

STUDENT COMMENTS

FEDERAL WATER POLLUTION LEGISLATION: CURRENT PROPOSALS TO ACHIEVE MORE EFFECTIVE ENFORCEMENT

Everyone wants clean water: the government, industry and the people.—The American Paper Institute

Over the past twenty years Americans have become increasingly concerned over the quality of their water. Each summer, as another beach is closed or the water of another river turns a murky green, greater pressure is placed on Congress to end this form of environmental degradation. Since the enactment of the Federal Water Pollution Control Act of 1948 (FWPCA),¹ each subsequent amendment has sought to provide the missing link in water pollution legislation, and each subsequent summer it becomes evident that more effective legislation is necessary.

One of the most difficult tasks in drafting water pollution legislation involves selection of the most appropriate method of control from the myriad of scientific, technological and legal proposals. This comment will examine the problems of achieving effective water pollution enforcement by comparing existing law with the legislative alternatives currently pending in Congress. Of these proposals, S. 2770, a bill recently passed by the United States Senate,² would radically alter the existing enforcement structure and, for this reason, it has attracted a great deal of criticism. Another proposal, which contains a similar approach to the problem, has been introduced in the House of Representatives.³ Although the Nixon Administration has not endorsed either of these proposals, nor offered its own alternative,⁴ it has, nevertheless, indulged in a broad criticism of the Senate bill and has made piecemeal suggestions for compromise legislation. In the context of this legislative activity, the comment will consider the crucial question of water pollution standards and their enforcement. Through this analysis, it is hoped that the strengths and weaknesses of the various pending proposals and suggestions will be disclosed. Finally, a summary assessment of the merits of each alternative will be offered.

¹ Ch. 758, 62 Stat. 1155 (1948 (codified at 33 U.S.C. §§ 1151 et seq. (1970))).

² S. 2770, 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 2770].

³ H.R. 11895 and 11896, 92d Cong., 1st Sess. (1971) [hereinafter cited as H.R. 11895 & 11896]. For purposes of analysis, this comment will focus on the Senate proposals. Because of the similarity of the Senate and House bills, the criticisms and suggestions offered in this comment will apply to both, except where noted.

⁴ Initially, the Administration submitted a number of bills to the Senate Subcommittee on Air and Water Pollution, which subsequently reported out S. 2770. Since Senate passage of the bill, the Administration has submitted no proposal in the form of legislation.

I. THE STANDARD

Of vital importance in any water pollution legislation is the control standard thereby established. Such a standard not only provides, by necessity, a definition of water pollution, but also indicates how much pollution society will tolerate. Less abstractly, the standard is the principal measure by which law enforcement officials distinguish between the violator and nonviolator of the law. In the case of water pollution, however, the standard itself is difficult to formulate because its definition must be derived from legal as well as commercial, technological and social factors. An examination of the standards contained in prior legislative efforts perhaps best illustrates the difficulty of establishing an appropriate water quality standard.

A. *Prior Legislation and Its Inadequacies*1. *The Prior Legislation*

Until 1965 the principal federal source of water pollution control and enforcement was contained in the limited provisions of the FWPCA of 1948. Under that Act federal enforcement authorities could intervene only where a body of water had in fact been polluted by the alleged polluter's discharges, and the pollution *actually* endangered the health or welfare of persons in another state.⁵ Consequently, it was a difficult task for enforcement officials to sustain the burden of proving that the polluter had polluted to the point of endangering the public health or welfare. To avoid this undesirable situation, it was suggested by experts that a water quality standard be administratively imposed upon each body of water.⁶ Any subsequent degradation of the water below that standard would, it was argued, indicate that a violation had taken place. In the water pollution amendments of 1965⁷ procedures were established which would achieve this goal.⁸

Since the 1965 amendments, the process of standard setting has not been altered. The FWPCA gives each state the authority to set its own water quality standards.⁹ In doing so the state must adopt 1) water quality criteria for interstate waters within the state, and 2) a plan for implementation and enforcement of the criteria.¹⁰ If the Administrator of the Environmental Protection Agency (Administrator) finds that the criteria "protect the public health or welfare, en-

⁵ 33 U.S.C. § 1160(a)(1) (1970). For a general discussion of this judicial restriction in similar subsequent legislation, see Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 Mich. L. Rev. 1103 (1970) [hereinafter cited as Barry].

⁶ Barry, *supra* note 5, at 1111. In 1956, water quality standards were considered together with other amendments to the FWPCA, but no new proposals were reported out of Committee in either house of Congress.

⁷ Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 amending 33 U.S.C. § 466 (1964) (codified at 33 U.S.C. § 1160(c) (1970)).

⁸ These provisions were codified in 33 U.S.C. § 1160(c) (1970).

⁹ *Id.* § 1160(c)(1).

¹⁰ *Id.*

hance the quality of water and serve the purposes of [the Act,] . . .” they will be deemed applicable to the interstate waters within that state.¹¹

Where a state fails to comply with these requirements, however, the Administrator must use a lengthy and cumbersome procedure, encompassing both an interstate conference and an administrative public hearing, before he may promulgate federal standards.¹² Once standards are promulgated by a state or the Administrator, discharges which violate them may be abated.¹³

2. *The Inadequacies of the Present Law*

It is arguable whether the existing process of standard setting has been successful. In the spring of 1971, the National Governors' Conference collected the responses of governors from forty-seven states to questions from the Senate Subcommittee on Air and Water Pollution concerning the extent to which states have initiated their own water quality standards.¹⁴ The survey revealed that all forty-seven states had established water quality standards for interstate waters.¹⁵ The survey also revealed that states which had not established standards for intrastate waters were in the process of doing so.¹⁶ Although both interstate and intrastate standards have been or are being established, environmental groups have expressed disappointment over the lack of success in establishing high standards of water quality and the “many inconsistent ‘exceptions’” generally contained in state standards.¹⁷ They argue that if standards are not stringent enough, they become “mere licenses to pollute.”¹⁸

Beyond these contentions, however, where water quality standards have been set at a satisfactory level, two problems still remain: (a) degradation and (b) detection and enforcement. Degradation occurs where the actual quality of a body of water initially exceeds, or is cleaner than, the established water quality standard, and subsequent discharges lower the quality of the water to the standard. An industry located on the banks of a trout stream could, for example, discharge a considerable amount of pollution into the water, and hence cause considerable damage before its discharge would violate the water quality standard. In response to this problem, some states have included anti-

¹¹ Id. § 1160(c)(3).

¹² Id. § 1160(c)(2), (4).

¹³ Id. § 1160(c)(5).

¹⁴ The Senate Subcommittee on Air and Water Pollution compiled the responses. They may be found in Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015, and S. 1017 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess. at 1448 et seq. (1971) [hereinafter cited as Senate Hearings].

¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at 683.

¹⁸ Id.

degradation clauses in their water pollution legislation.¹⁹ These clauses usually prohibit polluters from degrading the existing quality of the body of water into which they are discharging.

With similar intent, the sponsors of the Senate bill included a nondegradation clause in a group of amendments²⁰ to the Water Quality Act of 1965.²¹ Advocates of this proposal, in addition to arguing that the reduction of water quality from clean to semiclean is a net loss to the environment, also claimed that the absence of such a clause would encourage industries to relocate on clean waters rather than improve existing facilities on polluted streams.²² In spite of its apparent benefits, the possibility of adding a nondegradation clause to federal legislation has, however, attracted a substantial amount of criticism. Critics argue that such a provision would stifle growth of industry and force its movement away from urban areas, since it is impossible for a plant not to degrade a stream with high water quality.²³ It is also argued that antipollution programs ought to require that industries located on an overburdened river should relocate on bodies of water better able to handle their wastes and that nondegradation provisions will discourage this decentralization.²⁴ Still others contend that a nondegradation clause would be acceptable only if exceptions allowing for "legitimate water use" were made.²⁵ Such exceptions would include industrial as well as natural and recreational uses.²⁶

The second problem concerning the use of water quality standards involves detection and enforcement. In particular, where several industries are located on a waterway whose water quality standard is violated, the difficult task of identifying the source of the pollution creates additional problems. In this respect, the implementation of water quality standards has additionally been hindered by the lack of an effective monitoring system.²⁷

B. *New Alternatives: Effluent Limitations and Federal Enforcement*

The concept of effluent limitation has been offered as a logical alternative to the water quality standards. Instead of *indirectly* measuring discharges by their effect on water quality, monitoring equipment would *directly* measure discharges at their source. As a result, the effluent limitation standard has the distinct advantage of "pinpointing" the exact source of pollution. However, this type of standard, like that of water quality, poses various problems.

¹⁹ See *id.*

²⁰ S. 523, 92d Cong., 1st Sess., § 10(b)(1)(B) (1971).

²¹ Pub. L. No. 89-234, 79 Stat. 903 amending 33 U.S.C. § 466 (1964) (codified at 33 U.S.C. § 1160 (1970)).

²² Barry, *supra* note 5, at 1122.

²³ See Senate Hearings, *supra* note 14, at 756, 1071, 1116.

²⁴ See *id.* at 1503.

²⁵ See *id.* at 1088, 1117.

²⁶ *Id.*

²⁷ *Id.* at 647.

1. *General Problems*

One group of critics sees effluent limitations as a "bottomless pit of effort"²⁸:

Effluent standards can only be effective if there is no growth or any change in any operating proposals and . . . no change in the hydrology of the stream-flow or change in other characteristics of the receiving bodies of water. None of these premises are true in nature.²⁹

In short, it is argued that effluent limitations can easily be rendered ineffective by the constantly changing technological and environmental factors surrounding them. However, it is questionable whether this indictment of effluent limitations would hold true if the standards were periodically reviewed and revised.³⁰ This could be accomplished by requiring the administrative agency responsible for promulgating the limitations to review and make revisions of the limitations according to a predesignated timetable. Such a procedure, however, would require that the reviewing agency be kept informed of the latest technological and scientific knowledge regarding water pollution abatement. Otherwise, a certain amount of uncertainty might be injected into the enforcement officials' task of applying effluent limitations:

An honest administrator cannot guarantee an industry or municipality that if they build [a particular] type of installation . . . they will have no more problems from his organization. This technical inability is a very discouraging thing for the consulting engineers and State and local water pollution control administrators, because they know that there is no way to guarantee that the installation of a particular system of controls will, in all instances, prevent any further problems of waste control.³¹

Thus it would seem that without an adequate research program, a "technology gap" may result, rendering the effluent limitations too unstable to enforce.

A related problem involving technology and effluent limitation standards is the maintenance of standards, which should serve to guarantee that present water quality will be enhanced or stabilized. In fact this problem may become so troublesome that a state or federal agency may find itself an unwitting accomplice in promulgating effluent standards which are too low.³² Periodic review and revision of effluent standards, as well as accurate, current knowledge as to the relation

²⁸ Id. at 554.

²⁹ Id.

³⁰ Id. at 592.

³¹ Id. at 554.

³² Id. at 561.

between effluents and water quality are basic prerequisites in achieving solutions to this problem.

2. *Problems of Uniformity*

Once the decision is made to change the entire basis for enforcement from water quality standards to effluent limitations, a basic determination must also be made as to whether such standards should be uniform. Proponents of uniform standards claim that a lack of uniformity would induce industries to locate in states with more favorable standards.³³ This would, in turn, become an incentive for states not to strengthen their effluent limitations since most states actively encourage industrial concerns to locate within their borders. Supporters of uniformity point to a state such as Maryland, in which state-based plants have already relocated elsewhere as a result of tough water standards, as an example of the dangers of nonuniform standards.³⁴

Opponents of uniformity, the advocates of local standards, consider fears of "community-shopping" to be unwarranted:

The decision of an industry to relocate is the result of a combination of circumstances that results in an unprofitable or noncompetitive situation. These circumstances include factors such as changing markets, increased raw material costs or freight rates, unfavorable tax rates, need to replace outdated facilities or requirements for modernization, as well as other circumstances.³⁵

However, this argument does not rule out the possibility that states in which one or more of the above factors is only marginal may risk the loss of a particular group of industries in enacting stringent effluent limitations. Moreover, the argument does not acknowledge the situation where an industry, desiring to relocate, has found several states in which the nonenvironmental factors are satisfactorily met. In this situation, such an industry might well be tempted to choose the state with the most flexible standards.

The localists also argue that uniformity leads to mediocrity. Thus, in certain jurisdictions, such standards would tend to be too rigid and restrictive, while in others they might be too general and permissive.³⁶ It is further argued that uniformity would penalize those states which desire to have higher standards,³⁷ and, on the other hand, that it would be unnecessarily rigid in others "since some bodies of water, because of their present quality, volume, flow, or other factors, have a greater

³³ Id. at 376. See also a recent speech delivered by William D. Ruckelshaus, the Administrator of the Environmental Protection Agency, advocating tough federal standards to discourage states from using licensing as a means of attracting industry. 1 BNA Env. Rep., Current Devs. 562 (Feb. 12, 1971).

³⁴ Id. at 612.

³⁵ Id. at 1088.

³⁶ Id. at 385.

³⁷ Id. at 385, 592.

ability to cleanse themselves than do others."⁸⁸ Thus effluent limitations, the localists conclude, should be based upon local needs and characteristics rather than on a national norm.

3. *The State-Federal Dichotomy*

Beyond the decision of which type of standard Congress should adopt, there remains the troublesome question of whether the state and local governments or the federal government is to determine the standards. If one accepts the concept of uniformity, it would logically follow that the federal government should set the standards, since its national scope is more conducive to such a task. However, if standards are to be uniform only within a state, or not uniform at all, a number of alternatives to federal determination have been suggested. One approach would allow states and localities to set their own standards. Opponents of this proposal claim that the influence of industry on the local level is so extensive that state participation would not be independent enough to serve the public interest.⁸⁹ Another approach advocates the federal creation of strict guidelines within which the states may set their own standards. This proposal, it is urged, would encourage the federal government to draw on the knowledge and resources of state and local officials, and thereby foster state-federal cooperation. The desirability of this cooperation would seem necessary in light of the complexities of water control problems:

The diversity of water quality control problems existing in the United States today pose [*sic*] problems that are not amenable to the simple, generalized solutions that generally flow from a centralized agency. State water quality control agencies have acquired a background of information, experience and expertise in dealing with problems of their respective areas. This knowledge, experience and expertise should not be bypassed by the Administrator. . . .⁴⁰

Yet, it might be argued that this alternative is merely two steps away from the direct imposition of federal standards.

The accusation has also been made that a federal enforcement agency would set low standards, for political purposes.⁴¹ In order to maintain a good rapport with wealthy industrial concerns, federal officials, it is posited, would attempt to balance the public and industrial interests rather than to implement strictly the provisions of the water control legislation. It has been suggested, therefore, that an indepen-

⁸⁸ Barry, *supra* note 5, at 1123.

⁸⁹ Senate Hearings, *supra* note 14, at 612.

⁴⁰ Recommendations to the House Public Works Committee on Amendments to Federal Water Pollution Control Act, Advisory Task Force to the National Governors' Conference, tit. III, at 1 (Nov. 15, 1971) (on file in the B.C. Ind. & Com. L. Rev. Office).

⁴¹ Senate Hearings, *supra* note 14, at 1081.

dent organization such as the National Academy of Sciences set effluent standards based solely on scientific and technical grounds.⁴² This suggestion, however, rests on some faulty analysis. First, although the influence of industry on the activities of local levels of government has been recognized, there is no proof that this same influence will be exercised over federal water pollution enforcement. In addition, this proposal ignores the fact that standard setting is often better left to the agency responsible for enforcing the standards, since that agency is probably the most sensitive in terms of judging their adequacy. Enforcement procedures are not designed solely for the purpose of prosecuting violators; they are also intended to induce conformity with the law. Thus problems would also arise where an overly stringent standard is set. Too strict a standard could impede this inducement function since the risk of noncompliance might be less costly than conformity. Such a situation would also likely hinder effective enforcement.

Serious questions of due process and equal protection could arise if the standards are too stringent. If such standards were in force, enforcement officials would only be able to prosecute violators selectively, and the resulting discrimination and the imposition of judicial restraint could lead to no enforcement at all. Consequently, considerations such as these should compel enforcement officials to set standards at a reasonable level.

One final alternative has been suggested which would place responsibility for regulation on both state and federal governments. This proposal would permit the states to set effluent standards while the federal government would establish water quality standards (assuming that a combination of the two could be used).⁴³ On its face, this proposal seems to be nothing more than an arbitrary compromise. The probable effectiveness of federal-state cooperation should be based on an evaluation of each level of government's knowledge, expertise and ability to set standards. If the result shows that the federal government is more qualified than the states, this fact should then be weighed against the principle, traditionally embodied in this nation's water pollution legislation, that water pollution is primarily a state responsibility. Compromise would not only put standard setting into the hands of the least capable officials, but also add to the confusion and overlapping that already exists.

C. *The Senate Approach*

The bill recently passed by the Senate, S. 2770, which would amend the Water Quality Act, attempts to resolve many of the existing problems by emphasizing effluent limitations. The bill declares that, with few exceptions, the discharge of *any* pollutant by *any* person is unlawful.⁴⁴

⁴² *Id.*

⁴³ *Id.* at 741.

⁴⁴ S. 2770, § 301(a), note 2 *supra*.

[T]his legislation would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes.⁴⁶

The bill would implement this policy with a two-phase program for effluent limitations. Phase I would require that by 1976 effluent limitations for point sources,⁴⁶ other than publicly owned treatment works, would demand the application of the "best practicable control technology currently available."⁴⁷ By 1981, the date set for the beginning of Phase II, effluent limitations standards for the same sources would require the complete elimination of pollutants from discharges.⁴⁸ However, if it were found in certain cases that "no discharge" could not be achieved at a reasonable cost, the bill permits that the "best available technology" would be applied, taking into consideration its cost.⁴⁹

The bill also would provide for a system of "national standards of performance" for new facilities, published by the Administrator,⁵⁰ which would reflect an effluent reduction achievable by the particular industry through application of the "best available technology." Where practicable, the standard would permit no discharge of pollutants at all.⁵¹ The bill also exhibits a continuous concern for water quality. A section provides for the revision of effluent limitations when it is found that they would

interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters. . . . [This revision must] assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water. . . .⁵²

⁴⁵ S. Rep. No. 414, 92d Cong., 1st Sess. 42 (1971) [hereinafter cited as Senate Report].

⁴⁶ Point sources are defined as

any discernible confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

S. 2770, § 502(p), note 2 *supra*.

⁴⁷ Id. § 301(b)(1)(A)(i). To assist the Administrator in carrying out these objectives, the bill would establish a self-monitoring system and give enforcement officials authority to enter and inspect the facilities. Id. § 308(a)(4)(A).

⁴⁸ Id. § 301(b)(2)(A)(i).

⁴⁹ Id. In this area, the House bill can be distinguished from the Senate bill in one major respect. The House bill requires that the determination of the "best practicable" and "best available" technologies include consideration of the impact of world competition on a particular industry. H.R. 11896 & H.R. 11895 at § 304(b)(1)(B), note 3 *supra*. This change represents a reaction to complaints by industrial leaders that effluent requirements might greatly increase prices, thus rendering domestic industry vulnerable to foreign competitors not facing such requirements. See Senate Hearings, *supra* note 14, at 1079-80.

⁵⁰ S. 2770, § 306(a)(1), (b)(1)(A), note 2 *supra*.

⁵¹ Id. § 306(a)(1).

⁵² Id. § 302(a). The Senate bill provides for a national "Water Quality Inventory"

This concern with water quality is retained throughout Phase I of the program, but dropped for Phase II,⁵³ wherein effluent limitations are based solely on technology.⁵⁴ Phase I also would require conformity to existing water quality standards while Phase II would not.⁵⁵ These provisions serve as an answer to those critics who claim that effluent limitations callously disregard water quality. The provisions should also eliminate the possibility of government-sponsored degradation of water quality.

To prevent effluent limitations from becoming outdated as the result of a changing commercial, technological and natural environment, the bill would provide that standards be reviewed and revised at least every five years,⁵⁶ and that the regulations concerning them be reevaluated at least annually.⁵⁷ To aid in this effort, the Administrator would be required to publish information regarding the types of pollution and the methods available to abate them, as well as the cost of such methods.⁵⁸ If effectively coordinated with the research provisions of the bill, this provision might aid in eliminating the uncertainty inherent in enforcement. Industries and enforcement officials alike will breathe easier if the effluent limitations and the methods of attaining them have a high degree of reliability.

The Senate bill provides for uniformity of effluent limitations. As noted previously, once the concept of uniform limitations is accepted, it follows that the federal government would be more capable of setting such standards. Therefore, the Administrator would be required to promulgate regulations identifying, among other things, the degree of effluent reduction attainable through application of the "best practicable" and "best available" technologies for categories of sources.⁵⁹ Although state participation would be somewhat limited in the area of establishing standards, the states would not be precluded from assuming a vital role in the control process. Local expertise is not completely ignored, since the Administrator would be required to consult with "appropriate Federal and State agencies and other interested persons . . ."⁶⁰ before promulgating his regulations. It is questionable, however, whether this language is strong enough, since no mention is made as to what weight is to be given to a state's suggestions and criticisms. In short, this language, depending on the Administrator's interpretation, could provide the states with a meaningful role in the standard setting process, or could serve to ignore them almost completely.

to be taken, so that an accurate account of the quality of the nation's waters would be available. See *id.* § 305(b)(1)(A), (B), (C).

⁵³ S. 2770, § 301(b)(2)(A)(i), 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 2770].

⁵⁴ *Id.*

⁵⁵ *Id.* § 301(b)(1)(C).

⁵⁶ *Id.* § 301(c).

⁵⁷ *Id.* § 304(b).

⁵⁸ *Id.* § 304(c).

⁵⁹ *Id.* § 304(b)(1)(A), (2)(A).

⁶⁰ *Id.* § 304(b).

Yet, the state which acts on its own would not be penalized. The bill provides that "any more stringent effluent limitation, treatment standards, or schedule of compliance established pursuant to any other State or Federal law or regulation . . ."⁶¹ would be complied with during Phase I. Thus, even though the states would play a limited role in the federal process, a state desiring higher standards could invoke its local legislative and administrative machinery to accomplish this goal.

D. *The Administration's Approach*

The Nixon Administration has, with reservations, indicated approval of several features of the Senate bill:

1. the 1981 "no discharge" objective, where feasible;
2. use of the best practicable technology by 1976, provided that extensions of up to two years would be available;
3. use of precise effluent limitations for individual sources;
4. use of the best available technology for new sources.⁶²

The Administration has, however, raised objections to other provisions of the bill. Its chief criticism focuses on the almost exclusive attention the Senate bill gives to effluent limitations.⁶³ The Administration has proposed that the enforcement system be comprised of *both* effluent limitations and water quality standards, with the former being partly based on the latter:

In our view, the importance of effluent limitations cannot be overestimated. It is our intention that these limitations, to consist of clear descriptions of effluent quantity and quality, will tell industries and municipalities in unambiguous terms exactly what must be done to meet Federal requirements. We expect these limitations to be the principal basis for future enforcement actions.⁶⁴

Despite the fact that effluent limitations are not part of current federal law, the Environmental Protection Agency (EPA) has used them to a certain extent in issuing discharge permits and in conference recommendations.⁶⁵ Thus enforcement officials, as well as legislators, have

⁶¹ Id. § 301(b)(1)(C). See also id. § 510.

⁶² Statement of Russell E. Train, Chairman of the Council on Environmental Quality, on Water Pollution Legislation Before the House Committee on Public Works on Dec. 7, 1971, 2 BNA Env. Rep., Current Devs. 964 (Dec. 10, 1971).

⁶³ Statement of Russell Train, id. at 965. See also statement of William D. Ruckelshaus, Administrator of the Environmental Protection Agency, on Water Pollution Legislation Before House Committee on Public Works on Dec. 7, 1971. Id. at 967.

⁶⁴ Hearings on S. 25, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015 and S. 1017 Before the Subcomm. on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 1st Sess. at 19 (1971) [hereinafter cited as Senate Hearings].

⁶⁵ Id. at 1834.

already recognized the value of incorporating effluent limitations into an effective water pollution abatement system.

Combining effluent limitations with water quality standards, as the Administration suggests, is not an easy task. Its major problem is the current unavailability of technological knowledge regarding the relationship of polluted discharges to water quality.⁶⁶ In fact, this circumstance was one of the primary reasons given by the authors of the Senate bill for eventually eliminating water quality standards and basing effluent limitations entirely upon the availability of technology in Phase II.⁶⁷ The Senate bill has directed itself to meet this problem during Phase I by requiring the Administrator to develop and publish criteria of water quality, "establish[ing] the effects of pollutants on health or welfare, including the effects of pollutants on receiving water ecosystems and man, and identify[ing] the natural chemical, physical and biological integrity of the Nation's waters."⁶⁸

The Administration concedes that difficulty exists in relating effluent limitations to water quality, but it contends that the needed knowledge will soon be developed.⁶⁹ Therefore, despite admitted complexity, the Administration would base effluent limitations on both available technology and water quality.⁷⁰ Somewhat quixotically, Administration officials regard Senate efforts toward the ultimate use of available technology alone, as the "renunciation of known complexity on the altar of simplicity . . . the essence of bad government policy."⁷¹

The Administration also criticizes the Senate bill's Phase II procedure, which would establish a "no discharge" standard, because it provides for exceptions on a case by case basis *only* where costs would be unreasonable.⁷² Instead, the Administration would fashion Phase II standards "on the basis of federally approved State or regional plans which closely identify the full recreational, industrial and social potential for each river basin and which provide a meaningful schedule of remedial measures to realize the potential."⁷³ There are two aspects to this criticism. First, costs should be evaluated together with other factors when the standards are first set. Second, the concept of cost should include not only a consideration of the economic cost to industry and government, but also a weighing of social and economic benefits:

Without a consideration of the nature of the effluent, the

⁶⁶ Statement of Russell Train, 2 BNA Env. Rep., Current Devs. 965 (Dec. 10, 1971); statement of William Ruckelshaus, *id.* at 967.

⁶⁷ See Senate Report, *supra* note 45, at 7-8.

⁶⁸ *Id.* at 49.

⁶⁹ Statement of Russell Train, 2 BNA Env. Rep., Current Devs. 965 (Dec. 10, 1971); statement of William Ruckelshaus, *id.* at 967.

⁷⁰ *Id.*

⁷¹ Statement of William Ruckelshaus, 2 BNA Env. Rep., Current Devs. 967 (Dec. 10, 1971).

⁷² *Id.*

⁷³ *Id.*

quality, nature and use of receiving water, and the costs to society, we may be wasting resources which could be more effectively used to clear the air, dispose of solid wastes, or effectively address water pollution control in another body of water. . . . The alternative uses of finite resources are infinite.⁷⁴

For the most part, the Administration's criticisms concern the environmental cost of effluent limitations and their effect on water quality; to a certain extent, the criticisms are valid. However, the nature of the Senate bill mitigates the harshness of these criticisms by providing that the Administrator, when promulgating effluent limitation regulations, may specify factors to be considered in determining the "best practicable"⁷⁵ or "best available"⁷⁶ technology that the Administrator deems appropriate. Thus the flexibility of the Senate bill would permit consideration of the factors suggested by the Administration. It is this flexibility which makes the Senate bill the most viable alternative in the area of standards, and it is this same feature, although somewhat more limited, which recommends the bill in the area of enforcement.

II. ENFORCEMENT PROCEDURES

Standards alone, of course, do little to abate water pollution; to be effective, they must be accompanied by a meaningful system of enforcement procedures. Traditionally, federal water quality enforcement has been effected by means of two separate programs: administrative action and a refuse permit system. The Senate proposal represents a substantial effort to revise these two programs and to combine them in the Federal Water Pollution Control Act (FWPCA). As in the case of standards, practical and legal considerations, as well as the state-federal dichotomy have raised difficult questions and have complicated immeasurably the task of reform.

A. *Administrative Action*

Administrative action has been used as an enforcement method since the original water pollution legislation of 1948. It involves the procedure which takes place during and after the alleged polluter is detected, but before he is prosecuted in a court of law. The purpose of such a procedure is to gain compliance with the law and to avoid the costs and delays of litigation.

1. *Existing Law*

Present federal law provides for a three-stage administrative process. At the first level,⁷⁷ the Administrator may call a conference

⁷⁴ Id. at 967-68.

⁷⁵ S. 2770, § 304(b)(1)(A), note 53 *supra*.

⁷⁶ Id. § 304(b)(2)(A).

⁷⁷ 33 U.S.C. § 1160(d) (1970).

comprised of representatives of state and interstate agencies if one of four conditions is met:

- a) If a conference is requested by a Governor of any State, a State water pollution control agency, or the governing body of a municipality (with the consent of the Governor and State Water Pollution Control Agency of the State within which the municipality is located), referring to pollution endangering the health and welfare of persons in a state other than where the discharges originated.⁷⁸
- b) If a conference is requested by the Governor of a State referring to the pollution of navigable or interstate waters within the State, unless the pollution is not sufficient enough to exercise federal jurisdiction.⁷⁹
- c) If on the basis of a study, report or survey, the Administrator has reason to believe any pollution referred to in (a) is occurring.⁸⁰
- d) If the Administrator finds that the interstate shellfish industry is being substantially injured economically by pollution referred to in (a).⁸¹

At the conference, the alleged polluter and those affected by the pollution are given an opportunity to present their views.⁸² The conferees also have the power, by majority vote, to require the purported violator to file a report containing "such information as may reasonably be requested as to the character, kind, and quantity of such discharges . . . by the person filing such a report."⁸³ Failure to file such a report makes an alleged polluter liable for a civil penalty, recoverable in an action brought by a United States Attorney.⁸⁴

After the conference, if the Administrator believes "that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered. . ."⁸⁵ he can recommend to the proper state water pollution agency that abatement action be taken.⁸⁶ If the State agency does not comply within six months, the second stage of enforcement must be instituted: the public hearing.⁸⁷ The hearing, called by the Administrator, differs from a conference in the following ways:

- a) the hearing is adversary in nature;⁸⁸

⁷⁸ Id. § 1160(d)(1) (1970).

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id. § 1160(d)(3) (1970).

⁸³ Id. § 1160(k)(1) (1970).

⁸⁴ Id. § 1160(k)(2), (3) (1970).

⁸⁵ Id. § 1160(e) (1970).

⁸⁶ Id.

⁸⁷ Id. § 1160(f)(1) (1970).

⁸⁸ See 18 C.F.R. §§ 606.4(d), .9, .10 (1970).

- b) membership is comprised of representatives of federal departments as well as those from state agencies;⁸⁹
- c) the Hearing Board, rather than the Administrator, makes findings and recommendations;⁹⁰ and
- d) the Administrator has the discretion to require the alleged polluter to file a report.⁹¹

After the Board has made its findings and recommendations, the Administrator must convey them to the alleged polluter and must give him at least six months to comply.⁹²

If there is no compliance within the specified period, the third stage is initiated: litigation.⁹³ Where pollution is discharged in one state and is affecting another, that is, its effects are interstate, the Administrator may request the Attorney General to bring an action to secure abatement.⁹⁴ However, in the case where pollution is only affecting the state in which it is discharged, the Administrator may request the Attorney General to take appropriate action only upon the written consent of the Governor of that state.⁹⁵ Thus the state retains a certain amount of veto power over actions taken against polluters whose violations do not extend beyond its borders. It is questionable whether this veto power is justified in the light of water pollution abatement goals. Although the rights of state enforcement agencies should be recognized, the failure of the latter to exercise those rights should be resisted. Where a state has failed to act because of the influence of industry, its reluctance should not be permitted to bind the federal government in its effort to provide citizens relief.

The foregoing cumbersome procedure represents a slavish allegiance on the part of Congress to a policy which was intended to encourage the states to take responsibility for water pollution control.⁹⁶ It comes as no surprise that under this procedure only one case has reached the litigation stage,⁹⁷ and only a few have gone beyond the conference stage.⁹⁸ It must be emphasized, however, that the problem with existing federal procedure is not merely the policy of state responsibility. States *should* be given every opportunity to develop enforcement systems of their own. However, once a violation has occurred and a state fails to act, the federal government should be able to act swiftly to take the necessary abatement action.⁹⁹

⁸⁹ 33 U.S.C. § 1160(f)(1) (1970).

⁹⁰ *Id.*

⁹¹ *Id.* § 1160(f)(2) (1970).

⁹² *Id.* § 1160(f)(1) (1970).

⁹³ *Id.* § 1160(g) (1970).

⁹⁴ *Id.* § 1160(g)(1) (1970).

⁹⁵ *Id.* § 1160(g)(2) (1970).

⁹⁶ *Id.* § 1160(b) (1970).

⁹⁷ See statistics in 41 BNA Env. Rep., Fed. L. 5201 et seq. (1971).

⁹⁸ See *id.*

⁹⁹ See the President's 1971 Environmental Message to Congress, summarized in 1 BNA Env. Rep., Current Devs. 1097 (Feb. 12, 1971); Senate Hearings, *supra* note 64, at 20.

A step in the direction of immediate federal enforcement was taken in the 1965 Amendments.¹⁰⁰ If a discharge violates water quality standards, the Administrator may, as a result of the 1965 Amendments, request that the Attorney General bring an action of abatement, provided that the Administrator gives notice to the polluter and to other interested parties six months before the action is commenced.¹⁰¹ Although six months' notice is required, the time period is significantly shorter than the possible years of delay inherent in the regular procedure. The provision contains one limiting feature, however; it applies only to discharges made into "interstate waters," and not "navigable waters."

Historically, in cases dealing with the Commerce Clause, the United States Supreme Court has defined "interstate waters" as including "navigable waters" and their tributaries, as well as waters which flow across state boundaries.¹⁰² Prior water pollution law has explicitly stated that its enforcement provisions are applicable to *all* bodies of water included in this broad definition.¹⁰³ However, the six months' notice provision stands as an exception to this general rule, since the language of the section in which it is contained limits its use to "interstate waters" in the narrow sense of the term.¹⁰⁴ Although the Environmental Protection Agency has expressed a preference for using this provision rather than an action under the permit system,¹⁰⁵ this administrative procedure presents certain difficulties, discussed in the subsequent section.

2. *The Senate Approach*

The Senate bill eliminates these cumbersome conference and hearing procedures, since such procedures "would serve no purpose except delay in an enforcement program based on effluent limitations."¹⁰⁶ Instead, the bill would vest the states and the federal government with "concurrent" powers of enforcement.¹⁰⁷ Thus each state would be given the opportunity to develop its own administrative enforcement program. If the program met certain requirements enumerated by the bill, the Administrator would approve the program and allow the state to assume the responsibility of enforcement. Once a state's effluent limita-

¹⁰⁰ Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 amending 33 U.S.C. § 466 (1964) (codified at 33 U.S.C. § 1160 (1970)).

¹⁰¹ 33 U.S.C. § 1160(c)(5) (1970). Of course, where the Attorney General must receive the consent of the state, he must obtain the Governor's permission before proceeding. *Id.* § 1160(g)(2) (1970).

¹⁰² See *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1898).

¹⁰³ 33 U.S.C. § 1160(a) (1970).

¹⁰⁴ Compare *id.* with *id.* § 1160(c)(5) (1970).

¹⁰⁵ See EPA Guidelines on Water Pollution Enforcement, set forth at 2 BNA Env. Rep., Current Devs. 562 (Sept. 10, 1971).

¹⁰⁶ See S. Rep. No. 414, 92d Cong., 1st Sess. 64 (1971) [hereinafter cited as Senate Report].

¹⁰⁷ *Id.*

tions enforcement program has been accepted by the Administrator, the condition precedent to any federal action would be a failure to act on the part of the state.

The bill provides for two courses of federal action. First, if the Administrator should find "on the basis of information available to him" that any person is violating effluent standards, he must give thirty days' notice to the alleged violator and the state in which the violation occurred.¹⁰⁸ If the state failed to "commence appropriate enforcement action" within thirty days, the Administrator could issue an order to comply or bring a civil action for relief.¹⁰⁹ A second course of action available to the Administrator would be invoked where he "finds that violations of applicable effluent limitations . . . are so widespread that [they] appear to result from a failure of the State to enforce . . . effluent limitations effectively . . ."¹¹⁰ His finding would be made public if the state's noncompliance extended beyond thirty days,¹¹¹ and the period from the date of public notice until the state "satisfies" the Administrator that it will enforce the limitations is designated as a period of "federally assumed enforcement."¹¹² During this interval the Administrator would enforce any applicable effluent limitation by issuing an order or bringing a civil action.¹¹³

a. *The State-Federal Dichotomy.*—In the Senate report, the authors of the bill unequivocally reiterated the principle of state responsibility:

The Committee intends [that] the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.¹¹⁴

Unfortunately, in its efforts to reconcile the principle of state responsibility with the practical necessity of utilizing the federal enforcement ability, the Senate has ignored an important practical situation. That is, the fifty states are not easily separated into two categories: those ready and willing to enforce effectively and those that are unwilling or unable to enforce. This simple categorization overlooks a large number of states which inadequately enforce the law. The bill permits the Administrator to act if a state took no action at all.¹¹⁵ If, however, the state commenced "appropriate enforcement action," no matter how

¹⁰⁸ S. 2770, § 309(a)(1), 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 2770].

¹⁰⁹ Id.

¹¹⁰ Id. § 309(a)(2).

¹¹¹ Id.

¹¹² Id.

¹¹³ Id. § 309(a)(2)(A), (B). The bill also provides that any order issued by the Administrator and not complied with may be enforced by a civil action. Id. § 309(b)(1).

¹¹⁴ Senate Report, *supra* note 106, at 64. The bill also enunciates this principle in its statement of policy. S. 2770, § 101(b), note 108 *supra*.

¹¹⁵ S. 2770, § 309(a)(1), note 108 *supra*.

inadequate in the context of the entire enforcement process, the Administrator's hands would be tied. For example, a state might give a polluter an over-extended time in which to comply or file a complaint in court and then take no action on the problem. In both of these instances, "appropriate action" may have been commenced, yet the Administrator apparently would be powerless to intercede if the action were initiated, but not pursued.

The Administrator could use the power given to him by another provision of the bill to revoke his approval of the state enforcement program and to render it inoperable.¹¹⁶ However, this procedure would be extremely cumbersome, especially since the Administrator would have the burden of proving the entire program inadequate. In addition, if only one or a few violations were involved in the controversy, attacking the entire system of enforcement might be highly impractical. It is possible that if the state procedure continued in regard to a number of polluters, the Administrator could create a period of "federally assumed enforcement" under the bill.¹¹⁷ In such a situation, there is a danger that federal and state officials could waste valuable time arguing as to whether the state had sufficiently enforced the provisions of the act. This entire process is clearly cumbersome and unnecessary.

A major criticism of existing law, as noted earlier, has been that federal enforcers should be allowed to abate a violation where the state has failed to do so.¹¹⁸ A wiser alternative to the Senate approach would be to grant the federal government this power, unconditioned by any state efforts. Although the Senate bill has not adopted this approach in regard to effluent limitations, it has done so for purposes of enforcing the provisions dealing with "national standards of performance" and "monitoring systems."¹¹⁹ Thus to ease this potential state-federal conflict it would only be a matter of conforming the effluent limitations provision to this same approach.

It will, of course, be argued that allowing the federal government unconditional enforcement power with regard to effluent limitations will both violate the rights of those states which are willing and able to enforce them and, at the same time, cause a great deal of overlapping.¹²⁰ In practice, however, this will not occur. The Administrator's primary task is to abate pollution, not usurp states' rights. As a prac-

¹¹⁶ Id. § 402(c)(3).

¹¹⁷ Id. § 309(a)(2).

¹¹⁸ See text accompanying note 99 *supra*.

¹¹⁹ S. 2770, § 309(a)(3), note 108 *supra*.

¹²⁰ Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015 and S. 1017 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess. at 384, 548 (1971) [hereinafter cited as Senate Hearings]; Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 Mich. L. Rev. 1103, 1118 (1970) [hereinafter cited as Barry]. The argument has also been made that those subject to the law will completely bypass the state and look to the federal government since it would be the ultimate authority. Senate Hearings, *supra*, at 544.

tical matter, effective enforcement on the states' part would leave the Administrator more free to confront the numerous other problems which water pollution creates. At the same time, this approach should serve as an impetus to the states to develop effective enforcement programs in order to avoid federal intervention.¹²¹

b. *The Elimination of Administrative Procedure.*—Another criticism of the Senate bill has questioned the validity of the premise that notice followed by court action is the best method of enforcement. The authors of the Senate bill may be correct in their determination that existing law may require too much procedure, but the superfluity of procedure does not justify their eliminating the entire range of administrative remedies. The absence of at least one administrative hearing or conference may have two negative effects. First, it may mean the loss of a valuable enforcement tool against the consumer-conscious polluter. Frequently, a public hearing with its accompanying publicity serves as a strong—perhaps even stronger than the threat of litigation—incentive for such a polluter to comply with the control standard. Furthermore, in reality, pollution enforcement is rarely achieved by a simple reminder of the statutory limitations. Rather, enforcement is a complex procedure through which methods and schedules of compliance are mapped out.¹²² In light of the practicalities of the situation, it would seem that the enforcement official would have a great deal more control over the outcome in a conference proceeding than if the matter were adjudicated. Enforcement officials might also find it difficult to implement an overall plan for the several polluters of a specific body of water, since judicial decisions are often inconsistent from case to case and jurisdiction to jurisdiction.

The necessity of retaining the conference stage also seems advisable in light of the inefficiency of the American judicial system. Full scale litigation consumes a great deal of time and expense for both the enforcer and the violator. The enforcer might be prone to ignore small or marginal polluters for this very reason. Moreover, with the threat of enforcement litigation so slight, there would be little incentive for the small polluter to conform to effluent limitations. On the other hand, if the small polluter were prosecuted, he might, for litigation purposes, resort to funds that could be used for the purchase of needed abatement equipment. Assuming that the purpose of this legislation is to eliminate water pollution rather than to punish wrongdoers, exhaustion of a polluter's funds through litigation would be an undesirable result.

Although the value of the *in terrorem* effect of litigation as a bargaining tool is well recognized,¹²³ this enforcement tool alone is inadequate. What is needed to fill the void is a procedural vehicle, such as a statutorily required conference, through which the Administrator

¹²¹ Statement of William Ruckelshaus, 2 BNA Env. Rep., Current Devs. 968 (Dec. 10, 1971).

¹²² See Senate Hearings, *supra* note 120, at 69.

¹²³ The use of injunctions and temporary restraining orders, where appropriate, also must not be overlooked. See the provisions of S. 2770, § 309(b), note 108 *supra*.

and the alleged polluter may bargain.¹²⁴ Obviously, it is desirable for the Administrator to be empowered to abate violations without cumbersome procedural requirements in emergency situations, and under a separate provision of the bill he would have this power.¹²⁵ In this way, effective solutions could be obtained without incurring the cost and perils of litigation.

B. *The Permit System*

The permit system applies, in effect, a very common form of governmental regulation to the water pollution problem. By requiring a polluter to obtain a permit before discharging into a body of water, the system accomplishes two objectives: it notifies the enforcement officials of the polluter's presence, and it informs the polluter of his obligations. A permit system also vests the enforcement official with a certain amount of control over previolation behavior in the conditions he may impose on the permit. Furthermore, the official's efforts may extend over a broad range of pollution activity since an entire class or category of industries may be treated at the same time. Despite these advantages, there is the potential danger that permit conditions may be set too low. In such a case, a permit loses its enforcement qualities and becomes merely a legal permission to pollute.¹²⁶

1. *The Existing Law*

The present federal permit system is totally unconnected with the Water Pollution Control Act; rather, it finds the source of its authority in the Refuse Act of 1899.¹²⁷ Until 1970, when it was revised through an Executive Order,¹²⁸ the Act existed relatively unknown to enforcement agencies. Generally speaking, its provisions prohibit the dumping of refuse by any person into any body of water, with the one exception of liquid waste from streets and sewers.¹²⁹ Since the Refuse Act was enacted during the last century, it is questionable whether Congress in 1899 intended to include the modern conception of pollution in the

¹²⁴ As William D. Ruckelshaus, Administrator of the EPA, stated in a letter to the Senate Subcommittee, "a face [sic] finding forum . . . [may provide] a necessary prerequisite [in certain kinds] of court actions." Senate Hearings, *supra* note 120, at 69.

¹²⁵ S. 2770, § 504, note 108 *supra*.

¹²⁶ Senate Hearings, *supra* note 120, at 377.

¹²⁷ 33 U.S.C. § 407 (1970).

¹²⁸ Exec. Order No. 11,574, 3 C.F.R. 188-189 (1970).

¹²⁹ 33 U.S.C. § 407 (1970).

The Act prohibits the discharge of refuse into both navigable and nonnavigable waters, but requires permits to be issued only in the case of discharges into navigable waters. 33 U.S.C. § 407 (1970). Since 1899 the courts have widened federal jurisdiction to include tributaries of navigable waters as well, in order that down stream navigability might be protected. See p. 764 *supra*. The Army Corps of Engineers has followed suit by including nonnavigable tributaries within the scope of the system. 36 Fed. Reg. 6564 *et seq.* § 209.131(a) (1971). [The permit regulations took effect on April 7, 1971, and will be codified in 33 C.F.R. § 209.131. Citations will therefore be made to section numbers as they appear in the Federal Regulations, *supra*, and as they will appear in the Code of Federal Regulations.]

term "refuse." The Act was seemingly directed toward the problem of navigation, and with this as its goal it is highly likely that the term "refuse" was intended to describe debris which would obstruct navigation. However, throughout this century, the courts have given the term a liberal interpretation,¹⁸⁰ making it a "catch-all" applying to "matter of any kind, whether or not commercially valuable."¹⁸¹

a. *Operation of the Permit System.*—Administratively, the Refuse Act provides that the Secretary of the Army shall enforce its provisions, but the Act itself sets forth no standards to aid in the process.¹⁸² Consequently, the Army Corps of Engineers (Corps) has, pursuant to this authority, promulgated regulations which constitute the federal permit system.¹⁸³ These regulations declare all discharges, unless an exception applies, to be unlawful without the authorization of a permit.¹⁸⁴ In issuing a permit, the Corps will consider several criteria:

1. anchorage and navigation;
2. water quality standards and related factors; and
3. fish and wildlife values not covered by water quality standards.¹⁸⁵

In regard to the issuance procedures, the EPA plays a significant role in the permit-issuing process by advising the Secretary of the Army, concerning a) the meaning and content of applicable water quality standards; b) the impact of the proposed discharge on water quality; c) permit conditions required in order to comply with water quality standards; d) permit conditions necessary to carry out the FWPCA when water quality standards do not apply; and e) recommendations as to what the duration of the permit should be.¹⁸⁶ The EPA's influence is not, however, limited to its advisory position. The regulations also require that the Secretary accept the conclusions of the Regional Representative of the EPA that a potential permittee's discharge adversely affects water quality standards unless such conclusions are not supported by specific findings.¹⁸⁷ Since no permit may be issued which is inconsistent with these conclusions,¹⁸⁸ it would certainly appear that the EPA effectively controls much of the permit-issuing process.

Like the EPA, the states may also exercise some influence in the permit-issuing process. Thus, before a permit may be issued, the state

¹⁸⁰ For a discussion of the cases see Comment, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 58 Calif. L. Rev. 1444, 1448-52 (1970).

¹⁸¹ *Id.* at 1451.

¹⁸² See 33 U.S.C. § 407 (1970).

¹⁸³ 36 Fed. Reg. 6564 et seq. § 209.131 et seq. (1971).

¹⁸⁴ *Id.* at § 209.131(d)(4). The maximum duration of a permit is five years. *Id.* at § 209.131(N).

¹⁸⁵ *Id.* at § 209.131(d)(5).

¹⁸⁶ *Id.* at § 209.131(d)(7).

¹⁸⁷ *Id.* at § 209.131(d)(8), (9).

¹⁸⁸ *Id.* at § 209.131(d)(10), (11).

in which the applicant is located must certify that the issuance of such a permit will not have an undesirable effect on the state's water quality.¹³⁹ However, if the state does not exercise its right within a reasonable time, the certification is waived.¹⁴⁰

Beyond identifying the participants who are involved in the proceedings, the regulations contain additional procedural requirements. Notice¹⁴¹ is to be given and a public hearing held a) whenever in the opinion of a District Engineer it would be advisable to hold a hearing;¹⁴² b) when an affected state objects to the issuance of a permit and requests a hearing;¹⁴³ or c) when the Secretary proposes to suspend a permit where it violates water quality standards.¹⁴⁴

b. *An Assessment of the Permit System.*—To date the permit system has achieved limited success, with approximately twenty permits issued nationally.¹⁴⁵ The reason for such a small number lies more in the administrative inadequacies of the system than in any lack of initiative on the part of enforcement officials.¹⁴⁶ Factors such as incomplete applications, the invariable delays in state certification, and the necessity of designing complicated schedules for compliance as preconditions to the issuance of each permit may have caused much of the delay.¹⁴⁷ In addition, the relative novelty of the system may be a factor in its limited application; each time an existing enforcement procedure is modified or a new one is instituted, the change engenders a great deal of shifting of personnel and restructuring of operations, both of which increase delays and costs in the licensing procedure.

Besides these internal difficulties, a recent federal court decision, *Kalur v. Resor*,¹⁴⁸ seriously hampered the system's procedure; it held that an environmental impact statement must accompany each permit application. In its decision, the district court embraced a strict interpretation of the National Environmental Policy Act (NEPA).¹⁴⁹ That Act requires that in every "major Federal action . . . significantly affecting the quality of the human environment . . . [there must be included] a detailed statement . . . on . . . the environmental impact of the proposed action."¹⁵⁰ By its ruling the court has extended the principle of *Calvert Cliffs' Coordinating Committee v. Atomic Energy*

¹³⁹ Id. at § 209.131(h).

¹⁴⁰ Id. at § 209.131(h)(3). The states have been given certification authority by the 1970 Amendments to the Water Pollution Control Act, 33 U.S.C. § 1171(b) (1970), amending 33 U.S.C. § 1171 (1964).

¹⁴¹ 36 Fed. Reg. 6564 et seq. § 209.131(j) (1971).

¹⁴² Id. at § 209.131(k)(1).

¹⁴³ Id. at § 209.131(k)(5).

¹⁴⁴ Id.

¹⁴⁵ Chicago Tribune, Dec. 30, 1971, § 1, at 11, col. 4.

¹⁴⁶ Statement of Lieutenant General F. J. Clarke, Chief of Army Corps of Eng'rs, 2 BNA Env. Rep., Current Devs. 795 (Nov. 5, 1971).

¹⁴⁷ See id. and 2 BNA Env. Rep., Current Devs. 369 (July 30, 1971).

¹⁴⁸ Civil No. 1331, 3 E.R.C. 1458 (D.D.C., Dec. 22, 1971).

¹⁴⁹ 42 U.S.C. §§ 4331 et seq. (1970).

¹⁵⁰ Id. § 4332(C)(1).

*Commission*¹⁵¹ which held, in part, that the Commission must independently consider the impact that nuclear power plants might have upon water quality. The *Kalur* court took *Calvert Cliffs'* one step further by holding that the impact statement which NEPA requires applies not only to water quality determinations but also to "environmental improvement agencies," such as the Army Corps of Engineers, which had previously deferred to assessments made by the EPA.¹⁵²

While previous cases had recognized the Secretary's authority to consider environmental issues before issuing a permit,¹⁵³ it was assumed that express conformity with NEPA impact statement requirements was unnecessary with respect to EPA consultations. Similarly, another provision of NEPA declares that the duty to file an environmental impact statement does not affect the obligations of a federal agency to a) comply with environmental quality standards; b) consult with any other state or federal agency; or c) refrain from acting on the basis of recommendations of any state or federal agency.¹⁵⁴ The petitioner contended that although this judicial and statutory authority allows the Secretary to consult with the EPA and to balance state certification with other factors, it does not allow him to *abdicate* his authority to issue permits to another federal agency. The court agreed,¹⁵⁵ and ordered that environmental impact statements accompany all permits, thereby paralyzing the permit-issuing process.¹⁵⁶

The *Kalur* decision was not decided solely on the basis of statutory construction. The petitioner argued vehemently that the permit system itself was detrimental to the environment and urged that it be strictly construed. The court responded affirmatively to this contention in concluding that the "permit program only hinders the effectiveness of Congress' intent to keep our waterways clean for both navigation and environmental reasons."¹⁵⁷ Although the Corps initially claimed that an environmental impact statement would not be required for each of the 20,000 permit applications thus far received,¹⁵⁸ it has subsequently declared a moratorium on the issuance of all permits until Corps regulations are changed. The Corps, however, continues to process applications.¹⁵⁹

The *Kalur* court has similarly eviscerated the permit system by enjoining the Corps from issuing a permit for sources discharging into

¹⁵¹ 445 F.2d 1109 (D.C. Cir. 1971).

¹⁵² 3 E.R.C. at 1466.

¹⁵³ *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).

¹⁵⁴ 42 U.S.C. § 4334 (1970).

¹⁵⁵ 3 E.R.C. at 1467.

¹⁵⁶ See *id.* at 1468.

¹⁵⁷ *Id.* at 1464.

¹⁵⁸ See *Chicago Tribune*, Dec. 30, 1971, § 1 at 11, col. 4. Current regulations recognize the need for an impact statement when environmental subjects other than water are affected, but rely on assurances of the Council on Environmental Quality that the certification procedure is sufficient in the case of water quality and related water quality considerations. 36 Fed. Reg. 6564 et seq., § 209.131(L)(2) (1971).

¹⁵⁹ Noted at 2 BNA Env. Rep., Current Devs. 1088 (Jan. 7, 1972).

a nonnavigable body of water.¹⁶⁰ Thus the scope of the permit system has been made narrower than that of the FWPCA, which applies to navigable waters as well as their tributaries. As a result, the need for new legislation has become abundantly clear.

2. *The Senate Approach*

Initially, the Senate bill offers a solution to the problem of the limited scope of the permit system by incorporating the system into the FWPCA and defining navigable waters as "the navigable waters of the United States, portions thereof, and tributaries thereof. . . ."¹⁶¹ Thus the bill would eliminate the jurisdictional restrictions that the *Kalur* case imposed on the Refuse Act. Although the bill does not substantively change the basic approach of the permit system's method of enforcement, certain features of existing law have been retained and new ones have been added to insure a smooth functioning system, consistent with the goals of pollution abatement. Those features which have been retained include:

- a) the declaration that discharges without a permit are unlawful;¹⁶²
- b) the procedure by which permits are conditioned to assure compliance with applicable water quality requirements;¹⁶³
- c) the power of states to block effectively issuance of a specific permit by refusing to certify, and the waiver of that power by failing to act within a reasonable time;¹⁶⁴ and
- d) the issuance of all permits on the condition that they will not degrade the quality of affected water.¹⁶⁵

Among the changes proposed in the Senate bill, a principal measure would replace the Secretary of the Army Corps of Engineers with the Administrator of the EPA.¹⁶⁶ This measure was introduced with a view toward improving the efficiency of the system. Since the Administrator already administers most of the FWPCA, it is only sensible to grant him full legal authority.

Another change proposed in the Senate bill involves restructuring the jurisdiction of the state and federal governments under the Refuse Act. Dealing with one of the bill's more complicated problems, the authors of the bill confronted the difficult task of incorporating the permit system into the FWPCA, while attempting to reconcile the powers of the state and federal governments. Under existing laws, two separate systems exist in a few states: (a) the Refuse Act for federal enforce-

¹⁶⁰ 3 E.R.C. at 1468. See n.129 *supra* for background of prior law.

¹⁶¹ S. 2770, § 502(h), 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 2770].

¹⁶² *Id.* § 301(a).

¹⁶³ *Id.* § 402(a)(2).

¹⁶⁴ *Id.* § 401(a)(1).

¹⁶⁵ *Id.* § 402(h).

¹⁶⁶ See *id.* § 402(a)(1).

ment and (b) a state-developed permit system.¹⁶⁷ In approaching the problem, the authors were presented with four alternatives. First, the states could be given exclusive power to establish permit systems of their own. Although this alternative was advocated by many,¹⁶⁸ and would embody the ideal expressed in the state responsibility principle, it is questionable, in view of the states' poor performance under existing law, whether such an approach would be practical. A second alternative would create an exclusive federal enforcement program. This approach would not only be contrary to the principle of state responsibility, but might also be impractical. The network of state governments provides a useful framework for a permit system and should be used if possible.¹⁶⁹ Third, both the states and the federal government could have concurrent enforcement powers, with the federal government's power conditional on a state's failure to act. This alternative would produce some of the same problems discussed earlier in regard to administrative action.¹⁷⁰ A final alternative would give both the states and the federal government concurrent powers, without conditions attached to the federal power. The Senate bill adopts the latter approach.

In substance, the bill provides the Administrator with unlimited enforcement powers. However, if a state program met the statutory requirements, the Administrator could suspend the federal program for that state and allow the state program to continue.¹⁷¹ If the federal program were suspended, the state would still have to give the Administrator *opportunity to review each permit application* it receives.¹⁷² If the Administrator either were satisfied with the conditions of the permit or waived his right to review, the permit could be issued.¹⁷³ The Administrator could also waive his right to review in two other situations: where a state possessed expertise regarding a category or class of pollution sources, which the Administrator would recognize when he approved the state program;¹⁷⁴ and where the Administrator promulgated new regulations which he believed would adequately cover certain categories of sources.¹⁷⁵ Finally, if, after a public hearing, the Administrator found that a state was not maintaining its permit program properly, he could withdraw his approval of its system.¹⁷⁶ Thus, although the states would be given the opportunity to participate in the permit system, ultimate control would remain with the federal gov-

¹⁶⁷ See the discussion in 2 BNA Env. Rep., Current Devs. 207 et seq. (June 25, 1971) concerning the overlap of these two systems.

¹⁶⁸ See, e.g., Senate Hearings, *supra* note 120, at 459, 596. The states' position is well demonstrated in 2 BNA Env. Rep., Current Devs. 431 (Aug. 13, 1971).

¹⁶⁹ Senate Hearings, *supra* note 120, at 555.

¹⁷⁰ See text at pp. 765-67 *supra*.

¹⁷¹ S. 2770, § 402(b), (c)(1), note 161 *supra*.

¹⁷² *Id.* § 402(d)(1)(2), (3).

¹⁷³ See *id.* § 402(d)(2), (3).

¹⁷⁴ S. Rep. No. 414, 92d Cong., 1st Sess. 71 (1971) [hereinafter cited as Senate Report] in reference to S. 2770, § 402(e), note 161 *supra*.

¹⁷⁵ S. 2770, § 402(f), note 161 *supra*.

¹⁷⁶ *Id.* § 402(c)(3).

ernment. However, this relationship constitutes one of the major subjects for Nixon Administration criticism of the Senate bill.

3. *The Administration's Approach*

The Administration has praised the Senate bill's permit program as "an excellent solution which accommodates the existing permit program with the new effluent limitations."¹⁷⁷ However, the Administration tempered its praise by criticizing the state-federal relationship created by the bill: "the essence of a sound Federal-State partnership in a workable water pollution control program is to give both levels of government a meaningful and well defined role."¹⁷⁸ The Administration argues that under the Senate bill, a state which has demonstrated the ability to carry out its own permit system is not given a "meaningful delegation" of power.¹⁷⁹ Rather, the bill merely provides for the "imposition of a separate layer of government between the party applying for a permit and the government agency which issues the permit."¹⁸⁰ This added layer of government, the Administration urges, wastes both human and economic resources.¹⁸¹ In its place, the Administration would substitute a procedure which permits the Administrator to revoke all or part of a state's program when necessary, *thereby allowing him to review* those permits issued by the states within the ninety days preceding the revocation.¹⁸²

The Administration's assessment seems erroneously to be based on theoretical rather than practical inefficiency. In the report accompanying the Senate bill, its authors state:

Although the Administrator is given the authority to review any permit before it is issued by a State, the Committee expects that, after delegation, the Administrator will withhold his review of proposed permits which are not of major significance.¹⁸³

Thus, in practice, the Administrator would not duplicate the state efforts. Instead, he would only intervene in important cases to insure that the state is doing an adequate job. Under the Administration's proposal the Administrator would have to wait until the state handled a number of cases inadequately before he could revoke approval and, hopefully, undo the harm. In short, the real issue is whether the federal government is to be given the power to act immediately when states act irresponsibly. The Administration has advocated strong and

¹⁷⁷ Statement of William D. Ruckelshaus, 2 BNA Env. Rep., Current Devs. 968 (Dec. 10, 1971).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Senate Report, *supra* note 174, at 71.

swift federal enforcement powers.¹⁸⁴ Its approach to this matter seems to be totally inconsistent with the accomplishment of that objective.

C. Other Problems

In any discussion of possible improvements in water pollution legislation, two final areas require further comment. These are the problems of penalties and citizen participation in the enforcement process. Although neither of these problems is as controversial as effluent limitations or the permit system, they do play a significant role in the area of enforcement, and involve serious questions as to the proper role of government in an effective water pollution abatement system.

1. Penalties

The role of penalties in law enforcement in general has been the subject of debate among legal scholars.¹⁸⁵ One group, in adopting the traditional view, has argued that a potential law-breaker may be deterred from committing a crime by the penalty attached to it; the greater the penalty, the more deterrence there is.¹⁸⁶ Critics of this theory have contended that individuals do not behave rationally when breaking the law and that the penalty is only brought to their minds after the crime has been committed.¹⁸⁷ This may hold true with regard to homicides and burglaries, but it does not seem to apply in water pollution cases.

Since most pollution is caused by industrial concerns, penalties must be addressed to the businessmen who manage them. Normally, businessmen act quite rationally when evaluating the water pollution laws. Unfortunately, existing law does little to influence their decision to violate or comply with it. Although the FWPCA affords injunctive relief,¹⁸⁸ it does not penalize individual acts of pollution. Thus the polluter may continue to pollute throughout the process of administrative action until he is ordered to stop by a court. He is not held accountable for any of his violations prior to the issuance of the injunction. Under the Refuse Act there are criminal sanctions for violators, but the fines imposed are far less than the cost of abatement. Furthermore, the EPA has recommended to its regional offices that these sanctions be invoked only in cases of severe damage.¹⁸⁹ As a result of their ineffectiveness, these penalty provisions make neglect more profitable than abatement.¹⁹⁰ Clearly, legislation is needed to create the opposite incentive.

¹⁸⁴ See text at p. 763 *supra*.

¹⁸⁵ For a general discussion see S. Kadish and M. Paulsen, *Criminal Law and Its Processes* 64-94 (1969).

¹⁸⁶ E.g., *id.* at 83, 84.

¹⁸⁷ E.g., *id.* at 84, 85.

¹⁸⁸ 33 U.S.C. § 1160(h) (1970).

¹⁸⁹ EPA Guidelines on Water Pollution Enforcement, 2 BNA Env. Rep., Current Devs. 562 (Sept. 10, 1971).

¹⁹⁰ See Barry, *The Evolution of the Enforcement Provisions of the Federal Water*

The Senate bill has responded to this need by establishing a system of criminal and civil penalties. Those penalties which are to be assessed against persons who "willfully or negligently" violate an effluent limitation or permit, include:

- a) *First offense*.—A criminal fine of not more than \$25,000 nor less than \$2,500 per day of violation, or a prison term of not more than one year, or both.
- b) *Second offense*.—A criminal fine of not more than \$50,000 per day of violation, or a prison sentence of not more than two years, or both.¹⁹¹

Although its fines are substantial, the Senate bill seems to avoid the pitfalls of laws which are simply too stringent to be enforced. Often, because of the harshness of a law's penalty, an enforcement official may be reluctant to prosecute a violator, and a judge, even more hesitant to convict him. Although a \$2,500 fine is considerably greater than the \$500 minimum requirement of the Refuse Act,¹⁹² it does not reach the point of diminishing enforcement returns. In fact, the bill's scope gives a court considerable latitude to make abatement more profitable than pollution.

There still remains, however, a problem as to the use of these penalties. This is largely the result of a lack of an administrative forum in which the penalties may be used as bargaining chips. Although this problem has already been discussed above, under "administrative action,"¹⁹³ the point bears further mentioning here. Very little time is given to the polluter to comply with the threat of an unprofitable penalty after he has been detected.¹⁹⁴ If the function of the law is to secure compliance rather than collect fines, a valuable feature of strong penalties is at least partially lost here since compliance will not avoid the penalty. Moreover, the violator may, in facing the certainty of a fine, engage in dilatory litigation in order to delay as long as possible his payment of the fine.

The Senate bill has also added two other penal features to present law. The first would impose a possible \$10,000 criminal fine and a six months' jail sentence for making false representations on documents, or for tampering with monitoring devices.¹⁹⁵ If these penalties are actually enforced, the detection stage of an enforcement program will be greatly strengthened. However, their effectiveness may be limited by less than diligent observance of self-monitoring duties under the bill.¹⁹⁶ Similarly, the criminal sanctions placed upon individual acts of

Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation, 68 Mich. L. Rev. 1103, 1121 (1970).

¹⁹¹ S. 2770, § 309(c) (1) (E), note 161 supra.

¹⁹² 33 U.S.C. § 411 (1970).

¹⁹³ See text at pp. 767-68 supra.

¹⁹⁴ See S. 2770, § 309(2), note 161 supra.

¹⁹⁵ Id. § 309(c) (2).

¹⁹⁶ See note 47 supra.

pollution may be stymied by Fifth Amendment self-incrimination restrictions on the use of monitoring evidence.¹⁹⁷

The second added penalty feature is the "Federal Procurement" provision of the bill. It provides that:

No Federal agency may enter into any contract with any person, who has been convicted [under the enforcement provision], for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person.¹⁹⁸

This provision makes it clear that the federal government will not "patronize or subsidize polluters through its procurement practices. . . ." ¹⁹⁹ This proposal is an adaptation of a Pennsylvania procedure which removes polluters from the Commonwealth's bidding and purchasing lists until they comply with the pollution control regulations.²⁰⁰ The Senate approach, however, seemingly lacks the stringency of the Pennsylvania law. For example, a company could, under the proposed procurement regulation, have one of its nonpolluting plants submit a bid and transfer its other work to one of the company's polluting plants. However, the report accompanying the Senate bill has specifically recognized the possibility of this abuse and has indicated that the enforcing agency will require the polluting plant to achieve compliance with the law before any contract will be offered to the nonpolluting plant.²⁰¹

While stiffer penalties will provide some stimulus for change, some questions remain as to whether violations will be detected. If there is no guarantee of the detection, then the likelihood of few prosecutions will encourage industry to ignore the control standards, regardless of the possible penalties.

2. Citizen Participation

To increase the likelihood of detection, the Senate bill includes provisions to encourage citizens' suits. Although the concept of such suits is not novel,²⁰² its inclusion in the Senate bill has elicited both praise and criticism. Proponents of this measure have argued that "the public is clean water's best lobby." Therefore, the law should, in their view, provide a method whereby citizens may redress the imbalance

¹⁹⁷ Senate Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015, and S. 1017 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess. at 593 [hereinafter cited as Senate Hearings].

¹⁹⁸ S. 2770, § 508(a), note 161 *supra*.

¹⁹⁹ Senate Report, *supra* note 174, at 83.

²⁰⁰ Senate Hearings, *supra* note 197, at 1239.

²⁰¹ Senate Report, *supra* note 174, at 84.

²⁰² See Comment, The Clean Air Amendments of 1970: Better Automotive Ideas from Congress, 12 B.C. Ind. & Com. L. Rev. 571, 612-16 (1971).

created by the inadequate enforcement activity of government bureaucrats.²⁰³ Such a provision would aid water pollution enforcement in two ways: 1) by enforcing the law against pollution which the government has ignored, and 2) by pressuring enforcement officials to perform competently.

In contrast, critics of citizen participation argue that citizen suits would only harass government officials, produce a multiplicity of actions and encourage the exploits of self-seeking citizens.²⁰⁴ Critics have also claimed that citizens are already provided with a number of alternatives for individual action by existing law.²⁰⁵ A brief examination of existing law reveals, however, that the critics are in error and that, in fact, these alternatives are limited. Under the Refuse Act, for example, one who informs the Attorney General of an alleged permit violation is entitled to one-half of the fine, upon conviction of the violator.²⁰⁶ Under the Act, the traditional suit, a *qui tam* action, is "brought under a statute that establishes a penalty for the commission or omission of a certain act and gives the penalty, in whole or part, to anyone who sues for it."²⁰⁷ To date, several of these suits have been brought in federal district courts; all, however, have been dismissed because of the plaintiff's lack of standing to sue.²⁰⁸ The courts have strictly construed the Refuse Act as permitting only the Attorney General to bring an action, through the U.S. Attorney, in the federal district where the violation occurs.²⁰⁹

In addition, the common law has provided citizens with several other alternatives. For instance, a citizen owning waterfront property may sue on a private nuisance theory if his use and enjoyment of that property are being substantially impaired.²¹⁰ He may also sue on a riparian rights theory if he can prove that the polluter has put the water to an unreasonable use or if the court will accept the "natural-flow" theory of recovery.²¹¹ A citizen not owning waterfront property

²⁰³ Senate Hearings, *supra* note 197, at 647.

²⁰⁴ *Id.* at 755.

²⁰⁵ *Id.*

²⁰⁶ 33 U.S.C. § 411 (1970).

²⁰⁷ Comment, The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution, 58 Calif. L. Rev. 1444, 1459 (1970). In bringing such a suit, the plaintiff presents himself to the court as a person suing for himself and the government. *United States v. Griswold*, 24 F. 361 (D. Ore. 1885).

²⁰⁸ See, e.g., *Mitchell v. Tenneco Chem., Inc.*, 331 F. Supp. 1031 (D.S.C. 1971); *Bass Angler Sportsmen Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (N.D. Ala. 1971).

²⁰⁹ *Id.*

²¹⁰ See Comment, *supra* note 207, 58 Calif. L. Rev. at 1463; Davis, Theories of Water Pollution Litigation, 1971 Wis. L. Rev. 738, 740-41.

²¹¹ Davis, *supra* note 210, at 739. The natural flow concept in riparian rights litigation gives a riparian owner a right of action against an upstream owner who changes or alters the natural flow of the body of water upon which both owners are located. *Id.* at 745-46. Because of its drastic potential effect on industry, courts are more prone to follow the reasonable use theory of riparian rights. See *id.* 746. The reasonable use theory allows an upstream riparian owner to put water to a reasonable use. Thus only in the

is, of course, limited in water pollution cases to a cause of action for public nuisance where he can prove special damages.²¹² As a counterpoise to these rights, agency regulations may provide four different defenses:

1. the exclusive jurisdiction of the administrative agency could preclude a court from hearing a common law action;
2. compliance by the defendant with an administrative pollution abatement order could bar the action;
3. failure to exhaust administrative remedies could delay the action;
4. the rule of primary jurisdiction could bar the action.²¹³

As the analysis suggests, critics of the citizen suit proposal and the enforcement provisions in general are not quite accurate. Use of the citizen suit is currently limited and if it is to be effective, it must be bolstered as the Senate bill proposes.

The citizen suit provision within the bill authorizes a suit by "any person" against both the polluter (including governmental agencies) who has violated effluent standards, and the Administrator, if he has failed to perform his duties.²¹⁴ Suits against polluters could not be commenced until sixty days after the citizen has given notice to the Administrator, the state and potential defendant,²¹⁵ while suits against the Administrator could be commenced at any time after notice has been given.²¹⁶ The waiting period in the case of a suit against a polluter would give the enforcement authority a chance to act on the matter itself.²¹⁷ If the state or Administrator has in fact commenced and is diligently prosecuting an action in a federal court, the citizen could not bring his suit; he could, however, intervene in the government's case.²¹⁸ However, if the court decided that the state or Administrator's action was inadequate, it could still take jurisdiction over

most blatant cases of pollution can a downstream riparian owner-plaintiff ever expect to bring a successful action. *Id.* at 746-47.

²¹² *Id.* at 741.

²¹³ *Id.* at 768 et seq.

²¹⁴ S. 2770, § 505(a)(1), (2), 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 2770]. Jurisdiction and venue are important considerations. Although district courts are given jurisdiction over these actions without regard to the citizenship of the parties or the amount in question, *id.* § 505(a), venue in effluent standards cases is restricted to the district in which the violating source is located. *Id.* § 505(c)(1). Thus, if a number of suits were brought against the same source, they could be joined under the Federal Rules of Civil Procedure. See, Senate Hearings, *supra* note 197, at 699; see also Fed. R. Civ. P. 19.

²¹⁵ S. 2770, § 505(b)(1)(A), note 214 *supra*.

²¹⁶ *Id.* § 505(b)(2).

²¹⁷ Senate Report, *supra* note 174, at 80.

²¹⁸ S. 2770, § 505(b)(1)(B), note 214 *supra*.

the citizen's case,²¹⁹ but the Administrator would have the right to intervene.²²⁰

A citizen could base his cause of action on violations of effluent limitations. If a violation existed, the court could apply a civil penalty.²²¹ However, the citizen who brings the suit would not be entitled to any part of the penalty.²²² If he has suffered personal damages, the provision would allow him to sue by himself or in a class action under any other statute or the common law.²²³ Apparently, these latter provisions are meant to discourage those self-seeking citizens of whom the critics warned. An additional safeguard is included in the bill to insulate individuals and businesses from spurious claims: the court would be given the authority to award court costs.²²⁴ This provision would protect defendants from frivolous suits and would also reimburse plaintiffs who win their cases by judgment when the polluter has since ceased his polluting.²²⁵ In large measure, the Senate bill's citizens' suit provision withstands the criticism of its opponents. Citizens would be given the right to act where the system has failed them, and at the same time, their activity is structured in such a manner as to improve, rather than impede, the enforcement system.

CONCLUSION

In 1948 Congress, for the first time, directed serious attention toward the problem of water pollution by enacting the Federal Water Pollution Control Act. In spite of the salutary intention of this legislation, the problems of water pollution continued to proliferate. Thus on several subsequent occasions Congress attempted to respond by enacting a series of subsequent amendments. Present law, particularly in the area of enforcement, continues, however, to be less than adequate. Among other factors, cumbersome standards, overly complex administrative procedures and the lack of a clear-cut separation of federal-state enforcement powers have significantly limited the effectiveness of these legislative attempts to abate water pollution.

Not surprisingly, a broad range of answers has been suggested to solve the numerous problems inhering in existing water pollution enforcement procedures. Senate bill S. 2770 represents an attempt to deal with these problems by proposing a radically novel legislative schema of answers. The bill provides for (a) the use of the effluent limitation as the standard for enforcement, with due consideration

²¹⁹ Senate Report, *supra* note 174, at 80. The bill also provides that a Governor of a state may bring an action against the Administrator where he finds that the Administrator has failed to enforce a violation of an effluent standard in another state which is adversely affecting his own. S. 2770, § 505(g), note 214 *supra*.

²²⁰ *Id.* § 505(c)(2).

²²¹ *Id.* § 505(a).

²²² Senate Report, *supra* note 174, at 79.

²²³ S. 2770, § 505(e), note 214 *supra*.

²²⁴ *Id.* § 505(d).

²²⁵ S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971).

WATER POLLUTION LEGISLATION: CURRENT PROPOSALS

given to its ultimate water quality impact; (b) a speedy and more efficient administrative enforcement procedure; (c) the incorporation of the discharge permit system into the Federal Water Pollution Control Act; (d) the introduction of both strong penalties and citizen suits into the enforcement process; and (e) the establishment of a sounder balance of state-federal enforcement powers throughout the entire enforcement process. Although these provisions individually have failed to gain unanimous approval, as a whole they constitute the most operative alternative to existing law.

Equally important, the Senate bill indicates a new attitude on the part of legislators toward effective water pollution abatement; the proposed legislation evidences a necessary willingness on their part to experiment with new concepts, such as effluent limitations and strong federal enforcement. However, in order to be successful, this attitude must be implemented and sustained. Furthermore, if today's proposal should become tomorrow's failure, it should also be abandoned for the sake of the viable alternative.

HENRY R. HOPPER