The Development of the California and Federal Water Pollution Control Programs

I. INTRODUCTION

The subject of this article is the area of Federal-State interaction in their joint efforts to curb the pollution of our waterways. Specifically, the problem is the proper allocation of authority between the Federal and State Administrative entities in order to most effectively achieve their common goals in this area. This problem of Federal-State interaction is prevalent in all major areas of pollution control, and an analysis of the situation for controlling water pollution is relevant to other areas of pollution control as well.

The current mania for consideration of our environmental problems is a recent phenomenon. The government agencies honed balances and subtle distinctions. Moreover, it is only lation are unique for their newness.[1] This new legislation does not yet have the benefit of the experience and knowledge behind

[1]The first comprehensive Federal program to combat water pollution was enacted in 1948. Water Pollution Control Act, 62 Stat. 1155 (1948), as amended, 33 U.S.C. §§ 466-466k (1964). The first comprehensive Federal program to deal with air pollution was enacted in 1955. 42 U.S.C. § 1857 *et seq.* (1955), *as amended*, 42 U.S.C. § 1857 *et. seq.* (1967). These were the first attempts by Congress to deal specifically with pollution problems on a comprehensive scale. There had been a sporadic series of legislation back as far as the 19th century dealing with specific instances of pollution, or nuisance. See Middleton, *Air Pollution Control: New Goals in the Law*, 59 KENT. L.J., 644 (1970-71); Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part III; The Federal Effort*, 52 IOWA L. REV. 799 (1967).

it as do the more othodox regulatory schemes, with their time-honed balances and subtle distinctions. Moreover, it is only natural that this new legislation would be resisted by the private interests that will be financially hurt by regulation. The result is that this type of legislation is invariably the product of compromise, and usually far from perfect. The discussion to follow focuses upon one such species of legislation. The legislation is the Federal Water Pollution Control Act.[2] Its development reflects the compromise necessary for early survival. The issues involved in the compromise are the ultimate roles to be played by state and the federal administrative agencies in fighting water pollution.

II. FEDERAL VS. STATE REGULATION

Regulation of water pollution in California is administered by the State Water Resources Control Board, and the nine California Regional Water Quality Control Boards.[3] Though these state Boards have powers and functions delegated to them by the California legislature, they are subject to certain federal guidelines and standards, and they must act in a manner to take maximum advantages of conditional federal aid. This is absolutely necessary because of the approach that Congress has taken to attack the pollution problem. Rather than using the pre-emptive power which it possesses to blanket the field completely, Congress has chosen to leave the primary role of regulation and enforcement to the states.[4] Congress' basic approach to the water pollution problem is exemplified in the opening section of the Federal Water Pollution Control Act:

> The purpose of this Act is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.[5]
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> ...it is hereby 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.[6]

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[2]33 U.S.C. § § 466-66k (1964), *as amended*, 33 U.S.C. § § 466-66n (Supp. IV, 1965-1968), *as amended*, Act of April 3, 1970, Pub. L. No. 91-224, 84 STAT. 91 (1971).

[3]CAL. WAT. CODE § § 13140-68, 13225-47 (West 1971).

[4]This policy was established in the first enactment of the Federal Water Pollution Control Act in 1948, 62 Stat. 1155 (1948), 33 U.S.C. § 466 (1964).

[5]33 U.S.C. § 1 (a)(1964).

[6]33 U.S.C. § 1 (b) (1964).

Congressional influence is exerted by the establishment of certain standards by the Environmental Protection Agency which must be maintained in order to qualify for federal money. Beyond this, in certain instances, the federal power may be directly invoked if the states do not take appropriate action. This basic approach controls the Federal Water Pollution Control Act, and many of the failures to effectively curb water pollution have been due to the early timidity of Congress. The result has been that there are instances where there is inadequate authority of both the Federal and State governments to cope with a certain problem. Conversely, there may be areas where the federal and state activities overlap, with the involved agencies tripping over the activities of each other.

The restrictions on federal power to abate pollution are entirely self-imposed. It is clear that Congress may pre-empt the entire field of pollution control if it wishes to do so.[7] This power is derived from the Commerce Power of the federal government over all navigable waters. The requisite "navigability" has been interpreted very broadly. This position is established by a number of key decisions by the Supreme Court.[8] With this broad interpretation of the commerce clause, the result is that Congress may enter into almost any field that it wants, and may usually pre-empt it completely as well. This is so even in particular instances which have no appreciable effect on Interstate Commerce, as long as the "class" of activities to which the particular case belongs is declared by Congress to affect Interstate Commerce.[9] Accordingly, Congress may exercise jurisdiction over waters that are wholly intra-state in nature, because they belong to a "class" which affects interstate commerce.

The traditional view of pollution control is that it is a function uniquely suited to local government because of the historical role of the states in exercising their police power to protect the health of its citizenry.[10] There are strong arguments in support

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[7]See 1 SCHWARTZ, THE POWERS OF GOVERNMENT 218-19 (1963); S. Doc. No. 39, 88th Cong., 1st Session, 159-64 (1963); Edelman, *Federal Air and Water Control; The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 Geo. Wash. L. Rev. 1067 (1964).

[8]United States v. Darby, 213 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); Perez v. United States, 402 U.S. 146 (1971).

[9]Perez v. United States, 402 U.S. 146 (1971).

[10]See Graham, Disaster by Default 44 (1966).

of this position. Local control may be the most efficient means of handling the problem. Local conditions and needs are so diverse that it may not be reasonable to expect a centralized federal agency to adequately consider all the minute factors necessary to make a decision for any single area.[11] Thus, in the literature discussing the current federal efforts in pollution control, we find such phrases as "...the heavy hand of the federal government..."[12] There are those who see pollution distinctly as a concern of the local citizenry. Concern and outrage expressed by these irate citizens may be the impetus that drives the local agencies to action.[13] It would seem to follow that the more distant an agency is from the local populace, the less responsive the agency will be to the communities' needs. Those who adhere to these views would like to minimize the role of the federal government in pollution control.[14]

Not withstanding the theoretical niceties of local regulation, there are pitfalls and circumstances which render a purely local state regulatory scheme infeasible. There may be circumstances where the local authorities are unable to act, and an irate citizenry may be powerless to prompt any alleviating action.[15] We may use the easy example of the local economy-supporting industry. In a situation where an industry is the life-blood of the polluted area, even the most pollution conscious public official will think twice before biting the hand that feeds it. There are other problems which may be beyond the capacity of the state to control. Industries that are located on or near the borders of a state will be out of the jurisdiction of a neighboring state. That state must rely upon its neighbor to exercise its jurisdiction,

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[11] Morrison, *State and Local Regulation of Water Pollution*, 3 NAT. RES. LAW. 47 (1970).

[12] Welch, *Federal Air Quality Act of 1967*, 3 NAT. RES. LAW. 52 (1970).

[13] See *Hearings on Creative Federalism Before the Subgovernmental Relations Subcommittee of the Senate Committee on Governmental Operations*, 89th Congress, 2d Sess, pt. 1 (1966).

[14] See Hart, *Creative Federalism: Recent Trends in Regional Water Resources Planning and Development*, 39 COLO. L. REV. 29 (1968).

[15] See Crutchfield, *Water and the National Welfare,—Programs in Search of a Policy*, 42 WASH. L. REV. 177 (1966); Rogers, *Environmental Quality Control*, 3 NAT. RES. LAW. 716 (1970).

which it may or may not do.[16] This leads to another factor in the argument that a purely local regulation is infeasible. There are dangers in creating pockets of lenient and strict anti-pollution laws. Economic considerations make necessary a more uniform system of regulation. A state will always be faced with the danger that if its laws are too restrictive, new industries will locate elsewhere, and that established industries may pack up and move to a more hospitable state.[17]

Generally, there are two distinct areas in which local-state action may be inadequate. As previously mentioned, one is where the states themselves fail to exercise their regulatory power. Here, the presence of a strong central federal agency may not be absolutely necessary. Conceivably, there are other means by which to goad states with inadequate pollution controls to action, and even to establish some sort of uniformity of laws between the states.[18] A strong federal program, however, would go a long way toward effectuating the same goals. The other area in which local action may be inadequate involves money. To plan for the future needs of a community and to construct the requisite facilities to meet these needs requires huge sums of money. In most instances, the money needed is beyond the capacity of the states, counties, and municipalities which derive their revenue from the often inadequate bases of the property and sales taxes. This gap can only be filled by the Treasury of the United States, which has at its disposal the vast base of the income tax.[19] The lure of federal money may also be used to encourage states to take certain actions, rather than the threat of direct federal action.

Another need that the federal government may be best suited to fulfill is the need for a centralized coordination of research. These research activities are especially conducive to administration by a centralized federal agency, and much research would

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[16]The most obvious of these is the Interstate Compact. For a discussion of this type of interstate agency, see Article, *Water Pollution Control Through Interstate Agreement*, 1 U.C.D. L. REV. 43 (1969); Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part II; Interstate Arrangements for Pollution Control*, 52 IOWA L. REV. 433 (1966).

[17]*Id.*

[18]*Id.*

[19]Morrison, *State and Local Regulation of Water Pollution*, 3 NAT. RES. LAW. 47 (1970).

not get done at all, unless the federal government bore the cost.[20] As we shall see, the legislation passed by Congress from its earliest attempts to abate pollution to the present were passed with these considerations in mind. The initial steps into the field of dealing directly with pollution were limited to coordination of research and financial assistance to the states.[21] As conditions continued to worsen, the format gradually changed, with the federal government assuming an increasingly active role. Foreseeably, the process is not yet complete.

III. THE EARLY YEARS

A. THE REFUSE ACT OF 1899[22]

The evolution of a federal program for water pollution control strongly reflects the difficulty of achieving effective control while adhering to the stated goal of maintaining a primary state role in this area. The backbone of the federal effort to clean our nation's waters is the Federal Water Pollution Control Act,[23] originally enacted in 1948. Before then, as early as the 1930's, there had been various proposals to establish a separate federal program to control water pollution.[24] It was not until 1948 that the seemingly insurmountable conflicts and disputes within the House and Senate were overcome, and a compromise bill was finally passed. Prior to this time, there had been a number of acts passed by Congress to prevent obstructions of the waterways but their purpose was to protect the navigability of the waters.[25] The most important of these early acts is the Rivers

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[20]*Id.*

[21]Water Pollution Control Act, 62 STAT. 1155 (1948), *as amended*, 33 U.S.C. § § 466-466K (1964).

[22]Act of March 3, 1899, Ch. 425, § 13, 30, STAT. 1152, now found at 33 U.S.C. § 407 (1971).

[23]33 U.S.C. § 466-466K, *as amended.*

[24]Between 1936 and 1940, there were 3 separate attempts to pass a Federal Water Pollution Control Program through Congress. In the last attempt at the 76th Congress, the measure failed by one vote. For background on the development of the issues, see *Hearings on H.R. 519, H.R. 587, and H.R. 4070 Before the House Committee on Rivers and Harbors*, 79th Congress, 1st Session, 23-24 (1945); *Hearings on S. 3958, S. 3959, S. 4342, and S. 5627 before a Subcommittee of the Senate Committee on Commerce*, 74th Cong., 2nd Sess. 11, 168, 169, 200-12, 247, 324, 339 (1936); *Hearings on H.R. 2711 and H.R. 3419 Before the House Committee on Rivers and Harbors*, 74th Cong., 2d Sess. (1947).

[25]24 Stat. 329 (1886); 26 STAT. 453 (1890).

and Harbors Act of 1899, also referred to as the Refuse Act.[26] Despite its antiquity, this act has figured prominently as an enforcement measure in modern day water pollution control by the federal government, owing largely to liberal interpretations by the courts. The federal government has had to turn to this act for its enforcement procedures largely because of the cumbersome and time consuming enforcement provisions provided in the Federal Water Pollution Control Act.

The application of the Refuse Act to control pollution calls for a strained reading of the Act, as its original design was to protect the navigability of the nation's waters.[27] Thus, Section 403 of the Refuse Act forbids any "...creation of obstruction...to the navigable capacity of any of the waters of the United States..." with certain exceptions.[28] The most important provision in the Refuse Act for present day pollution litigation is Section 407. This section provides "It shall not be lawful to throw, discharge, or deposit, or cause...to be thrown, discharged, or deposited, ...any refuse matter of any kind...other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States..."[29] The main problem in using this provision is its overly broad language. It would not be fallacious to say that what the courts are doing is to apply fortuitously broad language to circumstances that the framers of the act had no intention of so doing. Nonetheless, the broad language is there, and it is still valid law. As might be expected, most of the litigated issues have revolved around such key phrases as "....refuse matter of any kind...", and "...other than that flowing from streets and sewers and passing therefrom in a liquid state." The Supreme Court has read the first phrase to embrace all that it literally

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[26] 30 STAT., 1152 (1899), 33 U.S.C. § 407 (1964).

[27] § 407. *Report of the House Committee on Rivers and Harbors, H. Rep. No.* 1826, 55th Cong., 2nd Sess. (1899). § 411 *Reports of the House Committee on Commerce, H. Reps. Nos. 1328 and 1963*, 50th Cong., 1st Sess. (1888); *Report of the Senate Committee on Commerce S. Rep. 224*, 50th Cong., 1st Sess. (1888); A complete history can be found in United States v. Republic Steel Corp., 362 U.S. 482 (1960).

[28] 33 U.S.C. § 403 (1964).

[29] 33 U.S.C. § 408 (1964).

claims to, and includes just about all foreign substances.[30] The second phrase is the key element in the section, because it establishes a broad exception to the statute which the courts could have interpreted in either direction. It is also important in that a large proportion of the contaminants entering our waters emit from sewers. Despite the importance of this exception, there are still a large number of issues unresolved regarding its interpretation.[31] The factors which the courts will most likely consider are whether the source pollutant was an industrial polluter, the particular type of pollutant involved, and whether the pollutant passed through a municipal system.[32] Until Congress can produce stronger legislation to replace it, it is expected that the courts will continue to be liberal in the application and interpretation of this strange statute in the environmentalist's arsenal of weapons with which to fight water pollution.

The Refuse Act is essentially a criminal statute. It imposes fines and possible imprisonment upon convicted violators of the act.[33] There are no provisions for civil injunctive relief in the text of the act.[34] The Supreme Court however, has granted such injunctive relief, because it is within the scope and intention of

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[30]United States v. Standard Oil Co., 384 U.S. 224 (1966). The court said that the word "refuse" as used in 33 U.S.C. § 407 "...includes all foreign substances and pollutants apart from those flowing from streets and sewers and passing therefrom in a liquid state into the water course." *Id.* at 230. The courts have held that even commercially valuable fuel oil may be "refuse". The Albania, 30 F.2d 727 (S.D.N.Y. 1928), and the Columbo, 42 F.2d 211 (2nd Cir. 1930).

[31]The only case which has dealt specifically with this key exception is United States v. Republic Steel, 362 U.S. 482 (1960).

[32]See Tripp and Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALBANY L. REV. 60 (1970-71).

[33]Section 406 of The Refuse Act provides for a fine from $500.00 to $2,500.00 per count, with a possible term of imprisonment of not more than one year. Section 411 is similar, except that the minimum term of imprisonment is 10 days. Sec. 441 is identical to section 411 except that the minimum fine is $250.00.

[34]Only Section 406 provides for a civil remedy in addition to a criminal penalty. This section provides "...the removal of any structures of parts of structures erected in violation of the provisions of the said sections [401, 403, and 404] may be enforced by the injunction of any district court..."

the act.[35] The open question that remains is whether a private action may be maintained under the act.[36]

The Refuse Act is currently administered through a permit system by the Department of the Army, through its Corps of Engineers.[37] A recent Federal District Court of Appeals case established that the Corps may consider ecological factors in issuing or refusing to issue permits to make discharges into navigable waters.[38] This permit system has recently been integrated with the water quality standards established by the states under the Federal Water Pollution Control Act.[39] In furtherance of the utilization of the permit system, a series of Executive Orders and administrative guidelines have been promulgated to best utilize the Refuse Act to control water pollution.[40] As recently as April 6, 1971, the Environmental Protection Agency and the Corps of Engineers entered into an agreement to establish certain guidelines for litigation under the Refuse Act permit system.[41] The permit system is applicable to all states regardless of existing regulation by any particular state.[42]

This new permit system is one specific area where federal activity may be unnecessary because a state may already have its own adequate procedure.[43] California already has a permit

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[35]United States v. Republic Steel Corp., 362 U.S. 482 (1960); Wyandotte Transportation Co. v. U.S., 389 U.S. 191 (1967).

[36]Section 411 provides that "...one-half of said fine to be paid to the person or persons giving information which shall lead to conviction." Whether this provision may be read to allow a private citizen to initiate a "qui-tam" action under the act is still untested.

[37]*See Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works*, United States Senate, 92nd Cong., 1st Session (1971),, at 7.

[38]Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3356 (U.S. Feb. 23, 1971) (No. 955).

[39]FWPCA § 21(b)(1), 33 U.S.C. § 1171 (b)(1) (1970). This section provides that applicants for a federal permit "which may result in any discharge into the navigable waters of the United States" must obtain a statement from the appropriate state or interstate agency certifying that the proposed discharge "will not violate applicable water quality standards."

[40]1 B.N.A. ENV. REP. CURRENT DEVELOPMENTS 910 (1971); CORPS OF ENGINEERS DEPT. OF THE ARMY, PERMITS FOR WORK IN NAVIGABLE WATERS, A.G.O. 200 39A. ARMY REG. ER 1145-2-303, para. 3(a) (changes) (April 23, 1970).

[41]DRAFT GUIDELINES FOR LITIGATION UNDER THE REFUSE ACT PERMIT PROGRAM F.R. DOC. 71-4808 Filed 4-6-71; Cong. Rec. Feb. 4, 1971.

[42]FWPCA § 21161, 33 U.S.C. § 1171 (b)(1) (1970).

[43]*Hearings Before the Subcommittee on Air and Water Pollution of the Committee on Public Works*, U.S. Senate, 92nd Cong. (1970) 1st Session, Pt. 1, at 590.

system similar to the one administered by the federal government.[44] Individual dischargers of waste must file reports with the appropriate California Regional Water Quality Control Board. The regional Board must issue discharge requirements (effuent standards) to each discharger of effluent. These requirements are part of water quality control plans where such plans have been implemented. The result is that industrial dischargers which have been already reviewed and regulated by California's Porter-Cologne Act will have to be reviewed all over again. This overlap of procedure by the federal government and California consumes administrative time and money that may be totally unnecessary.[45] To remain in harmony with the basic approach of the Federal Water Pollution Control Act, there should be an exemption allowed for those states that have their own comparable permit system in operation.[46] The alternative solution would be to make the federal permit system exclusive. Either solution would eliminate the unnecessary duplication of administrative duty, but they present obvious philosophical and theoretical differences.

In a way that must have been totally unforeseen by its drafters, the Refuse Act has been developed into a notable vehicle for dealing with water pollution. It is important to note that only recently has there been an effort to tie in the enforcement proceedings of the Refuse Act with the Federal Water Pollution Control Act. The Federal Water Pollution Control Act has its own enforcement procedures, inadequate as they may be, and it seems inconsistent to develop means of enforcement for the Federal Water Pollution Control Act outside of the act itself. Not surprisingly, the Justice Department is or has been hesitant to prosecute under the Refuse Act because it feels that since the Federal Water Pollution Control Act is allegedly the comprehensive format laid out by Congress, the Refuse Act is in a sense, superseded.[47] This position is understandable, but is not valid. Congress is aware of the existence of the Refuse Act, and has

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[44] CAL. WAT. CODE § § 13260 and 13261 (West 1971).

[45] See note 43, *supra*.

[46] *Id.*

[47] JUSTICE DEPT., GUIDELINES FOR LITIGATION UNDER THE REFUSE ACT, II.1 (June 15, 1970), reprinted in B.N.A. ENV. REP. CURRENT DEVELOPMENTS 288 (1970).

not repealed it. Moreover, the 1970 amendments to the Federal Water Pollution Control Act specifically refer to the permit system of the Refuse Act.[48] The real problem is the patchwork system of enforcement which is the result of the co-existence of the two acts. There is no real certainty as to what can or should be done in the area of enforcement. Secretary Ruckelshaus stated that the Environmental Protection Agency views the Refuse Act as being complimentary to the rest of the federal program.[49] Nonetheless, the uncertainty and the hazy overlap of jurisdictions remain.

B. CALIFORNIA REGULATORY ACTIVITY PRIOR TO 1949

Prior to the enactment of the Dickey Act in 1949, the regulation of discharges into state waters was chiefly the duty of the State Department of Public Health, which acted through its Division of Environmental Sanitation and Bureau of Sanitary Engineering.[50] The regulatory framework was directed at the construction of treatment or disposal facilities. A permit had to be issued for the construction of any such facility, or before any facility could discharge waste into state waters. The permit was not to be issued if the Department believed the discharge would cause a nuisance, or if it would endanger the Public Health. Another requirement for all proposed construction was that the disposal system would operate at 100 percent effectiveness for 20 years.[51] The Department had authority to investigate all existent and proposed sites to determine their adequacy, and could order any necessary changes.

This system, which on its face appeared to have great potential, was a failure.[52] A great fault was the inadequacy of the guidelines on the "nuisance" criteria, and the 100% operating efficiency requirement. Cities and industries were backed into the

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[48]33 U.S.C. § 1171 (b)(1) (1970).

[49]*Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works*, U.S. Senate, 92nd Cong. (1970) 1st Session.

[50]CAL. HEALTH AND SAF. CODE § § 5412-62 (West 1968).

[51]CAL. ASSEMBLY, REPORT OF INTERIM FACT-FINDING COMMITTEE ON WATER POLLUTION, 55 (1949) (hereinafter cited as 1949 Report).

[52]*Id.* at 36-38.

unlikely position of having to decide to build a facility to meet these unreasonable requirements, or to discharge raw sewage. More often than not, the choice was made to discharge the raw sewage.[53] This defect was due to a lack of foresight and serious planning in the enactment of the legislation which established this regulatory system. Consequently, there was no coordinating body for other government agencies and interests concerned, and the Department was not adequately staffed to carry out its appointed duties.[54] The role played by the Department was a simple veto power. There were no provisions for research, or financial aid for construction of any facilities. California's initial attempt to control water pollution was far from comprehensive, and the hectic years of the Forties made it clear that a new plan had to be put into effect.

IV. THE INITIAL STEPS TOWARD MORE COMPREHENSIVE CONTROL

A. THE FEDERAL WATER POLLUTION CONTROL ACT OF 1948

Congress began to seriously consider a separate federal program to combat water pollution in the post-war years of the 1940's. The accelerated industrial activity to supply the wares of war had left the nation's waterways in a seriously worsened condition.[55] But even though the legislation was considered by Congress under these critical conditions, there was heavy opposition to a federal entrance into the field in any substantive way.[56] The result was that the Federal Water Pollution Control Act, as finally passed in 1948, was much weaker in effect, and narrower in scope, than its proponents had initially hoped for. Even though the opening statements of the Act asserted that Congress had assumed jurisdiction of the nation's waterways, the act also declared that the primary responsibility for water pollution control rested with the states.[57] The role to be played

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[53]*Id.* at 50.

[54]See Comment, *California's Water Pollution Problem*, 3 STAN. L. REV. 649, 650 (1951).

[55]*See Hearings on H.R. 519, H.R. 587, and H.R. 4070 before the House Committee on Rivers and Harbors*, 79th Cong., 1st Sess. (1945).

[56]*See Hearings on S. 418 before a Subcommittee of the Committee on Public Works*, 80th Cong., 1st Sess. 29 (1947).

[57]Water Pollution Control Act, 62 STAT. 1155 (1948).

by the federal government was limited to providing technical services and funds to the states.[58] The theme of the act was "cooperation" and no mandatory dictates or restrictive standards were established.[59] By present day standards, the amount of money authorized was relatively meager. One million dollars was authorized for each of 5 years to the states to support research in water pollution control. Another one million dollars per year was likewise authorized for grants to the states for preliminary studies regarding construction projects.[60] 22.5 million dollars per year was authorized for loans to the states for construction of these projects. The maximum loan per project was 200,000 dollars or 1/3 the cost of the project, whichever was greater.[61]

In light of the emphasis upon the primary responsibility of the states to combat pollution and the limited role reserved to the federal government, the enforcement procedures provided in the Act were very limited. Before the federal enforcement process could even be initiated, there had to be a health hazard to citizens of another state other than from which the pollutants were being emitted.[62] Even if this condition existed, there still were even more formidable obstacles to overcome. There had to be a request from the local agency of the state against which an abatement action was sought before the attorney general could begin the judicial abatement action.[63] Then, certain time intervals were dictated during which the Surgeon General was to issue the polluter two notices.[64] The next step was a hearing before the Federal Security Administrator, to determine if it would be "reasonable and equitable" to abate the pollution.[65] Only then could the Attorney General be requested to initiate court action. Even then, the court was restricted by certain guidelines in the act which left many loopholes for the pol-

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[58]Water Pollution Control Act § § 3-10, 62 STAT. 1157 (1948).
[59]*Id.*
[60]Water Pollution Control Act § 8, 62 Stat. 1152 (1948).
[61]Water Pollution Control Act § 7, 62 Stat. 1157 (1948).
[62]*Id.* § 2 (d)(1).
[63]*Id.*
[64]*Id.* § 2 (d)(2).
[65]*Id.* § 2 (d)(3).

luter.[66] A more unlikely procedure for effective abatement of water pollution could hardly be imagined. Not surprisingly, there were no judicial proceedings initiated under the Federal Water Pollution Control Act of 1948.[67]

However, the Federal Water Pollution Control Act of 1948 is significant in that it marked the beginning of a serious federal involvement in water pollution control. With its foot in the door, the way was open for Congress to expand its programs, and to eventually assume its role as a dominant force in cleaning our nation's waters. The Act of 1948 got off to a very slow start. There were no appropriations for the fiscal year 1949, and only 9.4 million dollars was actually appropriated of the 83.4 million dollars authorized for 1950-52.[68] Thus, when the act was before Congress in 1952 to consider whether to renew it, there was not much background available as to its effectiveness. Accordingly, the act was extended to June 30, 1956, with no change.[69]

B. THE CALIFORNIA WATER POLLUTION CONTROL ACT OF 1949

As previously pointed out, California did not have a comprehensive water pollution control framework prior to 1949. The permit system then in existence was proving to be totally incapable of dealing with the worsening pollution of California waters. The state Department of Public Health, with its limited facilities and narrow powers, was not equipped to balance the social policies involved in controlling pollution within a society that was becoming increasingly complex and industrialized.[70] Nor was there to be any help forthcoming from the federal government. The federal program was just then barely establishing itself, and it was clear that water pollution control was still primarily a state function.

In 1949, the Assembly Interim Committee on Water Pollution concluded an intensive two year study and presented its radical

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[66] *Id.* § 2 (d)(7).

[67] *Hearings on S. 4 Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 89th Cong., 1st Sess. Pt. 2 (1965).

[68] *Hearings on H.R. 6856 Before the Subcommittee on Rivers and Harbors of the House Committee on Public Works*, 82nd Cong., 2d Session, 32 (1952).

[69] 66 STAT. 755 (1952).

[70] 1949 Report, *supra* note 51.

proposals to the legislature.[71] The legislature in turn accepted these recommendations and enacted the water pollution control act popularly referred to as the "Dickey Act."[72] The committee recommended establishing a number of regional boards corresponding to the natural water basins of the state, and a state board to supervise and review the actions of the regional boards.[73] This unique regional framework has been retained in the new Porter Cologne Act of 1970. The committee also recommended that pollution creating a menace to public health be separated from that which would only cause economic damage.[74] Under the Dickey Act, hazards to public health remained under the jurisdiction of the Department of Public Health. Water pollution posing an economic threat was the responsibility of the newly created state and regional boards. This division of jurisdiction was effectuated through the definitions of the words "pollution", "nuisance", and "contamination." "Contamination" was defined as any discharge of sewage or industrial waste which created an actual health hazard. In order for the Department of Public Health to assume jurisdiction there must have been an "actual hazard to the public health through poisoning or through the spread of disease."[75] "Pollution" existed if there were adverse and unreasonable effects on beneficial water uses, short of creating an actual health hazard.[76] A "nuisance" was damage to a community through odors or unsightliness resulting from the unreasonable disposal of waste.[77] "Pollution" and "nuisance" were under the jurisdiction of the state and regional boards.

The regional boards were vested with substantial powers and duties, the most important of which was the establishment of regional policies for water pollution and quality control and the establishment of discharge requirements.[78] These requirements governed a particular waste discharge, and were supposed to protect the beneficial uses of water which the board has de-

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[71] *Id.*
[72] CAL. WAT. CODE § 13000-13064 (West Supp. 1968).
[63] 1949 Report, *supra* note 51, at 108.
[74] *Id.*
[75] CAL. WAT. CODE § 13005 (West Supp. 1968).
[76] *Id.*
[77] *Id.*
[78] *Id.* § 13052.

cided should be protected. All persons who discharged waste were subject to these requirements, including "any city, county or district." The boards were restricted in the issuance of their requirements in that they were valid only if they were to protect the "beneficial uses" of water from "unreasonable use."[79] There could be no abatement procedure until the degradation of the water became "unreasonable." What was or was not a "beneficial use" was determined by the regional board by a consideration of the land and water resources of the region, the statewide water plans involving the region, and present and future uses of the water.[80] The general consensus was that waste disposal was a "beneficial use" of water. If a discharge was found to be occurring contrary to a discharge requirement, a hearing had to be held under the California Administrative Procedure Act.[81] If from such a hearing the regional board found that a "pollution" or nuisance existed or was threatened, an order was issued to correct the situation. If the order was disobeyed, an enforcement order had to be sought in the superior court for enforcement.[82]

There were many weaknesses in the Dickey Act. The major one was the basic approach of the regional board in determining what constituted a "beneficial use" of water, and the inclusion of waste discharge as one of these beneficial uses. This approach fostered the maintenance of the existent status quo, foresaw no improvement in water quality over time, and foreclosed any possibility of a higher use for a particular area in the future.[83] The glaring fault of the Dickey Act was that it did not aim towards long-range improvement of water quality. Related to this deficiency was the stigma of "legalized pollution" that the act fostered. Due to the fact that no "pollution" was officially occurring unless the "beneficial uses" of the water were adversely and unreasonably affected, there could be significant actual

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[79] *Id.* § 13005.
[80] WATER QUALITY POLICY, art. II. § C4.
[81] CAL. WAT. CODE § § 13060-61.5 (West Supp. 1968).
[82] *Id.* § 13063.
[83] See Article, *State Control of Water Pollution: The California Model* 1 U.C.D. L. REV. 1, 39-40 (1969).

pollution of a body of water that was not illegal.[84] These, and numerous other weaknesses in the Dickey Act, became obvious in the ensuing years, and along with increased federal activity in the area, were largely responsible for the improvements encompassed in the Porter-Cologne Act passed in 1970.

V. THE AMENDMENTS TO THE FEDERAL WATER POLLUTION CONTROL ACT

A. THE 1956 AMENDMENTS

Faced with the expiration of the Federal Water Pollution Control Act in 1955, serious efforts were made to amend the Act to make the federal effort more effective. Three major changes were urged, and met with heavy opposition. These changes were housed in two separate conflicting bills, S.890, and H.R. 9450. The major step of the establishment by the Surgeon General of federal water quality standards was proposed in S.890.[85] Proponents of the primary state role in water pollution control violently attacked this provision, and it failed to get out of committee.[86] A proposal calling for stronger enforcement procedures survived and was incorporated into the bill that was finally passed by the Senate.[87] The other contested innovation was a proposal to establish federal Grant-in-Aid programs to the states for sewage plant construction, in lieu of the loan provisions of the old act. Debate on these proposals included violent attacks on and defenses of the primary state role in pollution control, and the effect of these proposals upon the maintenance of a proper federal-state relationship.[88]

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[84] Reich, *Politics Hamper Efforts to Control Water Pollution*, L.A. Times, Feb. 26, 1968, pt. 11, at 8, col. 1.

[85] *Hearings on S. 890 and S. 928 before a Subcommittee of the Senate Committee on Public Works*, 84th Congress, 1st Sess. (1955).

[86] There were many arguments offered against the propriety of federal standards. Some felt that they would become too complex and were not needed. Others argued that the time and effort needed to set them up were unjustified. Most just believed that this was the realm of the states, and the entrance of the federal government into this area would merely confuse things. *See Hearings on S. 890 and S. 928 before a Subcommittee of the Senate Committee on Public Works*, 84th Cong., 1st Sess. 73, 92, 129-30, 161, 179, 189 (1955).

[87] 101 CONG. REC. 8627 (1955).

[88] *Hearings of S. 890 and H.R. 9540 Before a Subcommittee on Rivers and Harbors of the House Committee on Public Works*, 84th Cong., 1st and 2nd Sess. 76, 92, 131, 135-36, 189 (1956).

Although the bill that was finally passed was a compromise, it did significantly broaden the weak role played by the federal government under the 1948 Act. The construction loan program of the initial Federal Water Pollution Control Act of 1948 was replaced with a large scale grant-in-aid program.[89] 50 million dollars per year was authorized for grants to states and interstate agencies for construction of treatment plants. The Act recognized that large scale treatment works were beyond the small tax base of the smaller municipalities, and set aside 50% of the authorized money for cities with populations under 125,000.[90] The construction projects had to be approved by the appropriate state agency and the Surgeon General. They also had to be part of a comprehensive state plan to be initiated by the state pursuant to the Act. The comprehensive state plans had to be approved by the Surgeon General for the state to qualify for additional funds to assist the state in the administration of its program.[91] In addition, the act extended the federal role in research and training by providing more liberal and larger grants-in-aid, and provided for special projects to be carried out by the Public Health Service.

The all important enforcement provisions of the Act took both a step forward and a step backward. The new procedure eliminated the unnecessary second notice requirement, and the requirement of obtaining the consent of the state from which the pollution was being discharged.[92] The removal of these obstacles

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[89]Water Pollution Control Act Amendments of 1956, 70 STAT. 499 (1956), *as amended*, 33 U.S.C. § 46(e) (1964).

[90]*Id.* § 6(b), (d).

[91]*Id.* § 466(d). Essentially, the act stated that the Surgeon General shall approve any plan which meets five requirements: (1) provides for administration or for the supervision of administration of the plan by the state water pollution control agency, or, in case of a plan submitted by an interstate agency, by such interstate agency; (2) provides that such agency will make such reports, in such form and containing such information, as the Surgeon General may from time to time reasonably require to carry out his functions under this act; (3) sets forth the plans, policies, and methods to be followed in carrying out the state, or interstate, plan and in its administration; (4) provides for extension or improvement of the state or interstate program for prevention and control of water pollution; and (5) provides such accounting, budgeting, and other fiscal methods and procedures as are necessary for the proper and efficient administration of the plan. Water Pollution Control Act Amendments of 1956, 70 STAT. 499 (1956), *as amended*, 33 U.S.C. § 466d (1964).

[92]*Id.* § 6(b), (d).

didn't seem to help much, as there was only one abatement action initiated under the act.[93] Obviously, there were other barriers remaining, that made prohibitive a federal abatement action under the act. Any benefits derived from the elimination of the above mentioned requirements were more than offset by the addition of an initial conference into the enforcement procedure.[94] The result was that an abatement proceeding under the 1956 Amendments would be more time consuming than under the old procedure. The Amendments also narrowed the jurisdiction of the Act by defining "interstate waters" as "all rivers, lakes and other waters that flow across, or from a part of, boundaries between two or more states."[95] Though this redefinition of "interstate waters" was inadvertent, major bodies of water such as the Great Lakes were excluded from the jurisdiction of the Act.[96]

Between 1958 and 1960, the disagreement over the primary role of the states continued. President Eisenhower's administration strongly believed that the primary responsibility for controlling pollution rested with the states.[97] Thus, he was adamantly opposed to the grant-in-aid program for construction projects, but favored heavier federal participation in research, and stronger federal enforcement. So it was that when a bill was sent to President Eisenhower in 1960 to extend and broaden the federal construction-grant program, he vetoed it.[98] The bill had been laboriously and painfully guided through Congress under heavy debate and opposition. The House failed to raise the necessary 2/3 majority necessary to override the

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[93]This single action was not filed until 1960. As recently as August, 1967, that one action remained the only one ever filed under the F.W.P.C.A. *Hearings on S. 4 before the Special Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 89th Cong., 1st Sess. (1965); *Hearings on Activities on the Federal Water Pollution Control Administration—Water Quality Standards before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 90th Cong., 1st Sess. 674 (1967).

[94]Water Pollution Control Act Amendments of 1956, 70 STAT. 499 (1956), *as amended* 33 U.S.C. § 466(e) (1964).

[95]*Id.* § 11(e).

[96]H.R. REP. NO. 306, 87th Cong., 1st Sess. 8 (1961).

[97]104 Cong. Rec. 395 (1958).

[98]H.R. REP. NO. 346, 86th Cong. 2d Sess. 2 (1960).

veto.[99] This defeat was to be the last major triumph by those opposed to an expansion of the federal program.

B. THE 1961 AMENDMENTS

In February 23, 1961, John F. Kennedy took office, with his program for "The New Frontier." He was much less concerned with the maintenance of a "proper" federal-state relationship, and viewed the pollution problem with immediate urgency.[100] The funding for the Federal Water Pollution Control Act was to expire on June 30, 1961, and the familiar debate in Congress over the extent of federal involvement in pollution control was already well underway. Opposition was voiced to all proposals to expand the federal role except for that of research.[101] As a result, the 1961 Amendments as finally passed was again a compromise, and did not substantially strengthen the position of the federal government.[102]

Under the 1961 Amendments, the water pollution program was shifted from the Surgeon Generals Office to the Secretary of Health, Education and Welfare.[103] The role of the federal government was not bolstered appreciably. Grants for state programs were raised from an authorized 3 million dollars to 5 million dollars annually. The maximum limit on individual construction projects was raised to 600,000 dollars, with an eventual authorized total maximum of 100 million dollars per year, on a sliding scale.[104] The previous limitation upon the scope of the act was removed, to include almost all the waters of the nation.[105] The Amendments also provided that the federal abatement procedure could be invoked when the health or welfare of persons was endangered by discharges within the same state.[106] The pre-

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[99]106 Cong. Rec. 3486-94 (1960).

[100]107 **Cong. Rec.** 2585 (1961).

[101]H.R. REP. NO. 306, 87th Cong., 1st Sess. 325 (1961).

[102]Water Pollution Control Amendments of 1961, 75 STAT. 204, (1961), *as amended*, 33 U.S.C. § § 466-466k (1964).

[103]See H.R. DOC. 55, 81st Cong., 2d Sess. (1950); H. R. REP. NO. 306, 87th Cong., 1st Sess. 4 (1961).

[104]Water Pollution Control Amendments of 1961, 75 STAT. 204 (1961), *as amended*, 33 U.S.C. § § 466j(e) also provided that "interstate waters" would include "all rivers, lakes, and other waters that flow across or form a part of State boundaries, including coastal waters." This new definition brought the definition to within the original scope of the 1948 enactment of the act.

[106]*Id.*

vious 1956 amendment had limited the federal scope of enforcement to where the health of citizens of another state were endangered. The initial conference to begin this federal enforcement process, however, could be called only upon the request of the governor of the state in which the pollution originated.[107] The retainment of this veto power by a state in the Federal Water Pollution Control Act effectively made pointless any other gains made in the enforcement power of the federal government. Overall, small steps of progress were being made, but not in any substantial way. Naturally, the proponents of a strong federal program were far from mollified.

C. THE WATER QUALITY ACT OF 1965

The positions of these favoring a strong federal program were strengthened in the ensuing years. The degradation of the quality of our waters continued, and the regulatory frameword that had been set up appeared to be unable to effectively cope with it. Prospects for the future were glum. It was obvious that if the quality of the nation's waters was to be improved, or even stabilized, some very basic changes were going to have to be made.[108] There was very positive action in both houses of Congress as they prepared for the next time when the Federal Water Pollution Control Act would have to be renewed. The Senate formed a special subcommittee to thoroughly examine the problem.[109] The time seemed ripe to push through a major comprehensive program with substantially broadened federal involvement and powers. The main players in the forthcoming drama were the Special Senate Subcommittee on Air and Water Pollution, and its Chairman, Senator Edmund Muskie. In 1963 Senator Muskie introduced a bill which substantially broadened all aspects of federal involvement in water pollution control, and created the Federal Water Pollution Control Administration.[110] The contro-

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[107] *Id.* § 8(c)(1).

[108] 109 Cong. Rec. 7304 (1963).

[109] In April of 1963, the Senate Committee on Public Works appointed a Special Subcommittee on Air and Water Pollution from its own membership, with Edmund Muskie as its Chairman. 109 Cong. Rec. 7304 (1963).

[110] *See Hearings Before a Special Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 88th Cong., 1st Sess. (1963).

versial provision over which the battle was to be joined was the proposal to direct the Secretary of H.E.W. to establish effluent standards as well as standards for receiving waters for all navigable waters.[111] As was expected, this proposal met with stiff opposition, and the battle was long and agonizing.[115] Bills were passed by the House and the Senate, and were sent to a Conference Committee to work out a compromise.[112] The Water Quality Act of 1965 was the final result, signed into law on October 2, 1965.[113]

Again, the result was a compromise, unsatisfying to either side. The Water Quality Act of 1965, however, was a minor victory of sorts for those favoring a strong federal participation in. pollution control. The new section 10(c) of the Federal Water Pollution Control Act provided for the establishment of water quality standards for interstate waters.[114] The states had the initial and primary responsibility to formulate the standards under a timetable established by the Act. If the states failed to establish these standards, or if the standards established do not meet the minimal requirements as spelled out in the Act, the Secretary was authorized to formulate the standards himself. If the Secretary does exercise his authority to promulgate his own standards, the governor of the state may ask for a revision within 30 days. The secretary would then be required to call a hearing before a board, with substantially the same makeup as the board called for in the abatement post-conference hearing. If the board revises the standards, the Secretary is bound to abide by them.[115]

The Act provided abatement procedures for discharges which lowered the quality of interstate waters below that set by the standards. This procedure was limited to interstate waters and did not include all navigable waters.[116] The Secretary may request the Attorney General to bring an action to abate when he finds that the quality of the interstate waters falls below set standards. However, there are a number of limitations on this

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[111] *See Hearings Before the House Committee on Public Works*, 89th Cong., 1st Sess. (1965).

[112] See CONFERENCE REP. NO. 1027, 89th Cong., 1st Sess. (1965) (3 Vols.).

[113] Water Quality Act of 1965, 79 Stat. 963 (1965).

[114] *Id.* § 5(a) (adding S 10(c)(1) to the FWPCA), 33 U.S.C. § 466g(c)(1) (1964).

[115] *Id.* § 5(a) (adding S 10(c)(4) to the FWPCA), 33 U.S.C. § 466 g (c)(4) (1964).

[116] *Id.* § 5(a) (adding S 10(c)(5) to the FWPCA), 33 U.S.C. § 466g(c)(5) (1964).

power which seriously affect its effectiveness. If the discharges and the welfare of the persons affected are in the same state, the action cannot commence without the consent of the governor of that state.[117] No action may be initiated until 180 days after the secretary has given notice to the violators and all other parties involved.[118] This time-saving single 6 month notice procedure is limited to "interstate" waters, and not all navigable waters. All other waters are subject to the lengthly conference and hearing board procedure, and if the violation is purely intrastate in nature, the consent of the governor must be obtained. In addition, the enforcement provisions of the Act were expanded to allow the Secretary to call a conference when he found that pollution was adversely affecting shellfish or shellfish products under certain conditions.[119]

The new Act raised the authorized appropriations from 100 million dollars to 150 million dollars, with a ceiling per individual project of 1.2 million dollars. In addition, a new incentive program was initiated whereby a state's grant would receive a bonus of 10% if the project is certified as conforming to a comprehensive plan.[120] There were also substantial increases in the amount of money allocated for research. The Water Quality Act of 1965 was certainly a step forward in all ways. The unresolved question was whether it was adequate. There were obviously many who felt that it was not, as Congress continued to consider a continuous stream of environmental proposals introduced before it.

Work continued in Congress to strengthen the federal role in combating water pollution. In 1966, the President submitted a reorganization plan to Congress, transferring the operation of the Federal Water Pollution Control Administration to the Department of the Interior.[121] Some Congressmen, who had worked long and hard to create the separate water quality con-

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[117] 33 U.S.C. § 466g(g)(2) (1964).

[118] *Id.* § 5(a)(adding S 10(c)(5) to the FWPCA), 33 U.S.C. § 466g(c)(5) (1964).

[119] *Id.* § 5(b) (amending FWPCA § 10(d)(1)), *as amended* 33 U.S.C. 466g(d)(1) (1964).

[120] Water Quality Act of 1965, 79 Stat. 963 (1965).

[121] 31 Fed. Reg. 6857 (1966).

trol agency in H.E.W. were somewhat apprehensive at the prospect of moving their brainchild to a foreign environment.[122] Thanks to Secretary Udall's convincing salesmanship and his organizational talents, the reorganization plan met no significant opposition, and went into effect on May 20, 1966.[123] 1966 was a very eventful initial year for the Federal Water Pollution Control Administration. In addition to the confusion of reorganization and the burden of the added responsibilities given to it by the 1965 Act, the new agency had to be very aware of activities then taking place in Congress which would be very important to its future. The public concern for environmental matters was rising to a crest, and each session of Congress to come would see large numbers of significant environmental bills before it.

D. THE CLEAN WATER RESTORATION ACT OF 1966

After the enactment of the 1965 Water Quality Act, activities continued both within the administration and the Congressional Subcommittees to further augment and improve the federal program for water pollution. Senator Muskie, acting through information gained from extensive research by his Subcommittee on Air and Water Pollution, introduced a bill into Congress.[124] The administration introduced their own bill.[125] The Administration's bills proposed the creation of regional control agencies,

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[122]"Frankly, I have been tempted to oppose this plan. My primary objection is the timing." *Hearings before a Subcommittee on Executive Reorganization of the Senate Committee on Governmental Operations*, 89th Cong., 2d Sess. 64 (1966) (remarks of Senator Muskie).

[123]H. Res. 827 was introduced in the House April 27 to disapprove the reorganization plan, but it was not reported favorably upon by the House Committee on Governmental Operations. H.R. Rep. No. 1478, 89th Cong., 2d Sess. (1966).

[124]Senator Muskie's Subcommittee summarized its findings in a short report entitled "STEPS TOWARD CLEAN WASTE," in January of 1966. These findings and recommendations were based on results of hearings and investigations the Subcommittee had been engaged in for the past three years. S.2947 was based upon many of these recommendations. *See Subcommittee on Air and Water Pollution to the Senate Committee on Public Works*, 89th Cong. 2d Sess., STEPS TO CLEAN WATER(Comm. Print 1968).

[125]The major points of this bill were outlined in President Johnson's message on environmental quality, delivered Feb. 23. *See* 112 CONG. REC. 3519 (daily ed. Feb. 23, 1966). These proposals were ultimately formulated into S. 2987, and H.R. 13104.

based upon the natural river basins of the nation's waters. These agencies would have a comprehensive jurisdiction over the waters within the region. The federal government would assume the direct financial support of these agencies and their programs, and would increase the amount of grants for programs which were in compliance with the plan of the approved regional agency. In contrast, the bill also proposed that municipalities requesting grants under this plan must demonstrate that future needed projects could be financed without federal aid. The bill also contained a number of measures to bolster the federal enforcement powers.

Senator Muskie's Subcommittee had discovered that there was an enormous backlog of needed municipal sewage plant construction which was a major obstacle to controlling water pollution.[126] Thus, in contrast to the Administration's bill, Senator Muskie's bill contained an ambitious federal spending program to wipe out the backlog of needed construction. The bill proposed an authorization of six billion dollars over six years. Efforts were made in the proposed bill to facilitate building as soon as possible. Limits on grants were laxened, to allow large metropolitan areas a more proportionate share of federal money,[127] and municipalities could begin construction of their own, in reliance upon a reimbursement provision. In addition, the federal share of the cost of the project would be increased to 40% if 30% were provided by the state.

Both of these bills are significant in the history of the development of the Federal Water Pollution Control Act. Each would have significantly extended the influence of the federal government over the states, but in different ways. The Muskie bill utilized the force of federal money. The Administrations bill stressed the eventual financial independence of the municipalities, but favored more direct federal influence in other ways.

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[126] *Subcommittee on Air and Water Pollution to the Senate Committee on Public Works*, 89th Cong., 2d Sess., STEPS TO CLEAN WATER 4-9 (Comm. Print 1966); Hearings Before a Special Subcommittee on Public Works, 89th Cong., 1st Session. 80-92 (1965).

[127] One of the facts that came out of the Hearings was that the present federal program was not providing much of an incentive to the larger metropolitan areas, the very areas that were in the most need of new treatment facilities. *See Hearings before a Special Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 89th Cong., 1st Sess. 5-28, 141-43, 144-47 (1965).

The flavor of the debates had changed dramatically from those of ten or even one to two years ago. The social climate and the public clamor demanding positive action made it a foregone conclusion that the federal government would continue to expand its influence. To call for a cutback in federal involvement would have amounted to political suicide. The debates centered around not whether the federal power should grow, but rather how it should grow. Certainly there were still those who looked upon certain provisions expanding federal powers with disfavor, but their objections to these provisions were carefully clothed in terms of their being ineffective to combat the rising tide of pollution.[128] As was expected the resultant bill was a compromise, but contained significant provisions further extending the limits of federal involvement. Naturally neither side was satisfied. The Administration's clean river basins proposal was just about completely wiped out, and the Subcommittee's originally large authorization was substantially reduced.[129]

The 1966 Act removed the ceiling on individual grants, but only increased the total authorized money to 3.55 billion dollars, between 1967 and 1971. In order to stimulate the states to establish grant programs to match federal funds, the federal share was increased from 35% to 55% if the states established a standards and grant program that met certain conditions. There was also a reimbursement provision so that municipalities which had projects which satisifed federal requirements did not have to wait for federal funds in order to begin construction. A remnant of the Administration's river basin proposal provided that federal grants to support programs of local agencies would be increased to 55% if a comprehensive water quality program was developed on a river basin basis. In addition, the act increased appropriations and federal involvement in a variety of research areas and projects.[130]

There were advances made in the enforcement procedures on two levels. At the request of the Secretary of State, the Secretary can call a conference when pollution originating in the United States affects the health and welfare of persons in a

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[128]*See Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 89th Cong., 2d Sess. (1966).
[129]112 Cong. Rec. 14896 (daily ed. July 13, 1966).
[130]Clean Water Restoration Act of 1966, 80 Stat. 1246 (1966).

foreign country. The foreign country would have all the rights of any other local agency at the conference. These rights were only extended to countries which granted reciprocal rights to the United States.[131] The second advance involved information gathering by the Secretary in regard to polluters. The Secretary was given the right to require an alleged polluter to file a report, stating the "character, kind, and quantity" of the pollutants discharged, and the efforts and means being used to reduce these discharges.[132] The Secretary may make such a request at either the conference or hearing stage.[133] Failure to comply subjected the violator to a fine of one hundred dollars per day. This provision is significant because under the 1965 act, the Secretary was without means to gather specific information data on specific instances of pollution.

Though the Clean Water Restoration Act of 1966 was a significant step forward for federal involvement in water pollution control, the problem was far from solved. There still existed a significant divergence between what was being done, and the actual needs to clean the nation's waters. The stream of anti-pollution bills introduced in Congress continued its frenzied pace, and it was clear that the Federal Water Pollution Control Act had not yet achieved its final evolutionary state.[134]

In 1969 and 1970, two more acts were enacted by Congress which had substantial influence upon the role to be played by the federal government in water pollution control. They are the National Environmental Policy Act of 1969 (N.E.P.A.),[135] and the Water Quality Improvement Act of 1970, amending the Federal Water Pollution Control Act.[136] Both of these acts reaffirm the federal position that primary responsibility for the control of pollution rests with the states. Thus, the basic approach initiated in 1948 survives and is controlling the direction of the Federal Water Pollution Control Act today. The two Acts differ though, in that N.E.P.A. is a broad Congressional dictate of national policy, whereas the Amendments to the Federal Water

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[131] *Id.* § 206 [amending FWPCA § 10(d)(2)].
[132] *Id.* § 208 (b) [amending FWPCA § 10(f)(2)].
[133] *Id.* § 208(g) [amending FWPCA ‡ 10(k)(1)].
[134] See 1 C.C.H. WATER CONTROL NEWS, No. 38, at 2 (Feb. 6, 1967).
[135] Act of Jan. 1, 1970, Pub. L. No. 91-190; 83 STAT. 852 (1970).
[136] Water Quality Improvement Act of 1970, Pub. L. No. 91-224; 84 STAT. 91 (1971).

Pollution Control Act did not substantially alter any of the basic premises and philosophies of the act.

E. THE 1970 AMENDMENTS TO THE FEDERAL WATER POLLUTION CONTROL ACT

The most important section of the 1970 Amendments to the Federal Water Pollution Control Act is section 11, which repeals the Oil pollution act of 1924, and places within the jurisdiction of the Federal Water Pollution Control Act the problem of oil pollution of our waterways.[137] The act is significant in that Congress has for the first time, elected to impose civil and criminal penalties for prior acts of pollution under the Federal Water Pollution Control Act.[138] Persons in charge of any vessel or any oil drilling facility must report any known discharge of oil into navigable waters. Failure to do so will subject them to a fine of up to 10,000 dollars, or imprisonment for one year, or both. Any person in charge of any vessel or facility which knowingly discharges oil into navigable waters is subject to a civil penalty of 10,000 dollars per offense.[139]

The other major provision of Section 11 creates the National Contingency Plan for the detection and removal of Oil spills.[140] When an oil spill occurs, the owner of the facility or vessel responsible for the spill is allowed to clean up the spill. If the owner of the facility fails to do so, the National Contingency plan provides that the President may arrange to remove the oil. The owner of the responsible facility or vessel is then liable to the United States government for the costs incurred by it in such clean up, subject to certain limitations. If the spill was the result of an act of God, the United States will bear the burden of the cost. If the owner of the polluting facility can prove the fault of a third person, that third person is held liable.[141] The intent

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[137]The problem of oil pollution of the waterways had been administered by the separate Oil Pollution Act of 1924. 33 U.S.C. § 431-37. Section 108 of the 1970 Amendments to the FWPCA repealed the 1924 Act.

[138]The new penalties imposed by § 102 of the new act are substantially stiffer than those under the Act of 1924, 33 U.S.C. § 434 (1971).

[139]Water Quality Improvement Act of 1970, § 102, 84 STAT. (1971).

[140]*Id.* § 102 [adding § 11(c)(2) to the FWPCA].

[141]*Id.* § 102 [adding § 11(c)-(f) to the FWPCA].

of this framework is to hold liable those who are responsible for the spill. By so doing, it is hoped that those in charge of drilling operations and oil transport vessels will exercise more caution in avoiding the disastrous oil spills evidenced in recent years.

California also has a number of statutes which may be applicable to the control of oil pollution.[142] The State Department of Fish and Game has authority to proceed against anyone who negligently or willfully pollutes state waters.[143] As opposed to the Porter-Cologne Act, the authority vested in the Department of Fish and Game is most useful against occasional polluters. There are also two approaches in the Porter Cologne Act which may be used to abate oil pollution. If the pollution occurs in an offshore area[144] subject to Section 13243 of the Water Code which sets forth requirements of a program to achieve water quality objectives, absolute liability would fall upon the polluter.[145] If there are no applicable standards established for that particular region, the polluter will be required to remove the pollutants when the condition of pollution was created negligently or in-

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[142]The initial responsibility to *prevent* oil pollution rests upon the State Lands Commission, which makes a part of every offshort oil lease that is granted to a private party:

> (b) Pollution and contamination of the ocean, and tidelands, or navigable rivers or lakes, and all impairment of and interference with bathing, fishing or navigation in the waters of the ocean or any bay or inlet thereof, or any navigable river or lake, and all impairment of, and interference with, developed shoreline recreational or residential areas, is prohibited, and no oil, tar, residuary product of oil or any refuse of any kind from any well or works shall be permitted to be deposited on or pass into the waters of the ocean or any bay or inlet thereof or any navigable river or lake; provided, however, that this subsection (b) shall not be deemed to apply to deposit on or passage into said waters of water not containing any hydrocarbons or vegetable or animal matter. CAL. PUB. RES. CODE § 6873(b) (West 1971).

[143]CAL. FISH & G. CODE § 5650 (West 1958). This section provides:

> It is unlawful to deposit in, permit to pass into, or place where it can flow into the waters of this State any of the following:
>
> (a) Any petroleum, acid, coal or oil tar, lampblack aniline, asphalt, bitumen, or residuary product of petroleum, or carbonaceous material or substance.

[144]State waters include ocean waters for a distance of 3 nautical miles from the mean lower water mark on the California Coast. CAL. WAT. CODE § 13200(i) (West 1971).

[145]CAL. WAT. CODE § 13243 (West 1971) states the requirements of a program to achieve water quality objectives.

tentionally.[146] It is conceivable that there will be some conflict between the federal government and California in this area. State laws apply in the Outer Continental shelf area only to the extent where they are not conflicting with federal laws.[147] Many of the possible conflicts surfaced in the recent Santa Barbara Oil spill in 1969, where the Ninth Circuit Court of Appeals granted an injunction against the District Attorney of Santa Barbara to prevent him from proceeding under § 373(a) (Public Nuisance) of the Penal Code. The grounds were that the United States had the power to develop the Outer Continental Shelf through private leases, and that the District Attorney was acting in frustration of a federal power.[148] The question whether California may take action against those who, through their activities on the Outer Continental Shelf, affect the California shoreline, remains open.

Section 12 of the 1970 amendments to the Federal Water Pollution Control Act deals with hazardous pollutants.[149] This section directs that specific substances or elements which are water pollution hazards will be designated and promulgated by the President. These regulations will also recommend available techniques and methods for the removal of these substances. The section provides that any discharge of such hazardous pollutants must be reported, and attempts must be made to remove it. If the responsible party fails to do so, the President may remove the substance, and hold the responsible party liable.[150]

The other problems covered by the 1970 Amendments to the Federal Water Pollution Control Act are varied. Section 13 deals with the discharge of sewage from vessels.[151] The Secretary of the Interior, in cooperation with the Secretary of Transportation, must promulgate standards of performance for marine sanitation devices. Violation of these standards will be subject to an injunction or a civil penalty or both. Section 21 is the pro-

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[146]CAL. WAT. CODE § 13050(1) (West 1971), which defines "pollution."
[147]433 U.S.C. § § 1333(a)(1)-(2) (1964); Rodriguez v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).
[148]Union Oil Co. of Calif. v. Minier, 437 F.2d 408 (1970).
[149]Water Quality Improvement Act of 1970, § 102 [adding § 12(a)-(g) to the FWPCA].
[150]*Id.* § 102 [adding § 12(a)-(g) to the RWPCA]
[151]*Id.* § 102 [adding § 13(f) to the FWPCA]

vision which requires that any person contemplating construction or any other activity which will discharge any pollutant into navigable waters must obtain a federal license or permit.[152] The Act spells out the procedure to be followed in applying for such a permit. This permit system is the one which was previously mentioned in the discussion on the Refuse Act of 1899. For the first time Congress has incorporated a feature of the 1899 Act directly into the Federal Water Pollution Control Act.

The Amendments of 1970 to the Federal Water Pollution Control Act reflect a shift in Congressional policy in some ways, and reaffirm other basic premises. The basic format and approach to the general water pollution problem is unchanged from the 1965 Act. What is significant is that Congress has chosen to be much more specific in dealing with the particular problems of water pollution. Thus, in addition to the sections previously mentioned, there are sections which specifically concern pollution in the Great Lakes,[153] area acid and mine water pollution control demonstrations,[154] and training grants and contracts for the development of treatment works.[155] In dealing with these particular problems, Congress has been flexible in the approaches applied to each specific problem. In the section dealing with oil pollution, we see Congress enacting enforcement procedures within the Federal Water Pollution Control Act which are the most streamlined, efficient, and forceful as we have ever seen. Water pollution is a diverse problem, requiring varying approaches to each situation that may arise. It is good that Congress has assumed such a pragmatic stance in facing the specific needs of the general program.

On July 9, 1970, the President submitted a reorganization plan to Congress to create the Environmental Protection Agency. The plan consolidated the Administration of the Federal Water Pollution Control Act along with other federal agencies concerned with the environment into one centralized agency.[156] It is re-

[152]*Id.* § 103 [Adding § 21 to the FWPCA]. See also, Article, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HAST. L.J. 782 (1971), which discusses this permit system; *Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works*, 6-19, 92nd Cong., 1st Sess.

[153]Water Quality Improvement Act of 1970 § 102 [adding § 15 to the FWPCA].

[154]*Id.* § 102 [adding § 14 to the FWPCA].

[155]*Id.* § 102 [adding § 16-19 to the FWPCA].

[156]See 42 U.S.C. § 4321: REORGANIZATION PLAN NO. 3 of 1970; 35 F.R. 15623.

flective of the public concern for the environment that for the first time, there is a separate federal agency dealing with the environment alone. Prior to the establishment of the Environmental Protection Agency, the administration of the Federal Water Pollution Control Act and other environmentally related agencies, had been housed in other major Departments such as H.E.W., and the Department of the Interior.

VI. THE CALIFORNIA PORTER-COLOGNE ACT

The Dickey Act remained intact and unreviewed for about 20 years after its inception in 1948. In early 1968, Assemblyman Carley Porter, Chairman of the Assembly Water Committee, proposed a complete review of California's water quality control program.[157] The State Water Resources Control Board[158] sponsored a study panel to do as Assemblyman Porter suggested. In 1969, the panel submitted its report to the legislature.[159] The panel had carefully studied the then current law and its deficiencies, and recommended major changes. The legislature accepted most of the panel's suggestions, and the Porter-Cologne Water Quality Control Act was signed into law by the Governor on July 14, 1969, to take effect on January 1, 1970.[160]

The study panel recognized that the Dickey Act barely maintained water quality at a status quo, if it did that at all, with no design to improve water quality for future use.[161] In its final report, the panel stated "Corrective action must be initiated before a problem becomes acute and forces are set in motion which may well be irreversible except over very long periods of time."[162] The Legislature accepted this finding, and incorporated the new policy into the Porter-Cologne Act. This change in policy

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[157]JOURNAL OF THE CALIFORNIA ASSEMBLY 3003-05, (Reg. Sess. 1968).

[158]The State Water Resources Control Board is a five member, full time board, created in 1967 by the legislature, and is a merger of the then existing State Water Rights Board and State Water Control Board. CAL. WAT. CODE §§ 174-188.5 (West 1968); Ch. 284, (1967) Cal. Stats. 1441.

[159]CALIFORNIA STATE RESOURCES CONTROL BOARD, RECOMMENDED CHANGES IN WATER QUALITY CONTROL, FINAL REPORT TO THE STUDY PANEL.

[160]RECOMMENDED CHANGES IN WATER QUALITY CONTROL, FINAL REPORT OF THE STUDY PANEL (1969) (hereinafter cited as 1969 Report); the legislative changes were published separately as Appendix A to the 1969 Report.

[161]1969 Report, *supra* note 158, at 1, 3.

[162]*Id.*

is reflected in the new definitions as used in the Act.[163] "Pollution" was redefined to delete the need to show "adverseness" as was required under the Dickey Act; the key became whether the waste unreasonably affects waters for beneficial uses.[164] No harm or damage is now required to be shown to find pollution and the Boards can act when "reasonable" to protect the beneficial uses. This redefinition enables the Regional Boards to consider future needs and safety margins in drafting the water quality plans and waste discharge requirements.[165] The definition of "contamination" was revised to eliminate the word "actual" so that no actual existing hazard need now be established as was required under the Dickey Act.[166] The state can act when a hazard is eminent or threatening. The definition of "nuisance" is substantially that as defined by the California Civil Code.[167] The new definition eliminates the stiff burden of showing an "unreasonable practice" that was required in the Dickey Act. The old act was also inapplicable to waste treatment plants. The Porter-Cologne Act utilizes a broad definition of "waste" to include sewage plant discharges as well.[168]

The beneficial use categorization of state waters was changed in two important areas. First, esthetic enjoyment and scenic beauty was included as one of the beneficial uses to be considered in drafting the regional plans and discharge requirements.[169] Secondly, the use of water was a vehicle for carrying waste is no longer a recognized beneficial use. However, the omission of waste disposal as a beneficial use might be misleading, because the use of state waters for waste disposal is an obvious economic necessity. The change is that waste disposal is not an officially recognized "beneficial use" of water.[170] This is a clear "about-face" from the policy of the Dickey Act, which not only recog-

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[163]CAL. WAT. CODE § 1300 (West 1971).
[164]*Id.* § 13050(1). See also 26 Op. CAL. ATT'Y. GEN. 253 (1955).
[165]Robie, *Water Pollution: An Affirmative Response by the California Legislature*, 1 PAC. L.J. 2 (1970).
[166]CAL. WAT. CODE § 13050(k) (West 1971).
[167]CAL. CIV. CODE § § 3479 and 3480 (1970); CAL. WAT. CODE § 13050(m) (West 1971).
[168]CAL. WAT. CODE § 13050(d) (West 1971).
[169]CAL. WAT. CODE § 13050 (West 1971).
[170]*Id.* § 13241 and § 13263(b).

nized waste disposal as a beneficial use, but implied that there was an actual "right" to use state waters for waste disposal.[171] The Porter-Cologne Act states its position clearly: "All discharges of waste into waters of the state are privileges not rights."[172]

As noted above, the Porter-Cologne Act shifted the state policy as reflected in the Dickey Act, from one of merely abating present pollution–creating discharges, to one of "water quality control and planning." The Dickey Act gave no authority to the state or regional boards over matters of water quality.[173] A major change recommended by the study panel and enacted by the legislature was to provide for direct enforcement of water quality by the regional boards through the establishment of waste discharge requirements.[174] This substantial addition of power to the regional boards brought the state procedures into compliance with the 1965 amendments to the Federal Water Pollution Control Act. Prior to the Porter Cologne Act, the Dickey Act had been amended, to partially satisfy federal guidelines by authorizing the state boards to formulate regional water quality control policies. However, there were no provisions granting any enforcement power to the state or regional boards over matters of water quality.[175] Under Porter-Cologne, if waste discharge requirements are violated or threatened to be violated, the Regional Boards may first require that the discharger submit a detailed time schedule of corrective action to prevent or correct a violation of a requirement, and may also order the discharger to cease and desist the violation.[176] If such an order is violated the discharger can be fined up to 6,000 dollars a day.[177]

There were a number of other improvements over the Dickey

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[171]CAL. STAT. Ch. 1549, (1949) Cal. Stat. 2782, *as amended.*

[172]CAL. WAT. CODE § 13263(g) (West 1971).

[173]See CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON WATER, REPORT OF SUBCOMMITTEE ON WATER POLLUTION (1964). The subcommittee found that there were no suggestions by any witnesses to endow the regional and state boards with enforcement powers over matters of water quality. The Subcommittee therefore recommended that the boards remained without such power.

[174]CAL. WAT. CODE § 13320 *et seq.* (West 1971).

[175]See notes 171 and 157, *supra.*

[176]CAL. WAT. CODE § 13300-1 (West 1971).

[177]CAL. WAT. CODE § 13350 (West 1971).

Act embodied in the Porter Cologne Act. One was a specific requirement that all board members must act on behalf of all citizens of the state, and in their interests.[178] This was intended to alleviate the then prevalent public belief that most of the board members represented other specific interests. Another improvement was to grant the boards power to proceed against all state agencies as they could against a private discharger.[179] The Dickey Act provided only for a mandamus action against another polluting state agency.[180] A key addition to the arsenal of powers delegated to the state and regional boards is the power to issue what amounts to a "building ban," if additional industrial or community development would create discharges which would aggrevate an existing violation of discharge requirements.[181] This power to issue such a cease and desist order will prompt a community to conscientiously provide for construction of needed treatment facilities, or the economic growth of the community will be halted.

The Porter-Cologne Act is an obvious improvement in all ways over the Dickey Act. But it cannot be said that all present and future problems and needs stand correctly analyzed, and that water quality law in California has reached its final evolutionary state. There are still many shortcomings in the present act which must be dealt with. The article following this one will detail the operation of the Porter-Cologne Act in California, listing shortcomings of the act and suggesting improvements.

VII. CONCLUSION

In the area of water pollution, Congress has held fast to the line that the primary responsibility for control rests with the states. Working within this basic premise Congress has employed two basic approaches to exert its influence. One is the lure of federal money. By conditioning its grants upon certain condi-

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[178]CAL. WAT. CODE § 13201(a) (West 1971).

[179]The definition of "persons" contained in ch. 1549, (1949) Cal. Stats. 2782 was amended by ch. 1656, (1965) Cal. Stats. 3758 to add, "the state or any department or agency thereof." See CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON WATER, REPORT OF SUBCOMMITTEE ON WATER POLLUTION (1964), 20-23.

[180]CAL. WAT. CODE § 13057 (West 1971).

[181]CAL. WAT. CODE § 13300 (West 1971).

tions, the federal government has been able to maintain a firm grasp on the direction of the states in their programs for abating water pollution. The other approach is the threat that the E.P.A. will do for the states what the states fail to do themselves. This approach is utilized in the establishment of water quality standards, and enforcement of these standards. In most aspects, this has worked for water pollution. Through this basic framework, the benefits to be derived from a localized administration of water pollution control are largely retained.[182] At the same time, the areas where Congress feels that its dictates should be followed, it may induce state compliance by the bait of federal money, or the threat of direct federal action. In accordance with this approach, Congress has specifically acted in instances which uniquely require the intervention of a positive federal program. An example of this is the section in the 1970 Amendments to the Federal Water Pollution Control Act dealing with oil pollution, and the leading role played by the federal government in basic research.

The effect of the federal program upon California's water quality control legislation has been minimal. Under its own impetus, the California legislature has established what has been called "The toughest water quality act in the nation."[183] Only in specific instances as noted above, where the state and regional boards were granted power to enforce water quality criteria through discharge requirements, has California enacted subsequent legislation to conform to federal guidelines. The one area where federal activity has been influential is the much needed federal grant program. More than any other area, this is where more federal activity is needed. For Fiscal Year 1972, it is estimated that California has insufficient funds available to provide for even 80% of top priority projects and none whatsoever for any projects that are not top priority.[184] Even if a 75/15 federal/state grant ratio were adopted instead of the current 55/25 ratio, the funds generated would still fall below that needed for top priority projects by some $1.366 billion dollars. Clearly,

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[182]For a discussion of the operation of this localized administration see the Article immediately following.

[183]SOAP AND DETERGENT ASS'N., WATER IN THE NEWS 3 (Sept. 1969).

[184]THE CLEAN WATER GRANT PROGRAM, F.Y. 1970-71. OFFICE REPORT OF THE STATE WATER RESOURCES CONTROL BOARD (August 1971).

the one thing that California does need from the federal government is money.

The water pollution problem is far from solved. In recognition of this, there are again bills pending in Congress, the major one authored by Senator Edmund Muskie.[185] The ambitious goal of the Muskie bill is to eliminate water pollution in six years, at a total cost of $36 billion dollars.[186] An administration bill has 1985 as a target date. Heavy emphasis is being placed upon construction of treatment plants and facilities. The basic approach of the Federal Water Pollution Control Act remains the same. The recurrent theme is still primary state responsibility. The role of the federal government has not been expanded in scope, but immensely increased in volume. Also reflective of established policy are the many provisions of these bills dealing with certain specific areas of need. Major bills have passed both houses of the 92nd Congress and a compromise measure is in the offing. Such an Act is expected to be a major milestone in the history of the Federal Water Pollution Control Act.

That the approach of the Federal Water Pollution Control Act has been relatively successful for water pollution is not to say that it is feasible for all other areas of pollution. Each major area of pollution control has its own specific problems and needs, and may necessitate different approaches. Congress has elected to follow much the same approach for the problem of air pollution.[187] To a large extent, the federal program in air pollution has not been as successful as the one for water pollution. The inherent nature of the problem makes it difficult to blindly apply the approach of the Federal Water Pollution Control Act to the Air Quality Act. There are differences in the state of the art in technology, problems in detection and measurement, and difficulties in enforcement. As an attorney for the Air Resources Board for California so aptly put it, "What are we going to do, call out the National Guard to keep people off of the Los

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[185]The bill is S. 2770. The bill is largely a compromise of Senator Muskie's original S. 523, and the administration bills, S. 1011, S. 1012, S. 1013, and S. 1014. *See Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works*, 92nd Cong., 1st Sess. (1971).

[186]*Id.*

[187]Clean Air Act; 42 U.S.C. 1857, *as amended* by the Air Quality Act of 1967, P. Law 90-198, and by the Clean Air Amendments of 1970, P. Law 91-604, § 304.

Angeles Expressways?"[188] This same attorney stated that the primary inconsistency of the present set-up for abating air pollution is that E.P.A. establishes minimal air quality standards for the states to enforce, which the states are without the means to carry out. Much more so than in the case of water pollution, Congress must re-evaluate the current program for air pollution, and assume a more realistic approach to the problem. On the other side of the spectrum, the federal government has completely preempted the field in atomic energy and radioactive pollution through the Atomic Energy Act.[189] Due to its history of development as a child of National Security, and the new technology involved, this early pre-emption of the field was justified.[190] However, in light of the widespread use of atomic power, especially in the instance of atomic generating power plants for domestic use, and the advances made in atomic technology, complete federal pre-emption may no longer be justified.[191] The states are still the classic institutions to exercise the police power to protect the health of its citizens, and absent any real compelling reason to take this responsibility from the states, it should remain there.

The interplay between the states and the federal government is a flexible one, and should vary according to the actual needs of the specific field of concern. Over-adherence to state responsibility can be just as damaging as an over-zealous assumption of power by Congress. In the field of water pollution, the line chosen by Congress seems to be working. We should know within the next 10 years as the environmental wave reaches its climax, whether the lines drawn by Congress for the other areas of environmental control will fare as well. Our natural hope is that Congress will choose correctly, for the stakes are high, and the price of failure, a dismal heritage to be left our progeny.

Sid Cheong

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[188]Interview with Mr. Dan Simmons, Counsel for the Air Resources Board in Sacramento, California, December 10, 1971.

[189]42 U.S.C. § 2011-296 (1964).

[190]See Estep and Adelman, *State Control of Radiation: An Intergovernmental* Relations Problem, 60 MICH. L. REV. 41 (1961).

[191]See Cavers, *State Responsibility in the Regulation of Atomic Reactors*, 50 KY. L. REV. 29 (1959).