1967

**Water Pollution – Attempts to Decontaminate Florida Law**

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**Recommended Citation**

Plager, Sheldon J.; Maloney, Frank E.; and Baldwin, Fletcher N. Jr., "Water Pollution – Attempts to Decontaminate Florida Law" (1967). *Articles by Maurer Faculty*. 1137.  
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Pure water, in the chemical sense, is practically unknown in nature; even falling rain absorbs certain gases and solids from the atmosphere. One of the natural functions of water as it progresses through the hydrologic cycle is to cleanse the earth, yet in the performance of this function water may become contaminated by the waste it carries. Water may be considered polluted when it becomes so impure as to be rendered nearly useless for beneficial purposes. The extent to which water is polluted, however, depends largely on its history. Water, upon reaching the earth and passing through the various phases of the hydrologic cycle, continues its solvent action collecting both dissolved and suspended matter. The nature and concentration of these impurities govern the quality of a given water supply. In turn, the quality often limits the beneficial uses to which the water may be put. Before one can objectively evaluate the legal responses needed to combat the effects of

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*The preparation of this article has been supported by the Office of Water Resources Research, United States Department of the Interior, as authorized under the Water Resources Research Act of 1964, Public Law 88-379. It is part of a chapter of a forthcoming book on Florida Water Law. Part of the basic research for this article was undertaken by Kelly Smith, student research assistant on the project; editorial assistance of research associates William A. Haddad and David Monaco also played a substantial part in preparation for publication.

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1. For a more technical treatment of the qualitative aspects of water see SMITH, WAKEFIELD, BEVIS & PHELPS, STREAM SANITATION IN FLORIDA (Fla. Engineering Series No. 1, 1954).
Water pollution, one should have some appreciation of these general qualitative aspects of water. At the same time, however, one cannot ignore the specific aspects of pollution common to the particular area under study. Therefore, a summary of Florida's main pollution problems is presented here.

Current Pollution Problems in Florida

Domestic Pollution

Florida has made significant progress in the control of domestic pollution during the past twenty years. Nevertheless, due to the high construction cost of adequate treatment facilities, domestic wastes continue to pollute waters in many sections of the state. Currently, the largest problem is the City of Jacksonville, which "dumps approximately 15 million gallons of raw sewage a day into the St. Johns River." A "St. Johns River Valley Advisory Committee" report to the Governor of Florida in 1966 found an alarming decline in the river's important fishery resources due mainly to pollution. Obviously, despite some progress, much remains to be done.

Industrial Waste

Florida has made less impressive progress in controlling industrial pollution than in controlling domestic pollution. A recent instance of serious industrial pollution occurred March 11, 1967, on the Peace River in southwest Florida. A phosphate company pipeline, containing phosphate ore mixed with clay and sand, broke and spilled into the Peace River. Later


3. "Water pollution in the St. Johns begins at its Mayport mouth by the wanton dumping of oil, tar, grease, and other refuse from ships entering harbor. Other types of pollution discharged into the river include industrial wastes and acids from paint, paper and other plants located on its banks, excesses of fertilizers and of harmful residual-type pesticides used by agriculture and for insect control, ill-advised dredge-and-fill operations, and chemical control of water hyacinth and aquatic weeds which are killed and left on the bottom to rot. However it is our considered opinion that by far the most important source of this river's pollution is from sewage wastes. The City of Jacksonville, for instance, is estimated to dump approximately 17,500,000 gallons of raw, untreated sewage per day into the St. Johns River. Although it has a treatment plant capable of serving 80,000 people, it is now only serving 39,000 people. The County of Duval has over 100,000 persons served by septic tanks, and there is no public sewage treatment for more than 200,000 people. Recently 22 private sewage systems in Duval County were visited. In two of them the sewage which should have been treated was bypassing the systems, the effluents from 12 of them were admittedly septic from a bacteriological standpoint, and the remaining eight were locked up. In other words none of these plants were functioning properly, yet all were dumping their wastes into the St. Johns River. The fourteen counties bordering on the river or its tributaries contain a population of more than one million people. Yet our investigations have shown that more than one-half of this population is either completely without sewage treatment facilities, or is using septic tanks, or has its sewage undergoing only primary treatment." ST. JOHNS RIVER VALLEY ADVISORY COMMITTEE, REPORT TO THE GOVERNOR OF FLORIDA 1-2 (Dec. 20, 1966) (paragraphs combined).

the same day the dam of a 250 to 300-acre pond of phosphate slime belonging to the same company broke. The slime flowed into the Peace River and caused heavy pollution in over eighty miles of the river. It is estimated that almost all fish in the polluted area were killed. On the same day a similar accident occurred on a slime pool, which belonged to a different phosphate company, resulting in pollution of several miles of Saddle Creek, a popular fishing area.

Such dams, built of earth containing palmettos and other plants, sometimes collapse because the plants decay. An editorial in an area newspaper pointed to a more basic cause of the disaster—ineffective financing of the Board of Health and its resulting inability to provide enough inspectors to locate potential trouble spots and prevent just such accidents from occurring. Moreover, although criminal fines were available against polluters, the natural reluctance to indict polluters, however small the punishment, points up the overriding necessity for civil sanctions.

State Authorization of Pollution

Florida, by statute and constitutional provision, has in some cases actually authorized pollution. In 1930, section 12 of article IX was added to the state constitution. That section on its face provided a fifteen-year tax exemption (not extending beyond the year 1945) to particular industries, provided they established a plant in Florida and manufactured certain products during that fifteen-year period. The Florida Supreme Court in the case of National Container Corp. v. State took the position that when the legislature exempted an industry from taxation it necessarily granted an exemption from public nuisance suits. The case involved a woodpulp company that, pursuant to section 12, article IX, attempted to locate a plant in Jacksonville. A private citizen brought suit in the name of the state seeking to prevent erection of the mill on the theory that odors and refuse from it would constitute a public nuisance. The court, considering an appeal from an order denying a motion to dismiss, said:

In other words, the State of Florida offered the inducement cum onore. The defendant National Container Corporation accepted the invitation and accepted the terms under the Constitution and although the odors may be disagreeable, noxious and offensive, if the plant is operated in such manner as to, as far as is possible with presently known methods, to [sic] reduce or eliminate the emission of such noxious and offensive odors, it cannot be held to constitute a public nuisance.

Later in Watson v. Holland the court extended the constitutional exemption of an industry from a public nuisance action to include state statutory

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6. 138 Fla. 32, 189 So. 4 (1939).
7. Id. at 50, 189 So. at 11.
authorization of the use of sovereign lands. In Watson the court denied an injunction against the drilling of oil wells in tidal waters, citing a Florida statute authorizing the trustees of the internal improvement fund to execute oil leases on sovereign lands located in tidal waters. The court took the position that a statute could take a subject out of the class of public nuisances and that the legislature had accomplished that result in enacting the oil lease statute.

Another major Florida pollution problem was statutorily authorized by special act. By such legislation Taylor and Nassau counties were declared industrial counties, and municipal corporations and industrial firms were given permission to dump wastes in certain waters of these counties. In effect, these special acts superseded the Board of Health's power over these waters and removed most restrictions otherwise applicable. The Taylor County act gave every municipality and industry the right to discharge wastes into the Fenholloway River—the county's major water body. The area industries quickly took advantage of this opportunity. The largest, a cellulose producer, disposes of waste from plant operations at Foley, Florida, by using the Fenholloway River as a carrier of effluent from its plant to the Gulf of Mexico.

The constitutionality of special legislation allowing pollution was questionable. But since many of the inhabitants of the areas involved depended on the polluters' activities for employment or indirect economic benefit, they hesitated to attack the legislation. Nevertheless, in 1965 in Hodges v. Buckeye Cellulose Corp., adjoining landowners attacked the Taylor County special legislation as "unconstitutional in that it fails to provide for a reasonable classification, denies to the plaintiffs the equal protection of the laws, and results in the taking of their property for a private use and without due process of law, in violation of the Constitution of the United States and of the State of Florida." The court easily disposed of this claim by finding that plaintiffs had no standing to question the special legislation's constitutionality because the special act did not take any private person's right to sue for any tort in connection with the operation of industries.

It is difficult to understand why the Hodges complainants had no standing even to question the constitutionality of the legislation, especially in view of the gross inadequacy of common law remedies. However, the issue was
partially mooted by the repeal of the Nassau County Act\textsuperscript{15} by the 1967 legislature, which also limited the Taylor County Act to any industrial plant that located in the state in reliance thereon.\textsuperscript{16}

\textit{Pollution From Agriculture}

Another major source of Florida's pollution problems springs from the largest users of water in Florida, agricultural interests.\textsuperscript{17} Pollution occurs when insecticides, herbicides, and pesticides are washed from farm lands into streams and lakes. Agricultural pesticides have contributed significantly to pollution of the St. Johns River\textsuperscript{18} and other important bodies of water in Florida, such as Lake Apopka.\textsuperscript{19} This is partly due to poor land management.

\section*{Common Law Development}

\textit{The Reasonable-Use Rule}

The riparian owner, according to strict natural flow doctrine, has no right to change the natural condition or characteristics of the water in a navigable water body and any such change is actionable without necessity of actual harm.\textsuperscript{20} The reasonable-use rule modifies the strict approach of natural flow and grants the lower riparian only the right to have his water kept free from unreasonable interference. A use cannot be unreasonable if there is no actual injury to other riparian owners. Even if there is injury the use nevertheless may be privileged if reasonable under all the facts. Thus, in certain circumstances the pollution of water may be reasonable and therefore lawful under the latter approach.\textsuperscript{21}

The Florida court in an early case involving pollution of an underground stream accepted the reasonable use modification of the natural flow doctrine.\textsuperscript{22} In language often cited in reference to both ground and surface waters the court noted:\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{16} Fla. Laws 1967, ch. 67-436, §20 (3).
  \item \textsuperscript{17} 59 FLA. HEALTH NOTES, Jan. 1967, at 29.
  \item \textsuperscript{18} ST. JOHNS RIVER VALLEY ADVISORY COMMITTEE, REPORT TO THE GOVERNOR OF FLORIDA I (Dec. 20, 1966).
  \item \textsuperscript{19} Lake Apopka is polluted mainly by excessive nutrients, rather than more offensive and visible domestic and industrial sewage. However, the excessive nutrients severely decimated the game fish population. \textit{See generally} FLA. STATE BOARD OF HEALTH, BIOLOGICAL, PHYSICAL, AND CHEMICAL STUDY OF LAKE APOPKA 1962-1964 (1965).
  \item \textsuperscript{21} \textit{See Parsons v. Tennessee Coal, Iron & R.R.}, 186 Ala. 84, 64 So. 591 (1914) (denial of damages because no substantial injury shown from defendant's coal mining operation); Clark v. Lindsay Light & Chem. Co., 341 Ill. App. 316, 93 N.E.2d 441 (1950) (court refused injunction against pollution because damage only nominal); Panther Coal Co. v. Looney, 185 Va. 758, 40 S.E.2d 298 (1946) (verdict for plaintiff reversed, no substantial damage shown).
  \item \textsuperscript{22} Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896).
  \item \textsuperscript{23} \textit{Id.} at 595, 20 So. at 782 (emphasis added).
\end{itemize}
The right to the benefit and advantage of the water flowing past one owner's land is subject to the similar rights of all the proprietors on the banks of the stream to the reasonable enjoyment of a natural bounty, and it is therefore only for an unauthorized and unreasonable use of a common benefit that any one has just cause to complain.

Reasonableness is a factual question controlled by the circumstances of each case. It cannot be determined in advance with any certainty. In deciding how much pollution is reasonable courts have considered these factors: the stream's character, the stream's volume and velocity, past uses of the stream, location and use of the plaintiff's land, extent of plaintiff's damages, local customs and customs of the industry involved, and comparative public concern on the two sides of the controversy.

The Restatement of Torts takes the position that pollution is unreasonable unless the utility of defendant's conduct outweighs the gravity of the harm. In determining the utility of the conduct, the Restatement considers the following factors to be important:

(a) social value which the law attaches to the primary purpose of the conduct;
(b) suitability of the conduct to the character of the locality;
(c) impracticability of preventing or avoiding the invasion.

Remedies

A blend of property and tort law governs the common law remedies of the riparian owner damaged by pollution. The usual theory of action in a pollution suit is private nuisance, the suit being predicated upon an unreasonable interference with the use and enjoyment of land and accompanying water rights. Trespass is another theory employed by some courts, but it is not often relied upon since it is considered possessory in nature. Generally, pollution creates a cause of action for an injunction, damages, or for both.

Injunction. The preferred relief against interference with water rights is the injunction, rather than an action for damages, since the former furnishes relief before, rather than after, a threatened violation. Moreover, in many cases injunctive relief may be the only effective sanction because provable injury may be so small that a judgment for damages would be valuable only to prevent the defendant from gaining a prescriptive right.

27. Id. at §853.
The injunction will be issued only if the plaintiff establishes facts that entitle him to an injunction according to the usual rules governing equitable relief. Thus, the plaintiff must show not only that the defendant's use is unreasonable, but also that the injunctive relief is necessary because the threatened injury is irreparable or cannot be adequately compensated by damages at law, or that a multiplicity of suits would result from failure to grant the injunction. In *North Dade Water Co. v. Adken Land Co.*, plaintiff sought to enjoin the city of North Miami Beach and the North Dade Water Company from discharging effluent from a sewage plant into his lakes. On the basis of a chemist's testimony that sewage bacteria were in the lakes, the court found that defendant's actions created a private nuisance and a continuing trespass likely to endanger the plaintiff's health, welfare, and comfort and granted a permanent injunction.

In an appropriate case a court may compare the relative importance of the interest of upper and lower riparian owners and deny an injunction on the ground that public interest in permitting the pollution is of overriding importance, even though the plaintiff is clearly damaged. This is referred to as the balance of convenience doctrine, and it is often invoked in defense of municipal or governmental operations. In *State ex rel. Harris v. City of Lakeland*, plaintiffs (residents and farmers) sought to enjoin the city from dumping sewage effluent into a small canal on the theory of public nuisance. The Florida Supreme Court recognized the inefficiency of the city's sewage plant but applied the so-called balance of convenience doctrine and refused to enjoin the city's operation. The court permitted "a reasonable period of time to allow the municipality to so improve its plant as to overcome the deleterious condition which may be found at present to exist." A final decree was later granted by the circuit court ordering the city to remove hyacinths and mosquito larvae from the canal and enjoining the discharge of sewage into the canal. In the *North Dade Water Co.* case the court did not apply the balance of convenience doctrine and the city was enjoined. The fact that the city had an alternative method of disposal through a pipeline into a tidal creek may account for the court's refusal to apply the doctrine. The choice of a private rather than a public nuisance action is probably of little importance in this context, though it well may be controlling in an action for damages where legislative authority to pollute is claimed.

33. See *State ex rel. Harris v. City of Lakeland*, 141 Fla. 795, 193 So. 826 (1940); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886) (leading case for denying remedy); Maloney, *The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water*, 5 S.C.L.Q. 159 (1952).
34. 141 Fla. 795, 193 So. 826 (1940); City of Lakeland v. *State ex rel. Harris*, 143 Fla. 761, 197 So. 470 (1940).
35. The court spoke in terms of "balance of comparative injury."
37. See *Penn v. City of Lakeland*, 109 So. 2d 771 (2d D.C.A. Fla. 1959) (the final decree was entered by the Circuit Court on May 9, 1941).
38. 130 So. 2d 894 (3d D.C.A. Fla. 1961).
39. See text accompanying footnotes 10-16, supra.
Damages. If injunctive relief is available, damages for past harm can usually be obtained as an adjunct to the specific equitable relief given. An exception to the rule is *Penn v. City of Lakeland*\(^{40}\) where a court granting injunctive relief in equity was not also required to hear the claims of the plaintiffs for common law damages in light of the distinct and separate nature of their individual claims. The plaintiffs were still able to claim damages in a future action at law.

An action at law for damages, of course, can be sought without injunction and the measure of such damages will depend both on the nature and extent of the injury sustained.

Parties—Plaintiffs. Although actions arising from pollution injury are generally brought by a lower riparian, conditions may give rise to actions by others if they can show an injury to their interests. At common law the attorney general could sue to abate a public nuisance.\(^{41}\) A private individual could likewise bring an action to abate a public nuisance if he could show injury different in kind from that suffered by the populace generally.\(^{42}\)

Parties—Defendants. Defendants in water pollution suits are riparians and nonriparians who create or maintain the nuisance that causes the injuries.\(^{43}\) When pollution damage results from a concert of action the parties are jointly and severally liable.\(^{44}\) Some jurisdictions hold polluters jointly liable merely if they know the cumulative effect of their separate acts of pollution will result in injury.\(^{45}\) In Florida, however, when parties commit separate and distinct acts without common purpose, which later intermingle to cause injury, the defendants are liable for damages only in separate actions. In *Symmes v. Prairie Pebble Phosphate Co.*,\(^{46}\) for example, plaintiff sought to collect damages from eight phosphate companies that separately polluted a river and caused injury to his oyster beds. The court held there was no concert of action, and the fact that the results of the acts intermingled to bring about the consequence was not sufficient to hold the defendants as joint tortfeasors. A later case indicated that unless concert of action could be demon-

\(^{40}\) 109 So. 2d 771 (2d D.C.A. Fla. 1959).

\(^{41}\) Meriwether Sand & Gravel Co. v. State ex rel. Att'y Gen., 181 Ark. 216, 26 S.W.2d 57 (1930) (suit by attorney general to enjoin defendant from discharging washings from gravel beds into creek); COULSON & FORBES, WATERS AND LAND DRAINAGE 734 (6th ed. 1952); W. PROSSER, TORTS 605 (3d ed. 1964).

\(^{42}\) Bair v. Flood Control Dist., 144 So. 2d 818 (Fla. 1962). A recent Florida decision indicates that the special act of the legislature allowing an industry to pollute the Fenholloway River does not remove the right of a private person to sue for damages arising from the operation of the industry. Hodges v. Buckeye Cellulose Corp., 174 So. 2d 565 (1st D.C.A. Fla. 1965).


\(^{44}\) See Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413 (1937).

\(^{45}\) See, e.g., Phillips Petroleum Co. v. Hardee, 189 F.2d 205 (5th Cir. 1951); Bowman v. Humphrey, 124 Iowa 744, 747, 100 N.W. 854, 855 (1904); McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950).

\(^{46}\) 66 Fla. 27, 63 So. 1 (1913).
strated, a plaintiff would be required to show the extent to which specific acts of individual polluters caused his injury.\textsuperscript{47} Under these requirements, it is extremely difficult for a plaintiff to collect damages when more than one pollutor contributes to his injury.\textsuperscript{48}

\textit{The Inadequacies of the Common Law Remedies}

Common law tort liability generally has been an ineffective technique for controlling pollution. Perhaps the primary weakness is that the damage remedy, which is much easier to obtain for stream pollution than the injunction, is not designed to prevent pollution initially but to afford relief retrospectively to parties injured. Pollution and its control involve complex technical problems, which courts simply are not equipped to handle effectively. Even were a particular court to have the necessary expertise, it would be in no position to formulate a comprehensive pollution control program because it is compelled to act on a case-by-case basis. For this, among other reasons, Florida, along with most other states, has placed pollution control primarily in the hands of administrative agencies.

\textbf{Administrative Pollution Control in Florida}

In Florida, pollution control was for many years primarily under jurisdiction of the State Board of Health. Pollution control activity by local units of government was also significant. Other agencies, such as the Game and Fresh Water Fish Commission, had limited power of pollution control.

The 1967 Florida Legislature substantially changed the state's pollution control program, removing it from the jurisdiction of the Board of Health and placing it under the new Air and Water Pollution Control Commission. There is yet little experience under the new law, but the problems dealt with by the Board of Health are not unlike those that the new commission will have to face. Therefore, a discussion of the State Board of Health's enforcement experience may be helpful in evaluating the new law.

\textit{Pollution Control Administration Prior to July 1967}

Prior to the 1967 Florida Air and Water Pollution Control Act, pollution control in Florida was primarily the responsibility of the State Board of Health. The board is composed of five members appointed by the Governor for four-year terms.\textsuperscript{49} Two must be medical doctors, one a dentist, one a pharmacist, and the other a "discreet citizen."\textsuperscript{50} Within the Board of Health, the Bureau of Sanitary Engineering handled pollution problems.\textsuperscript{51}

\textsuperscript{47} Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 429 (1913).

\textsuperscript{48} The primary defenses that can be raised in resisting a suit for pollution damages are the statute of limitations, prescription, agreement, and laches. Due to space limitations, a discussion of these defenses cannot be included in this article. For more complete treatment see F. Maloney, S. Plager, & F. Baldwin, \textit{Water Law and Administration in Florida} §112.3 (1968) (a forthcoming book).

\textsuperscript{49} Fla. Stat. §381.011 (1965).

\textsuperscript{50} Id.

\textsuperscript{51} Florida Water Resources Study Commission, Florida's Water Resources, Report
Pollution Control Powers. Most of the board's duties and powers, as indicated by its composition, dealt directly with disease and health. However, the board had control powers extending beyond health aspects of pollution. It had rulemaking power over sanitary practices for handling public drinking water, sewage disposal, pollution of lakes, streams, and other bodies of water, and also had authority to prescribe qualifications for operators of milk plants, water purification plants, sewage treatment plants, and swimming pools.

Any person, municipality, or corporation installing or materially altering a water supply or sewage disposal system was required to submit complete plans and specifications for the board's advance approval. The board also had general control and supervision over all underground water, lakes, rivers, streams, canals, ditches, and coastal waters of the state "insofar as their pollution may affect the public health or impair the interest of the public or persons lawfully using them."

Finally, the board had extensive power to administer the Pollution of Waters Act of 1916 and related statutes. These statutes are now enforced by the new Air and Water Pollution Control Commission and divide analytically into three parts, each concerned with a different aspect of pollution control. The first part, dealing with underground pollution, prevented persons or cities from using a sink or well located within five miles of any town or city for purposes of draining surface water or discharging sewage without a permit from the board. The board could revoke and change permits with notice and hearing. The second main part dealt with springs or other sources of water and made it a felony to "willfully or maliciously" defile or injure any conductor of water. The third part made it a misdemeanor to deposit in waters of the state "any rubbish, filth, or poisonous or deleterious substance or substances, liable to affect the health of persons, fish, or live stock." Although the statute seemed broad enough to prevent all pollution of Florida's watercourses, it contained no provisions for injunctive enforcement; only criminal penalties were provided for its violation. The State Board of Health in 1957 obtained passage of an additional section to the Pollution of Waters Act, which specifically authorized the board to petition for injunctions to restrain violations of the act.
Operation of the State Board of Health, Bureau of Sanitary Engineering

The bureau emphasized enforcement through persuasion and cooperation rather than by legal sanctions. After making field studies to determine the alleged pollution's extent and cause, the bureau held conferences with the pollutor singled out as the source and attempted to resolve the problem. The bureau's primary means of persuasion was the ever-present threat of the ultimate weapon—the injunction. Normally, a satisfactory solution was achieved but if the pollutor refused to cooperate or delayed in acting a suit was filed.62

One of the board's most active pollution control activities was approving sewage treatment facilities. Through the efforts of the board during the past twenty years, 1,550 sewage treatment plants were built, thus substantially curbing the spread of water pollution despite Florida's rapid population

62. Interview with David Lee, Director of the Sanitary Engineering Bureau of the Florida State Board of Health, June 16, 1966. The board drew and filed many complaints, but apparently the threat of suit was sufficient since few cases actually went to trial. The board undertook more than 62 legal actions on behalf of the citizens of Florida from 1958 to 1967. Summaries of some of these cases were taken from 59 FLA. HEALTH NOTES, Jan. 1967, at 49: State of Florida ex rel. Sowder v. American Cyanamid Co. "Stream pollution of Turkey Creek, Alafia River and Lithania Springs occurred on February 5, 1965. A dike adjacent to waters of the State of Florida ruptured discharging over 35 million cubic feet of water containing phosphate waste. DISPOSITION: Injunction suit sought March 4, 1965, by State Board of Health to require control of company facilities adjacent to state waters. This case dismissed by Circuit Court on basis of a release by director of Fla. Game and Fresh Water Fish Commission. Damages of $20,000 were paid to the Commission by the company on March 12, 1965." State Board of Health v. V-C Chem. Co., a division of Socony Mobil Oil Co., Inc. "Stream pollution of Peace River occurred on October 26, 1964. Company negligently maintained a wooden overflow structure in slime pond. It collapsed and two to five 'acre feet' of phosphate slime were released into the Peace River. DISPOSITION: Referred to Polk County Solicitor on January 29, 1965; Solicitor advised State Board of Health that 'prosecution not justified' on January 13, 1966." State Board of Health ex rel. Sowder v. Container Wire Prods. Co. "Water pollution occurred on Ribault River and Cedar Creek in Duval County. Company has failed to meet approval of State Board of Health for waste treatment pursuant to orders of the agency of September 14, 1966. Suit filed by agency on September 16, 1966, requesting injunction to hold up operation until treatment devices are built." State Board of Health v. Sloan Rental Inc. "Criminal action was taken against this development of eight rental units at Tavernier in the Keys. Developer was utilizing dynamited holes in coral for discharge of human wastes. Under the direction of legal staff, dye tests indicated pollution into tidal waters surrounding this Key. After extended period of time, the Court found the defendant corporation and its president guilty, giving him 30 days to remove the rental units, which consisted of 16 x 16 foot plywood shacks. Removal was effected and case closed." State Board of Health v. Lovering & Cranfield. "Case taken before County Judge's Court in 1961 in Manatee County involved a chicken canning plant north of Palmetto. Unapproved waste treatment with holding ponds was adjacent to McMullin Creek, a tributary of Terra Ceda Bay tidal basin. Samples taken under the direction of State Board of Health attorney indicated salmonella present in holding basin and adjacent tidal waters. The company was ordered to close down, which resulted in termination of a $50,000 government contract on canned chicken for the U.S. Army and subsequent bankruptcy of the company. The company has reorganized and is currently in operation utilizing approved facilities and has recovered its previous losses."
growth. The Board of Health also encouraged adequate waste treatment plants for industries, and sixty-eight such plants were approved in 1965. Finally, the Board of Health also prevented the harvesting and commercial distribution of unsafe shellfish.

The Bureau of Sanitary Engineering acted as a central pollution control coordination and information agency. It collected basic data on pollution in Florida, assisted Florida cities in obtaining federal grants for financing sewage treatment plants, and gave technical assistance to cities and industries.

Classification of Florida's Streams. In 1965, a Governor's Advisory Committee on Water Quality Control was appointed in response to the 1965 Amendments to the Federal Water Quality Act, which directed states to establish water quality standards or face imposition of federal standards. The committee, composed of representatives from various interest groups, held public hearings throughout the state and recommended a classification system, based on six classes of water purity, for Florida. The State Board

63. 59 FLA. HEALTH NOTES, Jan. 1967, at 23. During this period the percentage of Floridians provided with sewers and adequate sewer treatment systems for their domestic waste disposal increased greatly. Id. at 17-19.
64. Id. at 27. Examples listed there are as follows: "Some Duval County companies, which had been emptying wastes into the Ribault and Cedar Rivers, installed treatment plants, oil separators and sewers to clean up their operations. Another company was informed that its waste needed additional treatment before entering the St. Johns River, and the City of Jacksonville and a few industries were discharging untreated waste into McCoys Creek. Currently the State Board of Health is seeking injunctions against two companies which have unduly delayed action on waste treatment. In Dade County, a force main was installed which connected the Miami International Airport to the City of Miami sewerage system for the purpose of collecting and transporting wastes from the airport and an industrial area. This main removed wastes which would have gone into the ground near a well field. In Putnam County, a pulp and paper company installed a primary clarifier and is working toward secondary treatment. Another plant has installed new sewers connected to Palatka's sewage treatment plant. A new plating waste treatment plant has been installed at Cape Kennedy in Brevard County. A Naval installation has put in treatment for airplane washing facilities in Santa Rosa County and a chemical company has reduced the amount of its wastes through in-plant practices in order to prevent pollution of Escambia Bay. Two companies in Escambia County, which previously were polluting Bayou Chico, have installed treatment plants; another company installed settling basins and a lake to remove solids from its wastes; a fourth company installed two deep disposal wells for strong wastes and is working to reduce contamination of cooling water. A Naval installation is working on a design for treatment of its industrial waste. The City of Leesburg in Lake County has expanded its sewage treatment plant which will treat waste from a citrus concentration operation. Two citrus processing companies in Orange County have expanded their treatment facilities and stopped polluting a nearby lake. Prosecution is pending against a third company as a result of its failure to halt pollution. Many treatment facilities have been installed for small plants, such as laundries and meat packing plants. Several large establishments have installed facilities to treat wastes which would otherwise cause pollution. These are located in Orlando, Bradenton, Hamilton County and West Palm Beach." (paragraphs combined).
65. See GOVERNOR'S ADVISORY COMMITTEE ON WATER POLLUTION, REPORT 1-7 (Feb. 8, 1967).
66. Id. at 5. These classes listed in descending order of purity are: Class 1—Public
WATER POLLUTION

of Health promulgated this classification of Florida water bodies on May 13, 1967.

There is yet no experience under the classifications, but cases from other states indicate the classification system is a valid exercise of police power, at least if notice and hearing are given. According to proponents of classification, those elements are essential to any comprehensive program of pollution control. No enforcement action can be undertaken, for example, without prior determination of the appropriate use and necessary purity of a particular body of water. However, the classification system is severely criticized on grounds that "the process is administratively difficult and time-consuming, that classifications once made are hard to change and tend to create vested interests, and that the tendency will be to reduce waters to mere carriers of wastes because of the pressure of special interests." Indeed, the new Florida classifications, if maintained, may well shackle the new Air and Water Pollution Control Commission operations at their very inception. Moreover, it is doubtful that all classifications will receive the necessary approval of the Department of the Interior under the new Federal Pollution Control Act.

Local Pollution Control

Although local units of government directly handle public water supplies and sewage systems, the State Board of Health had general power to supervise and regulate municipal and county sanitation and to approve new water supply and sewage disposal systems.

Under the County Water and Sewer Act, counties have power to prevent pollution of "any source of water supply from which is obtained water for human consumption to be used in any water supply system . . . ." Pollution is "any rubbish, filth, or poisonous or deleterious substance or substances, liable to affect the health of persons, fish or live stock . . . ." However, counties do not have power under this statute to regulate discharges of industrial waste into waters that are not part of a water supply system, or were not part of a supply system when the discharge was initiated, even though the latter waters may subsequently be desired as a supply system.
County commissioners, as ex officio governing boards of the districts, presently have power to regulate sewers and water supplies, and in certain cases may prescribe pretreatment for industrial wastes emptied into their disposal systems. In addition, counties have power to institute suits to enforce the "Waste From Mines" act, which forbids mine operators to dump mine debris into the state's rivers.

Numerous special acts, some pertaining to specific water bodies and others relating to individual counties, prohibit or otherwise control pollution.

Municipalities may control pollution under their general zoning power since exclusion of an industry from a given area effectively prevents pollution by that industry. Under Florida's "Municipal Zoning" act municipalities have specific authorization to regulate the use of water for industrial or residential purposes. Another possible opening for municipal regulation is a statute empowering municipalities to "prevent and abate nuisances."

Evaluation of Florida's Pollution Control Program Prior to 1967

There are several apparent objections to designating a health agency as the state's main instrumentality for pollution control. First, this categorizes pollution as a "health problem," and while pollution definitely affects health it is also objectionable from conservational, recreational, and aesthetic viewpoints. Representation of these nonhealth-oriented interests was needed in the pollution control agency. Another objection was that the Board of Health did not specialize in pollution control and had many other duties. Moreover, substantial appropriations for pollution control were harder to get when the pollution appropriation was just one of many items requested by the Board of Health.

The agency's permit power was limited to control of pollution of certain underground waters. When available to control all pollution, as in Illinois, such a permit system has been called "one of the most effective devices for

77. E.g., Fla. Laws 1963, ch. 63-1986, §§1-8, at 4022 (declares the Hillsborough River a public water supply and prohibits dumping of wastes—a fine of $500 is set and the state attorney is to prosecute); Fla. Laws 1959, ch. 59-1013, §§1-9, at 661 (prohibits certain dumping of industrial wastes into the Peace River and authorizes injunction and fine and makes polluters liable for costs of pollution surveys and fish restocking); Fla. Laws 1955, ch. 30289, §§1-9, at 419 (prohibits certain pollution in the Alafia River, provides fines, imprisonment and makes polluters liable for costs of pollution studies and fish restocking).
78. E.g., Fla. Laws 1963, ch. 63-1099, §§1-5, at 9 (Alachua County); Fla. Laws 1961, ch. 61-1969, §§1-37, at 662 (Broward County); Fla. Laws 1959, ch. 59-1119, §§1-29, at 434 (Brevard County); Fla. Laws 1959, ch. 59-1156, §§1-3, at 536 (Broward County).
pollution control." The Board of Health's criminal sanctions and injunctive powers admittedly were powerful tools, but a permit system would have made possible better planning. Civil sanctions, which are more appropriate than criminal sanctions for some violations, were also needed.

Finally, more financial support from state and other sources was necessary. Without such support even a pollution control agency with an administrative structure of maximum efficiency and dedication, as well as adequate enforcement authority, is ineffective. The Board of Health claimed that lack of a stronger pollution enforcement program was mainly due to insufficient personnel (especially sanitary engineers and legal staff) and financing. As stated by the board: "Enforcement is deficient because resources are not available for proper surveillance of domestic and industrial waste disposal facilities nor to provide the legal and scientific staffs to put the programs into full effect."

**Florida's New Air and Water Pollution Control Act**

On July 12, 1967, after debating and considering several proposals, the Florida Legislature enacted the new Air and Water Pollution Control Act. This act makes substantial changes in pollution control administration. It creates a Florida Air and Water Pollution Control Commission composed of the Governor, Secretary of State, Attorney General, Commissioner of Agriculture, and two "discreet citizens" appointed by the Governor and confirmed by the senate. Provision also is made for a director who "shall possess experience in bioenvironmental or sanitary engineering and such other qualifications as the commission may prescribe."

Florida now has the advantage of a separate specialized agency to deal with pollution problems. However, since this separate agency is in part an ex officio board having many other duties, its effectiveness may be decreased. One incidental benefit of this ex officio management, however, is that some members of the commission also serve on the Board of Conservation, which deals with many water problems other than pollution. Since pollution control is just one form of regulation of water use, it is very desirable to administer it in an integrated regulatory system.

84. Note, supra note 81, at 3869. See also Division of Water Supply and Pollution Control, U.S. Dep't of Health, Education, and Welfare, Suggested State Water Pollution Control Act, Revised xii (1965): "Potentially one of the most effective techniques for control of water pollution is a permit system, under which discharges of wastes into any waters of the State are prohibited except as permitted by the board after examination of plans, specifications or other data relative to, and inspection of the construction of, disposal systems. Through this means the board can either prohibit discharges altogether or condition their approval on treatment adequate to protect legitimate water uses."


87. Id.

88. Id. §8.

89. Governor, Secretary of State, Attorney General, and Commissioner of Agriculture. See Fla. Stat. §370.02 (1965).
Increased Powers of the Commission. The new legislation gives the commission substantially more pollution control power than was available to the State Board of Health. For example, under this act the commission can compel persons engaging in operations that may result in pollution to file reports to be used by the board in prescribing methods for controlling or preventing the pollution. The commission can establish a permit system for controlling the operation, construction, or expansion of any installation that might be a source of pollution. The new legislation strengthens enforcement powers by authorizing up to a 1,000 dollar-a-day civil penalty for violation of "any order of the commission, including orders or rules fixing standards of air and water quality, or permits issued pursuant to its authority." In addition, violation of any commission order is a misdemeanor punishable by maximum criminal penalties of a 1,000 dollar fine and a year in jail for each offense. By providing civil sanctions, the new law overcomes the inherent weakness in earlier legislation stemming from the natural reluctance to invoke criminal sanctions against a pollutor. Furthermore, the bill provides other civil liability:

Whoever causes an unlawful discharge of contaminants into the waters of this state which results in damage to the fish and fish food or other damage to said waters is liable to the state for such damages and the reasonable costs and expenses of the state incurred in tracing the source of the discharge and in restoring the waters to their former condition.

The new law, like earlier legislation, has provision for temporary and permanent injunctions.

The New Commission’s Relationship to the Board of Health. One problem under the new law is the remaining jurisdiction of the Board of Health in pollution matters. The act generally repeals "[a]ll rule-making jurisdiction over air and water pollution matters" held by other agencies, including the State Board of Health. However, the act only specifically repeals the air pollution statutes, and apparently the general Pollution of Waters Act, discussed above, is still in effect. This is consistent with the new law since the Pollution of Waters Act does not mention the Board of Health as its administrator and deals partly with subject matter not covered in the new act, such as intentional interferences with water supplies.

A more difficult problem arises from the fact that the provision setting forth the general authority of the Board of Health in pollution matters was not specifically repealed by the new legislation. Perhaps the intent was to allow the Board of Health to retain jurisdiction over health aspects of pol-
olution, such as the regulation of drinking water supplies. This interpretation is feasible since authority to regulate drinking water supplies is not given specifically to the Air and Water Pollution Control Commission under the new act.

As with any major transfer of power to a new administrative agency, some continuity is needed. The new act facilitates continuity by allowing the commission to "utilize the facilities and personnel of other state agencies, including the state board of health, and delegate to any such agency any duties and functions as the commission may deem necessary to carry out the purposes of this act."97 All state agencies are directed to provide assistance upon the commission's request.98 Continuity is also facilitated by a provision in the new act validating Board of Health regulations and orders.99

**Variances.** The 1967 Air and Water Pollution Control Act provides for variances from the "act or the rules and regulations adopted pursuant here-to."100 The variances are given at the commission's discretion for any of the following reasons:101

(a) there is no practicable means known or available for the adequate control of the pollution involved.
(b) compliance with the particular requirement or requirements from which a variance is sought will necessitate the taking of measures which, because of their extent or cost, must be spread over a considerable period of time. A variance granted for this reason shall prescribe a timetable for the taking of the measures required.
(c) to relieve or prevent hardship of a kind other than those provided for in items (a) and (b) above.

These variance provisions, especially the variance for cost, are a potential weakness of the law. Most pollution control measures are expensive, and they probably will become more expensive in the future. postponement for cost reasons only creates greater problems for the future.

**Other Significant Features of the New Law.** The new law has at least two other significant provisions. Perhaps the most controversial is the tax relief provision for industries that construct pollution control facilities.102 For ad valorem property tax purposes, new pollution control facilities have a value no greater than market value as salvage.103 This provision should encourage the construction of pollution control facilities. However, the purpose of its inclusion apparently was to appease industrial interests that otherwise might have opposed the bill.

97. Id. §7 (3).
98. Id. §§7 (4), (9).
99. Id. §22.
100. Id. §21 (1).
101. Id.
102. Id. §25.
103. Id. §25 (1).
Another significant feature of the act is its provision for local pollution programs. In general, these programs must impose standards as strict as the state program and are subject to the commission’s approval.\(^\text{104}\)

These provisions encourage initial planning and participation at local government levels and have much to commend them. The power to review such programs, and if necessary to request corrective action, leaves sufficient control in the commission to assure proper planning and enforcement.

**Comparison With Model Water Pollution Control Act of 1965.** In 1950, a “Suggested State Water Pollution Control Act” was promulgated by the Public Health Service and endorsed by the Council of State Governments.\(^\text{105}\)

By 1962 approximately thirty-five states had enacted new legislation or had modified existing legislation to conform in some degree with the Suggested Act.\(^\text{106}\) The model act was revised in 1965 by the Public Health Service.

The definitions of pollution in both the new Florida act and the model act are comprehensive, but the model act’s definition appears broader since it includes change in the water temperature.\(^\text{107}\) “The latter definition, for example, would cover heating of water in such a way as to deplete oxygen supply and reduce the capacity of the water to support fish life or stabilize discharges of wastes.”\(^\text{108}\)

The model act’s 1965 version suggests that a pollution control board “should be so constituted as to take into account the interests and views” of affected groups.\(^\text{109}\) Examples of such groups are “health, agriculture, conservation, wildlife, and recreational interests, industry and commerce, and municipalities.”\(^\text{110}\) The new Florida legislation does not provide for such a representation of interests. (Whether representation is advantageous or not is an open question.) However, the “two discrete citizens” can represent whatever interest the Governor wishes.\(^\text{111}\)

The model act also differs from the new Florida law in that it makes no provision for variances and does not include tax relief for installation of pollution control facilities. In this respect, the model act is less of a “compromise” than the Florida act, but for this reason may be less effective. As pointed out above, this tax relief should help the pollution control program; its greatest possible adverse effect is on county revenue.

The Florida penal provisions generally are stronger than the model act’s provisions, especially with regard to civil penalties.\(^\text{112}\) The Florida act and

\(^{104}\) Id. §19(1)(a)-(b).

\(^{105}\) Stein, Problems and Programs in Water Pollution, 2 Natural Resources J. 388, 410 (1962).

\(^{106}\) Id.

\(^{107}\) Division of Water Supply and Pollution Control, U.S. Dept of Health, Education, and Welfare, Suggested State Water Pollution Control Act, Revised §2 (1965) [hereinafter cited as Suggested Act].

\(^{108}\) Stein, supra note 105, at 405.

\(^{109}\) Suggested Act at x, Comment.

\(^{110}\) Suggested Act at x, Comment.

\(^{111}\) 1967 Pollution Control Act §5.

\(^{112}\) The Suggested Act contains no provision for civil remedy except injunctive relief:
the model act provide a permit system for construction of waste disposal facilities. Both acts also provide for classification of waters at the discretion of the pollution control agency. Both acts specifically preserve existing common law remedies while providing injunctive relief.

**Over-all Evaluation.** The new law, on balance, appears to establish more effective pollution control administration than Florida's present one. It strengthens and improves state authority to cope with the increased scope of the pollution problem. However, no matter what the enforcement structure, the effectiveness of Florida's pollution control effort will be determined by the support given it by the people of the state and their representatives. One important aspect of such support is financing. No pollution control program can operate successfully unless the people of the state adequately finance construction and operation of remedial works for treatment of water and provide adequate funds for operation of the enforcement agency. How well this financial support is provided will, in the final analysis, be the most important factor in the success or failure of Florida's new Air and Water Pollution Control Act.

The Pollution Control Commission held its first working session on November 7, 1967 and at that time cited fifty-five industries and scores of cities and municipalities for failure to meet prescribed pollution control standards. The citations, in effect, placed their recipients on notice that they were in violation of Florida's pollution laws and requested them to advise the commission on actions they planned to take to rectify the situation. Court action would appear to be imminent should there be a failure to comply with the mandate of the citations. The commission's prompt action hopefully indicates that Florida is on her way to successful state administered pollution control.

**The Federal Influence**

In the past two decades the over-all national pollution problem has grown rapidly, indicating that state pollution control programs in general were not completely adequate. Whether this was due to lack of money, lack of power, lack of know-how, or an over-abundance of political pressure, it became clear that many states needed help with their pollution control programs. Federal involvement became inevitable.

"Such provision has not been included in this 'Suggested Act,' however, since it is considered more appropriate for inclusion in the conservation laws of the State." *Suggested Act* §10 n.15.

113. *Suggested Act* §6 (b); 1967 Pollution Control Act §7 (16).
114. *Suggested Act* §§4 (g), 6; 1967 Pollution Control Act §7 (12).
117. Id. The commission cited 11 sugar cane processing firms, 10 pulp and paper firms, 30 citrus firms, and 4 phosphate firms for failure to meet pollution control standards.
118. Id. Among the many cities cited, 14 were listed as dumping raw sewage into the state's waters.
The Federal Pollution Control Act

The Federal Water Pollution Control Act was enacted in 1948. The basic act, with amendments over the years, comprises the present federal pollution control program. The President shifted the responsibility for administering the program from the Department of Health, Education and Welfare to the Department of the Interior pursuant to the President's Reorganization Plan No. 2 of 1966. Within the Department of the Interior the Federal Water Pollution Control Administration administers the act.

Purposes, Duties, Powers, and Functions

The stated purposes of the Pollution Control Act are "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution." The act further declares that the policy of Congress is to "recognize, preserve and protect the primary responsibilities and rights of the States in preventing and controlling water pollution . . . ." The heart of the act is the enforcement section. Broadly speaking, the act provides for proceedings to abate pollution on interstate or navigable waters if any person's health or welfare is endangered. State abatement action is encouraged and the act states that federal enforcement normally will not displace state action.

As one method of enforcement, the act calls for formulation of water quality standards for interstate waters and a plan for implementing the standards. Quality criteria and enforcement plans are established for these waters by the states. The act provides that the standards are to "protect the public health or welfare and enhance the quality of water," and that in setting standards consideration shall be given to the "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses." The Department of the Interior, which must approve each proposed state plan, has pub-

121. See generally Reorganization Plan No. 2 of 1966. Contents of this plan, which are now in effect, are found in 33 U.S.C. §466 (Supp. II, 1966).
125. 33 U.S.C. §466g (a) (1964).
127. Interstate waters are defined as "all rivers, lakes, and other waters that flow across or form a part of the State boundaries, including coastal waters." 33 U.S.C. §466j (c) (1964). The Department of the Interior defines "[c]oastal waters" as waters "subject to the ebb and flow of the tides, and the waters of the Great Lakes." U.S. DEP'T OF INTERIOR, GUIDELINES FOR ESTABLISHING WATER QUALITY STANDARDS FOR INTERSTATE WATERS 10 (News Release May 10, 1966).
128. For a discussion of the Florida Standards see text accompanying footnote 66.
lished guidelines for use by states in setting standards providing, among other things, that an interstate stream cannot be used "for the sole or principal purpose of transporting wastes," and that wastes amenable to treatment and control cannot be discharged into "any interstate water without treatment or control." If a state fails to submit acceptable standards within a year of the act (October 2, 1965), the Department of the Interior will set the interstate water standards for it after conferences and a hearing if the state desires. Thus, either the states or federal government will set standards for all interstate waters.

If waste discharged into interstate waters reduces quality below the standards set, the federal court can enforce the act after 180 days notice to violators and interested parties. If pollution originating in one state endangers the health and welfare of persons in another state the federal government can initiate the abatement suit. If pollution endangers health and welfare only in the state where the pollution originates, however, the federal government can initiate a suit under the act only with the written consent of the Governor of the state.

In addition to the approach involving the quality standards, there is also an abatement procedure. If pollution endangers the health or welfare of citizens residing in a state other than the one in which the pollution originates, then the endangered state or the federal government on its own initiative can commence the proceedings. When pollution of interstate or navigable waters endangers only persons in the polluting state, then that state's Governor alone can initiate the procedure.

No matter who initiates the proceedings, the administrative procedure is the same. Briefly, the Secretary calls a conference; remedial action is recommended; six months are given to comply; if compliance is not forthcoming, a public hearing is held; the Hearing Board makes recommendations for reasonable measures to secure abatement; and finally, at least six additional months are given to comply. The proceedings are continued only if satisfactory progress toward abatement is not made. If administrative proceedings fail to secure abatement, the Secretary of the Interior can initiate a suit in federal court when pollution endangers health or welfare in a state other than the state in which the pollution originates. On the other hand, if the administrative proceedings fail, but pollution endangers the health or welfare only of citizens in the polluting state, then the Secretary can originate suit only with the written consent of that state's Governor. The court is to give "due consideration to the practicability and to the physical and economic feasibility of security abatement of any pollution proved" in deciding the relief the public interest and equities of the case require. Although the

134. 33 U.S.C. §§466g (g) (1), (2) (Supp. II, 1966).
federal government has taken enforcement action against a number of cities and corporations,\textsuperscript{138} most actions were settled at the conference stage.\textsuperscript{139} The section of the act providing aid for construction of sewage treatment plants is one of its most important and successful parts. This provision authorizes the Secretary to make grants to states, cities, and interstate agencies "for the construction of necessary treatment works to prevent the discharge of untreated or inadequately treated sewage or other waste into any waters . . .".\textsuperscript{140} The project must be approved by the appropriate state water pollution control agency and by the Secretary.\textsuperscript{141} The grant for any project cannot exceed 30 per cent of the estimated reasonable cost and the grantee must pay the remaining cost.\textsuperscript{142} The money appropriated is allocated to states on a population and per capita income basis, with poorer states receiving more.\textsuperscript{143} For the fiscal year 1966-1967, $150 million was appropriated.\textsuperscript{144} During the years 1956-1962 the grants assisted 3,500 communities in beginning construction of treatment plants that will serve 35 million people.\textsuperscript{145} The authorization of federal aid in 1956 spurred a 62 per cent increase in construction over the previous five-year average.\textsuperscript{146} Through 1964, federal contributions of $575 million helped 5,617 communities (48 million people) build $2,737 million worth of treatment plants.\textsuperscript{147} In 1964, Florida received $2.26 million through the act.\textsuperscript{148} Unfortunately, a large backlog of needed facilities still exists.\textsuperscript{149} The act also authorizes the Secretary to conduct and support a large research and experimentation program.\textsuperscript{150} This is a most important activity because pollution involves many technical problems and the real hope for ultimate success in pollution control may lie with research.

At the request of a state water pollution agency, the Secretary may research and investigate specific problems facing a state, city, or industrial plant.\textsuperscript{151} The Secretary, in carrying out this section, is to demonstrate means of treating waste for maximum removal of pollutants, better methods of identification and measurement of pollutional effects on water uses, and methods for evaluation of effects on water quality of augmented stream flow as a pollution control measure.\textsuperscript{152} The act further directs the Secretary to encourage cooperative activities

\textsuperscript{138} Stein, \textit{supra} note 105, at 414.
\textsuperscript{139} \textit{Id.} at 415.
\textsuperscript{140} 33 U.S.C. §466e (a) (1964).
\textsuperscript{141} 33 U.S.C. §466e (b) (Supp. II, 1966).
\textsuperscript{142} 33 U.S.C. §466e (b) (Supp. II, 1966).
\textsuperscript{143} 33 U.S.C. §466e (c) (Supp. II, 1966).
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} Stein, \textit{supra} note 105, at 414.
\textsuperscript{146} U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, BUILDING FOR CLEAN WATER 13 (1964).
\textsuperscript{147} \textit{Id.} at 4-5.
\textsuperscript{148} \textit{Id.} at 6.
\textsuperscript{149} \textit{Id.} at 9.
\textsuperscript{151} 33 U.S.C. §466c (b) (Supp. II, 1966).
\textsuperscript{152} 33 U.S.C. §466c (d) (Supp. II, 1966).
by states in pollution prevention and control, enactment of uniform state pollution laws, and compacts between states for pollution prevention and control. In this regard a "Suggested State Water Pollution Control Act" has been written. The department also gives technical assistance and advice to states to encourage the formation of compacts.

Aims of the Federal Pollution Control Program

The over-all aim of the Federal Pollution Control Act is to bolster state pollution control through technical and financial aid programs, research programs, and encouragement of cooperation among states and between the federal government and the states. Even the enforcement sections provide that state and multi-state action to abate pollution shall be encouraged, and that federal enforcement action shall not displace state and multi-state action.

The 1965 provision for setting standards on interstate waters may indicate a change in the federal role in water pollution. The state standards on interstate waters must receive approval of the Department of the Interior. Thus, in effect, the federal government participates in the definition of "pollution" in interstate waters by using its veto power over state standards. This gives the federal government a more direct role in pollution control, at least on interstate waters. Certainly, states will be encouraged to enforce the standards to avoid federal enforcement. It is probably also true that the standards the federal government will approve for some states are virtually the same standards the states have had for years. However, the federal government now seems able to set minimum standards of water quality that apply to interstate waters across the entire country.

Other Federal Pollution Control Statutes

There are two acts, in addition to the Federal Pollution Control Act, dealing with water pollution. One, the Oil Pollution Act of 1924, prohibits vessels from discharging oil into navigable waters of the United States and adjoining shorelines. The other, the Rivers and Harbors Act, concerns the discharge of refuse matter into navigable waters. The most important provision of the Rivers and Harbors Act, section 13, creates two related but separate offenses. The first part of the statute prohibits discharge or deposit of refuse matter, other than that flowing from streets and sewers in a liquid state, into any navigable water of the United States. The second part prohibits the deposit of any material on any bank of a navigable water where

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154. Stein, supra note 105, at 410. This act was discussed in text accompanying footnotes 105-115.
155. Id. at 410-11.
159. Id.
the deposit may wash into the water and impede or obstruct navigation. Violation of the Rivers and Harbors Act is made a misdemeanor punishable by fine or imprisonment. In addition, an action for damages, grounded either in negligence or nuisance, may be maintained by any person sustaining a special injury as a result of an unlawful obstruction of, or deposit in, navigable waters. The exception in the first part of the act for refuse flowing from streets and sewers, however, apparently exempts much of the waste material that causes pollution problems. Finally, a federal district court is authorized to grant injunctive relief against a violation of the statute, although there is some doubt with respect to whether a mandatory, in contrast to a prohibitory, injunction may be decreed.

A recent Supreme Court case, United States v. Standard Oil Co., which originated in the District Court for the Middle District of Florida, dealt with the meaning of “any refuse matter” in the Rivers and Harbors Act. Respondent was indicted for violating the first part of section 13 by allowing commercially valuable aviation gasoline to be discharged into the St. Johns River. The district court dismissed the indictment, concluding that “refuse matter” did not include commercially valuable oil. On appeal to the Supreme Court, the majority held that the Rivers and Harbors Act must not be narrowly construed and, specifically, that “any refuse matter of any kind or description” was not limited to commercially valueless substances. The Court pointed out that the statute made no such distinction and that in terms of the statute’s intent, no such distinction should be implied. The “refuse” requirement is satisfied by any product that becomes waste, no matter how valuable it may once have been. The product need not be deliberately discarded to become refuse. Three dissenters believed that section 13 was a penal section and should therefore be narrowly construed. Thus, they reasoned “refuse matter” should be given a narrow meaning—“waste, rubbish, trash, debris, [or] garbage.”

Whether the Standard Oil case is an abrupt broadening of section 13 is an open question. The case, in any event, is illustrative of the very real and growing influence of the federal government in Florida’s pollution problems.

Conclusion

Attempts to control water pollution in Florida to date have resulted in a progression of remedies, none of which have proved completely satisfactory.

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To some extent each new level of remedy—common law, state and federal—has been in response to the failure, at least in part, of the earlier remedies. But the job itself has become progressively more complex as pyramiding population and industrialization have taxed both physical facilities and legal ingenuity.

Do the weaknesses of the earlier remedies require abandonment of the field to a federally conceived and directed pollution abatement program? Not necessarily so. While local remedies are not well suited to control major interstate pollutors, they still have their place in the spectrum of remedies needed for broad statewide pollution control. Pollution of a small non-navigable stream by a local wood distilling plant, for example, may be best controlled by municipal antipollution ordinances or even by common law injunction to abate the local nuisance. Such pollution, while serious at the local level, may well be beneath the control of a statewide agency and federal authorities would have no legal basis to take action even if so inclined. Moreover, the remedy by way of damages in a common law nuisance action may still be of value to the individual riparian owner when the state or municipality refuses to act because the balance of convenience seemingly favors an industry, or a state statute or constitutional provision prevents a public nuisance action.

Of course, failure of the state to take affirmative abatement action in such a situation may well lead to federal intervention if the pollution occurs in navigable waters, particularly if another state is affected. In the final analysis, the extent of federal intervention will probably be determined by the aggressiveness, or lack of it, with which the state pursues its own pollution abatement program. In turn, the likelihood of effective state action will depend on both the tools and financial support the state makes available to its pollution control agency.

In the past there has been a tendency, at both state and federal levels, to provide the machinery but not the financial support needed for effective enforcement and then to blame the administrative enforcement agency for its failure to utilize fully the tools it had available and transfer the enforcement job to a new agency. The transfer of water pollution abatement au-

167. An excellent example of municipal effective pollution abatement transpired last year when a local contractor dumped between 800,000 and 1,400,000 gallons of effluent into a Gainesville, Florida, stream. The city health department immediately issued a cease and desist order, and further pollution was halted. On November 22, 1967, the pollutor was found guilty of violating a city antipollution ordinance and fined $100 in municipal court. For further information, see Gainesville Sun, Nov. 3, 1967, at 1, col. 3 and Gainesville Sun, Nov. 9, 1967, at 2, col. 1.

168. See, e.g., Whalen v. Union Bag Co., 208 N.Y. 1, 101 N.E. 805 (1913), where a million dollar sulphide mill was restrained from discharging effluent into a stream by a plaintiff who could show only $100 a year damages. See also C. Morris, Studies in the Law of Torts 307 (1952).


171. See discussion following subheading The Federal Pollution Control Act, supra, and following subheading Florida's New Air and Water Pollution Control Act, supra.
authority in Florida from the State Board of Health to the new Air and Water Pollution Control Commission exemplifies this type of enforcement transfer. The new agency, however, has been given broader legal powers than its predecessor, and the fact that it has abatement power over both air and water pollution will make it possible for the commission to handle industrial pollution on a comprehensive basis not available to its predecessor.

If the new agency is to be successful it must proceed after careful state-wide planning and not on the case-by-case basis that characterized the Board of Health's enforcement action. It must also recognize that water pollution is a consumptive use of water and coordinate its planning with the Division of Water Resources of the State Board of Conservation. From this viewpoint it would have been more logical to make one state agency responsible for both types of consumptive uses, since effective prevention abatement, which makes water available for reuse, is often the most effective way of conserving a state's water supplies. Undoubtedly the biggest single problem facing the new commission will be adequate financing to provide the necessary staff, both technical and legal, to bring about the over-all pollution control and abatement needed to keep Florida the beautiful state that attracts so many new residents each year. As population increases, old methods of pollution abatement become inadequate in cities of modest size sewage control. The Jacksonville example illustrates the fact that in the face of a rapidly increasing population this type of control is becoming less and less feasible. Federal assistance and state tax incentives can be used to assist in solving this problem, but much costly research is yet needed to devise workable means of treating new industrial wastes. As Florida comes closer to using all of her available fresh water resources, uses that were once permissible and encouraged will need to be discouraged and even proscribed to permit reuse of the resource.

In the final analysis it must be remembered that the mere passing of laws and transferring of authority does not solve the technical or fiscal problems that must be faced if the state is not to see most pollution control pass into federal hands. Although federal control is probably the only feasible answer to large interstate and often multi-state pollution problems, the majority of Florida's pollution problems are not of this sort. The newly tough federal approach in the Standard Oil case, however, may well indicate that the time left for effective state action as an alternative of greatly increased federal intervention may be running out. Only time will tell whether the state will provide her new Air and Water Pollution Control Commission with the financial support necessary to match the determination with which it is tackling the

172. See discussion following subheading Florida's New Air and Water Pollution Control Act—Increased Powers of the Commission, supra.

173. Thus, one of the long range solutions of the water shortage in the Everglades National Park may be through the transfer to the Park of the millions of gallons of sewage effluent now being discharged to the Atlantic Ocean. Testimony of A. Tabita at Belle Glade hearings on Water Resources Plan for Central and South Florida, Nov. 15, 1967.

long and arduous job of keeping Florida water and air clean in the face of the challenges presented by her increasing population and technological growth.

If this support is not forthcoming, it seems inevitable that the federal government will exercise its power to institute abatement proceedings against the pollution of all navigable waters of the state rather than restricting its activities to interstate problems.