

University of Colorado Law School

Colorado Law Scholarly Commons

The Federal Impact on State Water Rights
(Summer Conference, June 11-13)

1984

6-12-1984

Effects of the Clean Water Act on Water Availability and Development

Paula C. Phillips

Follow this and additional works at: <https://scholar.law.colorado.edu/federal-impact-on-state-water-rights>



Part of the [Administrative Law Commons](#), [Animal Law Commons](#), [Biodiversity Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Energy and Utilities Law Commons](#), [Environmental Health and Protection Commons](#), [Environmental Law Commons](#), [Indian and Aboriginal Law Commons](#), [Jurisdiction Commons](#), [Legislation Commons](#), [Litigation Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Power and Energy Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Phillips, Paula C., "Effects of the Clean Water Act on Water Availability and Development" (1984). *The Federal Impact on State Water Rights (Summer Conference, June 11-13)*.
<https://scholar.law.colorado.edu/federal-impact-on-state-water-rights/11>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library
COLORADO **LAW**
UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

Paula C. Phillips, *Effects of the Clean Water Act on Water Availability and Development*, in THE FEDERAL IMPACT ON STATE WATER RIGHTS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1984).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

EFFECTS OF THE CLEAN WATER ACT
ON WATER AVAILABILITY AND DEVELOPMENT

Paula C. Phillips
Assistant Attorney General
Natural Resources Section
Denver, Colorado

Federal Impact
on
State Water Rights

University of Colorado
School of Law
Boulder, Colorado
June 11-13, 1984



Effects of the Clean Water Act
on Water Availability and Development

I. The Federal Clean Water Act

A. Historical background: the legislative response
to water pollution abatement

1. Early local and state regulation
2. First federal involvement: Water Pollution Control Act of 1948, consisting primarily of financial and coordinating support for state efforts
3. Water Quality Act of 1965: advent of water quality standards
 - a. Focus was on the receiving waters
 - b. States were required to
 - (1) set standards for interstate watercourses adequate to preserve designated uses and
 - (2) adopt a plan for the implementation and enforcement of the criteria
 - c. The states' responses were subject to federal review
 - d. Absent effective state action, the federal government was to promulgate water quality standards
4. Shortcomings of the water quality standards approach (See generally EPA v. California ex rel. State Water Resources Control Board,

426 U.S. 200 (1976))

- a. Lack of effectiveness in dealing with point sources, due primarily to the difficulty of extrapolating individual effluent limitations from a general ambient level in the receiving waters
 - b. Awkwardness of the scheme for federal-state sharing of responsibility
 - c. Cumbersome enforcement proceedings
- B. Federal Water Pollution Control Act Amendments of 1972: a radical change in the congressional approach to pollution abatement
1. Established dramatic goals and policies designed to attain the objective of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a), 33 U.S.C. § 1251(a))
 - a. Eliminate the discharge of pollutants into navigable waters by 1985
 - b. Where attainable, achieve "fishable, swimmable" water by July 1, 1983
 - c. Prohibit the discharge of toxic pollutants in toxic amounts
 - d. Provide financial assistance for construction of municipal waste treatment plants
 - e. Develop and implement areawide waste treat-

ment management planning

- f. Implement a major research and demonstration effort to develop the necessary technology to eliminate pollution discharges
2. Asserted broad federal power and jurisdiction under the commerce clause; "navigable waters" is defined as "waters of the United States," which has been held to encompass all waters over which Congress may constitutionally exercise jurisdiction (Section 502(7), 33 U.S.C. § 1362(7); see United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); Leslie Salt Co. V. Froehlke, 578 F.2d 742 (9th Cir. 1978))
 3. Retained a cooperative federal-state scheme while shifting the balance from the states to the federal government
 - a. The Environmental Protection Agency was authorized, inter alia, to
 - (1) establish effluent standards for industrial and municipal waste discharges (See section 304(b), 33 U.S.C. § 1314(b))
 - (2) establish effluent and pretreatment standards for toxic substances (Section 307, 33 U.S.C. § 1317)

(3) enforce its standards through National Pollution Discharge Elimination System (NPDES) permits (Section 402, 33 U.S.C. § 1342)

(4) establish an administrative structure for basin planning and areawide waste treatment management planning done by the states or regional planning agencies (Sections 208, 303(e), 33 U.S.C. §§ 1288, 1313(e))

b. The states retained a major role in the Act's implementation

(1) Among the areas for which the states are primarily responsible are

(a) fulfilling the water quality management requirements of Section 208 (33 U.S.C. § 1288)

(b) establishing, revising, and enforcing water quality standards on interstate streams (carried forward, with important modifications, from the '65 Act) and total maximum daily loads for pollutants where effluent limitations alone will not satisfy standards; and developing and imple-

menting a "continuing planning process" (Section 303, 33 U.S.C. § 1313)

- (2) A state may also assume responsibility for the NPDES permit program, subject to EPA approval

II. Some specific areas of tension between water quality control and appropriative rights

A. Water quality standards on interstate streams
(Section 303, 33 U.S.C. § 1313)

1. 1972 amendments retained and expanded upon the role under the '65 Act of water quality standards in controlling nonpoint source pollution
2. Water quality standards consist of
 - a. Designated use(s) for particular stream segments within a state
 - b. Water quality criteria sufficiently stringent to protect the desired use
 - c. A plan for the implementation and enforcement of the criteria
3. States must
 - a. Identify waters where effluent limitations alone will not be stringent enough to satisfy water quality standards
 - b. Establish a priority ranking for such waters
 - c. Establish the "total maximum daily loads"

for pollutants identified by EPA

- d. Establish total maximum daily thermal loads necessary to protect a "balanced, indigenous population" of fish, shellfish, and wildlife
4. Potential conflicts with state water rights: Colorado River salinity pollution exemplifies some of the difficulties
- a. Interstate and international pollution problem
 - b. A large part of the pollution load is contributed by nonpoint sources
 - c. Because of salt-concentrating effects, absent controls increased beneficial consumptive use would exacerbate the pollution

B. Areawide waste treatment management planning (Section 208, 33 U.S.C. § 1288)

- 1. Provides for state designation of areas with substantial water quality control problems and of a "representative organization" for each area "capable of developing effective area-wide waste treatment management plans for such area"
- 2. The state acts as planning agency for nondesignated areas
- 3. Plans must contain management alternatives

and be applicable to all wastes generated within the area

4. Additional, detailed requirements for 208 plans include, inter alia,
 - a. Identification of needed treatment works over a twenty-year period and development of a program to finance, locate, and construct such works
 - b. Provision for the application of best practicable waste treatment technology, including reclaiming and recycling of water (Section 201, 33 U.S.C. § 1281)
 - c. Development of processes to identify, and procedures and methods to control "to the extent feasible," agricultural, silvicultural, mining, and construction sources of pollution
 - d. Control of salt water intrusion "resulting from reduction of fresh water flow from any cause"
 - e. A process to control disposition of all residual waste that could affect water quality
 - f. A process to control land disposal of pollutants to protect ground and surface water

5. After approval of such a plan, no NPDES permit may be issued that is in conflict with the plan, nor may any grant for construction of a publicly owned treatment works be made except for works in conformity with the plan
 6. Potential conflicts with state water rights
 - a. The broad scope of the 208 planning mandate and of the regulatory authority to implement plans raises a number of water quantity and allocation issues
 - b. Control of wastewater facility siting, for example, would also determine the location of return flows
 - c. Control of treatment technology, particularly with the emphasis on recycling and reuse, could change consumptive use patterns
 - d. Specification of best management practices could significantly alter patterns of use and hence historic stream conditions and the balance between ground and surface water
- C. The NPDES program (Section 402, 33 U.S.C. § 1342)
1. Prohibits point-source discharges of pollutants

except in compliance with a permit issued by EPA or a state with an authorized program

2. Potential conflicts with state water rights
 - a. Treatment technology
 - b. Best management practices

D. Corps of Engineers dredge and fill permits (Section 404, 33 U.S.C. § 1344)

1. Required for the "discharge of dredged or fill material into the navigable waters," i.e., the waters of the United States
2. Applications are subjected to a broad-ranging public interest review
3. EPA is empowered to veto or restrict any permit if it finds that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas"
5. Potential conflicts with state water rights
 - a. The scope of water-use related construction subject to Section 404 requirements is broad
 - b. Virtually any limitation imposed by either the Corps or EPA has the potential for influencing at least the manner in which a

water right is exercised and, where a permit is denied, the viability of the right itself

- III. Some constitutional and statutory issues raised by the tension between pollution control requirements and appropriative rights
 - A. The extent to which the Clean Water Act recognizes and deals with the competing interests
 - B. Colorado's response: 1981 amendments to the Colorado Water Pollution Control Act
 - C. Some (many) unanswered questions