Michigan Water Resources Commission Act Amendments: A Response to the Federal Water Pollution Control Act Amendments of 1972

Jeffrey K. Haynes
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Environmental Law Commons, Legislation Commons, State and Local Government Law Commons, and the Water Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol7/iss2/10

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Water pollution control is a recognized national problem and a chronic element of it is the deficient enforcement provisions of most water pollution control legislation. Congress attempted to remedy this situation by creating a new national focus for the solution through the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).

This recent federal effort adds a new dimension to the evolution of water pollution control methods. Traditionally, a person injured by water pollution had a cause of action under nuisance law for damages or an injunction, or both. Private law remedies proved inadequate to control water pollution, fostering the development of state regulatory agencies.
designed to abate existing water pollution and control future pollution.\(^5\) Typically, the agency enabling statutes set up a system whereby permits are issued to waste effluent dischargers. The permits require compliance with specified water quality and effluent standards; the statute supplies accompanying penalties for noncompliance.\(^6\) The FWPCA adopts this general scheme,\(^7\) and, while recognizing the important regulatory role of the states,\(^8\) reserves residual power in the federal government to control water pollution.\(^9\) In order to conform to FWPCA requirements, Michigan recently amended its water pollution control legislation, the Water Resources Commission Act (WRC Act).\(^10\)

This article appraises the strengths and weaknesses of the WRC Act and its recent amendments. After a description of the federal impetus behind the new amendments, the Michigan statutory framework is evaluated, including comparison of the WRC Act with a model state act designed to meet FWPCA requirements.\(^11\) Finally, the past implementation of the Act is discussed, with suggestions for future improvement.

I. THE IMPACT OF THE FWPCA ON MICHIGAN

A. The FWPCA and Michigan Statutory Deficiencies

The FWPCA, calling for the elimination of all pollutant discharges into navigable waters by 1985,\(^12\) is a comprehensive\(^13\) response to the water pollution problem. It resulted from a call for uniform national stan-

---


\(^8\) 33 U.S.C. § 1251(b) (Supp. 1972). This section states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources....

*Id.* Much of the debates in the hearings on the FWPCA concerned the proper role and responsibilities of state governments and agencies. See e.g., 1971 Senate Hearings, supra note 2, at 543-44.


\(^12\) 33 U.S.C. § 1251(a)(1) (Supp. 1972). The no-discharge goal has been severely criticized as disregarding physical realities, social goals, and economic and environmental necessities. NWC REPORT, supra note 1, at 70.

\(^13\) See 33 U.S.C. § 1252 (Supp. 1972). The comprehensiveness of FWPCA has been criticized as ignoring a perceived need for "site specific" pollution abatement. NWC REPORT, supra note 1, at 63-64. See notes 149-51 and accompanying text infra.
dards to remedy prior federal and state failures to abate water pollution. Prior to the enactment of the FWPCA, state and federal efforts were marked by enmity rather than cooperation. States regularly

14 See House Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 911, 92d Cong., 2d Sess. 398-402 (1972) [hereinafter cited as House Report]. A principal argument for uniform national standards is that they would allow local enforcement of anti-pollution laws without fear of an industry migration. 1971 Senate Hearings, supra note 2, at 612, 724-25; D. Zwicker & M. Benstock, supra note 1, at 231. Industry reaction to uniform national standards has been mixed. Compare 1971 Senate Hearings, supra note 2, at 666, 1064, 1182, with id. at 736. If water pollution is viewed as a technological problem requiring a systemic approach, the case for national uniformity of control is even stronger. See Kramon, Towards a New Federal Response to Water Pollution, 31 Fed. B.J. 139, 141 (1972).


16 NWC Report, supra note 1, at 82. In 1971, it was estimated that there existed fifteen to twenty “relatively good,” fifteen mediocre, and fifteen to twenty poor state programs. Hearings on H.R. 11896, H.R. 11895 Before the House Comm. on Public Works, 92d Cong., 1st Sess. 277 (1971) [hereinafter cited as 1971 House Hearings]. Hines has determined that the “social laboratory” theory of allowing states to work out local solutions to local problems tends to be validated in practice. Hines, supra note 5, at 215. In spite of this arguably positive role of the states, both statutory and implementation deficiencies in the Michigan program have been noted:

We felt that a strong Federal bill was necessary because State and local programs too often failed to provide adequate standards and enforcement procedures. Our department has found this to be true in many States including Michigan.

Public Hearing on State of Michigan 402(b) Request to Operate NPDES Permit Program 56-57 (1973) (statement of John Yolton, United Auto Workers) [hereinafter cited Public Hearing].

Furthermore, the Water Quality Act of 1965, 33 U.S.C. § 1160(c) (1970), required states to develop water quality standards for interstate and coastal waters. The subsequent failure of the states to establish relationships between receiving water quality and effluent standards was another rationale for the establishment of federal effluent standards. 1971 Senate Hearings, supra note 2, at 388-89.


There has been some federal-state cooperation of necessity. In 1971, the permit system instituted under the Refuse Act of 1899, 33 U.S.C. § 407 (1970), was limited in scope to navigable waters. Kalur v. Resor, 335 F. Supp. 1, 11 (D.D.C. 1971). See generally Note, The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation, 46 N.Y.U.L. Rev. 304 (1971). Since the Refuse Act also prohibits discharges into nonnavigable tributaries of navigable waters, industries situated on these tributaries would therefore have been compelled to cease discharging and close down operations or be regulated by the states. As a consequence, on September 11, 1972, Michigan and the Environmental Protection Agency signed an agreement
complained of duplication of efforts,\textsuperscript{18} disruption of programs,\textsuperscript{19} and funding insufficiencies\textsuperscript{20} caused by federal programs. The FWPCA appears to answer these objections by ostensibly delegating primary enforcement responsibility to the states\textsuperscript{21} and appropriating needed monies to them.\textsuperscript{22} States may operate only within federally established guidelines,\textsuperscript{22} however, and thus cooperative effort to control water pollution has been forced upon the states.

The heart of the federal-state effort is the National Pollution Discharge Elimination System (NPDES).\textsuperscript{24} The system sets up a procedure whereby

whereby Michigan would issue permits to municipal and industrial dischargers under federal guidelines. This agreement was to have given Michigan almost total control over policing industrial dischargers. 3 BNA Env. Rep. Current Devs. 603 (1972).

\textsuperscript{18}See 1971 Senate Hearings, supra note 2, at 384, 385. Some advocate that the federal government intervene only in cases where states have failed in their attempts to control pollution. Id. at 543-44.

\textsuperscript{19}Flexible state methods of pollution control are said to be disrupted by federal preemption. See Senate Report, supra note 17, at 106. States have been exceedingly critical of the strict pollution program under the Refuse Act of 1899, 33 U.S.C. § 407 (1970), which "placed the Federal Government with boots and helmets in the front office of nearly every waste-discharging industry in the nation." Hearings on Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation) Before the House Comm. on Public Works, 92d Cong., 1st Sess., ser. 16, at 1363 (1971) [hereinafter cited as 1971 House Amendment Hearings].

\textsuperscript{20}See, e.g., 1971 Senate Hearings, supra note 2, at 458-89.

\textsuperscript{21}Federal enforcement activity will not commence until 30 days after a state has failed to take appropriate action. 33 U.S.C. § 1319(a)(1) (Supp. 1972). See also House Report, supra note 14, at 115. The federal government will reserve its power for enforcement actions of national scope. Senate Report, supra note 17, at 64. It should be noted that earlier federal programs granted the states much greater independent powers to control water pollution than does the FWPCA. See Barry, supra note 15, at 1118.

\textsuperscript{22}See, e.g., 33 U.S.C. §§ 1256(a), 1285, 1287 (Supp. 1972). There has been considerable controversy over exactly how much money the states will receive from FWPCA grants. At the express direction of the President, EPA disbursed less than half of the sewage treatment plant construction funds authorized under Sections 205 and 207 of the FWPCA. See 33 U.S.C. §§ 1285, 1287 (Supp. 1972). Suits were immediately brought to require disbursement of the allotted funds. The court held that the FWPCA requires full disbursement of all authorized funds. City of New York v. Ruckelshaus, 358 F. Supp. 669, 679 (D.D.C. 1973). Furthermore, withholding the funds was declared an abuse of executive discretion. Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 700 (E.D. Va. 1973). See also Maine v. Fri, 483 F.2d 439 (1st Cir. 1973).

\textsuperscript{23}The FWPCA creates preemptive federal effluent and water quality standards. 33 U.S.C. §§ 1311, 1312 (Supp. 1972). If the states fail to adhere to federal enforcement requirements, the FWPCA explicitly mandates that the federal government will assume responsibility for pollution control in that state. 33 U.S.C. § 1319(a)(2) (Supp. 1972). The enunciated policy is to preserve the primary right of the states to control water pollution. 33 U.S.C. § 1251(b) (Supp. 1972). However, a similar declaration in the earlier Federal Water Pollution Control Act, 33 U.S.C. § 1151(b) (1970), was held not to affect the clear intent of the Act that federal law controls the pollution of interstate waters. Illinois v. City of Milwaukee, 406 U.S. 91, 102 (1972).

In the FWPCA, there are some concessions to state independence. States may establish effluent standards more strict than those established by the federal government. 33 U.S.C. § 1370 (Supp. 1972). See Illinois v. City of Milwaukee, supra at 107 (1972). States may also promulgate effluent standards for new point sources within the state, 33 U.S.C. § 1316(c) (Supp. 1972), and certify the operation of point sources licensed by federal agencies, 33 U.S.C. § 1341(d) (Supp. 1972).

the federal government will issue permits which require waste dischargers to comply with effluent limitations, water quality limitations, and toxic materials discharge requirements. Although initial permit-issuing authority is vested in the federal government, it may be delegated to states on an interim or permanent basis if the state statutes and regulations meet federal guidelines, as established by the Environmental Protection Agency (EPA). When the FWPCA was enacted, it appeared that most states would have to enact new legislation in order to meet the federal guidelines. The states' desire to improve their legislation to meet federal standards rather than dismantle existing programs was implicit in the delegation rationale.

The WRC Act prior to the FWPCA failed to meet these NPDES guidelines. In the first place, the "order of determination" system administered by the Michigan Water Resources Commission (WRC) was not

25 33 U.S.C. § 1311 (Supp. 1972). "Effluent limitation" is defined as any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.


27 33 U.S.C. § 1317 (Supp. 1972). "Toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.


31 3 BNA ENV. REP., CURRENT DEVS. 823 (1972). States have not automatically received permanent NPDES authority upon passage of new legislation. The Kansas NPDES application was denied because its newly enacted statute contained inadequate legal authority to issue permits with effluent limitations. See 4 BNA ENV. REP., CURRENT DEVS. 913 (1973). See also Coggins, Regulation of Air and Water Quality in Kansas: A Critical Look at Legislative Ambiguity and Administrative Discretion, 21 Kansas L. Rev. 1 (1972).


The WRC recently has been given jurisdiction over pollution in county drains (Mich. Comp. Laws Ann. § 280.423 (Supp. 1973)), soil erosion and sedimentation (Id. § 282.101 et seq. (Supp. 1973)), and beach erosion (Id. § 281.632(d), (e), (g), -.635-.636 (Supp. 1973)). These additions to WRC jurisdiction give it authority over nearly every type of pollutant likely to reach the waters of the state.

Several other state and local governmental units, however, have some authority to regulate water pollution. Authority over water works and sewage systems is granted to the public health department. Mich. Comp. Laws Ann. § 325.201-.210 (1967). Local health departments have the power to deal with water quality problems related to health. Id. § 41.181 (townships); id. § 46.171 (counties) id. §§ 67.47, -.54 (villages);
equivalent to the FWPCA permit system.\textsuperscript{33} Secondly, the discretionary fine of up to $10,000 in the WRC Act\textsuperscript{34} did not meet the EPA guidelines which require that state penalty provisions be comparable to the $2,500 minimum and $25,000 maximum fines specified in the FWPCA.\textsuperscript{35} Also, ambiguous statutory language could be construed to exempt violations of WRC orders from prosecution under the WRC Act.\textsuperscript{36} Thirdly, the WRC itself did not conform to the EPA guidelines requiring that board members not have monetary conflicts of interest.\textsuperscript{37} Finally, there


\textsuperscript{34} Mich. Comp. Laws Ann. § 323.10 (Supp. 1973). The $10,000 fine replaced a mandatory $500 minimum fine. See No. 405, § 10, [1965] Mich. Pub. Acts 825. This change was probably a result of judicial confusion in regard to the lack of a maximum fine. See Symposium, supra note 10, at 159. The amended penalty section may not have been an improvement, for the language fixing the amount of the fine allows a violator to be fined nothing even if convicted.


A person, or any governmental unit, who discharges any substance into the waters of the state contrary to the provisions of section 6 or who fails to comply with section 13, is guilty of a misdemeanor and may be fined not more than $10,000.00 for each violation.... [T]he person shall not be subject to the penalties of this section if the discharge of the effluent is in conformance with and obedient to a rule or order of the commission.


\textsuperscript{37} EPA Guidelines state that each State or interstate agency participating in the NPDES shall insure that any board or body which approves NPDES permit applications or portions thereof shall not include as a member, any person who receives, or has during the previous 2 years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.

40 C.F.R. § 124.94 (1973). These guidelines do not exclude from state board membership persons who are merely employed by permit holders. Nevertheless, California, Michigan, and Missouri felt that their water pollution control boards would be affected by the federal requirements. 3 BNA ENV. REP., CURRENT DEVS. 969, 970 (1972). Representatives of municipal and industry groups on the Michigan Water Resources Commission were forced to resign because of the EPA guidelines. Statement by Attorney General, in Mich. Water Resources Comm'n, Michigan's Wastewater Discharge Permit Program 79-80 (1973).
was no statutory requirement that the WRC pursue a continuing planning process. While the WRC could implement the NPDES with most of its program remaining intact, the deficient elements of standards, enforcement penalties, and planning had to be modified to comply with the new federal law.

B. The Initial Michigan Response: Act 293 of 1972

Fearing federal preemption of its water pollution control program, the Michigan legislature amended the WRC Act. The most important change effected by the first amendment, Act 293, was the institution of a permit system for the regulation of waste discharges. For the first time in the WRC Act's history, WRC orders (now permits) to dischargers must require compliance with state standards. There are two implications of this provision. First, the WRC must set water quality and effluent standards. Secondly, the WRC need no longer rely on the ambiguous language in Section 6 of the WRC Act to determine the exis-

Interest groups were given representation on the WRC, No. 117, § 1, [1949] Mich. Pub. Acts 120, when water pollution was recognized as more than merely a public health problem. COUNCIL OF STATE GOVERNMENTS, STATE ADMINISTRATION OF WATER RESOURCES 23 (1957). Interest group representation was to ensure cooperation with all affected interest groups as well as state agencies concerned with water pollution control. M. WEISS, INDUSTRIAL WATER POLLUTION 6 (1951).

Section 2a of the WRC Act, added in 1949, might be construed to allow the WRC to carry out a planning process for water pollution control. No. 117, § 2a, [1949] Mich. Pub. Acts 121. As of 1957, however, Michigan was not one of the twenty states that authorized its water pollution agency to administer a planning program. COUNCIL OF STATE GOVERNMENTS, STATE ADMINISTRATION OF WATER RESOURCES 38-44 (1957). Also, there was no indication, prior to the enactment of the FWPCA, that Michigan was pursuing a comprehensive water quality planning process. Most state statutes enacted prior to the FWPCA give water pollution control agencies the power or duty to formulate comprehensive pollution control plans. See, e.g., OKLA. STAT. ANN. tit. 82, § 926.3(1) (Cum. Supp. 1973); S.C. CODE ANN. § 63-195.8(9) (Supp. 1971); TEX. WATER CODE ANN. § 21.062 (1972).

H.B. 6186 (later enacted as Act 293 of 1972) was designed to conform the WRC Act to pending federal legislation in order to ensure that the WRC could continue to administer "an uninterrupted pollution control program." MICH. DEP'T OF NATURAL RESOURCES, ANALYSIS OF H.B. 6186 at 1 (1972). See notes 27-31 and accompanying text supra.

Prior to 1972, the WRC was not required by the WRC Act to promulgate water pollution standards. See note 68 infra. Other states also require, rather than merely authorize, agencies to set standards. See, e.g., COLO. REV. STAT. ANN. § 66-28-8 (Cum. Supp. 1967); S.C. CODE ANN. § 63-195.7 (Supp. 1971).

Section 6(a) of the WRC Act now states:

It shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare; or which is or may become injurious to domestic, commercial, industrial, agricultural, recreational or other uses which are being or may be made of such waters; or which is or may become injurious to the value or utility of riparian lands; or which is or may become injurious to livestock, wild animals, birds, fish, aquatic life or plants or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired.

MICH. COMP. LAWS ANN. § 323.6(a) (Supp. 1973).
tence of a violation. Another new clause makes violations of permit provisions, existing orders, and stipulations actionable by the WRC. Act 293 thus made every waste discharger in Michigan subject to enforceable WRC permits.

The scope of the WRC Act was significantly increased by Act 293. Storage of materials likely to affect water quality became subject to permit restrictions. Underground waters of the state were completely protected from any type of pollution, whereas prior to this amendment they had been given statutory protection only from pollution discharged underground. The WRC was also authorized to conduct areawide water qual-

---

45 A stipulation is an agreement reached between the WRC and a discharger on the terms of a proposed permit. See Mich. Comp. Laws Ann. § 323.7(2) (Supp. 1973). Stipulation allows the discharger to eliminate the necessity of a public hearing concerning his proposed permit, and therefore avoids any possible adverse publicity arising out of the proceedings. In 1970, however, stipulations were judicially declared equivalent to WRC orders in order to bring them to the attention of the public. White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 277, 177 N.W.2d 473, 479 (1970).

Much of the WRC's administrative work in the past was accomplished in this manner. In 1971-72, nearly one-half of all waste discharge proceedings were completed by stipulation. 26 Mich. Dep't of Natural Resources Biennial Rep. 33 (1972). Stipulations cannot, however, be made under the FWPCA-influenced WRC Act. Moreover, any fears about inadequate public disclosure brought about by the use of stipulations should be dispelled by new wastewater discharge permit rules which contain detailed public notice requirements. See Mich. Ad. Code R 323.2117-2127, in Mich. Dep't of Natural Resources, Water Resources Comm'n Release, General Rules Part 21: Wastewater Discharge Permits (1973).

46 Compare No. 293, § 10, [1972] Mich. Pub. Acts 901 with No. 159, § 10, [1972] Mich. Pub. Acts 257. See note 36 and accompanying text supra. A severe deficiency in Section 10 of Act 293 is that the mere discharge of pollutants is not subject to a fine until it becomes a Section 6 violation, even if the discharge violates "pollution standards" promulgated by the WRC. See note 44 supra. Prior to the discharge's becoming a Section 6 violation, the WRC Act merely requires the WRC to issue a permit for such a discharge.


48 Groundwaters were added to the definition of "waters of the state." Compare Mich. Comp. Laws Ann. § 323.11(b) (Supp. 1973) with id. § 323.11 (1967).


ity planning. The establishment of the permit system and the creation of authority for comprehensive planning by Act 293 allowed Michigan to become one of ten states initially granted interim authority to issue NPDES permits. The lack of sufficiently strong monetary penalties in the WRC Act, however, prevented delegation of permanent NPDES authority to the Michigan Water Resources Commission.

C. The Final Michigan Response: Act 3 of 1973

Amendment of the WRC Act’s monetary penalty provision was necessary in order to fully comply with federal NPDES requirements and thereby preserve Michigan’s water pollution administration. The fear was expressed by the legislature that if EPA were to assume the administration of water pollution control in Michigan, the Michigan program would be downgraded. Nevertheless, the Department of Natural Resources (DNR), the agency presently responsible for the Michigan pollution control program, advised passage of the amendment since higher monetary penalties would be less onerous than complete federal control, even for the interests which would be adversely affected.

Act 3 imposes a blanket minimum criminal fine of $2,500, with a maximum of $25,000, for all violations of the WRC Act, any permit, or WRC rule, and for misrepresentation in a permit application or for tampering with a monitoring device. The WRC Act also gives the courts discretionary power to levy a $10,000 civil penalty on violators.

Act 3 changed the former absolute liability of a municipality for dis-

---

54 On January 11, 1973, the statutory authority of the WRC was transferred to the DNR under a type II transfer, which required the WRC to act in an advisory capacity to the DNR. Exec. Order 1973—2, § 2, Mich. Comp. Laws Ann. § 299.11 (1973 West’s Mich. Legis. Serv. No. 1 at 58-59). Under this reorganization plan, the WRC would have become little more than a hearing body. Apparently, industrial concerns feared that the DNR would act much more strictly toward it than had the WRC. The North Woods Call, Mar. 14, 1973, at 1. Two months later, the WRC was restored to its quasi-judicial powers in rule-making, enforcement, and order-issuance relating to water pollution control. Exec. Order 1973—2a, § 1, Mich. Comp. Laws Ann. § 299.11 (1973 West’s Mich. Legis. Serv. No. 1 at 61). The DNR, however, still retains authority to oversee WRC action.
charge of raw sewage.\textsuperscript{58} Instead of being in prima facie violation of the WRC Act and therefore subject to penalties, such a discharge is now subject only to administrative remedies.\textsuperscript{59} This provision will presumably exempt from monetary penalties municipalities that have temporary treatment plant overflows beyond their control. If the municipality has a valid permit, however, it is subject to the penalty provisions without any intervening administrative review of the violation.\textsuperscript{60} This stringent provision will most likely have the beneficial effect of eliminating any future raw sewage discharges by municipalities fearful of being fined up to $25,000 for each act.

The primary effect of Act 3 was to enable Michigan to become the fourth state to receive NPDES authority.\textsuperscript{61} A more long-term effect of the passage of Act 3 should be the improvement of water pollution control in Michigan. It appears that this improvement would never have taken place without federal incentives.

\section*{II. Adequacy of the Present WRC Act}

An effective program of water pollution control enforcement contains three basic elements: precise standards, adequate penalties, and the authority to implement the standards and levy the penalties. The WRC Act, prior to its new amendments, employed inadequate standards and penalties. Although these deficiencies have, to some extent, been corrected, much improvement can yet be made.

\subsection*{A. Standards}

An ideal water pollution control statute utilizes three components in establishing standards: a legislatively enunciated goal, water quality standards, and effluent limitations. A legislative goal mandating the eventual elimination of water pollution\textsuperscript{62} gives the implementing agency a direction in which to orient the two other elements. The legislature should


\textsuperscript{60} Id. This statutory remedy removes the common law liability of municipalities under the former Section 6(b). See White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 275, 117 N.W.2d 473, 478 (1970).

\textsuperscript{61} Michigan received permanent NPDES authority on October 18, 1973. 4 BNA ENV. REP., CURRENT DEVS. 1115 (1973). By amending its water pollution control statute on December 12, 1972, California was the first state to be granted permanent NPDES authority. See CALIF. WATER CODE §§ 13370-89 (Supp. 1973); 4 BNA ENV. REP., CURRENT DEVS. 131 (1973).

declare unlawful any pollution that is not specifically permitted. This declaration means that any discharge of pollutants becomes an explicit privilege authorized because of technological limits, a result obtained by the institution of the permit system under Act 293, rather than an inherent power to use waters for waste disposal. A second effect of this declaration is that pollution is precisely defined, a result yet to be accomplish in Michigan.

Water quality standards are one step beyond a legislative definition of pollution, because they inform the enforcement agency, in quantitative terms, when pollution exists. The standards are based on the theory that water can, to a certain extent, assimilate waste without harm. Michigan generally used this approach until the enactment of the FWPCA. The

---

63 The WRC Act has always declared certain types of pollution to be unlawful and a nuisance. MICH. COMP. LAWS ANN. § 323.6(a), (c) (Supp. 1973). See note 44 supra. A "public nuisance" provision of this type retained from older statutes does have some utility for a state subject to the FWPCA. Under the FWPCA there can be no prosecution of a discharger who complies with his permit, even though he is simultaneously violating water quality standards. 33 U.S.C. § 1342(k) (Supp. 1972). In Michigan, however, if any water quality or other standards are being violated by discharges under a validly issued federal permit, the WRC has independent authority, pursuant to its public nuisance abatement power, to revise the permit conditions. MICH. COMP. LAWS ANN. § 323.7(1) (Supp. 1973), as amended, No. 3, § 7(1), [1973] Mich. Pub. Acts (West's 1973 Mich. Legis. Serv. No. 1 at 10). See Public Hearing, supra note 16, at 78. See also S.D. COMPILED LAWS ANN. § 46-25-24(1) (Supp. 1973).

64 See, e.g., 33 U.S.C. § 1311(a) (Supp. 1972). See also Senate Report, supra note 17, at 42.


66 Water quality standards employ quantitative parameters related to the amounts of pollutants per unit of water for designated uses of the water. See generally MICH. WATER RESOURCES COMM'N, WATER QUALITY STANDARDS FOR MICHIGAN INTRASTATE WATERS (1968). The arguments for and against water quality standards are more fully discussed in Hines, supra note 5, at 220-26.

67 For an example of waters that can assimilate no wastes see Ayer, Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup, 58 CALIF. L. REV. 1273 (1970).

68 MICH. WATER RESOURCES COMM'N, WATER QUALITY STANDARDS FOR MICHIGAN INTRASTATE WATERS 6 (1968). The WRC has authority under Section 5 of the WRC Act to establish such water quality standards. 4721 OP. MICH. ATT'Y GEN. 6 (1971). The standard-setting authority has been unchanged since 1929. See No. 245, § 5, [1929] Mich. Pub. Acts 597. Section 5 states:

The commission shall establish such pollution standards for lakes,
water quality standards method, however, is deficient for enforcement purposes in several ways. First, enforcement of water quality violations can take place only after the water has been polluted beyond standard levels. These violations may be extremely difficult to prove. Furthermore, administrators do not like this method because it is usually difficult to determine the origin of a particular pollutant. Finally, water quality standards have limited utility unless they include antidegradation guarantees ensuring that water quality may not be reduced by pollutant discharges. Without such provisions, dischargers have no incentive to refrain from polluting a stream up to water quality limits. Although Michigan has stated that it has an antidegradation goal, this goal was not codified until the FWPCA-mandated water quality rules were promulgated.

Effluent limitations are the final requirement for effective water pollution control standards. Although not favored by the states, they are required by the FWPCA in a fundamental departure from former theories. Prior to enactment of the FWPCA, the WRC used effluent limitations only to control new or increased uses of waste-carrying water. Rivers, streams and other waters of the state in relation to the public use to which they are or may be put, as it shall deem necessary.

\[ \text{MICH. COMP. LAWS ANN. § 323.5 (Supp. 1973). Under this authority the Commission could apparently promulgate any type of standards or no standards at all, but the WRC seems never to have done so until state water quality standards were required by federal statute. See 79 Stat. 907 (1965), 33 U.S.C. §§ 1160(c)(1)-(3) (1970).}\]

\[ \text{The use of water quality standards entails many of the same considerations as those relevant in proving the existence of a nuisance: the source, concentration, and type of the pollutant, and the identifiable damage caused. See note 4 supra.}\]

\[ \text{Lavin, Enforcement of Environmental Law on the Local Level, in ENVIRONMENTAL LAW 93 (C. Hassett ed. 1971).}\]

\[ \text{MICH. WATER RESOURCES COMM'N, WATER QUALITY STANDARDS FOR MICHIGAN INTRASTATE WATERS 6 (1968). Representatives from Michigan, however, have been critical of nondegradation standards, claiming that these standards suggest an impractical, absolutist approach. 1971 Senate Hearings, supra note 2, at 384-85.}\]

\[ \text{33 U.S.C. § 1313 (Supp. 1972). It should be noted that the FWPCA conspicuously lacks antidegradation standards. Similarly, it appears that twenty states have antidegradation provisions in their regulations, but nonenforcement of these provisions is the rule rather than the exception, because of inadequate monitoring capabilities. 1971 Senate Hearings, supra note 2, at 619-20.}\]


\[ \text{See note 25 supra.}\]

\[ \text{See 1971 Senate Hearings, supra note 2, at 553-54. The National Water Commission called for a unilateral rescission of effluent standards and a reinstatement of water quality standards. NWC REPORT, supra note 1, at 92-3.}\]

\[ \text{See 33 U.S.C. § 1311 (Supp. 1972). The use of water quality standards entails characterizing water as a resource to be used for waste assimilation. See notes 66-67 and accompanying text supra. Effluent limitations, on the other hand, impose restrictions on pollutant sources irrespective of the resultant water quality.}\]

\[ \text{MICH. COMP. LAWS ANN. § 323.8(b) (Supp. 1973). States must use the effluent limitation approach in order to be granted NPDES authority. 33 U.S.C. § 1342(b)(1)(A) (Supp. 1972). Michigan has statutory authority to impose effluent limitations. MICH. COMP. LAWS ANN. § 323.5 (Supp. 1973). See note 68 supra. It declined to use them as a basis for water pollution control, however, as have most}\]
This reluctance to use effluent limitations is primarily a result of three factors. First, states have been unwilling to impose strict effluent limitations on industry, fearing that the industries will emigrate to less strict locales. The FWPCA, by establishing uniform effluent standards nationwide and requiring stricter standards for new point sources,\footnote{Compare 33 U.S.C. §§ 1316(a)(1), (b)(1)(B) (Supp. 1972) with 33 U.S.C. §1311(b)(1)(A)(i) (Supp. 1972).} will discourage any industrial migration.\footnote{See 33 U.S.C. § 1342(b)(1)(A) (Supp. 1972).} Secondly, there was no statutory command to the WRC to use effluent limitations in its pollution control program.\footnote{Violations of water quality standards may not be immediately traceable to offending dischargers. See note 69 and accompanying text supra. It would appear that the simplest enforcement tool for water pollution control would be a no-discharge rule. The Refuse Act of 1899 was, for that reason, far ahead of its time. See 33 U.S.C. § 407 (1970). An immediate no-discharge policy, however, would work economic hardship on present dischargers.} Finally, the lack of sufficient monitoring capabilities would discourage any deviation from existing water quality standards approaches.

The utility of an effluent limitation enforcement approach is immediately apparent. Complex fact-finding and negotiations required under a water quality standards approach are no longer necessary. The threshold for proving a discharge violation is lowered because the agency need show only a failure to meet effluent restrictions in order to proceed with enforcement.\footnote{Violations of water quality standards may not be immediately traceable to offending dischargers. See note 69 and accompanying text supra. It would appear that the simplest enforcement tool for water pollution control would be a no-discharge rule. The Refuse Act of 1899 was, for that reason, far ahead of its time. See 33 U.S.C. § 407 (1970). An immediate no-discharge policy, however, would work economic hardship on present dischargers.} Most importantly, unnecessary delays in enforcement, resulting from agency discretion in deciding whom to prosecute, will become apparent once objective means of determining violations are utilized.

**B. Penalties**

One of the effects of the FWPCA is standardization of state laws. State water pollution control statutes must generally meet certain federal minimum standards.\footnote{See note 77 supra.} This uniformity, however, is not necessary in state statute fine provisions. Although the FWPCA sets a federal minimum fine enforceable by the EPA,\footnote{See note 154 infra.} it does not require states to impose specific

---

\textit{MICH. WATER RESOURCES COMM'N, WATER QUALITY STANDARDS FOR MICHIGAN INTRASTATE WATERS 6 (1968). See also Weiss, supra note 37, at 65. There are a few states that began using effluent limitations before the FWPCA required them to do so. See, e.g., IDAHO CODE § 39-105(3)(k) (Supp. 1973); ILL. ANN. STAT. ch. 111½, § 1013 (Smith-Hurd Supp. 1973); IOWA CODE ANN. § 455B.32(2)(B) (Supp. 1973); MO. ANN. STAT. § 204.016(2) (Vernon Supp. 1973).}

\textit{See also 1971 Senate Hearings, supra note 2, at 1088. It has also been noted that effluent standards are preferred by industries because such standards equalize regulation. Maloney & Ausness, Water Quality Control: A Modern Approach to State Regulation, 35 ALBANY L. REV. 28, 44 (1970). See also 1971 House Hearings, supra note 16, at 269.}\n
\textit{79 The argument has been made that industry relocation depends on factors much more complex than strict pollution control enforcement. See 1971 Senate Hearings, supra note 2, at 1088. It has also been noted that effluent standards are preferred by industries because such standards equalize regulation. Maloney & Ausness, Water Quality Control: A Modern Approach to State Regulation, 35 ALBANY L. REV. 28, 44 (1970). See also 1971 House Hearings, supra note 16, at 269.}\n
minimum or maximum fines.85

The WRC Act penalties seemingly are some of the strongest under the FWPCA guidelines. First, the WRC need not show that a violation of the statute is willful or negligent in order to assess a criminal fine.86 This provision eliminates many of the difficulties that the WRC might ordinarily have in proving a violation. The basis for fine assessment is now merely an unauthorized discharge of pollutants. Furthermore, since the easily administered effluent standards are now the basis for enforcement, it would seem that the mandatory fines of the WRC Act would be used more often that when fines were based on flexible water quality standards.

The fines themselves are the highest of any state in the Midwest region.87 All violations of the WRC Act are lumped together under a single penalty structure, unlike the FWPCA88 and the Model Act.89 This arrangement is in sharp contrast to earlier eras of token fines,90 which were

85 The FWPCA requires that states, which desire NPDES delegation, have authority to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7) (Supp. 1972).

EPA guidelines specify only that the maximum civil penalties and criminal fines recoverable... shall (1) be comparable to similar maximum amounts recoverable by the Regional Administrator under section 309 or (2) represent an actual and substantial economic deterrent to the actions for which they are assessed or levied.

40 C.F.R. § 124.73(h) (1973).

The Model Act suggests that states adopt the FWPCA minimum fines of $2,500. MODEL ACT, supra note 11, § 21(a). Although EPA endorses the Model Act provision, it does not consider the $2,500 minimum mandatory. State minimums of as low as $250 are acceptable. 3 BNA ENV. REP., CURRENT DEVS. 1448 (1973). Some but not all states revising their statutes pursuant to the FWPCA have enacted minimum fine provisions. See, e.g., CAL. WATER CODE § 13387 (West Supp. 1973) ($2,500); ME. REV. STAT. ANN. tit. 38, § 453 (Supp. 1973) ($200); VA. CODE ANN. § 62.1-44.70 (Supp. 1973) ($100).


87 Public Hearing, supra note 16, at 67-68. See IND. ANN. STAT. § 13-1-3-14 (Burns 1973) ($25-$100); ILL. ANN. STAT. ch. 111½, § 1042 (Smith-Hurd Supp. 1973) ($10,000 maximum); MINN. STAT. ANN. § 115.07 (1964) (no fine provision); OHIO REV. CODE ANN. § 6111.99A (Page Supp. 1972) ($10,000 maximum); ch. 74, § 147.21 (3), [1973] Wisc. Laws (West's 1973 Wisc. Legis. Serv. No. 2 at 240) ($25,000 maximum). However, the Michigan Department of Health exercises jurisdiction over sewage treatment plants. The penalties for violation of this provision are a minimum $25 and maximum $100 fine and/or a maximum 90 days in jail per day of violation. MICH. COMP. LAWS ANN. § 325.213 (1967).


89 MODEL ACT, supra note 11, § 21.

90 The WRC Act as originally enacted (the Stream Control Commission Act) employed minimal fines. Violation of the statute or of a commission order, was a misdemeanor, punishable by a minimum fine of $25 up to a maximum of $100, or
likely to be cheaper for polluters than were the large expenditures needed to provide pollution control equipment.\textsuperscript{91} State officials\textsuperscript{92} and environmentalists\textsuperscript{93} agree that high penalties should serve as an economic threat sufficiently strong to deter a potential polluter from violating the law. Unfortunately, because of the fear of adverse industry action, most states did not have stiff penalties in their water pollution control laws prior to the FWPCA.

FWPCA incentives were necessary to create monetary penalties for tampering with monitoring devices and filing false surveillance reports,\textsuperscript{94} although Michigan had previously realized that monitoring discharges was essential to an adequate enforcement program.\textsuperscript{95} Similarly, misrepresentations to the WRC in any proceedings were not punishable by monetary imprisonment for up to 90 days, or both, in the court's discretion. No. 245, § 10, [1929] Mich. Pub. Acts 599. Furthermore, it appears that the Stream Control Commission was reluctant to enforce these penalties. Five years after its creation, only one case had been taken to court. \textit{MICH. STREAM CONTROL COMM'.N}, 2d BIENNIAL REP. 11 (1934).

The 1929 fine structure was replaced in 1949 by a discretionary maximum fine of $500, with no imprisonment penalty, for willful violations of the WRC Act. No. 117, § 9, [1949] Mich. Pub. Acts 122. The $500 fine was in the middle range of contemporary state water pollution law violation penalties. A survey of state legislation revealed only three states with the highest fine of $1,000. \textit{See} Weiss, \textit{supra} note 37.


One marked deficiency of the 1965 WRC Act penalty section was the exemption of violating municipalities from monetary liability. It is manifestly impractical to enjoin the operation of a municipal sewage treatment plant which is violating the WRC Act. \textit{See} People \textit{ex rel. Stream Control Comm'n v. City of Port Huron}, 323 Mich. 541, 545-46, 36 N.W.2d 138, 140 (1949). It would appear, then, that the 1965 WRC Act left no judicial recourse to the state against a municipal violator. In 1972, the municipality exemption was removed and a discretionary $10,000 fine was incorporated. No. 159, § 10, [1972] Mich. Pub. Acts 345.

\textsuperscript{91} Industrial interests wanted to mitigate the penalty provisions of the FWPCA, claiming them to be too harsh, especially in the first instance of negligent pollution. \textit{1971 Senate Hearings, supra} note 2, at 1543. Industry also criticized the penalty provision because no allowance was made for de minimis violations. \textit{Id.} at 1077.

\textsuperscript{92} \textit{See} 1971 \textit{Senate Hearings, supra} note 2, at 588.

\textsuperscript{93} \textit{See}, \textit{e.g.}, 1971 \textit{Senate Hearings, supra} note 2, at 603.


\textsuperscript{95} \textit{See note} 154 \textit{infra}. 
penalties before the enactment of the FWPCA. Such violations are now under strong, effective criminal sanctions. The WRC Act, however, makes no distinction between a knowingly false statement and an unintentionally false representation. This provision may thus be too strong. The penalties could apparently be assessed for any inaccuracy in any report received by the WRC from permit applicants. These strict provisions might inhibit compliance with the rest of the law and possibly divert needed agency resources from protecting the waters to prosecuting typographical mistakes on reporting forms.

An imprisonment sanction was not included in the amended WRC Act because there was no federal requirement to do so. An incarceration provision should be included. Since the WRC Act is a criminal statute, an imprisonment penalty is consistent with the character of the statute. Although some have called for the abolition of imprisonment sanctions from pollution control statutes, others maintain that imprisonment is the one sure deterrent to corporate polluters who can easily afford a fine. The $2,500 minimum fine could be absorbed by many major polluters without a significant alteration of their future behavior. A corporate decision-maker, however, might change his corporation’s pollution control practices if he knew that he could go to jail for violation of the water pollution statutes.

96 See 40 C.F.R. § 124.73(e)(3) (1973). The WRC Act did contain a remedy for one type of misrepresentation. Wastewater dischargers were required by No. 200, § 6b, [1970] Mich. Pub. Acts 573 to report to the WRC the quantities of “critical” materials in their discharges, and were subject to enjoining their business operations for violation, which presumably would include misrepresentations in the reports. MICH. COMP. LAWS ANN. § 323.6b (Supp. 1973).


101 Lavin, Enforcement of Environmental Law on the Local Level, in ENVIRONMENTAL LAW 96-97 (C. Hassett ed. 1971). Imprisonment is an alternative sanction in the FWPCA. 33 U.S.C. § 1319(c)(1), (2) (Supp. 1972). To ensure that corporate officials are subject to imprisonment, the FWPCA includes “any responsible corporate officer” as a “person” who can be imprisoned for violation of the FWPCA. 33 U.S.C. § 1319(c)(3) (Supp. 1972).
One useful feature of the WRC Act is the power granted to the Attorney General to recover the value of injured natural resources and the costs of surveillance. This provision had its origin prior to the FWPCA and provides guarantees beyond FWPCA requirements. Although supplementary to the punitive fines imposed by the WRC Act, these remedial penalties prevent depletion of agency appropriations caused by costs incurred in cleaning up pollution.

C. Adequate Authority

The final element of a good pollution control program is sufficient agency authority to implement standards and levy penalties. This authority must include the ability to seek injunctive relief for pollution abatement and the power to institute emergency clean-up proceedings once a hazardous pollution spill has occurred. In Michigan, the Attorney General has had authority to institute civil proceedings to enjoin any violation of the WRC Act. When there is an emergency situation created by pollutant spillage, however, even the few days involved in normal court proceedings are felt to be too long a delay in the clean-up effort. To remedy this situation, the WRC has recently used a $25,000 emergency clean-up fund for immediate remedial action. This fund appears to be

---


1.04 These powers are recommended, though not required, by the EPA guidelines for the purpose of acquiring additional funds for state program efforts. 40 C.F.R. § 124.73 comment (1973).


States are not necessarily required by the FWPCA to utilize emergency procedures. Emergency authority is necessary only if the state wishes to receive federal monies for its water pollution control program. 33 U.S.C. § 1256(e) (Supp. 1972). State emergency authority must be comparable to Section 504 of FWPCA, 33 U.S.C. § 1364 (Supp. 1972), which provides for emergency abatement upon a showing of
a successful venture. Moreover, it has been supplemented by the provision, added to the WRC Act by Act 3, allowing the WRC to request the Attorney General to institute an action for injunctive relief.

Even though these emergency powers are combined with the Attorney General's power to seek injunctions, they should be increased. The WRC itself should have authority to issue a judicially enforceable emergency abatement order, without notice and backed by statutory fines for non-compliance. This type of provision is needed because of past difficulties in referring matters to the Attorney General's office for enforcement action. Similar authority exists in other pollution control areas in Michigan, other state statutes, the Model Act, and a previous model water code. Fairness to those affected by an emergency order can be assured by holding a public hearing immediately following the issuance of the order, and by providing for an automatic dissolution of the order within a specified time period if the agency cannot prove its case in court. Failure to comply with an emergency order should subject the recalcitrant party to a suit for criminal and civil damages.

"imminent and substantial endangerment" to the health, welfare, or livelihood of the public.

A statutory authorization to the WRC to use up to $20,000 for each emergency was proposed for the WRC Act's amendment enacted as Act 293 of 1972, H.B. 6186 (1972), but later deleted (Substitute H.B. 6186 (1972)) because of lack of funding. MICH. DEPT. OF ADMINISTRATION, ANALYSIS OF H.B. 6186 at 1 (1972); MICH. DEPT. OF ADMINISTRATION, ANALYSIS OF SUBSTITUTE H.B. 6186 at 1 (1972). The emergency fund in H.B. 6186 was to have protected inland waters not subject to federal jurisdiction. MICH. DEPT. OF NATURAL RESOURCES, ANALYSIS OF H.B. 6186 at 1 (1972). The emergency fund is a welcome innovation as long as there are procedures guaranteeing the recovery of funds. Michigan dischargers have generally reimbursed the WRC for its expenses in cleaning up their waste spills. But because of the small funding, delays in repayments by dischargers have depleted the fund to seriously low levels. See Mich. Water Resources Comm'n, Meeting Minutes, Mar. 22-23, 1973, at 12.

In fourteen months of operation, there have been twelve applications of the emergency clean-up fund. Interview with Robert Courchaine, supra note 106. See also Mich. Water Resources Comm'n, Michigan State Water Pollution Control Program 100 (1973). It would appear, however, that use of the fund is excessively selective. In 1973, the Oil Pollution Control Section of the WRC responded to 413 reported petroleum product losses. Id. Most of those could have required use of the emergency fund. Apparently recognizing this need, the legislature has considered a bill to replace the existing fund which would provide up to $20,000 per emergency incident. S.B. 209 (1973).

Representatives of the WRC have in the past refused to act as complaining witnesses without a previous formal referral from the WRC to the Attorney General's office for legal action. See Mich. Water Resources Comm'n, Meeting Minutes, Aug. 23-24, 1973, at 4.


MODEL ACT, supra note 11, § 17. The administrative order procedure is favored to ensure prompt remedial action. Id. comment.


Emergency orders under the FWPCA are court enforced. 33 U.S.C. § 1364 (Supp. 1972). There are no provisions, unfortunately, for seeking fines against persons...
Another weakness in the WRC Act is the absence of a provision giving the WRC staff power to issue a compliance order to a violating discharger without waiting for Commission action. This procedure is authorized by both the FWPCA\textsuperscript{116} and the Model Act,\textsuperscript{117} and its unavailability has been a source of difficulty for the WRC.\textsuperscript{118} Although it has been suggested that such a procedure would be unfair to the person ordered to comply,\textsuperscript{119} it would seem that adequate administrative and judicial review would prevent any possible discriminatory practices by an agency. There are several reasons for permitting administrative staff orders. First, they allow immediate action to remedy a violation without the need to wait for the regular monthly meeting of the WRC. Secondly, the burden of proof is on a permit holder to dispel any doubts about his compliance with a permit.\textsuperscript{120}

A further aid in speeding up enforcement proceedings would be to allow the agency to administer fines as well as issue compliance orders.\textsuperscript{121} The civil penalty would necessarily be based on a factual showing of violation. This procedure is practicable given an adequate monitoring system which

\textsuperscript{116} See 33 U.S.C. § 1319(a)(3) (Supp. 1972). Procedures for a direct administrative order are more easily facilitated in the FWPCA because the administrative agency is not governed, as in most states, by a board representing regulated interests. This traditional organizational scheme of the state agencies may be one factor inhibiting prompt state action. The compliance order procedure is not specifically required for inclusion in state programs. See 33 U.S.C. § 1342 (Supp. 1972); 40 C.F.R. § 124.73(a)-(c) (1973).

\textsuperscript{117} Model Act, supra note 11, § 18.


The WRC field staff has used a "cease and desist" order not specifically authorized by the WRC Act with varying results. Compliance was not achieved in the Woodward Development case, where a developer allowed erosion of dirt piles to pollute a small trout stream in Traverse City, Michigan. See The North Woods Call, Feb. 7, 1973, at 11; July 11, 1973, at 11; Aug. 1, 1973, at 3. On the other hand, such an order achieved compliance by Minerals Recovery Corporation, an industry causing unusual turbidity in a small creek.

It has been suggested that the WRC staff be authorized by the WRC to make such orders between the WRC monthly meetings. Mich. Water Resources Comm'n, Meeting Minutes, Aug. 23-24, 1973, at 7-8. Some other states allow enforcement actions without prior approval by the governing board. See 4 BNA Env. Rep., CURRENT DEVS. 280 (1973).

\textsuperscript{119} See 1971 Senate Hearings, supra note 2, at 1543:


can give quantitative indications of violations. Under the prior water quality standards, such a procedure would have been impossible because of the awesome requirements imposed upon the agency to prove a violation.

Finally, the elimination of agency discretion to decide whether or not to enforce the law is essential to the maintenance of an effective pollution control program. To remedy violations of the WRC Act, the WRC has broad, discretionary authority, which it jealously guards. This discretion has been vigorously criticized by environmentalists. It would seem that a water pollution control agency should be a conduit for implementing the goals set forth by the legislature to eliminate water pollution. The agency must necessarily have the discretion to set standards and procedures to implement that goal practicably, but a violation of quantitative standards should not be subject to the same degree of discretion.

III. IMPLEMENTATION DIFFICULTIES AND SUGGESTED IMPROVEMENTS

Federal programs in water pollution control have historically been failures. It appears that the FWPCA has not completely remedied these
Good state water pollution control efforts, therefore, remain necessary to any national goal of water pollution elimination.

The Michigan Water Resources Commission is widely believed to be pursuing one of the better state water pollution control programs in the nation, although some dispute this assertion. The WRC, however, is all too typical of state agencies in many respects. Historically, it has had a crippling lack of funding. As a consequence, its manpower needs have suffered continuous shortages. An obvious additional source of funding to remedy these ills is the federal government. The FWPCA has recognized this fact by allotting large initial appropriations to the state agencies to assist their programs. Continuing appropriations are subject to certain restrictions, including continued state funding at no less than 1971 levels. This additional source of money will significantly augment Michigan's program funding.

---

127 See Natural Resources Defense Council v. Fri, 3 E.L.R. 20587 (D.D.C. 1973), in which defendant EPA and the plaintiffs stipulated that the defendant had not met statutory deadlines for inter alia, designation of water quality control problem areas.

128 A comparison of the WRC Act with other state acts was made in 1964. Compared to statutes in California, Pennsylvania, South Carolina, Texas, and Wisconsin, the 1949 WRC Act was superior in the areas of intergovernmental cooperation, jurisdiction, administrative hearings, data compilation, requests for funding, and cooperation with the federal government. Composition of the governing board was considered a deficiency. No mention was made, however, of the Michigan "order of determination" system or of the WRC Act's inadequate statutory sanctions. See Note, Water Pollution—State Control Committee, 17 Vand. L. Rev. 1364 (1964).


130 In 1933-34, the Stream Control Commission employed full-time an executive secretary, two engineers, an investigator, and a stenographer. Mich. Stream Control Comm'n, 2d Biennial Rep. 8 (1934). This necessitated reliance on other state and federal agencies to do investigative work for the Stream Control Commission. Similarly, in 1964, the Public Administration Service of the U.S. Department of Health, Education and Welfare found that 108 persons worked for the WRC, but that 171 would be desirable. 1971 House Oversight Hearings, supra note 17, at 51-52. See also White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 269, 177 N.W.2d 473, 475 (1970).


133 Michigan's minimum appropriation will have to remain at its 1971 level of $992,000. See 1971 Senate Hearings, supra note 2, at 94. For fiscal 1974, Michigan's
One possible addition to funding for enforcement activities is the payment of civil and criminal penalty monies into a special abatement fund. This system is operative in other states, and, with aggressive use of the penalty structures of the WRC Act, could markedly increase the funds available. Although the existence of such a fund might lead to overzealous enforcement, that alternative is preferable to lax implementation of the law because of inadequate appropriations.

Another disappointing similarity between the WRC and other state agencies has been its continuing use of the voluntary compliance method of pollution control. This practice developed because of insufficient agency resources. It is favored by polluters because it shields them from public scrutiny. Agencies have also preferred the method because of their distaste for preparing an evidentially sound case for presentation in court. The voluntary compliance method has failed to a great extent in Michigan. Although mere agency presence may intimidate small polluters, chronic problem areas, such as the Detroit River, have not been amenable to such a solution.

One reason for this failure is the lack of a credible threat to back up WRC demands for compliance. Action by the attorney general has been found extremely helpful in many states in enforcing compliance with water pollution control agency orders. In Michigan, however, the same procedure has secured mixed results, for although the WRC feels that polluters comply with its demands when they know the Attorney General will use his injunctive power against them if they refuse to comply, federal assistance was required to merely survey the extent of the Detroit River problem in 1962. See Purdy, The Water Situation Today—Pollution and Its Control, PROCEEDINGS OF THE WATER RESOURCES CONFERENCE, Lansing, Michigan 10-11 (1962).

It appears that 1,050 out of 35,000 miles of Michigan streams do not meet current water quality standards. These are primarily located below major population centers, where most chronic pollution occurs. MICH. WATER RESOURCES COMM’N, WATER STRATEGY FOR FISCAL YEAR 1974, at 3 (1973).
jurisdictional problems\textsuperscript{140} and severe staff shortages\textsuperscript{141} have handicapped utilization of the Attorney General's office by the WRC. Although the quality of work by the Michigan Attorney General's office in the area of water pollution control appears to have improved recently,\textsuperscript{142} inadequate staff prevents prosecution of even flagrant cases.\textsuperscript{143} One viable remedy would be the use of agency attorneys.\textsuperscript{144} Such a program would provide better coordination between the enforcement data-gathering personnel and the attorneys and would separate the legal staff from any funding problems the Attorney General's office might have. Use of agency attorneys would also permit the attorneys to become full-time specialists in water pollution control enforcement, contrary to the situation in most states.\textsuperscript{145}

Another reason for the failure of the WRC's voluntary compliance method has been its underutilization of existing statutory fines. One of the purposes of fines for pollution violations is to deter potential violators.\textsuperscript{146} This rationale is ignored by the WRC. Fines are used for only special situations, such as repeated violations.\textsuperscript{147} This attitude may have been caused by inadequate statutory authorization. The WRC may have felt that its efforts would be wasted in seeking a fine disproportionately small in comparison to the costs of clean-up and the value of the damaged natural resources. Nevertheless, the legislature would be understandably hesitant to give the WRC more power when it has not utilized the power

\footnotesize{\textsuperscript{140} The Attorney General has usually turned water pollution cases over to local authorities who go to the district courts. This resulted in a fine of $500 for a large fish kill in the celebrated McLouth Steel case. See Detroit News, July 23, 1971, at 10-A, col. 8. The WRC has suggested that stiffer penalties might be obtained by using the circuit courts. Id.}


\footnotesize{\textsuperscript{142} See Mich. Water Resources Comm'n, Meeting Minutes, Sept. 20-21, 1973, at 9.}

\footnotesize{\textsuperscript{143} See id., Apr. 26, 1973 at 5. The Department of Natural Resources has eight full-time attorneys assigned to it, but there are effectively only two attorneys working in the Environmental Protection branch, which serves the Water Resources Commission and the Air Pollution Control Commission. Interview with Charles S. Alpert, Assistant Attorney General, in Lansing, Michigan, Oct. 9, 1973.}

\footnotesize{\textsuperscript{144} See, e.g., Tenn. Code Ann. § 70.334 (Supp. 1973). Pennsylvania uses this system in preference to depending on the Attorney General's office. See 1971 House Oversight Hearings, supra note 17, at 405.}

\footnotesize{\textsuperscript{145} Most states found that the attorneys assigned to pollution cases were inexperienced and moved into other types of practice after a short while. GAO Report, supra note 133, at 25.}

\footnotesize{\textsuperscript{146} See People v. American Oil Co., 3 E.R.C. 1835, 1840 (74th Dist., Mich. 1972).}

\footnotesize{\textsuperscript{147} Interview with Robert Courchaine, supra note 106. See also Mich. Water Resources Comm'n, Enforcement Procedures (1971). One of these special situations was the McLouth Steel case, where the WRC hoped to get affirmative action with a $20,000 fine. Detroit Free Press, Feb. 28, 1971, at 2-A, col. 1. But the judge, construing the 1965 $500 minimum fine provision to be a maximum limit, assessed the company only $500. Id., July 21, 1971, at 6-A, col. 1. See note 90 supra.}

The WRC seems to still regard fines as an extraordinary remedy. The Commission argues that if a polluter satisfactorily cleans up its spill, nothing would be gained by assessing a fine. See Mich. Water Resources Comm'n, Meeting Minutes, May 24-25, 1973, at 6.
The penalty structure imposed by the FWPCA appears to have been necessary to break this deadlock. The WRC's position has been made much stronger by the new effluent limitations scheme, and any proven violation carries a minimum $2,500 fine. This fact will make the WRC's enforcement job easier, because the high penalties will hopefully reduce the number of future violations through their deterrent value.

The use of areawide planning by a state agency is essential for maximum utilization of meager state resources. Until mandated by the FWPCA, Michigan, like many other states, did not comprehensively plan its pollution control program. It employed the case-by-case method of singly dealing with polluters. Although this approach is viable if there is only a single waste discharger on a given body of water, it fails to recognize the cumulative nature of most water pollution. Only when a water pollution control agency develops a coordinated plan for pollution abatement can the goal of pollution elimination be effectuated.

An important aspect of any implementation scheme is the attitude of the agency. Historically, the WRC's attitude has been cautious, possibly since the goals of its enabling legislation were not consonant with public desires. This kind of attitude, however, is also caused by simple bureaucratic inertia.

A program of preventative action is increasingly considered an essential element of pollution control. The WRC has to an extent recognized this fact, by its usage of the critical materials list pursuant to the 1970 "Truth

---

148 In the McLouth Steel case, supra note 147, the WRC was hampered by the fact that it had no power to levy fines. See Lansing State J., July 25, 1971, at E-8, col. 1.


150 Hines, supra note 5, at 233. One of the most frequently voiced requests for improvement of the state administration of water resources has been the addition of a comprehensive planning process. COUNCIL OF STATE GOVERNMENTS, STATE ADMINISTRATION OF WATER RESOURCES 35 (1957). There are some modern state water pollution control statutes enacted prior to the FWPCA which contained provisions calling for comprehensive planning. See, e.g., CAL. WATER CODE § 13140-47 (1971); COLO. REV. STAT. ANN. § 66-28-5(c) (Supp. 1967); GA. CODE ANN. § 17-505 (1971). Others, however, merely authorize planning. See, e.g., ARIZ. REV. STAT. ANN. § 36-1856 (Supp. 1972); ME. REV. STAT. ANN. tit. 38, § 361 (Supp. 1973).

151 It is not entirely certain that state comprehensive plans, formulated pursuant to the FWPCA, 33 U.S.C. § 1256 (f), (g) (Supp. 1972), fulfill these goals. For instance, Michigan's current plan lists the Rouge River as thirty-seventh in priority for pollution control. MICH. WATER RESOURCES COMM'N, MICHIGAN STATE WATER POLLUTION CONTROL PLAN 12 (1973). The Rouge, however, has recently been called one of the ten most polluted rivers in the United States. D. ZWICK & M. BENSTOCK, supra note 1, at 193-94.

152 Under the 1929 Act, No. 245, [1929] Mich. Pub. Acts 597, the Stream Control Commission was obligated to tell complainants that even nuisance conditions could not be remedied by the Stream Control Commission unless fish were killed. MICH. STREAM CONTROL COMM'N, 2d BIENNIAL REP. 16 (1934). Even after the actionable injuries were increased by the 1949 WRC Act amendments, No. 117, [1949] Mich. Pub. Acts 120, the WRC's limited resources left all but the most severe pollution violations to local authorities, despite public complaints. See Mich. Water Resources Comm'n, 8 Q. BULL. 3 (1955).

153 See e.g., 1971 Senate Hearings, supra note 2, at 561. See D. ZWICK & M. BENSTOCK, supra note 1, at 382-88.
Another more innovative solution has been the promulgation of Oil Spillage Rules. These rules provide for measures to be taken by all persons storing oil or critical materials to prevent the spillage and spread of such materials in the event of a spill. Although the rules are possibly a unique step by a state agency acting on its own initiative, they are a halfway measure. Materials not on the critical materials list, but which can nevertheless cause environmental injury, are not subject to the rules. A more effective program would require similar measures for all materials likely to harm state waters.

It thus appears that the massive disruption of state water pollution programs by the FWPCA was a necessary element in the improvement of state efforts. Without the FWPCA, the states probably would have con-


The Truth in Pollution amendments did not, however, go far enough toward achieving an effective monitoring program. Reporting helps to determine the extent of water quality violations, but does not by itself mandate the reduction of those pollutants or even indicate the quantities of discharged wastes. This defect was remedied by Act 293 of 1972, No. 293, § 6b, [1972] Mich. Pub. Acts 899, which required quantities, as well as the nature, of critical materials to be reported. MICH. COMP. LAWS ANN. § 323.6b (Supp. 1973).

Increased surveillance requires increased financing, which was provided by requiring dischargers to pay for their surveillance. See MICH. COMP. LAWS ANN. § 323.13 (Supp. 1973). This system of monitoring fees is said to be unique. See Symposium, supra note 10, at 148 n.90. Apparently, other states are using Michigan's law as a model for similar legislation. 4 CCH CLEAN AIR AND WATER NEWS 777 (1972). The surveillance fee system appears to be functioning successfully. As of March 20, 1973, 95 percent of the surveillance fees for fiscal year 1973 had been paid. Mich. Water Resources Comm'n, Meeting Minutes, Mar. 22-23, 1973 at 21.


156 Interview with William G. Turney, supra note 33. But see ALASKA STAT. § 46.03.822-28 (Supp. 1973); IDAHO CODE § 39-105(3)(k) (Supp. 1973) (authorize agency control over storage of hazardous materials).

157 See, e.g., Mich. Water Resources Comm'n, Meeting Minutes, Sept. 20-21, 1973, at 29, wherein it was reported that a total of 31,048 fish were killed in spills of milk, molasses, and chlorine.

The definition of a toxic pollutant under the FWPCA, see note 27 supra, appears to be more comprehensive than the comparable Michigan provision:

"Toxic substance" means a substance of unnatural origin, except heat, in concentrations or combinations which are or may become harmful to plant or animal life.

continued their incomplete pollution control programs, being satisfied with a partial elimination of the water pollution problem.

IV. CONCLUSION

The Michigan Water Resource Commission Act, although a basically sound water pollution statute, has suffered from some statutory inadequacies and implementation deficiencies. Although the need for a comprehensive water pollution program has existed since its inception, the WRC Act has failed to completely protect Michigan’s waters from pollution. Like the experience in most other states, this failure was a consequence of inherent inadequacies of state efforts caused by insufficient funding, fear of industrial reaction to stringent laws, and a cautious agency attitude. The recurrence of these problems on a nationwide basis necessitated the enactment of the FWPCA and its radical reordering of pollution control theories, which gave a much-needed boost to the Michigan program. Without the FWPCA, states would probably never have accomplished satisfactory control over water pollution. Whether or not the federal government can achieve this goal better than the states will be seen when a comparison can be made between an existing state program and a state in which the EPA must operate the pollution control program. For Michigan, the imposition of federal standards means that state waters should receive the proper attention they have missed while under the jurisdiction of the Water Resources Commission.

—Jeffrey K. Haynes