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ENVIRONMENTAL LAW: THE SCOPE OF THE EPA'S AUTHORITY AND OTHER ISSUES

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Throughout the course of its 1983-84 term, the United States Court of Appeals for the Seventh Circuit decided relatively few cases concerning environmental law. Despite the small number of cases, the Seventh Circuit made key decisions in the areas defining the power of the United States Environmental Protection Agency,1 and the role of federal courts and federal law in environmental law cases. Specifically, the Seventh Circuit dealt with such issues as the reclassification of attainment areas,2 the approval of state implementation plans,3 the right of the EPA to enter the premises of a refinery allegedly operating in violation of mandated pollution standards to sample its waste discharge,4 and when the EPA is required to issue an environmental impact statement.5 In addition, the Seventh Circuit ruled on the power of federal courts to enforce state implementation plans approved by the EPA but subsequently invalidated by the state court on procedural grounds6 and the applicable law in a nuisance action involving the discharge of pollutants into an interstate body of water.7

This article will discuss the decisions handed down by the Seventh Circuit in the above-mentioned areas of environmental law. In addition, this article will focus on the reasoning employed by the court in reaching its conclusions, analyze the soundness of the decisions and suggest the possible ramifications stemming from the resolutions of the cases.

RECLASSIFICATION OF ATTAINMENT AREAS

As amended in 1970, section 109 of the Clean Air Act8 requires the

1. Hereinafter referred to as "EPA."
2. Bethlehem Steel Corp. v. EPA, 723 F.2d 1303 (7th Cir. 1983); Wisconsin Elec. Power Co. v. Costle, 715 F.2d 323 (7th Cir. 1983).
8. Hereinafter referred to as "NAAQS."
EPA to establish national ambient air quality standards, and section 110 requires the states to create and adopt implementation plans for attaining those standards.\(^9\) To more quickly achieve attainment goals, Congress, in the Clean Air Act amendments of 1977, added section 107(d) to the Clean Air Act.\(^10\) Under this section each state is required to submit to the EPA a list of areas within the state that have reached the proscribed attainment levels, areas that have not reached the attainment levels (nonattainment areas) and areas that cannot be classified either way based on available information.\(^11\) Additionally, section 172 was added to set more stringent requirements for state implementation plans\(^12\) in nonattainment areas.

Following the state's submittal of the list, the Administrator of the EPA is to promulgate each list with such modifications as he deems necessary. Whenever the Administrator proposes a modification, he is to notify the state and request all available data concerning the region to be modified. Further, the Administrator is required to allow the state an opportunity to demonstrate why any proposed modification would be inappropriate.\(^14\)

In *Bethlehem Steel Corp. v. EPA*,\(^15\) the Seventh Circuit was called upon to decide, for the first time, whether the EPA could modify a list after promulgation to change an air quality control region from unclassifiable status to a nonattainment area. In *Bethlehem Steel*, the State of Indiana submitted an original list of air quality regions. The Burns Harbor Works of Bethlehem Steel Corporation was located in a region designated as unclassifiable. The EPA also designated the region as unclassifiable on its list in 1978. Four and a half years later, the EPA reclassified the area encompassing the Burns Harbor Works as a nonattainment area.\(^16\) Bethlehem sought to have the EPA’s classification order set aside.\(^17\)

In deciding whether the EPA had the power to revise the list after

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10. Id. at § 7407(d) (1978).
11. Id. at § 7407(d)(1) (1978).
12. Hereinafter referred to as “SIP.”
13. 42 U.S.C. § 7502 (1978). The purpose of section 172 was to raise the existing air quality levels. Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1305 (7th Cir. 1983).
15. 723 F.2d 1303 (7th Cir. 1983).
16. Id. at 1305–06. Indiana was required to submit within one year a new SIP to the EPA that would provide for attainment of federal air quality standards within three and a half years of EPA approval.
17. Id. at 1306. The EPA argued that Bethlehem had forfeited its right to judicial review of the order by not timely challenging the EPA’s interpretation of the regulation, (40 C.F.R. § 81.300 (1978)), in which the EPA announced it could reclassify areas after the initial promulgation. The
promulgation, the court looked to the applicable statute. The court analyzed the wording of the statute and found nothing to support the EPA's argument that the Administrator had the power to revise the list "whenever" he deemed it necessary. The court further found that the word "whenever" in the section applied only to the notification requirement.

Having found nothing on the face of the statute to support the EPA's argument, the court next focused on the legislative intent behind the statute. The court noted that the bill that became section 107(d) of the Clean Air Act did not use the word "whenever" and the court had grave doubts that the committee intended the proposed section to have the "dramatic effect that EPA ascribes to it." Finally, the Seventh Circuit added that no procedures for reclassification were set forth other than in section 107(d) and this section would have been the natural place to empower the EPA to revise the list after promulgation.

The court continued its analysis by discussing the deadlines set forth in the 1977 amendments to the Clean Air Act. Under section 172(a)(1), compliance with NAAQS was required by December 31, 1982. Thus, when the area encompassing the Burns Harbor Works was reclassified as a nonattainment area in August, 1982, there were but a few months left to meet the statutory deadlines. Considering the time allotted for the state to submit to, and gain approval from, the EPA for a new implementation plan, the court reasoned that it would be unrealistic to expect compliance with the more stringent standards in such a short time period. The EPA was also aware of this unrealistic expectation, and, consequently, it "made up" new deadlines in order for it to gain the desired results. The court concluded that, in doing so, the EPA had gone beyond the scope of the 1977 amendments.

Finally, the Seventh Circuit noted that the Clean Air Act was designed to establish a scheme of cooperative state and federal regula-

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19. 723 F.2d at 1306. The court added that the word "whenever" used in this context means "in any way or every instance which"—a common usage of the word—rather than "at any time."
20. Id. at 1307.
21. Id.
23. 723 F.2d at 1308.
24. Id.
25. Id. The court found it directly in conflict with the statutory scheme for the EPA to impose deadlines on the states not provided for in the statute even though the successive amendments to the Clean Air Act have progressively enlarged the role of the EPA relative to that of the state regulators.
tion, rather than of purely federal regulation. Pursuant to this scheme of federalism, the primary responsibility for assuring air quality rests with the state through implementation plans subject to federal review.\textsuperscript{26} Although the EPA argued that the court should defer to the EPA's interpretation of the Clean Air Act, which the EPA enforced, the court disagreed. The court concluded that by allowing the EPA to add to the list of nonattainment areas whenever it so desired would be to destroy the balance of state and federal cooperative regulation set forth in the Clean Air Act. The court stated that it would be "dangerous to automatically defer to the agency's view."\textsuperscript{27} Finally, the court held that the EPA exceeded its power by ordering the reclassification of the area encompassing the Burns Harbor Works. Therefore, the order was vacated.\textsuperscript{28} In short, the court was unwilling to condone the EPA's action when the action was in stark conflict with the Clean Air Act.

In \textit{Bethlehem Steel}, the Seventh Circuit made a point much broader than that the EPA had merely overstepped its bounds. It is clear that a major goal of the Clean Air Act is to increase the air quality throughout the nation. In a narrow sense, the \textit{Bethlehem Steel} decision may have struck a blow against the goal. Although the case was decided consistently with the wording and intent of the statute, the end result was the refusal to allow the EPA to reclassify a specific area as a nonattainment area. In light of the more stringent standards placed upon nonattainment areas, the decision would seem to thwart, at least temporarily, the goal of increasing air quality.

However, another goal implicit in the Clean Air Act is a federalistic\textsuperscript{29} scheme of regulation. The decision clearly illustrates the Seventh Circuit's strong belief in this scheme. The federal court's holding was to the detriment of a federal agency, but to the benefit of a state. The court's refusal to permit unwarranted federal dominance over a state activity is consistent with the federalistic spirit of the Constitution and the Clean Air Act. It is necessary to adhere to this approach, especially

\textsuperscript{26} \textit{Id.} at 1308-09 (interpreting 42 U.S.C. §§ 7401(a)(3), 7407(a) (1978)).

\textsuperscript{27} 723 F.2d at 1309. Here, the court noted that it must enforce the balance and not maximize the position of one side at the expense of the other side.

\textsuperscript{28} \textit{Id.} at 1310. However, the court added that the EPA was not helpless to deal with the air pollution in the area in question. Alternative means of regulation were available. \textit{See 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1)(C) (1978)}.

\textsuperscript{29} In the context of this article, the word "federalistic" is used to suggest the notion of the balancing of power between the federal and state governments. Much of the federal anti-pollution legislation is federalistic in the sense that the duty of carrying out the legislation is divided between the federal and state governments. In that respect, much of the anti-pollution legislation is analogous to the federalism form of government in the United States.
when deviation would place discretion in the hands of a federal agency which, in this case, was prone to abuse discretion.

A second case which concerned the reclassification of attainment areas, but which presented the issue in a slightly different context, was *Wisconsin Electric Power Co. v. Costle.* In 1978, the EPA approved the Wisconsin Department of Natural Resource's list of classifications of attainment and nonattainment areas. According to the list, Milwaukee County was designated as an attainment area. However, in 1979, pursuant to the Clean Air Act, the WDNR recommended that portions of Milwaukee, including the portion in which the Wisconsin Electric Power Company's plant was located, be redesignated as nonattainment. In addition to the recommendation, WDNR submitted to the EPA documents describing monitored violations of air quality standards. Despite WEPCO's protests, the EPA signed the final rule of redesignation in 1980. WEPCO timely filed a petition for judicial review. However, the Seventh Circuit postponed decision on the petition until the EPA acted on WEPCO's petition to the EPA seeking reconsideration of its rule and redesignation of the Milwaukee area as an attainment area. In 1982, WEPCO's petition was denied by the EPA. The EPA's decision was based on a WDNR modeling analysis of the air quality which predicted numerous violations of air quality standards.

WEPCO appealed the nonattainment designation and the denial of the petition to change the nonattainment designation. The court declared that it would disturb the EPA decision only if it determined that the EPA acted beyond the scope of its statutory authority or in an arbitrary and capricious fashion.

In arguing against the nonattainment designation, WEPCO alleged that the EPA illegally based its decision on monitored data reported by running averages, as opposed to block averages. Conversely, the Seventh Circuit found that the EPA could, consistent with the Clean Air Act, base its decision on monitored data reported by running averages.

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30. 715 F.2d 323 (7th Cir. 1983). Douglas M. Costle is a former Administrator of the EPA.
31. Hereinafter referred to as "WDNR."
32. 42 U.S.C. § 7407(d)(2), (5) (1978). According to these sections, a state or the EPA may institute proceedings to revise a classification list if the need arises.
33. Hereinafter referred to as "WEPCO."
35. Id.
36. A "running average" is a monitored maximum average of sulfur dixoide concentrations based on a 24-hour period commencing at any time during the day.
37. A "block average" is a monitored maximum average of sulfur dixoide concentrations measured during a 24-hour period starting at midnight. A block average is less likely than a running average to detect air quality standard violations.
Act, rely on running averages. The court added that the EPA had expressed the rational reasoning that running averages should be used "because people breathe in SO₂ from the ambient air on a continuous basis rather than in midnight 'blocks'."

WEPCO's second challenge to the nonattainment designation was that in the time since the EPA had promulgated its ruling, new data had become available tending to show that the area would qualify as an attainment area. The court refused to accept the argument. Instead it emphasized that it is a principle of administrative law that WEPCO could not offer a reviewing court a post hoc basis for disturbing a prior decision and that the decision must stand or fall on the record before the EPA at the time when it announced its decision. The Seventh Circuit refused to set aside the EPA's designation based on information that was not available at the time the EPA rendered its decision.

WEPCO further contended that the EPA had improperly denied WEPCO's petition for redesignation of the nonattainment area. WEPCO argued that the EPA's decision was both procedurally and substantively improper. The court ruled that the only procedural requirements of the EPA were to give notice of its intention, to allow interested parties to comment, and to set forth the reasons for its decision. The court deemed the requirements satisfied. The EPA had sent WEPCO a letter informing it that the EPA would postpone its ruling on the petition until it received WDNR's RAM modeling analysis data. Thus, the court concluded that WEPCO was given adequate notice and that WEPCO had ample opportunity to comment during the waiting period. Further, the Seventh Circuit pointed out that the EPA had set forth its reasons for denying the petition when it based its decision on the numerous violations predicted by the RAM modeling analysis. Therefore, the court concluded that the EPA had met the procedural requirements in denying the petition.

39. 715 F.2d at 326.
40. Id.
41. Id.
42. Id. at 327. The court noted that the proper use of the post-decision data was to petition the EPA for a redesignation of the area. WEPCO did so, however the petition was denied.
43. Id. at 328.
44. Id. (interpreting 5 U.S.C. § 553). The court found that the "set for the reasons" requirement was implicit in the statute's structure.
45. A RAM model is an EPA approved multi-source model for making attainment or nonattainment determinations.
46. 715 F.2d at 327-28.
47. Id. at 329. The court added that "reviewing courts must refrain from creating administra-
WEPCO's substantive argument was that the EPA should have based its decision on monitored data tending to show the area as an attainment area rather than the data gathered from the RAM modeling analysis. However, the court showed that the Clean Air Act is explicit in authorizing the EPA to base its decisions on either monitored data or air quality modeling.\(^4\) Moreover, the Seventh Circuit noted that the EPA's policy does not mandate the preference of monitored data over modeling data.\(^4\) The EPA's policy dictates the use of monitored data over modeling data only if the monitored data is adequate and in conflict with the modeling results.\(^5\) The court decided that the EPA had reason to believe that monitored data was inadequate considering that the WDNR's model demonstrated that the monitors did not adequately reflect the air quality. Additionally, the monitored data was a historical record while the modeling data was a prediction of future air quality. Consequently the two sets of data were not in conflict. Therefore, the EPA acted properly in relying on the modeling data.\(^5\) WEPCO's petitions for review were denied.\(^5\)

As in Bethlehem Steel,\(^5\) Wisconsin Electric Power\(^5\) presented the Seventh Circuit with the issue of the federalistic scheme of the Clean Air Act. In the instant case, the scheme was carried out. The EPA acted based upon information from the state. Further, the EPA followed the procedural requirements of the Clean Air Act, which in part serve to guarantee the federalistic structure by balancing federal and state power. Although the scheme of the Clean Air Act procedurally balances power, a court could nevertheless upset the balance by allowing the EPA too much authority, or by restraining the EPA's authority. In the present case, if the Seventh Circuit had restrained the EPA, after the EPA had relied on state supplied information and had followed the mandated procedures, the federalistic balance of power would have been tipped too far toward total state control.

**APPROVAL OF STATE IMPLEMENTATION PLANS**

A second area of environmental law which confronted the Seventh
Circuit during its 1983-84 term was the EPA's power to approve SIP's. As in the area of reclassification of attainment areas, the court was asked to set boundaries on the EPA's authority.

In *Indiana & Michigan Electric Co. v. EPA*, the court addressed the question of whether the EPA could disallow an integral part of an SIP without determining that the part violated the provisions of the Clean Air Act. In this case, the Indiana Air Pollution Control Board submitted to the EPA a revised SIP. The SIP included a ceiling on sulfur dioxide emissions. However, the SIP also contained a provision that a source would be in compliance if its daily emission did not exceed the ceiling when averaged over thirty days. The EPA approved the SIP, yet the agency stated that it was "taking no action on the 30-day averaging concept." The company's petition for review challenged the EPA's order.

The Clean Air Act provides that the Administrator of the EPA shall approve any revised SIP provided it meets the requirements of the Act and has been adopted by the state. Although the court had previously held that the Administrator had the power to partially approve a revised SIP, here it found nothing to suggest that the EPA could approve a revision in part without first considering the part to be omitted. The Seventh Circuit declared that the EPA is bound to approve a revised SIP, limitations and all, if it determines that the SIP meets the requirements of the Clean Air Act. Consequently, the EPA must evaluate the entire SIP to determine whether the requirements have been met.

Finally, the court concluded that the state is entitled to have its SIP accepted or rejected based on the merits of the plan, not based on a regulatory delay. Thus, in failing to make a complete evaluation, the EPA acted beyond its power. The court set aside the EPA's order.

A related issue was presented in *New York v. EPA*, where the court was asked to determine the extent to which the EPA must consider the

55. 733 F.2d 489 (7th Cir. 1984). The Indiana & Michigan Electric Power Company will be hereinafter referred to as "Company."
57. 733 F.2d 489 (7th Cir. 1984).
60. 733 F.2d at 491.
61. Id. at 492.
62. Id. The court added that ruling otherwise would place a more stringent regulation on the state than the state desired without first determining that the less stringent regulation was unlawful. Id.
63. Id.
64. 716 F.2d 440 (7th Cir. 1983).
interstate impacts of a revised SIP. In New York, the EPA approved the revision of an Illinois SIP which allowed the Kincaid Power Station to increase its sulfur dioxide emissions. The State of New York challenged the approval as invalid based on a theory that the EPA did not consider the interstate impact caused by the relaxation.\(^6\)

The court agreed with the State of New York to the extent that relaxation of emission limits at Kincaid Power Station may have interstate effects upon all NAAQS and that the Clean Air Act requires the EPA to test by model the effects of the increased emissions.\(^6\) However, the New York court found that the EPA did make a modeling study of the effect of the emissions. The study showed that the effects of relaxation on the air quality would be the most drastic in the immediate area and would decrease sharply and quickly 1.7 kilometers from the Kincaid Power Station. Based on this information, the EPA concluded it would be unlikely that the emissions would have a significant impact beyond the immediate area. Thus, the increase would not prevent the attainment or maintenance of NAAQS in any downwind state.\(^6\) Accordingly, the New York court held that the EPA had complied with the requirements of the Clean Air Act in considering the interstate effects to the limited extent possible given current modeling tools.\(^6\)

The State of New York proceeded to argue that the EPA had a duty to use the most accurate and reliable modeling techniques available in making its determination.\(^6\) It further urged that the EPA was required to utilize a computer based modeling technique suggested by New York, or, in the alternative, defer any action on the proposed revision until the EPA developed an accurate and reliable model.\(^7\)

The Seventh Circuit ruled that the Clean Air Act did not require the EPA to adopt any specific modeling technique\(^7\) and that the EPA chose the model it used because the model was the most reliable. Therefore, the court concluded, the state of New York was asking the court to replace the technical judgment of the EPA with the court's judgment. This

\(^{65}\) Id. at 442.
\(^{67}\) 716 F.2d at 443.
\(^{68}\) Id. The court emphasized that it could not require the EPA to do the impossible. Accord, Connecticut v. EPA, 696 F.2d 147 (2d Cir. 1982).
\(^{69}\) An in-depth discussion of issues created by modeling techniques is contained in, Case, Problems in Judicial Review Arising from the Use of Computer Models and Other Methodologies in Environmental Decisionmaking, 10 B.C. ENVT'L AFF. L. REV. 251 (1982-83).
\(^{70}\) 716 F.2d at 444.
\(^{71}\) The EPA in making its decision also relied on information gathered by Commonwealth Edison using the EPA-approved CRSTER model.
was clearly beyond the court's authority.\textsuperscript{72}

The State of New York asserted that the EPA failed to make a prevention of significant deterioration\textsuperscript{73} analysis before approving the revision, as required by the Clean Air Act.\textsuperscript{74} The court quickly dismissed this argument. At the time of the EPA's decision, no baseline level of air quality\textsuperscript{75} had been set for Christian County,\textsuperscript{76} nor had an application for a PSD permit been filed. Further, the revision did not require such a permit. Thus, no calculation of baseline concentration was made. Therefore, it was impossible to determine whether the revision would cause impermissible increases of pollution over the baseline level. In addition, the Seventh Circuit declared that the EPA is not required to make a PSD analysis prior to a permit application which would trigger baseline calculations. Accordingly, the EPA had no duty to conduct a PSD analysis.\textsuperscript{77} The court held that the EPA had complied with the Clean Air Act. Therefore, New York's petitions for review were denied.

As in the cases concerning the reclassification of attainment areas, it is clear that in cases concerning the EPA approval of revised SIPs, the Seventh Circuit is willing to set guidelines on the scope of the EPA's power. Through careful interpretation of statutes and detailed investigation of EPA actions, the court has allowed the EPA much leeway. Nonetheless, the court has been quick to restrain the EPA from abusing its discretion when the result would be unjustly adverse to a state. These decisions emphasize the Seventh Circuit's commitment to promoting the federalistic scheme contemplated in the Clean Air Act. The balancing of power necessary under the scheme is not to balance powerful federal control against weak state control, or vice versa, to reach some sort of middle ground. Conversely, the balancing necessary is to balance the control and power between a strong federal governing body and a similarly strong state governing body. Although such balancing may be difficult, the Seventh Circuit has not shied away from its responsibility to help clarify the delicate balance.

The holding in \textit{New York v. EPA},\textsuperscript{78} that the EPA has the discretion to use the modeling technique of its choice, is sound in terms of the feder-
alistic regulatory scheme. However, the decision may inadvertently lead to stunting the development of more accurate modeling techniques. Obviously, more accurate modeling techniques could indirectly aid in increasing air quality.\(^7\) In all fairness to the Seventh Circuit, however, the burden of developing more sophisticated, accurate modeling techniques must fall on the EPA, not the courts.

**THE EPA'S POWER TO TAKE SAMPLES FROM INDUSTRIAL WASTE STREAMS**

Once again, in *Mobil Oil Corp. v. EPA*,\(^8\) the Seventh Circuit attempted to help clarify the EPA's scope of authority. However, the question of authority arose in an entirely different context in the *Mobil Oil* case. The Mobil Oil Corporation\(^8\) operates a petroleum refinery near the navigable Des Plaines River in Illinois. Pursuant to power delegated to it by the EPA, the Illinois Environmental Protection Agency issued a permit to Mobil to dump limited amounts of specified pollutants into the river. The permit required Mobil to monitor the pollutants it dumped into the river by regularly taking samples from the refinery's waste streams taken at a point representative of discharge\(^8\) into the river. The permit further required Mobil to periodically report the test results to EPA.\(^8\)

In 1982, engineers from the EPA sought Mobil's permission to collect samples of the treated and untreated water from the waste streams. Permission was granted concerning the treated waste water but refused concerning the untreated waste water. Later, the EPA obtained an administrative warrant to collect the untreated samples. Mobil's motions to quash the warrant, for a permanent injunction prohibiting the EPA from further exercising the warrant, and requiring the EPA to return the

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\(^7\) At least one commentator has suggested that federal courts' commitment to federalism in environmental regulation may be so strong as to lead to adverse effects on the environment. In the instant case, by allowing the EPA to use its allegedly out-dated modeling techniques the interstate effects of the increased limits were not considered to the fullest possible extent. Had the court forced the EPA to use the more advanced modeling system suggested by the State of New York, the possible adverse interstate effects would have been more fully considered. Nonetheless, the choice of modeling techniques was within the realm of the EPA's power. In the interest of the federalistic scheme but to the possible detriment of interstate air quality, the Seventh Circuit was unwilling to infringe upon the EPA's power. A discussion of similar problems created by the federalistic scheme can be found at, Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect?*, 13 Sw. U.L. Rev. 571 (1983).

\(^8\) 716 F.2d 1187 (7th Cir. 1983), cert. denied, 104 S. Ct. 2363 (1984).

\(^8\) Hereinafter referred to as "Mobil."

\(^8\) Presumably, Mobil treated its waste before dumping it into the river in order to bring the level of pollutants within the proscribed limits of the permit. For the EPA's purposes, the point representative of discharge into the river occurs after the treatment.

\(^8\) 716 F.2d at 1189.
previously gathered samples along with the information discerned, were all denied by the lower courts. Mobil appealed to the Seventh Circuit.\(^{84}\)

On appeal, the EPA argued that it was authorized to test the effluents before and after treatment, while Mobil countered that tests could be taken after treatments only. The Clean Water Act authorizes the EPA to enter the premises in which any effluent source is located and to sample any effluent samples which the operator of that source is required to sample.\(^{85}\) Thus, the court found that the EPA had a right to enter the premises, but the issue of the power to collect samples of untreated waste water remained.\(^{86}\)

In deciding this issue, the court looked to Mobil's interest in preventing the EPA from collecting samples. Mobil had an interest in preventing the disruption of the daily workings of its refinery. However, Mobil admitted that the EPA had the right to collect treated samples. Additionally, the EPA had the power to inspect Mobil's records and equipment used to combat the flow of pollutants from the refinery. Thus, the court found it hard to imagine that collecting samples of untreated effluent could be anymore inconvenient to Mobil than collecting treated samples. The court added that Mobil's true interest was apparently to frustrate the EPA in discerning the efficiency of Mobil's treatment processes.\(^{87}\)

Next, the court looked to the goals of the Clean Water Act and the obligations placed on the EPA by the Act. One of the goals of the Act is to eliminate the discharge of all water pollutants by 1985. In order to achieve that goal, the Act authorizes the EPA to police compliance with permits to pollute. Additionally, the EPA is required to set limits upon the level of water pollution by a permit holder.\(^{88}\) The *Mobil Oil* court noted that the EPA had a legitimate need for information regarding the efficiency of waste treatment streams.\(^{89}\) Therefore, the court concluded that the most effective means for the EPA to reach the goals of the Clean Water Act and to meet its obligations and legitimate needs was to take samples of both the treated and untreated waste water.\(^{90}\)

The court stated that Mobil's interest "in keeping secret information about the pollutants in its waste water" was not entitled to protection.\(^{91}\)

\(^{84}\) *Id.*
\(^{86}\) 716 F.2d at 1189.
\(^{87}\) *Id.* at 1190.
\(^{90}\) 716 F.2d at 1190.
\(^{91}\) *Id.*
Considering the EPA's legitimate interests in sampling the untreated waste water, the court accordingly affirmed the judgment of the lower court.

Consistent with the previously discussed environmental issues confronting the Seventh Circuit, the *Mobil Oil* case dealt with a gray area of the EPA's authority. Once again the court allowed the EPA considerable leeway in the absence of an explicit statutory provision to the contrary. Similarly, the EPA was able to articulate several legitimate needs, as well as statutory obligations, justifying the granting of the implied power.

The *Mobil Oil* case presented the balancing of power issue in a slightly different setting than the previously discussed cases. The Seventh Circuit decided the issue consistently with its other decisions. However, the instant decision was beyond a mere victory for the federalistic structure of environmental protection. The *Bethlehem Steel* decision may have indirectly failed to promote increased air quality by refusing to allow the EPA to reclassify an area as a nonattainment area, thus, subjecting the area to more stringent pollution standards. In addition, the *New York* decision may have been a set-back to the creation of more accurate modeling techniques which, in the long run, would aid in increasing air quality. In sum, these decisions may have the potential to indirectly lead to some sacrificing of the quality of the environment. The sacrifice was made in the name of the federalistic structure of environmental regulation. However, the ultimate resolution of the *Mobil Oil* case will lead to no such sacrifice. The decision allows the EPA to go directly to a source of pollution. If the EPA uses this authority properly, it can only lead to the reduction of water pollution.

THE EPA'S DISCRETIONARY POWER TO ISSUE ENVIRONMENTAL IMPACT STATEMENTS

In *Simons v. Gorsuch*, the court was presented with the issue of whether the EPA was required, as a matter of law, to issue an Environmental Impact Statement when a sewage treatment plant was constructed with the aid of funds from a federal grant. In *Simons*, the City

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92. 715 F.2d 1248 (7th Cir. 1983).
93. A second issue in the case was whether Simons had the right to notice, through the mail, of public hearings which were required by local ordinances prior to the issuance of a permit to operate the sewage treatment plant. Under the local ordinances such notice must be given to all land owners whose land is within 300 feet of the sewage treatment plant. However, the court found that Simons' land, by his own admission, was not within the 300 foot perimeters; thus, he was not entitled to such mailed notice. *Id.* at 1252.
94. Hereinafter referred to as "EIS". A discussion concerning the problems created by requir-
of Hayward, Wisconsin, received grants from the EPA to develop and ultimately construct a sewage treatment plant. Prior to construction, a WDNR study concluded that the plant would have no significant impact on the environment and the WDNR forwarded its findings to the EPA. The EPA evaluated the proposed project and concluded that it would have no significant impact on the human environment. Simons' suit seeking a permanent injunction prohibiting the construction and operation of the facility was denied by the lower court. No EIS had been prepared or issued by the EPA. On appeal, Simons argued that an EIS should have been issued as a matter of law.95

In order to determine whether an EIS was required, the court analyzed the applicable section of the National Environmental Policy Act.96 The Act requires the EPA to issue an EIS in a major federal action significantly affecting the quality of the human environment. In defining a "major federal action" the court looked to the Federal Water Pollution Control Act which deems a federally funded, publicly owned treatment plant as a "major federal action."97 Although the project qualified as a major federal action, the court reasoned that the EPA still had the discretion to determine whether the major federal action would significantly affect the quality of the human environment.98

The EPA had made a prior determination that the project would not significantly affect the human environment. Hence, the court held that the EPA was not required as a matter of law to issue an EIS.99 Consequently, Simons' appeal from the lower court's summary judgment in favor of the EPA was affirmed.100

The Simons case presented yet another context in which the court was called upon to interpret the EPA's discretionary power. The court showed a great deal of deference to the EPA. Here, the court's liberal reading of the statute avoided having stringent restraints placed on the EPA's discretionary authority.

95. 715 F.2d at 1249.
99. 715 F.2d at 1252. See 33 U.S.C. § 1371 (1978). The court added that such a requirement in all federally funded facilities cases, instead of only those cases involving significant effects on the human environment, would "strip the EPA of substantial discretion." 715 F.2d at 1252.
100. 715 F.2d at 1253.
The Federal Courts' Power to Enforce a SIP Invalidated by the State Court

Aside from aiding in the determination of the EPA's authority, the Seventh Circuit determined, in part, the scope of its own authority in certain aspects of environmental law. *Sierra Club v. Indiana-Kentucky Electric Corp.*[^101^] presented the court with the issue of whether a federal court may enforce a SIP approved by the state and the EPA, but subsequently invalidated by the adopting state on the state law procedural grounds. In *Sierra Club*, the Sierra Club brought suit to enforce an Indiana SIP against alleged polluters. However, prior to the suit, but subsequent to the EPA's approval of the SIP, the Indiana Court of Appeals held the SIP invalid on state procedural law grounds.[^102^]

The Seventh Circuit found it clear that an administrative action which failed to comply with proper procedures cannot be given effect. Further, when the SIP failed to comply with proper procedure, it was as if the SIP was never submitted to the EPA for approval.[^103^] Additionally, the court declared that federal decisions construing the Clean Air Act encouraged state court review of state procedural plan adoption.[^104^] The *Sierra Club* court stated that "These decisions establish that . . . state court review of plan adoption is an available, if not a mandatory, means which certainly is meant to be meaningful" given the state and federal partnership scheme of the Clean Air Act.[^105^] Therefore, rulings of the state court must be given effect and the SIP was held invalid.[^106^]

The Sierra Club's final argument was that the invalid SIP should remain in force until a substitute plan is devised. The court responded by noting that it found no support in the Clean Air Act for this argument and that the appropriate remedy is for the EPA to act.[^107^] The court bolstered its interpretation of the proper remedy by analyzing the legislative intent of the Act. It found that the legislature intended the federal

[^101^]: 716 F.2d 1145 (7th Cir. 1983).
[^102^]: Indiana Envtl. Management Bd. v. Indiana-Kentucky Elec. Corp., 181 Ind. App. 570, 393 N.E.2d 213 (1979). The ground was that the state officer presiding over the public hearings failed to submit written findings to the Indiana Environmental Management Board. *Id.* at 579, 393 N.E.2d at 222.
[^103^]: 716 F.2d at 1148-49.
[^104^]: See, e.g., Western Oil & Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir. 1980); Ohio Envtl. Council v. EPA, 593 F.2d 24 (6th Cir. 1979); Appalachian Power Co. v. EPA, 579 F.2d 846 (4th Cir. 1978) (suggesting in dicta that failure to pursue a state court challenge may render a party without standing in a federal court).
[^105^]: 716 F.2d at 1151.
[^106^]: *Id.*
[^107^]: *Id.* at 1153 (interpreting 42 U.S.C. § 7410(c)(1) (1970)). The court noted that the post-1970 amendments to the Act were not at issue in this case. 716 F.2d at 1146 n.1.
government to step in and establish a plan for a state when the state failed to create a satisfactory plan.\textsuperscript{108} Considering the Seventh Circuit's interpretation of the Act and the legislative history of the Act, the court held that it was "not free to fashion unprecedented and unusual alternative remedies," and consequently, the court rejected the Sierra Club's proposed remedy.\textsuperscript{109} Having found: (1) that the SIP was invalidated by a state court on procedural grounds; (2) that the state court ruling must be given effect; and (3) that the court could not accept Sierra Club's proposed remedy, the Seventh Circuit affirmed the lower court's ruling that the SIP was not enforceable.\textsuperscript{110}

\textit{Sierra Club} is an example of the Seventh Circuit rejecting a possible extension of its own authority in environmental law cases. Had the court accepted the extension, it would have substantially reduced the power of the state courts to make meaningful decisions concerning SIPs. In refusing to extend its authority, the Seventh Circuit showed great deference to the federalistic structure of the Clean Air Act and to the state courts. The decision is entirely consistent with the federalistic stance that the Seventh Circuit has taken in the previously discussed cases. The decision makes it clear that federalism in environmental law cases means not only the balance of authority between state and federal agencies, but between state and federal courts as well.

\section*{The Applicable Law in Nuisance Actions}

The Seventh Circuit's most significant ruling came in \textit{Illinois v. City of Milwaukee} \textsuperscript{111} where the court addressed the issue of which law, federal or state, is applicable in a nuisance action based on the discharge of pollutants into an interstate body of water. The Seventh Circuit had previously addressed this issue in the same case,\textsuperscript{112} prior to remand, and held that federal common law was controlling. On appeal, however, the United States Supreme Court ruled that federal common law in such a

\begin{itemize}
\item \textsuperscript{108} 716 F.2d at 1153-54 (citing 116 CONG. REC. H19205 (daily ed. June 10, 1970) (statement of Rep. Jarman)).
\item \textsuperscript{109} 716 F.2d at 1154.
\item \textsuperscript{110} Id. at 1154-55. The court acknowledged that the decision may have an adverse effect on environmental protection due to the fact that no proper SIP would be in force in Indiana at the time. However, the court expressed a belief that an acceptable SIP would quickly be created.
\item \textsuperscript{111} 731 F.2d 403 (7th Cir. 1984). The case was on remand from the Supreme Court. See supra note 110. The instant case was actually a consolidation of three cases. Each case involved a faction or citizen from one state suing a faction of a different state. In each case the nuisance cause of action arose out of the discharge of pollutants into Lake Michigan. Additionally, in each case the suing party brought the claim under the nuisance law of that party's state of residence.
\end{itemize}
nuisance action had been supplanted\textsuperscript{113} by the Federal Water Pollution Control Act.\textsuperscript{114} After considering the effect of the FWPCA on previously recognized causes of action, the Court concluded that Congress had so completely occupied the field as to supplant federal common law. Thus, there was "no basis for a federal court to impose more stringent limitations . . . by reference to federal common law."\textsuperscript{115} Although the State of Illinois petitioned the U.S. Supreme Court to decide whether a state law remedy was available in addition to the federal statutory remedy, the petition was denied.\textsuperscript{116}

During the present term, in \textit{Illinois v. City of Milwaukee},\textsuperscript{117} the Seventh Circuit specifically addressed whether state law provides a remedy in a nuisance action involving the discharge of pollutants into Lake Michigan. Here, the Seventh Circuit found that the issue of pollution of interstate waters was a "problem of uniquely federal dimensions" and concluded that federal law must govern to the extent required by the FWPCA.\textsuperscript{118} In a prior ruling on the case,\textsuperscript{119} the Supreme Court set forth several reasons for applying federal common law to issues of interstate water pollution. First, under the FWPCA, prior to the 1972 amendments, it was clear that federal, not state, law controlled the pollution of interstate waters.\textsuperscript{120} A second rationale was the interstate character of the parties.\textsuperscript{121} Finally, the Court noted that the basic interests of federalism and the federal interest in a uniform rule of decision in interstate pollution disputes required the application of federal law.\textsuperscript{122} Despite this reasoning, \textit{Milwaukee II} recognized that federal common law had been

\textsuperscript{113} Milwaukee v. Illinois, 451 U.S. 304, 320 (1981) (hereinafter referred to as "Milwaukee II"). It has been suggested it was necessary for the federal government to establish national minimum pollution control standards in order to combat previous state inertia in this area. However, the extensive federal legislation may have created a preemption problem for states now more desirous of implementing stricter or different methods of pollution control. Renz, \textit{The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?}, 43 MONT. L. REV. 197, 207 (1982). Jeffrey T. Renz was counsel for the State of Illinois in Milwaukee v. Illinois, 451 U.S. 304 (1981). \textit{See supra} notes 111-120 and accompanying text.

\textsuperscript{114} See 33 U.S.C. §§ 1251, et seq. (1972) (hereinafter referred to as "FWPCA").

\textsuperscript{115} 451 U.S. at 320.


\textsuperscript{117} 731 F.2d 403 (7th Cir. 1984).

\textsuperscript{118} \textit{Id.} at 410-11.

\textsuperscript{119} Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (hereinafter referred to as "Milwaukee I").

\textsuperscript{120} \textit{Id.} at 102.

\textsuperscript{121} \textit{Id.} at 105 n.6. The case involved attempts by one state to regulate municipalities of another state.

\textsuperscript{122} \textit{Id.} at 105. The Court noted that a uniform standard was necessary as a basis for dealing with "the environmental rights of a state against improper impairment by sources outside of its domain." \textit{Id.} at 107 n.9. The decision in \textit{Milwaukee I} overruled Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), which held that state law controlled interstate water pollution controversies.
displaced by FWPCA.123

In the instant case, the Seventh Circuit recognized that different states had competing interests in the use124 of the limited resource of Lake Michigan. Considering that such interests may impinge upon one another, the use of the lake must be equitably apportioned among the interests and states, and such apportionment is a "matter of special federal concern."125 The court noted that the same reasoning set forth by the Supreme Court for resorting to the federal common law in Milwaukee I126 made inapplicable in the case at bar the use of the law of the state claiming injury to out-of-state discharges. Therefore, given the logic of Milwaukee I and the ruling in Milwaukee II, the court held that federal law was controlling in the present situation except to the extent that the FWPCA authorized resort to state law.127

The court proceeded to analyze the FWPCA. It concluded that the Act contemplated the cooperative exercise of jurisdiction by the state within which discharges occur.128 Additionally, Section 1365 of the FWPCA authorizes a civil action to enforce any effluent standard or limitation; however, the action may be brought only in the judicial district in which the violating source is located.129 Further, another subsection of Section 1365 of the FWPCA states that "nothing in this section shall restrict any right a person or [classes 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."130

Based on its analysis of the FWPCA, the Seventh Circuit determined that the Act did not preclude an injured party from seeking a remedy other than through federal statutory law. The court concluded that the injured party could seek a remedy under a state law nuisance action. However, it added that the state law remedy must be sought under the law of the state encompassing the alleged violating discharge source, not the law of the state of the injured party.131 Considering that

123. See supra note 114 and accompanying text.
124. For example, the discharge of effluents into the lake as part of sewage treatment is one use, as is use of the lake for drinking water or recreation. 731 F.2d at 410.
125. Id. The court added that to allow one state to impose on another state effluent discharge limitations more stringent than required by federal law would impair the apportionment of water use to the latter state.
126. See supra notes 119-123 and accompanying text.
127. 731 F.2d at 410-11.
128. See, 33 U.S.C. § 1342(b) and (c).
129. See, 33 U.S.C. § 1365(c)(1).
130. 33 U.S.C. § 1365(e).
131. 731 F.2d at 414. The court noted that ruling that the state law of the injured party controlled would lead to the grave consequence of a "discharger" having to comply with various common laws of the surrounding states. The court stated: "For a number of different states to have
the present action was brought by the State of Illinois against the City of Milwaukee based on Illinois law while the discharge source was located in Wisconsin, and that this was not an action to enforce any effluent standard, the court held that the action could not stand. Consequently, the case was reversed and remanded to the district court for dismissal.

The Illinois case presented the court with a relatively simple issue which became rather complex in light of the Supreme Court's prior rulings. Nonetheless, the court made an in-depth investigation into the prior case law and applicable statutory law. As a result, the court made a strong, rational decision in the face of the complexities.

Clearly, had the court refused to recognize that a state common law action may exist, it may have finally put an end to a case that has been in and out of the federal courts for more than twelve years. However, the resolution of the case has a potentially deterrent effect on water polluters. By allowing an injured party access to state law remedies, the polluter will be confronted with another body of law as a factor to consider in deciding whether or not to pollute. Had the court held that federal statutory law had preempted all other bodies of law, potential polluters would be confronted by only one body of law.

If the sole purpose of the ruling had been to deter pollution, the court could have gone one more step. The court could have held that the law of the state in which the injury occurred was also applicable. Such a holding would have subjected polluters to an even greater number of potential penalties. However, consideration other than the deterrent effect on pollution must be taken into account. The decision gives some independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states." The court added, "[i]t would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water." Id.

132. See supra note 129 and accompanying text.
133. Id. See also supra note 112 and accompanying text. Considering that the other two cases presented in this case were based on the law of the state of the injured party, not the state law of the discharge source, these cases were also remanded for dismissal.
134. For example, the Supreme Court's rulings in Milwaukee I, see supra notes 119-123 and accompanying text; and Milwaukee II, see supra notes 113-115 and accompanying text; and the Court's denial of the State of Illinois' petition for a ruling on the issue involved here, see supra note 116 and accompanying text, helped make the issue more complex.
135. It has been argued that although firm federal minimum pollution standards are necessary to confront modern pollution problems, all protection of public health and welfare cannot be accomplished through the federal statutory scheme. Therefore, a state should not have its power to protect limited if the state is going to continue to protect its citizens. By allowing injured parties additional state law remedies, the state's power to protect is not limited as it would be if access to the state law remedies was precluded by federal preemption. See Renz, supra note 113 at 216.
136. Polluters would be subject to the FWPCA, the law of the state of the discharge source and the law of the state in which the injury occurred.
certainty to polluters. By holding that the law of the state of the injury is inapplicable, a discharger can be more certain as to exactly with which law and standards it must comply. The decision also strikes a balance between the competing interests of different states in the use of Lake Michigan. The laws of each state reflect each state’s interests. The decisions allows each state to create law to further its interests without allowing these interests to be subsumed by the laws or interests of a different state.

A possible problem stemming from the decision arises when considering the balancing of competing state interests rationale in conjunction with the holding that the law of the state encompassing the discharge source shall govern. It is feasible that the applicable state law will include some choice of law principles. It is also feasible that these principles may point to the application of the law of a state other than the state of the discharge source. Were this the case, the interests of the state of discharge may be impinged upon by the law of the other state. Such a result would be contrary to the balancing of competing state interests rationale for the decision in the Illinois case.

A somewhat similar problem presented by the decision is the potential for forum shopping. In recognizing a potential remedy through the state law of the discharge source, the court granted access to a remedy beyond relief through the FWPCA. Thus, an injured party may be able to choose whether to bring suit under the federal statute or under state law, depending upon which law would grant to the injured party the most favorable form of relief. Conversely, by rendering inapplicable the law of states other than the state of the discharge source, the decision eliminated other possible remedies. The existence of these other possible remedies may have given rise to more extensive forum shopping. Therefore, the decision may encourage forum shopping in one sense while discouraging it in another sense.

A final problem with the decision is its potential effect on industries which discharge pollutants into interstate bodies of water. The knowledge that such an industry will be subjected only to the FWPCA and the law of the state of the discharge location may be a factor the industry considers in deciding to locate or relocate in a specific state. A state with stringent effluent discharge limitations may be apt to lose industries to states with lesser standards. Similarly, a state with lesser standards will become more attractive as a place to locate or relocate industries.
CONCLUSION

The majority of the environmental law cases decided by the Seventh Circuit through the course of the 1983-84 term concerned the scope of the EPA's authority. While the court allowed the EPA considerable discretion, the Seventh Circuit was quick to restrain the EPA when it attempted to over-reach the bounds of its authority. The decisions were consistent with the balance between state and federal regulation contemplated by legislation such as the Clean Air Act. At times, the Seventh Circuit's commitment to this federalism may have been a detriment to the reduction of pollution. However, the detriments are potential at best. Further, several of the decisions do have the potential to lead to the reduction of pollution. The decisions reached show a strong deference to Congress by the Seventh Circuit. The court seems to operate under the theory that if Congress contemplated a federalistic system of regulation, that system must be the most appropriate to achieve the desired results. The court's resolutions reflect a consistent purpose to adhere to the congressional intent. As a result, the Seventh Circuit helped preserve the state and federal balance proposed by much of the environmental law legislation.