



Spring 1981

## Federal Common Law of Nuisance Expands

Eric M. Sommer

### Recommended Citation

Eric M. Sommer, *Federal Common Law of Nuisance Expands*, 21 Nat. Resources J. 419 (1981).  
Available at: <https://digitalrepository.unm.edu/nrj/vol21/iss2/14>

This Recent Developments is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact [amywinter@unm.edu](mailto:amywinter@unm.edu), [lsloane@salud.unm.edu](mailto:lsloane@salud.unm.edu), [sahrk@unm.edu](mailto:sahrk@unm.edu).

## FEDERAL COMMON LAW OF NUISANCE EXPANDS

ENVIRONMENTAL LAW—FEDERAL WATER POLLUTION CONTROL: A state may bring a federal common law action for nuisance against an intrastate polluter to prevent pollution of interstate or navigable waters. *Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980).

In August, 1978, the Illinois attorney general filed an action in federal district court on behalf of Illinois residents against Outboard Marine Corporation (OMC) for allegedly discharging highly toxic polychlorinated biphenyls (PCBs)<sup>1</sup> from its Waukegan, Illinois manufacturing facility into North Ditch, Waukegan Harbor, and Lake Michigan. The complaint alleged the PCBs threatened the health of Illinois residents, damaged aquatic, bird, and water life in and near these waters, and impaired Lake Michigan's usefulness as a public water supply and recreation area.<sup>2</sup> The state based its claim in part on federal common law of nuisance and the Federal Water Pollution Control Act (FWPCA).<sup>3</sup> In addition to civil penalties, the attorney general sought injunctions restraining further PCB discharge and directing OMC to remove and dispose of PCB-contaminated sediments and soil.

The district court granted OMC's motion to dismiss the complaint for lack of diversity jurisdiction, finding the federal common law count deficient because the controversy was between two Illinois parties. The complaint had failed to allege an injury to or from another state.<sup>4</sup> The state appealed the dismissal of the federal common law claim.

On March 17, 1978, prior to the commencement of *Illinois v. Out-*

---

1. PCBs are highly toxic chemical mixtures that are heat and flame resistant. The complaint alleged that hydraulic fluids used by OMC from 1959 until 1972 contained PCBs, and that these fluids were still draining into the receiving waters through OMC's waste-water collection and disposal system.

2. The complaint alleged that in some portions of Waukegan Harbor and its tributaries PCBs currently comprised as much as 25 percent of the bottom sediments.

3. 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979). The state added several pendent claims based on state law, including counts based on the Illinois Public Nuisance Act, the Illinois Environmental Protection Act, nuisance, and trespass.

4. The court also concluded it was without jurisdiction to hear the FWPCA claim because Illinois failed to timely notify the defendant or administrator.

*board Marine Corp.*, the federal government filed a complaint against OMC under the Refuse Act,<sup>5</sup> FWPCA, and the federal common law of nuisance. After Illinois' complaint was dismissed, the Illinois attorney general filed, on March 23, 1979, a motion for leave to intervene in the federal suit, arguing the following points: (1) Illinois had a statutory right to intervene under the Clean Water Act of 1977;<sup>6</sup> (2) Illinois' special interest in the litigation required intervention because the federal government could not adequately represent that interest; and (3) intervention was permissible because Illinois' claim coincided with the federal government's claim. The same district judge who dismissed Illinois' initial complaint denied the motion to intervene. The state appealed this decision also.

The Seventh Circuit Court of Appeals was thus presented with two issues: whether Illinois had a federal common law cause of action in nuisance against an in-state pollution source; and whether Illinois could intervene in the federal government's suit against OMC. The court of appeals reversed the district court's rulings, resolving both issues in Illinois' favor.<sup>7</sup>

The court of appeals significantly expanded the federal common law of nuisance in the seventh circuit by holding that Illinois had a federal common law cause of action in nuisance against an in-state pollution source. The court's opinion began with a thorough discussion of *Illinois v. City of Milwaukee*,<sup>8</sup> a landmark Supreme Court case first establishing federal common law of nuisance. In that case, Justice Douglas, writing for a unanimous court, said the nation has a basic, overriding federal interest in interstate and navigable waters which requires the development of a uniform program to protect these waters from pollution.<sup>9</sup> Justice Douglas suggested a common law of nuisance would fill in the gaps not covered by the FWPCA.<sup>10</sup>

The seventh circuit reasoned that the Supreme Court intended federal common law to apply to public nuisances which polluted either interstate or navigable waters, regardless of the jurisdictional amount or of the diversity of the parties. The court of appeals concluded that "navigable," as defined by congressional legislative history, included purely intrastate waters such as North Ditch and Waukegan Harbor.<sup>11</sup>

---

5. 33 U.S.C. § 407 (1976).

6. 33 U.S.C. § 1365(b)(1)(B) (1976).

7. OMC petitioned for a rehearing and rehearing en banc. The petition was denied on April 29, 1980.

8. 406 U.S. 91 (1972).

9. *Id.* at 103-04.

10. *Id.*

11. See *Illinois v. Outboard Motor Corp.*, 619 F.2d 623, 627 n.14 (7th Cir. 1980), for an expansive definition of navigable waters.

The court thus concluded that "the Supreme Court established, under federal common law, a right in tort for the pollution of interstate or navigable waters."<sup>12</sup>

The appellate court was not persuaded by OMC's argument that the Supreme Court intended to limit federal common law of nuisance to state actions against out-of-state polluters. The seventh circuit, broadly interpreting *Illinois v. City of Milwaukee*, concluded that the Supreme Court had attached no significance to the fact that the pollution came from an out-of-state source. Rather, the court reasoned that the Supreme Court based its decision on the broad national interest of controlling pollution in interstate or navigable waters because federal law ultimately controls such pollution.<sup>13</sup>

The court disagreed with the fourth and eighth circuit's narrow interpretation of *Illinois v. City of Milwaukee*. These circuits had earlier concluded that *Illinois v. City of Milwaukee* was inapplicable to intrastate pollution of navigable waters.<sup>14</sup> In distinguishing the two decisions from these circuits which interpreted *Illinois v. City of Milwaukee* more narrowly, the seventh circuit noted the pollution involved in these two cases had only an intrastate effect, while in this case the pollution affected all four states bordering Lake Michigan.

Rather than relying on this factual distinction, however, the court based its decision on the recognition in *Illinois v. City of Milwaukee* that a federal cause of action was necessary to abate pollution in either interstate or navigable waters. The court stated that "there is no basis for putting a gloss on the Supreme Court holding that would restrict its application to situations in which one state complains of damages to its environment or ecology by a pollution source in another state."<sup>15</sup> Thus the court held that Illinois' right to sue OMC in federal district court fell within the purpose and scope of a national policy of pollution control under federal common law.

The court offered several policy reasons for affording Illinois the right to sue. First, states now only have to file a single suit in a single forum as a result of this court's holding. Had this case involved two plants, one on each side of the Illinois-Wisconsin border, each pouring the same pollutant into Lake Michigan, Illinois would have had to file suit in Illinois state court and a similar suit in federal court if OMC's argument was applied. The court noted, however, that two

---

12. *Id.* at 629.

13. *Id.* at 627.

14. See *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492 (8th Cir. 1975); and *Committee for Consideration of Jones Falls Sewerage Sys. v. Train*, 539 F.2d 1006 (4th Cir. 1976).

15. 619 F.2d at 629.

separate suits would prove unsatisfactory; each polluter in each suit could argue that most or all of the pollution was produced by the other plant, thereby precluding Illinois from obtaining injunctive relief. Thus, "[b]ringing a single action against both defendants in one forum would prevent them from hiding behind each other."<sup>16</sup> Second, a suit in federal court would avoid multiplicity of suits, promote economy of judicial administration, and result in uniform decisions by allowing both state and federal governments to join the suit.<sup>17</sup> Finally, permitting a state to sue in federal court further insures that a state will continue to pursue an active policy of pollution control without having to fear that its ability to attract industry is being impaired. Without access to a federal forum, a state that vigorously enforces its nuisance law increases the likelihood that industries subject to that enforcement would favor investing in another state with less stringent enforcement policies.<sup>18</sup> Providing states with a cause of action in a federal forum, however, results in further "development of a comprehensive federal law of nuisance . . . [which] can be enforced against polluters no matter where the pollution originates."<sup>19</sup>

The court of appeals further concluded that where either interstate or navigable intrastate waters were polluted, a showing of extraterritorial pollution was not a necessary requirement for federal court jurisdiction.<sup>20</sup> Rather, the crucial inquiry was whether the dispute was a matter of federal concern in terms of the nation's policy to control pollution of interstate and navigable waters.<sup>21</sup>

Illinois was also granted its motion to intervene in the federal suit. Finding that Illinois had a statutory right to intervene under the Clean Water Act, the court ruled that Illinois' intervention was both practical and desirable in order for the federal forum to consider the state's interests and views.<sup>22</sup>

### CONCLUSION

The importance of this decision is two-fold. First, the reach of federal protection under the federal common law of nuisance appears now to extend to navigable waters that are purely intrastate. The court's decision, therefore, supplies states in the circuit with an additional tool for combatting pollution within their territorial bound-

---

16. *Id.* at 630.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 631.

aries. Second, these states now have the opportunity to sue intrastate polluters on the basis of federal common law without satisfying the federal jurisdictional requirement of diversity. By eliminating these jurisdictional barriers, these states can now freely choose between a state or federal forum in which to sue intrastate polluters.

ERIC M. SOMMER