

# ELR

## NEWS & ANALYSIS

### A Brief History of CWA §319 Implementation Policies

by Sara Hilbrich

In 1987, the U.S. Congress amended the Clean Water Act (CWA) to establish a national nonpoint source (NPS) program under §319.<sup>1</sup> The statute allows states meeting preliminary criteria to receive federal grant money from the U.S. Environmental Protection Agency (EPA) to address NPS pollution. To be eligible for grants, first, each state must identify and report which of its water bodies have not attained or will not maintain state water quality standards, the sources of nonpoint pollution into those waters, and the potential for remedial action.<sup>2</sup> Second, each state must submit to EPA a management program plan that identifies and implements best management practices and other measures to control NPS pollution.<sup>3</sup> Once EPA approves a state's assessment report and management program plan, the state becomes eligible for federal grants to implement the program.<sup>4</sup> Although §319 specifies a 10% cap on administrative spending,<sup>5</sup> it does not otherwise delineate what types of projects or programs may or may not receive funding.<sup>6</sup> Section 319 emphasizes that priority will be given to "effective" activities.<sup>7</sup>

Under §319, a state may receive grant funds only if EPA determines that the state has made satisfactory progress meeting the goals in its management plan during the previous year.<sup>8</sup> To this end, the statute contains some general reporting provisions. EPA may request information, data, and reports as necessary to assess a state's continuing eligibility.<sup>9</sup> And states must report annually both on their progress in meeting milestones, and, as available, information on reductions of NPS pollutant loadings and/or improvements to water quality.<sup>10</sup> Additionally, all grants are subject to EPA's

general grant requirements under 40 C.F.R. Parts 31 and 35, Subpart A.<sup>11</sup>

Instead of implementing the §319 program via static regulations, EPA has published a succession of guidance documents and, more recently, rules published as guidelines, since the program's inception. Thus, the Agency has retained the flexibility to adapt to changing circumstances. While the baseline requirements mandated by the statute have remained the same, implementation and grant priorities have changed over time. This Article reviews the evolution of the §319 grants program with particular attention to EPA funding priorities and state accountability and reporting requirements. It should be of value to environmental policy analysts, lawyers, and environmental historians seeking to understand the development of this modern-era federally funded but state-implemented program to deal with the largest remaining threat to U.S. water quality—NPS pollution.

#### Early Choices in Program Development

EPA's first guidance in December 1987,<sup>12</sup> established the process for submission and approval of state NPS assessments and management programs. It also highlighted 10 priority activities for states to consider implementing: addressing serious problems (such as agricultural runoffs); implementing innovative methods or practices, i.e., enforcement; controlling interstate pollution; protecting groundwater; addressing nationally significant, high-risk NPS problems; integrating federal, state, and local programs; addressing cross-media issues; providing for monitoring and evaluation; integrating other CWA requirements; and building long-term institutions.

In 1989, Congress appropriated money for the first round of grants during fiscal year (FY) 1990 and directed EPA to develop a "target" funding amount for every state. In December 1989, EPA issued back-to-back documents to fulfill this mandate.<sup>13</sup> It first developed initial planning targets based on a minimum amount considered in combination with: (1) population density and growth; (2) nonurban NPS

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1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. *Id.* §1329(a).
3. *Id.* §1329(b).
4. *Id.* §1329(h)(1).
5. *Id.* §1329(h)(12).
6. Although §319(i) provides for grants to states engaging in "groundwater protection activities," EPA has chosen to combine these funds with more general NPS grants under §319(h). *Id.* §1329(i). EPA urges states to use a portion of their grant money specifically for NPS groundwater activities.
7. *Id.* §1329(h)(5).
8. *Id.* §1329(h)(8).
9. *Id.* §1329(h)(10).
10. *Id.* §1329(h)(11).

11. Specifically, 40 C.F.R. §31.40 requires states to submit performance reports on the status of §319(h) grants.

12. U.S. EPA, NONPOINT SOURCE GUIDANCE (1987).

13. U.S. EPA, PLANNING TARGETS FOR FY 1990 NONPOINT SOURCE PROGRAM IMPLEMENTATION GRANTS (1989); U.S. EPA, GUIDANCE ON THE AWARD AND MANAGEMENT OF FY 1990 NONPOINT SOURCE GRANTS UNDER SECTION 319(h) OF THE CLEAN WATER ACT (1989).

problems; (3) wetlands acreage; and (4) wellhead protection areas. EPA then published guidance that adjusted the planning targets and provided more comprehensive direction on how the program would work. It created a *set-aside* of 5% from each state's planning target to be awarded to states with high quality and fully approved programs.

States eligible for grants were to submit work programs to be funded at 50, 100, and 150% of the target numbers. Actual grant awards would be based on the effectiveness of a state's performance to date and the content of its work programs. The Agency encouraged states submitting grant applications to strike a balance between local watershed-based projects and statewide programs. Statewide program implementation would include establishing state and local agencies to carry out regulatory and nonregulatory efforts such as financial assistance programs, educational programs, and enforcement monitoring. Watershed projects were focused on the improvement of particular water segments that would address local NPS problems and might serve as demonstrations. For example, a state with a great deal of mining might choose to focus on the mining issues within a particular watershed. EPA stated that statewide programs should account for 25-50% of a state's grant.

EPA encouraged states to focus on the 10 priority NPS activities introduced in the 1987 guidance. It also added new priority activities: engaging in pollution prevention at the source of NPS pollution; protecting sensitive and ecologically significant waters like fisheries and wetlands; using protective corridors such as greenways for watershed management; implementing antidegradation provisions; addressing urban stormwater not regulated by the national pollutant discharge elimination system (NPDES) program; and providing for rigorous water quality monitoring. The guidance also required that EPA Regions incorporate reporting requirements in each state's grant that were to be as simple as possible in accordance with §319(h)(11) and 40 C.F.R. §31.40.

### Competitive Awards and Watershed Projects

In 1991, EPA published its first "final guidance" based on public comments and the Agency's experience.<sup>14</sup> In this guidance, EPA made several important changes to the grant program. First, instead of holding aside 5% of grant funds for competitive redistribution, EPA dedicated one-half of all funds for Regions to award competitively, according to regional priorities. The Agency mandated that each state dedicate 10% of its noncompetitive "base" award for groundwater protection. Additionally, it created a 5% set-aside for national demonstration projects.

EPA continued to urge the states to strike a balance between statewide programs and watershed projects. For watershed projects, EPA laid out several objectives and the required elements of a watershed implementation plan. Each project was to comprehensively address major NPS within the watershed, focus on critical areas, and demonstrate or innovate technical and institutional approaches. A detailed implementation plan had to be submitted concurrently with grant proposals. To ensure that such projects would address the most serious problems, EPA also directed states to iden-

tify their highest priority surface waters and groundwaters. As it had previously, EPA emphasized the importance of monitoring. States were also explicitly encouraged to use some funds for limited activities to address urban stormwater runoff and contaminated sediments. Reporting requirements were again left largely to regional oversight, though EPA urged Regions to require semiannual or quarterly reports and to conduct an on-site, mid-year evaluation for each state.

In 1993, EPA published a new final guidance for FY 1994 and future years based on its continued experience with the program, congressional mandates, and input from state managers.<sup>15</sup> The new guidance made several substantive changes and added some clarifications. The Agency emphasized the statutory requirement that funds be used for implementation, not program development, and defined implementation as "carrying out" activities, such as "nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects."<sup>16</sup> EPA dropped the 5% set-aside for national demonstration projects and added a requirement that each state target 10% of its grant for watershed restoration activities. EPA also provided a list of criteria that states could use to identify high priority watersheds.

EPA clarified several issues regarding regional oversight and state reporting requirements. It authorized Regions to allow multiyear durations for some grants. The Agency also detailed legally required reporting requirements. Grant performance reports, pursuant to §319(h)(11) and 40 C.F.R. §31.40(b)(1), were to include a performance/milestone summary and reasons for any delays or unanticipated event. Annual NPS program progress reports were to include a general description of accomplishments, summary of overall improvements, assessment of further actions needed, and case studies of particularly successful efforts.<sup>17</sup> EPA also introduced the Grants Reporting and Tracking System (GRTS) and mandated that all performance report data be entered in the system, starting in 1994.

### Flexibility Increases

In the mid-1990s, EPA recognized that state NPS programs had matured. In a 1995 memorandum,<sup>18</sup> EPA began to give states greater flexibility to set their own priorities. Specifically, it removed the set-asides for groundwater protection and watershed resource restoration because it determined that the original purposes had been "fulfilled or exceeded." States had also progressed in addressing water-

14. U.S. EPA, GUIDANCE ON THE AWARD AND MANAGEMENT OF NONPOINT SOURCE PROGRAM IMPLEMENTATION GRANTS UNDER SECTION 319(h) OF THE CLEAN WATER ACT (1991).

15. U.S. EPA, GUIDANCE ON THE AWARD AND MANAGEMENT OF NONPOINT SOURCE PROGRAM IMPLEMENTATION GRANTS UNDER SECTION 319(h) OF THE CLEAN WATER ACT FOR FISCAL YEAR 1994 AND FUTURE YEARS (1993).

16. *Id.* at 7-9.

17. Financial status reports, pursuant to 40 C.F.R. §31.40(b), were to be submitted on Standard Federal Forms. EPA clarified that the requirements could be met via a "consolidated annual report" should the Region so allow.

18. U.S. EPA, SUPPLEMENTAL GUIDANCE ON THE NATIONAL NONPOINT SOURCE PROGRAM, an attachment to EPA memorandum, Memorandum from Robert H. Wayland III, Office of Wetlands, Oceans, and Watersheds, to Water Management Division Directors et al., Supplemental Guidance on the National Nonpoint Source Program (Apr. 7, 1995).

shed-specific problems and establishing statewide NPS programs, which EPA acknowledged in its FY 1997 guidance by overhauling the program to allow states much more flexibility in deciding how to use grant funds.<sup>19</sup> EPA described its role as primarily providing programmatic and technical support.

To this end, EPA discontinued the competitive award portion of the grant program in order to provide a predictable amount of funds to each state. It also reduced the amount and frequency of administrative oversight and reporting. In turn, states were encouraged to enhance their programs to incorporate nine key elements, including: targeting projects with both explicit short-term goals and milestones as well as long-term objectives; balancing the use of statewide and watershed-level programs; abating known impairments and preventing further threats; fulfilling assessment and reporting requirements under CWA §§305(b), 319(a), 303(d), 314(a), and 320; employing a combination of water quality-based and technology-based programs; and conducting self-review and evaluation at least every five years. Any state that incorporated all nine elements and had a proven track record of effective implementation would become an "NPS Enhanced Benefits state." Enhanced Benefits states would receive even more flexibility and substantially reduced oversight. Perks would include priority for multiyear grant workplans that would eliminate yearly negotiations and paperwork, reduced reporting requirements to no more than annually, and reduced EPA oversight of self-assessments and reports.

Although it was allowing for more flexibility, EPA continued to emphasize several priorities. It urged states to move away from demonstration projects and toward watershed-based, community programs that would include tracking and/or monitoring. And, it encouraged states to use environmental endpoints to the greatest extent feasible. Additionally, for any watershed-based project exceeding \$50,000, each state was to include in its grant application a brief synopsis of its implementation plan and the environmental indicators or performance measures to be used in evaluating the project.

EPA emphasized that all states, regardless of Enhanced Benefits status, must continue to fulfill statutorily mandated reporting requirements, though Enhanced Benefits states would be permitted to submit performance reports only once per year. Specifically, EPA urged each state to include a brief summary and time line of progress in meeting milestones, and data on reductions in NPS loadings and improved water quality, including habitat, or measures of environmental progress. EPA also suggested that states provide optional data, such as a list of further needed actions, case studies of successful NPS efforts, demonstrable increases in public awareness and involvement, and copies of state-produced materials. EPA regional offices were to use these annual reports to determine state eligibility the following year.

Also in the 1997 guidance, EPA included a list of specific elements states should enter via the GRTS system, including: project title; water body type; amount of §319 funds allocated; and project dates. States were also encouraged to use GRTS to submit all other reports.

## Focus on Impaired Waters and Incremental Funds

In February 1998, President William J. Clinton issued the Clean Water Action Plan (CWAP), an interagency cooperative effort designed to promote a renewed focus on identifying watersheds with critical water quality problems and directing resources toward effective strategies.<sup>20</sup> The Unified Watershed Assessment Framework, published later in 1998, defined watersheds not meeting or facing imminent threat of not meeting clean water and other natural resource goals as "Category I" watersheds.<sup>21</sup> Category I watersheds were those not attaining national goals and those with conditions such as declining wetland conditions, a high percent of impervious surface, or declining aquatic systems.

For FY 1999, the president asked Congress to provide additional funds for the CWAP, approximately doubling the size of the §319 grant program from about \$100 million to \$200 million per year. In anticipation of this increase in §319 funds, EPA issued a guidance to explain how the increase would affect grant distribution.<sup>22</sup> EPA designated the increased funds as "incremental funds" to be focused specifically on Category I watersheds. EPA stated that it would allocate incremental funds only to those states that had completed their assessment obligations under the Unified Watershed Assessment Framework and had incorporated all nine key elements to achieve Enhanced Benefits status. The Agency also urged states to focus on the CWAP's call for the establishment and strengthening of enforceable state authorities and an increase in loans made through state revolving loan fund programs.

In its guidance following the appropriation of the funds, EPA stated that incremental funds should be used for implementation of watershed restoration action strategies (WRAS) for identified watersheds, but authorized states to use up to 20% of the incremental funds for development of WRAS.<sup>23</sup> EPA also clarified that because incremental funds support implementation of goals included in a state's Performance Partnership Grant (PPG), they must be linked to watershed restoration objectives articulated in a PPG workplan or Performance Partnership Agreement.<sup>24</sup>

Every year since 1999, EPA has published supplemental guidance documents that did not fundamentally change the grant program as described in the previous three guidance documents, but made minor adjustments as necessary.<sup>25</sup>

19. U.S. EPA, NONPOINT SOURCE PROGRAM AND GRANTS GUIDANCE FOR FISCAL YEAR 1997 AND FUTURE YEARS (1996).

20. U.S. EPA ET AL., CLEAN WATER ACTION PLAN: RESTORING AND PROTECTING AMERICA'S WATERS (1998), available at <http://yosemite.epa.gov/water/owrccatalog.nsf/> (last visited Nov. 8, 2004).

21. U.S. EPA ET AL., FINAL FRAMEWORK FOR UNIFIED WATERSHED ASSESSMENT, RESTORATION PRIORITIES, AND RESTORATION ACTION STRATEGIES (1998).

22. U.S. EPA, PROCESS AND CRITERIA FOR FUNDING STATE AND TERRITORIAL NONPOINT SOURCE MANAGEMENT PROGRAMS IN FY 1999 (1998), available at <http://www.epa.gov/owow/nps/Section319/fy99guid.html> (also available from the ELR Document Service, ELR Order No. AD03975).

23. U.S. EPA, FUNDING THE DEVELOPMENT AND IMPLEMENTATION OF WATERSHED RESTORATION ACTION STRATEGIES UNDER SECTION 319 OF THE CLEAN WATER ACT (1998), available at <http://www.epa.gov/owow/nps/fy19992.html>.

24. See U.S. EPA, *Performance Partnerships*, at <http://www.epa.gov/ocirpage/nepps/> (last visited Nov. 8, 2004).

25. U.S. EPA, SUPPLEMENTAL GUIDANCE FOR THE AWARD OF SECTION 319 NONPOINT SOURCE GRANTS IN FY 2000 (1999), available at <http://www.epa.gov/owow/nps/Section319/fy2000.html>; U.S. EPA, SUPPLEMENTAL GUIDELINES FOR THE AWARD OF SECTION



In its FY 2001 guidance, EPA allowed states to use some of the incremental funds for the development and implementation of total maximum daily loads (TMDLs) for high priority §303(d) listed water bodies.<sup>26</sup> Most watershed projects were already addressing §303(d) listed waters, many WRAS were being developed on foundations established by TMDLs, and many states had been required by court order to expeditiously address TMDLs including those involving NPS.<sup>27</sup>

In its FY 2002 guidance, EPA strengthened its support for state implementation of NPS TMDLs by encouraging states to use their entire allotment of dedicated development funds (20% of the base and incremental combined) for TMDLs development, and to maximize their use of incremental implementation funds for TMDLs.<sup>28</sup> EPA also called on Regions to provide flexibility for states that had not yet developed adequate watershed-based plans and required more than 20% to complete those plans. EPA emphasized the importance of protecting as yet unimpaired waters, especially those threatened by changing land uses. To this end, it recommended that states prioritize base funds for on-the-ground projects and broader educational and regulatory programs. EPA also mandated new reporting fields for GRTS, including: identification of the stream or water body location; a project description; and an estimation of load reductions achieved by the project.

In its guidance for FY 2003, EPA carved out an exception to the rules regarding incremental funds.<sup>29</sup> A state could use funds for prevention-related activities if the regional office found that the state had unique aquatic resources at risk of irreparable harm and the state had made sufficient progress toward TMDL implementation. EPA urged states to integrate §319 objectives with those in the Farm Bill<sup>30</sup> and to coordinate with the U.S. Department of Agriculture, local conservation districts, and agricultural producers. Additionally, EPA directed Regions to require GRTS entry of the new data elements as part of each state's evaluation process and a condition of future grant awards. Although EPA acknowledged that states could now fulfill their reporting requirements entirely through GRTS, it urged them to also continue issuing annual reports for educational and public relations purposes.

In its guidance for FY 2004, EPA consolidated and replaced all guidance documents since the FY 1997 guidance with only a few additions and adjustments.<sup>31</sup> The Agency again explicitly described the types of nonwatershed-based activities for which states could use §319 funds. These include the following: groundwater protection activities related to NPS pollution; urban stormwater runoff activities not covered under an NPDES permit; abandoned land mine reclamation; animal feeding operation cleanup; and lake protection and restoration activities.

## Conclusion

The §319 grants program has had a major effect on state plans and expenditures to address NPS water pollution. Over time it has moved from program development to experimentation to flexibility, and then to increasing concentration on remedying NPS pollution of impaired waters.

EPA's guidance documents provide a road map to the identification of priorities, the maturation of state NPS programs, and the increasing reliance on the watershed approach as an organizing principle in addressing water pollution.

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319 NONPOINT SOURCE GRANTS IN FY 2001 (2000), *available at* <http://www.epa.gov/owow/nps/Section319/fy2001.html>; U.S. EPA, SUPPLEMENTAL GUIDELINES FOR THE AWARD OF SECTION 319 NONPOINT SOURCE GRANTS TO STATES AND TERRITORIES IN FY 2002 AND SUBSEQUENT YEARS (2001), *available at* <http://www.epa.gov/owow/nps/Section319/fy2002.html> (also available from the ELR Document Service, ELR Order No. AD04939) [hereinafter FY 2002 GUIDELINES]; U.S. EPA, SUPPLEMENTAL GUIDELINES FOR THE AWARD OF SECTION 319 NONPOINT SOURCE GRANTS TO STATES AND TERRITORIES IN FY 2003 (2002), *available at* <http://www.epa.gov/owow/nps/Section319/319guide03.html> (also available from the ELR Document Service, ELR Order No. AD04940) [hereinafter FY 2003 GUIDELINES].

26. 33 U.S.C. §1313(d).

27. Additionally, although each Region had been obligated since the FY 1997 guidance to make an eligibility determination for each state based on the state's annual reports and other reviews, this guidance was the first to require that each Region provide a written explanation regarding its determination.

28. FY 2002 GUIDELINES, *supra* note 25.

29. FY 2003 GUIDELINES, *supra* note 25.

30. Farm Security and Rural Investment Act of 2002, 107 Pub. L. No. 171, 200.

31. U.S. EPA, Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60653 (Oct. 23, 2003) (also available from the ELR Document Service, ELR Order No. AD04905).