Impact of Federal Water Pollution Controls on Local Land Use Decisions

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Impact of Federal Water Pollution Controls on Local Land Use Decisions

By
Nicholas L. White

Introduction

The Federal Water Pollution Control Act Amendments of 19721 (the Act) contain numerous provisions which affect land use decisions by state and local governments, and by private entities. As early as 1973, Lester Edelman, counsel to the House of Representatives Public Works Committee, stated:

"I am amused when I hear about fights in Congress about proposed land use legislation because Section 208 and other parts of the Water Act include land use legislation. The Water Act deals with much more than water . . . It requires that waste treatment plans also consider air and land resources."2

On June 9, 1974, the Louisville Courier-Journal & Times commented:

"TWO-O-EIGHT. Remember Section 208. If you live in the Louisville area, it could well affect your life.

"Section 208 is an obscure passage in a law passed by Congress two years ago: The 1972 amendments to the Federal Water Pollution Control Act.

"While the law's major thrust is the clean-up and prevention of water pollution, the sections that have to do with planning could affect the growth of America's cities. Section 208 could influence where factories will be built, where highways will go and where subdivisions will be situated. In short, it could determine how and where people will live in the next 20 to 50 years.

"Section 208 planning is the first significant governmental action aimed at the causes of environmental ills, not the symptoms, say many urban specialists. . . ."

"Some professional environmentalists see Section 208 as their best tool yet in channeling growth and stopping pollution."3

More recently, a similar observation was made by the Indianapolis-based Environmental Quality Control, Inc.:

"Some observers have felt right along that if environmentalists were unable to get land use legislation through the Congress, they would try to use Section 208 [Federal Water Pollution Control Act Amendments of 1972] to accomplish their objectives. Recent developments indicate that this may be the case."4

The stage is set for water quality control agencies at the federal, state, and regional levels to have substantial influence on what has been traditionally a local decision—land use planning and controls.

In considering this impact of the Act, and of Section 208 in particular, it is useful to distinguish between the control of "point sources" and "nonpoint source" is defined as:

"The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."5

"Nonpoint sources" are not expressly defined in the Act, but guidelines issued by the United States Environmental Protection Agency (EPA) state:

"Nonpoint sources, while not defined in the Act, are, by inference, the accumulated pollutants in the stream, diffuse runoff, seepage, and percolation contributing to the degradation of the quality of surface and ground waters. They include the natural sources (seeps, springs, etc.) and millions of small point sources that presently are not covered by effluent permits under the National Pollution Discharge Elimination System."6

Part I of this two-part article will concentrate on the direct and indirect effects on land use decisions by the required controls and regulation of point sources. Part II to appear at a later date will concentrate on non-point sources. It must, however, be

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1 P.L. 92-500; 33 U.S.C. §§ 1251 et seq. (Note: Throughout this article reference will be made to section numbers in the Act—e.g. Section 209—rather than the U.S.C. section numbers. This is done since most persons dealing with the Act have adopted this mode of reference. Footnotes will refer to both section numbers with the Act section number listed first.)
kept in mind that a comprehensive Section 208 areawide water quality management plan includes regulation and control of both point and non-point sources. The term “water quality management plan” is defined by EPA as follows:

“The term ‘water quality management plan’ means the plan for managing the water quality, including consideration of the relationship of water quality to land and water resources and uses, on an areawide basis, for each EPA/State approved planning area and for those areas designated pursuant to Section 208 (a) (2), (3), or (4) of the Act within a State. Preparation, adoption, and implementation of water quality management plans in accordance with regulations under this part and Part 131 of this Chapter shall constitute compliance with State responsibilities under Sections 208 and 303 (e) of the Act and areawide responsibilities under Section 208 of the Act.” (Emphasis added.)

PART I

Point Source Controls

Some provisions of the Act provide for direct control of point sources, while others have an indirect, but pervasive, effect on point sources and land use. It is these latter which go unnoticed until implemented. At that time it is often too late for those affected by the decisions to have input into the decision-making process. Among the provisions of the Act which affect point source discharges and land use decisions, the following are particularly noteworthy:

1. The requirement that each state adopt water quality standards for all streams and receiving waters—both interstate and intrastate—and determine waste load allocations for point source dischargers.

2. The requirements of the National Pollution Discharge Elimination System permit processes.

3. The requirement that EPA establish standards to determine eligibility for construction grants for publicly owned treatment works.

4. The requirements for areawide planning for waste treatment management as set forth in Section 208 of the Act.

Any one of these provisions can have profound effect on growth patterns and land use decisions in a given area, and, while they are listed separately, they are interrelated as will become readily apparent. As noted previously, it is Section 208 which may have the most impact.

Establishing Water Quality Standards and Determining Waste Load Allocations

On first impression, it might seem that the establishing of water quality standards and determining waste load allocations would not affect land use decisions. When it is recognized, however, that water quality standards of receiving streams and waste load allocations are an integral part of the point source permit system and are also a factor in determining the priority for construction grants for publicly owned treatment works, the indirect impacts on land use decisions in the watershed become apparent.

The distinction between water quality standards—i.e. ambient standards—and effluent limitation standards should be noted. Water quality standards pertain to the quality of the water in the receiving stream or lake. In Indiana these are promulgated by the Stream Pollution Control Board, and are part of basin plans adopted pursuant to Section 308 (e) of the Act. The role of this state agency is outlined briefly as follows:

“Basin plans, described in Section 303(e) of the Act, will be prepared by the state for all river basins in Indiana. These plans will: (1) provide water quality standards and goals; (2) define critical water quality conditions; and (3) define the nature and volume of pollutants (waste load allocations) that can be discharged without pushing water quality below certain minimal standards.”

Indiana has already established water quality standards for its receiving waters. These standards have been accepted by the federal government as meeting federal requirements, but are subject to periodic review and change with approval of the Administrator of EPA.

While water quality standards apply to the quality of the water in receiving waters, effluent limitations apply to the composition of effluent discharged at a point source. The Act provides:

“...The term ‘effluent limitation’ means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.”

Effluent limitations for literally hundreds of types of point source dischargers have been promulgated by EPA pursuant to Section 301 of the Act. These effluent limitations are based on numerous factors including the type and quantity of pollutant discharged and the level of technology available to remove such pollutants from the effluent. These effluent limitations are uniform nationwide.

At this point it should be noted that “waters” subject to the Act is a much broader concept than hereto-
fore brought under federal control. The term “navigable waters” is defined in the Act to mean the waters of the United States, including the territorial seas. Congress intended the term to “be given its broadest possible constitutional interpretation unencumbered by agency determinations which may have been made or may be made for administrative purposes.”

To date federal courts have upheld this all-encompassing definition of waters subject to the Act. In U.S. v. Phelps Dodge Corporation, the Act was held to apply to underground waters subject to the Act. In Ashland Oil and Transportation Co., to a ditch which was four tributaries removed from a stream which was actually navigable; and in Sun Enterprises v. Train, a small brook which emptied into a reservoir constructed on a stream not actually navigable. Thus, it is difficult to argue the Act does not apply for the reason that the receiving waters are not actually navigable and, therefore, are not within the jurisdiction of the federal government to control.

The next step is for receiving waters to be classified as either “effluent limited segments” or as “water quality limited segments.” An “effluent limited segment” is that part or segment of the receiving waters in which the established water quality standards can be met when all dischargers comply with the standard effluent limitations applicable to each point source discharger.

The “water quality limited segment” is that part or segment of the receiving waters that will not meet water quality standards after application of the standard effluent limitations for each point source discharger. As a result of this classification system, a point source discharger on a “water quality limited segment” must comply with more stringent standards than the same type discharger on an “effluent limited segment.”

It becomes apparent that the establishing of water quality standards for receiving waters and the determination of the receiving waters as an “effluent limited segment” or “water quality limited segment” can be a major factor in determining the type of land use that can be made along or near the receiving waters. As an example, a large food processing plant desires to locate on an Indiana stream and discharge waste waters into it. It can meet the required level of treatment of its waste water discharge to satisfy the industry-wide effluent limitation. This segment of the stream is, however, a “water quality limited segment” which will require the food processing plant to treat its waste waters more extensively than required by the industry-wide effluent limitation. If the food processing plant cannot attain the higher level of treatment, or if doing so is prohibitively expensive, the food processing plant cannot locate on this stream even though the land was zoned for such industrial use.

**National Pollution Discharge Elimination System**

The National Pollution Discharge Elimination System (NPDES) is the mechanism whereby point source dischargers are regulated and controlled. All point source dischargers over a certain size—both government operated and privately operated—must have a discharge permit.

It is estimated that in the state of Indiana over 1800 permits will be needed to comply with NPDES requirements. By categories, these are:

<table>
<thead>
<tr>
<th><strong>Issued Nov.</strong></th>
<th>Needed</th>
<th>1975</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agricultural Waste</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>General Sanitation</td>
<td>485</td>
<td>450</td>
</tr>
<tr>
<td>Industrial Waste</td>
<td>648</td>
<td>628</td>
</tr>
<tr>
<td>Municipal Wastewater</td>
<td>516</td>
<td>503</td>
</tr>
<tr>
<td>Water Supply</td>
<td>174</td>
<td>168</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1833</td>
<td>1745</td>
</tr>
</tbody>
</table>

The terms of the permit are governed by many factors including the quality of water to be achieved or maintained in the receiving stream. Thus, the fictional food processing plant would be required to have an NPDES permit, and the terms of the permit would be conditioned upon the water quality to be achieved or maintained in the receiving stream. If the food processing plant is your client, it must be alerted to the need for this permit and its conditions before a decision to locate can be made.

In the case of publicly owned treatment works, the NPDES permit will provide for the type and amount of sewage which the treatment works can accept for treatment. It is readily seen that this can affect land use

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20 Conference Committee Report, Senate Report 92-1236, p. 144.
22 504 F. 2d 1317, 7 ERC 1114 (6th Cir. 1974).
24 EPA Reg., 40 C.F.R. § 130.2(0)(2); 40 Fed. Reg. 55334 (1975):
25 "(2) Effluent limitation segment: Any segment where it is known that water quality is meeting and will continue to meet applicable water quality standards or where there is adequate demonstration that water quality will meet applicable water quality standards after the application of the effluent limitations required by Sections 301(b)(1)(B) and 301(b)(2)(A) of the Act."
26 EPA Reg., 40 C.F.R. § 130.2(0)(1); 40 Fed. Reg. 55334 (1975):
27 "(1) Water quality segment: Any segment where it is known that water quality does not meet applicable water quality standards and/or is not expected to meet applicable water quality standards even after the application of the effluent limitations required by Sections 301(b)(1)(B) and 301(b)(2)(A) of the Act."
29 EPA UP-DATE, Vol. 1, No. 7, November 1975 (Indiana State Board of Health; Indiana Stream Pollution Control Board).
30 EPA Regs., 40 C.F.R. § 124.45(e); 40 C.F.R. § 125.26(b).

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decisions as to the type and amount of growth in the area served by such treatment works. If a treatment works violates terms of its permit, the state or EPA administrator may restrict or prohibit new discharges into the treatment works.29

In Indiana, the Stream Pollution Control Board has from time to time issued bans on additional hook-ups to sewer systems when the treatment works becomes overloaded or is not properly operated resulting in the discharge of insufficiently treated sewage. This has been done by administrative order of the Board after a required notice and hearing. Such ban would become a part of an NPDES permit. Similar bans or moratoria on new hook-ups have been upheld by the courts in other jurisdictions including Illinois, Maryland and Pennsylvania.30 Such moratoria affect land use decisions since development is effectively halted unless a developer can supply its own treatment.

The industrial discharger into a publicly owned treatment works must also meet pretreatment standards for its discharge.31 EPA has promulgated regulations which set forth pretreatment standards based on compatibility with the design and capability of the treatment works.32 Pretreatment standards may be more strict under state or local law if such are necessary to meet the effluent limitations imposed on the publicly owned treatment works.33

Thus, the capacity and capabilities of the treatment works to treat an industry's wastes will determine the type and level of pretreatment required of such industry. The terms of this pretreatment become a part of the NPDES permit of the publicly owned treatment works.34

Most of the NPDES permits issued to Indiana dischargers to date were issued by the U.S. EPA (Region V, Chicago). On January 1, 1975, the State of Indiana (Stream Pollution Control Board) was granted authority by EPA to issue permits. The Stream Pollution Control Board has issued such permits pursuant to its own regulation.35 Although this state agency now issues permits and is in charge of enforcement, it is subject to oversight and review by the EPA.36

Eligibility for Construction Grants for Publicly Owned Treatment Works

In establishing standards for grants, EPA regulations and guidelines directly influence local decisions as to size and type of a publicly owned treatment works. EPA has promulgated regulations and guidelines which require, among other things, alternatives to the conventional end-of-the-pipe treatment, projections as to future needs, and the identification of development controls—e.g. zoning—necessary to assure compatibility of the treatment works with future needs for the planning period, usually twenty years.37

A number of criteria are applied in determining the priority for federal grants for construction of publicly owned treatment works. The most important is the severity of the water pollution problem.38 The indirect impact of this criteria is evident. If the receiving waters are severely polluted—i.e. the stream is in violation of, or not in compliance with, water quality standards established for such streams by the state39—the applicant for a grant to construct a treatment works will most likely have a higher priority for such grant as compared with grant applicants not so situated. Other criteria which determine ranking on the project priority list are capacity and effectiveness of the existing treatment works, and size of area and population to be served. The goal is to provide funds first for construction of treatment works where it will do the most good for the most people.

If industrial dischargers are to be served by the publicly owned treatment works built with federal funding, such industrial discharger must take into consideration two other factors in addition to pretreatment standards mentioned earlier.40 These are "user charges" and "industrial cost recovery charges." "User charges" are required by the Act,41 and are defined by regulation so that each discharger or class of dischargers pays its proportionate share of the costs of

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operation and maintenance of any waste treatment services provided by 
the treatment works.42 Not only is quantity of discharge a factor, but the composition and timing (flow rate) are factors in determining the user charge. Before a discharger would decide to locate in a community, the amount of this charge should be considered.

The “industrial cost recovery charge” is that charge to an industry to recover the costs of construction of the treatment works which costs are attributed to providing treatment for such industry’s wastes.43 In the siting of a new plant, an industry should take into consideration this cost if it intends to discharge into a publicly owned treatment works which is to be built or expanded with federal funds.

It can readily be seen that construction of a new, or expansion of an existing, treatment works has tremendous influence on local land use decisions. In nearly all cases, the availability of federal funds for such construction is the key to where, where and how such plants will be built.

Section 208 Areawide Planning

The fourth provision mentioned—§ 208 areawide planning—can have the most pervasive effect on local land use decisions. The Act envisages areawide planning instead of piecemeal, ad hoc decisions regarding water quality management. The Senate Committee on Public Works commented:

“Section 209 (now Section 208) requires that any regional plan developed pursuant to this Act . . . regulate the location, modification and construction of facilities in the region. . . .

“The independent functioning of units of government in areas of population concentration without regard to the pollution related requirements of other areas of the same region will not be possible.”44

While nonpoint source problems and control to be discussed in Part II of this article are an important element of Section 208 planning, the control of point sources in the Section 208 plan can have an impact on local land use decisions.

The Section 208 plan is interrelated with all three provisions of the Act discussed previously—establishing water quality standards, the NPDES permit system and the construction grants program. The relationship with water quality standards is described by EPA as follows:

“303(c) basin plans constitute the overall framework within which 208 plans are developed for specific portions of a basin with complex pollution control problems. Basin plans: 1) provide water quality standards and goals; 2) define critical water quality conditions; 3) provide waste load constraints; and 4) may help delineate 208 area boundaries. The results of 208 planning will constitute an integral part of these basin plans. 208 plans must be consistent with basin plans, and should be annually certified as so

by the governor.” (Emphasis added.)45

To the extent that water quality standards and waste load allocations affect land use decisions, they will become a part of the Section 208 plan.

Under the NPDES permit system no permit may be issued which will conflict with an approved Section 208 plan.46 The relationship between the Section 208 plan and the NPDES permit system is described by EPA as follows:

“The 402 National Pollutant Discharge Elimination System Permit Program is designed to ensure that pollutant dischargers will not exceed prescribed levels. The permit system provides an essential tool for implementation of the 208 plans within the framework of the 303 (e) basin plans. No permits may be issued for point sources which are in conflict with approved 208 plans since they automatically become part of the overall 303(e) basin plans. The 208 planning agency should assess current permit requirements and, when needed to achieve the 1983 goals, recommend appropriate conditions for future permit issuance. (Emphasis added.)47

As noted previously, the NPDES permit system applies to all point dischargers over a certain size—both public and private.

When a Section 208 plan is adopted and approved, construction grants for publicly owned treatment works may be awarded only for those plants which comply with the Section 208 plan.48 In describing the Section 208 areawide plan, EPA states:

“Areawide planning sets forth a comprehensive management program for collection and treatment of wastes and control of pollution

43 EPA Regs., 40 C.F.R. § 35.925; 40 C.F.R. § 35.925-13(a).
45 GUIDELINES, supra note 6 at 2-1.
46 EPA Reg., 40 C.F.R. § 125.21(e).
47 GUIDELINES, supra note 6 at 2-4.
48 P.L. 92-500, § 204(o)(1); 33 U.S.C. § 1289 (a)(1); EPA Reg., 40 C.F.R. § 35.925-19.

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from all point and nonpoint sources. Control measures for abating these sources utilize a combination of traditional structural measures together with land use or land management practices and regulatory programs. . . .

"The portion of the 208 plan devoted to future construction of publicly-owned treatment works should select and describe planning and service areas and treatment systems, and provide supporting analysis for the selection. The 208 planning requirements, therefore, overlap with the 201 planning requirements . . . ." (Emphasis added.)

As a result of this interrelation of Section 208 areawide planning and Section 201 construction grants, the task of ascertaining the priority and timetable for construction or expansion of a publicly owned treatment works is further complicated.

In addition to these interrelated provisions of the Act, the Section 208 plan must establish a regulatory program to "regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area." EPA has interpreted this provision of the Act as follows:

"Section 208(b)(2)(C)(ii) provides that the areawide waste treatment management plan include 'the establishment of a regulatory program to regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area . . . .' This provides authority for the 208 management agency(s) to regulate location of new pollutant dischargers by determining the location of municipal treatment facilities, by seeking control of other pollutant sources, and by seeking appropriate changes in land use plans and controls from the agencies possessing land use jurisdiction in the 208 area. The term 'facilities' in the above citation includes any controllable source of pollutants, the regulation of which contributes to attaining water quality standards." (Emphasis added.)

As will be explored in Part II of this article, the nonpoint source controls provided in a Section 208 plan may be even more pervasive in their impact on local land use planning.

It is important, therefore, that those concerned with land use decisions be aware of, and participate in, the §208 planning which is underway throughout the United States including Indiana. As of July 15, 1975, the U.S. EPA Water Planning Division had approved 149 areawide designations and had authorized areawide planning grants totalling $163,558,850. Areawide designations in Indiana and their grant status as of that date were:

<table>
<thead>
<tr>
<th>Area</th>
<th>Planning Agency</th>
<th>Grant Award</th>
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<tbody>
<tr>
<td>(Area)</td>
<td>OKI Regional Council of Governments</td>
<td>6/25/74</td>
</tr>
<tr>
<td>Cincinnati, OH (Dearborn County, IN)</td>
<td>426 E. 4th Street</td>
<td>$1,975,000</td>
</tr>
<tr>
<td>Lake and Porter Counties</td>
<td>Cincinnati, OH 45202</td>
<td>5/30/75</td>
</tr>
<tr>
<td>Northwestern Indiana Regional Planning Comm.</td>
<td>8149 Kennedy Ave. Highland, IN 46322</td>
<td>$985,000</td>
</tr>
<tr>
<td>Muncie (Madison, Henry, Delaware and Randolph Counties)</td>
<td>Region 6 Planning &amp; Development Comm.</td>
<td>6/6/75</td>
</tr>
<tr>
<td>Indianapolis (Marion, Hancock, Shelby, Morgan, Boone, Johnson and Hendricks Counties)</td>
<td>207 N. Talley Muncie, IN 47303</td>
<td>$669,000</td>
</tr>
<tr>
<td>South Bend (LaPorte, St. Joseph, Elkhart and Marshall Counties)</td>
<td>Indiana Heartland Coordinating Comm.</td>
<td>6/6/75</td>
</tr>
<tr>
<td>Terre Haute (Clay, Parke, Putnam, Sullivan, Vermillion and Vigo Counties)</td>
<td>Suite 217 7202 N. Shadeland Indianapolis, IN 46250</td>
<td>$1,301,000</td>
</tr>
<tr>
<td>Michiana Area Council of Governments</td>
<td>6/11/75</td>
<td></td>
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<tr>
<td>11th Floor City-County Bldg. South Bend, IN 46601</td>
<td>$862,000</td>
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<tr>
<td>West Central Indiana Economic Dev. Dis. P.O. Box 627 700 Wabash Ave. Terre Haute, IN 47808</td>
<td>6/19/75</td>
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<td>$447,000</td>
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Section 208 areawide planning has the advantage of managing water quality problems in the most cost efficient and effective manner for the area. This will benefit all land users in the area, but land use decisions will be constrained so as to comply with the § 208 areawide plan. The water quality plan is not the "tail wagging the dog," but it will be an indispensable element in land use planning at the local level. The Indiana Stream Pollution Control Board has noted:

"Planning on the local level is emphasized by the 208 program in an effort to find and implement cost-effective solutions to local water quality management problems. Grants are provided to help cover planning costs and selection of a management agency to carry out the plan.

"Areawide planning provides the local governments with an effective tool to solve the existing water pollution problems as well as managing the area's waters in the future. This program also gives the EPA and the states the machinery necessary to meet the national goal of clean water."

It should be noted that a recent decision of the District of Columbia District Court has held that Section 208 areawide planning must be performed for all areas of each state. In other words, there will be border-to-border Section 208 areawide planning. If local areawide planning agencies are not designated, the state must do such planning, and the federal government must fund such planning at the state level. This means, in effect, that state level agencies may become extensively involved in local land use decisions which affect water quality.

Conclusion

The control of point source discharges has a direct effect on water quality, and water quality is inseparably linked with land use. Those charged with the responsibility of protecting and enhancing the nation's waters, including those in Indiana, will be utilizing many tools to accomplish their purposes. Included in these tools is the control of point source dischargers with both its direct and indirect impacts on local land use decisions. The complexity of the Act will become even more evident when the control of nonpoint sources is reviewed in Part II.


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Year in High School __________________________ Intended College major ____________ Sex ________

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