



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 21 2011

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Tim Bishop
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Bishop:

Thank you for the letter dated June 17th regarding H.R. 2018, the Clean Water Cooperative Federalism Act. Attached, please find EPA's legal analysis of this legislation.

If you have any further questions, please feel free to contact me at (202) 564-4741.

Sincerely,

A handwritten signature in blue ink, appearing to read "Arvin Ganesan".

Arvin Ganesan
Deputy Associate Administrator
for Congressional Affairs

Technical Assessment of H.R. 2018

The bill would overturn almost 40 years of Federal legislation by preventing EPA from protecting public health and water quality.

- This bill would significantly undermine EPA's longstanding role under the CWA to assure that state water quality standards protect clean water and public health and comply with the law. It would fundamentally disrupt the Federal-State relationship outlined in the 1972 CWA and would hinder the federal government's ability to ensure that states protect interstate waters at a common level. This could lead to upstream states implementing standards that degrade waters in downstream states.
- This bill would prevent EPA from taking action without state concurrence even in the face of significant scientific information demonstrating threats to human health or aquatic life.
- This bill would unnecessarily delay EPA approval of new or revised State water quality standards, even where there are no concerns, and could lead to a higher rate of EPA disapprovals.

The bill would prevent EPA from providing its views on whether a proposed project that pollutes or even destroys lakes, streams, or wetlands would violate CWA standards.

- This bill would limit EPA from meeting its current CWA responsibility to facilitate disputes between States as to whether permit conditions protect water quality in all affected States.
- This bill would restrict EPA from providing its views on proposed permits or taking necessary action under existing law to protect public health and water quality.

The bill would remove EPA's existing state coordination role and eliminate the careful Federal/State balance established in the current CWA.

- Removing EPA's program oversight role is likely to reduce the quality of state-issued permits and may likely increase the number of lawsuits by citizens and environmental groups. This would shift the dispute resolution process from a productive state-EPA dialogue toward adversarial litigation.
- Restricting EPA's authority to ensure that states implement their programs as approved may lead states to reduce the protection they provide to their waters, thereby leading to a "race to the bottom" that jeopardizes water quality and human health.

The bill would prevent EPA from protecting communities from unacceptable adverse impacts to their water supplies and the environment caused by Federal permits.

- This legislation would remove EPA's ability to take action to protect communities from projects approved by the Corps of Engineers that would have unacceptable adverse effects to our nation's waters and public health. This would fundamentally disrupt the balance established by the original CWA in 1972 – a law that carefully constructed complementary roles for EPA, the Corps, and states.
- EPA has only used its CWA Section 404(c) authority 13 times in the nearly 40-year history of the CWA.

This bill would substantively eliminate the opportunity for EPA, the federal government's expert on water quality, to comment on Federal permits impacting water quality and public health.

- This bill would greatly limit EPA's ability to provide constructive and expert comments to the Corps on Section 404 permit applications. The bill would reduce the quality of information available to EPA and the time available to review it, resulting in more frequent EPA objections based on lack of information and unnecessary delays in the permitting process.
- This provision would require the Corps to adopt, through regulation, a more complex permitting process, which would add work for the Corps and uncertainty for applicants.

Technical Analysis of H.R. 2018

Bill Text in Bold – analysis in plain text

“...the Administrator may not promulgate a revised or new standard for a pollutant in any case in which the State has submitted to the Administrator and the Administrator has approved a water quality standard for that pollutant, unless the State concurs with the Administrator's determination that the revised or new standard is necessary to meet the requirements of this Act.”

- This provision would significantly undermine EPA’s ability to ensure that state water quality standards are adequately protective and meet Clean Water Act (CWA) requirements. It would fundamentally change the Federal-State relationship outlined in the 1972 CWA and would hinder the federal government's ability to ensure there is an equitable level of protection provided to our nation’s waters.
- The bill would generally prevent EPA, without State concurrence, from taking action to revise outdated State water quality standards. It also would prevent EPA from replacing difficult-to-implement narrative water quality criteria with more protective and easier-to-implement numeric water quality criteria. EPA would not be able to take action to promulgate new or revised WQS without State concurrence even in the face of significant scientific information demonstrating threats to human health or aquatic life.
- This bill would slow the process by which EPA approves new or revised State water quality standards. If EPA were prevented from taking action to replace outdated standards, EPA Regions would need additional time in their review of new or revised state water quality standards. EPA would also be more likely to disapprove state standards if it was precluded from taking action to ensure their protectiveness in the future.

“With respect to any discharge, if a State or interstate agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate determines under paragraph (1) that the discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307, the Administrator may not take any action to supersede the determination.”

- This subsection would prevent EPA from “superseding” a State certification under Section 401 of the CWA, which applies to Federal licenses or permits. The meaning, context, and application of the word “supersede” is ambiguous.
- Because of the provision’s uncertain scope, it has the potential to prevent EPA from fulfilling its CWA responsibility to facilitate disputes between States as to the effectiveness of permit conditions in protecting all affected States' water quality.
- This provision may reflect a misunderstanding of EPA’s recent actions with respect to CWA Sections 401 and 404. EPA formally deviates from a State-issued 401 certification very sparingly. With respect to Section 404 permitting for Appalachian surface coal mining operations, EPA has provided comments to the U.S. Army Corps of Engineers with respect to EPA’s water quality concerns. However, EPA has not taken formal action to “supersede” the State certification, so the practical effect of this provision is unclear.

“ The Administrator may not withdraw approval of a State program under paragraph (3) or (4), or limit Federal financial assistance for the State program, on the basis that the Administrator disagrees with the State regarding--

` (A) the implementation of any water quality standard that has been adopted by the State and approved by the Administrator under section 303(c); or

` (B) the implementation of any Federal guidance that directs the interpretation of the State's water quality standards."

- This provision takes a significant step toward eliminating the requirement that states implement water quality standards in their NPDES permits, which is a critical tool in ensuring that our nation's waters remain fishable and swimmable.
- The process of approving state NPDES programs is intended to ensure that they implement the minimum requirements specified in the CWA, thereby ensuring a more-or-less level playing field. Restricting EPA's authority to ensure that states implement their programs as approved could lead to a race to the bottom as each state seeks to ensure that their program is no more stringent than the least stringent state program.
- The term "implementation of any water quality standard" is significantly ambiguous and would likely lead to litigation. This term could include a variety of functions, such as implementing state water quality standards in NPDES permits, implementing applicable Total Maximum Daily Loads (TMDLs), ensuring that states meaningfully implement their narrative water quality standards, or taking enforcement action.
- States rely to varying degrees on narrative water quality standards, which are a practical solution to the infeasibility of developing a numeric standard for every pollutant of concern. EPA approval of narrative standards would be hampered if EPA could not then ensure their effective and meaningful incorporating into permits.
- EPA is unclear about the practical effect of this provision. EPA has not withdrawn approval of a state program for the reasons outlined above for a significant period of time.

"The Administrator may not object under paragraph (2) to the issuance of a permit by a State on the basis of--

` (A) the Administrator's interpretation of a water quality standard that has been adopted by the State and approved by the Administrator under section 303(c); or

` (B) the implementation of any Federal guidance that directs the interpretation of the State's water quality standards."

- This provision would prevent EPA from objecting to permits that fail to implement significant provisions of the CWA. EPA's role in overseeing State CWA programs – a role dating back to 1972 – serves a critical purpose by promoting national consistency and encouraging productive dialogue between EPA and states before permits are issued.
- Removing EPA's oversight role is likely to reduce the quality of state-issued permits and would likely increase the number of lawsuits by citizens and environmental groups to remedy these inadequate permits. This would shift dispute resolution from a generally productive state-EPA working relationship to an adversarial litigation-driven process.
- This provision appears to be motivated by a fundamental misunderstanding of EPA's recent actions with respect to Appalachian surface coal mining. EPA has not formally interpreted state narrative water quality standards or directed a specific interpretation of those state standards. Therefore, the practical impact of this provision is questionable.

Section 404(c): "Paragraph (1) shall not apply to any permit if the State in which the discharge originates or will originate does not concur with the Administrator's

determination that the discharge will result in an unacceptable adverse effect as described in paragraph (1)."

- This legislation would prevent EPA from taking action to protect the nation's aquatic resources from unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas without concurrence from the state. This would fundamentally disrupt the structure established by the original CWA in 1972 – a law that carefully constructed complementary roles for EPA, the Corps, and the states.
- EPA uses Section 404(c) as the action of last resort when no other approach works to prevent unacceptable impacts. EPA must follow a highly deliberative process (including an opportunity for significant public comment) in exercising its ultimate environmental review authority over CWA Section 404 permitting – and this authority only applies in cases where an activity will result in specific and severe adverse environmental effects.
- EPA has only used its CWA Section 404(c) authority 13 times in the nearly 40-year history of the CWA, and EPA reserves use of this authority for only the most unacceptable cases. EPA's use of Section 404(c) has protected more than 73,000 acres of wetlands and more than 30 miles of streams from unacceptable adverse impacts.
 - In 2008, the Bush Administration used Section 404(c) to protect over 67,000 acres of wetlands in Mississippi - some of the richest wetland and aquatic resources in the Nation. This area includes a highly productive floodplain fishery, highly productive bottomland hardwood forests, and important migratory bird foraging grounds.
 - Similarly in 1990, the first Bush Administration used Section 404(c) to protect a portion of the South Platte River in Colorado which has extraordinary aquatic resource values and supports an outstanding recreational fishery which the State of Colorado designated a "gold medal" trout stream.
- Many projects result in effects that cross state lines. In these cases, this bill would contribute to confusion as to which state must "concur" and could result in a situation where another State would unfairly bear the environmental costs associated with an activity.
- States already have a powerful tool under Section 401 of the CWA to prevent projects from violating state water quality standards, and they are already provided an important role in EPA's Section 404(c) process.

"The Administrator and the head of a department or agency referred to in paragraph (1) shall each submit any comments with respect to an application for a permit under subsection (a) or (e) not later than the 30th day (or the 60th day if additional time is requested) after the date of receipt of an application for a permit under that subsection."

- This subsection would significantly reduce the opportunity for public and interagency participation in the Corps' Section 404 permitting process, especially by EPA.
- For EPA, the agency entrusted with primary authority to implement the CWA, this bill would severely limit EPA's ability to provide constructive, informed comments to the Corps. Without access to complete information and adequate time to review and comment, EPA would be severely restricted in carrying out its CWA responsibilities.
- Reducing the quality of information available to EPA and the time available to review it would result in more frequent EPA objections based on lack of information, and unnecessary delays to the applications as the Corps works with the applicant to address EPA and others' less-informed comments.

- This legislation would disrupt the current mechanism by which the Corps receives comments from federal agencies and the public. Implementing this legislation would require agencies to submit comments after the Corps receives an application, regardless of whether the application is complete. This would require the Corps to make changes to its regulations that would create a more complex permitting process, thereby adding work for the Corps and adding uncertainty for applicants as they navigate a less straightforward permitting process.