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Best Brief for Intervenor: Eighteenth Annual Pace National Environmental Law Moot Court Competition

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BEST BRIEF FOR INTERVENOR*

Civ. App. No. 05-195

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BEARCLAW RIVER KEEPER, INC.
Appellant

and

TOWN OF NOBLESVILLE, NEW UNION
Intervenor

v.

MAJOR ELECTRONICS, INC.,
Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PROGRESS

BRIEF FOR INTERVENOR, TOWN OF NOBLESVILLE

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STANDARD OF REVIEW

Review of the grant of summary judgment is de novo, applying the same legal standard used by the district court. *Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir. 1995). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

STATEMENT OF THE ISSUES

I. Whether the PCB-impregnated soil at Appellee's Fort Union manufacturing facility constitutes a point source under 33 U.S.C. § 1362(14).
II. Whether Appellee's discharge of PCBs into the Bearclaw River in violation of the State of New Union's water quality standards are actionable under the Clean Water Act.
III. Whether the Clean Water Act preempts the federal common law of nuisance.
IV. Whether the Clean Water Act preempts state common law of nuisance for non-point source pollution originating in another state.
V. Whether Appellant Bearclaw River Keepers may maintain a public nuisance claim on behalf of its members under the "special injury" rule.
VI. Whether Appellants have claims for reimbursement and summary judgment against Appellee under 42 U.S.C. § 9613(f) or 42 U.S.C. § 9607.

STATEMENT OF THE CASE

Bearclaw River Keeper, Inc. ("BRK") brought suit under the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("CWA" or "the Act") on behalf of its members against Major Electronics, ("Appellee") alleging CWA violations arising from the discharge of Polychlorinated Biphenyls ("PCBs") into the Bearclaw River from its facility in Fort Union, State of Progress. (Record "R." at 3.) The town of Noblesville, New Union, filed a permissive intervention, joins BRK, and adds a claim for reimbursement of response costs under 42 U.S.C. § 9607 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). (R. at 3.)

The trial court held for Appellee on all issues. First, the court ruled that the soil underneath the Fort Union facility is not a statutory point source. (R. at 6.) Second, the court ruled that violation of water quality standards was not properly before the court. (R. at 7.) Third, the court ruled that the Act completely preempts the common law of nuisance. (R. at 8.) Last, the court ruled that Noblesville may not claim reimbursement. (R. at 9.)

STATEMENT OF RELEVANT FACTS

Intervenor, the Town of Noblesville, is a municipality located on the Bearclaw River in the State of New Union downstream from the state's border with the State of Progress. (R. at 4.) Appellant, BRK, is a not-for-profit corporation organized under the laws of New Union. (R. at 4.) Major Electronics ("Appellee") has for decades operated an electronics manufacturing facility on the shore of the Bearclaw River in Fort Union, State of Progress. (R. at 4.)

Appellee has a National Pollutant Discharge Elimination System ("NPDES") permit issued under 33 U.S.C. § 1342 by the Environmental Protection Agency ("EPA"), which allows it to discharge treated effluent into the Bearclaw River. (R. at 4.) Neither Appellee's initial nor renewed permits contained a PCB effluent limitation. (R. at 4.) Appellee's effluent occasionally contained low levels of PCBs, although Appellee stopped their use entirely in 1980. (R. at 4.) The State of Progress classified the stretch of river adjacent to Fort Union as a "Class C" water, in which it imposes no regulations on the discharge of PCBs. (R. at 4.)

Spills and leaks at Appellee's facility have impregnated the soil beneath the Fort Union facility with PCBs, which leach into

the Bearclaw River. (R. at 4.) These pollutants have migrated down the river to the Noblesville public beach, where they have impregnated the soil on the banks, the public beach, and the sediment in the river itself. (R. at 4.) As a result, fish taken at locations on or near the swimming beach contain levels of PCBs that exceed safety levels established by the Food and Drug Administration ("FDA"). (R. at 5.) PCB levels at the public beach also render the river unsafe for contact recreational use. (R. at 5.)

The State of New Union has classified the stretch of the Bearclaw adjacent to Noblesville as a "Class B" water, with water quality standards that limit PCBs to a level appropriate for contract recreational and fishing uses. (R. at 5.) On average, Noblesville's population is just above the poverty level. (R. at 5.) Because of this, many residents rely on the Bearclaw River, and particularly on locations near the beach, for sustenance fishing. (R. at 5.) Additionally, Noblesville lacks a municipal pool and many residents rely on the beach for recreation. (R. at 5.)

Noblesville has taken efforts to warn citizens about the danger posed by pollution at the public beach, including erecting a chain link fence and increasing policing of the area (at a cost of $50,000). (R. at 5.) Local swimming and fishing in the river have decreased by thirty and twenty-five percent, respectively. (R. at 5.)

SUMMARY OF ARGUMENT

I. PCBs at Appellee's Fort Union Facility Do Not Arise From a Point Source.

The text of the Act indicates Congress did not intend ordinary soil to be a point source. Instead, ordinary soil is more akin to non-point source pollution. Even broadly defined, a point source implies affirmative conduct by dischargers to channel pollution, which is absent here.

II. A Citizen Suit Is Warranted in the Present Circumstance.

The structure, legislative history and overall purpose of the CWA all support use of the Act's citizen suit provision to directly address violations of state water quality control standards. Further, the distressed state of the nation's waters and flaccid govern-

ment enforcement strongly favor allowing citizen enforcement of non-point source pollution standards.

III. The Common Law of Nuisance Is Properly Applied to the Present Circumstance.

The federal common law of nuisance was employed by the courts to resolve transboundary pollution before the modern CWA was passed. Cases since that time have only addressed issues of point source pollution. Because the instant dispute involves only a non-point source, federal common law is not preempted. The need for a uniform national standard to limit pollution from non-point sources, the conflict between the stated goals of the Act and the lack of adequate self-regulation by the State of Progress, and the inadequacy of other legal remedies available to New Union support its application. If the court instead applies state common law of nuisance, the same considerations urge application of New Union law.

IV. BRK May Not Maintain a Public Nuisance Action Under the Special Injury Rule

Under the special injury rule, a private party may not maintain a public nuisance action in the absence of an injury that differs in kind from the injury suffered by the general public. Here, BRK's members have suffered the same kind of injury suffered by the community of Noblesville as a whole, the curtailment of recreation and fishing activities. Although the severity of the injury may differ, the nature of the injury is the same. Thus Noblesville, as the local government authority, is the proper party to bring a public nuisance action on behalf of its constituents.

V. BRK and Noblesville May Maintain Claims Under CERCLA § 107.

Although BRK and Noblesville appear to be precluded from bringing a claim for contribution under § 113(f) in the absence of a previous or pending action under §§ 106 or 107, both have actionable claims for the recovery of response costs under § 107. Even if Noblesville were somehow classified as a liable party under § 107, it would still have a claim under that section under the implied right to contribution. Additionally, BRK's § 107 claim was improperly denied at the liability stage for alleged inconsistency with the National Contingency Plan.

ARGUMENT

I. ORDINARY SOIL IS NOT A POINT SOURCE.

The lower court correctly held that Appellee did not violate the prohibition contained in the CWA, barring discharge of any pollutant without a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311, 1342 (2005). The Act makes unlawful "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (2005). The jurisdiction of the Act depends on the meaning of "point source," defined as "any discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14).

CWA point source provisions do not govern pollutants in soil beneath Appellee's facility because "point source" does not include ordinary soil. First, the plain text of the Act indicates that Congress did not intend point source provisions to include ordinary soil. Second, pollutants in ordinary soil fall under the non-point source pollution control regime. Lastly, even where courts have broadly interpreted "point source," some conduct by dischargers to channel pollutants is always implicated, even if only to invite formation of conveyance by a natural force.

A. Congress Did Not Intend Ordinary Soil to be a Point Source.

While "point source" has been construed liberally, *see, e.g.*, *Beartooth Alliance v. Crow Butte Mines*, 904 F.Supp. 1168, 1173 (D.Mont. 1995), the supposed "plain purpose" of a statute cannot be invoked at the expense of specific terms, *Am. Min. Congress v. EPA*, 824 F.2d 1177, 1185 n.10 (D.C. Cir. 1987). Doing so ignores the significance of compromise in the legislative process and "prevents the effectuation of congressional intent." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Instead, "[t]he question . . . is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977).

1. The text of the Act refutes ordinary soil as a point source.

The chief canon of statutory interpretation declares "judicial inquiry . . . complete" when a statute's words are unambiguous. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

a. Words chosen by Congress to define "point source" do not manifest intent to encompass ordinary soil.

Ordinary soil is not enumerated as a "point source." 33 U.S.C. § 1362(14). While the definition of "point source" is not exclusive, words used to define the term ("discernable, confined") and examples given ("pipe, ditch") "evoke images of physical structures . . . that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *Id.*; *U.S. v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the Court contained its point source analysis to a pump moving pollutants from a canal to a wetland; the underlying permeable soil through which pollutants migrated was not deemed a point source.

Furthermore, it is "elemental that Congress does not add unnecessary words to a statute." *Plaza Health Labs., Inc.*, 3 F.3d at 646. The detailed statutory description of "point source" would be unnecessary and misleading if Congress anticipated inclusion of broad expanses of soil. 33 U.S.C. § 1362(14). Had Congress intended the CWA to regulate pollutants moving through soil, it could have forgone terms connoting a distinct, controlled conduit, including "confined" and "discrete," and embraced a more inexact definition for broader application. *Id.*

b. Textual emphasis on industrial sources reflects regulatory realities, not the intent to designate all sources of pollution as point sources.

Congress considered industrial dischargers a prime target for the CWA. That view finds textual support in the volume and potency of CWA provisions devoted to industrial sources. *U.S. v. W. Indies Transp., Inc.*, 127 F.3d 299, 308 (V.I. 1997). As implemented, the emphasis is corroborated by subjection of Appellee's facility to NPDES permit requirements. However, the CWA does

not impose strict liability for pollutants traced to an industrial site and the statute's emphasis on such sources does not tacitly imply its terms be construed to achieve that end.

Instead, Congress' focus on industrial sources reflects identification of a "sensible" target for regulation. *Plaza Health Labs., Inc.*, 3 F.3d at 646. Because industrial loadings typically "emerge from a discrete point such as the end of a pipe," they are well-suited for permit-based regulation. *Id.* Such loads are presumptively easier to isolate, quantify and control. *Id.*

Here, Appellants do not allege that pollutants are conveyed by such a discrete apparatus, only by ordinary soil. Unlike a "pipe," ordinary soil is diffuse by nature and does not facilitate quantification or control of migrating pollutants. Thus, Congress' focus on industrial facilities cannot sustain a torturously broad application of the CWA and render impotent all limits written by Congress for the term "point source." 33 U.S.C. § 1362(14). It is oft-claimed that "Congress would have regulated non-point pollution if a workable method could have been derived." *U.S. v. Earth Scis., Inc.*, 599 F.2d 368, 372 (10th Cir. 1979). Limiting NPDES permits to point sources *in spite* of this predilection to regulate more broadly confirms that Congress purposely passed on monitoring an outlet as inexact as ordinary soil through point source regulation.

2. Congress intended pollution in ordinary soil to be addressed by non-point source pollution solutions.

Congress recognized that the NPDES program could not address all pollution reaching navigable waters. *See Earth Scis., Inc.*, 599 F.2d 368; *see also Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980). Non-point source pollution is comprised of sources ill-suited to permit controls. 33 U.S.C. §§ 1288, 1329. Although not defined in statute, non-point source pollution is often associated with a rainfall or snowmelt event and includes runoff from fields and construction operations. 33 U.S.C. § 1362(14) (exempting agricultural storm water discharges and return flows from irrigated agriculture from the term "point source"); *see Earth Scis., Inc.*, 599 F.2d 368; *see also Abston Constr. Co.*, 620 F.2d 41. Association with a discrete conveyance is what distinguishes a point source from non-point source. *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333, 1358 (D.N.M. 1995) (non-point source "as any source of water pollution or pollutants not

associated with a discrete conveyance"); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 n.28 (D.C. Cir. 1982). Here, the pollution complained of is not associated with such a conveyance. It *is*, however, coupled with rainfall, a typical trigger of non-point source pollution. *Friends of Santa Fe County*. 892 F.Supp. at 1358-59. Therefore, Congress intended pollution moving through ordinary soil to be addressed not as a point source but as non-point source pollution.

3. Ordinary soil as a point source frustrates legislative policy decisions as it radically expands federal enforcement power at the expense of the states.

Congress chose to tackle point and non-point source pollution in conspicuously different ways. 33 U.S.C. §§ 1288, 1329, 1342. Construing ordinary soil as a point source dismantles the structural and regulatory dichotomy envisioned by Congress and implemented by the Act.

Also, ordinary soil as a point source drastically extends federal permitting power. In nearly every storm water event, rainwater might conceivably saturate contaminated soil causing leachate to pollute a navigable water in the manner alleged here. Subsuming rain-related discharge under the point source umbrella implicates serious federalism issues by emasculating the CWA delegation of power to states as chief regulators of non-point source pollution.

B. Ordinary Soil is Not Altered by the Hand of Man and So Is Not a Point Source.

Even where courts have interpreted the term "point source" broadly, courts have declined to characterize an unconfined, unaltered expanse of ordinary soil as a "point source." *See, e.g., Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 n.4 (10th Cir. 2005) ("[S]eepage that travels through fractured rock would be non-point source pollution").

1. Absence of *purposeful* human action to channel indicates that ordinary soil is not a point source.

Courts, including the lower court, have distinguished cases on the basis of some conduct by polluters to channel or guide pollu-

tion into a navigable water. In *Avoyelles Sportsmen's League Inc. v. Marsh*, the court found the defendant's bulldozers and backhoes created the channeling effect necessary to make the machinery itself a point source. 715 F.2d 897, 927 (5th Cir. 1983). In *Abston Construction Company*, mine operators who designed spoil piles in such a way as to affect drainage were liable as point source discharge violators under the CWA. 620 F2d at 52. Importantly, the court also recognized that natural rainfall drainage fell outside the purview of the Act. *Id.* Here, Appellee took no affirmative action to pile soil or otherwise channel leachate into the Bearclaw River. Appellants only allege that natural rainfall drainage through Appellee's soil implicates point source discharge liability and so cannot prevail.

2. Absence of *inadvertent* human action to channel indicates that ordinary soil is not a point source.

Liability for discharge without a permit does not *require* that a discharger act with the intent to channel polluted storm water into a navigable water. *See Earth Scis.*, 599 F.2d at 374. The definition of "point source" encompasses human conduct that only passively invites formation of conveyance by a natural force. *See id.* In *Earth Sciences*, the defendant's mining operation collected snowmelt and rainfall in a gold-extraction process. *Id.* From a lack of foresight or precaution, the limited capacity of the drainage system failed to contain overabundant wastewater and resulted in the discharge of toxic overspill. *Earth Scis.*, 599 F.2d at 374. The court found defendant's entire operation a point source in violation of the CWA. *Id.*

Interestingly, the court does not address the physical disconnect between the point source and the navigable water at issue in that case. This disconnect seems to run afoul of the CWA requirement that the pollutant enter the navigable water by *an addition from* a point source. 33 U.S.C. § 1362. This omission suggests one of two things. First, it indicates that the court did not intend for the channeling of wastewater over or through soil to be a point source and overlooked the requisite physical nexus between the point source and the navigable water. This conclusion supports the view that ordinary soil is not a point source because the point source designation is limited to the boundaries of the facility and does not include soil. *Earth Scis.*, 599 F.2d at 374.

The alternative rationale is that the court broadly defined point source to include the naturally-occurring runoff rivulets flowing through and over the soil without expressly saying so. While seeming to support ordinary soil as a point source, *Earth Sciences* is distinguishable because there, defendants created the conditions that allowed polluted rivulets to form. *Id.* The drainage system in *Earth Sciences* was constructed to prevent escape of cyanide-tainted wastewater and failed to do so. *Id.* Here, PCBs are not part of Appellee's normal wastewater discharge and PCB contamination under Appellee's facility is not due to failure of a wastewater discharge system. Furthermore, Appellee has not otherwise acted to encourage conveyance of PCBs through the soil. The soil beneath Appellee's facility is unaltered.

Instead, the physical state of the soil beneath Appellee's facility is more akin to the land at issue in *Sierra Club v. Martin*. 71 F.Supp.2d 1268, 1305-1306 (N.D. Ga. 1996). In *Martin*, plaintiffs argued that development on defendant's land would cause ditches to form and result in a channeling of pollutants in violation of the Act. *Id.* at 1306. The Court conceded that naturally-occurring ditches could turn diffuse storm water into a point source. *Id.* However, because the soil was to date unaltered, the Court refused to confer point source discharge liability. *Martin*, 71 F.Supp.2d at 1306. Similarly here, pollutants did not move through ditches or conveyance of any kind. PCBs were affected only by filtration properties of ordinary soil including permeability and surface pressure. Thus, ordinary soil is not a point source.

3. Seepages lack the qualities of a point source.

The issue of water seeping through soil to arrive at a navigable water is addressed in *Friends of Santa Fe County*, 892 F.Supp. 1333. There, the defendants operated an overburden pile and remediation system contaminated by acid mine drainage ("AMD"). *Id.* at 1337. Plaintiffs claimed that the operation itself *and* seepage carrying trace pollutants through soil to a nearby arroyo were a point source. *Id.* at 1359. While the court found the pile and remediation systems would "readily constitute" point sources, the seepages formed in ordinary soil through which polluted water moved did not. *Id.* In so concluding, the court noted that seepages were not of human-origin and merely "represented evidence that AMD had at some time in the past entered subsurface waters." *Id.* In other words, seepages amounted to "non-point source carri-

ers of pollutants similar to storm water . . . not subject to the Act's permitting requirements." *Id.*

Similarly here, any seepage of pollutant-laced rainwater through soil to groundwater or the Bearclaw River is not of human origin and is simply evidence that pollutants had at some past point entered the soil. It is undisputed that PCBs in the river originated from the soil beneath Appellee's New Union manufacturing facility. However, neither that fact alone nor in combination with a desire to abate the harm stemming from PCBs in the water makes the ordinary soil under Appellee's facility a conveyance within the definition of a point source.

II. ALLEGED VIOLATIONS OF STATE OF NEW UNION WATER QUALITY STANDARDS ARE ACTIONABLE UNDER SECTION 505(a) CITIZEN SUITS.

The CWA citizen suit provision allows any citizen acting on his own behalf to commence a civil suit against any person alleged to be in violation of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1) (2005). The CWA clearly envisions citizens exercising the private right to enforce NPDES permit-based discharge requirements. 33 U.S.C. § 1365(f). Additionally, the structure of the Act, legislative history and purpose of the CWA show that Congress intended the private right to extend to suits alleging violations of state water quality control standards.

A. The Structure and Text of the CWA Indicate that State Water Quality Standards are a Legitimate Basis for Citizen Suit.

Citizen suit jurisdiction hinges upon the meaning of "effluent standard or limitation" under the Act. 33 U.S.C. § 1365(a)(1). The CWA defines "effluent standard or limitation" by listing conditions including "other limitation under 1311." 33 U.S.C. § 1365(f)(2).

1. "Effluent standard or limitation" is not defined to exclude water quality standards.

While the specificity of the list hints at exclusivity, the lack of direct reference to water quality standards in "effluent standard or limitation" does not exclude water quality standards. 33 U.S.C. §§ 1365(a)(1), (f). Instead, "effluent standard or limitation" should

be considered suggestive of an obligation that falls within the Act's broader prohibitions. The Supreme Court advanced this reasoning in the context of the savings clause by stating that the reference to "any effluent standard or limitation" in § 1365(e) was not restricted to the terms of the CWA itself. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981). Instead, the Supreme Court opined that Congress intended the phrase be interpreted broadly, encompassing even state statutory limitations. *Id.* Thus, an enforceable effluent limitation under the citizen suit provision should not be read to outright exclude water quality standards.

2. Water quality standards promulgated under § 1313 are incorporated into "effluent standard or limitation" by reference to § 1311.

The list of criteria defining "effluent standard or limitation" need not specifically refer to § 1313-authorized state water quality standards in order for such standards to be actionable by citizen suit. *See, e.g., PUD #1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). In *Jefferson County*, the Supreme Court explained that while CWA certification did not specifically authorize states to condition certification of federal NPDES permits on containing state water quality standards, "the statute allows States to impose limitations to ensure compliance with [§ 1313] of the Act," and "[§ 1311] . . . incorporates [§ 1313] by reference." *Id.* at 713. In support, the Supreme Court pointed to "the broad enabling provision in § 1311 that required states to achieve pollution limitations, including those necessary to meet water quality standards." *Id.* at 713 n.3; 33 U.S.C. § 1311(b)(1)(C). The Supreme Court thus concluded that § 1311 "expressly refers to state water quality standards, and is not limited to discharges." *Jefferson County*, 511 U.S. at 713, n.3. Similarly here, reference to § 1311 in "effluent standard or limitation" amounts to a reference to § 1313. Therefore, statutory authorization for citizen suits founded on state water quality standards is afforded.

a. Legislative history substantiates incorporation of § 1313 by reference to § 1311.

Relevant legislative history reveals the same judgment. H.R. REP.NO. 95-830, p. 96 (1977) (Conf. Rep.). Regarded as "understood" that § 1313 "is required by the provisions of [§ 1311]," the

House Conference Report on CWA concluded that "[§ 1313] is *always* included by reference where [§ 1311] is listed." *Id.* (emphasis added). As a result, state water quality standards adopted pursuant to § 1313 are among the violations of § 1311 referenced in § 1365(f) upon which a citizen may base commencement of a civil suit. 33 U.S.C. § 1365(f).

b. Tools of statutory interpretation do not belie incorporation of § 1313 by reference to § 1311.

Moreover, while it is an established principle of statutory interpretation that courts must "construe a statute so that no provision is rendered inoperative or superfluous, void or insignificant," reading § 1311 as a reference to § 1313 has no such effect. *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (internal quotations omitted). Courts do not unbendingly foreclose the possibility that overlap or duplication exists in statute. *See, e.g., Jefferson County*, 511 U.S. 700. In *Jefferson County*, the Supreme Court resolved the ambiguity between provisions detailing the scope of state authority of CWA certification by finding that one was simply a more specific rendition of the other. Id. at 713-14. The majority rejected the view that overlapping sections rendered the more specific provision a "wasted effort" by Congress. *Id.* at 726 (Thomas, J., dissenting). Instead, the Court explained it as a manifestation of priority, the satisfaction of which did not preclude other limitations. *Id.* at 712-13.

Similarly here, it is no surprise that Congress placed great emphasis on citizen enforcement of point source permit violations. As a whole, the 1972 Amendments creating the modern CWA signified an enthusiastic congressional endorsement of national technology standards for point source dischargers. However, Congress retained the water quality-based strategy for waters that remained polluted after technology-based standards were applied. 33 U.S.C. § 1313. The emphasis on point source discharge in § 1365(f)'s "effluent standard or limitation" merely reflects a shift in principal focus, not an exclusion of the old regime.

Nor does construing § 1311 as a reference to § 1313 inappropriately undermine the limits of citizen suits. 33 U.S.C. § 1365(f). Even generous readings of "effluent standard or limitation" proscribe for example, citizen suits against the EPA Administrator for failing to enforce water quality standards or other enforcement action. *See, e.g., Allegheny County Sanitary Auth. v. EPA*, 732

F.2d 1167 (3d Cir. 1984) (no citizen suit can be maintained . . . for failure to issue orders to stop ongoing pollution). Those limitations are consistent with congressional intent to preserve discretion in the state and federal enforcement prerogative.

c. Caselaw rejecting incorporation of § 1313 by reference to § 1311 is distinguishable.

Admittedly, courts do not universally hold that § 1311 incorporates § 1313 by reference. *See, e.g., Friends of the Earth v. EPA*, 333 F.3d 184 (D.C. Cir. 2003). In *Friends of the Earth*, the court considered the issue in the context of the scope of jurisdiction for direct appellate review of EPA action. *Id.* at 193. Section 1369(b)(1) lists EPA proceedings subject to direct appellate review and includes decisions pertaining to "effluent limitations or other limitations" under § 1311. 33 U.S.C. § 1369(b)(1). The court declined to conclude that reference to § 1311 meant decisions regarding water quality standards promulgated under § 1313 were entitled to direct appellate review. *Friends of the Earth*, 333 F.3d at 193.

However, *Friends of the Earth* is distinguishable because courts of appeals "have consistently held that the express listing of specific EPA actions in *[§] 1369(b)(1)* precludes direct appellate review of those actions not so specified." *See, e.g., City of Baton Rouge v. EPA,* 620 F.2d 478, 480 (5th Cir. 1980) ("Thus, the rule is clear: the [c]ourts of [a]ppeals have jurisdiction for direct review only of those EPA actions specifically enumerated in 33 U.S.C. § 1369(b)(1)") (emphasis added). No such settled standard as to the scope and specificity of § 1311 in the context of the *citizen suit provision* exists here. 33 U.S.C. § 1365. To the contrary, the Supreme Court reasoning in *Jefferson County* and relevant legislative history endorse the opposite judgment. 511 U.S. at 713; H.R. REP.NO. 95-830, p. 96 (1977) (Conf. Rep.).

B. Private Enforcement of State Water Quality Standards Fulfills the Congressional Purpose Behind CWA Citizen Suit Provision.

The citizen plaintiff serves an important role in CWA enforcement, assuming functions of both independent actor and conscience of government authority. 33 U.S.C. § 1365(a)(1) (allowing direct citizen actions against polluters); 33 U.S.C. § 1365(a)(2) (allowing citizens to sue Administrator for failure to perform nondiscretionary duties); §§ 1365(b)(1)(A), (B) (making direct citizen

suits dependent upon notice and a showing that state or federal enforcers are not diligently prosecuting). In empowering citizen enforcement, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976). In sum, "these sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws." S. REP. NO. 92-1236, at 221 (1972) (Remarks of Sen. Bayh).

Citizen suits may make up for inadequate government resources or attention dedicated to enforcement. Here, neither the federal EPA nor state authorities have commenced an enforcement action against Appellee despite the harm to the resource and the public. Lack of initiative to address contamination stemming from Appellee's facility is illustrative of a larger problem of lax enforcement. *See* James R. May, *Now More Than Ever: Environmental Citizen Suit Trends*, 33 Envtl. L. Rep. (Envtl. L. Inst.) 10,704, 10,718 (2003) (reporting a 55% drop between 1997 and 2002 in the total number of EPA referrals for civil enforcement of the CWA).

Now, in a time when non-point source pollution is the "largest single source of contamination," (Linda A. Malone, *The Myths and Truths That Ended the 2000 TMDL Program*, 20 Pace Envtl. L. Rev. 63, 76 (2002)), it is more important than ever that the goal of the Act, "to restore and maintain the . . . integrity of the Nation's waters" advances through citizen enforcement of water quality standards. 33 U.S.C. § 1251 (2005). On the 25th Anniversary of the CWA, Former Vice President Al Gore noted that the push to safeguard our water resources may have been "formalized by our laws, but it was carried out by our people." Vice President Albert Gore, Remarks on the 25th Anniversary of the Clean Water Act (October 18, 1997) *available at* http://clinton3.nara.gov/WH/EOP/OVP/speeches/clean.html. Our people must keep working, unhindered by procedural hurdles, to make our waters fishable and swimmable. 33 U.S.C. § 1251.

III. THE COMMON LAW DOCTRINE OF PUBLIC NUISANCE IS PROPERLY APPLIED TO THE INSTANT CASE

Prior to the passage of the CWA, the instant dispute would have been governed by the common law doctrine of public nui-

sance. *See, e.g., Mo. v. Ill.*, 200 U.S. 496 (1906) (holding that the Supreme Court was competent to adjudicate a public nuisance suit brought by Missouri to enjoin Illinois from discharging sewage into the Illinois River). Public nuisance allows relief against defendants interfering with the interests of the community, where that interference consists of "more than a slight inconvenience or petty annoyance." *See Restatement (Second) of Torts*, § 821(f) (1977). This right is afforded whether or not the entire community is affected so long as the nuisance interferes with individuals who come into contact with it while exercising a public right. *Id.* at §821(b). Here, the rights of the citizens of Noblesville who rely on the Bearclaw River for fishing and recreation are significantly affected by the presence of dangerous levels of PCBs, which prevents their rightful enjoyment of its waters. *See, e.g., N.J. v. New York City*, 283 U.S. 473 (1930) (holding that trash from New York City that washed up on New Jersey beaches prevented citizens' enjoyment of swimming and constituted a public nuisance). Application of either federal common law or the common law of the affected state has been disfavored since the passage of the CWA in 1972. *See, e.g., City of Milwaukee v. Ill.*, 451 U.S. 304 (1981). ("*Milwaukee II*".) Choice of law, however, is necessarily dependent on the facts particular to a case, and no case with analogous facts has been considered by the Supreme Court in more than three decades. Here, the pollution arises from a non-point source and the laws of the State of Progress do not regulate the efflux of PCBs from Appellee's property. Thus, this Court is presented with a novel circumstance that finds precedent not in cases decided since the Act's passage, but in case law set out by the Supreme Court that predates the CWA.

A. The Act Provides Comprehensive Regulation of Pollutants Only When They Originate From Point Sources.

The Clean Water Act provides comprehensive regulation of the discharge of pollutants from point sources. 33 U.S.C. § 1311 (2005). The Act does not regulate pollutants arising from broader or more nebulous sources through the NPDES permit process.

Where water pollution arises from non-point sources, Congress has failed to implement a centralized federal program to regulate and abate discharges. Instead, 33 U.S.C. § 1329 leaves the regulation of non-point sources to the discretion of individual states. (2005). In the absence of federal regulation, there exists

today no uniform national standard to control the efflux of pollutants from sources such as the soil beneath Appellee's Fort Union facility.

1. Federal common law is preempted only where the discharge of pollutants is properly regulated by the Act.

When Congress enacted the CWA in 1972, it gave no indication that the statute was intended to pre-empt the federal common law of nuisance. 33 U.S.C. § 1365(3)(e) provides "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)." (2005). It is only subsequent interpretation by the federal courts that has limited the right to equitable relief under the federal common law of nuisance. In limiting this right to relief, however, the Supreme Court has ruled only on point source pollution. Where the Clean Water Act has been found applicable to the discharge of pollutants from point sources, it has properly supplanted the federal common law of nuisance, which was customarily used by this Court to resolve such disputes. *Ill. v. City of Milwaukee*, 406 U.S. 91 (1972) (" *Milwaukee I")* (allowing Illinois to sue under the federal common law of nuisance for the discharge of sewage into Lake Michigan).

In *Milwaukee II,* the state of Illinois sought an injunction against Milwaukee and three other Wisconsin cities to abate the nuisance created by discharging raw sewage from sewer systems and treatment plants into Lake Michigan. These discharges fell squarely under the provisions of the Act, "occur[ring] at discrete discharge points throughout the system." *Id.* at 309. Furthermore, the cities operated their sewer systems and discharged effluent under permits issued pursuant to the Act. *Id.* at 311. In this circumstance, the Court broke with its tradition of applying federal common law to interstate water pollution disputes, concluding that "at least so far as concerns the claims of respondents [Illinois], Congress . . . has occupied the field through the establishment of a comprehensive regulatory program . . ." *Id.* at 317. While the Court noted that Congress' intent was to establish an "all-encompassing" and "comprehensive" program of water pollution regulation, it also noted that only point sources were subject

to the Act. *Id.* at 318 (noting that every point source discharge is prohibited unless covered by a permit).

Two months later, the Court ratified the rejection of federal common law where it is pre-empted by the Act in *Middlesex County Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Respondents brought suit under the Act against various federal, state, and local officials for discharging pollutants in amounts not permitted by the Act and under the Marine Protection, Research, and Sanctuaries Act for permitting vessels to dump pollutants into coastal waters. Respondents alleged that sewage and other waste materials being discharged by certain of the petitioners were harming Atlantic fisheries. *Id.* at 4-5. As in *Milwaukee II*, sewage systems were in issue. Although the court below noted "it is not entirely clear that the complaint in *Sea Clammers* was confined to point source pollution" it is clear that the source of alleged pollution, sewage systems, are point sources as defined by 33 U.S.C. § 1362(14) and as interpreted by the Court in *Milwaukee II*. (R. at 8.) Moreover, the Court's discussion of the Act's restrictions on "discharges of pollutants," defined by the Act as "any addition of any pollutant to navigable waters from any point source," indicates that in deciding the case the Court considered the origin of the effluent to be point sources, whether or not all of the alleged pollution actually came from such sources. *Sea Clammers*, 453 U.S. at 11; 33 U.S.C. § 1362(12) (2005).

Though the Court found the federal common law of nuisance preempted under those circumstances, courts have preserved common law remedies when no irreconcilable conflict between statutory scheme and common law remedies exists. *See, e.g., Nader v. Alleghany Airlines*, 426 U.S. 290, 299 (1978). Because no irreconcilable conflict arises when applying federal common law to the circumstances here, federal common law is properly applied.

2. The federal common law of nuisance is not preempted because the CWA does not regulate efflux from Appellee's Fort Union facility.

In determining whether federal common law has been displaced by federal statute, courts assess the scope of the legislation and whether the congressional scheme addresses the issue once governed by federal common law. *Milwaukee II*, 451 U.S. at 315 n.8. Inasmuch as the Act regulates discharge of pollutants only from point sources and the soil beneath Appellee's facility is not a point source, the Act does not provide a basis on which to adjudi-

cate the present dispute. Instead, 33 U.S.C. § 1313(c) delegates the regulation of "water quality" to individual states, effectively leaving the regulation of non-point source solution to fifty separate agencies. (2005).

B. Federal Common Law Is Properly Applied Because It Furthers the National Interest in Clean Waterways.

Appellees have polluted the soil beneath their Fort Union facility with PCBs, which are entering the Bear Claw River and degrading the quality of life of the citizens of Noblesville. Appellee's pollution of the Bearclaw River is contrary to the Act's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2005). Although the Act has effectively confronted point source pollution, many rivers are still too polluted for fishing and swimming, largely because of non-point source pollution. Press Release, Envtl. Prot. Agency, Clean Water Action Plan (Feb. 19, 1998), *available at* http://www.epa.gov/history/topics/cwa/03.htm. Typically, federal common law is applied to programs which by their nature must be uniform in character throughout the Nation. *United States v. Yazell*, 382 U.S. 341, 354 (1966). The problem of interstate pollution, exemplified by the instant case, and Congress' expressed intent by creating a national regulatory program to deal with point source pollution demonstrates a pressing need for a common body of law to resolve non-point source disputes. Absent a common body of law to resolve disputes between the fifty States, each potentially with its own regulatory scheme for non-point sources, achieving meaningful national regulation of water quality standards will be impossible.

C. Federal Common Law Is Properly Applied Because There Is a Significant Conflict Between the Goals of the Act and the Laws of the State of Progress.

The Act's goals of restoring and maintaining the integrity of the nation's waters cannot reasonably be met where non-point source pollution continues to degrade the quality of the nations' navigable waters. (*See, e.g.*, Envtl. Prot. Agency, *supra*). Although the Act does not directly regulate non-point source pollution, it does set guidelines states must respect when crafting their own enforcement schemes. 33 U.S.C. §1313(c) (2005). The State of Progress is charged with establishing water quality standards in line with federal guidelines with respect to certain toxic chemi-

cals, including PCBs, set out in 33 U.S.C. §1317(a)(1), regardless of their source. (2005). Under federal guidelines, the ambient water criterion for PCBs in navigable waters is .001 microgram per liter. 40 C.F.R. §129. The State of New Union has set standards for the Bearclaw River adjacent to Noblesville in line with this requirement.

An initial bar to the application of federal common law is the need to demonstrate a significant conflict between federal policy and the use of state law. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). In the instant case, federal policy limits the concentration of PCBs allowed in navigable waters, yet the State of Progress has established no limitations on PCBs in the Class C waters immediately upstream from its border with the State of New Union. As a result, PCBs that have entered the river from Defendant's facility have accumulated near Noblesville and have rendered the fish in that habitat unsafe to eat under FDA guidelines.

33 U.S.C. § 1313(d) requires states to identify and prioritize bodies of water where the direct regulation of points sources by the Act are insufficient to meet water quality standards. Non-point sources are not subject to a federal permitting program and therefore non-point source reductions could be enforced against a polluter only to the extent that the state institutes regulatory requirements. *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1355-56 (N.D. Cal. 2000), aff'd sub nom *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2000). By not providing for a comprehensive regulatory scheme for non-point sources comparable to that promulgated for point source pollution under the Act, Congress has not created a uniform body of national law and has not pre-empted the application of federal common law to disputes like the one before this court. Where, as here, state law is in direct conflict with national policy, federal common law is properly applied to resolve the issue at bar.

D. The Federal Common Law of Nuisance Is Properly Applied Because the State of New Union Has No Other Adequate Legal Remedy.

In the absence of effective state regulation governing the discharge of PCBs into the Bearclaw River, Defendant will continue to frustrate the intent of the Act and harm the citizens of the State of New Union. It is the public that is effectively held hostage by the State of Progress' unwillingness to enforce water quality stan-

dards. Equitable relief under the public law of nuisance is necessary where a plaintiff has no other adequate statutory remedy. *Tex. v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971). Where, as here, no remedy exists, given the lack of standards for PCBs in its Class C waters, federal common law is properly applied to abate the clear and present hazard to the health of the citizens of the State of New Union.

Because the Act does not directly regulate non-point source pollution, it does not preempt the federal common law of nuisance that the federal courts have applied for most of the last century. The demonstration of congressional intent to eliminate pollution in the nation's waterways should not thwart the implementation of that will by this court. Application of federal common law will further the goals of the Act, provide a fair standard to adjudicate the conflict between the national policy limiting PCB efflux and the inadequate laws of the State of Progress, and afford the State of New Union with an adequate legal remedy.

E. Alternatively, State Common Law Can Be Employed to Enjoin Appellee's Further Pollution of the Bearclaw River.

If the court will not apply federal common law to the case at bar, state common law still governs the pollution of New Union's waters. In *International Paper Co. v. Ouellette*, the Supreme Court ruled that citizens of Vermont were entitled to use New York's common law of nuisance, even in light of CWA passage, against a polluter impacting water quality across the state line. 479 U.S. 481, 497 (1987). In that case, a paper mill located on the New York shore of Lake Champlain discharged pollutants from a diffusion pipe (a point source), allegedly causing significant degradation to the lake's waters across the state line in Vermont. *Id.* at 484.

Traditional choice-of-law rules may have allowed the Vermont property owners to apply their state's common law under the "law of the place of wrong rule" to the damages incurred in Vermont. The *Oullette* Court noted factors that called instead for application of the source state's law in the wake of the Act's passage. 479 U.S. at 495. Importantly, finding a New York source liable under Vermont law would effectuate an override of New York permit requirements and legislative policy choices. *Id.* New York might then be compelled to adopt different standards from those approved by the EPA, even though Vermont had not similarly

weighed the costs and benefits, undermining the efficiency and predictability of the permit system. *Id.* at 496.

The Court also noted that the Act defines the roles of both the source and affected states, providing through the NPDES permitting process a chance for their interests to be considered and balanced by the EPA. *Id.* at 497. This reasoning was echoed in *Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992), where Oklahoma sought to enjoin Arkansas from building and operating a sewage treatment plant that would discharge waste into the Illinois River. There, the Court noted that Congress had addressed the concerns of downstream states by providing an opportunity for hearings, requiring the upstream state to explain its failure to accept recommendations of the downstream state, and by authorizing the EPA to veto the issuance of a permit.

1. Economic and permitting considerations that have called for applying the source state's common law are not present in the case at bar.

Neither the economic nor permitting considerations that called for the application of New York common law in *Oullette* operate in the instant case. Whereas the application of Vermont's common law was held to frustrate the efficiency and predictability of the Act's operation in *Oullette*, here this court is presented with the converse problem. Application of the State of Progress' common law to the instant dispute will frustrate the intent of the Act and undermine the purpose of the regulatory framework it provides for point source discharges.

Application of New Union's law will not frustrate the Act's regulatory framework by applying stricter standards than those mandated by Congress and the EPA. To the extent that PCBs have accumulated in fish and sediments downstream of Appellee's facility at concentrations not merely inconvenient but hazardous to human health, Appellee's efflux is quite clearly beyond the minimal acceptable levels envisioned by Congress.

Further, there are no interests to be closely balanced; Congress has clearly expressed the intent to tightly control PCBs by setting a very low permissible ambient concentration and by banning their use outright. 15 U.S.C. § 2605(e) (2005). Unlike the economic benefit derived from the paper mill in *Oullette* or the construction and operation of the sewage treatment plant in *Arkansas*, no public good accrues to the citizens of the State of Pro-

gress by failing to eliminate toxic chemicals leaching from Appellee's property into the Bearclaw River. Requiring Appellee's to cease this efflux will neither impose costs on the State of Progress nor require Appellee to cease production at its Fort Union facility, since the pollution presumably arises not from present activity but from activity that ceased twenty-five years ago.

Nor can there be an adverse effect on the permitting process where, as here, no permit has been issued. Unlike the downstream states in *Milwaukee II* and *Arkansas*, the State of New Union had no opportunity to voice concerns to the EPA, and the EPA was not presented with the opportunity to bar Appellee's discharge. Because neither the remedies provided by the CWA nor the common law of the State of Progress are likely to afford relief to the citizens of Noblesville, the laws of the State of New Union should be applied to the case at bar.

2. Choice of law standards favor the application of the common law of the State of New Union.

With the concerns expressed by the Court in *Oullette* and *Arkansas* allayed, there is ample precedent to support the use of the State of New Union's laws to Appellee's pollution. Although the Full Faith and Credit Clause, U.S. Const. art. IV § 1, and the Due Process Clause, U.S. Const. amend XIV § 1, of the Constitution protect a citizen of one state from being subject to the laws of another, Appellee can nevertheless be liable under the laws of New Union. Under *International Shoe*, 326 U.S. 310, 316 (1945), Appellee is subject to the jurisdiction of the Courts of New Union because by polluting the Bearclaw River and beaches adjacent to Noblesville, it has demonstrated "minimum contacts. . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Because Appellee is a private party, the sovereignty of the State of Progress is only incidentally implicated by applying the laws of New Union to Appellee's activities in Fort Union. To that extent, however, neither the Full Faith and Credit Clause nor the Due Process Clause will shield Appellee in the instant case.

The Supreme Court addressed choice of law in *Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981) (holding that Minnesota law was correctly applied to an insurance policy issued in Wisconsin where the accident invoking the policy occurred in Minnesota), the laws of New Union are properly applied to Appellee's activities in Fort Union. Under *Allstate*, a state wishing to apply

its own laws to an out-of-state actor must demonstrate a "state interest" in applying its own laws. *Id.* at 308. It must also demonstrate that the refusal to apply the law of the other interested state does not threaten its sovereignty and show that the choice of law is not totally arbitrary or unfair to either litigant. *Id.* at 323, 326 (Stevens, J., concurring). New Union has a manifest state interest in protecting the quality of its waters and the health of its citizens. The application of New Union's laws is not a threat to the sovereignty of the State of Progress because in the instant dispute the State of Progress has failed to bring its laws into compliance with national standards and thus has abdicated its authority to enforce PCB limitations. Finally, it is the application of the State of Progress' law, not New Union's, which would effect an arbitrary, unfair result by allowing inadequate state laws out of out of compliance with national standards to hide behind the supposed preemption granted by the CWA.

Here, the facts are distinguishable from those previously considered by federal courts. Because the concerns about applying the common law of the effected state noted by the Supreme Court in *Oullette* and *Arkansas* do not apply here, and because absent these concerns the choice of law doctrine favors application of the laws of the affected state, if it elects to adjudicate under the state law of nuisance, this court should apply the common law of the State of New Union.

IV. BRK MAY NOT MAINTAIN A PUBLIC NUISANCE CLAIM ON BEHALF OF ITS MEMBERS UNDER THE "SPECIAL INJURY" RULE BECAUSE ITS INJURY IS NOT DIFFERENT IN KIND FROM THAT SUFFERED BY THE GENERAL PUBLIC.

Under federal common law, a government plaintiff, as the sovereign representative for the people, may bring a public nuisance action for the interference with public rights such as health, welfare, and comfort. *Phila. Elec. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985). In limited circumstances, a private party may also bring a public nuisance action for interference with such public rights. *Id.* This uniquely powerful tort is limited however, by the requirement that this private party show some recognized type of special, particular, or peculiar injury. *Bowe v. Scott*, 233 U.S. 658, 651 (1914). Under this special injury rule, a "private litigant cannot recover damages for a public nuisance unless he or

she can show a special injury *different in kind* from that suffered by the general public." *Oppen v. Aetna Ins.*, 485 F.2d 252, 259 (9th Cir. 1973) (emphasis added). Applying this rule here, the injury suffered by the members of BRK, the curtailment of recreation and fishing, is the exact same kind of injury suffered by all members of the Noblesville community. Although the injury to the members of BRK may have been more severe in degree than that suffered by the general public, the basic nature of the injury remains the same. Thus, BRK fails to establish any special injury beyond that to public rights held by all members of the Noblesville community. Accordingly, BRK may not maintain a public nuisance claim on behalf of its members.

A. The Injury to the Public Rights of Fishing and Recreation that BRK's Members Allege Differs at Most Only in Degree From that Suffered by the General Public.

The injuries asserted by BRK here are similar to those set forth by a class of Alaska Natives in the wake of the 1989 grounding of the Exxon Valdez in Prince William Sound, Alaska that resulted in a massive oil spill. *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997). There, a class of 3,455 individual Alaska Natives alleged injury to their "subsistence way of life, archaeological sites and artifacts . . . natural resources and property upon which [they] depend and/or which are part of their natural habitat and lives." *Id.* at 1197. While the Ninth Circuit recognized that the oil spill may very well have had a more detrimental effect upon the subsistence and communal life of Alaska Natives than other Alaskans, the court nevertheless held that the "right to lead subsistence lifestyles is not limited to Alaska Natives" and the harmed public rights of fishing and recreation were shared by all Alaskans. *Id.* at 1198. Accordingly, the Alaska Natives failed to allege an injury to their class that was different in kind from that suffered by all Alaskans, and subsequently failed to establish standing as a private party to bring a public nuisance action.

Similarly, when the Alaska Sportfishing Association brought a public nuisance action against Exxon, the Ninth Circuit affirmed the dismissal of that action. *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994). The court reasoned that the sportfishers had failed to allege an injury beyond that common to the general public. *Id.* at 771. Fishing, recreation, and the ba-

sic enjoyment of natural resources are rights shared by the general public. Although the sportfishers arguably exercised these rights more frequently and were thus harmed more severely, the injury remained the same in kind.

Notably, in dismissing both the sportfishers' and Alaska Natives' claims, the Ninth Circuit explained that private party standing for a public nuisance action can be established upon a showing of economic damage suffered as a result of the public nuisance. By failing to assert that the oil spill had somehow caused damage to their boats or equipment, however, the sportsfishers' claim failed to fit within this narrow exception. *Alaska Sport Fishing Ass'n.*, 34 F.3d at 772. By contrast, certain Alaska Natives who alleged economic damage to the commercial value of their fish harvest were found to have standing within the exception, and thus able to pursue compensation under their public nuisance action. *Alaska Native Class*, 104 F.3d at 1197-98. However, the bulk of the class, in the absence of economic damages and having suffered an injury that differed only in degree from the average Alaskan, was unable to "prove any 'special injury' to support a public nuisance action." *Id.* at 1198.

Here, BRK and its members assert no direct economic damages in the wake of the Bearclaw River contamination. Unlike the Alaska Natives whose commercial interests were damaged by the loss of fishing resources, none of BRK's members claim to have a stake in the commercial harvest of fish or to have suffered direct economic damages. Instead, BRK attempts to invoke the sweeping tenets of "environmental justice" in framing its right to maintain a public nuisance action. This argument is unpersuasive.

BRK does not produce any evidence that would indicate injury of a special, distinct, or even heightened nature from that suffered by the entire Noblesville community. Instead, BRK asserts that the injuries to its members are necessarily different based merely on economic-disadvantage and classification as an ethnic minority. BRK bears the burden to allege and show special injury in this private party public nuisance action. *Lower Commerce Ins. v. Halliday*, 636 So. 2d 430, 431 (Ala. Civ. App. 1994). BRK has failed to meet this burden.

First, even if BRK's members were indeed more vulnerable than the general public, the injury suffered would only differ in degree or severity, not in general kind. BRK does not allege any injury beyond that to public rights, which are not limited to its members or the Proto-litigian minority in Noblesville. Second, it

is not evident that BRK's members actually represent a distinct minority within the general community. The record does not indicate that they are necessarily any more vulnerable than the average Noblesville resident. Instead, the record reveals that eighty percent of Noblesville's population is also Proto-litigian, and that on average the population is just above the poverty line. Accordingly, it is difficult to rationalize how BRK's claims of "environmental justice" set in this context can somehow establish an injury that is sufficiently different from that suffered by the general public.

B. Mere Differences in Degree of Injury Do Not Confer Standing for a Public Nuisance Claim to Private Individuals.

The well-established special injury rule and its component "difference in kind" test have been followed by virtually all state and federal courts. The lone exception to this widespread endorsement is the state of Hawaii. In *Akau v. Olohana Corporation*, the Supreme Court of Hawaii rejected the "difference in kind" rule when considering a public nuisance action brought by private individuals asserting public rights to access ancient beach trails. 65 Haw. 383 (Haw. 1982). The court found that traditional rationales for the "difference in kind" test were not implicated and choose instead to follow an American Law Institute's Restatement (Second) of Torts provision that allowed private citizens to sue as representatives of the general public or as members of a class. *Id.* at 387. Importantly, this decision to abandon the traditional special injury rule and adopt the Restatement is limited to a minority of one state court.

Instead, nearly all jurisdictions maintain the strict "difference in kind" rule under its tripartite rationale. Under the first of these traditional rationales, the difference in kind requirement preserves the role of the sovereign to enforce the law. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 198 (2000) (Scalia, J., dissenting). Second, the rule prevents a multiplicity of actions and potentially endless litigation by individuals possessed of the same interests. *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 12 (Fla. 1974). Third, the rule aims to preclude actions that are minor, petty and trivial so far as the individual is concerned. Notably, as a matter of pure judicial convenience, the strict "difference in kind" test also relieves the courts

of the daunting task of somehow setting a dividing line in determining at which point differences in degree become actionable.

C. Noblesville, as the Duly Appointed Local Governmental Authority, Is the Appropriate Party to Bring a Public Nuisance Action on Behalf of the Injury Suffered by its Constituents.

Applying the tripartite rationale here, it is apparent that a departure from the traditional "difference in kind" special injury rule could easily result in countless, individual private parties pursuing virtually identical public nuisance claims. These claims would litigate a seemingly trivial matter to the individual, twelve pounds of fish annually and the right to swim at the public beach. Instead, collectively these injuries prove to be much more significant and should be pursued by the Town of Noblesville. As the local government authority, Noblesville has standing to sue under a public nuisance action without showing special injury. *See Cox v. New Castle County*, 265 A.2d 26 (Del. 1970). Nothing in the record indicates that Noblesville's interest in protecting the local environment and the public rights of its residents differs from the interests of BRK. Noblesville has already shown its desire to protect these interests by filing a public nuisance action. Additionally, Major Electronics has not challenged Noblesville's status as the proper plaintiff in this action. Accordingly, Noblesville is the appropriate party to bring a public nuisance action on behalf of the injury suffered by all of its constituents.

V. ALTHOUGH BRK AND NOBLESVILLE APPEAR TO BE PRECLUDED FROM BRINGING CLAIMS FOR CONTRIBUTION AGAINST APPELLEE UNDER CERCLA § 113(f), BOTH MAY MAINTAIN CLAIMS UNDER CERCLA § 107 FOR THE RECOVERY OF RESPONSE COSTS.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") provides for a right to cost recovery in certain circumstances, and separate rights to contribution in other circumstances. 42 U.S.C. §§ 9601 – 9675 (2005). Here, these two liability provisions could be applicable as BRK and Noblesville seek reimbursement or contribution for their response costs to the release of hazardous substances from Major Electronics' facility. Although both BRK and Noblesville appear to be pre-

cluded from bringing an action under CERCLA § 113(f), both parties have viable claims under § 107.

A. In the Absence of a Pending or Previous Action Under CERCLA §§ 106 or 107, BRK and Noblesville Do Not Have Claims Under CERCLA § 113(f) for Contribution.

CERCLA § 113(f), as an action for contribution, exists for the express purpose of allocating fault among potentially responsible parties ("PRPs"). *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997). The action allows parties to "seek contribution from any other person who is liable or potentially liable under [§] 107(a)." 42 U.S.C. § 9613(f) (2005). Accordingly, by its own terms, § 113(f) precludes wholly innocent parties from bringing a contribution action to recover response costs. Instead, innocent parties are able to file suit for full recovery of their costs under CERCLA § 107(a). *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). Here, BRK and Noblesville plainly do not fit within the scope of PRPs as set forth by § 107(a). Neither party is the current or past owner of a vessel or facility that has released a hazardous substance, nor can either be described as an arranger of disposal or as a transporter of any hazardous substances. 42 U.S.C. § 9607(a) (2005). Accordingly, any claims for recovery costs by BRK and Noblesville are more properly framed under § 107.

Even if BRK and Noblesville were somehow characterized as PRPs, an action under § 113(f) would still be unavailable to them. Following the Supreme Court's ruling in *Cooper Industries v. Aviall Services*, a party who has not been sued under CERCLA §§ 106 or 107(a) may not obtain contribution under § 113(f) from other liable parties. 125 S. Ct. 577, 580 (2004). Despite the seemingly permissive statutory language, that "any person *may* seek contribution" from other liable parties during or following an action under §§ 106 or 107, 42 U.S.C. § 9613(f)(1) (emphasis added), the Court maintained that as a matter of statutory construction a pending or previous action under §§ 106 or 107 is a prerequisite for a § 113(f) claim. *Aviall*, 125 S. Ct. at 583. Here, there is no indication that either BRK or Noblesville have been or currently are the target of a claim under §§ 106 or 107. As such, under *Aviall*, neither BRK nor Noblesville may bring a claim under § 113(f).

B. Although Noblesville Does Not Fit Within the Statutory Construction of a PRP, Even If It Were Characterized as a PRP as the Owner of the Contaminated Beach, Noblesville Would Still Be Entitled to Maintain a Claim Under CERCLA § 107 Under the Implied Right to Contribution.

As a preliminary matter, it bears repeating that Noblesville cannot be characterized as a PRP under the framework set forth by CERCLA § 107(a). That section imposes liability on four classes of PRPs: (1) current owners and operators of contaminated facilities; (2) previous owners and operators of such facilities; (3) generators of hazardous substances; and (4) transporters of hazardous substances. 42 U.S.C. § 9607. Here, as the current holder in public trust of the contaminated beach, Noblesville does not fall within any of these classes. To hold Noblesville and its taxpayers liable for the release of hazardous substances from Major Electronics' facility would plainly be contrary to the broad remedial purpose of CERCLA to shift the costs of environmental response to parties who benefited from wastes that caused harm. *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997).

Even if Noblesville were classified as a PRP, the town would still have a viable claim under § 107 for the implied right of contribution. In *Key Tronic Corporation v. United States*, the Supreme Court recognized that § 107 "unquestionably provides a cause of action for [PRPs] to seek recovery of cleanup costs" even though "that cause of action is not explicitly set out in the text of the statute." 511 U.S. 809, 818 (1994). With the enactment of § 113(f), Congress unequivocally stated that the express right of contribution under CERCLA was not to "diminish the right of any person to bring an action for contribution in the absence of a civil action under [§] 106 or [§] 107." 42 U.S.C. 9613(f). As the dissent in *Aviall* opined, this savings clause preserves "all preexisting state and federal rights of action for contribution, including the § 107 implied right this Court recognized in *Key Tronic*." 125 S. Ct. at 588 (Ginsburg, J., dissenting).

Although the majority in *Aviall* declined to consider the viability of a freestanding § 107 claim for the implied right of contribution, Aviall's assertion of a single, joint §§ 107 and 113(f) claim pursuant to § 113(f) did not provoke a denunciation of that possibility from the Court. 125 S. Ct. at 585. Instead, the right continues to garner acceptance. *See Metro. Water Reclamation Dist. of*

Greater Chi. v. Lake River Corp., 365 F. Supp. 2d 913, 918 (N.D. Ill. 2005) (recognizing implied right of contribution in light of broad coverage of § 107(a) and savings clause of § 113(f)(1)). Accordingly, if Noblesville was classified as a PRP and thus precluded from bringing a contribution action under § 113(f) in the absence of a pending or previous action under §§ 106 or 107, Noblesville would still be able to bring an action for the implied right of contribution under § 107. To preclude recovery for such response costs incurred voluntarily by a PRP would directly contravene CERCLA's general purpose of promoting the prompt and proper cleanup of contaminated properties. *Metro. Water*, 365 F. Supp. 2d at 918.

C. BRK's Claim Under § 107 Cannot Be Denied as Inconsistent With the National Contingency Plan Because Whether a Response Action Is Necessary and Consistent With the Criteria Set Forth in the Plan Is a Factual Question to be Determined at the Damages Stage of a § 107(a) Action, Not at the Liability Stage.

A determination of whether a response action is necessary and consistent with criteria set forth in the National Contingency Plan is a "factual one to be determined at the damages stage of a section 107(a) action." *Cadillac Fairview v. Dow Chem.*, 840 F.2d 691, 695 (9th Cir. 1998). Thus, alleged inconsistencies are "not a basis for granting summary judgment." *Mid Valley Bank v. No. Valley Bank*, 764 F. Supp. 1377, 1390 (E.D. Cal. 1991). Instead, noncompliance is better explored at trial, where both parties have an opportunity to substantiate whether response costs were unnecessary or inconsistent with the Plan. *Cadillac*, 840 F.2d at 695. Here, BRK's claim under § 107 was improperly denied at the liability stage of the action. The district court summarily and *erroneously* denied BRK's claim without any explanation of how its claim for response costs differed from the Plan. BRK's § 107 claim should proceed, as its response costs appear to have been "necessary to prevent, minimize, or mitigate damage to the public health or welfare . . . which may otherwise result from a release." 42 U.S.C. § 9601(23) (2005).

CONCLUSION

For the aforementioned reasons, Noblesville respectfully requests this court affirm the lower court's summary judgment find-

ings to the extent that ordinary soil is not a point source and BRK's public nuisance claim under the "special injury" rule fails. Noblesville also urges that this court find a private right of action to enforce water quality standards, apply federal or state common law of nuisance and validate Noblesville's claim for CERCLA reimbursement.

Respectfully Submitted

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