

A LEGISLATOR'S VIEW OF IMPENDING AMENDMENTS TO THE WATER POLLUTION CONTROL ACT

SENATOR EDMUND S. MUSKIE*

For more than twenty years, federal legislation designed to assist the national effort against various forms of environmental pollution has concentrated upon abatement and control. The legislation has attempted to invite and encourage the participation of all levels of government in the task of cleaning up the environment. Our experience with the early legislation, and the experience of other levels of government, suggest the need for environmental planning on a much broader scale. While we continue to press for control of existing sources of pollution, we are beginning to work toward a legislatively expressed environmental policy in which the rights to, and responsibilities for, use of the air, water and land resources will be more precisely defined.

I believe the presently pending water pollution control bill, S. 2770, is a significant example of such legislation, and as a sponsor of the Senate bill, I am in a position to offer some observations concerning its provisions and the objectives it is intended to accomplish. On November 2, 1971, the Senate approved and sent to the House of Representatives S. 2770 to amend the Federal Water Pollution Control Act. The House did not complete action during the first session of the 92nd Congress, but the House Committee on Public Works ordered the reporting to the House of a companion bill, H.R. 11896, which appears to retain the basic concepts and outline of the Senate bill.

The Senate bill provides a major change of policy objective in the federal effort against water pollution. For the first time, all aspects of water pollution control—research, planning, programs, construction and regulation—are directed toward an overall objective set forth in Section 101 of the Senate Bill: "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters." No such statement of policy appears in the existing Federal Water Pollution Control Act. This deficiency has allowed the various states and the federal administering agency to develop differing interpretations of the existing law's requirements. These interpretations, together with inadequate regulatory and enforcement procedures, have assisted in the frustration of the nation's pollution control efforts.

The Senate bill's objective and the supporting statements of pol-

* Chairman, Subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate.

icy, particularly the policy to eliminate the discharge of pollutants into the waters of the United States by 1985, are encountering significant opposition from various quarters. Oddly perhaps, some of this opposition is based upon a non sequitur. Some opponents, for example, apparently believe that a congressional statement of objective and policy is unnecessary. Control requirements, these opponents claim, can be negotiated by industry and government, against a background of economic and technical feasibility. Economic and technical feasibility are important elements in deciding upon a control strategy; they are not important elements in deciding whether pollution control is to be achieved. To put it another way, economic costs certainly are elements in deciding what specific controls must be installed at a particular time. But control requirements must be reviewed continually against the background of a congressional statement of objective and policy if, as the Senate bill requires, this Nation is to achieve clean water. Thus, such a claim is obviously a non sequitur.

As suggested earlier in this comment, all aspects of the federal effort against water pollution are directed by the Senate bill toward the overall objective of the Federal Water Pollution Control Act. This implies a major change in the direction of the federal research and development program. Under existing law, administrative agencies have undertaken research and development programs purportedly in support of a regulatory program based upon the discharge of pollutants into the waterways. The Senate bill maintains that such a program simply cannot achieve clean water in a consumption-oriented society with a growing population. Consequently, the Senate bill requires research and development that will, in fact, enable compliance with the national objective.

The Senate bill also concludes that the basic program of control provided by the Federal Water Pollution Control Act of 1965 contains a fatal flaw: the requirement that beneficial uses be established for various reaches of water before control regulations can be set for individual sources of discharges. This zoning, or designation of uses, has resulted in an exceedingly complex, error-prone process involving estimates of assimilative capacity, negotiations of mixing zones, estimates of the relative contributions of the discharge of pollutants from nonpoint sources, and agreements upon the actual criteria or scientific statements of precise levels of thirty to forty pollutants. Further, "feasibility" and "cost of compliance" under the 1965 Act are available to any polluter who wishes to avoid or mitigate complying even with the control "guess-timates" necessary to meet beneficial uses and assimilative capacity. From this experience, the Senate judges the regulatory procedure of the 1965 Act to be entirely unsatisfactory.

INTRODUCTION

There is yet another defect in the existing law: the enforcement procedure requires the government to prove a cause-and-effect relationship between the violation of an ambient water quality standard and a particular source of discharge. Such a burden of proof requirement blocks effective enforcement. To correct this defect, the Senate bill establishes a new concept of pollution control. Instead of proceeding through ambient water quality standards to control requirements, the bill provides directly for control requirements, referenced to the level of control which can be applied. In this manner, the bill allows immediate application of enforceable control requirements; it cuts away the opportunity to delay and to frustrate not only the setting of control requirements but also the enforcement sanctioned by existing law.

It is imperative that we attempt to arrest pollution and to restore the quality of our environment. In my opinion, the Senate bill gives us a better set of tools to manage, and to manage properly for our own protection, our activities within the environment.[†]

[†] *The proposed water pollution control standards and enforcement procedures contained in S. 2770 are given extended consideration in the comment appearing at p. 749 infra. — Eds.*