

CLEAN WATER COOPERATIVE FEDERALISM ACT OF 2011

JULY 8, 2011.—Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed

Mr. MICA, from the Committee on Transportation and  
Infrastructure, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2018]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom  
was referred the bill (H.R. 2018) to amend the Federal Water  
Pollution Control Act to preserve the authority of each State to  
make determinations relating to the State's water quality stand-  
ards, and for other purposes, having considered the same, report  
favorably thereon with an amendment and recommend that the bill  
as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Clean Water Cooperative Federalism Act of 2011”.

**SEC. 2. STATE WATER QUALITY STANDARDS.**

(a) **STATE WATER QUALITY STANDARDS.**—Section 303(c)(4) of the Federal Water Pollution Control Act (33 U.S.C. 1313(c)(4)) is amended—

(1) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(2) by striking “(4)” and inserting “(4)(A)”;

(3) by striking “The Administrator shall promulgate” and inserting the following:

“(B) The Administrator shall promulgate”; and

(4) by adding at the end the following:

“(C) Notwithstanding subparagraph (A)(ii), 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.”.

(b) **FEDERAL LICENSES AND PERMITS.**—Section 401(a) of such Act (33 U.S.C. 1341(a)) is amended by adding at the end the following:

“(7) 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.”.

(c) **STATE NPDES PERMIT PROGRAMS.**—Section 402(c) of such Act (42 U.S.C. 1342(c)) is amended by adding at the end the following:

“(5) **LIMITATION ON AUTHORITY OF ADMINISTRATOR TO WITHDRAW APPROVAL OF STATE PROGRAMS.**—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.”.

(d) **LIMITATION ON AUTHORITY OF ADMINISTRATOR TO OBJECT TO INDIVIDUAL PERMITS.**—Section 402(d) of such Act (33 U.S.C. 1342(d)) is amended by adding at the end the following:

“(5) 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.”.

**SEC. 3. PERMITS FOR DREDGED OR FILL MATERIAL.**

(a) **AUTHORITY OF EPA ADMINISTRATOR.**—Section 404(c) of the Federal Water Pollution Control Act (33 U.S.C. 1344(c)) is amended—

(1) by striking “(c)” and inserting “(c)(1)”;

(2) by adding at the end the following:

“(2) 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).”.

(b) **STATE PERMIT PROGRAMS.**—The first sentence of section 404(g)(1) of such Act (33 U.S.C. 1344(g)(1)) is amended by striking “The Governor of any State desiring to administer its own individual and general permit program for the discharge” and inserting “The Governor of any State desiring to administer its own individual and general permit program for some or all of the discharges”.

**SEC. 4. DEADLINES FOR AGENCY COMMENTS.**

Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended—

(1) in subsection (m) by striking “ninetieth day” and inserting “30th day (or the 60th day if additional time is requested)”; and

(2) in subsection (q)—

(A) by striking “(q)” and inserting “(q)(1)”; and

(B) by adding at the end the following:

“(2) 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.”.

**SEC. 5. APPLICABILITY OF AMENDMENTS.**

The amendments made by this Act shall apply to actions taken on or after the date of enactment of this Act, including actions taken with respect to permit applications that are pending or revised or new standards that are being promulgated as of such date of enactment.

**PURPOSE OF THE LEGISLATION AND SUMMARY**

The “Clean Water Cooperative Federalism Act of 2011,” H.R. 2018, amends the Federal Water Pollution Control Act to restore the long-standing relationship between states and the U.S. Environmental Protection Agency as co-regulators under the Act and preserve the authority of each state to make determinations relating to the state’s water quality standards and permitting.

**BACKGROUND AND NEED FOR THE LEGISLATION**

The objective of the Federal Water Pollution Control Act (commonly known as the “Clean Water Act” or the “CWA”) is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. The primary mechanism for achieving this objective is the CWA’s prohibition on the discharge into a waterbody of a pollutant without a National Pollutant Discharge Elimination System (“NPDES”) permit. NPDES permits are a basic regulatory tool of the CWA. The CWA also regulates, through a separate permit program, the discharge of dredged or fill material into waterbodies, including wetlands. The U.S. Environmental Protection Agency (“EPA”) has the basic responsibility for administering and enforcing most of the CWA, and the U.S. Army Corps of Engineers (“Corps”) has lead responsibility for administering the dredged or fill (section 404) permit program.

The CWA calls on states to establish water quality standards for the waterbodies in their states. Water quality standards are to serve as a mechanism to establish goals for the quality of the Nation’s waters and as a regulatory basis when standardized technology controls for point source discharges are determined to be inadequate to meet the water quality standards for a waterbody and water quality-based controls are to be developed. States are required to periodically (at least once each three years) review their water quality standards and, as appropriate, modify and adopt new standards. Water quality standards define the goals for a waterbody by designating its uses, setting water quality criteria to protect those uses, and establishing general policy provisions to protect water quality.

The CWA does not contemplate a single, federally-led water quality program. Rather, Congress intended the states and EPA to im-

plement the CWA as a federal-state partnership where the states and EPA act as co-regulators. The CWA established a system where states can receive EPA approval to implement water quality programs under state law, in lieu of federal implementation. These states are called “authorized states.” Under the CWA, 47 states and territories have been authorized to implement NPDES permits and enforce permits.

Even when a state has the lead authority to implement the CWA’s programs, EPA retains residual authority under the CWA to review certain actions by the state in implementing the CWA. For example, when a state proposes issuing an NPDES permit, EPA may review and object to it, and when a state adopts a new or revised water quality standard, the state is to submit such standards to EPA for review and approval/disapproval. EPA also retains authority to oversee and object to the Corps’ issuance of section 404 permits for the discharge of dredged or fill material. Once EPA has approved a state standard or permit, or a Corps section 404 permit, the implementation and interpretation of that standard or permit is left to the state or the Corps, respectively.

Recently, however, EPA has abandoned its proper role of approving state programs and ensuring that the standards that states adopt meet the minimum requirements of the CWA. Instead, EPA has decided to get involved in the implementation of state standards, and in second-guessing states with respect to how standards are to be implemented and even second-guessing EPA’s own prior determinations that a state standard meets the minimum requirements of the CWA. EPA also has inserted itself into the states’ and the Corps’ permit issuance decisions and is second-guessing state and Corps permitting decisions.

For example, in November 2010, EPA decided to federally promulgate water quality standards for nutrients in Florida, even though the state was well underway in developing its own, scientifically defensible nutrient standards for the state, and even though EPA had earlier approved Florida’s nutrient criteria development plans. In addition, EPA has begun pressing states in other ways to adopt nutrient standards and implement other CWA limitations in NPDES discharge permits. EPA has reminded states of its position that states with authorized CWA permitting authority cannot issue permits in the face of an agency objection, and has threatened to hold up permits from issuance or withhold Federal financial assistance from states.

EPA also formalized in 2009, with the Corps and the Department of Interior, an extra-regulatory review process, referred to as an “Enhanced Coordination Process,” of CWA section 404 dredged or fill permits for Appalachian region surface coal mining projects. This new process added a minimum of 60 days and potentially many months of review to the existing review process entirely outside of, and in addition to, the existing section 404 permitting procedures and timelines. At the end of this new process, only if issues identified by EPA are resolved in individual permit applications may those permits move forward to the Corps for processing and incorporation of new permit terms or conditions dictated by EPA during the process. If EPA’s concerns remain unresolved at the close of the process period, EPA then may initiate “veto” procedures to prohibit the issuance of a permit. In practice, EPA has uti-

lized the process to identify almost 250 coal-related section 404 permits currently pending with the Corps, and numerous permit applications remain indefinitely stalled.

Further, in an unprecedented move and without alleging any violation of a permit, in September 2010, EPA initiated steps to revoke a section 404 permit issued two years earlier for a surface coal mining operation in West Virginia. The permit was for the Arch Coal, Mingo Logan, Inc., Spruce No. 1 Surface Mine. Prior to the issuance of the permit, Arch Coal had conducted an extensive 10-year environmental review, including a 1,600 page Environmental Impact Statement (EIS) in which EPA fully participated and agreed to all the terms and conditions included in the authorized permit. Subsequently, the mine operated pursuant to and in full compliance with the Section 404 authorization. Nevertheless, EPA issued a determination that EPA withdraw the discharge authorization.

By second-guessing and inserting itself into the states' and the Corps' standards and permitting decisions, EPA has upset the long-standing balance between federal and state partners in regulating the nation's waters, and undermined the system of cooperative federalism established under the CWA in which the primary responsibilities for water pollution control are allocated to the states. EPA's actions have created an atmosphere of regulatory uncertainty for the regulated community, and have had a chilling effect on the Nation's economy and job creation.

The sponsors of H.R. 2018 introduced this legislation to halt these sorts of recent actions where EPA has gone beyond its appropriate role as the approver of programs and standards and instead has attempted to directly implement water quality programs, including standards and permits, in approved states, and second-guess the judgment of the water quality professionals in those states.

H.R. 2018 aims to provide common sense protections for states' EPA-approved water quality standards and permitting authorities under the CWA. Without these protections, state regulation, as approved by EPA, can still be usurped by EPA, creating a climate for regulatory uncertainty and delays.

#### LEGISLATIVE HISTORY

On May 26, 2011, Committee on Transportation and Infrastructure Chairman John Mica introduced H.R. 2018, the "Clean Water Cooperative Federalism Act of 2011." On June 22, 2011, the Committee on Transportation and Infrastructure met in open session to consider H.R. 2018, and ordered the bill reported favorably to the House by roll call vote with a quorum present. The vote was 35 yeas to 19 nays. An amendment was offered in Committee by Mrs. Capito, which was adopted by voice vote. The amendment made a clarifying change to the bill. The amendment stated that amendments that H.R. 2018 made to the Clean Water Act would apply to actions taken on or after the date of enactment of H.R. 2018, including actions that are pending or revised or new standards that are being promulgated as of such date of enactment. Mrs. Capito also offered and withdrew an amendment that would have required EPA to conduct an analysis of the impacts, on employment and economic activity, of any EPA action covered under the bill. Mr.

Bishop offered an amendment that would have excluded, from coverage under the bill, any waters that EPA determines are a source for a public drinking water supply, provide flood protection for communities, are a valuable fish and wildlife habitat that provide benefits to the economy, or are coastal recreational waters. The amendment was defeated in a voice vote.

#### HEARINGS

On May 5 and 11, 2011, the Subcommittee on Water Resources and Environment held hearings to receive testimony from state regulators, the mining industry, impacted businesses, economists, and EPA on EPA's surface mining policies and other related extra-regulatory activities.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. During consideration of H.R. 2018, a total of one roll call vote was taken, which was on a final vote ordering the bill reported as amended. The bill, as amended, was reported to the House with a favorable recommendation after a record vote which was disposed of as follows:

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
FULL COMMITTEE – ROLL CALL  
U.S. HOUSE OF REPRESENTATIVE – 112<sup>TH</sup> CONGRESS

Number of Members: (33/26) Quorum: 30 Working Quorum: 20  
Date: June 22, 2011 Presiding: Chairman Mica  
Amendment or matter voted on: Ordering H.R. 2018 reported as amended  
Vote: 35 - 19

	Yeas	Nays	Present		Yeas	Nays	Present
Mr. Mica	X			Mr. Larsen		X	
Mr. Rahall	X			Mr. Lipinski		X	
Mr. Altmire	X			Mr. LoBiondo	X		
Mr. Barletta	X			Mr. Long	X		
Mr. Bishop		X		Mr. Meehan	X		
Mr. Boswell	X			Mr. Michaud		X	
Ms. Brown		X		Mr. Miller (CA)	X		
Dr. Bucshon	X			Ms. Miller (MI)	X		
Ms. Capito	X			Mr. Nadler		X	
Mr. Capuano		X		Mrs. Napolitano		X	
Mr. Carnahan		X		Ms. Norton		X	
Mr. Coble	X			Mr. Petri	X		
Mr. Cohen		X		Mr. Ribble	X		
Mr. Costello	X			Ms. Richardson			
Mr. Cravaack	X			Ms. Schmidt	X		
Mr. Crawford	X			Mr. Shuler		X	
Mr. Cummings		X		Mr. Shuster	X		
Mr. DeFazio		X		Mr. Sires		X	
Mr. Denham	X			Mr. Southerland	X		
Mr. Duncan	X			Mr. Walz		X	
Ms. Edwards				Mr. Young			
Mr. Farenthold	X						
Mr. Filner							
Mr. Fleischmann	X						
Mr. Gibbs	X						
Mr. Graves							
Mr. Guinta	X						
Mr. Hanna	X						
Dr. Harris	X						
Mrs. Herrera Beutler	X						
Ms. Hirono		X					
Mr. Holden	X						
Mr. Hultgren	X						
Mr. Hunter	X						
Mr. Johnson (IL)		X					
Ms. Johnson (TX)		X					
Mr. Landry	X						
Mr. Lankford	X						

### COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Transportation and Infrastructure's oversight findings and recommendations are reflected in this report.

### COST OF LEGISLATION

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

### NEW BUDGET AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974, included below.

### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2018 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, June 30, 2011.*

Hon. JOHN L. MICA,  
*Chairman, Committee on Transportation and Infrastructure,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2018, the Clean Water Cooperative Federalism Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

ROBERT A. SUNSHINE  
(For Douglas W. Elmendorf, Director).

Enclosure.

### *H.R. 2018—Clean Water Cooperative Federalism Act of 2011*

H.R. 2018 would amend the Clean Water Act (CWA) to shift various regulatory powers concerning water treatment and the development of wetlands from the Environmental Protection Agency (EPA) to individual states. Major changes to the CWA would:

- Prohibit EPA from issuing a new water quality standard in any case in which a state standard has been approved by EPA, unless the state concurs with EPA that the revised or



new standard is necessary to meet the requirement of the CWA;

- Prohibit EPA from withdrawing approval of a state program for issuing water quality permits under the CWA, or from limiting federal financial assistance for a state permitting program on the basis that EPA disagrees with the state regarding a standard that the state has adopted and EPA has approved;
- Prohibit EPA from vetoing a permitting decision by the Army Corp of Engineers involving wetlands unless the state concurs with the veto;
- Allow states to assume and administer parts of the CWA permitting program rather than all of it or none of it, as is the case under current law; and
- Shorten the deadlines applicable to federal agencies for making decisions on some permits to dredge and fill wetlands.

Many of the restrictions posed by this bill would affect some aspects of EPA's longstanding oversight and enforcement role related to state water quality established under the CWA. Currently, EPA usually spends more than \$2 billion each year on activities related to the CWA (including grants to states). However, many of the activities that would be precluded under H.R. 2018 occur infrequently under current law and have not accounted for a significant fraction of the annual resources devoted to implementing the CWA. (For example, since the inception of the CWA in 1972, EPA has vetoed permitting decisions by the Army Corp of Engineers 13 times, and EPA has never withdrawn a state's delegated program.) Therefore, CBO estimates that enacting this legislation would not have a significant impact on EPA's budget to implement the CWA.

Pay-as-you-go procedures do not apply to H.R. 2018 because enacting the bill would not affect direct spending or revenues.

H.R. 2018 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to reduce regulatory burdens caused by EPA's second-guessing and inserting itself into the states' standards and permitting decisions, by restoring the long-standing system of cooperative federalism established under the CWA in which the primary responsibilities for water pollution control are allocated to the states.

#### ADVISORY OF EARMARKS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2018 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

## FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

## PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 2018 does not preempt any state, local, or tribal law.

## ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

## APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

## SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section 1. Short Title*

Section 1 of the bill designates the title of the bill as the “Clean Water Cooperative Federalism Act of 2011.”

*Section 2. State Water Quality Standards*

Section 2(a) of the bill (“State Water Quality Standards”) amends section 303(c)(4) of the CWA by restricting EPA’s ability to issue a revised or new water quality standard for a pollutant whenever a state has adopted and EPA already 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 the CWA.

Section 303 of the CWA authorizes EPA to approve state standards and to establish federal standards if needed to meet the requirements of the Act. By restricting EPA’s ability to override an existing state standard if it already has been approved by EPA, EPA as a co-regulator under the CWA would be forced to work together more closely, in a more cooperative fashion, with the state. H.R. 2018 would prevent unilateral actions by EPA that second-guess the decisions of the state regulatory agency.

In opposing this bill, it has been implied by some that the states cannot be trusted and that only EPA can protect water quality. The Committee has heard from representatives of the water quality programs in many states about how they implement their approved (by EPA) water quality programs under the CWA, and H.R. 2018 would not create a “race to the bottom” whereby state regulators would abandon their mission to protect water quality. H.R. 2018

maintains EPA's proper and appropriate authority to approve state programs and to approve state water quality standards.

Section 2(b) of the bill ("Federal Licenses and Permits") amends section 401(a) of the CWA by prohibiting EPA from superseding a water quality certification granted by a state under CWA section 401, that a discharge will comply with the applicable water quality requirements of sections 301, 302, 303, 306, and 307 of the CWA. Section 401 of the CWA vests in states alone the authority to decide whether or not a proposed Federal project or Federal action will adversely affect state water quality standards. Recently, EPA has suggested that they can override state determinations. This suggestion is unprecedented. H.R. 2018 restricts EPA's ability to carry out its threat to override state water quality certifications.

Section 2(c) of the bill ("State NPDES Permit Programs") amends section 402(c) of the CWA by prohibiting EPA from withdrawing approval of a state water quality permitting program under CWA section 402 (NPDES Permits), or from limiting Federal financial assistance for the state water quality permitting program, on the basis that EPA disagrees with the state regarding (a) a water quality standard that a state has adopted and EPA has approved under section 303(c), or (b) the implementation of any federal guidance that directs a re-interpretation of the state's approved water quality standards.

Section 2(d) of the bill ("Limitation on Authority of Administrator To Object to Individual Permits") amends section 402(d) of the CWA by prohibiting EPA from objecting to a state's issuance of an NPDES permit on the basis of (a) EPA's differing interpretation of an approved state water quality standard, or (b) the implementation of any federal guidance that directs a re-interpretation of the state's approved water quality standards.

Under section 402 of the CWA, once EPA approves a state water quality program, then that program is the permitting authority under the CWA and states have the authority to issue permits that they determine will meet state water quality standards that have been approved by EPA. In certain cases, EPA has the ability to independently enforce a state-issued permit. However, EPA has not previously claimed the authority to invent its own interpretation of what state water quality standards mean and how they should be implemented. EPA is now threatening these actions.

To prevent this from happening, H.R. 2018 limits EPA's authority to object to state-issued permits. The bill also limits EPA's authority to withdraw approval of a state NPDES permitting program, or from limiting federal financial assistance for the state water quality permitting program in the specified circumstances. These limitations apply only in situations where EPA is attempting to contradict a state agency's interpretation of its own water quality standards. EPA's recent attempts to rewrite state water quality standards are unprecedented. By limiting such over-reaching by EPA, H.R. 2018 in no way affects EPA proper role in reviewing state permits.

### *Section 3. Permits for Dredged or Fill Material*

Section 3(a) of the bill ("Authority of EPA Administrator") amends section 404(c) of the CWA by restricting EPA's ability to veto a Corps section 404 permitting decision under CWA section

404(c) unless the state concurs with EPA's determination that the discharge of dredged or fill material will result in an unacceptable adverse effect on a state's waters, as described in CWA section 404(c)(1) (as amended).

Under section 404(c) of the CWA, EPA has the authority to veto a Corps permit for the discharge of dredged or fill material to prevent unacceptable adverse effects on state waters. Recently, EPA has alleged unacceptable adverse impacts where a state agency (or the Corps) believes that none exist. H.R. 2018 would limit EPA's ability to override a state (or Corps) determination regarding whether there would be unacceptable adverse impacts on the state's waters.

Section 3(b) of the bill ("State Permit Programs") amends section 404(g)(1) of the CWA by allowing a state to assume and administer only parts of the section 404 permit program.

CWA section 404(g) authorizes states to assume responsibility for implementing the CWA section 404 permit program, but they are generally only allowed to assume the entire program. Currently, only two states (New Jersey and Michigan) have assumed responsibility for section 404 permitting in their states. Other states support a simplified and more flexible process for state assumption of the section 404 permit program, including partial assumption of program responsibilities, in order to improve effectiveness and provide more efficient and effective permitting for applicants. H.R. 2018 would make it easier for states to assume and administer only parts of the section 404 permit program.

#### *Section 4. Deadlines for Agency Comments*

Paragraph (1) of Section 4 of the bill amends section 404(m) of the CWA by shortening the deadline for the Fish and Wildlife Service to submit comments to the Corps on a proposed section 404 permit from 90 days to 30 days (or 60 days if additional time is requested).

Paragraph (2) of Section 4 of the bill amends section 404(q) of the CWA by clarifying that the deadline for EPA and other agencies to submit comments to the Corps on a proposed section 404 permit is 30 days (or 60 days if additional time is requested) after the date of receipt of the application for the section 404 permit.

Under section 404(q) of the Clean Water Act, agencies are required to enter into memoranda of understanding (MOUs) to limit delays in the issuance of permits by the Corps. In 1992, EPA entered into an MOU with the Corps agreeing to limit its review time to 30 days, which could be extended to a maximum of 60 days. H.R. 2018 holds EPA and other agencies to their obligation to prevent permitting delays.

#### *Section 5. Applicability of Amendments*

Section 5 states that amendments that H.R. 2018 would make to the CWA shall apply to actions taken on or after the date of enactment of H.R. 2018, including actions that are pending or revised or new standards that are being promulgated as of such date of enactment. Section 5 makes it clear that H.R. 2018 would apply to both pending and future permitting and standards actions.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**FEDERAL WATER POLLUTION CONTROL ACT**

\* \* \* \* \*

**TITLE III—STANDARDS AND ENFORCEMENT**

\* \* \* \* \*

**WATER QUALITY STANDARDS AND IMPLEMENTATION PLANS**

SEC. 303. (a) \* \* \*

\* \* \* \* \*

(c)(1) \* \* \*

\* \* \* \* \*

(4)(A) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

[(A)] (i) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act, or

[(B)] (ii) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act.

[The Administrator shall promulgate]

(B) *The Administrator shall promulgate* any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act.

(C) *Notwithstanding subparagraph (A)(ii), 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.*

\* \* \* \* \*

**TITLE IV—PERMITS AND LICENSES****CERTIFICATION**

SEC. 401. (a)(1) \* \* \*

\* \* \* \* \*

(7) *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.*

\* \* \* \* \*

#### NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a) \* \* \*

\* \* \* \* \*

(c)(1) \* \* \*

\* \* \* \* \*

*(5) LIMITATION ON AUTHORITY OF ADMINISTRATOR TO WITHDRAW APPROVAL OF STATE PROGRAMS.—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.*

(d)(1) \* \* \*

\* \* \* \* \*

*(5) 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.*

\* \* \* \* \*

#### PERMITS FOR DREDGED OR FILL MATERIAL

SEC. 404. (a) \* \* \*

\* \* \* \* \*

**[(c)]** *(c)(1) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.*

*(2) 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).*

\* \* \* \* \*

(g)(1) **【The Governor of any State desiring to administer its own individual and general permit program for the discharge】** *The Governor of any State desiring to administer its own individual and general permit program for some or all of the discharges of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.*

\* \* \* \* \*

(m) Not later than the **【ninetieth day】** *30th day (or the 60th day if additional time is requested)* after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

\* \* \* \* \*

**【(q)】** *(q)(1) Not later than the one-hundred-eightieth day after the date of enactment of this subsection, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice of such application is published under subsection (a) of this section.*

*(2) 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 re-*

*quested) after the date of receipt of an application for a permit  
under that subsection.*

\* \* \* \* \*



## DISSENTING VIEWS

In my opinion, consideration of H.R. 2018, the Clean Water Cooperative Federalism Act of 2011, is ill-timed given the legislation's far-reaching implications for water quality and public health. Members of this committee have not had an opportunity to investigate many of the facts and circumstances related to the underlying issues this bill purports to address, including its potential consequences.

While the Subcommittee on Water Resources and Environment has held three hearings on issues related to surface coal mining and nutrient water pollution, none of these hearings specifically examined the substantive changes to the Federal Water Pollution Control Act, more commonly known as the Clean Water Act, that are included in this legislation. In fact, the final of these three hearings, related to nutrient water pollution, was held two days after the Full Committee markup of H.R. 2018.

This lack of careful consideration on the implications of this legislation is readily apparent. For example, while proponents argue that portions of this bill were drafted to address recent EPA actions on nutrient water quality criteria, the implications of this legislation extend beyond these issues and impact both Federal and State abilities to reduce the discharge of any pollutants under the Act.

In my view, it is unfortunate that the Members of the Transportation and Infrastructure Committee were asked to vote on this legislation before the implications of H.R. 2018 had been thoroughly discussed and debated.

In addition, according to a technical review of this legislation by the U.S. Environmental Protection Agency (EPA), which I am including as part of my dissenting views, the potential adverse effect of this legislation would be to "overturn almost 40 years of Federal legislation by preventing EPA from protecting public health and water quality."

According to EPA, H.R. 2018 fundamentally alters the current Federal/State relationship outlined in the Clean Water Act 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 also prevents EPA, without State concurrence, from taking action to revise outdated State water quality standards.

I am also concerned that any action to allow for less protective water quality standards will have an equivalent negative impact on the quality and protectiveness of pollution discharge permits, assessing whether waterbodies are impaired, establishing and implementing of Total Maximum Daily Load (TMDL) allocations; and certifying whether other federal permits or licenses comply with state water quality standards.

This legislation makes a State the final arbiter of whether a permit, license, or standard is protective of water quality even if the resulting decision adversely impacts the water quality of neighboring states. Furthermore, EPA would be prohibited from resolving conflicting State decisions on protecting water quality, and States may be left with no recourse but to litigate conflicting standards in court.

H.R. 2018 also inhibits Federal and State efforts to incorporate greater scientific information on the impacts of pollution to human health and the environment into pollution discharge limits, and prohibits Federal efforts to incorporate more stringent discharge limits into permit programs to address emerging contaminants and pollutants.

My district in New York is separated from Connecticut by the Long Island Sound. Over time, the number of polluters in the area increased exponentially, killing fish, lobsters and imperiling the \$5 billion of economic output that the region depends upon. Fortunately, the States decided that the Sound was impaired and proposed a revised, more restrictive water quality standard for nitrogen—a \$5 billion bullet dodged.

Had Connecticut, for example, decided against the revised standard despite all the scientific evidence for doing so, under current law EPA could step in and require the stricter standard. Under H.R. 2018, EPA would be stripped of that leverage, and polluters in Connecticut could continue to discharge excessive amounts of nitrogen into the Sound, leaving my constituents and the State of New York without any recourse under the Clean Water Act to stop them.

I recently learned that Chicago, Illinois, is the only major metropolitan area that does not disinfect its treated sewage before dumping it into the Chicago River. Under this bill, EPA would have no authority to require the State to adopt a new standard for disinfection—as they did last month to protect the public from dangerous pathogens and bacteria.

If this bill were to pass, individual States could decide that collective efforts to address the water quality impairments in the Chesapeake Bay, Puget Sound, or the Gulf of Mexico are unnecessarily restrictive or burdensome, and refuse to participate in a meaningful way towards restoration of these regional waterbodies. This go-it-alone approach flies in the face of science, common sense, and decades of experience implementing of the Clean Water Act.

In my view, the far-reaching implications of this bill will have a significant adverse impact on our nation's clean water.

I oppose this bill.

TIMOTHY H. BISHOP.

## SUMMARY: EPA ANALYSIS 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 Clean Water Act (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 carefully crafted by the 1972 CWA and would hinder the federal government's ability to ensure that states provide an equitable level of protection to their waters.
- This bill would prevent EPA from taking action without state concurrence to update outdated State standards even in the face of significant scientific information demonstrating threats to human health or aquatic life from emerging contaminants or other pollutants.
- 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.

- H.R. 2018 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. It would also prevent EPA from taking necessary action under existing law to protect public health and water quality.
- Any action by individual States to allow for less protective water quality standards could affect the quality and protectiveness of state permits, Total Maximum Daily Loads, or the assessment of impaired waters. This would limit EPA's ability to ensure that the State's overall program complies with the CWA.
- 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, which may leave states with no legal recourse but to litigate conflicting standards in court.

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.

- H.R. 2018 would allow individual States to decide that collective efforts to address the water quality impairments in the Chesapeake Bay, Puget Sound, or the Gulf of Mexico are unnecessarily restrictive or burdensome, and refuse to participate in a meaningful way towards restoration of these regional waterbodies, potentially reversing decades of progress under the CWA.

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 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.

