Recent Development

Environmental Law — WATER POLLUTION — A corporation operating outside the forum state is liable to the state in which the trial court sits under the forum state's standards for the pollution of interstate waters.—*State ex rel. Scott v. Inland Steel Co.*, 72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975).

In *State ex rel. Scott v. Inland Steel Co.*,[1] the Cook County Circuit Court found Inland Steel Company, a Chicago-based company operating in Indiana, guilty of interstate water pollution and fined the company $1,905,000, plus $1,000 a day, until the company files an abatement plan acceptable to the State of Illinois and the Metropolitan Sanitary District of Greater Chicago (MSD).[2] Although in deciding *Inland Steel*, the Illinois trial court addressed the issue of subject matter jurisdiction, it did not turn its attention to the more specific issues of whether the state court was itself the proper arbiter or whether the damages should have been mitigated due to the polluter's compliance with other pertinent environmental standards.

The action was originally filed by the MSD in 1967 and was consolidated with one brought in 1972 by the Attorney General of Illinois. The plaintiffs' complaint was in two counts, citing 235

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[1]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) (Memorandum Ruling). See CCH POLLUTION CONTROL GUIDE, NEWSLETTER 476 (Sept. 15, 1975).

[2]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 18. Illinois Attorney General William J. Scott was quoted as calling the decision a "crucial legal precedent" and saying that the ruling "will determine whether we can stop destruction of the south end of the lake." Hammond Times, Sept. 11, 1975, at 43, col. 1. The Chairman of the Board of Inland Steel, Frederick G. Jaicks, reacted to the decision in the following statement:

> It calls for technology which doesn't exist. We remain convinced the state did not prove its contention that Inland's waste waters have adversely affected the drinking water of the City of Chicago or any other use of Lake Michigan. In addition, we believe there is no logical basis for the exorbitant punitive penalty assessed against us.

98 CCH POLLUTION CONTROL GUIDE, NEWSLETTER 476 (Sept. 15, 1975). Referring to another Indiana pollution case Attorney General Scott had entered, Indiana Attorney General Theodore L. Sendak said, "[O]fficials have their hands full in their own states without getting involved in the problems of other states." Hammond Times, Sept. 11, 1975, at 43, col. 1.

pollution violations.[3] First, plaintiffs alleged that Inland's discharges move into Illinois waters of Lake Michigan. Secondly, the plaintiffs asserted that the discharges endanger the drinking water drawn by the City of Chicago from its South Water Filtration Plant. The plant is located 8½ miles from Inland's Indiana Harbor Works. Inland denied that the discharges endanger the health of Chicago area citizens by contaminating their drinking water or in any other way. Further, the company contended that there was no good evidence that the discharges reach Illinois waters or that the lake is harmed by the types of materials discharged. Plaintiffs claimed that four types of the effluents actually harm Illinois waters: oil, ammonia, suspended solids, and phenol. Those wastes amount to a daily average of 924 million gallons.[4] Inland specifically contested the charge in each category.[5]

Despite the lapse of time since the MSD suit was filed in 1967, an out-of-court settlement was not reached. The MSD and the attorney general demanded that Inland recycle all of the billion gallons used each day, whether for processing or cooling, through an anti-pollution system. Inland resisted the provision for a comparatively lower discharge limit than that already accepted by Illinois in its settlement with Youngstown Sheet and Tube Company.[6]

After evaluating the voluminous technical evidence,[7] trial Judge Cohen ruled that Inland violated the Illinois Environmental Protection Act.[8] He fined the company $10,000 for the initial violation and $1,000 a day from July 1, 1970, the date the Act took effect.[9] In addition, Judge Cohen set daily maximum discharge limits for solids and oil. Daily discharges of phenol, ammonia, and cyanide were set at 1½ times the amount permitted

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[3]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 18.

[4]Chicago Sun-Times, Sept. 10, 1975, at 73, col. 1.

[5]Inland Steel Company, Chicago, Ill., Press Release, Sept. 8, 1975.

[6]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 17. The settlement between the State of Illinois and Youngstown Sheet and Tube Company (located next to the Inland Steel plant) was the first case in which one state has been able to get a court-enforced commitment by a major industry in another state to stop polluting. 45 CCH POLLUTION CONTROL GUIDE, NEWSLETTER 654-55 (Sept. 9, 1974).

[7]The court found liability when it was presented with factual evidence in the form of satellite photographs, infrared imagery, aerial surveys, and voluminous testimony. The state's objective was to show the trail of a plume from the canal reaching into Illinois waters visually, thermically, and chemically. Chicago Tribune, Sept. 10, 1975, at 2, col. 6.

[8]ILL. ANN. STAT. ch. 111½, §§ 1001-1051. (Smith-Hurd Cum. Supp. 1975-76).

[9]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 18.

under the Youngstown Sheet and Tube Agreement.[10] In spite of a significant reduction in effluent discharges made by Inland between 1967 and 1974, the court also assessed damages of $1,905,000 up to September 8, 1975.[11] Although Inland's representatives stated that the treatment effort had cost $36 million, Judge Cohen said that he ordered a large fine and $1,000 per day thereafter to the date such violations cease because "a lesser fine would have a slight impact and provide little incentive to correct the abuses or to deter the incessant, relentless continuation of such abuses."[12]

At the threshold of its opinion, the trial court expressed the importance of the jurisdictional issue.[13] As the trial court stated, "the crucial issue in this case is whether Illinois law may be enforced to abate the pollution of interstate waters."[14] The court's response was to hold that it did indeed have jurisdiction and that the Federal Water Pollution Control Act[15] had not preempted the field.

In support of its holding, the court cited the United States Supreme Court decision in *Illinois v. Milwaukee,*[16] which stated that the pollution of interstate waters could constitute a nuisance under federal common law.[17] Therefore, the trial court's exercise of jurisdiction was not found inconsistent with federal enforcement powers under the Water Pollution Control Act,[18] because that statute does not necessarily form the outer limits of pollution laws. Indeed, the Supreme Court in *Milwaukee* stated that "a State with higher water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."[19]

The trial court's holding also conforms to the decision in *United States v. Ira S. Bushey & Sons.*[20] In that case the federal

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[10] *Id.* at 20.

[11] *Id.* at 18.

[12] *Id.* at 19.

[13] *Id.* at 2.

[14] *Id.*

[15] 33 U.S.C. §§ 1154-55 (1970).

[16] 406 U.S. 91 (1972). Illinois' bill to invoke the original jurisdiction of the Supreme Court was denied without prejudice by the Court which held that the appropriate federal district court had jurisdiction under 28 U.S.C. § 1331(a) (1970) to give relief against the nuisance of interstate water pollution and was therefore the proper forum for litigation on the issues therein involved.

[17] *Id.* at 98-101.

[18] 33 U.S.C. §§ 1154-55 (1970). This Act tightens control over discharges into navigable waters so as not to lower other applicable water standards.

[19] 406 U.S. at 107.

[20] 346 F. Supp. 145 (D. Vt. 1972). This case summarizes the use of the federal common law of nuisance in assisting in anti-pollution enforcement. *See*

district court relied on " 'poor old nuisance' as a legal theory useful in the resolution of pollution conflicts involving interstate or navigable waters."[21] Relying on *Bushey*, the trial court thus held that the Federal Water Pollution Control Act did not preempt Illinois' right to seek an abatement of the defendant's pollution.[22]

The court found further support for its exercise of jurisdiction by concluding that Illinois' interests in bringing the action were as compelling as those of the Federal Government. The authority for the court's position is the District Court for the Northern District of Illinois' decision in *United States ex rel. Scott v. United States Steel Corp.* [23] The court in *United States Steel* held that it had jurisdiction under 28 U.S.C. § 1331(a) to hear the Federal Government's and Illinois' suit under the federal common law of nuisance to enjoin the steel company's waste water discharge into Lake Michigan.[24] The Federal Government's proprietary interest in protecting navigable waters conferred standing upon it to sue. Illinois was found to have a protectable interest as well, in that Illinois wished to safeguard the purity and recreational value of Lake Michigan; therefore it had standing to sue under the federal common law of nuisance to enjoin the steel company's waste water discharge.[25]

An additional bulwark for the trial court's holding was *Texas v. Pankey*.[26] In *Pankey* the Tenth Circuit Court of Appeals said:

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.[27]

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also Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 331 (1967); Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1451-56 (1972).

[21] 346 F. Supp. at 149.

[22] 72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 2. *See* Illinois v. Milwaukee, 406 U.S. 91 (1972). See Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972), for the state of the problem as it existed prior to the *Illinois v. Milwaukee* case.

[23] 356 F. Supp. 556 (N.D. Ill. 1973).

[24] *Id.* at 558.

[25] *Id.*

[26] 441 F.2d 236 (10th Cir. 1971).

[27] *Id.* at 240.

Inland Steel pointed out, however, that the cases cited by the court in support of its jurisdiction were inappropriate inasmuch as those cases dealt only with the situation in which the action was prosecuted in federal court under federal common law. The cases cited by the court did not deal with the issue of whether federal standards, either under the Water Pollution Control Act or federal common law, preempted conflicting state standards. The court refuted this argument by relying on *Ohio v. Wyandotte Chemicals Corp.*[28] In that case, the Supreme Court, declining to exercise its jurisdiction said:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest.[29]

The Illinois trial court's opinion, nevertheless, ignores the Supreme Court's construction of *Wyandotte* given in *Illinois v. Milwaukee.*[30] The *Milwaukee* Court said that federal policy is " 'to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution.' But the Act [Water Pollution Control Act] makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters."[31] A footnote with regard to the Act then points out that the contrary indication in *Wyandotte* was based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law of nuisance.[32] Thus, the trial court relied on a case with very tenuous precedential value. The frailty of the trial court's holding on the jurisdictional issue undermines the propriety of entertaining this cause of action as a vehicle for applying a local set of pollution control standards against a corporation operating under the guidelines of the locality in which it is located.

The discrepancy among the standards for pollution control is most readily apparent in the section of the Illinois trial court's opinion concerned with the imposition of penalties. One of the factors which should have had an effect upon the computation of penalties would have been a showing of compliance by the defend-

[28] 401 U.S. 493 (1970) (suit for abatement of a nuisance due to contamination and pollution of Lake Erie by means of its tributaries).

[29] *Id.* at 500.

[30] 406 U.S. 91 (1972).

[31] *Id.* at 102.

[32] *Id.* at 102 n.3.

ant with federal and Indiana standards. Therefore, a review of those standards would have been in order; nevertheless, the trial court chose not to address their relevance.

The Federal EPA had approved Inland's current and proposed pollution control programs shortly before the trial court decision. Inland believed the permit granted was the first such issued to a steel mill on the Great Lakes.[33] The second set of standards which the trial court did not consider were those set by the Indiana Stream Pollution Control Board.[34] The Federal EPA granted Indiana's request for approval of its program for controlling discharges of pollutants into navigable waters in accordance with the National Pollutant Discharge Elimination System (NPDES), pursuant to the Federal Water Pollution Control Act.[35] The Act establishes a permit system under which the Administrator of the Federal EPA may issue permits for the discharge of any pollutant, upon condition that the discharge meets the applicable requirements of the Act.

In spite of the existing federal and Indiana standards, the Illinois trial court elected to apply those of the Illinois statute.[36] This decision was made without consideration of the acceptance by the federal and Indiana regulatory agencies of Inland's facilities and programs and the consideration given by those agencies to Illinois water quality standards protecting Lake Michigan and the drinking water supply of Chicago.

Furthermore, the resulting pollution restrictions for Inland are proportionately higher than those allowed in the out-of-court settlement between Illinois and Youngstown Sheet and Tube Company.[37] Inland, therefore, argued in the trial court that the standard imposed upon it was discriminatory since Inland's production is nearly three times that of Youngstown's, and the Youngstown facility is thereby given a preference and competitive advantage. The trial judge responded that

> Inland cannot regard its vast size as a valid reason for the discharge of pollutants on a proportionate basis. . . . Moreover, it is a fundamental principle of fairness that

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[33]Chicago Tribune, Sept. 10, 1975, at 2, col. 6.

[34]*See* CCH POLLUTION CONTROL GUIDE ¶ 19,532 (1975).

[35]33 U.S.C.A. § 1342(b) (Cum. Supp. 1976).

[36]Inland was allowed a maximum daily discharge of solids, 9,300 pounds, and of oil, 5,950 gallons.

> The maximum daily discharges of phenol, ammonia and cyanide permitted shall be 1½ times the daily maximum amounts of these pollutants permitted to be discharged under the Youngstown agreement in its out-of-court settlement.

72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 20.

[37]CCH POLLUTION CONTROL GUIDE, NEWSLETTER 654-55 (Sept. 9, 1974).

> the greater the power, the greater the responsibility to prevent such power from injuring others.[38]

By applying its own set of standards for pollution control, the trial court satisfied itself that Inland was liable under the Illinois statute.

It is interesting to note a statement made by Ira Markwood, director of the Illinois EPA's public water supply division, in which he said that the drinking water regulations adopted by the Illinois Pollution Control Board should meet the requirements of the Federal Safe Drinking Water Act requirements.[39] According to Mr. Markwood, the Illinois regulations "are very close to what probably will be required by the Act [Water Pollution Control Act]."[40] In addition to raising a reasonable doubt about the trial court's determination that Inland was in violation of the Illinois Environmental Protection Act, Mr. Markwood's comment also brings up the point of the propriety of the trial court's imposition of damages.

Because of Inland's position as the largest integrated steel plant in the world, it is difficult to compare meaningfully its fine with those imposed on other corporate polluters. However, when compared with previous fines imposed by the Illinois EPA,[41] the attorney general's request for damages from 1967 seemed to Inland to be imbued with a punitive character. The Illinois Act,[42] the defendant contended, was not intended to be so construed. As stated in the opinion of the trial court,

> Defendant further maintains that the Attorney General is seeking to punish Inland because it refused to accept the settlement on the terms offered by the Attorney General and chose instead to defend itself at trial.[43]

Upon hearing the arguments, the court held that discovery and basic proof must be limited to matters which followed the effective date of the Illinois Act, July 1, 1970. The MSD case, filed in 1967, became truly active when it was consolidated in the court with the State's case, filed in January, 1972. As the court found the defendant to have been in constant violation of the Act since the effective date, it levied a fine totalling $1,905,000.

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[38] 72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975), at 15.

[39] 5 BNA Envir. Rptr. 1695 (Nov. 1974—Apr. 1975).

[40] *Id.*

[41] *See* 4 BNA Envir. Rptr. 898-99 (May 1973—Nov. 1973).

[42] ILL. ANN. STAT. ch. 111½, § 1012(a) (Smith-Hurd Cum. Supp. 1975-76).

[43] 72-CH-259, 67-CH-5682, (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 13.

The court then addressed the matter of the imposition of penalties. Citing *Reserve Mining Co. v. United States,*[44] the court vested the defendant's officers and directors with the responsibility of insuring an abatement of pollution to the extent required by the decree. *Reserve Mining* is also relevant to *Inland Steel* in a way not recognized by the trial court. The *Reserve Mining* court understood that it did not have the expertise to prescribe the precise scientific processes to be used. In its ruling, however, the Illinois trial court ignored the point in the *Reserve Mining* case which addressed itself to the crucial and equitable balancing of the health and environmental demands of society at large against the economic well-being of those parties and local communities immediately affected.[45] Since Inland employs more than 23,000 persons, pays $410 million in wages and pays taxes to the State of Indiana of almost $12 million a year,[46] it would seem that the Federal EPA in conjunction with the Indiana Stream Pollution Control Board would be the authorities best able to provide the equitable judgment necessary on behalf of the public-interest groups and others directly involved.[47]

The trial court substantiated its ruling with case law on the issues confronted. However, the use of the Illinois forum does not do justice to the more imperative socio-economic interest of the parties more directly involved with the pollution nuisance. Indiana, its communities and interest groups have already made a value judgment of the pollution's impact environmentally and economically on the community. Expertise, political considerations, and analysis of normative goals all contributed to the formulation of Indiana standards in the first place. Therefore, the responsibility for judging the relative value in such a decision on either an economic or environmental plane should be vested in an authority which can be attuned to the conflicting interest groups' needs.

Besides establishing a precedent of extreme punitive damages, the most important impact of this case on the development of water pollution law is that it highlights and adds to the proliferation of water pollution standards. Compliance with the law by industry is, therefore, that much more difficult to accomplish. Perhaps the solution was stated in *Dunlap Lake Property Owners Association v. City of Edwardsville:*[48]

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[44]498 F.2d 1073 (8th Cir. 1974).

[45]*Id.* at 1077.

[46]72-CH-259, 67-CH-5682, (Cir. Ct. Cook County, Ill., Sept. 8, 1975), at 15.

[47]For analogous underlying political motives, see Green, *Obstacles to Taming Corporate Polluters: Water Pollution Politics in Gary, Indiana,* 3 ENVIORONMENTAL AFFAIRS 199 (1974).

[48]22 Ill. App. 2d 95, 159 N.E.2d 4 (1959).

> Pollution of public waters of this State is a matter of public concern; but its control and abatement are best left to the specialized agency therewith concerned except in cases of flagrant and obvious pollution.[49]

It was the Illinois trial court's perogative to supersede the Federal EPA's and the Indiana Stream and Pollution Control Board's judgmental expertise with its own conclusion that this case was one of flagrant and obvious pollution. However, Justice Harlan's conclusion in *Ohio v. Wyandotte Chemical Corp.*[50] was worthy of consideration in deciding the *Inland* case:

> To sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, an element which is evidently totally lacking in this instance.[51]

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[49] *Id.* at 96, 159 N.E.2d at 6.
[50] 401 U.S. 493 (1971).
[51] *Id.* at 504.