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Federal water pollution abatement legislation has incorporated more localized implementation provisions in recent years, such as section 208 of the Federal Water Pollution Control Act Amendments of 1972. The goal is to spur local and regional abatement efforts through cooperation by various local governmental entities. But as the author of this article demonstrates, that goal has not been met in the majority of cases because of political opposition and lack of statutory clarity. The author presents recommendations for any future attempt at localized implementation of federal mandates based on the lessons learned from the section 208 experience.

THE IMPLEMENTATION OF WATER POLLUTION CONTROL MEASURES-SECTION 208 OF THE WATER POLLUTION CONTROL ACT AMENDMENTS

*Lawrence P. Wilkins**

I. INTRODUCTION

Professor Daniel Mandelker writes that problems of air and water pollution require corrective measures that are regional in scope.[1] Mandatory regional planning is essential, he says, to equitable and efficient land development policies throughout the country. He cites Section 208 of the Federal Water Pollution Control Act Amendments of 1972[2]

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1. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).
2. PUB. L. 92-500, 33 U.S.C. §§1251-1376 [Hereinafter referred to as the Act or FWPCAA].

(FWPCAA) approvingly, as legislation that mandates the needed regional approach to developing resource management policies.[3] Applauding a growing responsiveness by courts and legislatures to mandatory regional planning programs, he calls for increased use and enforcement of comprehensive planning by state, regional and local governments to solve these environmental problems.[4] Mandated comprehensive planning is needed, he points out, as a control upon ad hoc, uncoordinated, arbitrary land use decisions being made by local governments.[5] The need is especially critical in undeveloped areas in close proximity to expanding urban centers.

The reference to Professor Mandelker is not intended as a preamble to an analysis which questions the ultimate truth of his assertions. The logical relationship between the regional scope of air and water pollution problems and methods of dealing with those problems that are of regional scale is obvious. The rich and growing tradition of comprehensive planning philosophy and its underlying validity cannot be seriously challenged.

Without taking umbrage with the theory Professor Mandelker discusses it is suggested that his assertions reflect a high degree of hopeful naivete about the role of comprehensive planning at the local level, and the effectiveness of "mandated" regional planning programs under the FWPCAA. This same kind of naivete is contained in the Act itself as well as its supporting documents, and is largely responsible for the ineffectiveness that has characterized the program in attempts to reach its objectives.

The discussion which follows is an exploration of problems that have arisen in the implementation of section 208. The exploration proceeds from the standpoint of one charged with the responsibility of translating the mandatory regional comprehensive planning approach of that portion of the Law

3. Mandelker, *supra* note 1, at 916 (1976).
4. *Id.* at 973.
5. *Id.* at 972.

into action. The discussion is not, however, an attempt to simplify the extremely complex problems of implementation of a federal environmental program and treat them as if they center upon a singular inadequacy of legislative sophistication.[6] The sheer size of the country renders the implementation of an environmentally-related program of national scope a mind-numbing contemplation. Add to it the myriad of pollution-producing activities of mankind and the symbiotic relationships of many of those activities, and it may well be that history will judge the undertaking of the FWPCAA as one of the wonders of the age. Nor is this treatment simply a reiteration of the oft-observed delays and shortcomings of the Federal Environmental Protection Agency in administering the law.[7] The discussion will relate the experience of one attempt to realize the aims of section 208, marking along the way some critical features of the Law that have presented obstacles in the way of people who have been charged with the responsibility of carrying out the purposes of the program.[8] The obstacles will be discussed in the form of inherent dilemmas. They are inherent in the Act because of Congress' adoption of the regionalistic theory favored by Professor Mandelker, and the need to rely upon existing local governments to implement the Act; many, if not all of which disfavor conferral of power to government entities having regional jurisdiction.

II. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 AND SECTION 208

After nearly a quarter of a century of comparatively suspended animation, the federal law pertaining to water pollution control came to life with the sweeping and am-

6. *See* the brief discussion of problems by Prof. Richard B. Stewart in *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1196, 1196-1202 (1977). [Hereinafter referred to as STEWART.]

7. *See* Tripp, *Tensions and Conflicts in Federal Pollution Control and Water Resource Policy*, 14 HARV. J. LEGIS. 225, 235-53 (1977) and the sources cited therein; Comment, *Areawide Planning Under the Federal Water Pollution Control Act Amendments of 1972; Intergovernmental and Land Use Implications*, 54 TEX L. REV. 1047, 1048 (1976). [Hereinafter referred to as *Areawide Planning*.]

8. In this respect, the article probably serves as a demonstration of the validity of the prophetic analysis in the Texas Law Review Comment, *supra*, note 7. But even that analysis was heavily laced with optimistic

bitious reforms of the 1972 Amendments[9] to the Water Pollution Control Act of 1948.[10] Although maintaining the earlier philosophy of federal water pollution law that the primary responsibility for control resides at the local level, the 1972 Amendments embodied a radical departure from the relatively tolerant tone of their precursors. The imposition of water quality standards contained in the earlier law is based upon the premise that some pollution is acceptable. The water quality standards approach ideally determines how much pollution is acceptable and sanctions are imposed for excesses. A "no discharge" approach of effluent[11] limitations philosophy maintains that pollution *per se* is unacceptable and sanctions will be imposed for an effluent discharged into public waters. The 1972 Amendments embraced the latter approach in the section 301 prohibition of discharge of any pollutant by any person.[12] The toleration of pollution was to be continued only as long as necessary to allow dischargers to gear up their technology to meet the congressional objective of no pollution in thirteen years. Water quality standards were to be employed as an incremental measure during those thirteen years and dischargers would be exempted from section 301's prohibition by compliance with one of the Amendments' permit programs.[13]

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idealism and uncritical acceptance of the new law's provisions as if they were inevitabilities. *See generally*, Zener, *The Federal Law of Water Pollution Control*, in ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 682, 765 (E. DOLGIN and T. GUILBERT eds. 1974).

9. Actually, The Rivers and Harbors Appropriations Act, 33 U.S.C. §§403, 407, 411, prohibited refuse discharge into navigable waters since its inception in 1899, but the main body of federal law was contained in the Water Pollution Control Act and its amendments. *See generally*, sources cited in Zener, *supra* note 8, at 765.

10. Pub. L. 80-845, 62 Stat. 1155. The 1948 Act was amended five times prior to 1972: The Water Pollution Control Act Amendments of 1956, Pub. L. 84-660, 70 Stat. 498; The Federal Water Pollution Control Act Amendments of 1961, Pub. L. 87-88, 75 Stat. 204; The Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903; The Clean Water Restoration Act of 1966, Pub. L. 89-753, 80 Stat. 1246; and The Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91.

11. "Effluent" is defined as: "A discharge of pollutants into the environment, partially or completely treated or in its natural state. Generally used in regard to discharges into waters." U.S. ENVIRONMENTAL PROTECTION AGENCY, COMMON ENVIRONMENTAL TERMS — A GLOSSARY 8 (rev. ed. Nov. 1974). "Effluent limitation" is defined as: "a maximum allowable rate of discharge, concentration or amount of a pollutant which may be released from a point source into any body of water." IZAAK WALTON LEAGUE OF AMERICA, A CITIZEN'S GUIDE TO CLEAN WATER 13 (1973).

12. Section 301(a), 33 U.S.C. § 1311(a) (1978).

13. *E.g.*, § 402, 33 U.S.C. § 1342 (1978).

The five titles of the 1972 Amendments illustrate the comprehensive scope of the programs and controls contained in the measures. Title I spelled out research, investigatory, cooperative, training, informational, financial aid, and demonstration programs. Title II set up a construction grants program for waste treatment facilities, and programs for water quality management planning. Title III, the standards and enforcement title, set forth the requirements for developing effluent limitations, the water quality standards program for attaining the ultimate goal of no pollution, national standards of performance through the best technology available, programs for inspection, monitoring, entry, enforcement measures, international pollution abatement powers, regulation for oil and hazardous substance liability, standards for marine sanitation devices, creation of a national study commission, controls on thermal discharges, appropriations for a clean lakes program and a financing study, and granted authority to the Administration of the United States Environmental Protection Agency (U.S.E.P.A.) for purposes of aquaculture permits. Title IV outlined the permits and licenses features of the Amendment. The general provision of Title V conferred various administrative powers, created a water pollution control advisory board and an effluent standards and water quality information advisory committee, outlined emergency powers, and provided for civil enforcement action, among other miscellaneous provisions. As if in anticipation of criticism that the amendments would add more layers of bureaucracy, Congress declared a policy to "encourage the drastic minimization of paper work" and governmental red tape.[14]

The "Declaration of Goals and Policy" of the Act spelled out four national policies aimed at the realization of the Act's overall goals of elimination of pollution discharges by 1985 and obtaining "swimmable" and "fishable" waters by 1983: (a) the prohibition of discharges of toxic pollutants; (b) the provision of federal aid for building waste treatment plants; (c) the development and implementation of available waste treatment planning, and;

14. Section 101(f), 33 U.S.C. § 1251(f) (1978).

(d) the initiation and continuation of the technological research and demonstration efforts necessary to eliminate water pollution.[15]

The third national policy was the focus of section 208. That section was proclaimed by the House of Representatives Committee on Public Works as "the most important aspect of a water pollution control strategy."[16] The section was so important not only because it was aimed at carrying forward the national policy of management planning, but also because its scope went beyond mere planning to embrace the *implemetation* of plans. The title of the section itself, "Areawide Waste Treatment Management" reflects the emphasis upon management, and the major portions of the section are directed toward the development of management systems.

The first major division of the section required the U.S.E.P.A. to publish guidelines for the identification of areas of the country that had serious problems of water pollution.[17] The governor of each state, acting upon these guidelines, was required to identify the areas of the state having serious pollution problems and to designate an areawide organization capable of carrying out planning functions for the pollution problems in the area.[18]

The second division required the governors to certify the plans developed by the designated agencies. It set out a timetable for the certification process to take place and

15. Section 101(a)(3)-(6), 33 U.S.C. § 1251(a)(3)-(6) (1978).
16. H.R. REP. No. 92-911, 92d Cong. 2d Sess. 95 (1972) reprinted in 1 Senate Comm. on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 753 (Comm. Print 1973) [hereinafter referred to as Legis. History].
17. The past tense is used in describing the requirements of the section because it contained a very clear timetable for accomplishing its objectives. For example, the U.S.E.P.A. was to have published guidelines for use by local authorities within ninety days after the Act's effective date. The governors were to have designated the planning organizations within 120 days after the guidelines were published, and the initial water quality management plan was to have been certified by the governors within two years of the initiation of the planning process. The use of the past tense is not entirely accurate, however, since the process is still pending in most areas of the country.
18. Section 208(a)(1), 33 U.S.C. § 1288(a)(1) (1978).

specified the requirements for coverage of the contents of the plans.[19]

The third major division of the section required the governor of each state to appoint an agency or agencies to manage waste water treatment for each area that had been designated as having serious water pollution problems. The governors were to make this appointment with consultation from the organization that had been charged with responsibility for planning waste treatment management strategies pursuant to the first and second divisions of the section. The governors were then to submit their choices to U.S.E.P.A.[20]

This third division then set out nine functional capacities that a designated organization must possess. So long as none of these mimima were lacking, the Administrator of U.S.E.P.A. was required to accept the governors' designation. It declared that the agency or agencies must have the authority to: (a) implement the plan developed under the second division; (b) manage waste treatment and related facilities; (c) design, construct, operate and maintain new works; (d) accept and use grants from other sources for waste treatment purposes; (e) raise revenues; (f) incur short and long-term indebtedness; (g) assure that each participating community pays its proportionate share of treatment costs; (h) refuse to provide service for any community not complying with the areawide plan, and; accept industrial wastes for treatment.[21] The configuration of the management agency or agencies was not dictated by the legislation. Rather, the governors were permitted to designate an existing or newly created local, regional or state agency or other political subdivision to carry out the objectives of the Act.[22]

Alternative proposals for the management agency to be designated were to be developed and selected by the

19. Section 208(b)(1)-(4), 33 U.S.C. § 1288(b)(1)-(4) (1978).
20. Section 208(c)(1), 33 U.S.C. § 1288(c)(1) (1978).
21. Section 208(c)(2), 33 U.S.C. § 1288(c)(2) (1978).
22. Section 208(c)(1), 33 U.S.C. § 1288(c)(1) (1978).

organization charged with the responsibility to develop the plan. The proposals must have been approved by the local governments represented by the designated organization prior to submittal to the governor. That meant that not only must the nine minimal functional capacities be satisfied, but that the proposal satisfactorily fit the environmental, governmental and political objectives and programs of a large number of local officials in the area.[23]

III. THE FIRST DILEMMA: LOCAL PREFERENCE FOR TRADITIONAL GOVERNMENTAL PATTERNS VS. FEDERALLY-IMPOSED REGIONALISM

A. The Illusion of Flexibility in 208 Planning

The first and most troublesome dilemma was created by the conflict between the divisions of section 208 that called for the development of management systems and the division that outlined the kind of system that Congress wanted. On one hand, facially flexible language was employed to apparently provide an open choice for locally-developed management systems. On the other, the section was oriented toward an operationally-fixed type of system, foreclosing the choice of anything but a regional management strategy. A Guidance Memorandum issued from the Water Planning Division of U.S.E.P.A. containing guidelines for development of 208 programs recognized that those programs would have to conform to local preferences, custom, and habits if they were to be successful.[24] As if anticipating some difficulty in this respect, the drafter of the memorandum optimistically advised that "Section 208 recognizes the great diversity of these conditions around the country and provides states and localities with great flexibility to tailor the management system, including regulatory programs, to respond to these varying needs."[25] In the guidelines, several

23. Section 101(c), 33 U.S.C. § 1251(e) (1978); 40 C.F.R. § 131.20(a), (b), (c) (1978).
24. U.S.E.P.A., TECHNICAL GUIDANCE MEMORANDUM: TECH-35 April 11, 1977, in U.S.E.P.A. LEGAL AND INSTITUTIONAL APPROACHES TO WATER QUALITY MANAGEMENT (1977) [hereinafter referred to as March 1977 Guidelines]. The memorandum advised that the programs must "fit [the] region's governmental style, institutions, and citizen preferences."
25. *Id.*

evaluative criteria were offered to assist local decision-makers in rendering their choice of water quality management systems. Rather than outline structural models for consideration, the guidelines contained the admonition that any chosen system must be able to demonstrate administrative efficiency; comprehensive and effective capabilities to deal with environmental, economic and social problems; equity powers; political accountability to the individuals and groups; and political acceptability.[26] This was done because the drafters of the guidelines believed a wide range of institutional models could serve the needs of any one of the areas.[27]

Where state environmental agencies became involved in the process, further guidelines were sometimes offered to assist the planning organization in developing a permanent management system proposal. For example, in the Ohio guidelines it was required that the system must have "areawide representation"; "mechanism(s) and processes for regional coordination;" and powers of "intra-areawide or basin conflict resolution," among other attributes.[28] These state-level requirements echoed the "flexibility" approach of the federal requirements. In the Ohio guidelines it was proclaimed that "Existing or innovative legal forms may be used: [sic] such as a new intergovernmental agreement, structural to existing institutional arrangements, or whatever [sic]."[29]

The language of flexibility in the federal and state guidelines alerted experienced planners to possible difficulties in converting the guidelines into a workable plan. That language seemed to mean that less than specific guidance would be forthcoming from the reviewing organizations on the configuration of the management system. To one pre-

26. March 1977 Guidelines, *supra* note 24, at I-6 - I-9. The criteria were originally articulated in 4 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SUBSTATE REGIONALISM AND THE FEDERAL SYSTEM, at 98-99 (1974).

27. *Id.* at I-6.

28. OHIO E.P.A., REVISED GENERAL EVALUATION CRITERIA FOR A RECOMMENDED MANAGEMENT STRUCTURE (June 30, 1977).

29. *Id.*

sented with the task of developing a plan to satisfy the requirements of the Act, the dilemma was clearly presented. If the flexible language was to be taken literally a clean slate was presented upon which a comprehensive plan could be formulated without restrictions of form; an attractive proposition to any planner. If it meant that standards for evaluating plan philosophy, methodology, and objectives would remain largely undefined, or defined in the simplistic terms of the guidelines, a planning organization could expend a great deal of time and resources guessing what might be a certifiable plan and developing a methodology upon the basis of those guesses. If the guesses turned out to be wrong, much of those expenditures would be wasted. The frequent reference to regional solutions to waste water management problems indicated by the use of the terms "area" and "areawide" by the Act and the guidelines carried the unmistakable message that flexibility *within* the range of regional configurations was the intent of the federal government. Yet, if local custom, habits, and preferences were keys to successful plans, *regional* configurations carried low success potential, no matter how much flexibility of design the planner could exercise.

B. *The Illusion of Existing Agencies as Certifiable 208 Agencies*

A logical starting point in plan development under the guidelines would be to look to existing governmental entities to examine their potential for assuming water quality management responsibilities by applying the evaluative criteria suggested by the U.S.E.P.A. The guidelines provided illustrative examples of a generalized plan, assessing the institutional performance of municipalities, regional governments, and state agencies.[30]

The prime difficulty in producing a certifiable plan was clearly enunciated in the U.S.E.P.A. evaluation of municipalities:

30. March 1977 Guidelines, *supra* note 24, at I-9 - I-22.

> *Political acceptability.* Regulations of nonpoint sources associated with urban growth through such techniques as zoning, building regulations, and performance standards are traditionally local prerogatives. Displacing or even sharing these with regional or state governments engenders opposition from local officials, builders, chambers of commerce, as well as other home rule proponents. Local regulation will often be most compatible with an area's governmental style. The political acceptability that would result will be critical to a regulatory program's implementation.[31]

In the evaluations of special districts, urban counties, and regional councils it was concluded that the political sensitivities of local governments toward regional approaches would present significant obstacles to the adoption of a plan which incorporated a regional form of government. The discussion of urban counties contained the observation that:

> Area-wide planning agencies must assess the political realities of urging major governmental overhaul in the context of water quality planning. Attempts at general governmental reorganization in the context of federally-mandated water quality planning could irritate local officials and political groups as an unwarranted federal intervention in local affairs.[32]

A more accurate delineation of the first horn of the dilemma facing designated planners could hardly be formulated. The participation of local officials in plan development and implementation is a key feature of section 208. Where, for example, a council of governments was designated by a governor as the planning organization, groups of local government functionaries are *directly* involved in systems formulation. Plans submitted for governor certification by these groups could hardly be expected to contain recommendations for area-wide governmental systems which radically departed from the governmental structural preferences and philosophy of the officials who had approved it.

31. *Id.* at I-9.
32. *Id.* at I-18.

Any structural alternative that was, by its nature, unacceptable to the persons charged with implementing the ultimate plan was outside the range of consideration as a potential "208 agency."

The second horn of the dilemma soon became apparent to planners. As the first stage of plan development was carried beyond a generalized assessment of existing government entities similar to that contained in the guidelines it became clear that a sub-regional form of government would not be suitable. Detailed inquiry into the legal, financial and institutional characteristics of each of the types of government actually present in the designated area revealed functional shortcomings of varying degrees in each traditional local government form. Absent an agency with governmental powers which satisfied the nine functional minima listed in 208(c)(2), the following possibilities remained to be developed into specific recommendations: (a) to add to the powers of agencies already in existence to bring them into compliance; or (b) to consolidate the powers of two or more agencies already in existence so that the combination held all the requisite authority; or (c) to create a new government agency specifically for the purpose of assuming water quality management responsibilities. The flexible approach of the Act and the guidelines did not dictate which of the possibilities or which of many variations that could be entertained within the range of possibilities to be adopted. It was clear, however, that the recommendation for certification must include a regional form of government. The area-wide management requirements of the section, without more, describe a set of governmental powers that transcends any agency of less than regional scope. It is also clear that the illustrative, generalized evaluations of representative styles of government in the federal guidelines favored regional forms.[33] Where the state

33. See, March 1977 Guidelines, *supra* note 24, at I-12 - I-20. "Regional forms" as used here refers also to the urban county style of government, as well as regional councils and special districts. The criteria for evaluation actually came from the Advisory Commission on Intergovernmental Relations, which had produced a document which was aimed at allocating functional responsibilities to regional forms of government. See, 4 ADVISORY

reviewing agency delineated a regional orientation for plans, the open-choice among possible agency configurations was translated to mean an open-choice among configurations of regionalized government.[34] Thus, the greater the modification needed to bring the recommended management system into line with the area-wide requirements, the greater the likelihood of failure for the recommendation to obtain local approval on the ground of political acceptability.

C. Aversion to Regional Forms of Implementation

Local resistance to a specialized regional government concept could have been anticipated. Local government-watchers had been reporting for some time that governmental trends at the sub-state level were in the direction of strengthening local autonomy and some were warning that ambivalent federal action would jeopardize the objectives of programs of national scope.[35] Home rule traditions and governments based on the concept are prevalent in this country. The principle that government is done best that is done by local people has produced that prevalence. These traditions and the principle upon which they are based produce the corollary that the relationship between the American people and forms of American government controls affecting property interests becomes more strained and subject to grass roots resistance the farther removed from home that the government sits.[36] The overwhelming preference for networks of the consensual device of intergovernmental contracts[37] by local governments as solutions to

COMMISSION ON INTERGOVERNMENTAL RELATIONS, SUBSTATE REGIONALISM AND THE FEDERAL SYSTEM, at 98-99 (1974).

34. *See*, OHIO E.P.A., REVISED GENERAL EVALUATION CRITERIA FOR A RECOMMENDED MANAGEMENT STRUCTURE (June 30, 1977) which provided, in part:
    1. The governing and/or policy body of the recommended management structure must have area-wide representation.
    * * *
    3. Mechanism(s) and processes for regional coordination must be provided within the recommended management structure.

35. *See*, G. BLAIR, STATE-LOCAL RELATIONS IN 1966-67, BOOK OF THE STATES (1968-69) at 257; G. BLAIR, STATE-LOCAL RELATIONS IN 1968-69, BOOK OF THE STATES (1970-71) at 274.

36. See, Geisler and Martinson, *Local Control of Land Use: Profile of a Problem*, 52 LAND ECONOMICS 371 (1976); REPORT OF THE OHIO LAND USE REVIEW COMMITTEE TO THE OHIO GENERAL ASSEMBLY, 7, 10, and attached Minority Report at 4 (1977).

37. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, A HANDBOOK FOR INTERLOCAL AGREEMENTS AND CONTRACTS, at 18 (1967). Intergovern-

problems of area-wide scope rather than government reorganization has been no accident. The voluntary nature of contracts permits the participants the flexibility to deal with extra-territorial matters without ceding local autonomy. Creation of a water quality management authority of regional scope, either by adding to the powers of an existing agency that did not satisfy section 208 requirements or by forming a new agency altogether would require the permanent relinquishment of powers held very dear by local officials.

A water quality management system held together by intergovernmental contracts would not be acceptable under the technical requirements of the Act because participant governments could refuse to enter and withdraw from the system at will.[38] At the same time, a designated planning organization that failed to present non-regional management systems alternatives for consideration at the local level would be deemed irresponsible by its constituent local government officials. Approval procedures of the planning agencies which required local officials to select from sets of alternative proposals which contained regional management systems in juxtaposition to non-regional management systems could not be expected to produce many final plans with the kind of regional orientation envisioned by the drafters of section 208.[39]

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mental contracts are the arrangements by which one government will carry out various governmental functions by entering into a contract with another governmental unit, as, for example, a contract wherein one unit of government agrees to purchase services from another unit of government.

38. The nine functional minima of § 208(c)(2), taken as a whole, simply describe an abstract governmental entity that is different from an alliance of local governments formed by a network of contracts. The consensual nature of contractual relations militates against the rather complete set of autonomous powers described by that set of minima. The idea has been expressed by Mr. Valdas V. Adamkus, Acting Regional Administrator, U.S.E.P.A. Region V, Chicago, Ill., in this way:

> What remains to be furnished is the formal commitment of each of these agencies [that already have water quality management capabilities] to participation in the 208 plan, and an *overall binding* structure which will coordinate the management agencies and provide for an annual update of the plan.
>
> Speech entitled "Management Structures in Areawide Water Quality Management Planning," presented to the Ohio Municipal League — Ohio Environmental Protection Agency Conference on Water Quality Management (Section 208) Structures, Columbus, Ohio, May 24, 1978. [Emphasis supplied].

39. This is not to say that plans with regional government recommendations could not get past the local approval stage. It is obvious from the develop-

D. Pollution Control Hegemony—Has Congress Failed to Learn?

In retrospect, it was the curious paradoxical overall approach of the Act toward solving the nation's water pollution problems that produced the first dilemma. Impetus for passage of the Act was supplied largely by the poor record of water pollution control on the part of state and local governments.[40] Congress had already had less than satisfactory experience with legislation that was dependent upon state and local implementation for promoting environmental quality, even in the face of ever-increasing efforts to induce state and local activity. The history of air pollution control measures is illustrative.

Air pollution, from the outset of federal interest in the area, was considered to be primarily of state and local concern. Federal interventions in 1955, 1963, and 1965 were limited to mere encouragement of regulation as well as technical and financial assistance to state and local governments.[41] Although the Air Quality Act of 1967 conferred certain supervisory and enforcement powers upon federal officers, the underlying philosophy was that state and local government still carried the main responsibility. The less-than-enthusiastic response of state and local governments prompted the enactment of stiff federal regulatory powers in the Clean Air Amendments of 1970.[42] Yet, Congress still clung to the concept of primary state and local responsibility for combatting air pollution.

Congress' approach in the FWPCAA, on the heels of the Clean Air Act developments, borders upon irresponsibil-

ment of regional forms of government in various places of the country that regional government is not anathema to all. There is, however, a considerable difference between locally-initiated regional government and federally-imposed regional government. Furthermore, mere approval of a plan to be submitted for gubernatorial certification can be perceived as something less than an irrevocable commitment to regional government by the local officials who approved the plan when it comes to actually putting the plan into operation.

40. *See*, S. REP. No. 92-414, 92 Cong. 2d Sess. 4-5 (1971), reprinted in 2 Legis. History 1415.
41. Pub. L. 84-145, 69 Stat. 322; Pub. L. 88-206, 77 Stat. 392; Pub. L. 89-234, 79 Stat. 903, respectively. *See generally* W. RODGERS, ENVIRONMENTAL LAW 208-353 (1977).
42. P.L. 91-604, 42 U.S.C. § 1857 et seq. as amended (1978).

ity. Federal implementation of the programs outlined in the Act directed toward the monumental task of cleaning up the nation's waters would, of course, have required marshalling resources not available to the federal government within a reasonable period of time.[43] There was no reason to expect that a federally-mandated comprehensive water pollution control program to be made operational in the manner required by section 208 would be favorably received and acted upon by state and local officials. It does not stretch the bounds of reason to contemplate a state governor standing for reelection and being reluctant to encourage state environmental agency pressure on local officials to develop plans surrendering any measure of local autonomy. In a state having strong home-rule traditions, issues of local self-governance can become emotionally over-charged and can very quickly be placed above considerations such as long-range environmental objectives. Often subtle legal issues, such as whether the state can override home rule decisions in the field of water pollution control through the exercise of its police powers, pale in significance to the purely political issue of whether the governor would *dare* let something like that happen.

Congress should have been aware from the history of air cleanup efforts that a more incremental approach to water cleanup would have been advisable. Relying, as it must, on local efforts to accomplish the cleanup, Congress was faced with the problem of inducing local action commensurate with the federal timetable. The Air Act Amendments experience taught that advisory encouragement and financial assistance was not enough to spur local government units into acting as federal agents for pollution control. The political acceptability of wholesale adoption of federal objectives and programmatic techniques at the local level should have been considered suspect at the time the Water Act Amendments were being drafted. Concealing fairly rigid federal design preferences in language claiming local flexibility was at best ill-advised with the air pollution

43. *See*, Train v. Natural Resources Defense Council, Inc. 421 U.S. 60, 64 (1975).

control experience. Common sense should have shown that the Water Act Amendment approach was weak, in essence asking local governments to perform a politically unacceptable act as a favor while at the same time saying nonperformance for reasons of political unacceptability would be excused.

A system truly flexible, in which primary responsibilities to implement would be allowed to remain at the local level, but which would not include the mandatory regional orientation of certifiable management systems could have been developed in the legislation. The natural features of many water pollution control problems would themselves require areawide techniques to be employed, but local governments would be more inclined to employ those techniques on a consensual, cooperative basis than they would if they felt regionalism was being forced upon them. As the management strategies and systems were developed and modified in response to experiences and evaluations gained from operation, a regional form of government could very well evolve. Encouraging and assisting would certainly not be enough, but the governmental profile of regionalism created by section 208(c)(2) criteria put many local officials off the environmental quality objectives for the sake of protecting local autonomy.[44]

44. STEWART, *supra* note 6, at 1200. A side-effect of the delays encountered in implementing section 208 in comparison to other sections of the Act exacerbated this problem in the area in which the author was involved. Under the facilities construction grants program of Section 201 of the Act, many communities were able to build treatment facilities before efforts even began on Section 208. These facilities, modern in design and method, engendered a great deal of local pride. When the prospect of surrendering local decisionmaking powers over these facilities to a regional form of government under Section 208 became apparent to local officials, it became very difficult to even discuss the possible alternative forms of government with these officials. They were not interested in whether a modified sewer and water conservation district, for example, demonstrated administrative efficiency; comprehensive and effective capabilities to deal with environmental, economic and social problems; equity powers; and political accountability. The cession of local autonomy to such an entity was simply politically unacceptable, and discussion need proceed no further. Where this had occurred, even a more incremental approach of, say, a confederation with other local communities would not pass muster on political acceptability grounds. The silence produced by this "territorial imperative" reaction carried over to matters of internal management strategy and became maddening to a researcher trying to obtain information about how well *existing* agencies were performing their water quality management functions. The frustration increased as local officials began to perceive efforts to obtain information relevant to § 208 objectives as attempts

IV. THE SECOND DILEMMA: FEDERAL REQUIREMENTS FOR NON-POINT SOURCE POLLUTION MANAGEMENT STRATEGIES VS. NEED FOR DEFINITION OF THE NATURE AND EXTENT OF NON-POINT SOURCE POLLUTION PROBLEMS AS JUSTIFICATION FOR THE REQUIRED MANAGEMENT STRATEGIES

A. The Non-Point Source Management Systems Planning Requirements of the Act

It was clear that the management strategies to be developed pursuant to section 208 were to be more than "end of pipe," or point source oriented.[45] Non-point sources of pollution were an important concern of the section and supporting guidelines. The section required plans developed pursuant to its second main division to include procedures and methods for identifying and controlling agricultural and silvicultural runoff, such as runoff from manure disposal areas,[46] surface and underground mine runoff,[47] construction activity related pollution,[48] salt water intrusion,[49] and disposition of residual wastes.[50]

For planners charged with converting section 208 into an areawide management plan, the various federal guidelines and regulations suggested a simple five-point line of inquiry. Planners were instructed to determine (a) the existence and extent of water quality problems; (b) the extent to which the water quality problems could be ascribed to activities that generated pollution that could not be

by the designated organization to *promote* regional government. To many local officials, "208" meant federally-mandated regional government; as The Act became notorious and understanding deteriorated, the planning organization came to be thought of as "the Feds".

45. Section 502(14), 33 U.S.C. § 1362(14) (1978) defined "point source" to be "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". A simple negative definition of "non-point" source to be derived from this definition would be any type of water pollution that could be described as not coming from a point source.
46. Section 208(b)(2)(F), 33 U.S.C. § 1288(b)(2)(F) (1978).
47. Section 208(b)(2)(G), 33 U.S.C. § 1288(b)(2)(G) (1978).
48. Section 208(b)(2)(H), 33 U.S.C. § 1288(b)(2)(H) (1978).
49. Section 208(b)(2)(I), 33 U.S.C. § 1288(b)(2)(I) (1978).
50. Section 208(b)(2)(J), 33 U.S.C. § 1288(b)(2)(J) (1978).

delineated as coming from a discrete location; (c) the degree of reduction in pollution from those activities that might be required; (d) the cost of that reduction; and (e) the legal, financial and institutional management structure or system necessary to reduce the pollution.[51]

These points of inquiry are obviously interdependent and hierarchial. Without developing a substantial data base and analyzing that data at the first level, planners could not intelligently carry the inquiry to the next level, and so on to the fifth level. It was clear, as the title of the section itself suggested, that a federally-acceptable plan would be one which addressed management strategies of pollution problems of areawide scope as well as those that emanated from a discretely identifiable point source. It was equally clear that to be federally acceptable the strategies identified in the plan were not to be exercises in the realm of theory, but were to be anchored firmly to a base of carefully gathered and analyzed concrete data.

B. Proving the Need for Non-Point Source Pollution Control Measures

Where the section 208 planning process in the designated areas got started late because of delays in the program,[52] planning organizations found themselves facing deadlines in the certification process with scant data upon which to begin to consider management strategies and systems. Assembly, analysis and correlation of data were so difficult that development of the needed data within a short period of time was out of the question. Any recommendation of a management system without a significant foundation in empirical investigation could be perceived as circumventing the logical hierarchy of the five-point inquiry

51. *See*, U.S.E.P.A., DRAFT GUIDELINES FOR AREAWIDE WASTE TREATMENT SYSTEMS Ch. 6 (May 1974); U.S.E.P.A., GUIDELINES FOR STATE AREAWIDE WATER QUALITY MANAGEMENT PROGRAM DEVELOPMENT Ch. 6 (Aug. 1975); U.S.E.P.A., DRAFT GUIDELINES FOR STATE AND AREAWIDE WATER QUALITY MANAGEMENT PROGRAM DEVELOPMENT Ch. 7 (Feb. 1976); 40 C.F.R. § 131.11 *Plan Content* (1978) as amended. *See also*, W. DAVEY, CONSERVATION DISTRICTS AND 208 WATER QUALITY MANAGEMENT 65-84 (1977).

52. *See*, STEWART, *supra* note 6, at 1196.

and would subject the planners to criticism by local government officials.

Thus, the second dilemma was complete and working to drain the local planning effort of real meaning. Taking the time to assemble and examine the non-point source data would run afoul of the federal timetable. Making the recommendation on the basis of speculation and projection would jeopardize the local acceptability of the proposed management strategy.

Furthermore, the logical relationship between areal, or non-point source pollution and areal land use compelled the consideration of land use controls as a strategy to be employed in the management system. Comprehensive land use control embraces physical problems and political, legal, and ethical issues that are much broader than water pollution problems. Any recommendation that proceeded on the line of thought contained in the federal guidelines, which asserted simply that a water quality management system must take other social, economic and environmental considerations into account when making land use decisions would be presumptuous in the eyes of local officials. To them, it remained at best an open question whether land use decisionmaking capability should be made to reside in an institutional structure created for, oriented toward, and accountable according to its degree of attainment of water quality goals. Less than comprehensive land use decisionmaking capacity on the part of the water quality management system would also be a logical consideration since not all traditional land use control techniques are specifically suited to solving water pollution problems. But the propriety of recommendations that propose a fragmentation of land use decisionmaking capacity between potentially competing government entities would surely be questioned.[53] A local government that pursued an aggressive and progressive zoning, or annexation, or subdivision regulation policy would view the conferral of land use control powers upon an areawide system with skepticism simply because it could not foresee

53. *See generally, Areawide Planning, supra* note 7.

whether or not the land use decisions based upon water quality considerations would clash with land use decisions based upon urban growth and development considerations. Recommendations of a management system having a thin data base and founded primarily upon the mere *logical* relationship between non-point source problems and land use control would have a difficult time obtaining local approval.

The federally perceived need for action and the requirement for action based upon that perception being imposed upon the designated planning organization without the time to develop a defensible logical and empirical foundation for that action created quite enough pressure on local planners who were conscientiously attempting to comply with the Act. Efforts to incorporate proposals for land use controls into a management strategy would produce unavoidable friction among the local officials who jealously guard the status quo in land use decisionmaking. That friction would mean that the greater the land use control power the proposed management agency or agencies would have, the lesser the political acceptability the recommendation would have.

V. THE THIRD DILEMMA: CERTIFICATION

A third dilemma was produced by the certification process outlined by the U.S.E.P.A. regulations,[54] although it is closely related to the second dilemma discussed above. The process required the final plan to be "a detailed portion of the water quality management plans of the State," and required it to provide "an adequate basis for selection of management agencies to be designated."[55] In addition, in order to reduce areas of disagreement between the state level reviewing agency and the designated planning agencies, the states were required to implement a process for review and comment on a timely basis.[57] If the reviewing agency interpreted the word "detailed" literally, any hesitation on

54. Contained in 40 C.F.R. § 131 Subpart C as amended (1979).
55. 40 C.F.R. § 131.20(f)(1)(i) as amended (1979).
56. 40 C.F.R. § 131.20(f)(1)(iv) as amended (1979).
57. 40 C.F.R. § 131.20(b)(1) as amended (1979).

the part of the designated planners to make recommendations on the specific configuration of a management system component to deal with non-point source problems could be construed as insufficiently detailed. Any specific recommendations without a substantial empirical data base could be criticized for not supplying an "adequate basis" for the proposed system.

Furthermore, timely review and comment is subject to great variance in interpretation. The process of review and comment in concept could encompass the spectrum of cursory perusal and verbal comment on the one hand, to detailed, formalized, point-by-point, word-by-word analysis with written comment on the other. Timeliness could also vary according to the technique of review and comment selected. Where the more formalized technique was adhered to, a planning organization could begin to encounter problems with the timetable of the Act just by waiting to hear from the reviewing agency about preliminary plans that had been submitted.[58] For example, if the governor of the state was facing an election and wished to avoid alienating significant segments of the voters by committing to a federally-imposed regional form of government, the review and comment process could be utilized effectively to postpone decisions. Since the review and comment process was designed to provide local planners with a notion of what was to be considered a certifiable plan, the process could also be utilized to exert pressure on the designated planning organization to conform the plan to the state agency's idea of what a "208 agency" should be.

58. The process for state certification for the designated area in which the author was involved called for submission of the final plan to the reviewing agency on May 21, 1978. An interim plan was submitted for review and comment in November of 1977. Official review and comment by the agency was received in March of 1978. The draft plan was submitted in September of 1978, revised January, 1979. As of the date of this writing, certification has not been received by the planning organization on all elements of the plan.

See also, M. Reddish, *The TMACOG 208 Water Quality Management Plan: A Realistic Alternative for Ohio Counties*, Statement presented at Conference on Clean Water: Alternatives for Ohio Counties, Columbus, Ohio, September 7, 1977, wherein Mr. Reddish asserts that the TMACOG planning organization had not received certification of a plan that had been submitted nine months earlier.

VI. THE REALITIES OF IMPLEMENTATION — DO WE LEARN FROM THIS EXPERIENCE?

The implementation of Section 208 plans nationwide cannot be characterized as spectacular. As of January, 1979, fifty-five water quality management plans have been certified at the state level.[61] Of those, thirteen have been certified by the U.S.E.P.A.[62] Twenty-two states, in which seventy-one designated planning organizations are working on Section 208 implementation, had not certified a single plan by that date.[63] Six planning organizations in four states and Puerto Rico had been "de-designated" as water quality management planners.[64] Of $110 million allocated in fiscal year 1977 to the U.S.E.P.A. regional offices for continued planning, only $20.5 million had been disbursed to the designated planning organizations and the state by December 20, 1978.

Professor Richard B. Stewart of Harvard University suggests that the over-zealousness of the FWPCAA was intentional. He may be correct that the proponents of the Act saw it as a grand legislative experiment seeking to sensitize the American public to water pollution problems, garner support for public programs, and demonstrate federal dedication to cleanup action. If that is an accurate view of the Act, the long-range effect of the experiment could have much more of a negative character than the experimenters envisioned. Public sensitivity to water pollution problems was heightened, but so was the local official's sensitivity to federally-imposed programs. Support for programs to combat water pollution may have been gained in some circles, but support for the objectives and methodolgy of the Act was undermined by the predisposition of Section 208 toward a form of government alien to a significant portion of the population. Federal dedication to cleanup efforts was demonstrated, but the program based upon federal-state-local cooperation with the local segments serving as the imple-

59. N.A.R.C. Water Quality Report — 208 Status Report 1 (January 1979).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. STEWART, *supra* note 6, at 1199.

mentation arm has been perceived as the federal government handing down a set of platitudes, the locals getting stuck with all the dirty work—and the states being caught in the middle. If something can be learned from the experiment and the negative side effects can be avoided in the next program of national scope needing local implementing powers, then perhaps these costs can be counted as well-spent in the long run. From the standpoint of one involved in that phase of the experiment where congressional words were sought to be converted into local action, the life of the paper tiger seems to be ebbing.

It may recover, and future programs will be stronger at the outset, if the message from this experiment can be remembered. If a program with federal objectives is dependent upon a flexible cooperative multi-government effort, then true flexibility and opportunity for cooperation must be included in the underlying legislation. If the consensus of Congress is that flexibility and cooperation will only guarantee the ineffectiveness of the program, then clear, unequivocal, mandatory language must be employed and clear, unequivocal enforcement mechanisms set into motion. If nothing else, it should be remembered that when a federal program is suspect on the ground of political unacceptability at the local level it makes no sense to make the implementation of the program turn upon its political acceptability. Such an approach allows for no middle ground to be reached between the polar aspects of regional federalism and local autonomy and only perpetuates the tension created by that polarity.