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## **A LANDOWNERS' REMEDY LAID TO WASTE: STATE PREEMPTION OF PRIVATE NUISANCE CLAIMS AGAINST REGULATED POLLUTION SOURCES**

KATHLEEN ROTH\*

Government control of pollution through the process of review and permit regulation has the potential to preempt the established common law remedies that traditionally have been invoked to protect private and public property interests.<sup>1</sup> Congress resolved this issue by expressing its intent to save these causes of action or to preclude them in each environmental protection statute.<sup>2</sup> Thus, by incorporating or excluding common law actions in federal law, Congress aimed to further the policy of each law to the greatest extent possible.<sup>3</sup>

Some states, however, have abandoned this particularized preemption approach and have experimented in limiting state common law nuisance

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<sup>1</sup> These traditional remedies included common law claims of public and private nuisance, trespass, inverse condemnation, negligence, negligence per se, and strict liability for abnormally dangerous activities. Shay S. Scott, Comment, *Combining Environmental Citizen Suits & Other Private Theories of Recovery*, 8 J. ENVTL. L. & LITIG. 369, 380-98 (1994) (citations omitted) [hereinafter Scott].

When faced with claims of preemption, courts have focused on the precise terms of the statute involved. See, e.g., *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 815 (D. Idaho 1994) (citing *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 180-81 (1946), to support finding that the Federal Power Act (FPA), 16 U.S.C. § 791 (1994), preempts common law claims); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981) (holding that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 (1988), preempts common law nuisance claims), *aff'd*, 688 F.2d 204 (3d Cir. 1982). But see *The Lyden Co. v. Citgo Petroleum Corp.*, No. 1:91CV1967, 1991 U.S. Dist. LEXIS 19783, at \*6 (N.D. Ohio Dec. 15, 1991) (citing *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989), to support its finding that because CERCLA exempts petroleum products from the definition of "hazardous substances," the state nuisance claim for damages was not preempted by the federal statute).

<sup>2</sup> Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. § 1365(e) (1994); Clean Air Act (CAA), 42 U.S.C. § 7604(e) (1988); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(f) (1988).

<sup>3</sup> See *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-93 (1987); S. REP. NO. 414, 92d Cong., 2d Sess. 81 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746.

actions against permittees operating in compliance with set standards. Some of these states have chosen to limit the application of nuisance actions to specified types of sources.<sup>4</sup> Alaskan lawmakers have amended their state's private nuisance statute so that claims are barred against most polluters.<sup>5</sup> Still other states have chosen to apply even broader blanket preemptions so that courts have interpreted operation in compliance with a pollution permit issued under a comprehensive regulatory scheme to serve as a bar to common law nuisance actions.<sup>6</sup>

These broad preemptions, aimed at protecting sources of pollution that operate within the approved standards, far exceed the protection afforded to polluters by permit-shield provisions and limitations on citizen suits. The permit-shield provisions and the limitations on enforcement actions brought by private citizens were designed to prevent frivolous or harassing lawsuits.<sup>7</sup> The blanket preemptions, however, eliminate or restrict private nuisance causes of action that allow private property owners to stop pollution at harmful levels or to seek compensation for damages to their property caused by a facility's pollution.<sup>8</sup> Because permit-shield provisions and existing procedural and substantive restraints on lawsuits already adequately protect polluting interests who comply with regulatory requirements, sweeping blanket preemptions should not be adopted. The absolute bar imposed on common law remedies and causes of action for private interests unfairly favors industrial interests and unnecessarily harms private landowners.

Part I of this Note will discuss the historic significance of the private nuisance claim in cases of pollution damage. Previous liability limitations for sources subject to regulation will be analyzed in Part II. Part III will consider the origin and implementation of across-the-board preemptions of private

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<sup>4</sup> ALASKA STAT. § 09.45.235 (1995) (barring private nuisance actions against preexisting agricultural operations that have been in operation for at least three years); OKLA. STAT. tit. 2, § 9-210 (1993) (limiting feed yard liability for nuisance actions by creating presumptions against nuisance for facilities operating within set standards).

<sup>5</sup> A person may not maintain an action under this section based upon an air emission or water or solid waste discharge, other than the placement of nuclear waste, where the emission or discharge was expressly authorized by and is not in violation of a term or condition of . . . (2) a license, permit, or order. . . .

ALASKA STAT. § 09.45.230(b) (1995).

<sup>6</sup> *Brown v. County Comm'rs*, 622 N.E.2d 1153, 1159 (Ohio App. 1993).

<sup>7</sup> *Shell Oil Co. v. EPA*, 950 F.2d 741, 762 (D.C. Cir. 1991).

<sup>8</sup> ALASKA STAT. § 09.45.230(b) (1995).

nuisance claims. Finally, the impact of preempting private nuisance actions against polluters will be discussed in Part IV.

#### I. THE HISTORIC SIGNIFICANCE OF PRIVATE NUISANCE ACTIONS IN CASES OF POLLUTION DAMAGE TO PRIVATE PROPERTY

"Simply stated, a nuisance is a 'wrongful invasion of a right of interest.'"<sup>9</sup> Because nuisance claims were historically used to provide remedies for landowners adversely affected by actions of their neighbors,<sup>10</sup> the claim was quickly put to use in cases of environmental pollution.<sup>11</sup> The elements of a private nuisance claim include:

conduct [that] is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.<sup>12</sup>

The nuisance claim has been used by private parties in a wide variety of circumstances including pollution from odors,<sup>13</sup> dust,<sup>14</sup> and various other interferences.<sup>15</sup> A finding of unreasonable interference allows the court to award damages or abate the interference.<sup>16</sup> Thus, nuisance law is a source of polluter liability to private parties injured by their discharges.

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<sup>9</sup> Scott, *supra* note 1, at 381.

<sup>10</sup> *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 719 (Mich. 1992).

<sup>11</sup> *Id.* at 720, 725 n.30.

<sup>12</sup> RESTATEMENT (SECOND) OF TORTS § 822 (1979).

<sup>13</sup> *E.g.*, *Varjabedian v. City of Madera*, 572 P.2d 43 (Cal. 1977).

<sup>14</sup> *E.g.*, *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

<sup>15</sup> See Scott, *supra* note 1, at 382-83 (citing cases for claims relating to blasting, flooding, stream pollution, odors, smoke, dust, noise pollution, the threat of fire hazard, and "a pond full of malarial mosquitos").

<sup>16</sup> *Id.* at 382.

## II. EXISTING LIABILITY LIMITATIONS FOR REGULATED SOURCES

### A. *Permit-Shield Provisions*

#### 1. *Operation*

Federal statutes that provide protection to permittees include the Refuse Act,<sup>17</sup> Resource Conservation and Recovery Act ("RCRA"),<sup>18</sup> and Clean Water Act ("CWA").<sup>19</sup> These provisions decrease the opportunities for enforcement actions against polluters whose operations are consistent with the terms of their permits.<sup>20</sup> Protection is extended under the Refuse Act so that sources are also shielded from criminal prosecution where pollution is occurring within the limitations set by the facility's permit.<sup>21</sup> The RCRA protection bars enforcement actions by federal and state agencies.<sup>22</sup>

Early cases interpreting these statutes indicate that *all* enforcement actions were precluded by these permit-shield rules.<sup>23</sup> In 1991, the Court of Appeals for the District of Columbia refused to consider the Environmental Defense Fund's challenge to the Environmental Protection Agency's ("EPA") permit-shield regulation.<sup>24</sup> The court found no actual controversy because the EPA had evidently changed its position as to whether enforcement suits by private attorneys general under the statute's citizen suit provisions were precluded entirely.<sup>25</sup> EPA briefs indicated that "although [EPA] believes its permit system will narrow the opportunities for citizen suits, the Agency does not maintain that the shield precludes [such] suits."<sup>26</sup>

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<sup>17</sup> 33 U.S.C. § 407 (1994).

<sup>18</sup> 42 U.S.C. § 6901 (1988).

<sup>19</sup> 33 U.S.C. § 1251 (1994).

<sup>20</sup> *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1041 n.12 (7th Cir. 1975); *Kalur v. Reesor*, 335 F. Supp. 1, 11 (D.D.C. 1971). *Cf.* *Shell Oil Co. v. EPA*, 950 F.2d 741, 762 (D.C. Cir. 1991) (upholding EPA's authority to promulgate permit-shield rules limiting enforcement actions).

<sup>21</sup> *Kalur*, 335 F. Supp. at 11.

<sup>22</sup> *Shell Oil*, 950 F.2d at 762.

<sup>23</sup> *Id.* at 763.

<sup>24</sup> *Id.* (rejecting arguments that the rule conflicted with RCRA's citizen suit provision).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* Compare previous agency interpretations that the permit-shield rule was preclusive. 45 Fed. Reg. 33,312 (1980).

## 2. *Rationale*

Numerous reasons justifying permit-shields have been offered. One motivation is to protect industry from uncertainty as to their potential liability for the effects of their operations.<sup>27</sup> Another consideration is to serve judicial economy by avoiding a proliferation of unwarranted citizen suits.<sup>28</sup> These provisions also protect the EPA's authority to issue limitations and permits.<sup>29</sup> Permit-shields also conserve limited agency resources by allowing regulating agencies to focus on pollution sources that have not obtained or complied with permit requirements.<sup>30</sup> Finally, permit-shields arguably will cause the government to act expeditiously to review sources and issue pending renewal permits to ensure adequate environmental protection.<sup>31</sup> It is argued that the agency will be spurred to action where the application for renewal is not processed because the permittee remains protected under older pollution standards.<sup>32</sup> Despite this broad language of intent however, courts have not extended this defense to sources releasing pollutants pending an *initial* permit application approval.<sup>33</sup> Therefore, permit-shield rules will not protect sources operating without any permit, even where their emissions meet the requirements of the statute.<sup>34</sup> Thus, while providing an incentive for agency efficiency, the rules do not nullify permit requirements.<sup>35</sup>

These arguments all rest on the assumption that current permit issuance and enforcement policies and procedures adequately protect the

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<sup>27</sup> *Shell Oil*, 950 F.2d at 762, 764.

<sup>28</sup> *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975).

<sup>29</sup> *Glazer v. American Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1039 (E.D. Tex. 1995) (citing *Greenpeace v. Waste Technologies Indus.*, 9 F.3d 1174 (6th Cir. 1993)).

<sup>30</sup> *Shell Oil*, 950 F.2d at 762, 764.

<sup>31</sup> S. REP. NO. 92-414, 92d Cong., 2d Sess. 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730.

<sup>32</sup> 40 C.F.R. §§ 122.6(a), 270.4 (1995); *Costle v. Pacific Legal Found.*, 445 U.S. 198, 210-11 n.10 (1980); *NRDC v. EPA*, 859 F.2d 156, 212-13 (D.C. Cir. 1988); *Student Pub. Interest Research Group v. Fritzsch, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1538 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985).

<sup>33</sup> *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168 (D. Mont. 1995); *United States v. Tom-Kat Dev., Inc.*, 614 F. Supp. 613 (D. Alaska 1985).

<sup>34</sup> *Beartooth Alliance*, 904 F. Supp. 1168.

<sup>35</sup> *Kitlutsisti v. Arco Alaska, Inc.*, 592 F. Supp. 832 (D. Alaska 1984). Note, however, that the court refused plaintiff's request for an immediate injunction where defendants were operating in compliance with the statute, and EPA had refused to process their individual permit applications because a former general permit applied. *Id.*

public's interest. Because these schemes are organized to protect all parties, polluters are restrained adequately and therefore, permit-shield rules do not risk unchecked harm to private parties. Supporters of permit-shields argue that permit programs are structured to assure environmental safety through federal oversight, public participation, strict compliance requirements, and emergency exceptions.

First, state-run National Pollutant Discharge Elimination System ("NPDES") permitting programs remain within the scrutiny of the federal EPA to ensure adequate limitations. The state's authority to administer permitting of sources is contingent upon the EPA Administrator's approval of its program.<sup>36</sup> Even following approval of the state permitting program, the protections for citizen interests continue by means of EPA permit reviews and objections.<sup>37</sup> Protection continues throughout the permit's duration. EPA retains authority to modify, revoke, reissue, or terminate permits.<sup>38</sup> This authority allows the agency to account for substantial changes in the source's facility or activities, newly discovered information, changes to the limitation standards supporting the permit,<sup>39</sup> or for other cause.<sup>40</sup> Additionally, the EPA may revise the state program<sup>41</sup> or even withdraw program approval for continuing non-compliance under NPDES.<sup>42</sup> These various provisions all serve to ensure that the state permitting process is not merely a rubber stamp on polluters' activities. Given the adequacy of these limitations, supporters claim that the permit-shield rule does not subject individuals to uncontrolled dumping.

Second, permits may be issued only after a variety of opportunities for public input on the allowed limitations. Citizens may influence state effluent

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<sup>36</sup> State Program Requirements, 40 C.F.R. § 123.1(c) (1995).

<sup>37</sup> *Id.* § 123.44.

<sup>38</sup> *Shell Oil Co. v. EPA*, 950 F.2d 741, 765 (D.C. Cir. 1991).

<sup>39</sup> 40 C.F.R. § 270.41(a) (1995).

<sup>40</sup> Causes for modification, revocation, or reissuance include: noncompliance with any permit condition; failure to disclose all relevant facts in the permit application; misrepresentation or relevant facts at any time; EPA determination that human health or environment is endangered and can only be reduced to acceptable levels by modification or termination; or, the proposed transfer of a permit. *Id.* §§ 270.41(b)(2), 270.43.

<sup>41</sup> *Id.* § 123.62.

<sup>42</sup> *Id.* § 123.63 (allowing withdrawal of approval for continuing non-compliance with NPDES requirements).

limitations during the state program approval process.<sup>43</sup> Individuals also may affect a particular permit's terms through notice-and-comment review<sup>44</sup> or participation in the review process of the Regional Administrator.<sup>45</sup> The stated opportunities for participation in the permitting process balance the needs of both the public and the source, thus, the permit-shield rule only enforces the results of this deliberative process.<sup>46</sup>

Third, strict compliance policies protect the public from abuses of a source's permit. When a permit has been issued, NPDES policy requires 100% compliance.<sup>47</sup> A polluter's liability is not limited by the permit-shield rule for emissions in excess of the limitations approved in the permit.<sup>48</sup>

Last, permit-shield rules are not without limits. Emergency exceptions adequately ensure polluters will not be able to create unmitigated harm due to the unforeseen impacts of a pollutant.<sup>49</sup> For example, under RCRA, the

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<sup>43</sup> *Id.* § 123.1(e) ("Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.").

<sup>44</sup> *E.g., id.* §§ 124.10-.19; *Shell Oil Co. v. EPA*, 950 F.2d 741, 765 (D.C. Cir. 1991).

<sup>45</sup> 40 C.F.R. § 123.44(d)(3) (1995) (allowing opportunity to comment on the basis of EPA's objection to a permit); *Id.* § 123.44(e) (allowing public hearing on request by the state or any interested person).

<sup>46</sup> The effectiveness of public notice and comment is disputed. See Blair P. Bremberg, *Pre-Rulemaking Regulatory Development Activities and Sources as Variables in the Rulemaking Calculus: Taking a Soft Look at the Ex-APA Side of Environmental Policy Rulemakings*, 6 J. MIN. L. & POL'Y 1, 1 n.2 (1990/1991) (stating that in pre-rulemaking activities involving input by stakeholders, representation of interests tends to be unbalanced); *Id.* at 6 (noting the frequent reopening of rulemaking comment periods in programs subject to active congressional oversight); Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 389 n.160 (1988) (observing that comments received on a proposal to release gypsum into the Mississippi River "was so conflicting, with respect to every pollutant, that it disposed of nothing").

The ability of the agency to solicit meaningful public participation is limited by the cost of publicizing notice of hearings and comment periods. David Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENVTL. L. 679, 743 n.235 (1982) (stating the ability of increased notice requirements to produce meaningful public comment is questionable). Compare Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 75, 145. "The NPDES permitting process seems to effectively take state input into account." *Id.*

<sup>47</sup> *In re Shell Chem. Co.*, Nos. 85-14, 85-15, 85-16, 1987 WL 120997, at \*4 (Oct. 20, 1987).

<sup>48</sup> See *Kalur v. Resor*, 335 F. Supp. 1, 11 (D.D.C. 1971); *Shell Oil*, 950 F.2d at 762.

<sup>49</sup> *Shell Oil*, 950 F.2d at 765.



EPA may take action to avoid "imminent and substantial endangerment to health or the environment."<sup>50</sup>

## B. *Limitations on Citizen Suit Standing*

### 1. *Operation*

The public's ability to enforce environmental protection through federally authorized citizen suits is limited further by procedural and substantive requirements.<sup>51</sup> All actions must be based on violations of the governing permit.<sup>52</sup> Plaintiffs must allege "ongoing violations" of the permit requirements.<sup>53</sup> The action may not proceed until after notice is given to both the polluter and the agency.<sup>54</sup> After issuing notice, a potential plaintiff must wait either sixty or ninety days before commencing the action,<sup>55</sup> or the action will be dismissed absent some extenuating circumstance.<sup>56</sup> Suits may not be maintained where the government has taken and diligently pursued corrective

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<sup>50</sup> 42 U.S.C. § 6973(a) (1988); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) (stating EPA need not prove an emergency exists to prevail).

<sup>51</sup> See *Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1105 (D. Haw. 1994).

<sup>52</sup> Actions may only be brought for violations of actual discharge limitations, rather than water quality standards. *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 850 (9th Cir. 1987); *Northwest Envtl. Advocates v. City of Portland*, 11 F.3d 900, 909-10 (9th Cir. 1993). Citizen suits may not enforce National Ambient Air Quality Standards or an agreement between the state enforcement agency and the source because CAA provisions are only enforceable under the citizen suit provision if (1) it falls within the definition of an "emission standard or limitation," and (2) it is "'in effect under' the Act." *Cate v. Transcontinental Gas Pipe Line Corp.*, 904 F. Supp. 526, 529 (W.D. Va. 1995). But see *Sierra Club v. Cedar Point Oil Co.*, Nos. 94-20461, 95-20227, 1996 WL 11077, at \*9 (5th Cir. Jan. 11, 1996) (allowing citizen suit although no effluent limitations had been issued based on CWA § 1311(a)).

<sup>53</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 56-63 (1987).

<sup>54</sup> CAA, 42 U.S.C. § 7604(b) (1988); CWA, 33 U.S.C. § 1365(b) (1994); RCRA, 42 U.S.C. § 6972(c) (1988). This notice may be filed before the actual violation has occurred, such as when a permit will be expiring. *Citizens for a Better Env't—Cal. v. Union Oil Co.*, 861 F. Supp. 889, 912 (N.D. Cal. 1994).

<sup>55</sup> CAA, 42 U.S.C. § 7604(b) (1988); CWA, 33 U.S.C. § 1365(b) (1994); RCRA, 42 U.S.C. § 6972(b)-(c) (1988).

<sup>56</sup> CAA, 42 U.S.C. § 7604(b) (1988) (excepting violations of 42 U.S.C. § 7412(c)(1)(B), (f)(4), or an order of the Administrator under 42 U.S.C. § 7413(a)); CWA, 33 U.S.C. § 1365(b) (1994) (excepting violations of 33 U.S.C. §§ 1316, 1317(a)); RCRA, 42 U.S.C. § 6972(c) (1988) (excepting violations of Chapter III of RCRA).

action.<sup>57</sup> These limitations enable citizens to become involved in enforcement only in cases where the agency is required to act, is on notice of its failure to do so, and still has failed to initiate any type of enforcement action.<sup>58</sup>

Another factor limiting the liability of polluting sources is the ability of states to restrict standing to bring the claims. The Court of Appeals for the District of Columbia has held that nothing requires a state to extend the same ability to bring actions as the federal statutes.<sup>59</sup> Some states have resisted allowing citizen enforcement actions on a state level.<sup>60</sup> For example, Virginia's limited standing provisions withstood EPA and environmentalist pressure for several years so that enforcement actions have been extremely limited.<sup>61</sup> Only after years of administrative and court battles have citizens gained protection.<sup>62</sup> Where enforcement may only be brought by the overburdened agencies, the source's vulnerability to suit is necessarily decreased.

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<sup>57</sup> *Culbertson v. Coats Am., Inc.*, No. 94-CV-135-WCO, 1995 WL 739301, at \*5 (N.D. Ga. Dec. 20, 1995) (citing *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991)). Diligence of the government's prosecution will be presumed and is only overcome "with persuasive evidence that the government has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive, or otherwise in bad faith." *Glazer v. American Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1037 (E.D. Tex. 1995) (quoting *Connecticut Fund for the Env't v. Contract Plating Co., Inc.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986)).

<sup>58</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60-61 (1987). *But see Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1123 n.41 (D. Haw. 1994) (holding an enforcement action only precludes citizen suits if the public has had a chance for meaningful participation).

<sup>59</sup> *NRDC v. EPA*, 859 F.2d 156, 176-77 (D.C. Cir. 1988).

<sup>60</sup> *Id.*

<sup>61</sup> Virginia's CAA Title V stationary source permitting program limits judicial review of permitting decisions to plaintiffs able to prove a "pecuniary and substantial interest" in the outcome of the litigation. VA. CODE ANN. § 10.1-1318(B) (Michie 1995). These limitations are currently being litigated in the federal courts. *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996).

<sup>62</sup> On April 4, 1996, after the Fourth Circuit had rejected Virginia's constitutional challenges to the CAA, Governor George Allen signed a bill making it easier for the public to challenge permits. *Allen to Form Environmental Commission*, RICHMOND TIMES DISPATCH, Apr. 12, 1996, at B4. Still, Governor Allen vowed to continue the litigation against the CAA. *Id.* The standing changes will apply to agency action or review of agency action commenced on or after July 1, 1996. Administrative Process Act—Application to Certain Agencies, Ch. 573, § 2 (Apr. 4, 1996).

## 2. *Rationale*

The restrictions on citizen suits serve several purposes. By requiring that the action rest on violation of specific limitations, Congress sought to avoid having courts engage in "subjective analysis of technological considerations" during enforcement.<sup>63</sup> These restrictions also balance the environmental interests against the source's need for predictable liability.<sup>64</sup> The notice requirements attempt to balance the needs of environmental protection against the agency's discretion.<sup>65</sup> This interim may allow the defendant and/or the agency to address the problem so that the lawsuit is unnecessary.<sup>66</sup> Agency inaction is required in order to avoid overburdening courts<sup>67</sup> and imposing inappropriate penalties if the agency has agreed to forego penalties where the violator takes "some extreme corrective action" that it would not otherwise be obligated to take.<sup>68</sup>

### C. *Defenses to Liability and Presumptions Favoring the Source*

Absolute preemption of private common law nuisance claims where a facility is operating in compliance with a permit is the broadest of measures taken to protect polluters from liability. Various other approaches are adopted by some states in an attempt to balance the competing interests without stripping landowners of a traditional remedy. Some of these approaches include recognition of new defenses or innovative remedies, treatment of the permit as a limitation to possible remedies,<sup>69</sup> and

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<sup>63</sup> *Northwest Env'tl. Advocates v. City of Portland*, 11 F.3d 900, 910 (9th Cir. 1993). S. REP. NO. 414, 92d Cong., 2d Sess. 81 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745.

<sup>64</sup> *Northwest Env'tl. Advocates*, 11 F.3d. at 911.

<sup>65</sup> "The primary purpose of the notice requirement is to inform the federal and state agencies of the claimed violation, thereby providing them with an opportunity to take their own enforcement and remedial action if so advised." *Mancuso v. New York State Thruway Auth.*, No. 93-CIV-1145, 1995 WL 753971, at \*3 (S.D. N.Y. Mar. 31, 1995). *See also* *Culbertson v. Coats Am., Inc.*, Nos. 94-CV-135-WCO, 1995 WL 739301, at \*5 (N.D. Ga. Dec. 20, 1995) (stating purpose of notice provision is to meet exhaustion requirement).

<sup>66</sup> *Citizens for a Better Env't—Cal. v. Union Oil Co.*, 861 F. Supp. 889, 912 (N.D. Cal. 1994).

<sup>67</sup> *See Glazer v. American Ecology Env'tl. Servs. Corp.*, 894 F. Supp. 1029, 1034 (E.D. Tex. 1995).

<sup>68</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60-61 (1987).

<sup>69</sup> *Morgan County Concrete Co. v. Tanner*, 374 So. 2d 1344 (Ala. 1979) (barring injunctive relief where defendant is operating in compliance with permit conditions).

presumptions against the finding of nuisance.

The accountability of polluters is already limited by agency and court recognition of possible defenses to enforcement actions. These defenses aim to avoid hardship for good faith industry action.<sup>70</sup> Examples of these defenses include upset,<sup>71</sup> bypass,<sup>72</sup> and impossibility of performance.<sup>73</sup> States aiming to protect industry interests could enact legislation expressly recognizing similar defenses to common law actions or by encouraging the use of innovative remedies to nuisance actions.<sup>74</sup> Because the injunctive relief is an equitable remedy some courts have attempted to arrive at a middle ground between competing claims.<sup>75</sup> The federal courts have followed this example when faced with injunction requests in instances of environmental harms.<sup>76</sup> The Ninth Circuit Court of Appeals implicitly recognized at least a partial defense when it held that defendants should be allowed to present evidence against the injunction or to limit its scope.<sup>77</sup> This consideration of competing claims aims to reconcile private rights with industry's needs.

Industry interests also would be adequately protected by treating proof

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<sup>70</sup> See *In re Shell Chem. Co.*, Nos. 85-14, 85-15, 85-16, 1987 WL 120997, at \*3 (Oct. 20, 1987). These defenses are not universally recognized. See, e.g., *Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1105 (D. Haw. 1994) (stating [CWA] imposes strict liability without allowance for "de minimis" or "rare" violations regardless of the polluter's good faith).

<sup>71</sup> Following enforcement actions against polluters under the CWA for violations created by random variations of discharges, a minority of federal circuits held that the EPA was required to utilize variance provisions. *In re Shell Chem. Co.*, Nos. 85-14, 85-15, 85-16, 1987 WL 120997, at \*2 (Oct. 20, 1987) (citing *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1266-74 (9th Cir. 1977), and *FMC Corp. v. Train*, 539 F.2d 973, 985-86 (4th Cir. 1976)). EPA responded by enacting the upset defense providing for protection from liability where the permit violation was "an exceptional incident in which there is unintentional and temporary noncompliance . . . because of factors beyond the reasonable control of the permittee." *In re Shell Chem. Co.*, Nos. 85-14, 85-15, 85-16, 1987 WL 120997, at \*2 (Oct. 20, 1987); 40 C.F.R. § 122.41(n) (1995).

<sup>72</sup> 40 C.F.R. § 122.41(m) (1995).

<sup>73</sup> *Union Elec. Co. v. EPA*, 593 F.2d 299, 306 (8th Cir. 1979). Cf. *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 633 (D. Md. 1987). This defense was rejected in regard to CWA permits which are facility-specific. *United States v. C.P.S. Chem. Co.*, 779 F. Supp. 437, 454 (E.D. Ark. 1991).

<sup>74</sup> See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970) (Jasen, J. dissenting); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972).

<sup>75</sup> *Boomer*, 257 N.E.2d 870; *Spur Indus., Inc.*, 494 P.2d 700.

<sup>76</sup> E.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

<sup>77</sup> *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995) (relying on *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 544-45 (1987)).

of operation under a permit to serve only as a limit to injunctive relief. Alabama courts have gone even further to hold that operation in compliance with a permit bars injunctive relief.<sup>78</sup> Private interests are protected through the availability of damage awards, environmental interests are protected through incentives created for industry to reduce pollution to avoid tort liability, and polluting interests are protected from unexpected shutdowns.<sup>79</sup>

Another possible approach to balance the competing interests of the landowner with the polluter might be a presumption of reasonableness and necessity that must be overcome before a complainant could state a claim of nuisance.<sup>80</sup> The Tenth Circuit Court of Appeals applied this approach so that an oil company operating under a valid permit was not protected if the source abused the privilege of operation by maintaining an ongoing nuisance.<sup>81</sup> Oklahoma has also attempted to codify this moderated approach to limiting liability in certain circumstances.<sup>82</sup> The Oklahoma statute provides that "[a]ny animal feeding operation licensed pursuant to the Oklahoma Feed Yards Act, § 9-201, of this title, operated in compliance with such standards, and in compliance with the regulations made and promulgated by the Board, shall be deemed to be prima facie evidence that a nuisance does not exist . . . ."<sup>83</sup>

### III. EXAMPLES OF BROAD PREEMPTIONS OF NUISANCE CLAIMS FOR POLLUTION DAMAGE

#### A. *Limiting Nuisance Application to Specified Sources*

One approach to limiting private actions only protects selected industries. Oklahoma legislatures were faced with the dilemma of a weakening economic base following the decline of the oil industry.<sup>84</sup> In 1993, in an effort to lure new industry to the state, lawmakers placed substantial restrictions on the nuisance claims against livestock operations.<sup>85</sup> The

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<sup>78</sup> Morgan County Concrete Co. v. Tanner, 374 So. 2d 1344 (Ala. 1979).

<sup>79</sup> *Id.* at 1347.

<sup>80</sup> *E.g.*, Union Oil Co. v. Heinsohn, 43 F.3d 500, 504 (10th Cir. 1994) (citing *Briscoe v. Harper Oil Co.*, 702 P.2d 33 (Okla. 1985)).

<sup>81</sup> *Id.*

<sup>82</sup> OKLA. STAT. tit. 2, § 9-210 (1993).

<sup>83</sup> *Id.* at § 9-210B.

<sup>84</sup> Jean Anne Casey & Colleen Hobbs, *Look What the GATT Dragged In*, N.Y. TIMES, Mar. 21, 1994, at A17.

<sup>85</sup> *Id.*

amendment provides for protection of feed yards operating in compliance with permit terms and regulations and not operating in violation of zoning laws.<sup>86</sup> Separate and more sweeping protection is afforded to permitted yards that are more remotely located so that proof of nuisance requires a showing "by a preponderance of the evidence that the operation endangers the health or safety of others."<sup>87</sup>

### B. *Barring Nuisance Actions Against Most Permitted Sources*

A second approach to limiting industry liability offers protection to a much broader range of pollution sources. This approach was recently adopted in Alaska. Until recently, Alaskan courts and the legislature expanded the definition and application of private nuisance claims,<sup>88</sup> indicating that common law nuisance applied to injuries caused by pollution. This interpretation by the Alaskan courts was not affected by the enactment of the state's environmental protection statute and subsequent regulatory oversight.<sup>89</sup> These statutes expressly gave citizens the right "to suppress nuisances, to seek damages, or to otherwise abate or recover for effects of pollution or other environmental degradation."<sup>90</sup>

Beginning in 1991, a class of 120 property owners invoked the nuisance action to seek injunctive relief and damages for water pollution caused by a foreign-owned paper mill.<sup>91</sup> During the three years of litigation that followed, the paper mill was shut down and the parties eventually settled on the issue of damages so as to avoid further litigation costs.<sup>92</sup> However, the incident caused the Alaskan legislature to substantially limit private nuisance actions relating to environmentally regulated activities.<sup>93</sup> Only a few months

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<sup>86</sup> OKLA. STAT. tit. 2, § 9-210B (1993).

<sup>87</sup> *Id.* § 9-210C. This section applies to complying feedlots located "more than three miles outside the incorporated limits of any municipality and which is not located within one mile of ten or more occupied residences." *Id.*

<sup>88</sup> *E.g.*, ALASKA STAT. §§ 09.50.170-09.50.240 (1995). *See also* Letter from Bruce Botelho, Alaska Atty. Gen., to Walter Hickel, Governor of Alaska, 1994 WL 779205, at \*5 (June 14, 1994).

<sup>89</sup> Letter from Grace Schaible, Alaska Atty. Gen., to Mike Davis, Alaska State Legislator, 1988 WL 249507 (Aug. 3, 1988).

<sup>90</sup> ALASKA STAT. § 46.03.870(c) (1995).

<sup>91</sup> Naftali Bendavid, *Edwards et al. v. Alaska Pulp Corp.*, LEGAL TIMES, Oct. 24, 1994, at 16.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; ALASKA STAT. § 09.45.230 (1995).

before the settlement, the state's private nuisance statute was amended so that private nuisance actions were prohibited for non-radioactive pollution damages where the emission or discharge was expressly authorized by statute, regulation, court order, or permits subject to monitoring, review, renewal, or the Alaska Coastal Management Program.<sup>94</sup> The effect of this amendment is to create a blanket preemption of any common law remedies protecting affected landowners' interests.

### *C. Absolute Prohibition of Nuisance Claims for Permitted Sources*

Under Ohio law, the nuisance doctrine had been interpreted as including "anything which 'endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.'"<sup>95</sup> However, Ohio's application of the nuisance doctrine in light of state regulation led to widespread preclusion of the public nuisance claim in that state.<sup>96</sup> Ohio courts developed protection for all types of "legalized activity"<sup>97</sup> and reasoned that actions sanctioned by the law could not also be a public nuisance.<sup>98</sup> Over time, the courts expanded this reasoning to bar claims proceeding on strict liability nuisance theories even in cases involving abnormally dangerous activities.<sup>99</sup>

In 1992, the Ohio Court of Appeals for the First District held that the application of strict liability is inappropriate "where the public policy of Ohio has clearly chosen to allow operators . . . to do business in this state subject to limitations imposed under . . . a comprehensive and vigilant regulatory scheme."<sup>100</sup> This preclusion of claims, however, also was applied outside the area of strict liability so that even an action that may have been a common law nuisance is no longer an actionable tort—especially where a set of legislative acts or administrative regulations governing the details of the conduct exists.<sup>101</sup> The court ruled that this decision applied equally to public and

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<sup>94</sup> ALASKA STAT. § 09.45.230 (1995).

<sup>95</sup> *MHE Assocs. v. United Musical Instruments, U.S.A., Inc.*, No. 1:93CV1883, 1995 U.S. Dist. LEXIS 5808, at \*7 (N.D. Ohio filed Mar. 24, 1995) (citing *Harris v. City of Findlay*, 18 N.E.2d 413 (Ohio App. 1938)).

<sup>96</sup> *State ex rel. Brown v. Rockside Reclamation, Inc.*, 351 N.E.2d 448 (Ohio 1976).

<sup>97</sup> *See Allen Freight Lines v. Consolidated Rail*, 595 N.E.2d 855, 856-57 (Ohio 1992).

<sup>98</sup> *City of Mingo Junction v. Sheline*, 196 N.E. 897, 900 (Ohio 1935).

<sup>99</sup> *State ex rel. Schoener v. Board of County Comm'rs*, 619 N.E.2d 2, 6 (Ohio App. 1992).

<sup>100</sup> *Id.*

<sup>101</sup> *Brown v. County Comm'rs*, 622 N.E.2d 1153, 1159 (Ohio App. 1993).

private nuisance claims.<sup>102</sup> Only a qualified private nuisance was held to remain available for landowner claims so that a licensed and regulated operation would be liable for nuisance when the complainant established negligence on the part of the defendant.<sup>103</sup>

However, four months later the Ohio Supreme Court rejected its earlier holding after the state amended the licensing statute by allowing nuisance actions to suppress pollution.<sup>104</sup> Still, two dissenting judges argued that the comprehensive regulatory structure preempted the claims.<sup>105</sup>

#### IV. IMPACT OF BLANKET PREEMPTIONS OF CLAIMS AGAINST PERMITTED SOURCES

Provisions which limit the ability of individuals to protect their interests where the polluter is operating in compliance with a permit create a gap in the scheme for environmental protection and unnecessarily harm private landowners. The existing limitations provided by citizen suits and permit-shield rules already strike the appropriate balance between industrial interests and environmental protection.<sup>106</sup> Given the broad application of these permit-shields the balance is in favor of industry.

The combined effect of these existing limitations with the blanket preemption of the nuisance remedy is destruction of the delicate balance of interests. Where the common law deterred harmful activity in the past by imposing liability for pollution, now all but the most egregious pollution will go unchecked until severely overburdened agencies are able to address the issue through regulations and translate them into each polluting facility's permit standards. This unaccountability risks creating conditions that are less controlled than they were prior to the environmental protection awakening of the 1960s and 1970s. There will no longer be any adequate limiting actions to polluters where private nuisance damages and injunctions were formerly available.

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<sup>102</sup> *Id.* at 1160.

<sup>103</sup> *Id.*

<sup>104</sup> *Atwater Township Trustees v. B.F.I. Willowcreek Landfill*, 617 N.E.2d 1089 (Ohio 1993) (reversing State *ex rel.* *Brown v. Rockside Reclamation, Inc.*, 351 N.E.2d 448 (Ohio 1976)).

<sup>105</sup> *Atwater Township Trustees* 617 N.E.2d at 1093.

<sup>106</sup> *See In re Shell Chem. Co.*, Nos. 85-14, 85-15, 85-16, 1987 WL 120997 (Oct. 20, 1987); *Union Oil Co. v. Heinsohn*, 43 F.3d 500, 504 (10th Cir. 1994). *See supra* notes 22-42.



### A. *Over-Reliance on Agency Control*

The primary defect with these blanket preemptions is an unjustified reliance on the agency or other government agents to protect the public's interests. This defect is demonstrated clearly by a worst-case scenario of having no regulatory limitation to act as a safety net for environmental protection. This is precisely the state of circumstances formerly found with livestock operations in Oklahoma. "Officials at every state and Federal agency charged with protecting the air and water agree that the Oklahoma Department of Agriculture is in charge of regulating feedyards and their application of animal waste."<sup>107</sup> However, in 1991 that department enacted a rule repealing any regulations applicable to these facilities' operations.<sup>108</sup> For approximately three years replacement rules were not adopted.<sup>109</sup> Abolition of the private nuisance claim coupled with the repeal of livestock feeding regulations left a tremendous gap in the operations' liability for harmful actions.

Permit-shield rules have been interpreted as protecting polluters from enforcement of subsequently enacted regulations.<sup>110</sup> The few available exceptions to these permit-shield rules have been strictly interpreted by both courts and agencies.<sup>111</sup> For example, the exception permitting actions for noncompliance with requirements that become effective by statute does *not* include regulations promulgated by the agency pursuant to a statute requiring the Administrator to set standards governing previously permitted facilities.<sup>112</sup>

The ramifications of this narrow analysis suggest that if a pollution problem is serious enough to warrant controls, but does not rise to the level of a pending catastrophe (which would allow the agency to overcome the permit-shield rule), the legislature itself must directly set the control standards or allow the harm to continue unchecked. The already overburdened legislature that lacks the agency's particularized expertise, must create the regulation, rather than delegate the authority to do so, in order to bind the existing sources.<sup>113</sup> Thus, prohibiting actions that impose common law

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<sup>107</sup> Casey & Hobbs, *supra*, note 83, at A17.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Current regulations have been issued at OKLA. REG. § 35:30-35-9 (1995).

<sup>110</sup> *In re* Env'tl. Waste Control, Inc., RCRA Appeal No. 92-93, 1994 WL 200540, at \*18 (May 13, 1994).

<sup>111</sup> *See, e.g., id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

liability will reopen gaps left in the statutory scheme where either the agency or legislature have not been able to enact protection.

Also, the ability to participate or attack the validity of a permit is not adequate protection of the individual's rights where state legislation regarding the scope of citizen involvement in the permitting process limits participation. For example, until July 1, 1996, Virginia has limited standing to challenge any agency permitting or enforcement action to those parties "aggrieved by" the regulation or decision.<sup>114</sup> Where courts have been willing to construe such standing provisions narrowly, the result has been that affected landowners are cut out of the process altogether.<sup>115</sup> Although the EPA's policy has been to encourage citizen participation, if the state has elected to restrict public involvement, changing the state's position has proved very difficult.<sup>116</sup>

Reliance on regulators to solely look after the interests of the public creates a potential opportunity for disregard of the public's interests as the regulator and source develop a relationship. Also, the possibility of "capture" of the agency<sup>117</sup> by the interests it seeks to regulate demonstrates that agency control is not an acceptable proxy for individual remedies.<sup>118</sup> This potential for bureaucratic disregard of public interests will be increased significantly by proposed provisions of the Clean Water Act Amendments of 1995, allowing local government employees or officials to serve as members of boards that approve discharge permit applications, notwithstanding a prohibition on membership for persons who have received a significant portion of income from permit holders or applicants.<sup>119</sup> Because the proposal would remove the previous safeguard barring conflicts of interest, the persons approving

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<sup>114</sup> VA. CODE ANN. § 9-6.14:16 (Michie 1993). See *supra*, note 60, 61 and accompanying text.

<sup>115</sup> *Citizens for Clean Air v. Virginia ex rel. State Air Pollution Control Bd.*, 412 S.E.2d 715 (Va. App. 1991).

<sup>116</sup> See *Virginia v. United States*, 74 F.3d 517 (1996).

<sup>117</sup> See, e.g., Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. ENVTL. L.J. 156 (1994). The relationship arises due to movement between government and private industry workers and agency dependency on industry for resources, information, and political support, so that "[t]he inevitable result of such close interaction is that the regulated community's position . . . receives closer attention from the regulators." *Id.* at 192. See also Louis L. Jaffe, *The Effective Limits of the Administrative Process*, 67 HARV. L. REV. 1105, 1109 (1954) (noting the origins of "agency capture" as early as the nineteenth century railroad commissions).

<sup>118</sup> See *Gonzalez v. Whitaker*, 643 P.2d 274, 278 (N.M. App. 1982).

<sup>119</sup> CWA Amendments of 1995, H.R. 961, 104th Cong., 1st Sess. § 302 (1995).

operating permits and designating discharge limitations will be more likely to advance the polluters interests, rather than those of the affected public.

The lack of landowner protection resulting from a current dearth in regulatory oversight is exacerbated by the lack of resources available to agencies. As federal legislators propose staggering budget cuts for agency operations,<sup>120</sup> other provisions require the Administrator of the EPA to certify that for each new regulation's implementation, costs will be covered by appropriated federal assistance for the states,<sup>121</sup> and to place specific limitations on the allowable use of these funds.<sup>122</sup> Other strains on agency resources may result from proposed legislation requiring the agency to compensate landowners whose property is devalued by as little as twenty percent as a result of regulatory action.<sup>123</sup> The fund for this compensation will come from each federal agency's operating budget.<sup>124</sup> The agency's enforcement actions will be reduced as greater demands are placed on fewer funds.<sup>125</sup>

Agency officials and permit boards will be unable to meet these new responsibilities of increased regulation and more frequent permit renewal. In addition to new workloads created by legislative proposals requiring the agency to perform reasonable risk-assessment and cost-benefit analysis<sup>126</sup> under the oversight of independent peer-review panels,<sup>127</sup> the removal of nuisance will also create a substantial flood of work for overburdened

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<sup>120</sup> H.R. 1814, 104th Cong., 1st Sess. (1995). "GOP budget proposals cut funds designated for environmental enforcement by 25 percent." Gary Lee, *GOP Environmental Tactics Scored*, WASH. POST, Feb. 27, 1996, at A17.

<sup>121</sup> CWA Amendments of 1995, H.R. 961, 104th Cong., 1st Sess. § 505 (1995).

<sup>122</sup> H.R. 2099, 104th Cong., 1st Sess. § 66 (1995) (providing that "none of the funds appropriated under this heading may be made available for the development and implementation of new or revised effluent limitation guidelines and standards, pretreatment standards, or new source performance standards under the Federal Water Pollution Control Act, as amended").

<sup>123</sup> E.g., Job Creation & Wage Enhancement Act, H.R. 9, 104th Cong., 1st Sess. § 204 (1994) (proposing that landowners be compensated for property devaluation of 20% or more); H.R. 925, 104th Cong., 1st Sess. § 3 (1995) (proposing compensation for devaluation of 20% or more); S. 605, 104th Cong., 1st Sess. § 204 (1995) (proposing compensation for devaluation of 33% or more).

<sup>124</sup> *Private Property Rights Legislation, 1995: Hearings on S. 605 Before the Senate Environment and Public Works Comm.*, 104th Cong., 1st Sess. 155 (1995) (statement of Gary S. Guzy, Deputy General Counsel, EPA).

<sup>125</sup> *Id.*

<sup>126</sup> CWA Amendments of 1995, H.R. 961, 104th Cong., 1st Sess. § 303 (1995).

<sup>127</sup> Mary Beth Regan, *The G.O.P.'s Guerrilla War on Green Laws*, BUS. WK., Dec. 12, 1994, at 102.

agencies. Rulemaking duties will increase as a result of the need for stricter effluent limitations applicable to a larger number of pollutants. Existing limits will need to be revised to avoid pollution that was previously deterred by the source's liability to private individuals.<sup>128</sup> Since sources will be required to meet only their permits' requirements to be free of liability it will become necessary for the facility's permit to embody greater protection. Permitting responsibilities are therefore likely to increase dramatically because the duration of the permit will need to be decreased in order to avoid long periods of unregulated non-compensable harm.

Other practical factors will limit the agency's ability to adequately protect the public from uncontrolled pollution damage. First, the agency will not be able to promulgate regulation standards until the harmful effects of the pollution are discovered and studied.<sup>129</sup> Those parties who are damaged by these pollutants may not be able to stop pollution when there are no existing regulations for the polluter to violate. Even when an agency has been able to develop limiting standards, it is uncertain whether polluters can be compelled to comply with regulations not contained in the provisions of the issued permit.<sup>130</sup> Under the existing permit's standards, a nuisance may cause serious harm. Pollution would be able to continue under long-term permits<sup>131</sup> for as long as ten years.<sup>132</sup> The EPA has a limited ability to bring actions when a permit has been issued in order to respond to instances of imminent and

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<sup>128</sup> Problems of over-reliance on agency enforcement ability will be exacerbated by a possible move toward reducing the frequency of required public hearings by agencies for reviewing, modifying, or adopting water quality standards. CWA Amendments of 1995, H.R. 961, 104th Cong., 1st Sess. § 304 (1995) (expanding time period between public hearings regarding limitation standards from once every three years to once every five years).

<sup>129</sup> F. GRAD, ENVIRONMENTAL LAW 73, 74 (3d ed. 1995) (noting difficulties in identifying pollution sources and impacts).

<sup>130</sup> For cases limiting enforcement to permit terms, see *In re Envtl. Waste Control, Inc.*, RCRA Appeal No. 92-93, 1994 WL 200540, at \*18 (May 13, 1994); *Shell Oil Co. v. EPA*, 950 F.2d 741, 762 (D.C. Cir. 1991); and *Kalur v. Resor*, 335 F. Supp. 1, 11 (1971). Compare *Sierra Club v. Cedar Point Oil Co.*, Nos. 94-20461, 95-20227, 1996 WL 11077, at \*9 (5th Cir. Jan. 11, 1996) (stating Congress initially intended to limit citizen suits to dischargers operating without a permit that was otherwise available but this liability shield lapsed under statutory language on December 31, 1974 so that polluters are liable under CWA § 1311(a)). EPA has also recognized the ability to bring certain citizen suits even where effluent limitations have never been issued. *Id.* at \*13.

<sup>131</sup> *Sierra Club*, Nos. 94-20461, 95-20227, 1996 WL 11077, at \*13.

<sup>132</sup> *In re Envtl. Waste Control, Inc.*, RCRA Appeal No. 92-93, 1994 WL 200540, at \*18 (May 13, 1994).

substantial endangerment to health or environment. However, the private plaintiff is still without any individual remedy, and agency deterrence may be too late, given the high threshold of harm allowed before the agency has the authority to act.<sup>133</sup>

### B. *Lack of Adequate Remedies for Individual Landowners*

Removing common law private nuisance actions will also leave individual landowners without adequate remedies for harm caused by the polluter. The remaining causes of action are not sufficient to compensate parties for their injuries. Retrospective relief is unavailable under the enforcement scheme that has a prospective focus.<sup>134</sup> The primary purpose of the federal statutes is to prevent and regulate pollution, rather than to compensate individual property owners harmed by the emissions.<sup>135</sup> Even when citizens overcome the procedural hurdles and permit-shield provisions to succeed in asserting a citizen enforcement suit, remedies under these actions only permit awards for reasonable court costs and attorney fees, but no remedy for personal property damage.<sup>136</sup>

Any attempt to base a claim for property damage on federal common law is also unlikely to be accepted. Actions filed under federal common law for pollution arising from a source outside the affected state or under the federal courts' maritime jurisdiction generally have been held to be preempted by the comprehensive scheme of federal environmental protection laws.<sup>137</sup>

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<sup>133</sup> 42 U.S.C. § 6973(a) (1988) (allowing agency action to avoid "imminent and substantial endangerment to health or the environment").

<sup>134</sup> See Scott, *supra* note 1, at 378-79.

<sup>135</sup> *Id.*

<sup>136</sup> NRDC v. EPA, 859 F.2d 156, 176 n.34. (D.C. Cir. 1988); S. REP. NO. 92-414, 92d Cong., 2d Sess. 81 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745; Scott, *supra* note 1, at 377.

<sup>137</sup> *E.g.*, Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding the CWA preempts the federal common law claim of nuisance); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981) (applying Milwaukee v. Illinois to preempt maritime nuisance claim); National Audubon Soc'y v. Department of Water, 869 F.2d 1196, 1200-06 (1988) (holding CAA preempts claims of nuisance for interstate air pollution); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1147-48 (E.D. Pa. 1982); United States v. Price, 523 F. Supp. 1055, 1069 (D.N.J. 1981) (holding RCRA and CERCLA preempt common law nuisance claims for groundwater pollution), *aff'd*, 688 F.2d 204 (3d Cir. 1982). *Cf.* United States v. Waste Indus. Inc., 734 F.2d 159, 167 (4th Cir. 1984) (holding RCRA only preempted federal common law claims for groundwater pollution but not common law nuisance principles, so that 42

These cases left the protection of private interests to the source state's common law when there were gaps left in the federal statutory scheme.<sup>138</sup>

Other forms of state common law and statutory actions that remain available are also inadequate to remedy individual harms. Trespass is another common law theory frequently used by property owners against polluters.<sup>139</sup> A claim based on trespass may require the plaintiff to prove that the property has been physically invaded by the pollution.<sup>140</sup> "One is subject to liability to another for trespass . . . if he intentionally: (a) enters land in the possession of the other, or causes a thing or a third person to do so . . . ."<sup>141</sup> Courts may also require that some *tangible* object *directly* enter the property.<sup>142</sup> "Some courts hold that if an intervening force, such as wind or water, carries the pollutants onto the plaintiff's land, then the entry is not 'direct.' Others define 'object' as requiring something larger or more substantial than smoke, dust, gas, or fumes."<sup>143</sup> However, under the private nuisance remedy, recovery is not limited to instances of physical invasion.<sup>144</sup> "[I]t is enough that plaintiffs can show sufficient obstruction or interference with the use or enjoyment of the land."<sup>145</sup>

Recovery under state constitutional claims designed to protect the individual's property rights will be much more difficult. The Alaskan landowner may file an inverse condemnation claim against the state.<sup>146</sup> The Alaska statute indicates that polluters who have been protected by the statutory bar on the private nuisance claim will be required to indemnify the state for monies paid under these inverse condemnation claims.<sup>147</sup> Although the state has adopted a very broad definition of a taking to include "damage" to property, the private landowner will be less likely to recover because "damage" will require a greater proof of harm than the private nuisance

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U.S.C. § 7003 mandated that courts apply the common law principles of nuisance while not permitting federal common law nuisance claims).

<sup>138</sup> *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

<sup>139</sup> See 1 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 2.15-.16 (2d ed. 1986).

<sup>140</sup> *Id.* § 2.15, at 127-28.

<sup>141</sup> RESTATEMENT (SECOND) OF TORTS § 158 (1965).

<sup>142</sup> 1 RODGERS, *supra* note 139, § 2.15, at 127-28.

<sup>143</sup> *Id.* § 2.15, at 128 (citations omitted).

<sup>144</sup> *MHE Assocs. v. United Musical Instruments, U.S.A., Inc.*, No. 1:93CV1883, 1995 U.S. Dist. LEXIS 5808, at \*8 (N.D. Ohio Mar. 24, 1995). Private nuisance is a non-trespassory invasion. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

<sup>145</sup> *MHE Assocs.*, No. 1:93CV1883, 1995 U.S. Dist. LEXIS 5808, at \*8.

<sup>146</sup> *Cf.* ALASKA STAT. § 09.45.230(f) (1995).

<sup>147</sup> *Id.*

standard of interference with use.<sup>148</sup>

### C. *Potential for Abuse and Confusion*

Eliminating nuisance liability provides substantial opportunities for abuse and misunderstanding. Unscrupulous industries will be encouraged to release pollution without any controls until the agency has not only completed the promulgation of new effluent limitations, but also has been able to incorporate these standards into the facility's operating permit during the review and renewal process.

Second, as with the permit-shield provisions, there is substantial uncertainty as to the scope of preclusion under the statutory blanket preemption of nuisance. The Alaska statute's language of "expressly authorized" emissions leaves room for misunderstanding. Other states faced with claims that pollution was "authorized by law" because the defendant was operating under a permit have interpreted the language very narrowly.<sup>149</sup> Courts have required that the express terms of the authorizing law, or an extremely clear implication therein, indicate that the legislature contemplated the "doing of the very act which occasions the injury."<sup>150</sup> Therefore, authorization to build a sewage plant was found not to equate with a sanction of any particular level of odors from that plant.<sup>151</sup> Accordingly, it is unclear whether a plaintiff may state a claim of nuisance for harm caused by pollutants that are not specifically addressed in the source's permits. Courts seeking guidance as to the language's meaning may turn to evidence of the legislative intent. This apparent move of the state toward placing limitations on polluter liability may compel courts to interpret these vague standards to the benefit of emitting sources and to the further detriment of the private claimant.

### D. *Contradiction with Intent Underlying Federal Statutory Protection*

The legislators who enacted permit-shield rules and the courts who imposed limitations on citizen suits acted over a safety-net of common law remedies that were understood to protect private interests in addition to the

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<sup>148</sup> See ALASKA CONST. art. 1, § 18 (1994); *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

<sup>149</sup> RODGERS, *supra* note 139, § 2.12.

<sup>150</sup> *Varjabedian v. City of Madera*, 572 P.2d 43, 47 (Cal. 1977) (quoting *Hasserl v. San Francisco*, 78 P.2d 1021, 1022 (1938)).

<sup>151</sup> *Varjabedian*, 572 P.2d at 48.

regulatory law. Limitations on citizen suit actions for enforcement did not preempt or curtail citizens' rights to seek enforcement or other relief under any statute or common law.<sup>152</sup> Even the permit-shield provisions were enacted with full reliance on continued citizen protection of the environment through private common law actions because these remedies were specifically left intact by statute.<sup>153</sup>

Further evidence of the contradiction between these blanket preemptions and the intent of federal legislatures is presented by the recent cries for deregulation. Advocates for the reduction of regulatory action cite the availability of private nuisance claims to support their arguments that the federal bureaucracy should be cut back.<sup>154</sup> Proponents of requiring compensation to landowners whose use is denied by an agency have even written nuisance into the proposed legislation as the distinguishing line for acceptable regulations.<sup>155</sup>

## V. CONCLUSION

In summary, while there is a need to balance the interests of private citizens with industry's need for predictable liability, the current protection afforded by limitations on citizen suits and permit-shield provisions are adequate measures. Even if there was a need for added certainty, operation under a permit could serve as limited protection. To apply the permit as an across-the-board preclusion of private nuisance remedies unfairly imposes the burden of industry discharges on the parties harmed by this pollution and invites abuse from unscrupulous sources.

Any claim that only a blanket preemption of private nuisance claims is sufficient to avoid inevitable uncertainty concerning liability for sources is not persuasive. Just as product manufacturers may be liable in tort for defective products, polluters should be held accountable for the harms their

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<sup>152</sup> NRDC v. Train, 510 F.2d 692, 701 (D.C. Cir. 1974).

<sup>153</sup> CWA, 33 U.S.C. § 1365(e) (1994); CAA, 42 U.S.C. § 7604(e) (1988); RCRA, 42 U.S.C. § 6972(f) (1988).

<sup>154</sup> Frank Clifford, *Bill Would Limit Federal Power over Environment*, L.A. TIMES, Dec. 28, 1994, at A1; *Private Property Rights Legislation, 1995: Hearings on H.R. 925 Before the Task Force on Property Rights of the House Comm. on Resources*, 104th Cong., 2nd Sess. 177 (statement of James S. Burling, Pacific Legal Foundation).

<sup>155</sup> See, e.g., Job Creation and Wage Enhancement Act, H.R. 9, 104th Cong., 1st Sess. § 204 (1995); H.R. 925, 104th Cong., 1st Sess. § 4 (1995); S. 605, 104th Cong., 1st Sess. § 204 (1995).



actions have caused. The law must not permit them to externalize their costs to their unfortunate neighbors.