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COMMENT

CONTROL OF INDUSTRIAL WATER POLLUTION IN NEW MEXICO

During the past two decades it has become increasingly clear that something must be done about water and air pollution. The federal government and the states have enacted considerable legislation to meet the pollution threat. New programs and agencies have been instituted at every governmental level. In most areas efforts are too recent to evaluate. Judged by the expense of legislative time and energy, the situation is hopeful, but judgment by results is necessarily tentative. Efforts to control and prevent pollution in New Mexico are even more difficult to evaluate than those of other states. Industry, the most troublesome source of pollution, is a relative newcomer to New Mexico. It is impossible to determine how well anti-pollution legislation is enforced in the absence of actual or potential violators. On the other hand, the fact that New Mexico has little industry places it in an enviable position from the standpoint of pollution control. Pollution is far easier to prevent than abate. Any evaluation of existing controls in New Mexico must, therefore, allow for the fact that prevention is the primary goal. An evaluation of existing controls must also recognize the present economic situation. New Mexico is in the awkward position of the choosy beggar. Attraction of industry to the state is a primary objective. At the same time, the preservation of a clean, if not pristine environment is crucial to the maintenance of the state as a tourist attraction. Hopefully clean industry is not a contradiction in terms. In any event, New Mexico's economic dilemma is a second precondition to a sober evaluation of existing controls. Finally, in the area of water pollution it must be remembered that New Mexico is not rich in water and that all of her streams are fully appropriated.¹ It necessarily follows that before an industry can pollute water in New Mexico it must first acquire an existing water right. A great shift in the use of water rights could very well call for modification of existing controls. The flexibility of existing controls must therefore be considered in any evaluation.

Since the landmark case of *Rylands v. Fletcher*,² it has been theoretically possible for an aggrieved party to recover damages

1. Interview with F. Harlan Flint and Carl Slingerland, New Mexico State Engineer's Office, in Santa Fe, New Mexico, Aug. 20, 1969. To say that all streams are fully appropriated is not to say they are fully utilized. For example, the City of Albuquerque has rights to more water than it is currently using.

2. L.R. 3 H.L. 330 (1868).

for harm caused by undesirable water. In that case it was the quantity rather than the quality of the water that caused plaintiff's injury, but the case was subsequently cited by some courts to support recovery for harm caused by water pollution.³ The absolute liability doctrine of *Rylands v. Fletcher* has also been rejected by some courts.⁴ However, the aggrieved party has not been restricted to that doctrine. Recovery has been allowed in actions based on negligence,⁵ absolute liability or negligence *per se* created by statute,⁶ the riparian right to unimpaired quality⁷ and the doctrine of nuisance.⁸ A detailed discussion of private recovery is beyond the scope of this Comment,⁹ but the possibility of such recovery must be remembered. Such suits have their place in the common law of tort and may be of use to severely damaged individuals. However, their expense, combined with the likelihood of damage awards rather than injunctive relief,¹⁰ makes them minor factors in pollution control. There is virtually unanimous agreement with Sax's summary of the role of the personal action:

Today the common law is of little significance in pollution control; the field has been virtually taken over by state and federal statutory schemes. While there are still isolated cases dealing with individual instances of pollution, it has become increasingly clear that litigation among individual private parties could not cope with the problems created by large industrial and municipal complexes.¹¹

State statutes making the pollution of water a criminal offense constitute an intermediate stage in the evolution of modern control techniques. Typically, such statutes designate pollution a public nuisance and treat it as a misdemeanor. New Mexico has had some form of water pollution statute since well before statehood, and

3. *Berry v. Shell Petroleum Co.*, 140 Kan. 94, 33 P.2d 953 (1934); *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N.W. 336 (1895).

4. *United Fuel Gas Co. v. Sawyers*, 259 S.W.2d 466 (Ky. 1953); *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221 (1936).

5. *Drake v. Lady Ensley Coal, Iron & Ref. Co.*, 102 Ala. 501, 14 So. 749 (1894); *Duhon v. Buckley*, 161 So. 2d 301 (La. 1964).

6. *Wilmore v. Chain O'Mines, Inc.*, 96 Colo. 319, 44 P.2d 1024 (1934); *Owen-Osage Oil & Gas Co. v. Long*, 104 Okla. 242, 231 P. 296 (1924).

7. *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N.E. 468 (1907); *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913).

8. *Niagara Oil Co. v. Ogle*, 177 Ind. 292, 98 N.E. 60 (1912); *Helms v. Eastern Kansas Oil Co.*, 102 Kan. 164, 169 P. 208 (1917).

9. See Knodell, *Liability for Pollution of Surface and Underground Waters*, 12 Rocky Mt. Min. L. Inst. 33 (1967) for a complete discussion of private remedies.

10. Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality, Part I: State Pollution Control Programs*, 52 Iowa L. Rev. 186, 200 (1966).

11. J. Sax, *Water Law, Planning & Policy* 387 (1968).

there are no substantial differences between the early acts and the current provision. Essentially, it is now a public nuisance to release any object or substance offensive or dangerous for human or animal consumption or use into any public waters, but hardly a serious offense.¹² Public officers or private citizens may also bring a civil action in the name of the State to abate a public nuisance.¹³ To date there have been no reported cases under the nuisance statutes. In some states, notably Washington,¹⁴ criminal sanctions have been combined with regulatory legislation. That approach is a more reasonable use of such sanctions, since the major difficulty with the criminal statute approach is its isolation from informed procedures for making the difficult judgment that a given action is in fact offensive or dangerous. Just as with private remedies, the control of pollution requires more constant study and supervision than would be generated by the use of only misdemeanor statutes.

As public alarm over water pollution increased, the states began looking to administrative control agencies to handle the problem. Public health departments were initially given control of pollution. With the exception of the power given public health officials in common with other public officers by N.M. Stat. Ann. § 40A-8-5 (Repl. 1964), New Mexico did not pass through the public health phase of pollution control evolution.¹⁵ Unquestionably, the New Mexico Department of Public Health has played a major role in pollution surveillance and was instrumental in the formulation of present water standards for New Mexico. However, the New Mexico Department of Public Health was never designated a pollution control agency until it became a constituent of the present Water Quality Control Commission. To understand the development of this Commission, it is necessary to first examine the federal Water Quality Act of 1965,¹⁶ for this Act provided the impetus for the New Mexico legislation establishing the Water Quality Control Commission.

In the past two decades, the federal government has played an increasingly aggressive role in the control of stream pollution. Obviously the problem of water pollution, especially in interstate streams, is of national scope. However, federal legislation has time

12. N.M. Stat. Ann. § 40A-8-2 (Repl. 1964).

13. *Id.* § 40A-8-5.

14. Wash. Laws Ex. Sess. 1967, ch. 139, § 14.

15. Omitting this stage was not harmful, since the trend is now away from public health oriented pollution controls. The drawbacks of relying on public health departments include their emphasis on short range physical dangers and lack of facilities to deal with complex questions of controlling pollution to facilitate multiple use.

16. Water Quality Act of 1965, 33 U.S.C. §§ 466-466k (Supp. IV, 1969).

and again become ensnarled in attempts to preserve the primacy of local control.¹⁷ It was a concern for local institutions that led to the standard-setting mechanism of the federal Water Quality Act of 1965. Federal legislation before and after 1965 is beyond the scope of this Comment,¹⁸ but a brief discussion of the 1965 Act is essential to an understanding of recently enacted state controls in New Mexico and several other states.

There is no doubt that under the Commerce Clause Congress can exercise broad control over the pollution of interstate waters.¹⁹ Conversely, it is likely that pollution control can only be enhanced by participation at the local level. Under the 1965 Act, the states are invited to share in the control of interstate stream pollution, and at the same time "threatened" with federal standards and controls if they do not do so. The Water Quality Act of 1965 provides that:

If the Governor of a State or State water pollution control agency files, within one year of October 2, 1965, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Secretary determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof.²⁰

If any state does not adopt acceptable standards, the waters of interstate streams within its boundaries are subject to standards to be formulated by the federal government. Many states responded affirmatively to this invitation. The Governor of New Mexico was the first to submit the required letter of intent to formulate acceptable standards. Subsequently, the New Mexico legislature enacted comprehensive legislation designed to comply with the federal requirements.

The Water Quality Act passed by New Mexico on March 29,

17. Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part III: The Federal Effort*, 52 Iowa L. Rev. 799 (1967).

18. The Hines article cited in note 17 gives an excellent survey of federal controls.

19. See Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 Geo. Wash. L. Rev. 1067 (1965).

20. Water Quality Act of 1965, 33 U.S.C. §§ 466-466k, 466g (c)(1) (Supp. IV, 1969). Paragraph (3), referred to in the quoted provision, is a general statement of goals, including the protection of public health and welfare and the enhancement of water quality.

1967²¹ created the Water Quality Control Commission. Representatives from the following six state agencies constitute the Commission: the Department of Public Health, the Department of Game and Fish, the State Engineer's Office, the Oil Conservation Commission, the Department of State Parks and Recreation, and the Department of Agriculture.²² The Commission is given several powers and duties, including the formulation of water quality standards to serve "as a guide to water pollution control"²³ and the adoption of regulations "to prevent or abate water pollution in the state or in any specific geographic area or watershed of the state."²⁴ No regulations are permitted to specify "the method to be used to prevent or abate water pollution."²⁵ In making its regulations, the Commission is directed to consider all appropriate circumstances, six of which are specifically, but not exclusively, enumerated.²⁶ A hearing procedure is dictated for the adoption of standards and regulations, and judicial review of these hearings is permitted.²⁷ The Commission may also enter into agreements with the federal government or other states,²⁸ grant individual variances from its regulations,²⁹ and require filing with it or a constituent agency of notice of intent to introduce waste into state waters.³⁰ Responsibility for enforcement and administration of the Act is to be assigned by the Commission "to constituent agencies so as to assure adequate coverage and prevent duplication of effort,"³¹ but exclusive authority over pollution as a result of oil and gas operations is reserved to the Oil Conservation Commission.³² The Water Quality Control Com-

21. N.M. Stat. Ann. §§ 75-39-1 to -12 (Repl. 1968).

22. *Id.* § 75-39-3. Since the passage of this Act the Department of Public Health has merged with the Department of Welfare to become the Department of Health and Social Services.

23. *Id.* § 75-39-4C.

24. *Id.* § 75-39-4D.

25. *Id.*

26. *Id.* § 75-39-4D (1)-(6). The six listed considerations are:

(1) character and degree of injury to or interference with health, welfare and property; (2) the public interest, including social and economical value of the sources of water contaminants; (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved; (4) successive uses, including but not limited to, domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses; (5) feasibility of a user or a subsequent user treating the water before a subsequent use; and (6) property rights and accustomed uses.

27. *Id.* §§ 75-39-5 to -6.

28. *Id.* § 75-39-4F.

29. *Id.* § 75-39-4G.

30. *Id.* § 75-39-4I.

31. *Id.* § 75-39-4E.

32. *Id.* § 75-39-11G.

mission is charged to seek voluntary compliance with its regulations,³³ but is empowered to bring suit in the district court if such compliance cannot be achieved.³⁴ Injunctive relief may be sought against actual or threatened violations.³⁵ In emergency situations requiring "immediate action to protect human health" the director of the Department of Public Health, in concurrence with the Governor, may order an immediate abatement.³⁶

While the Act specifically does not alter other rights of action under common law or civil and criminal statutes,³⁷ it is obvious from the prior discussion of such other rights that any pollution control at the present time is dependent upon this Commission. The Water Quality Act can obviously be no more effective than the Commission it created. Any attempt to assess the effectiveness of a state's pollution control must look closely at the work of the agency responsible for promulgating and enforcing its standards. It has been observed that

In some states the record of enforcement is very good, yet no significant discrepancies can be observed between the laws of these states and the laws of states with a history of weak enforcement.³⁸

In the absence of much history, enforcement or otherwise, the work of the New Mexico Commission in setting standards and adopting regulations is the only key to its probable effectiveness in enforcement.

Within three months after the passage of the New Mexico Water Quality Act, the Commission had adopted standards for all interstate stream basins in New Mexico³⁹ as well as an Implementation and Enforcement Plan for Water Quality in New Mexico. The standards are based on hearings conducted by the Department of Public Health.⁴⁰ The United States Geological Survey was especially helpful in the monitoring of streams to determine existing water quality. Much of their data appears in the appendices to the stand-

33. *Id.* § 75-39-9A.

34. *Id.*

35. *Id.*

36. *Id.* § 75-39-10.

37. *Id.* § 75-39-12.

38. Hines, *Part I: State Pollution Control Programs*, *supra* note 10, at 227.

39. The five basins for which standards were set are the Rio Grande, the Pecos, the Canadian, the Gila-San Francisco and the San Juan, La Plata Animas basin.

40. N.M. Stat. Ann. § 75-39-5 (Repl. 1968) provides that "the commission may adopt water quality standards on the basis of the record of hearings held by the New Mexico department of public health prior to the effective date of the Water Quality Act [75-39-1 to 75-39-12] if those hearings were held in general conformance with the provisions of this section."

ards. Since these standards were adopted the Commission, with assistance from the federal government, has established thirteen monitoring stations throughout the state.⁴¹ These stations enable the Commission to keep constant watch over stream quality.

The New Mexico Water Quality Control Commission has published a separate volume of standards and data for each of the major interstate stream basins in New Mexico.⁴² In addition to the extensive U.S.G.S. data in the appendices to each of these volumes, there is an extended discussion of existing uses of the streams and an analysis of municipal treatment facilities in each basin. Each stream is described in great detail. Three types of standards are given for each stream: general standards, which apply to the entire stream, special standards depending upon particular reaches of each stream, and special standards depending upon the chemical quality of each stream at various stations. The following standards exemplify this three-part approach. The general standards are for the entire Rio Grande, while the special standards apply to specific reaches of the Rio Grande.

General Standards

The following general standards shall apply to the waters of the main stem of the Rio Grande and to the Rio Chama in New Mexico regardless of the magnitude of flow. The detection of an infraction of the intent of these standards in a single sample shall be sufficient cause for investigation with the sources of pollution subject to abatement.

1. *Odor*

Pollution which results in esthetically objectionable or obnoxious odors of receiving waters shall be subject to abatement. Odors having a natural origin are not subject to this section.

2. *Floating Solids, Oil and Grease*

Receiving waters shall be free of objectionable floating solids, oils, and grease where these materials come from other than natural sources.

3. *pH*

pH of the receiving water should be within the range 6.6 to 8.6. Sudden fluctuation of pH from that normally found at a particular sampling station shall be subject to study. If these fluctuations of pH are considered to be inimical to beneficial

41. Interview, *supra* note 1.

42. New Mexico Water Quality Control Commission, Water Quality Standards, June 1967 (in five volumes the titles of which are the river basins covered). There is also a sixth volume which includes only the standards for all five basins without introductory material or appendices.

uses, sources of pollution are subject to abatement. Changes attributed to natural causes are not subject to this section.

4. *Turbidity*

Turbidity of receiving waters shall not reduce light transmission to the point that existing aquatic life in that section of the stream is inhibited or that will cause substantial visible contrast with natural appearance of water. Naturally occurring turbidity caused by silt and suspended sediment or by the reasonable operation of irrigation or flood control facilities are not subject to these regulations.

5. *Color*

Color of receiving waters should not create an esthetically undesirable condition nor should color impair the use of the water by existing aquatic life with abatement action to be taken only where color is caused by pollution.

6. *Bottom Deposits*

The stream bottom shall be free of debris and sediment of other than natural origin that will adversely inhibit the growth of normal stream flora and fauna or significantly alter the physical and chemical properties of the bottom.

7. *Toxic Substances*

Toxic substances such as, but not limited to, pesticides, herbicides, heavy metals, and organics, shall not be present in receiving waters in concentrations which will change the ecology of receiving waters to an extent detrimental to existing forms of life or which are toxic to human, plant, fish and animal life. Toxicities of substances in receiving waters will be determined by appropriate bio-assay techniques, or other acceptable means, for the particular form of aquatic life which is to be preserved with the concentrations of the toxic materials not to exceed 10% of the 48-hour median tolerance limit.

8. *Radionuclides*

Radionuclides shall not be present in receiving waters in concentrations that are inimical to aquatic life or that will, after conventional drinking water treatment, prevent meeting the U.S. Public Health Service 1962 Drinking Water Standards, or be greater than 1/10 of the 168-hour value for other radioactive substances specified in *National Bureau of Standards Handbook 69*.⁴³

Special Standards

The flow in the Rio Grande and the uses of the waters of the river vary considerably from one section to the next. Because of

43. New Mexico Water Quality Control Commission, Water Quality Standards: The Rio Grande in New Mexico, S-6 to -9, June 1967.

these variations, two sets of special standards are proposed to protect the waters of the river for both existing and for potential future uses. One set of special standards is used to differentiate between the sections of the river where fish propagation, recreational fishing and recreation represent significant uses, and those sections where there is essentially no fishing because a permanent, perennial flow is not maintained. In addition to the quality characteristics protected by the general standards, the most significant criteria for a fishing water is the dissolved oxygen (DO) concentration. Trout, or cold-water fish, require a higher minimum DO than do warm-water fish. Closely allied to the DO is the water temperature as the maximum solubility of oxygen increases as temperature decreases. The biochemical oxygen demand is associated with the DO as it is a measure of the potential oxygen consumption due to the organic matter in solution and in suspension in the stream. Thus the special standards for this purpose differ from one reach to the next depending upon water temperature and upon the existence of flow in the river.

The second set of special standards is used to differentiate between waters of different chemical quality. There is a general degradation in the chemical quality of water as it is used, or when water is stored for future uses and for recreational purposes; this degradation becoming more noticeable as the river proceeds downstream. Special standards to protect the chemical quality must be related to points where sampling stations have been maintained for long periods of time. For this reason the river is divided into separate reaches for special standards related to these characteristics.⁴⁴

B. For the main stem of the Rio Grande from the head waters of Elephant Butte Reservoir upstream to Cochiti Dam. These standards apply to all flows.

(1) *Temperature Increase*

Temperature of receiving waters should not be such so as to render the water unsuitable for beneficial use nor should the temperature of the receiving water be increased so as to result in a water pollution condition.

(2) *Biochemical Oxygen Demand and Dissolved Oxygen*

Materials in solution and suspension which exert an oxygen demand shall not be present in concentrations which will deplete the dissolved oxygen in the stream to a point that a water pollution exists.

(3) *Fecal Coliform Bacteria (as determined by the Fermentation Tube MPN Technique, most current edition of Standard Methods)*

The arithmetic average of five consecutive daily samples

44. *Id.* at S-9 to -10.

collected under similar conditions should not exceed 5,000 fecal coliform per 100 ml.⁴⁵

- C. For the main stem of the Rio Grande from Otowi Bridge downstream to the U.S. Geological Survey sampling at San Marcial, New Mexico. These standards shall not apply during months when the average monthly flow falls below 100 cfs at San Marcial.

(1) *Chlorides*

The monthly average concentration of chlorides shall not exceed 250 mg/l as determined by chemical analysis of the samples collected at the U.S. Geological Survey gaging station at San Marcial, New Mexico.

(2) *Sulfates*

The monthly average concentration of sulfates shall not exceed 500 mg/l as determined by chemical analysis of the samples collected at the U.S. Geological Survey gaging station at San Marcial, New Mexico.

(3) *Total Dissolved Solids*

The monthly average concentration of total dissolved solids shall not exceed 1,500 mg/l as determined by chemical analysis of the samples collected at the U.S. Geological Survey gaging station at San Marcial, New Mexico.⁴⁶

There are similar standards for other basins and reaches of various streams, all of which are based on existing conditions and uses.

In addition to promulgating stream standards, the Commission has adopted five regulations. One of these regulations is a restriction on effluents. This is very important from an enforcement standpoint. Standards such as those quoted above concern the quality of a stream at a given point. Standing alone, such standards would be difficult to enforce. Comparing stream standards to effluent standards, Hines observes that

[B]ecause the stream standard only indicates the quality of water that must be maintained, they are more difficult to translate into necessary disposal facilities by the potential polluter and more demanding of the administrative talents of the control agency than are effluent standards.⁴⁷

45. *Id.* at 8-12 to -13.

46. *Id.* at 8-18 to -19.

47. Hines, *Part I: State Pollution Control Programs*, *supra* note 10, at 226.

Effluent standards (or regulations), expressed in terms of what may or may not be discharged into a stream, are simpler to enforce and "usually promote equality of regulation among similar types of waste creating operations."⁴⁸ The following is the Commission's regulation concerning effluent quality, adopted on March 4, 1968:

Regulation No. 4—Effluent Quality

No person shall cause or allow effluent to discharge to a watercourse if the effluent contains concentrations of the constituents listed below (as indicated by daily composite samples examined in accordance with the latest edition of Standard Methods for the Analyses of Water and Waste Water published by the American Public Health Association) in excess of the indicated value in:

- (a) any two consecutive daily composite samples or
- (b) more than one sample per month (when less than 10 daily composite samples are examined per month) or
- (c) more than 10% of the daily composite samples per month (when 10 or more daily composite samples are examined per month):

<i>Constituent</i>	<i>Concentration in a Daily Sample</i>
Bio-Chemical Oxygen Demand (BOD)	30 mg/1
Chemical Oxygen Demand (COD)	50 mg/1
Settleable Solids	0.5 ml/1

provided that this regulation does not apply to constituents diverted from the stream and returned thereto.⁴⁹

The first regulation adopted by the Commission on November 16, 1967 and amended on July 25, 1969, requires that anyone

. . . intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge, unless the change is being made or will be made into a community sewer system, shall file with the Water and Liquid Waste Section of the New Mexico Health and Social Services Department a notice of such proposed discharge. . . .⁵⁰

Notice concerning discharges from oil and gas operations is to be sent to the Oil Conservation Commission. In either case the notice must contain a statement of the quantity and quality of the discharge.

48. *Id.*

49. New Mexico Water Quality Control Commission Regulations, Regulation No. 4, March 4, 1967.

50. *Id.* Regulation No. 1, July 25, 1969. The amended regulation merely changed the phrase "waste discharge" to "water contaminant discharge" and recognized the reorganization of the Department of Public Health.

Of the remaining three regulations, one requires filing specifications for proposed sewerage systems, one prohibits refuse disposal in or near natural water courses, and the last establishes the procedure for requesting a variance from the Commission's regulations pursuant to N.M. Stat. Ann. § 75-39-46 (Repl. 1968). That Section provides that the Commission

May grant an individual variance from any regulation . . . whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide the petitioner a reasonable opportunity to be heard in the event his petition is not granted.

In order to meet the requirements of the federal Water Quality Act of 1965, the states were to promulgate "a plan for the implementation and enforcement of the water quality criteria adopted."⁵¹ The New Mexico Water Quality Control Commission promulgated such a plan in June, 1967.⁵² Five features of this plan are especially relevant to the control of industrial pollution. The Commission has compiled lists of all industrial and commercial polluters in each of the five basins.⁵³ Following these lists and a discussion of irrigation and water reclamation projects, is a list of regulations previously adopted by the Oil Conservation Commission, which has sole authority over pollution resulting from oil and gas operations. In addition to citing the specific oil and gas regulations, the Commission briefly outlines the work of the Oil Conservation Commission in pollution control:

It would be very difficult to estimate the number of man hours that are spent by Oil Conservation Commission personnel in activities relating to the prevention of water pollution, but when it is considered that Commission personnel approve all casing, cementing and plugging programs (as well as witness many of the actual jobs), gather and publish water production figures, hold hearings and issue numerous

51. Water Quality Act of 1965, 33 U.S.C. §§ 466-466k, 466g (c) (1) (Supp. IV, 1969).

52. New Mexico Water Quality Control Commission, Implementation and Enforcement Plan for Water Quality Control in New Mexico, June 1967.

53. *Id.* at 7-15. The lists are restricted to those polluters who do not discharge their water into municipal sewers. One hundred five polluters are listed: 50 in the Rio Grande Basin, 31 in the Pecos Basin, 12 in the San Juan Basin, 10 in the Canadian River Basin, and 2 in the Gila-San Francisco Basin.

orders in regard to brine disposal, make numerous inspections of disposal systems, and conduct frequent casing leak surveys, it becomes apparent that protection of fresh water must be recognized as a major function of the Oil Conservation Commission.⁵⁴

The work of the State Game Commission is then discussed and a copy of an existing regulation adopted by that agency is attached. Promulgated on February 23, 1967, that regulation provides that

It shall be unlawful for any person, firm, corporation or municipality to introduce, directly or indirectly, into any public water of this state, any substance which alters the physical, chemical, or biological qualities of the water in such quantity and such duration as will injure, drive away, or destroy any fish, amphibians, birds or mammals from such water or will be detrimental to the reproduction of fish, amphibians, birds or mammals, or detrimental to the reproduction and growth of natural fish, amphibian, bird or mammal food.⁵⁵

Since the Water Quality Control Commission does not have its own staff, the duties of enforcing regulations are parcelled out among the six constituent agencies. These allotted duties are stated in general terms in the Implementation and Enforcement Plan:

State Engineer's Office—Interstate Stream Commission—Continue financing of water quality monitoring stations and flow data to be collected in cooperation with the U.S. Geological Survey.

Department of Agriculture—Administration of the New Mexico Economic Poison Act, and the New Mexico Pesticide Applicators Law.

Department of Parks and Recreation—Administer the water quality standards to prevent pollution from small marinas and boats at State Park facilities.

Oil Conservation Commission—Control pollution from oil and gas production activities.

Department of Game and Fish—Administer the water quality standards to prevent pollution that affects the game and fish resources of the State.

Department of Health—Act as administrative body for the Commission, keep the records of the Commission, administer P.L. 660, work with the Federal Water Pollution Control Administration as a water pollution control agency, analyze samples collected by the Health Department and other agencies, and file water quality data.⁵⁶

54. *Id.* at 36-37.

55. *Id.* at 39.

56. *Id.* at 40-41.

Finally, the plan gives a detailed discussion of surveillance techniques to be employed, listing the various monitoring stations planned and in operation.⁵⁷

In July of 1968 the New Mexico standards and implementation and enforcement plan were approved by the Secretary of the Interior subject to three exceptions: (1) the need for a non-degradation statement, (2) changes in temperature standards on the lower Pecos, and (3) the need for specific dissolved oxygen criteria for Navajo Reservoir.⁵⁸ The latter two exceptions were handled in 1969 by amendments to the standards.⁵⁹ The non-degradation statement requirement stems from guidelines issued by the Secretary of the Interior in 1966 to help guarantee that state standards would meet with the Secretary's approval. These guidelines included the following:

Water quality standards should be designed to "enhance the quality of water." If it is impossible to provide for prompt improvement in water quality at the time initial standards are set, the standards should be designed to prevent any increase in pollution. In no case will standards providing for less than existing water quality be acceptable.⁶⁰

In apparent contradiction to that guideline, N.M. Stat. Ann. § 75-39-11 (F) (Repl. 1968) provides that "reasonable degradation of water quality resulting from beneficial use shall be allowed." The New Mexico statute is designed to allow more industrial development in the state. The Secretary's guideline was an immediate source of alarm among several western states, including New Mexico, in which industrial expansion is yet to come. State reaction caused the Secretary to soften his anti-degradation stand.⁶¹ Thus the issue has been compromised and New Mexico's program has been approved.

Since the enactment of the New Mexico Water Quality Act and the adoption of standards and regulations by the Water Quality Control Commission, there has been very little activity directed toward the control of industrial pollution in New Mexico. This is not to say that the Commission is doing nothing, but merely that there have been no industrial violations requiring sanction by the Commis-

57. The location of stations has changed slightly since 1967. Interview, *supra* note 1.

58. 2 Rocky Mt. Min. L. Newsletter: Water Law, No. 7, at 9-10 (Oct. 1968).

59. New Mexico Water Quality Control Commission, Amendments to the Water Quality Standards, January 13, 1969 and May 28, 1969.

60. Guidelines for Establishing Water Quality Standards for Interstate Waters, U.S. Dept. of the Interior, Federal Water Pollution Control Administration 2-11 (May 1966).

61. 2 Rocky Mt. Min. L. Newsletter, *supra* note 58, at 1-2.

sion. There has been some activity directed toward the control of municipal sewerage disposal systems.⁶² An arid state such as New Mexico with only a hundred or so known industrial and commercial polluters obviously has yet to confront the bulk of its pollution problems. The Water Quality Control Commission has functioned smoothly thus far, and the constituent agencies seem to be working harmoniously.⁶³ No court actions have been instituted or contemplated against industrial or commercial polluters. In fact, it has not been necessary for the Commission to approach any industry or business on the subject of illegal pollution.⁶⁴

It is quite difficult to evaluate the New Mexico water quality program, because both the responsible agency and the pollution it is charged to control are new to New Mexico. Beyond noting that the constituent agencies of the Commission are currently functioning bodies and that they are not at odds on the Commission, there is little that can be said of the Commission itself. When problems are attacked by broad enabling legislation establishing a responsible agency, solutions will depend upon the aggressiveness of that agency. This unknown quantity limits evaluation until the agency can be observed for some time. However, there are certain features of both the Commission's work and the underlying legislation which can be critically examined.

The Commission has done everything positive that it is either empowered or required to do. It has set federally approved stream standards which constitute an overall pollution control program for interstate streams. It could also set intrastate standards, but there is very little water in New Mexico that is not part of an interstate stream basin. Any threat to intrastate waters is met by the effluent regulations which apply to all state waters and provide a rough translation of promulgated stream standards into practically enforceable units. The regulations themselves are reasonably stringent.⁶⁵ However, since the regulations apply equally to all polluters, it is obvious that an increase in the number of polluters could lower the quality of a stream below the standards with no polluter violating the regulations. There are three possible solutions to this problem if it arises. The Commission could adopt a permit system and limit the number of polluters on a stream, the standards could be lowered, or the regulations could be changed. The New Mexico

62. Interview, *supra* note 1.

63. *Id.*

64. *Id.*

65. It has been reported that a proposed paper mill for New Mexico could not presently meet the chemical oxygen demand regulation, even with advanced abatement facilities. The New Mexico Review and Legislative Journal, Aug. 1969, at 1, col. 3.

Water Quality Act does not authorize the issuance of permits. In Washington and Oregon, where permit systems are employed, there are statutory authorizations for their use.⁶⁶ Even if it were possible for the New Mexico Water Quality Control Commission to adopt a permit system without legislative authorization or if the legislature authorized a permit system, there are drawbacks to such a system. More administrative paperwork would be required, and a first come first served approach would dictate the direction of industrial growth in New Mexico. Furthermore, a permit has unfortunate connotations of a license to pollute at a given rate. Modification of standards or regulations would require no new legislation at the state level. However, as far as interstate streams are concerned, the existing standards, approved by the Secretary of the Interior and potentially enforceable by the federal government,⁶⁷ are relatively inflexible. Regulations, on the other hand, can be viewed as the means of maintaining standards. Thus, whenever more pollution arrives, the Commission can tighten the regulations as required to maintain stream standards.⁶⁸ An administrative agency charged with surveillance such as the Commission is particularly well-suited to view its regulations in a context of existing and ideal stream quality and is fully authorized to adopt stricter regulations if necessary.

Through no fault of its own, the New Mexico Water Quality Control Commission is not an independent agency in the sense of being separately funded. It is a conglomerate of six agencies which existed at the time of its formation. The six constituent agencies have had to make room for the Commission in budgets and personnel. Given the short time in which the Commission was conceived and established, such an arrangement was probably necessary. In fact, since New Mexico lacks both water and industry, it could be a needless expense to establish an autonomous agency at this time. By using personnel from six existing agencies, the Commission is assured an overall approach to pollution problems and can easily draw on past experience of the member agencies. Finally, if pollution becomes a political issue in New Mexico, as it has in many

66. Ore. Rev. Stat. § 449.083 (Repl. 1967); Wash. Rev. Code Ann. § 90.48.160 (Supp. 1968).

67. Water Pollution Control Act Amendments of 1956, 70 Stat. 499, 505 (1956), as amended, 33 U.S.C. §§ 466-466k, 466g (g) (Supp. IV, 1969).

68. Cf. Hines, *Part I: State Pollution Control Programs*, *supra* note 10, at 224-25. "If the principle of basing standards on the reasonable uses to be made of the receiving waters is followed, changes in use demands should lead to changes in the applicable standards. No reason appears why this result should be avoided, except through lack of administrative diligence, which can equally stymie any type of control program. Experience has shown that state water quality standards can be upgraded if the control agency is committed to such a program." The same arguments can be applied to effluent regulations implementing stream standards based on reasonable uses.

states, the six-part Commission is less susceptible to budget pressures than an independent agency.

Literature on the subject of water pollution suggests several approaches which can be used in a control program and which are not employed in New Mexico. The German practice of assessing effluent taxes is often cited.⁶⁹ However, since New Mexico's problem is prevention rather than abatement, the use of taxes should not be necessary unless the prevention program fails. Bonds, on the other hand, could be a helpful element in a prevention program. Potential polluters could be required to post a bond to be forfeited when they are found to be in continuing violation of regulations. This would be somewhat unfair if existing polluters are not also required to post bonds. Furthermore, if it is accepted that New Mexico needs new industry, a bond requirement could be a serious hindrance to attracting industry at a time when other available states have no such requirement. Bonds would be most effective if required in uniform state laws.

Some states have incorporated criminal sanctions into their water quality acts.⁷⁰ New Mexico has not done so, but N.M. Stat. Ann. § 75-39-12 (Repl. 1968) provides that existing criminal sanctions are not affected by the Water Quality Act. Thus, N.M. Stat. Ann. § 40A-8-2 (Repl. 1964) could be applied to industrial polluters. However, the sanctions imposed by public nuisance statutes are not severe and no criteria are given to determine what constitutes criminal pollution. If criminal sanctions were included in the Water Quality Act, the problem of severity would still not be solved. The new Washington legislation provides for a penalty of \$100 per day for each violation of its permit requirement. Operating without a permit when required or exceeding the effluent limit of a permit is a violation.⁷¹ The difficulty with this penalty is that it is not severe enough to deter large-scale polluters. Negative publicity is the most serious threat posed by the statute,⁷² but publicity can be generated without criminal statutes. To adopt stiffer penalties to meet the problem of the large polluter would again compromise the state's bargaining position when attempting to attract industry.

The provision allowing variances from the Commission's regulations is the most problematic element in the present program. The minor dispute over a non-degradation statement was simply the state's attempt to leave its doors open to industrial and population expansion, and there was no substantial federal objection to the

69. J. Sax, *supra* note 11, at 407.

70. Wash. Laws Ex. Sess. 1967, ch. 139, § 14.

71. *Id.*

72. 43 Wash. L. Rev. 425, 446 (1967).

Commission's standards as such. To allow a variance, however, is to allow a compromise of the Commission's regulations, which are presumably based on existing stream conditions. Since there are no present violations of the regulations, variance requests must come from new or expanding industries. It seems particularly unfortunate to have the Commission in a potentially weak position when dealing with new polluters. If justified by stream conditions, the Commission has full power to modify its regulations or restrict their application to certain stream reaches. Even that procedure, however, would be questionable if stream standards were thereby compromised, since the federal government stands behind the present standards. Of course, it is possible that a variance would pose no threat to a comparatively clean stream. However, the statute does not require that variances be restricted to streams that can tolerate more effluent.⁷³ The only consideration mentioned is unreasonable hardship to the polluter. Admittedly, the Commission is given discretion in granting variances, but neither the statute nor the Commission's regulation concerning procedures for requesting a variance suggest any specific criteria to be applied in considering requests for variances. Pollution abatement can be very expensive. Financial burdens are unreasonable or not depending on one's perspective. It is not difficult to imagine an industry that could be financially hamstrung by effluent regulations but would ruin a stream if not controlled. If such an industry were granted a variance, it could be said that the Commission has failed, even if federal enforcement managed to handle the problem. There is, however, no evidence that the Commission would even consider granting a variance to such an industry. Since the Commission has as yet not had to deal with any industrial variance requests,⁷⁴ there is no way to predict the outcome of any such issue. It is possible that the Commission will be approached in the near future with a variance request by a paper mill. If that situation arises, the action taken by the Commission will provide a helpful footnote to this examination. Final evaluation of New Mexico's program must await just such situations, which are increasingly likely as both industry and concern about pollution continue to escalate.

GREGORY PEASE

73. N.M. Stat. Ann. § 75-39-4G (Repl. 1968).

74. Interview with F. Harlan Flint, New Mexico State Engineer's Office, in Santa Fe, New Mexico, Sept. 2, 1969.