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The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied the Waters?

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THE EFFECT OF FEDERAL LEGISLATION ON
HISTORICAL STATE POWERS OF POLLUTION
CONTROL: HAS CONGRESS MUDDIED STATE
WATERS?

Jeffrey T. Renz*

It follows that we speak concerning Purprestures. A purpre-
ture, or more properly speaking, a Porpresture, is when anything
is unjustly encroached upon; against the King; as is the Royal De-
mesnes, or in obstructing public ways, or in turning public waters
from their right course . . . . For this purpose the following Writ
shall issue—The King to the Sheriff, Health. I command you,
that you compel N., that without delay, he appear in the Court of
I. his Lord, and there abide by the right concerning his free Tene-
ment, that he hath encroached against him as he says, least, &c.
Witness, &c.

Glanville, J.¹

Federal courts lack authority to impose more stringent effluent
limitations under federal common law than those imposed by the
agency charged by Congress with administering this comprehen-
sive scheme.

Rehnquist, J.²

I. INTRODUCTION

Sovereign powers historically have had the authority to pro-
tect the health and welfare of their citizens or subjects. Ranulph de
Glanville, a King's justice under Henry II, described one of the
earliest uses of this power—the power to abate a public nuisance—40 years before the signing of the Magna Carta. In the 800
years following Glanville's description, the King's power became
that of the individual states of the United States and, to a lesser
extent, the powers of the federal government.

In the United States, the states, rather than the federal gov-
ernment, have traditionally exercised this "police power," through
their attorneys general in courts of equity, to protect the health
and welfare of their citizens.³ The Supreme Court's decision in

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1. R. GLANVILLE, TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND
193-96 (c. 1187).
3. See generally 2 WOOD ON NUISANCES, ch. XIII (3d ed. 1893).
City of Milwaukee v. Illinois, authored by Justice Rehnquist, provides a watermark in a movement toward assumption and usurpation of the states' police powers by federal administrative agencies.

This article surveys the federal legislation in the environmental field to chart the shift of these police powers to the federal government, and to illustrate the breadth of the power that federal agencies have assumed. A recent line of cases construing the Federal Water Pollution Control Act Amendments and the Clean Air Act Amendments of 1970 reveals that this federal legislation has effectively foreclosed remedies available to states under federal common law. The article concludes, on the basis of these two examples, that federal assumption of jurisdiction, in areas affecting the health and welfare of a state's citizens, has resulted in consequences for which neither the states nor their citizens may have bargained.

II. THE COMMON LAW BACKGROUND OF STATE POLICE POWERS

Glanville provides one of the first descriptions of an aspect of the sovereign's police powers—the power to abate a public nuisance or Purpresture. Generally, this was not an action so much to protect the health and welfare of the King's subjects as it was to abate a subject's encroachment upon the lands, waters or roads of the King. This same writ was also available to abate a subject's encroachment upon the lands of his feudal lord. The writ evolved into, or may have been concurrent with, the sovereign power to abate a private act that endangered the public welfare.

By the eighteenth century, the power to abate public nuisances was well established, and it generally encompassed the area we now describe as environmental law. Blackstone, in 1765, defined a public nuisance as follows:

[A] species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires.

7. See supra note 1.
8. Id. at 196.
9. 4 Fleta, Seu Commentaries Juris Anglicani 111-14 (1647).
10. 4 W. Blackstone, Commentaries 166 (3d ed. 1884).
The powers of the states to protect the health and welfare of their citizens by statute, by an action to abate a nuisance, or by other means is well established. These powers have been exercised in such areas as water pollution, air pollution, infectious disease, unsafe buildings, diversion of irrigation waters, storage of explosives, noise and even in illegal banking. More recently the states' powers have been extended to land use planning and solid waste disposal. In the arid West, the power also encompasses water use.

Prior to World War II, there was little or no federal involvement in such areas as pollution abatement. Problems were addressed at the local, state or interstate level. For example, when raw sewage discharges into Lake Michigan caused typhoid epidemics in Chicago, the city reversed the flow of the Chicago River and sent its sewage down the Illinois River. This prompted a lawsuit by Missouri, which claimed that the discharges fouled its drinking water. When emissions from a Tennessee copper smelter damaged Georgia forests and endangered the health of Georgia residents, the State of Georgia responded with a successful abatement action. States have commonly sued to protect their citizens' share of interstate waters as well.

In the post-war era, industrial expansion increasingly fouled interstate waters. Dirty air became a problem of regional dimen-

sions, exacerbated by the automobile. State efforts to control pollu-
tion were notably lax. Some states became havens for polluters,
exchanging clean air and water for economic growth. Water quality
in some areas declined so much as to shock the national con-
science. Examples include the denigration of Lake Erie into a
nearly lifeless sump and the fire that raged on a portion of the
Cuyahoga River near Cleveland, Ohio. In the face of the states’
inertia, the federal government was slow to react. Early federal legis-
lation reflected the historic approach that environmental
problems were to be addressed by the states with a minimum of
federal intrusion.

III. FEDERAL ASSUMPTION OF STATE POLLUTION CONTROL POWERS

Federal incursion into the traditionally state-regulated area of
pollution control began cautiously, and then exploded in the 1970s
with a series of extensive statutory schemes, governing not only air
and water pollution but also solid waste disposal and land use.
This section charts this statutory incursion in order to demon-
strate the shift of power to the federal government and to illus-
trate the pervasiveness of the federal control that exists today.

A. Early Federal Attempts

In 1948 Congress enacted the Water Pollution Control Act\textsuperscript{26} to
aid states in controlling water pollution. The Act established a
convoluted method of control by which the United States Surgeon
General first advised the alleged polluter of the extent of its pollu-
tion and the state in which the discharges occurred. Then, after a
hearing and with the consent of the polluted state, the Federal Se-
curity Administrator could request the United States Attorney
General to file an abatement action.\textsuperscript{27} Later legislation followed
this "advise and consent" format and established monetary incen-
tives to encourage states to create their own pollution control
programs.\textsuperscript{28}

The Water Quality Act followed in 1965,\textsuperscript{29} establishing the
joint promulgation\textsuperscript{30} by state governments and the federal govern-

\begin{itemize}
\item \textsuperscript{26} Pub. L. No. 80-845, 62 Stat. 1155 (1948) (superseded by scattered sections of ch.
26, 33 U.S.C. (1976)).
\item \textsuperscript{27} Id. at 1155-56.
\item \textsuperscript{28} Federal Water Pollution Control Act of 1956, Pub. L. No. 84-660, 70 Stat. 498
(1956) (superseded by scattered sections of ch. 26, 33 U.S.C. (1976)).
\item \textsuperscript{29} Pub. L. No. 89-234, 79 Stat. 903 (1965) (superseded by scattered sections of ch. 26,
33 U.S.C. (1976)).
\item \textsuperscript{30} See also Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246
\end{itemize}
ment of water quality criteria for interstate waters. The federal government was empowered to bring abatement actions after a 180-day notice, provided that the alleged pollution was interstate in nature and that it endangered citizens of another state. The conference and hearing procedures found in the prior law were retained. The states, however, were slow to cooperate with these federal pollution control schemes and, therefore, the federal government began relying on the Refuse Act of 1899 to abate unilaterally pollution of navigable waters.

Federal efforts to reduce air pollution were similar. For example, the Air Pollution Control Act of 1955 declared that pollution control was the responsibility of the states. Then, in 1963, Congress passed the Clean Air Act, which provided for federal abatement if air pollution from a particular source had interstate effects and the governor of the affected state requested federal intervention, or if the Secretary of Health, Education and Welfare found that the pollution endangered the health and welfare of the citizens of the affected state. Actual abatement was conditioned on conference procedures similar to, and ultimately as ineffective as, the Water Pollution Control Act.


32. Id.

33. The hopelessness of these procedures is reflected by Illinois' efforts to clean up Lake Michigan. Illinois initiated a conference in 1967. See generally PROCEEDINGS OF THE CONFERENCE ON POLLUTION OF LAKE MICHIGAN AND ITS TRIBUTARY BASIN (1967). The proceedings dragged on without result for three years, forcing Illinois to file an action seeking Supreme Court original jurisdiction. Illinois v. City of Milwaukee, 406 U.S. 91 (1971).


38. Id. at 396-98.


40. See supra notes 26-28 and accompanying text.
In 1967, Congress enacted the Air Quality Act, which established atmospheric areas and air quality control regions. The Act called upon states to adopt ambient air standards and to promulgate emission standards designed to prevent violations of those air standards. The process had not been completed, however, when Congress passed the Clean Air Act Amendments of 1970.

B. The Environmental Decade

A groundswell of public and political reaction to pollution and unrestrained growth led to the "environmental decade" of the 1970s. Ushered in by the National Environmental Policy Act of 1969, the decade witnessed the creation of the United States Environmental Protection Agency (EPA) as well as the enactment of nearly a dozen laws addressing air and water pollution, noise, solid waste and land use.

1. The Water Quality Improvement Act

In 1970 the Water Quality Improvement Act became law, implementing a federal permit procedure for the first time. The permit system, which was similar to that promulgated by the Army Corps of Engineers under the Rivers and Harbors Act, authorized discharges subject to restrictions on quantity and quality. The permit system, however, proved ineffective since it entailed a cumbersome procedure based on the quality of receiving waters. For example, a permit with appropriate conditions was required only if state and federal agencies determined that the discharges would lower water quality below certain standards. As a result of this overly deliberative procedure and state recalcitrance, the statutory format was replaced by the Federal Water Pollution Control Act Amendments of 1972.

42. Id. at 490-91.
43. Id. at 491-93.
47. See 33 C.F.R. § 209 (1971). See also supra note 34 and accompanying text.
2. The 1970 Clean Air Act Amendments

The Clean Air Act Amendments of 1970 were a markedly federal incursion into jurisdiction historically claimed by the states. The Amendments authorized the EPA to establish air quality criteria, similar to those for water quality, for types of air pollutants, which were found by the EPA Administrator to endanger public health and welfare, and which were emitted by diverse stationary and mobile pollution sources. The EPA was also directed to promulgate primary and secondary ambient air quality standards for each pollutant for which air quality criteria had been issued. Each state was directed to adopt an implementation plan incorporating and providing for enforcement of primary ambient air quality standards. The plans were subject to EPA review and approval. If a state failed to adopt such a plan, or if the plan adopted failed to meet the standards of the Clean Air Act, then the EPA was authorized to devise, implement and enforce its own plan for that state.

State plans, under the 1970 Amendments, were required to ensure attainment of primary ambient air quality standards within three years of implementation. The plans were also to include emission limitations for stationary sources and time schedules for meeting such limitations. Finally, the state plans were to include the new source performance standards of section 111 of the Act, which requires either the EPA or the state to establish emission limitations for any new air pollution sources found within a certain category. A list of categories was to be promulgated by the EPA.

In sum, the 1970 Clean Air Act Amendments left implementation of air quality plans and their enforcement to the states, but only if the states followed EPA regulations. Although a national set of minimum emission standards was a necessary solution for a serious problem, which was caused in part by state inertia, it may have created a problem of preemption for states desirous of differ-

50. Id. § 7408(a)(1).
51. Id. § 7409(a)(1).
52. Id. § 7410(a)(1).
53. Id. § 7410(a)(2)-(4).
54. Id. § 7410(a)(2).
55. Id. § 7410(c)(1). The State of Illinois, for example, currently lacks an approved plan. See Illinois v. EPA, 621 F.2d 259 (7th Cir. 1980).
56. Id. § 7410(a)(2).
57. Id.
ent methods of pollution control. This problem will be examined further below.

3. Amendments to the Federal Water Pollution Control Act

The Federal Water Pollution Control Act Amendments of 1972 (FWPCA) followed in large part the statutory scheme of the 1970 Clean Air Act Amendments. The Amendments directed the EPA to establish effluent limitations for publicly owned treatment works and for other point sources of effluent. Congress dropped the receiving waters rationale of the 1970 Water Quality Improvement Act and, instead, declared flatly that all discharges of pollutants into navigable waters were unlawful. Congress defined "navigable waters" so broadly that nearly all water bodies or courses within the United States fell under the Amendments. States, or if they failed to act, the EPA, were also directed to establish water quality standards. The FWPCA also provided that more stringent limitations could be applied where water quality standards could not be met, or where certain general water quality goals could not be met through effluent limitations on all sources.

Generally, as in the Clean Air Act Amendments, states were allowed to establish pollutant discharge elimination systems subject to EPA review and approval. Again, if the state failed to act or if its system did not meet EPA approval, the federal agency could regulate water pollution within the state. In addition, the Amendments provided that, even when a state system was approved, permits issued by a state's pollution control authority could still be reviewed and, if found deficient, disapproved by the EPA.


60. Id. § 1311(b). A point source is virtually any confined source of a discharge into navigable water. Id. § 1362(14).

61. See supra note 47 and accompanying text.


63. Id. § 1362(7).

64. Id. § 1313.

65. Id. §§ 1313(d), 1312 (stricter limitations applicable, after hearing, if prior to permit issuance, Administrator finds discharges would interfere with water quality goals, i.e., fish propagation or drinking water quality).

66. Id. § 1342(b).

67. Id.

68. Id. § 1342(d).
Section 402(k), however, provided that compliance with a discharge permit would be deemed compliance with most of the sections that constituted the "teeth" of the Amendments, including: section 301, which outlaws pollutant discharges; section 302, which directs application of stricter effluent limitations in certain cases; section 306, which establishes new source standards; section 307, which outlaws discharges of toxic pollutants; and section 403, which outlaws discharges into the ocean. As will be shown below, section 402(k) may be relied on in the future to support a "permit defense" to common law actions.

4. Other Pollution Control Acts

The remaining pollution control acts passed during this decade were intended to regulate such diverse subjects as noise and insecticides as well as pollution of the marine environment. These acts generally followed the statutory schemes outlined above by setting minimum regulatory standards and authorizing state enforcement programs that conformed to the minimum standards.

5. Solid and Hazardous Waste Control

The Resource Conservation and Recovery Act of 1976 extended federal control to solid and hazardous wastes, other areas traditionally controlled by the states. Along with creating a "cradle-to-the-grave" system of tracking toxic wastes, the Act set minimum standards for sanitary landfills. The federal-state relationship embodied in the Act differed from that of previous legislation, since a state solid waste program that satisfied federal guidelines entitled the state to infusions of federal aid to implement it. The Act did not provide for federal assumption of the state's solid waste regulatory program upon the state's default. But the Act did provide that the federal regulations concerning hazardous waste

69. Id. § 1342(k).
70. Id. § 1311.
71. Id. § 1312.
72. Id. § 1316.
73. Id. § 1317.
74. Id. § 1343.
77. Id. § 6847.
were paramount, effectively preempting state regulatory schemes.\textsuperscript{78}

6. Federal Land Use Control

The Coastal Zone Management Act of 1972\textsuperscript{79} and the Surface Mining Control and Reclamation Act of 1977\textsuperscript{80} established, in essence, federal land use regulations. The Coastal Zone Management Act offers federal funds in return for an approved coastal zone management program. Although the Act purports to allow states to manage their coastlines in their own way, the Supreme Court has held otherwise.\textsuperscript{81}

The Surface Mining Control and Reclamation Act deserves more detailed treatment since it is the most recent land use legislation to come out of Congress. The Act establishes priorities for land use relative to its use for strip mining. For example, lands may be excluded from mining if they cannot be reclaimed, are fragile or historic, or are renewable resource lands that could suffer a substantial loss in productivity.\textsuperscript{82} Other types of lands are automatically excluded from mining.\textsuperscript{83} The Act places a priority as well on post-mining uses by directing miners to submit reclamation plans that establish: (1) post-mining land uses; (2) means of ensuring the post-mining land use; and (3) requirements for soil replacement, revegetation, and protection of the quality and quantity of underground waters.\textsuperscript{84}

Section 505 of the Act expressly provides for limited preemption of state law that "may be inconsistent with its provisions."\textsuperscript{85} But this section provides further that any state law or regulation, "which provides for more stringent land use and environmental controls . . . shall not be construed to be inconsistent with this Act."\textsuperscript{86}

As in the Clean Air Act, the Reclamation Act provides for state control of strip mining regulatory programs once the programs are approved by the Secretary of Interior.\textsuperscript{87} In the absence of an approved state plan, the federal government assumes control.

\textsuperscript{78} Id. § 6929.
\textsuperscript{82} 30 U.S.C. § 1271.
\textsuperscript{83} Id. § 1272(e).
\textsuperscript{84} Id. §§ 1258, 1265(b).
\textsuperscript{85} Id. § 1255(a).
\textsuperscript{86} Id. § 1255(b).
\textsuperscript{87} Id. § 1253.
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of strip mine regulation in the state.88

C. Summary

Federal environmental legislation generally permits states to promulgate and enforce their own regulatory programs, but only if they comply with fairly strict guidelines established by federal agencies. Although a national set of minimum standards was a necessary solution for a serious problem, given the states’ inertia, this extensive legislation may have created a problem of preemption for states now desirous of stricter or different methods of pollution control.

IV. FEDERAL USURPATION OF TRADITIONAL STATE POWERS

The previous section illustrates the extent to which the federal government has assumed what, as we have seen, were traditional areas of state control. The discussion that follows, although centering on the FWPCA and City of Milwaukee v. Illinois,89 demonstrates the extent to which federal agencies may have usurped state police powers.

A. The Milwaukee Cases: The Demise of the Federal Common Law of Pollution Abatement

In the 1960s the State of Illinois initiated efforts, under existing federal legislation, to abate sewage discharges from Milwaukee, Wisconsin.90 Milwaukee's sewage treatment plants, located as little as 25 miles from the Illinois line, and its combined sewer overflows91 were discharging billions of gallons of raw and poorly treated sewage into Lake Michigan each year.92 These discharges carried billions of bacterial and viral pathogens into the waters of Lake Michigan, to be transported to Illinois where they infected Illinois residents.93 Milwaukee's sewage was so noxious that the city required two flushing tunnels to clear its waters of wastes.94

88. Id. § 1254.
89. 451 U.S. 304 (1981) [hereinafter cited as Milwaukee II].
90. See supra note 33. See also Brief for Respondent at 6-9, Milwaukee II, 451 U.S. 304 (1981).
91. A combined sewer overflow is, in effect, a release valve for sewers that carry both sewage and storm water. During a rain storm, these overflows discharge raw sewage and runoff which exceeds the capacity of the sewer. Milwaukee II, 451 U.S. at 308-09.
92. Brief for Appellee at 8, Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979).
93. Id. at 14-17.
94. Id. at 8-9.
Illinois' efforts proved fruitless and the state turned to the Supreme Court, invoking that Court's original jurisdiction for suits between states, to sue Milwaukee and several other Wisconsin municipalities. The Supreme Court, in a landmark decision referred to as Milwaukee I, declared that its exclusive original jurisdiction did not apply to suits between a state and a municipality of another state. Instead, the Court recognized the existence of a federal common law nuisance claim that Illinois could bring in federal district court.

In the opinion of a unanimous Court, Justice Douglas found a number of independent grounds for the application of federal common law. The first basis was the sovereign character of the two parties. The second basis was the recognition of a *casus belli* in the pollution of interstate waters, which, under our federal system, is settled not by a war between the offending and objecting states, but by "the more peaceful means of a suit" in federal court. Third, Justice Douglas recognized that air and water in their ambient and interstate aspects present questions of federal common law. Fourth, Justice Douglas apparently recognized the need for a uniform rule of decision. Fifth, Justice Douglas found that "[t]he remedy sought by Illinois [was] not within the precise scope of remedies prescribed by Congress." In that event, federal courts could "fashion federal law where federal rights are concerned," filling the interstices left by Congress.

Armed with these declarations, Illinois filed suit in federal district court, alleging violations of federal common law, of Illinois statutes and of Illinois common law. The district court, after a

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95. See supra note 33 and accompanying text.
98. Id. at 101.
100. Id. at 105-06 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907)): "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . ."
102. Milwaukee I, 406 U.S. at 103, 105. See also Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92 (1930); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1970).
104. Milwaukee I, 406 U.S. at 103.
105. Id.
lengthy trial, found for Illinois on all counts and ordered Milwaukee to abate and treat its sewage discharges. 108 Illinois' victory in what is called Milwaukee II was short-lived, however, because the Seventh Circuit reversed the district court in part. 109 On certiorari, the Supreme Court ruled in favor of Milwaukee and vacated the judgment of the Seventh Circuit. 110 Enactment of the Federal Water Pollution Control Act Amendments of 1972, its implementing regulations, and the "mid-course adjustment" of the Clean Water Act of 1977 were the critical factors in the reversals by both the court of appeals and the Supreme Court. 111

Between 1972 and 1977, the EPA had promulgated numerous regulations, standards, guidelines, policy statements and opinions concerning treatment of sewage from treatment plants and combined sewer overflows. The State of Wisconsin's Department of Natural Resources had been given authority to issue permits to dischargers under the National Pollutant Discharge Elimination System. 112 Milwaukee had applied for and, after public hearings and a review by the EPA, had been issued such a permit for its sewage treatment plants and overflows. 113

The remedy imposed by the district court was far more stringent than the standards and limitations contained in Milwaukee's permits. 114 This remedy was based on evidence that included: (1) Milwaukee's discharges contained uncountable numbers of viruses; 115 (2) these viruses were more long-lived and far more virulent than the bacteria whose concentration served as the indicator for adequate sewage treatment; 116 and (3) more stringent treatment of Milwaukee's discharges was necessary to reduce the concentration of the viruses to a safe level. 117 The Seventh Circuit ig-

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110. Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979).
113. See generally Part 133, 40 C.F.R. (1974) (permits required Milwaukee's treatment plants to meet federal requirements for secondary treatment; Milwaukee was required to produce plans for separate discharge system as well as combined sewer overflow).
115. See Milwaukee II, 451 U.S. at 312.
117. Id.
118. Id. See also Record at 309, 3206, 12065-68, 12402, Illinois v. City of Milwaukee, No. 72-C-1253 (N.D. Ill. July 29, 1979).
nored this evidence and substituted its own findings for those of the district court.\textsuperscript{119} In short, the Seventh Circuit found no reason why the weaker effluent limitations and treatment standards set by the EPA and imposed by Wisconsin were inadequate.\textsuperscript{120}

In vacating the Seventh Circuit’s decision, the Supreme Court held that the federal common law nuisance remedy, enunciated by Justice Douglas in \textit{Milwaukee I},\textsuperscript{121} was by nature extraordinary.\textsuperscript{122} Since Congress had legislated extensively in the area of water pollution, the Court concluded that federal courts were precluded from exercising this form of equity.\textsuperscript{123} It should be noted that the Supreme Court did not rely on any express provision of the FWPCA to the effect that it supplants federal common law or remedies under other federal statutes.\textsuperscript{124} Instead, the Court pointed to the comprehensive nature of the legislation and its vast, complex web of rules.\textsuperscript{125} Thus, this decision marks the end of the federal common law remedies recognized in \textit{Milwaukee I} and \textit{Washington v. General Motors Corp.}\textsuperscript{126} The decision of the Supreme Court highlights the dangers inherent in committing responsibilities for the health and welfare of a state’s citizens to a federal administrative agency, without a concomitant reservation of the means to protect their health and welfare at the state and local levels.

\textbf{B. The Aftermath of Milwaukee II}

A case decided shortly after \textit{Milwaukee II}, Middlesex County Sewerage Authority \textit{v. National Sea Clammers Association},\textsuperscript{127} expanded the \textit{Milwaukee II} rationale. In \textit{Middlesex}, the Supreme Court held that the FWPCA did not create an implied right of action, and that civil rights actions brought pursuant to 42 U.S.C. § 1983 (1976) had not been preserved in respect to injuries inflicted by pollution under the color of state law, despite the language of the FWPCA's section 505(e).\textsuperscript{128} Thus, \textit{Middlesex} appears to pre-

\begin{footnotes}
\textsuperscript{119}. Illinois \textit{v. City of Milwaukee}, 599 F.2d 151, 173-74 (7th Cir. 1979).
\textsuperscript{120}. \textit{Id.} at 174-75.
\textsuperscript{121}. 406 U.S. at 107-08.
\textsuperscript{122}. See, e.g., \textit{Milwaukee II}, 451 U.S. at 316 (specific test for application of federal common law; distinct from that of federal preemption).
\textsuperscript{123}. \textit{Id.} at 317.
\textsuperscript{124}. \textit{See id.} at 327-32.
\textsuperscript{125}. \textit{See id.} at 317-26.
\textsuperscript{126}. 406 U.S. 109 (1972) (allegations of conspiracy by automobile industry to restrain development of motor vehicle air pollution control equipment; original jurisdiction denied but federal common law avenue indicated).
\textsuperscript{128}. 33 U.S.C. § 1365(e) (1976) provides in pertinent part: “Nothing in this section
clude the bringing of any action independent of the administrative relief embodied in the Act. Middlesex and Milwaukee II, however, leave two questions unanswered: (1) Are remedies available under state statutes or common law to abate pollution of interstate waters by out-of-state dischargers; and (2) are remedies available under state common law to abate pollution of intrastate waters by an in-state polluter?

1. Availability of State-Based Relief for Interstate Pollution

State law, as it applies to interstate waters, may have been preempted by the FWPCA. As noted earlier, the Supreme Court in Milwaukee I recognized that pollution of interstate waters created a federal question, to which federal, not state, common law should be applied. For authority, the Court relied on Hinderlider v. La Plata River & Cherry Creek Ditch Co., a case in which the Court held that the federal common law doctrine of equitable apportionment was paramount to state water law, where interstate waters were involved. Moreover, the Court noted that federal law should apply to ensure a uniform rule of decision.

Several courts, however, have addressed the question specifically. In City of Evansville v. Kentucky Liquid Recycling, the Seventh Circuit affirmed the dismissal of the city's state law claims, pointing to a statement in its decision in Milwaukee II that federal law controls the area. Likewise, in Committee for the Consideration of Jones Falls Sewage System v. Train, the Fourth Circuit stated, in dictum, that "the law of the state whose citizens were subject to injuries by the interstate pollution ought not to govern the conduct of citizens and municipalities in another state . . . ." Jones Falls was cited with approval in Milwaukee II, although the Court did not rely on the language quoted.

Scott v. City of Hammond addressed this question directly, although the case was filed while Milwaukee II was pending before the Supreme Court. Besides a federal common law nuisance claim,

shall restrict any right which any person (or class of persons) may have under any statute or common law to seek any other relief (including relief against the Administration or state agency)."

129. See supra notes 97-106 and accompanying text.
132. 604 F.2d 1008 (7th Cir. 1979).
133. Id. at 1021 n.43 (citing Milwaukee II, 599 F.2d at 165-66).
134. 539 F.2d 1006, 1008 (4th Cir. 1976).
which the district court summarily dismissed after Milwaukee II was decided, plaintiffs brought claims based on Illinois statutory and common law as well as on the Illinois constitution. The court addressed the question of whether, in the light of the comprehensive nature of the FWPCA, state law claims may be brought to abate the pollution of interstate waters by an out-of-state municipality. Defendants contended that state law was preempted by the federal statute. The court held that state law could be applied but permitted an immediate appeal of its decision to the Seventh Circuit. The court’s holding was based on its refusal to follow City of Evansville, since that decision was grounded on the Seventh Circuit’s holding in Milwaukee II, which had been vacated by the Supreme Court. Considering the Seventh Circuit’s earlier pronouncements on this issue, the district court’s holding may well be in jeopardy.

Ohio v. Wyandotte Chemicals Corp., a Supreme Court decision, also provides limited authority for finding a state basis to abate interstate pollution. That case, however, concerned an attempt by Ohio to invoke the Supreme Court’s original jurisdiction which was opposed by defendants. Plaintiff, in oral argument, admitted that it had an adequate forum in Ohio, an admission which certainly aided the Court in denying Ohio’s bill of complaint.

In sum, it is likely that state common law remedies, as they might be asserted to control interstate pollution, are preempted by the amendments to the FWPCA. This conclusion follows from the earlier pronouncements of the Seventh and Fourth Circuits and the certain application of the FWPCA.

137. Id. at 293.
138. Id.
139. Id. at 298.
140. Id.
141. Id.
142. Id. at 293.
145. Arguably, section 505(e) of the FWPCA (33 U.S.C. § 1365(e) (1976)) and section 304(e) of the Clean Air Amendments (42 U.S.C. § 7604(e) (1976 & Supp. III 1979)) can be relied on to find no preemption of state common law remedies. But, the Supreme Court failed to find such a result in regard to federal common law remedies or remedies under other federal statutes. See Milwaukee II, 451 U.S. at 323-32; Middlesex, 101 S. Ct. at 2626-27 (42 U.S.C. § 1983 (1976) claim preempted). The Seventh Circuit, however, has found preemption of these state remedies. See supra notes 132-33 and accompanying text.
2. Availability of State-Based Relief for Intrastate Pollution

The second question—whether state common law may be relied upon to abate intrastate pollution—suggests an extension of the Milwaukee II and Middlesex preemption rationale to the state level. The Supreme Court did not rely on any express statement in the FWPCA that it supplants federal common law or remedies under other federal statutes, but pointed instead to the comprehensive nature of the legislation and the vast, complex web of rules that had been promulgated under it. An extension of this reasoning to the control of pollution that occurs entirely within a state's boundaries would appear to foreclose traditional state remedies.

The FWPCA, as noted, provides a framework for administrative application of effluent limitations on nearly every stream or body of water in the United States. The federal government and the individual states have promulgated regulations, prescribing limits on the concentrations of the most common pollutants in effluent, and limits for many other pollutants, based on state-of-the-art and future state-of-the-art technology. The EPA has identified some 65 toxic pollutants for which no discharge is allowed. In light of this regulatory framework, present at both the federal and state level, it seems likely that an argument will be made that the FWPCA and its state statutory and regulatory counterparts have supplanted pre-existing state statutory and common law.

Such an argument would certainly include the point that Congress and the states, in turn, have delegated the fight against pollution to expert administrative agencies, which have expertise that a state trial judge lacks. Moreover, it can be argued that the agencies are addressing the problem comprehensively, while a court can only do so on a case-by-case approach. The court's decision, it could also be argued, would interfere with and frustrate such a comprehensive, administrative approach. Since the power of a

146. Milwaukee II, 451 U.S. at 328. Indeed, the only express language on the subject reveals an intent to preserve those remedies. See 33 U.S.C. § 1365(e); Milwaukee II, 451 U.S. at 339-40 (Blackmun, J. dissenting).
147. Again, it may be argued that section 505(e) of the FWPCA and section 304(e) of the Clean Air Amendments preserve these remedies. See supra note 144. But here we are concerned with preemption of state common law by state statute. State statutes do not necessarily include counterparts to such federal disclaimers. But see MONTANA CODE ANNOTATED §§ 75-2-104, 75-5-102 (1981).
148. See supra note 59-68 and accompanying text.
149. See Milwaukee II, 451 U.S. at 311.
151. New England Legal Found. v. Costle, 632 F.2d 936 (2d Cir. 1980) (per curiam) (applying this reasoning to find federal common law preempted in air pollution matters).
legislature to replace common law with statute has long been rec-
ognized, the arguments above are reasons why a legislature
might cast aside common law remedies in favor of a statutory
framework.

There are, however, sound arguments for retaining the flex-
bility embodied in the traditional common law actions. First, in
many cases, states have chosen simply to promulgate the stan-
dards, guidelines or limitations established by the EPA. In essence,
the state simply adopts and administers a program put together at
the federal level. Needless to say, standards set at the national
level may be inapplicable locally. Air quality standards, for exam-
ple, that are acceptable in a city may cause damage to crops in
rural areas. If a clean air statute is found to replace common law
remedies, the air pollution source, which has damaged crops, may
be insulated from suit if it holds an air quality permit.153

Similarly, damage may occur from substances or organisms
not addressed in the administrative agency's regulations or in the
permit. For example, the greatest hazard posed by Milwaukee's
discharges was the huge concentration of enteric viruses found in
its effluent, even when it complied with the issued permits. The
simple fact was that neither the EPA nor the Wisconsin Depart-
ment of Natural Resources had established limitations intended to
guard against virus. As long as Milwaukee complies with its per-
mits and the limitations inherent in them, Illinois appears to be
left without an effective remedy.

Second, state administrative agencies may grant variances to
polluters. In Montana, for example, the Anaconda copper smelter
operated under a variance from air quality standards until its self-
imposed closure in 1980. In Wisconsin, Milwaukee's combined
sewer overflows were granted permits, which largely directed only
that the discharges of raw sewage be monitored, and that they be
corrected some time in the future. In the meantime, these pollu-
tion sources continued to pose a hazard to public health and
welfare.

Third, administrative rulemaking often involves a variety of
trade-offs that allow discharges of certain amounts of pollution.
For example, in 1976 the EPA eliminated a chlorination require-
ment for publicly owned sewage treatment works.154 The reason for
this elimination was that, while chlorination was effective in killing

153. The same analysis might apply to water pollution. See 33 U.S.C. § 1342(k) (1976);
supra note 149; supra notes 69-74 and accompanying text.
germs, it also resulted in discharges of organic chlorine compounds, which are both toxic and carcinogenic. Similarly, agencies engage in cost-benefit analyses that may often be questionable. The cost-benefit analysis may be described as the application of the law of diminishing returns to the area of pollution control. Thus, where it costs more to remove the last five percent of a pollutant from discharges than it did the first 95 percent, 100 percent removal may not be required. The EPA has applied this rationale to the elimination of combined sewer overflows and requirements for tertiary sewage plants. Similar trade-offs are made in a risk-benefit analysis, in which an agency first determines an incidence of disease or death considered acceptable by society, and then establishes levels of control to achieve those rates.

It must also be noted that trade-offs inevitably arise between strict regulation for a healthful environment and the desire for economic growth. Congress, itself, recognized that regulation under the Clean Air Act and the FWPCA would cause marginal operations to close. This, in fact, occurred during the early campaigns under these Acts. Later legislation, however, inserted the effect of regulation on economic growth as a factor to be included in the regulatory equation.

This trading process of benefits for costs, of one form of pollution for another, of pollution for other environmental impacts, must inevitably result in increased concentrations of pollutants in our environment. These will harm someone, somewhere. If a polluter is insulated from suit by a permit and ostensibly by a skein of statutes and regulations, the injured party is left without a remedy. The final danger is the reality that the EPA may relax its standards, or that Congress may relax requirements in its legislation. The present Administration is predisposed to, and has advanced proposals for, both approaches. The question then arises, when do new federal laws fail to preempt the field of federal or state common law of nuisance?

Although these comments derive from a consideration of the FWPCA, it is clear, in light of the pervasiveness and the similarity 155. See United States Environmental Protection Agency, Program Review Memorandum, No. 75-34 (1975).


158. Id.


of the other federal statutory and regulatory schemes, that the same questions and the same answers pertain to those other areas where federal agencies have assumed state police powers.¹⁶¹

V. CONCLUSION

As the above examples demonstrate, we need flexibility in our pollution abatement programs. A firm federal floor of minimum standards is necessary to ensure that we do not return to pre-1970 conditions, but common law tools that have been available for 800 years should not be sacrificed in favor of administrative expedience. Hazards to public health and welfare that cannot or will not be addressed under statutory or regulatory schemes have arisen and will continue to arise. The states' powers to guard against these threats cannot be limited if the states are to continue their historic role as parens patriae.

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