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REGULATORY ASPECTS OF FEDERAL WATER POLLUTION CONTROL

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Since the turn of the century, Congressional interest in federal water pollution control has increasingly reflected a belief shared by Commissioner Stein: the people's interest in maintaining safe and pleasant waterways must be given a higher priority than industrial property and profits. Mr. Stein traces the historical development of major federal legislation pertaining to water quality, culminating in the important 1965 provision for state participation in establishing desirable quality standards for interstate waters. He describes the enforcement procedures available to the Secretary of the Interior once a state's criteria are adopted as federal standards. Central to his discussion is the thesis that the success of regulatory measures depends upon the percentage of cases that can be effectively disposed of by federal-state negotiation and cooperative action — and not by court action.

CONSIDER the following quotation taken from a classic case dealing with the effects of industrial water pollution:

> The exigencies of the great industrial interests must be kept standing in view; the property of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences or occasional annoyances, they ought not to be held responsible. . . .
>
> It is certainly true that owing to the want, if not necessities, of the present age . . . some changes must be tolerated in the channels in which water naturally flows, and in its adaptation to beneficial uses. Reasonable diminution of its quantity, in gratifying and meeting customary wants, has always been permitted. So, its temporary detention for manufacturing purposes, followed by its release in increased volume, is a necessary consequence of its utilization as a propelling force. Nor must we shut our eyes to the tendency — the inevitable tendency — of these and other uses, in which water is an indispensable element, to detract somewhat from its normal purity. These modifications of individual right must be submitted to, in order that the greater good of the public be conserved and promoted. But there is a limit to this duty to yield, to this claim and right to expect and demand. *The water course must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted as practically to destroy or greatly impair its value to the lower riparian proprietor.*[1]

This 1893 decision was one of the earliest of any significance in the history of United States court action regarding water pollution. It has great relevance, for better or worse, to attitudes widely held

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[1] Tennessee Coal, Iron & R.R. Co. v. Hamilton, 100 Ala. 252, 260, 14 So. 167, 170 (1893) (emphasis added).

today, even though the riparian rights doctrine it discusses does not prevail in the United States, and the conditions of our waters have since vastly changed.

As might be expected, industries as they came into being and underwent booming growth did not keep the judge's ideas on comparative injury in mind. Even this relatively benign judicial restraint applied only to litigated cases, and the paucity of reported water pollution cases attests to the negligible social effect of private litigation in this area. In the development of this country, industries were by no means the only offender. Towns and cities with their burgeoning populations also indulged for decades in a profligate use of one of the most valuable natural resources this richly endowed nation offered. The combined indulgence was so widespread and so strong that the natural assimilative process of many water courses could not keep up with the amount of wastes being spewed into them. There was no public insistence that money should be spent for proper waste treatment even though the costs generally would have been much less than the cost of cleaning up an environment fouled by pollution. Consequently, it did not take very long before the majority of our major rivers and many smaller ones were seriously polluted.

The court in *Tennessee Coal* speaks of modification of the individual right for the benefit of the common weal. Today this concept still guides us, but we now realize that the promotion of the public interest has far wider implications than were obvious to the author of that opinion, and that much more is at stake now than when he set forth his guidelines. His words sound eminently reasonable, but in the light of the status of the present environment and our rising expectations they can be seen as somewhat deceptive. The time is long overdue for taking a more rigid view than that taken by the judge on what to accept and what not to accept in water quality. Because we are all too familiar with the damaging consequences of pollution, we cannot afford to be as tolerant as he was when he urged that degradation of water should be prevented only if it is so pervasive as "practically to destroy or greatly to impair" the value of water.[2] It has been estimated that industry contributes equally as much biochemical oxygen demand to the nation's streams as all municipalities combined and generates and discharges even more of most other pollution materials.

Today our general awareness has shifted from mere appreciation of the economic advantages a water-using industry brings to a particular area to a broader realization that many more human and other factors are pertinent to an area's quality of life and that they are more complex than the compartively simple interests directly served

[2] *Id.*

by any one industry. This new awareness stems from the realization of many important points, not the least of which is the knowledge that the effects of pollution can far outweigh the advantages to industries and municipalities and thus to the public of intemperate disposal of unsatisfactorily treated wastes. We need to emphasize a reversal of the 19th century approach and to give people a higher priority than property and profits.

I. Congressional Action

Perhaps the current water supply and pollution problems should be blamed on the fact that earlier water conditions were not overwhelming soon enough to prompt recognition of the trouble that was forthcoming. Until recently, not enough of a hue and cry was raised to translate into preventive action and, worse still, not enough anxiety was articulated to carry over into remedial action once the damage was done. Despite the general feebleness of the public voice, at the turn of the 19th century, Congress passed the first piece of legislation which bore on water quality.

The authority of Congress to legislate in matters of water pollution control and prevention derives from the commerce clause of the Constitution.[3] In the exercise of its jurisdiction over the navigable waters of the United States in connection with the regulation of interstate and foreign commerce, Congress has asserted the federal interest and responsibility in protecting the quality of these waters.

The Rivers and Harbors Act of 1899, among other things, prohibited the discharge of deposit into any navigable waters of any refuse matter except that which flowed in a liquid state from streets and sewers.[4] As the first specific federal water pollution control legislation, its primary purpose was to prevent impediments to navigation.

In the 20th century, legislation pertaining to water quality has come before every Congress except during the war years. However, prior to the end of World War II, Congress had enacted into law but two of these proposed bills. Health implications of water pollution received attention in the Public Health Service Act of 1912 which authorized investigations of water pollution related to disease.[5] The Oil Pollution Act of 1924 was enacted to control oil discharges in coastal waters damaging to aquatic life, harbors and docks, and recreational facilities.[6]

The measures described were only indicative and not representative in themselves of the many varied proposals introduced in

[3] U. S. Const. art. I, § 8(3).
[4] Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152.
[5] Act of Aug. 14, 1912, ch. 288, § 1, 37 Stat. 309.
[6] Act of June 7, 1924, ch. 316, 43 Stat. 604, 33 U.S.C. §§ 431-37 (1964).

Congress during the first half of this century. Many different approaches to the problem were put forth in these proposals. Some of them conceived the federal role in water pollution as being strongly regulatory with wide enforcement powers. Among the bills that found their way into the hoppers were those which provided for a federal permit system for the discharge of wastes and a prohibition against the purchase of paper by the federal government from any manufacturers who discharged wastes into a stream. On three separate occasions, in 1936, 1938, and 1940, comprehensive water pollution control legislation narrowly missed final enactment or approval. After World War II renewal of efforts resulted in the enactment by the 80th Congress of the Water Pollution Control Act of 1948.[7] This law was admittedly experimental and initially limited in duration to a period of five years, which was extended for an additional three years to June 30, 1956.[8]

Comprehensive water pollution control legislation of a permanent nature was finally attained by the amendments enacted in 1956.[9] The amended Act was administered by the Surgeon General of the Public Health Service under the supervision and direction of the Secretary of Health, Education, and Welfare. Among other things, this act

> (1) Reaffirmed the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states in preventing and controlling water pollution;
>
> (2) Authorized increased technical assistance to states and broadened and intensified research by using non-governmental research potential; authorized collection and dissemination of basic data on water quality relating to water pollution prevention and control;
>
> (3) Directed the Surgeon General to continue to encourage interstate compacts and uniform state laws;
>
> (4) Authorized grants to states and interstate agencies for water pollution control activities, and to municipalities for the construction of waste treatment plants;
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> (5) Modified and simplified procedures governing federal abatement actions against interstate pollution;
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> (6) Authorized the appointment of a Water Pollution Control Advisory Board; and
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> (7) Set up a program to control pollution from federal installations.

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[7] Act of June 30, 1948, ch. 758, 62 Stat. 1155, *as amended*, 33 U.S.C. §§ 466-66j (1964).

[8] Act of July 17, 1952, ch. 927, 66 Stat. 755, 33 U.S.C. § 466f (1964).

[9] Act of July 9, 1956, §§ 1-14, 70 Stat. 498, *as amended*, 33 U.S.C. §§ 466-66j (1964).

Proposals to amend the Federal Water Pollution Control Act to provide for a still more effective program of water pollution control were introduced early in the first session of the 87th Congress, and received the endorsement of President Kennedy in his February 1961 message on natural resources.

In July 1961, President Kennedy signed into law the Federal Water Pollution Control Act Amendments of 1961.[10] These amendments improved and strengthened the Act by

(1) Extending federal authority to enforce abatement of intrastate as well as interstate pollution by making "navigable" waters subject to enforcement jurisdiction; and strengthening enforcement procedures;

(2) Increasing amounts authorized for financial assistance to municipalities in the construction of waste treatment works for each of the six following fiscal years; raising the single grant limitations; and providing for grants to communities combining in a joint project;

(3) Intensifying research toward more effective methods of pollution control; authorizing for this purpose annual appropriations and the establishment of regional and field laboratories;

(4) Authorizing the inclusion of storage to regulate stream flow for the purpose of water quality control in the planning of federal reservoirs and impoundments; and

(5) Designating the Secretary of Health, Education, and Welfare to administer the Act.

As in prior legislation and all succeeding legislation, the Act declared Congressional policy affirming the primary responsibilities and rights of the states in preventing and controlling water pollution. Consequently, the federal functions in the area were designed to be carried out in the fullest cooperation with state and interstate agencies and with local public and private interests.

It may be readily perceived that the programs authorized by the Federal Water Pollution Control Act grouped themselves into three major areas of effort — financial and technical assistance, research, and enforcement. All stimulated voluntary action. Where such voluntary action was not forthcoming, enforcement authority could make remedial action mandatory. The end product, abatement of pollution and its prevention and control, has always been the aim and purpose of all three of these coordinated program areas.

Extensive changes in the federal water pollution control program were made in 1965 by enactment of the Water Quality Act.[11] The

[10] Act of July 20, 1961, 75 Stat. 204, 33 U.S.C. §§ 466a, 466g, 466i, 466j (1964).
[11] Act of Oct. 2, 1965, 79 Stat. 903, 33 U.S.C. § 466 (Supp. I, 1965).

program was entirely removed from the Public Health Service and constituted as an independent agency, the Federal Water Pollution Control Administration.[12] It is clear from the legislative history that Congress had been dissatisfied with the slow tempo of regulatory action and hoped, by upgrading the program, to emphasize the importance and urgency of pollution control. On May 10, 1966, the Federal Water Pollution Control Administration was transferred to the Department of the Interior, and shortly thereafter an Assistant Secretary of the Interior for Water Pollution Control was appointed.[13] With most of the federal government's water programs under one roof, better coordination and elimination of duplicated effort has been effected, and the entire Department is united to fight the water problems of the country.

II. ESTABLISHING WATER QUALITY STANDARDS

The most important addition to water pollution legislation has been the establishment of national water quality standards for interstate waters. Section 10(c)(1) of the Water Quality Act of 1965 required all 50 states, the District of Columbia, the Territories of Guam and the Virgin Islands, and Puerto Rico to submit to the Department of the Interior proposed water quality criteria, or standards, for interstate or navigable water.[14] These standards are, in the words of the legislation, to "protect the public health or welfare, enhance the quality of water . . . ." Those establishing the standards should consider "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses."[15] With their proposals for standards, which were to be submitted by June 30, 1967, the states included plans for implementing and enforcing them. The Secretary of the Interior is required to review them and either pass them or institute procedures, as outlined in the Act, to work with the states in devising acceptable standards. By now, he has judged that the standards of most of the states adequately serve the cause of water pollution control, and he has approved many as official federal water quality standards.

To aid the states in establishing these water quality standards, the Department of the Interior issued guidelines which explained their purpose and desired function. These guidelines pointed out that the water quality standards were designed to upgrade existing water quality, except in those few cases where rivers are still in a

[12] *Id.* § 2.

[13] Reorganization Plan No. 2 of 1966, 80 Stat. 1608.

[14] Act of Oct. 2, 1965, 79 Stat. 903, 33 U.S.C. § 466g (Supp. I, 1965).

[15] *Id.* § 5, 79 Stat. 908, 33 U.S.C. § 466g (Supp. I, 1965).

state of natural purity. The standards could not "lock in" existing low levels of water quality, or condemn rivers to serve as sewers. No standards could allow any treatable wastes to be discharged without treatment or without the best practicable treatment unless it could be proven that lesser degrees of treatment were enough to provide high water quality. The standards were to be designed with a view to future water quality, taking into consideration urban and industrial growth and increased demands for recreational opportunity.

The Interior Department also issued guidelines for the enforcement and implementation plans required by the legislation. The plans submitted by the states include time schedules for achieving the water quality objectives. These time schedules include target dates by which each waste discharger must provide adequate treatment. The degree of treatment required depends, of course, on the quality of water required by the standards. The time schedules provide, generally, for the abatement of all existing conventional municipal and industrial pollution within five years. Programs for more complicated problems, such as combined sanitary and storm water sewer overflows, have been scheduled over periods as long as ten years. The measures to be used by the state pollution control agencies to ensure compliance are specified in the enforcement plans.

The standards themselves were set by the states after public hearings. At these hearings public testimony concerning all the water uses which involved interstate or navigable streams was invited. All water users, large and small, were considered — from a few solitary fishermen to a large fishing fleet, from a farmer watering a few head of cattle to a giant steel plant. The water uses under consideration also included those not yet in existence. A small town's potential as a future tourist center could have been deemed a critical economic fact. The obsolescence of an industry, and its likelihood of folding within a few years, also could have been important in determining the best use of the region's waterways. Predicted population changes over a long period of time had to be considered, although they could not be allowed to obscure the desires of the present population.

Water quality standards could not be established generally and then applied to specific bodies of water as they had been in some states prior to the Act. Each river, stream and lake may have its own characteristics. The people of a region may prefer to swim in one river, to fish in another. On some rivers industries are already established; other rivers are still pristine. The wildlife in one stream may already have been destroyed by pollution. Some rivers are dredged frequently for navigational purposes. Some are naturally

silty. Others have natural growths of algae. All kinds of facts, physical and human, were to be judged in deciding the best that could be done with each body of water.

The Department of the Interior fully respected the desires of the states to treat each stream as a separate case. Uniformity was not the goal of the legislation. In fact, the only generalization to be made about the water quality standards is that they are all to serve in overcoming pollution. None of them will be permitted to allow respite in the anti-pollution struggle.[16]

III. FEDERAL ENFORCEMENT AUTHORITY

It is not intended that the water quality standards be mere promises of good intentions. They are to be powerful weapons in combatting pollution because they are to be effectively enforced. The authority of the new federal Water Pollution Control Administration was expanded by the 1965 amendments to cover enforcement of these standards so that the Secretary of the Interior is empowered to act when the quality of interstate waters or portions thereof has been reduced below the level set.[17] Once a state's quality criteria and implementation plans are adopted as federal standards, any violation of these standards is subject to abatement by enforcement action. If the violation of the standards has interstate effects, the Secretary of the Interior may proceed immediately to a suit against the polluters.[18]

This does not mean that preference for cooperative action has been discarded at all. In certain situations, the Secretary will continue to base enforcement action on the existing order of procedures. Such situations are pollution of intrastate waters when a state governor requests federal action, and interstate cases when a state water pollution agency requests action. Current enforcement procedures will still be employed in another matter of pollution which was placed under the jurisdiction of the Secretary of the Interior by the 1965 Water Quality Act. This new authorization, termed the "shellfish provision," directs the Secretary to initiate enforcement action on his own when he finds that substantial economic injury is resulting from the inability to market shellfish or shellfish products in interstate commerce because of pollution of interstate or navigable waters and the action of federal, state, or local authorities.[19]

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[16] Some States have taken advantage of the travail, hearings, and publicity accompanying the establishment of the standards and have either updated or expanded existing intrastate standards or established intrastate standards for the first time.

[17] Act of Oct. 2, 1965, § 5, 79 Stat. 909, 33 U.S.C. § 466g (Supp. I, 1965).

[18] *Id.*

[19] *Id.*

By the Clean Water Restoration Act of 1966, federal enforcement authority was extended to international pollution when the Secretary of State requests the Secretary of the Interior to initiate an action.[20] The regular conference and public hearing technique also is retained in such a case. To date, this new authority has not been applied to pollution involving boundary waters or rivers which the United States shares with Mexico and Canada, but the existence of such pollution situations involving international waters persuaded Congress to provide for it.

As laid down by the Federal Water Pollution Control Act, the enforcement authority covers interstate or navigable waters where pollution causes damage to the health or welfare of any persons.[21] According to the *Appalachian Coal* case[22] and similar decisions, a stream is considered navigable when it either is navigable in fact or has once been navigable or by the reasonable expenditure of funds can be made navigable. Being navigable means carrying some kind of commercial traffic.

Where pollution emanating from sources in one state endangers the health or welfare of persons in another state, initiation of the enforcement process is mandatory upon the request of a state governor, or an official state water pollution control agency, or a municipality in whose request the governor and state agency concur. It is similarly mandatory in intrastate pollution situations upon the request of the governor of the state concerned, when the effect of such pollution on the legitimate uses of waters is judged sufficient by the Secretary of the Interior to warrant federal action. The exercise of federal jurisdiction to abate interstate pollution without state request is required when the Secretary of the Interior believes on the basis of reports, surveys, or studies that such interstate pollution is occurring.

The enforcement procedures give ample opportunity for cooperative federal-state action. The procedures specified to be taken are (1) a conference, (2) a public hearing, and (3) court action. Each successive step is taken only if the preceding step is unsuccessful in securing compliance.

A. *Conference*

The initial stage of the enforcement process brings together the federal government and the state and interstate water pollution control agencies concerned. An enforcement conference operates

[20] Act of Nov. 3, 1966, § 206, 80 Stat. 1250, *amending* 33 U.S.C. § 466g (Supp. I, 1965).

[21] 33 U.S.C. § 466g(a) (1964).

[22] United States v. Appalachian Elec. Power Co., 311 U.S. 377, 416-17 (1940).

informally and is not an adversary, courtroom proceeding. There are no defendants and no prosecution, although in a few instances the non-federal conferees have conceived of themselves in such a relationship. No strict rules of evidence are applied, and all statements offered are accepted as relevant. The conference inquires into the occurrence of the pollution subject to federal abatement, the adequacy of the measures taken to abate it, and the delays, if any, that are being encountered. As the conferences are public, each of the conferees is permitted to bring as many people as he wishes to speak, and each conference continues as long as anyone has anything to contribute. There is a distinction between the conferees and other participants, of course, since under the statute the conferees alone must come to conclusions and recommendations. However, private citizens, representatives of conservation groups, managers of industrial plants, politicians, and professors attend these conferences and are heard.

After an opening by the chairman, a conference normally begins with the presentation of a federal report on the condition of the waters in question and the requirements for their improvement. The strategy is to present a factual report, win agreement on the diagnosis of the situation, and let the recommendations for action follow unavoidably as the only means of correcting the situation. The federal report is offered first as a courtesy to the state representatives, giving them an opportunity for responding to it if they so desire. However, any other conferee may report first; the agenda is arranged in consultation with the state representatives. As each state makes its statement, the industries and towns within that state often make separate statements. In line with Congress' declared policy of respecting the primary rights and responsibilities of the states in pollution control, private industries and cities are dealt with only through the state agencies.

At the conclusion of all statements, the conference usually recesses for an "executive session" among the conferees for the purpose of working out an agreement. In our concern for openness in conducting these conferences, we have tried to dispense with these closed sessions whenever possible.

The entire purpose of the conference is to see how much progress can be made toward a free, mutual agreement on a program of corrective action, assuming a finding that the waters under discussion are polluted and that such pollution is subject to abatement under the Federal Water Pollution Control Act. However, in the absence of adequate scientific and technical data, the conferees may agree that further study is necessary before a schedule can be established. The 1966 amendments added a new tool for acquiring infor-

mation necessary to producing a remedial schedule. The new section provides that upon request of the majority of conferees in any enforcement conference (or during the next stage, the public hearing) the Secretary may ask an alleged polluter to file with him a report on the kind and quality of discharges he is putting into a river or other body of water.

It has been impressively experienced that it is possible for the conferees to arrive at unanimous conclusions and recommendations to place before the public, the press, and the Secretary of the Interior for approval.

After the conference, the Secretary issues formal recommendations for pollution abatement which are usually identical to the recommendations of the conferees. If the conferees have reached no agreement, the Secretary must issue his own recommendations. Upon establishment of a remedial schedule, the states are encouraged to obtain compliance under their own authorities and are allowed at least 6 months to take the necessary actions.

At the enforcement conference, the public is the chief ally. Progress in pollution control depends almost entirely on the formation of community understanding of the problem and support for strong and vigorous action. Experience has demonstrated the importance of elucidating the future as well as the immediate consequences of water pollution; the urgency of the problem and the disastrous effects of procrastination; the widespread implications of water pollution, not only for commercial fishermen, conservationists, and other special interest groups but for the entire public and the entire economy of a region. Above all, it is important to project the water pollution problem on a canvas of future population growth and economic expansion.

Once these points are made clearly to a broad audience, half the battle is won. The best weapon against resistance to the requirements of pollution abatement is a widespread public knowledge of the problem and the efforts being made to combat pollution. Few industries want to incur a reputation of disregard for a community's water resources, particularly those which market directly their own finished product as compared to those which manufacture an intermediate product which is then turned into a finished product elsewhere. Few cities can refuse to provide adequate sewage treatment if their citizens really understand the penalties of water pollution, and are willing to vote the necessary funds to take care of remedial facilities.

Since the conference step of the enforcement procedures is held to be the method of choice in securing compliance, in my opening statement as chairman of an enforcement conference, I frequently

quote from a United States Supreme Court opinion of 1921.[23] In a suit against the State of New Jersey by the State of New York, the Court at that time pointed out the unsuitability of court action for settling disputes involving large concentrations of population and industry, the solutions to which require complicated technical judgment, mutual concessions, and detailed plans of action. Even though the conference is only the first step, it is most frequently the only step necessary. Of the 43 enforcement actions to date, only four have gone to the hearing stage, and of these only one went to the final stage of court action. Cooperative action taken in agreement with state and local authorities is therefore a method likely to be more earnest, more effective, and easier and less expensive for all concerned than action enforced as a result of moving to the next step or beyond.

B. *Public Hearing*

When remedial action within the period allowed is not taken, the Act provides that a public hearing shall ensue.[24] The alleged polluters are made direct participants before a hearing board of five or more persons appointed by the Secretary. Testimony is sworn and statements of witnesses are subject to cross-examination. The hearing board makes findings on the evidence presented and recommends to the Secretary the measures which must be taken to secure abatement. The board's findings and recommendations are sent by the Secretary to the polluters and to the state agencies, together with a notice specifying a reasonable time, which may not be less than 6 months, to secure the abatement of the pollution.

C. *Court Action*

The last stage may be requested by the Secretary to be brought by the Attorney General when remedial action is not taken by the polluters within the time specified in the notice. In an intrastate pollution matter, the written consent of the governor is necessary to proceed with the court action.

In the operation of the water quality standards, when they are adopted and acquire federal stature, enforcement successes will continue to be measured by the number of cases that do *not* require court action. The assumption that the vast majority of cases can be solved through negotiation shall remain as a guidepost. When state, federal, and local authorities combine with private organizations and industries to pool technical know-how, financial resources, and their commitment to restoring the waters of our country, the stage is usually set for meaningful effective action.

[23] New York v. New Jersey & Passaic Valley Sewerage Comm'rs, 256 U.S. 296, 299-300 (1921).

[24] Act of Oct. 2, 1965, 79 Stat. 908, 33 U.S.C. § 466g (Supp. I, 1965).