

ENVIRONMENTAL PROTECTION  
AGENCY PERSPECTIVE

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Ladies and Gentlemen, it is very nice to be with you today and to participate in this, the Twenty-second Annual New Mexico Water Conference. As Steve Reynolds will recall, this is not the first time that I have participated in the conference. In the Spring of 1967, I was here to discuss what was then a new Federal requirement for water pollution control - the adoption of Water Quality Standards for interstate waters. My message today is not much different from my remarks to you 10 years ago.

Let me go back a little bit to 1965. In 1965, the Congress amended the Water Pollution Control Act to provide for the establishment of water quality standards, standards across the country. The states were required to adopt water quality standards for all inter-state and coastal waters, and those water quality standards were to be based on the beneficial uses of water. That is because we are really to rehabilitate the nation's streams and determine what beneficial uses we are really trying to address, provide for, and maintain. The Water Pollution Control Program at the federal level was then in the Department of the Interior and from the legislation we derived twelve guidelines to assist the states in adopting water quality standards. Incidentally, these standards had to be submitted to the Federal Government and had to be approved by the Federal Government. If the state failed to adopt the standards or failed to come up with standards that we, the Feds, would approve, we would then adopt the standards for them, and Congress provided for this. It was really the first, I think, pre-emption by the Federal Government through Congressional action in the water pollution control area, thereby supplanting a primary state role, up to that point in time.

Two of the guidelines that I made reference to were these: Guideline No. 1 said that no water quality standards would be acceptable if it was less than existing water quality. It became known as the anti-degradation policy. That guideline was inherent in the 1965 Act and is still inherent in the Water Pollution Control Act. Anti-degradation was a "no-no", if you will. The second guideline in 1965 was Guideline No. 8; it said in a sense that any waste discharge that was amenable to treatment or control shall be treated or controlled whether or not the

receiving water needed that degree of treatment. Now, this was kind of contrary to this beneficial use concept that I stated previously, but there was a fundamental incongruity in the Water Pollution Control Act even back in 1965. The states did adopt the water quality standards, submitted them to the Federal Government and ultimately they were approved, but they were limited to coastal and inter-state waters. The states also came forward with a plan of implementation and it was generally directed toward point sources of pollution - municipal and industrial waste discharges.

Well, then in 1972, the Congress made some very fundamental changes to the Water Pollution Control Act. It provided for the extension of water quality standards to all waters within a state (intra-state waters) not just limited to inter-state and coastal waters. It provided for some fundamental water quality goals, the 1983 goal, most of you are familiar with, says our waters in this nation should be fishable and swimmable by 1983. There are two other words in the legislation that does say "where attainable", and I think a lot of us forget those two words; but it should be "fishable and swimmable waters nationally where attainable." I cannot answer the attainability question for you, but it certainly has an economic constraint, it certainly has a technical constraint, and it also, I think, has a political constraint or "what will the public accept?" But, nonetheless, fishable and swimmable waters by 1983.

There is also in the Act the "no discharge" goal of 1985. The law was provided with a massive permit program for point sources - municipal and industrial waste discharges. A permit program that was administered by the Federal Government until the Federal Government could and would delegate that permitting function to the state water pollution control agencies. At this point in time, we have roughly half the states across the country that have been delegated the permit program. In those other states, the Federal Government is still writing waste discharge permits for municipalities and industries; a very strong federal involvement. The law also provided for an extension of the enforcement responsibilities by the federal agency prior to 1972. Our antecedent agencies were limited to enforcement on inter-state waters when the waste discharge from one state impacted a water use in an adjacent state, but that was the limit of the enforcement powers. Today, EPA has the responsibility, the authority, to take legal action almost anywhere that people are not meeting the permit conditions for municipalities and industries. We have a big question today, "How does this apply to non-point source waste discharges?" which I will deal with in a few moments.

We have really moved in 1972 from a water control standards program to a technology-based program. Congress provided for best practicable treatment by industries by 1977 and the best available treatment by 1983. This indicates a high level of technically achievable waste discharge control measures by municipalities and industries. So, we went from

this water quality limited program to a technology-based kind of a program, again, a major change in the thinking of the Congressional people dealing with water pollution control. The law also provided for a very significant planning effort, of which 208 is the major piece of planning. The law also provided for the first approach nationally to dealing with non-point sources of pollution, basically through 208. The important element as far as 208 planning and non-point source is the absence of federal involvement. The responsibility really goes to the state and the locals. This was reinforced not too many months ago by a court action where the judge ruled in a sense that EPA could not limit the size of animal feedlots, for example, or irrigation return flow discharges. We could not permit it on a basic number, so many head of cattle or so many irrigated acres. The court rendered that that was not permissible under the law. We could have areawide waste discharge permits, but fundamentally, our approach is that state and the locals are to come up with the regulatory mechanisms to deal with non-point source. The legislation says, in dealing with non-point sources, that the states and the locals and/or the locals shall have a process to identify the discharges and a regulatory program to control it to the extent feasible. The process is to identify and a mechanism to regulate to the extent feasible. That is very simply what the law says.

How we move into this and where we go from here, I will be discussing with you this morning. The 208 program got off to a rather slow start as compared to the point source program. In EPA, we made our number one priority the municipal and industrial waste discharges and we deferred attention on 208 until two or three years after the law was passed. We started providing for the planning grants in FY '74, continued in 1975 and we are still continuing. The legislation provided for \$300 million to support state programs and/or designated agency programs, a designated agency by the Governor. \$300 million: \$50 were to be used in one fiscal year, \$100 and \$150 in the other two fiscal years. We were permitted by the Office of Management and Budget to authorize \$163 million out of the \$300, which we did, and funded 149 designated agencies. Again, these are local agencies that had been designated by the Governor. But we did not fund any state water pollution control agencies or other agencies identified by the Governor for statewide 208 kind of planning. We were sued on this matter by the National Association of Regional Counsels, it was an impoundment suit, and as most of you know, our track record on impoundment suits is near perfect. We've lost them all. I will leave that to you as to whether you think that is good business or bad business, but as such we have been sued, we have lost that suit so we are now faced with the proposition of obligating an additional \$137 million. \$137 added to the \$163 bringing it up to about \$300 million. We have not as an agency made our decision as to whether or not we will appeal that court suit. We have until about the first week in September. The smart money is betting if we do appeal, we will lose again. So I think we can look forward to more funds in that particular program.

We were also sued again on the basis that we had administered this program or were starting to administer it primarily as a designated planning program, planning at the local level. Again, planning agencies designated by the Governor. The Judge heard that EPA was responsible not only to fund but to require 208 planning to be done by the states in all areas that were not designated by the Governor. So we have a requirement that we have to have statewide 208 kind of planning and that EPA has to fund the states to do this. We were permitted again by OMB, and we had Congressional authority, to spend an additional \$53 million, and we have that money out working today. We have started now to fund all the states and an additional 26 agencies, so we essentially have now, out working, something like a little over \$300 million, \$350 million or so in this program at this point in time. The Congress is also considering additional funding which may well bring the total aggregate level for 208 planning up to somewhere around a half a billion dollars. A good many of you have worked in the past on comprehensive planning for water resource projects or other kinds of comprehensive planning and realize that just the magnitude of the dollars is kind of staggering, at least it is to me. It is a very, very significant amount of money to get out to do this kind of work, and most of it is directed toward the non-point source piece of the water pollution control problem in this country. We are having some problems with the 208 program. I will be pleased to share some of these problems with you. First of all, there is an attitude problem, an attitude within the Environmental Protection Agency, I think an attitude within a lot of the traditional water pollution control agencies in this country. This developed from the standpoint that we had added new actors into the planning business. Some of the planning grants in the early going went to Council of Governments and local agencies, but these were agencies that traditionally had not been involved with water pollution control. So we have seen an awful lot of resistance, not only in the state water pollution control agencies, but also in EPA. EPA people, and you might count me among them, have some real fears, had some real fears at least, on whether the locals would do the job. Could we trust the locals to pick up this very significant piece of the water pollution control program in the country, and a lot of people, I think, pre-ordained 208 failure from the very beginning? I submit to you today that it is not a failure and will not be a failure, and I think just the fact that this many people are assembled here today to learn, talk and find out how we can have good non-point source programs administered, again by the state and local people, is evident in itself that we have a high probability of success in the non-point source activities in this country.

We do have this attitudinal problem; it is still with us to a degree, and also, I think another problem we have had is that there are an awful lot of new actors in water pollution control. Agencies, people, that have traditionally not worked in water pollution control. At the state level, we have the State Departments of National Resources, State Forestry Departments, Minerals and Geology Departments, Planning

and Developing Agencies within the State. All have a significant role in planning in the non-point source activity. The same thing holds true at the federal level.

The one thing that EPA cannot do from a technical standpoint is provide you good solid technical assistance in non-point source control measures. We do not have the technical expertise in that area. One example is in sediment transport, the federal agency that knows how to deal with sediment is the Soil Conservation Service. It is that federal agency that EPA is primarily looking to provide the technical know how, the technical assistance to the state and to the local people working in sediment transport. I would be masquerading if I said EPA can help you in best management practices. Best management practices are site specific and only local solutions to local problems will work. However, EPA will not come out with uniform regulations that say that anybody dealing with forestry or anybody dealing with irrigated agriculture or non-irrigated agriculture are going to have to conform to these national standards. Our approach is that the states and the locals have the authority and the responsibility to come up with solutions to those particular problems.

Another question has been the funding and funding has been a problem. It is kind of like alternating a current. One day it's on and one day it's off, and I have given you the litany about the money story. The big question today is will the federal government provide for continuing funding in the 208 program, and I cannot tell you yes nor can I tell you no, today. I think to a good measure, the continual funding support by the federal government will depend on how successful we are in planning at the state and the local level. But, the funding is a big question. Most of the funds have to be expended and the reports and implementing programs completed by November of 1978. Then the big question is, "what after 1978?" The law requires a continuing planning and implementation program. It is not to stop with a plan on a bookshelf. It is one of the plans that can be implemented in a continuing planning re-evaluation to control water pollution in this country. That is a big question mark and I am sorry I cannot tell you today as to whether or not the Federal Government will continue to support these kinds of planning and implementation activities. To a degree, it will be up to the Congress and the Administration to come to an agreement on this particular matter. Perhaps as we see the Congress deal with the fundamental amendments to the Water Pollution Control Act, they may well deal with the funding issue.

Another problem that we are having with 208 is the regulatory nature of the program. Again, a process to identify and a regulatory mechanism to control, to the extent feasible, those waste discharges from non-point sources. But, we are finding a great deal, not as much resistance, as we are questions about what kind of regulatory program does EPA expect out of the state and locals. Is EPA going to hold out, for example, to get soil and water conservation districts with regulating authority

to take legal action against the farmer? Where is that regulatory stick going to be? Is it going to be in soil and water conservation districts? Is it going to be in the state water pollution agencies? Is it going to be in the department of natural resources? Where within that state and that system is this regulatory responsibility going to rest?

These are some of the questions that people are dealing with and that we are faced with across the country in 208, and it is a problem that we have today. People are just warming up to the idea that it is a regulatory program. Again, we do want a plan that can and will be implemented and starts coming to grips with non-point source programs. The other problem is that 208 is 75% political and 25% technical; and I say that because I think a synonym for "208" is "environmental policies by decisions, by elected officials." Not only in the legislative arena and in the Executive Department, but at the local level - in the county courthouse and in the city halls where elected officials make decisions to implement these water pollution control programs. I do not mean to down-grade our need for technical data and technical know-how, but I do submit that we have far more technology available to us today in non-point source control than what we have and are implementing. The solutions have been known for years in sediment transport; for example, the Soil Conservation Service has book after book on design criteria and methods that can be used to retard sediment transport: "Keep the soil on the land." This activity is directly compatible to the water pollution control program, and I think one of the big areas of concern in 208 today is to really support in a dollar sense and a regulatory sense the sediment control programs that SCS and local soil and water conservation commission have been trying to do since the mid-thirties.

But there is, to a degree, another problem that we have not recognized - the political nature and the fact that elected officials are going to have to vote for the regulatory programs. They are going to have to vote for some funding to support those regulatory agencies. This is a problem that we face nationally. An additional problem is the fact that EPA has really not tipped our hand as to what we expect out of a non-point source program. This is sort of what we used to do in comprehensive planning and other kinds of work in the Environmental Protection Agency. I used to work for a boss and would take something to him and he would look at it and hand it back. He would always say, "I don't know what I want, but it ain't it," and in so many cases, I think this is where we are with 208 today.

I alluded to the fact today that EPA is not going to come up with a set of rules and regulations and how-to-books that tell you what you have to do at the state and local level. We are giving you ample leeway, to come up with site specific solutions to your particular projects. Now there is no question that that project (208) and how it is implemented, will have to be submitted to the Governor. The Governor will

have to approve it, and the Governor will have to submit it to EPA for review and approval. But some of the tests that we will look at may well give you some ideas as to what directions we expect, in EPA Headquarters, the program to go. We will look to see, "Will these kinds of activities, these best management practices as are implemented, will it improve the water quality? At what rate will the water quality be improved, to what extent is it a regulatory program? To what extent is it a voluntary program? Can it be implemented? Is there funding locally or at the state level to support sediment control efforts in the districts to carry out a sediment control program, sanitarians to deal with the septic tank problems, building inspectors to deal with the construction problems."

We have yet to prove 208 program, although we have some excellent examples nationally of what has been done. We have about sixteen recent improvements in state-wide sediment control acts. They are starting in the direction of a regulatory program which provides funding programs for these expanded sediment control acts. We have recently seen forest practices acts in states of Oregon, Washington, Idaho, California. Alaska is considering a forest practices act which starts getting down to the practices, with the purpose being to start implementing those practices and keep the pollution impact of these activities at a minimum.

One of the major policy problems that EPA is wrestling with today is the fact that where we will ultimately approve a best management practice and begin depending upon that piece of non-point source practice that we are dealing with. As an example, some of the best management practices in the logging industry say not to use caterpillars on such steep slopes. We would use high speed logging in certain areas and we would need to use buffer strips that would not be logged to provide for filtration of sediment that would run down the slopes. In your sediment control activities it may be the use of grassed waterways or the application of terraces and all those kinds of activities that you folks know far more about than I. But, in the event that we would come up with best management practices that can and will be implemented at the state and local level, what happens if we still have a violation of water quality standards? Will EPA force the states, or will EPA come up with a regulatory mechanism that starts enforcing that particular activity on the land? That is a question that has been nagging us for a number of years. Our position is this: That as best management practices are adopted, and we will ask the Soil Conservation Service to review those best management practices for a local area, EPA will hold our water enforcement until 1983. We will give the application of best management practices a chance to work, evaluate it over the time frame between now and 1983, and then address the issue as to whether or not water quality standards should be adjusted or the best management practices should be adjusted. So, what we have to come to is the accommodation of water quality standards and best management practices for the non-point source pollution in this country, they have to mesh.

Too often in the past we have had problems with even the point source program where the point source permit dictates an amount, we have a certain degree of treatment and we have a water quality standards program that sets the water quality level in the stream and they often do not meet. I often tell the story related to the way they used to build tunnels in Ancient China. There would be a mountain, so they would start a group of coolies on one end and a group of coolies on the other end and they would drill toward the center. If they met, we would have a tunnel. If they did not, we had two tunnels. To a degree, we are running a two-tunnel program today. The water quality standards not only in the point source but in the non-point source area, have to mesh. We must work toward bringing these two pieces of the water pollution control program together and have the degree of compatibility needed.

People frequently ask the question, "What happens if we (state) don't have a regulatory program to deal with non-point source?" They have asked us and we have normally shied away from dealing with these kinds of issues. If a state absolutely refused and the locals absolutely refused to come up with a non-point source control program, then EPA is going to be left holding the sack. We are going to have to do something. Some of our people, our lawyers, tell us, "You can withhold the construction grants," that is the grant program to support the construction of municipal sewage treatment plants. That is a possibility. I did not say that it is a probability. I do not think politically we would ever get away with that and besides it is not in the best interest of water pollution control to do it. We have not dealt with the sanction issue to this point in time.

I think most of you people know enough about EPA to recognize that fact that we spent our first five years in EPA establishing ourselves as a regulatory agency. Of course, that is what the law says, "You are regulators." And believe me when I say that we have the capability to write regulations. In fact, we have flooded the Federal Register with regulations by the hundreds and there is a rumor going around Washington D.C. which I would like to stop: "The Federal Register is not going to be re-named the EPA Journal." Sometimes it looks like it. However, I think in the non-point source area, we have provided a great opportunity for the states and local people to develop programs that can meet your requirements. You would then have EPA in the position where we would not have to come in and start regulating. But, we have the option, if the states and locals fail, to come up with some regulatory programs. And if we do come up with some regulatory programs, they always have to be applied uniformly across the country. We make everybody lock step and do it the same. This obviously is not the answer to water pollution control. Again, I come back to each state's specific nature, as they have particular solutions available to deal with the problems that are out there.



In summary, let me say that we have come a long way in solving the nation's water pollution problems in the past 10 years. This is particularly true with point source discharges of municipal and industrial wastes. Today and in the near future, the task at hand is to start dealing effectively with non-point sources of pollution. The state and local communities have the opportunity today to plan, through the 208 program, and to implement the control measures to deal with your water problems.