Boston College Law Review

Volume 15
Issue 4 *Special Issue Recent Developments In Environmental Law*

Article 6

4-1-1974

Environmental Law -- Water Pollution Remedies -- Use of Public Nuisance Theory in Suit by Federal and State Governments -- United States v. United States Steel Corp.

Philip E. Murray

CASE NOTES

Environmental Law—Water Pollution Remedies—Use of Public Nuisance Theory in Suit by Federal and State Governments—*United States v. United States Steel Corp.*[1]—The United States and the State of Illinois sought permanent injunctive relief in the United States District Court for the Northern District of Illinois to prevent the defendant, United States Steel Corporation, from discharging five and one half million gallons of waste water per day from its Illinois works into Lake Michigan, a navigable interstate body of water.[2] Plaintiffs, alleging that this daily discharge of industrial waste had a destructive effect on the aquatic life and water quality of Lake Michigan,[3] filed a complaint consisting of three counts, seeking the same relief on three different legal theories. Count I, filed by both the United States and the State of Illinois, requested that the court enjoin these discharges under its federal common law power to abate public nuisances[4] in navigable or interstate waters. Count II, brought solely by the United States to restrain these discharges, alleged that such emissions were violative of section 13 of the Rivers and Harbors Act of 1899 (the 1899 Act).[5] Count III, filed solely by the State of Illinois, requested the court to invoke its pendent jurisdiction to abate this public nuisance under the common law of Illinois.

Defendant, U.S. Steel, moved for dismissal of the complaint. It argued, as to Count I, that the federal common law power to abate public nuisances in navigable or interstate waters has been recognized in only two situations: first, where there is a conflict between sovereigns or quasi-sovereigns and the polluter and the victims of the pollution reside in different states; and second, where there are express statutory enactments from which the court implies a remedy or develops a rule in order to implement the statutes. The defendant

---

[1] 356 F. Supp. 556 (N.D. Ill. 1973).

[2] Although not mentioned in the court's opinion, the waste water reportedly contained iron, zinc, lead, cyanide and grease. See 3 E.R.C. (Current Developments) 683 (1972). The plaintiffs also sought the installation by the defendants of waste treatment facilities to eliminate the discharge of contaminants. Id.

[3] Brief for State of Illinois as Plaintiff at 1, United States v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973). Plaintiffs also alleged that the discharges contained significant color and cloudiness which degraded the aesthetic quality of the lake as well as its use as a recreational facility. See 3 E.R.C. (Current Developments) 683 (1972).

[4] A public nuisance is "[a]n act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all . . . .' " W. Prosser, Handbook of the Law of Torts 583 (4th ed. 1971) (footnote omitted).

[5] 33 U.S.C. § 407 (1970). This section, popularly known as the 1899 Refuse Act, provides in pertinent part:

> It shall not be lawful to . . . discharge . . . from . . . [a] . . . manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . .

contended that in the instant case there was no conflict of sovereigns, that both the alleged polluter and the alleged victims resided in the State of Illinois, and that, to the extent that federal statutes applied, the Federal Water Pollution Control Act (FWPCA)[6] was a comprehensive statute which preempted federal common law. Alternatively, the defendant argued that the Federal Water Pollution Control Act Amendments of 1972 (1972 Amendments)[7] superseded the federal common law since they specifically provided for injunctive relief.

In response to Count II, the defendant alternatively contended that: (1) the 1899 Act was not intended to apply to the discharge of waste water, but rather to the navigable capacity of the nation's waterways;[8] (2) the defendant had applied for a permit to allow the discharge of waste water in accordance with the permit program of the 1899 Act, and, having been foreclosed by operation of law from obtaining such a permit, could not then be prosecuted under that act;[9] (3) the 1899 Act had been superseded by the FWPCA;[10] (4) the 1972 Amendments prohibit the prosecution under the 1899 Act of those who have pending permit applications;[11] and (5) the 1899 Act

[6] 33 U.S.C. §§ 1151 et seq. (1970).

[7] 33 U.S.C. §§ 1251 et seq. (Supp. II 1972).

[8] In support of this claim, defendants relied on Comment, Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899, 33 U. Pitt. L. Rev. 483 (1972), and the dissent of Justice Harlan in United States v. Republic Steel Corp., 362 U.S. 482, 493 (1960) (dissenting opinion), both of which argue that an interpretation of the Rivers and Harbors Act of 1899 as applying only to discharges which impede navigation is required by the legislative history of the Act. Contra, e.g., United States v. Standard Oil Co., 384 U.S. 224 (1966) (interpreting the 1899 Act as applying to all foreign substances and pollutants); United States v. Republic Steel Corp., 362 U.S. 482 (1960); United States v. Maplewood Poultry Co., 327 F. Supp. 686 (D. Me. 1971) (stating that the 1899 Act prohibits all discharges of polluting matter—other that sewage—into navigable waters).

[9] Defendant claimed that enforcement

> under these circumstances would be contrary to the intention of Congress . . . and would constitute an unreasonable and arbitrary exercise of jurisdiction unrelated to any legitimate public end, thereby depriving the defendant of Due Process of law in violation of the Fifth Amendment.

Brief for Defendant at 10, United States v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973) (citations omitted) [hereinafter cited as Brief for Defendant]. Contra, United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 624 (1973) (where the Court held that the 1899 Act does not require the establishment of a formal regulatory permit program allowing otherwise prohibited discharges of refuse into navigable water, and that the unavailability of such a program does not bar prosecution under that act for an alleged violation).

[10] Brief for Defendant, supra note 9, at 4-5.

[11] The defendant relied on 33 U.S.C. § 1342(k) (Supp. II 1972). This section provides in pertinent part:

> Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of . . . section 407 of this title . . . .

An earlier decision, United States v. Consolidation Coal Co., 354 F. Supp. 173, 179 (N.D.W. Va. 1973), held, inter alia, that § 1342(k) was intended to be applied prospectively and was not intended to apply to pending litigation.

does not expressly provide for civil remedies, since it is a criminal statute.[12]

In denying the defendant's motion to dismiss Count I, the district court HELD: that both the United States and the State of Illinois had a cause of action and standing to sue under the federal common law of nuisance to abate the pollution of a navigable interstate body of water;[13] that the federal district court, under 28 U.S.C. § 1331(a) (1970), had jurisdiction over an action founded on federal common law;[14] and that neither the FWPCA nor the 1972 Amendments preempted the federal common law as it applied to this action.[15] As to Count II, the court found that the United States had a cause of action under the 1899 Act to enjoin the pollution of a navigable interstate body of water, and that this cause of action was unimpeded by the FWPCA or the 1972 Amendments.[16] The court dismissed Count III, stating that "[i]t adds nothing to the other two [counts] . . . [for] . . . if plaintiffs succeed on the earlier counts, . . . [the third count] is merely cumulative."[17]

The tripartite significance of *U.S. Steel* lies in its extension of the recent Supreme Court decision in *Illinois v. City of Milwaukee,*[18] in which the Court declared that a plaintiff state had a valid cause of action under federal common law to enjoin the pollution of interstate waters by governmental bodies in other states. *U.S. Steel* first stressed that such action may be brought to enjoin the pollution of interstate waters by non-governmental parties, even where the polluting activities and the party alleging injury are totally within the jurisdiction of one state. Secondly, the court extended that cause of action to include, under the federal common law, actions to enjoin the pollution of interstate waters brought by the federal government as well as by an aggrieved state. Finally, the decision established the viability of such action despite the existence of the FWPCA and the 1972 Amendments.

---

[12] However, general injunctive relief has been implied from the 1899 Act by the courts. See, e.g., United States v. Republic Steel Corp., 362 U.S. 482, 491-93 (1960).

Defendant reserved argument on Count III, noting that the court's jurisdiction of the pendent claim was dependent upon the validity of Count I, which the defendant contended should be dismissed.

[13] 356 F. Supp. at 558.

[14] Id. The jurisdictional section to which the court referred provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331(a) (1970).

[15] 356 F. Supp. at 558.

[16] Id. at 559-60. This note is limited to a discussion of the federal common law and related issues of Count I. The court's decision in Count II under § 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1970), will not be discussed in any depth greater than already presented in notes 8-12 supra and accompanying text.

[17] 356 F. Supp. at 560.

[18] 406 U.S. 91 (1972).

This note will consider and evaluate the *U.S. Steel* court's extension of the federal common law cause of action enunciated by the Supreme Court in *City of Milwaukee*. In particular, this note will first explain the *City of Milwaukee* decision, noting those areas left ambiguous by that decision. The defendant's contentions that *City of Milwaukee* should not be extended to the facts of *U.S. Steel* will then be analyzed, beginning first with an examination of the claim that the federal common law is applicable only to conflicts between sovereigns and quasi-sovereigns, and proceeding to an analysis of the contention that the federal common law is applicable only in situations where the polluter is located outside the jurisdiction of the injured state. The standing of both the state and the United States to bring actions based on the federal common law of nuisance will then be considered, leading finally to a consideration of the effect which the FWPCA and its 1972 Amendments have on the continued vitality of the federal common law in this area. It will be submitted that the court in *U.S. Steel* correctly concluded that the legal character and physical location of the polluter are immaterial to an action under the federal common law of nuisance for the abatement of pollution in interstate waters, and that neither the FWPCA nor its 1972 Amendments preempt the federal common law of public nuisance in an action brought by a state. However, it also will be submitted that, in light of the federal policy expressed in the FWPCA of deferral to the states for primary pollution abatement action, and the action taken by the State of Illinois to enjoin the alleged discharges by the defendant, and in light of the specific procedures in the FWPCA for pollution abatement action by the federal government, the United States should not have been permitted to bring this particular action under the federal common law.

The Supreme Court's decision in *Illinois v. City of Milwaukee* was a milestone in the legislative and judicial history of federal jurisdiction over public nuisance actions. The institution of public nuisance actions by the United States to protect navigable or interstate waters virtually ceased after the enactment of the Rivers and Harbors Act of 1899.[19] Although this Act expressly provided penal sanctions for all violators[20] and offered only limited injunctive relief,[21] the courts consistently implied a provision for general injunctive relief into the Act,[22] finding such provision indispensable for fulfillment of the policy mandate of the legislation.[23]

[19] Note, 14 B.C. Ind. & Com. L. Rev. 767, 775 (1973). For a discussion of the historical use of the public nuisance concept in the protection of public rights in interstate and navigable waters, see id. at 774-79.

[20] 33 U.S.C. §§ 406, 411 (1970).

[21] 33 U.S.C. § 406 (1970) (providing that the removal of structures or parts of structures erected in violation of §§ 401, 403 and 404 of the 1899 Act may be enforced by injunction).

[22] See, e.g., United States v. Republic Steel Corp., 362 U.S. 482, 491-93 (1960); Sanitary District v. United States, 266 U.S. 405, 425-26 (1925).

[23] The Supreme Court has read the prohibition of § 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1970), as proscribing the introduction of any and all foreign substances

The states, however, cannot enforce the Rivers and Harbors Act of 1899.[24] Therefore, public nuisance actions, under the original jurisdiction of the Supreme Court,[25] continued to be used by states seeking injunctive relief from polluting activities of other states and their subdivisions.[26] This practice was confronted with a formidable obstacle when, in the case of *Ohio v. Wyandotte Chemicals Corp.*,[27] the Supreme Court declined to exercise its original jurisdiction in an action brought by the State of Ohio, alleging that the pollution of Lake Erie tributaries by Wyandotte, a non-resident corporation, was a public nuisance. In remitting the parties to a state court, the Court implied that there was no alternative federal forum available to an aggrieved state for the abatement of pollution in an interstate body of water.[28] Thus, Ohio was deprived of a federal forum in an

---

and pollutants into the navigable waters of the United States. See note 8 supra. Noting that, in some cases, the polluting party may find it economically more advantageous to pay the fine imposed while allowing discharges to continue, and further noting the unsuitability of imposing prison sentences for violations of the Act, the Court has held that injunctive relief is a proper enforcement measure, necessary to ensure "the full effectiveness of the Act." Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967).

[24] See 33 U.S.C. § 413 (1970).

[25] U.S. Const. art. III, § 2, provides in pertinent part: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." The original jurisdiction of the Supreme Court is explained more clearly in 28 U.S.C. § 1251 (1970), which provides in pertinent part: "(b) The Supreme Court shall have original but not exclusive jurisdiction of: . . . (3) All actions or proceedings by a State against citizens of another State or against aliens."

[26] See, e.g., New Jersey v. City of New York, 283 U.S. 473 (1931) (garbage dumped at sea carried to state's beaches by tide); New York v. New Jersey, 256 U.S. 296 (1921) (threatened discharge of sewage into New York harbor); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (discharge of noxious gases from defendant's works carried over large tracts of plaintiff's territory); Missouri v. Illinois, 200 U.S. 496 (1906) (dumping of sewage in an interstate stream). It should be noted, however, that historically most cases involving interstate public nuisances have been settled through mutual agreement.

[27] 401 U.S. 493 (1971).

[28] Id. at 498-99 n.3. The Court concluded that the district court would not have jurisdiction over this action, stating:

> This particular case cannot be disposed of by transferring it to an appropriate federal district court since [28 U.S.C. § 1251(b)(3)] by itself does not actually confer jurisdiction on those courts . . . and no other statutory jurisdictional basis exists. The fact that there is diversity of citizenship among the parties would not support district court jurisdiction under 28 U.S.C. § 1332 because that statute does not deal with cases in which a State is a party. Nor would federal question jurisdiction exist under 28 U.S.C. § 1331. So far as it appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law.

Id. (citations omitted). But see the dissent of Justice Douglas, stating that, as navigable waters are under the sovereignty of the federal government, this case raises issues of federal law and presents "a classic type of case congenial to our original jurisdiction." Id. at 505 (dissenting opinion). This would appear to be inconsistent with Justice Douglas' authorship of the *City of Milwaukee* opinion, in which the Court remitted the parties to a federal district court. 406 U.S. at 108. Justice Douglas may have felt that while a state court would not be an appropriate forum, such a case would be cognizable before either the Supreme Court or a federal district court. However, Justice Douglas, in his dissent to *Wyandotte*, 401 U.S. at 505, did not suggest the federal district court as an alternative forum to the Supreme Court.

action against a non-resident polluter and was limited to the unsatisfactory choice of proceeding in either its own state court or the state court of the non-resident polluter.[29]

In *City of Milwaukee,* the Supreme Court established a federal forum in the federal district courts for actions brought by states, against non-resident governmental polluters, alleging public nuisance violations in navigable or interstate waters. In that case the State of Illinois, attempting to invoke the original jurisdiction of the Supreme Court, moved for leave to file a complaint against four cities and two local sewerage commissions of the State of Wisconsin.[30] Illinois sought injunctive relief, alleging that the defendants were unlawfully polluting Lake Michigan. The Supreme Court, declining to exercise its original jurisdiction, denied the motion and remitted the parties to an appropriate federal district court, stating that the powers of the district court "are adequate to resolve the issues."[31]

In so doing, the Supreme Court held that aggrieved states, at least in the absence of statutory remedies which expressly preempt common law, have a cause of action for abatement of pollution of interstate waters by subdivisions of other states under the federal common law of nuisance.[32] Because *City of Milwaukee* factually involved an interstate intersovereign conflict, there remained some ambiguity as to how far the Supreme Court had opened the doors of the federal courthouse to actions founded on the federal common law of public nuisance. Specifically, questions remained as to whether the federal common law of public nuisance was applicable in cases not involving conflicts between sovereigns or quasi-sovereigns, in situations where the polluter was located within the jurisdiction of the state bringing the action, or in actions brought at the behest of the federal government. Further, since *City of Mil-*

[29] If relief is sought in the courts of the aggrieved state there are problems with service of process, jurisdiction, and enforcement of judgments. It is unlikely that the courts in the defendant's state would be willing to enforce the plaintiff state's injunction. For that reason, as well as by reason of the fear of unduly interfering with the affairs of the other state, it is likely that the courts of the plaintiff state would refuse to grant injunctive relief. See generally Restatement (Second) of Conflict of Laws §§ 102, 103 (1971). If relief is sought in the state where the defendants reside, problems of an unfavorable forum or unfavorable laws may arise. As the Supreme Court has stated:

> The object of vesting in the courts of the United States jurisdiction of suits by one state against citizens of another was to . . . avoid the partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888) (citations omitted). See also Note, 50 Texas L. Rev. 183, 184 (1971). Similarly, if the defendant is a resident of the plaintiff state, that state's court may favor the economic interest of the state over environmental interests in interstate waters. See text at note 52 infra.

[30] 406 U.S. at 100-01.

[31] Id. at 108.

[32] Id. at 99-100, 103. See generally Note, 77 Dick. L. Rev. 451 (1973); Comment, 7 Suffolk L. Rev. 790 (1973); Note, 52 Neb. L. Rev. 301 (1973).

waukee pre-dated the 1972 Amendments, the effect of those amendments on the continued vitality of the federal common law of public nuisance remained uncertain.

U.S. Steel, in the instant case, first argued that the court should limit the decision in *City of Milwaukee* to the facts of that case and apply federal common law solely to actions involving a conflict between sovereigns or quasi-sovereigns.[33] While it is true that *City of Milwaukee* involved an action by a state against a subdivision of another state, undue emphasis on this fact could be misleading. In light of the problem caused by *Wyandotte,* the broad terms in which the *City of Milwaukee* opinion is couched, and the opinion of the Court in *Washington v. General Motors Corp.*,[34] decided the same day as *City of Milwaukee,* it is submitted that the decision in *City of Milwaukee* is best read as creating a cause of action under federal common law based not on the sovereign or quasi-sovereign character of the polluter, but rather on the character of the resource being protected.

Support is lent to this interpretation by the fact that the Court in *City of Milwaukee* quoted with approval the Tenth Circuit's decision in *Texas v. Pankey,*[35] which upheld the right of a state to invoke federal common law nuisance against private polluters in another state[36] to abate the pollution of a navigable or interstate stream.[37] Further, in a footnote to its opinion, the Court in *City of Milwaukee* commented that "[i]t is not *only* the character of the parties that requires us to apply federal law."[38] This footnote refers to a statement in the text of the opinion that "[r]ights in interstate streams . . . 'have been recognized as presenting federal questions.' "[39] A reasonable reading of this footnote leads to the

---

[33] Brief for Defendant, supra note 9, at 2-3. It should be noted that the limitation on the jurisdiction of the federal district courts to actions involving "conflicts between sovereigns or quasi-sovereigns" suggested by the defendant would in reality limit the district courts to conflicts between sovereigns *and* quasi-sovereigns and to conflicts between two quasi-sovereigns. This would be the case because conflicts between two states must be heard by the Supreme Court, despite *City of Milwaukee,* since the Court is given both original and *exclusive* jurisdiction of conflicts between states under 28 U.S.C. § 1251(a)(1) (1970), which provides in pertinent part: "(a) The Supreme Court shall have original and exclusive jurisdiction of : (1) All controversies between two or more States . . . ."

[34] 406 U.S. 109 (1972). Significantly, both *City of Milwaukee* and *Washington* were decided by unanimous Courts.

[35] 441 F.2d 236 (10th Cir. 1971).

[36] The *Pankey* case was brought by Texas in federal district court to enjoin residents of New Mexico from using pesticides which, Texas claimed, were being carried into an interstate river used as a source of water by several Texas municipalities. Id. at 237-38. The Tenth Circuit, reversing the district court's dismissal of the action, held that jurisdiction of the action was granted to the federal district court by 28 U.S.C. § 1331(a) (1970). 441 F.2d at 242.

[37] 406 U.S. at 103, 107 n.9.

[38] Id. at 105 n.6. (emphasis added).

[39] Id. at 105, quoting Hinderliter v. La Plata Co., 304 U.S. 92, 110 (1938). "The underlying purpose of the federal system is to provide each state with authority to govern events occurring *within its domain* while reserving to the federal government the power to

conclusion that there are factors other than the governmental character of the parties—namely the overriding federal interest in interstate waters and the need for uniform decisions to protect these waters[40]—which compel the application of federal common law to disputes involving navigable or interstate waters.[41]

The decision of the Court in *Washington* would appear to be in accord with just such a reading of this footnote. In *Washington* the plaintiff states sought to invoke the original jurisdiction of the Supreme Court in an action against the nation's four major automobile manufacturers seeking injunctive relief for, *inter alia,* public nuisance contrary to state and federal policy. The Supreme Court, in declining to exercise its original jurisdiction, remitted the parties to an appropriate federal district court. The plaintiffs, the Court noted, were free to bring against the defendants (all of which were private corporations) any appropriate action, including one predicated upon the nuisance theory pressed in *City of Milwaukee.*[42]

Further support for the assertion that an action founded on the federal common law of nuisance is not dependent upon the sovereign or quasi-sovereign character of the polluter can be found in the jurisdictional basis supporting such actions. The Court in *City of Milwaukee* held that federal district courts are the proper forums for federal common law actions under general "federal question" jurisdiction,[43] construing the federal common law as a "law" of the United States within the meaning of 28 U.S.C. § 1331(a) (1970).[44] In so construing section 1331(a), the Court in *City of Milwaukee* adopted the view expressed by Justice Brennan in *Romero v. International Terminal Operating Co.*[45] that

> [t]he contention cannot be accepted that since petitioner's rights are judicially defined, they are not created by "the laws . . . of the United States" within the meaning of § 1331 . . . . In another context, that of state

---

control occurrences that *affect* more than one state." Note, 50 Texas L. Rev. 183 (1971) (emphasis added).

[40] 406 U.S. at 105 n.6.

[41] One writer, however, presents two alternative readings:

> [The Court's footnote in question] could be construed as meaning that it was indeed the governmental character of the parties which compelled the application of federal common law, although there were additional non-compelling reasons for doing so. Alternatively, this statement could mean that there were other considerations which themselves required the application of federal law, and that the character of the parties merely added force to the persuasiveness of these other considerations.

Note, 52 Neb. L. Rev. 301, 305 (1973).

[42] 406 U.S. at 112 n.2.

[43] General "federal question" subject matter jurisdiction is conferred on federal district courts by 28 U.S.C. § 1331(a) (1970). See note 14 supra.

[44] 406 U.S. at 99-100.

[45] 358 U.S. 354 (1959). The majority opinion in *Romero* did not reach the question of whether federal common laws are "laws" within the meaning of § 1331(a).

> law, this Court has recognized that the statutory word "laws" includes court decisions. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law . . . . These rules are as fully "laws" of the United States as if they had been enacted by the Congress.[46]

The pollution of a navigable or interstate water, therefore, is a public nuisance under the federal common law and presents a "federal question" over which federal courts have jurisdiction, regardless of the legal character of the parties.

It seems clear from the unequivocal language of the Court in *City of Milwaukee,* the decision of the Court in *Washington,* and the jurisdictional basis supporting actions founded on the federal common law of nuisance, that private parties which pollute navigable or interstate waters are subject to actions in federal district courts under the federal common law of nuisance. The basis for the application of federal common law lies in the character of the resource being protected, *i.e.,* a navigable or interstate water, and not in the sovereign or quasi-sovereign character of the polluter. The *U.S.Steel* court agreed with the interpretation of the decision in *City of Milwaukee* as establishing a cause of action under the federal common law when an interstate body of water is polluted, regardless of the legal character of the polluter.

The second contention of the defendant in *U.S. Steel* was that *City of Milwaukee* should be limited to the holding that federal common law is applicable only in situations where the polluter is discharging in one state and the victims of the pollution reside in another state. However, the Court in *City of Milwaukee* nowhere expressed an intention that its decision should be so narrowly construed; to the contrary, there is much evidence that no such intent in fact existed.

After discussing the numerous federal statutes regulating pollution in interstate waters,[47] the Court noted that while it is federal policy to defer to the states in preventing and controlling water pollution, it is "clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters."[48] Recognizing that state law was inapplicable, and pointing out that no federal statutes provided the precise remedy sought by Illinois,[49] the Court stated that the remedies provided by Congress were not the only

---

[46] 406 U.S. at 99, citing *Romero,* 358 U.S. at 393 (Brennan, J., concurring in part and dissenting in part).

The question of the jurisdictional amount requirement of § 1331(a) was easily resolved by the *City of Milwaukee* Court, which noted that "[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount . . . ." 406 U.S. at 98. This statement applies with equal force to the situation in *U.S. Steel.*

[47] 406 U.S. at 101-02.

[48] Id. at 102 (footnote omitted).

[49] Id. at 103.

remedies available, that federal courts could fashion federal law where federal rights are concerned, and that "when we deal with . . . water in its . . . interstate aspects, there is a federal common law."[50] Further, the Court suggested that the interest of the federal government in protecting the navigable interstate waters of the United States demands a uniformity of decisions which can only be achieved through the application of federal law.[51] The need for uniformity is a direct and logical concomitant not of the location of the polluter, but of the character of the resource.

Persuasive arguments can be made in support of the contention that interstate waters, because their boundaries are not coterminous with the borders of the states, are not well suited to state control. Problems involving interstate bodies of water must be dealt with from a broader perspective than that of the individual states. Should the varying laws of the states be seen to govern disputes involving interstate waters, those states with stricter water quality standards could be adversely affected by pollution emanating from states with more lenient standards. Further, it is submitted that a backlash reaction, with its obvious adverse effect upon the natural resource in question, could result from resigning anti-pollution responsibilities entirely to the states. For example, if a state enacted strict anti-pollution regulations, it might correspondingly engender economic retaliation. Local industry, unwilling to submit to such restrictions, might find it well worth the effort to relocate in a state with less demanding laws. Any such move—or even the threat thereof—on the part of job- and revenue-generating businesses would run a high risk of inducing the state to modify its regulations (or, if still in the planning stage, to shelve proposals for anti-pollution requirements). It does not seem overly cynical to assume that state judicial decisions might be equally likely to be affected by overwhelming state interest in retaining and attracting industry. Federal courts, however, by applying to all disputes involving interstate waters the same body of law, rather than the varying law of the states (as well as by viewing all possible interests involved from a broader, more objective perspective), are better able to protect the nation's interstate waters.[52]

The court in *U.S. Steel* was not the first to view the *City of Milwaukee* holding as extrapolatable beyond the *City of Milwaukee*

[50] Id. See also id. at 103 n.5.

[51] In a footnote to its opinion, the Court stated: "Where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." Id. at 105 n.6. Uniformity is established by bringing actions under federal common law in federal district courts in that all actions, while largely dependent upon the informed judgments of the federal judges, are resolved according to the same body of law rather than the varying laws of the states. Note, 77 Dick. L. Rev. 455, 455-56 (1973).

[52] See Wright, The Federal Courts and the Nature and Quality of State Law, 13 Wayne L. Rev. 317, 331-32 (1967).

facts. In *United States v. Ira S. Bushey & Sons, Inc.*,[53] the District Court for the District of Vermont extended *City of Milwaukee* to allow the United States to bring an action under the federal common law of nuisance against a private corporation located in Vermont. The decision in *Bushey* is significant not only because of its implicit agreement that the federal common law of nuisance could support an action against a private corporation, but also because it applied that same federal common law to intrastate pollution of a navigable, interstate body of water. In *Bushey* the polluter was located in Vermont, the suit was brought in the federal district court for Vermont, and the polluting substances were spilled into the Vermont waters of Lake Champlain.[54] Lake Champlain is both a navigable and an interstate body of water, as is Lake Michigan in the instant case. The court in *Bushey* denied the defendant's motion to dismiss, relying on the Supreme Court's decision in *City of Milwaukee* which, it observed, enunciated a federal common law right to seek abatement of pollution in a navigable or interstate body of water.[55] It is a reasonable inference from the *Bushey* court's silence on the issue of the location of the defendant that this factor is immaterial in light of the fact that the resource being damaged was a navigable and interstate water and, as such, was within the purview of the federal common law.

This inference is further supported by the fact that actions founded upon the federal common law of nuisance have been recognized as presenting federal questions, no more dependent upon diversity of citizenship[56] than upon the sovereign nature of the parties.[57] While the defendant's discharge may not have actually caused pollution across state lines, it is the interstate character of Lake Michigan, and not the location of the source of the polluting discharge, which confers jurisdiction upon the *U.S. Steel* court under the federal common law of nuisance.[58]

The decision in *U.S. Steel* also raised the issue of the standing of both the State of Illinois and the United States to bring an action founded on federal common law. The standing of a state to enforce federal common law on behalf of its residents in seeking abatement of an interstate public nuisance was recognized by the Court in *City of Milwaukee*[59] as having been settled in *Georgia v. Tennessee*

[53] 346 F. Supp. 145 (D. Vt. 1972). See Note, 14 B.C. Ind. & Com. L. Rev. 767 (1973).

[54] 346 F. Supp. at 146.

[55] Id. at 149-50.

[56] A suit between a state and citizens of another state will not qualify as an action based on diversity of citizenship because a state cannot be a citizen of itself. Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894); Dacey v. Florida Bar, Inc., 414 F.2d 195, 198 (5th Cir. 1969), cert. denied, 397 U.S. 909 (1970).

[57] See text at notes 43-44 supra.

[58] Brief for State of Illinois as Plaintiff at 5-6, United States v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973).

[59] 406 U.S. at 104.

Copper Co.[60] In *Tennessee Copper,* Georgia, invoking the original jurisdiction of the Supreme Court, complained of damage to its "forests, orchards, and crops" caused by the non-resident company's emission of sulphurous acid gas, and requested that the Court enjoin defendant's emissions.[61] The Court, agreeing with Georgia, recognized the right of a state to make such a demand on behalf of its residents.[62] In *U.S. Steel* the State of Illinois presented an equally reasonable demand, namely, that the court enjoin the defendant corporation from continuing its discharges in order "to preserve the purity and recreational value of Lake Michigan in which the State and its residents have an obvious interest."[63]

Turning to the standing of the United States to bring this action, the court in *U.S. Steel,* while noting that the Supreme Court "has never explicitly held that the government of the United States has standing to abate a common law nuisance on behalf of its residents,"[64] held that the right of the federal government to intervene in this litigation coupled with its "proprietary interest in the navigable waters of Lake Michigan . . . [and its] . . . interest in establishing a 'uniform rule of decision' by enforcing a Federal common law" was sufficient to confer upon the United States standing to sue in this instance.[65] Similarly, the standing of the United States to enforce the federal common law of public nuisance was acknowledged by another federal district court in the *Bushey* case, where it was said that the Attorney General may sue to protect federal interests in the quality of air and water in their ambient or interstate aspects.[66]

The final issue raised by the decision in *U.S. Steel* is whether the federal common law of public nuisance, when used at the behest of the states or the federal government, is compatible with the FWPCA or the 1972 Amendments.

With regard to the effect of the FWPCA on the continued vitality of the federal common law of public nuisance when used by states or subdivisions of states, the Supreme Court decision in *City of Milwaukee* is controlling. In that case, the Supreme Court specifically noted that while "[t]he remedy sought by Illinois is not within the precise scope of the remedies prescribed by Congress,"[67] federal courts are not restricted solely to those remedies provided by Congress, having the power to " 'fashion federal law where federal rights are concerned.' "[68] The Court proceeded to enunciate a fed-

---

[60] 206 U.S. 230 (1907).
[61] Id. at 236.
[62] Id. at 238.
[63] 356 F. Supp. at 558.
[64] Id.
[65] Id.
[66] 346 F. Supp. at 149-50.
[67] 406 U.S. at 103.
[68] Id., quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957).

eral common law of public nuisance to abate pollution in navigable or interstate waters stating that "[t]he application of federal common law . . . is not inconsistent with the Water Pollution Control Act."[69] Since there are no provisions in the FWPCA which regulate state pollution abatement actions, the use of the federal common law of public nuisance in suits maintained by state governments is not inconsistent with the FWPCA. It must be concluded, therefore, that, at least prior to the 1972 Amendments, the FWPCA did not preempt plaintiff Illinois' use of the federal common law of public nuisance in the *U.S. Steel* case.

As regards the use of the federal common law at the behest of the federal government, however, the issue is more complex. While it is clear that the federal government has sufficient interest in the navigable and interstate waters of the United States to satisfy the requirements for standing to bring a pollution abatement action, it is not at all clear that the federal common law of public nuisance provides an appropriate basis for federal action.

Congress, in the FWPCA, stated that the general policy of the federal government was to rely primarily on the states for anti-pollution enforcement, and to supplement state action with federal action only where necessary.[70] It can reasonably be submitted that the drafters of the FWPCA considered the possibility of federal enforcement undesirable except in cases where the state did not act.[71] Moreover, in order to ensure that the states would bear the primary responsibility for pollution abatement, Congress included in the FWPCA specific provisions regulating federal abatement actions.[72] These provisions include conference and hearing procedures coupled with attempts by the federal government to induce state action prior to the authorization of federal action.[73]

Nevertheless, in *Bushey,* the Vermont district court, dealing with a comparable provision of the FWPCA which regulated discharges of oil into navigable or interstate waters,[74] held that federal action under the federal common law of public nuisance was consistent with the FWPCA. The court stated:

> What is important about Illinois v. City of Milwaukee for the purposes of the instant case, however, is the declaration there that the numerous laws Congress has enacted to prohibit or control pollution of interstate waters or

---

[69] 406 U.S. at 104.

[70] See 33 U.S.C. §§ 1151(b), 1160(b) (1970).

[71] See 33 U.S.C. § 1160(b) (1970), which provides:

> Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

[72] 33 U.S.C. § 1160 (1970).

[73] 33 U.S.C. §§ 1160(d)-(g) (1970).

[74] 33 U.S.C. § 1161(e) (1970).

> navigable waters do not establish in themselves the exclusive means by which the federal policy concerning, and interest in, the quality of waters under federal jurisdiction may be protected in the federal courts.[75]

While this statement is concededly accurate when applied to pollution abatement actions brought by states or their subdivisions, it is submitted that the extension of public nuisance to include actions brought at the behest of the federal government would permit the federal government to circumvent the specific procedures established by Congress for federal abatement action and would be inconsistent with the policy embodied in the FWPCA of deferral to the states for primary pollution enforcement.

Where the state does not act to enjoin the pollution of a navigable or interstate body of water, federal action should be initiated under the FWPCA according to the procedures established by Congress. Where the state is acting but the federal government is dissatisfied with the state action and claims that its (the federal government's) interests are not being adequately represented, the federal government could arguably intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure.[76] However, in light of the action taken by the State of Illinois in *U.S. Steel* and in the absence of any claim by the United States that its interests would not be adequately represented by the State of Illinois, the allowance of federal action in this particular case seems incompatible with the federal policy expressed in the FWPCA. It is submitted that the court in *U.S. Steel,* in accordance with this policy, should have allowed action under the federal common law to be brought solely by the State of Illinois.[77]

---

[75] 346 F. Supp. at 149. But see Note, 14 B.C. Ind. & Com. L. Rev. 767, 784 (1973) (arguing that the application of the federal common law in *Bushey* was inappropriate as specific relief for the federal government against pollution by oil was provided by § 1161(e) of the FWPCA).

[76] Fed. R. Civ. P. 24(a)(2) states:

> (a) . . . Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

See United States v. Reserve Mining Co., 56 F.R.D. 408, 413-15 (1972).

[77] Albeit not within the precise scope of this note, it should be mentioned that one commentator has taken the position that:

> Having created a federal common law for adjudicating public entities' claims of injury caused by discharges into ambient or interstate waters, there would appear to be no ground upon which the Court could bar *any* person possessing such a claim from insisting that it be heard by a federal court as a civil action arising under the laws of the United States.

McMahon, The New Federal Common Law, 13 For the Defense 83, 84 (1972) (footnote omitted).

While it may be accurate to conclude that the federal common law in this area is not

The defendant in *U.S. Steel* further argued that even if the federal common law was not preempted prior to 1972, such preemption was nevertheless effected by the 1972 Amendments.[78] The court in *U.S. Steel* noted, however, that this action was filed twelve days prior to the effective date of the 1972 Amendments.[79] Thus, the 1972 Amendments are not here controlling. Despite defendant's contention that, as prospective relief is being sought, is is impossible to decide this action without consideration of the 1972 Amendments,[80] it is well settled that pending actions may be prosecuted to completion under previously existing laws even where the relief granted will be prospective.[81]

The defendant's agrument is even further weakened by the fact that the court took the 1972 Amendments into consideration on its own accord, and nevertheless concluded that "[w]e no not find any provision in this amendment which purports to abolish the Federal

limited to the claims of public entities, private actions under the federal common law would be confronted with several formidable obstacles. First, in order to obtain standing to bring such an action, the individual would have to show that it had suffered "injury in fact." Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). Second, in order to obtain federal jurisdiction, the individual would have to suffer damage sufficient to satisfy the jurisdictional amount requirement of 28 U.S.C. § 1331(a) (1970). It should be noted that the use of a class action, under Rule 23 of the Federal Rules of Civil Procedure, will not alleviate this problem since the Supreme Court has recently held that each member of a class must meet the jurisdictional amount requirement. Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973). While the *Zahn* case was based on diversity jurisdiction under 28 U.S.C. § 1332(a) (1970), the Court, in a footnote to its opinion, noted that the same rule would apply to class actions invoking federal question jurisdiction under 28 U.S.C. § 1331 (1970), specifically referring to *City of Milwaukee*. 42 U.S.L.W. at 4091 n.11. It is possible that private class actions could be brought in federal courts, despite *Zahn*, in cases where at the time of suit the defendant has not yet curtailed the alleged pollution, if the plaintiffs

> [include] in their complaint a claim for injunctive relief under Rule 23(b)(2). In injunction actions the matter in controversy is determined by the value of the right to be protected or the extent of the injury to be prevented. . . . Having succeeded in asserting federal jurisdiction over their (b)(2) claim for injunctive relief, [the plaintiffs] could then [join] their (b)(3) claim for compensatory and punitive damages, and [invoke] the court's ancillary jurisdiction over this claim.

Note, 14 B.C. Ind. & Com. L. Rev. 543, 557-58 n.88 (1973) (citations omitted). Third, in order to state a claim under a public nuisance theory, the individual would have to suffer special harm, that is, peculiar harm differing from that suffered by the public generally. Restatement (Second) of Torts § 203(2) and comment *d* (1965). Finally, the individual would be required to prove that the damage alleged was in fact caused by the emissions of the defendant. This problem is not encountered by a sovereign who sues a polluter since the mere emission of a pollutant into a waterway is injury to the state under the view that the sovereign has a property interest in the waterway. See Comment, The Scope of State and Local Government Action in Environmental Land Use Regulation, 13 B.C. Ind. & Com. L. Rev. 782, 791 (1972).

[78] Brief for Defendant at 5-7, United States v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973) [hereinafter cited as Brief for Defendant].

[79] 356 F. Supp. at 559.

[80] Brief for Defendant, supra note 78, at 6.

[81] State ex rel. City of Grand Island v. Union Pac. R.R., 152 Neb. 772, 778, 788-90, 42 N.W.2d 867, 872, 877-78 (1950). This is especially true where there is a "saving clause," id. at 789-90, 42 N.W.2d at 877-78, as there is in the 1972 Amendments. 33 U.S.C. § 1371(a) (Supp. II 1972).

common law of nuisance but rather an intention to supplement and amplify any preexisting remedies."[82]

With regard to actions brought by states the decision in *U.S. Steel* would seem to be correct. In the first section of the 1972 Amendments it is stated that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and right of the States to prevent, reduce, and eliminate pollution . . . ."[83] In addition, another section of the 1972 Amendments states:

> Except as expressly provided in this chapter, nothing in this chapter shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.[84]

There is no language in the Amendments to the FWPCA that expressly or impliedly preempts the federal common law of public nuisance as enunciated in *City of Milwaukee,* nor is there any language which establishes the Amendments as the exclusive means to protect federal interests in the quality of interstate or navigable waters.[85] Congress has been very explicit where it has intended to make the statutory structure of the Amendments the exclusive remedial scheme;[86] absent any such clear intent, nonstatutory remedies, such as the federal common law of nuisance, must be presumed to retain their vitality.[87] As the court in *U.S. Steel* noted, "[i]t is hornbook law that statutes will not be construed in derogation of common law unless such intent is clear."[88]

---

[82] 356 F. Supp. at 559 (citations omitted).

[83] 33 U.S.C. § 1251(b) (Supp. II 1972).

[84] 33 U.S.C. § 1370 (Supp. II 1972).

[85] Rather, § 505(e) of the 1972 Amendments, 33 U.S.C. § 1365(e) (Supp. II 1972), specifically allows suits by citizens under common law, stating that:

> 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).

[86] See 33 U.S.C. § 1161 (1970), left unchanged by the 1972 Amendments, 33 U.S.C. § 1321 (Supp. II 1972); 33 U.S.C. § 1163(f) (1970), left unchanged by the 1972 Amendments, 33 U.S.C. § 1322(f)(1) (Supp. II 1972) (expressly prohibiting action outside the FWPCA with respect to regulation of marine sanitation devices).

[87] The Supreme Court, in construing the Clean Air Act, 42 U.S.C. §§ 1857 et seq. (1970), indicated that statutes are preempted only where Congress has explicitly so stated and that nonstatutory remedies such as the federal common law continue to exist in the absence of express preemption. See Washington v. General Motors Corp., 406 U.S. 109, 114-15 (1972).

[88] 356 F. Supp. at 559, citing Isbrandtsen Co. v. Johnson, 343 U.S. 778, 783 (1952).

As this note reached completion, the United States District Court for the Northern District of Illinois denied defendant's motion to dismiss in the case of Illinois v. City of Milwaukee, 5 E.R.C. 2018 (N.D. Ill. 1973) (remitted by the Supreme Court, 406 U.S. at 108). The court, in almost complete agreement with the reasoning proposed in notes 82-87 supra and accompanying text, held that the 1972 Amendments do not preempt federal common law nuisance actions in interstate waters. 5 E.R.C. at 2020. Further, the court held that two recent regulations—40 C.F.R. §§ 125, 130 (1973)—promulgated by the Environmental Protec-

The unlikelihood that federal common law of nuisance actions by states or their subdivisions were foreclosed by the specific remedies of the 1972 Amendments is further established through an examination of the provisions of the Clean Air Act.[89] In existence for some time prior to the decision in *City of Milwaukee,*[90] the Clean Air Act provides for specific remedies similar to those in the 1972 Amendments.[91] Yet, in *Washington v. General Motors Corp.*,[92] an air pollution case decided the same day as *City of Milwaukee,* the Supreme Court, in remitting the parties to a federal district court,[93] noted specifically that the plaintiffs might renew their public nuisance count according to the rationale of *City of Milwaukee.*[94] As the Clean Air Act was in effect at the time of the Court's decision in *Washington,* this suggestion by the Court indicates the Court's belief that federal common law actions as enunciated in *City of Milwaukee* are not preempted by the existence of statutory remedies such as those found in the Clean Air Act. Since the remedial provisions of the 1972 Amendments are similar to those found in the Clean Air Act, it would seem that the use of the federal common law in actions by states would also avoid preemption by the 1972 Amendments.

As regards the use of the federal common law at the behest of the federal government, it is submitted that the allowance of such action would be inconsistent with the 1972 Amendments. While the 1972 Amendments change the federal government's authority to bring abatement suits, permitting them whenever the government becomes aware of any violations of the Act,[95] the policy of deferral to the states for primary pollution enforcement has been continued

tion Agency in accord with the design of the 1972 Amendments do not preempt federal common law nuisance actions, despite defendant's contention that these regulations "now set up a uniform federal law which preempts federal common law . . . ." 5 E.R.C. at 2020.

This conclusion is further supported by the decision of the District Court for the District of Vermont in United States v. Ira S. Bushey & Sons, Inc., 5 E.R.C. 1710 (D. Vt. 1973), in which the court ordered a permanent injunction against Bushey and the other defendants requiring their compliance with specific measures designed to control their oil spills. In so ordering, the court in *Bushey* held that federal common law nuisance actions were not preempted by the 1972 Amendments. Id. at 1716-17. Since the *Bushey* case was instituted prior to the 1972 Amendments, however, it would seem that the 1972 Amendments would not be controlling in that case. See text at notes 78-81 supra.

[89] 42 U.S.C. §§ 1857 et seq. (1970). See generally Comment, The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution, 14 B.C. Ind. & Com. L. Rev. 724 (1973).

[90] The Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970), was enacted on Dec. 31, 1970. It is codified at 42 U.S.C. §§ 1857 et seq. (1970).

[91] Compare § 113(b) of the Clean Air Act, 42 U.S.C. § 1857c-8(b) (1970), with § 309(b) of the 1972 FWPCA Amendments, 33 U.S.C. § 1319(b) (Supp. II 1972).

[92] 406 U.S. 109 (1972). See text at note 42 supra.

[93] Id. at 116.

[94] Id. at 112 n.2.

[95] Section 301(a) of the 1972 Amendments, 33 U.S.C. §§ 1311(a) (Supp. II 1972), states that "[t]he discharge of any pollutant by any person [not in compliance with this Act]shall be unlawful . . . ," and §§ 309(a)(1), (3), and (b), 33 U.S.C. §§ 1319(a)(1), (3), (b) (Supp. II 1972), taken together, authorize commencement of civil action, including injunction, against any violators of § 301(a).

in the 1972 Amendments.[96] Additionally, the Public Works Committee stated in the legislative history to the 1972 Amendments that:

> The Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements.
>
> . . .
>
> The Committee again . . . notes that the authority of the Federal government should be used judiciously by the Administrator in those cases [which] deserve Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.[97]

It is submitted, therefore, that federal abatement action should be used sparingly by the federal government, and that when the federal government does act it should proceed under the provisions of the 1972 Amendments.

In conclusion, the overriding federal interest in protecting interstate waters, combined with the need for uniform decisions in this area, and the greater ability of the federal courts to solve problems in areas which ultimately affect more than one state, necessitate the availability of a federal forum for all actions involving the pollution of interstate bodies of water. The court in *U.S. Steel* correctly extended the federal common law of public nuisance to include an action by an aggrieved state for the abatement of pollution of an interstate body of water by a private corporation residing within that state. Hopefully, continued use and development of the federal common law of nuisance will provide more effective protection for our valuable interstate bodies of water, as well as lead to further and better legislation by highlighting the gaps in presently existing legislation. It is submitted, however, that the court should not have allowed the United States to file an action under the federal common law of nuisance. Absent an express contention that the interests of the United States are not adequately protected, such an action would allow the federal government to circumvent the specific procedures for federal pollution abatement action established by Congress in both the FWPCA and the 1972 Amendments, and would therefore be incompatible with the federal policy expressed in those

[96] 33 U.S.C. § 1251(b) (Supp. II 1972). See text at note 83 supra.

[97] U.S. Code Cong. & Ad. News 3730 (1972).

enactments that the federal government should defer to states for primary pollution enforcement.

PHILIP E. MURRAY, JR.

Antitrust Law—Environmental Law—Use of Antitrust Law as Environmental Remedy for Suppression of Pollution Control Technology—*In re Multidistrict Vehicle Air Pollution M.D.L. No. 31.*[1]—Defendants, the automobile industry's "Big Four" and the industry trade association,[2] participated in a joint research-and-development effort aimed at solving the problem of automobile-caused air pollution.[3] In 1953 the industry set up the Vehicle Combustion Products Committee to facilitate joint research, and two years later a cross-licensing agreement was added under which any discoveries would be equally available to all participants.[4] After industry critics charged that the joint effort was retarding, not speeding, the anti-pollution effort, a federal grand jury was convened.[5] The Justice Department subsequently filed a civil antitrust suit against defendants,[6] charging them with a violation of section 1 of the Sherman Act.[7] The complaint alleged that defendants and other companies (named as co-conspirators but not as defendants) had conspired to eliminate competition among themselves in the research, development, manufacture, installation and publicity of air pollution control devices and in the purchase of patents and patent rights covering such equipment.[8] The suit was settled by a consent decree under which the defendants, without admitting any illegal practices, agreed to cease any anticompetitive activity.[9] In approving the decree, the district court denied the

[1] 5 Trade Reg. Rep. (1973 Trade Cas.) ¶ 74,819, at 95,647 (C.D. Cal. Nov. 21, 1973), on remand from 481 F.2d 122 (9th Cir. 1973).

[2] The defendants were General Motors Corp., Chrysler Corp., American Motors Corp., Ford Motor Co. and the Automobile Manufacturers' Association, Inc.

[3] The concern over automobile emissions was intensified in 1950, when Dr. Arlie Haagen-Smit, a California biochemist, discovered the link between automobile exhaust gases and smog. Esposito, Vanishing Air 36 (1970) (the Nader task-force report on air pollution).

[4] Nader, Unsafe at Any Speed 154 (1965). See generally Green, The Closed Enterprise System 254-63 (1972) (the Nader task-force report on antitrust enforcement); L. Jaffe & L. Tribe, Environmental Protection 141-80 (1971).

[5] Green, supra note 4, at 255.

[6] For a description of the complaint, see United States v. Automobile Mfrs. Ass'n, [1961-1970 Transfer Binder] Trade Reg. Rep. ¶ 45,069, at 52,705 (1969) [hereinafter cited as Complaint].

[7] 15 U.S.C. § 1 (1970). The section reads, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

[8] See Complaint, supra note 6, at 52,705.

[9] United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd mem. sub nom. New York v. United States, 397 U.S. 248 (1970). The text of the decree is reported in 1969 Trade Cas. ¶ 72,907, at 87,456. In substance it prohibited the defendants