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EC95-816 Extending the Clean Water Act: Issues and Alternatives

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Extending the Clean Water Act--Issues and Alternatives

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Author's note: This publication was written in the months immediately prior to the beginning of the 104th Congress in January 1995. While the basic issues have not changed, the schedule for reauthorization of the Clean Water Act and the approach to issues may have been altered by the change in political-party leadership in the Congress. For example, wetlands policy and private property rights may be treated as separate pieces of legislation in 1995.

The Federal Water Pollution Control Act of 1972, frequently referred to as the Clean Water Act (CWA), was last amended and updated in 1987. This reauthorization expired on September 30, 1994. Although hearings and other activities leading to yet another reauthorization took place in 1993 and 1994, disputes over key provisions precluded final action. It is expected to be considered again in 1995.

The following overview identifies major issues to be resolved in the Clean Water Act reauthorization. No attempt has been made to array these issues by priority, either for members of Congress or for particular groups of citizens.

Funding for Sewage Treatment Plants

The original clean water legislation focused primarily on reducing wastewater contamination of lakes, streams and other bodies of water by municipalities and industrial plants. It required that wastewater be treated before being discharged into waterways.

Originally, grants were offered to municipalities to assist in the construction of sewage treatment plants. In the 1987 reauthorization, Congress changed the program to one based on loans, not grants. The idea was to provide an initial infusion of funds to the states from which loans would be made via state revolving funds (SRFs) to municipalities. As municipalities paid off loans, funds would then be available for other communities to construct appropriate sewage treatment plants. In theory, the program was to be self-sustaining after fiscal year 1994.

In the current debate, two funding issues dominate:

- A significant overall gap continues to exist between SRFs and state needs. According to the General Accounting Office (GAO), SRFs will meet only about one-third of the states' funding needs for sewage treatment plants over the next 10 years. Critics point to this as an example of an "unfunded federal mandate." (In fairness, many state and local government officials want to address wastewater problems but not necessarily under a federal mandate.)
- The problem of funding sewage treatment plants in small communities is particularly acute. Many have small tax bases, limited or no access to capital markets, lower relative household incomes and higher per capita needs. In short, they find it difficult, if not impossible, to finance large public improvements, even with 100 percent loans and low interest rates. The Environmental Protection Agency (EPA) estimates that 75 percent of the communities in violation of sewage treatment requirements are rural.

Alternatives for addressing the funding problem are as follows:

1. Do nothing; that is, leave in place the scheduled 1994 phase-out of federal assistance, with or without changing current federal tolerances for wastewater contamination of streams and other surface waters.
2. Extend federal funding for SRFs beyond 1994.
3. Shift back to a grants program, especially to address the needs of small communities and even some large cities that see little or no advantage from the SRF loan program.
4. Make special procedural or repayment arrangements for small communities that participate in the SRF loan program.
5. Change the formula for allocation of any available federal funds to the states to take into account recent population growth and/or the condition (age) of current sewerage facilities.
6. Give states new authority to issue tax-free bonds to build sewage treatment facilities.
7. Provide additional market incentives, e.g., charge fees on the basis of toxicity when sewage plants and industrial facilities discharge toxic pollutants into surface waters.

In addition to sewage treatment plants, some have suggested that federal funds (loans or grants) should be made available for other water pollution control projects. In particular, this could include facilities to control stormwater and sewerage overflows.

(The 1987 amendments directed EPA to implement a specific permit program for stormwater discharges from industrial sources and municipalities, but this provision has not been fully implemented.)

Nonpoint Source Pollution

Nonpoint source pollution, i.e., water pollution associated with runoff from land, not from specific sources, was addressed in Section 319 of the 1987 amendments. States were required to make an assessment of nonpoint source pollution problems and propose a plan(s) for addressing those problems. Some federal funding was provided for both assessments and implementation of plans.

Nebraska's Section 319 report was approved by EPA in 1989. About 40 watersheds in the state were identified for federal cost-sharing to address problems caused by sedimentation and agricultural chemical contamination. However, authorized federal funding has been considerably below that needed to fully implement plans.

With respect to Section 319, these are the most important issues in the current debate:

- The required state assessment of nonpoint source pollution problems was a one-time-only activity. Some observers now believe that because of improved technology and the potential for changes in water quality over time, it would be appropriate for states to update their initial assessments.
- Federal appropriations for Section 319 grants have totaled \$268 million, although \$400 million was authorized. Both figures are below the amount needed to comprehensively address nonpoint source pollution problems. States contend that they cannot fully implement plans without adequate federal funding.
- Some members of Congress have been reluctant to define national solutions to local nonpoint source pollution problems. (In Nebraska, it is frequently argued that nonpoint source pollution is a problem that can best be addressed by local Natural Resource Districts.) However, the Coastal Zone Management Act, P.L. 101-508, directs the federal government to provide specific guidance on measures or practices to limit nonpoint sources of pollution. The requirements concerning coastal waters may serve as a model for all waters in a revised Section 319.
- Agriculture and industry groups have expressed several concerns: Section 319 could impose nonpoint source controls on all agricultural producers, regardless of water quality conditions; effective management practices may compensate for nonpoint source pollution in some cases; and the economic vitality of rural areas should be a factor when new regulations are implemented.
- In contrast, some environmental groups fear that new legislation could enable states to exempt "any and all" nonpoint sources, such as farms, from implementing enhanced pollution controls. They argue that those responsible for nonpoint sources should provide data demonstrating why they deserve an exemption.

Alternatives for addressing Section 319 issues are as follows:

1. Make no changes from current law. This would essentially mean that federal law would expect states to address nonpoint source pollution problems but with insufficient federal funding to support that effort. EPA would not be able to enforce nonpoint pollution control requirements.
2. Mandatory cleanup of nonpoint source pollution could be strengthened with or without compensating payments from the federal government. EPA would be authorized to enforce nonpoint source pollution requirements if states did not.
3. States could be allowed to take a more flexible approach to water pollution control.
 - a. One possibility is for the EPA to provide guidance only, the assumption being that state or local units of government can more appropriately address the problem.
 - b. Another possibility is to allow states/local governmental units to focus on an entire watershed instead of individual sources or types of pollution.
4. Citizen suits for past violations of pollution limits could be allowed.
5. A tax could be levied on synthetic fertilizers and pesticides, with the proceeds directed to solving problems caused by nonpoint source pollution.

Wetlands

Section 404 of the CWA addresses wetlands preservation by specifying certain permitting and compliance procedures when wetlands are to be altered. Over the years it has become one of the more contentious sections of the Act. The issues are as follows:

- The Army Corps of Engineers has been given administrative authority for Section 404 with oversight responsibilities vested in the Environmental Protection Agency. Two other federal agencies, the Natural Resources Conservation Service and the Fish and Wildlife Service, also have been given certain responsibilities with respect to wetlands. In simplest terms, this leads to the question, "Who should have final regulatory authority over wetlands?" (Both President Bush

and President Clinton have indicated it should be the Natural Resources Conservation Service.)

- Former President Bush set a "no net loss" goal for wetlands. Should this policy be codified by law? Under "no net loss," should trading be allowed so current wetlands could be developed as long as previously developed wetlands were returned to their natural state?
- The ecological value of wetlands may vary. Should this be a factor in determining future policy? In other words, should some wetlands be protected more or less stringently than others?
- Farmers, developers and other landowners have said the process of obtaining a Section 404 permit is too expensive, time-consuming and confusing. Can an alternative be devised?
- Environmentalists, in contrast, have called for broadening the permitting program to regulate wetland-destroying activities other than filling, such as draining and channelization. Should, for example, a "wetlands conservation" provision, initially applied to agricultural production and administered by the Natural Resources Conservation Service, apply to all wetlands?
- Should the federal government compensate land-owners whose property values are diminished by wetlands restrictions? (The Constitution guarantees compensation for the taking of private property for such uses as highway construction. But some landowners also want to be compensated when federal regulations limit the potential uses of their property. Environmentalists counter that the property rights debate is a smoke screen for lawmakers who oppose conservation; in addition, they fear that compensation for land owners in this case would undermine federal environmental laws generally.)

Alternatives for addressing wetlands issues (Section 404) are as follows:

1. Do nothing; that is, continue to require Section 404 permits for the same purposes as in the past with the Army Corps of Engineers as the permitting agency.
2. Alter the nature of Section 404 permits to include all types of wetlands alterations.
3. Designate a lead federal agency for all federal regulations relating to wetlands.
4. Devise a system to distinguish relative priorities for wetlands preservation; i.e., size, location and ecological value could be among the factors considered.
5. Specifically recognize the significance that wetlands designation and regulation may have on private property values. Consider appropriate remuneration.

Stormwater

Stormwater discharge systems are the pipes and sewer lines that carry rainwater or snow melt (but not sanitary wastes) away from urban areas and commercial and industrial facilities. Because stormwater can transport significant amounts of pollutants, the 1987 amendments directed EPA to implement a specific permit program for stormwater discharges from industrial sources and municipalities. Delays in issuing regulations, coupled with high compliance costs (especially for some cities) have brought stormwater back as a legislative issue.

Alternatives:

1. Some of the current permitting requirements could be modified and additional time could be given for compliance.
2. Cities with populations of less than 100,000 could be exempted from being required to obtain permits.

Groundwater Protection

To date, the CWA has focused on cleaning up the nation's surface waters. However, groundwater

protection could also become a goal under the Act, with permits being required whenever discharges are made into the ground or groundwater. These are the specific issues:

- Groundwater protection already is addressed under several other federal statutes, including the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Federal Insecticide, Fungicide and Rodenticide Act, and a provision in the 1990 farm bill, the Water Quality Improvement Program. Thus, the question is whether groundwater contamination needs further addressing under the CWA.
- Some states and local governments are addressing groundwater quality protection with aggressive programs. Examples in Nebraska include special protection areas and groundwater management areas. Further attention to the problem by another level of government may not be needed.
- Federal funding for other provisions of the CWA already is limited. The question is whether funding for other provisions should be reduced even more to accommodate a groundwater provision.

Alternatives:

1. Do not specifically address groundwater problems in the CWA.
2. Develop a comprehensive program for addressing groundwater problems, with or without federal funding.
3. Develop a stop-gap program in the CWA to address problems not addressed elsewhere in federal or state legislation.

Toxics

- Before discharge to either municipal sewers or surface water, industrial toxic wastes must be treated so as to not exceed a specific standard of toxicity. However, EPA data indicate that toxicity levels are twice as high for industrial wastes discharged to municipal sewer treatment plants as for wastes treated and discharged directly to surface units. Apparently, industrial plants sometimes expect municipal sewage treatment plants to do some of the clean-up (or dilution of toxicity) for them. Because municipal sewage treatment plants are not principally designed to treat raw industrial toxic wastes, compliance with existing pretreatment programs could be strengthened.

Alternatives:

1. Do nothing; that is, expect municipal sewage plants to reduce toxicity of wastewaters to the extent it is not being done by industrial plants directly responsible for the toxicity.
2. Mandate and enforce rules requiring industrial plants to reduce toxicity of wastewater before it is released to municipal sewage treatment plants.

Enforcement

Some observers, including those with a strong interest in the environment, have argued that provisions for enforcement of the CWA need to be strengthened.

Alternatives:

1. Civil and criminal penalties for polluters could be increased.
2. Citizens could be allowed to sue for past violations of the law, as long as infractions occurred

within the five-year statute of limitations. Recovery of attorney fees for private plaintiffs could also be allowed, thereby encouraging even more legal action.

3. The states could be given some enforcement powers, including the option of using money collected in fines for appropriate CWA projects in the state.

Market Incentives

Market incentives could supplement--but probably not replace--current regulatory provisions in the CWA. The idea would be to enhance economic efficiency while meeting the Act's objectives.

Alternatives:

1. Impose fees commensurate with the Act's objectives, e.g., the more pollution caused, the greater the fee.
2. Allow "trading" between point and nonpoint sources to control nutrients such as phosphorus and nitrogen.
3. Establish wetlands mitigation "banks" to compensate in advance for adverse impacts caused by wetlands development.
4. Offer financial incentives for good water-management practices.

Concluding Thought

Reauthorization of the Clean Water Act has been difficult because it addresses, directly or indirectly, more issues than ever before. Moreover, most issues are controversial, with important constituencies on both sides.

Environmentalists generally believe that the legislative proposals are too lax. Industry leaders and state/local governmental officials counter that the proposals are too costly and burdensome. The longer the debate and the more polarized it becomes, the more difficult it will be to reach final approval.

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Water Quality

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