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Environmental Controls: Water Pollution Control Act of 1972

Nicholas L. White

Indiana University School of Law

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ENVIRO\textsc{imental Controls}

WATER POLLUTION CONTROL ACT OF 1972

\textsc{by Nicholas L. White}\textsuperscript{*}

Bloomington, Indiana

The Federal Water Pollution Control Act Amendments of 1972\textsuperscript{1} (hereinafter referred to as the Act) will have substantial effects on land use planning by both the public sector and the private sector. State and local governments and agencies will be affected; and, of course, industrial dischargers, land developers, farmers and extractive industries will be affected. It was the intent of the Act that it affect land use decisions as they relate to water quality management. Lester Edelman, legal counsel to the House of Representatives Public Works Committee, commented after enactment of the 1972 Act:

I am amused when I hear about fights in Congress about proposed land use legislation. §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.\textsuperscript{2}

My personal observations have been as a consultant to the Water Planning Division of the Environmental Protection Agency and as a consultant to the National Commission on Water Quality which commission is assessing the impact and effectiveness of the 1972 Act.\textsuperscript{3} If there is one issue that commands attention at meetings involving local, regional and state officials, it is the land use implications of the Act.

The Act is viewed as having three major components:

1. Construction grants—grants for the construction of publicly owned treatment works.
2. Planning—state planning for river basins, facilities planning for individual treatment plants and §208 areawide waste treatment management planning.
3. Regulation and enforcement provisions—national pollution discharge elimination system (NPDES) permit program, effluent limitations, pretreatment requirements, and monitoring and enforcement provisions.

As the Act affects land use, these three major components are interrelated with the emphasis on the planning component. The other two components implement the planning component. For example, treatment works constructed with the federal grants must comply with approved section 208 areawide planning,\textsuperscript{4} and the NPDES permits must conform to approved section 208 water quality management plans.\textsuperscript{5}

\textsuperscript{*Professor of Law, Indiana University.}
1 P.L. 92-500; 33 U.S.C. §1251 \textit{et seq.}
4 P.L. 92-500, §208(d); 33 U.S.C. §1288(d).
5 P.L. 92-500, §208(e); 33 U.S.C. §1288(e).
These interrelations and effects on land use decisions can be illustrated by two examples. The first involves a prospective private discharger such as a large industrial plant and the second, a publicly owned treatment works. In each instance these are point source dischargers and must have an NPDES permit in order to discharge their effluent into receiving waters.\(^8\)

In the case of the industrial discharger, such discharger has a choice of treating its waste waters and discharging them, or discharging its waste waters into a publicly owned treatment works following pretreatment by the discharger if necessary. If it elects to treat and discharge, it needs a permit, and the location of the plant upon the receiving waters presents a land use decision. As required by section 303 of the Act, the state must classify the receiving waters according to ambient water quality standards and must also make waste load allocations among dischargers.\(^7\) If the stream is loaded to capacity or is considered "polluted"—i.e., in violation of the water quality standards of the stream—the industrial discharger may not receive a permit to discharge into the stream. If such discharger does receive a permit, it may be on conditions so stringent that the discharger has difficulty meeting the terms. Thus, the decision as to where the plant is to be located—which is in part a land use decision—will have been affected by how the state classified the receiving waters and the waste load allocations with respect to dischargers.

At the time that section 208 areawide planning is approved, all point source dischargers including our hypothetical industrial discharger must comply with the areawide plan.\(^8\) The areawide plan must take into consideration, and provide for regulation of, the siting of all facilities which discharge into receiving waters in the area.\(^9\) Thus, the section 208 areawide plan which may have been conceived and adopted without much interest by an industrial discharger will determine if such industrial discharger may discharge at a particular point and, if so, what types of discharges will be permitted. As noted previously, the industrial discharger being a point source discharger cannot lawfully discharge into the receiving waters without a permit.\(^10\) These conditions will become part of the NPDES permit which is the enforcement tool.\(^11\)

With respect to the publicly owned treatment works, it likewise needs a permit. The amount and kind of effluent—i.e., effluent limitations—will be determined by the classification of the stream and waste load allocations established pursuant to section 303. If the publicly owned treatment works

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\(^6\) P.L. 92-500, §502(14), §402; 33 U.S.C. §1362(14), §1342. See 40 C.F.R. §125.4 for exclusions to the NPDES permit requirements none of which would apply to the two examples. It is estimated that 40,000 industrial dischargers and 10,000 to 13,000 municipal dischargers will need NPDES permits.


\(^8\) P.L. 92-500, §208(e); 33 U.S.C. §1288(e).

\(^9\) P.L. 92-500, §208(b)(1); §201(c), §208(b)(2)(C)(ii); 33 U.S.C. §1288(b)(1), §1281(c), §1288(b)(2)(C)(ii).


\(^11\) P.L. 92-500, §208(e); 33 U.S.C. §1288(e). See 40 C.F.R. §125.21(e) which provides that no NPDES permit may be issued that conflicts with an approved §208 areawide plan.
becomes overloaded and the terms of its permit are violated, legal action may be instituted to prevent additional hook-ups. This means that land use development will be delayed indefinitely until such time as the capacity of the plant is increased. This capacity may be increased by constructing a new plant or adding to an existing one and will most likely be funded by the federal construction grants component of the Act. Until such time as a federal construction grant is available, there may be a moratorium on additional hook-ups.

Prior to adoption and approval of a section 208 areawide plan, there are planning requirements for publicly owned treatment works financed under the Act which planning requirements may affect land use decisions. The first step in the construction grants process under the Act requires a facilities plan which must provide, among other things, for the size and capacity of the treatment works, the area to be served, types of discharges which will be accepted, the level of treatment and the effect of the treatment plant discharge into receiving waters. It can readily be noted that the facilities plan will have an effect on land use decisions in the area to be served by the treatment works. This is, of course, not a new phenomenon, but EPA as well as state agencies now have review and approval authority over these facilities plans. The autonomy of local decisionmakers has been lessened substantially.

In the case of the industrial discharger who desires to discharge into a publicly owned treatment works, such discharger is subject to pretreatment standards for some pollutants and bans on discharging toxic pollutants into such treatment works. Thus, these standards and bans can determine whether a particular industrial discharger may locate in an area served by such publicly owned treatment works.

The foregoing indicates only some of the land use impacts as they relate to point source dischargers, or to industrial or commercial dischargers who discharge into a publicly owned treatment works.

The Act also provides for identification and control of nonpoint sources of water pollution. While point sources are defined in the Act, nonpoint sources are not. By inference, nonpoint sources include diffuse runoff, and seepage and percolation contributing to the pollution of ground and surface waters. Included in nonpoint sources are runoff from urban/

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15 P.L. 91-500, §201(g); 33 U.S.C. §1281(g).


17 P.L. 92-500, §§201(c), §206(b)(2)(F)—(I); 33 U.S.C. §1281(c), §1288(b)(2)(F)—(I).


19 See Guidelines for Areawide Waste Treatment Management issued by U.S. EPA, August 1975 (listed in bibliography).
suburban areas, agriculture, silviculture, mining and construction site sources. A program to identify and control these nonpoint sources must be included in each section 208 areawide plan. Each large development which may affect run-off or generate nonpoint source pollutants should be considered in the ongoing section 208 areawide planning process. To the extent that it might have an adverse effect on water quality, the size and type of development will be subject to this new control. This could require greater set-backs from receiving waters, green belts, terracing or even a prohibition of development in certain areas. As a result, land use decisions and planning must be undertaken in light of the section 208 areawide plan. Local input is insured since the planning agency must include elected officials from the area.

It should be noted that a recent federal court decision has interpreted the requirements of section 208 of the Act to apply to all parts of the state, not merely to those urban-industrial concentrations which are normally associated with major water quality problems. If areawide planning agencies are not established for all areas of the state, a state level agency will be required to do the equivalent of areawide planning for these less populous areas. In many instances, this will include the agricultural areas in the state. Eventually there will be border to border areawide waste treatment management planning.

To date, the problems of nonpoint sources have not been addressed with the same degree of expertise as have point source problems. One of the few recognized effective ways to combat nonpoint source problems is through land use controls. Thus, where nonpoint sources are a contributing factor to water degradation, those charged with making land use decisions will have to consider the effect of their decisions on water quality.

Lawyers may represent the private sector such as industrial dischargers or the public sector which would include the owners and operators of publicly owned treatment works, land planning commissions, zoning boards, etc. The point to remember is that the Federal Water Pollution Control Act Amendments of 1972 have added new constraints to clients' land use decisions. To proceed without recognizing these constraints is to invite litigation, delay and expense.

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20 Id. See 1 CCH Pollution Control Guide, ¶5166.
23 See Chapter 4 (Detailed Considerations for Land Use) and Chapter 6 (Detailed Consideration for Nonpoint Source Management), Guidelines for Areawide Waste Treatment Management Planning, U.S. EPA, August 1975 (listed in bibliography).
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