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ENVIRONMENTAL LAW: THE GROWTH AND EVOLUTION
OF RIGHTS AND LIABILITIES

THOMAS F. HARRISON*

Although few in number, the 1978-79 term decisions by the United States Court of Appeals for the Seventh Circuit in the area of environmental law dealt with a broad range of environmental issues. These issues include strict liability for discharges of oil into navigable waters,1 restoration of shoreline damage,2 new source performance standards under the Clean Air Act3 and public participation in the enforcement of water pollution laws.4 The Seventh Circuit also reviewed adjudicatory hearings under the National Pollutant Discharge Elimination System5 permit program6 and common law nuisance under the Clean Water Act.7

STRict liability for the discharge of oil

The strict liability provisions of section 311(b)(6) of the Federal Water Pollution Control Act,8 now the Clean Water Act,9 were upheld

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1. United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978); United States v. Marathon Pipe Line Co., 589 F.2d 1305 (7th Cir. 1978).
2. Save the Dunes Council v. Alexander, 584 F.2d 158 (7th Cir. 1978).
5. Hereinafter referred to as NPDES.
6. Alton Box Bd. Co. v. EPA, 592 F.2d 395 (7th Cir. 1979).
8. 33 U.S.C. § 1321(b)(6) (1976). This section was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1593-96 (1977), but the cases arose and were decided under the pre-amendment language. The current version of section 311 may be found at 33 U.S.C.A. § 1321 (1978).
9. Section 2 of the 1977 amendments noted that although the act may be cited as the Federal Water Pollution Control Act, the full regulatory scheme would henceforth be "commonly referred to as the Clean Water Act." Although the Seventh Circuit used both designations in the five Clean Water Act cases decided in its 1978-79 term, the current nomenclature will be used in this article. See 33 U.S.C.A. § 1251-1376 (1978).
by the Seventh Circuit during the 1978-79 term.\textsuperscript{10} Section 311(b)(6) establishes a basic "no discharge" policy for oil and hazardous substances and prohibits discharges of these materials in harmful quantities.\textsuperscript{11} When a discharge does occur, three distinct liabilities are provided for under the section: liability for the actual cost of removal of the substance;\textsuperscript{12} liability for a variable civil penalty if the substance is not removable;\textsuperscript{13} and liability for a civil penalty of not more than $5,000 for each offense.\textsuperscript{14} Section 311(k) of the Clean Water Act\textsuperscript{15} provides that this last civil penalty not to exceed $5,000 for each offense is to be used as a means of funding the enforcement and administration of section 311. In addition, acts of God, acts of war, negligence of the United States and acts or omissions of a third party are available as defenses to liability under this section\textsuperscript{16} except that the civil penalty is not to exceed $5,000 where there is strict liability. It was this strict liability provision which was addressed by the Seventh Circuit in two related cases of first impression during 1978.

Fault was not an issue in either \textit{United States v. Marathon Pipe Line Co.}\textsuperscript{17} or \textit{United States v. Tex-Tow, Inc.}\textsuperscript{18} Marathon is the owner of an underground pipeline located in southern Illinois. The easement for the line had been duly recorded with the local recorder's office and the line itself was marked in full compliance with applicable regulations. The owner of the land was having an irrigation ditch constructed when a bulldozer struck the pipe during the summer of 1975. The bulldozer damage ultimately caused the pipe to split and in November 1975 the company was informed that oil was being discharged from the pipe into the Kaskaskia River. Marathon took immediate steps to contain the spill and promptly reported the incident to the EPA. About 20,000 gallons of crude oil were discharged and a little more than half of this was either recovered or burned. The record established that Marathon was not at fault with regard to the digging or the damage prior to the spill.\textsuperscript{19} Nevertheless, in an action brought by the United

\textsuperscript{10} \textit{United States v. Tex-Tow, Inc.}, 589 F.2d 1310 (7th Cir. 1978); \textit{United States v. Marathon Pipe Line Co.}, 589 F.2d 1305 (7th Cir. 1978).
\textsuperscript{12} \textit{Id.} § 1321(f).
\textsuperscript{13} \textit{Id.} § 1321(b)(2)(B)(iii).
\textsuperscript{14} \textit{Id.} § 1321(b)(6).
\textsuperscript{15} \textit{Id.} § 1321(k).
\textsuperscript{16} \textit{Id.} §§ 1321(f), 1321(b)(2)(B)(ii).
\textsuperscript{17} 589 F.2d 1305 (7th Cir. 1978).
\textsuperscript{18} 589 F.2d 1310 (7th Cir. 1978).
\textsuperscript{19} 589 F.2d at 1307.
States Coast Guard under section 311(b)(6), the United States District Court for the Eastern District of Illinois entered a judgment enforcing a civil penalty of $2,000 against Marathon.\(^2\)

In *United States v. Tex-Tow, Inc.*,\(^2\) Tex-Tow was the operator of a tank barge which was being loaded with gasoline at a dock owned and operated by Mobil Oil Company. As the barge was being filled, it sank into the water and ultimately struck a submerged steel piling that punctured its hull and caused some 1600 gallons of gasoline to be discharged into the river. The record established that there was no reasonable way the company could have known about the piling.\(^2\)

The same district court again entered judgment in favor of the Coast Guard assessing a $350 civil penalty against Tex-Tow\(^2\) under section 311(b)(6).

Both Marathon and Tex-Tow appealed to the United States Court of Appeals for the Seventh Circuit. Marathon argued that, in the absence of fault, no more than a nominal civil penalty could be imposed under section 311(b)(6).\(^2\) Tex-Tow, on the other hand, argued that no penalty at all could be imposed on a party that did not "cause" the discharge.\(^2\)

Both companies contended that the purpose of the civil penalty is to serve as a deterrent to spills and that assessment of a penalty in the absence of fault would not fill that deterrent role, thereby invalidating section 311(b)(6) as not bearing a reasonable relationship to a proper legislative purpose. In addition, Tex-Tow argued that the third party causation defense available under section 311(f) should be read into the civil penalty provision.\(^2\)

The Seventh Circuit rejected these arguments, although not without some reservations, as evidenced by the concurring opinions of Judges Bauer and Wood.\(^2\) Judge Castle, writing for the majority, reviewed section 311 in its entirety and found it to be a clear and unambiguous manifestation of the intent of Congress "to impose a substantial civil penalty on owners or operators even in the absence of fault and that such an intent is well within the constitutional powers of

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21. *See* 589 F.2d at 1307.
22. 589 F.2d 1310 (7th Cir. 1978).
23. *Id.* at 1312.
24. *Id.* at 1317.
25. 589 F.2d at 1307-08.
26. 589 F.2d at 1312.
27. *Id.* at 1313.
Congress."\textsuperscript{29} The Seventh Circuit therefore rejected the companies' attempts to read into section 311(b)(6) anything other than what Congress had intended to include in the section. As a matter of statutory construction, the Seventh Circuit had no other choice.\textsuperscript{30}

In essence, the court in \textit{Marathon} and \textit{Tex-Tow} found that the strict liability provision was enacted for the purpose of economic regulation rather than as a means of deterrence. The Seventh Circuit stated that strict liability "though performing a residual deterrent function is based on the economic premise that certain enterprises ought to bear the social costs of their activities."\textsuperscript{31} The court concluded that by enacting the Clean Water Act, Congress "made a legislative determination that polluters rather than the public should bear the costs of water pollution."\textsuperscript{32} The court declined to question the wisdom of this congressional determination, merely noting that "the Supreme Court has not invalidated an economic regulation on substantive due process grounds since 1937. . ."\textsuperscript{33}

\textit{Tex-Tow}'s argument that there must be some causal relationship between the pollution and the obligation of a particular party to bear clean-up costs was answered by the Seventh Circuit in one word: foreseeability. The Seventh Circuit stated:

Tex-Tow was engaged in the type of enterprise which will inevitably cause pollution and on which Congress has determined to shift the cost of pollution when the additional element of an actual discharge is present. These two elements, actual pollution plus statistically foreseeable pollution attributable to a statutorily defined type of enterprise, together satisfy the requirement of cause in fact and legal cause. Foreseeability both creates legal responsibility and limits it. An enterprise such as Tex-Tow engaged in the transport of oil can foresee that spills will result despite all precautions and that some of these will result from the acts or omissions of third parties. Although a third party may be responsible for the immediate act or omission which "caused" the spill, Tex-Tow was engaged in the activity or enterprise which "caused" the spill. Congress had the power to make certain oil-related activities or enterprises the "cause" of the spill rather than the conduct of a third party.\textsuperscript{34}

Since Marathon and Tex-Tow were engaged in a type of business enterprise in which pollution is "statistically foreseeable," the Seventh

\textsuperscript{29} Id. at 1308.
\textsuperscript{30} See, \textit{e.g.}, \textit{Caminetti v. United States}, 242 U.S. 470, 485 (1917); \textit{International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.}, 518 F.2d 913, 917-18 (9th Cir. 1975).
\textsuperscript{31} 589 F.2d at 1309 (citations omitted).
\textsuperscript{32} Id. (citations omitted).
\textsuperscript{33} Id. at 1308 (citations omitted).
\textsuperscript{34} 589 F.2d at 1313-14 (citations omitted).
Circuit concluded that this fact, combined with the actual spill, was sufficient to sustain the imposition of the civil penalty based on strict liability.\textsuperscript{35} Thus, the Seventh Circuit affirmed the two district court judgments.

Judges Wood and Bauer concurred with Judge Castle’s analysis of the law but expressed some reservations about the practical results flowing from it. According to Judge Wood, it is basically unfair to penalize a business whose only “fault” was that it was in business: “[l]ittle good can be accomplished in these particular circumstances by this unusual process which is generally considered to be contrary to the accepted principles of law and equity.”\textsuperscript{36} Judge Bauer contended that to “punish a business engaged in enterprises essential to our national well-being for an unfortunate accident when the business is faultless, seems to be a self-defeating exercise of power.”\textsuperscript{37}

While the Seventh Circuit reached the correct conclusion in Marathon and Tex-Tow as a matter of statutory construction, there is also little doubt that the result is, indeed, troublesome. Clearly, Congress has the power to deal with the question of oil spills in the manner provided in section 311 of the Clean Water Act.\textsuperscript{38} But just as the concept of “guilt by association” is inimical to our jurisprudential system, so too is a regulatory scheme premised upon a concept of “guilt by engaging in a business enterprise.” Congress did not address this particular issue during its deliberations on the 1977 amendments. Resolution of this issue, then, perhaps along the line of a greater relationship between more proximate cause and the civil penalty, awaits another day.

**Procedural Requirements Under the Rivers and Harbors Act of 1968**

In Save The Dunes Council v. Alexander,\textsuperscript{39} the Seventh Circuit upheld certain actions by the Army Corps of Engineers\textsuperscript{40} under section 111 of the Rivers and Harbors Act of 1968.\textsuperscript{41} Section 111 authorizes the Secretary of the Army, acting through the Chief of the Corps of Engineers, to investigate, study and construct projects to prevent or mitigate shore damage attributable to federal navigation works.\textsuperscript{42}

\textsuperscript{35} Id. at 1314.
\textsuperscript{36} 589 F.2d at 1310 (Wood, J., concurring).
\textsuperscript{37} Id. (Bauer, J., concurring).
\textsuperscript{38} See text accompanying notes 8-15 supra.
\textsuperscript{39} 584 F.2d 158 (7th Cir. 1978).
\textsuperscript{40} Hereinafter referred to as the Corps.
\textsuperscript{41} 33 U.S.C. § 426i (1976).
\textsuperscript{42} Id.
Save the Dunes involved erosion to the Lake Michigan shoreline of the Indiana Dunes National Lakeshore\textsuperscript{43} caused by certain federally-developed harbor structures in Michigan City Harbor, Indiana. In 1970, the town of Beverly Shores, located within the Dunes, asked the Corps to study the erosion and to take remedial action under section 111.\textsuperscript{44} The Corps undertook a preliminary study and in 1971 reported that the harbor structures had caused about sixty percent of the erosion of the Dunes.\textsuperscript{45} Based on these preliminary findings, the Corps arranged for the preparation of a more detailed report. This involved consideration of various proposals and alternatives. A "final feasibility report" was issued recommending the authorization of a shoreline protection project to rebuild the beach west of the harbor structures. A draft environmental impact statement for the project was filed with the Council on Environmental Quality.\textsuperscript{46}

In 1973, while the final report was still in preparation, the Save the Dunes Council brought suit to compel the Corps to take remedial action on the shoreline damage caused by the harbor structures. Count I of the complaint alleged that the Secretary of the Army was required to mitigate the erosion damage and that the council was entitled to a writ of mandamus to compel the Secretary to act.\textsuperscript{47} Count II alleged that the harbor structures constituted a public nuisance and that the Secretary had abused his discretion in failing to stop or alleviate the erosion caused by the structures. The council sought mandatory injunctive relief under the Administrative Procedure Act.\textsuperscript{48} The Corps moved to dismiss or, in the alternative, for summary judgment. After a lengthy delay,\textsuperscript{49} the district court granted summary judgment in favor of the Corps.\textsuperscript{50}

The Seventh Circuit unanimously affirmed the lower court decision on procedural grounds. The court in Save the Dunes held that mandamus jurisdiction\textsuperscript{51} is present "only when a clear, plainly defined,
and peremptory duty on the federal defendant is shown and there is a lack of an adequate remedy other than mandamus." The Seventh Circuit noted that the language of section 111 is discretionary rather than mandatory, concluding that no peremptory duty existed upon which a writ of mandamus could be predicated.

Having determined that the Secretary's duty under section 111 is discretionary in nature, the Seventh Circuit next considered whether there had been any abuse of that discretion in the form of inaction by the Secretary. The court noted that the National Environmental Policy Act of 1969 requires the Secretary to "utilize a systematic, interdisciplinary approach . . . in planning and in decisionmaking . . . ." NEPA further requires the preparation of an environmental impact statement that, *inter alia*, discusses alternatives to the proposed action. The court in *Save the Dunes* held that the Secretary had no choice but to comply with these provisions and that in so doing he was not causing any unreasonable delay. Specifically, the court found that the Secretary was exercising his discretion, without delay or abuse, and was acting in a reasonable and responsible manner to develop a feasible plan for the prevention of the extreme Lake Michigan water erosion threat to the Dunes.

The court disposed of the claim for relief under the Administrative Procedure Act in summary fashion. The Corps' actions were found not to be subject to review since they were not yet final agency actions. Thus, the Seventh Circuit concluded that there was no final agency action upon which judicial relief could be based.

*Save the Dunes* appears to be the first court of appeals case construing section 111. The decision, however, does not create any procedural or environmental precedent. Rather, the Secretary of the Army

52. 584 F.2d at 162.
53. Section 111 provides, in pertinent part:
The Secretary . . . is authorized to investigate, study and construct projects for the prevention or mitigation of shore damages attributable to federal navigation works.
54. 584 F.2d at 164.
55. 42 U.S.C. § 4332 (1976) [hereinafter referred to as NEPA].
57. 584 F.2d at 164. In so holding, the Seventh Circuit added that "the Secretary, acting through the Corps, rather than taking ill-advised precipitous affirmative action in tearing out the harbor structures, has complied with statutory and administrative requirements for well-advised decision-making." *Id.*
58. *Id.*
59. The agency's actions were not final since the Corps' decision-making and planning processes were still ongoing. *See id.*
60. *Id.*
acted under section 111 and the Seventh Circuit in *Save the Dunes* merely affirmed the correctness of the Secretary's actions.

**NEW SOURCE PERFORMANCE STANDARDS UNDER THE CLEAN AIR ACT**

Unlike the Secretary of the Army, the Administrator of the Environmental Protection Agency was far less successful in *Central Illinois Public Service Co. v. EPA.* The *Central Illinois Public Service* involved an interpretation of the "innovative technology" waiver provisions added to section 111 of the Clean Air Act by the 1977 amendments.

Section 111 requires the EPA administrator to publish a list of categories of stationary sources of air pollution and then to promulgate federal standards of performance for new sources within each category. The standard of performance must reflect the degree of emission limitation and the percentage reduction that is achievable through the application of "the best technological system of continuous emission reduction which . . . has been adequately demonstrated." A "new" source is one the construction or modification of which commences after the publication or proposal of a standard of performance. Once a standard has been promulgated, no new source may be operated in violation of its requirements. However, in order to encourage the use and development of new and innovative technological systems of air pollution control, Congress in 1977 enacted a new subsection to provide a procedure whereby a company proposing to use such technology could apply to the administrator for a waiver from the requirements of section 111 provided certain conditions were met.

The issue in the *Central Illinois Public Service* case involved the

61. 594 F.2d 636 (7th Cir. 1979). The Environmental Protection Agency is hereinafter referred to as the EPA.
63. *Id.* § 7411(b)(1)(A).
64. *Id.* § 7411(b)(1)(B).
65. *Id.* § 7411(a)(1).
66. *Id.* § 7411(a)(2).
67. *Id.* § 7411(e). The section provides that:

[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

68. *Id.* § 7411(j). The section provides, in pertinent part:

Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction.
proper time for the filing of the request for the waiver as provided for under the amendment. The company applied for its waiver after it had placed in operation a new coal-fired generator with an innovative double alkali flue gas desulfurization system for the control of sulfur dioxide emissions. The administrator denied the request on the ground that a company could not apply for a waiver after it had placed a new source in operation.69

The Seventh Circuit in *Central Illinois Public Service* unanimously reversed the administrator's denial of the request. The court rejected the administrator's conclusion that, based on the prospective language in section 111,70 a company already operating a new source could not obtain a waiver. In so doing, the court concluded:

Apparently [the Administrator] interpreted the language to require application during the proposal stage of the project, which would clearly bar an application made after the project had already commenced operations. We do not believe that the language can be given this interpretation, however, because a project becomes more than a proposal once construction commences, yet the EPA agrees that application for a waiver may be made during construction. If application is not restricted to the proposal stage, the rationale for the Administrator's denial of a post-startup application falls.71

The Seventh Circuit in *Central Illinois Public Service* conceded that startup in violation of the applicable standard of performance would be significant72 in view of the prohibition of section 111(e),73 but merely noted that the administrator's decision did not rely on that section nor on the fact that the generator was in violation of the standard of performance for new coal-fired steam generators74 at the time of application. The court, as a consequence, did not express any view as to whether section 111(e) would bar a waiver application by a company already in violation of the relevant performance standard.75

In *Central Illinois Public Service*, the Seventh Circuit appears to have divided the life-cycle of a new source into four possible stages: proposal, construction, startup and operation, and operation in violation of the standard of performance.76 The court held that application for a waiver may be made during any of the first three stages and took

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69. 594 F.2d 636, 637 (7th Cir. 1979).
70. Id. at 637. The language employed included phrases such as "proposing to own or operate," "is to be located," "proposed system," and "proposed source."
71. Id. (citations omitted).
72. Id.
74. 594 F.2d at 637. See 40 C.F.R. § 60.43 (1978).
75. 594 F.2d at 637.
76. Id.
no position on whether a waiver could be sought during the fourth stage.\textsuperscript{77} This approach by the Seventh Circuit ignores the plain language of the Clean Air Act. The correct approach would delineate two stages: pre-operation, during which application for waiver may be made, and post-operation, where waiver is barred. It must be remembered that the purpose of the waiver provision is to permit a new source to operate even though it is not in compliance with the requirements of an applicable standard of performance. If the source were in compliance with the standard, it would not need a waiver. Absent the waiver, section 111 would otherwise prohibit any violative operation of the source. Another provision, section 111(j) of the Clean Water Act,\textsuperscript{78} cannot and should not be read as permitting the continued operation of a new source that is out of compliance with a standard of performance until such time as the owner or operator, at its leisure, gets around to applying for a waiver.\textsuperscript{79}

Taken as a whole, section 111 provides the owner of a new source with three options: operate in compliance with the appropriate standard of performance, operate with a waiver from compliance with the standard, or do not operate at all. The language of section 111(e) is clear and unambiguous and the Seventh Circuit's dismissal of its provisions is unpersuasive. Whether or not the administrator cited section 111(e) as a reason for denying the waiver is irrelevant; the section is in the law, and the Seventh Circuit should not have brushed it aside. The

\textsuperscript{77} Id.
\textsuperscript{79} Section 111(j) of the Clean Water Act provides, in pertinent part:

Innovative Technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C). . .

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified. . .
court's decision in Central Illinois Public Service was simply not in accord with the Clean Water Act.

**Public Participation in the Enforcement of Water Pollution Control Laws**

The EPA administrator was again unsuccessful in *Citizens for a Better Environment v. EPA*. The *Citizens for a Better Environment* involved a challenge to the administrator's approval of the State of Illinois' program to administer the National Pollutant Discharge Elimination System within the state.

Section 301 of the Clean Water Act generally prohibits all discharges into the navigable waters of the United States unless they are in compliance with the terms and conditions of an NPDES permit issued in accordance with section 402 of the act. Initially, administration of the permit program was vested in the EPA, but Congress contemplated that much of this authority would ultimately devolve upon the states. In 1977, the State of Illinois applied for authority to administer the permit program. The EPA approved, finding Illinois' plan to be in full compliance with section 402 and the guidelines for state NPDES programs. The Citizens for a Better Environment, a non-profit public interest organization, challenged this approval, contending that the Illinois scheme was deficient in that it failed to provide for adequate citizen participation in the enforcement of the program.

The question of what constitutes an "adequate" degree of public participation in the enforcement of state NPDES program requirements is complex and not without ambiguities. The statute requires the EPA administrator to promulgate guidelines establishing the minimum procedural standards and other elements necessary for a state permit program. These elements must include requirements for monitoring, reporting, funding, and manpower as well as enforcement provisions. Once these guidelines were promulgated, any state could request EPA approval of its program. The administrator must approve the state's

80. 596 F.2d 720 (7th Cir. 1979).
81. Id.
84. Id. §§ 101(b), 402(b), 33 U.S.C. §§ 1251(b), 1342(b) (Supp. I 1977).
86. Hereinafter referred to as CBE.
88. The statutory basis for approval is described in section 402(b) of the Clean Water Act. 33 U.S.C. § 1342(b) (1976).
program if the administrator determines, *inter alia*, that the program is adequate to abate violations of the permit or other elements of the program.  

These sections are the only provisions of the Clean Water Act that speak directly to the question of the enforcement requirements of state permit programs. The sections do not denominate public participation as one of the necessary elements. Rather, several sections of the Clean Water Act must be read with the enforcement requirement section to establish the element of public participation. Section 101(e) sets out an unequivocal declaration of congressional policy:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this [act] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

In addition, section 505 establishes the right of a private citizen to initiate a civil action to enforce a permit or permit condition, intervene in any enforcement action pending in a federal court, file suit against the administrator for failure to perform a non-discretionary act, and recover reasonable attorney and expert witness fees developed in the pursuit of such actions. Finally, section 101(b) establishes the congressional policy to recognize, preserve, and protect the primary responsibilities and rights of the states to prevent, reduce, and eliminate pollution.

The Illinois program at issue in *Citizens for a Better Environment* provided for a private person to file a complaint with the Pollution Control Board against any person allegedly violating any permit term or condition. The program did not, however, contain any of the other participation opportunities afforded private citizens by section 505 of the Clean Water Act. According to CBE, this made the program fatally deficient. Although conceding that the Illinois program met all the requirements for state programs, CBE argued that the requirements

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89. *Id.* Section 402(b) does not explicitly state that the program, to be approved, must meet the "minimum procedural and other elements" set forth in the section 304(i) guidelines.


91. These "public participation" guidelines are codified at 40 C.F.R. § 105 (1978). However, the administrator did not bring the existence of these guidelines to the attention of the court until he filed his petition for rehearing. See 596 F.2d at 725-26.

92. 33 U.S.C. § 1365 (1976). The "citizen rights" enumerated in section 505 were not carried over as necessary program elements in either 40 C.F.R. § 105 or § 124 guidelines.


themselves were incomplete and the Illinois plan did not comport with the overall public participation mandates under the Clean Water Act.\textsuperscript{95} Thus, although framed in terms of a challenge to a specific EPA determination in applying the guidelines to a particular set of facts, CBE was in reality challenging the statutory adequacy of those guidelines.

This is the somewhat confused background against which the Seventh Circuit rendered the decision in \textit{Citizens for a Better Environment v. EPA}.\textsuperscript{96} The court in the case held that "because EPA failed to establish guidelines by which the adequacy of the Illinois provisions for public participation in the enforcement of the state program could be assessed, the EPA approval of the program failed to comply with the terms of [the Act] and must be overturned."\textsuperscript{97} The Seventh Circuit in \textit{Citizens for a Better Environment} placed the blame on the EPA administrator. The court concluded that the administrator had failed to establish guidelines regarding public participation in state NPDES enforcement and had thereby ignored the statutory directive of section 101(e).\textsuperscript{98} In so doing, the Seventh Circuit stated that "[t]he Administrator's failure to provide these guidelines, in violation of the Act's framework, compels reversal of his approval of the Illinois program."\textsuperscript{99}

The "failure to provide guidelines" argument had gathered so much momentum that when the EPA, in its petition for rehearing, belatedly pointed out that the administrator had in fact promulgated the guidelines required by that section at part 105, the Seventh Circuit brushed the guidelines aside almost summarily, noting that "the regulations promulgated under section 101(e) of the Act . . . do not alter the conclusion reached" in the original ruling. That conclusion, however, was that no public participation guidelines had been promulgated at all—an apparent inconsistency not explained by the Seventh Circuit.

In characterizing the EPA's conduct as a "failure to promulgate," the Seventh Circuit utilized a "terminological inexactitude" that needlessly detracts from what is otherwise a penetrating and perceptive analysis of the act. It would have been clearer and more accurate if the Seventh Circuit had stated that although the EPA did promulgate public participation guidelines, they were not adequate under the act. In any event, by relying on the language of section 101(e) as well as por-

\textsuperscript{95} The CBE also contended that the action was also a review of the minimum program elements in 40 C.F.R. § 124 as they affected the case. See Brief for Petitioner at vii, \textit{Citizens for a Better Environment v. EPA}, 594 F.2d 636 (7th Cir. 1979).
\textsuperscript{96} 594 F.2d 636 (7th Cir. 1978).
\textsuperscript{97} \textit{Id.} at 721 (emphasis added).
\textsuperscript{98} \textit{Id.} at 724 (citations omitted).
\textsuperscript{99} \textit{Id.} at 725 (emphasis added).
tions of the legislative history, the court in *Citizens for a Better Environment* found that the concept of citizen involvement in the enforcement process is paramount under the act, surpassing even the congressional recognition of the rights and responsibilities of the states contained in section 101(b).

Although the EPA contended that the question of the extent of citizen participation in state enforcement proceedings pending in state courts was one that should be resolved by the states under section 101(b), the Seventh Circuit disagreed, finding no conflict between that section and section 101(e). The court ascertained that under section 101(e) "the Administrator of the EPA has a duty to establish state program guidelines and evaluate state programs to insure that there is public participation in the enforcement of these programs."

Less obvious, however, is the amount and kind of public participation required by section 101(e). CBE argued that the Clean Water Act requires state programs to incorporate the section 505 "citizen suit" provisions, but the Seventh Circuit declined to decide what provisions must be made for citizen participation in the state NPDES enforcement process. However, based on the court's rejection of part 105 of the guidelines, it seems clear that section 505 is the standard against which state programs will be judged. In rejecting the guidelines, the court in *Citizens for a Better Environment* found the guidelines "pay lip-service, at best" to the congressional directive for public participation and "do nothing to mandate citizen participation in the state enforce-

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102. *See* 596 F.2d at 724 n.6.

103. *Id.* at 724 (emphasis added).

104. *Id.* at 725 n.8.

105. The relevant portions of the rejected guidelines provide as follows:

   **Enforcement.** Each state agency shall develop internal procedures for receiving and ensuring proper consideration of information and evidence submitted by citizens. Public effort in reporting violations of water pollution control laws shall be encouraged, and the procedures for such reporting shall be set forth by the agency. Alleged violations shall be promptly investigated by the agency.

   **Legal Proceedings.** Each agency shall provide full and open information on legal proceedings under the Act, to the extent not inconsistent with court requirements, and where such disclosure would not prejudice the conduct of the litigation.

   *Id.* at 726 n.2.

106. *Id.* at 726.
This last phrase epitomizes the Seventh Circuit's view of what constitutes adequate citizen participation within the meaning of section 101(e): at a minimum, a citizen has a right to intervene in state enforcement proceedings.

Having delivered these general observations on the public participation requirements under the Clean Water Act, the court then declined to apply them to the Illinois program. Rather, the Seventh Circuit held that the administrator's failure to provide guidelines, in violation of the Clean Water Act, was sufficient to compel reversal of the Illinois program irrespective of the terms of the program, noting that "Congress did not intend reviewing courts to make ad hoc determinations about the adequacy" of specific state plans. The court concluded its opinion by directing the EPA to withdraw its approval of the Illinois program and take appropriate action in accordance with the opinion.

Subsequently, the EPA administrator notified the Seventh Circuit that he was initiating a rulemaking proceeding that would, inter alia, require states wishing to receive or maintain NPDES permit authority to allow citizen intervention in enforcement proceedings and to provide additional public participation measures. The rulemaking would require approximately nine months. Thus, the EPA asked the Seventh Circuit to enlarge the time for entry of its mandate until completion of that process. The court granted a stay until February 23, 1980.

The great public participation battle ended with a victory for the private citizen. Although the EPA has delegated NPDES authority to a majority of the states, Citizens for a Better Environment represents the first challenge on the issue of citizen participation. It remains to be seen whether the EPA's proposed rulemaking will pass judicial muster. But for now, the EPA appears firmly committed to an expanded

107. *Id.* The Seventh Circuit further stated that the guidelines require no more than that a state "answer its telephone and listen and look into" a citizen's complaint and that the guidelines are no more than a "legalistic articulation of a common courtesy." *Id.*

108. See *id.* at 723.

109. *Id.* at 725.

110. *Id.*

111. *Id.*

112. In fact, the court seemed by inference to invite such a motion in its denial of the petition for rehearing. See *id.* at 726 n.3.

113. For the notice of proposed rulemaking involving increased public participation in the permit process, see 40 Fed. Reg. 49,275 (1979).

114. See, e.g., Save the Bay, Inc. v. EPA, 556 F.2d 1282 (5th Cir. 1977).

115. CBE filed a similar challenge to EPA's approval of the Wisconsin permit program, but the Seventh Circuit dismissed that petition on procedural grounds without a published opinion. See 577 F.2d 748 (7th Cir. 1978).
role for the private citizen in the enforcement of state pollution control permits.

Before leaving Citizens for a Better Environment, consideration should be given to some disturbing procedural and jurisdictional consequences that flow from the Seventh Circuit's treatment of a challenge to the adequacy of substantive agency rules of general applicability. Section 509(b)(1) of the Clean Water Act confers jurisdiction upon the appropriate court to review specific actions of the administrator,\(^\text{116}\) including any determination as to a state's permit program.\(^\text{117}\) The CBE in Citizens for a Better Environment argued that a United States Court of Appeals for the Ninth Circuit decision, California v. EPA,\(^\text{118}\) established direct appellate jurisdiction to review substantive rules of general applicability.\(^\text{119}\) The EPA, on the other hand, argued that the Seventh Circuit lacked jurisdiction in Citizens for a Better Environment to hear a general challenge to the adequacy of the NPDES guidelines.\(^\text{120}\)

\(^\text{117}\) Id. § 402(b), 33 U.S.C. § 1369(b)(1)(D) (1976) (emphasis added). However, EPA action in promulgating and publishing guidelines under either section 101(e) or section 304(i)(2) is not included under section 509(b)(1). Presumably, judicial review of those actions would be available under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1976), but jurisdiction to hear such cases would normally be invoked on "federal question" grounds. 28 U.S.C. § 1331 (1976).
\(^\text{118}\) 511 F.2d 963 (9th Cir.), rev'd on other grounds sub nom., EPA v. California State Water Resources Control Bd., 426 U.S. 200 (1976). This case involved a section 509(b)(1)(D) challenge to EPA action in approving permit programs submitted by two states but exempting federally owned and operated facilities from their purview. The Ninth Circuit held that "the Act provides for state regulation of federal as well as state dischargers . . . . Hence we declare invalid those portions of [the federal NPDES permit program requirements] that exclude federal facilities discharging pollutants into navigable waters from compliance with any state permit program operating under NPDES." 511 F.2d at 965 (emphasis added).
\(^\text{119}\) Although the Supreme Court reversed the Ninth Circuit, the Court seemed to ratify and, indeed, adopt the Ninth Circuit's approach to the jurisdictional issue of reviewing regulations of general applicability. The Court stated:

From the outset of EPA's administration of the NPDES and in its first regulations establishing the Section 304(b)(2) guidelines for state NPDES permit programs . . . . the EPA has taken the position that federal facilities are not subject to state permit program procedures. The implications of this position were soon made explicit in 40 C.F.R. § 125.2(a)(2)(b) (1975) . . . . This construction by the Agency . . . . is reasonable and . . . . we sustain the EPA's understanding . . . .

426 U.S. at 226-27 (emphasis added) (citations omitted).
\(^\text{120}\) The EPA contended that its NPDES regulations were not reviewable in the abstract but could be reviewed only in the context of specific permit actions and proceedings. See 44 Fed. Reg. 32,854, 32,855-56 (1979) (to be codified at 44 C.F.R. § 121 (1979)). The EPA believed that two factors militated against review in the abstract: the absence of a factual context to focus review, and the absence of a concrete record to aid a reviewing court. In so stating, the EPA relied on the authority of Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Diamond Shamrock Co. v. Costle, 580 F.2d 670 (D.C. Cir. 1978); American Iron & Steel Inst. v. EPA, 543 F.2d 521 (3d Cir. 1976). These cases seem to suggest that the courts will apply a balancing test, weighing the interests of the court and the agency in postponing review until the issue arises in a concrete form against any hardship to a party seeking relief from the challenged regulation's immediate and practical impact upon it.
Unfortunately, the Seventh Circuit did not address these jurisdictional questions. The court's reticence is disappointing. To allow a party to expand a specific challenge of a particular course of conduct under a regulation into a general attack upon the regulation itself, without apparent statutory authority, is, at the very least, precedential, and the question ought to have been discussed by the court. The assumption of jurisdiction by the Seventh Circuit under the circumstances of this case calls into question the concept of finality in administrative rulemaking. The court appears to be condoning a new concept in jurisprudence, one that permits a challenge to the adequacy of rulemaking to occur at any time by any party. This is a departure from the traditional approach of requiring a general attack upon the adequacy of agency rules to be made within either a statutorily specified time or, if there be none, within a reasonable time.

ADJUDICATORY HEARINGS UNDER THE NPDES PERMIT PROGRAM

The Seventh Circuit also decided against the EPA administrator in Alton Box Board Co. v. EPA. Alton involved the NPDES permit program affecting the Alton Box Board Company paperboard mill in Alton, Illinois.

One provision of the Clean Water Act requires dischargers to meet effluent limitations that call for the application of the "best practicable control technology currently available" by July 1, 1977. In addition, a discharger must meet any additional state standards by the same date. The BPT effluent limitations are to be based upon effluent guidelines promulgated by the EPA. These effluent limitations and other requirements are applied to individual dischargers through the NPDES permit program.

In Alton, the paperboard mill had been receiving about half of its raw material from wood chips pulped at the plant with the balance.

121. See 596 F.2d at 724.
122. Id.
123. 592 F.2d 395 (7th Cir. 1979).
coming from wastepaper. By 1973, it had become clear that the mill could not comply with federal and Illinois pollution control standards if the pulping of wood chips continued. In that year, Alton embarked upon a program that would convert the mill to the exclusive use of wastepaper and ultimately result in full compliance with the BPT effluent limitations for plants using wastepaper exclusively. At the time the EPA published the BPT guidelines, the Alton mill was still using a combination of wood chips and wastepaper. The initial stages of the company’s process change were completed by June 1975; after that date, Alton used only wastepaper.129

Alton’s initial NPDES permit was issued in November 1974 and was modified in April 1976; the modified permit was to expire in June 1977. The company applied for a renewal of the permit, but the EPA denied this request in October 1977.130 The basis for denial was two-fold: Alton could meet neither the BPT limits nor the more stringent Illinois standards by July 1, 1977 and the Illinois EPA had refused to certify the renewal permit.131 Alton requested an adjudicatory hearing on the denial of the permit,132 contending that since the plant had undergone a process change after the promulgation of BPT limits, “fundamentally different factors” were present warranting a variance from those limitations.133 The EPA refused to hold the adjudicatory hearing on the ground that Alton had raised no issue of material fact.134

The company appealed both the denial of the permit and the denial of the adjudicatory hearing. A unanimous Seventh Circuit in Alton ordered the EPA to hold the hearing but declined, under the doctrine of primary jurisdiction, to order the issuance of the permit.135 In so doing, the court held that Alton’s contention that the necessity of the process change was a fundamentally different factor, entitling Alton to a variance, was sufficient to justify a hearing.136 The Seventh Circuit rejected the EPA’s argument that Alton had waived its right to raise the

129. 592 F.2d at 397.
130. Id. at 396.
132. An adjudicatory hearing may be requested by any interested person whenever a permit is granted, denied or modified. See 40 C.F.R. § 125.36 (1978). The Seventh Circuit held in United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977), that the provisions of the Administrative Procedure Act apply to the granting or denial of NPDES permits by the EPA and that the act also requires the holding of an adjudicatory hearing in such instances.
133. The “variance clause” allowing a showing of fundamentally different factors from the relevant BPT limitations is set forth at 40 C.F.R. § 430.52 (1978).
134. 592 F.2d at 398.
135. Id. at 399.
136. Id. at 401.
variance issue by not bringing it up at the time it applied for renewal of the permit. The court in Alton found that the regulation itself sets no such time limit and there was no evidence in the record which showed an "intentional and voluntary" waiver by Alton.137

Alton established no precedent in the area of environmental law. Rather, the Seventh Circuit corrected an error made by the EPA administrator in refusing to conduct the adjudicatory hearing. The administrator's refusal to conduct the hearing was improper since an issue of fact—whether Alton was entitled to a variance—was so clearly present. Thus, the Seventh Circuit's decision in Alton to grant the adjudicatory hearing was a correct one.

COMMON LAW NUISANCE IN THE AGE OF THE CLEAN WATER ACT

The Seventh Circuit was confronted with the viability of a common law nuisance action under the Clean Water Act in Illinois v. City of Milwaukee.138 In what appears to be a case of first impression, the court provided a penetrating analysis of the ancient and honorable common law right of the sovereign to abate a public nuisance and found that the right has survived the enactment of federal water pollution control legislation.139

The facts in City of Milwaukee are fairly simple, but the legal ramifications flowing from them are much more complex. The city of Milwaukee owns and operates two sewage treatment plants which process wastes collected from within its corporate limits and from several surrounding communities. The treated effluent is generally, but not always, in compliance with the secondary treatment standards required by section 301(b)(1)(B) of the Clean Water Act.140 On some occasions, particularly during periods of heavy rain, Milwaukee's combined storm and sanitary sewers overflow, causing the discharge of raw, untreated sewage. Whether treated or untreated, the effluent enters the waters of Lake Michigan where it is carried by current southward into Illinois waters close enough to the shoreline to come into contact with

137. Id. at 400.
138. 599 F.2d 151 (7th Cir. 1979).
139. Id. at 153.
140. 33 U.S.C. § 1311(b)(1)(B) (1976). The 1977 amendments did not change this requirement. "Secondary treatment" is defined in terms of quality of the effluent for specified pollutants. For biochemical oxygen demand (five day), the arithmetic mean of the values for effluent samples collected in a period of thirty consecutive days shall not exceed thirty milligrams per liter; this is commonly expressed as thirty mg/I BOD. For suspended solids, the arithmetic mean for samples collected in a thirty day period shall not exceed thirty milligrams per liter (30 mg/l SS). See 40 C.F.R. § 133.102 (1978).
bathers and to be inducted into drinking water treatment plants. Bacteria in the effluent can obviously cause infections in human beings with whom it comes in contact. The State of Illinois brought suit to require Milwaukee to eliminate the combined sewer overflows entirely and to upgrade the level of its sewage treatment to better than secondary.\textsuperscript{141} The district court agreed and ordered Milwaukee to undertake an extensive construction program to provide increased storage and holding capacity by 1989 so that there would be no overflows of untreated sewage.\textsuperscript{142} The district court further ordered Milwaukee to provide treatment facilities which by 1986 would result in an effluent standard higher than required by EPA regulations and the NPDES permits in effect for the two plants.\textsuperscript{143}

The city of Milwaukee appealed to the Seventh Circuit. The court in \textit{City of Milwaukee} was presented with two issues: whether a court in a common law nuisance action can order a greater degree of relief than is available under a comprehensive federal statute and whether the evidence before the district court was sufficient to support the relief it granted. The Seventh Circuit unanimously held that the Clean Water Act does not limit the relief which may be ordered in a nuisance case, but that the evidence before the court was sufficient to support only

\textsuperscript{141} The history of this case is long and complicated. Illinois originally moved for leave to file a complaint in the Supreme Court under original jurisdiction doctrine U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251 (1976). The motion was denied on the ground that a municipality is not a "state" within the meaning of original jurisdiction doctrine. Instead, Illinois was advised to file its complaint in a district court under the federal common law of nuisance. Illinois v. City of Milwaukee, 406 U.S. 91, 98, 107 (1972). Illinois then filed suit in the United States District Court for the Northern District of Illinois. Defendants' motions to dismiss for lack of in personam jurisdiction and improper venue were denied. Illinois v. City of Milwaukee, 4 ERC 1849 (N.D. Ill. 1972), as were defendants' subsequent motions to dismiss for failure to state a claim upon which relief could be granted. Illinois v. City of Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973).

\textsuperscript{142} 366 F. Supp. at 300.

\textsuperscript{143} The court held the city to a "5/5" standard rather than the "30/30" standard required by EPA regulations and NPDES permits in effect at the two plants.

The NPDES permits for the two treatment plants were issued by the Wisconsin Department of Natural Resources under section 402(b) of the Clean Water Act, 33 U.S.C. § 1341(b) (1976). Although Wisconsin had the authority to enact limitations more stringent than those established by EPA, the state did not do so here. The EPA did not exercise its authority to veto the permits under section 402(d)(2). The Seventh Circuit succinctly summarized the differences between the district court's requirements and those of the discharge permits:

All of the effluent limitations imposed by the district court, except the phosphorus limitation, are significantly more stringent than those prescribed by EPA or in the discharge permits; in lieu of 30 mg/1BOD\textsubscript{5} and suspended solids, the district court requires 5 mg/1; in lieu of 200 fecal coliform cells per 100 ml, the district court requires 40/100 ml; in lieu of the monitoring requirement for chlorine, the district court requires a free chlorine residual 15 minutes after exposure. Further, as to BOD\textsubscript{5} and suspended solids, the district court imposes an absolute maximum of 10 mg/1 instead of the variable 85% removal requirement in the EPA regulations and the discharge permits.

599 F.2d at 174.
part of the remedy fashioned by the district court. Specifically, the court upheld the order to eliminate the overflows, but reversed the requirement to upgrade the treatment level to better than secondary treatment on the ground that the evidence of record did not support that result.

Regarding the relief issue, Milwaukee argued that while the 1972 and 1977 amendments to the Federal Pollution Control Act, now the Clean Water Act, did not preempt the federal common law of nuisance, the amendments severely circumscribed the limits of relief that could be granted under the act. The act itself speaks to this issue. Section 101(b) of the act provides:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

Congress then built upon this foundation by confirming the right of a state to adopt and enforce effluent limitations and abatement requirements more stringent than those established by the EPA. This recognition of the right of individual state enforcement was reemphasized by section 301 of the act which permits some diversity by the states in approaching the goal of abating pollution. Any remaining doubts as

144. Id. at 175-76.
145. Id. at 177.
149. The State of Wisconsin argued amicus curiae that the act is a comprehensive scheme that preempts the common law. 599 F.2d at 151. The United States argued amicus curiae to the contrary. Id.
151. Congress declared in section 510 that:

[N]othing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof . . . 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 . . . is in effect under this chapter, such state or political subdivision . . . may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent than the effluent limitation . . . under this chapter; 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.

152. Clean Water Act § 301, 33 U.S.C. § 1311(b)(1)(C) (1976). Section 301 requires that there shall be achieved:

[N]ot later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulation . . . or any other federal law or regulation, or required to implement an applicable water quality standard established pursuant to this Act.
to the intentions of Congress were dispelled by section 505(e) of the act which declared that:

[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . .

Finally, in section 511(a) of the act, Congress stated that the act:

shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with the provision of the Clean Water Act.

The Seventh Circuit in Illinois v. City of Milwaukee looked to the legislative intent behind the enactment of these sections. In so doing, the court found that Congress did not intend to preclude a state from enacting limitations more stringent than those established by the Clean Water Act. With regard to a common law nuisance action, the Seventh Circuit in City of Milwaukee determined that there was no congressional intent for the Clean Water Act to preempt a federal common law action of nuisance. In addition, the court held that the Clean Water Act did not preclude a federal court, as an officer or agency of the United States, from imposing more stringent effluent requirements which may be necessary to prevent harm in a common law nuisance action.

Having recognized the right of Illinois to maintain this action and obtain relief other than that provided for under the Clean Water Act, the Seventh Circuit next examined the elements of the claim and the appropriate standards of proof. The Seventh Circuit concluded that Illinois had the burden traditionally present in a nuisance case—a preponderance of the evidence. Applying this standard to the record before it, the court in City of Milwaukee determined that the evidence

153. Id. § 1365(e).
154. Id. § 1371(a).
155. 599 F.2d 151 (7th Cir. 1979).
156. Id. at 162.
157. Id. at 163.
158. Id.
159. Id. at 167. The Seventh Circuit noted that in exercising its original jurisdiction in pollution cases, the Supreme Court has adopted the preponderance of the evidence standard when the polluter is a private party, Georgia v. Tennessee Copper Co., 206 U.S. 230, 238-39 (1907), but a clear and convincing evidence standard when the polluter is a state, New York v. New Jersey, 256 U.S. 296, 309 (1921). However, based on language in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 501-02 (1971), to the effect that the clear and convincing standard was an accommodation to the Supreme Court's function as an appellate tribunal, the Seventh Circuit held that the rationale for requiring the higher standard of proof is inapplicable when the action is tried in a trial court. 599 F.2d at 167.
supported the district court's order to require Milwaukee to eliminate the overflows, but did not support the order requiring Milwaukee to upgrade the level of its existing treatment system. In essence, the court could find nothing in the record to connect the specific numerical limitations imposed by the trial court with concrete, measurable protection of Illinois residents. Significantly, the Seventh Circuit did not hold that limitations more stringent than required by the Clean Water Act could never be ordered in a nuisance action. The court simply stated that, on this record, such a remedy could not be supported.

Illinois v. City of Milwaukee appears to be the first "post-1972 amendments" case to raise the common law nuisance issue. The Seventh Circuit squarely faced this issue and rendered an important, precedential decision. The court's decision in favor of the rights of the citizen to be protected from environmental nuisance is entirely consistent with the spirit of the court's concerns for the rights of public participation as expressed in Citizens for a Better Environment v. EPA.

CONCLUSION

The Seventh Circuit's 1978-79 term was marked by several significant decisions in the area of environmental law. With the exception of Central Illinois Public Service Co. v. EPA, all cases appear to have been appropriately decided. Although these decisions are few in number, the 1978-79 cases illustrate that the Seventh Circuit continues to make important contributions to the area of environmental law.

160. Id. at 168.
161. The Seventh Circuit was particularly concerned that unsupported conclusions by experts were being offered in an effort to justify effluent limitations substantially more stringent than (1) those established in the EPA regulations, (2) those established in the Wisconsin permits for the purpose of protecting residents in the immediate vicinity of the discharges, and (3) those established by Illinois itself for waters other than Lake Michigan. The Seventh Circuit found the record to be conspicuously silent as to the reasons these less stringent standards were found adequate to protect persons in the immediate environs of the discharges by experts presumably as dedicated to the protection of public health and the environment as those experts relied upon by the State of Illinois. The Seventh Circuit concluded:

Our difficulty with the evidence . . . is that it consists merely of conclusions of the experts and does not explain why the particular standards are necessary to protect the health of Illinois residents. We are asked to accept the conclusions on faith. It is difficult for us to see how the opinion of an expert can be intelligently appraised unless it is supported by reasons.

Id. at 175.
162. Id. at 176.
163. 599 F.2d 151 (7th Cir. 1979).
164. 596 F.2d 720 (7th Cir. 1979). See text accompanying notes 80-122 supra.
165. 594 F.2d 636 (7th Cir. 1979).