Philip Weinberg *is a professor of law at St. John's University School of Law, New York. J. D. Columbia 1958. Professor Weinberg headed the New York Attorney General's Environmental Protection Bureau, 1970-78. He is Chairman of the Committee on Environmental Law of the Association of the Bar of the City of New York.*

COASTAL AREA LEGISLATION: TAKING ARMS AGAINST A SEA OF TROUBLES

by Philip Weinberg *

In recent years an emerging awareness of the need to protect our coastal areas has led to a dramatic increase in federal and state legislation to preserve our nation's irreplaceable shorelands. The federal and state governments, however, continually collide in efforts to balance the economic and recreational values of the coasts and offshore waters against the pressures of development. Until a firm national policy is established, our state legislatures, and our state and federal courts will continue to be the forums for resolving emergent disputes. This article will identify some of the conflicts and disputes that have emerged, and the statutes that have been designed to resolve them. Additionally, it will suggest a course for the future.

Introduction

Shorelines and coastal waters are considered a public trust. Roman jurisprudence held that the sea and, hence, the seashore were owned in common by all of the public. The principle of public trust, however, did not emerge until private property rights in coastal areas were recognized.[1] In 1892, the Supreme Court in *Illinois Central Railroad Co. v. Illinois*[2] espoused the public trust doctrine. The Court upheld the right of the state's legislature to set aside an earlier waterfront conveyance in derogation of the public trust in underwater lands.

The United States Congress, in 1899, enacted the Rivers and Harbors Act.[3] The Act is designed to prohibit the obstruction of the navigable waters of the United States by requiring a permit from the Army Corps of Engineers before any construction is commenced.[4] The Act also prohibits

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[1] Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-64 (1970).

[2] 146 U.S. 387, 437 (1892).

[3] 33 U.S.C. §§ 401-687 (1976 & Supp. IV 1980).

[4] *Id.* § 403.

the discharge of refuse, except for liquid "flowing from streets and sewers" into the navigable waters.[5] Judicial interpretation has made it clear that the Act serves not only to protect navigability, but to bar pollution as well.[6] Congress, however, has deployed federal authority over the nation's shorelines sparingly. The Marine Protection, Research and Sanctuaries Act, universally dubbed the Marine Protection Act,[7] regulates the dumping of harmful substances at sea. The Clean Water Act[8] controls the discharge of pollutants into the waters of the United States, including the oceans within the three-mile limit, although in fact much of the Act's permit authority is delegated to the states. In 1972 the Clean Water Act imposed a comprehensive permit system for the discharge of pollutants. The federal government, acting through the Environmental Protection Agency, may grant this power to the states and has done so in the case of New York and New Jersey.[9] Finally, the Coastal Zone Management Act[10] encourages each state to control its shoreline areas—an invitation some states have steadfastly resisted.

Land use in coastal zones remains the states' bailiwick. Today ocean and river states have attempted to exert more control on both the land along their coastlines and the water off their coasts. This article will address the dynamics of the two federal statutes which affect these areas the most: the Coastal Zone Management Act and the Marine Protection, Research and Sanctuaries Act (Marine Protection Act).

Coastal Zone Management Act

Congress found that there was a "national interest in the effective management, beneficial use, protection and development of the coastal zone."[11] The coastal zone encompasses coastal waters and adjacent shore-

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[5] *Id.* § 407.

[6] *See* United States v. Republic Steel Corp., 362 U.S. 482 (1960) (Act bars discharge of industrial solids in suspension); United States v. Standard Oil Co., 384 U.S. 224 (1966) ("refuse" includes commercially valuable gasoline which pollutes a waterway).

[7] 33 U.S.C. §§ 1401-1444 (1976 & Supp. IV 1980).

[8] 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980).

[9] 40 Fed. Reg. 31, 687 (1975): New York took over the issuance of water quality permits in 1975 when its state pollution discharge elimination system, known as SPDES, was approved by the United States Environmental Protection Agency. *See* N.Y. ENVTL. CONSERV. LAW §§ 17-0801 to 17-0829 (McKinney Supp. 1981). 47 Fed. Reg. 10,812 (1982): New Jersey's permit system was approved in 1982. The state discharge elimination system includes a pretreatment program and federal facilities authority. *See* N.J. STAT. ANN. §§ 58:10A-1 to -20 (West 1982).

[10] 16 U.S.C. §§ 1451-1464 (1976 & Supp. IV 1980).

[11] *Id.* § 1451.

lands and wetlands, including the shores of the Great Lakes.[12] Under its terms, the federal government will pay up to eighty percent of a state's costs of developing a management program approved by the Secretary of Commerce.[13] In addition, the Coastal Management Act's most dramatic provision requires federal agencies conducting, funding, or permitting activities directly affecting a state's coastal zone to conform with the state's coastal zone management plan to the maximum extent practicable.[14] Generally, the Coastal Management Act encourages state control over land use in coastal areas.

State Legislation and Judicial Review

California

California responded to the congressional invitation to states to manage their coastal and offshore resources by enacting a coastal management program; it was approved by the Secretary of Commerce in 1977.[15] In addition, the State created the Coastal Commission with jurisdiction throughout its shorelands and offshore areas to control land use by issuing permits for development.[16] California's management program was upheld by the federal courts against the claim that it unduly restricted offshore drilling for oil and gas.[17] In *California v. Watt*,[18] the State was able to enjoin the Secretary of the Interior from preparing an offshore oil lease sale in federal waters nine miles off the California coast.

The controversy in *California v. Watt* arose when the Secretary of the Interior announced the lease sale of twenty-nine tracts in the Santa Maria Basin, off Santa Barbara, California. The State argued that the drilling and the risk of spills would endanger water quality, fishing and shellfishing, recreation and the existence of the southern sea otter and the gray

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[12] *Id.* § 1453.

[13] *Id.* §§ 1454-55.

[14] *Id.* § 1456(c)(1). This provision is unusual but not unique. Section 401 of the Clean Water Act, 33 U.S.C. § 1341 (1976 & Supp. IV 1980), allows a state to bar a federally licensed project which it finds will contravene state water quality standards. *See* DeRham v. Diamond, 32 N.Y.2d 34, 295 N.E.2d 763, 343 N.Y.S.2d 84 (1973).

[15] *See* American Petroleum Institute v. Knecht, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979).

[16] CAL. PUB. RES. CODE §§ 30000-30823 (West 1976 & Supp. 1982).

[17] *American Petroleum Institute*, 456 F. Supp. at 925-27.

[18] 520 F. Supp. 1359 (S.D. Cal. 1981), *modified*, 17 Env't Rep. Cas. (BNA) 1857 (9th Cir. 1982) (The court upheld the lower court order restraining the lease sale until a consistency determination is made).

whale. The District Court had "no difficulty in finding . . . a direct effect [on] the coastal zone."[19] The court enjoined the Secretary of the Interior, James Watt, from proceeding with pre-leasing activities as not conforming to the State's management plan to the maximum extent practicable. This action was taken even though leases are expressly exempted from the conformity provisions of the Act.[20] Shortly after this decision, the Secretary withdrew other proposed lease sales in four other basins off the California coast because of the "chilling impact" of the ruling.[21]

Most recently, California has sued Secretary Watt raising identical issues with regard to proposed drilling off Santa Monica Bay, Los Angeles Harbor and Orange County.[22] The Secretary's proposal to lease these tracts in defiance of the court's decision prompted Representative Leon Panetta of California to describe Watt's actions as "a shell game with the environment and economics of the central and northern California coastline."[23]

Predictably, proponents of offshore leasing, including Secretary Watt, have sought to amend the Coastal Management Act to allow the Commerce Department to override states' non-conformity determinations.[24] To date, these efforts have been unsuccessful. States' scrutiny in the area of environmental law is more vigilant than that of the federal government. With environmental groups asserting states' rights and industrial groups asserting federal preemption, a pattern of polarization has emerged. Examples of this pattern appear in various states' attempts to regulate activities such as oil tanker traffic,[25] transportation of nuclear materials,[26] and, most absorbingly in California, the ban on new nuclear power plants pending compliance with federal regulations.[27]

But unlike these cases, in which federal statutes enacted under the commerce power preempt state police power over environmental issues, the Coastal Zone Management Act explicitly gives the states the weapon with which to halt federal domination.

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[19] *Id.* at 1380.

[20] 16 U.S.C. § 1456(c)(3) (1976).

[21] [Current Developments] 12 ENV'T REP. (BNA) No. 16, at 485 (Aug. 14, 1981).

[22] [Current Developments] 13 ENV'T REP. (BNA) No. 2, at 32 (May 14, 1982). On June 9, 1982, the court enjoined the Interior Department from receiving bids on twenty-four offshore tracts in Outer Continental Shelf Lease Sale 68, under the Coastal Zone Management Act and the Outer Continental Shelf Lands Act. *Id.* at 158-59 (June 11, 1982).

[23] [Current Developments] 13 ENV'T REP. (BNA) No. 2, at 32 (May 14, 1982).

[24] *See* H.R. 4597, 97th Cong., 1st Sess. (1981), currently pending in the Interior and Insular Affairs and Merchant Marine and Fisheries Committee.

[25] Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

[26] City of New York v. Department of Transportation, 539 F. Supp. 1237 (S.D.N.Y. 1982).

[27] Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission, 659 F.2d 903 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2956 (1982).

California's Coastal Act[28] has clustered the State's police power over land use, generally parcelled out to municipalities, in the State's Coastal Commission. Like other state laws controlling land use in environmentally critical areas, such as New Jersey's Pinelands Protection Act,[29] the Coastal Act requires a state permit for development in addition to whatever permits the municipality imposes. The California Commission's rigorous insistence on public access to beaches has drawn it into litigation with developers attempting to insure private beachfronts for their purchasers. In *Sea Ranch Assn. v. California Coastal Commn.*,[30] the court rejected claims of *de facto* taking of the owners' property, holding the easement for public access a reasonable regulation, without which "ten miles of the California coastline would become a private beach . . . ."[31]

The issue of public access to beaches versus private ownership will not soon abate. The Republican Governor-elect, former Attorney General George Deukmejian, made abolishing the Coastal Commission and consequently returning to local controls and private beach ownership a campaign issue.[32] The beach debate harks back to cases which hold that the public trust doctrine mandates public access to municipally-owned beaches, such as *Neptune City v. Borough of Avon-by-the-Sea*,[33] decided by the New Jersey Supreme Court in 1972.

New York

In New York, a long-standing jurisdictional dispute between the State Department of Environmental Conservation and the Department of State delayed the enactment of a coastal zone act until 1981, when the

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[28] CAL. PUB. RES. CODE §§ 30000-30823 (West 1976 & Supp. 1982).

[29] N.J. STAT. ANN. §§ 13:18A-1 to -29 (West Supp. 1981).

[30] 527 F. Supp. 390 (N.D. Cal.), *vacated*, 102 S. Ct. 622 (1981). The vacatur followed enactment of a statute modifying the Commission's permit and resolving the details of the litigation. CAL. PUB. RES. CODE § 30610.6 (West 1981). For a description of the Coastal Commission's jurisdictional struggle with the State's public utilities agency over power plant siting along California's lengthy coastline, see *California's Energy Commission: Illusions of a One-Stop Power Plant Siting Agency*, 24 UCLA L. REV. 1313 (1971).

[31] 527 F. Supp. at 393.

[32] N.Y. Times, June 13, 1981, at 35.

[33] 61 N.J. 296, 294 A.2d 47 (1972). The City of Avon-by-the-Sea charged an extra fee to non-resident bathers. The charge was upheld by the court upon a finding that the municipal law permitted an unwarranted discrimination between resident and non-resident users of the beaches. *See also* Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978). The court held that a municipality may not divide its beaches into those for residents only and those for non-resident and residents.

Waterfront Revitalization and Coastal Resources Act[34] (the Waterfront Act) was adopted. This statute avers the State's policy to balance development and preservation of its coastal areas. It finds, somewhat contradictorily, that the well-being of New York's coastlines depends on their preservation, protection and development. Local governments are encouraged to revitalize their waterfronts in consultation with the Department of State, which won the tug-of-war over coastal jurisdiction in New York. Unlike California, New York has largely renounced the opportunity to systematically plan and control coastal development at the state level.

The strongest provision of the Waterfront Act is section 913. This section authorizes the Secretary of State to furnish opinions as to whether the programs of other state agencies are consistent with the Act's goals. If vigorously employed by the Secretary of State, it will enable him to coordinate the actions of other state agencies with conflicting concerns over areas such as energy, transportation and housing. Taken seriously, it may infuse the Waterfront Act with real meaning, at least where state agencies are at loggerheads over coastal development. In addition, the Secretary of State's action will trigger the environmental impact statement requirements of the State Environmental Quality Review Act.[35]

Under its Tidal Wetlands Act[36] (Wetlands Act) New York effectively regulates most development along its shores. The Wetlands Act, passed in 1973, requires a state permit, in addition to any municipal permits for any construction involving dredging or filling of tidal wetlands. Moreover, a permit is required for "any other activity within or immediately adjacent to wetlands which may substantially impair or alter the natural condition of the tidal wetland area."[37] Wetlands are defined broadly to include "those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters."[38] The Wetlands Act, in practice, has brought the

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[34] N.Y. EXEC. LAW §§ 910-920 (McKinney 1981).

[35] N.Y. ENVTL. CONSERV. LAW art. 8 (McKinney 1981) (dubbed SEQRA). The draft environmental impact statement currently being prepared in anticipation of federal approval of New York's coastal zone management plan includes a proposal by the State Department of Environmental Conservation to amend SEQRA to require state agencies to determine in advance whether their activities affect the coastal zone. *See* Robinson, *State Coastal Program Near Federal Approval,* N.Y. L.J., June 30, 1982, at 26. Under the New York Coastal Act, municipal coastal zone management plans are binding on the State, but the State retains jurisdiction in localities which fail to adopt plans.

[36] N.Y. ENVTL. CONSERV. LAW art. 25 (McKinney Supp. 1981).

[37] *Id.* § 25-0401(1), (2).

[38] *Id.* § 25-0103(1), (a).

State into coastal land use regulation, albeit on a case-by-case basis. An applicant has the burden of showing his activity is consistent with the policy of the State "to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state."[39]

As with any legislation stringently controlling land use, the Wetlands Act poses the issue of a *de facto* taking of property when denial of a permit deprives the owner of its reasonable use. The courts have been reluctant to find an unconstitutional taking under wetlands protection laws. Cases have held that the assertion of no reasonable use was conclusory;[40] that the loss of business opportunity was not a taking;[41] and that protection of wetlands for fish and shellfish breeding and flood control was tantamount to preventing a public nuisance.[42] Although it provides little additional regulation for building in coastal areas, New York's Waterfront Act illustrates the need to protect such areas and may help support other legislation, such as the Wetlands Act, against claims asserting *de facto* taking as a cause of action.

New Jersey

New Jersey enacted coastal legislation in 1973, antedating the federal law. The Coastal Area Facility Review Act (CAFRA)[43] requires that a permit be issued from the State Department of Environmental Protection to construct a "facility"[44] anywhere in the State's coastal area. A permit applicant must submit an environmental impact statement.[45] As defined in the statute, the coastal area runs south from Raritan Bay, excluding

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[39] *Id.* § 25-0102, -0402. *See* McKinney v. Dept. of Envtl. Conserv., 52 A.D.2d 881, 383 N.Y.S.2d 57 (App. Div. 1976).

[40] Matter of Spears v. Berle, 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636 (1976), arising under the parallel provision of the N.Y. Freshwater Wetlands Act, N.Y. ENVTL. CONSERV. LAW art. 24 (McKinney 1973 & Supp. 1981).

[41] Allain-Lebreton Co. v. Dept. of the Army, 670 F.2d 43 (5th Cir. 1982), involving the Flood Control Act, 33 U.S.C. §§ 701-709a (1976 & Supp. 1982).

[42] Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972); Sibson v. State, 110 N.H. 8, 259 A.2d 397 (1969).

[43] N.J. STAT. ANN. §§ 13:19-1 to -21 (West Supp. 1981).

[44] N.J. STAT. ANN. § 13:19-3(c) (West 1979). Facility is defined as including: (1) electrical power generating plants; (2) food and food by-products factories; (3) incineration waste facilities; (4) paper production plants; (5) public facilities for sanitary waste and public houses; (6) agrichemical production plants; (7) inorganic acids and salt manufacturing plants; (8) factories using mineral products; (9) chemical processing plants; (10) bulk storage facilities; (11) factories producing or synthesizing metals; (12) miscellaneous facilities.

[45] N.J. STAT. ANN. §§ 13:19-6 to -7 (West 1979).

New York Harbor, the Hudson River, and Newark Bay, but including the Delaware River. The courts have sustained this territorial limit as valid under the equal protection clause.[46] New Jersey's Act, an amalgam of coastal zone and environmental impact legislation, goes further than most states' in mandating consideration of the risks to its coastal resources.

Like New York, New Jersey has a Coastal Wetlands Act[47] which, like CAFRA, is limited to the coastal area from Raritan Bay southward and the Delaware River.[48] The State's urban waterfronts north of Raritan Bay require a Department of Environmental Protection permit for development under separate legislation.[49]

The political and economic effect of New Jersey's ownership of lands formerly tidal has led to litigation and legislative maneuvering. Under the public trust doctrine, as set forth in the *Illinois Central* case[50] in the last century, the states own all lands which are below the mean high water mark. The New Jersey Legislature codified its intent that the State retain extensive control over its tidal flowed lands.[51] The statute defining the extent of the State's ownership claims "[A]ll lands belonging to this State now or formerly lying under water are dedicated to the support of the public schools."[52] In *O'Neill v. State Highway Dep't* the New Jersey Supreme Court expressed the view that the average high water mark should be determined by accumulating all the high water levels over the past 18.6 years.[53] Subsequently, in 1980, the supreme court rejected a claim that a new methodology of determining the average high water boundaries was invalid.[54] Because the state agency was given such broad powers to determine the "specialized and technical procedures for its task" the court held that the scientific methods used were reasonable. The result of this decision has been to sanction a technique called biological delineation using infrared aerial photography to determine the high water

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[46] Toms River Affiliates v. Dept. of Envtl. Protection, 140 N.J. Super. 135, 355 A.2d 679 (1976).

[47] N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979).

[48] *Id.* § 13:9A-2. Its geographic limits were likewise upheld in Sands Point Harbor, Inc. v. Sullivan, 136 N.J. Super. 436, 346 A.2d 612 (1975).

[49] N.J. STAT. ANN. §§ 12:3-2, :3-3, :5-3 (West 1979).

[50] 146 U.S. 387 (1892).

[51] N.J. STAT. ANN. § 18A:56-5 (West Supp. 1982-83).

[52] *Id.* This law has been upheld by the courts in O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1 (1967). In that case the State's ownership of tidewaterlands was challenged. The private owner claimed that the State was estopped from asserting ownership. The court held first, that the State is not subject to estoppel or laches with respect to its ownership of land. Second, "that the State's title in tidelands cannot be lost by adverse possession or prescription." 50 N.J. at 320.

[53] 50 N.J. 307, 323-24 (1967).

[54] City of Newark v. Natural Resource Council, 82 N.J. 530, 414 A.2d 1304 (1980).

boundaries of State-owned tidal lands.[55] The prospect of finding one's land owned by the State unnerved numerous New Jerseyans and led to a constitutional amendment, approved in 1981, which bars the State from asserting ownership of land not tide-flowed for the past forty years. The State has one year to assert its claim over such lands.[56] The conflict's intensity can be measured from the hard-fought legal action over the wording of the interpretive statement explaining the amendment to voters.[57] The Attorney General and other state officials opposing the amendment insisted on language pointing out that revenue from the sale of State-owned tidal lands to their private occupiers is earmarked for public education. The amendment's proponents in turn charged the Attorney General with unlawful electioneering within the State's polling places.[58] The Supreme Court drafted appropriate language for the voters, and the amendment subsequently passed.

While the State continues to map the estimated 235 thousand acres[59] at issue, the dispute of state ownership continues. The courts will have to determine whether land has been tide-flowed for the past forty years.

Controlling Ocean Dumping

The offshore waters near our major cities have been a major dumping ground for sewage sludge and industrial waste, the volume of which, ironically, has increased as a result of improved sewage treatment. To combat the problem of dumping and to control water pollution within the territorial limits of the United States, the Congress enacted the Clean Water Act[60] and the Rivers and Harbors Act.[61] The Clean Water Act is designed to control water pollution by requiring land based pollution sources, such as factories or sewage treatment plants, to obtain a permit before they can discharge pollutants into the waters of the United States. The Rivers and Harbors Act, on the other hand, serves to control the discharge of any type of refuse into the navigable waters of the United

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[55] *But see* Dolphin Lane Assoc., Ltd. v. Town of Southampton, 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975). In that case the court held that reliance on novel scientific methods should not replace the traditional and historic means of determining tideland boundaries.

[56] N.J. CONST. art. VIII, § 5 (1982).

[57] Gormley v. Lan, 88 N.J. 26, 438 A.2d 519 (1981).

[58] *Id.* at 34, 438 A.2d at 523.

[59] *Id.* at 30, 438 A.2d at 521.

[60] 33 U.S.C. § 1345 (1976 & Supp. IV 1980).

[61] *Id.* § 407.

States which might hinder or impede navigation of ships and vessels in harbors, rivers, or coastal zones. In addition to federal legislation, most states have local pollution statutes. New York, for example, has enacted a Water Pollution Control Act[62] which prohibits dumping of any waste into the marine districts along the coast of New York, including New York Harbor, that would adversely affect edible fish or shellfish.

These federal and state laws, however, did not directly address the problems resulting from ocean dumping, because permits continue to be routinely issued by the Federal Environmental Protection Agency (EPA) and the states. Such routine and continuous dumping over a prolonged period may kill all but the most hardy fish and shellfish.

The Marine Protection Act,[63] enacted in 1972, recognized that "[u]nregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities."[64] The Act establishes a permit system to regulate ocean dumping and makes provisions for the initiation of "comprehensive and continuing programs of research with respect to the possible long-range effects of pollution, overfishing, and man-induced changes of ocean ecosystems."[65] The Administrator of the EPA is given the responsibility of issuing permits for ocean dumping,[66] and for promulgating criteria for evaluating permit applications, after consultation with federal, state, and local officials and interested members of the general public.[67]

The Act's jurisdiction depends upon the origins of the material being transported. If the vessel is carrying material from the United States then the Act's jurisdiction begins outside the territorial sea, defined as water within three miles of the coast.[68] If the material is transported from outside the United States the Act's jurisdiction shall include the territorial sea as well as the contiguous zone "extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured."[69]

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[62] N.Y. ENVTL. CONSERV. LAW § 17-0503 (McKinney 1973 & Supp. 1981).

[63] 33 U.S.C. §§ 1401-1444 (1976 & Supp. IV 1980).

[64] *Id.* § 1401(a).

[65] *Id.* § 1442(a).

[66] *Id.* § 1412(a).

[67] *Id.*

[68] *Id.* § 1411(a); Pacific Legal Foundation v. Quarles, 440 F. Supp. 316 (S.D. Cal. 1977) (explains the jurisdictional differences between the Clean Water Act and the Marine Protection, Research and Sanctuaries Act).

[69] 33 U.S.C. § 1411(b) (1976 & Supp. IV 1980).

The Environmental Protection Agency grants permits under the Act, except for the transporting of "radiological, chemical and biological warfare agents and high-level radioactive waste," and dredged material which is regulated by the Army Corps of Engineers.[70] Both entities use essentially the same criteria, but the EPA may veto the Army's grant of a permit. If the Secretary of the Army, after notice and hearing, finds no economically feasible method or site available, a waiver may be requested from the EPA. The waiver must be granted within thirty days after receipt of the request, unless the EPA finds an "unacceptably adverse impact on municipal water supplies, shell-fish beds, wildlife, fisheries (including spawning and breeding areas), or recreational areas."[71] The EPA therefore has the final say, just as in the case of permits issued by the Secretary of the Army to dredge and fill under section 404 of the Clean Water Act.[72]

The dumping of dredge spoil in Long Island Sound has triggered intense litigation in recent years, culminating in the landmark case of *Natural Resources Defense Council v. Callaway*.[73] The court there enjoined a Navy dredge-spoil dumping program stemming from the deepening of Connecticut's Thames River, holding that the Secretary of the Army had improperly issued a permit under the Clean Water Act,[74] and thereby had disregarded the mandate of the National Environmental Policy Act. The court held that the dredging endangered the Long Island Sound fishery by dumping large amounts of spoil containing heavy metals from the New London harbor. In the absence of criteria for dumping in Long Island Sound, the court upheld the use of the EPA's ocean dumping criteria. In 1980, Congress amended the Marine Protection Act to specifically cover dredge spoil disposal in Long Island Sound.[75] The amendment was the result of the *Callaway* case and the efforts of former United States Representative Jerome Ambro of Long Island.

The Marine Protection Act's 1981 amended deadline for the cessation of ocean dumping has been largely successful, with over two hundred municipal dumpers already using alternative disposal methods.[76] The City

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[70] *Id.* § 1413.

[71] *Id.* § 1413(d).

[72] 33 U.S.C. § 1344 (1976 & Supp. IV 1980).

[73] 524 F.2d 79 (2d Cir. 1975).

[74] 33 U.S.C. § 1344 (1976 & Supp. IV 1980).

[75] 33 U.S.C. § 1416(f) (Supp. 1982).

[76] [Current Developments] 10 ENV'T REP. (BNA) No. 47, at 2145 (Mar. 21, 1980). Los Angeles, pursuant to the Clean Water Act deadline, has agreed to build plants to use sewage sludge to generate electricity. *See* [Current Developments] 10 ENV'T REP. (BNA) No. 49, at 2220 (Apr. 4, 1980).

of New York, however, continues to resist the deadline, and dumps about 260 dry tons a day into an area of the ocean known as the New York Bight Apex, which is off the central New Jersey coast.[77] New York's sewage sludge dumping is uniquely massive and environmentally hazardous. The city insists that dumping its sludge on land or incinerating it would be more harmful than burial at sea. The city sued to compel the EPA to consider its evidence, relying on the general provisions of the Marine Protection Act requiring the EPA to weigh the costs and risks of the dumping against land-based alternatives.[78] Ironically, the city's long-term dumping into the Bight Apex has so degraded the water quality that the court found, "cessation of the dumping would result in no discernible improvement in the Bight in the foreseeable future. . . ."[79]

Although section 1412(a) of the Marine Protection Act, as amended, states that the EPA "shall end the dumping of sewage sludge into ocean waters . . . as soon as possible after November 4, 1977, but in no case may the [EPA] Administrator issue any permit . . . which authorizes any such dumping after December 31, 1981,"[80] the court held this seemingly crystal-clear language not dispositive. The district court pointed out that the Act defines sewage sludge as municipal waste "the ocean dumping of which may *unreasonably* degrade or endanger" health or the marine environment.[81] Therefore, it held the 1977 amendment "does not purport to modify in any way the factors that [the Act] . . . required EPA to consider in determining whether dumping would unreasonably degrade the environment; it simply provides that EPA may not, after 1981, permit dumping that fails the test established by the 1972 Act."[82]

The court found New York's dumping did not unreasonably degrade the environment under the Act and that the EPA regulations[83] adopted pursuant to the Act were so strict they effectively deprived the agency of discretion to grant a permit and were therefore contrary to the intent of Congress. It directed the EPA to consider the city's evidence that ocean dumping is a less harmful alternative than land disposal.

The aftermath of the decision was a settlement under which the EPA agreed to adopt the court's view of the statute. The EPA will apply the

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[77] City of New York v. United States Environmental Protection Agency, 15 Env't Rep. Cas. (BNA) 1967 (S.D.N.Y. 1981) (hereinafter referred to as "*N.Y. v. E.P.A.*").

[78] 33 U.S.C. § 1412a (1976 & Supp. IV 1980).

[79] *N.Y. v. E.P.A.*, 15 Env't Rep. Cas. (BNA) at 1967.

[80] 33 U.S.C. § 1412a(a) (West Supp. 1982).

[81] *Id.* § 1412a(b).

[82] *N.Y. v. E.P.A.*, 15 Env't Rep. Cas. (BNA) at 1988.

[83] 40 C.F.R. §§ 220-230 (1979).

1981 deadline only to dumping which will "unreasonably degrade the environment at its particular site, in view of all relevant statutory criteria," and to evaluate the city's application for a continued permit.[84] Under the settlement, the agency also will continue to evaluate an alternate site one hundred and six miles offshore. The site was proposed earlier as an interim dumping location to relieve the pressure on the present dumping site.[85] This provision caught the EPA in a crossfire between the city's resistance to a far more distant dumping area and fishermen's demands that offshore dumping of sewage sludge be halted completely. An amendment to section 1412a of the Marine Protection Act to explicitly end ocean sludge dumping in the New York Bight was defeated in May of 1982 in the House Committee on Merchant Marine and Fisheries.[86]

Concern by fishing and shellfishing organizations over the city's continued dumping in the Bight Apex of sewage sludge containing toxic chemicals and heavy metals has, in recent years, turned to fury. In 1977 the National Sea Clammers Association, in *National Sea Clammers Ass'n. v. City of New York*,[87] (*Sea Clammers*) sued federal officials and state and local officials in New York and New Jersey. The clammers attempted to halt the dumping and, in addition, sued to recover five hundred million dollars in compensatory and punitive damages. The clammers' cause of action was based upon common-law nuisance, the Marine Protection Act, the Clean Water Act, and the Rivers and Harbors Act.[88] The district court dismissed the complaint, holding federal common-law nuisance and the Rivers and Harbors Act not available to private plaintiffs and the citizen-suit provisions of the Clean Water and Marine Protection Acts not timely since their sixty day notice provisions[89] were not followed. The court of appeals reversed, except as to the Rivers and Harbors Act, and reinstated the complaint.

The Supreme Court, in an opinion by Justice Powell, again reversed, but painting with a far broader brush, dismissed all the respondents' claims on the grounds that they afforded no cause of action for private citizens. The Clean Water and Marine Protection Act claims were dismissed. The Court ruled that they provide no right of action for damages,

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[84] [Current Developments] 12 ENV'T REP. (BNA) No. 31, at 929 (Nov. 27, 1981).

[85] *Id.*

[86] N.Y. Times, May 6, 1982, at 32, Col. 6.

[87] 616 F.2d 1222 (3d Cir. 1980), *rev'd sub nom.* Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

[88] The complaint also relied on some less persuasive authority. *See Sea Clammers*, 453 U.S. at 5 n.6.

[89] 33 U.S.C. §§ 1365(b)(1), 1415(g)(2)(A) (1976).

and that injunctive relief lies only under their citizen-suit provisions, which the plaintiffs did not invoke. The Court followed its 1981 decision in *City of Milwaukee v. Illinois*,[90] (*Milwaukee II*) holding that federal nuisance as a cause of action is no longer available in water pollution cases where Congress has provided for enforcement by the EPA.[91] The *Sea Clammers* decision augments the recent Supreme Court trend curtailing private causes of action under federal statutes unless Congress specifically authorized them—holdings frankly aimed at stemming the onslaught of federal litigation.[92]

Broadly read, *Milwaukee II* and *Sea Clammers* appear to sharply curtail the remedy enunciated by the Supreme Court in the first *Illinois v. City of Milwaukee*[93] a decade earlier. In that decision the Court unanimously found a federal common law nuisance remedy existed to abate pollution of interstate or navigable waters.[94] The remedy was justiciable in federal district courts as an action arising under the "laws" of the United States as set forth in 28 U.S.C. section 1331.[95] The Court noted:

> The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act [Clean Water Act]. Congress provided in § 10(b) of that Act that, save as a court may decree otherwise in an enforcement action, "[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action."[96]

Yet in 1981, reviewing the first *Milwaukee* decision that resulted in an injunction requiring Milwaukee to cease discharging raw sewage into Lake Michigan, the Supreme Court held that the amended Act "occupied the field through the establishment of a comprehensive regulatory pro-

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[90] 451 U.S. 304 (1981).

[91] Justices Stevens and Blackmun dissented in part, contending that 42 U.S.C. § 1983 furnishes a remedy to private plaintiffs, a claim the majority had rejected and which the plaintiff had never raised. *See also* Henderlider v. La Plata Co., 304 U.S. 92 (1938); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Kansas v. Colorado, 206 U.S. 46 (1907); Missouri v. Illinois, 200 U.S. 496 (1906).

[92] *See* Middlesex Cty. Sewerage Auth. v. Nat. Sea Clammers, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981) (no private cause of action under Rivers and Harbors Act section 10).

[93] 406 U.S. 91 (1972).

[94] 28 U.S.C. § 1331 (1976).

[95] This statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[96] 406 U.S. at 104 (1972).

gram supervised by . . . [a] federal administrative agency, . . . supplanting the federal common law. . . .''[97]

The second *Milwaukee* decision, unlike the first, was by a divided court. Justice Blackmun's dissent, joined in by Justices Marshall and Stevens, noted that not only did federal nuisance actions long antedate the *Milwaukee* case,[98] but that:

> [t]he language and structure of the Clean Water Act leave no doubt that Congress intended to preserve the federal common law of nuisance. Section 505(e) of the Act 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 Adminstrator or a State agency)." 33 U.S.C. § 1365(e) (emphasis added).[99]

The Act specifically defines "person" to include states.[100] In *Sea Clammers,* which was mainly brought under federal statutes, the Court simply dismissed the incidental nuisance claim on the basis of *Milwaukee II.* But it seems clear that *Milwaukee II* should be limited to its facts: a suit seeking injunctive relief for the discharge of pollutants beyond the effluent limitations imposed by a Clean Water Act permit. Future cases, whether or not involving discharges covered by that Act, should not be governed by *Milwaukee II* unless they too seek such relief. This decision, which flies in the face of the strong presumption against curtailment by implication of a time-honored common law remedy,[101] and ignores the plain wording of the Clean Water Act as well, should certainly be inapplicable to suits where Clean Water Act effluent limitations are not in issue.

A suit for injunctive relief under the citizen-suit provisions of the Clean Water or Marine Protection Acts[102] seems to be the only avenues

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[97] City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981).

[98] *See* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906).

[99] 451 U.S. at 339.

[100] 33 U.S.C. § 1362(5) (1976).

[101] *See, e.g.,* Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."). *See also* Township of Long Beach (N.J.) v. City of New York, 445 F. Supp. 1203, 1215 (D. N.J. 1978) (nuisance action similar to *Sea Clammers,* denying the city's motion to dismiss based on preemption of federal nuisance by the Clean Water Act.).

[102] 33 U.S.C. §§ 1365(b)(1), 1415(g) (1976).

available to the National Sea Clammers Association. To date they have not filed suit under these acts or written to trigger the sixty day notice provisions.[103]

Suits to restrain ocean dumping in environmentally valuable areas are still being brought. In March of 1982, Manatee County, Florida sued to halt the Army Corps of Engineers from dumping polluted dredge spoil in a coral reef area which provides habitat for commercial fish and shellfish.[104] The action is based on the Marine Protection Act, coupled with the failure of the EPA, under the National Environmental Policy Act,[105] to complete even a draft environmental impact statement examining the effects of the dumping and alternatives to it.

The Marine Protection Act provides an additional means of preventing exploitation of valuable ocean sites. Under the Act, environmentally valuable ocean water areas may be designated marine sanctuaries by the Secretary of Commerce if he determines them "necessary for the purpose of preserving or restoring areas for their conservation, recreational, ecological or esthetic values."[106] Except with regard to treaties, conventions, and other agreements to which the United States is a signatory, the Secretary of Commerce shall regulate any activity affecting the marine sanctuary through the promulgation of regulations and the issuance of permits.[107]

The Marine Protection Act may be used to frustrate the sale or lease of offshore tracts for oil and gas exploration.[108] However, if the decision is

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[103] Conversation with United States Attorney's Office, Newark, New Jersey (August 3, 1982).

[104] Manatee County v. Gorsuch, D.C.M.D. Fla. No. 82-248 Civ.-T-GC (1982), *reported in*, Env't Rep. Cas. (BNA) No. 2 (Apr. 9, 1982).

[105] 42 U.S.C. §§ 4321-4347 (1969).

[106] 16 U.S.C. § 1432(a) (1976). This designation shall be made with the approval of the President and after consultation with the Secretaries of State, Defense, the Interior, and Transportation, the Administrator and the heads of other interested Federal agencies. *Id.*

[107] *Id.* 1432(f), (g). An example of the implementation of this Act is the Key Largo Coral Reef Marine Sanctuary off of Florida's coast. This Sanctuary came under the authority of the Secretary of Commerce in 1975. In March 1980 the Commerce Department announced a management program that called for a joint state-federal monitoring of the reef's aquatic life and the effect of pollution on it. [Current Developments] 10 ENV'T REP. (BNA) No. 47, at 2159 (Mar. 21, 1980).

Other ocean sanctuaries can be found off the coasts of Georgia, California, and Florida. [Current Developments] 11 ENV'T REP. (BNA) No. 40, at 1862 (Jan. 30, 1981).

[108] Com. of Mass. v. Andrus, 594 F.2d 872 (1979), in that decision the court examined the effect of the Marine Sanctuaries Act on the prospective offshore sale of leaseholds sought by the Secretary of Interior and intervening oil companies in the Georges Bank area off the coast of Massachusetts. In its discussion of the environmental impact statement the court noted the different management objectives between the Marine Sanctuaries Act and Outer Continental Shelf Lands Act. The former emphasized "conservation, recreation or ecological or aesthetic values" whereas the latter placed emphasis on the "exploration of oil, gas and other minerals." *Id.* at 885.

made not to recommend the area for consideration as a marine sanctuary, or to postpone the decision to designate it as such, the Secretary of the Interior may make a decision pursuant to the Outer Continental Shelf Lands Act.[109]

Prospects for the Future

The struggle for lasting protection for our precious coastal resources is, as we have seen, only partly won. Even where effective legislation exists, vigilant enforcement requires committed leaders, efficient agencies, and adequate funds.

What legislative steps would help safeguard our coasts? First, states without effective coastal zone land use laws must strengthen them. New York, we have noted, has not fully dealt with this problem. Its Waterfront Revitalization Act[110] requires strengthening if, like California's, it is to serve as a bulwark for the State's coasts, which are under prodigious pressure as real estate values escalate. New York might amend its Act to empower the State, whether through the Department of State, the Department of Environmental Conservation, or an independent commission as in California, to write a plan for coastal zone protection, giving heavy weight to municipal concerns but ultimately recognizing that the husbanding of its coastal resources is the concern of every New Yorker.[111]

In New Jersey, the Division of Coastal Resources, which administers CAFRA, has the long-range goal of strengthening the statute to have it apply to shoreside developments too small to be classed as "facilities" but which nonetheless will have an environmental impact. As a possible exchange, the State might relinquish some jurisdiction over facilities not directly on the shoreline to its municipalities. The Attorney General now has the authority to enforce the provisions of CAFRA in the courts. The

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If the Secretary of Commerce were to deem the Georges Bank as a marine sanctuary he could "exclude all drilling operations and otherwise take steps to conserve and protect the natural resources of the region . . . . " *Id.* at 885.

[109] 43 U.S.C. §§ 1331-34 (West 1980). The Secretary of Commerce through the National Oceanic and Atmospheric Administration announced on November 30, 1981, that the Georges Banks area will not be considered for marine sanctuary designation until further studies are performed, but not before 1983. [Current Developments] 12 ENV'T REP. (BNA) No. 32, at 962 (Dec. 4, 1981).

[110] N.Y. EXEC. LAW art. 42 (McKinney 1981).

[111] Similar recognition at the state level has been accorded the Adirondacks. *See* Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 800-820 (McKinney 1982) (Creating a state board with power to encourage local zoning and if warranted to overrule it in passing on large-scale developments within these scenic mountains. New York's courts have recognized that the Adirondacks are the patrimony of every citizen of the State). *See* Horizon Adirondack Corp. v. State, 88 Misc.2d 619, 388 N.Y.S.2d 235 (Ct. Cl. 1976).

Division should have the power to assess penalties at the administrative level, eliminating the need to apply to the courts.[112]

At the federal level, the most imaginative coastal legislation now being considered is aimed at protecting barrier islands. Barrier islands are thin strands of land which shield coastal bays and wetlands. These include New York's Fire Island, New Jersey's Long Beach Island, Maryland's Assateague, North Carolina's Outer Banks, and similar land barriers. Many barrier islands are highly developed, such as New Jersey's Atlantic City, Maryland's Ocean City, and Florida's Miami Beach. Hurricanes, beach erosion and winter storms, however, continue to demolish buildings and wash away roads and bridges. The Federal government, and ultimately the taxpayer, labors to restore these islands and their beaches after each storm. The roads are rebuilt through federal highway appropriations; the beaches are restored through Army Corps of Engineers restoration programs; and the buildings are repaired through federally subsidized flood insurance programs.

As a result of a suit by the Sierra Club and the Natural Resources Defense Council to enjoin these redevelopment programs,[113] the Coastal Barrier Resources Act was introduced.[114] If passed, this bill[115] will halt new federal expenditures for the restoration of buildings, roads, bridges, or causeways. In addition, the bill will curtail programs which control beach erosion (except in cases of emergencies endangering life or property) and flood insurance on now undeveloped barrier islands listed by the Secretary of Commerce as part of the Coastal Barrier Resources System. Energy development, maintaining channels, and military activities essential to national security are exempt. The bill was unanimously reported by the Environmental Pollution Subcommittee to the full Senate Environment and Public Works Committee on April 28, 1982.[116] In the House, the Merchant Marine and Fisheries Committee is holding hearings on the bill.

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[112] Conversation with John R. Weingart, Acting Director, Division of Coastal Resources, New Jersey Department of Environmental Protection, August 2, 1982.

[113] Sierra Club v. Hassel, 10 Env't Rep. Cas. (BNA) 2224 (1980). The named defendants are the Army Corps of Engineers, the Federal Highway Administrator and the Coast Guard. The plaintiffs alleged they ignored Executive Orders 11,988 and 11,990, which directed federal agencies not to further the development of a flood plain or wetland area "wherever there is a practical alternative." The suit is pending in the United States District Court for the Southern District of Alabama.

[114] H.R. 3252, S. 1018, 97th Cong., 1st Sess. (1981). Bill not enacted as of May 25, 1982. The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 § 341, 95 Stat. 357, 418 (codified as amended at 42 U.S.C.A. § 4028 (West Supp. 1982)), ended flood insurance for structures on undeveloped barrier islands.

[115] Sponsored by Senator John Chafee, Republican from Rhode Island, and Representative Thomas B. Evans, Republican from Delaware.

[116] Conversation with Sharon Newsome, National Wildlife Federation, Washington, D.C., June 30, 1982.

The amounts of federal dollars spent on the endless task of rebuilding barrier islands and restoring their developments are staggering. Between 1975 and 1980 the federal government spent about one billion dollars in developing these islands. Twenty million dollars were spent on one beach restoration alone at Cape Hatteras—totally wasted when a hurricane washed away the replenished beach.[117]

It is essential that this unending cycle of restoration and flood insurance at the expense of every federal taxpayer be curtailed. The pending barrier island legislation, while a giant step forward, should be viewed as only a beginning. Ferryboats rather than bridges should be used to connect barrier islands with the mainland. Legislation should bar the issuance of federal permits for private, state, and municipal development on pristine barrier islands, except for emergencies or to maintain channels. States and localities must legislate, regardless of whether they have coastal management acts, to achieve these results at their respective governing levels. It is at these levels that vital decisions regarding land use have been traditionally made.

With regard to water pollution, the federal courts, in the wake of *City of Milwaukee v. Illinois,*[118] should reexamine the fate of the common law nuisance remedy.[119] As set forth in the 1972 *Milwaukee* decision,[120] the doctrine of common law nuisance stems from the historic federal concern over navigable waters, evidenced by the Rivers and Harbors Act, the Clean Water Act, as well as earlier cases involving navigation and water rights.[121] Alternatively, if the courts fail to act, Congress should amend section 505(e) of the Clean Water Act[122] (the provision relied on to

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[117] *Id.*

[118] 451 U.S. 304 (1981).

[119] The Second Circuit declined to apply *Milwaukee II* to a federal nuisance action to abate air pollution where standards under the Clean Air Act, 42 U.S.C. §§ 7401-7641 (Supp. II 1978), are involved. New England Legal Found. v. Costle, 666 F.2d 30 (2d Cir. 1981), affirmed dismissal of the complaint on the narrower ground that the EPA had given a variance from its air-quality standards for the very activities the plaintiffs sued to enjoin. Thus the Second Circuit invoked the traditional reluctance of the courts "to enjoin as a public nuisance activities which have been considered and specifically authorized by the government," especially "where the conduct sought to be enjoined implicates the complex area of environmental law and where Congress has vested administrative authority in a federal agency presumably having significant technical expertise." *Id.* at 33. The court pointed out that the variance was reviewable, so plaintiffs had a remedy at law. It specifically declined "to reach the broad question whether the Clean Air Act totally preempts federal common law nuisance actions based on the emission of chemical pollutants into the air," noting that the Clean Water Act, unlike the Clean Air Act, "regulated every point source of water pollution." *Id.* at 32 n.2.

[120] Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

[121] *Id.* at 101.

[122] 33 U.S.C. § 1365(e) (1976).

suppress the federal nuisance remedy) to express what was almost certainly their original intent—that the Act and the common law remedy should supplement each other.[123]

Finally, a solution to the intractable problem of sewage sludge dumping must be found. While the present impasse goes on, our waters worsen. Other countries, notably Japan, process sewage sludge to make construction material, or dehydrate and burn it to produce electricity. The City of Milwaukee has for decades turned its sludge into Milorganite, a gardening compost.[124] Unfortunately, New York contends that chromium, lead and other metals in its sludge make it unsuitable for these purposes. The Federal government, especially the Environmental Protection Agency, must furnish financial incentives and sponsor research.

Americans have taken their coastal resources for granted. Our major cities are built on our shores, and we continue to exploit the sea for commerce, recreation, and fishing, but if we fail to safeguard this priceless asset we will lose it. If, in the pursuit of monetary gains, we fail to act now to protect our coasts, wetlands, barrier islands, and the sea itself, future generations will liken us to Othello, who described himself as one who "threw away a pearl richer than all his tribe."

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[123] Hearings have commenced before the Senate Comm. on the Environment and Public Works, on an amendment to the Clean Water Act § 505(e), 33 U.S.C. § 1365(e) (1976), to overturn the *Milwaukee II* decision. The National Association of Attorney Generals has testified in favor of such an amendment.

[124] Rodgers, ENVIRONMENTAL LAW 411 n.17 (West 1977).