

THE NEBRASKA ENVIRONMENTAL PROTECTION ACT:
EFFECTS AND IMPLICATIONS FOR THE NEBRASKA
COMMUNITY

INTRODUCTION

This article is intended primarily for the Nebraska legal community. Because the Nebraska Environmental Protection Act of 1971 [Act]¹ will have far-reaching effects throughout the state, this article will attempt to relieve some of the confusion surrounding the Act, and will serve as a guide for Nebraska attorneys as they enter the field of environmental law. Because of the effect which environmental law has upon aspects of community life, an attorney should know the legal responsibilities of his clients to the environment. He should also know of the benefits and grants, available from federal and state government, designed to aid corporations, municipalities, and state governments in protecting and enhancing the environment.

To understand the Nebraska Environmental Protection Act, it is essential that one understand the federal legislation which served as its impetus. Thus, this article will first sketch the Nebraska Environmental Act; it will then turn to the federal legislation in the areas of clean air, water quality, solid waste and pesticides. In each area of federal legislation this article will examine the appropriate Nebraska legislation, rules and regulations, examining how they respond to federal law, and how they complement and serve the federal goals. Finally, it will examine possible future trends.

THE NEBRASKA ENVIRONMENTAL PROTECTION ACT

In 1971, under the Nebraska Environmental Protection Act, the state Air and Water Pollution Control Councils were combined with parts of the Nebraska Department of Health to form two separate bodies:² The Department of Environmental Control [Department],³ headed by a director [Director];⁴ and the Environmental Control

1. NEB. REV. STAT. §§ 81-1501 *et seq.* (Reissue 1971), *as amended* NEB. REV. STAT. §§ 81-1501 *et seq.* (Cum. Supp. 1972 & Supp. 1973).

2. L.B. 939, 82d Legis., 1st Sess. (1971), *codified at* NEB. REV. STAT. §§ 81-1502(6), -1503(1), (11) (Reissue 1971).

3. NEB. REV. STAT. § 81-1502(6) (Cum. Supp. 1972).

4. *Id.* § 81-1502(7) (Supp. 1973).

Council [Council],⁵ headed by a chairman. The Council is primarily a policy-making body; the Department is the chief enforcement agency.

The Council is composed of sixteen members, each serving a four-year term, appointed by the governor with the advise and consent of the legislature.⁶ Each member represents a special-interest group within the state.⁷ James L. Higgins, the current Director, has noted some speculation that the Council, so composed, could become the "tool of the polluters."⁸ However, he has attempted to refute such speculation:

[The Council] has acted, in the year and a half since its inception, with impartiality, fairness and with the environmental interests of the state as a guide. It has cooperated with the Director and Department in a manner which exceeded our greatest hopes and expectations.⁹

The major function of the Council is policy making: all standards, rules and regulations are to be adopted by the Council after consideration of the Director's recommendations.¹⁰ Notice and a public hearing are required prior to the adoption, amendment or repeal of any standard.¹¹

It is the duty of the Director and the Department to carry out all standards, rules and regulations adopted by the Council.¹² The Department exercises exclusive general supervision of the administration and enforcement of the Act¹³ plus the administration of

5. *Id.* § 81-1503(1) (Cum. Supp. 1972).

6. *Id.* § 81-1503(2) (Cum. Supp. 1972).

7. *Id.* § 81-1503(1) (Cum. Supp. 1972). This Council consists of two representatives from municipal government, one professional engineer experienced in the control of air and water pollution and solid wastes, one physician knowledgeable in the health aspects of air, water and land pollution, and one representative from each of the following interest groups: the food manufacturing industry, conservation, the agricultural processing industry, the automotive or petroleum industry, the chemical industry, heavy industry, labor, the power-generating industry, county government, the livestock industry, the public at large, and the agricultural industry actively engaged in crop production. *Id.*

8. Address by James L. Higgins, Director of the Nebraska Department of Environmental Control, Neb. County Attorney's Ass'n Seminar, Mar. 29, 1973 [hereinafter cited as Higgins Address].

9. *Id.*

10. NEB. REV. STAT. § 81-1503(7) (Cum. Supp. 1972).

11. *Id.* § 81-1505(3) (Supp. 1973).

12. *Id.* § 81-1503(7) (Cum. Supp. 1972).

13. *Id.* § 81-1504(1) (Cum. Supp. 1972).

all federal and state grants for environmental protection.¹⁴ The Department is also designated as the state air and water pollution control agency.¹⁵ The extensive powers and duties of the Department include the power to issue orders,¹⁶ subpoenas,¹⁷ permits,¹⁸ to hold inspections¹⁹ and hearings,²⁰ to institute legal proceedings,²¹ and to develop and enforce compliance schedules consistent with the standards and rules adopted by the Council.²²

The Act declares that the "water, land and air of [Nebraska] are among its most precious resources,"²³ the pollution of which creates a "menace to the health and welfare of each person, and the public in general"²⁴ The public policy of Nebraska is: (1) to conserve water and improve its quality; (2) to achieve and maintain a reasonable degree of purity in the natural atmosphere; (3) to promulgate laws, rules and regulations and to enforce them uniformly to give meaningful recognition to the protection of each element of the environment; and (4) to cooperate with other states and the federal government to accomplish these objectives.²⁵

In order to carry out these policies, the Council has the power to adopt rules and regulations which establish standards of air, water and land quality, and to classify air, water and land contaminant sources.²⁶ Air quality is to be of "such a reasonable degree of purity . . . that human beings and all other animals and plants

14. *Id.* § 81-1503(11) (Cum. Supp. 1972).

15. *Id.*

16. *Id.* § 81-1504(7) (Supp. 1973). The Department is authorized:

(7) to issue, modify, or revoke orders: (a) Prohibiting or abating discharges of wastes into the air, waters or land of the state; (b) requiring the construction of new disposal systems or any parts thereof or the modification, extension of or the adoption of other remedial measures to prevent control or abate pollution; and (c) setting standards of air, land, and water quality or evidencing any other determination by the council under the provisions of [this act]

17. *Id.* § 81-1504(9) (Supp. 1973).

18. *Id.* § 81-1504(11) (Supp. 1973).

19. *Id.* § 81-1504(21) (Supp. 1973).

20. *Id.* § 81-1504(9) (Supp. 1973).

21. *Id.* § 81-1504(22) (Supp. 1973).

22. *Id.* § 81-1504(25) (Supp. 1973). The Act declares that the Council can adopt no rules which are less stringent than those defined by the federal guidelines. *Id.*

23. NEB. REV. STAT. § 81-1501 (Reissue 1971).

24. *Id.*

25. *Id.*

26. *Id.* § 81-1505(1) (Supp. 1973). Contaminant sources are to be classified according to levels and types of emissions and other characteristics which relate to air, water and land pollution. *Id.*

which are indigenous to [Nebraska] will flourish in approximately the same balance as they have in recent history."²⁷ Water quality standards shall

be such as to protect the public health and welfare and the present and prospective future use of such waters for public water supplies, propagation of fish and aquatic life and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses.²⁸

Land quality must of such a reasonable degree of purity as shall

protect human health and safety, and, to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of the state, facilitate the enjoyment of the natural attractions of the state, and to provide for the prevention, abatement and control of new or existing land pollution.²⁹

The Act declares it to be unlawful: (a) to cause pollution or (b) to discharge wastes into any air, waters or land of the state.³⁰ Any such action is declared a public nuisance.³¹ The Act also declares the following activities to be unlawful unless carried on with a permit: (a) the construction, installation, modification or operation of any disposal system, or any new outlet for the discharge of wastes; (b) the increase in volume or strength of any wastes in excess of the permissive discharges specified under any permit; (c) the operation of any establishment which causes an increase in the discharge of wastes or alters the physical, chemical or biological properties of any air, land or waters in any manner not already authorized.³²

The Department is authorized to require submission of plans, specifications and other information [PS&I] as it deems necessary.³³ If, within thirty days after receipt of PS&I, the Department deter-

27. NEB. REV. STAT. § 81-1501(2) (Reissue 1971).

28. *Id.* § 81-1505(1) (Supp. 1973).

29. *Id.* § 81-1514 (Reissue 1971).

30. *Id.* § 81-1506(1) (a), (b) (Cum. Supp. 1972).

31. *Id.* § 81-1506(1) (b) (Cum. Supp. 1972).

32. *Id.* § 81-1506(2) (Cum. Supp. 1972).

33. *Id.* § 81-1506(2) (Cum. Supp. 1972).

mines the proposed establishment will not be in accordance with the Act, it shall issue a preliminary order prohibiting such construction.³⁴ Failure to issue an order is deemed to be a determination that the establishment may proceed if in accord with the PS&I.³⁵

If the Director believes that a violation of the Act has occurred, he may issue a written complaint to be served on the alleged violators.³⁶ The complaint shall specify the violation, and order the necessary corrective action.³⁷ Such order is final unless a hearing is requested by the person served. In lieu of such order, the Director may require the violator to appear before him.³⁸ A fair hearing is required, at which the Director will make findings of fact and conclusions of law, and enter an order in furtherance of the Act.³⁹ Any person who is denied a permit is also afforded a hearing, followed by an order.⁴⁰ In all these situations proper notice must be given.⁴¹

The Director may also issue emergency orders, without notice or hearing, whenever he determines that an emergency exists which requires immediate action to protect the public health and welfare.⁴² The Director may require such action as he deems necessary to meet the emergency.⁴³ Emergency orders are effective immediately.⁴⁴ However, all aggrieved parties are entitled to a hearing not later than ten days after they apply for it.⁴⁵

Penalties for general violations of the Act range from \$100 to \$500, with a further fine of \$10 per day for each day of violation.⁴⁶ For willful or negligent violation of water quality standards, effluent standards and limitations, or failure to obtain a permit pursuant to the National Pollutant Discharge Elimination System [NPDES], a violator shall be guilty of a misdemeanor and fined not more than \$5000 for each day of such violation or imprisoned for not more than six months.⁴⁷ In assessing the fine the court is to consider the size of

34. *Id.* § 81-1506(3) (Cum. Supp. 1972).

35. *Id.*

36. *Id.* § 81-1507(1) (Cum. Supp. 1972).

37. *Id.*

38. *Id.*

39. *Id.* § 81-1507(2) (Cum. Supp. 1972).

40. *Id.* § 81-1507(3) (Cum. Supp. 1972).

41. *Id.* § 81-1507(2), (3) (Cum. Supp. 1972).

42. *Id.* § 81-1507(4) (Cum. Supp. 1972).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* § 81-1508(1) (a) (Supp. 1973).

47. *Id.* § 81-1508(1) (b) (Supp. 1973). The National Pollutant Discharge Elimination System is a program administered by the states under the Federal Water Pollution

the operation and the degree and extent of pollution.⁴⁸ This provision has recently caused controversy because it allegedly fails to conform with federal law.

The applicable federal program in this area calls for a maximum fine of \$25,000 plus \$25,000 for each day's violation; after the first conviction, penalties are doubled.⁴⁹ The federal Environmental Protection Agency [EPA] indicated that it might withhold approval of the Nebraska NPDES Program (with the resultant withholding of federal grants) because Nebraska's \$5000 penalty was too small.⁵⁰ The Department disagreed, stating that the size and extent of industry in Nebraska, as compared to states like New York, warranted a proportionately smaller penalty.⁵¹ The Department felt that in Nebraska, considering the nature of state conditions, \$5000 was sufficient.⁵²

The Director is to make every effort to obtain voluntary compliance before initiating enforcement proceedings.⁵³ However, when the Director has reason to believe a violation has occurred, he may petition the Nebraska district court for an injunction.⁵⁴ It will then be the duty of the appropriate county attorney or the state attorney general to institute appropriate proceedings.⁵⁵ This provision of the Act, added in the 1973 amendments, gives the Director a civil remedy in addition to the criminal penalties.⁵⁶

Control Act Amendments of 1972, 33 U.S.C. § 1342 (Supp. II 1972). See text at notes 197-230 *infra*.

48. NEB. REV. STAT. § 81-1508(1) (b) (Supp. 1973).

49. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1319(c) (1) (Supp. II 1972).

50. Interview with James L. Higgins, Director of the Nebraska Department of Environmental Control, in Lincoln, Nebraska, Aug. 16, 1973 [hereinafter cited as Higgins Interview].

51. *Id.*

52. The EPA subsequently reconsidered and agreed that \$5,000 was adequate for Nebraska. Interview with Richard Hansen, Legal Counsel to Nebraska Department of Environmental Control, by telephone in Omaha, Feb. 11, 1974.

53. NEB. REV. STAT. § 81-1510(1) (Cum. Supp. 1972).

54. *Id.* § 81-1508(3) (Supp. 1973).

55. *Id.*

56. AGRICULTURE COMM. 83D LEGIS., 1ST SESS., STATEMENT ON L.B. 538 (1973). The legislative history of the provision indicates that it was intended to bring both parties together so that there could be an expeditious settlement without having to go to court and file a criminal complaint. *Floor debate on L.B. 538*, 83d Legis., 1st Sess. 3461 (May 9, 1973).

Of interest to the Nebraska attorney is that provision is also made in the Department's *Rules of Practice and Procedure* for advisory opinions (when a question arises through any interested party which does not concern another's person or property) and for declaratory rulings (applicable to any person or property, concerning any standard, rule, regulation, or statute enforceable by the Director). NEBRASKA DEPT' OF ENVIRONMENTAL CONTROL, RULES OF PRACTICE AND PROCEDURE, R. 8 (*effective* Nov. 21, 1972).

Any adversely affected party may appeal to the District Court of Lancaster County on any final order or final determination made by the Director.⁵⁷ Notice of appeal must be given to the Department within thirty days after receipt of the final order.⁵⁸ In hearing the appeal, the court shall deem as final all findings of fact made by the Director, unless unsupported by substantial evidence.⁵⁹ Further, the Director's actions are deemed to be prima facie reasonable.⁶⁰ The trial of the appeal before the district court is without a jury and is de novo.⁶¹ An appeal may be taken to the Nebraska supreme court.⁶²

The Director has the power to require the maintenance of records⁶³ by any person operating a pollutant source, and may enter and inspect any property at which a contaminant⁶⁴ source is located or being constructed.⁶⁵ Should inspection be refused, a field representative can obtain a search warrant.⁶⁶ However, in emergency situations, entry may be made without a search warrant.⁶⁷

A person may apply to the Director for a variance from the rules and regulations.⁶⁸ The Director may grant the variance after consideration of numerous factors and a public hearing.⁶⁹ The granting

57. NEB. REV. STAT. § 81-1509 (Cum. Supp. 1972). The Department's *Rules of Practice and Procedure* emphasizes that the Director should make every effort to obtain voluntary compliance by (1) warning, (2) conferring, (3) obtaining records, (4) examining plans to correct or abate pollution, and (5) obtaining the assistance of other agencies and departments of federal and state governments. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, RULES OF PRACTICE AND PROCEDURE R. 2.11 (effective Nov. 21, 1972).

58. NEB. REV. STAT. § 81-1509(1) (Cum. Supp. 1972).

59. *Id.* § 81-1509(3) (Cum. Supp. 1972).

60. *Id.*

61. *Id.* § 81-1509(4) (Cum. Supp. 1972).

62. *Id.* § 81-1509(5) (Cum. Supp. 1972).

63. *Id.* § 81-1510(2) (Cum. Supp. 1972). The Department has provided that any person operating a pollutant source must make reports concerning the specific nature of the pollutant outlet, and must make these reports available to the Department. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, RULES OF PRACTICE AND PROCEDURE R. 2.09.0 (effective Nov. 21, 1972). The Act provides that any records obtained by the Department which relate to production or sales figures or to processes or production unique to the owner shall be for the confidential use of the Department. NEB. REV. STAT. § 81-1527 (Cum. Supp. 1972).

64. NEB. REV. STAT. § 81-1502(1) [air]; §§ 81-1502(14), (20) [water]; §§ 81-1502(15)-(19) [land] (Supp. 1973).

65. *Id.* § 81-1511 (Cum. Supp. 1972).

66. *Id.*

67. *Id.*

68. *Id.* § 81-1513(1) (Cum. Supp. 1972).

69. *Id.* Factors which the Director must examine include: a) the character and degree of injury to health and property; b) the social and economic value of the source; c) the question of priority of location in the area involved; and d) the technical practicability and economic reasonableness of reducing emissions from the source. *Id.*

of a variance is not a right, but lies within the Director's discretion. His decision shall be a final order, and subject to judicial review.⁷⁰

A political subdivision of Nebraska may oversee its own pollution program, provided the program is not inconsistent with the Act.⁷¹ In order for a political subdivision to control its own program, the Director must issue a certificate of exemption.⁷² Any political subdivision desiring a certificate of exemption may apply to the Director who shall then investigate, make recommendations and hold a hearing to determine if the program is consistent with the Act. If the Director finds that the location requires an areawide air, water or land pollution control program, then the Director may determine the boundaries within which such program is necessary. A controversial provision provides that cities of the second class⁷³ and villages⁷⁴ shall be exempt from the provisions of this Act pertaining to licensing and control of solid waste disposal systems, provided that no pollution of rivers results and that reasonable supervision of a solid waste disposal system is provided to protect public health and welfare.⁷⁵ Apparently, the Unicameral's Agriculture Committee felt that a voluntary program would be preferable to a compulsory one for second class cities, since most of these cities were striving to control their solid waste pollution.⁷⁶

A limitation of the Act is that it is not to be construed to give the Department any jurisdiction with respect to air contamination existing solely *within* commercial and industrial plants or shops, to affect relations between employers and employees, or to supersede any law or ordinance relating to sanitation, industrial health or safety.⁷⁷

In sum, the Act provides a basic framework within which the Department can provide standards and procedures for effectuating environmental protection in Nebraska. The Act was enacted primarily in response to federal environmental legislation.⁷⁸ To better un-

70. NEB. REV. STAT. § 81-1513(5) (Cum. Supp. 1972).

71. *Id.* § 81-1528 (Cum. Supp. 1972).

72. *Id.*

73. Cities of the second class in Nebraska are defined as those containing 800 to 5,000 inhabitants. NEB. REV. STAT. § 17-101 (Cum. Supp. 1972).

74. Villages are defined as containing 100 to 800 inhabitants. *Id.* § 17-201 (Cum. Supp. 1972).

75. NEB. REV. STAT. § 81-1528 (Cum. Supp. 1972).

76. AGRICULTURE COMM., 83D LEGIS., 1ST SESS., STATEMENT ON L.B. 254 (1973).

77. NEB. REV. STAT. § 81-1529 (Reissue 1971).

78. Higgins Interview.

derstand how the Nebraska legislation responds to the federal law, this article will provide brief examination of the pertinent federal legislation, demonstrating how the Act complements and serves federal goals.

FEDERAL CLEAN AIR LEGISLATION AND THE NEBRASKA RESPONSE

The Clean Air Act Amendments of 1970, amending the Clean Air Act [CAA],⁷⁹ created the first statutory basis sufficient for meaningful federal action.⁸⁰ While strengthening the role of the federal government in dealing with air pollution by establishing nationwide standards,⁸¹ the CAA attempts to delegate the enforcement of these standards to state and local governments.⁸²

The CAA gave the EPA Administrator power to establish air quality regions based on considerations of climate, meteorology, topography, urbanization and governmental subdivisions.⁸³ Although the regions do not follow state boundaries, each state retains the power to implement national standards within its portion of an interstate region.⁸⁴

Nebraska has been divided into four air quality control regions: (1) the Lincoln-Beatrice-Fairbury Intrastate Air Quality Control Region; (2) the metropolitan Sioux City Interstate Region; (3) the Omaha-Council Bluffs Interstate Region, and (4) the Nebraska Intrastate Region which includes all counties within the state exclusive of those counties included in another region.⁸⁵

Ambient air quality⁸⁶ is to be regulated by two sets of standards:

79. 42 U.S.C. §§ 1857 *et seq.* (1970).

80. 1 A. REITZE, JR., *ENVIRONMENTAL LAW* Three-36 (2d ed. 1972) [hereinafter cited as REITZE].

81. See U.S. ENVIRONMENTAL PROTECTION AGENCY, *THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA'S STATUTORY AUTHORITY* 1 (1972) [hereinafter cited as PRIMER].

82. U.S. ENVIRONMENTAL PROTECTION AGENCY, *CITIZEN ROLE IN IMPLEMENTATION OF CLEAN AIR STANDARDS* 1 (1971).

83. 42 U.S.C. § 1857c-2 (1970); REITZE at Three-36. The EPA has established 250 regions. REITZE at Three-36. The EPA Administrator is required to establish national uniform air quality standards based on these geographic regions. 42 U.S.C. § 1857c-4 (1970); PRIMER at 5.

84. PRIMER at 6.

85. NEBRASKA DEPT OF ENVIRONMENTAL CONTROL, *RULES AND REGULATIONS IMPLEMENTING NEBRASKA AMBIENT AIR QUALITY STANDARDS* 3 (*effective* June 6, 1972).

86. "Ambient air quality" is defined as the average atmospheric purity as distinguished from discharge measurements taken at the source of pollution. It is the general amount of pollution present in a broad area. PRIMER at 5 n.2.

primary and secondary air quality standards. Primary air quality standards are those necessary to protect the public health (defined as the minimum level of air quality necessary to keep people from physical illness).⁸⁷ Secondary standards are those necessary to protect the public welfare (defined as those standards which, in the judgment of the EPA Administrator, are necessary to protect the public from any other adverse effects, such as economic damages, associated with air pollution).⁸⁸ Primary standards maintain physical health; secondary standards maintain the quality of life. Thus secondary standards are more stringent. National ambient air quality standards have been established by the federal government.⁸⁹

CAA requires state implementation plans.⁹⁰ State governments within each air quality region⁹¹ are required to develop and implement plans to determine how national air pollution objectives are to be reached.⁹² However, the EPA Administrator has virtually complete control over the development of the plan. If a state's implementation plan is considered inadequate by the EPA Administrator, he can usurp the state's program.⁹³ Each state must submit its implementation plan to the EPA Administrator, who then reviews it under criteria prescribed in the CAA.⁹⁴

The state environmental agency must have the necessary legal authority to adopt an implementation plan.⁹⁵ The Nebraska Legislature has given this requisite authority to the Department.⁹⁶

The state environmental agency must also have the necessary

87. 42 U.S.C. § 1857c-4(b)(1) (1970); PRIMER at 5; REITZE at Three-36.

88. 42 U.S.C. § 1857c-4(b)(2) (1970); REITZE at Three-36.

89. 40 C.F.R. §§ 50 *et seq.* (1973). However, these standards may be lowered due to the energy crisis. Legislation was introduced in both the Senate [S. 2680, 93d Cong., 1st Sess. (1973)] and the House of Representatives [H.R. 11882, 93d Cong., 1st Sess. (1973)] to temporarily suspend emission standards on both stationary and ambient sources. 4 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENT 1183, 1229, 1323 (1973). House and Senate conferees passed the bill, but Congress adjourned without passing the bill. *Id.* at 1369, 1371, 1415.

90. 42 U.S.C. § 1857c-5 (1970).

91. See note 83 *supra*.

92. 42 U.S.C. § 1857c-5 (1970); PRIMER at 6. Under the CAA, states are required to achieve primary standards within three years, and secondary standards within a reasonable time. 42 U.S.C. § 1857c-5 (1970).

93. 42 U.S.C. 1857c-5 (1970); REITZE at Three-36.

94. 42 U.S.C. § 1857c-5(a)(1) (1970); PRIMER at 6.

95. REITZE at Appendix Three-11.

96. NEB. REV. STAT. § 81-1501 (Reissue 1971), § 81-1504(2), (3) (Supp. 1973).

legal authority to take certain actions.⁹⁷ These powers have been secured in the Nebraska Environmental Protection Act, and include the power to: (1) adopt emission standards and limitations to achieve national standards;⁹⁸ (2) enforce all applicable laws and regulations, and secure injunctive relief;⁹⁹ (3) take emergency action to abate pollution which substantially endangers health, including the authority to curtail appropriate pollution sources if necessary;¹⁰⁰ (4) prevent the construction, modification or operation of any stationary source (all pollutant sources other than vehicles) at any location where its emissions will prevent attainment or maintenance of a national standard;¹⁰¹ (5) obtain information necessary to determine whether air pollution sources comply with laws, regulations and standards, including authority to require record keeping and to make inspections and conduct tests;¹⁰² and (6) require stationary sources to install emission monitoring devices and to periodically report on the nature of emissions.¹⁰³ The CAA also requires that the state implementation plan itself include the following seven major components.

First, the implementation plan must contain a control strategy, indicating by what steps the state plans to achieve national air quality standards.¹⁰⁴ The Department developed such a control strategy when it promulgated the *Rules and Regulations Implementing Nebraska Ambient Air Quality Standards* [Air Standards] in 1972.¹⁰⁵ The Air Standards appear to fulfill each of the six criteria mentioned in the paragraph above.¹⁰⁶

97. REITZE at Appendix Three-11, 12.

98. NEB. REV. STAT. § 81-1505 (Supp. 1973).

99. *Id.* § 81-1508 (Supp. 1973).

100. *Id.* § 81-1507(4) (Cum. Supp. 1972).

101. *Id.* §§ 81-1506(3)-(6) (Cum. Supp. 1972).

102. *Id.* §§ 81-1504 (15), (21), (24), -1505(2) (Supp. 1973).

103. *Id.* §§ 81-1504(7), -1505(2) (Supp. 1973).

104. REITZE at Appendix Three-12, *citing* CONSERVATION FOUNDATION, A CITIZEN'S GUIDE TO CLEAN AIR (1971).

105. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, RULES AND REGULATIONS IMPLEMENTING NEBRASKA AMBIENT AIR QUALITY STANDARDS (*effective* June 6, 1972) [hereinafter cited as AIR STANDARDS]; *see also* NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, SUMMARY OF MAJOR CHANGES IN THE AIR POLLUTION CONTROL REGULATIONS (1972) [hereinafter cited as AIR SUMMARY].

106. Emissions standards are found in AIR STANDARDS R. 4(d), 5, 12, 13, 14, 15, 16, 17; AIR SUMMARY at 1. Enforcement measures are found in AIR STANDARDS R. 24. Emergency action provisions are in AIR STANDARDS R. 22. Prohibitions on construction or operation of any stationary source whose emissions will prevent attainment of the national standards are found in AIR STANDARDS R. 4, 5 by providing for a permit system of control. AIR STANDARDS R. 10 gives the Department the power to obtain

Second, the state is required to develop emergency procedures in line with EPA guidelines, indicating what steps the state will take should the quality of the air in its region drop to a level which threatens health.¹⁰⁹ The Nebraska plan for emergency situations is apparently satisfactory under the CAA.¹⁰⁹

Whenever the Director finds that an emergency exists requiring immediate action to protect public health and welfare, he shall make a public announcement, and take such action as he deems necessary to meet the emergency.¹⁰⁹ Three levels of air pollutant concentration guide the Director in his determination of whether an emergency exists. These are: (1) an alert level, (2) a warning level and (3) an emergency level. Whenever one of these levels is declared to exist, the person responsible for the operation of the air pollutant source must take all action required by the *Air Standards* in accordance with the level proclaimed.¹¹⁰

Third, a compliance schedule must be included in the implementation plan.¹¹¹ Each major source of pollution within a control region must prepare and follow a detailed, step-by-step schedule of measures it will take to bring its emissions into accord with the state implementation plan. These timetables are known as compliance schedules. The EPA requires each state to negotiate compliance schedules with all major sources of pollution; such schedules are legally enforceable and become part of the state's implementation plan.¹¹² All new or modified installations in Nebraska must comply with the *Air Standards*.¹¹³ All existing installations must comply with the *Air Standards* within 120 days after a notice of violation.¹¹⁴

information. AIR STANDARDS R. 10(c), (d) give the Director power to require an emission source to maintain stationary monitoring equipment and report on the nature of the emissions.

107. REITZE at Appendix Three-12, 13.

108. AIR STANDARDS R. 22, Appendix I.

109. *Id.* R. 22(a).

110. *Id.* R. 22(a)(1)-(5), (b)(1)-(4). The *Air Standards* define "alert level" as that concentration of pollutants which requires initiation of first stage emission control actions. "Warning level" indicates that air quality is continuing to degrade, pollutant concentrations are increasing, and that additional control actions are necessary. "Emergency level" indicates that air quality is continuing to degrade to a totally unacceptable level and that the most stringent measures of control are necessary. The *Air Standards* set forth the meteorological conditions and the pollutant concentrations which indicate the appropriate level. *Id.*

111. U.S. ENVIRONMENTAL PROTECTION AGENCY, CITIZEN ROLE IN IMPLEMENTATION OF CLEAN AIR STANDARDS 4 (1971).

112. REITZE at Appendix Three-12.

113. AIR STANDARDS R. 7(a).

114. *Id.* R. 7(b).

Provisions for variance are included which require a specific time schedule within which compliance may be expected and which are subject to certain limitations.¹¹⁵

Fourth, state plans must provide for two different surveillance systems — one for monitoring pollution levels in the ambient air, the other for monitoring emissions from individual sources. The latter system has two further components: (1) the EPA requires that all owners or operators of stationary sources maintain records and periodically report to the responsible state or local agency on the nature and amounts of their emissions; and (2) the state agency must establish an inspection system to check on compliance by individual sources.¹¹⁶ The Nebraska plan apparently contains both of these surveillance systems, including the two components.¹¹⁷

Fifth, each implementation plan must establish a procedure for review, prior to construction, of the possible impact of new sources of air pollution. The state agency should be able to prevent the construction or operation of a source which would interfere with the attainment or maintenance of national air quality standards.¹¹⁸ The Nebraska *Air Standards* include a permit program designed to meet this requirement.¹¹⁹

The language of the Clean Air Act of 1970 makes it clear that Congress intended the individual citizen to have an influential role in the air quality control process. Hence, the sixth requirement (which has been provided in Nebraska)¹²⁰ is that public hearings be held before the state adopts an implementation plan.¹²¹

Finally, the CAA requires that the state make emission data

115. *Id.* R. 7(c). Abnormal operating conditions resulting from a breakdown and/or necessary repairs which cause emissions in excess of limitations are not deemed violations, provided notice is given to the Department and the number of occurrences is not excessive. *Id.* R. 9.

116. REITZE at Appendix Three-13, citing CONSERVATION FOUNDATION, A CITIZEN'S GUIDE TO CLEAN AIR (1971).

117. AIR STANDARDS R. 10.

118. REITZE at Appendix Three-13, citing CONSERVATION FOUNDATION, A CITIZEN'S GUIDE TO CLEAN AIR (1971).

119. AIR STANDARDS R. 5. The Nebraska plan requires persons to obtain a permit before installation or modification of any processing machine, indirect heating equipment, waste incinerator, or complex sources (*e.g.*, designated areas, highways, new roads, airports). *Id.*; AIR SUMMARY R. 5.

120. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, RULES OF PRACTICE AND PROCEDURE R. 7 (1972).

121. REITZE at Appendix Three-14, citing CONSERVATION FOUNDATION, A CITIZEN'S GUIDE TO CLEAN AIR (1971).

gathered from individual sources publicly available.¹²² This last requirement has also been provided for in the Nebraska Air Standards.¹²³

Generally, the federal government sets national air quality standards and the states (by means of implementation plans approved by the EPA) determine how to achieve such standards.¹²⁴ The purpose of the implementation plan is to give the states the responsibility for deciding which activities to regulate or prohibit in order to achieve the national standard.¹²⁵

However, the states were not given authority to regulate all aspects of air pollution; a few areas were singled out by Congress for special treatment because of their essentially interstate nature or because of the severe threat to health involved.¹²⁶

Through their implementation plans, states are required to meet the national primary standards by 1975. However, the CAA provides for waiver of that deadline for up to two additional years if compliance is technologically impossible and reasonable alternatives are inadequate.¹²⁷

A few states will find that the air quality in their region is already cleaner than the minimum air quality standards set by the EPA. The issue of degradation — that is, whether the state implementation program merely has to prevent the air quality from falling below the national primary and secondary standards — was raised in *Fri v.*

122. REITZE at Appendix Three-14, citing CONSERVATION FOUNDATION, A CITIZEN'S GUIDE TO CLEAN AIR (1971).

123. AIR STANDARDS R. 23.

124. Compliance with all seven basic requirements does not assure automatic EPA approval. While the Nebraska plan is currently undergoing revision (it is likely that the revised plan will be approved), there is always the possibility that a provision considered by the Nebraska Department as conforming to the CAA may not be considered as such by the EPA.

In fact, the Nebraska Air Quality implementation plan has been once disapproved by the EPA. The plan was found inadequate for reasons which included not having: 1) a legally enforceable compliance schedule; 2) a contingency plan for preventing emergency episodes in the Omaha-Council Bluffs region; and 3) episode criteria and public announcements procedures in the Lincoln-Lancaster area. 3 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENTS 412 (1972).

125. PRIMER at 6.

126. *Id.* at 7. Thus, special federal authority exists to control (1) new stationary sources of pollution — 42 U.S.C. § 1857c-6 (1970); (2) hazardous air pollutants — *Id.* § 1857c-7; (3) motor vehicle emissions — *Id.* § 1857f-1; (4) low-emission vehicle procurement — *Id.* § 1857f-63; (5) aircraft emissions — *Id.* §§ 1857f-9 to -12; (6) fuel and fuel additives — *Id.* § 1857f-6c. Unless the EPA has ruled to the contrary, states may also regulate any fuel or additive; the state must submit its regulations through the implementation plan process. *Id.* § 1857f-6c(c) (4).

127. 42 U.S.C. § 1857c-5 (1970); PRIMER at 6.

Sierra Club.¹²⁸ The Supreme Court affirmed¹²⁹ the decision of the United States District Court for the District of Columbia which stated that the EPA Administrator shall not approve any state implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of the ambient air quality.¹³⁰ The court based its decision on the CAA's policy of nondegradation of existing clean air.¹³¹

Although the CAA provides for an extensive scheme of federal enforcement,¹³² it is expected to be largely enforced by the states. However, if a state fails to enforce the CAA, the EPA Administrator himself may enforce the abatement (after thirty days notice), and may also enforce state implementation plans.¹³³ The EPA Administrator may start a civil action for an injunction or other appropriate relief whenever any person (1) violates an order; (2) violates an implementation plan during federal enforcement and after thirty days notice; (3) violates emission limits concerning new stationary sources and hazardous air pollutants; or (4) fails to comply with inspection, monitoring and entry provisions.¹³⁴ Penalties for violations range up to \$25,000 per day and/or one year in prison.¹³⁵

One of the most important provisions of the CAA permits citizen suits.¹³⁶ The CAA gives any individual the right to sue in federal district court to enjoin violations of the CAA and the state implementation plans under it.¹³⁷ The plaintiff need allege no special damage to himself. The potential plaintiff is limited only in two ways — (1) he may not sue a state in which he does not reside,¹³⁸ and (2) he may not sue when the EPA Administrator or the state is prosecuting a related civil action in state court.¹³⁹ "Any person" may be named as defen-

128. 412 U.S. 541 (1973), *aff'g by an equally divided Court* *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972).

129. Although the decision was affirmed, it should be noted that the Court was split four-four with Justice Powell abstaining.

130. 344 F. Supp. 253 (D.D.C. 1972).

131. *Id.* at 255.

132. 42 U.S.C. § 1857c-8 (1970).

133. *Id.* § 1857c-8(a).

134. *Id.* § 1857c-8(b).

135. *Id.* § 1857c-8(c). After a first conviction, penalties double. A knowingly false statement can bring a fine of up to \$10,000 and/or six months imprisonment. *Id.*

136. 42 U.S.C. § 1857h-2 (1970).

137. *Id.*

138. R. AYRES & J. MILLER, *CITIZEN SUITS UNDER THE CLEAN AIR ACT ACT AMENDMENTS OF 1970 2* (reprinted by the U.S. ENVIRONMENTAL Protection Agency 1970).

139. 42 U.S.C. § 1857h-2(b) (1970). However, if the EPA Administrator or the state is diligently prosecuting in federal court, the citizen may intervene as a matter of right and so become a full party to the suit. *Id.*

dant; and the plaintiff may obtain an injunction against the federal Administrator or local polluter, or a mandamus against the EPA Administrator for violation of a nondiscretionary duty.¹⁴⁰

The federal courts have jurisdiction over citizen suits regardless of the amount in controversy. The CAA confers jurisdiction on the federal district courts to enforce a state or federal emission standard.¹⁴¹ Suit must be brought where the stationary source is located. As to non-stationary sources, a citizen may presumably bring the suit in any federal district court limited only by forum non conveniens and the rules of personal jurisdiction.¹⁴²

The policy of the CAA is to encourage (by generous grants to the states)¹⁴³ state implementation of federal standards. Obviously, Congress recognized that the national air quality standards could not be achieved by the federal government alone. The lack of trained manpower and resources is prohibitive.¹⁴⁴ As a result, Congress developed a comprehensive scheme in which the federal government maintained firm control over the policy and standards to be achieved in each individual state by its own methods. Citizen suits are another means by which the federal government can set its own high standards while utilizing the manpower of its citizens to ensure enforcement of those standards. Thus, by means of the Clean Air Act, Congress achieved a scheme which binds the nation together under stringent environmental standards, while allowing each state to implement the national standards in its own way.¹⁴⁵

Fortunately, we find that the comprehensive scheme of the CAA is repeated in federal water quality legislation.

FEDERAL WATER QUALITY LEGISLATION AND THE NEBRASKA RESPONSE

The Federal Water Pollution Control Act Amendments of 1972, amending the Federal Water Pollution Control Act [FWPCA],¹⁴⁶ com-

140. 42 U.S.C. § 1857h-2(a).

141. *Id.*

142. R. AYRES & J. MILLER, CITIZEN SUITS UNDER THE CLEAN AIR ACT AMENDMENTS OF 1970 3 (reprinted by the U.S. Environmental Protection Agency 1970).

143. 42 U.S.C. § 1857c (1970).

144. REITZE at Three-50.

145. State standards are, however, completely subject to EPA approval. 42 U.S.C. § 1857c-5 (1970); REITZE at Three-36.

146. 33 U.S.C. §§ 1251 *et seq.* (Supp. II 1972).

prise the first viable and comprehensive federal legislation in the area of water pollution.¹⁴⁷ The FWPCA is similar to the Clean Air Act in that the FWPCA also creates federal programs which the individual states enforce. The FWPCA established two goals: first, the achievement of an interim level of water quality that provides for water recreation and the protection and propagation of fish and wildlife by July 1, 1983;¹⁴⁸ second, the elimination of all discharges of pollutants into navigable waters by 1985.¹⁴⁹

The FWPCA changed the thrust of enforcement from water quality standards (which regulate the amount of pollutants in a given body of water) to effluent limitations,¹⁵⁰ which regulate the amount of pollutants discharged from particular point sources.¹⁵¹ However, ambient water quality standards can still dictate the amount of pollutants permitted from a discharger,¹⁵² if effluent limitations based on control technology are insufficient to achieve water quality goals. The discharge of any pollutant not in accordance with the FWPCA is declared unlawful.¹⁵³ Thus, dischargers must comply with the methods set out by Congress to achieve water quality goals or face prosecution.

The FWPCA provides a combination of the following two basic methods to achieve national water quality goals: effluent limitations based on control technology, and effluent limitations based on water quality standards.¹⁵⁴

The first method provides that industrial dischargers must have the best practicable control technology for reducing and preventing pollution by July 1, 1977.¹⁵⁵ By July 1, 1983, industrial dischargers must have the best available control technology economically available.¹⁵⁶

147. REITZE at Supplement-22 (Supp. 1973).

148. 33 U.S.C. § 1251(a)(2) (Supp. II 1972).

149. *Id.* § 1251(a)(1).

150. The FWPCA defines "effluent limitation" as any restriction established by a state or the EPA Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources. 33 U.S.C. § 1362(11) (Supp. II 1972); PRIMER at 13 n.1.

151. The FWPCA defines "point sources" as any discernible, confined, and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C. § 1362(14) (Supp. II 1972); PRIMER at 13 n.2.

152. PRIMER at 13-14.

153. 33 U.S.C. § 1311(a) (Supp. II 1972).

154. U.S. ENVIRONMENTAL PROTECTION AGENCY, CLEAN WATER REPORT TO CONGRESS 7 (1973) [hereinafter cited as REPORT TO CONGRESS]. This report to Congress by the EPA was required by 33 U.S.C. § 1375(a) (Supp. II 1972).

155. 33 U.S.C. § 1311(b)(1)(A) (Supp. II 1972). Under this section, "best practicable control technology" is to be determined by the EPA Administrator.

156. *Id.* § 1311(b)(2)(A).

The EPA Administrator can impose a no-discharge (complete elimination) requirement if such is both technologically and economically feasible.¹⁵⁷ Municipal wastes must use secondary treatment¹⁵⁸ by mid-1977, and advanced methods¹⁵⁹ of disposal by mid-1983.¹⁶⁰

The second method for achieving water quality goals requires the EPA Administrator to set more stringent effluent standards than found under the first method, if the first method would interfere with the attainment of water quality that would protect fish and wildlife and allow recreational use.¹⁶¹

STATE WATER QUALITY PLANS

Reflecting the basic policy of the FWPCA (*i.e.*, state responsibility for water pollution control), the FWPCA provides a plan by which states administer and implement the FWPCA directed by EPA guidelines.¹⁶² Each state is expected to have a water quality program containing water quality standards for all interstate and intrastate navigable waters within the state.¹⁶³ Such state standards must meet minimum federal standards. The FWPCA requires each state to submit its water quality program to EPA for approval before it can begin to implement the FWPCA by means of its plan.

The required statewide water quality plan must be "a continuing planning process" for navigable waters. The FWPCA lists criteria which each state plan must include before it can be approved by the EPA Administrator.¹⁶⁴

157. *Id.* § 1314(b) (3); REITZE at 22, 26 (Supp. 1973).

158. 33 U.S.C. § 1311(b) (1) (B) (Supp. II 1972). In "primary treatment of wastes," solids are allowed to settle on the bottom or float to the top and are removed from the water. REITZE at Four-11. In "secondary treatment," bacteria are allowed to consume the organic parts of the waste. PRIMER at 14 n.l. The two principal types of secondary treatment are trickling filters and the activated sludge process. REITZE at Four-12.

159. Advanced waste treatment techniques provide more complete methods of removing pollutants from water. The advanced treatment techniques under investigation range from extensions of biological treatments (capable of removing nitrogen and phosphorus nutrients) to physical chemical separation techniques (such as absorption, distillation, and reverse osmosis). REITZE at Four-14.

160. 33 U.S.C. § 1311(b) (2) (B) (Supp. II 1972); REITZE at 22 (Supp. 1973).

161. 33 U.S.C. § 1312(a) (Supp. II 1972).

162. *Id.* § 1313.

163. *Id.*

164. *Id.* § 1313(e) (3). The following criteria must be included in a state's water quality plan:

If a state fails to submit water quality standards, or if the standards submitted by a state fail to meet the EPA requirements, the EPA Administrator shall promulgate water quality standards for the state.¹⁶⁵

The state-developed water quality plans¹⁶⁶ are "designed to be the central management tool of the states in administering their water quality programs."¹⁶⁷ The EPA has stated that the "planning process will provide direction to resource expenditures through establishing priorities and schedules of action."¹⁶⁸ It is hoped that the use of statewide water planning will achieve maximum effectiveness in pollution control programs.¹⁶⁹

As each state prepares its water quality standards it must spell out water use classifications, such as recreation, fish and wildlife propagation, public water supplies and industrial and agricultural uses.¹⁷⁰ States must then establish the quality of water required to achieve these uses and detailed plans for maintaining the desired level of quality.¹⁷¹ In preparing its water quality standards, each state must classify all river segments as either water-quality-limited or effluent-guidelines-limited;¹⁷² e.g., each state must identify those waters within its boundaries for which effluent limitations are not as stringent as they might be.¹⁷³

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- (1) Effluent limitations and schedules of compliance at least as stringent as those required by the FWPCA;
 - (2) An areawide waste management plan;
 - (3) Total maximum daily loads for pollutants necessary to meet water quality standards;
 - (4) Procedures for revision;
 - (5) Adequate authority for intergovernmental operation;
 - (6) Adequate implementation, including schedules of compliance, to meet revised or new water quality standards;
 - (7) Control over water waste treatment residuals; and
 - (8) An inventory and ranking, in order of priority, of needs of construction of waste treatment works required to meet the water quality standards.

Id.

165. 33 U.S.C. § 1313(b).

166. *Id.* § 1313(e).

167. REPORT TO CONGRESS at 7.

168. *Id.*

169. *Id.* at 7-8.

170. 33 U.S.C. § 1313 (Supp. II 1972); PRIMER at 14.

171. 33 U.S.C. § 1313 (Supp. II 1972); PRIMER at 14.

172. REPORT TO CONGRESS at 9.

173. 33 U.S.C. §§1313(d) (1) (A), (B) (Supp. II 1972).

Each state must also establish the total maximum daily load for those pollutants determined by the EPA Administrator to be suitable for calculation,¹⁷⁴ and the total maximum daily thermal load required to assure protection and propagation of fish.¹⁷⁵ States must identify their public lakes according to eutrophic conditions and set up procedures to control and restore polluted lakes.¹⁷⁶

The FWPCA requires the EPA Administrator to publish guidelines for identifying areas with substantial water quality problems. The governor of each state must then identify the problem areas in his respective state. Thereafter, (a) boundaries must be designated, and (b) a single agency capable of developing areawide waste treatment management plans must be designated.¹⁷⁷ If the governor fails to act, local officials may perform these functions.¹⁷⁸ Each designated agency must establish an areawide planning process, subject to various requirements.¹⁷⁹ Areawide waste treatment management planning will be accomplished primarily in metropolitan areas which have substantial water quality problems requiring treatment levels beyond "secondary" for municipal wastes and "best practicable control technology" for industrial wastes.¹⁸⁰

Effective water quality planning requires an adequate water quality surveillance scheme.¹⁸¹ Under strategy developed by the EPA, the states will undertake extensive monitoring surveys as a part of their continuing planning processes.¹⁸² The EPA Administrator is authorized to require monitoring of all point sources, to enter and inspect any premises where an effluent source is located, and to inspect any records.¹⁸³

Nebraska has established its own state water quality plan, intended to comply with the FWPCA. The Nebraska Department promulgated

174. *Id.* § 1313(d)(1)(C).

175. *Id.* § 1313(d)(1)(D).

176. *Id.* § 1324.

177. *Id.* § 1288(a).

178. *Id.*

179. *Id.* § 1288(b).

180. REPORT TO CONGRESS at 9-10.

181. *Id.* at 10.

182. *Id.*

183. 33 U.S.C. § 1318 (Supp. II 1972). To insure compliance, the penalty for knowingly making false statements in a filed document, or tampering with a monitoring device, is a fine of not more than \$10,000, or not more than six months imprisonment, or both. *Id.* § 1319(c)(2).

Water Quality Standards Applicable to Nebraska Waters,¹⁸⁴ which provided guidelines and standards for the discharge of waste from domestic, industrial and agricultural sources.¹⁸⁵ Waste discharges are not to degrade the water quality of receiving waters beyond the limits provided by Nebraska standards.¹⁸⁶ An anti-degradation clause is provided to require that waters whose existing quality is better than the established standards shall be maintained at their high level unless a change is shown to be justified.¹⁸⁷ It is the policy of the Council that all domestic waters receive at least secondary treatment, with prescribed bacterial control, and such additional treatment necessary to maintain water quality criteria.¹⁸⁸

All of the waters in the state are classified according to water use.¹⁸⁹ Water classifications include use for agriculture, industry, water supply, full and partial body contact sports, fish wildlife, and other aquatic and semi-aquatic life.¹⁹⁰ The water-use classification of a given body of water determines the applicable water quality criteria.¹⁹¹

The Nebraska plan includes a list of known sources of industrial and municipal discharges to boundary waters.¹⁹² Special recognition is given to the problems of combined sewer overflows, irrigation, wastes from vessels and marinas, land erosion and the operation and maintenance of wastewater treatment facilities.¹⁹³ Wastewater discharge is not permitted to degrade a specific receiving water's quality below the criteria established for its use classification.¹⁹⁴

Provision is made for a stream surveillance program which would include monitoring, sampling and surveillance of streams and other bodies of water.¹⁹⁵ This provision is intended to supplement existing state and federal sampling stations.¹⁹⁶

184. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, *WATER QUALITY STANDARDS APPLICABLE TO NEBRASKA WATERS* (effective June 11, 1973).

185. *Id.* at 1.

186. *Id.*

187. *Id.* at 1-2.

188. *Id.* at i-ii.

189. *Id.* at 11-22.

190. *Id.* at 4.

191. *Id.* at 23-30.

192. *Id.* at 31, supp. A, A-1, B, C.

193. *Id.* at 31-33.

194. *Id.* at 31-35.

195. *Id.* at 33.

196. *Id.*

As can be seen, Nebraska's water quality plan seems to meet all of the requirements of FWPCA. As of this date there has been no federal approval of the Nebraska water quality plan.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The FWPCA provides for a program of regulating discharges into navigable waters.¹⁹⁷ This is by means of a permit program and is known as the National Pollutant Discharge Elimination System [NPDES].¹⁹⁸ The FWPCA requires any applicant for a federal license or permit whose activities may result in a discharge into navigable water to obtain a certificate from the state in which the discharge originates.¹⁹⁹ The state certificate must indicate that the discharge will meet the requirements of (1) effluent limitations based on control technology,²⁰⁰ (2) water quality related effluent limitations,²⁰¹ (3) national standards for new sources²⁰² and (4) toxic and pretreatment effluent standards.²⁰³ If a state fails to act within a reasonable time the permit is deemed waived.²⁰⁴

Under the FWPCA, the EPA Administrator will turn the NPDES permit program over to the states subject to various guidelines,²⁰⁵ unless he determines the state permit program does not meet the federal requirements.²⁰⁶ Each state desiring to administer its own NPDES program may submit to the EPA Administrator a full description of its proposed NPDES program. Adequate authority must exist in the state for the proper issuance of permits.²⁰⁷

197. 33 U.S.C. § 1342 (Supp. II 1972).

198. *Id.*

199. *Id.* § 1341.

200. *Id.* § 1311.

201. *Id.* § 1312.

202. *Id.* § 1316(b). New sources of pollution are regulated by a national standard of performance, determined by the EPA Administrator as the best demonstrated available technology which reflects the greatest reduction of pollutant discharges. *Id.* § 1315(a), (b).

203. 33 U.S.C. § 1317. The EPA Administrator must promulgate effluent standards for toxic pollutants and pretreatment standards for pollutants discharged into public treatment works (state pretreatment requirements not in conflict are allowed). *Id.*

204. 33 U.S.C. § 1341.

205. *Id.* § 1342(b).

206. *Id.* The Nebraska NPDES program has not yet received EPA approval.

207. *Id.* The FWPCA insists that before a state may take over the operation of the NPDES in its state that adequate authority must exist in the state:

(1) To issue permits which

(a) insure compliance with the four requirements listed above;

When a state permit program complies with the requirements, the EPA Administrator will turn the program over to the state.²⁰⁸ Where the EPA Administrator determines that the transfer shall not occur, the EPA, while issuing the permit itself, will allow the state to cooperate in the preparation of permit conditions, supported by state analysis.²⁰⁹

In 1973, the Nebraska Legislature amended the Nebraska Environmental Protection Act to grant the necessary legal authority to the Council, enabling Nebraska to establish its own permit program in compliance with NPDES.²¹⁰ The 1973 amendment requires the Council to adopt rules and regulations which will conform to the NPDES. The Department and the Council are designated the issuing agencies for water discharge permits.²¹¹ The legislature gave such authority because it wished to avoid federal administration of the

- (b) are for fixed terms not exceeding five years; and
- (c) can be terminated or modified for cause including, but not limited to, the following:
 - (i) violation of any condition of the permit;
 - (ii) obtaining a permit by misrepresentation, or failure to disclose all relevant facts;
 - (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
- (d) control the disposal of pollutants into wells;
- (2) To comply with inspection and monitoring provisions of the FWPCA;
- (3) To insure public notice of each application for a permit and provide opportunity for public hearings before issuance of a permit;
- (4) To insure that the EPA Administrator receive notice of each application for a permit;
- (5) To insure any state which would be affected by the granting of a permit the opportunity to submit recommendations;
- (6) To insure that no permit will be issued if in the judgment of the Secretary of the Army navigation would be impaired;
- (7) To abate violations of the permit program, including civil and criminal penalties;
- (8) To insure that any permit for a discharge from a publicly owned treatment plant includes conditions to require adequate notice of substantial changes in volume or character; and
- (9) To insure that any industrial user of a publicly owned treatment plant will comply with the provisions for inspection of toxic pollutants, and will pay its proportionate share of the costs of operation and maintenance of the waste treatment services.

Id.

208. 33 U.S.C. § 1342(b).

209. REPORT TO CONGRESS at 40-41.

210. NEB. REV. STAT. § 81-1505(6) (Supp. 1973).

211. AGRICULTURE AND ENVIRONMENT COMM., 83D LEGIS. 1ST SESS., INTRODUCER'S STATEMENT OF PURPOSE ON L.B. 538 (1973).

permit program in Nebraska.²¹² It feared that if the federal government administered the permit program, Nebraska's priorities could be upset.²¹³ In addition, it was recognized that if Nebraska administered the permit program, it could make a fairer judgment in assessing the situation based on local conditions,²¹⁴ and render more personalized service to Nebraska industry.²¹⁵

Pursuant to this authority the Department has promulgated *Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System*.²¹⁶ Under these rules it is the stated policy of the Council that its goals are the requirements of the NPDES contained in the FWPCA.²¹⁷ These rules are designed to comply with the NPDES requirements as outlined above. Specifically, the rules prohibit all persons from discharging pollutants from a point source into any waters of Nebraska unless they have obtained a permit.²¹⁸ Certain listed discharges are held exempt from having to obtain an NPDES permit.²¹⁹ The rules set up specific procedures for making application for an NPDES permit in varying circumstances.²²⁰ Specific limitations are placed upon what terms and conditions permits may be issued by the Director;²²¹ these are in line with the requirements of the FWPCA.

Provision is made for public notice of every NPDES application,²²² and for public participation.²²³ Opportunity is given for any interested party to petition for a public hearing. This includes the applicant, any affected state or interstate agency, or any interested agency, person or group.²²⁴ Provision is also made for public notice of any hearing.²²⁵

212. *Hearings on L.B. 538 Before the Comm. on Agriculture and Environment*, 83d Legis., 1st Sess. 5 (1973).

213. *Id.*

214. *Id.*

215. *Id.* at 2.

216. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL RULES AND REGULATIONS PERTAINING TO THE ISSUANCE OF PERMITS UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (*effective* Sept. 19, 1973).

217. *Id.* R. 1.

218. *Id.* R. 3.01.

219. *Id.* R. 3.02.

220. *Id.* R. 4.

221. *Id.* R. 5.

222. *Id.* R. 6.03-6.05.

223. *Id.* R. 6.06.

224. *Id.* R. 6.12.

225. *Id.* R. 6.13, 6.14.

Other provisions in accordance with the FWPCA include: 1) provisions for the duration (not to exceed five years) and review of NPDES permits,²²⁶ and 2) provisions for monitoring the discharge of pollutants, maintaining records of all information resulting from monitoring, and reporting periodically to the Director not less than once per year.²²⁷ These and other rules bring Nebraska's permit program within the ambit of NPDES.

Although the Nebraska Water Quality Plan and the Nebraska NPDES program have obtained the approval of the Nebraska Environmental Control Council, they will not become operative under the FWPCA until the EPA gives its approval;²²⁸ thereby granting the Department administration of the program.²²⁹ Before such approval is obtained, however, amendments to the plans can be expected.²³⁰

ENFORCEMENT OF THE FWPCA

The FWPCA confers the ultimate enforcement authority upon the EPA Administrator, in the event that a state fails to enforce the law. Whenever the EPA Administrator finds that any person is in violation of any condition of a state-issued NPDES permit, the FWPCA authorizes the EPA Administrator: (1) to issue an order requiring compliance; or (2) to bring a civil action for appropriate relief, including a temporary or permanent injunction; or (3) to notify the alleged violator and the state and, if the state has not commenced appropriate enforcement action after thirty days, to issue a compliance order, or (4) to bring a civil action.²³¹ Widespread violations allow the EPA Administrator, after proper notice and reasonable time, to take over and enforce a state program.²³²

The FWPCA gives the EPA Administrator emergency powers. He may bring a restraining order or other action in federal court where

226. *Id.* R. 7.

227. *Id.* R. 8.

228. The major obstacle to approval was considered to be the \$5,000 penalty. See note 52 *supra*. The other obstacle to approval is the absence of a clause providing that all data must be made available to the public. It is expected that approval of the plan will be obtained once these two barriers are removed.

229. Letter from Richard Hansen, Legal Counsel to Nebraska Department of Environmental Control, to Sarah J. Penn, Jan. 2, 1974.

230. *Id.*

231. 33 U.S.C. § 1319(a), (b) (Supp. II 1972); REPORT TO CONGRESS at 28.

232. 33 U.S.C. § 1319(a) (2) (Supp. II 1972); REPORT TO CONGRESS at 28.

either health or livelihood is substantially and imminently endangered.²³³

Despite the extensive federal enforcement provisions in FWPCA, it is intended that the states carry the primary responsibility for enforcement. The federal role is essentially a back-up role — where states cannot maintain an adequate enforcement level, the federal government will insure enforcement.²³⁴

In addition to state and federal enforcement, the FWPCA gives individuals a limited right to bring citizen suits.²³⁵

Although the FWPCA provides stiff penalties for violators,²³⁶ as noted earlier, Nebraska's \$5000 penalty has been deemed adequate by the EPA.²³⁷

The Nebraska Legislature promulgated a plan of enforcement to comply with the FWPCA.²³⁸ Enforcement begins with an informal conference with a violator, followed by a formal hearing and court action where necessary to ensure compliance.²³⁹

GRANTS

To assist the states in exercising their rights and responsibilities, Congress authorized numerous grants to aid the states' pollution control efforts.²⁴⁰ Assistance to the states is available for research and development,²⁴¹ manpower training,²⁴² water quality planning,²⁴³ monitoring and enforcing.²⁴⁴ Grants are available to institutions of

233. 33 U.S.C. § 1364 (Supp. II 1972).

234. REPORT TO CONGRESS at 41.

235. 33 U.S.C. § 1365 (Supp. II 1972).

236. Willful or negligent violation of 33 U.S.C. §§ 1311, 1312, 1316, 1318 (Supp. II 1972), or any condition or limitation in an EPA-issued or state-issued permit implementing any of these sections, is punishable by a fine of not less than \$2,500, nor more than \$25,000 a day, or by imprisonment for not more than one year or by both. 33 U.S.C. § 1319(c) (Supp. II 1972). A second conviction is punishable by doubling the penalties. *Id.* Other violations of FWPCA or compliance orders are subject to a civil penalty of not more than \$10,000. *Id.* § 1319(d).

237. See text at notes 49-52 *supra*.

238. NEB. REV. STAT. §§ 81-1508(1)(b)-(d) (Supp. 1973); AGRICULTURE AND ENVIRONMENT COMM., 83D LEGIS., 1ST SESS., INTRODUCER'S STATEMENT OF PURPOSE ON L.B. 538 (1973).

239. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, RULES OF PRACTICE AND PROCEDURE R. 2.11, 5 (*effective* Nov. 21, 1972).

240. PRIMER at 18.

241. 33 U.S.C. § 1255 (Supp. II 1972).

242. *Id.* § 1254(g).

243. *Id.* § 1256.

244. *Id.*

higher learning for program development aimed at training students in professions dealing with water pollution control.²⁴⁵

A major thrust of the federal grant effort is directed toward municipalities for the construction of sewage treatment plants.²⁴⁶ The grant applicant furnishes plans, specifications and estimates [PS&E] for each stage of the overall waste treatment facility.²⁴⁷ Upon approval of the PS&E, the federal government is obligated to pay seventy-five percent of the cost.²⁴⁸ One of the conditions imposed is that each user of a waste treatment plant will pay his share of the operating costs.²⁴⁹ The allotment of funds to each state is based on a formula of need.²⁵⁰

The FWCPA also provides reimbursement for publicly owned treatment plants on which construction began between June 30, 1956, and July 1, 1972.²⁵¹ Municipalities are further eligible for grants for demonstration projects utilizing new methods for treating sewage, joint systems for municipal and industrial waste, and new water purification techniques.²⁵²

OTHER NEBRASKA PROVISIONS FOR WATER POLLUTION CONTROL

Nebraska has developed control programs in other areas of water pollution. These include disposal wells, oil and hazardous spills and livestock waste. Rules promulgated in all three of these areas were adopted prior to the passage of the FWPCA and, therefore, must be updated and revised. However, they may be considered to be part of Nebraska's water quality plan.

The Department promulgated rules designed to protect underground water and subsurface resources by regulating disposal

245. *Id.* § 1259.

246. *Id.* § 1281; PRIMER at 18. FWPCA provides for a federal share of seventy-five percent of the construction cost for funds authorized after June 30, 1971. 33 U.S.C. § 1282 (Supp. II 1972).

247. 33 U.S.C. § 1283 (Supp. II 1972).

248. *Id.*

249. *Id.* § 1284(b).

250. *Id.* § 1285. The EPA Administrator is authorized to make grants of \$18 billion during fiscal years 1973-75 for construction of new municipal waste treatment works. *Id.* § 207. However, to date President Nixon has impounded half of this \$18 billion. 4 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENTS 1533 (1973).

251. 33 U.S.C. § 1286 (Supp. II 1972).

252. PRIMER at 19.

wells.²⁵³ Plans and specifications for each well must be submitted to the Council with hydrolytic, geologic and construction data plus waste characteristics.²⁵⁴ Permits are required for both construction and operation of the disposal wells.²⁵⁵

The Department also developed an *Oil and Hazardous Material Spill Contingency Plan*,²⁵⁶ activated whenever there is a sudden and/or accidental discharge of oil, hazardous or toxic substance into state waters or in such close proximity that it threatens to enter state waters.²⁵⁷ In accordance with the Nebraska water quality standards, the plan makes it incumbent upon the owner or other responsible person to report immediately to the Department a discharge or spillage of oil, hazardous or toxic substance that is likely to enter any state waters.²⁵⁸

The plan provides for a system of notification²⁵⁹ and response procedures in which the source of the spill is held primarily responsible for containing and cleaning up the material.²⁶⁰

The Department also promulgated rules pertaining to livestock waste control, to prevent degradation of the Nebraska environment due to improper management of livestock wastes.²⁶¹ The rules require the operator of any proposed or existing livestock operation utilizing livestock waste control facilities to apply for a permit.²⁶² Livestock waste control facilities are required whenever runoff therefrom creates a nuisance or violates the Nebraska water quality standards.²⁶³

253. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, RULES AND REGULATIONS FOR THE CONTROL OF DISPOSAL WELLS TO PROTECT GROUNDWATER AND OTHER SUBSURFACE RESOURCES OF THE STATE OF NEBRASKA (*effective* Aug. 30, 1972) [hereinafter cited as DISPOSAL WELLS].

254. *Id.* R. 3.02; 3 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENTS 466 (1972).

255. DISPOSAL WELLS R. 3.02, 3.30; 3 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENTS 466 (1972).

256. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, OIL AND HAZARDOUS MATERIAL SPILL CONTINGENCY PLAN (1972).

257. *Id.* at 2.

258. *Id.* at 1, *citing* NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, WATER QUALITY STANDARDS APPLICABLE TO NEBRASKA WATERS (*effective* June 11, 1973).

259. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, OIL AND HAZARDOUS MATERIAL SPILL CONTINGENCY PLAN at 4-6 (1972).

260. *Id.* at 6-9.

261. NEBRASKA DEP'T OF ENVIRONMENTAL CONTROL, RULES AND REGULATIONS PERTAINING TO LIVESTOCK WASTE CONTROL R. 1 (*effective* June 22, 1972) [hereinafter cited as LIVESTOCK WASTES].

262. *Id.* R. 3.04.

263. *Id.* R. 4.01.

It should be noted, however, that the rules permit waste material to move off the property of a livestock feeder provided the waste does not enter a stream or lake.²⁶⁴ While the rules provide for inspection of the facilities,²⁶⁵ an adjoining landowner must first file a complaint before a feedlot operator is compelled to abate his pollution.²⁶⁶ It is prima facie evidence that a nuisance does not exist when a livestock operation is conducted in accordance with the rules, and when the best practicable technology is applied to alleviate offensive odors and other objectionable conditions.²⁶⁷

FURTHER SOURCES OF WATER POLLUTION CONTROL

For the Nebraska environmentalist there exist further sources of water pollution control besides the 1972 FWPCA and the particular Nebraska response to it. Even since the passage of the FWPCA, the Rivers and Harbors Act of 1899²⁶⁸ and certain common law remedies have proved to be highly effective in other states for the control of water pollution. They are included here to demonstrate to the Nebraska environmentalist that he is not limited in his remedies to the 1972 FWPCA.

The Rivers and Harbors Act of 1899

Prior to 1972 the most stringent and effective source of federal water pollution control, from an enforcement viewpoint, was the Rivers and Harbors Act of 1899. This act, originally designed only to protect against obstructions to navigation,²⁶⁹ has recently been interpreted to cover pollution.²⁷⁰ Enforcement authorities turned to this legislation when they discovered the difficulty of enforcing the early federal water pollution control acts.²⁷¹

Sections 401, 403 and 404 of The Rivers and Harbors Act deal with obstruction to navigation, making it unlawful to create any obstruc-

264. 3 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENTS 285 (1972).

265. LIVESTOCK WASTES R. 6.

266. 3 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENTS 285 (1972).

267. LIVESTOCK WASTES R. 8.

268. 33 U.S.C. §§ 401, 403-04, 406-09, 411-15 (1970).

269. *Id.* §§ 401, 403-04 (1970); REITZE at Four-34.

270. *United States v. United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind. 1970).

271. REITZE at Four-108.

tion to the navigable capacity of any of the waters of the United States, without first obtaining the approval of the Secretary of the Army.²⁷²

Section 407 is the heart of the Act and, along with sections 411 and 413, is often referred to as The 1899 Refuse Act. The Refuse Act is an absolute liability statute which strictly prohibits the dumping of refuse into any navigable water or tributary of any navigable water.²⁷³ The Refuse Act also prohibits the depositing of material on the bank of a navigable waterway where it could be washed into the river and impede navigability.²⁷⁴ In addition, the Refuse Act prohibits all pollution discharges except liquid waste from streets and sewers and public works carried on by the United States.²⁷⁵

The Refuse Act provided, however, that permits could be issued to allow the deposit of any material in navigable waters.²⁷⁶ The permit system under the Refuse Act is superseded by FWPCA;²⁷⁷ however, the Refuse Act and its penalties for violation still apply in situations where an offender has no permit (i.e., neither a permit issued under the 1972 NPDES nor a permit issued prior to 1972 under the Refuse Act), or where an offender goes beyond the limits of his permit.²⁷⁸

But it is only the permit system concept which has been taken over by FWPCA; the remainder of the Rivers and Harbors Act is still viable.

The Refuse Act has been interpreted as applying not only to refuse deposited in a navigable stream, but also to commercially valuable substances which may be accidentally spilled.²⁷⁹ It has

272. Criminal penalties for the violation of 33 U.S.C. §§ 401, 403 and 404 (1970) are provided for in 33 U.S.C. § 406 (1970).

273. 33 U.S.C. § 407 (1970). The term navigable waters means the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7) (Supp. II 1972). The phrase "navigable waters" had been previously construed by the Supreme Court to require (1) navigability in fact, and (2) the capability of affecting interstate commerce. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). The new definition eliminates the requirement of navigability in fact; all that is remaining is that the waters in question be capable of affecting interstate commerce. Memorandum from John R. Quarles, Jr., EPA General Counsel, to EPA Regional Offices on the meaning of the term "Navigable Waters," June 8, 1973.

274. 33 U.S.C. § 407 (1970).

275. *Id.*

276. *Id.*

277. *Id.*; 33 U.S.C. § 1342(a) (5) (Supp. II 1972).

278. See *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 662, 666 (1973); 33 U.S.C. § 1371(a) (Supp. II 1972).

279. *United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1966).

further been held to apply not only to "direct" discharges of refuse into navigable waters, but also to "indirect" deposits where an industry allows liquid petroleum to be spilled on its land and allows it to flow over the ground into the ocean.²⁸⁰ It has also been held that the Refuse Act does not require any element of scienter; that the very act of depositing refuse in navigable waters is the *malum prohibitum*.²⁸¹

Many have indicated that the Rivers and Harbors Act is no longer a viable source of pollution control legislation, on the ground that it has been superseded by FWPCA.²⁸² However, it is evident that the Rivers and Harbors Act remains an important piece of water pollution legislation. The very nature of the Rivers and Harbors Act, and recent court decisions, mandate that it not be lightly brushed aside.

Since the passage of FWPCA, at least two decisions indicate the continuing viability of the Refuse Act. In *United States ex rel. Scott v. United States Steel Corp.*,²⁸³ the court was directly confronted with the issue of whether the Refuse Act had been superseded by FWPCA; it answered in the negative.²⁸⁴

Perhaps the most important decision involving the Refuse Act since 1972, *United States v. Pennsylvania Industrial Chemical Corp.*²⁸⁵ settled the issue of the viability of the Refuse Act. There the United States Supreme Court held that the Refuse Act was operative as an *absolute ban on discharges* except as permitted. The Court said that there was nothing in the Refuse Act to condition its enforcement on the establishment of a formal regulatory permit system.²⁸⁶ Thus,

280. *United States v. Esso Standard Oil Co.*, 375 F.2d 621 (3d Cir. 1967).

281. *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969).

282. REITZE at Four-36, Four-108.

283. 356 F. Supp. 556 (N.D. Ill. 1973).

284. *Id.* at 559. In this case the United States and the state of Michigan were seeking to enjoin U.S. Steel from discharging wastewater into Lake Michigan. An earlier decision, *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), held that the Refuse Act clearly prohibited discharges of refuse in both navigable waters and in non-navigable tributaries of navigable waters, provided, however, that the Secretary of the Army could permit discharge into navigable waters. The court concluded that no permit could be issued by the Corps of Engineers for deposit in a nonnavigable tributary of a navigable water. *Id.* at 11-12. The effect of the decision was to suspend the operation of the permit system under the Refuse Act.

In *United States ex rel. Scott v. United States Steel Corp.*, the issue was whether the defendant was prevented from obtaining a permit from the Secretary of the Army pursuant to the Refuse Act because such procedure was *ultra vires* the Secretary's authority for nonnavigable waters under *Kalur*. 356 F. Supp. at 559-60. The court stayed the issue pending the outcome of *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973).

285. 411 U.S. 655 (1973).

286. *Id.* at 662.

while the permit system of the Rivers and Harbors Act has been superseded by FWPCA, the Refuse Act can still be relied on as an absolute ban on discharges in situations where the offender discharges without a permit or the offender goes beyond the limits of his permit.

One of the more interesting methods of utilizing the Rivers and Harbors Act to prevent pollution of waters since the passage of FWPCA was accomplished in *Sierra Club v. Leslie Salt Co.*²⁸⁷ Here the defendants had constructed dikes in an area of the San Francisco Bay which had destroyed the ecological productivity of the area. The Sierra Club as plaintiff alleged the obstruction of navigation in its cause of action. Under sections 401 and 403 of the Rivers and Harbors Act, obstruction of navigable waters is unlawful without the prior consent of the Corps of Engineers.²⁸⁸ While the Sierra Club itself was mostly concerned with the ecological destruction occurring from the placement of the dikes, the gravamen of its complaint was obstruction of navigation without first obtaining approval. Under the Rivers and Harbors Act, such action is patently illegal. The plaintiffs prevailed as private citizens because section 406 of the Rivers and Harbors Act, in providing for penalties for the violation of sections 401 and 403, provides not only for criminal penalties, as does section 411 of the Refuse Act, but also for civil penalties,²⁸⁹ which section 411 does not.²⁹⁰

It is obvious from these cases, particularly *Pennsylvania Industrial Chemical*, that the Refuse Act is still a viable tool for the protection of water resources and the enforcement of water pollution policies.

Common Law

The federal common law of nuisance provides yet another remedy to the environmentalist. This remedy was first espoused in the area of water pollution in *Illinois v. City of Milwaukee*.²⁹¹ In that case Illinois filed a complaint against four cities in Wisconsin. The

287. 4 BNA ENVIRONMENTAL RPTR. — DECISIONS 1663 (N.D. Cal. 1972).

288. 33 U.S.C. §§ 401, 403 (1970).

289. *Id.* § 406; 4 BNA ENVIRONMENTAL RPTR. — DECISIONS at 1666 n.2.

290. 33 U.S.C. § 411 (1970); 4 BNA ENVIRONMENTAL RPTR. — DECISIONS at 1666 n.2.

291. 406 U.S. 91 (1972).

alleged cause of action was pollution by the defendants of Lake Michigan. The state of Illinois sought to abate this public nuisance. Justice Douglas stated that the remedy sought by Illinois was not within the precise scope of remedies prescribed by Congress. However, Justice Douglas continued:

Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." [Citation omitted] When we deal with air and water in their ambient or interstate aspects, there is a federal common law The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act.

. . . .

When it comes to water pollution this Court has spoken in terms of a "public nuisance"

It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.²⁹²

In *United States ex rel. Scott v. United States Steel Corp.*²⁹³ the question arose whether FWPCA had preempted the field of water pollution and ousted common law jurisdiction. The Court held that nothing in FWPCA purported to abolish the federal common law of nuisance.²⁹⁴ The Court found, rather, an intention in FWPCA to supplement and amplify preexisting remedies.²⁹⁵

Thus, the Supreme Court has held that there exists a federal common law of nuisance which may be utilized in the field of water pollution to abate a public nuisance in interstate or navigable waters created by water pollution.

292. *Id.* at 103-04, 106-07.

293. 356 F. Supp. 556 (N.D. Ill. 1973).

294. *Id.* at 559.

295. *Id.*

For the environmentalist in Nebraska there exists an arsenal of material to use in combating water pollution. While the provision for citizen suits in the FWPCA is not as broad as that found in the CAA, yet, environmentalists may be able to utilize the common law and the Rivers and Harbors Act. These two resources should also be useful to the Department which should be able to find in them weapons not always available through the FWPCA.

Having examined two highly effective and comprehensive pieces of federal environmental legislation, the CAA and the FWPCA, we turn now to the area of solid waste management, an area in which the federal legislation is especially weak and in which strong federal legislation is sorely needed.

FEDERAL SOLID WASTE LEGISLATION AND THE NEBRASKA RESPONSE

The current federal law in the area of solid waste management is the Solid Waste Disposal Act of 1965, as amended by Resource Recovery Act of 1970 [SWDA].²⁹⁶ Directed toward development of a technology to handle solid waste, the 1965 legislation was largely a system of grants stressing state and local responsibility.²⁹⁷ The 1970 legislation brought legislative recognition to another aspect of solid waste management, the recycling concept.²⁹⁸ Thus, there are two major aspects of the SWDA: (1) solid waste disposal and (2) resource recovery. The SWDA gives recognition to the primary responsibilities of state and local government and emphasizes the need for planning at local government levels.²⁹⁹

The SWDA differs in important aspects from the federal air and water legislation. The EPA by law has no enforcement powers; it may

296. 42 U.S.C. §§ 3251 *et seq.* (1970).

297. PRIMER at 24.

298. *Id.* at 25. As stated by Senator Edmund Muskie of Maine the new emphasis was on recoverable resources — "those which maintain useful physical or chemical properties throughout their process of use and therefore can be continuously recycled in the production-consumption process." REITZE at Two-86. The Resource Recovery Act of 1970 established a national materials policy, recognizing the fact that United States resources are not unlimited and requiring their efficient utilization in anticipation of both future United States and world needs. 42 U.S.C. § 3251 (1970); REITZE at Two-86.

299. THE COUNCIL OF STATE GOVERNMENTS, THE STATES' ROLES IN SOLID WASTE MANAGEMENT: A TASK FORCE REPORT 2 (1973) [hereinafter cited as TASK FORCE REPORT].

provide recommended guidelines for solid waste management, but it cannot set standards.³⁰⁰ While the air and water legislation is comprehensive, the land legislation is not.

Although primary responsibility clearly resides with state and local officials, the SWDA provides for federal activities in several areas. These include providing for solid waste management research,³⁰¹ granting financial assistance for research projects,³⁰² requiring the publication of recommended guidelines,³⁰³ and providing grants for both state planning,³⁰⁴ and training projects.³⁰⁵

The SWDA encourages cooperation between states and localities.³⁰⁶ The EPA makes grants to eligible states, municipalities, interstate and intermunicipal agencies to survey solid waste disposal practices,³⁰⁷ to develop disposal plans,³⁰⁸ to demonstrate resource recovery systems,³⁰⁹ and to construct test facilities.³¹⁰ To be eligible a state must meet certain requirements under the SWDA. These requirements include: adopting a state or interstate plan which applies to the area involved;³¹¹ constructing facilities consistent with both the plan and the recommended guidelines of the SWDA;³¹² and advancing "the state of the art" by limiting waste disposal or recovering or recycling useful materials.³¹³ The SWDA provides that a grant may not be made until the applicant has made satisfactory provision for proper and efficient maintenance of the project.³¹⁴ Additionally, a grant may be made subject to conditions imposed by the EPA Administrator.³¹⁵

300. LEAGUE OF WOMEN VOTERS, IN SEARCH OF NEW POLICIES FOR RESOURCE RECOVERY — RECYCLE 32 (1972).

301. 42 U.S.C. §§ 3253, 3254a(c). (1970).

302. *Id.* § 3253.

303. *Id.* § 3254c.

304. *Id.* § 3254a. SWDA provides that the EPA Administrator shall submit a comprehensive plan for the creation of a system of national disposal sites for the storage and disposal of hazardous wastes. *Id.* § 3254f.

305. 42 U.S.C. § 3254d(b) (1970).

306. PRIMER at 26.

307. 42 U.S.C. § 3254a(a)(1) (1970).

308. *Id.* § 3254a.

309. *Id.* § 3254b(a).

310. *Id.* § 3254d.

311. *Id.* § 3254b(c)(1)(A).

312. *Id.*

313. *Id.* § 3254b(c)(1)(B).

314. *Id.* § 3254b(e)(3).

315. *Id.* § 3254b. The SWDA would allow federal funding of up to 75% of the construction cost, but only if the above requirements are met. *Id.*

The SWDA also provides that the EPA Administrator shall recommend guidelines for solid waste recovery, collection, separation, and disposal systems; and that he shall recommend model codes, ordinances, and statutes designed to implement these guidelines.³¹⁶ The guidelines here are only recommended guidelines and only the federal government must comply.³¹⁷

The Nebraska response to the SWDA has been almost negligible. It has been inferred that such weakness of response has been a direct result of the inherent weakness of the SWDA itself.³¹⁸ Recognizing the need for strong solid waste management and resource recovery in Nebraska, Director James L. Higgins has indicated that in the future there may be a separate Nebraska solid waste management act.³¹⁹

The Council on State Governments has also recognized that the weakness of state response to the Solid Waste Disposal Act has been a result of a lack of strong federal policy in this area.

TASK FORCE REPORT ON THE SOLID WASTE DISPOSAL ACT

The emphasis on research, planning, and primary state and local responsibility, without an emphasis on providing a sustained national policy to deal with the solid waste problem, has prompted a great deal of criticism. Critics have found that

[because] the [redeemable solid waste] problem is of a sufficient national magnitude that the individual states cannot adequately deal with the problem, [o]nly a uniform national system will be the answer.³²⁰

An independent Task Force created by the Council on State Governments and supported by the EPA conducted a study on the role of the state in solid waste management. The Report of the Task Force recognized that states have the primary role in regulation of solid waste.³²¹ It noted that federal policy toward regulatory stan-

316. 42 U.S.C. § 3254c (1970).

317. *Id.* § 3254e.

318. Higgins Interview.

319. *Id.*

320. REITZE at Two-87, citing Comment, *Control of Redeemable Solid Waste: A Proposed National Bill*, 5 SUFFOLK U.L. REV. 962, 964 (1971).

321. TASK FORCE REPORT at 35.

dards should be general, with specification and engineering standards developed by state governments.³²² However, the Task Force emphasized a need for strong federal policies reflecting a general national commitment to improve solid waste management practices with regulations being only one part of the commitment.³²³ At the same time, similar commitments by state and local governments will be necessary if workable regulatory policies are to be developed.³²⁴

The program outlined by the Task Force would be one in which the federal government would set the example for the nation in vital areas.³²⁵ The national policy would establish a commitment to action, providing direction to all state and federal agencies, recognizing a federal-state partnership, and providing fundamental information on environmental effects of solid waste.³²⁶ The Task Force felt that federal legislation should be oriented toward development of state capabilities to improve solid waste management practices.³²⁷ It indicated that only with suitable technical and financial assistance to the states could the federal government expect them to develop measures to insure that adequate solid waste services were provided to inhabitants.³²⁸ Although the states should be the prime enforcers of solid waste services in each state, the Task Force emphasized the need for minimum federal quality standards. These federal standards would be minimum performance requirements (not engineering standards) providing policy level guidance to permit states to develop flexible engineering specifications, according to each state's need.³²⁹

The program outlined by the Task Force is akin to those federal programs found in water and air — a far cry from the current federal solid waste program. It is hoped that a comprehensive national policy act will be passed; current federal legislation does not directly regulate the disposal of solid waste.³³⁰ Unless the environmentalist

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 37.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 38.

330. REITZE at 10 (Supp. 1973).

can utilize some other piece of legislation,³³¹ he is forced to work with this rudimentary³³² and non-enforcement-oriented³³³ bit of federal legislation.

NEBRASKA LAND RESOURCE LEGISLATION

In the Nebraska Environmental Act [Act] one finds minimal land resource legislation. The Act declares Nebraska's public policy with respect to land resources to be the achievement of a level of purity that will protect human health and safety, prevent injury to plant and animal life, and protect property.³³⁴ In accordance with this policy, no person is permitted to dispose of any refuse at any place, except a disposal area licensed in accordance with the Act.³³⁵ The Director must grant yearly approval to such licenses.³³⁶

Before the Director can approve a solid waste disposal area, it must be approved by the local county board or city council.³³⁷ Prior to such approval, a hearing must be held and public notice must be given. Before issuing a license, the Director must (1) inspect the site and determine if the proposed operation is in compliance with the Act, and the ordinances of the county or city, (2) see that approval is given by the governmental subdivision and (3) find the applicant to be a responsible and suitable person.³³⁸ The Director

331. See generally 33 U.S.C. § 1362(6) (Supp. II 1972) [prohibiting the discharge of solid waste into navigable waters]; *Id.* § 1288 [encouraging area-wide waste management plans]; *Id.* § 1282 [providing grants for construction of waste treatment works]; REITZE at 10 (Supp. 1973) [prohibitions of open burning under virtually all state implementation plans—*e.g.*, Nebraska: AIR STANDARDS 18]; Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.* (1972).

332. The Council on Environmental Quality reports:

"Regulation of solid waste management practices, other than for public health protection, is in a rudimentary state. However, state-wide and regional solid waste planning is on the rise. And it is leading to increased regulatory activity — such as prohibitions against open dumps and controls over landfill practices."

COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1971), in REITZE at Two-87.

333. LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, IN SEARCH OF NEW POLICIES FOR RESOURCE RECOVERY—RECYCLE 32 (1972).

334. NEB. REV. STAT. § 81-1514 (Reissue 1971). See text at note 29 *supra*.

335. *Id.* § 81-1516 (Reissue 1971). A person is not prohibited from disposing his household refuse on his own land provided it does not create a nuisance or hazard to health. *Id.* § 81-1522 (Reissue 1971).

336. NEB. REV. STAT. §§ 81-1517, -1519 (Reissue 1971).

337. *Id.* § 81-1518 (Reissue 1971).

338. *Id.*

may revoke a license (after reasonable notice and hearing) if it is found that the operation of the disposal area is not in compliance with the Act.³³⁹ The Director also has the authority to establish sanitary standards for disposal areas, and to implement the policies of the Act with respect to land resources.³⁴⁰

The Act makes it unlawful to accumulate junk or nonagricultural property to the extent that it is a potential hazard to health.³⁴¹

As can be seen, the Nebraska legislation in the area of land resources is minimal. Strong federal and state legislative measures are mandatory if effective solid waste management and resource recovery programs are to begin.

FEDERAL PESTICIDE LEGISLATION AND ITS EFFECT ON NEBRASKANS

In 1972 Congress amended the Federal Insecticide, Fungicide and Rodenticide Act of 1947 with the Federal Environmental Pesticide Control Act [FEPCA]³⁴² to create a comprehensive regulatory scheme for pesticides. The FEPCA provides for a well-developed system by which the EPA may regulate and control pesticides.³⁴³ It is the inten-

339. *Id.* § 81-1520 (Reissue 1971).

340. *Id.* § 81-1521 (Reissue 1971).

341. *Id.* § 81-1523 (Reissue 1971). This provision is primarily aimed at the accumulation of old cars; the threat to health is that of rat infestation. It has been indicated that the courts are requiring hard evidence of the potential hazard to health, and that no matter how offensive the junk may be aesthetically, the Department has no case unless it can prove a hazard to health. Higgins Address, *supra* note 8. Rat infestation of cars is almost impossible to prove when junk cars are still on their wheels. *Id.* The problem of the difficulty of proof has recently manifested itself in the concern over accumulation of junk cars along the Niobrara River. *Id.* Higgins has expressed concern over possible pollution of the Niobrara River with old cars, stating that a separate statute is needed which would prohibit the depositing of old cars in the waters for any reason. *Id.*; See also *Hearings on L.B. 538 Before the Comm. on Agriculture and Environment*, 83d Legis., 1st Sess. 3 (1973).

A person failing to remove accumulated junk when ordered to do so by the Director is guilty of a misdemeanor and may be fined up to \$100. NEB. REV. STAT. § 81-1525 (Cum. Supp. 1972).

342. 7 U.S.C. § 136 (Supp. II 1972).

343. Pesticides must be registered, and no person may sell, transport or receive "any pesticide which is not registered with the Administrator." *Id.* §§ 136a.(a), 136j.(a)(1)(A). Each applicant for registration must file with the EPA Administrator a statement which includes (a) his name and address; (b) the name of the pesticide; (c) a complete copy of the labeling, claims to be made for it, and any directions for use; (d) a full description of tests made and results thereof upon which the claims are based; (e) the complete pesticide formula; and (f) a request that the pesticide be classified for general or restricted use. *Id.* § 136a.(a). The EPA Ad-

ministrator will approve or deny registration for a five-year period depending on whether the requirements for registration are satisfied and whether the use of the pesticide will generally cause unreasonable adverse effects on the environment. *Id.* §§ 136d.(a) (1), 136a.(c) (5), (6).

As part of the registration the EPA Administrator is directed to classify each pesticide by use — general, restricted or both. *Id.* § 136a.(d). The EPA Administrator will classify the pesticide for general use if he finds that the pesticide, when applied according to directions, will not generally cause unreasonable adverse effects on the environment. *Id.* § 136a.(d) (1) (B). If unreasonable adverse environmental effects may be caused, then the pesticide will be classified for restricted use. *Id.* § 136a.(d) (1) (C). It is illegal to use a pesticide classified for restricted use for purposes other than those permitted. *Id.* § 136j.(a) (2) (G). If the EPA Administrator classifies a pesticide for restricted use because of a determination that the acute dermal or inhalation toxicity presents a danger to the applicator or others, then the pesticide may be applied for any use to which the restricted application applies only by or under direct supervision of a certified applicator. *Id.* § 136a.(d) (1) (C) (i). If it is classified for restricted use because of adverse environmental effects, then it may be applied only by a certified applicator or under his direct supervision and only for uses to which the determination applies, and subject to such restriction as the EPA Administrator may provide. *Id.* § 136a.(d) (1) (C) (ii).

The FEPCA gives the EPA Administrator power of cancellation and suspension of registration. If the EPA Administrator determines that a pesticide or its use does not comply with the provisions of the FEPCA, then he may (1) cancel its registration, (2) change its classification, or (3) hold a hearing to determine whether its registration should be canceled or its classification changed. *Id.* § 136d.(b). The EPA Administrator's action will not become effective for thirty days. If a hearing is held, then the decision pertaining to registration or classification is to be final. *Id.*

However, if the EPA Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may suspend the registration of the pesticide immediately. *Id.* § 136d.(c) (1). A suspension order may not be issued unless the EPA Administrator issues notice of his intention to cancel the registration or change the classification of the pesticide. *Id.*

In *Dow Chemical Co. v. Ruckelshaus*, 477 F.2d. 1317 (8th Cir. 1973), Dow Chemical sought a writ of mandamus against the EPA Administrator to compel him to register its pesticide. The EPA Administrator had reviewed the record and set forth findings of fact which he felt made it clear that the registrant, Dow Chemical, had not met its burden of proof, *i.e.*, had not established the elements necessary to entitle its products to registration. The court found that Congress intended that any substantial question of safety triggers the issuance of cancellation notice, shifting to the manufacturer the burden of proving the safety of his product. *Id.* at 1324-25. The court held that under FEPCA the EPA Administrator is not restricted to only issuing a cancellation order upon proof that the substance involved does not meet the statutory standards involved for the safety of the public; but that it is the EPA Administrator's duty to issue a cancellation order whenever he has a substantial doubt as to the safety of the product. *Id.* at 1324.

Further provisions in FEPCA enable the EPA Administrator to effectively carry out the scheme of the act by: (1) authorizing the EPA Administrator to prescribe regulations requiring producers to maintain such records as he determines necessary for the enforcement of the FEPCA, and to make these records available to any duly designated officer of the EPA on request — 7 U.S.C. § 136f. (Supp. II 1972); (2) providing for the EPA Administrator or his delegates to enter and inspect any establishment producing pesticides — *Id.*; and (3) authorizing the EPA Administrator to issue a "stop sale, use, or removal" order to any person who controls a pesticide which he has found reason to believe is in violation of the FEPCA—*Id.* § 136k.(a).

The FEPCA provides for certification of applicators of pesticides according to standards prescribed by the EPA Administrator. *Id.* § 136b.(a) (1). States may certify their own pesticide applicators by submitting a plan to the EPA Administrator for his approval. *Id.* § 136b.(a) (2). Approval shall be granted provided that satisfactory assurances are made that: (1) the state has designated a responsible agency to administer the plan throughout the state; (2) the agency has legal authority and qualified personnel to carry out the plan; (3) the state will devote adequate funds to the administration of the plan; (4) the state agency will make reports to the EPA Administrator; and (5) the state's standards conform to the federal standards

tion of the FEPCA to institute stronger, more extensive mechanisms to prevent pesticides from harming human health and the environment.³⁴⁴ It meets this challenge by carrying federal controls to the actual application of pesticides by the user, and by regulating intrastate as well as interstate marketing of pesticide products.³⁴⁵ Most importantly, the FEPCA aids the farmer in applying pesticide products properly and safely, thereby insuring the continued use of these products with their wide range of benefits.³⁴⁶

Because of the agricultural nature of Nebraska, the federal pesticide legislation is of particular importance. Until Nebraska passes its own pesticide act, consistent with the federal act, and obtains EPA approval, the federal legislation will be of prime importance in the state.

A Nebraska pesticide act is planned to be introduced in this session of the Nebraska Legislature. The same bill was introduced in the last session but never got out of committee.³⁴⁷ The proposed bill, if approved by EPA, would be a response to the FEPCA, and would allow the Nebraska State Department of Agriculture to administer certain authorized portions of the FEPCA.

LOOKING TO THE FUTURE: LAND USE PLANNING

In recent years the crisis taking place in our environment has been primarily precipitated by two factors: (1) the increase in population, especially in urban areas; and (2) the evolution of a highly complex technology with a corresponding increase in the discharge of industrial wastes.³⁴⁸ The resultant problems arising from these factors have wrought highly complex legislation. However, some have

prescribed by the Administrator. *Id.*

The states are given authority to regulate the use of any pesticide to the extent consistent with the FEPCA. *Id.* §§ 136r.(a), (b). A state may also provide for registration of pesticides within that state to meet special local needs if that state is certified by the EPA Administrator and if registration for the use of a pesticide has not been previously denied by the EPA Administrator. *Id.* § 136r.(c).

344. U.S. ENVIRONMENTAL PROTECTION AGENCY, THE FEDERAL ENVIRONMENTAL PESTICIDE CONTROL ACT OF 1972: HIGHLIGHTS 2 (1973).

345. *Id.*

346. *Id.*

347. L.B. 392, 83d Legis., 1st Sess. (1972).

348. REITZE at Introduction-15 to -29.

advocated that society go beyond this type of protective legislation.³⁴⁹ They advocate affirmative legislation, *i.e.*, land use planning legislation, which will not only treat the ailments of society, but will also work to take affirmative action to reorganize priorities and restructure our basic land use policies. Such legislation will embrace the total society, not just isolated problems.

A prelude to such planning legislation is found in the National Environmental Policy Act [NEPA]³⁵⁰ and the California Environmental Quality Act.³⁵¹ NEPA, a federal statute, speaks in terms of man and his environment. The environment includes not only air, water and the biosystem, but also the total human experience. NEPA requires federal agencies to submit an environmental impact statement whenever an agency plans action which will have a significant effect on the environment.³⁵² Such a procedure forces agencies to weigh various values and to affirmatively consider the public interest.³⁵³ California's Environmental Quality Act [California EQA] is also of this nature, requiring environmental impact statements of state agencies.³⁵⁴

The sophisticated schemes of NEPA and the California EQA go far beyond those found in Nebraska, yet even they are not the ultimate in environmental legislation. The Nebraska Act is an "environmental conservation act." It speaks in terms of saving the air, water and land. NEPA and the California EQA speak in terms of forcing agencies to weigh competing values; they consider the total human experience by going beyond the mere determination of whether an air or water quality standard is violated. The ultimate legislation will be land use planning legislation. The United States Senate has already passed a land use planning bill.³⁵⁵ The United States House of Representatives is currently working on a land use

349. Nebraska's policy is "to conserve the water" and "to achieve and maintain such a reasonable degree of purity of the natural atmosphere . . . that . . . all . . . will flourish in approximately the same balance as . . . in recent history." NEB. REV. STAT. § 81-1501 (Reissue 1971).

350. 42 U.S.C. §§ 4321 *et seq.* (1970).

351. CAL. PUB. RES. CODE §§ 21000-165 (West Supp. 1973).

352. 42 U.S.C. § 4332(2) (c) (1970).

353. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir. 1971).

354. CAL. PUB. RES. CODE § 21100 (West Supp. 1973).

355. 4 BNA ENVIRONMENTAL RPTR. — CURRENT DEVELOPMENTS 273 (1973) [S. 268, 93d Cong., 1st Sess. (1973)].

bill.³⁵⁶ But because of the tremendous controversy over land use planning legislation, and because many states are extremely sensitive to any form of land use control, the chances for a strong and effective land use law appear to be remote at the present time.

Land use legislation may already be found, however, in parts of the CAA³⁵⁷ and in the FWPCA.³⁵⁸ These may be considered as forerunners of comprehensive land use legislation at the federal level; they require planning and management control of activities within the planning regions, with the added sanction that if the state and local governments fail to plan in accordance with these acts, federal monies will become unavailable.

CONCLUSION

In Nebraska, the scheme of environmental law is still in its infancy. Although our law has not reached the sophistication and refinement found in NEPA or the California EQA, Nebraska is in line with a majority of the states.

The Nebraska Act was designed to establish broad guidelines and set basic policy.³⁵⁹ It gives the Department and the Council the basic statutory authority to adopt rules and regulations and to establish air and water standards.³⁶⁰ It was the intention of the legislature that the Department, with its special expertise, would be able to effectively establish highly complex technical standards and procedures.³⁶¹ Therefore, the procedure used to promulgate rules and regulations allows the Department to develop the technical rules and standards, but also contains built-in safeguards against delegating absolute

356. S. 268 provides for state land use planning within a national framework, administered by the Department of the Interior. Under the bill's provision, each state would be required to develop an adequate statewide land use planning process as a condition of continued eligibility for federal grants. Statewide or regional zoning is not required; rather, local governments shall enact their own zoning laws in accordance with state, regional and federal plans. Of primary significance is the provision requiring states to adequately plan for the proper use of critical land areas. S. 268, 93d Cong., 1st Sess. (1973).

357. 42 U.S.C. § 1857c-2 (1970) (Air quality control regions regulate emissions).

358. 33 U.S.C. § 1288 (Supp. II 1972) (Areawide waste treatment management).

359. Higgins Interview.

360. *Id.*

361. *Id.*

authority to the Department. Thus, we find in the authorized procedure that the Department first draws up rules and regulations; second, it submits them to public hearing; third, it obtains the approval of the Council which adopts them; and finally, the Department submits the rules and regulations to the EPA for its approval. Although the rules may be effective in Nebraska without EPA approval, unless EPA approval is obtained the state cannot obtain federal money for its operations, nor can it operate within the framework of the federal law.

As indicated above,³⁶² the first Nebraska CAA implementation plan has been disapproved by the EPA. A second Nebraska CAA implementation plan is in the process of being adopted, and is expected to be submitted to EPA.³⁶³ The Nebraska FWPCA implementation plan (both the Nebraska water quality plan and the Nebraska NPDES) is currently undergoing EPA scrutiny.³⁶⁴

In developing and enforcing environmental law in this state, the current director, James L. Higgins, has stated his philosophy to be one of monitoring the "pace" of the state as a whole.³⁶⁵ Director Higgins first looks to what the problems are and their magnitude; second, he looks to the people's general mood about the environment, and their environmental education; and only last does he look to the legislation. Mr. Higgins analogizes the introduction of environmental legislation in Nebraska to the problems encountered when Social Security was first introduced in this country. Higgins feels the approach to be taken is one of educating people to accept environmental standards and regulations as a matter of course.³⁶⁶ Education of the public is considered to be one of the major goals of the Department.³⁶⁷ It is felt that through education the most effective enforcement and attainment of air and water quality standards can be achieved.

A major environmental problem in the state and the one which is most noticeable by the people is the problem of odors.³⁶⁸ At the pre-

362. See note 124 *supra*.

363. Letter from Richard Hansen, Legal Counsel to Nebraska Department of Environmental Control, to Sarah J. Penn, Jan. 2, 1974.

364. *Id.* See note 228 *supra*.

365. Higgins Interview.

366. *Id.*

367. *Id.*

368. *Id.*

sent time there are no rules and regulations on odors, and hence there is virtually nothing the Department can do to prohibit them.³⁶⁹ The private citizen may perhaps find some redress in the laws of nuisance, but this would be subject to a finding that the private citizen has suffered some special injury different from the public as a whole.

One place in which the Nebraska Act is weak is the area of solid waste management and disposal. While the Nebraska Act responds well to federal air and water legislation — giving the Director ample authority to work within the framework of the CAA and the FWPCA³⁷⁰ — the Nebraska Act should be strengthened in the area of solid waste. The weakness of the Nebraska Act in this area is perhaps due to the lack of impetus from the federal government.³⁷¹ Nevertheless, a separate solid waste management act for Nebraska may be in the future.³⁷²

At the current time the Nebraska Act seems to be working fairly well. As indicated above, the Department is highly concerned over education of the public. Because the policy of the Act is one of obtaining voluntary compliance, the Department tries to give potential violaters every opportunity to comply; yet, when a potential violater has made no effort to cooperate, the Department has shown no hesitation in closing down the violator's operation.³⁷³ Primarily, the Department asks for an expression of good faith that an industry will comply.

There is no provision in the Nebraska Act for citizen suits. A citizen's best remedy is to complain of violations to the Department — where Higgins says citizens will be listened to — or to his local city council or county board.³⁷⁴

The current Nebraska environmental act is by no means the final word expected from the legislature. The Act will become more

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. Since the promulgation of the *Rules of Practice and Procedure* (1972), the Nebraska Department of Environmental Control has made twenty-two administrative enforcements: nineteen by voluntary compliance, three by court actions. Interview with Richard Hansen, Legal Counsel to Nebraska Department of Environmental Control, by telephone in Omaha, Feb. 11, 1974.

374. Higgins Interview.

sophisticated as the legislature and the people of Nebraska increase their awareness of the need for further refinements. However, at the present time the current Act is adequately serving its purpose. Under its authority, the Department has laid the groundwork for a Nebraska environmental program.

Sarah J. Penn — '75