

REAUTHORIZATION OF THE CLEAN WATER ACT BY THE 104TH CONGRESS

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For more than two decades the focus of water quality efforts in the United States has been within the general framework created by the Federal Water Pollution Control Act of 1972 (Clean Water Act). Certainly much has been accomplished in cleaning the nation's waterways, yet weaknesses have been identified (Smith et al, 1987; Adler et al, 1993). Efforts of the 103rd Congress to amend the Clean Water Act were discussed in detail at the 1992 annual meeting of the Universities Council on Water Resources (1992). Those efforts, however, did not result in the reauthorization of the Act. This paper addresses the activities of the 104th Congress to reauthorize the Clean Water Act. At the time of this writing, the House has passed H.R. 961 to reauthorize the Act. The Senate is moving more slowly on its version. Although Congress is continuing to debate this legislation, the major issue areas have been identified.

Over-Arching Issues

The November 1994 election that swept a Republican majority into the House and Senate will certainly have an effect on the form and substance of the Clean Water Act, assuming that it is reauthorized during their tenure in power. Four issues have dominated the early deliberations of Congress: unfunded mandates, risk assessment, cost-benefit analysis, and property rights. In addition, efforts to balance the budget will most certainly result in funding cuts for water-related research and management. These over-arching issues are inexorably linked with provisions of the Clean Water Act and will likely be addressed in some form in the Act or through broader legislation.

Unfunded Mandates

The 104th Congress has already passed unfunded mandates legislation. Public Law 104-4 (S. 1) is designed to make Congress more aware of the costs imposed by legislation and regulation on states, local governments, and the private sector. It requires cost estimates by the Congressional Budget Office (for statutes) and agencies (for regulations) that would impose unfunded mandates of more than \$50 million on states and local governments and \$200 million on the private sector.

H.R. 961 authorizes funding for some programs but not for all programs likely to be viewed as mandates by state and local governments. Specifically, no funding is authorized for the stormwater management program or the 404 wetlands program, which is voluntary. This may reflect, however, the intent of the House to reduce or eliminate these programs.

Cost/Benefit Analysis and Risk Assessment

Current Clean Water Act provisions do not expressly include analysis of cost or cost effectiveness of water quality standards. H.R. 961 would require EPA when issuing water quality criteria to estimate the costs of complying with the criteria. No water quality standard would be issued by EPA for a state where the costs of attaining the standard are not reasonably related to anticipated benefits. The bill would allow states to consider the costs and benefits of attaining a water quality standard and make it easier for states to revise use designation if the benefits do not justify the costs. Such provisions enable the states to set water quality standards, a move that is opposed by EPA (Browner, 1995).

Although risk assessment is not required by the current law, several provisions require EPA to evaluate a range of factors which effectively serve as risk assessment. H.R. 961 would specifically require comprehensive risk assessment, along with cost/benefit analysis, before issuing standards, effluent limitations, other regulatory requirements, or guidance under the Clean Water Act.

The Clean Water Act requires dischargers to meet technology-based performance standards contained in effluent limitation guidelines issued by EPA, the principal mechanisms for setting pollution control levels. The provisions of H.R. 961 would place new emphasis on risk, relative risk, costs, and benefits on virtually all Clean Water Act regulatory actions. These provisions would elevate risk and cost/benefit considerations over other criteria now specified in the law. Although EPA is not opposed to cost/benefit analysis or risk assessment, they are concerned with placing greater emphasis on them than on protecting human health (Browner, 1995).

Property Rights

The House has passed H.R. 9 which includes provisions for compensating land owners for takings of property by the federal government. If the federal governmental action results in a diminution of the fair market value of the property by more than 20 percent, the land owner must be compensated.

Much of the controversy over federal regulatory takings of property relates to the Section 404 wetlands program and, in particular, with the federal wetlands delineation manual released in 1989. This ongoing controversy, coupled with the fact that an estimated 75 percent of the remaining

wetlands in the United States are located on private property, has spurred Congress to address the issue (Copeland, 1995). Essentially the provisions on compensation from H.R. 9 have been incorporated into Title VIII of H.R. 961.

Balancing the budget

Initial actions of the House toward balancing the budget by 2002, suggest that across the board research dollars will be slashed significantly. Consequently, water-related research historically supported by such agencies as the National Science Foundation, U.S. Geological Survey, and Environmental Protection Agency may no longer be available or available at previous levels. Water management agencies will also feel the knife cut deep. Committee action on EPA's budget resulted in an overall 34 percent reduction in recommended funding. So too, other water management agencies will likely see significant cuts. It is too soon to determine the magnitude of their impact but if the initial efforts are any indication, water research and management efforts will surely be constrained.

H.R. 961

The first indication of how the 104th Congress might specifically address reauthorization of the Clean Water Act came with the introduction of H.R. 961 by Representative Bud Shuster (R-PA), Chairman of the Committee on Transportation and Infrastructure, and cosponsored by 15 members of the House. The version of H.R. 961 that passed the House on May 16, 1995 (240-185), differs substantially from the introduced version but retains the original intent to provide increased flexibility and regulatory relief. MAJOR ISSUES ADDRESSED BY H.R. 961 INCLUDE the following.

Reauthorization Funding Levels

The intent of Congress to balance the budget has resulted in major cuts being recommended for all types of programs. The first indication of how the budget knife might affect the Clean Water Act is in the reauthorization bill. Thus far the reauthorization funding levels are favorable. Authorized levels of funding for FY 1996-2000 in H.R.961 include: \$11.45 billion for the state revolving fund and \$1 billion for nonpoint control. There can be a big difference, however, between the level of funding authorized and what is actually appropriated. Although the reauthorization level is important in that it sets the cap on how much can be appropriated, the actual appropriation might be considerably less.

Water Quality Criteria and Standards

Considerable controversy is evident regarding water quality criteria and standards. The changes in the law are generally supported by the states in that they provide increased flexibility and extend the period for reviewing water quality standards from three to five years. As previously discussed, EPA opposes giving the authority to set water quality standards to the states and allowing downgrading of existing uses due to cost considerations (Browner, 1995).

Nonpoint Source Pollution Management

In 1987, Congress established the first comprehensive program in the Clean Water Act to address nonpoint sources of pollution, utilizing state management programs with EPA technical and financial assistance. H.R.961 requires that state programs be updated and revised periodically. In addition to regulatory programs and enforceable policies and mechanisms, voluntary and incentive-based approaches are allowable. Current law includes no date for meeting water quality goals but amendments to Section 319 in H.R.961 identify a 15-year time frame consistent with other parts of the bill. In addition, the bill provides greater flexibility for use of 319 funds, including preparation of reports and management programs. EPA is directed to issue guidance on economically achievable measures for controlling nonpoint source pollution which reflect application of best available practices, technologies, processes, siting criteria, operating methods or other alternatives.

Debate on nonpoint measures focused on section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (P.L. 101-508) which requires coastal states to develop nonpoint source control programs that emphasize impacts of land use practices on coastal water quality. These nonpoint control programs are currently being implemented by the coastal states. As introduced, H.R. 961 would repeal section 6217. Although coastal state groups had sought more flexibility, time and funding, there is no consensus on the need to have major rollbacks of requirements. A compromise was reached after considerable debate to allow coastal states to seek an exemption from participating in this program.

Watershed Management

Watershed management provides a new management tool that incorporates a broader systems approach to meeting water quality standards. Approved state programs would allow for pollutant trading, modification of permits to meet standards, and

extensions of permit dates in order to synchronize all permits within a watershed. These provisions were not generally controversial, although pollution trading is not universally accepted as a workable mechanism.

Combined Sewer Overflows

Combined sewer overflows (CSOs), which collect sanitary sewage and stormwater runoff together, are found primarily in older cities. Where CSOs exist, high volumes of rainwater or snowmelt can cause the capacity of the collection and treatment system to be exceeded, resulting in the discharge of raw wastewater into receiving waters. The cost of correcting CSOs is high, estimated by EPA at \$41 billion.

The introduced version of H.R.961 included specific language to address CSOs. As passed by the House, however, the bill simply codifies the terms of the CSO control policy issued by EPA in April 1994. This policy, negotiated by EPA and stakeholders, establishes a 15 year period to resolve CSO problems through management and structural measures.

Stormwater Management

In 1987, Congress directed EPA to implement a specific permit program for stormwater discharges from industrial and municipal sources. Implementation of the program in the larger cities and urban counties has proved expensive and controversial. H.R.961 weakens the current stormwater permit program by changing it to a nonpoint source management-type program. For industrial and commercial sources, a state program is to include options for voluntary stormwater pollution prevention, general permits, and site-specific permits if necessary.

Wetlands Conservation and Management

Arguably the most controversial part of H.R.961 is Title VIII which addresses wetlands conservation and management. This section includes the compensation measures from H.R. 9 which already passed the House. In addition, the bill establishes a wetlands classification system, ranging from Type A (most ecologically valuable) to Type C (least valuable). If the owner wants to sell them at fair market value and assuming that the funds are available, Type A wetlands would generally be purchased by the federal government and added to the national wildlife refuge system. Permits for converting Type A and Type B wetlands would require sequential analysis seeking avoidance of adverse impacts, minimizing such impacts, and compensating for loss of wetlands functions. Type C wetlands would not be regulated in any manner.

Responsibility for implementing the law rests solely with the Corps of Engineers and the Natural Resources Conservation Service (NRCS) for agricultural lands. EPA would no longer have veto authority. The Corps is directed to issue regulations for the establishment, use, and oversight of mitigation banks. The Corps is also directed to establish standards for wetlands delineation based on clear evidence of wetlands hydrology, hydrophytic vegetation, *and* hydric soils. Wetlands delineation is to be accomplished within 10 years by the Corps and the NRCS for agricultural lands.

The current requirement that permits be issued for periods of no more than five years would be eliminated, allowing permits to last indefinitely. A new administrative appeals process would be established. Penalties in the bill for wetlands violations are less stringent and specify, in the case of civil penalties, that the amount of the penalty should be proportional to the scope of the project.

The bill would allow qualified states to be delegated authority to administer the wetlands program for individual and general permits. H.R.961 does not call for permit-by-permit review, as is the case with current law, but requires a five-year review of state programs by the Secretary of the Army. No grant funding is authorized to assist states to implement the wetlands program.

In a joint statement to a subcommittee of the Senate Committee on Environment and Public Works, the federal agencies involved in wetlands management estimated that under the wetlands provisions of H.R. 961 between 60 percent and 75 percent of the currently regulated wetlands would no longer be defined as wetlands and about 50 percent of those remaining would be classified as Type C wetlands and provided no protection. Consequently only 10 to 20 percent of currently regulated wetlands would be protected under the provisions of H.R. 96 (Joint Agency Testimony, 1995).

Conclusions

The House has moved quickly to reauthorize the Clean Water Act but the Senate is moving more slowly. Senator John Chafee, chairman of the Senate Environment and Public Works Committee, is a supporter of the current Clean Water Act. Since President Clinton has already stated that he would veto the version of the Act passed by the House, the efforts of the Senate will likely focus on developing a bill that is more acceptable to the Administration and current Clean Water Act supporters.

References

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