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THE FATE OF NON-COMPLIANT MUNICIPALITIES WITH REGARD TO THE SECONDARY TREATMENT STANDARDS PURSUANT TO THE 1972 FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS—A PROBLEM OF ENFORCEMENT

I. INTRODUCTION

Water pollution is a dualistic problem which concerns both water quality and adequacy of supply of water. The failure to maintain a certain standard with regard to quality and/or adequacy leads to detrimental effects in such areas as domestic water supply, industrial water supply, agricultural water supply, wildlife watering, propagation of marine life, recreational activities, and aesthetic enjoyment.

There are many categories into which water pollution may be divided;¹ however, there are basically two principal classes.

One results from directly introducing toxic materials which make the water unsafe because the introduced materials are themselves unsafe; the other is the indirect type of degradation which results from the physical, chemical and biological processes among the water, its contents, and the introduced contaminants. Some contaminants have both a direct and indirect effect. For example, domestic sewage which is improperly treated may be dangerous because of the possibility of a typhoid epidemic, but it is also undesirable because of its effect in depleting dissolved oxygen.²

1. The general categories include domestic sewage and other oxygen-demanding wastes, infectious agents, plant nutrients, organic chemicals (e.g., pesticides and detergents), inorganic chemicals (e.g., acids), sediments, radionuclides, and thermal heat. 2 V. YANNAKONE & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES § 12:16 (1972).

2. *Id.* at § 2:19. An example of oxygen depletion and its effects is that of eutrophication. Eutrophication is a natural aging process of a body of water. The first phase of this process is the increase in biological productivity as a result of nutrient enrichment. This productivity is characterized by a vast population of algae whose decomposition requires vast supplies of oxygen. Though algae gives off oxygen while alive, the oxygen required for decomposition eventually becomes far greater than that replenished, and as the body of water becomes devoid of oxygen, for decomposition purposes, the ecosystem changes from lake to a swamp, and finally fills in to become dry land. The problem arises in that man-added nutrients (i.e., nitrogen and phosphorus compounds) accelerate this process and achieve in a few decades what the natural process would take tens of thousands of years to achieve. These accelerated algae growths interfere with domestic water supply, alarmingly decrease fish populations due to lack of oxygen, restrict recreational usages, lower shoreline property values, and desecrate aesthetic values. A prime example of the eutrophication problem is Lake Erie in which one-fourth of the lake is devoid of oxygen. It is interesting to note that 72% of the phosphorus entering Lake Erie comes from municipal wastes. See 1 A. REITZE, ENVIRONMENTAL LAW 4-25 (1972).

Attention should be directed to the problem of regulating the disposal of such domestic sewage which is the subject of this comment.

On July 1, 1977, about one-half of all the municipalities in the United States failed to comply with secondary treatment and water quality standards established pursuant to section 301 of the Federal Water Pollution Control Act Amendments of 1972 [hereinafter referred to as the Act].³ A problem arises regarding proper enforcement procedures to be taken against these non-compliant municipalities.

The basis of these section 301 standards is the concept of the "environmental debt", in that, a cost of "doing business" is the restoration of environmental destruction as to be more productive in the future. Collection of this "debt" is the primary responsibility of the federal government. The evolution of the Water Pollution Control Acts of 1948, 1956, and 1965, culminating in the 1972 Act, clearly shows the pre-emption of the federal government in this field.⁴ With few exceptions, individual states simply failed to enforce water pollution legislation, probably due to the real, or imagined, fear of driving industry from the state by the imposition of tougher environmental controls.⁵ Thus, the Environmental Protection Agency [hereinafter referred to as the EPA] became the implementor of the 1972 Act.⁶

3. Interview with Mr. Davis, Executive Secretary of the Virginia State Water Control Board, in Richmond, Virginia (September 15, 1977): Note that only about 10% of the major industrial dischargers failed to comply with their July 1, 1977 deadlines pursuant to § 301(b)(1)(A), § 1311(b)(1)(A) (Supp. V, 1975) of the Fed. Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. (Supp. V, 1975) [hereinafter cited as Act].

4. For example, the initial 1948 Act only authorized the federal government to supply technical assistance, research aid, and low interest loans to the states. In comparison, the 1956 Act incorporated limited federal enforcement power over interstate waters and the 1965 Act allowed the federal government to revise or reject submitted state water quality standards. See H. LIEBER, *FEDERALISM AND CLEAN WATERS* 12 (1975) [hereinafter cited as LIEBER]; See also S. Rep. No. 92-414, 92d Cong., 1st Sess. 2-3, reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3669-3670.

5. See generally LIEBER, *supra* note 4. As John Quarles, legal counsel for EPA, asserted: "We believe it is really only through the Federal Government that you can have an upgrading of standards, because you cannot expect any State to impose tougher standards that will drive industry away." H.R. REP. NO. 92-1333, 92d Cong., 2d Sess. 53 (1972) as cited in LIEBER, *supra* note 4, at 18 n.33.

6. Act § 101(d). The authority for water pollution control was conferred upon the independent EPA in 1970. Prior to that water pollution matters were handled by the Public Health Service, which came under the Department of Health, Education, and Welfare, from 1912 to 1965. Then the Federal Water Pollution Control Administration was created under HEW and later transferred to the Department of Interior in 1966. Finally, by presidential reorganization, the independent EPA was created in December 1970. LIEBER, *supra* note 4, at 12 n. a.

However, the passage of the 1972 Act dealt less with a moralistic obligation to pay this "debt", but rather was an outgrowth of the political realities of the time. Prior to passage of the 1972 Act, Presidential-aspirant Senator Muskie and President Nixon were jockeying for the "environmental votes."⁷ Senator Muskie had a strong record in environmental legislation⁸ and could indeed be considered the helmsman of the 1972 Act. The Muskie exposure of the issue, plus growing public concern as was evidenced by Muskie's following, forced President Nixon to engage in "politics" regarding this matter, which resulted in easy passage of the Act through Congress. Even upon vetoing the 1972 Act for "fiscal reasons"⁹ (which was subsequent to Senator Muskie's withdrawal from the presidential race), President Nixon still asserted that environmental protection had been "one of my highest priorities as President."¹⁰

Failure of the Presidential veto¹¹ led to the passage of an Act which has been labeled "difficult to understand, construe, and apply."¹² The tautology of "if no one pollutes, there will be no pollution"¹³ may seem valid to the Act's framers, but is of little solace to the Act's implementors, environmental practitioners, and the municipalities concerned.

II. THE FAILURE OF THE APPROPRIATE ACT SECTIONS

The objective of the 1972 Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"¹⁴ and the "goals" used to achieve this objective include the elimination of discharges of pollutants into navigable waters by 1985,¹⁵ an interim goal of water quality by July 1, 1983,¹⁶ and a prohibition on the discharge of toxic pollutants in toxic amounts.¹⁷ However, these "goals" are not anything more than exhor-

7. See LIEBER, *supra* note 4, at 17.

8. See *id.* at 39, 85; 118 CONG. REC. 37279 (1972) (remarks by Sen. Mansfield).

9. One explanation of the Presidential veto is that it was in retaliation for Congress not passing H.R.16810-a debt ceiling bill that would have authorized the President to restrict budget expenditures to \$250 billion for fiscal year 1973. LIEBER, *supra* note 4, at 82.

10. 118 CONG. REC. 37054 (1972) (veto message of President Nixon.)

11. Both houses repudiated the Presidential veto by a vote of 52-12 in the Senate, 118 CONG. REC. 36879 (1972), and 247-23 in the House of Representatives, 118 CONG. REC. 37060 (1972).

12. *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1027 (10th Cir. 1976); See also Note, *Judicial Maelstrom In Federal Waters: A Composite Interpretation Of The Federal Water Pollution Control Act Amendments Of 1972*, 45 *FORD. L. REV.* 625, 627 (1976).

13. *Judicial Maelstrom In Federal Waters*, *supra* note 12, at 626.

14. Act § 101(a), 33 U.S.C. § 1251(a) (Supp. V, 1975).

15. Act § 101(a)(1), 33 U.S.C. § 1251(a)(1) (Supp. V, 1975).

16. Act § 101(a)(2), 33 U.S.C. § 1251(a)(2) (Supp. V, 1975).

17. Act § 101(a)(3), 33 U.S.C. § 1251(a)(3) (Supp. V, 1975).

tations, in that, they are not legally binding nor self-executing, but rather, are totally dependent upon the effective administrative and technological implementation of several interrelated provisions.¹⁸

A framework of these provisions begins with section 301(a) which, except in compliance with the Act,¹⁹ considers "the discharge of any pollutant by any person" to be unlawful. Within the concept of legal and illegal discharges, the 1972 Act establishes a sliding scale of standards whereby permissible discharges (effluent limitations) become increasingly restrictive, arriving (supposedly) at the 1985 goal.²⁰

To monitor discharges so as to determine illegality, section 402 of the 1972 Act requires that a permit be issued for the discharge of any pollutant and that such permit be conditioned upon all applicable provisions of the Act.²¹

One applicable provision required that by July 1, 1977, all publicly owned treatment works plants were to have achieved a system of secondary treatment²² and were to have met any applicable water quality standards if the latter standards were more stringent in terms of effluent limitations than that of the secondary treatment system.²³ Continued operation after

18. As Senator Muskie stated: "[T]he 1985 deadline . . . is not locked in concrete. It is not enforceable. It simply established what the committee thinks ought to be done on the basis of present knowledge." Senate Committee on Public Works, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong., 1st Sess. 1262 (1973) as cited in LIEBER, *supra* note 4, at 42 n.12.

19. The exceptions include the compliance by such persons with §§ 301, 302, 306, 307, 318, 402, and 404 of the Act. Act § 301(a), 33 U.S.C. § 1311(a) (Supp. V, 1975).

20. See *Judicial Maelstrom In Federal Waters*, *supra* note 12, at 627. Note that § 302(b)(2) of the Act, 33 U.S.C. § 1312(b)(2) (Supp. V, 1975), allows EPA to seek improvements in water quality standards as weighed against the socioeconomic costs. Hence, attainment of the 1985 goal could depend heavily upon administrative skill in such endeavors.

21. The issuance of permits may be undertaken by the EPA, Act § 402(a)(1), 33 U.S.C. § 1342(a)(1) (Supp. V, 1975), or by any state that the EPA considers capable of administering such a program, Act § 402(a)(5), 33 U.S.C. § 1342(a)(5) (Supp. V, 1975) but EPA shall have veto power over the issuance of any permit by a delegated state, Act § 402(a)(5), 33 U.S.C. § 1342(a)(5) (Supp. V, 1975).

22. Act § 301(a)(1)(B), 33 U.S.C. § 1311(a)(1)(B) (Supp. V, 1975). The highly technical explanation of what constitutes secondary treatment, pursuant to EPA's authority to promulgate such rules, Act § 304(d)(1), 33 U.S.C. § 1314(d)(1) (Supp. V, 1975), may be found at 40 C.F.R. § 133.102 (1976).

23. Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (Supp. V, 1975). Water quality standards relate to the characteristics of the body of water into which pollutants are being discharged, with the idea that if the discharge is of the same character as the present water quality then such discharge is allowable. In contrast, effluent limitations are restrictions upon the type and amount of pollutants which may be discharged from a particular point source. *State Water Control Board v. Train*, 559 F.2d 921, 923 (4th Cir. 1977); See Davis and Glasser, *The Discharge Permit Program Under The Federal Water Pollution Control Act Of*

failing to comply with this deadline either rendered the treatment plants ineligible for a discharge permit, which resulted in discharge of pollutants without a permit, or rendered the plants in violation of a present permit condition (e.g. being in compliance with the July 1, 1977 deadline).²⁴ Both of these situations are violations of the law pursuant to the 1972 Act.²⁵

To comply with the mandates of section 301, the federal government, through the EPA, was to have provided 75% of the financing required for the construction of secondary treatment plants.²⁶ Section 207 authorized \$18 billion for this program for fiscal years 1973 through 1975.²⁷

Attributable to the non-compliance by one-half of all the municipalities in the United States to the secondary treatment standards²⁸ are arguments of a general administrative failure²⁹ and unrealistic and arbitrary deadlines due to insufficient funding of the construction grant program³⁰ and technological impracticabilities.³¹

However, the crushing blow to the secondary treatment standard deadline came after the presidential election of 1972 when President Nixon immediately impounded \$6 billion of the \$11 billion allocated for fiscal years 1973 and 1974.³² Under the guise of fiscal responsibility, President Nixon's "unique" statutory construction authorizing such power was premised upon section 207 which prefixed each fiscal year's authorization with the phrase "not to exceed"³³ and that the allotment provision of

1972—*Improvement Of Water Quality Through The Regulation Of Discharges From Industrial Facilities*. 2 *FORD. URB. L.J.* 179, 189-235 (1973).

24. See note 3 *supra*, and accompanying text.

25. See Act § 309, 33 U.S.C. § 1319 (Supp. V, 1975).

26. Act § 201(g)(1), 33 U.S.C. § 1281(g)(1) (Supp. V, 1975); Act § 202(a), 33 U.S.C. § 1282(a) (Supp. V, 1975).

27. The allotment of these funds to the states were to be undertaken on a pure need basis. Act § 205(a), 33 U.S.C. § 1285(a) (Supp. V, 1975). Also note that these grants were made on a contract funding method, Act § 205(a), 33 U.S.C. § 1285(a) (Supp. V, 1975), and that the grants were submitted on the basis of the plans submitted by the locality, Act § 201(g)(2)(A), 33 U.S.C. § 1281(g)(2)(A) (Supp. V, 1975).

28. See note 3 *supra*, and accompanying text.

29. See generally *State Water Control Bd. v. Train*, *supra* note 23, at 924; *LIEBER*, *supra* note 4, at 110-122.

30. See generally *State Water Control Bd. v. Train*, *supra* note 23, at 924; 123 *CONG. REC. H3031* (daily ed. April 5, 1977) (remarks by Rep. Burgener); Interview with Mr. Bailey, Director of Enforcement of the Virginia State Water Control Board, in Richmond, Virginia (September 15, 1977).

31. Interview with Mr. Bailey, *supra* note 30.

32. *Lieber*, *supra* note 4, at 111.

33. Section 207 of the Act, 33 U.S.C. § 1287 (Supp. V, 1975); states: "There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed \$5,000,000,000, for the fiscal year ending June 30, 1974,

section 205(a) stated "[s]ums authorized to be appropriated pursuant to section 207 . . ." instead of "[a]ll sums. . ." From these two provisions President Nixon felt he could thwart the power of Congress to spend. The Supreme Court unanimously declared such action illegal in 1975,³⁴ but the damage was already suffered. As early as March 1973, the EPA admitted that "even with sufficient funds it will be difficult for all communities to meet the 1977 deadline."³⁵

Given this set of circumstances, the Virginia State Water Control Board made the argument that receipt of the construction grant funding was a condition precedent to the duty to comply with the 1977 deadline. But, the Fourth Circuit in *State Water Control Board v. Train*³⁶ expressly held that: "Section 301(b)(1)'s effluent limitations are, on their face, unconditional; and no other provision indicates any link between their enforceability and the timely receipt of federal assistance."³⁷ Also the court did not discover an implicit link in the statutory scheme.³⁸

Hence, the non-compliant municipalities are subject to the general enforcement proceedings³⁹ of civil, criminal, and injunctive sanctions as are contained in section 309.⁴⁰

not to exceed \$6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed \$7,000,000,000."

34. *Train v. City of New York*, 420 U.S. 35 (1975).

35. Cited in LIEBER, *supra* note 4, at 115.

36. 559 F.2d 921 (4th Cir. 1977).

37. *Id.* at 924. Note that the results have been mixed with regard to a lack of promulgation of effluent guidelines concerning industrial dischargers. Compare *Republic Steel Corp. v. Train*, 557 F.2d 91 (6th Cir. 1977), with *Bethlehem Steel Corp. v. Train*, 544 F.2d 657 (3d Cir. 1976) and *U.S. Steel v. Train*, 556 F.2d 822 (7th Cir. 1977).

38. 559 F.2d 921, 924-27 (4th Cir. 1977).

39. Section 301(a), 33 U.S.C. § 1311(a) (Supp. V, 1975), of the Act provides that, except as in compliance with the Act, "the discharge of any pollutant by any person shall be unlawful." Being that the Act considers a municipality to be a "person" as under section 502(5), 33 U.S.C. § 1362(5) (Supp. V, 1975), they are subject to the general enforcement proceedings of section 309, 33 U.S.C. § 1319 (Supp. V, 1975), as are industrial polluters.

40. Willful violations of the Act for first time offenders may be fined up to \$25,000 per day of violation and/or up to one year in jail, whereas second offender sanctions are \$50,000 per day of violation and/or up to two years in jail. Act § 309(c)(1), 33 U.S.C. § 1319(c)(1) (Supp. V, 1975). Making knowingly false representations, with regard to reporting requirements under the Act, carries a penalty of \$10,000 and/or up to six months in jail. Act § 309(c)(3), 33 U.S.C. § 1319(c)(3) (Supp. V, 1975). Mere non-compliance with the Act, of which involuntary non-compliance is covered, subjects one to a civil penalty not to exceed \$10,000 per day of any such violation. Act § 309(d), 33 U.S.C. § 1319(d) (Supp. V, 1975). Also, an immediate restraining order may be obtained in a federal district court where the pollution source presents an imminent and substantial endangerment to the health, welfare, or livelihood of any such affected people. Act § 504, 33 U.S.C. § 1364 (Supp. V, 1975).

However, such traditional enforcement procedures, as contained in the Act, are impractical and do not solve the problem at hand. To "jail" or fine a financially strapped municipality would exacerbate the problem rather than alleviate it. So, in noting the prosecutorial discretion allowable EPA under section 309,⁴¹ the court in *State Water Control Board v. Train* warned the EPA to exercise such discretion in declining to bring action against municipalities failing to comply with the deadline due to good faith inability. The court strengthened its warning by announcing its intention to retain equitable discretion in determining penalties imposed in such situations.⁴² Furthermore, the court noted that "such discretion must be exercised on a case by case basis" because "[t]here is no conclusive presumption that a municipality not receiving timely federal assistance is economically unable to comply with the 1977 deadline."⁴³

So, given the paradox of the absolute mandate of section 301 and the undesirability of its implementation under section 309, the conclusions are two. First, *State Water Control Board v. Train* shows that the problem cannot be handled at the permit issuance stage by the attachment of a compliance schedule, in that, the issuance of a permit not in conformance with the secondary treatment standard would itself be illegal.⁴⁴ Second, caught between judicial rigidity and Congressional inaction, the EPA and its subservient agencies⁴⁵ must develop an ad hoc enforcement scheme to reconcile the conflicting interests of preserving the integrity of the 1972 Act and to spare "faultless" municipalities. Through a series of intra-agency letters and memos, such an enforcement scheme has been developed in broad outline.

41. See also *Sierra Club v. Train*, 9 ERC 1096, (1975), *aff'g*, No. 75-4028 (5th Cir. Aug. 12, 1977) (this case held that a § 505(a)(2) citizen suit cannot compel EPA's initiation of an enforcement action under § 309, since the agency's § 309 enforcement duties are discretionary. Such a citizen suit will only be successful where the duty is mandatory); 8 ENVTL REP. CURR. DEV. 219 (June 10, 1977).

42. *State Water Control Bd. v. Train*, 559 F.2d 921 (4th Cir. 1977). The Court said in whole: We fully expect that, in the exercise of prosecutorial discretion, EPA will decline to bring enforcement proceedings against such municipalities. Furthermore, in cases where enforcement proceedings are brought, whether by EPA or by private citizens, the courts retain equitable discretion to determine whether and to what extent fines and injunctive sanctions should be imposed for violations brought about by good faith inability to comply with the deadline. In exercising such discretion, EPA and the district courts should, of course, consider the extent to which a community's inability to comply results from municipal profligacy.

Id. at 927.

43. *Id.* at 927 n. 35.

44. Note the lower court opinion of *State Water Control Bd. v. Train*, 424 F. Supp. 146 (E.D. Va. 1976).

45. See note 21, *supra*.

III. DEVELOPMENT OF ENFORCEMENT PROCEDURES AND MECHANISMS

To fulfill the dual objectives of securing maximum pollution abatement by accelerating compliance and maintaining the integrity of the Act,⁴⁶ EPA will follow the spirit of *State Water Control Board v. Train* by taking section 309 action against non-complying municipalities proceeding in "bad faith"⁴⁷ and will concoct extra-permit mechanisms for "good faith" municipalities to avoid section 309 proceedings.⁴⁸ Similarly, to achieve the objective of maximum pollution abatement, initial enforcement action will be directed against "major" dischargers and focus upon construction of grant facilities rather than effluent limitation violations.⁴⁹

Conversely, the EPA will not proceed against a municipality in a section 309 proceeding if the discharger has no effective permit due to the fault of the EPA, if the discharger's delay is attributed to utilization of appeal procedures made available by EPA, or if the discharger's delay is caused by "the protracted nature of the construction grant process."⁵⁰ The latter exemption applies only to those municipalities that in "good faith" proceeded as expeditiously as practicable and were funded under section 207 as of July 1, 1977.⁵¹

Hence, a priority ranking of municipalities that EPA will bring section 309 enforcement action against will be determined by the factors of: "a) Threat to human health; b) Bad faith,⁵² particularly where the discharger has acted in bad faith in the past and is presently proceeding on such a casual schedule that present and future bad faith can be assumed; and c) Impact of existing discharges and length of time required to obtain compliance."⁵³ So, the major, "bad faith" municipalities will be proceeded against through section 309, whereas the "good faith" municipalities will

46. Letter from Mr. Costle, EPA Administrator, to All Regional Administrators and Approved NPDES State Directors, at 1 (June 21, 1977).

47. *Id.* at 4.

48. *Id.* at 6.

49. *Id.* at 2.

50. Letter from Mr. Legro, Assistant Administrator for Enforcement (EPA), to Regional Administrators, Regional Enforcement Directors, and NPDES State Directors, at 2 (June 3, 1976).

51. *Id.*

52. Examples of "bad faith" includes, but is not limited to, municipalities that failed to meet the deadline despite funding being available to the state, or inadequate operation and maintenance of constructed treatment facilities. Costle Letter, *supra* note 46, at 1.

53. *Id.* at 3. Priorities for enforcement action against violations of effluent limitations are: "a) magnitude of the violation; b) inadequate treatment facilities; c) inadequate treatment facility operation." *Id.* at 4. *Accord*, 8 ENV'TL REP. CURR. DEV. 249 (June 10, 1977).

be allowed to escape such enforcement proceedings by means of extra-permit mechanisms.⁵⁴

The recommended EPA extra-permit mechanism for these "good faith" municipalities is the Enforcement Compliance Schedule Letter [hereinafter referred to as the ECSL].⁵⁵ Under this mechanism a permit is issued which states that the receiving municipality has met the required standards. Hence, the receiving municipality is in violation of law, with regards to being in violation of a permit condition, at the point of issuance. However, the issuing authority simultaneously issues an ECSL which is composed of a compliance schedule and a *statement of the authority's intention* to refrain from enforcing the July 1, 1977 deadline.⁵⁶

It is significant that the ECSL does not waive any enforcement rights, nor does the municipality admit to any "wrongdoing." So, the threat of EPA enforcement is always present, and, in case of municipal violation of an ECSL, the appropriate agency would be required to follow the enforcement proceedings of section 309.

The ECSL may be illegal because EPA has no specific authority to issue such a document,⁵⁷ in that, section 301 makes no exceptions as to compliance with the standard. But the ECSL strategy is an ad hoc mechanism adapting to the realities of Congressional inaction and a need to effectively reconcile competing interests, which constitutes a benefit overriding the taint of illegality. As an aide to Senator Muskie stated, the ECSL strategy "was illegal, but sensible".⁵⁸

Two other extra-permit mechanisms that are used to achieve ECSL results are the court order schedule and the consent order.⁵⁹ The former action is a court-imposed compliance schedule establishing interim standards with congruent penalties for non-compliance.⁶⁰ In most states this is very impractical in that the expense and time involved in obtaining judicial approval would be an impossible burden for most agencies.⁶¹

However, the consent order is far more appealing. Under this scheme⁶²

54. Costle Letter, *supra* note 46, at 6.

55. *Id.*

56. Legro Letter, *supra* note 50, at 4.

57. Telephone interview with Mr. McEachern, Division Head of Bureau of Enforcement of the Virginia State Water Control Board, in Richmond, Virginia (Sept. 21, 1977).

58. 8 ENV'TL REP. CURR. DEV. 512 (Aug. 5, 1977).

59. Interview with Mr. Bailey, *supra* note 30.

60. *Id.*

61. However, for a state like Delaware, with only seventy-five major dischargers, this system is very efficient. *Id.*

62. A "consent order", or a "consent judgment", is a judgment entered on agreement of

the appropriate agency issues a permit in compliance with the secondary treatment deadline simultaneously with a consent order which sets out interim standards in accordance with grant availability.⁶³ The municipality agrees to the conclusions of facts and law stated within the order, and upon non-compliance with any interim standard the consent order is directly enforceable by the courts.⁶⁴ Hence, in contrast with the ECSL, the agency has an enforcement mechanism over the interim standards and the process of establishing facts and law as to the action is dispensed with, in that, the "consent judgment" is complete.⁶⁵ Of course, if the municipality does not agree with the consent order, judicial action is appropriate.

Whatever terminology is used—ECSL, court order schedule, or consent order—these ad hoc mechanisms are forced to be developed due to Congressional inaction. But, within both houses of Congress there have been proposed amendments to the 1972 Act which have been under consideration for the past two years.⁶⁶ The present versions of S1952 and HR3195⁶⁷ differ in many respects, but the respective provisions relating to the extension of the secondary treatment deadline are not in real conflict.⁶⁸ Furthermore, with the exception of stated deadlines for the time allotted for such extensions,⁶⁹ the passage of these amendments shall merely codify the EPA enforcement strategy as outlined above.⁷⁰ So, as to enforcement strategy with regard to the non-compliance with the secondary treatment deadline, the passage of the proposed amendments shall have no effect.⁷¹

the parties, which receives the sanction of the court, and it constitutes a contract between the parties to the agreement, operates as an adjudication between them and, when a court gives the agreement its sanction, becomes a judgment of the court. *Traveler's Ins. Co. v. United States* 283 F. Supp. 14 (D. C. Tex. 1968). For instance, in Virginia, the State Water Control Board issues consent orders via VA. CODE ANN. § 62.1-44.15(8)(a) (Cum. Supp. 1977) which is directly court enforceable pursuant to VA. CODE ANN. § 62.1-44.23 (Cum. Supp. 1977). Note that the consent order is considered a species of a "special order" in these provisions. Telephone interview with Mr. McEachern, *supra* note 57.

63. Interview with Mr. Bailey, *supra* note 30.

64. See note 62, *supra*.

65. *Id.*

66. See 123 CONG. REC. H3028 (daily ed. Apr. 5, 1977) (remarks by Mr. Johnson).

67. For the text of these amendments, see 123 CONG. REC. H3049 (daily ed. Apr. 5, 1977); 123 CONG. REC. S13,619 (daily ed. Aug. 4, 1977).

68. The only substantive difference is that the Senate version allows possible extensions up to July 1, 1983, whereas the House version allows possible extensions to July 1, 1982. *Id.*

69. *Id.*

70. 8 ENV'T'L REP. CURR. DEV. 512 (Aug. 5, 1977).

71. *Id.* But, note the problem of financing these construction grant programs. This program is presently held together by the surplus of the released impounded funds and a supplemental one billion dollar funding appropriation for fiscal 1977, but it is estimated that thirty-four states will exhaust their funds in 1977. 8 ENV'T'L REP. CURR. DEV. 9 (May 6, 1977). Obvi-

CONCLUSION

As explicitly maintained throughout this commentary, the establishment of selective enforcement through ad hoc mechanisms with regard to non-compliant municipal dischargers is required by the particular realities of the situation. However, such alteration of the law by administrative fiat could produce great adverse impacts. As one expert stated, "If enforcement of the first significant deadline is fumbled, the new thrust in water pollution control hailed with such enthusiasm in 1972 will have failed its first crucial test."⁷²

The failure of the July 1, 1977 deadline is perhaps a statement of the present condition of all environmental legislation, in that, the exhortatory rhetoric of such legislation's passage is circumvented by the economic and political pressure brought to bear upon the legislation's enforcement.⁷³ Indeed, environmental legislation lies on a continuum between consensus and conflict—the consensus at least being the appeasement of "public opinion" by the passage of such legislation, whereas the enforcement circumvention arises due to the conflicts of powerful economic and political entities who feel the environmental legislation in antithesis to their interests.

But, as in all changes in legislation or in all changes of enforcement policy, the interest groups of a political system are constantly changing positions slightly as to "eke out" a product in terms of legislation or policy. The problem is that these legislative and policy directives are usually only developed after the situation has been at hand for a long period of time. The rub is that by then it may be too late.

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ously, new funding, as is included within the proposed amendments, is required for the continuance of construction grants.

72. 8 ENV'T'L REP. CURR. DEV. 430 (July 15, 1977).

73. For example, under pressure from the automobile manufacturers, Congress approved a delay in standards of emission controls on 1978 model cars. 8 ENV'T'L REP. CURR. DEV. 567 (Aug. 12, 1977). Perhaps even more significant is that if Congress had not granted such an extension the EPA had already devised an enforcement policy which would have extracted only nominal penalties from the automobile manufacturers. 8 ENV'T'L REP. CURR. DEV. 599 (Aug. 19, 1977).

