

Overview of Clean Water Act and Porter-Cologne Water Quality Control Act

Karen O'Haire, Sr. Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
May 18, 2010

Introduction

- Federal Clean Water Act
- State Porter-Cologne Water Quality Control Act
- Differences between the federal and state water quality statutes

Federal Clean Water Act

- Federal Water Pollution Control Act first enacted in 1948
- Major overhaul with Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1251 et seq.)
 - Commonly referred to as the Clean Water Act
 - Established national goals
 - Various titles
 - Established research program
 - Created massive grant program
 - Standards program (both water quality and technology-based)
 - Permitting/license program

Federal Clean Water Act (cont...)

- Made it unlawful to discharge any pollutant from a point source to *waters of the United States* without a permit
- 1972 amendments were an enormous shift:
 - From reliance on violations of ambient water quality standards as the primary enforcement tool, to
 - Establishment of specific technology-based effluent limitations that are enforceable as permit conditions
- Assumption that technology-forcing components would solve water pollution problems
- Water quality standards still seen as a backstop and required to be implemented as permit conditions

Federal Clean Water Act (cont...)

What are *Waters of the United States* ???

- Surface Waters, not Ground water
- YES: Traditionally navigable waters and relatively permanent non-navigable tributaries to TNWs
- YES: Wetlands adjacent to either of above
- NO: isolated wetlands (Solid Waste Agency of Northern Cook County –SWANCC)
- NO: Waterbodies that lead nowhere (non-tributaries)
- UNCLEAR: Other tributaries to TNWs -- must have significant nexus for dredge and fill permit (Rapanos), probably not for NPDES permit (Talent)

Federal Goals & Policy

- Lofty congressional goals and policy guide the courts' construction of the Act
 - to restore and maintain the chemical, physical, and biological integrity of the Nation's waters
 - it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985
 - it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983
 - it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited

Federal Standards and Limitations

- Effluent limitations (33 U.S.C § 1311)
 - A system of minimum national effluent standards for each industry created to reflect best practicable control technology
 - More stringent requirement of best available technology economically achievable for toxic pollutants
 - Pretreatment for industries discharging to publicly owned treatment works
 - Secondary treatment for publicly owned treatment works
 - Industrial/municipal storm water requirements added in 1987 (33 U.S.C. § 1342(p))
 - Any more stringent limitation necessary to implement water quality standards (33 U.S.C. § 1311(b)(1)(C); *Burbank* 35 Cal.4th 613)

Water Quality Standards

- Standards and implementation plans (33 U.S.C § 1313)
 - Consist of
 - (1) Designated uses
 - Public water supply
 - Fish and wildlife
 - Recreation
 - Agricultural use
 - Industrial use
 - (2) Criteria used to protect the designated uses
 - Regulations also require an anti-degradation policy that the USEPA treats as a standards requirement (40 C.F.R. § 131.12)
 - Criteria requires consideration of “value” and “serves the purposes of the act”
 - Designated uses must be “appropriate”

Water Quality Standards (cont...)

- Must consider downstream uses to be protected (“tributary rule”)
- Use attainability analysis (UAA)
 - Existing uses (any time after 1975) can not be removed (40 C.F.R. § 131.10(h))
 - Designated uses can only be removed through a UAA (40 C.F.R. § 131.10(g))
 - Regulations essentially create a presumptive designation that waters will be fishable/swimmable, unless the state prepares a UAA to avoid designating fishable/swimmable (40 C.F.R. § 131.10(j))
- Water quality standards must be reviewed at least every three years (“triennial review”)
- Water quality standards must be reviewed and approved by USEPA before becoming effective (“Alaska Rule”)
- USEPA can establish water quality standards if the state fails to act or if USEPA determines that state water quality standards not consistent with the Act

Water Quality Standards (cont...)

- Total maximum daily loads (TMDLs) (40 C.F.R. § 130.7)
 - Backstop when other water quality requirements have failed
 - Identify waterbodies that fail to attain standards
 - Typically the biennial “303(d) list” of impaired water bodies
 - Develop TMDL to attain standard
 - A TMDL is the amount of a specific pollutant that a waterbody can receive and assimilate and still meet water quality standards
 - A TMDL must include a margin of safety taking account of lack of knowledge and critical conditions
 - TMDLs address all sources of pollution, either point or nonpoint
 - States, not EPA, responsible for nonpoint source implementation
 - (*Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123)
 - TMDLs are approved or disapproved by USEPA
 - If disapproved, USEPA develops the TMDL
- TMDLs may increasingly drive water quality regulation in California

Clean Water Act Permits

- Water quality certification by the state to receive a federal permit (33 U.S.C. § 1341)
 - State's power to ensure federally licensed projects that may discharge pollutants to waters of the United States meet state water quality standards
 - Conditions of state certification become part of federal permit
 - Unusual state veto power over federal projects where there is broad preemption
- Dredge and fill permit (33 U.S.C. § 1344)
 - Issued by U.S. Army Corps of Engineers
 - Discharge of dredged or fill material into navigable waters

NPDES Permits for Point Sources

- National Pollutant Discharge Elimination System (NPDES) permits (33 U.S.C. § 1342)
 - Must be applied for and obtained by anyone discharging pollutants into U.S. waters from any point source
 - Operated as an in lieu program in most states
 - USEPA can authorize a state to issue permits or certain classes of permits
 - USEPA can continue to issue permits (i) for specific classes or (ii) upon objection to a specific NPDES permit issued by the state
 - Specifies the discharge standards and monitoring and reporting requirements that a facility must achieve for each point source or outfall

NPDES Permits for Point Sources

(cont...)

- Requires more stringent controls when toxic pollutants are discharged
 - Regulations for toxics are based on best available and economically achievable technology
- Special rules for point source storm water discharges (33 U.S.C. § 1342(p)(3)(A))
 - Industrial facilities must meet same technology standards and water quality standards required by 33 U.S.C. § 1311
 - Municipalities subject to “maximum extent practicable” and such other requirements as administrator/state determines appropriate

NPDES Permits for Point Sources

(cont...)

- Statutory Permit Exemption for “discharges composed entirely of return flows from irrigated agriculture”
 - 33 USC Sec. 1342(I)(1)
- Statutory Permit Exemption for “agricultural stormwater discharges”
 - 33 USC Sec. 1362(14)

NPDES Permits for Point Sources

(cont...)

- Former Regulatory Permit Exemption for application of pesticides consistent with FIFRA label if applied to waters to control aquatic pests or over waters to control pests that are near waters.
 - Rejected in *Nat'l Cotton Council*
 - Exemption effective until April 9, 2011
 - State Water Board general NPDES permits

State Water Quality Law

- Porter-Cologne Water Quality Control Act (Water Code, § 13000 et seq.)
 - State Water Resources Control Board
 - Coordinated water quality and water rights responsibility (Wat. Code, § 174)
 - State water pollution control agency for all purposes under the Clean Water Act (Wat. Code, § 13160)
 - Establishes state policy on water quality control
 - Serves as appellate body for most adjudicative decisions of the regional water boards
 - Regional water quality control boards
 - Nine regional water boards
 - Semiautonomous (budget and legal controlled by State Board)
 - Responsible for day-to-day implementation of Porter-Cologne and Clean Water Act in California

Porter-Cologne – Basin Plan

- Water quality control plan = basin plan
- Regional board's primary regulations
 - Planning function for water boards
 - Is a regulation under the Administrative Procedure Act with specialized process
 - Provides the underlying basis for most of the Regional Board's actions (e.g., permit conditions, cleanup levels)
- Consists of three elements
 - Beneficial uses
 - Water quality objectives to reasonably protect beneficial uses
 - Implementation program for water quality objectives (includes most TMDLs)
- Must be approved by State Water Board

Porter-Cologne – Basin Plan (cont...)

- Periodically reviewed
- Basin plan requirements for waters of the United States
 - Serve as water quality standards under the Clean Water Act
 - May also be adopted by the State Water Board
 - Must be approved by USEPA
 - Must be reviewed every three years
- State agencies (including water boards) shall comply with plans approved by the State Water Board (*Wat. Code, §§ 13146, 13247; see also SWRCB Cases, 136 Cal.App.4th 674.*)

Porter-Cologne – Water Quality Tools

- Waste discharge requirements (a.k.a. permits) (*Wat. Code, § 13263*)
 - Covers all discharges that “could affect the quality of waters of the state”—surface or groundwater
 - Shall implement the relevant basin plans
 - Shall take into considerations
 - Beneficial uses to be protected
 - Water quality objectives reasonably required for that purpose
 - Other waste discharges
 - The need to prevent nuisance
 - Provisions of Water Code section 13241 (e.g., economic considerations, need for housing, need the recycled water)
 - Waste discharges are privileges, not rights

Porter-Cologne – Water Quality Tools

(cont...)

- Some waste discharge requirements also serve as Clean Water Act NPDES permits (*Wat. Code, § 13377; Chapter 5.5, Wat. Code, § 13370 et seq.*)
 - Affects the considerations required under section 13263 (*Burbank, 35 Cal.4th 613*)
 - CEQA exemption (*Wat. Code, § 13389*)
 - Mandatory penalties for certain violations (*Wat. Code, §§ 13385, 13399.33*)
 - Citizen suits (*33 U.S.C. § 1365*)

Porter-Cologne – Water Quality Tools

(cont...)

- Waivers of waste discharge requirements ([Wat. Code, § 13269](#))
 - Available if discharge consistent with basin plan and waiver in the public interest
 - Must be conditional
 - Generally must include monitoring
 - Not available for discharges to waters of the United States
- Cleanup and abatement orders ([Wat. Code, § 13304](#))
 - To any person who causes or permits waste to be discharged where it may reach a water of the state
 - Either in violation of WDRs or other order or prohibition, or if it threatens a condition of pollution or nuisance
- Cease and desist orders ([Wat. Code, § 13305](#))
 - Used to address violations, or threatened violations, of waste discharge requirements or discharge prohibitions

Differences: Purpose

Clean Water Act:

- “Restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

(33 U.S.C. § 1251(a))

Porter-Cologne:

- “The quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.
- “Activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable.”

(Wat. Code § 13000)

Differences: Discharge Permits

Clean Water Act:

- NPDES/404
- Discharge to waters
 - Not Irrigated Ag Return
- Pollutants
- Navigable Waters
 - Waters of the United States
 - Generally surface waters
 - But see *SWANCC*,
Rapanos

Point sources only

Porter-Cologne:

- WDRs
- Discharge could affect water quality
- Waste
- Waters of the State
 - Surface, ground, and saline waters,
 - Includes waters of the United States
 - Includes wetlands
- Point and nonpoint

Differences: Enforcement

Clean Water Act:

- Criminal/civil/admin
 - Feds, state, or citizens can enforce NPDES permits
- Max admin penalties of \$10,00 per day of violation and \$10 per gallon discharged
- California NPDES permits: some mandatory penalties of \$3,000 per violation
- Debarment

Porter-Cologne:

- Criminal/civil/admin
 - Generally only state can enforce waste discharge requirements and waivers
- Max admin penalties of \$5,000 per day of violation or \$10 per gallon of waste discharged

Questions

