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Water Quality Policy and the Park City Principles

Lawrence J. MacDonnell

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INTRODUCTION

The Federal Water Pollution Control Act Amendments of 1972[1] made protection of water quality a national objective to be achieved through a nationally designed, federally supervised program. Enactment of this law marked the culmination of a twenty-four year process that began in 1948 with the first tentative federal involvement in water quality matters.[2] Now another twenty-four years have passed under the new regime, marked by impressive improvements in water quality across the country.[3] Despite these widely acknowledged water quality gains, proposals for making major changes in what is now known as the Clean Water Act abound.[4] Congress is in the midst of one of its periodic reauthorizations of the Clean Water Act, prompting much of the motivation for these discussions.

This paper applies the Park City Principles to the existing system of water quality protection under the Clean Water Act. It begins with a brief overview of the legal framework governing water quality protection. It then turns to a general consideration of the Park City Principles in relation to this legal framework. Next it applies the Park City Principles to selected portions of a bill passed by the U.S. House of Representatives in 1995 to amend the Clean Water Act. Finally it assesses the effectiveness of the Park City Principles in evaluating federal water quality policy.

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* Lawrence J. MacDonnell is a lawyer and consultant in Boulder, Colorado. In February 1996, he was appointed to be the executive director of the Western Water Policy Review Advisory Commission. He was the director Natural Resources Law Center at the University of Colorado School of Law between 1983 and 1994. He holds a B.A. from the University of Michigan, a J.D. from the University of Denver College of Law, and a Ph.D. from the Colorado School of Mines. The author would like to acknowledge the help of Paul Frohardt, Denise Fort, and Ben Grumbles in preparing this paper.

1. Pub. L. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1387 (1994)).

2. The Federal Water Pollution Control Act ch. 758, 62 Stat. 1155 (1948) (current version at 33 U.S.C. §§ 1251-1387 (1994)). *See also* N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 IOWA L. REV. 643 (1977).

3. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL WATER QUALITY INVENTORY 1994 REPORT TO CONGRESS (1995) [hereinafter NATIONAL WATER QUALITY INVENTORY].

4. *See, e.g., Clean Water Agenda: Remaking the Laws that Protect Our Water Resources*, EPA J., Summer 1994.

The Park City Workshops represent an attempt through a consensus process to find guiding principles that should shape and define water policy. In turn, the Powell Consortium sought to test these principles in relation to selected water policies. This paper focuses on existing federal policy for managing the sources of water quality degradation that impair desired uses of water. The paper begins with a introduction to the Clean Water Act.

OVERVIEW OF THE CLEAN WATER ACT

In 1972 Congress announced its intention "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] Three basic mechanisms are provided to accomplish this objective: a federally-mandated permit system regulating all discharges from point sources such as pipes;[6] grants for the construction of publicly-owned sewage treatment facilities;[7] and planning and management for nonpoint sources.[8] The Clean Water Act establishes a national program intended to control and reduce the discharges of pollution that limit desired uses of water in the states.[9]

A. The Permit System

The heart of the federal system for water pollution control created in 1972 is the National Pollution Discharge Elimination System (NPDES).[10] Congress mandated that the discharge from a "point source"[11] of "any pollutant" was unlawful,[12] except in compliance with the NPDES permit program. Discharges under the permit must meet specified "effluent limitations" based on nationally uniform, technologically-based performance standards for categories of processes.[13] More stringent limitations apply for toxic pollutants.[14] States are authorized to administer the permit

5. 33 U.S.C. § 1251(a).
6. 33 U.S.C. § 1342.
7. 33 U.S.C. § 1281.
8. 33 U.S.C. § 1288.
9. 33 U.S.C. § 1313.
10. 33 U.S.C. § 1342.
11. 33 U.S.C. § 1362(12), (14). A point source is defined as "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." *Id.*
12. 33 U.S.C. § 1311(a).
13. 33 U.S.C. § 1311.
14. 33 U.S.C. § 1317.

program upon approval by the EPA Administrator.[15] In 1987, Congress brought stormwater discharges within the NPDES program.[16]

B. Publicly Owned Treatment Works

In addition to controlling discharges from specific sources, Congress was interested in getting more waste streams treated by new or upgraded regional treatment facilities. Discharges from such facilities would require a permit as well, but with performance standards set at a more modest level than for industrial sources.[17] To encourage the construction of such facilities Congress established a major grant program.[18] In 1987, Congress authorized states to establish revolving loan funds with initial capitalization from federal appropriations.[19]

C. Nonpoint Source Control

Initially, Congress created an "areawide" planning process for addressing diffused or nonpoint sources of water pollution.[20] States were to identify areas with "substantial water quality control problems" and to establish an organization to develop a management plan, supported by federal grants.[21] In 1987, Congress added the requirement that each state prepare a report for the EPA identifying waters not meeting water quality standards because of nonpoint source pollution, identifying the sources of that pollution, identifying best management practices for controlling these sources, and describing programs for their control.[22] States then are to prepare a management plan for controlling nonpoint sources. Again, federal grants are made available upon satisfactory completion of the assessment report and development of the state program.

D. Water Quality Standards

Water pollution control is not an end in itself. Rather it is a means by which desired uses of water are protected from degradation impairing or preventing such uses. Water quality standards consist of designated

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15. 33 U.S.C. § 1342(b).
16. Pub. L. 100-4, tit. IV, §§ 401-404(a), 404(d), 405, 101 Stat. 65-67, 69 (1987) (codified at 33 U.S.C. § 1342(p)).
17. 33 U.S.C. § 1311(b)(1)(B).
18. 33 U.S.C. § 1281.
19. Pub. L. 100-4, tit. II, § 212(a), 101 Stat. 23 (1987) (codified at 33 U.S.C. § 1383).
20. 33 U.S.C. § 1288.
21. 33 U.S.C. § 1288(a)(1), (2); 33 U.S.C. § 1288(f).
22. Pub. L. 100-4, tit. III, § 316(a), 101 Stat. 52 (1987) (codified at 33 U.S.C. § 1329).

uses and water quality "criteria" designed to protect such uses.[23] Uses include such things as public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes. EPA develops criteria for the maximum concentrations of pollutants and other factors necessary to ensure particular uses.[24] States are required to set standards to "protect the public health or welfare, enhance the quality of the water and serve the purposes of this [law]."[25] They must revisit their water quality standards every three years.[26]

Standards, however, are goals to be met and maintained. They do not directly provide mechanisms by which they are to be attained. It was the unenforceability of water quality standards alone under earlier federal laws addressing water pollution control that led to the emphasis on direct regulation of discharges from point sources.[27] The Clean Water Act also provides a specific link between point source regulation and water quality standards by authorizing states to establish more stringent effluent limitations on point sources where determined to be necessary to attain established water quality standards.[28] Moreover, applicants for federal licenses or permits for activities involving water discharges must obtain certification from the affected state that the discharges will comply with state water quality standards.[29]

With this brief overview of key provisions of the Clean Water Act, I turn now to a discussion of the Park City Principles and apply them to these provisions.

E. Park City Principles

Six general principles emerged from the Park City workshops: recognize diverse interests; problemshed approach; flexible, predictable, adaptable; decentralize to the states; negotiation and market-like approach; and joint policy participation. In this section I discuss my understanding of these principles and then apply them to present federal water quality policy.

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23. 33 U.S.C. § 1313(c)(2)(A).
24. 33 U.S.C. § 1314(a).
25. 33 U.S.C. § 1313(c)(1), (2)(A).
26. 33 U.S.C. § 1313(c).
27. *See generally*, 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.1 (1986).
28. 33 U.S.C. § 1313(d). Under this provision, states are to prioritize waters not meeting standards according to the severity of the pollution and uses to be made of the water. Total maximum daily loads of pollutants that may be added to these waters and still achieve water quality standards are to be established, with EPA approval. In practice, the national categorical effluent limits have become secondary to permit-specific requirements imposed to meet stream water quality needs.
29. 33 U.S.C. § 1341(a).

F. Understanding the Principles

1. Recognize Diverse Interests

Recognition of diverse interests places a value on openness and inclusiveness in water policy. It asks whether existing policy is keeping pace with evolving values and needs. More fundamentally, it suggests that water policy must itself have the means to make necessary changes and reflect new and different values as they gain importance.

2. Problemshed Approach

The problemshed principle suggests a necessity for approaching water issues in a system-based, integrated manner. It recognizes the inevitable tendency to view issues in self-defined terms which may neglect aspects essential to effective decisionmaking or management. It proposes a comprehensive approach to water policy development and implementation that is "problem" focused rather than jurisdictionally or institutionally defined.

3. Flexible, Predictable, Adaptable

The flexible-predictable-adaptable principle articulates generally desirable attributes of water policy while acknowledging the tradeoffs among these attributes. This principle is described in terms of responsiveness, apparently similar in this respect to the first principle. It focuses less on the general importance of inclusiveness, however, and more on the role of managers (and presumably other policy makers) as decision makers and implementors. It refers to the importance of good information but the inevitable uncertainty under which many actions must be taken.

4. Decentralize to the States

The decentralize-to-states principle suggests that water policy is best established and implemented at the state level. In particular, it calls for federal policy to reflect this view. Premised on the assumption that "decentralized, close-to-the-ground approaches work best,"[30] this principle suggests that states are the appropriate level for reflecting local needs while recognizing "overriding national interests and goals."[31]

30. D. Craig Bell et al., *Retooling Western Water Management: The Park City Principles*, 31 LAND & WATER L. REV. 301, 304 (1996) (located in this issue).

31. *Id.*

5. Negotiation and Market-Like Approach

The negotiation and market-like approach principle is presented as a preference to "command and control" approaches for accomplishing policy objectives. Directive approaches are not rejected outright but are characterized as "overused," "often ineffective," and causing "unintended adverse consequences."[32] Negotiation and market-like approaches are viewed as empowering.

6. Joint Policy Participation

The joint-policy-participation principle expresses the importance of coordinating, and even possibly integrating, federal and state water policy development and implementation. At one level this principle is aimed at traditional concerns about duplication of effort and conflicting objectives. At another level it is directed at growing interest in more integrated management approaches organized around watersheds or ecosystems, along the lines suggested by the problemshed principle.

G. Applying the Principles to Federal Water Quality Policy

The Park City Principles reflect, in part, an effort to identify conceptual common ground among a group of people with considerable influence regarding water policy in the western states. Assuming these principles in fact represent general policy directions supported by water leaders in the West, they suggest interest in changes from existing approaches in several respects. In particular they reflect special interest in revisiting federal and state roles in western water matters, with the states assuming (or reassuming) a more central position.

In the ebb and flow of federalism in this country the Clean Water Act represents a high tide of federal direction of water quality objectives. Like a number of other statutes enacted in the 1970s, the Clean Water Act reflects public, or at least Congressional, impatience with state efforts to provide environmental protection. Two decades later, with clear progress in environmental improvement apparent and with public support of environmental protection now more fully reflected at the state level, the need for a uniform, federally directed program of water quality protection is less evident. Comprehensive, detailed federal statutory and regulatory requirements remain, however.

32. *Id.*

Applying the Park City Principles to the federal water quality framework necessarily involves a number of subjective judgments. For example, which "diverse interests" should be recognized? What does it mean to "recognize" an interest? Is it enough that the interest is acknowledged? Must it be formally considered in decisions? Must it be given the opportunity to participate? Must it be allowed to vote on decisions? The following discussion reflects assumptions about the meaning of these principles that may or may not be shared by those involved in the workshops.

1. Recognize Diverse Interests

In some respects the assertion of water quality protection as a national requirement was a reaction to the widespread failure to protect water quality-dependent uses of water. The benefits of allowing activities to degrade water quality (for example, using rivers and lakes for the disposal of untreated waste) were viewed as outweighing the costs of that degradation. Water quality-based interests were largely disregarded.

In the existing framework, water quality interests are reflected in the water quality standards established by states for stream segments. Through this process the uses of the water are identified and at least some of the water quality parameters necessary to protect those uses are established. Presumably, if additional uses are determined to be valuable they will be addressed within the states' triennial review process.

Some have suggested that water quality protection now overrides other important values such as property rights to use water and the traditional prerogative of the states to make water allocation decisions.[33] Moreover, there has been longstanding concern about the effects on sources of nonpoint pollution such as agriculture if they were to be subjected to direct regulation. Cities in particular have complained about the costs of the stormwater control program established in 1987. Indeed there is always the danger that in the pursuit of one objective, other objectives or interests are harmed.

The existing water quality protection framework takes an instructive approach to relating national and state interests. It makes water quality protection a national objective but leaves it to the states to establish the uses of water that are to be protected. EPA identifies the criteria that will protect those uses; states adopt water quality standards based, in part, on those criteria. The federal law imposes absolute requirements only on those discharging

33. *See generally* Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Quality Versus Water Quantity: A Delicate Balance*, 34 ROCKY MTN. MIN. L. INST. 24-1 (1988).

pollutants from a point source. It makes these requirements uniform by type of source on a national basis. It explicitly defers to states in matters of water allocation.[34] It explicitly exempts agricultural return flows from point source regulation.[35] That water quality considerations do not now outweigh all other interests is reflected by the fact that water quality standards remain unmet in as much as forty percent of all waters in the country.[36]

2. Problemshed Approach

The emphasis in the Clean Water Act on regulation of point sources of pollution suggests a failure to take the problemshed approach, focusing instead on a single aspect of the problem. In retrospect, it seems likely that the drafters of the 1972 amendments viewed water quality degradation largely in terms of unregulated industrial wastes. Nevertheless a comprehensive look at the Clean Water Act suggests that it contains considerable support for a problemshed approach to water quality protection. For example, as shown in Table 1, the State of North Carolina identified a number of provisions in the law that either require or encourage basinwide planning for water quality protection.[37] These include the areawide approach encouraged in section 208, the planning encouraged under section 303, and the nonpoint source management provided for under section 319. Moreover, as shown in Table 2, North Carolina identified a number of other provisions of the Clean Water Act that would, in its view, be "more completely and efficiently implemented" through a basinwide approach.[38]

Nevertheless it is probably fair to say that the Clean Water Act was not designed from a problemshed-oriented perspective. It divides water quality problems according to categories of sources of pollution or impairment that reflect, in part, political judgments about the need for their control rather than professional judgments about what is necessary to achieve water quality protection. Thus discharges from industrial processes, irrespective of the contaminants in those discharges, must be controlled to technological limits, while discharges from municipal water treatment facilities need only achieve "secondary" standards.[39] Pollution from diffused sources is not regulated at

34. 33 U.S.C. § 1251(g).

35. 33 U.S.C. § 1362(14).

36. NATIONAL WATER QUALITY INVENTORY, *supra* note 3.

37. NORTH CAROLINA DEP'T OF ENV'T, HEALTH, AND NATURAL RESOURCES, NORTH CAROLINA'S BASINWIDE APPROACH TO WATER QUALITY MANAGEMENT: PROGRAM DESCRIPTION, Report No. 91-08 (2d prtg. 1992).

38. *Id.*

39. To meet stream specific water quality needs the NPDES permit for a municipal facility can in fact impose more stringent effluent limitations on such discharges. Moreover, the strict limits on discharges of toxics apply equally to all permitees under the Clean Water Act.

all. There is little in the Clean Water Act that encourages the development of creative approaches at the watershed level. To the contrary, its original intention was to force all the states to follow a uniform regulatory approach. The 1972 amendments were not intended to be "empowering." They were designed to force action.

3. Flexible, Predictable, Adaptable

The Clean Water Act requires that certain things happen. Most prominently, it prohibits the discharge of a pollutant without a permit.[40] Most of the law's directives are aimed at the Administrator of the EPA. It requires the states to establish water quality standards.[41] Once a state takes over implementation of a permit program it must follow certain requirements.[42] The states are required to undertake certain planning processes;[43] they are also required to submit certain reports.[44]

Regulatory approaches are inflexible by definition since they tend to prescribe performance standards that must be met or specific actions that must be taken. Thus categorical effluent requirements set specific limits on the parameters of certain constituents contained in discharges from certain types of facilities. The implementation of the point source and stormwater permit programs is based on assuring that similar sources are treated the same, no matter where in the country they are located. Such an approach can be regarded as equitable as among those in the same business using the same basic process or those cities of the same size since they will all be required to use the same basic technology for treating their discharges. Since EPA gets to determine what is technologically achievable at a national level, more removed from the pressures of any particular interest, presumably these judgments are objective and independent. At the same time, this approach is inherently inflexible in some respects. Little room is given for making case-specific adjustments or in allowing the relaxation of requirements in return for other water quality improvements. Little recognition is given to the assimilative capacity of the receiving waters or the cost-effectiveness of the required measures.

Permits are issued for five-year periods. Point source requirements are now well established and understood so that most of the issues that

40. 33 U.S.C. § 1311(a).

41. 33 U.S.C. § 1313(a)(3)(A).

42. 33 U.S.C. § 1342(b).

43. For example, states are required to undertake areawide waste treatment mangement planning under 33 U.S.C. § 1288(b) and continuing planning under 33 U.S.C. § 1313(e).

44. For example, 33 U.S.C. § 1315 requires all states to submit biennial water quality reports to EPA and 33 U.S.C. § 1329 requires the submission of nonpoint source assessment reports.

arose originally in developing standards and writing permits to satisfy these standards have been settled. Thus, from the perspective of both the regulator and the regulated there is now a considerable degree of predictability in the point source program. By comparison, the stormwater permit program is still in the process of definition and development; the ultimate requirements to be imposed under parts of this program remain uncertain.[45]

The practice of requiring Congress to periodically reauthorize the appropriations under which the Clean Water Act and other federal environmental programs operate provides a regular opportunity for review of the substantive provisions of the law as well. Thus there have been significant revisions in 1977 and 1987, and Congress is once again considering bills that would make important changes in the law.

The need for more flexibility in the administration of the Clean Water Act is one of the major themes of the bill sponsored by Congressman Shuster, discussed in the following section. A committee staff report accompanying the bill notes: "Given the deplorable state of our waters in 1972, a program that relied on a top-down, command-and-control regime run from Washington was necessary."[46] It goes on: "But the rigid, Washington-based management scheme so effective in the past has become an obstacle to future gains . . . Under dispute is not the goal of further progress in water pollution control, but the methods by which we will get there."[47]

4. Decentralize to the States

Interestingly, the water quality enforcement provisions of the Clean Water Act are cited as a model of decentralization of authority and accountability in the Park City Principles.[48] The Clean Water Act explicitly recognizes that the control of pollution is a "primary" responsibility of the states.[49]

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45. Joel B. Eisen, *Toward Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1, 54-55 (1995).

46. MAJORITY STAFF OF THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE, UNDERSTANDING THE CLEAN WATER AMENDMENTS OF 1995 (H.R. 961) 1 (1995) [hereinafter REPORT ON H.R. 961].

47. *Id.* at 2.

48. The decentralize-to-states-principle provides:

> Authority and accountability should be decentralized within policy parameters. This includes a general federal policy of recognizing and supporting the key role of states in water management as well as delegation to states and tribes of specific water-related federal programs *patterned after the model of water quality enforcement.*

Bell et al., *supra* note 30, at 304 (emphasis added).

49. 33 U.S.C. § 1251(b).

States establish water quality standards for waters within their boundaries and are invited to administer the permit program for point sources.[50] States develop programs for managing nonpoint sources of pollution.[51] Many aspects of the Clean Water Act are required as a matter of law, and their implementation is supervised by EPA. But considerable effort is made to have the major program components managed and implemented by the states. A major incentive motivating state efforts is the large number of grant programs that make money available to states who meet certain requirements.

The preference expressed in the Park City Principles for bargained-for approaches rather than command-and-control, on its face, suggests fundamental disagreement with the directive requirements of the Clean Water Act. The explanatory text accompanying the principles, however, takes a far more moderate tone, recognizing the value of command-and-control approaches in some instances. Perhaps this principle means that whenever it appears that desired results can be achieved either through a voluntary or an involuntary approach the voluntary approach is to be preferred. If so, the issue then becomes the desired outcome(s) and whether there are effective voluntary approaches.

The goals of the Clean Water Act that the discharge of pollutants into navigable waters be eliminated by 1985, that water quality suitable for recreation and for protection and propagation of fish, shellfish, and wildlife be achieved by 1983, and that the discharge of toxic pollutants in toxic amounts be prohibited were not likely to be achievable through voluntary measures. Indeed, they were not achievable even with the command-and-control measures established under the law. As described, what is in fact being commanded under the Clean Water Act is that dischargers from point sources obtain a permit that requires compliance with certain minimum standards of performance. Judging from attempts to amend the Clean Water Act, there is little fundamental opposition to this requirement at present, except concerning stormwater permits for large municipalities.

5. Negotiation and Market-Like Approach

Voluntary measures for inducing changes in pollution-causing activities, especially if the expected changes are more costly than existing approaches, are problematic. Bargaining and markets work in situations where one party has something transactable that another party wants. In the water quality context, those wanting to enjoy the benefits of improved water quality could pay those whose activities are degrading the water

50. 33 U.S.C. §§ 1313(a), 1342(b).
51. 33 U.S.C. § 1329(b).

quality to stop their activities or to modify their activities so that effects on quality are regarded as acceptable. This is the solution proposed by Professor Coase in 1960.[52] United States environmental law, however, established as a basic tenet the proposition that it is the polluter who should pay, and that pollution at least at specified levels and from particular sources should be prohibited. This was a fundamental choice, not now likely to be revisited. Within this basic framework, however, there is growing interest in exploring opportunities to create markets in certain pollutants, to encourage trading of pollution requirements, or to otherwise induce desired results without having to prescribe the means by which the results are accomplished.[53]

6. Joint Policy Participation

The 1972 Federal Water Quality Act Amendments asserted federal domination over the design and supervision of the program it established, though it clearly envisioned an active state implementation role. Public participation at both the federal and state level is actively encouraged.[54] The EPA Administrator is directed to cooperate with state water pollution control agencies, among others, in developing programs for controlling water pollution.[55] The Administrator is to consult with states respecting the criteria for water quality that are to be developed.[56] The Administrator also is to consult with states respecting effluent limitation guideline regulations.[57]

I turn next to a consideration of H.R. 961 and the increased role it would provide for the states.

H.R. 961 AND THE PARK CITY PRINCIPLES

In 1995, the U.S. House of Representatives passed H.R. 961, the Clean Water Amendments of 1995.[58] In a number of respects this bill reflects sympathy with the views expressed in the Park City Principles.[59] In

52. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

53. *See* ROBERT N. STAVINS, PROJECT 88—ROUND II INCENTIVES FOR ACTION: DESIGNING MARKET-BASED ENVIRONMENTAL STRATEGIES (1991); JOHN O. LEDYARD, DESIGNING ORGANIZATIONS FOR TRADING POLLUTION RIGHTS (1993); JENNIFER L. KARAS, COST EFFECTIVE ATTAINMENT OF AIR QUALITY GOALS: CLOSED AND OPEN MARKET EMISSIONS TRADING PROGRAMS EFFORTS TO UNIFY DUELING PRINCIPLES (1995); ELAINE MULLALY JACOBSON, THE THEORY AND PRACTICE OF POLLUTION CREDIT TRADING IN WATER QUALITY MANAGEMENT (1994).

54. 33 U.S.C. § 1251(e).

55. 33 U.S.C. § 1252(a).

56. 33 U.S.C. § 1314(a)(1).

57. 33 U.S.C. § 1314(b).

58. H.R. 961, 104th Cong., 1st Sess. (1995).

59. As a general matter there is considerably more deference to states. Thus in section 101

this section I look only at selected provisions relating primarily to stormwater, watersheds, and pollution prevention or reduction.

In 1987, Congress extended the permitting program of the Clean Water Act to municipal and industrial stormwater discharges.[60] Difficulties in implementing this permit system prompted the House of Representatives to transform this program from a regulatory to a voluntary one.[61] In a new section 322, stormwater discharges would be managed by states. States are to identify "categories" of discharges that should be subject to control measures. Then they are to identify measures that would make it possible to meet water quality standards within fifteen years. Essentially, stormwater discharges would be managed in the same manner as nonpoint source pollution.

In section 321, H.R. 961 authorizes states to establish "watershed management programs." The required elements for such programs are spelled out in some detail.[62] A number of specified activities under an approved program are listed as eligible to receive federal funding assistance.[63] There is special provision for a "pollution reduction credits trading program."[64]

In amendments to section 302, H.R. 961 allows modification of permit terms and conditions to encourage pollution prevention or reduction. Thus a compliance deadline may be extended if the permittee agrees to implement an "innovative pollution prevention technology" with the potential to reduce effluents more than would otherwise occur under the permit.[65] In addition, permit modifications are authorized if the permittee commits to implementing pollution prevention measures or practices that "will achieve an overall reduction in emissions to the environment (including emissions to water and air and disposal of solid wastes) from the facility . . . greater than would otherwise be achievable [under the Act] and will result in an overall net benefit to the environment."[66] Permit modifications also are authorized where the owner or operator of a discharge source has entered into a binding contractual agreement with any other source in the same watershed to implement pollution reduction controls or measures beyond those required by law that, it is determined,

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there are two new provisions making it national policy to support state efforts.

60. 33 U.S.C. § 1342.

61. For a discussion of the types of concerns that prompted this change, see REPORT ON H.R. 961 *supra* note 46, at 89-93.

62. H.R. 961 § 321(a)(2).

63. H.R. 961 § 321(c)(1).

64. H.R. 961 § 321(g).

65. H.R. 961 § 302(a)(1).

66. H.R. 961 § 302(b).

"will result collectively in an overall reduction in discharges to the watershed that is greater than would otherwise be achievable if the parties to the pollution reduction agreement each complied with [the Act] resulting in a net benefit to the watershed."[67] The so-called "anti-backsliding" provision in section 402(o) is amended to allow less stringent effluent limitations in permits for permittees taking pollution prevention measures that produce a "net environmental benefit."[68]

Thus many of the changes proposed in H.R. 961 are consistent with the sentiments expressed in the Park City Principles. They seek to provide more flexibility in the administration of the permit program, transform one permit program to a best management practices approach, and increase the role of the states. A watershed approach is explicitly encouraged. And the possibility of increased flexibility in the permitting system is introduced to provide additional incentives for pollution control.

CONCLUSION

The Park City Principles are presented as fundamental attributes for good water policy. Numerous elements of the federal Clean Water Act appear to be at variance with these principles. The apparently inevitable conclusion is that the Clean Water Act is seriously flawed.

Some would agree with this conclusion, but many more would not. The quality of water in the United States has improved dramatically in the last twenty years, due in large part to the actions put into place by the Clean Water Act. I find little reason to believe that a federal water quality law established in 1972 based entirely on the Park City Principles would have been as successful in improving water quality.

The Park City Principles reflect policy characteristics that may now make sense at this point in the evolution of water quality policy. Thus the failings of the Clean Water Act in reflecting these characteristics may well indicate areas in which changes are needed at this time. There is a need for additional flexibility in the regulatory apparatus to encourage actions that would provide greater benefits than those required by regulation. It is not flexibility per se that is the desirable attribute, however, but flexibility that is likely to produce additional benefits. Likewise there are gains that can potentially be made by decentralizing some aspects of the law to the states. Simply turning back water quality protection to the states does not, by itself, guarantee that water quality improvements will

67. H.R. 961 § 302(c).
68. H.R. 961 § 302(d).

occur. Similarly there is room to incorporate more incentive-based approaches into the water quality protection system, but only if they are likely to produce more water quality benefits (without offsetting costs) than existing approaches.

As this discussion suggests, the Park City Principles fail to consider the substantive objectives of water policy and to factor in the effectiveness by which policies reflecting these principles would achieve these objectives. With the possible exception of recognizing diverse interests, none of the Park City Principles appears to represent some absolutely essential policy attribute. Rather they seem to be developed more in reaction to what exists now, suggesting the needed or desired direction of change. In short, they are relative, not absolute. In this sense they probably do not qualify as true principles.

Much of the effectiveness of the Clean Water Act derives from its national mandate. There is a rough sense of fairness in the requirement that all like point sources of pollution must achieve equivalent levels of pollution control. Having this requirement come from the national level frees the states to focus on the task of implementation. To the states is reserved the more important task of establishing water quality standards for its waters. These are the uses the states would like their users to be able to make of the water. It is their users that are the beneficiaries, for the most part. It is this dynamic that is the fundamental genius of the Clean Water Act: a federally driven program intended to support state-determined objectives.

Thus if the objective of the Park City Principles is to establish some basic touchstones for policy formation they probably do not succeed. If, on the other hand, they are understood as one consensus about the directions in which changes of water policy are needed, they seem on point. Indeed, changes in the Clean Water Act in the direction of the Park City Principles appear to have considerable support in the Congress as well as in the West.

TABLE 1. Sections of the Federal Clean Water Act that Require or Encourage Basinwide Planning and the Development of Basinwide Management Plans.[69]

Section	Congressional Mandate
201(c)	To the extent practicable, waste treatment management shall be on an areawide basis and provide control or treatment of all point sources of pollution including in place or accumulated pollution sources.
208	Several clauses of this section call for areawide planning, reporting, and control of point and nonpoint sources. The two clauses cited below are presented as examples only and are not intended to represent the entire scope of this section.
208(a)	Encourage and facilitate the development and implementation of areawide waste treatment management plans.
208(b)	Section 1 - Not later than one year after the date of designation, the organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 201.
203(d)	Subsection 1A - Each state shall identify those waters within its boundaries for which the effluent limits required by 301(b)(1) A and B are not stringent enough to complement any water quality standards applicable to such waters. The state shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.
303(e)	Subsection 3 (A)-(H) - The administrator shall approve any continuing planning process . . . which will result in plans for all navigable waters within such state, which include but are not limited to A - effluent limits and schedules of compliance at least as stringent as those required by 301(b), 306, and 307;

69. NORTH CAROLINA DEP'T OF ENV'T, HEALTH, AND NATURAL RESOURCES, NORTH CAROLINA'S BASINWIDE APPROACH TO WATER QUALITY MANAGEMENT: PROGRAM DESCRIPTION, Report No. 91-08 (2d prtg. 1992).

B - the incorporation of all elements of any applicable areawide waste management plans under section 208 and applicable basin plans under section 209;

C - total maximum daily loads for pollutants per 303(d);

D - procedures for revision;

E - adequate authority for intergovernmental cooperation;

F - adequate implementation including schedules for compliance;

G - controls over the disposition of all residual waste; and

H - an inventory and ranking, in order of priority, of needs for construction of waste treatment works.

319(a) Nonpoint Source Management Program, State Assessment Reports - The Governor of each state shall submit a report which (a) identifies waters which require control of nonpoint sources to attain water quality standards, (b) identifies those categories of nonpoint sources (or specific sources) which add significant pollution to each portion of waters identified in a (c) describes the process for identifying best management practices and measures to control each category, and (d) identifies and describes state and local programs for controlling nonpoint sources.

319(b) State Management Plans - The Governor of each state shall submit a management program. Each management program shall include (a) identification of the best management practices which will be undertaken, (b) identification of programs (both regulatory and nonregulatory) to achieve implementation of best management practices by categories, (c) a schedule of annual milestones for implementation, (d) a certificate from the State Attorney General that the laws of the state provide adequate authority to enforce b, or schedule to seek additional authority, and (e) sources of federal or other assistance and funding.

319(b) Section 4 - A state shall, to the maximum extent practicable, develop and implement a management program under the subsection on a watershed by watershed basis.

TABLE 2. Sections of the Federal Clean Water Act that Would Be More Completely and Efficiently Implemented Through Basinwide Management and Planning.[70]

Section	Congressional Mandate
209(a)	The President, acting through the Water Resources Council, shall as soon as practicable prepare a Level B plan under the Water Resources Planning Act for all basins in the United States. Priority should be given to areas designated under 208(a) paragraphs 2, 3, and 4 as water quality problem areas. This section was intended to establish a national planning framework, different in scale and concept from state sponsored basinwide planning. This section demonstrates that Congress recognizes the importance and utility of the basin as a basic planning unit.
210	Annual Survey - The administrator shall annually make a survey to determine the efficiency of operations and maintenance of treatment works conducted under this Act. The survey of treatment plants is an important step in determining the true wasteload allocations because of noncompliance. This information is critical in determining the remaining assimilative capacity. This would be a routine part of the five year basin plan updates.
214	Public Information - The Administrator shall develop and operate within one year a continuing program of public information and education on recycling and reuse of wastewater. The public education sections of the planning document and the public hearings held for each draft basin plan provide an excellent forum for public education and information concerning water quality issues, including recycling and reuse of wastewater.
302	Water Quality Related Effluent Limitations - This section provides to the administrator or delegated program the authority to develop water quality-based effluent limitations when the technology-based effluent limits are not sufficient to maintain water quality. The section also provides the authority for using alter-

70. NORTH CAROLINA DEP'T OF ENV'T, HEALTH, AND NATURAL RESOURCES, NORTH CAROLINA'S BASINWIDE APPROACH TO WATER QUALITY MANAGEMENT: PROGRAM DESCRIPTION, Report No. 91-08 (2d prtg. 1992).

native effluent control strategies to restore water quality to the desired level. The alternative effluent control strategies could include such basin management tools as assimilative capacity "banking."

304(l) Impaired Waters - This subsection has several requirements including the development of lists of waters that fall into various categories of nonattainment and which need additional pollution control (point source and nonpoint source); identification of offending point sources; and development of a control strategy for each point source in order to achieve the water quality standard as soon as possible. Basinwide planning would include a comprehensive analysis of the inputs to each basin that may cause water quality degradation. This approach allows for more objective priority setting and determination of management agencies.

305(b) Water Quality Inventory - Each state will submit biennially a report including the following:

A - a description of the water quality of all navigable waters;

B - an analysis of the extent to which all navigable waters provide for the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities in and on the water;

C - an analysis of the extent to which elimination of pollutant discharges and desired levels of water quality have been or will be achieved and recommendations for additional action;

D - an estimate of (i) the environmental impact, (ii) economic and social costs needed to achieve the objectives of the act, (iii) the economic and social benefits of such achievements, and (iv) estimated date of achievement; and

E - description of the nature and extent of nonpoint sources, and recommended programs.

314(a) Clean Lakes - Each state shall submit biennially the following:

A - an identification and classification according to eutrophic condition of all publicly owned lakes;

B - a description of procedures, processes, and methods (including land use requirements) to control sources of pollution of such lakes;

C - a description of methods to restore the quality of such lakes;

D - a description of methods to mitigate harmful effects of high acidity and removing toxic materials;

E - a list of publicly owned lakes for which uses are known to be impaired; and

F - an assessment of the status and trends in lake water quality and the nature and extent of pollution loading form point and nonpoint sources.

Sections 305(b) and 314 of the Clean Water Act both consist primarily of reporting requirements on the status of surface waters within the state. Each basinwide plan will include a comprehensive assessment of the current condition of waters in the basin, although these plans will be updated on a five-year cycle rather than biennially. Each year, however, updated reports will be available for one or more basins (see Section 5).