

FEDERAL-STATE ENVIRONMENTAL AGENCY RELATIONSHIPS: A WEAK CONFEDERACY

Douglas P. Haines

AUTHORS: Executive Director and Founder, Georgia Center for Law in the Public Interest, 264 N. Jackson Street, Athens, Georgia 30601.
REFERENCE: *Proceedings of the 1999 Georgia Water Resources Conference*, held March 30 and 31, 1999, at the University of Georgia.
Kathryn J. Hatcher, editor, Institute of Ecology, The University of Georgia, Athens, Georgia 30602-2202.

Abstract. The relationship between state and federal environmental agencies has changed significantly over the last several years as concepts of "devolution" and increased local control have gained increasing political force. The United States Environmental Protection Agency (EPA) no longer speaks in terms of strong federal environmental authority, but discusses state-federal relationships in terms of "partnerships" and "win-win" situations. States, including Georgia, regularly express their unwillingness to undertake environmental programs and responsibilities which are not uniformly required of all states. As a result, the relationship between federal and state agencies, and their respective roles in responding to water quality issues has become less clear. Citizens must play an increasingly important role in overseeing the actions of the environmental agencies, and must push for state-federal agreements, including Performance Partnership Agreements (PPA), which state with particularity the respective roles of state and federal environmental agencies.

A RECENT HISTORY OF FEDERAL-STATE ENVIRONMENTAL AGENCY RELATIONSHIPS

The environmental community expressed cautious optimism at the election of Bill Clinton in 1992. Many believed that the incoming administration would begin to reassert more federal authority over the nation's environmental laws and reverse the twelve-year trend of diminishing federal control which had characterized state/federal relationships during the administrations of Presidents Reagan and Bush. The level of optimism in Georgia increased when Carol Browner was named as Administrator, and even more so when John Hankinson was named as Region IV Administrator. The regulated community and states, evidently anticipating a major change in EPA's role, appeared resigned to accepting a stronger federal role in environmental protection. At the beginning of the Clinton/Browner/Hankinson era, EPA appeared poised to take a more prominent position vis-a-vis the states, yet also offered to engage in dialogue with states

regarding potential partnerships, and increased roles for the public in environmental decisionmaking. The prospects for strong, comprehensive federal/state/public agreements were good, with the administration flexing its new-found muscle, yet offering to seek middle ground at the same time.

The mid-term elections of 1994 brought an end to Democratic control of the House and Senate, and also to the willingness of state and regulated communities to find a compromise position on the exercise of federal environmental authority. The "Republican Revolution" also brought a halt to any hope that EPA would exert strong federal control over Clean Water Act issues. Instead, EPA and the Department of Justice (DOJ) began to warn pro-environment litigants that citizen suit activity under federal environmental laws might cause the Republican Congress to severely weaken major environmental laws, including the Clean Water Act and the Endangered Species Act. Litigants in Georgia and several other states were warned that their attempts to enforce Total Maximum Daily Load (TMDL) provisions under Clean Water Act §303 might cause Congress to weaken or eliminate the TMDL provisions because, EPA feared, Congress might consider the TMDL provisions to be "unfunded mandates." While TMDL litigants in Georgia, and nationwide generally were not dissuaded from going forward, several national environmental groups refrained from litigating Endangered Species Acts claims after they convinced themselves that pursuing ESA claims would give rise to "takings" alarms, and cause Congress to eliminate the Act altogether. So, on several environmental fronts, environmental organizations joined EPA in a culture of environmental activism atrophy. In essence, the EPA and many in the environmental community had decided that the rule for enforcing certain environmental laws was: "Don't use them or you'll lose them. [Notably, congress failed in efforts to weaken environmental laws, and in the next two election cycles, American voters from all political persuasions sent Washington a clear message that the American voters will not support weakening of federal environmental laws.]

At the national level, EPA signaled its unwillingness to take a stronger federal role in enforcing federal

environmental laws. Instead, EPA pushed for cooperative and "stakeholder" solutions, including such promising programs as Project XL and the Common Sense Initiative. However, with EPA no longer willing to flex its federal muscle for fear of offending states' rights-oriented governors and entrenched heads of state environmental agencies, EPA marched forward through much of this decade armed only with carrots, but little visible stick. Industry, and prospective state partners exhibited no great willingness to find environmental middle ground so long as they did not perceive EPA as a powerful enforcement threat. Georgia EPD and other state environmental agencies refused to undertake environmental protection programs unless EPA specifically required every state to undertake a similar program. So, as EPA remained essentially silent about state agency responsibilities, Georgia EPD refused to devote resources to new programs, including the TMDL program.

CITIZEN ACTION STIMULATES EPA EXERCISE OF FEDERAL AUTHORITY

The Georgia environmental community took several steps which moved EPA into a more active role in Georgia water quality issues. 1) EPA was convinced to get involved in several high profile CWA citizen suits; 2) Georgia's delegated authority to carry out the NPDES permitting program was challenged by a withdrawal petition and by federal court order; and 3) EPA was forced to accept specific programmatic and oversight functions as a result of the Georgia TMDL lawsuit.

First, EPA was convinced to take enforcement action in several high profile CWA citizen suits where Georgia EPD had failed to diligently prosecute facilities with long histories of NPDES violations and/or where Georgia EPD had failed to resolve longstanding environmental problems. In several citizen actions, which received high levels of media attention (only three are specifically identified here), EPA agreed to accept a stronger enforcement role. EPA's entrance on the scene usually stirs action by Georgia EPD. The most notable example was EPA's decision to bring an enforcement action regarding the City of Atlanta's sewage treatment system. EPA's involvement (EPA brought Georgia EPD along in the investigation as well) was stimulated by the tremendous media attention generated by Upper Chattahoochee Riverkeeper Fund et al. v City of Atlanta (N.D.Ga 1:95-CV-2550-TWT). This 1995 case involved longstanding and egregious CWA violations by the City of Atlanta where Georgia EPD enforcement had been ineffective. Similarly, in 1998, EPA brought suit to address longstanding land application system (LAS) problems of

Dalton Utilities in, *United States v. Dalton Utilities*, (N.D.Ga. 4:98-CV-191-HLM)(pending case). EPA filed suit (and Georgia EPD followed) after the Georgia Center for Law in the Public Interest and the State of Alabama filed notices of intent to sue. Also in 1998, EPA was convinced to take indirect federal oversight action related to the pending case of *Sierra Club v Georgia Power*, (M.D. Ga. 5:97-CV-78-3(HL) (11th Cir. Case No. 98-9011)(cases pending in District Court and Court of Appeals). EPA requested that Georgia EPD retract a proposed NPDES permit after citizen suit litigants presented a compelling case that Georgia EPD's proposed NPDES permit could not rectify environmental problems. EPA's intervention (and expected permit modifications by Georgia EPD) is expected to finally require Georgia Power to install heat reduction technology, which had never been required by Georgia EPD despite annual exceedances of permit temperature limits in 22 of 23 years that the facility had been permitted by Georgia EPD. Absent citizen action, it is unlikely that EPA (and then, Georgia EPD) would have gotten involved in the Georgia Power, City of Atlanta, and Dalton Utilities cases.

Federal action and state response has also been stimulated by the environmental community's threats to strip Georgia EPD of its delegated NPDES permitting authority under the CWA. In 1997, the Southern Environmental Law Center (SELC) filed a petition to decertify Georgia's program based on a number of alleged failings by Georgia EPD, including failure to carry out TMDL responsibilities, inadequate permitting, lack of stormwater programs, and inadequate public participation in agency decisionmaking. If EPA were to accept the allegations and withdraw Georgia's certification to carry out the NPDES program, EPA would be required to take over sole responsibility for the Georgia program. Not surprisingly, EPA is less than anxious to take over a state program, and thus, has never completely granted a decertification petition. However, EPA's fear of having a state program land in its lap caused EPA to take a more active role in convincing Georgia EPD to alter its NPDES program to better carry out CWA responsibilities. While decertification petitions have provided indirect leverage against intransigent states, a court order in the Georgia TMDL case made clear that Georgia EPD stood on the cusp of having its NPDES program withdrawn by a federal court. The court ruled that, [i]f the State refuses to implement TMDLs through the NPDES process, EPA shall withdraw certification of the State NPDES program, pursuant to CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3) and 40 CFR § 123.63(a)(5) (withdrawal permitted where the State has not "develop[ed] an adequate regulatory program for developing water-quality based effluent limits in NPDES

permits"). *Sierra Club v Hankinson*, 939 F.Supp. 872, 874 (N.D.Ga. 1996).

The Georgia TMDL suit has also had a profound effect in forcing EPA to take a more active role in overseeing and compelling CWA compliance by Georgia EPD. The statutory framework of the Clean Water Act provides EPA with an oversight function to ensure that states carry out their delegated responsibilities. The Court acknowledged that states with delegated programs are primarily responsible for carrying out the CWA, yet found that "the [CWA] requires EPA to step in when states fail to fulfill their duties under the [CWA]." *Sierra Club v Hankinson*, 939 F.Supp. 865, 871 (N.D.Ga. 1996). The Court found that the State had failed to carry out its TMDL responsibilities, and entered an order establishing a TMDL process backed by an assurance that EPA is ultimately responsible for completing each step in the process. *Sierra Club v Hankinson*, 939 F.Supp. 872 (N.D.Ga. 1996).

The Georgia Center for Law in the Public Interest and EPA entered various settlement agreements and consent decrees which required EPA to accomplish certain tasks, most notably, developing TMDLs in entire river basins in accordance with a statewide rotating schedule. Each river basin has two deadlines for developing TMDLs; one deadline for the state, and, two months later, a deadline for EPA TMDL development in the event the state fails to meet its obligations. EPA fears that it might be saddled with an inordinate amount of the TMDL process work, and has an even greater fear that other states will similarly shunt their TMDL responsibilities to EPA. This fear can be expected to cause EPA to seek agreements with states that place the lion's share of TMDL responsibilities on states. Of course, such agreements will help to clarify federal-state relationships.

The terms of the TMDL settlements and consent decrees require EPA to provide significant assistance to Georgia EPD, both in carrying out TMDL development responsibilities, and in reviewing and recommending improvements in Georgia's TMDL programs. EPA has, or will have completed by the date of publication of this article, reports and recommendations to Georgia EPD regarding CWA §303(d) listing procedures, design of §303(d) water quality monitoring programs, §303(d) listing requirements for toxic impaired waters, and an analysis and recommendations for addressing water quality problems from forestry activities. These EPA reports and recommendations establish concrete criteria by which Georgia EPD programs can be assessed. State agencies are often loathe to provide verifiable success benchmarks because state agencies recognize that such benchmarks provide an easy basis for federal oversight and enable the

public to assess the effectiveness of state programs. Benchmarks also provide a ready basis for citizens to take action to rectify easily verifiable agency shortcomings. The court-ordered EPA reports constitute a significant alteration of the typical federal-state relationship in that it is unlikely that these issues would have been addressed at a policy or technical level had there not been citizen suit enforcement of the Clean Water Act.

The Georgia TMDL process also alters federal-state-public relationships because court orders and legal agreements dictate specifically the roles that EPA and Georgia EPD must take. Citizens can be involved readily because agency responsibilities must be satisfied in predetermined locations, with precise requirements for agency tasks. This means citizens can watchdog agency activity, and, more importantly, participate in the TMDL process by adding their efforts to the planned agency activities.

Although citizen action has been successful in facilitating a federal-state relationship which is more accountable to the public, and which better defines EPA's oversight responsibilities, the relationship between EPA and Georgia EPD still requires significant clarification.

THE PERFORMANCE PARTNERSHIP AGREEMENT

The Performance Partnership Agreement (PPA)(these agreements were known as a "work agreements" before the verbiage of compromise and conciliation dominated the federal-state vocabulary) should provide an effective mechanism for clarifying the respective roles and responsibilities of EPA and Georgia EPD. The current PPA proposal (all discussion will reflect publicly available PPA drafts as of January 21, 1999) clarifies many aspects of the EPA-Georgia EPD relationship, and identifies specific program commitments of each agency. However, the PPA continues to reflect the historical propensity of EPA and Georgia EPD to maintain a relatively ill-defined relationship.

One of the major shortcomings of the PPA is that neither EPA nor Georgia EPD appear fully committed to engaging the public in a dialogue about what the PPA should contain. While public participation was encouraged and facilitated, neither agency expressed any willingness to enter an ongoing dialogue regarding PPA issues, choosing instead to simply collect comments and make intra-agency decisions whether to ignore or incorporate suggested changes to the PPA. To their credit, EPA and Georgia EPD specifically provided for public participation in the 1999-00 PPA process, including sponsoring a meeting where the public could discuss a first draft of the PPA with representatives

of both EPA and Georgia EPD. This was a great improvement over the previous PPA draft process, which initially provided for no public participation. At public request, a hearing ultimately was held for the previous PPA, and was attended by several EPA representatives who willingly responded to public concerns. However, many who attended the hearing expressed concern that the PPA drafting process might be little more than a perfunctory exercise, noting that Georgia EPD did not send a single representative to the only public meeting.

The PPA will not achieve broad public acceptance until the public is brought in as an equal partner in a dialogue which includes EPA, Georgia EPD, and the public.

The PPA is also deficient because it fails to state goals which are objective, quantifiable or measurable. According to the PPA, "[t]he long-term goal for the Water Protection Branch is to use the 1994-1995 305(b) report waters not fully supporting as a baseline and increase by 10% the percentages of river miles, estuary acres, and lake acres fully supporting designated uses by the year 2005." This goal is not clear as to how it can be measured, or as to what must be accomplished to satisfy the goal; it uses an inadequate baseline for comparative purposes, and; it states a very unambitious goal which would require centuries to remediate existing water quality problems.

The PPA also fails to specifically describe the oversight functions of EPA. This is particularly troubling regarding permitting and permit oversight. The fact that facially inadequate NPDES permits have been issued and then repeatedly reissued by Georgia EPD highlights the present inadequacy of EPA's NPDES oversight. EPA must take a more active role in NPDES oversight, and EPA's responsibilities should be stated specifically in the PPA. Instead, the PPA uses vague terms which simply suggest that EPA will have an "effective" program, or that EPA will deal with problems "expeditiously," yet fails to define what "effective" or "expeditious" means. Absent clear definitions, the public has no clear guidance about what it has a right to expect from its environmental agencies.

CONCLUSION

The effectiveness of state environmental agencies depends in large part on strong leadership at the federal level by EPA. Absent leadership, technical assistance, policy guidance, and diligent oversight by EPA, some state agencies can be expected to neglect important water quality protection responsibilities. Citizen suits and other concerted citizen action can move EPA toward taking a stronger role vis-a-vis state agencies, but these actions alone cannot assure an effective federal-state relationship.

Ultimately, this relationship must be governed by a comprehensive PPA which details the specific roles and responsibilities of federal and state environmental agencies. Such a PPA will never be created in Georgia until EPA, citizens, and Georgia EPD agree to work together in drafting such an agreement.