Marine Pollution: Injury Without a Remedy?

M. CASEY JARMAN*

Pollution of coastal and ocean waters is a complex and serious problem. Many contaminants reaching the ocean are harmful to marine organisms. Pollution affects the marine environment at all levels, from marine organisms to human beings. Along with the environment, the economy suffers injury because of damage to food sources. This Article discusses the role of federal courts as a forum for redress of damages suffered from the pollution of coastal and ocean waters. It examines conflicting state and federal common law and statutory remedies for marine pollution. It concludes that in the face of the federal judiciary's retreat, Congress and state legislators must take affirmative steps to preserve remedies that traditionally have been available to injured persons.

INTRODUCTION

Early in United States history, it was believed that inland waterways and the oceans were so vast that mankind could not generate enough waste to create permanent adverse effects. However, the twentieth century has witnessed increased awareness of the delicate balance of coastal ecosystems and their abilities to assimilate wastes

* B.A. 1971, Barry University; J.D. 1981, University of Mississippi; LL.M. 1985, University of Washington. Director, Coastal and Marine Law Research Program, Mississippi Law Research Institute, University of Mississippi Law Center. This Article was prepared with support from the United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of Sea Grant under Grant No. NA85AA-D-56005. The views herein expressed represent the author's alone and do not represent the views of the National Oceanic and Atmospheric Administration.

created from human activities.[1] Many contaminants reaching the ocean are toxic to marine organisms, and other nontoxic materials such as petroleum may enter the ocean in such great quantities that they kill or injure marine life.[2] At the very least, pollutants eventually destroy the natural beauty of the oceans and waterways and deprive us of the many forms of recreation and sources of livelihood that coastal and ocean waters provide.

Because marine resources are common property,[3] the public as a whole suffers from marine pollution. However, those who make a living from the ocean's resources — commercial fishermen, associated support industries, and other water-dependent business enterprises — feel the adverse effects of such pollution most keenly. Historically, fishermen and other businessmen have had state, maritime, and federal common law negligence and nuisance remedies for marine pollution. In the absence of strong congressional effort to control water pollution, the judiciary has been willing to play an active role. In recent years, however, the situation has changed. In 1948, Congress first attempted to treat water pollution problems comprehensively.[4] The law has been amended several times since then, but the Federal Water Pollution Control Amendments of 1972 (FWPCA)[5] are widely considered to be the point at which Congress gave the federal government a major active role in coordinating the cleanup of our national waters. Along with the 1972 amendments,

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1. In the coastal area, the assumption of an infinite resource out there in the wetlands and seas is not easily shaken when the casual observer views the vast estuaries, marshes, bays, beaches, and the sea, or watches thousands of pounds of fish and shrimp landed by one fishing vessel. What the casual observer missed, but has begun to see, especially during the past decade, is that the natural coastal systems are in a delicate balance, having only a limited resilience to man's tampering.

Frishman, *The Development of Coastal Consciousness*, in ACHIEVEMENTS OF THE '70S AND PROSPECTS FOR THE '80S: PROCEEDINGS OF SEVENTH ANNUAL CONFERENCE OF THE COASTAL SOCIETY 9, 10 (1981).

2. Marine organisms accumulate chemicals and other pollutants directly from seawater or through digesting tainted organisms lower in the food chain. Humans can be affected directly by such bioaccumulations because the accumulations tend to be magnified at higher trophic levels. Humans are also affected indirectly. Loss of one species because of pollution can cause the alteration of another dependent for food upon the polluted species for food. U.S. DEPARTMENT OF COMMERCE, U.S. OCEAN POLICY IN THE 1970S: STATUS AND ISSUES VI (1978). "With the expanded use of derivatives of organic compounds, such as halogenated hydrocarbons and synthetic organic chemicals resistant to degradation, modern society has the potential to inflict more lasting effects on the marine environment." *Id.* at VI-1.

3. Common property is owned by the public and held by the government to be managed for the benefit of the public as a whole. BLACK'S LAW DICTIONARY 1383 (4th ed. 1968).

4. Water Pollution Control Act of 1948, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-66 (1986)).

5. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-66 (1986) [hereinafter FWPCA].

Congress passed the Marine Protection, Research, and Sanctuaries Act (MPRSA)[6] dealing with ocean pollution issues.

Following the enactment of these laws, federal courts began restricting common law and maritime remedies available to those harmed by marine pollution, both at the federal and state level. This Article traces the decline of the federal courts as a forum for redress for damages suffered from both deliberate and negligent pollution of coastal and ocean waters. It then examines conflicting case law regarding the viability of state statutory and common law remedies for marine pollution. Finally, the Article asserts that in the face of the judiciary's retreat, Congress and state legislatures must take affirmative steps to preserve remedies traditionally available to injured parties.

FEDERAL COMMON LAW AND MARITIME REMEDIES

Early Supreme Court decisions establishing marine pollution as an actionable nuisance arose from interstate disputes between governmental entities. In 1921, New York sued New Jersey to enjoin the construction of a sewage project that would have discharged pollutants into New York Harbor.[7] New York alleged that sewage would be carried by tides and currents into the Hudson and East Rivers, where it would be deposited on the bottom and shores of Hudson Bay, as well as on adjacent wharves and docks in New York City. New York claimed that the sewage would create a public nuisance in three ways: (1) bathing and commerce would be restricted, (2) vessels would be damaged, and (3) fish and oysters would be poisoned, rendering them unfit for human consumption.[8] The federal government intervened in the suit, contending that the sewage discharged from the project would obstruct navigable channels, injure the health of those using the waters at a nearby Navy yard, and damage government property bordering the harbor. Following negotiations that resulted in modifications to the sewage project, the federal government withdrew from the suit without prejudice.[9]

The Court ruled in New Jersey's favor, noting conflicting testimony over the effects of the proposed plan. In declining to enjoin the project's construction, the Court found that the federal government's

6. Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. §§ 1431-34 (1986); 33 U.S.C. §§ 1401-45 (1986) [hereinafter MPRSA].
7. New York v. New Jersey, 256 U.S. 296 (1921).
8. *Id.* at 302-03.
9. *Id.* at 303-05.

change in position gave more credibility to New Jersey's evidence.[10] Also influencing the Court's decision was its finding that New York City's system was similar to the one New Jersey was constructing to treat its waste.[11] Finally, the Court expressed its wish that states resolve interstate water pollution problems by negotiation rather than litigation. Although the Court found no nuisance in this particular fact situation, the case is important because it recognized the federal common law of nuisance as a viable cause of action in water pollution disputes.

Ten years later New York and New Jersey were again before the Supreme Court over a pollution dispute.[12] In this case, New Jersey asked the Court to enjoin the City and State of New York from dumping garbage directly into the ocean. New Jersey claimed that garbage would wash ashore, causing unsightly and noxious beach pollution, impairing bathing, and damaging fish nets.[13] Once again New Jersey emerged victorious. The Court ruled that New York had created a public nuisance. Although other potential sources of pollution which could have affected New Jersey beaches existed at the time, the Court found their effects negligible compared to those caused by New York City's garbage.[14] New York City, however, was given a reasonable period of time to change its disposal system from ocean dumping to incineration.[15]

The Milwaukee *Decisions*

Interstate water pollution continued to be a problem over the next few decades. Some litigation as well as the development of interstate compacts resulted.[16] A dispute between Milwaukee and Illinois set the stage for recent developments. Illinois alleged that inadequately treated sewage discharges from the City and County of Milwaukee had polluted Lake Michigan, causing a nuisance that threatened the health of Illinois citizens. Two significant decisions resulted from this conflict. In its first decision in 1972, Milwaukee v. Illinois[17] (*Milwaukee I*), the Supreme Court held that the existence of a federal common law cause of action to abate a nuisance caused by interstate water pollution was consistent with the Water Pollution Control Act

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10. *Id.* at 306-07.
11. *Id.* at 311.
12. New Jersey v. New York City, 283 U.S. 473 (1931).
13. *Id.* at 476.
14. *Id.* at 481.
15. *Id.* at 483.
16. Illustrative of the Court's analysis in these cases is Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) (upholding a cause of action by Texas against New Mexico citizens for pollution of the Canadian River, caused by pesticides used on New Mexico farmlands).
17. 406 U.S. 91 (1972) [hereinafter *Milwaukee I*].

in effect at the time.[18] The Court found it significant that the Act did not provide a forum sufficient for Illinois to protect its interests.[19] However, the Court did state that new federal laws eventually could result in preempting the field of federal common law nuisance.[20]

The second decision, Milwaukee v. Illinois[21] (*Milwaukee II*), decided in 1981, marked the beginning of the demise of federal common law remedies for marine pollution. Before *Milwaukee I*, Congress had taken only a limited role in dealing with water pollution. For the most part, states had been primarily responsible for managing water pollution problems.[22] However, in the nine years between the two decisions, Congress created a complex regulatory program designed to combat problems associated with water pollution.[23] When *Milwaukee II* was decided, a permit system was in place for the discharge of pollutants.[24] The sewer facilities that Illinois alleged to be causing pollution in Lake Michigan were operating pursuant to such a permit. The defendants, having been found in violation of their permit, were under a state court-mandated timetable to construct the facilities necessary to comply with the permit.[25] Illinois argued that the federal common law of nuisance as articulated in *Milwaukee I* provided the state with a cause of action against Milwaukee for pollution caused by overflows and inadequate treatment of sewage. The district court, ruling in Illinois' favor, placed restrictions on the defendant's sewage treatment plant more stringent than those required pursuant to the permit.[26] Although the court of appeals reversed that ruling, it upheld an alternate ruling of the district court which required the elimination of sewage overflows, deciding that FWPCA had not preempted federal common law nuisance.[27]

In a six-to-three decision, the Supreme Court held that a federal

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18. *Id.* at 101-04.
19. *Id.* at 104.
20. *Id.*
21. 451 U.S. 304 (1981) [hereinafter *Milwaukee II*].
22. Water Pollution Control Act of 1948, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-66 (1986)).
23. *See generally* 33 U.S.C. §§ 1251-66; MPRSA, 16 U.S.C. §§ 1431-34, 33 U.S.C. §§ 1401-45.
24. 33 U.S.C. §§ 1311, 1342-45. Under the National Pollution Discharge Elimination System program, wastewater discharge permits are issued by either the Environmental Protection Agency or a qualified state agency. The *Milwaukee* defendants were operating under permits issued by the Wisconsin Department of Natural Resources. *Milwaukee II*, 451 U.S. at 311.
25. *Milwaukee II*, 451 U.S. at 311.
26. *Id.* at 311-12.
27. Illinois v. Milwaukee, 599 F.2d 151 (7th Cir. 1979).

common law nuisance claim to abate interstate water pollution caused by effluent discharges from a sewage treatment plant had been preempted by the 1972 FWPCA amendments.[28] After examining FWPCA, its accompanying regulations, and the legislative history, the Court concluded that Congress had "occupied the field [of water pollution] through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."[29] The Court was influenced by the following arguments: (1) effluent limitations are directly addressed by Congress;[30] (2) the technical problems associated with water pollution control are better suited to the expertise of an administrative agency;[31] (3) the potentially affected state has ample opportunity to protect its interests through the permit granting process;[32] and (4) the savings clause language of section 1365(e) is restricted to the citizen suit provision and therefore does not prevent the entire Act from supplanting formerly available federal common law.[33]

The *Milwaukee II* decision concerning interstate pollution of inland navigable waters was controlled by FWPCA. In *Middlesex County Sewage Authority v. National Sea Clammers Association*,[34] also decided in 1981, the Supreme Court extended its preemption holding to include ocean waters regulated by MPRSA.[35] The plaintiffs sought injunctive relief and compensatory and punitive damages for the alleged collapse of the fishing, clamming, and lobster industries in the Atlantic Ocean off the New York coast due to defendant's discharge of waste materials into New York Harbor and the Hudson River. Relying on its decision in *Milwaukee II*, the Court ruled summarily that the federal common law of nuisance respecting water pollution had been preempted by the passage of FWPCA and MPRSA.[36]

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28. *Milwaukee II*, 451 U.S. at 317-32.

29. *Id.* at 317. In analyzing FWPCA and MPRSA, the Court found that the acts were so comprehensive that they totally restructured the field of water pollution to the extent that the legislation "occupies the field." The Court's language became even stronger: "The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is *no* room for courts to attempt to improve on that program with federal common law." *Id.* at 319 (emphasis added).

30. *Id.* at 318.

31. *Id.* at 325.

32. *Id.* at 325-26.

33. *Id.* at 327-29. The savings clause reads: "Nothing in this section shall restrict any right which any person [or class of persons] may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief [including relief against the Administrator or a State Agency]." 33 U.S.C. § 1375(e).

34. 453 U.S. 1 (1981).

35. Subchapter I of MPRSA addresses problems associated with pollution of ocean areas by direct dumping of material. It establishes a permit system for the intentional dumping of materials into the ocean. 33 U.S.C. §§ 1401-1421.

36. 453 U.S. at 21, 22. The Court evidently felt little need to distinguish the facts in this case or provide any rationale separate from its *Milwaukee II* decision. The Court

The Aftermath of Milwaukee II *and* National Sea Clammers Association

In the marine pollution area, two sources of judge-made law exist: (1) federal common law brought as a federal question or in diversity under 28 U.S.C. §§ 1331 and 1332, and (2) federal maritime law brought under 28 U.S.C. § 1333. The cases discussed above dealt with federal common law. In those cases, the Court left open the question of the extent to which maritime tort remedies remain viable. To date, at least one court has extended the *Milwaukee II* and *National Sea Clammers Association* holdings to maritime law — *Connor v. Aerovox*,[37] which represents the current standard for analysis. In *Connor*, the First Circuit Court of Appeals dismissed a maritime nuisance claim for alleged damage to fishing grounds caused by the discharge of toxic substances. The plaintiffs, licensed commercial fishermen and the Massachusetts Lobstermen's Association, Inc., sought $20 million in damages from defendants who, plaintiffs claimed, discharged substantial quantities of toxic chemicals, including PCBs, into the Achusnet River, New Bedford Harbor, and Buzzards Bay in southern Massachusetts. Plaintiffs further alleged that the discharge caused shellfish and bottom-feeding fish to accumulate concentrations of toxic pollutants sufficiently high to require restriction of commercial fishing in those areas. As a result, plaintiffs asserted that they were forced to fish in waters more hazardous and remote, which increased their costs and risks and reduced the size of their catch.[38]

The First Circuit affirmed the district court's ruling, holding that maritime nuisance actions for damages resulting from water pollution had been preempted by FWPCA and MPRSA. The court first reviewed the Supreme Court's opinion in *National Sea Clammers Association* and reasoned that the elements of a claim for damages based on the federal common law of nuisance are the same as those for a maritime nuisance action. Therefore, the court concluded, if the Supreme Court had foreclosed a federal common law of nuisance remedy for water pollution in *National Sea Clammers Association*, then implicitly it must have precluded the applicability of a maritime nuisance claim. To hold otherwise, the court stated, would mean that the Supreme Court had left unconsidered in *National Sea*

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also refused to apply an implied private right of action for money damages under either FWPCA or MPRSA.

37. 730 F.2d 835 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 426 (1985).

38. *Id.* at 836.

Clammers Association a basis for recovery virtually co-extensive with the claim rejected.[39]

Next, the court found that even if the Supreme Court had not held impliedly that the *National Sea Clammers Association* plaintiffs would have been unable to pursue their maritime nuisance claim, such a claim is nonetheless no longer viable. Using a rationale similar to the Supreme Court's in *National Sea Clammers Association* and *Milwaukee II*, the First Circuit found FWPCA and MPRSA sufficiently comprehensive to preempt the federal maritime law of nuisance. In reaching its conclusion, the court emphasized the comprehensiveness of the policies in the two statutes, rather than the adequacy of their provisions to further those policies.[40]

The death knell clearly has sounded for claims involving the federal maritime common law of nuisance when a pollution incident is regulated by FWPCA or MPRSA. A question not yet answered by the courts is whether a maritime negligence action survives FWPCA and MPRSA under federal common law. The First Circuit in *Connor* tantalized litigants with this possibility in a footnote:

> The plaintiffs have not pressed a maritime tort under a negligence theory before this court . . . . We do not consider whether such a claim is appropriate where intentional discharge of pollution into public waters is at issue, nor whether a private cause of action for negligence for injuries due to water pollution still sounds in maritime tort after FWPCA's enactment.[41]

Applying the Supreme Court's reasoning in *Milwaukee II* and *National Sea Clammers Association*, I predict that the Court will have little trouble in sending the negligence remedy also to its final resting place. The analysis the Court used in determining whether statutory law displaces common law embraces the legislation's comprehensiveness: "The question is whether the field has been occupied, not whether it has been occupied in a particular manner."[42] The analysis, then, rests not on the nature or adequacy of the common law remedy, but on the legislation's preemptive effect. The presumption underlying the Court's emphasis on statutory construction is that federal common law is appropriate "only when a court is compelled to consider a federal question to which Congress has not pro-

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39. *Id.* at 839.

40. *Id.* at 841. Although the court alluded to the more comprehensive rationale of *In re* Oswego Barge Corp., 664 F.2d 327 (2nd Cir. 1981), for finding statutory preemption of federal common and maritime law, its holding ultimately was based upon the Supreme Court's "comprehensive legislation" standard. Citing several Supreme Court cases, the First Circuit iterated the following factors to use in finding preemption: explicit statutory language, legislative history, scope of legislation (i.e., does judge-made law fill a gap or rewrite congressional rules?), and a rebuttable presumption against preemption. 664 F.2d at 338-39.

41. 730 F.2d at 838 n.6.

42. *Milwaukee II*, 451 U.S. at 324.

vided an answer."[43] Applying the above reasoning, the fate of a negligence action appears to be sealed.

At least one court has held the federal common law of negligence unavailable to the federal government for recovery of total cleanup costs resulting from an oil spill.[44] Because a specific provision in FWPCA deals with oil spill cleanup issues, the Second Circuit began its analysis with the rebuttable presumption that common law remedies had been preempted. The court found that common law remedies permitting recovery for damages were clearly inconsistent with the specific limitation of liability provisions in FWPCA. To find preemption, the court relied upon the comprehensiveness of the oil spill liability provision rather than the entire Act.[45]

Remedies Preempted by OCSLA

In the cases above, the pollution included discharges regulated by FWPCA and MPRSA. Marine natural resources can be damaged also by pollution resulting from offshore oil and gas development pursuant to the Outer Continental Shelf Lands Act (OCSLA).[46] Does a federal common law or maritime tort remedy survive OCSLA? Following the Supreme Court's analysis under MPRSA and FWPCA, little doubt remains that such remedies are no longer viable.

OCSLA governs offshore oil and gas leasing and development. However, it is more than a procedural statute that prescribes rules for access to offshore minerals. OCSLA represents Congress' attempt to balance oil and gas development needs with protection of the marine environment and the renewable resources therein dependent upon a healthy environment.[47] In recognition of the likelihood that oil spills can occur and cause severe damage, the law provides for an Offshore Oil Pollution Compensation Fund (Fund).[48] Private

43. Illinois v. Outboard Marine Corp., 680 F.2d 473, 475 (7th Cir. 1982) (holding that 1972 FWPCA amendments displaced federal common law remedies for nuisances resulting from pre-1972 discharges).

44. *In re* Oswego Barge Corp., 664 F.2d 327, 339-41 (2d Cir. 1981).

45. *Id.*

46. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56; 1801-66 [hereinafter OCSLA].

47. "The Outer Continental Shelf is a vital national reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards . . . ." H. R. REP. NO. 590, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1450, 1528. *See also* Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979).

48. 43 U.S.C. §§ 1811-24.

parties who suffer economic loss resulting from oil pollution[49] can recover damages that include: (a) injury to or destruction of real property; (b) loss of use of real or personal property; (c) injury to or destruction of natural resources; (d) loss of use of natural resources; (e) loss of profits or impairment of earning capacity due to injury to or destruction of real or personal property or natural resources; and (f) loss of certain tax revenues.[50] To assert a claim for lost profits or earning capacity impairment, an individual must show that he derives at least twenty-five percent of his earnings from activities that utilize the natural resource.[51] Private party claims are first addressed directly to the owner-operator of the polluting vessel or facility. If liability is denied or the claim is not settled within sixty days from presentation, or if the damages exceed the liability limitation provision of OCSLA,[52] the action can be pursued in court or presented to the Fund.[53] In addition to specific damage recovery provisions, OCSLA contains a citizen suit provision with a savings clause almost identical to the language found in FWPCA.[54]

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49. Oil pollution is defined as:
(A) the presence of oil either in an unlawful quantity or which has been discharged at an unlawful rate (i) in or on the waters above submerged lands seaward from the coastline of a State (as the term "submerged lands" is described in section 1301(a)(2) of the title), or on the adjacent shoreline of such a State, or (ii) on the waters of the contiguous zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606); or (B) the presence of oil in or on the waters of the high seas outside the territorial limits of the United States — (i) when discharged in connection with activities conducted under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*), or (ii) causing injury to or loss of natural resources belonging to appertaining to, or under the exclusive management authority of the United States; or (C) the presence of oil in or on the territorial sea, navigable or internal waters, or adjacent shoreline of a foreign country, in a case where damages are recoverable by a foreign claimant under this subchapter.
Id. § 1811(9).

50. *Id.* § 1813(a)(2).

51. *Id.* § 1813(b)(4).

52. Under the heading "Limitation of liability," the statute states:
Except when the incident is caused primarily by willful misconduct or gross negligence, within the privity or knowledge of the owner or operator, of applicable safety, construction, or operating standards or regulations of the Federal Government, the total of the liability under subsection (a) of this section incurred by, or on behalf of, the owner or operator shall be — (1) in the case of a vessel, limited to $250,000 or $300 per gross ton, whichever is greater, except when the owner or operator of a vessel fails or refuses to provide all reasonable cooperation and assistance requested by the responsible Federal official in furtherance of cleanup activities: or (2) in the case of an offshore facility, the total of removal and cleanup costs, and an amount limited to $35,000,000 for all damages.
Id. § 1814(b).

53. *Id.* § 1817. Once made between the court and the fund, this secondary election is irreversible. *Id.* § 1817(C).

54. 43 U.S.C. § 1349.

It appears that Congress has spoken more specifically to the issue in OCSLA than in either MPRSA or FWPCA. The remedy available is set out in definite terms and is practically co-extensive with federal common law remedies of nuisance or negligence.[55] In some respects, more protection is afforded the injured party in that an additional claim can be made to the Fund when full and adequate compensation is unavailable because of liability limitation provisions or the defendant's financial incapacity.[56] Also, it seems to open the availability of a remedy to an additional group of potential plaintiffs.[57] Therefore, under the *Milwaukee II* rationale, there seems to be "no room" for additional common or maritime law protection, despite the existence of the savings clause.

On the other hand, because the savings clause in the Fund subchapter is more definite than savings clauses in FWPCA and MPRSA, OCSLA may preserve federal common law and maritime law remedies.[58] Concurrent liability with state remedies is clearly provided: "Except as otherwise provided in this subchapter, this subchapter shall not be interpreted to preempt the field of liability or to preclude any State from imposing additional requirements or liability . . . ."[59] The "field of liability" language is certainly broad enough to encompass federal liability laws, whether statutory or judge-made. Because the *Milwaukee* line of cases applies to pollution covered by FWPCA and MPRSA only and not to pollution relating to offshore oil and gas development activity, it thus may be arguably inapplicable to the latter type of pollution. Therefore, under OCSLA there are federal maritime and common law remedies to be saved.

Preservation of these remedies, however, does not necessarily benefit those injured by oil pollution. As stated above, OCSLA actually

55. Congress essentially has codified and expanded upon the Ninth Circuit Court of Appeals holding in Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), which allowed commercial fishermen to collect for pure economic losses resulting from the Santa Barbara oil spill of 1969.

56. 43 U.S.C. § 1817(d).

57. In Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), claims for economic loss absent accompanying private ownership of the property were granted to commercial fishermen only. The court found that the defendant oil companies "could reasonably have foreseen that negligently conducted drilling operations might diminish aquatic life and thus injure the business of commercial fishermen." Thus, they owed a duty to the plaintiffs. *Id.* at 569. In Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973), *aff'd*, 559 F.2d 1200 (1st Cir. 1977), the First Circuit upheld a cause of action for commercial fishermen and clam diggers while denying such relief for coastal businesses.

58. 43 U.S.C. § 1820.

59. *Id.* § 1820(c).

expands the scope of the remedy available under federal maritime and common law. In most instances, then, it would be advantageous to recover under statutory rather than judicially-created law.[60]

CERCLA and Preemption of State Remedies

A third source of pollution with potentially damaging effects on fishery resources comes from vessels, such as petroleum losses from tanker and freighter discharges or vessel accidents. As with other areas of marine pollution, Congress has enacted laws to minimize vessel-source pollution. The two main statutes that address vessel-source pollution are FWPCA[61] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[62] These laws establish an elaborate scheme for removing oil and other hazardous substances from the marine environment and assign liability for costs incurred during removal operations and for costs of restoration or replacement of marine resources damaged by a spill.[63] As discussed earlier, the Supreme Court has held that FWPCA and MPRSA have preempted federal maritime and common laws of nuisance and negligence.[64] To the extent that FWPCA addresses vessel-source pollution, it is logical for reasons discussed above to presume that non-statutory federal judicial remedies are unavailable to private parties.

The question, then, is this: to what extent do CERCLA provisions regarding vessel-source pollution preclude federal maritime and common law remedies? Consistent with the Supreme Court's rationale in past cases, CERCLA would most likely be viewed as a statute sufficiently comprehensive to preclude other judicially forged remedies. This interpretation is likely for several reasons. First, Congress specifically designed CERCLA to provide the federal government with the tools necessary to respond to hazardous waste disposal incidents (including oil and other hazardous substance discharges or spills at sea) and to assign liability for remedying their harmful effects.[65]

60. However, § 1820 prohibits double recovery for damages or removal costs. Once recovery is had under federal or state law, no further compensation is available under a different law. *Id.* § 1820(a).

61. 33 U.S.C. § 1321(b).

62. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-57 [hereinafter CERCLA].

63. FWPCA and CERCLA do not include provisions which allow private individuals to recover for damages from such pollution. Instead, state and federal governments, as trustees of these resources for the public, are authorized to recover not only cleanup costs, but also expenses necessary to restore or replace natural resources damaged or destroyed by such a spill. "The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources." 33 U.S.C. § 1321(f)(5) (1986).

64. *See supra* notes 16-43 and accompanying text.

65. *See* U.S. v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn.

Second, CERCLA expressly limits claims for damages to public trust resources to federal and state governments,[66] thus suggesting that Congress deliberately intended to limit private party remedies. This limiting provision provides a sharp contrast to the mechanisms afforded private parties under OCSLA. Third, CERCLA forms part of a network of laws concerned with pollution problems associated with hazardous materials disposal into the marine and terrestrial environments. Several cross-references[67] are made in CERCLA to related provisions of OCSLA, FWPCA, and the Intervention on the High Seas Act.[68] Read together, these laws seem to "occupy the field" so thoroughly that they preclude the use of federal maritime or common law remedies. Although CERCLA and related statutes make no provisions to compensate those whose commercial livelihoods depend upon a healthy marine environment, such omission is apparently irrelevant when Congress has exercised its lawmaking authority in a comprehensive manner.[69]

1982).

66. [O]ther claims resulting from a release or threat of a release of a hazardous substance from a vessel or a facility may be asserted against the Fund under this subchapter for injury to, or destruction or loss of, natural resources, including costs for damage assessment: *Provided, however*, that any such claim may be asserted only by the President, as trustee, for natural resources over which the United States has sovereign rights, or natural resources within the territory or the fishery conservation zone of the United States, or by any State for natural resources within the boundary of that State belonging to, managed by, controlled by, or appertaining to the State.

42 U.S.C. § 9611(b) (emphasis added).

67. *Id.* § 9605 (National Contingency Plan), § 9606 (Abatement Action), § 9607 (Liability), § 9611 (Uses of Fund).

68. Intervention on the High Seas Act, 33 U.S.C. §§ 1471-1487 (statute implementing the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil).

69. *See supra* notes 40-43 and accompanying text. On the other hand, at least one court has ignored the *Milwaukee* line of cases in an action by commercial fisherman for purely economic damages resulting from a chemical spill caused by the collision of two vessels. Although the Fifth Circuit in Louisiana v. M/V Testbank, 752 F.2d 1019, 1030 (5th Cir. 1985), ruled against the commercial fishermen, the court's decision was not based upon a *Milwaukee* analysis. Instead, the majority based its decision on another Supreme Court case, Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). The Court in *Robins Dry Dock* denied recovery for economic loss that resulted from physical damage to property in which the plaintiff had had no proprietary interest. The cause of action was based upon a theory of negligent interference with contractual rights. After analyzing the situation in light of *Robins Dry Dock*, the Fifth Circuit concluded that nuisance is not a separate tort subject to rules of its own, but instead is a type of damage. To allow recovery for losses under the public nuisance theory, the court reasoned, "would permit recovery for injury to the type of interest that, as we have already explained, we have consistently declined to protect." *M/V Testbank*, 752 F.2d at 1032. The dissent, on

Although the scope of the demise of federal maritime and common law remedies is not yet clear, a marked shift away from nonstatutory federal remedies has occurred. The next question addressed is the extent to which these decisions have had a chilling effect on the availability of state remedies.

State Statutory and Common Law Remedies

It appears that the federal judiciary's role in providing a maritime or common law forum for persons dependent upon ocean and coastal waters for a living has been seriously curtailed, if not extinguished, by judicial interpretation of congressional enactments in the marine pollution field. Unfortunately, with the exception of OCSLA, these pollution control laws do little to provide redress for private injuries. With the closing of federal courthouse doors to plaintiffs, the availability of state law remedies becomes crucial. Traditionally, federal maritime law has been the primary source of redress for injured parties. However, the United States Supreme Court, while noting the national need for uniform maritime law, has also recognized that federalism concerns do not always require preemption of state regulations promulgated under the state's police power.[70]

The extent to which state law remedies survive FWPCA as interpreted by the courts in the *Milwaukee* line of cases remains unclear. Because judge-made federal law regarding marine pollution has been held to be supplanted by FWPCA and MPRSA, any remedies left available to the state will be those preserved in the Acts themselves. Three "savings clauses" of FWPCA are applicable.[71] Court interpretation of these provisions will determine the fate of state remedies. Cases decided to date, while not providing a definitive answer, do provide some insight. Leading cases and the effects of their holdings are discussed below.

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the other hand, asserted that a federal common law nuisance action is a remedy distinct from an action for negligent interference with contract. The dissent concludes that the plaintiffs should have been given an opportunity to proceed with their evidence in support of such a claim. Four of the dissenting judges even suggested that such a holding is viable because of a lack of federal legislative action. "*Robins* should not be extended beyond its actual holding and should not be applied in cases like this, for the result is a denial of recompense to innocent persons who have suffered a real injury because Congress has been indifferent to the problem." *Id.* at 1053 (Rubin, J., dissenting). It would seem that the judges either did not do their homework or chose to ignore the parallel line of cases represented by *Milwaukee* and its progeny.

70. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history . . . . Here, as is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy. Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959).

71. 33 U.S.C. §§ 1365(e), 1321(o), 1370. No comparable language exists in MPRSA.

Preemption of State Common Law and Statutory Remedies for Interstate Marine Pollution

A recent Supreme Court decision resolving conflicting opinions of the Second and Seventh Circuits sets forth the Court's line of analysis. To understand the opinion and the basis for its reasoning, it is instructive to review the lower court holdings. The Seventh Circuit in *Scott v. Hammond*,[72] yet another decision in the *Milwaukee* sequence, applied the reasoning of the earlier *Milwaukee* cases to decide that FWPCA preempts state statutory or common law in providing a remedy for damages in interstate water pollution disputes. Citing *Milwaukee I*[73] and *Milwaukee II*,[74] the court determined that federal law governs except to the extent that FWPCA authorizes resort to state law.[75]

The Seventh Circuit then turned its analysis to the effect of FWPCA's savings clause. The court interpreted this section narrowly to save only "the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters."[76] Citing *Milwaukee II*, the court reasoned that to hold otherwise would undermine the goals of uniformity and state cooperation that Congress sought in the Act.[77] As a result, in the Seventh Circuit, a suit for damages caused by interstate pollution can be brought only in the courts of the state in which the discharge occurs.[78] The *Scott*

72. 731 F.2d 403 (7th Cir. 1984). Illinois v. Milwaukee and Scott v. Hammond were consolidated upon appeal for procedural purposes. When the U.S. Supreme Court considered *Milwaukee II*, it decided the federal common law claims based upon petition from Milwaukee, specifically declining to rule on Illinois' claim under state law because it was the subject of Illinois' petition, not Milwaukee's. *Milwaukee II*, 451 U.S. at 310 n.4. Illinois subsequently raised its state law claim. The Court denied its petition for *certiorari*. 451 U.S. 982 (1981). However, a separate but similar suit was brought by a private citizen of Illinois, Mr. W. Scott, under Illinois statutory and common law. Because of the confusion caused by the Supreme Court's previous denial of *certiorari* to Illinois, the Seventh Circuit consolidated the cases and decided the issue under Scott's claim. *Scott*, 731 F.2d at 405.

73. 406 U.S. 91.

74. 451 U.S. 304.

75. *Scott*, 731 F.2d at 411. "The claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing states." *Id.* at 410-11.

76. *Id.* at 413. The court found that *Milwaukee I* bolstered its holding because if federal law alone is applicable, then there was no right or jurisdiction outside the discharging state to be saved. *Id.*

77. *Id.* at 414.

78. "However, it seems implausible that Congress meant to preserve or confer any right of state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II." *Id.*

plaintiffs, then, could have sued in Wisconsin, but not in Illinois courts.

The Second Circuit specifically rejected the Seventh Circuit's reasoning in *Ouellette v. International Paper Company.*[79] In *Ouellette*, Vermont and certain riparian[80] property owners sued International Paper Company under Vermont law of nuisance, negligence, impairment of riparian rights, and violation of a National Pollution Discharge Elimination System (NPDES) permit. Plaintiffs alleged that pollution resulting from discharges emanating from New York in excess of defendant's NPDES permit allowances had damaged property on Lake Champlain in Vermont.

The issue before the district court was whether FWPCA's savings clause[81] permits application of Vermont common law to provide remedy for injury caused by discharge of pollutants from a paper mill in New York. The court held that application of traditional state common law remedies would not, as a practical matter, interfere with FWPCA's objectives.[82] After reviewing the language of the savings clause, state authority provisions, the Act's stated objectives and its legislative history, the court concluded that FWPCA's goal is to eliminate pollutant discharges.[83] State imposition of compensatory damage awards merely supplements rather than conflicts with the standards and limitations imposed by the Act.[84] In fact, such awards help achieve the Act's goal by deterring would-be polluters.

During the course of its opinion, the *Ouellette* court analyzed and rejected the Seventh Circuit's reasoning in *Scott.* It dismissed *Scott's* restrictive reading of the savings clause as antithetical to the Act's goals and legislative history. In addition, the court stated, *Scott's* holding leaves without a remedy parties injured by interstate water pollution.[85] The Second Circuit attacked the Seventh Circuit's use of the *Milwaukee I* arguments on two grounds. First, after reviewing the legislative history, the court decided that at the time of passage of the 1972 FWPCA amendments, Congress believed that state common law, rather than federal common law, controlled.[86]

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79. 602 F. Supp. 264 (D. Vt. 1985), *aff'd*, 776 F.2d 55 (2d Cir. 1985).

80. A riparian owner owns land adjacent to a watercourse. BLACK'S LAW DICTIONARY 1490 (4th ed. 1968).

81. 33 U.S.C. § 1365(e).

82. 602 F. Supp. 271-72.

83. *Id.* at 271.

84. *Id.* The court here made a distinction between suits involving private parties only and those involving governmental entities, indicating that the analysis, and perhaps the result, would differ in the latter case.

85. *Id.* at 269.

86. *Id.* "Without any textual support in the Act, this (*Scott*) conclusion appears to be *post hoc* speculation as to what Congress *would* have intended *had it known* at the time of the Act's creation that the Supreme Court, in *Milwaukee I*, would hold that federal common law preempted state common law." *Id.* (emphasis added). The court

Therefore, the "no law to be preserved" argument did not survive the Second Circuit's analysis. Second, assuming that *Milwaukee I* did result in the preemption of state law, the court found it logically inconsistent to permit suit in one state court and not the other as proposed by the Seventh Circuit.[87] In addition to being logically inconsistent, the *Oullette* court found such reasoning to be antithetical to traditional choice of law principles.[88] Finally, the court decided that availability of state nuisance laws would not in this case interfere with regulatory functions of the state.[89]

On appeal, the United States Supreme Court, using the the Seventh Circuit's rationale in *Scott*,[90] reversed the part of the *Ouellette* opinion that allowed a plaintiff to sue in the state where the injury occurred.[91] It specifically disagreed with the Second Circuit's finding that application of other than source state law would supplement rather than conflict with FWPCA.[92] It concluded that to hold otherwise would permit out-of-state liabilities to attach "even though the source had complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other states could do indirectly what they could not do directly — regulate the conduct of out-of-state sources."[93] The Court found unconvincing the lower court's conclusion that state imposition of penalties furthers the goal of eliminating pollution, instead taking the position that use of state law interferes with the uniform system Congress established.[94] Finally, the Court responded to the Second Circuit's concern that adoption of the *Scott* rationale would leave injured parties without a remedy by saving two forums for injured parties — the source state[95] and federal courts sitting in diversity.[96]

Three dissenting justices rejected the majority's holding that limited the applicable substantive law to that of the source state. They accepted the lower court's rationale in *Ouellette*,[97] arguing that no

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continued: "In basing its decision on an incompatibility of state and federal law not yet recognized by Congress at the time of FWPCA's creation, *Milwaukee* thus imposed artificial limitations on the right to bring a state common law nuisance action." *Id.* at 270.

87. *Id.* at 270-71.
88. *Id.* at 270.
89. *Id.* at 271-72.
90. *See supra* notes 72-78 and accompanying text.
91. Int'l Paper Co. v. Ouellette, 107 S. Ct. 803 (1987).
92. *Id.* at 812-12.
93. *Id.* at 813.
94. *Id.* at 813-14.
95. *Id.* at 814-15.
96. *Id.* at 816.
97. *See supra* notes 80-89 and accompanying text.

sound reason existed for rejecting traditional choice-of-law principles when determining which law to apply.[98]

The majority opinion reflects a broad-brush policy approach that interprets federalism principles in the water pollution arena as requiring uniformity and administrative efficiency, even though it results in precluding a viable state role in redressing the rights of injured individuals. This approach is overreaching, inequitable, and inconsonant with FWPCA. First, the Court's holding departs from its historical recognition of states' valid role in maritime matters.[99] Second, it indicates a retreat from the Court's position that federalism principles require a presumption that, in the absence of a clear and manifest congressional purpose, state law should not be superseded by a federal statute.[100]

Third, the Court failed to distinguish between actions for injuries caused by illegal pollution discharges and those discharges in accordance with a valid NPDES permit. Most would agree that a source should be free from liability for damages under any state or federal common law when the discharge was pursuant to a lawfully issued permit. However, sound policy reasons exist for holding liable persons who pollute unlawfully, under either source state or state of injury law. As stated by the lower court in *Ouellette*, imposition of state penalties is consistent with the FWPCA policy of deterring water pollution in order to reach state and federal water quality goals.[101] In addition, out-of-state plaintiffs suing in the courts of a source state are disadvantaged. A court in the source state is more likely to be influenced by the impact its decision will have on the socio-economic system of the community in which the source is located. For example, a discharging plant may be an important part of the economic base of a community. Enforcement of permit conditions and imposition of monetary penalties could disrupt the operation of the plant, possibly causing temporary or permanent lay-offs. Add to this the fact that the pollution in question is not affecting that community, but another state altogether. These factors could be given disproportionate weight in favor of the pollution when the equities are being balanced.

Fourth, as pointed out by the dissent, traditional choice-of-law

98. *Oullette*, 107 S. Ct. at 817. The other dissenting justices found the ruling that a federal court sitting in diversity could hear the suit was sufficient to decide the case because the issue of which substantive law to apply had not yet been dealt with by the district court.

99. *See supra* note 70 and accompanying text.

100. "Contrary to the suggestions of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law." *Milwaukee II*, 451 U.S. at 316.

101. *Ouellette*, 602 F. Supp. at 271.

principles have worked well in other areas of law and should not be abandoned without a compelling reason to the contrary. The majority in *Ouellette* offered no such reasons.

Preemption of State Remedies for Intrastate Pollution

Both the *Ouellette* and *Scott* courts interpreted as applicable to interstate pollution the general savings clause provisions found at sections 1365(e) and 1370 of FWPCA. Their holdings indicate that these provisions are sufficient to preserve state remedies for intrastate pollution. The leading Supreme Court decision interpreting the savings clause found in FWPCA section 1321(o), *Askew v. American Waterways Operators*,[102] sets the stage for analysis of intrastate water pollution remedies for oil and hazardous substance spills. *Askew* concerned a challenge to a Florida statute which imposed strict liability for damage incurred as a result of an oil spill in the state's territorial waters from a waterfront oil transfer facility. In upholding Florida's statute, the Court analyzed the savings clause in light of federal preemption principles. Citing the provision's plain language and its legislative history, the Court first determined that FWPCA allows, rather than precludes, state regulation.[103] The question remained whether Florida's statute conflicted with the federal Act. The Court found that although FWPCA contains a pervasive scheme for federal regulation of oil pollution, it reaches only the federal costs of cleanup and takes no cognizance of damage to state resources. The Court reasoned that Florida's statute fills this gap; as such, it is the kind of regulation that Congress was saving in section 1321(o). Therefore, the Florida law supplements rather than conflicts with FWPCA.[104]

The Court in *Askew* was influenced by the lack of remedy, in the absence of state regulation, to state or private property owners damaged by oil discharges.[105] The Court also took cognizance of the state's territorial waters. A finding of preemption would have allowed "federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage — an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are

102. 411 U.S. 325 (1973).
103. *Id.* at 329-30.
104. *Id.* at 336.
105. *Id.* at 334.

greatly dependent."[106]

An *Askew*-type preemption analysis applied to the Offshore Oil Spill Pollution Fund[107] provision of OCSLA would arguably result in the preservation of state liability remedies. A close reading of the language indicates specific preservation of alternate state remedies. Unlike the FWPCA savings provision, OCSLA provides that the entire subchapter must not be interpreted to preempt state-imposed liability.[108] In addition, this section restricts recovery for damages to state remedies, other federal remedies, or the Fund in order to prevent a "double-dipping" windfall for a plaintiff. Thus, the statute tacitly acknowledges other forms of action, both state and federal.[109] The OCSLA legislative history strengthens this view: "With the exception of requirements as to financial responsibility, this title does not preempt the field of liability and does not prevent any state from imposing oil spill liability laws or additional requirements. Any state may impose requirements or liability for oil spills causing clean-up costs or damages within its jurisdiction."[110] Because of the "double-dipping" prohibition contained in the savings clause provision, the imposition of alternate state remedies must be regarded as unlikely to conflict with OCSLA.

A similar argument can be made for state-imposed liability for damage caused by the release of hazardous substances in state territorial waters. CERCLA's[111] savings clause provision explicitly authorizes states to enforce additional liability "with respect to the release of hazardous substances within such State."[112]

Askew and its progeny[113] reflect the existence of a strong policy

106. *Id.* at 328-29. In order to reach a decision, the Court had to distinguish its holding in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), which set the standard for preemption of the federal government in admiralty matters. It did so by reiterating *Jensen's* limitation to suits relating to relationships of vessels and crews plying the high seas and territorial waters. In this case, the situation involved shoreside injuries by ships on navigable waters. The court held also that the Admiralty Extension Act is not an exclusive remedy and therefore did not bar Virginia's regulations. *Askew*, 411 U.S. at 340-41.

107. *See supra* notes 48-53 and accompanying text.

108. 43 U.S.C. § 1820.

109. *Id.*

110. H. R. REP. No. 95-590, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1599.

111. *See* discussion of CERCLA, *supra* note 62 and accompanying text.

112. 42 U.S.C. § 9614(a).

113. Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1979) (FWPCA does not preempt a Virginia statute that fails to impose limitations of liability for the cost of cleaning up oil spilled from a barge that sank in Chesapeake Bay); Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980) (upheld Puerto Rican statute that created a cause of action for environmental damage to natural resources caused by oil spills); *In Re* Oswego Barge Corp., 664 F.2d 327 (2d Cir. 1981) (federalism concerns create a presumption against preemption of state law, including state common law); Chevron U.S.A. Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984) (upholding Alaskan statute governing the discharge of ballast by oil tankers into Alaskan territorial waters);

under FWPCA for the states to provide remedies for oil and hazardous substance pollution within state territorial waters. Their holdings are consistent with the policies embodied in *Ouellette* and *Scott* that permit use of state law to redress injury from intrastate marine pollution. The same result is likely under OCSLA and CERCLA. It is likely, then, that state remedies would be held to be available to a party injured by marine pollution.

Preemption of State Law in Marine Waters Under Federal Jurisdiction

The states' authority to give redress for injuries that occur in federal waters is in doubt. No cases directly on point exist in the field of marine pollution liability. However, a recent Supreme Court case regarding the preemptive effect of the federal Death on the High Seas Act (DOHSA)[114] on state wrongful death statutes appears analogous. The Court in *Tallentire v. Offshore Logistics, Inc.*[115] reversed a Fifth Circuit decision, which upheld a Louisiana wrongful death statute allowing Louisiana citizens to recover under the state statute even though the death occurred in federal waters.[116] The lower court also held that DOHSA did not preempt recovery for nonpecuniary losses under the state statute.[117] The case arose when two Louisiana offshore workers were killed in a helicopter crash 30 miles off the Louisiana coast. A Louisiana corporation owned and operated the helicopter. The defendant corporation argued that DOHSA preempted the state statute; therefore, defendant could not be held liable for nonpecuniary damages.

Resolution of the issue turned on the interpretation of the savings clause in DOHSA (the Mann Amendment), which states in part that "[t]he provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."[118] As originally drafted, this section specifically limited state statutes to actions accruing within the territorial limits of the

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Stoddard v. W. Carolina Regional Sewer Auth., No. 85-1584L (4th Cir. 1986) (state common law of nuisance in South Carolina not preempted by FWPCA regarding intrastate pollution).

114. Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1985).

115. 106 S. Ct. 2485 (1986). *See also* Nygaard v. Peter Pan Seafoods, 701 F.2d 77 (9th Cir. 1980).

116. The lower court decision can be found at 754 F.2d 1274 (5th Cir. 1985).

117. *Id.* at 1286.

118. 46 U.S.C. § 767.

state.[119] Courts have disagreed over the significance of this change in language, and resort to legislative history has provided no clear guidance. The Fifth Circuit, relying on the principle that "absent a clearly expressed legislative intention, the plain words of the statute must ordinarily be regarded as controlling,"[120] found that state law was not preempted.[121] The Supreme Court disagreed, interpreting the Mann Amendment to be a jurisdictional savings clause. As such, it provides state courts a basis to hear cases under state law when a death occurs in territorial waters and, under DOHSA, for those deaths that occur in federal waters.[122] The Court, recognizing the Mann Amendment's ambiguity, found a policy reason for its interpretation in the need to promote and achieve uniformity in maritime law.[123] The Court agreed with the Ninth Circuit decision in *Nygaard v. Peter Pan Seafoods*[124] that it is illogical to conclude that Congress, absent a clear expression to the contrary, would intend state law to control in federal waters where primary federal interests are clear.[125]

The analysis in *Tallentire* is seemingly persuasive in determining the viability of state statutory marine pollution remedies in federal waters. Absent an express and unequivocal grant of state authority to apply state law in federal waters, preemption will likely be found. The general savings clause of FWPCA section 1365(e) is not as explicit as DOHSA's, leading to the conclusion that preemption would result.[126] A better argument can be made for section 1321(o). In addition to preserving rights of states to impose liability when discharges occur within their territorial waters, this section also preserves state laws that do not conflict with the federal liability portions of the provision. Because section 1321(o) deals almost exclusively with recovery of government costs associated with removal of oil and hazardous substances in national waters, imposition of liability for damages would be supplemental rather than conflicting. The Fourth Circuit used similar reasoning in upholding a Virginia statute which imposed liability for state cleanup costs.[127] Because no conflicting federal statutory or common law pollution liability laws exist, states should be able to regulate in that area.

However, the Court could follow its analysis of a similar savings clause in *Milwaukee II*, finding that the language in question is ap-

119. 59 CONG. REC. 4482 (1920).
120. 754 F.2d at 1282.
121. *Id.*
122. 106 S. Ct. at 2485.
123. *Id.*
124. 701 F.2d 77 (9th Cir. 1980).
125. 106 S. Ct. at 2485.
126. *See supra* note 33 and accompanying text.
127. *Steuart Transp. Co.*, 596 F.2d at 609.

plicable only to that specific provision of FWPCA and therefore cannot preempt the effect of the entire Act. *Milwaukee II* tells us that the federal maritime law of marine pollution as governed by FWPCA and MPRSA preempts federal maritime and common law remedies. And because federal liability law is absent in federal waters, it would, therefore, be illogical to allow state liability law to control. The savings clause provision becomes irrelevant under this analysis.

The savings clauses of OCSLA are probably insufficient to preserve state remedies on the high seas under *Tallentire*. The language of section 1349(a)(6) is identical to that in section 1365(e) of FWPCA, which, as mentioned above, does not clearly preserve state remedies. In addition, the provision of the Offshore Oil Pollution Compensation Fund that preserves state remedies limits actions for such remedies to injuries occurring within a state's jurisdiction. The same limitation is imposed upon states under CERCLA's concurrent liability section. It is unlikely, then, that the *Tallentire* test could be met.

CONCLUSION

At a time when nationwide publicity is being given to increased use of the ocean as a disposal site for human-generated wastes, remedies for those injured by such practices are dwindling.[128] With the exception of the statutorily authorized Offshore Oil Pollution Compensation Fund, no federal remedies appear available to parties injured by marine pollution. The applicability of state remedies for other than intrastate water pollution is in doubt. This restriction of remedies is antithetical to the goals of marine pollution legislation. Providing redress to parties for injury caused by others not only serves to compensate injury, but also acts to deter would-be polluters. Requiring polluters to pay for unauthorized pollution furthers the goal of improving water quality.

In a sense, laws relating to marine pollution are resource allocation laws. Administrative agencies make decisions about the parameters of such allocation, for example, the right to use the waters to

128. Not only are private remedies being assaulted, so too is restoration of public natural resources damaged or destroyed by oil and hazardous substance pollution. A December 13, 1985, ruling by the Environmental Protection Agency (EPA) required that plans for restoring natural resources under CERCLA be preauthorized before reimbursement. Citing limited funding, the EPA has established criteria for evaluating claims and options when preauthorization is denied. 50 Fed. Reg. 51,205 (December 13, 1985).

dispose of pollutants and the right to take fish from the waters. Parties who overreach their allotment unlawfully deprive others of their share of the resource. Historically, when this happens some form of restitution has been required from the offender to the injured party. Use of questionable interpretations of federalism and narrow readings of savings clauses by courts upsets this balance, allowing significant inequities to arise.

Congress and state legislatures must now respond to the judiciary's short-sightedness. Pollution laws should be amended to reflect unequivocally injured parties' right to seek redress for damages caused by unlawful pollution. Unless this happens, marine pollution may well be an injury without a remedy.