Illinois Environmental Law - The New Assault on Water Pollution

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ILLINOIS ENVIRONMENTAL LAW—
THE NEW ASSAULT ON WATER POLLUTION

Michael D. Freeborn*

The nation's industrial progression has caused ecological regression through contamination of society's waterways. Michael Freeborn reviews the actions of the State of Illinois in attempting to implement the 1972 amendments to the Federal Water Pollution Control Act. Not only are the amendments broader in scope than previous federal legislation, but they shift the emphasis in the nation's water pollution control program from a system of water quality standards, relating to the condition of the receiving waters, to an effluent limitation system, relating to the condition of the water being discharged to the receiving waters. One of the primary policies of federal legislation in this area is the implementation of effective water pollution control standards between all levels of government. The author reviews the parameters of the new water pollution enforcement procedure and the revised permit system, which will be eventually administered by state agencies.

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INTRODUCTION

Perhaps the greatest single development in Illinois environmental law during the last year has been the series of steps taken in this state to implement the Federal Water Pollution Control Act Amendments of 1972, which completely overhauled the law of water pollution throughout the country.

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The author gratefully acknowledges the constructive criticism of Messrs. Henry L. Pitts and James T. Harrington in the preparation of this Article. He further wishes to mention that this area of environmental law has been undergoing rapid and comprehensive changes recently and, while every effort has been made to insure the comments herein are current, the author cannot be responsible for developments in the law subsequent to Oct. 1, 1974.
To be sure, there has also been an expected number of court decisions,\(^1\) state statutory enactments,\(^2\) and regulatory actions\(^3\) deal-

1. For example, in City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146 (1974), the Illinois Supreme Court held that the grant of authority in the Environmental Protection Act allowing the Board to impose discretionary monetary penalties in enforcement cases was constitutional; in People ex rel. Scott v. Janson, 57 Ill. 2d 451, 312 N.E.2d 620 (1974), the Supreme Court held that the Pollution Control Board's jurisdiction is not exclusive and enforcement cases may continue to be brought in the courts as well as before the Board since “[n]o existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this [Environmental Protection] Act.” \textit{Id.} at 459, 312 N.E.2d at 624; in Mystik Tape, Div. of Borden, Inc. v. Pollution Control Bd., 16 Ill. App. 3d 778, 306 N.E.2d 574 (1st Dist. 1973) the appellate court held that the Board must adopt and use recognizable and reasonable “environmental control standards” in exercising its powers, and in its decisions it “may not simply discuss the evidence and announce a result.” \textit{Id.} at 792, 306 N.E.2d at 586; in Meadowlark Farms, Inc. v. Pollution Control Bd., 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974), the Environmental Protection Act was upheld against constitutional attack which had alleged that it unlawfully grants to an administrative agency both legislative and judicial powers in violation of Section I of Article II and Section I of Article VI of the Illinois Constitution; and in City of Monmouth v. Pollution Control Bd., 57 Ill. 2d 482, 313 N.E.2d 161 (1974), the Illinois Supreme Court held that the general prohibition against causing or tending to cause “air pollution” (ILL. REV. STAT. ch. 111/2, § 1009(a) (1973)), when read in conjunction with the more descriptive provisions of ILL. REV. STAT. ch. 111 1/2, §§ 1003(b), 1003(d), 1033(c) (1973), contained sufficient standards to withstand a contention that the general prohibition is unconstitutional.

2. During the 78th General Assembly only five laws were passed which significantly amended the Illinois Environmental Protection Act, one of which, P.A. No. 78-862 (Sept. 14, 1973) amended the Act to conform to the Federal Water Pollution Control Act Amendments of 1972, discussed more fully elsewhere in the text of this survey. The remaining four amendments were of substantially smaller scope:

(1) P.A. No. 78-243 (Oct. 1, 1973)—Prohibits the Pollution Control Board from imposing a general ban on leaf-burning.

(2) P.A. No. 78-500 (Oct. 1, 1973)—Provides that the 90-day period for automatic granting of a variance or permit to a petitioner shall not run during any period up to 30 days in which the Pollution Control Board does not have a quorum.

(3) P.A. No. 78-840 (Oct. 1, 1973)—Permits the Pollution Control Board to prescribe alert and abatement standards for land pollution emergencies.

(4) P.A. No. 78-941 (Nov. 14, 1973)—Prohibits the Pollution Control Board from delegating to the Environmental Protection Agency its power to require a performance bond in connection with the granting of a variance, and prohibits the Agency from requiring a performance bond as a condition for the granting of a permit.

3. Examples of regulatory actions taken by the Pollution Control Board subsequent to the last edition of this Survey include:


(3) Hearings Regarding Availability of Sulfur Dioxide Removal Technology
ing with other aspects of environmental law; but their significance is pale in comparison to the vast and far-reaching developments now occurring with respect to water pollution control.

I. THE NEW STATUTORY FRAMEWORK

The new statutory framework for water pollution control in Illinois has its origins not in the Illinois General Assembly but in the United States Congress. On October 18, 1972, Congress overrode the veto of then-President Nixon and thereby enacted into law the Federal Water Pollution Control Act Amendments of 1972 (hereafter the 1972 Amendments), thus climaxing one of the most bitterly fought legislative battles in recent years. The 1972 Amendments were hailed by some as bringing "the Rule of Law" to water pollution control for the first time.

The 1972 Amendments are broader in scope than any previous federal legislation affecting the nation's waters. Unlike prior federal legislation, they are not strictly limited in their application to navi-

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(4) Hearings Regarding Proposed National Pollutant Discharge Elimination System (NPDES) Regulations in accordance with the Federal Water Pollution Control Act Amendments of 1972 (discussed more fully elsewhere in the text of this survey)—Doc. No. R73-11.


5. Address by John R. Quarles, Jr., General Counsel for United States Environmental Protection Agency, American Bar Association National Institute, Oct. 26, 1972:

The key to an effective regulatory system is that there be firm, specific requirements imposed on all parties with evenhanded fairness. The exact requirements must be clearly understood and publicized. They must also be uniformly and strictly enforced.

In the field of pollution control the basic ingredients simply have not existed. Therefore, we never have had a meaningful system of legal regulation. The chief tool used to date in efforts to curtail pollution has been public opinion, striking with unpredictability whenever and wherever officials or citizens have been able to attract publicity to alleged cases of notorious abuse. Even when cases have gone to court, the results of litigation have often been forged as much in the newspapers as in the courtrooms.

All of us in this field should look forward with gratification and relief to the establishment—at long last—of an effective Rule of Law (emphasis added).

6. This change in scope will be considered further in Section II infra.
gable waters; indeed, the term "navigable waters" itself is cleverly defined to be simply "the waters of the United States," apparently regardless of whether such waters in fact are navigable or are located wholly within one state.

Further, the 1972 Amendments shift emphasis in the nation's water pollution control program from a system of water quality standards to a new system of effluent limitations. Previously, the approach to water pollution control involved approval by the federal government of water quality standards applicable to bodies of water in each of the states, based on the needs of the respective waters into which effluent was discharged. It was then the responsibility of the states to submit implementation plans to the federal government for approval. Pursuant to these plans the states were expected to control effluent discharges within their boundaries to the extent necessary to achieve the specified level of quality in the receiving waters. While such water quality standards related to the condition of the receiving waters, the new effluent limitation system instead relates to the condition of the water being discharged to the receiving waters. The new system contemplates establishment by the federal government of limitations on the total quantity of specified contaminants which may be discharged by a particular source or group of sources, regardless of the quality of the receiving waters. This statutory framework requires the achievement by July 1, 1977, of effluent limitations for point sources which shall employ "best practicable control technology currently available." It also requires the achievement by July 1, 1983, of effluent limitations for "categories and classes" of point sources which shall employ "best available technology economically achievable" for such category or class, which will result in reasonable further progress toward the goal of eliminating discharges of all pollutants by

8. This change in emphasis from water quality standards to effluent limitations will be considered further in Section III infra. It should be noted that this shift in emphasis is not a repeal of the water quality standards; in some parts of the country the water quality standards will continue to be more significant than the newer effluent limitations. See note 12 infra.
9. 33 U.S.C. § 1311(b)(1)(A) (Supp. II, 1973). The significance of these terms will be considered further in Section III infra.
10. Id. § 1311(b)(2)(A). The significance of these terms will be considered further in Section III infra.
1985. Until the promulgation of such effluent limitations, the water quality standards established under prior legislation remain in effect, unless the administrator of the United States Environmental Protection Agency determines that they are inconsistent with the requirements of the 1972 Amendments.

The new legislation contemplates that the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, upon such conditions as he determines are necessary to carry out the provisions of the 1972 Amendments. Thus, for example, if an existing plant is unable presently to comply with effluent limitations established by the Administrator, the plant may nevertheless apply for a permit, the conditions of which would include provisions requiring certain abatement measures during a specified time period, in order to achieve the 1977 and 1983 goals mentioned above. This permit system, called the National Pollutant Discharge Elimination System (NPDES) is expected to ultimately be turned over to the respective states for administration, but the Administrator of the United States Environmental Protection Agency will retain a "veto power" as to the issuance by the state of any permit. Illinois has already amended its Environmental Protection Act with a view toward obtaining this permit-granting authority, and the contemplated Illinois framework will be considered in more detail later herein.

11. Note that "[i]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," id. § 1251(a)(1), but the 1972 Amendments do not go so far as to actually impose such a "zero discharge" requirement and do not make the discharge of all pollutants unlawful after 1985. See also note 40 infra.

12. Id. § 1313. Indeed, even after promulgation of the effluent limitations the water quality standards remain in effect where compliance with the effluent limitations would nevertheless result in violations of the standards. In other words, if the effluent limitations which would ordinarily have been established continue to cause water quality to exceed the former standards, more restrictive effluent limitations will be required. Id. § 1313(b).

13. The permit system will be considered further in Section IV infra.


15. Id. § 1342(d)(2). It should be noted that the question of the extent to which the states will continue after the 1972 Amendments to have responsibilities greater than those of a mere scrivener is presently the subject of a case pending before the United States Court of Appeals for the Second Circuit in Natural Resources Defense Council, Inc. v. Environmental Protection Agency, No. 74-1258 (1974). See also note 39 infra.
It is hoped that enforcement of the terms of the NPDES permits and effluent limitations will prove less cumbersome than enforcement of the former water quality standards or the nascent "federal common law" of water pollution, since enforcement of an effluent limitation "would not require reanalysis of technological [or] other considerations at the enforcement stage. [Rather], these matters will have been settled in the administrative procedure leading to the establishment of such effluent control provisions." Just as significant, the 1972 Amendments abandon the lengthy conference procedure which was a prerequisite to federal enforcement under the earlier Act. Under the new legislation, whenever the Administrator of the United States Environmental Protection Agency finds that any person is violating the conditions of a permit or is violating an effluent limitation, etc., he may issue an order requiring compliance or bring a civil action for appropriate relief, including a permanent or temporary injunction. A willful or negligent violation may be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, imprisonment for not more than one year, or both. Second offenders may be punished by a fine of not more than $50,000 per day of violation, imprisonment for not more than two years, or both. Further, a civil penalty of up to $10,000 per day of violation may be imposed. Finally, a private citizen having an interest which is or may be adversely affected, may, after giving sixty days notice to the Administrator (if the Administrator and state fail to act), commence a civil action in his own behalf to enforce an effluent limitation or an order issued by

16. Enforcement will be considered further in Section V infra.
17. See Illinois v. City of Milwaukee, 406 U.S. 91 (1972). It is not certain that very much remains of the recently announced "federal common law" of water pollution, since City of Milwaukee was a case in which the remedy sought was not within the precise scope of remedies provided by Congress, and the 1972 Amendments may constitute the "new federal laws and new federal regulations [which] pre-empt the field of federal common law of nuisance." Id. at 108. This portion of the Supreme Court's opinion in City of Milwaukee was recently emphasized in United States v. Lindsay, 357 F. Supp. 784, 794 (E.D.N.Y. 1973).
20. Id. § 1319(c).
21. Id.
22. Id. § 1319(d).
the Administrator or a state with respect to such an effluent limitation.\textsuperscript{23} The federal district courts have jurisdiction of such suits without regard for the dollar amount in controversy,\textsuperscript{24} and they may award costs of litigation to either party, including reasonable attorney and expert witness fees.\textsuperscript{25}

II. Scope of the New Assault

As mentioned earlier, the 1972 Amendments are broader in scope than any previous federal legislation affecting the nation's waters. Indeed, it is probably safe to say that with this legislation the federal government will be asserting unprecedented control over the nation's waters, even where such waters are wholly contained within one state.

This is so partly because the term "navigable waters" is defined in the 1972 Amendments without any reference to actual navigability and without any reference to the impact of the waters on interstate commerce. "The term 'navigable waters' means the waters of the United States including the territorial seas."\textsuperscript{26} This purported scope of the 1972 Amendments promptly raises the question of federal jurisdiction and the constitutional basis on which it rests, since the United States Constitution does not expressly give Congress the direct power to regulate all the waters of the United States. Further, since under the Constitution the states, as sovereigns, were to retain all powers of regulation except to the extent such powers were given exclusively to the federal government, expressly prohibited to the states, or reserved to the people,\textsuperscript{27} one might have assumed that many such intrastate waters would constitutionally be within the exclusive control of the states, not the federal government.

The provision of the United States Constitution which the courts and Congress have most often relied upon as the basis for federal environmental regulation has been the Commerce Clause, article I, § 8: "The Congress shall have power . . . to regulate commerce

\textsuperscript{23} Id. § 1365.
\textsuperscript{24} Id. § 1365(a).
\textsuperscript{25} Id. § 1365(d).
\textsuperscript{26} Id. § 1362(7).
... among the several states. ..."28 Further, navigability has historically been the criterion for determining whether a waterway is or is not a part of the flow of interstate commerce.

Indeed, federal legislation controlling water pollution in the United States has always, until the 1972 Amendments (which, after giving lip-service to the continuing primary responsibilities of the states, 33 U.S.C. § 1251(b), thereafter proceed to significantly expand the scope of federal control efforts) religiously observed the primary responsibilities of the states and the distinctions between interstate and intrastate waters. For example, the Federal Water Pollution Control Act of 1948 originally provided that the federal government could sue alleged violators only with the consent of the state in which such a violation occurred,29 although later amendments to the Act permitted direct federal enforcement where the pollution was interstate in character.30 Further, the Federal Water Quality Act of 1965 provided for the establishment of water quality criteria and standards applicable only to interstate waters.31 Even the absolute prohibitions of the antiquated Rivers and Harbors Act of 1899,32 which has been used in recent years for purposes of pollution control (despite the fact that its drafters never so intended it),33 applied only to navigable waters and their tributaries.34 The writer has found no case in which the United States

28. See, e.g., United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). To be sure, it has also been held that Congress has under Article I, § 8 the constitutional power to "provide for the . . . general welfare of the United States," and this power has occasionally been regarded as the basis for some federal environmental regulation, particularly in reclamation cases. Ivanhoe Irrigation Dist. v. McCracken, 337 U.S. 275 (1958); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950). Further, in the National Environmental Policy Act of 1969 Congress expressly declared that "it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, . . . to foster and promote the general welfare. . . ." 42 U.S.C. § 4331(a) (1970). But overall the General Welfare Clause has been infrequently employed in federal environmental regulation, and federal water pollution control efforts in particular have until recently been exclusively based upon the Commerce Clause.

30. Id. § 1160(g)(1).
31. Id. § 1160(c).
32. Id. § 407 (1970).
34. "The [Rivers and Harbors] Act applies only to navigable waters and their
Supreme Court has had squarely before it the question whether the federal government has jurisdiction for purposes of pollution control over waters which are neither navigable themselves nor tributaries of such navigable waters, but the 1972 Amendments may cause this issue to be litigated in the future.

In any event, the United States Environmental Protection Agency, in an apparent effort to avoid such a confrontation, has imposed on itself a policy slightly less expansive than the 1972 Amendments otherwise purport to allow:

- It will, of course, be a major task to determine, on a case by case basis, what waters fall within the category 'waters of the United States.' However, for the purpose of making initial administrative determinations, at least the following waters would appear to be "waters of the United States":
  1. All navigable waters of the United States;
  2. Tributaries of navigable waters of the United States;
  3. Interstate waters;
  4. Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
  5. Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
  6. Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.35

On the other hand, all this may in the end prove to be little more than an academic exercise because, as a practical matter, only the states are in a position to complain of an encroachment upon their sovereignty; and they (at least Illinois) appear quite willing to allow the exercise of these powers by the federal government, in return, of course, for the federal grant funds contemplated by other provisions of the 1972 Amendments. Nevertheless, one wonders whether this arrangement constitutes either a delegation of legislative function or a bartering away of the state's sovereignty, either or both of which would be unlawful.36

35. Excerpt, Memorandum from John R. Quarles, Jr., General Counsel of Environmental Protection Agency, to Regional Offices, Feb. 6, 1973 (emphasis added).
III. EFFLUENT LIMITATIONS AND STANDARDS

Having thus observed the greatly increased scope of federal control over the state’s waters, it is appropriate now to consider the system of effluent limitations and standards which are currently becoming the law in Illinois applicable to water dischargers.

It has been mentioned that the 1972 Amendments contain a shift in emphasis from water quality standards to effluent limitations, the former being related to the condition and needs of the receiving waters and the latter being related to the condition of the waters discharged. The new system contemplates establishment by the federal government of limitations on the total quantity of specified contaminants which may be discharged by a particular source or group of sources, regardless of the quality of the body of water which is to receive the discharge.

The 1972 Amendments require the achievement by July 1, 1977, of effluent limitations for point sources which shall employ “best practicable control technology currently available,” and the achievement by July 1, 1983, of effluent limitations for “categories and classes” of point sources which shall employ “best available technology economically achievable” for such category or class.

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37. The Illinois Environmental Protection Act was amended on Sept. 14, 1973, by P.A. 78-862, which contemplated that the Pollution Control Board “may” promulgate regulations prescribing, among other things:

Effluent standards specifying the maximum amounts or concentrations, and the physical, chemical, thermal, biological and radioactive nature of contaminants that may be discharged into the waters of the State.

ILL. REV. STAT. ch. 111 1/2, § 1013(a)(ii) (1973). Further, the Act specified that the Board “shall” adopt:

Requirements, standards, and procedures which, together with other regulations adopted pursuant to this Section 13, are necessary or appropriate to enable the State of Illinois to implement and participate in the National Pollutant Discharge Elimination System (NPDES) pursuant to and under the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500).

Id. ch. 111 1/2, § 1013(b)(i). On Aug. 29 and Sept. 5, 1974, the Board, after a series of public hearings, adopted its NPDES procedural rules and substantive regulations (Doc. Nos. R73-11 and R73-12).


39. 33 U.S.C. § 1311(b)(2). It is not yet clear whether these effluent limitations and those referred to in note 38 supra are to constitute absolute maximum constraints or are instead to constitute guidelines for the permit issuing authority, subject to a further exercise of discretion based upon localized conditions. See also note 15 supra.
which will result in reasonable further progress toward the national goal of "zero discharge" by 1985. Both the 1977 and 1983 milestones thus contain two basic elements: (1) a consideration of technological limitations ("currently available" and "available"), and (2) a consideration of economic reasonableness ("practicable" and "economically achievable"). Although each of the two milestones contains slightly different wording, they are consistent at least in this respect. But the terminology employed is still so ambiguous as to virtually insure difficulties in interpreting and achieving the objectives of the Act.

For example, note that the 1972 Amendments contain a disincentive to advance pollution abatement technology. This disincentive results from the ambiguity in the terms "currently available" and "available," and from the fact that technology in water pollution control, like technology in many other areas of modern life, is undergoing rapid change. Since the frontier of new technology is constantly shifting, one first has difficulty identifying that technology which will have to be achieved in 1977 and 1983; and, second, one has difficulty predicting what specific effluent limitations must be achieved as the result of technology on those dates. The consequence is a natural desire to "wait and see" what will be needed, since it would be foolish to spend a million dollars today only to discover tomorrow that the equipment so purchased is obsolete. This difficulty is compounded by the pragmatic problem facing corporate budget officials as they decide how much money to allocate to pollution abatement research and development, since successful research and development effort may well result in the need for expending yet larger sums to implement the control technology so discovered.

Note also that the task of balancing the technological limitations against factors of economic reasonableness is left largely to the discretion of the Administrator. And the statutory terms "economically achievable" and "practicable" are of little help in specifying how

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40. The policy considerations supporting the pursuit of this goal are questionable, in the view of some. See The Wall Street Journal, Aug. 1, 1972, at 8, cols. 1-2. See also text accompanying note 45 infra.


42. Id. § 1311(b).
much money the Administrator can lawfully require a discharger or
class of dischargers to expend for pollution control devices. Thus,
the Administrator is left with the task of deciding which firms in
each industry will be driven out of business because of require-
ments to install control devices which are inordinately expensive
as to certain of them. That there will indeed be the demise of some
such firms is demonstrated by the fact that, while some industries
admit that technology now exists (if one assumes that cost is no ob-
ject) to remove virtually all materials from industrial wastewater,\textsuperscript{43}
the cost of doing so will vary from plant to plant but will in most
cases increase dramatically as pollutant removal approaches 100%.
In this connection, it is interesting (or, perhaps, alarming) to see
how Senator Muskie, one of the chief sponsors of the 1972 Amend-
ments, interprets the phrase “best practicable;” he says that this
phrase should be determined on the basis “of an average of the
best existing performance of plants of various sizes, ages, and unit
processes within each industrial category.”\textsuperscript{44}

Senator Muskie’s suggestion is based on the assumption that
since some of the plants in a particular industrial category have
been able to afford certain technology, the other plants in the cate-
gory ought to be able to do so also. But the assumption is faulty
and will inevitably result in the closing of some plants, since the abil-
ity to afford technology will vary from plant to plant depending
upon the economic condition of each. Less profitable plants and
those which cannot, as a result of their credit rating, obtain long
term financing on sufficiently favorable terms, will simply decide
that the cost of compliance with the Administrator’s decisions is too
great, and will presumably be forced to close down.

Finally, the political heat which is likely to be generated by such
determinations will be increased further by the observation that the
great cost of pursuing the goal of “zero discharge” will in many in-
stances not be balanced by benefits sufficiently attractive. It is hard
in the first place to attribute a dollar value to an aesthetically pleas-

\textsuperscript{43.} \textit{Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S.
on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st

\textsuperscript{44.} 118 CONG. REc. 33696 (1972) (Remarks of Senator Muskie).
ing stream or to a beach where swimmers can safely swim. The problem becomes even more acute when it is realized that the emphasis on effluent limitations without regard for the quality of the receiving waters will mean that in certain areas of the country dischargers will be required to purify a discharge into a river which is nevertheless exceeding, and will continue to exceed despite the pure discharge, federal water quality standards. For example, there is evidence that the extent of pollution from such sources as agricultural operations, water fowl refuges, and other natural surface wash "is great enough that water quality standards widely accepted for fish habitat and water-related recreation could not be met in the lower Missouri River [even] if [all] municipal and industrial wastes were completely eliminated from the river and its tributaries."45


Moreover, there will be circumstances in which pursuit of a "zero discharge" water pollution control level would have an adverse net environmental impact:

Coal that is burned to operate the pollutant removal facilities will produce large amounts of fly ash, sulfur dioxide, nitrogen oxides, and B.t.u.'s of waste heat to be disposed of through the air. If land disposal is used, serious problems exist, especially with heavy metals and chemicals, in terms of land availability and costs, transportation, land treatment techniques, and soil and underground water contamination.

One very enlightening example of this transferral problem was posed to the committee. To achieve the zero discharge level, one chemical plant has estimated it would annually take 9,000 tons of chemicals, 1,500 kilowatts continuous over a year of electric power, and a quantity of steam that would require 19,000 tons of coal to generate; 15,000 tons of natural resources would be required to produce the 9,000 tons of chemicals and 6,000 tons of coal would be required to produce the 1,500 kilowatts of electric power continuously over a year. The 1,500 continuous kilowatts of electric power would produce 300 tons of fly ash, 350 tons of sulfur oxides, 60 tons of nitrogen oxides, and billions of B.t.u.'s per year waste heat.

Each year 9,000 tons of chemical sludge would be generated creating a separate solid waste disposal problem. The plant would generate in producing the steam 1,200 tons of fly ash, 1,000 tons of sulfur and 200 tons of nitrogen oxides. Suppliers of the 9,000 tons of chemicals would generate 6,400 tons of chemical wastes, including 1,700 tons of chloride wastes and 800 tons of iron sludge. For this one plant, 40,000 tons of natural resources would be consumed to remove 4,000 tons of pollutants from the water and 20,000 tons of additional wastes—solid wastes and air pollution—would be produced to achieve a zero discharge. In other words, five times more pollutants would be produced than would be removed from the plant.

Another major manufacturing concern has calculated that at one of its facilities it is technologically feasible to reduce copper residual to 0.40 p.p.m. However, such a reduction is theoretically obtainable only at pH
Municipal and industrial discharges are apparently of minor significance in comparison with the pollution in that portion of the river as the result of surface wash and other natural causes upstream. Under these circumstances, it becomes quite difficult to justify with cost-benefit analysis the expenditure of millions of dollars for treatment of municipal and industrial wastes.

IV. PERMITS

In the earlier remarks concerning the new statutory framework, it was mentioned that the 1972 Amendments mandate the establishment of a permit system, known as the National Pollutant Discharge Elimination System (NPDES), pursuant to which the Administrator may, after opportunity for a public hearing, issue a permit for the discharge of any pollutant, upon such conditions as he determines are necessary to carry out the provisions of the legislation. Thus, for example, if a plant is unable presently to comply with the effluent limitations promulgated by the Administrator, a permit may nevertheless be issued, the conditions of which would include certain abatement measures designed to ultimately result in achievement of the 1977 and 1983 goals.

Accordingly, one of the first questions which a discharger is likely to ask himself is “Do I need a permit?” One might reasonably have expected that the answer to such a simple question should be easily ascertained from the federal and state statutes and regulations dealing with the 1972 Amendments and the NPDES. However, due to the fact that the legislative drafting at the federal level was, in the view of this writer, mediocre, and the drafting at the state level was, again in the view of this writer, even worse than at the federal level, the answer to this basic threshold question requires a journey circuitous enough to entertain even Rube Goldberg.

We must start with the observation that under the original Illinois Pollution Control Board regulations dealing with water pollu-

\[\text{values greater than pH 9. This would create a high demand for lime, 60 percent of which would persist as sludge, with the excess lime required beyond pH 8 passing into receiving waters as dissolved solids. Thus, as a result of installing the best available technology two new pollution problems which had not existed before would be created having an adverse overall net environmental effect.}\]

118 Cong. Rec. 10229-30 (1972) (Remarks of Representative Miller).
tion, drafted under the watchful eye of University of Chicago Professor David P. Currie, the first Chairman of the Board, a discharger could be held in violation of the law either by exceeding the standards stated in the regulations,\(^4\) or by merely failing to apply for a permit,\(^4\) or both. Professor Currie, for one, apparently believed that enforcement would be facilitated if all dischargers (with the exception of certain sizes and categories of dischargers)\(^4\) were required to submit an application for a permit and demonstrate that they deserved permission to continue the discharge rather than allowing dischargers to wait with impunity for the arrival of the enforcement agencies at their doors. Thus, it did not matter that a discharger's effluent was in compliance with all standards; the discharger nevertheless had to submit a documented permit application and the Environmental Protection Agency could then participate in the determination whether the discharger's effluent was in compliance, in the first instance.

Today, however, it is not so certain that a discharger must apply for an NPDES permit, if the discharger's effluent otherwise complies with effluent limitations. The federal government has taken the position that such a permit is required even if the permittee is in compliance with all limitations and standards,\(^4\) but this position does not seem to have support in the wording of the 1972 Amendments. The 1972 Amendments provide in pertinent part:

\[\text{(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.}^5\]

\(^4\) "In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard." State of Illinois Pollution Control Board Regulations, ch. 3 (Water Pollution), Reg. 402 (1972).

\(^4\) "No person shall cause or allow the use or operation of any treatment works or wastewater source after December 31, 1972, without an Operating Permit issued by the Agency, except as provided in paragraphs (b), (c), and (d). \textit{Id.} Reg. 903(a).

\(^4\) For example, Operating Permits were not required for wastewater sources designed and intended to discharge the sewage of 15 or less persons. \textit{Id.} Reg. 903(b).

\(^4\) "Under the 1972 law, it is illegal to discharge any pollutant into the Nation's waters without an NPDES permit." United States Environmental Protection Agency, Toward Cleaner Water: The New Permit Program to Control Water Pollution 2 (Jan. 1974).

Of the sections referred to in the preceding passage, only one relates to the NPDES program: section 1342. The others relate to establishment by the Administrator of water quality related effluent limitations (section 1312), establishment of national performance standards (section 1316), establishment of toxic and pretreatment effluent standards (section 1317), permission to discharge specific pollutants during approved aquaculture projects (section 1328), and permission by the Secretary of the Army to discharge dredge or fill material into the navigable waters at specified disposal sites (section 1344). Moreover, nowhere in section 1342, the only section dealing with NPDES permits, is there contained any express requirement to obtain a permit. Instead, that section merely authorizes the Administrator to issue a permit, provided certain conditions are satisfied. Thus, assuming that one's discharge does not exceed the limitations and standards of sections 1312, 1316, and 1317, and further assuming that no aquaculture project, or dredging or fill disposal, is involved, one may apparently discharge sans a permit without violating section 1311(a), quoted above, since the discharge is in compliance with the sections listed.

Further, the Illinois Environmental Protection Act, as amended, and the Illinois Pollution Control Board regulations dealing with water pollution leave considerable confusion as to the circumstances in which an NPDES permit application will be required.

The Act, as amended to initially implement the 1972 Amendments and the NPDES, provides in part:

No person shall: ... cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit . . . .

Fine. So far it appears that one must indeed obtain an NPDES permit before discharging any contaminant to the waters of the state, regardless whether the contaminant is in such quantity as to exceed the substantive effluent limitations or standards, and to that extent the amended Environmental Protection Act bears some resemblance to the requirements for permit applications which Professor Currie had heretofore fostered. However, a subsequent portion of the same subsection in the Act provides:

51. The text of section 1342, which is several pages long, is omitted here.
No permit shall be required under this subsection and under Section 39(b) of this Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and regulations pursuant thereto.53

Thus, it can still be argued that in situations where no NPDES permit is required at the federal level, no NPDES permit is required at the state level.

However (the game is not over yet), Illinois has decided to preserve, via Pollution Control Board regulation, an additional permit system independent of the NPDES permit system. The permit system which existed in Illinois prior to passage of the 1972 Amendments, pursuant to which the Environmental Protection Agency issued construction permits and operating permits, is continued "[e]xcept for treatment works or wastewater sources which have discharges for which NPDES Permits are required . . . ."54 Thus, for new discharge sources which have neither an NPDES permit nor a construction or operating permit under the former system, it is likely that one or the other may be required under state law. Nevertheless, in some cases, an argument can be made that at least a discharger who currently has a state-granted operating permit need not necessarily apply for either a federal or a state NPDES permit if he is otherwise in compliance with newly applicable effluent limitations and standards.

All the foregoing may initially seem a bit esoteric, but the considerations are in fact very practical because the decision of a discharger to apply or not to apply for a permit can result in quite significant consequences either way. For example, the discharger who presently has an Illinois operating permit but who does not know whether he will successfully obtain an NPDES permit may choose not to draw attention to himself by the filing of an NPDES permit application, which application would (in addition to involving some administrative expense in preparing the application) have to contain a disclosure of the extent to which, if at all, he is not in compliance with all of the newer effluent limitations and standards.

53. Id. (emphasis added).
54. State of Illinois Pollution Control Board Regulations, ch. 3 (Water Pollution), Reg. 951 et seq. (1974).
55. Id. Regs. 951-52.
Further, during the life of the NPDES permit the permittee must keep detailed records56 of the character and quantity of his discharges. Also, punishment for violations of the terms of the permit or effluent limitations, in contrast to the prior system, is more severe for the defendant57 and more easily attained by the prosecuting authorities,58 including private citizens.59 Thus, if there is no additional independent liability imposed on such a person for merely failing to file an NPDES permit application in the first place, he may deem it advisable not to file one.60

V. ENFORCEMENT PROCEDURE

Consider next the means by which the provisions of the 1972 Amendments and permits issued thereunder will be enforced by the federal61 and state62 governments, as well as by private citizens.63

From the standpoint of the federal government, two important observations should be made concerning enforcement. The first is that the 1972 Amendments eliminated the lengthy conference procedure which was required by the original Act64 as a condition precedent to federal enforcement. The second is that the 1972 Amendments did not expressly repeal the antiquated Rivers and Harbors Act of 1899,65 pursuant to which the federal government had, in the two-year period preceding passage of the 1972 Amendments, brought numerous civil suits for water pollution abatement in reliance upon the absolute prohibitions contained in the 1899 Act. Each of these observations will be considered more fully below.

56. The terms of the permit specify such requirements.
57. See notes 20-22 supra.
58. See note 19 supra.
59. See note 23 supra.
60. Obviously, this course of action will not be successful for the more visible dischargers who are clearly exceeding effluent limitations, but there may well be a number of less conspicuous dischargers who will adopt this strategy. Counsel cannot, of course, advise a client to violate the law, but here it appears that a mere failure to submit an NPDES permit application will not in all cases be such a violation of the law.
61. See notes 19-22 supra.
63. See note 23 supra.
65. Id. § 407.
In actions under 33 U.S.C. § 1160(d) of the original Federal Water Pollution Control Act, it was contemplated that the Administrator of the United States Environmental Protection Agency would, prior to initiating enforcement action on behalf of the federal government and displacing state action, hold a conference after three weeks notice and then “[r]ecommend to the appropriate State water pollution control agency that it take necessary remedial action” with respect to the discharge involved. After such a recommendation, the Administrator would “[a]llow at least six months” for the taking of such recommended action. Then, if the remedial action taken was insufficient, the Administrator would hold a public hearing after a minimum of three weeks prior notice, at which every person contributing to the alleged pollution or affected by it would be given an opportunity to make a full statement of his views. After the hearing, the findings and recommendations resulting therefrom would be forwarded by the Administrator to the persons allegedly responsible for the pollution, along with a notice specifying a reasonable time (not less than six months) to secure abatement. Then, if action reasonably calculated to secure abatement of the pollution within the time specified in the notice was not accomplished, the Administrator could request the Attorney General to bring a suit on behalf of the United States to secure abatement (but only if the harm caused by the pollution was interstate in character; otherwise, the Administrator needed the written consent of the Governor of the state before requesting the Attorney General to bring suit). Thus, before the Administrator requested the Attorney General to bring a suit under the Act on behalf of the United States to secure abatement, at least one year and six weeks would have expired from the date on which he first received reports or information concerning the discharges, and even

66. Id. § 1160(d)(3).
67. Id. § 1160(e). An alternative procedure was also available for federal enforcement under 33 U.S.C. § 1160(c)(5), but even this procedure involved a delay of at least six months.
68. Id. § 1160(e).
69. Id. § 1160(f)(1).
70. Id.
71. Id.
72. Id. § 1160(g). See also note 67 supra.
then such a suit would require approval of the Governor of the state in certain circumstances.

Under the 1972 Amendments, however, if the Administrator finds that any person is in violation of any effluent limitation or standard, or of any condition in an NPDES permit, he must either issue an order requiring compliance or bring a civil action. He is not required to give advance notice of such an order or suit, but he may do so. In such a civil suit, the Administrator may seek a permanent or temporary injunction and civil penalties not to exceed $10,000 per day for certain violations. Additionally, there is the possibility of substantial fines and/or imprisonment for willful or negligent violations, or multiple convictions.

Clearly, the 1972 Amendments have streamlined the enforcement mechanisms available to the federal government under the Federal Water Pollution Control Act, and hereafter one might well expect increased federal enforcement activity and less reliance on state enforcement activity pursuant to that Act.

The second observation, with respect to enforcement by the federal government, is that the 1972 Amendments did not expressly repeal the antiquated Rivers and Harbors Act of 1899. The 1899 Act contains the following absolute prohibitions:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . .

It appears from the legislative history of the foregoing provision that its drafters intended not to prohibit discharges of industrial process water but rather to prohibit dumping of materials which

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73. Id. § 1319(a) (Supp. II, 1973).
74. Id.
75. Id. § 1319(b).
76. Id. § 1319(d).
77. Id. § 1319(c).
78. Id. § 407 (1970).
79. Id. (emphasis added).
would constitute obstructions to navigation. Accordingly, the Act lay dormant as a pollution control device for approximately seventy years until Congressman Henry S. Reuss of Wisconsin, apparently dissatisfied by the slow progress being made against pollution pursuant to the Federal Water Pollution Control Act and armed with several judicial interpretations tending to favor his viewpoint, pressured some reluctant Justice Department officials into using more frequently the absolute prohibitions of the 1899 Act for purposes of pollution control. Almost before anyone could say "rely on long standing administrative interpretation" or "interpret a statute so as not to require the impossible," literally hundreds of suits were filed pursuant to the 1899 Act. A clash between the absolute prohibitions of the 1899 Act and the "reasonable" discharge provisions of the Federal Water Pollution Control Act was inevitable. An attempt was made to accommodate the two by establishment of a permit program, known as the Refuse Act Permit Program, but the attempt was effectively defeated by a federal court decision. The decision would have required detailed "environmental impact statements" for each permit the issuance of which would constitute major federal action significantly affecting the environment, pursuant to the National Environmental Policy Act. Thereafter, Congress commenced the hearings which produced the 1972

81. Id. at 486.
82. Id. at 487-90.
83. Hearings on the Refuse Act Permit Program Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 92d Cong., 1st Sess., ser. 92-7, at 100 (1971). Because the prohibition in the 1899 Act purports to be so absolute, there was little left to litigate and many of the cases resulted in nolo and guilty pleas or consent decrees. However, for a review of some of the decisions which were reported, see United States v. Pennsylvania Industrial Chemical Corp., 461 F.2d 468 (3rd Cir. 1972), modified, 411 U.S. 655 (1973); United States v. Armco Steel Corp., 333 F. Supp. 1073 (S.D. Tex. 1971); United States v. Maplewood Poultry Co., 327 F. Supp. 686 (D. Me. 1971); United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970).
85. The impact statements would be signed by the responsible federal official and would specifically and completely identify any adverse environmental effects which cannot be avoided should the permit be granted, alternatives to the granting of the permit, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved should the permit be granted. Id. at 4-5 nn. 6-7.
Amendments. One might have thought that passage of the extensive 1972 Amendments would have eliminated the need for continuation of the Rivers and Harbors Act of 1899 and the problems attendant thereto. However, the drafters of the 1972 Amendments conspicuously avoided express repeal\(^7\) of the 1899 Act, deciding instead to impose what amounts, in effect, to a two-year freeze on new\(^8\) criminal enforcement actions based on the 1899 Act. Further, pending actions based on the 1899 Act were not abated by reason of passage of the 1972 Amendments.\(^9\) On December 31, 1974,\(^9\) the

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\(^7\) This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899. . . .


\(^8\) Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of . . . section 407 of this title [the 1899 Act], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

Id. § 1342(k) (emphasis added).

With respect to the Rivers and Harbors Act of 1899, it should be emphasized that there never has been any express statutory provision authorizing civil actions for injunction to enforce 33 U.S.C. § 407. Further, the United States Supreme Court has never held that 33 U.S.C. § 407 may be enforced by civil injunctions prohibiting discharges of industrial process water which do not have an effect or potential effect on navigation. In the landmark Supreme Court cases involving remedies under the 1899 Act, United States v. Republic Steel Corp., 362 U.S. 482 (1960) and United States v. Standard Oil Co., 384 U.S. 224 (1966), the defendants had discharged materials which unquestionably constituted either an "obstruction" to navigation, 362 U.S. at 486, or a "menace" to navigation, 384 U.S. at 226, and the Standard Oil case, like the more recent case of United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973), is further distinguishable because it was a criminal action, not a civil suit for injunction. Thus, none of the foregoing cases should be cited for the proposition that civil injunctive relief is available pursuant to the 1899 Act for discharges of industrial process water which do not have an effect or potential effect on navigation. Nevertheless, some lower courts (not all of which are in agreement) have held to the contrary, and, with the exception of the two-year freeze period ending December 31, 1974, the Justice Department has continued to bring such civil suits purportedly under the 1899 Act, 33 U.S.C. § 407.


(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by section 2 of this Act [which enacted this chapter] (emphasis added).

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\(^9\) See note 88 supra.
freeze period ends and the possibility exists that shortly thereafter new enforcement actions may be commenced based on the archaic terms of the 1899 Act, notwithstanding the establishment of the NPDES permit program in the interim.\(^91\)

As for state enforcement, it should be emphasized that the 1972 Amendments do indeed restate the need for continued state controls\(^{92}\) and, in fact, the state of Illinois will in all likelihood continue to take an active role in environmental affairs.\(^{93}\) The recent amendments to the Illinois Environmental Protection Act further indicate such a role.\(^{94}\) These amendments find:

(iii) that it would be inappropriate and misleading for the State of Illinois to issue permits to contaminant sources subject to such federal law, as well as State law, which do not contain such terms and conditions as are required by federal law, or the issuance of which is contrary to federal law;

(iv) that the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) provide that NPDES permits shall be issued by the United States Environmental Protection Agency unless (a) the State is authorized by and under its law to establish and administer its own permit program for discharges into waters within its jurisdiction, and (b) pursuant to such federal Act, the Administrator of the United States Environmental Protection Agency approves such State program to issue permits which will implement the provisions of such federal Act;

(v) that it is in the interest of the People of the State of Illinois for the State to authorize such NPDES program and secure federal approval thereof, and thereby to avoid the existence of duplicative, overlapping or conflicting state and federal statutory permit systems. \(^{95}\)

Accordingly, the Board and the Agency are directed to:

[A]dopt such regulations and procedures as will enable the State to secure federal approval to issue NPDES permits pursuant to the provisions of

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91. In the view of this writer it is a strong probability, not a mere possibility. See Section VI infra and note 88 supra.


93. The recent landmark decision of the United States Supreme Court, to the effect that there is a federal common law of nuisance relating to water pollution, had its origins in the state of Illinois, for example. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).


95. ILL. REV. STAT. ch. 111½, §§ 1011(a)(iii)-(v) (1973).
The amendments further provide that no person shall:

(f) Cause, threaten or allow the discharge of any contaminant into the waters of the State as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

Thus, the state has in effect adopted for purposes of its own enforcement the substantive controls promulgated by the federal government.

Of perhaps greater interest than the foregoing comments concerning federal and state enforcement are, the new provisions giving private citizens the opportunity to sue. While the Illinois Environmental Protection Act has given private citizens the right to file a complaint before the Pollution Control Board and, if unsuccessful there, to bring a civil suit for injunctive relief, private citizens previously did not have the right to enforce any provisions of the Federal Water Pollution Control Act. Now, however, the 1972 Amendments give to private citizens having an interest which is or may be adversely affected the right to commence civil actions in their own behalf:

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

96. Id. § 1011(b).
97. Id. § 1012(f).
98. Id. § 1031(b).
99. Id. § 1045(b).
The federal district courts have jurisdiction over such cases without regard to the amount in controversy or the citizenship of the parties, and they have statutory authority to award costs of litigation (including reasonable attorney and expert witness fees) to either party. Interestingly, such costs of litigation might technically be awarded even to a losing party, unless the court determines such an award would not be "appropriate." 

Private litigants will probably find these provisions more attractive than the citizen suit provisions of the Illinois Environmental Protection Act, since the latter requires as a condition precedent to suit the prior exhaustion of remedy before the Pollution Control Board and further requires that "[t]he prevailing party shall be awarded costs and reasonable attorneys' fees." The citizen suit provisions of the 1972 Amendments, on the other hand, allow almost immediate suit in federal court, and, even if the plaintiff loses, it is not mandatory that he be assessed the defendant's attorney's fees.

There are, however, some limitations on this right of citizens to sue, one of which is that they can sue to enforce only (1) an effluent standard or limitation promulgated under the 1972 Amendments, (2) an order issued by the Administrator or a State with respect to such a standard or limitation, or (3) a nondiscretionary act or duty of the Administrator imposed by the 1972 Amendments. Further, the term "effluent standard or limitation" is specifically defined in the statute. Thus, the 1972 Amendments do not, with respect to suits by private citizens based upon federal or state common law, or based upon discretionary duties of the Administrator, or based upon violations of water quality standards (as distin-

102. Id.
103. Id. § 1365(d).
104. Id.
105. ILL. REV. STAT. ch. 111 1/2, § 1045(b).
106. Id. (emphasis added).
107. The plaintiff must give 60 days notice before commencing such a suit, unless a violation of the national performance standards or toxic effluent standards is involved, 33 U.S.C. § 1365(b) (Supp. II, 1973).
108. Id. § 1365(d).
109. Id. § 1365(a).
110. Id. § 1365(f).
guished from “effluent standards or limitations”), dispense with requirements of standing, jurisdictional amount, and diversity of citizenship. It is apparent from the legislative history\footnote{SENATE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. REP. No. 92-414, 92d Cong., 1st Sess. 79 (1971) (emphasis added).} of these provisions that the drafters intended that citizen suits should not become entangled with the difficult issues of proof (including technological constraints, economic benefits, causation, etc.) which are inevitable in cases involving common law or water quality standards.

A second limitation is that no citizen suit may be commenced if the Administrator or state has already commenced and is diligently prosecuting a civil or criminal action against the discharger to require compliance.\footnote{Id. at 81 (emphasis added).} However, this limitation is not very restrictive since the citizen may nevertheless intervene as a matter of right in such an action, if it is pending in federal court (not state court).\footnote{33 U.S.C. § 1311 (Supp. II, 1973).}

\section*{VI. Some Problems and a Prediction}

It has been mentioned that there are a number of problems inherent in the new assault on water pollution. There are disincentives in the development of new pollution control technology,\footnote{See Section III supra.} ambiguities inevitable in the meaning of such terms as “best practicable control technology currently available” and “best available technology economically achievable,”\footnote{33 U.S.C. § 1365(b)(1)(B) (Supp. II, 1973).} questionable policy determinations underlying the statutory national goal of “zero discharge” by

\footnote{[The Citizen Suits provision] would not substitute a “common law” or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require re-analysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.\footnote{Id. at 81 (emphasis added).}}
1985,\textsuperscript{116} likelihood of political brouhahas whenever an agency of the executive branch of government attempts to make decisions determining in effect which members of particular industries will be forced out of business by 1977 or 1983 due to the financial inability to comply with effluent limitations,\textsuperscript{117} and enforcement difficulties resulting from an incomplete requirement for permit applications.\textsuperscript{118} Add to this the fact that time is rapidly slipping away, and one quickly concludes that the objectives and milestones stated in the 1972 Amendments will \textit{not} all be achieved as rapidly as intended. Indeed, William Ruckelshaus has been quoted as saying, "When I was administrator of the Environmental Protection Agency, I saw Congress pass bills on clean air and clean water when they knew—absolutely knew—that the goals couldn't be fulfilled."\textsuperscript{119}

With respect to the 1972 Amendments in particular, consider that the United States Environmental Protection Agency is now making an effort to insure that all major NPDES permits are issued by the end of 1974. However, assuming that the permittees have preserved their rights for judicial review by timely pursuit of administrative remedies, \textit{i.e.}, by the filing of a petition for administrative review of the initial decision by the Administrator,\textsuperscript{120} appeal may be had in the United States court of appeals in the district where the party taking the appeal resides or transacts business. This appeal must be filed in that court within ninety days from the final administrative determination\textsuperscript{121} unless the ground for appeal did not arise until after such period.\textsuperscript{122}

Thereafter, the Administrator has forty days within which to file the record in the court of appeals,\textsuperscript{123} the appellant has another forty days in which to file a brief,\textsuperscript{124} the appellee has another thirty

\begin{footnotes}
\footnotetext[116]{\textit{See} note 40 \textit{supra}.}
\footnotetext[117]{\textit{See} text accompanying note 42 \textit{supra}.}
\footnotetext[118]{\textit{See} Section IV \textit{supra}.}
\footnotetext[119]{\textit{TIME}, July 15, 1974, at 33.}
\footnotetext[120]{40 C.F.R. \textsection 125.34(p)(3)-(4) (1973).}
\footnotetext[121]{33 U.S.C. \textsection 1369(b)(1) (Supp. II, 1973).}
\footnotetext[122]{\textit{Ibid.}}
\footnotetext[123]{\textit{Fed. R. App. P.} 17.}
\footnotetext[124]{\textit{Fed. R. App. P.} 31.}
\end{footnotes}
days in which to file its brief,\textsuperscript{125} and the appellant then has another fourteen days to file a reply brief.\textsuperscript{126} Oral argument and a decision from the court of appeals may well require an additional six months.

Thus far, it is easy to see that if judicial review is sought by the discharger a final, unreviewable permit determination may not be obtained until early 1976, with the 1977 compliance milestone\textsuperscript{127} just around the corner. That does not leave much time for construction of necessary abatement devices.

The consequence of all this is that some degree of dissatisfaction with progress in water pollution control by the federal and state governments pursuant to the 1972 Amendments is inevitable. And that dissatisfaction seems likely to result in an irresistible temptation to resume reliance, after December 31, 1974,\textsuperscript{128} upon such unsuited but seemingly simple statutory devices as the Rivers and Harbors Act of 1899.\textsuperscript{129}

If the government does not resist this temptation, we will thus have come full circle: implementation of the water quality standards of the original Federal Water Pollution Control Act; dissatisfaction with the Federal Water Pollution Control Act; “rediscovery” around 1970 of the Rivers and Harbors Act of 1899; amendment in 1972 of the Federal Water Pollution Control Act to set up a permit system replacing the permit system started under the Rivers and Harbors Act of 1899; dissatisfaction with the 1972 amendments of the Federal Water Pollution Control Act; and finally re-use of the absolute prohibitions of the Rivers and Harbors Act of 1899. One hopes that we will have learned some lessons\textsuperscript{130} during this circuit-

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{128} At this time the Justice Department’s hiatus on new enforcement actions under the 1899 Act will expire. Id. § 1342(k) (Supp. II, 1973). \textit{See also} 40 C.F.R. § 125.42(b) (1973).
\textsuperscript{130} For example, the courts would be well advised in the future to make more frequent use of the doctrine of accommodation than they have in the past, as they face the difficult problem of how to reconcile the absolute prohibitions of the 1899 Act with the effluent limitations and standards resulting from the government’s attempt to balance technological and economic considerations pursuant to the 1972 Amendments. \textit{In The Boys Markets, Inc. v. Retail Clerk's Union Local 770}, 398
ous travel, and that we will not be sharing the hopeless plight of the man who, after stumbling blindly through the blizzard, finally comes upon his own footprints in the snow and, not realizing he has come this way before, follows his own trail forever without making any forward progress.

U.S. 235 (1970) the Supreme Court held that, where two statutes enacted at greatly disparate times appear to conflict, it becomes the task of the courts to accommodate and reconcile the older statute with the more recent one. The Boys Markets case involved a suit brought under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1970), where the Court upheld an injunction against a strike in violation of a collective bargaining agreement containing a compulsory arbitration clause, notwithstanding the literal terms of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970), as well as the Court's previous decision in Sinclair Refinery Co. v. Atkinson, 370 U.S. 195 (1962). In The Boys Markets case, the Court stated:

The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions. See Richards v. United States, 369 U.S. 1, 11 (1962); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956); United States v. Hutcheson, 312 U.S. 219, 235 (1941). As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus, it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones.

398 U.S. at 250-51.

The proper role of accommodation is described by Justice Brennan in his dissenting opinion in Sinclair Refinery Co. v. Atkinson, 370 U.S. 195 (1962) (adopted by the Court as the correct statement of the law in The Boys Markets and overruling the Sinclair Refinery Co. case) where he stated:

Of course § 301 of the Taft-Hartley Act did not for purposes of actions brought under it, "repeal" § 4 of the Norris-LaGuardia Act. But the two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. Our duty therefore, is to . . . give the fullest possible effect to the central purposes of both.

Id. at 215-16. The result of such an accommodation between the 1899 Act and the 1972 Amendments could be to apply the effluent limitations and standards of the 1972 Amendments whenever a discharge source covered by the 1972 Amendments is involved, and apply the ancient prohibitions of the 1899 Act only where other discharge sources are involved.