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EFFLUENT CHARGES: WATER POLLUTION CONTROL

I. INTRODUCTION

Although there is little argument about the existence of a national water pollution problem, there are contrasting opinions about the urgency of that problem and the harmful nature of its effects. Health officials, for example, have warned that the United States has become dangerously susceptible to outbreaks of water-borne epidemics.¹ In support of this contention, it was reported in a recent congressional hearing that 228 water-borne disease outbreaks occurred from 1946 to 1960.² Similarly, testimony further revealed that 50 million Americans were drinking water that fails to conform with Public Health Service Drinking Water Standards, and that another 45 million Americans were drinking water that has not even been tested by the Public Health Service.³ On the other hand, other experts see the principal danger of water pollution not as a health threat, but as an encroachment on the beauty of our natural resources. Two leading water resource economists argue that the great expense of improving water quality cannot be justified on the basis of insuring public health, and that current water quality is both adequate and easily maintainable for this purpose.⁴ In support of their contentions, they allege that water quality improvement or deterioration has no significant impact upon industrial costs or benefits, and that toxic elements in municipal water supplies, comprising only a small amount of drinking water, are separable.⁵ Far from negating the need for water quality improvement, however, these arguments merely indicate the costs of water quality improvement relative to the benefits derived therefrom. Thus, whether the problem is viewed as an eminent health hazard or as a threat to the beauty of our environment, there is an expressed public demand for quality water.

Even if no immediate disaster is foreseeable, the evident concern indicates that future water problems and the possibility of

¹ Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 189 (1966).

² *Hearings on Environmental Quality before the House Comm. on Science and Astronautics*, 90th Cong., 2nd. Sess., pt. 1, at 179 (1968) [hereinafter cited as *1968 House Hearings*].

³ *1968 House Hearings* at 180.

⁴ A. KNEESE & B. BOWER, *MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS* 125-6 (1968) [hereinafter cited as *KNEESE & BOWER*].

⁵ *KNEESE & BOWER*, 125-126.

circumventing them should be examined. For example, it has been predicted that by the year 2000 the amount of fresh water available in the United States will fall short of demand by 350 billion gallons per day.⁶ Another commentator foresees a decline in the American standard of living to only a subsistence level in 200 years if present rates of rainfall, population growth, and water use demand are combined with current treatment and use methods.⁷

Assuming that mobilized national concern will prevent such a drastic reduction in the American standard of living, man must still contend with the increasing contamination of his environment by wastes whose effects upon him are as yet undetermined. Testimony presented to a congressional hearing revealed that potentially carcinogenic and toxic substances have been identified in our water sources, although at levels not currently believed hazardous to health.⁸ Whether the presence of such substances at current levels represents a danger to health is uncertain, because of insufficient research on long-term implications of the multitudinous known and unknown destroyers of our environment.⁹ Nevertheless, it is possible that the limits of human adaptability may eventually be exceeded by the addition of massive chemical and mechanical pollution to the environment. Of course, national concern for the environmental problem of water pollution has been manifested previously, an example being the 1948 Water Pollution Control Act.¹⁰ Despite attempts to control water pollution, however, the problem remains and grows.

Various schemes to abate pollution have been proposed as the answer to the problem: expansion of existing treatment facilities; imposition of heavy penalties on individual polluters; granting tax incentives to reduce pollution; an absolute prohibition on dumping of certain or all pollutants; and the imposition of effluent¹¹ charges. The particular remedy that is pursued should be selected on the basis of its ability to eliminate the root causes of pollution. Therefore, before an effective solution may be formulated, it is necessary to consider the reasons for the existence of the water pollution problem.

⁶ Hines, *supra* note 1, at 187-188.

⁷ THE WATER CRISIS, vol. 38, no. 6, p. 23-24 (G. Nikolaieff, ed.).

⁸ 1968 House Hearings 178 (remarks of Dr. Leon Weinberger).

⁹ *Hearings on the Adequacy of Technology for Pollution Abatement before the House Comm. on Science and Astronautics*, 89th Cong., 2nd. Sess., pt. 1, at 458 (1966) (remarks of Dr. Abel Wolman) [hereinafter cited as *1966 House Hearings*].

¹⁰ 33 U.S.C. § 466 (1965).

¹¹ An effluent is a pollutant that flows out; specifically, the outflow of a sewer or sewage tank.

II. CAUSE OF POLLUTION

Water pollution exists because water is an underpriced good. In other words, the value of water exceeds the price which must be paid for it. People and industry naturally tend to minimize their individual costs by using relatively inexpensive goods; hence, water is consumed in great quantities. Unfortunately, one by-product of extensive water use is pollution, which damages the environment and imposes costs in the form of decreased water quality on subsequent water users.¹² Consequently, a pollution problem exists because individuals are encouraged to consume water in a way that damages the environment.

In order to prevent further water pollution, it is necessary to create a market which will assign to water a price that will serve as an incentive to users to minimize water consumption. The effluent charge system is ideally suited to accomplish this task. This system is a pricing mechanism which would charge each consumer the total cost¹³ of each unit of water purchased, including the costs attributable to the pollution his consumption may create. The charges would provide an incentive for users to reduce pollution.¹⁴ The funds which are collected from those who continue to pollute¹⁵ would be used to ameliorate water quality.¹⁶

¹² These costs include health dangers, foregone aesthetic and recreational benefits, increased industrial costs, and the burdening of municipal water treatment facilities with more wastes than the facilities can treat.

¹³ That total cost is the composite of costs necessary to supply water and to ameliorate quality, *i.e.*, planning, construction of facilities, operation and maintenance of facilities, and administration of an effluent charges system.

¹⁴ Users can reduce pollution by decreasing water consumption, employing methods of water use that would minimize pollution, or building their own treatment facilities. Several industries actually faced with sewer charges for excessive pollution have changed production methods in order to minimize sewer charges. KNEESE & BOWER, 168-169.

Contrary to predictions that pollution control will drive some industries out of business, some industries will actually enjoy net savings and profits by becoming more efficient water users, *i.e.*, by water recirculation, materials recovery, changing the product mix, or using cooling tower programs. When a commercial laundry installed a concrete sump which removed suspended solids from and cooled its discharge water, the result was a net saving in its production costs, even though the costs included a sewer charge. KNEESE & BOWER, 169-170.

¹⁵ As of now, every polluter is receiving an indirect subsidy through municipally financed treatment of wastes, through undercharging water users for water services, and through costly or irremedial damage to the environment. Under an effluent charge system those water users actually needing a subsidy would have the burden of obtaining a direct subsidy. It is conceded that industrial polluters who pay effluent charges will probably pass this cost on to the purchasers of their product. However, it should be recognized that this is the means by which consumers are allowed to make value judgments regarding particular water uses. Purchasers of goods will be able to signify their approval or disapproval of a certain water use by purchasing or not purchasing certain goods, the price of which reflects the environmental costs of a certain water use. An effluent charges system would thus create a water price structure which would, by reflecting the relative scarcity of water for certain uses, allocate water to those uses which would ensure that desired water quality levels will be achieved.

¹⁶ The Department of the Interior conservatively estimated that the capital outlays

The charges would be calculated so that each consumer would pay a price reflecting the burden that he imposes upon the assimilative capacities of surface waters. Thus, each polluter would pay his pro rata share of that expenditure necessary to improve water quality. Presently, the lawful water quality level in each state is approved or promulgated by the Secretary of the Interior under the 1965 Water Quality Act,¹⁷ although some states impose more stringent standards. Despite the existence of defined water quality standards and the ability to determine whether water quality meets those standards,¹⁸ one must still determine the cost of restoring and maintaining important water quality characteristics. A recent study indicates that such charges can be calculated by apportioning the total costs of the water maintenance program to individual polluters. The 1966 Delaware Estuary Study, indicating that an effluent charge can be calculated in certain circumstances,¹⁹ concluded:

required to achieve federally approved water quality standards for the period 1969 through 1973 would be \$14.9 billion. This represents three times the total water quality control expenditure in the United States by all levels of government between 1962 and 1966. If federal appropriations continue to fund only one half of authorized grants, state and local governments will be required to spend \$12.7 billion from 1969 to 1973, or three times their expenditures from 1962 to 1966. If federal appropriations were to equal authorizations for water pollution control, state and local governments would have to provide approximately \$11 billion. FED. WATER POLLUTION CONTROL ADMIN., DEPT. OF INTERIOR, THE COST OF CLEAN WATER 9-10 (1968) [hereinafter cited as THE COST OF CLEAN WATER]. A greater amount of money than previously made available must be provided in order that progress may be made in meeting desired water quality standards.

¹⁷33 U.S.C. 466g (c) (1965). As of 1969, 49 states, three territories and the District of Columbia standards had been approved. *Hearings on Water Pollution before the Senate Comm. on Public Works*, 91st Cong., 1st Sess., pt. 4, at 1030 (1969) [hereinafter cited as *1969 Senate Hearings*].

¹⁸ It is currently known how to measure important water quality characteristics instantaneously or over time periods of one month by continuous monitoring. In 1968 the United States Geological Survey was engaged in continuous and periodic monitoring of 8,000 surface water sites, and was completing plans for collecting all information in a master data bank. *1968 House Hearings* 200 (remarks of W. T. Pecora, Director of U.S. Geological Survey, Department of the Interior). In 1967, the Ohio River Valley interstate compact agency, ORSANCO, reported that it was able to survey by robot monitoring ten different water quality characteristics from as many as 40 different locations. The monitoring system assembled data on quantity and quality variations. ORSANCO also reported success with tracing spills and accidental discharges. E. CLEARY, THE ORSANCO STORY 197-210 (1967).

¹⁹ The study calculated the magnitude of charges necessary to reach a specified water quality in a specific body, the Delaware Estuary. Sophisticated monitoring and computer simulation of individual polluters' dumping behavior were used to estimate the costs of waste removal financed by effluent charges. Four cost allocation methods were used to calculate the charges necessary to achieve five alternate levels of dissolved oxygen in the estuary. The study assumed that an individual polluter would not reduce its waste generation and that the quality to be ameliorated was one of a low oxygen level, thereby maximizing cost estimates. Johnson, *A Study in the Economics of Water Quality Management*, 3 WATER RESOURCES RESEARCH JOURNAL 291-5 (1967).

It is unlikely that a perfectly accurate effluent charge could presently be calculated. A strict cost-benefit analysis would make effluent charges impossible of accuracy, because we cannot presently measure aesthetic and recreational value components of water quality. KNEESE & BOWER, 127. If the benefits of high water quality cannot be so measured, then

[E]xcept in isolated cases, occurring at unrealistic levels of charges, per capita cost of indirect treatment plus charge payments do not appear to be unreasonably high.²⁰

The Estuary Study further concluded that a scheme of charges could achieve desired water quality at lower treatment costs than conventional waste treatment.²¹

III. INSTITUTIONAL ARRANGEMENTS

Any level of government—federal, state, or local—could administer a system of effluent charges. There are, however, problems peculiar to each of these levels which must be considered if the effectiveness of such a system is to be maximized. For example, if an effluent charge system is instituted at the local level, limits which our laws place on municipal jurisdictional power may diminish the impact of the program.

The history of water pollution control efforts in St. Joseph, Missouri, illustrates this problem. Because of that municipality's lack of jurisdiction over upstream polluters, meat packers outside the city limits dumped their wastes into the Missouri River with impunity. Neither state nor federal enforcement officials were able to expedite control procedures. Consequently, four years elapsed between the first enforcement attempt and the eventual resolution of the dispute by the passage of a bond issue to finance construction of necessary treatment facilities.²²

A second problem in administering an effluent charge program on a local level is that responsibility remains so fractionated that it is extremely difficult to realize either comprehensive planning or

the damage to those benefits caused by pollution likewise cannot be given a dollar value. Consequently, it is presently impossible to assign a dollar price to water which reflects all the costs of water use; however, the problem of realizing a theoretically ideal pricing mechanism has been mooted by the 1965 Water Quality Act. See note 17, *supra*. By this legislation, Congress has ordered the states to establish water quality standards which are acceptable to the Department of the Interior. It will require the expenditure of an ascertainable sum of money to meet such standards, and that cost will determine the price of water to be assigned to each consumer.

As the analysis of real costs and benefits to various users for different water uses becomes more refined, data derived therefrom could be used to set charges in a comprehensive water development program which would not only comply with federally approved water quality standards, but would also respond more accurately to the public demand for water quality. For the near future, however, federally approved standards must be met and costs must be assessed accordingly. Although federally approved standards may not accurately identify the real costs of water pollution, this imperfect method of estimating true collective public costs created by water pollution is the best presently available.

²⁰ Johnson, *supra* note 19, at 303. For individuals, the estimated cost ranged from \$0.49 to \$7.72 per person per year to attain a reasonable water quality level; for industry, costs ranged from 1.2% of output value to a maximum of 5% of value for paperboard mills.

²¹ Johnson, *supra* note 19, at 306.

²² LEAGUE OF WOMEN VOTERS, THE BIG WATER FIGHT 41, 43 (1966).

effective pollution abatement. For example, it would be inefficient and ineffective to construct and operate municipal waste treatment facilities when a significant source of pollution is jurisdictionally immune from the municipality's power to charge for use of treatment facilities. It would also be inefficient to ignore possible scale economies for pollution control accruing from a comprehensive water resource unit.

An effluent charge system instituted at the federal level would also encounter serious problems. First, the history of congressional appropriations does not support an expectation that the federal government will finance a substantial part of water pollution control costs.²³ It has been estimated that for the years 1969 through 1973 it will cost \$15 billion to *achieve* federally approved water quality standards;²⁴ an estimated additional \$110 billion will be required over the next thirty years to *maintain* acceptable water quality.²⁵ From the beginning of the construction grants program in 1956 through 1968, total federal grants were only \$960 million.²⁶ Total project costs in the United States for that same period, however, were \$4,598 million.²⁷ If federal appropriations continue in the same manner, state and local governments will be required to provide \$12.7 billion of the estimated \$15 billion necessary for the years 1969 through 1973.

Perhaps an even greater obstacle to implementation of an effluent charge program at the federal level is political acceptability. A majority of the 47 state governors polled in a 1966 House of Representatives study disapproved of federally imposed effluent charges, but several suggested that state imposed charges might be appropriate.²⁸ It was pointed out that despite the success of the Tennessee Valley Authority in revitalizing an economically depressed region, this autonomous, managerially independent, federal regional authority has received little acceptance outside

²³ The states have already been carrying the greatest financial burden in water pollution control. Note 16, *supra*. See also 33 U.S.C. 466 (b):

[I]t is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states in preventing and controlling water pollution . . . and to provide . . . financial aid to states and interstate agencies and to municipalities in connection with the prevention and control of water pollution.

²⁴ THE COST OF CLEAN WATER, *supra* note 16, at 9.

²⁵ Carmichael, *Forty Years of Water Pollution Control in Wisconsin*, 1967 WIS. L. REV. 350, 415 (citing, Hanks and Kube, *Industry Action to Combat Pollution*, 44 HARV. BUS. REV. 49, 57-9 (1966)).

²⁶ 1969 Senate Hearings, pt. 1, at A 70.

²⁷ 1969 Senate Hearings, pt. 1, at A 70.

²⁸ *Hearings on Activities of the House Comm. on Government Operations before the House Comm. on Government Operations*, 89th Cong., 1st & 2nd Sess. 48 (1966). Works are "financed by a system of charges designed to cover, to the extent practicable, construction costs of such works and operating and maintenance costs."

the Valley. Similarly, federal administrators have repeatedly rejected the idea of more agencies of this nature when proposals for TVA-type solutions to national problems have been advanced.²⁹ Moreover, experiences of the Arkansas-White-Red River Basins Inter-Agency Committee and the Texas Commission indicate that comprehensive federal water management programs, administered through the joint efforts of relevant federal agencies, would foster undesirable inter-agency competition.³⁰ Nor will implementation of an effluent charge system at the state level completely avoid administrative problems. For example, many jurisdictional problems encountered with a municipally controlled program will also be present under state administration. Furthermore, economies of scale possible through massive water treatment programs may not be realized to the extent that inter-state cooperation will be required. Finally, many people believe that the states are less sensitive to public needs than other levels of government, however, these charges may be unfounded.³¹

Notwithstanding these potential obstacles, the problems of administering an effluent charge system at either the federal³² or municipal³³ level are such that at the present time such a system is best administered by the state. Therefore, the remainder of this comment will discuss the constitutional problems of implementation of state programs designed to solve the problem of water pollution.

IV. CONSTITUTIONALITY OF THE STATE ACTIONS NECESSARY FOR WATER POLLUTION CONTROL

A successfully administered state program of water pollution control based on effluent charges will require the state to construct, operate, and maintain all treatment and water resource

²⁹ P. SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* 78, 262 (1966). The very same factors so crucial to TVA's success have probably created opposition to similar experiments with independent federal regional agencies: freedom from Civil Service requirements, freedom to apply revenues to current operating expenses without accountability to Congress, and power to make regional planning decisions and to carry them out by coordinating state, local and other federal agencies.

³⁰ R. PEALY, *COMPREHENSIVE RIVER BASIN PLANNING: THE ARKANSAS-WHITE-RED RIVER BASINS INTERAGENCY COMMITTEE EXPERIENCE* 53 (U. of Mich., Institute of Public Health 1959); and R. PEALY, *ORGANIZATION FOR COMPREHENSIVE RIVER BASIN PLANNING: THE TEXAS AND SOUTHEAST EXPERIENCE* 152, 159 (U. of Mich., Institute of Public Health 1959).

³¹ See, *1966 House Hearings* 487. Dr. Abel Wolman remarked:

[C]ontrary to undocumented pronouncements of those who have recently 'discovered' the pollution problem, the record of many state agencies has been outstanding in dealing with it . . . long before pollution was a high-pitched political issue . . . substantial progress was made by the states.

³² See notes 23-30, *supra*.

³³ See note 22, *supra*.

facilities and to calculate and impose charges over the whole state. Water treatment traditionally has been performed by political subdivisions (hereinafter "municipalities") of the states. Consequently, to exercise the required control, it would be necessary for the state to appropriate municipally owned and operated facilities either by eminent domain or by legislation transferring control of such facilities to state agencies.

The United States Supreme Court held in *Hunter v. City of Pittsburgh*³⁴ that a state's power to exercise eminent domain over, or transfer control of municipal property to state agencies is unlimited by the Federal Constitution but subject to any state constitutional provisions. Indeed, *Hunter* has provided the basis for the doctrine that, except where limitations have been imposed by the state constitution, the powers of a legislature with respect to its municipalities are unlimited.³⁵ The philosophy underlying this doctrine of legislative supremacy is that:

In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.³⁶

³⁴ 207 U.S. 161 (1907). The Court held at 175-179 that the Pennsylvania legislature could permit consolidation of the governments and property of the cities of Allegheny and Pittsburgh. The rationale of the decision was:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. *The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.* (Emphasis added).

³⁵ See note 34, *supra*. See also *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir.), *cert. denied*, 389 U.S. 991 (1967). *Detroit Edison Co. v. East China Twp.* School District No. 3, 378 F.2d 225 (6th Cir.), *cert. denied*, 389 U.S. 932 (1967).

³⁶ *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923). Here, the state

In addition, a state has, as an adjunct of its police power, the "power . . . and duty to control and conserve the use of its water resources for the benefit of all its inhabitants,"³⁷ and the power to prohibit discharges causing or tending to cause pollution.³⁸

Despite the powers of the states over their municipalities and over the use of the water resources of the state, an exercise of these powers in a state-administered program of effluent charges may in some cases encounter state constitutional barriers. Three types of state constitutional provisions relevant to legislative control of municipal sewage facilities are: (1) provisions which prohibit "special commissions;"³⁹ (2) provisions providing for municipal home rule;⁴⁰ and (3) provisions placing limitations upon indebtedness.

A. *The Prohibition Against Special Commissions*

There are only four reported decisions dealing with the issue of whether state administrative control over municipal sewage or public utility facilities constitutes a violation of a state constitutional prohibition of special commissions. Two of those decisions are from the Supreme Court of Utah. In *Logan City v.*

was allowed to recover damages in an action to recover license fees from the City of Trenton for water diverted from the Delaware River. Some courts, prompted by *Hunter*, have limited the state's power over municipal property to that held by the municipality in a governmental, as opposed to a proprietary, capacity.

Handloff, *Legislative Limitations Upon the Self-Government of Municipalities*, 31 Temp. L.Q. 243 (1958). See also *Monaghan v. Armatage*, 218 Minn. 108, 15 N.W.2d 241 (1944), holding that property held by a municipality in either a governmental or proprietary function is subject to the paramount power of the state. For an understanding of the distinction between governmental and proprietary capacities, see *Hunter*, *supra* note 34.

³⁷ 262 U.S. 182, 185.

³⁸ *United States v. 531.13 Acres of Land*, 366 F.2d 915 (4th Cir. 1966); *Texas Co. v. Montgomery*, 73 F.Supp. 527 (E.D. La.), *aff'd mem.* 332 U.S. 827 (1947).

³⁹ See for example UTAH CONST. art VI, § 29:

The legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capital site, or to perform any municipal functions.

The OHIO CONST. art 18, § 4, which gives municipalities power to acquire, construct, own, lease or operate public utilities whose product or service is to be supplied to the municipality or its inhabitants, has been construed by the Ohio Supreme Court to prevent the legislature from imposing any restrictions on this right. *Pfau v. City of Cincinnati*, 142 Ohio St. 101, 50 N.E.2d 172, 173 (1943). In these states, to overcome judicial construction of sewage as a constitutionally protected municipal function, it would be necessary to either amend the state constitution so that the state would have ultimate authority in the area of sewage, or else hope for a change in interpretation of the provisions permitting municipal activity in the public area.

⁴⁰ In 1966, there were 33 states with constitutional home rule; there were 10 with legislative home rule. See Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 273-7 (1968). In legislative home rule states, the state constitution would not prevent the exercise of state power over municipal property, according to the *Hunter* case.

*Public Utilities Commission of Utah*⁴¹ a Public Utilities Act delegated to a state administrative commission the power to fix rates of electric utilities, including municipally owned public utilities. The court held that the Act was in violation of the state constitution, because it delegated to a special commission the power to “indirectly supervise, direct and interfere with” a municipal improvement.⁴² However, the court emphasized that the municipal utility involved was owned and operated by the city solely for the use and benefit of the city’s inhabitants.⁴³ The court noted that if the utility were to affect persons unable to exercise control over its operations, a state commission to control such a utility would be a legitimate exercise of the state police power.⁴⁴ In view of the court’s distinction between a utility affecting only city inhabitants, and a utility affecting persons *outside* the city, the *Logan* decision seems reconcilable with the concept of state control of utilities whose effects go beyond the city’s boundaries.

In a subsequent case, *State Water Pollution Control Board v. Salt Lake City*,⁴⁵ the Utah Supreme Court followed its earlier literal application of the state constitutional ban against special commissions. In *Pollution Control Board* the court held that the Board’s regulations concerning the design of municipal sewer systems were invalid because they interfered with municipal improvements. The court, however, placed a qualification on municipal control by indicating that the municipal sewer system would come under the jurisdiction of the Board if the system were conducted so that it posed a pollution threat beyond the confines of the city. Since the *Pollution Control Board* court carefully limited its holding to “the problem of sewage disposal *within* Salt Lake City”⁴⁶ [emphasis added], the decision is not inconsistent with the *Logan* court’s conclusion that state control is unwarranted where the municipality’s operation of the utility affects *only* those persons within the city.

Similarly, Pennsylvania followed Utah in declaring that municipal sewage facilities are municipal improvements which may not be regulated by a special commission.⁴⁷ The Pennsylvania court

⁴¹ 72 Utah 536, 271 P. 961 (1928).

⁴² 271 P. at 972.

⁴³ 271 P. at 971.

⁴⁴ 271 P. at 971.

⁴⁵ 6 Utah 2d 247, 311 P.2d 370 (1957).

⁴⁶ 311 P.2d 375. The court observed that

[i]t is obvious that a community might so handle its sewage as to constitute a menace to the health of other communities or inhabitants of the state. . . . [In such cases] the Board is endowed with authority to supervise and regulate such matters where they are conducted in a manner which threatens pollution of waters beyond the confines of the city.

⁴⁷ *Lighton v. Abington Township*, 336 Pa. 345, 9A.2d 609 (1939).

held that the legislature could not authorize a municipality to delegate the management of a municipal sewage system to a private corporation, because the legislature itself was powerless under the Pennsylvania Constitution to effect such a delegation. However, the court noted that the Constitution proscribed only delegation to a private corporation, and acknowledged the state's power to "modify township government by taking part of it from the township, and vesting it in a public corporation."⁴⁸ Since the court expressly stated that its decision concerned an unconstitutional authorization to a municipality "to make a contract with a *private corporation* to take over and operate public property"⁴⁹ [emphasis added], the case is distinguishable from state control and operation of municipal utilities by public bodies.

The Montana courts have also determined that regulation and control of water rentals by a state Public Service Commission does not offend the state constitutional prohibition against delegation of powers to a special commission.⁵⁰ In ruling on a challenge to a Montana statute which literally divested municipalities of all control over their sewage facilities and made state control supreme,⁵¹ the Montana Supreme Court strained to construe the statutory language as intending to authorize "reasonable regulation" and not to "take away from the city active management of the water plant or to operate it or interfere with" its operation.⁵² The court clearly was concerned with the public policy issue of a state's power to control pollution. It rejected the city's claim of absolute control over its water system on grounds that

if it should transpire that the water supply became contaminated, spreading contagious disease generally, the state would be helpless and could not interfere. We decline to adopt such a construction, since, as we view it, the language of the constitutional provision does not lead to that conclusion.⁵³

Thus the Montana interpretation indicates there is room for at least "reasonable" state regulation of municipal sewage facilities,

⁴⁸ 9A.2d 613.

⁴⁹ 9A.2d 613.

⁵⁰ Public Service Commission of Montana v. City of Helena, 52 Mont, 527, 159 P. 24 (1916).

⁵¹ The Montana Supreme Court interpreted the statute which provided:

. . . the Public Service Commission is hereby invested with full power of supervision, regulation and control of such utilities . . . and to the exclusion of the jurisdiction, regulation and control of such utilities, by any municipality, town or village.

159 P. 28.

⁵² 159 P. 28.

⁵³ 159 P. 28.

and the *Pollution Control Board* case would presumably allow state control when water pollution has undesirable effects beyond the borders of a municipality. It is therefore possible, in states having constitutional provisions similar to those of Utah and Montana, that the courts may entertain the argument that water pollution is a state concern since the damage caused by inadequate municipal sewage treatment and pollution control has statewide effects. An additional reason may be that the state may be sued for failing to curb pollution within its borders.⁵⁴ In view of the duty of the states to control pollution, the generally recognized validity of the exercise of the state police power to protect municipal water supplies,⁵⁵ and the fact that water pollution is a condition whose effects extend beyond the boundaries of any particular municipality, it would seem that the states have an interest in the coordinated administration of all sewage facilities sufficient to justify state administrative control.

B. Municipal Home Rule

A second potential constitutional stumbling block to state control of municipal sewage facilities is the problem of whether a home rule provision in a state constitution⁵⁶ permits only local control of sewage treatment facilities. The language of constitutional home rule provisions generally provide, for legislative supremacy;⁵⁷ however, most states have found an area of municipal freedom from legislative control implicit in the home rule provisions.

This division of ultimate power over municipalities is characterized in language of "state" versus "local" affairs; however, the courts have consistently failed to develop a rule for identifying a state or local affair.⁵⁸ In any event, the reason frequently given for this municipal autonomy is that unless local law prevails over inconsistent state law, the home rule provision would have no

⁵⁴ 33 U.S.C. § 466g (g) (j) (i) and (k) (1965) gives the federal governmental the power to sue a state or its political subdivisions for violation of the 1948 Federal Water Pollution Control Act.

⁵⁵ See for example *Public Service Commission of Montana v. City of Helena*, 52 Mont. 527, 159 P. 24 (1916).

⁵⁶ See for example MO. CONST. art. 6, § 18 (a), which provides:

Any country having more than 85,000 inhabitants, according to the census of the United States, may frame and adopt and amend a charter for its own government as provided in this article, and upon such adoption shall be a body corporate and politic.

⁵⁷ See for example MO. CONST. art. 6, § 19, which provides that home rule charters are to be "consistent with and subject to the Constitution and laws of the State."

⁵⁸ Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 U. of Kan. L. Rev. 367, 368 (1964).

purpose.⁵⁹ In most states today, however, affairs of a municipality are subject to regulation if they are also concerns of the state.⁶⁰ As discussed with reference to state prohibitions of special commissions, water pollution control is not just a legitimate area of state concern, but an area in need of immediate state action. Furthermore, it is doubtful whether municipalities would have either the jurisdictional ability to deal adequately with water pollution or the inclination to fund the necessary program once the pollution was within the municipality's control. Thus, the legislative action necessary to administer an effluent charge system at the state level should not be voided by state home rule provisions.⁶¹

C. State Constitutional Limitation Upon Indebtedness

To raise the funds necessary for adequate water quality control, states may be required to issue bonds beyond present state constitutional limits on indebtedness.⁶² These limits, however, apply

⁵⁹ See State *ex rel.* Avery v. Sherrill, 142 Ohio St. 574, 586-7, 53 N.E.2d 501, 508 (1944).

⁶⁰ Vanlandingham, *supra* note 40, at 293. See also Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705, 713 (1929). Here, an inconsistent state law prevailed because it was a general health law which applied to a substantial state concern.

Extraterritorial pollution effects provided the rationale for a New York court's decision that an act creating the Buffalo Sewer Authority was constitutional and not void as a "local law." In Robertson v. Zimmerman, 268 N.Y. 52, 59, 268 N.E. 740, 742 (1935), the court said that:

[The act] was designed to eliminate a serious menace to the health of the people of the state generally, and particularly the communities . . . which are obtaining their water supply from the waters polluted by untreated sewage from the city of Buffalo.

The issue was whether a law applying to only one home rule municipality was a "local" or "general" law. The issue required the labelling of a municipal activity or municipally owned property as either a "general" or a "local" concern. The New York Constitution home rule charter provision said that the Legislature would prevail over its municipalities only by general laws, not by local or special laws. See also Opinion of the Justices, 250 N.E.2d 547 (1969).

⁶¹ California represents one of a small number of states whose constitutional home rule provisions clearly prohibit legislative interference in the affairs of local government. CAL. CONST. art. 11, § 6, provides that charter cities and towns might "make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters. . . ." The California courts have upheld this municipal dominance in local affairs; specifically with regard to sewage facilities. In Cramer v. City of San Diego, 164 Cal. App.2d 168, 330 P.2d 235 (1958) the court held that the operation and financing of a sewer system are municipal affairs concerning which a chartered city is not subject to general law, except as its charter may provide. This case is significant, because the California court construed a constitutionally authorized grant of power to a municipality in regard to a certain activity as an absolute grant. In states like California, a state constitutional amendment authorizing state control over sewage facilities would be required in order to administer a valid state system of effluent charges.

⁶² See for example KAN. CONST. art. 11, § 6, which provides in part:

For the purpose of defraying extraordinary expenses and making public improvements, the state may contract public debts; but such debts shall never, in the aggregate, exceed one million dollars. . . .

to general obligation bonds,⁶³ and not to revenue bonds, for a pledge of the revenue from a public utility or other property purchased with bond issue proceeds does not create an indebtedness within the meaning of constitutional or statutory debt limitations.⁶⁴ The theory underlying the doctrine that revenue bonds are not indebtedness within the meaning of constitutional prohibitions is that the creditor has no legal right to call upon or constrain the debtor-state to pay.

In the proposed scheme, the level of effluent charges would be set so that the revenue received over time would be sufficient to redeem the principal and interest on any state bond issues necessary to finance not only the initial planning and construction costs but maintenance, expansion and administrative costs as well. One problem, however, is that 100% financing of the program by revenue bonds could so tremendously increase state bond offerings that the supply (given possible state restrictions on the interest rate which may be paid) might be greater than the demand. Nevertheless, these considerations would not invalidate the practicability of financing as much of the costs of starting and administering an effluent charges system as possible and supplementing the necessary financial support with continued state and federal appropriations for water pollution control. In any event, the use of revenue bonds would escape state constitutional debt and referendum limitations on an effluent charge system and could be used to finance as much of the costs of pollution control as possible without resorting to general tax measures and legislative appropriations for the total amount of necessary funds.

V. CONCLUSION

A state implemented system of effluent charges supplemented by existing state and federal water quality control laws would serve as a pricing mechanism by which water would be allocated to the uses and users found by the general public to be most deserving. When production of a certain commodity has resulted

⁶³ General obligation bonds are those paid out of general revenues of the governmental unit issuing the bonds and guaranteed by the full faith and credit of the governmental unit.

⁶⁴ See for example in *State ex rel. Fatzer v. Board of Regents of State of Kansas*, 167 Kan. 587, 207 P.2d 373 (1949), where the Supreme Court of Kansas held that revenue bonds which were issued by the State to obtain funds for construction of student dormitories and which required the bondholders to look solely to revenue and income from dormitories for repayment did not constitute a debt within the meaning of the state constitution, and were not required to be submitted for the approval of the voters. On the subject of referendum requirements and revenue bonds, see generally *Foley, Revenue Financing of Public Enterprises*, 35 MICH. L. REV. 1 (1936).

in the discharge of pollutants into a river or stream covered by the plan, the manufacturer will incur a charge which will be reflected in the cost of the product to the public. Thus, by comparing the prices of similar products, the public can choose the manufacturer who is most efficient and pollutes the least. In addition to properly allocating the scarce resource of quality water, a comprehensive system of effluent charges can provide the funds necessary to maintain water quality at desired levels.

To successfully institute a proposal of this type, the individual states should adopt legislation which would accomplish the following:

1. Vest ownership in and/or transfer control to the state of all publicly owned water resource facilities in the state;
2. Establish a state agency, with the authority and responsibility for statewide comprehensive water resources planning, development, and management, whose power and duties would include:
 - a. the power to issue revenue bonds,
 - b. the power to monitor water resources and sewage flows of any water user in the state,
 - c. the responsibility and authority to identify particular substances as pollutants,⁶⁵
 - d. the power to prohibit any dumping into state waters of

⁶⁵ It is conceivable that some persons would challenge such legislation on the grounds that it constitutes an unconstitutional delegation of legislative power to the executive because of the lack of a sufficient standard to guide agency discretion. However, such sufficient standards could probably be provided to define the limits of agency discretion in identifying pollutants by re-enacting federal water quality standards established for that state as state law, by specifically referring to state water quality standards, and by declaring substances found to violate or which tend to violate such standards to be pollutants. A much broader delegation of discretion than proposed here was upheld in *Texas Co. v. Montgomery*, 73 F.Supp. 527 (E.D.La.), *aff'd*, 332 U.S. 827 (1947). There, a delegation of power to prohibit discharges resulting in pollution, which is unreasonable and against the public interest in view of existing water conditions, was upheld. An almost equally broad delegation was upheld in an air pollution case, *Department of Health v. Owens-Corning Fiberglass Corp.*, 100 N.J.Supp. 366, 242 A.2d 21 (1968), where the standard for "air pollution" defined by the legislature was that of proof of injury to health or unreasonable interference with the comfortable enjoyment of life and property. Finally, the cases dealing with the delegation of discretion to agencies to designate particular substances as narcotics, depressants, or stimulating drugs for purposes of criminal prosecutions are important. Broad delegations which have been upheld are: found to be addicting, *Martinez v. Colorado*, 160 Colo. 333, 417 P.2d 485 (1966), *Hohnke v. Commonwealth*, 451 S.W.2d 162 (1970); found to have potential for abuse, *White v. United States*, 395 F.2d 5 (1st Cir. 1968), *cert. denied*, 393 U.S. 928, and *Iske v. United States*, 396 F.2d 28 (10th Cir. 1968). The criminal drug cases are important, because the standard for an ascertainable guide to agency discretion must be more clearly defined when criminal, rather than non-criminal, consequences are involved. *State v. Phelps*, 12 Ariz. App. 83, 467 P.2d 923 (1970). Both the drug designation powers and the pollutant designation powers are granted to protect the public health and welfare from insidious influences. In the water pollution case, where the designation will lead to a monetary payment as a consequence of the exercise of

- pollutants, which are either prohibitively expensive, dangerous, or impossible to treat or remove from the water,⁶⁶
- e. the authority and responsibility to calculate and collect effluent charges from all water users within the state;⁶⁷ and
3. Allow actions by private attorneys general against the agency as a means of ensuring that the public interest in quality water is protected from agency inaction or error.

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agency discretion, the proposed standards are no less stringent than those already sustained in the criminal drug cases, and such proposed water pollution standards should be more than sufficient.

⁶⁶ Delegations of the state's power to prohibit pollution have been upheld in *Department of Health v. Owens-Corning Fiberglass Corp.*, *supra* note 65 (air pollution discharges), and in *Texas v. Montgomery*, *supra* note 65 (water pollution discharges).

⁶⁷ The argument that effluent charges would be a direct tax, subject to state constitutional infirmities such as uniformity requirements or prohibitions against delegation of the taxing power, are most probably invalid. An effluent charge would, like a toll for a bridge, be a charge for the use of another's property. In the case of effluent charges, the charge would be for the use of the state's water resource and treatment facilities.

Whenever the issue has been raised, it has been held that statutes relating to tolls for the use of bridges or similar improvements do not come within state constitutional provisions respecting taxes. See *People ex rel Curren v. Schommer*, 392 Ill. 17, 63 N.E.2d 744 (1945), where the court held that tolls charged by the state Highway Commission for the use of its superhighway were compensation for the use of another's property and not a tax; *Tulare County v. Dinube*, 188 Cal. 664, 206 P. 983 (1922), where the court held that a statutory annual charge of 2% of gross receipts against public service corporations with a state franchise was a toll paid as consideration for the privilege of using highways occupied by public utilities and not a tax; *State ex rel Washington Toll Bridge Authority v. Yelle*, 195 Wash. 636, 82 P.2d 120 (1938), where in an action to compel the state auditor to approve certain vouchers the court held that tolls collected by the state Toll Bridge Authority were an exaction for the use of the bridge and not a tax, and, therefore, not to be treated as tax revenues.

The United States Supreme Court articulated the rationale of the distinction between a toll and a tax in *Sands v. Manistee River Improvement Company*, 123 U.S. 288 (1887), which rationale has been either expressly cited or borrowed by state courts. In *Sands*, the Court upheld a board of control's authority to fix rates of toll for floating logs and lumber over improved portions of a river:

Taxes are levied for the support of the government, and their amount is regulated by its necessities. Toll are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield. The legislature . . . may prescribe . . . the tolls to be charged; but, ordinarily, it leaves their amount to be fixed by officers or bodies appointed for that purpose