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## Enforcement of Section 208 of the Federal Water Pollution Control Act Amendments of 1972 to Control Nonpoint Source Pollution

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# COMMENT

## ENFORCEMENT OF SECTION 208 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 TO CONTROL NONPOINT SOURCE POLLUTION

Point source water pollution is a recognized problem. A thick, smelly fluid pouring from a pipe into the local river is highly visible, and an obvious source of water pollution. Less recognized are the water pollution problems presented by irrigation, logging, road building and other similar activities. The nation has taken great strides in turning the corner in efforts to control industrial and municipal water pollution. Yet the battle has barely begun in the effort to control pollution resulting from agriculture or other nonpoint sources. Nonpoint source pollution (NPS) looms as a greater and greater contributor to this country's water pollution as the more obvious sources are brought under control.

The major vehicle for the control of water pollution are the Federal Water Pollution Control Act Amendments of 1972.<sup>1</sup> The only provision of that far reaching legislation that deals directly with the problem of NPS is Section 208<sup>2</sup> and because a statute's effectiveness extends only as far as its enforcement capabilities this comment discusses the enforcement of Section 208 as it relates to the implementation of controls on NPS. Three levels of enforcement are discussed: enforcement by the Environmental Protection Agency (EPA), enforcement through the citizen suit and enforcement on the state and local level.

### THE NONPOINT SOURCE POLLUTION PROBLEM

The first steps in discussing the control of NPS should be to clarify what NPS is and the extent of the problem.

#### *What NPS Is*

**The Federal Water Pollution Control Act Amendments of 1972 (hereinafter the Act) do not explicitly define NPS,**

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1. Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), Pub. L. No. 92-500, 86 Stat. 816 (1972), §§ 101-516; 33 U.S.C.S. §§ 1251-1376 (Supp. 1978).
2. 33 U.S.C.S. § 1288 (Supp. 1978); Textual references will be to sections of the original Act, with U.S.C.S. citations in the footnotes.

but it can be inferred that NPS is the accumulated pollutants in the stream, diffuse runoff, seepage and percolation contributing to the degradation of the quality of surface and groundwaters. An example of NPS is that created when irrigation water is applied to the land, it accumulates sediment, pesticides and fertilizer chemicals.<sup>3</sup>

NPS can be practically defined as all water pollution not caused by point sources.<sup>4</sup>

The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.<sup>5</sup>

The types of pollution not encompassed by this definition of point sources are treated by the Act as NPS.

### *Extent of the Problem*

NPS pollution has come to be recognized as a major contributor of pollution on many waterways.<sup>6</sup> In the past, it had been assumed the effect of NPS was minimal relative to point sources such as municipal and industrial waste discharges.<sup>7</sup> It is now known that this assumption is wrong. In some cases, reductions achieved through control of point

3. EPA, GUIDELINES FOR STATE AND AREAWIDE WATER QUALITY MANAGEMENT PROGRAM DEVELOPMENT, 7-1 (November 1976). [Hereinafter cited as 1975 GUIDELINES].

4. An EPA official has listed what he thought were the characteristics of NPS:

(1) It discharges in a diffuse manner, at intermittent intervals.

(2) It arises over an extensive area of land and is in transit overland.

(3) Generally, it can't be monitored at its point or origin and often the exact source is not traceable.

(4) Elimination or control efforts must be directed at specific sites.

(5) The most effective controls are land management techniques and conservation practices.

(6) Compliance monitoring must be carried out on land rather than water.

(7) NPS can't be measured in terms of effluent limitations.

(8) Often the extent of NPS is related, at least in part, to uncontrollable climatic events, geology, and geography, these vary greatly from site to site.

(9) It is usually derived from consecutive operations on extensive units of land versus industrial activities that typically use repetitive operations on intensive units of land.

Pisano, *Nonpoint Source Water Pollution*, 31 J. OF SOIL & WATER CONSERVATION 95, 96 (May-June 1976).

5. F.W.P.C.A.A. § 502(14); 33 U.S.C.S. § 1362(14) (Supp. 1978).

6. BNA ENVIRN. REP., CURRENT DEV., 2145, 2164 (Apr. 23, 1976).

7. Loehr, *Characteristics and Comparative Magnitude of Non-Point Sources*, 46 J. OF WATER POLLUTION CONTROL FED'N 1849 (Aug. 1974).

sources are minimized by NPS.<sup>8</sup> Thus, the 1983 interim goal of a water quality sufficient for "the protection and propagation of fish, shellfish, and wildlife and . . . recreation in and on the water" set by the Act<sup>9</sup> can not be met unless meaningful NPS controls complement the point source controls.<sup>10</sup>

Agricultural activities create a great deal of NPS. Erosion from an estimated 400 million acres of cropland is the greatest pollutant, yielding nearly two billion tons of sediment yearly.<sup>11</sup> Irrigation is a major part of that problem,<sup>12</sup> affecting water quality in many ways.<sup>13</sup> Irrigation water can erode sediment and carry it into receiving waters. Often transported, besides sediment, are nitrogen and phosphorus from fertilizer and pesticides which are carried into receiving waters.<sup>14</sup> Irrigation return flows may also add heavy metals, trace elements, farm oils and greases, bacteria and other forms of pollution.<sup>15</sup> Irrigation also contributes to the salinity problem which is very serious in some areas.<sup>16</sup>

Silviculture is another major NPS contributor. Silviculture is the cutting and hauling away of timber and the cultivating of new trees to replace those taken. There are 500 million acres of commercial forests in the United States of which 1.7 and 1.5 million acres were harvested in 1965 and 1975 respectively.<sup>17</sup> Removal of vegetative cover and the overhead canopy and the construction of logging roads are the main causes of silviculturally related NPS. Most of the pollution occurs as a result of naturally occurring precipitation and most of the pollution material is sediment. Wherever pesticides and fertilizers are used, those chemicals

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8. STAFF REPORT TO THE NATIONAL COMMISSION ON WATER QUALITY, I-73 (April, 1976). [Hereinafter cited as STAFF REPORT].

9. F.W.P.C.A.A. § 101(a)(2), 33 U.S.C.S. § 1251(a)(2) (Supp.1978).

10. Staff Report, *supra* note 8, at 5.

11. Pisano, *supra* note 4, at 96-97.

12. Nearly 65% of irrigation water is used consumptively. Water may be lost by evaporation, or transpiration from plants. The portion of water remaining after all losses which finds its way back into the surface and subsurface hydrosystem is termed "irrigation return flow." Comment, *Federal Law, Irrigation and Water Pollution*, 22 S.D.L. REV. 553, 556 (1977).

13. About 97% of irrigated farmland in the United States is located in the 17 western states, Arkansas, Louisiana, and Florida. Staff Report, *supra* note 8, at II-173.

14. *Id.* at II-169.

15. Comment, *supra* note 12, at 558.

16. See generally, Comment, *Colorado River Salinity Problems—Old Approaches to a New Issue*, 11 LAND & WATER L. REV. 459 (1976). Although about 65% of the salinity problem is from natural causes, much of the rest is caused by irrigated agriculture. Staff Report, *supra* note 8, at VI-11.

17. Staff Report, *supra* note 8, at I-74.

become a component of the pollution also. It is estimated that logging is the major cause of increased sediment yields in the Northeast and Pacific Northwest.<sup>18</sup>

Another primary source of NPS is construction activity. A recent estimate found 1.6 million acres disturbed annually by construction activities with construction of roads and highways accounting for 90% of the disturbed acreage.<sup>19</sup> The annual sediment yield from uncontrolled construction sites is estimated to be 200 million tons.<sup>20</sup>

Mining activity and urban runoff also make their contributions to the problem. The primary problems associated with inactive mines, found in many areas of the west, are sediment production from areas stripped of their vegetative cover and acid production from exposed chemically reactive areas.<sup>21</sup> Strip mining necessarily requires the creation of piles of overburden, while the vein is mined, which are very susceptible to erosion and sediment production.

Although the United States Court of Appeals for the District of Columbia treated storm sewers as point sources,<sup>22</sup> urban areas are still sources of NPS. For instance, runoff from uncontrolled dumping sites transports pollutants into rivers and streams. In areas not served by adequate storm sewers, the first wash of city streets caused by a downpour will yield material amounts of pollutants such as sediments, chemicals, bacteria and other similar types of pollutants.

The National Commission on Water Quality estimated that if best practical technology were achieved with point sources the following amounts of these pollutants will be attributable to NPS: Suspended solids 92%; nitrogen 79%; phosphorus 53%; and fecal and coliform counts 98%.<sup>23</sup> Non-point source pollution is coming to the forefront as the next major water pollution problem. Solving the water pollution problem necessarily entails successfully confronting NPS.

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Natural Resources Defense Council, Inc. v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369 (D.C. Cir. 1977).

23. *Pisano*, *supra* note 4, at 95.

### *NPS Can Be Controlled*

Although reduction of NPS is not an easy task, it can be accomplished. Many potential control methods have been identified so most of the remaining obstacles are related to implementation problems and economic feasibility.

As far as methodology is concerned, two options are available:

1. The collection and treatment of pollutants,
2. The reduction and/or prevention of the formation of runoff, seepage and percolation of pollutants.<sup>24</sup>

The first option is the method typically used to control point sources. With a point source a discernible conveyance makes the collection of pollutants relatively easy. Also, point sources of pollution are susceptible to effluent limitations because the volume or types of pollutants can be measured at the point they leave the particular conveyance. On the other hand, NPS is difficult if not impossible to collect. The runoff occurs over vast areas of land as does the seepage into groundwater. By definition, it does not become concentrated into a discernible conveyance and thus NPS from any particular source is difficult to measure. The overall effect on a river can be measured, but the sources can usually only be identified as contributors. Without accurate measurement, effluent limitations are not effective against specific NPS sources.

The second option is the methodology needed for the control of NPS. Generally, the identification and use of appropriate management practices is more likely to achieve success.<sup>25</sup> Appropriate management practices are those methods of conducting activities, which create NPS, in such a manner that the efficacy of runoff is reduced or potential pollutants are protected from the runoff. For example, where mining or construction have denuded an area of its vegetative cover, new plants or other impediments are needed to slow the rate of runoff. More careful use of fertilizer and

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24. 1976 GUIDELINES, *supra* note 3, at 7-4.

25. Loehr, *supra* note 7, at 1870.

pesticides would reduce the exposure of these potential pollutants to runoff.

Appropriate management practices are effective. If soil conservation practices were applied to all farmland, sediment pollution could be reduced by 50% as well as concomitant reductions in related pollutants such as pesticides and nutrients.<sup>26</sup> Management practices such as timing the application of fertilizer to coincide closely with crop need, proper timing and methods of irrigation and proper land and crop management techniques could further reduce pollution.<sup>27</sup> Application of vegetative cover to reduce the rate of runoff would aid in regulating erosion.<sup>28</sup> Silviculture sedimentation could be significantly reduced by changes in logging practices or site preparation methods. Sediment management at construction sites could reduce the sediment yield by 70%.<sup>29</sup>

#### THE STATUTORY SCHEME

The Federal Water Pollution Control Act Amendments of 1972<sup>30</sup> were enacted by Congress as a comprehensive plan to conquer the nationwide water pollution problem. Its ambitious goal is to "restore and maintain the chemical, physical and biological integrity of the nation's waters."<sup>31</sup> Goals and statements of national policy to achieve the overall goal were also explicitly stated. Among them was the goal to eliminate discharges into navigable waters by 1985. The Act also required that federal financial assistance be provided to construct publicly owned waste treatment works and that areawide waste treatment management processes be developed and implemented to control all sources of pollution within a state.<sup>32</sup> Numerous articles have addressed various aspects of the Act,<sup>33</sup> so it would serve no purpose to describe it in detail. A brief outline of the Act will suffice to put Section 208 in perspective.

26. Pisano, *supra* note 4, at 96.

27. Loehr, *supra* note 7, at 1870.

28. *Id.* at 1852.

29. Staff Report, *supra* note 8, at I-74.

30. 33 U.S.C.S. §§ 1251-1376 (Supp. 1978).

31. F.W.P.C.A.A. § 101(a); 33 U.S.C.S. § 1251(a) (Supp. 1978).

32. F.W.P.C.A.A. § 101(a)(1)(4)(5); 33 U.S.C.S. § 1251(a)(1)(4)(5) (Supp. 1978).

33. See Generally Ipsen and Raisch, *Enforcement Under the Federal Water Pollution Control Act Amendments of 1972*, 9 LAND & WATER L. REV. 369 (1974); Comment, *Federal Water Pollution Control Act Amendments of 1972*, 17 NAT. RES. J. 511 (1977).

The Act consists of three major components; the National Pollution Discharge Elimination System<sup>34</sup> (NPDES), the construction grants program,<sup>35</sup> and various planning provisions.<sup>36</sup> The discharge of any pollutant<sup>37</sup> into navigable waters<sup>38</sup> is prohibited<sup>39</sup> unless an NPDES permit is obtained.<sup>40</sup> The definition of "discharge of pollutants" limits that term to pollution from point sources. Of course, by definition, NPS is not subject to this type of regulation. Effluent limitations<sup>41</sup> are established, and permits to discharge pollutants must be in conformity. If a state can establish a satisfactory system, it can operate and manage its own NPDES program.<sup>42</sup>

The second major component of the Act is the construction grants program. Its purpose is to prompt the planned construction of waste treatment works which will aid the achievement of the goals of the Act.<sup>43</sup>

The third component of the Act consists of four important planning provisions. Section 106(f)(3) requires an annual report by the state on its, "program for the prevention, reduction, and elimination of pollution in accordance with the purposes and provisions of this Act."<sup>44</sup> Annual federal grants for state pollution control programs are conditioned on the submission of acceptable plans.

Section 201(b)<sup>45</sup> calls for waste treatment plans to be used in conjunction with the construction grants program.

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34. F.W.P.C.A.A. §§ 401-405; 33 U.S.C.S. §§ 1341-1345 (Supp.1978).

35. F.W.P.C.A.A. §§ 201-217; 33 U.S.C.S. §§ 1281-1297 (Supp. 1978).

36. F.W.P.C.A.A. §§ 106(f)(3), 201(b), 303(e), 208; 33 U.S.C.S. §§ 1256(f)(3), 1281(b), 1313(e), 1288.

37. The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. F.W.P.C.A.A. § 502(12); 33 U.S.C.S. § 1362(12) (Supp. 1978).

38. "The term 'Navigable waters' means the waters of the United States, including the territorial seas." F.W.P.C.A.A. § 502(7); 33 U.S.C.S. § 1362(7) (Supp. 1978).

39. "Except as in compliance with this section and sections shall be unlawful." F.W.P.C.A.A. § 301(a); 33 U.S.C.S. § 1311(a) (Supp. 1978).

40. F.W.P.C.A.A. § 402; 33 U.S.C.S. § 1342 (Supp. 1978).

41. The term "effluent limitation" means 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. F.W.P.C.A.A. § 502(11); 33 U.S.C.S. § 1362(11) (Supp. 1978).

42. F.W.P.C.A.A. § 402(b); 33 U.S.C.S. § 1342(b) (Supp. 1978).

43. See generally, F.W.P.C.A.A. §§ 201-217; 33 U.S.C.S. §§ 1281-1297 (Supp. 1978).

44. 33 U.S.C.S. § 1256(f)(3) (Supp. 1978).

45. 33 U.S.C.S. § 1281(b) (Supp. 1978).



It has been incorporated by EPA into the construction grants program as step one facility planning.<sup>46</sup>

States are required to create and maintain a continuous planning process by Section 303(e).<sup>47</sup> Numerous items must be included in the planning process such as effluent limitations and schedules of compliance, water quality standards, priorities for the construction grants program and all the required elements of Section 208 planning. "The purpose of the states' continuous planning process is to set up a management program and procedures to carry out water quality planning and implementation requirements of the Act."<sup>48</sup>

### SECTION 208

Section 208<sup>49</sup> is the fourth planning provision and the one with which this comment is primarily concerned. It is designed to aid the development and implementation of area-wide waste treatment planning processes to assure the adequate control of all sources of pollution in each state.<sup>50</sup> As the National Commission on Water Quality noted, "Any effective strategy for control of nonpoint sources within the framework of the Act can only be a product of the areawide planning process."<sup>51</sup> Although nonpoint sources are mentioned in other parts of the Act, this is the vital and indispensable section dealing directly with their control.

Section 208 has three major subsections. Subsection (a) provides for the designation of planning agencies, whose responsibility it is to formulate the 208 plan for its designated area. Subsection (b) sets out what must be contained

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46. Staff Report, *supra* note 8, at V-104.

47. 33 U.S.C.S. § 1313(e) (Supp. 1978).

48. 1976 Guidelines, *supra* note 3, at 2-1. EPA has proposed new regulations affecting the four major planning sections. Proposed Regulations 40 C.F.R. §§ 35.1500-35.1580, Fed. Reg. (1978). They would amend 40 C.F.R. by deleting Parts 130, 131, 35.200 through 35.236, and 35.551 through 35.570. Their effect is to consolidate and revise the regulations implementing sections 106, 208, and 303(e). One reason behind the proposed regulations was the passage of the Clean Water Act of 1977 (P.L. 95-217) which amended the Act. Due to the anticipated adoption of these regulations reference will be made to them throughout this comment. [Hereinafter cited as Prop. Reg.].

49. 33 U.S.C.S. § 1288 (Supp. 1978).

50. F.W.P.C.A.A. § 101(a)(5); 33 U.S.C.S. § 1251(a)(5) (Supp. 1978).

51. Staff Report, *supra* note 8, at I-65. Originally, the other two components of the Act, NPDES permits and construction grants, were to follow the dictates of § 208 planning. In reality, the permit program and the construction grants program were given priority over § 208 planning, thus reversing the Congressionally intended sequence. *Id.* at I-64.

in each 208 plan. Subsection (c) provides for the designation of management agencies. There may be more than one management agency for each designated area and it is their responsibility to implement their assigned components of the 208 plan.

### *Planning Agencies*

Subsection (a) of Section 208 sets forth the procedural process for initiating the 208 planning process. Section 208 (a)(1) requires the Administrator to publish guidelines for the identification of areas with substantial water quality problems. Next the Governor of each state is required by Section 208(a)(2) to identify areas in his state with substantial water quality problems and designate a local organization to provide the 208 planning for that area. According to Section 208(3) Governors of two states may designate a local organization to conduct the planning for an interstate area. If the Governor fails to designate water quality problem areas, local groups may do so.<sup>52</sup>

At first the EPA and the states interpreted subsection (a) as requiring 208 planning only for those areas designated as having substantial water quality problems. The result was ninety-five percent of the country was not covered by 208 planning. But in Section 208(a)(6) the Act provides the state shall act as the planning agency for all areas of the state not designated as critical areas. Thus, the United States Court of Appeals for the District of Columbia held, in *Natural Resources Defense Council v. Costle*,<sup>53</sup> that the state, when it is acting as the planning agency under Section 208(a)(6), must include in its planning all the elements required in subsection (b), just as though it were a designated agency. The effect of that decision is the entire country must go through the rather detailed 208 planning, rather than just areas deemed to have substantial pollution problems. The decision is far reaching in its effect, and might mean the difference between effective or ineffective control of NPS under the Act.

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52. F.W.P.C.A.A. § 208(a)(4); 33 U.S.C.S. § 1288(a)(4) (Supp. 1978).

53. *Natural Resources Defense Council v. Costle*, 184 U.S. App. D.C. 88, 564 F.2d 573 (D.C. Cir. 1977).

*Management Agencies*

Management agencies are to implement the appropriate provisions of 208 plans as developed by the designated planning agencies or the states. Subsection 208(c) sets out the process of designating management agencies. The Governor may designate one or more management agencies for each area designated under subsection (a).<sup>54</sup> The EPA administrator (hereinafter the Administrator) must accept such a designation unless the management agency lacks authority to perform various enumerated tasks.<sup>55</sup> Management agencies usually are existing state or local agencies with some expertise in the specific area of the 208 plan assigned to them for implementation. For example, the state highway department may be designated to develop and implement management practices for highway construction. A local soil and water conservation district may be designated to work on NPS from agriculture in its district.

*Requirements of the 208 Plan*

Subsection (b)(2)<sup>56</sup> describes the required elements of a 208 plan. A twenty year municipal and industrial waste treatment planning and financing program is required by Section 208(b)(2)(A). Section 208(b)(2)(B) calls for the establishment of construction priorities and a time schedule for their completion. Measures necessary to carry out each plan such as time, costs, and impact must be included in the plan.<sup>57</sup>

The nonpoint source control provisions are contained in 208(b)(2)(F - H). For "agriculturally and silvaculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production,"<sup>58</sup> mine related sources of pollution,<sup>59</sup> and construction activity related sources of pollution,<sup>60</sup> a process to identify these sources of pollution

54. F.W.P.C.A.A. § 208(c)(1); 33 U.S.C.S. § 1288(c)(1) (Supp.1978).

55. F.W.P.C.A.A. § 208(c)(2)(A-1); 33 U.S.C.S. § 1288(c)(2)(A-1) (Supp. 1978).

56. 33 U.S.C.S. § 1288(b)(2) (Supp. 1978).

57. F.W.P.C.A.A. § 208(b)(2)(F); 33 U.S.C.S. § 1288(b)(2)(F) (Supp. 1978).

58. F.W.P.C.A.A. § 208(b)(2)(F); 33 U.S.C.S. § 1288(b)(2)(F) (Supp. 1978).

59. F.W.P.C.A.A. § 208(b)(2)(G); 33 U.S.C.S. § 1288(b)(2)(G) (Supp. 1978).

60. F.W.P.C.A.A. § 208(b)(2)(H); 33 U.S.C.S. § 1288(b)(2)(H) (Supp. 1978).

and a process to "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources"<sup>61</sup> must be included in the 208 plan. Although land use requirements are often controversial,<sup>62</sup> the Act clearly contemplates such measures. "The term land use controls in section 208(b)(2)(F - H) includes those land use controls (legally permitted uses) and those land management regulations (regulation of activities conducted on land) which contribute to the attainment of water quality standards."<sup>63</sup>

Land use practices and other management practices effective in controlling NPS will be identified as best management practices (BMP's) and will provide the basis for any control program.<sup>64</sup> EPA has defined BMPs as,

those methods, measures, or practices to prevent or reduce water pollution and include but are not limited to structural and nonstructural controls, and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving water. Economic, institutional, and technical factors shall be considered in determining feasibility. BMPs shall be developed in a continuing process of identifying control needs . . . and evaluating and modifying the BMPs as necessary to achieve the goals.<sup>65</sup>

For any given NPS problem, there may be more than one management practice effective in reducing NPS. The above factors are to be considered in selecting the one to be used.

Section 208 planning for the control of NPS must reflect BMPs as defined by planning agencies in accordance with

61. F.W.P.C.A.A. § 208(b)(2)(F-H); 33 U.S.C.S. § 1288(b)(2)(F-H) (Supp. 1978).

62. See generally, Comment, *Areawide Planning Under Federal Water Pollution Control Act Amendments of 1972: Intergovernmental and Land Use Implications*, 54 TEX. L. REV. 1047 (1976).

63. 1976 Guidelines, *supra* note 3, at 6-2. A comprehensive list of suggested land use controls and practices includes: Zoning; flood plain zoning and regulations; environmental performance zoning; subdivision regulations; planned unit development regulations; buffer zones; conservation and scenic easements; density bonuses; housing codes; building codes; construction permits; development permits; transferable development rights; hillside development regulations; drainage regulations; grading regulations; soil erosion and sediment control ordinances; solid waste control ordinances; septic tank ordinances; taxation policies; public works policies; public investment policies; land conservation policies; discharge permits. *Id.* at 6-5 to 6-5.

64. Pisano, *supra* note 4, at 98.

65. Prop. Reg. 40 C.F.R. § 35.1519-6(c)(1) (1978).

federal and state regulations and guidelines.<sup>66</sup> Generally BMPs are to be developed on the local level; because there are so many variable factors, they practically have to be site specific.<sup>67</sup>

Also required by Section 208 are processes to identify and control salt water intrusion, disposition of residual wastes which could affect water quality, and a process to control land or subsurface disposal of pollutants.<sup>68</sup> Special provisions govern any program submitted to EPA to control the discharge or placement of dredged or fill material.<sup>69</sup>

#### ENFORCEMENT

Nonpoint source pollution as an extensive and significant problem, will be expensive<sup>70</sup> and time consuming to control. Section 208 is the only method the Act provides for the control of NPS. Reduction of NPS will only be achieved if the NPS control measures contained in the 208 plans are actually implemented. Logically, implementation will depend upon enforcement; if implementation cannot be compelled there will likely be minimal implementation. Thus, one of the vital questions of Section 208 is how enforceable is it. Of course, some nonpoint source polluters may voluntarily implement BMPs, but because of the necessary time and monetary expenditure, this group will be small.

Enforcement procedures may be undertaken by EPA, by private citizens, and by state and local agencies. Enforcement could be necessary on three different levels. If a state or planning agency does not produce a 208 plan, it would be necessary to attempt to compel them to do so. Additionally, a 208 plan might be submitted but it may not be adequate to achieve the objectives of Section 208. A procedure might then be necessary to force substantive changes in the submitted plan. Finally, assuming an adequate 208 plan exists, it would be necessary to be sure the plan's BMPs are implemented by nonpoint source polluters. The remainder of this

66. 40 C.F.R. § 131.11(j)(1) (1978).

67. Conversation with Larry Robinson, Planning Coordinator for the 208 Program, Department of Environmental Quality, State of Wyoming, Cheyenne, Wyoming, January 17, 1979.

68. F.W.P.C.A.A. § 208(b)(2)(I-K); 33 U.S.C.S. § 1288(b)(2)(I-K) (Supp. 1978).

69. F.W.P.C.A.A. § 208(b)(4); 33 U.S.C.S. § 1288(b)(4) (Supp. 1978).

70. The Act funds the planning process but there are almost no implementation funds.

comment discusses which, if any, of these enforcement problems may be successfully undertaken by EPA, private citizens or state and local agencies.

### *Enforcement by EPA*

Carrots and sticks are explicitly granted to EPA to enforce portions of Section 208. None of them, either used by themselves or together, are adequate to deal with the full range of enforcement problems likely to arise under Section 208.

For instance, Subsection 208(d) provides, "After . . . a plan . . . has been approved under Subsection (b) of this section, the Administrator shall not make any grant for construction of a publicly owned treatment works under Section 201(g)(1) . . . except . . . for works in conformity with such a plan."<sup>71</sup> It is doubtful that this provision can be used to compel production of a 208 plan or an adequate plan if an inadequate plan is submitted. The language "After a plan has been approved" causes the problem. That language probably means that Subsection (b) can only be used after an adequate plan has been approved by EPA.<sup>72</sup> The withholding of construction grant funds would be very persuasive, but it seemingly can only be used to assure construction of treatment works in conformity with a 208 plan.

Current federal regulations<sup>73</sup> broadly interpret Section 208(d), to allow withdrawal of construction grant funds "where an incomplete or disapproved water quality management plan does not provide an adequate assessment of the needs and priorities for the area in which the project is located consistent with the Act's planning requirements."<sup>74</sup> This is a broad regulation<sup>75</sup> and the proposed regulation to replace it is narrower.<sup>76</sup> While perhaps an effective enforcement tool in the waste treatment facilities area, it will be rare that NPS problems resulting from agriculture, mining or

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71. 33 U.S.C.S. § 1288(d) (Supp. 1978).

72. An attorney for EPA agreed this was probably true. Conversation with Kemper Will, Office of Regional Counsel for EPA Region VIII, Denver, Colorado, January 19, 1979.

73. 40 C.F.R. § 130.31(c) (1978).

74. 40 C.F.R. § 130.31(c) (1978).

75. The statute merely requires a facility to be in compliance with a plan, it does not go to a remedy for an inadequate plan.

76. Prop. Reg. 40 C.F.R. § 35.1531-4(b)(1) (1978).

silviculture will be related to waste treatment facilities to the extent that these regulations would provide an enforcement tool.

The Act appropriated funds to pay 75% of the states' and planning agencies' costs of the planning process required by Section 208(b).<sup>77</sup> Federal regulations say that in the event a recipient of planning funds fails to comply with the Act, the Regional Administrator may reduce or terminate the planning grant.<sup>78</sup> Similarly this provision probably would be ineffective for any of the three enforcement problems because the threat would come too late. Grants are made in advance but planning problems would develop later thus leaving few funds to withhold.<sup>79</sup> However, these grants can be made by the reimbursement method instead of in advance when the Regional Administrator determines it is in the Agency's interest.<sup>80</sup> In some cases, EPA may be able to predict compliance problems and require a certain level of compliance before issuing the grant money.

A significant enforcement tool does exist, however, in the withholding of other program grants. Section 106<sup>81</sup> appropriates \$100 million per year to administer pollution control programs. The grant is conditional on the Administrator's finding that the state's pollution control program is in accordance with the provisions of the Act in such form as the Administrator may prescribe.<sup>82</sup> Section 314<sup>83</sup> appropriates \$60 million per year to give to the states to control pollution in lakes. Section 205(g)<sup>84</sup> appropriates funds for the states for water management planning. These grants are given according to the discretion of the Administrator and are available as an enforcement tool to compel both adequate planning and effective implementation.

If the Regional Administrator determines that a state is not implementing any portion of an approved state WQM [water quality management]

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77. 33 U.S.C. 1288(f) (Supp. 1978). It paid 100% until October, 1977.

78. 40 C.F.R. § 35.212(c) (1978).

79. Goldfarb, *Water Quality Management Planning: The Fate of 208*, 8 U. Tol. L. Rev. 105, 122 (1976).

80. 40 C.F.R. § 35.218-1 (1977).

81. 33 U.S.C.S. § 1256 (Supp. 1978).

82. F.W.P.C.A.A. § 106(f)(3); 33 U.S.C.S. § 1256(f)(3) (Supp. 1978).

83. 33 U.S.C.S. 1324 (Supp. 1978).

84. 33 U.S.C.S. 1285(g) (Supp. 1978).

plan, or any portion of an approved areawide WQM plan for which the state has implementation responsibility, he may withhold all or part of funds which the State would otherwise receive under sections 106, 205(g), 208, and 314 of the Act. Since the state is responsible for WQM planning throughout the State, the Regional Administrator may also withhold such grant funds from the State if he determines that: (1) any approved portion of an areawide plan is not being implemented; (2) the State has the capability to implement those portions; and (3) after reasonable notice from the Regional Administrator to the Governor, the state has failed to use its best efforts to implement those portions.<sup>85</sup>

It has been suggested that the threat of withholding funds is not credible because it is unlikely the EPA would inhibit an entire state's pollution control program for failure to plan adequately.<sup>86</sup> Some states have found comfort in this reasoning.<sup>87</sup> Other states seem to have taken the EPA seriously<sup>88</sup> and might be persuaded to comply because of such a threat.<sup>89</sup> There appears to be no reason why the EPA would have to cripple a state's pollution control program. Withdrawal of enough funds to apply pressure but not mortally wound might be persuasive. On the other hand, compelling implementation of a regulatory NPS program may be too difficult because most states lack statutory authority for such a program<sup>90</sup> and state legislatures may react adversely to EPA pressure.

The Act allows the states to operate their own NPDES system if they take the required steps.<sup>91</sup> Section 303(e) places

85. Prop. Reg. 40 C.F.R. § 35.1531-3(a) (1978).

86. Goldfarb, *supra* note 79, at 123.

87. A North Dakota official said withholding of funds would have as severe repercussions on EPA as it would on a state agency, letter from Norman L. Peterson, Director of Division of Water Supply and Pollution Control, Department of Health, (January 22, 1979).

A Wyoming official said the threat would be persuasive if anybody thought EPA was serious. Conversation with Larry Robinson, *supra* note 68.

88. Letter from Steven L. Pilcher, Water Quality Bureau, Environmental Sciences Division, State of Montana, (February 2, 1979).

89. Letter from Terry Keyes, Manager of Planning and Standards Section, Division of Environment, State of Idaho (Feb. 1, 1979).

Letter from E. G. Gregory, Administrator, Division of Environmental Protection, State of Nevada (January 23, 1979).

90. See discussion *infra* on state enforcement.

91. F.W.P.C.A.A. 402(b); 33 U.S.C.S. § 1342(b) (Supp. 1978).



a limitation on this, "The Administrator shall not approve any state permit program under title IV of this Act [33 U.S.C.S. §§ 1341-1345] for any state which does not have an approved continuing planning process under this section."<sup>92</sup> As pointed out, one requirement of the continuing planning process is "the incorporation of all elements of any applicable areawide waste treatment management plans under Section 208."<sup>93</sup> Since a NPS control program is an element of a 208 plan, EPA would have legal authority to take over a State's NPDES permit program if a NPS control program was not pursued.<sup>94</sup>

The effectiveness of this sanction may not be as real as it first appears. There is some indication that states may not care if EPA were to take over their NPDES permit program.<sup>95</sup> Wyoming's 208 planning official stated he did not think very many states would be upset at the prospect of EPA withdrawal of approval of their state's NPDES program.<sup>96</sup> Running an NPDES program creates an extensive administrative burden on the state agency so they would not be too reluctant to give it up. Likewise, the EPA would probably be unwilling to take over a state's NPDES program for the same administrative reasons. Another limitation is that this power could only be used against states and not designated planning agencies, because the planning agencies have no connection with the NPDES program.

It is important to note that at present, the EPA does not need extensive enforcement powers because most states are willing to produce 208 plans.<sup>97</sup> The states are even willing to attempt to bring their plans into compliance with EPA requirements but there is a potential problem in the

92. 33 U.S.C.S. § 1313(e)(2) (Supp. 1978).

93. F.W.P.C.A.A. § 303(e)(3)(13); 33 U.S.C.S. § 1313(e)(3)(13) (Supp. 1978).

94. 40 C.F.R. § 130.32(b) (1978). Approval of a state's participation in the NPDES program may be withdrawn if approval of the state's continuous planning process is withdrawn.

Substantial of any plan prepared pursuant to the continuing planning process to conform with requirements may indicate a need for revision. Failure to revise could result in withdrawal of approval of all or a part of the process. 40 C.F.R. § 130.32(b) (1978).

95. Goldfarb, *supra* note 79, at 123.

96. Conversation with Larry Robinson, *supra* note 67. A California official stated he could not imagine a situation where EPA would want to take over their NPDES program. Letter from Peter A. Rogers, Chief, Division of Planning and Research, State Water Resources Control Board, State of California (February 5, 1979).

97. A survey of eleven western states (California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming) indicated their willingness to proceed with 208 plans.

future. At present states are allowed to conduct a program to control NPS based on voluntary compliance (voluntary implementation of BMPs by NPS polluters).<sup>98</sup> If a voluntary program does not achieve water quality goals, EPA has the power to require a regulatory program in which the management agencies must have authority to compel implementation of BMPs.<sup>99</sup> A regulatory program will be repugnant to most states, which generally lack statutory authority, to impose such a program. EPA's enforcement powers will be tested when it attempts to compel production of a regulatory program.

### *Citizen Suits*

Private citizens suing to compel government agencies and officials to perform their duties are a common occurrence, especially in the pollution arena and therefore, the efficacy of citizen suits in reducing NPS is discussed. Unfortunately, only one of the three enforcement problems is susceptible to enforcement by a citizen suit.

Section 505<sup>100</sup> specifically provides for the use of citizen suits to enforce certain provisions of the Act.

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act [33 USCS §§ 1251-1376] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 USCS §§ 1251-1376] which is not discretionary with the Administrator.<sup>101</sup>

98. EPA, *Regulatory Programs for Nonpoint Source Control*, SAM-31 MEMORANDUM (November 14, 1978).

99. Prop. Reg. 40 C.F.R. § 35. (1978).

100. 33 U.S.C.S. § 1365 (Supp. 1978).

101. 33 U.S.C.S. § 1365 (Supp. 1978).

Paragraph (1) of subsection 505(a) is not applicable to Section 208 or NPS problems because it is directed only at the enforcement of effluent limitations or standards. Paragraph (2), however, allows a citizen suit to compel the Administrator to perform nondiscretionary acts or duties mandated by the Act and suits related to Section 208 can be prosecuted under this provision. There are two limitations to suits brought under this paragraph that seriously restrict their efficacy in compelling actions to reduce NPS. First, only nondiscretionary actions may be compelled and, second, suits can only be brought against the Administrator and not state and local agencies.

The nondiscretionary duties of EPA under Section 208 relating to the three main enforcement problems are few. One suit successful in compelling a nondiscretionary duty, forced the EPA to issue regulations requiring the state to perform 208 planning for all parts of the state not within a designated critical area.<sup>102</sup> Even though EPA issued the required regulations, as noted above, EPA has limited power to compel compliance. The most significant enforcement tool that EPA possesses is the withholding of program grants under Sections 106, 314 and 205(g).<sup>103</sup> The withholding of the funds are discretionary with the EPA so this type of enforcement action cannot be compelled by a private citizen. The withholding of planning grant funds by the EPA under Subsection 208(f) is also discretionary.<sup>104</sup> The two nondiscretionary enforcement actions would, appear to be the withholding of construction grant funds<sup>105</sup> and taking over a state's NPDES program.<sup>106</sup> Since neither of these enforcement tools would be effective in compelling production of a plan, or an adequate plan or in compelling implementation, a citizen suit against the EPA would not be productive in reducing NPS.

However, a Section 505 citizen suit may not be the only basis for a citizen suit to enforce the Act. It is disputed whether the saving provision of Section 505 allows other

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102. Natural Resources Defense Council v. Costle, *supra* note 53.

103. See *supra* notes 81-89 and text.

104. See *supra* notes 77-80 and text.

105. See *supra* notes 71-76 and text.

106. See *supra* notes 91-96 and text.

grounds for jurisdiction of suits brought to enforce the Act. The saving provision states:

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).<sup>107</sup>

Courts interpreting identical Clean Air Act provisions<sup>108</sup> have held the saving provision refers to suits brought under other laws and not the Clean Air Act.<sup>109</sup> The view taken by some courts interpreting the Act was that section 505 was intended by Congress to expand jurisdiction and not to exclude other methods of relief under the Act.<sup>110</sup> This latter view is buttressed by a Supreme Court holding that only on clear and convincing evidence of contrary legislative intent should courts restrict access to judicial review.<sup>111</sup>

Other grounds providing for jurisdiction of a citizen suit include the federal question statute,<sup>112</sup> the Administrative Procedure Act (APA)<sup>113</sup> or an action in the nature of mandamus.

A controversy arising under the laws of the United States is a federal question. The suit may be brought in the district courts if the matter in controversy exceeds the value of \$10,000, but the jurisdictional amount is not required in an action brought against the United States, any agency, or officer thereof.<sup>114</sup>

Under the APA, final agency actions for which there is no other adequate remedy in court<sup>115</sup> and are not committed by law to agency discretion<sup>116</sup> are reviewable. The right of review is in a person adversely affected by agency action.<sup>117</sup>

107. 33 U.S.C.S. § 1365(e) (Supp. 1978).

108. 42 U.S.C. § 1857h-2(e) (1976).

109. *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Pinkney v. Ohio Environmental Protection Agency*, 375 F. Supp. 305 (N.D. Ohio 1974).

110. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Natural Resources Defense Council v. Train*, 106 U.S. App. D.C. 312, 510 F.2d 692 (1974).

111. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

112. 28 U.S.C.S. § 1331 (1977).

113. 5 U.S.C.S. §§ 701-705 (1977).

114. 28 U.S.C.S. § 1331(a) (1977).

115. 5 U.S.C.S. § 704 (1967).

116. 5 U.S.C.S. § 701 (1967).

117. 5 U.S.C.S. § 702 (Supp. 1978).

The scope of review includes interpretation of law, compelling agency action unlawfully withheld, and the setting aside of actions which are arbitrary, in excess of authority or otherwise not in accordance with law.<sup>118</sup>

A frequent issue that arises in regard to these statutes is the question of who has standing to sue. *Sierra Club v. Morton*<sup>119</sup> set out some guidelines. The alleged injury must be to an interest arguably within the zone of interests to be protected or regulated by the statutes the agencies were claimed to have violated and there must have been injury in fact to the petitioner. The party seeking review must place himself among those injured but the injury may be non-economic in nature such as aesthetic or environmental well being.<sup>120</sup>

Mandamus is another ground for jurisdiction. It is available to compel public officers to perform nondiscretionary duties.<sup>121</sup> It will not issue when performance is impossible as when it is beyond the physical, mental or financial capability of the officer.<sup>122</sup>

The existence of independent jurisdictional grounds for suits to enforce the Act is significant to the control of NPS in two ways. The use of the federal question statute and APA provide a broader scope for review of EPA actions under Section 208. For example, abuse of discretion is not reviewable under Section 505, but would be under the APA. The ability to use the federal question statute or mandamus actions may allow suits against state officials or agencies to enforce the Act. For example, a claim that a state official or agency has misapplied federal law or regulations would arise under federal law as a federal question.<sup>123</sup>

A suit brought under one of these jurisdictional basis probably could be successful in compelling production of a 208 plan. A suit against EPA claiming EPA abused its discretion in not withholding program grant funds would likely

118. 5 U.S.C.S. § 706 (1967).

119. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

120. *Id.* at 733, 735. See *Gonzales v. Costle*, F. Supp. (N.D. Calif. 1978).

121. *Am. Jur.* 2d Mandamus § 72 (1970).

122. *Id.* at § 37.

123. *Currie, Judicial Review Under Federal Pollution Laws*, 62 *IOWA L. REV.* 1221, 1227 (1977).

be futile since EPA could have sound reasons for granting the funds. The better procedure would be to sue the state or planning agency, asking that they prepare a plan. Section 208 uses mandatory language that plans shall be prepared and shall contain certain provisions.<sup>124</sup> Among the required provisions are methods to identify and control NPS.

The problem would be in compelling a plan adequate to control or reduce NPS. The Act is not specific as to what methods should be used to control NPS. It appears to be very much discretionary with states and planning agencies the manner by which they will plan for NPS reduction. Thus, though a plan which formally complies with Section 208 can be compelled, a citizen suit cannot compel a quality plan.

There are problems with a citizen suit forcing implementation of BMPs. An argument can be made that control NPS pollution, consistent with the Act's water quality goals is mandatory. If a state's 208 plan specifies BMP's then perhaps it would not be discretionary whether management agencies or states should cause their implementation. Most states lack statutory authority to compel implementation of BMPs and of course a writ of mandamus will not run to the legislature to require enactment of a law.<sup>125</sup> As long as voluntary compliance with BMPs is relied upon, the citizen suit will not aid this third enforcement problem.

### *Enforcement on the Local Level*

The pollution control effort structured by the Act places responsibility directly on the states for the development of NPS control measures. Designated planning agencies are responsible for developing programs in designated areas and states must do so in all nondesignated areas.<sup>126</sup> Alternatively, states may assume the entire responsibility for NPS control planning.<sup>127</sup> States are required to achieve the desired level of control of NPS through the application of BMPs.<sup>128</sup> EPA guidelines originally required the implementation of a

124. F.W.P.C.A.A. § 208(b); 33 U.S.C.S. § 1288(b) (Supp. 1978).

125. 52 AM. JUR. 2d Mandamus § 131 (1970).

126. F.W.P.C.A.A. § 208(b)(1)(13); 33 U.S.C.S. § 1288(b)(1) (Supp. 1978).

127. F.W.P.C.A.A. § 208(b)(4)(A); 33 U.S.C.S. § 1288(b)(4)(A) (Supp. 1978).

128. 40 C.F.R. § 131.11(j)(1) (1978).

regulatory program for NPS control.<sup>129</sup> Current EPA policy is to allow states to experiment with a voluntary BMP implementation program unless the result is ineffective or inadequate control.<sup>130</sup> The non-regulatory program must have adequate administrative arrangements, financing, public education programs, and surveillance capability.<sup>131</sup> Approval of such programs will be withdrawn by EPA if substantial progress, including the application of BMPs, is not made toward attaining water quality goals.<sup>132</sup>

A survey of eleven western states<sup>133</sup> indicates that all but one<sup>134</sup> are planning to rely on a voluntary compliance program. Whether voluntary implementation of BMPs will be achieved is questionable. Probably the major factor in questioning the effectiveness of voluntary compliance is the expense involved in implementation of BMPs.

Costs of controlling pollution from irrigation return flows range from \$5.00 per acre per year to \$78.00 per acre per year.<sup>135</sup> Implementation of NPS control measures on non-irrigated cropland could require a capital investment of \$2.6 billion.<sup>136</sup> Implementation of NPS control measures in the silviculture area could increase logging costs from \$39 to \$130 per acre. Reasonable control measures in construction activities could cost \$910 to \$1,482 per acre.<sup>137</sup> Cost of vegetative buffers to reduce sediment from areas denuded by mining could cost \$520 per acre. Land reclamation from strip mining could cost from \$130 to \$5,200 per acre.<sup>138</sup> NPS control will not be cheap in most instances. Even the most optimistic officials might justifiably be concerned that some NPS polluters may be reluctant to implement costly BMPs.

It may be that farmers are more sensitive to added costs than are other industries. They must sell their products at market prices, preventing them from increasing prices to

129. 1976 Guidelines, *supra* note 3, at 7-2.

130. EPA, *Regulatory Programs for Nonpoint Source Control*, *supra* note 98, at 4.

131. Prop. Reg. 40 C.F.R. § 35.1519-5(b) (1978).

132. EPA, *Regulatory Programs for Nonpoint Source Control*, *supra* note 98, at 5.

133. California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, Wyoming.

134. Nevada indicates it is seeking legislation authorizing mandatory implementation of BMPs. Letter from E. G. Gregory, *supra* note 89.

135. Staff Report, *supra* note 8, at I-49 to I-50.

136. *Id.* at I-52.

137. *Id.* at I-74.

138. *Id.* at I-75.

pass on added costs.<sup>139</sup> The Clean Water Act of 1977<sup>140</sup> contained two provisions helpful to the farmer. It specified that all irrigation return flow is NPS, even if it otherwise fits the definition of a point source.<sup>141</sup> Thus farmers need not obtain permits for that form of pollution. Additionally, the Clean Water Act provided the Act's only 208 BMP implementation funds; all other funds are planning funds. The Secretary of Agriculture is authorized to contract with owners and operators of rural land to pay 50% and in some instances a higher percentage of their reasonable costs of installing and maintaining BMPs.<sup>142</sup> Only the future will reveal whether this measure will increase the chances of effective voluntary implementation.

### *Regulatory Enforcement Within States' Voluntary Programs*

Within a state's overall program of voluntary compliance, various mandatory controls exist. One method, to be used by Montana and Wyoming<sup>143</sup> is enforcement using state water quality standards. If a water quality standard is violated and it can be traced to a NPS polluter, the Department of Environmental Quality can take enforcement actions.<sup>144</sup> However, they would not have the power to mandate BMPs.<sup>145</sup> Additionally this enforcement method is extremely limited because of the difficulty in tracing pollution to a specific NPS polluter.<sup>146</sup>

California can regulate nonpoint sources by requiring a waste discharge permit.<sup>147</sup> However, methods of control for the most part cannot be dictated, so BMPs cannot be compelled.<sup>148</sup>

In some instances, states may use authority granted to other state agencies to control NPS or compel implementa-

139. Montgomery, *Control of Agricultural Water Pollution: A Continuing Regulatory Dilemma*, 1976 U. ILL. L. F. 533 (1976).

140. P.L. 95-217, 91 Stat. 1566 (1977).

141. F.W.P.C.A.A. § 502(14); 33 U.S.C.S. § 1362(14) (Supp. 1978).

142. F.W.P.C.A.A. § 208(j); 33 U.S.C.S. § 1288(j) (Supp. 1978).

143. Letter from Steven L. Pilcher, *supra* note 88. Conversation with Larry Robinson, *supra* note 67.

144. WYO. STAT. § 35-11-302(a)(i) (1977).

145. Conversation with Larry Robinson, *supra* note 67.

146. *Id.*

147. CAL. WATER CODE § 13263 (West) (1971).

148. CAL. WATER CODE § 13360 (West) (Supp. 1978).



tion of BMPs. In Wyoming, soil conservation districts can mandate BMPs (soil conservation measures) for lands within the district.<sup>149</sup> But this power has never been used, and the state cannot force the District to use it because of its independent status. The State Highway Department could include BMPs in its contracts with builders.<sup>150</sup> Again the state cannot force this, but the highway department seems cooperative in controlling construction NPS.<sup>151</sup> California intends to use the enforcement powers of state agencies where possible, such as the Department of Food and Agriculture to regulate pesticide use, and the Department of Forestry to regulate silvacultural activities.<sup>152</sup> Where the cooperation of the state agency can be obtained, this approach may provide effective enforcement within the range of the agency's powers.

Certain local agencies may have legislative and enforcement powers due to their nature. When a county is designated a management agency, it can enact and enforce various land use and zoning measures which would be effective in controlling some NPS. This has been effectively accomplished in Teton County, Wyoming.<sup>153</sup> In urban areas local ordinances probably prohibit many actions causing NPS. It certainly would be within the police power of a city to regulate other activities, such as construction, so as to minimize NPS. However, the city's cooperation must first be gained.

The Clean Water Act of 1977 added a provision allowing the imposition of mandatory BMPs as a requirement of certain classes of NPDES permits.<sup>154</sup> The BMPs should control plant site runoff, spillage, leaks, sludge or waste disposal and drainage from raw material storage which are associated with industrial manufacturing. These BMPs could be required in any state where the NPDES program is operated by EPA. Where the state runs the program, state law would have to permit the imposition of BMPs as a requirement of a permit.

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149. WYO. STAT. § 11-16-125 (1977).

150. WYO. STAT. § 24-2-106 (1977).

151. Conversation with Larry Robinson, *supra* note 67.

152. Letter from Peter A. Rogers, *supra* note 96.

153. Conversation with Larry Robinson, *supra* note 67. Where appropriate, Teton County has incorporated their 208 planning into their county land use plan.

154. F.W.P.C.A.A. § 304(e); 33 U.S.C.S. § 1314(e) (Supp. 1978).

*Use of Federal Agencies*

There is yet another enforcement tool available to states and planning agencies to aid them in implementing BMPs. Section 313 of the Act directs federal agencies to comply with Federal, State and local pollution control requirements in the same manner as nongovernmental entities.<sup>155</sup> Before the Clean Water Act of 1977<sup>156</sup> was enacted, section 313 was interpreted as requiring federal agencies and instrumentalities to comply with substantive state requirements, such as effluent limitations, but not procedural requirements, such as obtaining discharge permits.<sup>157</sup> Section 51(a) of the Clean Water Act<sup>158</sup> amended section 313, to require procedural compliance in addition to substantive compliance, in direct response to the Supreme Court rulings. Section 313 now says:

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any record keeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.<sup>159</sup>

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155. 33 U.S.C.S. § 1323 (Supp. 1978).

156. P.L. 95-217, 91 Stat. 1566 (1977).

157. EPA v. Calif. State Water Resources Control Board, 426 U.S. 200 (1976).

158. P.L. 95-217, 91 Stat. 1566 (1977).

159. 33 U.S.C.S. § 1323(a) (Supp. 1978).

As an outside limit a district court found that an independent contractor operating a federally owned facility does not come within this language.<sup>160</sup> However, the language is very broad, and seems to include most federal activities. Relative to the control of NPS, this provision is especially important to the west due to the large amount of federally owned land. Certainly, the major federal land managers such as the Bureau of Land Management, Bureau of Reclamation and Forest Service are affected by this statute.

The language of the statute is broader than merely requiring federal agency compliance with effluent limitation or water quality standards.<sup>161</sup> Federal agencies must comply with "all" requirements, in any situation, where the discharge of runoff of pollutants might result. Runoff is a term applicable to NPS while the term discharge is applicable to point sources. Thus federal agencies must comply with state or local controls on NPS, presumably including the implementation of BMPs.

However, there is a limitation; compliance is only required to the extent nongovernmental entities must comply. A state that compels the implementation of BMPs may compel federal agencies to do so but when a state is using voluntary compliance, arguably the federal agencies need only voluntarily comply as well.

It is hoped that federal agencies would voluntarily cooperate to the fullest extent possible. Besides using similar language to Section 313, Executive Order 12088 contains language which may be somewhat broader.

Each agency shall cooperate with the Administrator of the Environmental Protection Agency . . . and State, interstate, and local agencies in the prevention, control and abatement of environmental pollution.<sup>162</sup>

This order may provide some incentive for federal agency cooperation.

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160. *United States v. Penn. Environmental Hearing Board*, 431 F. Supp. 747 (D. Penn. 1977).

161. Comment, *Federal Law, Irrigation and Water Pollution*, *supra* note 12, at 583.

162. Exec. Order No. 12088, 43 Fed. Reg. 47707 (1978).

EPA regulations also require federal agencies to cooperate with and support states or designated planning agencies in the formulation and implementation of WOM plans.<sup>163</sup> As an additional aid EPA sets itself up as a mediator between federal agencies and state or local agencies in any disputes.<sup>164</sup>

If states cannot achieve satisfactory compliance from federal agencies, their sole enforcement remedy<sup>165</sup> is through use of the citizen suit provision of § 505.<sup>166</sup> States and political subdivisions come within the definition of person<sup>167</sup> and for purposes of section 505(a), citizen is defined as an adversely affected person.<sup>168</sup> Also, section 313(a) expressly waives any sovereign immunity a federal agency might have had, for purposes of 313.<sup>169</sup>

One might reasonably assume that in most cases, federal cooperation would be forthcoming considering statutory and executive policy. This is often true. For example, EPA and the Interior Department have recently agreed on increase cooperation to attain water quality goals; specifically Interior was to take a more active role in Section 208 planning.<sup>170</sup> Wyoming has received cooperation in formulating agreements with federal agencies, such as persuading the Forest Service to put BMP requirements in timber contracts.<sup>171</sup> But there are bound to be disputes such as one in Ohio where the EPA finally encouraged the state to bring suit, on an air pollution case, to force federal facilities to comply with state regulations.<sup>172</sup>

### CONCLUSION

The control of nonpoint source pollution through the Federal Water Pollution Control Act Amendments of 1972 must be through Section 208. At various stages of develop-

163. 40 C.F.R. § 131.35(b) (1977).

164. 40 C.F.R. § 131-35(c) (1977). Prop. Reg. 40 C.F.R. § 35.1529-2 to 3) (1978).

165. *Hancock v. Train*, 426 U.S. 167, 197 (1976).

166. 33 U.S.C.S. § 1365 (Supp. 1978).

167. F.W.P.C.A.A. § 502(5); 33 U.S.C.S. § 1362(5) (Supp. 1978).

168. 33 U.S.C.S. § 1365(g) (Supp. 1978).

169. 33 U.S.C.S. § 1323(a) (Supp. 1978).

170. 9 BNA, ENVIRN. REP., CURRENT DEV., 1456 (December 15, 1978).

171. Conversation with Larry Robinson, *supra* note 68.

172. 9 BNA, ENVIRN. REP., CURRENT DEV., 1300, (November 17, 1978). EPA is discussing methods of avoiding the problem of the federal government suing itself, as would occur if EPA sued to enforce compliance with the Act by federal facilities or agencies.

ment of a program to control NPS, some enforcement measures exist. However, on the level of actual implementation, only a few specific areas have actual enforcement mechanisms. The rest of the NPS sources will be covered by a program of voluntary implementation of BMPs. Implementation will often be costly, thus reducing the probability of voluntary compliance. The willingness of states to enact mandatory programs seems in doubt as is the ability of EPA to compel production of such a program. Thus, unless some legislative changes are forthcoming, either more enforcement power or more financial aid for implementation, the control of nonpoint source pollution will not be achieved.

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