Legislation on Water Pollution Control

MURRAY STEIN, A.B. LL.B.

THE AUTHORITY of Congress to legislate in matters of water pollution control and prevention derives from the commerce clause of the Constitution. In the exercise of jurisdiction over the navigable waters of the United States in connection with the regulation of interstate and foreign commerce, the Congress has asserted the Federal interest and responsibility in protecting the quality of these waters.

The Rivers and Harbors Act of 1899, among other things, prohibited the discharge or deposit into any navigable waters of any refuse matter except that which flowed in a liquid state from streets and sewers. That provision constituted the first specific Federal water pollution control legislation, and its primary purpose was to prevent impediments to navigation. Health implications of water pollution received attention in the Public Health Service Act of 1912, which authorized investigations of water pollution related to disease. The Oil Pollution Act of 1924 was enacted to control oil discharges in coastal waters damaging to aquatic life, harbors and docks, and recreational facilities.

These three measures are only indicative and not representative in themselves of the many and varied proposals on water pollution control introduced in the Congress during the past 65 years. Many different approaches to control were put forth in these proposals. In essence, they conceived the Federal role in water pollution as being either one of study and research or as being strongly regulatory with wide enforcement powers. Among the bills introduced were those providing for a Federal permit system to condition waste discharges and for prohibiting the purchase of paper by the Federal Government from any manufacturer who discharged wastes into a stream. On three occasions, in 1936, 1938, and 1940, comprehensive water pollution control legislation narrowly missed final enactment or approval. Renewal of efforts after World War II resulted in the enactment of the Water Pollution Control Act of 1948 (P.L. 845, 80th Congress). This law was admittedly experimental and initially limited in duration to a period of 5 years, after which it was to be reviewed and revised on the basis of experience. This 5-year period was extended for an additional 3 years to June 30, 1956, by P.L. 579, 82d Congress.

Mr. Stein is chief enforcement officer, Division of Water Supply and Pollution Control, Public Health Service.

Federal Water Pollution Control Act of 1956

Comprehensive, permanent water pollution control legislation was finally enacted with the passage and approval on July 9, 1956, of the Federal Water Pollution Control Act (P.L. 660, 84th Congress). Responsibility for administration of this act, which extended and strengthened the 1948 law, was vested in the Surgeon General of the Public Health Service under the supervision and direction of the Secretary of Health, Education, and Welfare. The act:

1. Reaffirmed the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution.

2. Authorized continued Federal-State cooperation in the development of comprehensive programs for the control of water pollution.

3. Authorized increased technical assistance to States and broadened and intensified research by using the research potential of universities

and other institutions outside of Government.

4. Authorized collection and dissemination of basic data on water quality relating to water pollution prevention and control.

5. Directed the Surgeon General to continue to encourage interstate compacts and uniform State laws.

6. Authorized grants to States and interstate agencies up to $3 million a year for the next 5 years for water pollution control activities.

7. Authorized Federal grants of $50 million (up to an aggregate of $500 million) for the construction of municipal treatment works, the amount for any one project not to exceed 30 percent of cost, or $250,000, whichever is smaller.

8. Modified and simplified procedures governing Federal abatement actions against interstate pollution.

9. Authorized the appointment of a Water Pollution Control Advisory Board.

10. Authorized a cooperative program to control pollution from Federal installations.

Amendments of 1961. Proposals to amend the Federal Water Pollution Control Act to provide for a still more effective program of water pollution control were introduced early in the first session of the 87th Congress and received the endorsement of President Kennedy in his message on natural resources of February 23, 1961. The Congress enacted, and President Kennedy, on July 20, 1961, signed into law, the Federal Water Pollution Control Act Amendments of 1961, P.L. 87–88. The 1961 amendments improved and strengthened the act by:

1. Extending Federal authority to enforce abatement of intrastate as well as interstate pollution of navigable or interstate waters and by strengthening enforcement procedures.

2. Increasing the authorized annual $50 million Federal financial assistance to municipalities for construction of waste treatment works to $80 million in 1962, $90 million in 1963, and $100 million for each of the four following fiscal years, 1964–67, raising the single grant limitation from $250,000 to $600,000 and providing for grants to communities combining in a joint project up to a limit of $2,400,000.

3. Intensifying research toward more effective methods of pollution control, authorizing for this purpose annual appropriations of $5 million to an aggregate of $25 million and authorizing the establishment of field, laboratory, and research facilities in, among others, seven specified areas of the nation.

4. Extending for 7 years, until June 30, 1968, and at the same time increasing Federal financial support of State and interstate water pollution control programs by raising the annual appropriations authorization from $3 million to $5 million.

5. Authorizing the inclusion of storage for regulating streamflow for the purpose of water quality control in the survey or planning of Federal reservoirs and impoundments.

6. Designating the Secretary of Health, Education, and Welfare to administer the act.

At the outset, the existing act declares the policy of Congress to affirm the primary responsibilities and rights of the States in preventing and controlling water pollution. Consequently, Federal functions in this area are designed to be carried out in the fullest cooperation with State and interstate agencies and with local public and private interests.

The programs authorized by the Federal Water Pollution Control Act lend themselves to grouping into three major areas of effort—financial and technical assistance, research, and enforcement. All stimulate voluntary action. Where such voluntary action is not forthcoming, enforcement authority can make remedial action mandatory. The end product, abatement of pollution and its prevention and control, is the aim and purpose of all three of these coordinated program areas.

Federal enforcement measures. The enforcement provisions, section 8 of the existing act, fully adhere to the act's basic principle of concerted Federal, State, and local efforts in water pollution control. Authority to enforce abatement is asserted over the pollution of interstate or navigable waters which endangers the health or welfare of any persons. The procedures to be followed in the enforcement process are specifically set out. They consist of (*a*) a conference, (*b*) a public hearing, and (*c*) court action. Initiation of the enforcement process in situations of interstate pollution, where pollution emanating from sources in one State endangers the health or welfare of persons in another State, is mandatory upon the request

of the State Governor, an official State water pollution control agency, or a municipality in whose request the Governor and State agency concur. It is similarly mandatory in intrastate pollution situations upon the request of the Governor of the State concerned when the effect of such pollution on the legitimate uses of the waters is sufficient to warrant Federal action. The exercise of Federal jurisdiction to abate interstate pollution without State request is required when reports, surveys, or studies indicate that such pollution is occurring.

The conference, the initial stage of the enforcement process, brings together the State and interstate water pollution control agencies concerned and the Federal Government. It inquires into the occurrence of pollution subject to Federal abatement, the adequacy of the measures taken to abate it, and the delays, if any, that are being encountered. The conferees may agree upon a schedule of required remedial measures or, in the absence of adequate scientific and technical data, may agree that further study is necessary before a schedule may be established. When agreement on a remedial schedule is reached, the States are encouraged to obtain compliance under their own authorities and are allowed at least 6 months to take the necessary action.

When such action within the period allowed is not taken, the act provides that a public hearing shall ensue. The alleged polluters are made direct participants before a hearing board appointed by the Secretary of Health, Education, and Welfare. Testimony is sworn, and witnesses are subject to cross-examination. Based on the evidence presented, the hearing board makes its findings and recommends to the Secretary the measures which must be taken to secure abatement. The board's findings and recommendations are sent by the Secretary to the polluters and to the State water pollution control agencies party to the hearing, together with a notice specifying a reasonable time, which may not be less than 6 months, to secure the abatement of the pollution.

The U.S. Attorney General may be requested to bring court action, the final step of the enforcement process, when remedial action is not taken by the polluters within the specified time. In an intrastate pollution matter, the written consent of the Governor is necessary to proceed to this stage.

Thirty Federal enforcement actions have been instituted to date. Thirteen have been taken because of State requests and 17 upon Federal initiative as provided in the act. Five involved intrastate pollution situations in which Federal jurisdiction was invoked at the request of the Governors of the States concerned. Four of the actions progressed to public hearings; thus far, court action has been initiated in only one instance but did not have to be pursued to its final course. This record attests to the success of the conference stage in obtaining remedial action.

Involved in these enforcement actions have been more than 671 municipalities and more than 681 industries, located in 36 States and the District of Columbia. The actions encompass more than 7,000 miles of waterways. Remedial schedules already established are estimated to entail construction expenditures of $1.7 billion. Not included in this estimate are such large areas as the Colorado River, the Detroit River and western Lake Erie, and Raritan Bay, where interim studies are being made to provide technical data necessary as a basis for remedial action. Costs in these areas when finally established may well be of staggering proportions.

Federal installations. The act imposes on the Federal establishment the obligation to pursue effective water pollution control practices at its own installations. This brings within the scope of the conference and hearing stages any Federal installation contributing to the pollution which is the subject of an enforcement action. An inventory of waste disposal practices at Federal installations has been completed, and followthrough action is progressing to obtain correction of deficiencies.

Suggested State Water Pollution Control Act

Increasing interest in development and conservation of our country's water resources is reflected in the concern which State legislatures have shown in the problem of water pollution. Within the past few years numerous States have adopted new legislation in this field or strengthened existing laws. A suggested State Water Pollution Control Act has been prepared

as part of the Federal Government's effort to join with the States in a comprehensive attack on the problem.

The principles of the suggested act have become the basic document which is considered when State legislation is drafted. It should be emphasized that this is a "suggested," not a model act. As water resources and water pollution control problems vary from State to State, so must legislative approaches to solving them also vary. Further, use of different approaches affords an opportunity to examine and test new techniques.

The underlying concept and purpose of the suggested legislation is to facilitate interstate cooperation for a more concerted attack on water pollution. Many benefits would derive if the States adopted legislation uniform in basic principles. It is not expected that all States will repeal their existing legislation and adopt this suggested law. The process of obtaining uniformity is one of evolution. It is suggested that the States take a realistic look at their basic statutes in the field of water pollution control and compare them with the suggested law. Those familiar with State law in this field will find that little is new in the suggested draft. Basically, it has adopted the best practices from existing State statutes and used these as a framework to develop a statute that could aid and strengthen the State programs. A preliminary draft of the suggested act was submitted for comments to State sanitary engineers, lawyers, wildlife conservationists, industrialists, sportsmen, agricultural and recreational groups, national lay organizations, municipal organizations, and other persons interested in water pollution control. Subsequently, this preliminary draft, together with comments received from all parts of the country, was considered and discussed by a board of expert consultants meeting in Washington. The suggested act was then revised in the light of the resulting comments and suggestions.

Traditionally, State water pollution control legislation developed out of the authority of health departments to preserve public health. Concurrently, there was a piecemeal lodging of water pollution control authority in other departments of State governments having interests in water pollution control, such as those dealing with agriculture, fish and wildlife, and mines and minerals. Recent State statutes reflect a trend to preserve and improve water quality for all legitimate uses through a single agency representing all State interests. Accompanying this trend is a shifting of emphasis from the mere abatement of existing pollution to the prevention of pollution in its incipiency.

The early statutes employed a largely negative approach. When a particular action was found to cause pollution, the administrative agency was authorized to take steps to abate such pollution. The suggested State Water Pollution Control Act follows the more recent statutes by authorizing the water pollution control agency to develop a comprehensive program to deal with the problem in all waters of the State. Under this approach, the agency, having determined permissive limits of waste discharges into the waters of the State, uses its enforcement procedure to abate existing pollution and restore the quality of polluted waters while, through a system of permits, it prevents any increase in waste discharges which would impair desired water uses.

Classification of waters and standards of quality. Some agencies administering water pollution control programs have classified the waters of a State according to use and have established standards of quality for the respective uses. Proponents of this method urge the adoption of classifications and the setting of standards as essential to any comprehensive program. They believe also that no enforcement action can be undertaken without prior determination of the use to which a particular body of water will be put and the degree of quality the water must have to be suitable for such use. Others, however, have severely criticized this approach as administratively difficult and time consuming. This group maintains that classifications, once made, are hard to change and tend to create vested interests as well as to reduce waters to the level of mere waste carriers because of pressures by special interests.

The suggested State Water Pollution Control Act authorizes the control agency to classify the waters and set standards of water quality within particular classifications but does not make this mandatory. Classifications and standards, once promulgated, have a definite legal effect,

and their violation is unlawful; conversely, discharges which comply with such classifications and standards are not pollution within the meaning of this act. In view of the number of persons affected, the suggested act requires that the adoption of classifications and standards be preceded by a public hearing open to all residents of the areas concerned and that adequate notice thereof be given. The act further provides that, in classifying the waters and setting standards, the agency will be guided by the principle of constantly seeking to improve water quality and of upgrading streams for progressively higher uses to the maximum extent practicable.

Because of increasing water needs and the growth in magnitude and complexity of the water pollution control situation, the administrator is moving closer to scientific water quality management. This will require the determination of more adequate and more uniform water quality standards, both as to scientific reliability and coverage of the causes and effects of water pollution.

Thus far 36 States have legislation that directs or permits the establishment of stream classifications or of water quality standards, or of both, according to the respective use of the waters. Fourteen States lack such legislation. Criteria in use range from a minimum requirement of primary treatment of wastes to complex systems of stream classification and water quality standards. In certain States where fairly comprehensive systems have been established, standards and classifications are not applied statewide, and cases are judged on an individual basis.

Six formal interstate agencies, several informal interstate groups, and the International Joint Commission—United States and Canada have legislation or agreements providing for water quality standards and classifications. All but five States are members of formal interstate agencies or informal interstate groups and apply the established or agreed upon classifications and water quality standards to their interstate waters.

Permits. Potentially, one of the most effective techniques for control of water pollution is a permit system, under which waste discharges into any waters of the State are prohibited except as permitted by the State water pollution control agency after examination of plans, specifications, and other data. Thus the agency can prohibit discharges altogether or condition its approval on treatment adequate to protect legitimate water uses. The suggested act contains broad provisions authorizing the agency to require permits for waste discharges and additions to plants which would result in increased pollution. Normally, the permit system would be restricted to new pollution or increases in existing waste discharges, but the breadth of the language employed is sufficient to enable the agency to extend its requirement to existing discharges where this is considered desirable administratively.

Enforcement. The suggested act affords a variety of methods for proceeding against an alleged polluter. It is made unlawful to cause any pollution of the waters of the State or to violate any order issued by the water pollution control agency, including an order establishing a classification of waters or standards of water quality. Pollution of waters of the State is declared to be a public nuisance and is therefore subject to abatement in accordance with State practice for abatement of nuisances. Violation of provisions of the act or any order or determination by the control agency or failure to perform any duty imposed by the act is declared to be a misdemeanor. In addition, the State attorney general has the duty to bring an action for an injunction against any person violating any provision of the act or any order of the agency. The principal method of making the program effective through compulsory process, however, is by administrative action. The agency is empowered to issue orders against alleged polluters after adequate opportunity for hearing. Such orders, if not appealed to the courts, become final and are enforceable in much the same way as the judgment of the court. The same administrative hearing procedure is employed in cases of revocation, denial, or modification of permits.

Administrative powers. The suggested act confers on the State water pollution control agency the requisite administrative powers to carry out its responsibilities. The agency is empowered to hold hearings, subpoena witnesses, enforce its subpoenas, administer oaths,

examine plans and specifications, require the keeping of records and making of reports, and to enter on property at reasonable times for purposes of inspection and investigation. The act is designed to give the agency broad discretion in administration of the program and make its jurisdiction complete over all waters in the State. It avoids such restrictive practices as the exemption of particular industries or geographic areas and the legislative classification of particular streams for specified water uses. Though complete in itself, the act rests upon a framework of other State statutory and constitutional provisions. Perhaps one of the most important of these relates to municipal financing. No water pollution control program can operate successfully unless the State and its political subdivisions can finance the construction and operation of remedial works for treatment of wastes.

Definition of pollution. The most important definition in the suggested act is that of pollution. It is designed to protect all legitimate uses of waters in the State. To this end, pollution as defined includes both discharges of wastes actually or potentially harmful to such uses and also the altering of the properties of the waters in such a way as to be harmful. This definition must be read with subsequent sections of the act authorizing the classification of water and the setting of standards of water quality. Discharges which violate such standards and classifications are declared unlawful, but discharges consistent with them are not considered pollution for purposes of the act. The act, therefore, gives effect to the agency's action on classifying waters and setting standards, but does not hold its enforcement powers in abeyance until such action can be completed.

Type of administrative agency. One of the most important decisions confronting any State in preparing water pollution control legislation is determination of the agency to which enforcement of the program will be entrusted. Most early legislation vested authority in the State health department. However, water pollution control concerns interests other than health and, in a broader sense, is an integral part of the problem of preserving the water resources of the State. Therefore, any agency set up to administer such a program needs to be so constituted as to take into account the interest and views of representatives of wildlife conservation, industry, municipalities, agriculture, and other affected groups, in addition to considerations of health.

In recently adopted water pollution control legislation, some 20 States have set up completely independent control agencies, but more frequently older legislation has placed the agency within an existing State government department, generally the department of health. The present distribution of authority for control activities among the 50 State governments may be readily grouped into three categories: (*a*) the State health agency, 20 States; (*b*) a specific agency created by statute and placed organizationally within the State health agency, 10 States; (*c*) an independent agency, established outside the State health agency, 20 States.

Where the control agency is set up within an existing State government department, it is believed desirable to vest it with authority to act independently. An agency representing so broad a field of State interests should not be subject to the supervisory control of any single State government department operating in a comparatively narrower field.

Most States which have recently enacted water pollution control legislation have entrusted its enforcement to a board representing all affected interests. This facilitates representation of the affected interests in the control agency. If such a board is to be set up, provision should also be made for an executive secretary to serve as the administrator of the program and to carry out the policies adopted by the board. Some States may wish to vest responsibilities for the program in a single administrator. If this is done, it would seem advisable to obtain representation of affected interests through an advisory council. Also a board of review to hear appeals from the single administrator's decisions may be desirable. The suggested State Water Pollution Control Act has alternative provisions that cover a control agency with either a board or with a single administrator.

The modern comprehensive approach to pollution control, whose objective is to preserve and improve water quality for all legitimate uses

and to do this through an agency that represents all affected interests in the State, is reflected in the statutes of 35 States and of Puerto Rico. Under this approach the administering agency is authorized to develop a comprehensive program to deal with pollution in all waters of the State. It is generally empowered to determine the permissive limits of waste discharge into the waters of the State, to enforce the abatement of existing pollution, and, through a system of permits, to regulate any new or increased discharges so as to prevent impairment of desired water uses. The other 15 States still have legislative and, consequently, administrative inadequacies.

Although the States have primary responsibility for water pollution control, with few exceptions they have not provided adequate funds to do the required job. Deficiencies in the State water pollution control programs need correction if State activities in controlling water pollution are to be uniformly effective. This will require increased public awareness of the importance of pollution control and adequate financial support for pollution control programs. Legislative and organizational changes will also be needed to give the water pollution control program the necessary status and authority to achieve clean water objectives.

The major points of controversy current in State water pollution control legislation center around classification of streams and a method for bringing municipalities to comply with State orders. Enforcing an order of a State water pollution control agency against political subdivisions of the State has always been a delicate problem under our system of jurisprudence. While the courts in the past have directed city councils to comply with orders of the State agencies or have assessed fines against noncomplying municipalities, this process is prolix and time consuming. A possible improvement is seen in a recent proposal in Minnesota. Under this proposal, when the State agency has directed a political subdivision to construct a project for which the issuance of bonds is required, all provisions of law requiring an election for bond issue would be suspended and inoperative, and the municipal authorities would be required to provide for the issuance of such bonds without election. This proposal has not yet received acceptance but may well warrant further serious consideration.

Vigorous administration of the State water pollution control programs authorized in most State statutes is necessary for the achievement of effective water pollution control and prevention. Federal programs, in accordance with the Federal Water Pollution Control Act, are designed to complement and support State and local efforts. To this end, State agencies might well place more emphasis on their own enforcement activities with the assured knowledge that Federal enforcement authority is available as needed to supplement and enhance their authorities. Federal-State cooperation in this area, as in other aspects of water pollution control, can produce accomplishments not attainable through independent action.

State Aid for Waste Treatment Works

The States have most notably responded and cooperated in the administration of the Federal grant program designed to stimulate the construction of needed municipal waste treatment works. Staffs of State water pollution control agencies have given time and effort to this phase of the program, and their communities have met each dollar of Federal aid with $5 of their own.

Only 12 States, however, have provided for any form of State financial aid to their communities for sewage treatment facilities. Since 1956, legislation has been enacted in Georgia, Maine, Maryland, and Vermont, providing grants to governmental units for sewage treatment facilities similar to construction grants authorized by the Federal Water Pollution Control Act. New Hampshire guarantees bonds of municipalities providing sewage treatment works. In addition, the States of California, Indiana, New Mexico, New York, Ohio, Oregon, and Pennsylvania provide some sort of financial assistance for the planning or construction of municipal sewage treatment works.

Several States provide financial incentives to industry in connection with the construction of waste treatment works. Four States provide tax relief to industries installing waste treatment facilities. New Hampshire exempts industrial waste treatment facilities from local taxation for 25 years. For tax purposes North Carolina provides rapid amortization of indus-

trial waste treatment facilities, permitting their writeoff in 5 years, and, in addition, exempts such facilities from local taxation forever. Virginia provides accelerated amortization of industrial waste treatment facilities over a 5-year period. Wisconsin provides that all equipment installed to abate or eliminate water or air pollution is exempt from local taxation for 5 years, provided the operation of the facilities does not produce a net income during that period. This law also provides for accelerated amortization of industrial waste treatment facilities, allowing the cost to be written off in 60 months for tax purposes.

Great strides have been made in the past decades in the growth and development of Federal and State water pollution control measures and of programs working toward the common goal of preserving and protecting the quality of our nation's waters. Much more, of course, remains to be done. More efficient and effective administration of the control programs at all governmental levels is necessary. Intensive research into means to control the complex organic and inorganic wastes of modern industry is likewise imperative. These aims can only be achieved through the cooperative endeavors of all.