program was enacted in the 113th Congress (H.R. 3080/P.L. 113-121). The legislation, the Water Resources Reform and Development Act (WRRDA) Title V, Subtitle C, authorized a five-year WIFIA pilot program. The bill authorized EPA to provide credit assistance (secured loans or loan guarantees) for drinking water and wastewater projects and the U.S. Army Corps of Engineers to provide similar assistance for water resource projects, such as flood control or hurricane and storm damage reduction. Proponents argue that WIFIA offers a number of financing advantages, such as providing credit assistance at low U.S. Treasury rates to projects that otherwise have difficulty obtaining financing, thus lowering the cost of capital to borrowers. Under the legislation, EPA and the Corps each were authorized a total of $175 million over five years (beginning with $20 million in FY2015 and increasing to $50 million in FY2019 for each agency) to provide assistance. Projects must be $20 million or larger in costs to be eligible, except that projects in rural areas (population 25,000 or less) must have eligible project costs of $5 million or more.[32]

EPA has been preparing for implementation of the WIFIA program, including through a series of public listening sessions in several U.S. cities in 2014. In November 2016 EPA released two rules (one an interim final rule, the other a proposed rule) to explain and clarify some provisions of the program and establish guidelines and fees for the application process. The rules are intended to address a number of questions about the program, such as defining eligible projects, determining selection criteria, developing a ranking system, and determining project creditworthiness. The agency's goal is to be ready for making the first loans in 2017.

Before the program can proceed, it was necessary for Congress to provide appropriations for it. The first appropriations, in FY2015 and FY2016, provided EPA with resources to hire staff and begin preparation for the program, but did not appropriate funds to actually finance projects.[33] However, in legislation enacted in December 2016, Congress appropriated $20 million that will allow EPA to begin making loans (see "FY2017 Appropriations").

In addition to the WIFIA provisions, P.L. 113-121 included a number of provisions amending certain water infrastructure provisions of the CWA, especially the Title VI SRF program. Some of the provisions in P.L. 113-121 were included in other legislation and proposals in recent Congresses that have not advanced (such as extending SRF loan repayment from 20 to 30 years, allowing states to make subsidized loans under certain circumstances, adding land acquisition to the definition of "treatment works" in order to be eligible for SRF assistance, and explicitly allowing SRF monies to be used for security projects at wastewater treatment plants). Several of the provisions had been included in recent appropriations bills and are now codified in the CWA by P.L. 113-121 (such as expanding the list of SRF-eligible projects to include energy- and water-efficiency and others; increasing SRF assistance to Indian Tribes; and imposing "Buy American" requirements on SRF assistance). The CWA provisions included in P.L. 113-121 are the first

[32] For additional information, see CRS Report R43315, *Water Infrastructure Financing: The Water Infrastructure Finance and Innovation Act (WIFIA) Program*, by Claudia Copeland.

[33] Under the Federal Credit Reform Act of 1990, appropriations for federal credit assistance programs cover the subsidy cost of the program, which is the "estimated long-term cost to the Government of a direct loan or loan guarantee, calculated on a net present value basis, excluding administrative costs" (104 Stat. 1388-610).

amendments to Title VI since 1987. However, the amendments did not address other long-standing Title VI issues: authorization of appropriations for capitalization grants (i.e., the amendments do not reauthorize clean water SRF grants), state-by-state allocation of capitalization grants (i.e., the allocation formula that has been in effect since 1987), or applicability of prevailing wage requirements under the Davis-Bacon Act (locally prevailing wages are to be paid to workers on projects that receive SRF assistance).[34]

Other Clean Water Act Issues

A number of other issues affecting efforts to achieve the goals and objectives of the CWA have drawn interest and been the subject of congressional oversight and legislation. Some legislators have been highly critical of recent regulatory initiatives, while others have been more supportive of EPA's implementation efforts.

Since 2009, EPA has proposed and promulgated numerous regulations implementing the CWA and other pollution control statutes that it administers. Critics of the Administration, both within Congress and outside of it, have accused the agency of reaching beyond the authority given to it by Congress and ignoring or underestimating the costs and economic impacts of these rules. Majority party leaders in the House conducted vigorous oversight of the agency in the 112th and 113th Congresses, and both the Senate and House have conducted oversight in the 114th Congress. Bills seeking to overturn specific regulations or to limit the agency's authority also were introduced, along with proposals to bar EPA funding for specific activities. Environmental groups disagree that the agency has overreached, and EPA itself contends that critics' focus on the cost of controls obscures the benefits of new regulations. The agency estimates that benefits far exceed the costs, and that investing in pollution control is an important source of economic activity, exports, and American jobs. Although particular attention has been paid to the Clean Air Act, a number of EPA's initiatives concerning the CWA also received legislators' scrutiny.[35] In several cases, policymakers sought to curtail water quality protection initiatives under the CWA following court rulings that expanded the regulatory scope of the law. In the 114th Congress, scrutiny of EPA initiatives continued to be intense, including those involving water quality.

Mountaintop Mining in Appalachia

One water quality issue that received considerable attention is mountaintop coal mining. Mountaintop removal coal mining involves removing the top of a mountain in order to recover the coal seams contained there. This practice occurs in six Appalachian states (Kentucky, West Virginia, Virginia, Tennessee, Pennsylvania, and Ohio). It creates an immense quantity of excess spoil, which is typically placed in nearby valleys, burying streams that flow through the valleys. Critics say that, as a result of valley fills, stream water quality and the aquatic and wildlife habitat that streams support are destroyed. The mining industry argues that mountaintop mining is essential to conducting surface coal mining in the Appalachian region and that surface coal mining would not be economically feasible there if producers were restricted from using valleys for the disposal of mining overburden.[36]

[34] For additional information on P.L. 113-121, see CRS Report R43298, *Water Resources Reform and Development Act of 2014: Comparison of Select Provisions*, by Nicole T. Carter et al.

[35] For information, see CRS Report R41561, *EPA Regulations: Too Much, Too Little, or On Track?*, by James E. McCarthy and Claudia Copeland.

[36] For additional information, see CRS Report RS21421, *Mountaintop Removal Mining: Background on Current Controversies*, by Claudia Copeland.

Beginning in 2009, the Obama Administration undertook a number of initiatives intended to reduce the harmful environmental impacts of mountaintop mining and surface coal mining in Appalachia. The actions were implemented through regulatory proposals, guidance documents, and review of applications for permits to authorize mountaintop mining-valley fill operations. The Administration's actions have been controversial with industry and also with Members of Congress, which has held oversight hearings and considered legislative responses that would curtail the Administration.

Because of controversies about the environmental impacts of mountaintop mining, legislation to restrict the practice has been introduced. A bill in the 114th Congress, H.R. 912, would place a moratorium on permitting for mountain removal coal mining until certain health studies are conducted. Another bill in the 114th Congress (H.R. 6411, the Clean Water Protection Act) would narrow the CWA definition of "fill material," and thus narrow the types of materials that can be discharged into U.S. waters under a Section 404 permit. The significance of the bill is that discharges of materials that are not eligible for a Section 404 permit are regulated under CWA Section 402. Because Section 402 discharge requirements are more restrictive than those for Section 404, some discharges that could be permitted under Section 404 cannot be authorized under Section 402. Supporters favor making it more difficult to use Section 404 to authorize activities that they consider to be environmentally harmful. On the other hand, critics of the legislation say that, as a practical matter, economically important activities such as coal mining could not meet the more stringent limitations of a Section 402 permit and, thus, would be infeasible.[37]

Another aspect of the mountaintop mining issue that has drawn attention is EPA's 2011 veto of a CWA Section 404 permit for a surface coal mining operation in West Virginia, the Spruce No. 1 mine. EPA's action has been controversial, particularly because the veto occurred after the permit had been issued by the Army Corps. EPA's veto of the permit was challenged, and in 2012, a federal district court overturned the veto, ruling that EPA had exceeded its statutory authority in the Spruce No. 1 action. However, a federal appeals court reversed the lower court's decision and upheld EPA's authority to retroactively veto permits.[38] The appeals court ruling was applauded by environmental groups and criticized by the mining industry. In response, bills were introduced to limit or prohibit EPA's ability to exercise this veto authority, contained in CWA Section 404(c). Several proposals in the 114th Congress (S. 54/S. 234, H.R. 896, and H.R. 1203) would bar EPA from vetoing a 404 permit retroactively.

Continuing Issue: Appropriations

Although few CWA amendments have been enacted recently, clean water policy and program issues have been addressed regularly by Congress in the context of annual appropriations acts. EPA's appropriations are included in the Interior, Environment, and Related Agencies appropriations acts.[39]

[37] For additional information, see CRS Report RL31411, *Controversies over Redefining "Fill Material" Under the Clean Water Act*, by Claudia Copeland.

[38] Mingo Logan Coal Company v. U.S. Environmental Protection Agency, 714 F.3d 608 (DC Cir. 2013); *cert. denied*, 134 S. Ct. 1540 (2014). For background on the veto, see CRS Report RS21421, *Mountaintop Removal Mining: Background on Current Controversies*, by Claudia Copeland.

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

FY2016 Appropriations

The Administration's FY2016 budget sought $8.6 billion for EPA, or $452 million more than the FY2015 enacted level of funding.[40] The EPA request included $1.116 billion for clean water SRF capitalization grants ($333 million less than the FY2015 enacted level; see **Table 1**) and $15 million for Alaska Native Village and U.S.-Mexico Border water infrastructure projects. The Administration sought $238.8 million to protect surface waters (19.5% higher than the FY2015 enacted level), and $250 million for the Great Lakes Restoration Initiative (17% below the FY2015 enacted level). The budget sought increases for several water quality grant programs (Section 106 grants, Section 319 grants, and wetlands program development grants).

Although the House and Senate Appropriations Committees reported bills to provide FY2016 appropriations for EPA (H.R. 2822 and S. 1645), final appropriations action for EPA and other agencies occurred as part of the Consolidated Appropriations Act, 2016, signed by the President December 18, 2015 (P.L. 114-113). The bill provided $1.394 billion for clean water SRF capitalization grants ($55 million less than FY2015, but $278 million above the President's request) and $30 million for Alaska Native Village and U.S.-Mexico Border water infrastructure projects. It also provides $300 million for the Great Lakes Restoration Initiative. The final bill included the requested increase in funds for Section 319 nonpoint pollution management grants, but not for other water quality grant programs (i.e., Section 106 grants and wetlands program development grants).

FY2017 Appropriations

The Administration's FY2017 budget, presented to Congress in February 2016, requested $8.3 billion in total for EPA ($127 million above the FY2016 enacted budget). The request for EPA included $979.5 million for clean water SRF capitalization grant ($424 million less than the FY2016 enacted level), $228 million for core surface water protection programs ($28 million increase), and $250 million for the Great Lakes Restoration Initiative ($50 million decrease).

During congressional hearings on the EPA request, many Members criticized the requested 30% decrease in funds for clean water SRF capitalization grants. This criticism was reflected to some degree in appropriations bills that the Appropriations Committees subsequently approved that include EPA funding. In July 2016, the House passed H.R. 5538, FY2017 Interior and Environment Appropriations Act; it included $1.0 billion for clean water SRF grants. The Senate Appropriations Committee reported a companion bill, S. 3068, in June. It included $1.35 billion for clean water SRF grants. The Senate did not take up this bill.

Congress did not reach final agreement on an EPA funding bill before the start of FY2017, on October 1. However, on September 28, the House and Senate passed a 10-week continuing resolution that extends FY2016 funding levels, minus a 0.496% across-the-board reduction, through December 9, 2016 (P.L. 114-223). A second continuing resolution, passed in December 2014, extends FY2016 funding levels, minus a 0.1901% across-the-board reduction, from December 10, 2016, through April 28, 2017 (P.L. 114-254).

The Administration's FY2017 budget submission also included a $15 million request to allow EPA to begin making WIFIA loans (see "WIFIA Pilot Program and SRF Amendments in P.L. 113-121"). P.L. 114-254 includes the first appropriation, $20 million, for EPA to do so.

[40] See CRS Report R44208, *Environmental Protection Agency (EPA): FY2016 Appropriations*, by Robert Esworthy and David M. Bearden, and CRS In Focus IF10383, *U.S. Environmental Protection Agency (EPA): FY2017 President's Budget Request*, by Robert Esworthy and David M. Bearden.

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