The National Permit Program: A Polluter's Bridge Over Troubled Waters?

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THE NATIONAL PERMIT PROGRAM: A POLLUTER'S BRIDGE OVER TROUBLED WATERS?

JOHN T. BERNBOM*

INTRODUCTION

On October 18, 1972, over President Nixon's veto, Congress enacted the Federal Water Pollution Control Amendments of 1972, "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." The 1972 Amendments state that by July 1, 1983, water quality shall be such as to provide for the protection and propagation of fish, shellfish and wildlife and to provide recreation in and on the water. Additionally, it is declared to be a national goal to achieve zero discharge of pollutants into navigable waters by 1985. To attain these laudable goals, the 1972 Amendments changed and revitalized the assault on water pollution. They provide new enforcement tools, increased federal funding for upgrading publicly owned waste treatment facilities and increased federal funding for water pollution research. The 1972 Amendments also provide for a comprehensive waste discharge permit program. This permit program and its implications will be discussed in this article; in particular, the impact and consequences of holding a permit will be examined.

PERMITS UNDER THE 1972 AMENDMENTS

The permit system established by the Amendments is called the


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1. Message from the President of the United States Returning without Approval of the Bill (S.2770) Entitled "The Federal Water Pollution Control Act Amendments of 1972."

2. 33 U.S.C. §§ 1251 et seq. [hereinafter also referred to as the 1972 Amendments or the Amendments]. Throughout the text, the Federal Water Pollution Control Act Amendments of 1972 will be referred to as the 1972 Amendments, or the Amendments. The various sections referred to in the text correspond to the section number of Pub. L. 92-500. The Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 et seq., was initially enacted in 1948 and was the subject of numerous amendments of which the 1972 Amendments were the most significant and comprehensive.


National Pollutant Discharge Elimination System (NPDES). The discharge of any pollutant by any person without a permit or in violation of any condition of a permit is unlawful. The Amendments provide for both criminal and civil enforcement actions. If a person willfully or negligently violates a permit requirement, a fine of not less than $2500 nor more than $25,000 per day may be assessed upon the first conviction. A fine of not more than $50,000 per day may be assessed upon the second conviction. Additionally, imprisonment for not more than one year may be imposed for a first conviction and imprisonment for not more than two years for a second conviction. Further, there is a civil penalty of up to $10,000 per day.

Federal waste discharge permit programs are not new and state permit programs are common. It is the strict penalties coupled with the comprehensive scope of the NPDES program which distinguishes it from other permit systems. Initially, the United States Environmental Protection Agency (USEPA) is to administer the NPDES program and issue the permits in each state. Prior to the issuance of a permit by the USEPA, the state in which the discharger is located must certify that the permit will meet applicable state standards. Eventually, each state is expected to administer its own program subject to certain federal limitations. An NPDES permit is required for the discharge of pollutants from point sources into navigable waters. In view of this broad requirement, it would be

12. Many states had adopted standards prior to the enactment of the 1972 Amendments which, in many instances, are more stringent than federal standards. In states without pre-existing standards, the federally promulgated standards became the applicable state standards.
13. Federal Water Pollution Control Act Amendments of 1972 §§ 402 and 405, 33 U.S.C. §§ 1342 and 1345 (Supp. II, 1972). “Point source” is defined in section 502(14) of the Amendments as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

Pursuant to authority provided in sections 402 and 405 of the Amendments, the USEPA
rare for an attorney with commercial clients not to encounter NPDES related problems. Each NPDES permit will impose certain conditions designed to meet the goals of the Amendments. Such conditions may include monitoring to measure the quality and quantity of pollutants discharged, record keeping, reporting, compliance scheduling, specific limitations on the pollutants discharged, and specific limitations of pollutant impact on the receiving waterway.

A significant distinction between the Amendments and prior federal water pollution legislation is that emphasis is placed upon effluent limitations rather than water quality standards. Under prior legislation, limitations were established in order to achieve particular water quality standards. Water quality relates to the condition and resulting usage of a body of water. Effluent means any waste water discharged to a waterway. Under the Amendments, improved water quality is clearly the goal, however, the achievement of the goal is accomplished by limiting the quantity and concentrations of

promulgated policies and procedures for the administration of NPDES, 40 C.F.R. § 125 et seq. The regulations exempted certain point sources from NPDES requirements. These included discharges from storm sewers composed entirely of storm runoff uncontaminated by industrial or commercial activity; from relatively small animal confinement facilities; from silvicultural activities; and certain irrigation return flow, 40 C.F.R. 125.4(f) and (j). These exemptions were challenged by a citizen group, National Resources Defense Council v. Train, 7 E.R.C. 1881 (1975), on the basis that the exemptions diminished the overall effect of the Amendments. The USEPA contended that the problems created by the exempted categories are better dealt with absent a permit; that the exemption related only to a need for a permit and not to substantive discharge requirements; and that to require permits for exempted categories would render the permit program unworkable. The court found against the USEPA based upon the required comprehensiveness of the NPDES permit program. The USEPA is currently attempting to develop methods to bring the previously exempted point sources into the permit program.

Section 502(7) of the Amendments provides that the term "navigable waters" includes "waters of the United States including territorial seas." The USEPA has sought to give greater certitude to the term, and defined it to include, 40 C.F.R. 125.1(p):

1. All navigable waters of the United States;
2. Tributaries of navigable waters of the United States;
3. Interstate waters;
4. Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
5. Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
6. Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

Section 502(6) of the Amendments defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radio-active materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."
contaminants discharged by the establishment of effluent limitations.

Enforcement of NPDES effluent standards is the heart of the water pollution enforcement program. An enforcement action against a permittee for violation of a procedural permit requirement or for a pollutant discharge in excess of a permit limitation is designed to be less cumbersome than a traditional nuisance action. All that need be proved is that a particular permit requirement exists and that the permittee failed to comply with such requirement.

General guidelines concerning pollutant limitations allowable in an NPDES permit are provided in the Amendments. The Amendments take a three-step approach to accomplish the stated goals.

A) By no later than July 1, 1977:
   1) Publically owned sewage treatment works must utilize secondary treatment;
   2) Dischargers other than publically owned treatment works must utilize the best practicable control technology currently available;
   3) All pollutant discharges must meet State laws, rules, or regulations.

B) By no later than July 1, 1983:
   1) Publically owned sewage treatment plants must utilize the best practicable waste treatment technology;
   2) Discharges other than publically owned treatment works must utilize the best available technology economically achievable.


By July 1, 1977, publicly-owned sewage treatment plants must employ secondary treatment which is a treatment process beyond mere liquid-solid separation. Such secondary treatment may include chemical additions and the use of microorganisms to break down organic matter. Industry must employ the best practicable control technology currently available (commonly known as BPT). BPT is determined by computing the average of the best existing performances by well operated plants within each industrial cate-

14. Id. § 301, 33 U.S.C. § 1311 (Supp. II, 1972). The complexities and impact of the discharge guidelines are beyond the scope of this article. A more complete discussion of this subject may be found in, Smith, Highlights of the Federal Water Pollution Control Act of 1972, 77 Dick. L. Rev. 459 (1973). The United States Environmental Protection Agency translated these guidelines into particular discharge limitations for certain classes of dischargers pursuant to section 304 of the Amendments. The Amendments also require the establishment of particular standards for new sources, Id. § 306, 33 U.S.C. § 1316, and for toxic and pretreatment discharges, Id. § 307, 33 U.S.C. § 1317.
category. BPT as a standard is susceptible to criticism in that it only considers the best existing performance, even though some discharges are presently meeting the 1977 standards. Absent more stringent preexisting state standards, BPT provides the basis for final NPDES permit requirements. Further, by July 1, 1977, industrial dischargers to municipal sewer systems must meet pre-treatment standards. Finally, effluent limitations may be imposed by July 1, 1977, to achieve any other state requirements which are more stringent than those required by the Amendments.

By July 1, 1983, publicly-owned sewage treatment works must provide the best practicable method of waste treatment. Industrial dischargers must employ the best available technology (commonly known as BAT) economically achievable. Subsequent to July 1, 1983, efforts will be made to achieve the zero discharge goal by January 1, 1985.

THE IMMUNITY ISSUE

As the NPDES program progresses, and the bulk of the permits are issued, there is a question as to whether a permittee who is in compliance with the terms and conditions of an NPDES permit remains, nonetheless, subject to enforcement actions; or, whether such compliance renders the permittee immune from all pollution-related actions. The Amendments address the question of immunity in section 402(k) and provide that:

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 309 (Federal Enforcement) and 505 (Citizen Suits), with sections 301, 302, 306, 307 and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health.¹⁵

Certain major sections of the Amendments which presumably provide for non-permit related enforcement actions include sections 311 (Oil and Hazardous Substances Liability), 504 (Emergency Powers), 510 (State Authority) and 511 (Other Affected Authority).¹⁶ Violations of any of these sections regardless of compliance

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¹⁵. Id. § 402(k), 33 U.S.C. § 1342(k). The immunity of section 402(k) is apparently contradicted by section 402(i) which provides that nothing in the section shall limit the authority to take action under section 309 [Federal Enforcement]. A reasonable interpretation of section 402(i) is that it insures continued federal enforcement after the assumption of State NPDES authority.

with the terms of an NPDES permit may result in enforcement liability. Actions arising out of oil and hazardous substances spills, emergency actions necessitated by imminent endangerment to health and safety, and actions brought pursuant to the Refuse Act will be considered below.

Section 510 is the most significant section of the Amendments relating to the subject of possible immunity of a permittee from enforcement actions. Section 510 provides:

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. 17

This section specifically guarantees the right of any state and political subdivision to adopt or enforce any pollutant discharge standard or impose any compliance program if such standard or program is more stringent than that required by the Act. Section 510 suggests that the requirements of the Amendments represent the “bottom line” in water pollution control. Thus, it may be argued that a state can adopt, enforce and impose a compliance program based on standards more stringent than, and thus inconsistent with, NPDES requirements. In light of this possibility, immunity under an NPDES permit may be illusory; future state action inconsistent with NPDES standards remains possible.

Certain states took the lead in environmental enforcement during the 1960’s. In response to citizen pressure, many states took steps toward pollution abatement. It had been the policy of some states, aided by citizen groups, to impose strict standards, to initiate enforcement strategies, to impose significant compliance programs, and to levy substantial fines against polluters. These environmen-

tally aggressive states may consider going beyond the enforcement strategy dictated by NPDES permits, especially since some facilities have already met 1977 and 1983 standards. Also, since NPDES permits can be issued for up to five years, factors such as new technology, population shifts and water usage changes may arise which would render a permit obsolete. The existence of an obsolete permit, due to changed circumstances or possible drafting error, coupled with citizen pressure to alleviate an environmental problem, is likely to result in state action against an NPDES permittee.

Beside potential state actions mentioned above, a polluter may be held accountable under a federal statute, public trust doctrine, or nuisance theory. The extent to which the issuance of a NPDES permit will affect these actions, must be examined in the context of each action. Some actions have been expressly preserved in the Amendments, while the fate of other actions will be left to the judicial interpretation of section 510.

**Refuse Act**

Of the enumerated actions which are specifically preserved in the Amendments, an action brought under the Rivers and Harbors Act of 1899 (more commonly known as the Refuse Act) is one of the most noteworthy. Section 511(a)(2)(B) explicitly states that the Amendments shall not impair the authority of the Secretary of the Army under the Refuse Act.

The Refuse Act was enacted in 1899 primarily to prevent obstruction of navigation in the nation's waterways. Section 13 of the Act reads in part:

19. Section 402(b)(1)(C)(iii) provides that a permit can be modified upon the "change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." It may be contended that this provision should not be broadly construed as to allow permit changes to reflect improved technology. This interpretation is supported by analogy to section 306 (d) which provides that any facility, the construction of which was commenced after enactment of the Amendments, need not meet more stringent standards of performance during a ten-year period beginning at completion of construction or during the period of depreciation or amortization of the facility, whichever is first to occur. However, the significant emphasis in the Amendments (§§ 101-15) on technological research supports the conclusion that improved technology justifies permit modification.

(a) This Act shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899.
It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship . . . or from shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any description whatever . . . into any navigable water of the United States, or into any tributary of any navigable water . . . And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material . . . 22

While the above section seemingly provides for absolute prohibition of a discharge, it also enables the appropriate public official to permit certain discharges. The Refuse Act was resurrected in the early 1960's to regulate and curtail pollutional discharges. Cases subsequent to the Refuse Act's resurrection liberally interpreted the definition of refuse to include substances that had value immediately prior to discharge. The application of the Act was correspondingly extended beyond actual obstruction to navigation.23 Although expansively applied, the statute did not cover the discharge of municipal sewage.

In 1970, although there were thousands of industrial dischargers located on the nation's waterways, only 266 permits had been issued under section 13.24 Late in that year, President Nixon issued an executive order charging the Army Corps of Engineers with the responsibility of developing a comprehensive permit program under section 13.25 As a result of this order, the Army Corps reevaluated its permit program and announced sweeping changes, including the issuance of new permits where existing permits had been issued without adequate consideration of the quality of the effluent. Finally, in April of 1971, new regulations were adopted and published.26

Within sixteen months, the 1972 Amendments were enacted into

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law, and the newly created NPDES program was to supersede the section 13 permit authority under the Refuse Act. Section 402(a)(5) of the Amendments states, "No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title."27 Provisions were made for the interim period until the effective date of the new permits until December 31, 1974, in any case where a permit has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of . . . Section 13 of the Act of March 3, 1899 . . . 28

However, several actions were pending under the Refuse Act on the date of the enactment of the 1972 Amendments. Senator Muskie, Chairman of the Subcommittee on Air and Water Pollution and the major sponsor of the legislation, noted the concern of some legislators that pending actions under the Refuse Act could be nullified or dismissed by the above provisions. He stated that such concern was without foundation in light of the Savings Provision which provided:

"No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by . . . this Act."29

He went on to state that "without any question it was the intent of the Conferees that this provision (the Savings Provision) included enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, and any other acts of Congress,"30

During debate in the Senate, Senator Robert Griffin expressed the fear that the "immunity provision," (section 402 k) would moot the currently pending action against the Reserve Mining Company of Silver Bay, Minnesota which was discharging 67,000 tons of asbestos-like materials into Lake Superior daily.31 In response to Senator Griffin’s concern, John R. Quarles, Jr. of the General Counsel’s office of the USEPA wrote:

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31. Some of the litigation surrounding Reserve Mining Co. has subsequently been resolved. 380 F. Supp. 11 (N.D. Minn.), 498 F.2d 1073 (8th Cir. 1974), 418 U.S. 911 (1975).
Section 402(k) as you note provides "that until December 31, 1974, in any case where a permit has been applied for pursuant to this section . . . such discharge will not be a violation of . . . Section 13." Your concern is that the word "case" can be construed to render moot all pending litigation. It is my opinion that it is most unlikely that the language contemplated such a result or that a court would so interpret the statute. For it is reasonable to conclude that the courts will not interpret any legislation to deprive them of jurisdiction of pending litigation in the absence of clear and explicit language. There is no clear and explicit language to this effect in the pending bill.  

Thus, Congressional intent that actions under the Refuse Act shall be preserved regardless of the immunity provision of section 402(k) was clearly manifested by the legislative history and explicit language of section 511.

On the one hand, the integrity and authority of the Refuse Act is preserved while its core, the permit provision of section 13, is inoperative. The effect of section 402(k) on the long-term viability of the Refuse Act remains to be seen. However, in *United States v. Rohm and Haas Company*, the court upheld congressional intent to preserve pending Refuse Act suits. The government brought an action for continuous discharge against a chemical manufacturing plant which discharged its wastes into the Houston Ship Canal. The lower court had granted injunctive relief by limiting the discharge of various contaminants such as ammonia, cyanide, nickel, oil and grease, chromium, and chemical oxygen demand. The practice of barging such waste to sea was enjoined. The defendants contended that the Amendments of 1972 preempted the Refuse Act action, and the doctrine of primary jurisdiction should be applied, thereby requiring USEPA to make the initial determination concerning effluent limitations. The defendants further contended that even if the Amendments did not preclude the action, they should provide the basis for the proper standards to be applied to the company's discharge.


34. Justice Department policy has been, prior to 1971, to bring actions primarily for spills, leaks, and accidents as opposed to continuous discharges. For discussion of such early action see, Rodgers, note 26 supra.
Arguing preemption, defendants raised the 402(k) "immunity provision" and stated that they had applied for an NPDES permit. The court, reviewing the legislative history, determined that the Savings Provision applied and rejected defendant's contention. Concerning the primary jurisdiction issue, defendant argued that the proper forum for the action was an expert administrative body, the USEPA. In denying this claim, the court stated:

First, the question in this case is not what standard of discharge EPA may eventually permit, but rather what quantities of industrial wastes, if any, an equity court should permit a Refuse Act violator to discharge pending final EPA action on the Company's application for a permit.  

Secondly, the court continued, the complex technical issues relate to the type of relief to be granted—conceivably a complete halt of defendant's discharge. Such equitable relief, involving even extremely technical problems, was an appropriate matter for the courts. The data was not more complex than that which was presented to the courts in antitrust or patent suits.

The court then narrowly construed the Refuse Act and held that any order issued by the lower court was to be modified so as to be consistent with the terms and conditions of the NPDES permit when issued. The court cited section 402 (a)(4) which provides:

All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term . . . .

The court then ordered the decree effective, only so long as defendants remained in violation of the Refuse Act, i.e. until a final NPDES permit was issued.

Critical acclaim for the Refuse Act is based on the interpretation that it totally prohibits the discharge of pollutants. The 1972 Amendments similarly state that by 1985 zero discharge is the national goal. It is becoming increasingly apparent that, like the May

36. Primary jurisdiction has been raised in a number of cases dealing with the effects of the 1972 Amendments. See text accompanying note 95 infra.
37. 500 F.2d at 174-75.
30, 1975 Air Quality Standards, 39 1985 will come and go and the zero discharge goal will not be achieved. 40 The value of the Refuse Act as a total prohibition on the discharge of pollutants is magnified. Should technology change, or should current standards be found inadequate, the Refuse Act could once again be resurrected as a tool of effective enforcement.

Notwithstanding the exclusive preservation of the Refuse Act in section 511, the Rohm and Haas court has defined a final remedy in Refuse Act litigation to be contingent upon the ultimate contents of an NPDES permit. For purposes of section 13 of the Refuse Act, compliance with the NPDES program is compliance with the Refuse Act. If other courts follow suit, the options for effective enforcement may be crucially diminished. The value of the Refuse Act may be relegated to the role of supplementing deficiencies in the 1972 Amendments. Such areas of supplementation would include certain oil spills, instantaneous or short-term discharges, sources which are not definable as point sources, or solid waste deposits into navigable waters. 41

Prior to the enactment of the Amendments, debate raged over the most appropriate approach to regulate industrial discharges short of the absolute prohibition of the Refuse Act. The issuance in 1967, for the first time, of far reaching guidelines for approval of standards for state water quality improvement was hailed as, at last, a step toward a concrete technical regulatory framework. 42 Although these initial state standards were sometimes misconstrued or ignored, the first step had been taken on the road to the promulgation of effluent standards.

Although the goals and standards of the Amendments are being met, the pitfalls of mammoth administration, and yet to be discovered hazards, may create a system from which there is little possibility of legal extrication for at least the decade to come. 43 Zero dis-

42. Federal Water Pollution Control Administration, United States Department of the Interior. Guidelines for Establishing Water Quality Standards for Interstate Waters.
43. Before sounding the death knell for the Refuse Act or singing its praises too highly, an examination of its enforcement history may be helpful. In 1970, the Justice Department issued Guidelines for Litigation under the Refuse Act. 1 BNA Env. Rep. Current Developments 288. These guidelines preceded the development of the permit policy in 1971. The various United States Attorneys were instructed to use the Refuse Act as a prosecutorial tool against discharges which were accidental, or even infrequent, but not against continuous ones. The latter type of discharges were to be handled under the then Federal Water Quality
charge is in some instances an unrealistic goal; but statutory provision for absolute prohibition of waste discharges is a useful and perhaps necessary remedy. The lawmakers of 1899, without the technological advantages of the lawmakers of 1972, provided the best enforcement tool to date.

Rationalization about "reasonable amounts" of pollution is not easily reconciled with a statute which declares it a crime to dump "refuse of any kind or description whatever" into navigable waters.  

**OIL AND HAZARDOUS SUBSTANCES**

Although the Refuse Act remains an effective enforcement tool for sudden discharges such as oil spills, there is a further enforcement tool in the Amendments. Section 311 which addresses oil and hazardous substance liability is the next of the enumerated sections which are not subject to the "immunity provision" of 402(k). Section 311 incorporates and improves upon oil spill and prevention provisions which were first included in the Federal Water Pollution Control Act in 1970. Section 311 deals primarily with prevention, clean up, and liability for clean up costs. Section 311(b)(1) initially declares that it is the policy of Congress that there be no discharges of oil or hazardous substances into or upon navigable waters. In seeming contradiction a following section, 311(b)(3), when states that the discharge of oil or hazardous substances in harmful quantities as determined by the President are prohibited. The de-
termination which is to be made by the President includes those quantities of oils and any hazardous substances "the discharge of which, at such times, locations, and circumstances, and conditions, will be harmful to the public health or welfare . . ."49

The enforcement mechanism requires that any person in charge of a facility causing an oil spill and having knowledge of such spill, shall notify the United States Government immediately. A violation of section 311 may result in a $10,000 penalty and imprisonment for not more than one year.50

Responsibility for enforcement of these oil spill provisions remains with the United States Coast Guard. Violations shall subject violators to, at minimum, a civil penalty of not more than $5,000 for each offense. If it is determined that there is an imminent and substantial threat to the public health or welfare due to an actual or threatened discharge of oil (or hazardous substance) into a navigable water, appropriate relief to abate such a threat may be sought in a district court of the United States.51

In addition to the oil spill provision the Administrator of the USEPA is required to

develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.52

Presumably, the substances on this list are subject to the aforementioned provisions for spill and discharge incidents.

Although the initial provision, section 311(b)(1), enunciates a no discharge policy, the actual prohibition relates to discharges in harmful quantities. It has been suggested that the requirements for removal of discharges, and installation of spill prevention equipment may be read in the light of this no discharge policy.53 To reconcile the prohibition of discharges of "harmful quantities" with an NPDES permit, which clearly allows specified amounts of oils in a permittee's effluent, is a troublesome problem. The term dis-

charge is defined as "any spilling, leaking, pumping, pouring, emitting, emptying or dumping." The presence of oil in a permittee’s effluent could come under the purview of such definition. This particular question was raised during the congressional debate surrounding the adoption of this section. The administrative comments of the House Committee on Public Works state that this section is apparently intended to apply primarily to spills. The definition of discharge would not include any discharge that is in compliance with an effluent limitation which has been established under section 301, 302, 306, or 307; or is in compliance with a permit issued under section 402.

House debate addressed the definitional problem in a different manner, yet arrived at a similar conclusion. The language of the Conference Report stated:

Notwithstanding the broad definition of “discharge” in subsection (a)(2) the provisions of this section are not intended to apply to the discharge of oil from any onshore or offshore facility, which discharge is not in harmful quantities and is pursuant to, and not in violation of, a permit issued to such facility under section 402 of this Act. Another speaker (not a conferee) contended that the definition was not merely limited to spills, but applied to facilities which discharged oil continuously or intermittently, including any manufacturer who had in fact obtained a permit under section 402.

Assuming that Congress did not intend to create an inconsistency, the language of section 311 is far from clear. That there are provisions for immediate notification, Coast Guard enforcement activity, and clean-up liabilities indicates that the main thrust of the section is in the direction of spills and sudden discharges. Presumably, issued permits would allow oil discharges in less than harmful quantities. "Harmful quantity" under section 311 may be interpreted broadly. Thus, this could produce unfair situations which

58. For example, the standard imposed on the oil and grease discharge of a major oil refinery in the Midwest was 8.6 mg/l as an average and 16.4 mg/l as a maximum.
59. Pursuant to the original oil discharge provisions in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1161-62 (1970), the Secretary of the Interior promulgated regulations defining a harmful quantity as any quantity which will cause a film or sheen upon or discoloration of the surface of the water. 40 C.F.R. § 110.3 (1974). This definition was upheld in United States v. Boyd, 491 F.2d 1163 (9th Cir. 1973). See also 40 C.F.R. § 112.2.
should be addressed at the permit issuance stage.  

SECTION 504

A third action which is excluded from the 402(k) "immunity clause" is section 504, the emergency powers provision, which authorizes the Administrator:

[U]pon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons . . . may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

By excluding a section 504 action from 402(k), it seems that Congress intended to make section 504 available where a facility may be discharging under a permit, yet presenting an imminent hazard to the public health. Such a precautionary measure is necessitated by the proclivity of technology to use new methods before considering potential environmental effects.

It is difficult to prove the imminent danger of some pollutional discharges. Individual discharges may fall short of the imminent danger standard; yet in combination with other discharges they pose a severe threat to the public health. Whether the emergency provisions will fill the gap in the event of an unsatisfactory yet permitted discharge remains to be seen.

OTHER ACTIONS

The Amendments declare a congressional policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . . ." Although merely a policy statement, it aids in interpreting other sections of the Amendments. Section 510 of the Amendments guarantees the right of any state to adopt or enforce standards more stringent than those required by the Amendments. This section establishes a clear-

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60. Zener, note 53 supra, at 758.
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cut impediment to an NPDES permittee, alleging immunity from a pollution action. The legislative history of the Amendments particularly section 510, confirms that states and political subdivisions are guaranteed the right to bring statutory and common law nuisance actions against NPDES permittees. The House Committee Report on section 510 reads as follows:

The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, the Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices.\(^{45}\)

Even absent the clear statutory language of section 510 and its supportive legislative history, case law exists that provides that federal legislation shall not be interpreted as preempting state environmental enforcement, and that the mere existence of a permit or administration agency approval will immunize against state enforcement. This case law can be placed into two categories: nuisance actions under federal common or state statutory law (legislative enactment of the principles of public nuisance); and statutory actions under state environmental program standards.

**Federal Common Law Nuisance**

There have been, to date, several federal common law actions against facilities discharging into navigable waterways. During the pendency of these actions, these same facilities have been issued, or have been in the process of adjudicating NPDES permits. Although the cases are few, they may well determine the direction of the effort to clean the nation’s waterways. In each case the discharger used the existence of an NPDES permit as a mechanism to delay, or even terminate the common law proceedings.

An early case involves an action brought by the State of Illinois against the City of Milwaukee for the discharge of sewage into Lake Michigan. These proceedings gave rise to the landmark decision of *Illinois v. City of Milwaukee*,\(^{46}\) which established the right to bring an environmental action under federal common law. In *City of Milwaukee*, the Supreme Court refused to take original jurisdiction and remanded the case to federal district court wherein defendants

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sought to dismiss the complaint. The defendants, in support of their motion to dismiss, argued that the 1972 Amendments preempted the action under federal common law. The district court noted that prior to the enactment of the 1972 Amendments, similar arguments were advanced in other cases contending that the right of states to bring federal common law nuisance actions was preempted by the earlier versions of the Federal Water Pollution Control Act. That earlier legislation was also intended by Congress to create a comprehensive federal water pollution program. Defendant's contention of federal preemption, the court noted, had been repeatedly rejected in those other cases. The Federal Water Pollution Control Act, both prior to and subsequent to the enactment of the Amendments, is intended by Congress to place the primary responsibility on the states to enforce water quality and eliminate pollution.

In City of Milwaukee, defendants attempted to distinguish the Amendments from earlier legislation, in that the Amendments provided for the promulgation of specifically enumerated standards to ensure water quality, and that particularly, the NPDES program, because it specified standards, should preclude a common law nuisance action. Defendants' theory was that the doctrines expressed by the Supreme Court, prior to the enactment of the Amendments, were decided in a context in which there were no existing standards having the capability or effect of preempting federal common law. Aside from noting the intent of Congress to preserve the primary responsibility of the states in matters of water quality, the court rejected defendants' contentions on several other grounds. Complex regulations governing water quality (as opposed to effluent standards) did exist prior to the Amendments, without preempting an action based on federal common law nuisance. Secondly, the court specifically noted that section 510 of the Amendments plainly showed an intent to preserve other actions, such as federal common law nuisance actions. Finally, the court stated that had Congress intended to preclude a particular kind of action by legislation, Congress would have expressly exhibited such an intent. By way of example, the court pointed out that the Amendments specifically preempted the area of marine sanitation devices. Analogously, the

opinion points to a similar interpretation placed upon the Clean Air Act. The Supreme Court in *Washington v. General Motors Corp.*, stated that a non-statutory remedy is still viable in the absence of explicit preemption by Congress.

The district court's interpretation in *City of Milwaukee*, as to the effect of the 1972 Amendments on federal common law nuisance actions was followed in *United States and People ex. rel. Scott v. United States Steel Corp. (Waukegan Works)*. United States Steel, Waukegan Works, discharges its wastewaters directly into Lake Michigan. Defendants moved to dismiss and based its claim on several theories. Foremost of these was that the 1972 Amendments preempted state intervention which was predicated upon federal common law nuisance theory. The court ruled on defendant's contention although the case was filed twelve days prior to the enactment of Amendments. Citing sections 510 (State Authority), 511 (Refuse Act), and 4 (Savings Provision), the court found no provision in the Amendments which would have effectively abolished the federal common law of nuisance. Statutes, the court stated, will not be interpreted to be in derogation of common law absent a clearly exhibited intent.

In *United States Steel, (Waukegan Works)* defendants distinguished the characteristics of its case from *City of Milwaukee* in that the dispute in *City of Milwaukee* was between sovereigns (or quasi-sovereigns) who resided in diverse states. The court rejected defendant's argument and held that Illinois had standing to enforce federal common law on behalf of its residents against a private corporation, as well as against another sovereign. Commentators have suggested, quite correctly, that federal question jurisdiction was not based solely on the diversity of the parties, or the location of the polluter, but instead on the nature of the protected resource. Lake Michigan is an interstate body of water, traditionally, a subject of judicial action in the federal courts. The *City of Milwaukee* opinion stated that "it is not only the character of the parties that requires us to apply federal law . . ." and that "[r]ights in inter-state streams . . . have been recognized as presenting federal ques-

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74. *Id.* at 558, citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).
tions." Thus, it is possible that the United States Steel Corp. (Waukegan Works) case stands for the proposition that an action based on federal common law can be brought against a facility by a complainant located in the same state, so long as the resource or body of water is interstate in character, giving rise to federal concern, and therefore, federal question jurisdiction.

Where an NPDES permit has been issued to a facility located on an interstate body of water and such permit contains effluent and water quality standards less stringent than those of an adjacent state, it appears that City of Milwaukee holds that regardless of the issuance of a permit, a federal common law nuisance action would be preserved under section 510. However, assuming that the facts of United States Steel Corp. (Waukegan Works) arose after state issuance of a permit a different result may be postulated. Would a state which issued an NPDES permit be estopped from bringing an action for nuisance under federal common law because of its previous approval and issuance of a "license to pollute?" In such an instance a defendant would argue that the state had promulgated the permit, had been able to present its position before an administrative law judge in the event that adjudicatory proceedings on the permit had been held, had been given the opportunity to voice its objections in a permit appeal process, or had certified the permit. Defendant would contend that it would be unfair for a state to bring a federal common law abatement action against a facility that had been issued a permit to regulate its discharge. Conceivably such state action would be equitably estopped.

In environmental litigation, courts have estopped state attempts to revoke permits. Although estoppel may be applied in Illinois against a public entity, it is a doctrine reluctantly invoked, and never applied so as to impair police powers or power to collect revenues. Although it may be argued that the state may be estopped from revoking a permit for an activity which does not cause a prima facie adverse impact, estoppel will not be invoked in state attempts to directly promote health and welfare and exercise traditional concepts of police powers.

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The estoppel issue may be obviated by a well-drafted permit. Many permits contain a provision specifically preserving future state action, usually worded in the following manner:
States have successfully raised various arguments against the invocation of the estoppel doctrine. In many states several agencies may take pollution abatement action. Often a defendant will argue that the activity of one agency is representative of the State and therefore will estop the regulatory activity of another. In Illinois, explicit statutory language would indicate the contrary. While the Illinois Environmental Protection Agency may actually issue a water discharge permit (whether under a state permit program or NPDES program), the Attorney General may “on his own motion” file an action to enjoin violations of the Environmental Protection Act, which defines water pollution as

such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare . . . .

The Attorney General may also file environmental actions pursuant to chapter 12 of the Illinois Revised Statutes which gives the Attorney General

the power and authority, notwithstanding and regardless of any proceeding instituted or to be instituted by or before the Environmental Protection Agency, Pollution Control Board any other administrative agency, to prevent air, land or water pollution within this State by commencing an action or proceeding in the circuit court of any county in which such pollution has been, or is about to be, caused or has occurred, in order to have such pollution stopped or prevented either by mandamus or injunction.

A state may also argue from the holding of City of Milwaukee that the action of a regulatory agency or subdivision is not state action for purposes of the estoppel doctrine. In City of Milwaukee, the Supreme Court rejected the argument that it was a conflict between two states insofar as original jurisdiction was concerned. Plaintiff Illinois argued that the action was one against the State of Wisconsin in that defendants, City of Milwaukee, City of Racine, and the Metropolitan Sewage Commission of the City of Milwaukee were Nothing in this permit shall be construed to preclude the constitution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State Law or regulation under authority preserved by § 510 of the Act.

82. ILL. REV. STAT. ch. 111 1/2, § 1042(d) (1973).
83. ILL. REV. STAT. ch. 111 1/2, § 1002(n) (1973).
instrumentalities of the State of Wisconsin. The Court held that political subdivisions of a state were "citizens" for diversity purposes and concluded that the term "States" as used in the Federal Rules of Civil Procedure should not be read to include their political subdivisions. This principle was implicitly reiterated in the case of Metropolitan Sanitary District v. United States Steel. Defendant, United States Steel, invoked the doctrine of primary jurisdiction in an attempt to dismiss or stay the pending proceeding until the finalization of the adjudicatory hearing which involved the issuance of its NPDES permit. The court rejected defendant's argument that plaintiff, the Metropolitan Sanitary District, was a party to the adjudicatory hearing because it was a political subdivision of the State of Illinois which, through the Illinois Environmental Protection Agency, had intervened in the adjudicatory hearing as an "affected state." Thus, just as the action of a regulatory agency or subdivision is not state action for the doctrines of original or primary jurisdiction, it is also not state action such that would estop a different agency or subdivision from bringing a pollution abatement action.

A final "anti-estoppel" argument that could be invoked by a state which has issued or certified a NPDES permit is centered on the essential character of federal common law nuisance. It is well settled that an action for abatement of pollutional discharge, based on common law nuisance by way of injunctive relief, must meet the standard of imminent irreparable injury, or grave and immediate danger, or immediate threat to the health of the population. The presumption could be made that a permit, containing technologically determined standards, issued to a facility operating in compliance with such standards, could not allow the discharge of pollutants which present an imminent hazard to the public health. If this presumption is correct then necessarily a "permitted" discharge will never be a defense to a federal common law action. However, the complex problems of water pollution are not so compartmentally logical. Technology is unpredictable. Today's permitted discharge is tomorrow's imminent hazard. To determine the gravity of a nuisance, a court may draw upon standards utilized by the state in which the harm occurs, which may be more stringent than the stan-

86. 406 U.S. at 98 (1972).
dards permitted in the state where the discharge occurs. Regardless of the motivation of uniformity in the federal water pollution control program, one state’s discharge standards may be considered a grave and immediate danger in a downstream state.\(^8\)

**State Nuisance**

Federal common law is not the only source of nuisance actions to abate water pollution. Although an action for nuisance is rooted in common law tradition, most states have enacted nuisance statutes. The *Metropolitan Sanitary District v. United States Steel Corporation*\(^9\) case was originally brought by the Metropolitan District of Greater Chicago (MSD) in 1969 against United States Steel, Gary Works. The MSD claimed that the discharge from the Gary Works into Lake Michigan was presenting a grave danger and immediate threat to the population within the Sanitary District. Specifically, the action was filed pursuant to its statutory authority which provides:

The sanitary district has the power and authority to prevent the pollution of any waters from which a water supply may be obtained by any city, town or village within the district. The sanitary district acting through the general superintendent has the power to commence an action or proceeding in the circuit in and for the county in which the district is located for the purpose of having the pollution stopped and prevented either by mandamus or injunction.\(^9\)

The complaint, similar to a common law action for nuisance, sought injunctive relief to abate the continued pollution of a public water supply. The extent to which the statutory action for nuisance resembled a common law action was noted by the court:

However, the creation of this statutory authority should not be viewed as a new or radical innovation in the law of Illinois. In fact, the right of an individual or a municipality to apply to a court of chancery for injunctive relief against pollution of a water supply and the rendition of such relief by the court has been recognized for many years. In *Ruth v. Aurora Sanitary District*, 17 Ill. 2d 11,

\(^8\) For example, in Illinois the water quality standard for ammonia nitrogen is 0.02 mg/l total ammonia while the federal standard is 0.02 un-ionized ammonia. The Illinois standard is more stringent in that the 0.02 represents total ammonia in solution, while the federal standard relates to the un-ionized ammonia fraction which is considered by some experts to be that portion which is toxic to aquatic biota. The debate between “total” and “toxic portion” has been extended to a number of chemical contaminants.

158 N.E.2d 601, the Supreme Court affirmed an injunction ordering trustees of a municipality to abate a nuisance caused by discharge of sewage into a water supply source. This injunction had been obtained by a private individual and the Court referred to the action as "abatement of a public nuisance." (17 Ill.2d 11, 17, 158 N.E.2d 601.) To illustrate the venerable age of this principle, we note that the Court cited Green et al. v. Oakes, 17 Ill. 249. There, in 1855, the Supreme Court reversed a decree dismissing a suit seeking to prevent obstruction of a public way. The Court referred to this as a nuisance and a wrong or invasion of the common right. Another instance of the recognition of the propriety of injunctive relief to restrain the pollution of a water supply is City of Northlake v. City of Elmhurst, 12 Ill. App.2d 190, 190 N.E.2d 375, citing Barrington Hills Club v. Barrington, 357 Ill. 11, 191 N.E. 239 and other authorities.

Subsequent to the filing of the action by MSD, the State of Illinois, through its Attorney General joined as a party. This intervention was predicated upon two areas of statutory authority. First, under the Illinois Environmental Protection Act the "Attorney General may . . . on his own motion, institute a civil action for an injunction to restrain violations of this Act." 93 The second basis for intervention was the independent authority of the Attorney General to prevent pollution by commencing an action for injunctive relief. 94

In 1974, subsequent to the issuance of a draft NPDES permit, defendant filed its motion to alternatively dismiss or stay the proceedings on the basis that the NPDES adjudicatory hearing was pending. Defendants believed that the doctrine of primary jurisdiction authorized a court to stay proceedings pending administrative disposition of a permit application. This doctrine may apply when enforcement of a cause requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. 95 The purpose of invoking the doctrine is the need for administrative skill in deciding technical questions requiring consistency and uniformity which can only be provided by the expertise of an administrative agency. 96 The court in MSD did not apply the doctrine of primary jurisdiction. Although

the court recognized that plaintiff and USEPA shared the same goal, attainment of an unpolluted water supply, since the manner and method of reaching this goal was entirely different, this difference precluded the application of the doctrine. In analyzing this difference, the court emphasized the distinction between the goals of the permit program, and those of a nuisance action, a distinction which may prove valuable in future nuisance actions:

The adjudicatory hearings before the federal agency will be concerned with a permit which expressly approves and validates continued pollution of the water supply until its expiration date of July 31, 1979. The record does not show precisely what is expected to follow after the expiration date. However, it seems from the federal statute that another permit will then be issued in an attempt gradually to eliminate the pollution problem. In complete contrast, the proceedings before this court are not concerned with a gradual and permissive elimination of the problem. The gist of the abatement action is, exactly as its name implies, an attempt to terminate the pollution, subject only to such essential delays as may be absolutely necessary and unavoidable. In short, the federal administrative hearings are concerned with permissive regulation and the proceedings before us involve total abatement. The proceedings before us are thus completely divergent from the matter pending before the administrative body. In a situation of this type, the doctrine of primary jurisdiction is not applicable. We do not have here an issue of priority of jurisdiction but we have two tribunals which are approaching a problem from entirely different points of view and which are attempting to exercise jurisdiction in two entirely different matters.97

The MSD decision also relied upon congressional intent supporting the 1972 Amendments. The court noted that the declared policy of Congress was to preserve in the states the primary responsibility to eliminate pollution:

Repeated congressional pronouncements show the continuing intention of Congress not only to perpetuate rights of municipalities, such as plaintiff, to adopt and enforce requirements to abate pollution more stringent than any which may be adopted under the federal system but also to make certain that this activity by states and municipal corporations, such as plaintiff, continues for the public benefit.98
The court clearly held that actions of states and political subdivisions shall indeed be preserved regardless of the permit process.

**State Statutory Action**

Many states implemented definitive standards prior to the enactment of the Amendments. The General Assembly of the State of Illinois, for example, passed the Illinois Environmental Protection Act in 1970. Action to abate water pollution was based upon the statutory prohibition that

> no person shall cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois.\(^9\)

The definition of water pollution prohibits the discharge of "any contaminant into any waters of the State, as will or is likely to create a nuisance."\(^{100}\) Thus, actions under the Illinois Environmental Protection Act for water pollution were similar to nuisance actions. In the two years following the enactment of the Illinois Environmental Protection Act, specific effluent, and water quality standards were promulgated. These standards applied to dischargers into Illinois waterways and provided the basis for enforcement action. The Amendments were enacted subsequent to the implementation of this enforcement program. In some instances the numerical standards created by the USEPA diverged from those promulgated by Illinois. In general, Illinois standards were more stringent.

Conflicts might arise because dischargers could potentially be held accountable to different state standards. If state A has standards more stringent than federal standards, but adjacent state B adopts the federal standards, can state A attempt to enforce its standards against dischargers located in state B and discharging into a waterway common to both states? On its face, section 510 plainly indicates that state A could enforce those more stringent standards. No standards respecting discharge of pollutants are abrogated so long as they are not less stringent than those under the Amendments, nor is any jurisdiction or right of any state to be affected by the Amendments. If such an event were to occur, the discharger would presumably defend on several grounds. He could contend that it is inequitable to submit to state standards, which are more stringent than the uniform federal ones, because in complying with NPDES effluent standards he had invested heavily

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in a certain type of wastewater treatment or recycle program. Further, an estoppel argument could be invoked against an adjacent state to the same extent that estoppel is invoked against a state bringing a common law action against a facility for which it has certified or issued an NPDES permit. The regulations enacted pursuant to the NPDES program provide that following receipt of certification of a given permit, the USEPA must notify any state whose waters may be affected by the discharge. Upon such notification the affected state may object to such permit and request a public hearing. The written objection of such state may be included in the permit, or excluded with reason. In addition, an affected state may intervene in an adjudicatory hearing conducted in regard to the issuance of a permit.

As a result, it may be argued that an adjacent state waived its rights by not participating in the adjudicatory process. Once again the clear meaning of section 510 would seem to mitigate such a contention. If a state must participate in the permit process to preserve its rights, Congress would have explicitly so stated. There is also a practical consideration. Issuing permits to every point source in a given state is a massive task. To expect a state to actively participate in the permit process of another state is a burden that many state agencies are not equipped to handle.

Finally, there may be a strong distinction between an action brought to enforce particular water quality and effluent standards, and an action brought under common law or statutory nuisance. The distinction drawn in Metropolitan San. Dist. v. United States Steel stated that the permit program is an attempt at gradual and permissive elimination, while the nuisance action before the court

101. In determinations concerning cost-benefit ratios for pollution removal it has been theorized that removal of the bulk of contaminants is a modest cost when related to the size of the economy. However, some experts argue that after a certain percentage of contaminant removal, costs begin to increase with each additional unit to be removed. For example, it has been estimated that reduction of BOD (Biochemical Oxygen Demand—oxygen depleting bacteria in water) in a meat processing discharge averages six cents per pound up until 90% removal. Each additional pound removed after that 90% figure may cost up to sixty cents. Thus, to the discharger a small variation of a standard in a downstream state may represent significant removal costs. The experts, however, differ on the validity of such a conclusion. Some would say the more stringent standard is the better one, and additional removal costs must be borne. Others would contend that the over-all effect on water quality would not be significant enough to require that additional expenditure. For a complete discussion of the relative costs of contaminant removal, see, Kneese and Schultz, POLLUTION, PRICES, AND PUBLIC POLICY (Brookings Institution 1974).

102. See text accompanying note 79 supra.

was based on total abatement. A state enforcement action could be based, in addition to nuisance, on numerical limitations to be achieved by certain compliance dates. Thus, not only the goal, but also the manner and methods to achieve the goal are identical to those of the USEPA. The MSD court emphasized that the "manner and methods" of USEPA, and of plaintiffs were potentially different. Perhaps, the issue will be considered differently if the manner and methods by which plaintiff's goal was to be reached paralleled those of the USEPA.

**Remedies**

Distinguishing actions to abate pollution on "manner and methods" as opposed to objectives may yield no real difference. The intent of the Amendments, the plain language of section 510, and the cases which have touched on the permit issue, have reinforced the theory that an action may be brought against a discharger even though he has obtained or is in the process of obtaining an NPDES permit representing considerable compliance efforts.

The original action in MSD was filed for "abatement" of pollution. Injunctive relief seeking abatement does not necessarily mean turning off the faucet. Abatement may be interpreted as compliance with certain technological goals and standards. In *United States ex rel. Scott v. United States Steel Corp.*,\(^{104}\) the prayer for relief sought abatement in two forms: a prohibitory injunction which was to prohibit discharges into the waters of Lake Michigan, and a mandatory injunction requiring the installation of equipment to eliminate the discharge. The difficulty of enforcing the Federal Water Pollution Control Act of 1948 was in part related to the ambiguous and difficult process of fashioning a remedy. If the relief sought was complete and immediate cessation of defendant's discharge by shut-down of a facility, the balancing of economic factors too often precluded such an alternative. As a result, the water pollution control offensive evolved toward the use of numerical standards.\(^{105}\) Regardless of the kind of action instituted, the obvious source of a remedy is the current status of technology which would be reflected by the federally promulgated discharge standards created as a result of the 1972 Amendments. The few cases that have addressed the permit problem have exhibited such a trend.

As discussed previously, the remedy in the *Rohm & Haas* case\(^{106}\)

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105. See note 42 supra.

106. *United States v. Rohm and Haas Company*, 500 F.2d 167 (5th Cir. 1974).
was to be contingent on the limitations set forth in defendant’s NPDES permit. Subsequent to the court’s decision preserving an action under federal common law in United States ex rel. Scott v. United States Steel Corp., the parties entered into a consent decree. The agreement was that the defendant would gradually abate and eventually eliminate its discharge in accordance with the program set forth in its pending NPDES permit.

A currently pending case may be instructive on this issue. In 1967, the Metropolitan Sanitary District of Greater Chicago (MSD) filed a suit against Inland Steel, a steel facility located in Indiana, which discharges its wastewaters into Lake Michigan. In 1972, while the MSD case was still pending, the Attorney General of Illinois also filed and the cases were consolidated. The intervention of Illinois was based on that section of the Illinois Environmental Protection Act which allows the Attorney General to file actions for injunctive relief to halt pollution. Finding the defendant’s discharge to constitute a nuisance and to be in continued violation of the Illinois Environmental Protection Act, the court fined Inland $1,905,000. On the issue of actual abatement of the discharge the court noted that it did not have the scientific expertise to prescribe the precise abatement program required. It referred to a similar problem confronted in Wilmington Chemical Corp. v. Celebreze in which that court said: “The Court is also loathe to substitute its judgment for the expertise of the administrative official charged with the duty of passing on the subject.”

The Inland court stated that abatement methods should be the responsibility of the defendants, and set forth “compromise figures” based on effluent limitations that defendant was to meet. At the

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107. Rohm and Haas was a Refuse Act case. During the enactment of the Amendments the issue of fashioning remedies under the Refuse Act was discussed. A statement made by the Assistant United States Attorney for the Southern District of New York was included in the record of the House debate. It dealt with criticism of the Refuse Act because no standards had been written into it. He stated that although there were no cases dealing directly with the problem of lack of standards, a prosecutor does in effect deal with standards which were characterized as the “maximum feasible abatement under the present technology.” He indicated that the above was precisely the goal of the USEPA, when evaluating permit applications. House Debate on HR 11896, p.689.


110. ILL. REV. STAT. ch. 111 1/2, § 1042 (1973). See text accompanying note 82 supra for a discussion of this section.

same time this decision was handed down, Inland Steel and the USEPA were involved in settlement discussions regarding the standards to be contained in the company's NPDES permit. When the opinion was issued, USEPA suspended discussion and publicly stated that its final position on the subject permit would be reserved until after the completion of the litigation. The interdependency of permit issuance and court decision-making is notable.

In the *Metropolitan San. Dist. v. United States Steel Corp.* decision, the court, in rejecting the application of primary jurisdiction, relied on a Florida case, *State ex rel. Shevin v. Tampa Electric Company*, in which the court held that the trial court wrongly applied the doctrine of primary jurisdiction. In a nuisance action, the *Shevin* court stated, it is historically a judicial function to make the determination as to what activity constitutes a nuisance, a determination not always dependent on technologically based data. "[A] given activity can constitute a judicially abatable nuisance notwithstanding full compliance with either legislative mandate or administrative rule." The court then addressed the problem of practicalities in the context of a remedy:

> [I]f there are any practicalities involved which should be considered in the light of present technology limitations, they inhere in the equities involved; and regardless of their potentially technical nature they more properly ought to be taken into account by the trial court in the mandate of any injunctive relief deemed warranted.

Although actions based upon common law, statutory nuisance, or environmental standards may be brought against a permittee, the practical effect is a heavy reliance on current technological programs of water pollution abatement. The courts need look no further than the presently constituted NPDES program.

**CONCLUSION**

This article has not been concerned with a substantive examination of the Amendments and the NPDES program created thereunder. But the soundness and viability of the Amendments penetrate to the heart of the problem addressed. The thesis is that regardless of convincing estoppel and jurisdictional arguments, a permittee

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112. Chicago Sun Times, Sept. 12, 1975, at 8, col. 3.
115. Id. at 48.
116. Id.
operating in compliance with the requirements of the NPDES program, may still be brought to task for such a discharge through several different modes of action. Ability to utilize a variety of legal actions is necessary to the survival of effective environmental enforcement. The preservation of those actions, however, may be a legal fiction. When the time comes to fashion a remedy, a massive federally developed uniform program for discharge control cannot go unnoticed. When ordering injunctive relief in a nuisance situation, the courts must balance the "conveniences" in regard to both parties.\textsuperscript{117} Does the abatement of the continued activities constituting a nuisance represent a greater harm to the perpetrator than its continuation does to the complainant? When the effluent standards promulgated under the NPDES program were being developed, complex cost benefit analyses were used. A court need search no further in its quest for an effective standard to measure the economic impact of an abatement program. Even though most permits have only three to five-year terms, the direction of NPDES will pervade this nation's efforts to clean its waterways for at least a decade to come.

\footnotesize{117. 42 Am. Jur.2d INJUNCTIONS § 55 (1969).}