



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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May 12, 2023

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Subcommittee Hearing on “*The Next Fifty Years of the Clean Water Act: Examining the Law and Infrastructure Project Completion*”

I. PURPOSE

The Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure, will meet on Tuesday, May 16, 2023, at 10:00 a.m. ET in 2167 of the Rayburn House Office Building to receive testimony on “*The Next Fifty Years of the Clean Water Act: Examining the Law and Infrastructure Project Completion*.” At the hearing Members will receive testimony from witnesses representing the National Association of Clean Water Agencies (NACWA), the National Association of Manufacturers (NAM), the state of North Dakota, and the state of Maryland. The hearing will examine the *Clean Water Act (CWA)*, and how to modernize the *CWA* to protect water quality, while ensuring the completion of projects, reducing supply chain challenges, and promoting commerce.

II. BACKGROUND

CWA Jurisdiction

The Subcommittee on Water Resources and Environment (Subcommittee) maintains jurisdiction over several agencies, including the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps). Specifically, the Subcommittee in its capacity overseeing laws governing water quality and wastewater infrastructure, holds jurisdiction over EPA and the Corps as they regulate activities related to water quality. Additionally, the

Subcommittee maintains sole jurisdiction of the *CWA*, the Federal Government’s primary statutory tool for protecting the water quality of the Nation’s navigable waters.¹

The *CWA* provides a major Federal-state program as the principal law governing water quality of the Nation’s surface waters.² Congress enacted the 1972 amendments to the *Federal Water Pollution Control Act*, commonly referred to as the *CWA*, with the objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³ To achieve this objective, two goals were established: (1) to eliminate pollutant discharge into navigable waters by 1985, and (2) where possible, to ensure water quality that is “fishable” and “swimmable” by 1983.⁴

The *CWA* consists of two major parts: (1) the authorization of financial assistance for construction of municipal wastewater treatment plants, and (2) the regulatory requirements that apply to those who discharge into navigable waters, including industrial and municipal actors.⁵ Planning, financial, and technical assistance for various regions and issues are also addressed.⁶ This SSM focuses primarily on key sections of the *CWA* that have produced substantial interest for legislative action related to expediting the completion of infrastructure projects.

CWA Regulatory Authority Background

Title III of the *CWA* establishes the authority for the technological and water quality-based effluent limitation guidelines that must be abided by point source dischargers.⁷ Whereas Title III of the *CWA* largely focuses on the creation of water quality guidelines and limitations, Title IV primarily deals with application of the regulatory program, informed by the guidelines created pursuant to Title III, through which dischargers must receive permits or certifications.⁸

In order to achieve its objectives, the *CWA* is predicated on the principle that discharges into waters of the United States are only lawful if authorized by a permit.⁹ Therefore, the application of various *CWA* components require a regulatory program. While certain regulatory programs under the law may only be carried out by the Federal Government, through either EPA or the Corps, certain responsibilities can be assumed by states approved by EPA.¹⁰

¹ H. COMM. ON TRANSP. & INFRASTRUCTURE, JURISDICTION AND ACTIVITIES OF THE SUBCOMM. ON WATER RESOURCES AND ENVIRONMENT, 118TH CONG., (2023) (on file with Comm.) [hereinafter JURISDICTION AND ACTIVITIES REPORT].

² *Id.*

³ *CWA*, Pub. L. 92-500, 86 Stat. 816 [hereinafter *CWA*].

⁴ LAURA GATZ, CONG. RSCH. SERV. (RL30030), CLEAN WATER ACT: A SUMMARY OF THE LAW, (Updated Oct. 18, 2016), available at <https://www.crs.gov/Reports/RL30030> [hereinafter CRS REPORT RL30030].

⁵ *Id.*

⁶ *Id.*

⁷ See CRS REPORT RL30030, *supra* note 4; see also *CWA*, *supra* note 3, §301-320.

⁸ See CRS REPORT RL30030, *supra* note 4; see also *CWA*, *supra* note 3, §401, 402, 404.

⁹ See CRS REPORT RL30030, *supra* note 4.

¹⁰ See e.g. *CWA*, *supra* note 3, § § 401, 402, 404.

CWA Action in the 118th Congress

The Committee on Transportation and Infrastructure (Committee) has already acted on a number of CWA-related issues this Congress. For example, the Committee took actions in response to the Biden Administration's definition of waters of the United States (WOTUS), which governs the application of CWA programs.¹¹ Following the release of EPA and the Corps' final "Revised Definition of the 'Waters of the United States'" rule on December 30, 2022, the Subcommittee held a hearing and received testimony from interested stakeholders on February 8, 2023.¹² In response to the Biden Administration's revised WOTUS definition, Chairman Sam Graves and Water Resources and Environment Subcommittee Chairman David Rouzer introduced H.J. Res. 27, *Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of the Army, Corps of Engineers, Department of Defense and the Environmental Protection Agency relating to "Revised Definition of 'Waters of the United States'"*.¹³ The Committee favorably reported H.J. Res. 27 to the House on February 28, 2023.¹⁴ The resolution then passed the House on March 9, 2023, and the Senate on March 29, 2023. H.J. Res. 27 was then vetoed by President Biden, after which the House voted and failed to override the veto.¹⁵

Additionally, on February 28, 2023, the Committee favorably reported H.R. 1152, the *Water Quality Certification and Energy Project Improvement Act* to the House.¹⁶ The goal of this legislation is to promote the development of the Nation's infrastructure by amending the permitting process under Section 401 of the CWA and focusing Section 401 on CWA water quality.¹⁷ Section 401 of the CWA requires applicants seeking a Federal permit or license for an activity that may result in discharge into navigable waters to obtain a water quality certification from the state or tribe with the jurisdiction of the area of possible discharge.¹⁸ These activities include projects under Sections 402 and 404 of the CWA, the *Rivers and Harbors Act*, as well as from the Federal Energy Regulatory Commission (FERC).¹⁹ H.R. 1152 was included in H.R. 1, the *Lower Energy Costs Act*, which passed the House on March 30, 2023.²⁰

Although both issues and pieces of legislation are relevant to CWA implementation, this Subcommittee hearing will primarily focus on other key sections of the CWA. The regulatory

¹¹ See generally LAURA GATZ & KATE R. BOWERS, CONG. RSCH. SERV. (R46927), *REDEFINING WATERS OF THE UNITED STATES (WOTUS): RECENT DEVELOPMENTS*, (Updated July 8, 2022), available at <https://www.crs.gov/reports/pdf/R46927/R46927.pdf> [hereinafter CRS REPORT R46927].

¹² See Revised definition of "waters of the United States" Final Rule, 88 Fed Reg. 3004 (Jan. 18, 2023); See also *Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule: Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure*, 118th Cong. (2023).

¹³ H.J. Res. 27, 118th Cong. (2023).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Water Quality Certification and Energy Project Improvement Act*, H.R. 1152, 118th Cong. (2023).

¹⁷ *Id.*

¹⁸ CWA, *supra* note 3, §401.

¹⁹ *Id.*; see also LAURA GATZ & KATE R. BOWERS, CONG. RSCH. SERV. (R46615) *CLEAN WATER ACT SECTION 401: OVERVIEW AND RECENT DEVELOPMENTS*, (Updated Aug. 24, 2022), available at <https://crsreports.congress.gov/product/pdf/R/R46615>.

²⁰ The Lower Energy Costs Act, H.R. 1, 118th Cong. (2023).

processes of the *CWA* are of particular interest to the Subcommittee at a time when the *Infrastructure Investment and Jobs Act (IIJA)* (P.L. 117-58) has provided large investments into the United States' infrastructure, including water infrastructure spending under the Clean Water State Revolving Fund (Clean Water SRF), and other infrastructure modes, such as roads, bridges, dams, and energy.²¹ Specifically, industry stakeholders are urging lawmakers to accelerate the project permitting process across infrastructure sectors and to deliver projects, on-time and on-budget, so that communities can realize project benefits as quickly as possible and to keep up with global competitors, such as China.²²

III. SECTION 402: NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

Section 402 of the *CWA* authorizes the NPDES program for regulation of discharges of pollutants from point sources into navigable waters.²³ Point sources are defined as “any discernible, confined and discrete conveyance, such as a pipe, ditch, channel, conduit, discrete fissure, or container,” and also include “vessels or other floating craft” from which pollutants may be discharged.²⁴

Since all point source dischargers are subject to the NPDES program, a total of more than 65,000 industrial and municipal conventional dischargers are required to obtain permits pursuant to Section 402.²⁵ In addition, NPDES permits are required for stormwater discharges from industrial and municipal sources, including over 150,000 individual sources.²⁶ NPDES permits require the point source to attain technology-based effluent limits, while specifying the numerical effluent limitations that sources must meet in order to guarantee water quality where possible, and date of compliance.²⁷ EPA is responsible for defining the level of treatment required for municipalities and various types of industries, as well as for developing minimum water quality criteria specifying the maximum concentrations of pollutants permitted for different designated uses of waters.²⁸

NPDES permits are issued for up to five years and must be renewed thereafter if discharge is to continue.²⁹ However, if the permittee provides a complete application, but is not reissued a permit prior the date of expiration, the permit may be “administratively continued.”³⁰

²¹ *Infrastructure Investment and Jobs Act*, Pub. L. 117-58, 135 Stat 429.

²² See James McBride & Anshu Siripurapu, *The State of U.S. Infrastructure*, COUNCIL ON FOREIGN RELATIONS (Nov. 8, 2021), available at <https://www.cfr.org/background/state-us-infrastructure>; AM. SOC. OF CIVIL ENGINEERS, A COMPREHENSIVE ASSESSMENT OF AMERICA'S INFRASTRUCTURE: 2021 REP. CARD FOR AMERICA'S INFRASTRUCTURE, available at https://infrastructurereportcard.org/wp-content/uploads/2020/12/National_IRC_2021-report.pdf.

²³ *CWA*, *supra* note 3, §402; see also CRS REPORT R46927 *supra* note 11; see generally also EPA, *NPDES Permit Basics*, available at <https://www.epa.gov/npdes/npdes-permit-basics> [Hereinafter NPDES Permit Basics].

²⁴ NPDES Permit Basics, *supra* note 23.

²⁵ CRS REPORT RL30030, *supra* note 4.

²⁶ *Id.*

²⁷ *Id.*

²⁸ JURISDICTION AND ACTIVITIES REPORT, *supra* note 1.

²⁹ See NPDES Permit Basics, *supra* note 23 (stating applicants for NPDES permit renewals must complete an application for renewal at least 180 days prior to original expiration).

³⁰ *Id.*

Permit applications are considered backlogged for new applications if they are not issued or denied within 365 days of receipt, and for extensions if they are administratively continued for 180 days or more.³¹ As of September 2021, there were 284 permits under the responsibility of EPA (e.g., in the States and territories under EPA-authority) awaiting reissuance in backlog and 22 new permit applications in backlog.³² While EPA has not formally documented the number of administratively continued permits issued by states with approved NPDES permit programs since fiscal year 2017, at that time, approximately 14,000 facilities were in possession of permits requiring reissuance.³³

While EPA runs its own NPDES permitting program, the *CWA* authorizes EPA to approve individual states and tribes to manage their own NPDES permitting programs, in keeping with the *CWA*'s intent of Federal-state partnership.³⁴ In order to be approved to manage a NPDES permit program, a state must meet specific requirements, including developing water quality standards. States may use either EPA's water quality standards, or different standards approved by EPA, if the state demonstrates to EPA that the differences are warranted and not inconsistent with the *CWA* antidegradation policy.³⁵ Nearly all states have assumed administration of their own NPDES permitting programs, with only three exceptions: Massachusetts, New Hampshire, and New Mexico.³⁶

Point sources may in some instances apply for a NPDES general permit as opposed to a NPDES individual permit. A NPDES individual permit is written for site-specific discharges that are unique to a specific location or discharge.³⁷ On the other hand, NPDES general permits cover "multiple dischargers with similar operations and types of discharges," such as pesticide use or stormwater discharge.³⁸ Obtaining coverage under a general permit is often quicker than an individual permit, with point sources submitting a Notice of Intent (NOI) to be covered under a general permit after it is issued by a permitting authority.³⁹

IV. SECTION 404: DREDGED AND FILL MATERIAL

Section 404 of the *CWA* authorizes a separate type of permit required to discharge dredged or fill materials into navigable waters. Activities covered under the Section 404 program include those associated with pipeline projects; water resources projects such as levees and dams; mining projects such as those for critical minerals; infrastructure development such as

³¹ *Id.* (explaining these deadlines are only for EPA-issued permits. See next paragraph below for more information on state assumption of NPDES permitting programs).

³² EPA, *NPDES Permit Status Reports*, available at <https://www.epa.gov/npdes/npdes-permit-status-reports#current>.

³³ See EPA, PERMIT STATUS REPORT FOR NON-TRIBAL MAJOR INDIVIDUAL, MINOR INDIVIDUAL, AND NON-STORMWATER GENERAL PERMIT COVERED FACILITIES - END-OF-YEAR FY2017, available at https://www.epa.gov/sites/default/files/2017-12/documents/final_fy17_eoy_non-tribal_backlog_report_card-sum.pdf.

³⁴ CRS REPORT RL30030, *supra* note 4.

³⁵ CRS REPORT R46927, *supra* note 11; *CWA*, *supra* note 3, §510.

³⁶ *Id.*

³⁷ See NPDES Permit Basics, *supra* note 23.

³⁸ *Id.*

³⁹ *Id.*

highways and airports; and other development.⁴⁰ Some activities are exempt from Section 404 permitting requirements, such as certain farming and forestry activities.⁴¹ Section 404 permits are typically issued for a term of five years.⁴²

EPA and the Corps play complementary roles in implementing the Section 404 program, with the Corps in charge of issuing permits for discharge of dredged or fill material, using a set of environmental guidelines promulgated by EPA in conjunction with the Corps to evaluate permit applications.⁴³ The Corps likewise administers the day-to-day program, including jurisdictional determinations (JD) which certify the presence or absence of waters subject to the *CWA*.⁴⁴

Similar to the NPDES permitting process, EPA may also allow states and tribes to assume authority to grant or deny dredge and fill permits under Section 404, under the condition that states or tribes develop a wetlands permit program consistent with the *CWA*.⁴⁵ Currently three states have assumed authority over their Section 404 program: Florida, Michigan, and New Jersey.⁴⁶

Pursuant to Section 404, the Corps issues two types of permits: general and individual. The *CWA* authorizes the issuance of general permits for discharges that are “similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment” and are issued on a nationwide, regional, or state basis for particular categories of activities.⁴⁷ Nationwide Permits (NWP) and Regional General Permits are issued by the Corps on a National basis and are designed to “enhance regulatory efficiency and provide clarity for the regulated public without decreasing environmental protections.”⁴⁸ The most recent reissuance of NWPs went into effect in February 2022, covering 59 distinct activity categories, including mooring buoys, residential developments, utility lines, road crossings, and mining activities.⁴⁹

Section 404 also authorizes EPA to restrict, prohibit, deny, or withdraw the specification by the Corps of a site for the discharge of dredged or fill material, if the agency determines that the discharge will have an unacceptable adverse effect on municipal water supplies, shellfish

⁴⁰ EPA, *Permit Program under CWA Section 404*, available at <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404> [hereinafter Permit Program under CWA Section 404].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *CWA*, *supra* note 3, §404(b); *see also* CRS REPORT RL30030, *supra* note 4.

⁴⁴ Permit Program under CWA Section 404, *supra* note 40.

⁴⁵ EPA, *State or Tribal Assumption of the CWA Section 404 Permit Program*, available at <https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program>.

⁴⁶ *See* CRS REPORT R46927, *supra* note 11.

⁴⁷ *CWA*, *supra* note 3, §404(e); *see also* Permit Program under CWA Section 404, *supra* note 40.

⁴⁸ Press Release, CORPS., *Army Corps of Engineers announces publication of 2021 Nationwide Permits* (Jan. 13, 2021), available at <https://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/2470506/army-corps-of-engineers-announces-publication-of-2021-nationwide-permits>.

⁴⁹ *See* CORPS., *2021 Nationwide Permit Information*, available at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits>.

beds and fishery areas, wildlife, or recreational areas.⁵⁰ Section 404(c) is commonly referred to as EPA's "veto authority." Since the *CWA*'s enactment, EPA has issued fourteen 404(c) determinations, most recently for the Pebble Deposit Area in Alaska.⁵¹

V. WITNESSES

Dr. Andrea Travnicek

Director, Department of Water Resources
State of North Dakota

The Honorable Serena Coleman McIlwain

Secretary of the Environment
State of Maryland

Mr. Mickey Conway

CEO, Metro Water Recovery, Denver, Colorado
on behalf of the National Association of Clean Water Agencies

Mr. Brandon Farris

Vice President, Energy and Resources Policy
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⁵⁰ *CWA*, *supra* note 3, §404(c); See also EPA, *Clean Water Act Section 404(c) "Veto Authority"*, available at <https://www.epa.gov/sites/default/files/2016-03/documents/404c.pdf>.

⁵¹ EPA, *Chronology of CWA Section 404(c) Actions*, available at <https://www.epa.gov/cwa-404/chronology-cwa-section-404c-actions>.