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INTRODUCTION

Developments in the use of a federal doctrine of common law of public nuisance to enjoin pollution of interstate and navigable bodies of water[1] have received considerable recent attention.[2] In *Illinois v. City of Milwaukee,*[3] the United States Supreme Court affirmed a District Court decree granting injunctive relief to the state of Illinois against an out-of-state municipal polluter, the City of Milwaukee, on public nuisance grounds.[4] The federal common law doctrine of public nuisance has been invoked successfully by the federal government to enjoin pollution by a private business concern, [5] and by both the federal government and a state to secure injunctive relief against a private party engaged in intrastate pollution of an interstate body of water.[6] However, despite this apparent expansion of federal remedies available to both the states and to the federal government, official federal policy as expressed in the Federal Water Pollution Control Act is to place primary pollution control responsibility in the hands of the states.[7] Though the availability of federal remedies is useful in some situations, there are pressing environmental pollution problems which are clearly outside the scope of federal jurisdiction.[8] This article will examine the doctrine of common law public nuisance as it has been applied in recent state court decisions,[9] focusing in particular upon the Pennsylvania case of *Commonwealth v. Barnes and Tucker Company,*[10] (hereinafter cited as *Barnes and Tucker*). The objectives are threefold: to explain that decision in light of traditional common law public nuisance doctrine; to relate its significant aspects to current developments in other jurisdictions; and to identify the difficulties involved in using the legal theory of public nuisance as a means of pollution control at the state level.

I. Private and Public Nuisance

The term "nuisance" describes a particular type of injury rather than a kind of proscribed conduct. A common law nuisance may result from activity which is either negligent or intentional.[11] The essence of nuisance is the unreasonable and substantial invasion of the interests of others, either by action or inaction.[12] Two categories of nuisance are recognized depending upon the nature of the interests invaded. A private nuisance involves interference with a property-owner's use and enjoyment of land.[13] Judicial relief will depend upon a weighing of such factors as the gravity of the harm, the character of the harm[14] and the possibility of avoiding it, the offsetting social value of the conduct creating the nuisance, and the appropriateness of the locality in which the conduct takes place.[15] If a private nuisance is found to exist, the injured party may recover damages or, in some instances, obtain injunctive relief.[16]

On the other hand, the common law has long recognized the public's right to be free from certain interferences with the public safety, public morals, public peace, and public welfare; interferences which are collectively known as public nuisances.[17] A public nuisance must involve interference with public interests generally, and not solely with the interests of a few individuals. The cause of action for public nuisance rests primarily with the state. A private person may bring an action for public nuisance only if he has suffered thereby some "special injury" or "particular damage" not incurred by the public generally.[18] Whether courts have been uniform in requiring special injury *in kind,* or have occasionally granted standing to private individuals injured specially in degree only, has been the subject of some debate.[19] At present, however, it is clear that public nuisance actions are most readily available to representatives of the state or municipal government. Though public nuisance traditionally constitutes a crime, equitable relief may issue if the criminal penalty is deemed insufficient to prevent the apprehended damage.[20] Modern cases in the environmental field seldom discuss the criminal aspects of the public nuisance doctrine.

The availability of common law public nuisance as an alternative to state administrative or statutory enforcement mechanisms can have important environmental consequences. Administrative remedies are often slow and cumbersome. While hearings take place and administrative orders await judicial enforcement, the polluting activity continues. Public nuisance actions can provide potentially faster relief.[21] Further, statutory or administrative remedies may not be applicable to particular fact situations, or for various reasons the

individuals charged with enforcement of environmental legislation may be reluctant to act.[22] Since one may not acquire a prescriptive right to maintain a public nuisance, nor invoke the defenses of laches or the statute of limitations,[23] the action is available when other theories might fail. At the very least, a common law public nuisance action might serve to plug loopholes that develop in an otherwise comprehensive statutory scheme, as the *Barnes and Tucker* case illustrates.

II. Commonwealth v. Barnes and Tucker Company

The defendant in *Commonwealth v. Barnes and Tucker Company,*[24] had been engaged for thirty years in active deep mining operations at its Mine No. 15 until work was terminated and the mine was closed and sealed in July, 1969. Throughout the period of operation defendant had possessed valid water drainage permits as required by the Pennsylvania Clean Streams Law.[25] The permits were issued by the Sanitary Water Board,[26] a state administrative agency charged with control of water pollution under the Clean Streams Law, upon its approval of proposed drainage plans submitted periodically by the company.[27] In June, 1970, approximately one year after the closing of the mine, the natural discharge of acid mine water was discovered at two separate locations.[28] The Department of Environmental Resources immediately filed a bill in equity in the Commonwealth Court seeking preliminary and permanent injuctions requiring the defendant to chemically neutralize the discharge, on four grounds: (1) that defendant as a discharge permit holder assumed responsibility for treatment of acid mine drainage occurring after cessation of operations, under sections 306, 307 and 315 of the 1965 Amendment to the Clean Streams Law;[29] (2) that defendant assumed responsibility for abatement of the discharge under section 316 of the 1970 Amendments,[30] which empowered the Sanitary Water Board in the event of mine discharge to order the offending party to correct the condition; (3) that the discharge constituted a statutory public nuisance under section 3 of the 1970 Amendments;[31] (4) that the discharge constituted an abatable common law public nuisance for which the defendant was responsible.[32]

After the issuance of a preliminary injunction and a hearing on the merits, the lower court denied permanent injunctive relief, finding that the defendant was not responsible for the discharge under any of the four theories advanced by the Department. The court held that since the law prior to the 1970 Amendments had referred only to "operators"[33] of mines and to those engaged in "opening,

reopening or operating"[34] the same, it did not place responsibility on the mine owner for *postmining* discharge when the mine had been operated and sealed in conformity with a valid permit.[35] Section 316 of the 1970 Amendment was deemed inapplicable because no order had issued from the Sanitary Water Board or the Department of Environmental Resources requiring the defendant to abate the pollution, as provided for in that section.[36] As a consequence, section 316 was not available to the plaintiff. The court also rejected the plaintiff's claim of statutory public nuisance by finding that discharge of pollutants into "unclean" waters was not proscribed until passage of the 1970 Amendment,[37] and that section 3 of that Amendment was inapplicable because, in its view, the operative facts of the cause of action arose before 1970. Lastly, with respect to the common law public nuisance count, the court stated: " . . . we cannot declare . . . that a breakout of mine water through the forces of nature adjunctive to said artificial condition [the sealed mine shaft], constitutes a public nuisance for which B & T is responsible today."[38] In so holding the court appeared to rely upon an oft-distinguished but never expressly overruled opinion in *Pennsylvania Coal Co. v. Sanderson,*[39] (hereinafter cited as *Sanderson*) a private nuisance case asserting the right of an upper riparian mine owner to "lead" mine water, accumulating during the normal and natural course of mining operations, out of his mine and into streams which form the natural drainage basin.[40]

On appeal the Pennsylvania Supreme Court agreed in substance with the lower court's dismissal of counts one and two, but held that the Department of Environmental Resources nevertheless could maintain an action under *either* the statutory or the common law theories of public nuisance.[41] With respect to the statutory action, the court cited section 3 of the 1970 Amendment, which identifies as a public nuisance any ". . . discharge of sewage or industrial waste or any substance into the waters of this Commonwealth, which causes or contributes to pollution . . . or creates a danger of such pollution . . . ," and section 601, providing for the abatement of nuisances ". . . in the manner provided by law or equity . . . ."[42] Since any privilege of discharging mine water which may have been conferred upon mine operators by past legislation was effectively withdrawn by section 3, and since that section was merely declaratory of the common law which had at all times provided for water pollution abatement, the court saw no problem of retroactive statutory application with respect to the 1970 Amendments. "Legislative withdrawal of a prior grant of a privilege is not retrospective legisla-

tion."[43] It is the discharge itself, rather than the activities producing it, which is the nuisance to be abated under section 601.

The court then approved the use of a common law nuisance theory as a valid alternative grounds for action, noting that although discussion of alternative bases for liability was not normally undertaken, doing so was necessary in order to clarify the common law of public nuisance in the state.[44] As to the applicability of public nuisance doctrine to water pollution, the court found that it was unnecessary to determine whether an asserted public interest (in this case, recreational use of water resources) in the water allegedly polluted was sufficient to justify an injunction, " . . . since we believe the public has a sufficient interest in clean streams alone regardless of any specific use thereof."[45] Since the record was not sufficient to indicate feasible means for corrective action, the case was remanded for formulation of specific relief which would not be unduly harsh on the defendant.[46]

Barnes and Tucker thus provides common law recognition of a strong public interest in clean streams sufficient to override the alleged right of industrial property owners, enunciated in *Pennsylvania Coal Co. v. Sanderson,* to foul the public waterways. Faced with an obvious danger to the public health, safety or welfare resulting from a particular polluting activity, courts have readily provided abatement remedies to the state in public nuisance actions.[47] The public interest in such cases is clear and immediate, and the exercise of state police power is maintainable against a property owner's defense of "taking" without due process.[48] However, the value to society of clean streams generally, absent pollution threats to public health or safety, is less tangible, especially when balanced against the concrete costs to polluters (and often others) which pollution abatement usually entails. From this perspective, the court's treatments of *any substantial* water pollution as a public nuisance is significant. A public nuisance has been defined as " . . . an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all . . .' "[49] The *Barnes and Tucker* court makes clear that the maintenance of clean streams constitutes such a "public right", and that acid mine drainage into any stream produces actionable "damage."

In granting relief to the Commonwealth on a public nuisance theory, the Supreme Court of Pennsylvania offers an example of successful extra-statutory state court action against alleged polluters. The principle inherent in that decision may be applicable beyond water pollution to all types of environmental damage. How-

ever, before this common law approach can be employed successfully in an environmental lawsuit, several obstacles, dealt with either explicitly or implicitly by the Pennsylvania court, must be overcome. These pitfalls will be examined below in light of *Barnes and Tucker* and analogous recent cases in other jurisdictions.

III. Preemption and the Doctrine of Primary Jurisdiction

Though the Pennsylvania legislature had adopted a broad plan to rid the state of polluted waters through administrative regulation and supervision, the state Supreme Court nonetheless affirmed, in *Barnes and Tucker,* the survival of a common law public nuisance action to abate pollution.[50] This finding is consistent with section 701 of the Clean Streams Law,[51] which provided specifically for the survival of common law rights of action, and is in accord with similar holdings in other jurisdictions.[52] If a provision of the relevant statute indicates clearly that the remedies it creates are not intended to be exclusive, then courts generally will recognize a concurrent common law right of action.[53] However, if there is no such provision, a problem of implied legislative intent arises. Though most jurisdictions will indulge in a presumption favoring survival of the independent common law action,[54] others, if the statutory remedy is wide in scope, will draw opposite conclusions as to legislative intent.[55] If the statute contains no provisions in derogation of the common law, and if there is no clear expression elsewhere (e.g. legislative reports) of legislative intent that statutory remedies be exclusive, then it seems most reasonable to suppose that common law rights of action survive.[56] Common law actions can serve a useful function in plugging loopholes which might develop in an otherwise extensive statutory scheme, and the legislature may always clarify the point subsequently if it did, in fact, intend particular statutory remedies to be comprehensive. It has been argued that extensive administrative enforcement plans by their very nature imply exclusion of common law rights in the areas which they cover.[57] However, in such instances the more appropriate principle to apply would seem to be the doctrine of primary jurisdiction (discussed below), rather than that of preemption.

Though the common law may not be preempted by legislation in a particular area, the doctrine of "primary jurisdiction" may still be applied to defeat initial resort to a common law remedy. That doctrine, a judicially created device designed to improve the coordination of effort between administrative agencies and courts,[58] was first invoked in the federal court system, and was applied despite a

specific legislative grant of authority to the courts to act on a claim in the first instance.[59] The doctrine has since been applied by many state courts as well.[60] It arises when a particular claim, though originally cognizable in the courts, is thought to involve questions which might better be determined in the first instance by an existing administrative agency.[61] A court will invoke the doctrine upon consideration of the necessity for uniformity and consistency in the administration of particular legislative schemes; the existence of particular expertise possessed by the relevant agency; judicial efficiency and economy; and the importance of administrative autonomy.[62] "The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies for it governs only the question whether courts or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue."[63] Where the doctrine is applied, the court will either dismiss the action or stay the proceeding pending an administrative determination of the question.[64]

In the context of this article, the issue of primary jurisdiction might be raised when an attorney general, a comparable state official, a municipal authority, or a private individual under appropriate circumstances,[65] attempted to enjoin pollution of water or air under a common law public nuisance theory. If the doctrine were invoked the plaintiff would be forced to file a complaint with the appropriate state administrative agency. This might be unsatisfactory to the plaintiff for a number of reasons, among them the inability of the agency to give the specific relief requested;[66] the possibility of undue delay before administrative investigatory and hearing procedures can be set in motion;[67] or the influence of possibly biased fact-findings upon the substantive issues, if later heard by the court.[68]

In *Barnes and Tucker* the Pennsylvania court did not mention the doctrine of primary jurisdiction, and it was apparently not raised by the defendants in the court below.[69] Recently however, two jurisdictions have squarely confronted the issue and may have set a course for the future handling of the doctrine in environmental suits.[70] In *State v. Dairyland Power Cooperative,*[71] (hereinafter cited as *Dairyland Power*), the attorney general of Wisconsin attempted to enjoin a public nuisance under the authority of a sixty-year-old statute empowering him, or any person affected, to bring nuisance actions under certain circumstances. The defendant argued that in light of the broad scope of recent state environmental legislation, which had empowered the Department of Natural Resources to investigate air, water and solid waste disposal pollution and to hold

hearings and issue abatement orders, the court should invoke the doctrine of primary jurisdiction and dismiss the action.[72] The court instead affirmed the lower court's overruling of a demurrer to the complaint made, *inter alia,* on this ground. Arguing in support of the demurrer, the defendant indicated its intention to introduce a large quantity of technical evidence bearing upon the feasibility of abating the pollution, and suggested that an administrative agency might be better equipped than the court to evaluate this data. The court disagreed. "In this case issues of law, rather than issues of fact, appear to be paramount."[73] The court noted that irrespective of the technical feasibility of pollution abatement, the crucial questions presented by the case were whether relief should be granted to the plaintiff on the facts, and if so, what kind. These questions involve fundamental policy judgments which the court apparently considered unsuitable for administrative determination.[74]

A similar approach was taken in *State ex rel. Shevin v. Tampa Electric Co.,*[75] (hereinafter cited as *Tampa Electric*). There, the Florida attorney general brought a public nuisance suit against the defendant to enjoin air pollution allegedly constituting a danger to public health. The trial court dismissed, invoking the primary jurisdiction doctrine in light of state air and water pollution statutes which established a Department of Pollution Control to deal with pollution problems. The court justified dismissal "' . . . in the interest of orderly procedure, standardizing pollution control, and reconciling the interest of the public, along with necessary industry.' "[76] The Florida Court of Appeals reversed, asserting that the determination of what constitutes a public nuisance is historically a judicial function, and involves issues not so intimately bound with technical fact considerations as to be more appropriately heard by administrative experts.[77]

If the common law of public nuisance is to have the effect of supplementing legislative programs that fail to provide, for various reasons, full and complete remedies to particular environmental wrongs, then courts must be open to the particular facts of each case brought before them, and aware of the environmental implications in each case of forcing plaintiffs to resort to alternative administrative channels. However, to the extent that *Dairyland Power* and *Tampa Electric* represent the view that only courts are competent to make judgments in the area, they may be ill-considered. Such a view carried to extremes could threaten the independent exercise of agency authority and limit the efficacy of comprehensive legislative schemes for pollution control. Some analysts have argued that ad-

ministrative agencies can be more flexible and effective in dealing with particular environmental problems than the courts,[78] and the possibilities in this regard should be given weight. Further, technical expertise possessed by administrative bodies may be of considerable value when the feasibility of abatement techniques is at issue. The policy question of whether or not relief should be granted may be inextricably linked with the technical question of whether abatement is possible, especially when the defendant is a public utility providing a necessary service, as in *Dairyland Power* and *Tampa Electric*.

It should be noted here that if an administrative proceeding is preferred to the institution of an independent action for public nuisance, then judicial review of any initial administrative action under a statutory scheme may be delayed by the doctrine of exhaustion of administrative remedies.[79] In such a case the basis for an immediate judicial appeal from an initial agency ruling would not involve a public nuisance action. This article being concerned only with the latter theory, the exhaustion doctrine will not be examined here.

IV. Legislative Authorization

One important issue specifically left unresolved by *Barnes and Tucker* is whether a public nuisance can exist despite legislative, administrative or municipal authorization of the particular activity in question. The court stated that the legislature could, within constitutional limits,[80] authorize conduct which otherwise would constitute a nuisance, but found that although the defendent operated in accordance with the Clean Streams Law, its discharge of acid mine water during that period was at best "permitted", but not "authorized", by the legislature.[81] The defense of legislative authorization was not available to it. This finding is consistent with the generally strict scrutiny given by courts to statutes under which legislative authorization to maintain a nuisance is claimed.[82] Any grant of authority must be explicit, and an alleged grant may be held not to extend to a particularly obnoxious means of accomplishing an otherwise permitted activity.[83] Thus in a suit by the New York state attorney general to enjoin the operation of a methadone maintenance facility for drug addicts on public nuisance grounds,[84] the court affirmed a lower court grant of injunctive relief, despite defendant's argument that the maintenance program was operated pursuant to the New York Public Health Law and was licensed, certified or inspected by various state and federal agencies. The evidence, said the court, supported allegations in the plaintiff's com-

plaint that the facility, though authorized, was being operated in an offensive manner.[85]

In the face of an *explicit* legislative authorization it would seem unreasonable, absent constitutional necessity, to allow the executive branch of government to maintain a public nuisance action.[86] Most of the cases are in accord on this point.[87] However, when the alleged "authorization" is not explicit, as in *Barnes and Tucker,* or where a subordinate governmental body (an agency or a municipality) has allegedly "authorized" the activity, a division of opinion begins to develop.[88] Usually at issue in such cases is the immunity derivable from administrative agency permits and similar grants of authority, and from municipal zoning ordinances.

In *Barnes and Tucker* the Department of Environmental Resources had revoked the defendant's mine drainage permit prior to commencement of the action. Therefore the court was not " . . . called upon to decide *the more difficult question* of whether a public nuisance can exist during the pendency of a valid mine drainage permit" (emphasis added).[89] Several recent cases in other jurisdictions have dealt at least incidentally with this issue. In *Venuto v. Owens-Corning Fiberglas Corporation,*[90] (hereinafter cited as *Venuto*), plaintiffs, as private individuals, sought an injunction and damages against defendant for both public and private nuisance, based upon injury allegedly suffered as a result of air pollution from defendant's plants. Defendant was operating within air purity standards set by the Bay Area Pollution Control District. While holding that plaintiffs lacked standing to bring a public nuisance action,[91] the court stated in dicta that the proper public authorities could have maintained such an action because, " . . . we find nothing in the statutes delineating the authority of the District which gave it the express authority to permit commercial enterprises to engage in activities which the law pronounces to be a nuisance."[92] Thus the strict scrutiny standards often used by courts in evaluating the scope of alleged legislative authorization of nuisance activities might be extended similarly to a review of the specific legislative grant of authority to a particular administrative agency.

Another approach was taken by the Michigan Supreme Court in *Ebel v. Saginaw County Board of Road Commissioners,*[93] (hereinafter cited as *Ebel*). Plaintiff, a private party, alleged that a railroad's placement of a flashing light signal in the center of the street at a railroad crossing constituted a public nuisance. In defense, the railroad pointed to a specific order from the Michigan Public Utilities Commission requiring such placement, and noted a Michigan statute prohibiting the removal of crossing signals without the au-

thority to do so.[94] The court held: "No state agency is free to maintain a nuisance, and hence it cannot permit or require another person to do so."[95]

Administrative agencies are often established to control pollution actively case by case, but zoning laws are designed to set aside specific geographic areas within which otherwise obnoxious activity may be pursued. The recent Colorado case of *Green v. Castle Concrete Co.*,[96] (hereinafter cited as *Green*), indicates that zoning authorization may be a more difficult obstacle to the maintenance of common law nuisance actions than permits or licensing by an administrative agency. In *Green* the defendant planned quarrying operations in an area zoned for such activity, and plaintiffs sought an injunction on both public and private nuisance grounds, alleging[97] that the dust from defendant's operations would obscure the view of nearby mountains and that operations would drastically affect the tourist trade in the area. The lower court found the quarry to be both a public and a private nuisance and permanently enjoined the quarrying operation. The Supreme Court of Colorado reversed, framing the public nuisance issue as: " . . . whether the operation of a limestone quarry—a permissible activity by legislative zoning action—can by judicial decree be deemed a public nuisance."[98] Stating that the common law of public nuisance was preempted by legislative statutory and zoning regulations, the court dismissed the action, stressing its view that the reordering of societal rights and priorities, which attention to environmental aesthetics would require, could not be attempted under the guise of judicial nuisance abatement, but was rather a matter of legislative concern.[99] A strong dissent was registered by Chief Justice Pringle.[100] The court indicated that the plaintiffs could bring their private nuisance action in the future, if and when the issue became ripe.[101] Presumably, the availability of injunctive relief in such an action would depend upon a balancing of the equities involved.[102]

Though *Green* may stand for the proposition that an activity permitted under a legislatively enacted zoning plan cannot constitute an enjoinable public nuisance, it may still permit a public nuisance action simply to abate resulting pollution, where it is abatable without destruction of the enterprise. Future production of excessive dust might be seen as relating merely to the *manner* in which defendant is using his property. However, *Green* is especially interesting from an environmental point of view because it represents an implicit refusal by the court to consider aesthetic impairment of the environment, absent other types of damage, to be a proper subject for judicial action. Not having a statutory statement

of public policy analogous to that which influenced the *Barnes and Tucker* court,[103] the Colorado court was arguably correct in viewing such a subject as beyond judicial competence.

V. Private Actions for Public Nuisance

A serious obstacle to the emergence of the common law of public nuisance as a major environmental weapon at the state level is what has been termed the standing problem.[104] In order for a private individual to bring an action for public nuisance, he must suffer "special injury" different *in kind*[105] from that suffered by the public in general. If it can be shown that the plaintiff's injury is merely different in degree but not in kind, then the action will be dismissed.[106]

The advantages to environmentalists of a private action for public nuisance are clear. State officials may be the only parties authorized to pursue statutory remedies created by environmental legislation,[107] and past experience has shown that state agencies and governmental officials are often less than effective in dealing with environmental problems, either due to the influence of economically powerful pressure groups or to a sheer lack of resources.[108] Moreover a mandamus action is generally not available to private citizens to force initiation of action by state government officials,[109] absent statutory provisions to the contrary.[110] Since the availability of private nuisance actions is unlikely to benefit the general public in any great measure, especially if private remedies are limited to damage recovery[111] and if the traditional balancing of equities is involved,[112] there are frequent instances in which widespread injury occurs but no one, public or private, is able or willing to pursue a remedy.

The formerly unanimous agreement among jurisdictions with respect to this standing question has been upset recently by a Florida lower court decision, *Save Sand Key, Inc. v. United States Steel,*[113] (hereinafter cited as *Save Sand Key*). Plaintiff organization, a nonprofit citizen's group claiming vested prescriptive rights[114] along with the general public in a particular ocean beach owned by the defendant, sought to enjoin as a public nuisance a barrier placed by the defendant in such a location as to interfere with those rights.[115] The defendant maintained, *inter alia,* that plaintiff had suffered no injury distinct in kind from that of the public in general and therefore lacked standing to bring the action. The District Court of Appeals, however, reversed the lower court's dismissal of the action and remanded for trial on the merits. Not only did the court find that plaintiff organization was a proper representative of its members' interests,[116] but it also held generally " . . . that a person who

is entitled to enjoyment of a right or who *directly and personally* suffers or is about to suffer an injury may sue for relief or redress whether or not such right or injury is special to him or is shared in common with the public generally" (emphasis added).[117] The court was influenced by a perceived federal trend toward liberalization of standing rules, as evidenced by *Flast v. Cohen*,[118] and by a provision of the Florida Constitution that the state's courts " . . . shall be open to every person for redress of any injury."[119] The court conceived the case before it as one involving an injury for which there would be no redress without liberalized standing requirements.[120] Dismissing arguments that the holding would lead to a multiplicity of suits—the problem it believed basic to the old "special injury" rule—the court cited the increased expense of litigation, the more frequent use of class actions, and the precedential value of prior cases as modern developments which rendered the old rule obsolete.[121]

If the opinion in *Save Sand Key* is followed in subsequent Florida cases, that state would become the first to sanction private actions for public nuisance without a showing of special injury. If standing is allowed to a private person asserting public rights in property acquired from another by prescription, there would seem to be no reason why the principle could not be broadened to include private vindication of public rights in public property such as water[122] and air, and further to include even interference with asserted public rights which are *not* property-based.[123] This latter course would be consistent with the history of public nuisance which, unlike private nuisance, was not founded on interference with interests in land.[124] It should be noted that a deep judicial incursion into the broad realm of public environmental rights, to which the Florida holding might lead, could quickly bring courts into areas of outright social planning, with which they are ill-equipped to deal. The vigor of public nuisance enforcement by state officials, as opposed to private parties, is ultimately a function of the political process, and to the extent that this process reflects the diverse and legitimately conflicting interests involved in every environmental controversy it may produce the most equitable resolution of environmental questions. Concern for the environment raises complex cost-benefit issues and requires the weighing of conflicting values. Public nuisance enforcement might be more appropriately left to those who are in some measure directly accountable to the public for the resolution of those issues.

Conclusion

The Pennsylvania Supreme Court in *Barnes and Tucker* declared the doctrine of common law public nuisance to be a viable tool in the fight against water pollution, supplementary to administrative and legislative programs in that area. In the process, the courts established the fact of water pollution as a common law public nuisance, actionable whenever it occurs. Environmentalists in other jurisdictions might find the doctrine useful if obstacles to its use, such as preemption, primary jurisdiction and legislative authorization are overcome. However, the ultimate common law environmental weapon, the private action to enjoin a public nuisance before it occurs, has yet to be clearly accepted by the highest court in any jurisdiction without adherence to traditionally strict standing requirements. Arguably, liberalized standing would carry with it dangers of judicial overreaching which should be avoided.

APPENDIX

Partial Statutory Texts

Act of May 8, 1945, P.L. 435, Pa. Stat. Ann. tit. 35, § 691.313 (1964):

> "Before any existing or new coal mine may be opened or reopened, and before any existing coal mine may be continued in operation, a plan of the proposed drainage and disposal of industrial wastes, and acid mine drainage of such mine, shall be submitted to the Sanitary Water Board, and it shall be unlawful to open or reopen any such mine, or to continue the operation of any mine . . . unless and until the board . . . has approved such plan or change of plan . . ." (Repealed by the 1970 amendments).

Pa. Stat. Ann. tit. 35, § 691.307 (virtually unaffected by the 1965 amendments):

> "No person shall hereafter erect, construct or open, or reopen or operate, any establishment which, in its operation, results in the discharge of industrial wastes which would flow or be discharged into any of the waters of the Commonwealth and thereby cause a pollution of the same, unless such person shall first provide proper and adequate treatment works . . . approved by the board . . . "

Pa. Stat. Ann. tit. 35, § 691.315 (part of 1965 amendments):

> "(a) Before any coal mine is opened, reopened, or continued in operation, an application for a permit approving the proposed drainage and disposal of industrial wastes shall be submitted to the Sanitary Water Board . . ."
> "(b) It shall be unlawful to open, reopen or continue in operation any coal mine . . . unless and until the board . . . has issued a permit . . ."

Pa. Stat. Ann. tit. 35, § 691.316 (Supp. 1974) (Part of the 1970 amendments):

> "Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the Board may order the landowner or occupier to correct the condition in a manner satisfactory to the Board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, 'landowner' includes any person holding title to or having a proprietary interest in either surface or subsurface rights."

Pa. Stat. Ann. tit. 35, § 691.3 (Supp. 1974) (Part of the 1970 amendments):

> "The discharge of sewage or industrial waste ['industrial waste' was

defined to include mine drainage in the 1965 amendments] or any substance into the waters of this Commonwealth, which causes or contributes to pollution as herein defined or creates a danger of such pollution is hereby declared not to be a reasonable or natural use of such waters, to be against public policy, and to be a public nuisance."

FOOTNOTES

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[1] The federal courts take jurisdiction under 28 U.S.C. § 1331(a). *See,* Illinois v. City of Milwaukee, 406 U.S. 91, 99 (1972), for the conclusion that a claim based on federal common law arises under the "laws" of the U.S. within the meaning of §1331 (a). For an historical summary of the use of the public nuisance doctrine in protecting interstate waters, *see,* Note, *Environmental Law - Water Pollution Remedies - Use of Public Nuisance Theory in Suit by Federal Government,* 14 B.C. IND. & COM. L. REV. 767 (1973).

[2] Note, *Environmental Law - Water Pollution Remedies - Use of Public Nuisance Theory in Suit by Federal and State Governments,* 15 B.C. IND. & COM. L. REV. 795 (1974); 14 B.C. IND. & COM. L. REV. 767, *supra* n. 1.

[3] 406 U.S. 91 (1972).

[4] For discussion *see,* 14 B.C. IND. & COM. L. REV. 767, *supra* n. 1.

[5] United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 146 (D. Vt. 1972). This decision has been criticized for suggesting that the federal government might avoid the enforcement limitations of particular Congressional water pollution legislation, notably the "imminent and substantial threat" requirement of the Federal Water Pollution Control Act, 33 U.S.C. §1162 (1970), *as amended* 33 U.S.C. §1321 (e) (Supp. 1974), by resorting to a federal common law action, thereby defeating the policy intentions of Congress. 14 B.C. IND. & COM. L. REV., at 783.

[6] United States v. United States Steel, 356 F. Supp. 556 (N.D. Ill. 1973). The grant of standing to the federal government in this case has been criticized on grounds similar to those expressed in note 5, *supra. See,* 15 B.C. IND. & COM. L. REV. at 812.

[7] "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution . . ." 33 U.S.C. § 1251(b) (Supp. 1974).

[8] For example, pollution which does not involve interstate or navigable bodies of water.

[9] A compilation of state environmental protection legislation may

be found in ENV. RPTR. (BNA), 1 & 2 *State Water Laws* and 1 & 2 *State Air Laws.*

[10] ____Pa. ____, 319 A.2d 871 (1974). (Hereinafter cited as *Barnes & Tucker*).

[11] W. Prosser, LAW OF TORTS 574 (4th ed. 1971). (Hereinafter cited as Prosser).

[12] *Id.* at 580.

[13] Trespass, on the other hand, refers to an interference with exclusive *possession* of land. Prosser, *supra* n. 11, at 595. The interference involved in nuisance does not have to be physical but can consist of loud noises, dust, danger of contagious disease, etc., as long as it is unreasonable and substantial. *Id.* at 592.

[14] Courts have been more inclined to grant relief where there is physical damage as against personal discomfort. *Id.* at 597.

[15] This factor is particularly significant from an environmental point of view, in light of zoning laws which courts are sometimes reluctant to disturb.

[16] *See,* Prosser, *supra* n. 11, at 604.

[17] *Id.* at 583-85.

[18] *Id.* at 586. One recent Florida case suggests that this rule may be changing. *See* text, *infra,* at n. 113. Some states have attempted to create by statute the right of a private individual to bring an action for public nuisance with no special injury requirement. *See* Prosser, *supra* n. 11, at 587, n. 68.

[19] *Compare* Prosser at 587-89 and Rothstein, *Private Actions for Public Nuisance: The Standing Problem,* 76 W. VA. L. REV. 453 (1974).

[20] Prosser, *supra* n. 11, at 604.

[21] In particular, a preliminary injunction might be secured. This preliminary remedy would immediately alleviate the continuing social cost attributable to a particular polluting activity while forcing the polluter to assume (at least in part) the monetary costs associated with abatement during the course of litigation. *See* J. Sax, DEFENDING THE ENVIRONMENT 116, (1971).

[22] Hill, *The Politics of Air Pollution: Public Interest and Pressure Groups,* 10 ARIZ. L. REV. 37 (1968); *State and Local Regulation of Water Pollution,* 3 NAT. RESOURCES LAW J. 47 (1970); Greer, *Obstacles to Taming Corporate Polluters: Water Pollution Politics in Gary, Indiana,* 3 ENV. AFF. 199 (1973).

[23] Prosser, *supra* n. 11, at 589.

[24] ____ Pa. ____, 319 A.2d 871 (1974).

[25] Act of June 22, 1937, P.L. 1987, Pa. Stat. Ann. tit. 35, § 691.1 *et seq.* (1964). (The Act was amended in part in 1945, 1965, and

1970. The amendments will hereinafter be referred to by the year of enactment.)

[26] Abolished by the Act of December 3, 1970, P.L. 834, No. 275, § 30, Pa. Stat. Ann. tit. 71, § 510-103 (Supp. 1974) and its functions assumed by the Department of Environmental Resources by authority of Act of Dec. 3, 1970, P.L. 834, No. 275, § 20, Pa. Stat. Ann. tit. 71, § 510-1(22) (Supp. 1974).

[27] Act of June 22, 1937, P.L. 1987, art. III, § 313, added by Act of May 8, 1945, P.L. 435, § 7, repealed by Act of August 23, 1965, P.L. 372, § 4, Pa. Stat. Ann. tit. 35, § 691.313 (1964). (*See* Appendix for text.)

[28] Acid mine drainage is polluted water caused by the interaction of air and coal in the mine. Commonwealth v. Pittsburgh Coal Co., 452 Pa. 77, 306 A.2d 308 (1973).

[29] Act of Aug. 23, 1965, P.L. 372, §§ 306, 307, 315; Partial texts of the 1965 amendments are quoted by the Court, 319 A.2d at 874-75 (*see* appendix), but the original text is not available in the current statutory compilation. For version of § 307 and § 315 following the 1970 amendments, see Pa. Stat. Ann. tit. 35, §§ 691.307, 691.315 (Supp. 1974). § 306 was repealed by the 1970 amendments.

[30] The 1970 amendment to § 316 extended the coverage of permit requirements to anyone who discharged or permitted the discharge of industrial waste, including mine drainage, into *any* waters of the Commonwealth. (*See* appendix for text).

[31] *See* Appendix for text of § 3.

[32] 319 A.2d at 878.

[33] § 307 of the 1965 amendments, *supra* n. 29. (*See* Appendix for text).

[34] § 315 of the 1965 amendments, *supra* n. 29. (*See* Appendix for text).

[35] Commonwealth v. Barnes & Tucker Co., 9 Pa. Cmwlth. 1, ____, 303 A.2d 544, 563 (1973).

[36] *Id.* at ____, 303 A.2d at 564.

[37] Pa. Stat. Ann. tit. 35, § 691.3 (Supp. 1974). Note that the 1945 and 1965 amendments specifically proscribed only the discharge of acid mine drainage into *clean* waters of the Commonwealth. Act of June 22, 1937, P.L. 1987, art III, § 306, Pa. Stat. Ann. tit. 35, § 691.306 (1964). § 306 was repealed by the 1970 amendments.

[38] 9 Pa. Cmwlth. at ____, 303 A.2d at 572.

[39] 113 Pa. 126, 6 A. 453 (1886).

[40] The court in *Sanderson* was undoubtedly influenced by its view of the economic consequences of an opposite result: "The plaintiff's grievance is a mere personal inconvenience [plaintiff used the

stream water for household and drinking purposes]; and we are of the opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest." 113 Pa. at 149, 6 A. at 459. In Pennsylvania Railroad Co. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386 (1924), the court pointed out that *Sanderson* was a private nuisance case decided by a balancing of interests between the mere inconvenience of a private individual and a "great public industry." Where acid mine drainage was polluting a reservoir used both for public drinking and by the railroad industry, thus interfering with an important public use, the mine owner was subject to a decree for abatement of the discharge. In Commonwealth ex rel. Shumaker v. New York and Pennsylvania Co., Inc., 367 Pa. 40, 79 A. 439 (1951), the court held that when the state proceeds against a polluter of public waterways to secure an abatement decree, no balancing of interests takes place, nor does the rule of *Sanderson* apply, as it might in an action by a private party. For other Pennsylvania opinions distinguishing *Sanderson, see*: McCune v. Pittsburgh and Baltimore Coal Co., 283 Pa. 83, 85 A. 1102 (1913); Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A. 1065 (1904); Hindson v. Markle, 171 Pa. 138, 33 A. 74 (1895).

[41] 319 A.2d 871, 880 (1974).

[42] *Id.*

[43] *Id.* at 884.

[44] *Id.* at 881.

[45] *Id.* at 882. The court was influenced in this regard by provisions of Article I, § 27 of the Pennsylvania Constitution, which read: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people," and in addition by various policy declarations in § 4 of the 1965 amendments, including, *inter alia:* "It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted . . . ." 319 A.2d at 875.

[46] *Id.* at 886.

[47] For a Pennsylvania example, *see* Pennsylvania Railroad Co. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386 (1924).

[48] For a discussion of the "taking" issue and its relation to the protection of alleged "public rights," see Sax, *Takings, Private*

Property and Public Rights, 4 ENV. L. REV. 467 (1973).

[49] Prosser, *supra* n. 11, at 583.

[50] 319 A.2d 871, 880 (1974). *Accord,* Commonwealth ex rel. Shumaker v. New York and Pennsylvania Company, Inc., 367 Pa. 40,53, 79 A.2d 439, 446 (1951).

[51] Pa. Stat. Ann. tit. 35, § 691.701 (1964).

[52] With regard to the survival of common law rights of action following passage of broad measures providing for administrative regulation of pollution, *see*: G & A Contractors, Inc. v. Alaska Greenhouses Inc., 517 P.2d 1379 (Alas. 1974); Filisko v. Bridgeport Hydraulic Co., 30 Conn. Sup. 401, 317 A.2d 462 (1973); Commonwealth ex rel. Shevin v. Tampa Electric Co., 291 So.2d 45 (Fla. App. 1974); Ohio River Sand Co. v. Commonwealth, 467 S.W.2d 347 (Ct. of App. Ky. 1971).

[53] The doctrine of primary jurisdiction may be applied, however. *See,* White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 177 N.W.2d 473 (1970), and text, *infra.*

[54] This appears to have been done in J.D. Jewell, Inc. v. Hancock, 226 Ga. 480, 175 S.E. 2d 847 (1970).

[55] People v. New Penn Mines, Inc., 212 Cal. App.2d 667, 28 Cal. Rptr. 337 (1963). "The Legislature did not establish a hierarchy of administrative agencies, a carefully conceived group of artificial definitions, a deliberately designed distribution of powers and a set of administrative procedures with the notion that any branch of the state government — armed only with loosely defined traditional functions — might bypass these elaborate arrangements through the device of an injunction suit." 212 Cal. App.2d at 675, 28 Cal. Rptr. at 341. See Commonwealth v. Glen Alden Corp., 418 Pa. 57, 210 A.2d 256 (1965), where the court held that administrative remedies to abate air pollution were intended to be exclusive; and Brookhaven Borough v. American Rendering, Inc., 434 Pa. 290, 256 A.2d 626 (1969), where a common law right to enjoin air pollution was held to lie following an amendment to the Air Pollution Control Act, preserving explicitly common law rights and remedies.

[56] Ellison v. Rayonier, 156 F. Supp. 214 (W.D. Wash. 1957).

[57] *See* note 55, *supra.*

[58] 3 K.C. Davis, ADMINISTRATIVE LAW TREATISE 5 (1st ed. 1958).

[59] Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426 (1907). The Supreme Court held that any shipper seeking redress against a carrier on the basis of allegedly unreasonable rates must first file a complaint and seek an order from the Interstate Commerce Commission, even though the Interstate Commerce Act specifically provided that its provisions did not

abridge traditional common law rights of action against carriers charging unreasonable rates.

[60] 3 K.C. Davis, ADMINISTRATIVE LAW TREATISE 47-52 (1st ed. 1958).

[61] United States v. Western Pacific Railroad, 352 U.S. 59 (1956).

[62] *Id.* at 64.

[63] 3 K.C. Davis, ADMINISTRATIVE LAW TREATISE 3 (1st ed. 1958).

[64] *Id.*

[65] *See* text *infra* at n. 104 ff.

[66] Until passage of the 1970 amendments the Sanitary Water Board had power only to revoke, suspend or modify discharge permits, upon a finding that the enterprise or individual was in violation of the Clean Streams Law. 319 A.2d 871, 879 (1974).

[67] *See* procedure required as a result of a decision invoking the primary jurisdiction doctrine, in People v. New Penn Mines, Inc., 212 Cal. App.2d 667, 676, 28 Cal. Rptr. 337, 342 (1963).

[68] *See* Winder, *Citizen's Groups, the Law and the Environment,* 2 ENV. L. REV. 40, 41 (1971), and Sax, DEFENDING THE ENVIRONMENT 133 (1971).

[69] No mention was made in the lower court opinion, Commonwealth v. Barnes and Tucker Company, 9 Pa. Cmwlth. 1, 303 A.2d 544 (1973). The agency itself was seeking a judicial remedy even though, as noted in the Supreme Court opinion, an administrative remedy was apparently available under the 1970 amendments, Pa. Stat. Ann. tit. 35, §691.316 (Supp. 1974).

[70] *But see,* White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 177 N.W.2d 473 (1970), where primary jurisdiction was held to be in the Water Resources Commission, despite a holding that the common law doctrine of nuisance survived state water pollution control legislation, when there was no showing either (1) that no administrative relief was available, (2) that the agency had refused to act, or (3) that judicial proceedings had advanced to such a point that it would work undue hardship on plaintiff to dismiss. *See also,* Ellison v. Rayonier, 156 F. Supp. 214 (W.D. Wash. 1957).

[71] 52 Wis.2d 45, 187 N.W.2d 878 (1971).

[72] *Id.* at 50, 187 N.W.2d at 880. *Dairyland Power* involved air pollution from defendant's power plants. Wis. Stat. Ann., ch. 144 §§ 144.30- 144.46 (1974) defines the powers and duties of the Department in controlling air pollution. The Department has authority to issue abatement orders in a wide variety of situations, though its orders are enforceable in the courts only by the attorney general, under § 144.536.

[73] *Id.* at 56, 187 N.W.2d at 883.

[74] *Id.* at 56, 187 N.W.2d at 884.

[75] 291 So.2d 45 (Fla. App. 1974).

[76] *Id.* at 46.

[77] The court distinguished situations calling for application of the doctrine in this way: " . . . if in a given case the operative conclusion to be reached by the court is one of ultimate fact, or of law which in turn is dependent upon the existence of highly technical or specialized criteria peculiarly within the expertise of an administrative agency, such doctrine is invoked more as a matter of advised judicial deference to a more competent tribunal rather than as a matter of judicial discretion which may or may not be exercised in favor of such deference . . . On the other hand, if the ultimate question in the case is solely a matter of law or one of law which is not 'intertwined' with technical facts the 'primary jurisdiction' doctrine is not applicable at all . . . Given existing conditions which are fairly simple to establish, the determination of whether they constitute a judicially abateable nuisance, together with the nature and extent of a full and appropriate remedy if indeed they do, is a matter of law and lies within the special competence of judicial expertise." *Id.* at 47.

[78] Kovel, *A Case of Civil Penalties,* 46 J. URBAN L. 153, 162 (1969).

[79] *See generally,* Davis, 3 ADMINISTRATIVE LAW TREATISE 56 *et seq.* (1st ed. 1958). For state court discussion of the difference between primary jurisdiction and the exhaustion of administrative remedies doctrine, *see* State v. Dairyland Power Cooperative, 52 Wis.2d 45, 187 N.W.2d 878 (1971).

[80] One unconstitutional extreme might be legislative authorization of conduct which results in actual destruction of plaintiff's property. *Cf.,* Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A. 1065 (1904).

[81] 319 A.2d 871, 883 (1974). This position is understood more fully in light of policy statements contained in the 1965 amendments, such as: "It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted." Pa. Stat. Ann. tit. 35, § 691.4(3) (Supp. 1974).

[82] Hassell v. San Francisco, 11 Cal.2d 168, 171, 78 P.2d 1021, 1022 (1938). *See also,* Commonwealth *ex rel.* Shevin v. Tampa Electric Co., 291 So.2d 45, 48 (Fla. App. 1974).

[83] McKim v. Philadelphia, 217 Pa. 243, 66 A. 340 (1906).

[84] People v. HST Meth, Inc., 43 App. Div. 932, 352 N.Y.S.2d 487 (1974).

[85] *Id.* at ____, 352 N.Y.S.2d at 488. Plaintiff alleged that the individuals who frequented the center were loud and boisterous, that drugs were openly sold both within and immediately outside the facility, and that large groups of individuals congregated in front, intimidating residents of the area. Justice Murphey, dissenting, argued that revocation of license and increased police protection in the area were the proper solutions to this complaint. *Id.* at ____, 352 N.Y.S.2d at 490.

[86] Note, *Nuisance and Legislative Authorization,* 52 COLUM. L. REV. 781 (1952).

[87] *See e.g.,* Boccardo v. United States, 341 F. Supp. 858 (N.D. Cal. 1972); Shields v. Spokane School Dist. No. 81, 31 Wash. 247, 196 P.2d 352 (1948); "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Cal. Code Ann. § 3482 (1970).

[88] One writer identified three policy considerations which he believed were influential in findings of immunity from public nuisance action on the basis of authorization; (1) whether the court believed the beneficial effects of the activity outweighed the harm produced, (2) whether the source of authorization was legislative or merely administrative, and (3) whether the plaintiff " . . . although ostensibly representing the state, is identified by the court with a political entity inferior to the source of the purported authorization." Note, *Nuisance and Legislative Authorization,* 52 COLUM. L. REV. 781, 782-83 (1952).

[89] 319 A.2d 871, 883 n. 12 (1974). *But see,* Commonwealth *ex rel.* Shumaker v. New York and Pennsylvania Company, Inc., 367 Pa. 40, 53, 79 A.2d 439, 446 (1951), where the court said that an agency " . . . cannot by a contrary decree make a discharge which is in fact a 'nuisance,' not a 'nuisance' . . ."

[90] 22 Cal. App.3d 116, 99 Cal. Rptr. 350 (1971).

[91] *Id.* at 131, 99 Cal. Rptr. at 360.

[92] *Id.* at 129, 99 Cal. Rptr. at 359.

[93] 386 Mich. 598, 194 N.W.2d 365 (1972).

[94] *Id.* at 606, 194 N.W.2d at 368.

[95] *Id.* at 607, 194 N.W.2d at 369. Note that this was a damage action, based on both nuisance and negligence, for injuries resulting when plaintiff's car struck the flashing light signal. The court made little attempt to distinguish the two theories. It may be that agency authorization is a weaker bar to public nuisance actions where *negligent* conduct is the cause of an ensuing nuisance.

[96] 509 P.2d 588 (Colo. 1973).

[97] In addition to private injury special in kind.

[98] 509 P.2d at 589.

[99] "We feel compelled to state that, although the goal of creating an aesthetically pleasing environment is clearly laudable, it is equally clear that where the accomplishment of this goal entails the restructuring of societal rights and priorities it cannot be fairly or justly done through a judicially sanctioned private condemnation without compensation under the guise of abating a nuisance. In our populous society, the courts cannot be available to enjoin an activity solely because it causes some aesthetic discomfort or annoyance. Given our myriad and disparate tastes, life styles, mores, and attitudes, the availability of a judicial remedy for such complaints would cause inexorable confusion." *Id.* at 591.

[100] "The majority opinion today announces the rule that any activity operating under a valid legislative zoning authority can never be declared a public nuisance by the courts. I cannot agree. The welfare, the safety, and the health of the public, including its right to a decent environment, transcends, in my view, the right to engage in a zone permitted business, and where that business is so conducted as to detrimentally affect the public health, welfare and safety, including the public's right to a decent environment, and thus become a danger to them, then it becomes a public nuisance subject to control by the courts." *Id.* at 592. Two other justices, though concurring in result with the majority, specifically disavowed the proposition that a court under no circumstances can enjoin a legislatively permitted public nuisance. *Id.*

[101] 509 P.2d 588, 591 (Colo. 1973).

[102] *See,* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970), for holding that injunctive relief is not available to private plaintiffs when the injury to defendant would be unduly harsh in comparison with that suffered by plaintiff, and when permanent damages would provide a sufficient remedy.

[103] The 1965 amendments contained a policy section strongly indicating Pennsylvania's commitment to pollution free waterways; *supra* n. 45. The court quoted that section at length in its opinion. Note that the Colorado Constitution contains no explicit reference to a public right of pure water or air, as does the Pennsylvania Constitution.

[104] *See, generally,* Rothstein, *Private Actions for Public Nuisance: The Standing Problem,* 76 W. VA. L. REV. 453 (1974); Lohrmann, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution,* 2 ENV. L. REV. 199 (1971) (hereinafter

cited as Lohrmann); Davies, *Theories of Water Pollution Litigation,* 3 ENV. L. REV. 237 (1972).

[105] Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App.3d 116, 99 Cal. Rptr. 350 (1971); Save the Bay Com., Inc. v. Mayor of Savannah, 227 Ga. 436, 181 S.E.2d 351 (1971); Clabaugh v. Harris, 27 Ohio Misc. 153, 273 N.E.2d 923 (C.P. 1971); Raymond v. Southern Pacific Co., 259 Ore. 629, 488 P.2d 460 (1971). Rothstein, *supra* n. 104, suggests that at least one jurisdiction has allowed a private individual standing based upon injury different in degree only: Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972).

[106] Prosser, *supra* n. 11, at 586-87.

[107] Filisko v. Bridgeport Hydraulic Company, 317 A.2d 462 (Conn. Super. 1973).

[108] *See* note 22 *supra.*

[109] Lohrmann, *supra* n. 104, at 212. *See* Warner v. Mayor of Taunton, 253 Mass. 116, 148 N.E. 377 (1925).

[110] At least one state has such a provision. *See,* Fla. Stat. Ann. § 403.412(2)(a) (1973), allowing private citizens to bring mandamus proceedings to compel state agencies to enforce environmental legislation.

[111] *See,* Boomer v. Atlantic Cement Company, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970).

[112] Some of the most serious environmental pollution occurs through the operation of large industrial plants, which employ substantial numbers of people and contribute to a community's economic well-being. An individual injured by such pollution may recover damages, but equitable relief, which might benefit the public at large, will be more difficult to obtain, especially if the pollution is not abateable without extreme hardship to the defendant.

[113] 281 So.2d 572 (Fla. App. 1973), *appeal dismissed without opinion,* 286 So.2d 206 (1973).

[114] The existence under certain circumstances of enforceable prescriptive rights in the public to sand beaches was recognized by the Florida court in City of Daytona Beach v. Tona-Rama, 271 So.2d 765 (Fla. App. 1972).

[115] 281 So.2d at 573.

[116] *Id.* at 576, following NAACP v. Button, 371 U.S. 415 (1963).

[117] *Id.* at 577.

[118] 392 U.S. 83 (1968).

[119] Fla. Const. art. I, § 21 (1968). The previous provision had extended judicial relief to cases involving injury to " . . . lands, goods, person or reputation." Fla. Const. art. I, § 4 (1885).

[120] 281 So.2d at 574.

[121] *Id.* at 575.

[122] In Save Our Bay, Inc. v. Hillsborough County Pollution Control Commission, 285 So.2d 447 (Fla. App. 1973), the court gave plaintiff standing to seek injunctive relief against defendant for failing to follow up its water pollution abatement orders, under the statute described *supra*, n. 110.

[123] Note in this connection Sax, *Takings, Private Property and Public Rights,* 4 ENV. L. REV. 467 (1973), where the author argues for an expanded concept of public rights in environmental resources which should be weighed in each case with private property rights.

[124] Prosser, *supra* n. 11, at 572.