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The "Waters of the United States" Rule: Legislative Options and 114th Congress Responses

Updated December 29, 2016

Congressional Research Service
https://crsreports.congress.gov
R43943

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

On May 27, 2015, the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) finalized a rule revising regulations 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 2014 in light of Supreme Court rulings that created uncertainty about the geographic limits of waters that are and are not protected by the CWA.

According to EPA and the Corps, their intent in proposing the rule was to clarify CWA jurisdiction, not expand it. Nevertheless, the rule 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. The final rule contains a number of changes to respond to criticisms of the proposal, but the revisions may not satisfy all critics of the rule. The rule became effective August 28, 2015, replacing EPA-Corps guidance that has governed permitting decisions since the Supreme Court's rulings. However, a federal appeals court issued a nationwide stay of the rule that has been in effect since October 2015.

Despite the court's stay of the rule, some in Congress favor halting EPA and the Corps' current approach to defining "waters of the United States." To do so legislatively, at least four options were reflected in bills in the 114th Congress.

- **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. The Senate and House passed such a joint resolution (S.J.Res. 22), but President Obama vetoed it on January 19. On January 21, a procedural vote in the Senate to override the veto failed.
- **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. Bills with such limitations were reported in 2015 and 2016, but none of these bills were enacted.
- **Standalone 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 rule that have been criticized. The House passed one such bill (H.R. 1732) in 2015. Similar legislation was reported in the Senate, but failed to advance (S. 1140).
- **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 in the 114th Congress are discussed in this report. Each option faced a steep path to enactment, because of the Obama Administration's opposition to legislation to halt or weaken a major regulatory initiative such as the "waters of the United States" rule. With a change in administration in January 2017, the 115th Congress and the new administration seem likely to revisit the "waters of the United States" issue and controversies, but how that will occur is unclear for now.

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Introduction

On May 27, 2015, the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) finalized a rule revising regulations 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 2014 in light of Supreme Court rulings that created uncertainty about the geographic limits of waters that are and are not protected by the CWA.

The revised rule became effective on August 28, 2015, 60 days after publication in the *Federal Register*, to allow time for review under the Congressional Review Act.[1] However, multiple legal challenges to the rule were filed in federal district and appeals courts around the country. On October 9, 2015, a federal appeals court in Cincinnati issued an order granting a request by 18 states to stay the new rule nationwide, pending further developments. On June 14, 2016, this court set the briefing schedule in the litigation; the court's schedule likely would lead to oral arguments in February 2017 or later. As a result of these judicial actions, until legal proceedings are concluded, the new rule is not in effect, and prior regulations and agency guidance will govern determinations of CWA jurisdiction.

According to EPA and the Corps, the agencies' intent was to clarify CWA jurisdiction, not expand it. Nevertheless, the rule 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 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.

Many critics in Congress and elsewhere urged that the proposed rule be withdrawn, but EPA and the Corps pointed 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. Still, even though the 2015 rule has been stayed by a federal court, some in Congress favor halting the agencies' approach to defining "waters of the United States" and leaving the status quo in place or giving EPA and the Corps new directions on defining CWA jurisdiction. This report discusses several options that Congress has considered that were reflected in bills in the 114th Congress.

Background[2]

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas."[3] Waters need not be truly navigable to be subject to CWA

[1] 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.

[2] The CWA and the proposed and final rules are more fully discussed in CRS Report R43455, *EPA and the Army Corps' 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 and final rules.

[3] CWA §502(7); 33 U.S.C. §1362(7).

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 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" more fully 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 appropriate scope of waters protected under the CWA.[4]

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 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 appeared to be picking up on the suggestion of several of the justices in *Rapanos* that an amended rule would be helpful.

The 2015 final rule retains much of the structure of the agencies' existing definition of "waters of the United States."[5] 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 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

[4] 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.

[5] 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."

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 waters.

- 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.[6] The final rule announced on May 27, 2015, 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.[7] The agencies' intention has been to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. Based on press reports of stakeholders' early reactions to the final rule, it appears that some believe that the agencies largely succeeded in that objective, while others believe that they did not.[8]

Congressional interest in the rule has been strong since the proposal 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 114th Congress. The proposal

[6] 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.

[7] See CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"* for discussion.

[8] See, for example, Amena H. Saiyid, "Obama Says Water Jurisdiction Rule Provides Clarity, Certainty; Critics Claim Overreach," *Daily Environment Report*, May 28, 2015, p. A-1.

also was discussed at House committee hearings during the 113th Congress. As described below, a number of bills were introduced in the 114th Congress, most of them intended either to prohibit the agencies from finalizing the 2014 proposed rule or to detail procedures for a new rulemaking.

Congressional Options

As noted earlier, some in Congress have long favored 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, standalone legislation, and broad amendments to the Clean Water Act.

Congressional Review Act[9]

The Congressional Review Act (CRA), enacted in 1996, establishes special congressional procedures for disapproving a broad range of regulatory rules issued by federal agencies.[10] 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).[11] If Congress passes a joint resolution disapproving the rule under procedures provided by the act, and the resolution becomes law,[12] 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.[13]

Joint resolutions of disapproval of the final clean water rule have been introduced in the House (H.J.Res. 59) and the Senate (S.J.Res. 22). On November 4, the Senate passed S.J.Res. 22, by a 53-44 vote, and the House passed S.J.Res. 22 on January 13, 2016, by a 253-166 vote. However, President Obama vetoed the joint resolution on January 19. On January 21, the Senate failed to invoke cloture on a motion to proceed to override the veto (52-40), and the veto message was indefinitely postponed by the Senate by unanimous consent.

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

[9] 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 Report R43992, *The Congressional Review Act: Frequently Asked Questions*, by Maeve P. Carey, Alissa M. Dolan, and Christopher M. Davis.

[10] 5 U.S.C. §§801-808. The CRA applies to a "rule," as defined in 5 U.S.C. §804(3).

[11] Under the CRA, GAO is required to report on major rules, summarizing and assessing the procedural steps taken by the agencies. GAO completed its review of the final clean water rule on July 16. See Robert J. Cramer, Managing Associate General Counsel, GAO, letter to the Honorable Jim Inhofe, the Honorable Barbara Boxer, the Honorable Bill Shuster, and the Honorable Peter A. DeFazio, July 16, 2015, http://www.gao.gov/products/GAO-15-750R#mt=e-report.

[12] 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.

[13] The CRA has been 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.

introduced within a specific time frame: during a 60-days-of-continuous-session period beginning on the day the rule is received by Congress.[14]

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.[15] The path is particularly steep if the President opposes the resolution's enactment, as was the case with a resolution disapproving the EPA-Corps rule to define "waters of the United States," which, as noted, the President vetoed on January 19, 2016.[16] Overriding a veto of a joint resolution, like any other bill, requires a two-thirds majority in both the House and Senate.[17]

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 *Federal Register*.[18] 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.[19]

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

[14] 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.

[15] See P.L. 107-5 (2001) (disapproving an Occupational Safety and Health Administration rule regarding ergonomics published at 65 *Federal Register* 68261).

[16] Executive Office of the President, *Veto Message from the President—S.J. Res 22*, January 19, 2016, https://www.whitehouse.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22.

[17] 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 were enacted. In the other instances, the Senate debated the question of calling up the resolution or the resolution itself, and rejected the question.

[18] For purposes of CRA review, the final clean water rule was received by Congress on June 8. See Executive Communication EC-1843, *Congressional Record*, daily edition, vol. 161 (June 8, 2015), p. S3858.

[19] 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.

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 "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.

Appropriations Bills

Including a provision in an appropriations bill is a second option for halting or redirecting the "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 so far, congressional opponents of the rule have not succeeded in using appropriations measures to halt or delay it.

In the 114th Congress, on May 1, 2015, 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 in effect on October 1, 2012, pertaining to the CWA definition of "waters of the United States." On June 18, 2015, the House Appropriations Committee approved the FY2016 Interior and Environment Appropriations bill (H.R. 2822) with a similar provision to bar EPA from developing, adopting, implementing, or enforcing any change to rules or guidance pertaining to the CWA definition of "waters of the United States." The House began debate on H.R. 2822 in July 2015, but did not take final action. The Administration indicated that the President would veto both of these bills, based in part to objections to this provision.[20] The Senate Appropriations Committee included a similar provision in legislation providing FY2016 appropriations for EPA (S. 1645), which the committee approved in June 2015. The full Senate did not consider this bill.

Full-year FY2016 appropriations for EPA and the Corps were provided in the Consolidated Appropriations Act, 2016, signed by the President on December 18 (P.L. 114-113). The legislation did not include any provisions concerning the "waters of the United States" rule.

Similar provisions were included in FY2017 appropriations bills, including H.R. 5055, a bill providing funding for the Army Corps. The House debated this bill in May 2016, but the measure was defeated in the House on May 26 (112-305), due to controversies about other provisions. Provisions to block the rule were included in bills to fund EPA in FY2017 that were reported by

[20] Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy on* H.R. 2028, *Energy and Water Development Appropriations Act, 2016*, April 28, 2015, and *Statement of Administration Policy on* H.R. 2822, *Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016*, June 23, 2015.

the House Appropriations Committee (H.R. 5538) and the Senate Appropriations Committee (S. 3068), but neither bill received floor consideration.[21]

Congress did not reach final agreement on legislation to fund the Corps or EPA before the start of FY2017, on October 1, 2016. However, on September 28, the House and Senate passed a 10-week continuing resolution that extended FY2016 funding levels for these and most other federal agencies, minus a 0.496% across-the-board reduction, through December 9, 2016 (P.L. 114-223). A second continuing resolution, passed in December 2016, extended FY2016 funding levels, minus a 0.1901% across-the-board reduction, from December 10, 2016, through April 28, 2017 (P.L. 114-254). Neither of these stopgap funding bills included legislative language that would affect the "waters of the United States" rule.

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 issued the final rule on May 27, 2015, before enactment of any FY2016 appropriations bills. A funding prohibition included in an FY2016 appropriations bill would not have halted finalizing the rule, but it still could attempt to block funds for implementation.

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.[22] Some observers predicted a somewhat easier path for congressional consideration of such restrictions in the 114th Congress, with Republican majorities in both the House and Senate. However, a bill would still have needed the President's signature, or the votes of two-thirds majorities in both chambers to override his veto.

Standalone Legislation

A third option is standalone targeted legislation to redirect 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 "waters of the United States" rule, the 2011 proposed revised guidance, or any similar rule. One such bill in the 114th Congress was H.R. 594.[23] It also would have directed the Corps and EPA to consult with state and local

[21] The 113th Congress also considered appropriations bills with provisions concerning a revised "waters of the United States" rule. H.R. 4923, the FY2015 Energy and Water Appropriations Act, passed the House on July 10, 2014. It 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 that bill 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).

Previous to the release of the proposed rule in 2014, the House passed appropriations bills in 2012 and 2013 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 were enacted.

[22] See CRS Report R43709, *Environmental Protection Agency (EPA): FY2015 Appropriations*, by Robert Esworthy.

[23] Another 114th Congress proposal that includes a provision similar to H.R. 594 as part of a larger measure is S.

officials on CWA jurisdiction issues and develop a report on results of such consultation.[24] Another bill in the 114th Congress was H.R. 2599. It would have prohibited the obligation of unobligated funds from the office of the EPA Administrator until she withdraws the "waters of the United States" rule.

In the 114th Congress, H.R. 1732, the Regulatory Integrity Protection Act, was approved by the House on May 12, 2015, 261-155.[25] It would have required 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 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 opposed H.R. 1732 and said that the President would veto the bill.

In the Senate, the Federal Water Quality Protection Act (S. 1140) was approved by the Senate Environment and Public Works Committee on June 10, 2015. On November 3, 2015, the Senate voted 57-41 to take up S. 1140, thus falling short of the 60 votes needed to overcome a filibuster on the motion to proceed to the bill's consideration. (On November 4, 2015, the Senate did pass S.J.Res. 22, a Congressional Review Act resolution disapproving the rule, as discussed above.)

Like H.R. 1732, S. 1140 would have required the agencies to develop a new rule, taking into consideration public comments on the 2014 proposal. The bill would have required the agencies 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 identified 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 bill reflected 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 would follow the test of jurisdiction stated by Justice Scalia in the *Rapanos* case.[26] Under the legislation, a rule not adhering to principles in the bill would have no force or effect.

Another approach was reflected in S. 1178. It would have required 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 have barred the agencies from developing, finalizing, implementing, or enforcing the 2014 proposed rule or a substantially similar rule prior to

791/H.R. 1487.

[24] In the 113th Congress, similar legislation was introduced in the Senate (S. 2496). Also in the 113th 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.

[25] The House passed a similar bill in the 113th Congress, H.R. 5078.

[26] See CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

receiving a report from the commission. This bill responded in part to criticism that the science underlying the rule was not thoroughly peer-reviewed and subject to public comment before the rule was proposed in 2014. (For discussion, see CRS Report R43455, *EPA and the Army Corps' 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 were widely criticized. For example, many stakeholder groups contended that key definitions in the 2014 proposed rule—such as "tributary," "floodplain," and "significant nexus"[27]—were ambiguous, and other terms—such as "upland," "gullies," and "rills"—were entirely undefined. Critics said that ambiguities could lead to agency interpretations that greatly expand the regulatory scope of CWA jurisdiction. However, such criticisms of the proposed rule for the most part were 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 is a challenge requiring technical expertise that legislators generally delegate to agencies and departments, which implement laws, but one that many in Congress believe the agencies failed to meet in this case.[28]

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

[27] 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.

[28] 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 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.

Restoration Act) were introduced in the 107th, 108th, 109th, 110th, and 111th 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 111th Congress, one of these bills was reported in the Senate (S. 787), but no further action occurred.[29]

Other legislation intended to restrict regulatory jurisdiction was introduced in the 108th and 109th Congresses (the Federal Wetlands Jurisdiction Act, which was H.R. 2658 in the 109th Congress). Rather than broadening the statutory definition of "navigable waters," which is the key statutory term for determining jurisdiction, it would have narrowed the definition. 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 114th Congress, legislation titled the Defense of Environment and Property Act was introduced (S. 980). This bill would have clarified 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.[30] Similar bills were introduced in the 112th and 113th Congresses; there also was no legislative action on them.

Another such bill in the 114th Congress was H.R. 2705, which would have repealed the final rule that was announced in May 2015. Similar to S. 980, this bill would have revised the CWA definition of "navigable waters" narrowly to mean waters that are navigable-in-fact or are permanent or continuously flowing bodies of water that are connected to navigable-in-fact waters.

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 President Obama might have signed 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 114th Congress was unlikely. On the other hand, if the House and Senate were to pass legislation to narrowly define CWA jurisdiction, President Obama likely would have vetoed it, as he did with the CRA resolution. 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' "waters of the United States" rule and that were reflected in bills in the 114th Congress: the Congressional Review Act, appropriations bill limitations, standalone legislation, and broad amendments to the Clean Water Act.

[29] For background on S. 787, see archived CRS Report R41225, *Legislative Approaches to Defining "Waters of the United States"*, by Claudia Copeland.

[30] 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*.

It is noteworthy that several of the options—a CRA resolution, appropriations bill limitations, and some current forms of standalone legislation—would not only have blocked EPA and the Corps from adopting, implementing or enforcing the 2015 rule, but also would have prohibited them from developing a similar rule. As described previously, blocking both the rule and future action (e.g., H.R. 594, H.J.Res. 59, and S.J.Res. 22), limiting the agencies through appropriations, 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.

As described above, on October 9, 2015, a federal appeals court placed a nationwide stay on the clean water rule. The effect of the court's order is to achieve, at least temporarily, the goal of some of the legislation discussed in this report—to leave the status quo in place for determinations of CWA jurisdiction. Many critics of the 2015 rule endorse that result. Other critics favor passage of legislation that would provide direction to EPA and the Corps to develop a different rule, because legal challenges to the 2015 rule may take years to resolve.

Stakeholder groups involved in the "waters of the United States" debate find agreement on few aspects of the issue. Some support the 2015 rule, some prefer the status quo rather than a rule that they consider unclear, and some have concerns with the rule but do support clarifying the extent of CWA-regulated waters. The 114th Congress legislative activity in the Senate on S.J.Res. 22 and S. 1140 and in the House on H.R. 1732 suggests that, even with the final rule on hold nationwide for now and judicial proceedings that could continue for quite some time, there is continuing interest in Congress to change the agencies' course of action.

With a change in administration in January 2017, the 115th Congress and the new administration seem likely to revisit the "waters of the United States" issue and controversies. The new administration's legislative priorities, as well as plans for addressing the ongoing litigation of the 2015 rule or for initiating a new CWA jurisdiction rule are unclear for now. For Congress, although a resolution of disapproval under the CRA is no longer an available option to halt the rule,[31] Congress could pursue the other legislative options to halt or redirect the rule discussed here.

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[31] See CRS Insight IN10437, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, by Christopher M. Davis and Richard S. Beth.

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