

COAL JOBS PROTECTION ACT OF 2014

SEPTEMBER 18, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 5077]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 5077) to amend the Federal Water Pollution Control Act to provide guidance and clarification regarding issuing new and renewal permits, 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 “Coal Jobs Protection Act of 2014”.

SEC. 2. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM.

(a) **APPLICABILITY OF GUIDANCE.**—Section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342) is amended by adding at the end the following:

“(s) **APPLICABILITY OF GUIDANCE.**—

“(1) **DEFINITIONS.**—In this subsection:

“(A) **GUIDANCE.**—

“(i) **IN GENERAL.**—The term ‘guidance’ means draft, interim, or final guidance issued by the Administrator.

“(ii) **INCLUSIONS.**—The term ‘guidance’ includes—

“(I) the interim guidance memorandum issued by the Administrator on April 1, 2010, entitled ‘Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order’;

“(II) the proposed guidance described in the notice of availability and request for comments entitled ‘EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act’ (76 Fed. Reg. 24479 (May 2, 2011));

“(III) the final guidance memorandum issued by the Administrator on July 21, 2011, entitled ‘Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order’;

“(IV) the proposed guidance submitted to the Office of Information and Regulatory Affairs of the Office of Management and Budget for regulatory review under Executive Order 12866 entitled ‘Guidance on Identifying Waters Protected By the Clean Water Act’ and dated February 17, 2012 (referred to as ‘Clean Water Protection Guidance’, Regulatory Identifier Number (RIN) 2040–ZA11, received February 21, 2012);

“(V) any successor document to, or any substantially similar guidance based in whole or in part on, any of the foregoing guidance documents; and

“(VI) any other document or paper proposed or issued by the Administrator through any process other than the notice and comment rulemaking process.

“(B) **NEW PERMIT.**—The term ‘new permit’ means a permit covering discharges from a point source—

“(i) that is issued under this section by a permitting authority; and

“(ii) for which an application is—

“(I) pending as of the date of enactment of this subsection; or

“(II) filed on or after the date of enactment of this subsection.

“(C) **PERMITTING AUTHORITY.**—The term ‘permitting authority’ means—

“(i) the Administrator; or

“(ii) a State, acting pursuant to a permit program under subsection

(b).

“(2) **PERMITS.**—

“(A) **IN GENERAL.**—Notwithstanding any other provision of law, in making a determination whether to approve a new permit or a renewed permit, the permitting authority—

“(i) shall base the determination only on compliance with regulations issued by the Administrator or the permitting authority; and

“(ii) shall not base the determination on the extent of adherence of the applicant for the new permit or renewed permit to guidance.

“(B) **NEW PERMITS.**—If the permitting authority does not approve or deny an application for a new permit by the date that is 270 days after the date of receipt of a substantially complete application for the new permit, the applicant may discharge as if the application were approved in accordance with Federal law for the period of time for which a similar permit would be approved.

“(C) **SUBSTANTIAL COMPLETENESS.**—In determining whether an application for a new permit or a renewed permit received under this paragraph is substantially complete, the permitting authority shall use standards for

determining substantial completeness of similar permits for similar facilities submitted in fiscal year 2007.”.

(b) STATE PERMIT PROGRAMS.—

(1) IN GENERAL.—Section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342) is amended by striking subsection (b) and inserting the following:

“(b) STATE PERMIT PROGRAMS.—

“(1) IN GENERAL.—At any time after the promulgation of the guidelines required by section 304(i)(2), the Governor of each State desiring to administer a permit program for discharges into navigable waters within the jurisdiction of the State may submit to the Administrator—

“(A) a full and complete description of the program the State proposes to establish and administer under State law or under an interstate compact; and

“(B) a statement from the attorney general (or the attorney for those State water pollution control agencies that have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of the State, or the interstate compact, as applicable, provide adequate authority to carry out the described program.

“(2) APPROVAL.—The Administrator shall approve each program for which a description is submitted under paragraph (1) unless the Administrator determines that adequate authority does not exist—

“(A) to issue permits that—

“(i) apply, and ensure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

“(ii) are for fixed terms not exceeding 5 years;

“(iii) can be terminated or modified for cause, including—

“(I) a violation of any condition of the permit;

“(II) obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; and

“(III) a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; and

“(iv) control the disposal of pollutants into wells;

“(B)(i) to issue permits that apply, and ensure compliance with, all applicable requirements of section 308; or

“(ii) to inspect, monitor, enter, and require reports to at least the same extent as required in section 308;

“(C) to ensure that the public, and any other State the waters of which may be affected, receives notice of each application for a permit and an opportunity for a public hearing before a ruling on each application;

“(D) to ensure that the Administrator receives notice and a copy of each application for a permit;

“(E) to ensure that any State (other than the permitting State), the waters of which may be affected by the issuance of a permit may submit written recommendations to the permitting State and the Administrator with respect to any permit application and, if any part of the written recommendations are not accepted by the permitting State, that the permitting State will notify the affected State and the Administrator in writing of the failure of the permitting State to accept the recommendations, including the reasons for not accepting the recommendations;

“(F) to ensure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired by the issuance of the permit;

“(G) to abate violations of the permit or the permit program, including civil and criminal penalties and other means of enforcement;

“(H) to ensure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) into the treatment works and a program to ensure compliance with those pretreatment standards by each source, in addition to adequate notice, which shall include information on the quality and quantity of effluent to be introduced into the treatment works and any anticipated impact of the change in the quantity or quality of effluent to be discharged from the publicly owned treatment works, to the permitting agency of—

“(i) new introductions into the treatment works of pollutants from any source that would be a new source as defined in section 306 if the source were discharging pollutants;

“(ii) new introductions of pollutants into the treatment works from a source that would be subject to section 301 if the source were discharging those pollutants; or

“(iii) a substantial change in volume or character of pollutants being introduced into the treatment works by a source introducing pollutants into the treatment works at the time of issuance of the permit; and

“(I) to ensure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

“(3) ADMINISTRATION.—Notwithstanding paragraph (2), the Administrator may not disapprove or withdraw approval of a program under this subsection, or limit Federal financial assistance for such program, on the basis of the following:

“(A) The failure of the program to incorporate or comply with guidance (as defined in subsection (s)(1)).

“(B) The implementation of a water quality standard that has been adopted by the State and approved by the Administrator under section 303(c).”.

(2) CONFORMING AMENDMENTS.—

(A) FEDERAL ENFORCEMENT.—Section 309 of the Federal Water Pollution Control Act (33 U.S.C. 1319) is amended—

(i) in subsection (c)—

(I) in paragraph (1)(A), by striking “402(b)(8)” and inserting “402(b)(2)(H)”; and

(II) in paragraph (2)(A), by striking “402(b)(8)” and inserting “402(b)(2)(H)”; and

(ii) in subsection (d), in the first sentence, by striking “402(b)(8)” and inserting “402(b)(2)(H)”.

(B) ADDITIONAL PRETREATMENT.—Section 402(m) of the Federal Water Pollution Control Act (33 U.S.C. 1342(m)) is amended in the first sentence by striking “subsection (b)(8) of this section” and inserting “subsection (b)(2)(H)”.

(c) SUSPENSION OF FEDERAL PROGRAM.—Section 402(c) of the Federal Water Pollution Control Act (33 U.S.C. 1342(c)) is amended—

(1) by redesignating paragraph (4) as paragraph (5); and

(2) by inserting after paragraph (3) the following:

“(4) LIMITATION ON DISAPPROVAL.—Notwithstanding paragraphs (1) through (3), the Administrator may not disapprove or withdraw approval of a State program under subsection (b), or limit Federal financial assistance for the State program, on the basis of the following:

“(A) The failure of the program to incorporate or comply with guidance (as defined in subsection (s)(1)).

“(B) The implementation of a water quality standard that has been adopted by the State and approved by the Administrator under section 303(c).”.

(d) NOTIFICATION OF ADMINISTRATOR.—Section 402(d)(2) of the Federal Water Pollution Control Act (33 U.S.C. 1342(d)(2)) is amended as follows:

(1) By striking “(2) No” and all that follows through the end of the first sentence and inserting the following:

“(2) OBJECTION BY ADMINISTRATOR.—

“(A) IN GENERAL.—Subject to subparagraph (C), no permit shall issue if—

“(i) not later than 90 days after the date on which the Administrator receives notification under subsection (b)(2)(E), the Administrator objects in writing to the issuance of the permit; or

“(ii) not later than 90 days after the date on which the proposed permit of the State is transmitted to the Administrator, the Administrator objects in writing to the issuance of the permit as being outside the requirements of this Act.”.

(2) In the second sentence, by striking “Whenever the Administrator” and inserting the following:

“(B) REQUIREMENTS.—If the Administrator”.

(3) By adding at the end the following:

“(C) EXCEPTION.—The Administrator may not object to or deny the issuance of a permit by a State under subsection (b) or (s) based on the following:

“(i) Guidance, as that term is defined in subsection (s)(1).

“(ii) 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).”.

SEC. 3. PERMITS FOR DREDGED OR FILL MATERIAL.

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

(1) by striking “(a) The Secretary may issue” and inserting the following:

“(a) **PERMITS.**—

“(1) **IN GENERAL.**—The Secretary may issue”; and

(2) by adding at the end the following:

“(2) **DEADLINE FOR APPROVAL.**—

“(A) **PERMIT APPLICATIONS.**—

“(i) **IN GENERAL.**—Except as provided in clause (ii), if an environmental assessment or environmental impact statement, as appropriate, is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary shall—

“(I) ensure that the environmental review process begins not later than 90 days after the date on which the Secretary receives a permit application; and

“(II) approve or deny an application for a permit under this subsection not later than—

“(aa) if an agency carries out an environmental assessment that leads to a finding of no significant impact, the date on which the finding of no significant impact is issued; or

“(bb) if an agency carries out an environmental assessment that leads to a record of decision, 15 days after the date on which the record of decision on the environmental impact statement is issued.

“(ii) **PROCESSES.**—Notwithstanding clause (i), regardless of whether the Secretary has commenced an environmental assessment or environmental impact statement by the date described in clause (i)(I), the following deadlines shall apply:

“(I) An environmental assessment carried out under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall be completed not later than 1 year after the deadline for commencing the environmental review process under clause (i)(I).

“(II) An environmental impact statement carried out under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall be completed not later than 2 years after the deadline for commencing the environmental review process under clause (i)(I).

“(B) **FAILURE TO ACT.**—If the Secretary fails to act by the deadline specified in clause (i) or (ii) of subparagraph (A)—

“(i) the application, and the permit requested in the application, shall be considered to be approved;

“(ii) the Secretary shall issue a permit to the applicant; and

“(iii) the permit shall not be subject to judicial review.”

(b) **STATE PERMITTING PROGRAMS.**—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)”; and

(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).”

(c) **STATE PROGRAMS.**—The first sentence of section 404(g)(1) of such Act (33 U.S.C. 1344(g)(1)) is amended by striking “for the discharge” and inserting “for some or all of the discharges”.

(d) **DEADLINE FOR AGENCY COMMENTS.**—Section 404 of such 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. 4. IMPACTS OF EPA REGULATORY ACTIVITY ON EMPLOYMENT AND ECONOMIC ACTIVITY.

(a) **ANALYSIS OF IMPACTS OF ACTIONS ON EMPLOYMENT AND ECONOMIC ACTIVITY.**—

(1) ANALYSIS.—Before taking a covered action, the Administrator shall analyze the impact, disaggregated by State, of the covered action on employment levels and economic activity, including estimated job losses and decreased economic activity.

(2) ECONOMIC MODELS.—

(A) IN GENERAL.—In carrying out paragraph (1), the Administrator shall utilize the best available economic models.

(B) ANNUAL GAO REPORT.—Not later than December 31 of each year, the Comptroller General of the United States shall submit to Congress a report on the economic models used by the Administrator to carry out this subsection.

(3) AVAILABILITY OF INFORMATION.—With respect to any covered action, the Administrator shall—

(A) post the analysis under paragraph (1) as a link on the main page of the public Internet Web site of the Environmental Protection Agency; and

(B) request that the Governor of any State experiencing more than a de minimis negative impact post such analysis in the Capitol of such State.

(b) PUBLIC HEARINGS.—

(1) IN GENERAL.—If the Administrator concludes under subsection (a)(1) that a covered action will have more than a de minimis negative impact on employment levels or economic activity in a State, the Administrator shall hold a public hearing in the State at least 30 days prior to the effective date of the covered action.

(2) TIME, LOCATION, AND SELECTION.—A public hearing required under paragraph (1) shall be held at a convenient time and location for impacted residents. In selecting a location for such a public hearing, the Administrator shall give priority to locations in the State that will experience the greatest number of job losses.

(c) NOTIFICATION.—If the Administrator concludes under subsection (a)(1) that a covered action will have more than a de minimis negative impact on employment levels or economic activity in a State, the Administrator shall give notice of such impact to the State's congressional delegation, Governor, and legislature at least 45 days before the effective date of the covered action.

(d) DEFINITIONS.—In this section, the following definitions apply:

(1) ADMINISTRATOR.—The term “Administrator” means the Administrator of the Environmental Protection Agency.

(2) COVERED ACTION.—The term “covered action” means any of the following actions taken by the Administrator under the Federal Water Pollution Control Act (33 U.S.C. 1201 et seq.):

(A) Issuing a regulation, policy statement, guidance, response to a petition, or other requirement.

(B) Implementing a new or substantially altered program.

(3) MORE THAN A DE MINIMIS NEGATIVE IMPACT.—The term “more than a de minimis negative impact” means either of the following:

(A) With respect to employment levels, a loss of more than 100 jobs. Any offsetting job gains that result from the hypothetical creation of new jobs through new technologies or government employment may not be used in the job loss calculation.

(B) With respect to economic activity, a decrease in economic activity of more than \$1,000,000 over any calendar year. Any offsetting economic activity that results from the hypothetical creation of new economic activity through new technologies or government employment may not be used in the economic activity calculation.

SEC. 5. LIMITATIONS ON AUTHORITY TO MODIFY 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 deter-

mination 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.”

SEC. 6. STATE AUTHORITY TO IDENTIFY WATERS WITHIN ITS BOUNDARIES.

Section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313) is amended by striking subsection (d)(2) and inserting the following:

“(2)(A) Each State shall submit to the Administrator from time to time, with the first such submission not later than 180 days after the date of publication of the first identification of pollutants under section 304(a)(2)(D), the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall approve the State identification and load or announce his disagreement with the State identification and load not later than 30 days after the date of submission, and if—

“(i) the Administrator approves the identification and load submitted by the State in accordance with this subsection, such State shall incorporate them into its current plan under subsection (e); and

“(ii) the Administrator announces his disagreement with the identification and load submitted by the State in accordance with this subsection, the Administrator shall submit, not later than 30 days after the date on which such announcement is made, to the State his written recommendation of those additional waters that he identifies and such loads for such waters as he believes are necessary to implement the water quality standards applicable to such waters.

“(B) Upon receipt of the Administrator’s recommendation the State shall within 30 days either—

“(i) disregard the Administrator’s recommendation in full and incorporate its own identification and load into its current plan under subsection (e);

“(ii) accept the Administrator’s recommendation in full and incorporate its identification and load as amended by the Administrator’s recommendation into its current plan under subsection (e); or

“(iii) accept the Administrator’s recommendation in part, identifying certain additional waters and certain additional loads proposed by the Administrator to be added to such State’s identification and load and incorporate such State’s identification and load as amended into its current plan under subsection (e).

“(C)(i) If the Administrator fails to either approve the State identification and load or announce his disagreement with the State identification and load within the time specified in this subsection, then such State’s identification and load is deemed approved and such State shall incorporate the identification and load that it submitted into its current plan under subsection (e).

“(ii) If the Administrator announces his disagreement with the State identification and load but fails to submit his written recommendation to the State within 30 days as required by subparagraph (A)(ii) then such State’s identification and load is deemed approved and such State shall incorporate the identification and load that it submitted into its current plan under subsection (e).

“(D) This paragraph shall apply to any decision made by the Administrator under this subsection issued on or after March 1, 2013.”

SEC. 7. DEFINITION OF FILL MATERIAL.

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended by adding at the end the following:

“(27) FILL MATERIAL.—

“(A) IN GENERAL.—The term ‘fill material’ means any material placed in waters of the United States where the material has the effect of—

“(i) replacing any portion of a water of the United States with dry land; or

“(ii) changing the bottom elevation of any portion of a water of the United States.

“(B) INCLUSIONS.—The term ‘fill material’ includes—

“(i) rock;

“(ii) sand;

“(iii) soil;

“(iv) clay;

“(v) plastics;

“(vi) construction debris;
 “(vii) wood chips;
 “(viii) overburden from mining or other excavation activities; and
 “(ix) materials used to create any structure or infrastructure in the waters of the United States.

“(C) EXCLUSIONS.—The term ‘fill material’ does not apply to trash or garbage.”.

SEC. 8. APPLICABILITY OF AMENDMENTS.

Except as otherwise specifically provided, 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 pending, or revised or new standards in the process of being promulgated, on such date of enactment.

PURPOSE OF THE LEGISLATION

The “Coal Jobs Protection Act of 2014,” H.R. 5077, 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

Background

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the “Clean Water Act” or “CWA”) with the objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (*See* CWA § 101(a); 33 U.S.C. § 1251.) In enacting the CWA, it was the “policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this Act.” (*See id.* at § 101(b).)

The CWA prohibits the discharge of any pollutant by any person, unless in compliance with one of the enumerated permitting provisions in the Act. The two permitting authorities in the CWA are section 402 (the National Pollutant Discharge Elimination System, or “NPDES”), for discharges of pollutants from point sources to jurisdictional waterbodies, and section 404, for discharges of dredged or fill material to jurisdictional waterbodies.

The U.S. Environmental Protection Agency (“EPA”) has the basic responsibility for implementing the CWA, and is responsible for implementing the NPDES program under section 402. Under the NPDES program, it is unlawful for a point source to discharge pollutants into jurisdictional waterbodies, unless the discharge is authorized by and in compliance with an NPDES permit issued by EPA (or by a state, under a comparable approved state program).

EPA shares responsibility with the U.S. Army Corps of Engineers (“Corps”) for implementing section 404 of the CWA. Under this permitting program, it is unlawful to discharge dredged or fill materials into jurisdictional waterbodies, unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps (or by a state, under a comparable approved state program).

The CWA calls on states to establish water quality standards for the waterbodies in their states. (See CWA §303.) 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-based 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 periodically (at least once each three years) review their water quality standards and, as appropriate, modify and adopt new standards. (See CWA §303(c).) 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.

States also identify waters where technology-based controls are not stringent enough to implement any water quality standards applicable to such waters, and develop lists of these "impaired" waters. (See CWA §303(d).) The CWA requires that states establish priority rankings for waters on the lists and develop total maximum daily loads (TMDLs) for these waters. (See *id.*) A TMDL is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards.

The CWA does not contemplate a single, federally-led water quality program. Rather, Congress intended the states and EPA to implement 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, 46 states 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. In addition, EPA may review and approve/disapprove lists of impaired waters and TMDLs developed by states. 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.

Concerns of Regulatory Overreach

Recently, stakeholders have become concerned that EPA has abandoned its proper role of approving state programs and ensuring that the standards which states adopt meet the minimum requirements of the CWA. Instead, there is concern that EPA has gotten 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. There is also concern that EPA has inserted itself into

the states' and the Corps' NPDES and section 404 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.

In addition, in 2013, EPA partially rejected West Virginia's list of impaired waters in the state and imposed a new list adding approximately 200 additional streams. (*See* Letter, from Shawn W. Garvin, Regional Administrator, EPA Region III, to The Honorable Randy C. Huffman, Secretary, West Virginia Department of Environmental Protection (Sept. 30, 2013) (transmitting final list of waterbodies that EPA is adding to West Virginia's list of water quality limited segments pursuant to CWA section 303(d)).) EPA, in creating its impaired waters list for West Virginia, decided to apply West Virginia's stream condition evaluation index differently than how it had been applied in the past or how the West Virginia Legislature determined the index should be applied, in effect turning the index into a new water quality standard without a rule-making and setting the standard at a different level than what it had been in previous years when EPA approved West Virginia's impaired waters lists in the past.

Further, even though agency guidance or statements of policy are only supposed to provide an indication of an agency's thoughts on a topic, and are not supposed to be legally binding on courts or persons outside the agency, EPA has developed and utilized certain guidance and policies that could, in effect, become binding on states, local governments, or regulated parties.

In one instance, EPA and the Corps drafted new joint guidance to describe their latest views of federal regulatory jurisdiction over U.S. waters under the CWA. The agencies proposed CWA jurisdiction guidance in May 2011, which purported to describe how the agencies would identify waters subject to jurisdiction under the CWA and implement the Supreme Court's decisions in *SWANCC* and *Rapanos* concerning the extent of waters covered by the CWA. (76 Fed. Reg. 24,479 (May 2, 2011) (notice entitled *EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act*)). The agencies noted, among other things, in the proposed guidance that "the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance." (Proposed Guidance, at p.3.)

Members of Congress, stakeholders, and states submitted comments on the proposed guidance to the agencies, expressing concern, among other things, that the proposed guidance misconstrues

applicable rulings of the U.S. Supreme Court's cases regarding the scope of CWA jurisdiction, is inconsistent with the agencies' regulations, and expands federal jurisdiction under the CWA; that the proposed guidance amounts to being a *de facto* rule because it effectively amends existing regulations that were at issue in the applicable Supreme Court cases by describing new conditions under which the agencies may assert jurisdiction; and the Administrative Procedure Act (5 U.S.C. 500 *et seq.*) mandates that, when the agencies revise preexisting regulations or make specific, binding regulatory pronouncements, those pronouncements and rules must be promulgated pursuant to formal notice-and-comment rulemaking; that the agencies are using interim or final guidance as a substitute for regulation or to change or expand the effects of regulation, and the agencies should, instead, proceed to formal rulemaking and not issue or apply the proposed guidance in the interim. (See generally, Comments Submitted to the Agencies, contained in EPA Docket Folder, *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, Docket ID No. EPA-HQ-OW-2011-0409); see also Letter, Comments of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), to Nancy K. Stoner, Acting Assistant Administrator for Water and Jo Ellen Darcy, Assistant Secretary of the Army (Civil Works), *Re: EPA and Army Corps of Engineers Draft Guidance on Identifying Waters Protected by the Clean Water Act*, Docket ID No. EPA-HQ-OW-2011-0409 (July 29, 2011); Environmental Council of the States (ECOS), Policy Resolution Number 11-1, *Objection to U.S. Environmental Protection Agency's Imposition of Interim Guidance, Interim Rules, Draft Policy and Reinterpretation Policy* (approved Mar. 30, 2011); ECOS, Policy Resolution Number 11-8, *On the Use of Guidance* (approved Sept. 26, 2011).

In February 2012, the agencies prepared and sent to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB/OIRA) for regulatory review under Executive Order 12866 revised proposed CWA jurisdiction guidance. (*Guidance on Identifying Waters Protected By the Clean Water Act* (dated Feb. 17, 2012) (referred to as "Clean Water Protection Guidance," Regulatory Identifier Number (RIN) 2040-ZA11, received Feb. 21, 2012).) The revised guidance was largely unchanged from the proposed version, despite the many concerns expressed in the public comments submitted to the agencies. In September, 2013, the Corps and EPA announced their withdrawal, from OMB/OIRA, of the proposed guidance before the guidance was finalized. At the same time, the agencies sent to OMB/OIRA, for regulatory review, a draft rule entitled *Definition of 'Waters of the United States' Under the Clean Water Act* (RIN: 2040-AF30). The draft rule purported to "clarify" which waterbodies are subject to federal jurisdiction under the CWA.

In another instance, EPA formalized in 2009, with the Corps and the Department of Interior as part of a memorandum of understanding of policies and procedures between the agencies, an extraregulatory review process, referred to as an "enhanced coordination process," of CWA section 404 dredged or fill permits for Appalachian region surface coal mining projects. (See "Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection

Agency on Implementing the Interagency Action Plan on Appalachian Surface Coal Mining” (June 11, 2009) (hereinafter, “MOU”).) In conjunction with the release of the MOU, EPA issued formal details on the enhanced coordination process, which were immediately effective and imposed substantive changes to the section 404 permitting process by creating a new level of review by EPA and an alternate permitting pathway not contemplated by the current regulatory structure.

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 CWA 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 could 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 could initiate “veto” procedures to prohibit the issuance of a permit. In practice, EPA has utilized the process to identify almost 250 coal-related section 404 permits currently pending with the Corps, and numerous permit applications remain indefinitely stalled. Neither EPA nor the Corps proposed to revise the existing codified review procedures and EPA did not propose to amend its existing section 404 guidelines when formalizing the enhanced coordination process.

EPA also released interim guidance in April 2010 for the review of all coal mining operations. (See EPA Memorandum, “Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order” (April 1, 2010).) While EPA solicited public comment on the interim guidance, it nevertheless made the guidance effective immediately. In the guidance, EPA made pronouncements regarding the need for water quality-based limits in NPDES permits, as well as the adequacy of mitigation measures associated with section 404 permits. Among other things, the guidance effectively established a region-wide water quality standard by directing that section 402 and 404 permits should contain conditions that ensure that conductivity levels in waters do not exceed specified concentrations. EPA finalized the guidance more than a year later. (See EPA Memorandum, “Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order” (July 21, 2011).)

In July 2010, the National Mining Association (NMA) filed a lawsuit, in the United States District Court for the District of Columbia, against EPA over the guidance and the enhanced coordination process. The states of West Virginia and Kentucky filed similar cases in United States District Courts in Kentucky and West Virginia, which were transferred to the United States District Court for the District of Columbia and consolidated with the NMA case. (*National Mining Association, et al. v. Jackson, et al.*, Nos. 10–1220, 11–295, 11–0446, 11–0447(RBW) (U.S. D.Ct, D.C.)) In decisions issued on October 6, 2011 and July 31, 2012, the District Court invalidated the enhanced coordination process and the guidance.

In July 2014, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court and upheld EPA's enhanced coordination process, but limited the policy's application, saying state permit writers are "free to ignore" the agency's advice when crafting discharge permits and EPA may not use the policies to justify enforcement actions. The D.C. Circuit also concluded the final guidance "is not a final agency action reviewable by the courts at this time," and "If and when an applicant is denied a permit, the applicant at that time may challenge the denial of the permit as unlawful." (See *National Mining Association, et al. v. McCarthy, et al.*, No. 12-5310 (D.C. Cir. 2014).)

In light of the circuit court's decision, stakeholders remain concerned that EPA will continue to use the enhanced coordination process and guidance to cause delays and impose new and unattainable conditions in the section 402 and 404 permit processes for coal mining operations. NPDES permitting statistics from the West Virginia Department of Environmental Protection illustrate reasons for stakeholders' concerns. In 2008, before the enhanced coordination process and guidance were implemented, 339 NPDES permits were issued for coal mining activities in West Virginia, and 306 applications were left pending at the end of the year. By 2011, under enhanced coordination, only approximately half as many (177) NPDES permits were issued for mining activities, while the number of pending applications more than doubled to 722. In 2013, following the District Court's decisions in *National Mining Association, et al. v. Jackson, et al.* invalidating the enhanced coordination process and the guidance, the number of permits issued in West Virginia increased to 626, as the backlog was reduced and only 294 applications were left pending. Permitting statistics from the Corps show the issuance of section 404 permits also decreased when the enhanced coordination process and guidance were implemented. Stakeholders anticipate the circuit court's July 2014 opinion restoring enhanced coordination will again result in increased permitting delays, like what happened by 2011.

Legislation to Restore the Federal-State Partnership Under the CWA

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.

H.R. 5077 was introduced to halt these sorts of 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.

The "Coal Jobs Protection Act of 2014," H.R. 5077, amends the Clean Water Act (CWA) to restore the long-standing relationship between states and EPA as co-regulators under the Act and pre-

serve the authority of each state to make determinations relating to the state's water quality standards and permitting. The bill aims to preserve the authority of each state to make determinations relating to the state's water quality standards, and to restrict EPA's ability to second-guess or delay a state's permitting and water quality certification decisions under the CWA.

H.R. 5077 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.

HEARINGS

No hearings were held on H.R. 5077.

In the 112th Congress, 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 the EPA on EPA's surface mining policies and other related extra-regulatory activities. Also in the 112th Congress, on June 24, 2011, the Subcommittee on Water Resources and Environment held a hearing to receive testimony from state water quality regulators, a state department of agriculture and consumer services, and a municipal wastewater reclamation utility on EPA's nutrients policies under the CWA.

LEGISLATIVE HISTORY AND CONSIDERATION

On July 11, 2014, Representative Shelley Moore Capito introduced H.R. 5077, the "Coal Jobs Protection Act of 2014." On July 16, 2012, the Committee on Transportation and Infrastructure met in open session to consider H.R. 5077, and ordered the bill reported favorably to the House by roll call vote with a quorum present. The vote was 28 yeas to 24 nays.

An amendment was offered in Committee by Ranking Member Rahall, which was adopted by voice vote with a quorum present. The amendment added additional provisions to enhance the purposes of the bill by covering other areas where EPA has overreached with states, including with the implementation of water quality standards, certifications, and permitting decisions.

Representative Tim Bishop offered an amendment that would have excluded, from applicability, provisions in the bill that EPA determines would likely increase the interstate movement of pollutants through surface waters, increase the costs to be incurred by another state to maintain or achieve approved water quality standards for the state; or cause or contribute to the impairment of surface or coastal waters of another state. The amendment was defeated in a roll call vote with a quorum present. The vote was 29 yeas to 23 yeas.

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. 5077, two record votes were taken.

The first record vote was taken on an amendment offered in Committee by Representative Tim Bishop. The Committee disposed of this amendment by record vote as follows:

The other record vote was taken on reporting the bill, as amended, to the House with a favorable recommendation. The bill, as amended, was reported to the House with a favorable recommendation after a record vote which was disposed of as follows:

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.

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. 5077 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 18, 2014.

Hon. BILL SHUSTER,
*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. 5077, the Coal Jobs Protection Act of 2014.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 5077—Coal Jobs Protection Act of 2014

Summary: H.R. 5077 would amend EPA's regulatory authority under the National Pollutant Discharge Elimination System (NPDES) permitting program, part of the Clean Water Act (CWA).

CBO estimates that implementing this legislation would cost \$97 million over the 2015–2019 period, subject to appropriation of the necessary amounts. Enacting H.R. 5077 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 5077 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA), and any costs incurred by state, local, or tribal governments would result from participation in a voluntary federal program.

Estimated cost to the Federal Government: The estimated budgetary effect of H.R. 5077 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—					
	2015	2016	2017	2018	2019	2015–2019
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	20	20	20	20	20	100
Estimated Outlays	17	20	20	20	20	97

Basis of estimate: For this estimate, CBO assumes that H.R. 5077 will be enacted near the end of 2014 and that the necessary amounts to implement the legislation will be appropriated each year.

The NPDES permitting program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. (Point sources are discrete conveyances such as pipes or man-made ditches). Proposed development activities that could result in such discharges are regulated through a review and permit process. The U.S. Army Corps of Engineers (Corps) is responsible for making such permitting decisions and the Environmental Protection Agency (EPA), under section 404(c) of the CWA, has the authority to restrict, prohibit, deny, or withdraw areas specified in permits before or after the permits are issued by the Corps. In most cases, EPA has delegated that authority to individual states, although EPA retains the authority to review certain actions taken by the states that are implementing the program.

Provisions of this legislation would:

- Prohibit EPA (or a state administering the NPDES program) from basing decisions to approve or deny an NPDES permit on EPA guidance;
- Prohibit EPA from modifying or revoking any permit for any discharge that originates in a state if the state does not agree with EPA's determination that the discharge would have an unacceptable adverse effect;
- Prohibit EPA from issuing a new or revised water quality standard for a pollutant if a water quality standard for that pollutant has already been approved by a state and EPA;
- Modify EPA's process for approving or denying a state plan to establish a total maximum daily load, which is the maximum amount of a pollutant a watershed can receive and still meet applicable water quality standards;
- Set deadlines for EPA and other federal agencies for commenting on and reviewing a NPDES permit application; and
- Require EPA to perform an analysis of the impact of its regulations or guidance documents on employment and economic activity before issuing them.

According to EPA and industry experts, most of the provisions included in this bill are aimed at limiting EPA's authorities under the NPDES program by precluding certain actions or shortening timeframes for its review of permit applications. While such restrictions could reduce spending by EPA, CEO does not expect that enacting this legislation would result in any significant cost savings because the bill mostly addresses actions that EPA rarely undertakes. For proposed development projects posing the most concern to EPA, it is likely that EPA would incur costs to review permits whether or not H.R. 5077 is enacted.

In contrast, the provision in H.R. 5077 requiring additional analyses related to employment and economic activity prior to issuing guidance and regulations would increase EPA's costs. Based on information from EPA, CBO estimates that such analysis and related public hearings would cost \$2 million, on average, to complete. Based on EPA's CWA regulatory plan from prior years, CBO estimates that EPA would undertake about 10 actions requiring a study of employment and economic impacts each year. Thus, we estimate that enacting this legislation would cost about \$20 million annually, subject to the availability of appropriated funds.

Pay-As-You-Go considerations: None.

Intergovernmental and private-sector impact: H.R. 5077 contains no intergovernmental or private-sector mandates as defined in UMRRA, and any costs incurred by state, local, or tribal governments would result from participation in a voluntary federal program.

Estimate prepared by: Federal costs: Susanne S. Mehlman; Impact on State, Local, and Tribal Governments: Jon Sperl; Impact on the Private Sector: Amy Petz.

Estimate 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. 5077, as amended, 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.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(j) of H. Res. 5, 113th Cong. (2013), the Committee finds that no provision of H.R. 5077, as amended, establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKINGS

Pursuant to section 3(k) of H. Res. 5, 113th Cong. (2013), the Committee estimates that enacting H.R. 5077, as amended, does not specifically direct the completion of any specific rulemakings within the meaning of section 551 of title 5, United States Code.

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. 5077, as amended, 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 is created by this legislation, as amended.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation, as amended, 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 “Coal Jobs Protection Act of 2014.”

Section 2. National Pollutant Discharge Elimination System

Section 2 of the bill amends section 402 of the CWA. Section 2(a) adds a new subsection (s) at the end of section 402. Section 2(a) prohibits EPA, or a state with authority to administer the NPDES program under the CWA, from relying on the use of guidance to make a determination, on an application for a new permit or a renewed permit under section 402 of the CWA, of whether to approve the new or renewed permit. Such determinations are to be based only on compliance with regulations issued by EPA or the permitting authority.

In addition, section 2(a) requires that applications for all new NPDES permits be acted upon within 270 days. If the permitting authority does not approve or deny an application for a new permit by the date that is 270 days after the date of receipt of a substantially complete application for the new permit, the applicant may discharge as if the application were approved in accordance with federal law for the period of time for which a similar permit would be approved.

The term “guidance” means draft, interim, or final guidance issued by EPA, and includes:

(1) the interim guidance memorandum issued by EPA on April 1, 2010, entitled “Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order”;

(2) the proposed guidance described in the notice of availability and request for comments entitled “EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act” (76 Fed. Reg. 24479 (May 2, 2011));

(3) the final guidance memorandum issued by EPA on July 21, 2011, entitled “Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order”;

(4) the proposed guidance submitted to the Office of Information and Regulatory Affairs of the Office of Management and Budget for regulatory review under Executive Order 12866 entitled “Guidance on Identifying Waters Protected By the Clean Water Act” and dated February 17, 2012 (referred to as “Clean Water Protection Guidance,” Regulatory Identifier Number (RIN) 2040-ZA11, received February 21, 2012);

(5) any successor document to, or any substantially similar guidance based in whole or in part on, any of the foregoing guidance documents; and

(6) any other document or paper proposed or issued by EPA through any process other than the notice and comment rule-making process.

Section 2(b) of the bill prohibits EPA from disapproving or withdrawing approval of a state 402 permitting program, or limiting federal financial assistance for such program, on the basis of (1) the failure of the program to incorporate or comply with guidance, or (2) the implementation of a water quality standard that has been adopted by the state and approved by EPA.

Section 2(c) 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 (1) a water quality standard that a state has adopted and EPA has approved under section 303(c), or (2) the implementation of any guidance that directs a re-interpretation of the state’s approved water quality standards.

Section 2(d) of the bill 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 (1) EPA’s differing interpretation of an approved state water quality standard, or (2) the implementation of any 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. 5077 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. 5077 in no way affects EPA's proper role in reviewing state permits.

Section 3. Permits for dredged or fill material

Section 3 of the bill amends section 404 of the CWA regarding the section 404 permitting process. Section 3(a) requires that, if an environmental assessment or environmental impact statement, as appropriate, is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.; (NEPA)), the NEPA environmental review process is to begin within 90 days of a complete section 404 permit application. If there is a finding of no significant environmental impact, the permit must be approved or denied on the date of that finding. If there is an environmental assessment conducted that leads to a record of decision, the permit must be approved or denied within 15 days of the issuance of that decision.

If an environmental assessment is carried out, it must be completed within one year after the deadline for commencing the environmental review process. If an environmental impact statement is carried out, it must be completed within two years after the deadline for commencing the environmental review process. If any of these deadlines are missed, the application and the requested permit are to be considered approved, the permitting authority is required to issue the permit, and the permit shall not be subject to judicial review.

Section 3(b) of the bill 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. 5077 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(c) of the bill 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. 5077 would make it easier for states to assume and administer only parts of the section 404 permit program.

Paragraph (1) of section 3(d) 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 3(d) 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. 5077 holds EPA and other agencies to their obligation to prevent permitting delays.

Section 4. Impacts of EPA Regulatory Activity on Employment and Economic Activity

Section 4 of the bill requires EPA, before taking a “covered action” under the CWA, to perform an analysis of the impact of the action on employment levels and economic activity, including estimated job losses and decreased economic activity. The analysis must include the impact on jobs and economic activity in each impacted state. This analysis must be posted on the front page of EPA’s Website and be provided to the Governor of each impacted state. Whenever a covered action will have more than a de minimis negative impact on employment levels or economic activity in a state, the Administrator shall hold a public hearing in the state at least 30 days prior to the effective date of the covered action. A “covered action” includes issuing a regulation, policy statement, guidance, response to a petition, or other requirement, or implementing a new or substantially altered program under the CWA.

Section 5. Limitations on authority to modify state water quality standards

Section 5(a) of the bill 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. 5077 would prevent unilateral actions by EPA that second-guess the decisions of the state regulatory agency. H.R. 5077 maintains EPA's proper and appropriate authority to approve state programs and to approve state water quality standards.

Section 5(b) 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. 5077 restricts EPA's ability to carry out its threat to override state water quality certifications.

Section 6. State authority to identify waters within its boundaries

Section 6 of the bill amends CWA section 303(d)(2) to give state governments greater authority to determine the list of impaired waters in their states and the total maximum daily loads (TMDLs) for those impaired waters within their borders. Under current law, EPA has the authority under section 303(d)(2) of the CWA to approve a state's submission of lists and TMDLs, or reject the submission and impose the agency's own lists and TMDLs.

Section 6 provides that a state will submit its lists and TMDLs to EPA, just as it does under current law. If EPA accepts the state's submission, then the process works just as it does under current law. If EPA announces its disagreement with the state's submission, instead of imposing its own list and TMDLs on the state, EPA is to submit to the state, not later than 30 days after the date on which such announcement is made, the agency's written recommendation of those additional waters that EPA identifies and such TMDLs for such waters as EPA believes are necessary to implement the water quality standards applicable to such waters.

Upon receipt of the Administrator's recommendation, the state is to, within 30 days, either (1) accept EPA's recommendation in full, (2) accept EPA's recommendation in part, identifying certain additional waters and certain additional TMDLs proposed by EPA, or (3) implement the state's original submission. If EPA fails to meet its deadline to either approve or disagree with a state's submission, or meet its deadline to present its own proposal to the state, then the state will implement its own submission.

Section 7. Definition of fill material

Section 7 codifies into the CWA the current regulatory definition of the term "fill material" (in 40 C.F.R. § 232.2). The current definition is consistent with EPA and the Corps' longstanding practice and ensures that necessary placement of excess rock and soil generated by construction and development projects in jurisdictional waters are regulated by the Corps under section 404 of the CWA. EPA and the Corps promulgated the current definition of fill material in 2002, after a lengthy rulemaking process that began in 2000. (See 67 Fed. Reg. 31129 (May 9, 2002) (Revisions to the Regulatory Definition of "Fill Material").) The current definition of fill material provides a fair standard for protecting our water while al-

lowing for economic activity. Keeping it in place protects our environment and provides certainty to both regulators and regulated entities.

Section 8. Applicability of amendments

Section 8 states that amendments that H.R. 5077 would make to the CWA shall apply to actions taken on or after the date of enactment of H.R. 5077, including actions that are pending or revised or new standards that are being promulgated as of such date of enactment. Section 8 makes it clear that H.R. 5077 would apply to both pending and future permitting and standards actions, except as otherwise specifically provided.

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 pol-*

lutant, unless the State concurs with the Administrator's determination that the revised or new standard is necessary to meet the requirements of this Act.

(d)(1) * * *

[(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D), for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.]

(2)(A) Each State shall submit to the Administrator from time to time, with the first such submission not later than 180 days after the date of publication of the first identification of pollutants under section 304(a)(2)(D), the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall approve the State identification and load or announce his disagreement with the State identification and load not later than 30 days after the date of submission, and if—

(i) the Administrator approves the identification and load submitted by the State in accordance with this subsection, such State shall incorporate them into its current plan under subsection (e); and

(ii) the Administrator announces his disagreement with the identification and load submitted by the State in accordance with this subsection, the Administrator shall submit, not later than 30 days after the date on which such announcement is made, to the State his written recommendation of those additional waters that he identifies and such loads for such waters as he believes are necessary to implement the water quality standards applicable to such waters.

(B) Upon receipt of the Administrator's recommendation the State shall within 30 days either—

(i) disregard the Administrator's recommendation in full and incorporate its own identification and load into its current plan under subsection (e);

(ii) accept the Administrator's recommendation in full and incorporate its identification and load as amended by the Administrator's recommendation into its current plan under subsection (e); or

(iii) accept the Administrator's recommendation in part, identifying certain additional waters and certain additional loads proposed by the Administrator to be added to such State's identification and load and incorporate such State's identification and load as amended into its current plan under subsection (e).

(C)(i) If the Administrator fails to either approve the State identification and load or announce his disagreement with the State identification and load within the time specified in this subsection, then such State's identification and load is deemed approved and such State shall incorporate the identification and load that it submitted into its current plan under subsection (e).

(ii) If the Administrator announces his disagreement with the State identification and load but fails to submit his written recommendation to the State within 30 days as required by subparagraph (A)(ii) then such State's identification and load is deemed approved and such State shall incorporate the identification and load that it submitted into its current plan under subsection (e).

(D) This paragraph shall apply to any decision made by the Administrator under this subsection issued on or after March 1, 2013.

* * * * *

FEDERAL ENFORCEMENT

SEC. 309. (a) * * *

* * * * *

(c) CRIMINAL PENALTIES.—

(1) NEGLIGENT VIOLATIONS.—Any person who—

(A) negligently violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or [402(b)(8)] 402(b)(2)(H) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

* * * * *

shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) KNOWING VIOLATIONS.—Any person who—

(A) knowingly violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or [402(b)(8)] 402(b)(2)(H) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

* * * * *

shall be punished by a fine of not less that \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is

for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or imprisonment of not more than 6 years, or by both.

* * * * *

(d) Any person who violates section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State,, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or ~~402(b)(8)~~ 402(b)(2)(H) of this Act, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

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) * * *

[(b) At any time after the promulgation of the guidelines required by subsection (i)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters 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 water pollution control 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 de-

scribed program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

[(1) To issue permits which—

[(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

[(B) are for fixed terms not exceeding five years; and

[(C) can be terminated or modified for cause including, but not limited to, the following:

[(i) violation of any condition of the permit;

[(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

[(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

[(D) control the disposal of pollutants into wells;

[(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

[(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

[(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

[(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

[(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

[(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

[(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

[(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being intro-

duced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

[(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.]

(b) STATE PERMIT PROGRAMS.—

(1) *IN GENERAL.*—At any time after the promulgation of the guidelines required by section 304(i)(2), the Governor of each State desiring to administer a permit program for discharges into navigable waters within the jurisdiction of the State may submit to the Administrator—

(A) a full and complete description of the program the State proposes to establish and administer under State law or under an interstate compact; and

(B) a statement from the attorney general (or the attorney for those State water pollution control agencies that have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of the State, or the interstate compact, as applicable, provide adequate authority to carry out the described program.

(2) *APPROVAL.*—The Administrator shall approve each program for which a description is submitted under paragraph (1) unless the Administrator determines that adequate authority does not exist—

(A) to issue permits that—

(i) apply, and ensure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

(ii) are for fixed terms not exceeding 5 years;

(iii) can be terminated or modified for cause, including—

(I) a violation of any condition of the permit;

(II) obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; and

(III) a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; and

(iv) control the disposal of pollutants into wells;

(B)(i) to issue permits that apply, and ensure compliance with, all applicable requirements of section 308; or

(ii) to inspect, monitor, enter, and require reports to at least the same extent as required in section 308;

(C) to ensure that the public, and any other State the waters of which may be affected, receives notice of each application for a permit and an opportunity for a public hearing before a ruling on each application;

(D) to ensure that the Administrator receives notice and a copy of each application for a permit;

(E) to ensure that any State (other than the permitting State), the waters of which may be affected by the issuance of a permit may submit written recommendations to the permitting State and the Administrator with respect to any

permit application and, if any part of the written recommendations are not accepted by the permitting State, that the permitting State will notify the affected State and the Administrator in writing of the failure of the permitting State to accept the recommendations, including the reasons for not accepting the recommendations;

(F) to ensure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired by the issuance of the permit;

(G) to abate violations of the permit or the permit program, including civil and criminal penalties and other means of enforcement;

(H) to ensure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) into the treatment works and a program to ensure compliance with those pretreatment standards by each source, in addition to adequate notice, which shall include information on the quality and quantity of effluent to be introduced into the treatment works and any anticipated impact of the change in the quantity or quality of effluent to be discharged from the publicly owned treatment works, to the permitting agency of—

(i) new introductions into the treatment works of pollutants from any source that would be a new source as defined in section 306 if the source were discharging pollutants;

(ii) new introductions of pollutants into the treatment works from a source that would be subject to section 301 if the source were discharging those pollutants; or

(iii) a substantial change in volume or character of pollutants being introduced into the treatment works by a source introducing pollutants into the treatment works at the time of issuance of the permit; and

(I) to ensure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

(3) ADMINISTRATION.—Notwithstanding paragraph (2), the Administrator may not disapprove or withdraw approval of a program under this subsection, or limit Federal financial assistance for such program, on the basis of the following:

(A) The failure of the program to incorporate or comply with guidance (as defined in subsection (s)(1)).

(B) The implementation of a water quality standard that has been adopted by the State and approved by the Administrator under section 303(c).

(c)(1) * * *

* * * * *

(4) LIMITATION ON DISAPPROVAL.—Notwithstanding paragraphs (1) through (3), the Administrator may not disapprove

or withdraw approval of a State program under subsection (b), or limit Federal financial assistance for the State program, on the basis of the following:

(A) The failure of the program to incorporate or comply with guidance (as defined in subsection (s)(1)).

(B) The implementation of a water quality standard that has been adopted by the State and approved by the Administrator under section 303(c).

[(4)] (5) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) * * *

* * * * *

(d)(1) * * *

[(2)] No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. Whenever the Administrator

(2) OBJECTION BY ADMINISTRATOR.—

(A) IN GENERAL.—Subject to subparagraph (C), no permit shall issue if—

(i) not later than 90 days after the date on which the Administrator receives notification under subsection (b)(2)(E), the Administrator objects in writing to the issuance of the permit; or

(ii) not later than 90 days after the date on which the proposed permit of the State is transmitted to the Administrator, the Administrator objects in writing to the issuance of the permit as being outside the requirements of this Act.

(B) REQUIREMENTS.—If the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(C) EXCEPTION.—The Administrator may not object to or deny the issuance of a permit by a State under subsection (b) or (s) based on the following:

(i) Guidance, as that term is defined in subsection (s)(1).

(ii) 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).

* * * * *

(m) ADDITIONAL PRETREATMENT OF CONVENTIONAL POLLUTANTS NOT REQUIRED.—To the extent a treatment works (as defined in section 212 of this Act) which is publicly owned is not meeting the requirements of a permit issued under this section for such treat-

ment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to a section 304(a)(4) of this Act into such treatment works other than pretreatment required to assure compliance with pretreatment standards under [subsection (b)(8) of this section] *subsection (b)(2)(H)* and section 307(b)(1) of this Act. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act, affect State and local authority under sections 307(b)(4) and 510 of this Act, relieve such treatment works of its obligations to meet requirements established under this Act, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

* * * * *

(s) *APPLICABILITY OF GUIDANCE.*—

(1) *DEFINITIONS.*—*In this subsection:*

(A) *GUIDANCE.*—

(i) *IN GENERAL.*—*The term “guidance” means draft, interim, or final guidance issued by the Administrator.*

(ii) *INCLUSIONS.*—*The term “guidance” includes—*

(I) *the interim guidance memorandum issued by the Administrator on April 1, 2010, entitled “Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order”;*

(II) *the proposed guidance described in the notice of availability and request for comments entitled “EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act” (76 Fed. Reg. 24479 (May 2, 2011));*

(III) *the final guidance memorandum issued by the Administrator on July 21, 2011, entitled “Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order”;*

(IV) *the proposed guidance submitted to the Office of Information and Regulatory Affairs of the Office of Management and Budget for regulatory review under Executive Order 12866 entitled “Guidance on Identifying Waters Protected By the Clean Water Act” and dated February 17, 2012 (referred to as “Clean Water Protection Guidance”, Regulatory Identifier Number (RIN) 2040-ZA11, received February 21, 2012);*

(V) *any successor document to, or any substantially similar guidance based in whole or in part on, any of the foregoing guidance documents; and*

(VI) *any other document or paper proposed or issued by the Administrator through any process*

other than the notice and comment rulemaking process.

(B) NEW PERMIT.—The term “new permit” means a permit covering discharges from a point source—

(i) that is issued under this section by a permitting authority; and

(ii) for which an application is—

(I) pending as of the date of enactment of this subsection; or

(II) filed on or after the date of enactment of this subsection.

(C) PERMITTING AUTHORITY.—The term “permitting authority” means—

(i) the Administrator; or

(ii) a State, acting pursuant to a permit program under subsection (b).

(2) PERMITS.—

(A) IN GENERAL.—Notwithstanding any other provision of law, in making a determination whether to approve a new permit or a renewed permit, the permitting authority—

(i) shall base the determination only on compliance with regulations issued by the Administrator or the permitting authority; and

(ii) shall not base the determination on the extent of adherence of the applicant for the new permit or renewed permit to guidance.

(B) NEW PERMITS.—If the permitting authority does not approve or deny an application for a new permit by the date that is 270 days after the date of receipt of a substantially complete application for the new permit, the applicant may discharge as if the application were approved in accordance with Federal law for the period of time for which a similar permit would be approved.

(C) SUBSTANTIAL COMPLETENESS.—In determining whether an application for a new permit or a renewed permit received under this paragraph is substantially complete, the permitting authority shall use standards for determining substantial completeness of similar permits for similar facilities submitted in fiscal year 2007.

* * * * *

PERMITS FOR DREDGED OR FILL MATERIAL

SEC. 404. [(a) The Secretary may issue] (a) PERMITS.—

(1) IN GENERAL.—The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(2) DEADLINE FOR APPROVAL.—

(A) PERMIT APPLICATIONS.—

(i) IN GENERAL.—Except as provided in clause (ii), if an environmental assessment or environmental impact

statement, as appropriate, is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary shall—

(I) ensure that the environmental review process begins not later than 90 days after the date on which the Secretary receives a permit application; and

(II) approve or deny an application for a permit under this subsection not later than—

(aa) if an agency carries out an environmental assessment that leads to a finding of no significant impact, the date on which the finding of no significant impact is issued; or

(bb) if an agency carries out an environmental assessment that leads to a record of decision, 15 days after the date on which the record of decision on the environmental impact statement is issued.

(ii) PROCESSES.—Notwithstanding clause (i), regardless of whether the Secretary has commenced an environmental assessment or environmental impact statement by the date described in clause (i)(I), the following deadlines shall apply:

(I) An environmental assessment carried out under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall be completed not later than 1 year after the deadline for commencing the environmental review process under clause (i)(I).

(II) An environmental impact statement carried out under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall be completed not later than 2 years after the deadline for commencing the environmental review process under clause (i)(I).

(B) FAILURE TO ACT.—If the Secretary fails to act by the deadline specified in clause (i) or (ii) of subparagraph (A)—

(i) the application, and the permit requested in the application, shall be considered to be approved;

(ii) the Secretary shall issue a permit to the applicant; and

(iii) the permit shall not be subject to judicial review.

* * * * *

(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] 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)(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 re-

spect 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.

* * * * *

TITLE V—GENERAL PROVISIONS

* * * * *

GENERAL DEFINITIONS

SEC. 502. Except as otherwise specifically provided, when used in this Act:

(1) * * *

* * * * *

(27) *FILL MATERIAL.*—

(A) *IN GENERAL.*—The term “fill material” means any material placed in waters of the United States where the material has the effect of—

- (i) replacing any portion of a water of the United States with dry land; or
- (ii) changing the bottom elevation of any portion of a water of the United States.

(B) *INCLUSIONS.*—The term “fill material” includes—

- (i) rock;
- (ii) sand;
- (iii) soil;
- (iv) clay;
- (v) plastics;
- (vi) construction debris;
- (vii) wood chips;
- (viii) overburden from mining or other excavation activities; and
- (ix) materials used to create any structure or infrastructure in the waters of the United States.

(C) *EXCLUSIONS.*—The term “fill material” does not apply to trash or garbage.

* * * * *

DISSENTING VIEWS

In my view, consideration of H.R. 5077 is ill timed given the legislation's far-reaching implications for public health and water quality. As a nation, we are witnessing a noticeable and disturbing stagnation in our progress to restore and protect our Nation's waters and wetlands.

As I have commented at several hearings this Congress, there is a growing body of evidence that, in the last decade or so, this nation has stopped making progress in improving the overall quality of its waters.

For example, if you review the last three State assessments of water quality (Clean Water Act 305(b) lists)—covering the years from 2008 through 2012—the results should be alarming.

For rivers and streams, State assessments show a steady decline in water quality—from 50 percent of assessed rivers and streams not meeting their state water quality standards in 2008 to 52 percent of these waters not meeting state water quality standards, today.

Similarly for lakes and reservoirs, in 2008, State assessments showed that 64 percent of these waters failed to meet state water quality standards. Today, 68 percent of assessed lakes and reservoirs fail to meet these standards.

Finally, in 2008, State data shows that 45 percent of assessed coastal shoreline miles failed to meet state water quality standards; today, a shocking 86 percent of assessed coastal shoreline miles fail to meet state standards.

These trends are also reflected in the Environmental Protection Agency's (EPA) recent Wadeable Streams Assessments. For example, in 2006, EPA noted that, nationally, 41.9 percent of nation's Wadeable Streams were given a "poor" rating for biological condition, while only 28.2 percent were given a "good" assessment. In 2013, EPA's follow-up report noted that 55.3 percent of the nation's Wadeable Streams have a "poor" rating, but only 20.7 percent have a "good" rating.

This information suggests that we are starting to move in the wrong direction in improving the quality of our nation's water resources. Yet, the reality is that any significant additional improvements in water quality will be more complicated, more expensive, and more politically challenging.

I have also repeatedly commented on a second trend in this nation's overall efforts to protect our waters—and one that focuses back on the Congress. Over the past few years, under the leadership of the Republican Congress, this body has stopped making significant Federal investments in improving our nation's water quality.

For example, only 4 years ago, Congress appropriated over \$6 billion to the Clean Water State Revolving Fund (SRF) to finance the

cost of necessary wastewater infrastructure—\$2.1 billion through the regular appropriations process, and an additional \$4 billion through the Recovery Act. Since that time, annual appropriations for the Clean Water SRF have been declining—from an appropriation of \$1.5 billion in fiscal year 2011 to a recommendation of \$1 billion in the Chairman’s Mark of the Interior and Environment appropriations bill for fiscal year 2015.

Not surprising, as Federal investments in water quality improvements decrease, we hear more-and-more concern about the rise in “unfunded Federal mandates” or “Federal regulatory overreach”.

To be clear, I do not share the view that the recent actions of EPA or the U.S. Army Corps of Engineers (Corps) are the result of “overzealous” Federal agencies. In my view, these Federal agencies are simply doing the job we—the Congress—told them to do over 40 years ago—“to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”

EPA and the State regulatory agencies see the same trend lines in declining water quality that I mentioned earlier, and are trying to do something about them.

However, in carrying out the job we gave them, they are exposing how, again, continued improvement in restoring and protecting water quality will be more complicated, more expensive, and more politically challenging.

Yet, rather than take on these hard questions of why progress in improving water quality has seemingly stopped, we are asked to vote on legislation that will, at best, continue this trend, or, at worst, will actually worsen this situation.

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. 5077 have been thoroughly explored, vetted, and debated. While it is true that the Committee and the Subcommittee on Water Resources and Environment have held oversight hearings related to the surface mining policies and nutrient reduction activities of the past few years, the Committee has failed to even remotely examine the possible implications of H.R. 5077 with the EPA, the Corps, the State-regulatory agencies, or stakeholders at large.

Instead, we have been compelled to vote on a package of fundamental changes to the Clean Water Act without a common understanding of what these changes would accomplish, whether these changes would address the stakeholder concerns raised before this Committee, or whether these changes are even supported by the State agencies they are suggested to benefit.

Prior to consideration of this bill, I asked EPA for a technical review of the legislation, which I am enclosing as part of these dissenting views. Yet, to sum up this review, enactment of H.R. 5077 would represent a giant step backward in our 40-plus-year efforts to protect water quality. As noted in its review of similar legislation (H.R. 2018) from the 112th Congress, the potential adverse effects of this legislation would “overturn almost 40 years of Federal legislation by preventing EPA from protecting public health and water quality.”

During consideration of H.R. 5077, I offered an amendment which highlighted one of the fundamental flaws I see in this legis-

lation—which is the fact that H.R. 5077 would place downstream states at the mercy of their upstream neighbors in protecting the quality of their own waters.

As our nation's history in protecting water quality has shown, relying solely on the States to protect the nation's water quality simply does not work. From the enactment of the first Federal Water Pollution Control Act in 1948 through the late 1960s, States were given the primacy in establishing the level of appropriate level of protection for their own waters. At that time, there was no minimum Federal standard for protecting water quality, and the Federal government could only participate in protecting water quality when requested by the States.

Unfortunately, that Federal-State relationship failed to ensure uniform levels of water quality protection among the States, and contributed to the cataclysmic water pollution events of the time, including the burning of the Cuyahoga River. Enactment of the 1972 Clean Water Act reversed this trend by establishing Federal minimum standards for protecting water quality, but allowing states to enact more stringent protections to protect local water quality.

Unfortunately, H.R. 5077, as amended, would restore many of the failed water pollution control policies that existed prior to the Clean Water Act, and would significantly curtail the ability of EPA to protect the nation's waters from pollution. Yet, if pollution is allowed to increase due to the competing interests of states, this pollution needs to go somewhere and—since pollution does not respect state boundaries—when it travels downstream, it will have an adverse impact on the quality of life and the quality of the environment of those downstream states.

While my amendment failed by vote of 23–29, it highlighted that the end result of enactment of H.R. 5077 will be that downstream states will become responsible for treating the pollution of their upstream neighbors—which, at a minimum, will increase the compliance costs of downstream states, and at a maximum, may destroy the ecological or economic health of these states.

My district in New York is separated from Connecticut by the Long Island Sound. Over time, the number of polluters in the area as 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 more restrictive water quality standard for nitrogen—a \$5 billion bullet dodged.

Had Connecticut, for example, decided against the revised standard, despite all scientific evidence for doing so, under the current Clean Water Act, EPA could step in and require the stricter standard. Under H.R. 5077, EPA would be stripped of that authority and polluters in Connecticut could continue to discharge excessive amounts of nitrogen into the Sound, leaving my constituents in the State of New York without any recourse under the Clean Water Act to stop them.

If this bill were to be enacted, individual states would decide that collective efforts to address the water quality impairments of the Chesapeake Bay, the Puget Sound, the Great Lakes, or the Gulf of Mexico were 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, of common sense, and decades of experience in implementing the Clean Water Act.

Let me close by saying that I am sympathetic to all that states and local communities are compelled to accomplish with limited funding. However, I am not convinced that our nation has thrown up the white flag on making further improvements in water quality. We should not be satisfied that, as some have suggested, our waters are as clean as they can ever be. We must continue to make progress in achieving the goals we established over four decades ago, and we, the Congress, must be willing to put resources on the table for states and localities to accomplish this task.

Earlier this summer, the President signed into law the Water Resources Reform and Development Act (P.L. 113-121) which includes the first reauthorization of the Clean Water SRF ever. This new law will provide additional financial flexibilities to States and to communities to make the cost of building water infrastructure more affordable.

Enactment of WRRDA was a tremendous first step, and one that we should take pride in discussing; however, it is only the first step. Now, we must follow-through on providing the Federal resources necessary to partner with our States and our communities to get this job done.

If we remain committed to the goals of fishable and swimmable waters, then we must be willing to commit to providing a portion of the funds to do so.

Investing in our water infrastructure network, like many of the things we do in this Committee, is an investment in our nation's future. Let us not short-change the public, environmental, and economic health of generations to come by failing meet this commitment, or by enacting legislation that will only set-back the progress this nation has thus far made, such as H.R. 5077.

In my view, H.R. 5077 will have far-reaching and significant adverse impacts on our nation's clean water. For this reason, I oppose this bill.

TIM BISHOP.

This technical assistance should not be construed in any way as representing the policy positions of the Agency or the Administration on this bill.

KEY ISSUES REGARDING THE “COAL JOBS PROTECTION ACT” (H.R. —)
(REP. CAPITO)

Section 2: National Pollutant Discharge Elimination System (NPDES)

- Reduces clarity, predictability, and consistency for industry, state and local governments, NGOs, and the public regarding implementation of state NPDES programs.
- Removes certain local community pollution protections for human and ecosystem health, including fishing, swimming, and drinking water systems.
 - Weakens existing protections that assure water quality and even basic stream uses are maintained such as fishing, swimming, and recreation.
 - Eliminates existing provisions of law intended to protect waters that flow from one state into another. Downstream states lose their current ability to prevent waste from being dumped upstream that may violate downstream water quality standards.

Section 3: Permits for Dredged or Fill Material

- Establishes new unrealistic deadlines for meeting the requirements of the CWA and NEPA and creating automatic permit approvals, even when the law is not met.
- Weakens existing environmental requirements that assure water quality and public health are protected.
- Reduces opportunities for public and interagency participation in the Section 404 permitting process.
- Creates incentives for Corps to deny permits because deadlines eliminate opportunities to find solutions.
- Weakens critical federal authorities under CWA Section 404(c) to ensure proposed projects do not harm public water supplies, fishery and wildlife areas, and recreational waters.
- Increases ambiguity and uncertainty in the rules states must meet to take over the section 404 permit program.

Section 4: Impacts of EPA Regulatory Authority on Employment and Economic Activity

- Would require a constrained and burdensome economic analysis of virtually all EPA actions.
- Analysis could not consider benefits to public health and the environment; could only consider costs.

Section 5: State Authority to Identify Waters Within Its Boundaries

- Undermines current efforts to provide national consistency in restoring and protecting the nation’s waters, particularly with interstate waters.
- Creates opportunities for wastes to be dumped at state borders by eliminating downstream state and federal authorities to protect shared waters.

Section 6: Definition of Fill Material

- Would codify the agencies' existing definition of "fill material,"

*LIKELY AMENDMENT: LIMITATIONS ON AUTHORITY TO MODIFY STATE
WATER QUALITY STANDARDS (WQSS)*

- Contributes to huge variations nationwide in the level of protections provided to America's waters. Water quality would reflect the weakest link of environmental protections.
- Establishes unrealistic deadlines for approving state impaired waters lists undercutting the role of science and opportunities for states and federal agencies to work together to find solutions.

