



Arkansas Water Primer Series: A History of National Water Legislation

Introduction

Clean water is of vital importance to sustaining public health, maintaining a strong economy and preserving a thriving ecosystem. Laws and regulations have played a major role in protecting the country's environment. To better understand water quality and quantity legislation, it is important to examine the history of the federal government's role as well as the states' in regulating this important resource.

The Cornerstone of Environmental Law

The National Environmental Policy Act of 1969 (NEPA) is considered the nation's first comprehensive environmental legislation. NEPA applies to almost all actions taken by – or approved by – federal agencies. The first part of NEPA establishes broad environmental goals for the nation. The second part contains the statute's requirements for agency actions. The Act is based on the principle that federal agencies should “look before they leap.” Thus, NEPA requires federal agencies to conduct an environmental assessment (EA) before taking any major action. An EA allows the agency to decide if its proposal may have significant impacts.

If the agency decides that the proposal will not have significant impacts, then the agency can end the process by issuing a “finding of no significant impact” (FONSI). If the agency finds that a proposed action might have significant impacts, then it must do a full environmental impact statement (EIS). The full NEPA process can be lengthy and complicated. It requires agencies to seek public comment at many points in the EIS process. However, the federal courts have ruled

that NEPA is a purely procedural statute. Even after preparation of a full EIS, NEPA does not mandate any particular decision. It simply requires that agencies do the analysis and reporting required by law. NEPA requirements apply to all agencies of the federal government, but not to Congress, the courts or the president.

Earliest Water Laws

Federal water legislation dates back to the 19th century with the passage of the River and Harbor Act of 1899. The purpose of the Act was to protect the nation's waters and promote interstate commerce. Almost 50 years went by before Congress enacted the Water Pollution Control Act of 1948. The legislation provided federal technical assistance and funds to states interested in protecting their water quality. In 1965, Congress passed the Water Quality Act (WQA), which charged states with setting water quality standards for interstate navigable waters.

Navigable waters are waters of the United States that have been used historically or are now used for interstate commerce or foreign commerce, including, but not limited to, interstate waters, interstate wetlands, intrastate lakes, rivers and streams.

The Clean Water Act

In 1972, the Federal Water Pollution Control Act (FWPCA) strengthened WQA's water quality standards protocol and established a regulatory structure for controlling discharges of pollution into the nation's waters. FWPCA made it illegal to discharge a toxic or non-toxic polluting substance without a permit, encouraged the use of the best available technology for pollution control and provided federal funding for constructing sewage treatment plants. The Act also directed states to set water quality standards

for waters other than those designated as interstate navigable waters and to implement wetlands protection programs.

In 1977, FWPCA was amended by the Clean Water Act (CWA). The Act authorizes water quality programs, requires state water quality standards and permits for discharges of pollutants into navigable waters and authorizes funding for wastewater treatment works, construction grants and state revolving loan programs. CWA identifies two sources of pollution:

- Point source – pollution from clearly discernible discharge points such as pipes, wells, containers, concentrated animal-feeding operations, boats or other watercraft.
- Nonpoint source – pollution coming from diffused points of discharge such as runoff from parking lots, agricultural fields, lawns, home gardens, construction, mining and logging operations.

CWA established federal restrictions on discharges. No one may discharge a pollutant from a point source into navigable waters of the U.S. without a National Pollution Discharge Elimination Systems (NPDES) permit, which is issued by the U.S. Environmental Protection Agency (EPA). There are considerable administrative penalties, fines and/or criminal prosecution both at the state and federal levels for people or organizations that do not have a NPDES permit.¹

Federal and State Oversight of CWA

The U.S. Army Corps of Engineers (the Corps), EPA and the states are charged with enforcing various provisions of CWA. Under CWA, states are charged with protecting and restoring the quality of the nation's waters:

It is 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...

States engage in a number of activities to fulfill the requirements of CWA, including assessment, identification of total maximum daily loads and implementation. Assessment is the process of determining the status and condition of a state's water resources and the progress being made to restore and protect these waters.

CWA Assessment Reports

States are required to submit assessment reports to EPA. These include but are not limited to:

- Section 305(b) reports – comprehensive biennial inventories of the conditions and trends of waters within the state
- Section 314 reports – information about clean lakes within the state and
- Section 319 reports – information about waters within the state that are threatened by nonpoint source pollution.

Enforcing the CWA

EPA has three basic tools for enforcing CWA:

- Administrative orders requiring compliance
- Administrative penalties and
- Civil actions to collect penalties or obtain an injunction.

Separate enforcement provisions apply to dredging and filling activities and oil discharges that require a permit from the Corps. EPA has almost complete discretion to negotiate and settle its civil or administrative enforcement actions. Fines are calculated according to specific penalty policies or guidelines, which typically emphasize the severity, frequency and duration of the violation. Settlements also typically include a consent order creating a specific timetable for compliance and stipulated penalties for violations of the consent order.

The Safe Drinking Water Act

Another significant water law is the Safe Drinking Water Act (SDWA). Passed by Congress in 1974 and amended in 1986 and 1996, SDWA regulates the nation's public drinking water supply in order to protect public health. SDWA authorizes EPA to set national health-based standards for the presence of contaminants in drinking water. It also allows EPA, states and drinking water systems to work together to implement these standards.

SDWA gives EPA authority to regulate all public water systems in the U.S. that provide piped water for human consumption for at least 60 days a year to at least 15 service connections or 25 people. Systems that do not meet this definition are classified as private

water systems and are not subject to federal regulation. EPA has established Primary Drinking Water Regulations. States are responsible for enforcing the regulations, which require identifying contaminants that may pose a risk to human health and that occur in drinking water at potentially unsafe levels. EPA specifies a Maximum Contaminant Level Goal (MCLG) for each contaminant. The goals are set at levels below which there are no predicted health risks. The agency also creates a legally enforceable Maximum Contaminant Level (MCL), which is the greatest amount of contaminant that will be allowed in the public water supply.

The Act originally stressed treatment as the primary means of providing safe drinking water. The 1996 amendments greatly expanded the law's scope by recognizing the need for:

- Capacity development
- Source water protection
- Operator training
- Public information and
- Funding for water system improvements.

It also required source water assessment programs (SWAP) for all U.S. public drinking water supplies.

These source water assessments determine a drinking water system's potential susceptibility to contaminants. In addition, public water suppliers are required to inform customers about the source and quality of their tap water with an annual consumer confidence report.

The Arkansas Department of Health's (ADH) Division of Engineering is charged with the regulation and oversight of the state's public water systems. According to the ADH's Drinking Water Program Annual Report, there were 1,094 public water systems in operation during 2006. Of those, 714 were community water systems, 35 were non-transient non-community water systems and 345 were transient non-community water systems. Arkansas' public water systems serve 91.8 percent of the population. The Division's mission is to protect the health of all of Arkansas' citizens and visitors by providing technical assistance, analytical services, training, regulation and public education for the purpose of ensuring that public water systems provide adequate quantities of safe, palatable water and that community sewage systems dispose of domestic wastes in a safe manner.

Specifically, ADH's Division of Engineering:

- Reviews plans of new water system facility construction
- Inspects water system facilities
- Troubleshoots water treatment and distribution problems
- Investigates complaints
- Collects and analyzes samples to determine water quality
- Reviews plans of new sewer system construction
- Inspects proposed cemetery sites
- Reviews plans of public swimming pools and
- Trains and certifies water system operators.

Drinking water standards for public water systems are based on their type and size:

Community Water System – a public water system that serves the same people year-round.

Non-Community Water System – a public water system that serves the public but does not serve the same people year-round.

There are two types of non-community water systems:

• **Non-Transient Non-Community Water System** – a non-community water system that serves the same people more than six months per year, but not year-round. An example would be a school with its own water supply.

• **Transient Non-Community Water System** – a non-community water system that serves the public but not the same individuals for more than six months. An example would be a rest area or a campground.

Drinking Water State Revolving Fund Program

A 1996 amendment to SDWA authorized the Drinking Water State Revolving Fund (DWSRF) Program to help public water systems finance infrastructure improvements needed to protect public health and ensure compliance with SDWA. Arkansas Act 772 of 1997 created the Safe Drinking Water Fund Program. Types of projects which can be funded include compliance, water supply, public health, treatment, distribution storage, plan and design, consolidation and restructuring. Entities eligible for funding include cities, towns, counties, public facilities boards, improvement districts, regional water distribution districts, community water systems and regional development authorities.

Types of assistance approved under the program include low-interest loans up to 20 years or the life of the project, whichever is less, or up to 30 years or the life of the project for disadvantaged communities,

whichever is less. The Arkansas Natural Resources Commission (ANRC) is the lead agency for the Safe Drinking Water Revolving Loan Fund Program. ANRC works with ADH to identify eligible projects. In order for a project to receive funding it must be listed on the federal DWSRF project priority list.

Through an interagency agreement, the Arkansas Development Finance Authority (ADFA) serves as the financial manager for the program. ADFA is responsible for investing and disbursing funds as authorized by ANRC, servicing loans, preparing and submitting monthly financial reports and annual financial statements and procuring audit services.

ADFA and ANRC use a priority system for funding projects based on three criteria from the Act. Priority is given to projects that:

- Address the most serious risk to human health
- Are necessary to ensure compliance with the requirements of SDWA and
- Assist systems most in need, on a per-household basis, according to state-determined affordability criteria.

The federal government annually provides money to states, which, in turn, negotiate loans at below-market interest rates to pay for qualifying improvements to drinking water system infrastructure. Each state's grant allotment is proportional to the total state need identified in the most recent national assessment of drinking water infrastructure needs. States use the principal and interest payments received from loan recipients to provide more loans. According to EPA, Arkansas' appropriation was \$10.33 million for fiscal year 2007. States are allowed to make loans for eligible

projects to publicly owned, privately owned and nonprofit community water systems and non-community water systems.

There are five basic categories of eligible projects:

- Treatment
- Transmission and distribution
- Source
- Storage and
- Consolidation

Items specifically excluded from DWSRF eligibility include:

- Expenditures for monitoring, operations and maintenance
- Projects whose primary purpose is to facilitate growth
- Projects to construct or rehabilitate dams and reservoirs
- Projects to obtain water rights and
- Projects needed primarily for fire protection.

For more information on the Safe Drinking Water Fund Program, contact the Arkansas Natural Resources Commission at 501-682-1611 or go to ANRC's web site at <http://www.anrc.arkansas.gov>.

Additional Resource

Fact Sheet 109 (FSPPC109) – *Glossary of Water-Related Terms* – contains a comprehensive list of terms used in the Arkansas Water Primer Fact Sheet Series.

¹ 33 U.S.C. Section 1342(a) (1) and (2); States with approved programs may administer permit requirements and issue and enforce permits; 33 U.S.C. Section 1342(b); 40 CFR Section 122 et seq for provisions regarding activities required to obtain permits; activities not requiring permits; modification; revocation and reissuance of permits; schedules of compliance.

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