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TRENDS IN ENVIRONMENTAL LAW

ROGER H. DUSBERGER*

During its 1979-80 term, the United States Court of Appeals for the Seventh Circuit issued opinions in six environmental cases, certain of which may be expected to have a profound future impact on this ever expanding area of the law. The primary issues addressed in these decisions involved the federal common law of nuisance governing pollution,1 state intervention in a federal enforcement action,2 federal regulation of intrastate dredge and fill activities,3 and the attainment designation process4 and state implementation planning process5 under the Clean Air Act.

FEDERAL COMMON LAW OF NUISANCE REVISITED AND ENLARGED

During its previous term, the Seventh Circuit held that the federal common law of nuisance was not preempted by the Federal Water Pollution Control Act6 and that the FWPCA did not limit the relief which may be granted in a nuisance action.7 During its 1979-80 term, the Seventh Circuit revisited this area of the law, issuing what appear to be two landmark decisions which substantially enlarge and render more comprehensive the federal common law of nuisance governing incidents of pollution.

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4. United States Steel Corp., v. USEPA, 605 F.2d 283 (7th Cir. 1979), cert. denied, 100 S. Ct. 710, reh. denied, 100 S. Ct. 1332 (1980).
5. Illinois v. USEPA, 621 F.2d 259 (7th Cir. 1980).
6. 33 U.S.C. §§ 1251-1376 (1976). The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1593-96 (1977), constitute the keystone of water pollution law today. Section 2 of the 1977 Act provides that while the Federal Water Pollution Control Act still may be cited, the full regulatory scheme is to be "commonly referred to as the Clean Water Act." However, since the Seventh Circuit referred almost exclusively in its 1979-80 term environmental decisions to the "Federal Water Pollution Control Act," the abbreviation FWPCA is used hereinafter.
City of Evansville v. Kentucky Liquid Recycling, Inc.

City of Evansville v. Kentucky Liquid Recycling, Inc., 8 involved an appeal from a district court dismissal of a damage suit brought by three Indiana municipal corporations 9 which arose out of the defendants' alleged pollution of the Ohio River from Kentucky. The primary question on appeal was whether the plaintiffs stated a claim over which the district court had jurisdiction. 10 The Seventh Circuit held that they had stated a valid claim under the federal common law of nuisance and that the district court had jurisdiction under 28 U.S.C. § 1331. 11 The district court's decision was affirmed in part, and reversed and remanded in part for further proceedings on the nuisance issue.

The plaintiffs alleged that Kentucky Recycling had discharged toxic chemicals into the sewer system of the co-defendant sewage district, and that the district had in turn discharged them into the Ohio River, from which the plaintiffs drew drinking water. The plaintiffs further alleged that as a result of these discharges they incurred unusual water treatment expenses. They sought to recover those expenses and sought punitive damages as well. The district court dismissed the plaintiffs' amended complaint for lack of federal jurisdiction.

On appeal, the plaintiffs asserted that jurisdiction existed on three separate grounds: (1) under 28 U.S.C. § 1331 relative to rights of action implied under (a) section 13 of the Rivers and Harbors Act, 12 (b) the FWPCA, and (c) the Safe Drinking Water Act; 13 (2) under the citizen suit provisions of the latter two statutes; and (3) under 28 U.S.C. § 1331 relative to a right of action under the federal common law of nuisance.

The Seventh Circuit first addressed the issue of whether section 13 of the Rivers and Harbors Act created either an implied or an express private right of action. The court held that it did not. In reaching this result, the Seventh Circuit began with the principle that "when Con-

8. 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980).
9. The plaintiffs were Evansville, Indiana, Evansville's water department, and Mount Vernon, Indiana. The defendants were Kentucky Liquid Recycling, Inc., three of its employees, and a local sewage district.
10. 604 F.2d at 1010.
11. Id. 28 U.S.C. § 1331(a) (1976) provides in pertinent part that:
The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, . . . and arises under the . . . laws of the United States.
13. 42 U.S.C. §§ 300f, 300g, 300h, 300i, 300j (1976).
The court noted recent Supreme Court decisions which had established a stricter standard for the implication of private causes of action than that previously enunciated by the Court.

Having thus acknowledged the need for a conservative approach, the Seventh Circuit considered the factors set forth by the Supreme Court in *Cort v. Ash*, for determining whether a private remedy is implicit in a federal statute not expressly providing one. In so doing, the court found that section 13 of the Rivers and Harbors Act appeared to benefit the public at large, rather than a class of municipalities such as the plaintiffs or their agents; that the legislative history cited by the parties was inconclusive; that the statutory framework of the Act suggested a congressional intent to grant primary enforcement authority to the Department of Justice rather than to create private rights of action; and that although traditionally such a cause of action as presented in this case has been left to state law, the area is not primarily the concern of the states.

The Seventh Circuit next focused its attention on the plaintiffs’ contention that private rights of action existed under the FWPCA to support their claims. It first considered their argument that an express right existed under the citizen suit authority in section 505 of the FWPCA. But, since the plaintiffs failed to give the statutorily required notice before filing their action, the Seventh Circuit, in agreement with the district court, held that their reliance on section 505 was misplaced.

14. 604 F.2d at 1011.
18. 422 U.S. 66 (1975). The four factors enunciated in *Cort* were: (1) whether the plaintiff was part of a class for whose special benefit the statute was enacted, (2) whether the legislative intent appears to create or deny a federal right in favor of the plaintiff, (3) whether the purported private right is consistent with the underlying purposes of the legislative scheme (statutory framework), and (4) whether the cause of action is one traditionally relegated to state law in an area basically reserved to the states, so that it would be inappropriate to infer a solely federal right. *Id.* at 78.
19. 604 F.2d at 1012.
20. 33 U.S.C. § 1365 (1976). Section 505 creates private rights of action for certain FWPCA violations, conditioned upon the service of 60 days advance notice upon the alleged violator, the United States Environmental Protection Agency, and the affected state, before such action may be commenced.
21. The court of appeals said in dicta that, even if the requisite notice had been given, section 505 would not have authorized the plaintiffs’ claim because it only allows citizen actions for al-
The citizen suit provisions of the FWPCA having thus been held inapplicable, the Seventh Circuit next considered whether any other right of action existed under the FWPCA to support the plaintiffs' claims. The court found that there was none. Noting that the plaintiffs failed to rely upon any particular provision of the Act, the court looked to section 301, which proscribes the discharge of any pollutant except in conformity with the requirements of the FWPCA. The court then returned to the four factors stated in Cort v. Ash to determine whether a private right of action could be implied under section 301.

The Seventh Circuit found an absence of any congressional intent to confer private rights of action upon particular classes of persons or to authorize rights additional to the citizen suit authority in section 505. Rather, it perceived the existence of 505 as demonstrating an intent to carefully channel public participation in the enforcement of the FWPCA, since that section requires advance notice and allows intervention if adequate government enforcement proceedings are filed. The court felt that the legislative history of 505 suggested that rights of action for money damages must be found outside the FWPCA. It further determined that a private right of action under section 301 would be inconsistent with the congressional purpose implicit in the FWPCA's statutory framework, which encourages public participation in enforcement through the citizen action provisions of section 505. Moreover, it found the FWPCA's general enforcement scheme to be adequate. It, therefore, held that the plaintiffs had not stated a claim under the FWPCA on which relief could be granted.

The Seventh Circuit next addressed the asserted existence of private rights of action and citizen suit authority under the Safe Drinking Water Act. However, it declined to undertake a detailed analysis of this argument, finding that with an exception not relevant here, the Act does not purport to regulate pollutant discharges, but instead attempts to insure that public water systems provide drinking water meeting minimal safety standards. Thus, the court of appeals could find no alleged present violations, that is, actions against persons “alleged to be in violation” of an effluent limitation, standard or administrative order, and does not authorize actions for past violations or the recovery of damages. 604 F.2d at 1014.

23. 604 F.2d at 1015.
24. Id.
25. Id. at 1016.
26. Id.
27. Id.
28. 42 U.S.C. §§ 300f, 300g, 300h, 300i, 300j (1976).
29. 604 F.2d at 1016. A public water system is defined in pertinent part by the Act to be “a
provision in the Act into which the defendants' alleged discharges even arguably fell.  

After determining that no cause of action existed under the Safe Drinking Water Act, the Seventh Circuit considered plaintiffs' final claim to a right of action under the federal common law of nuisance and to the existence of federal jurisdiction over such an action under 28 U.S.C. § 1331. It upheld both contentions. In so doing, the court interpreted the common law doctrine of nuisance governing pollution, formulated by the Supreme Court in *Illinois v. Milwaukee*, as extending to municipal or public corporations in actions for money damages. In that decision, the Supreme Court held that states have rights of action under federal common law for the abatement of pollution of interstate or navigable waters.

The district court in *City of Evansville* had strictly interpreted the decision in *Illinois v. Milwaukee* as being limited to states in actions to abate pollution, not to municipal corporations seeking money damages. On appeal, the Seventh Circuit conceded in *Evansville* that the plaintiffs were not seeking to represent the quasi-sovereign or ecological rights of the State of Indiana, but rather sought only to recover damages for the defendants' discharges of toxic chemicals into their drinking water supplies. Nevertheless, the Seventh Circuit ruled in favor of the plaintiffs, liberally interpreting the Supreme Court's reasoning in *Illinois v. Milwaukee*. The court of appeals concluded that the same reasons the Supreme Court found compelling when it formulated the nuisance doctrine were equally present where plaintiffs are public or municipal corporations which are required to spend public monies to eradicate the effects of pollution caused by acts performed in another state.

The Seventh Circuit found particularly persuasive the Court's observation in *Illinois v. Milwaukee* that federal common law has been fashioned "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic inter-

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30. 604 F.2d at 1016.
31. 406 U.S. 91 (1972). It should be noted that this case has no relation to the 7th Circuit decision, *Illinois v. Milwaukee*, referred to in note 7 and accompanying text supra.
32. *Id.* at 99. *Illinois v. Milwaukee* involved the alleged discharge of pollutants by the City of Milwaukee into the interstate waters of Lake Michigan, and its resultant effect on Illinois.
33. 604 F.2d at 1017.
34. *Id.*
35. *Id.* at 1018.
ests of federalism." Implicit in the Seventh Circuit's opinion in *City of Evansville* is the conclusion that similar federal interests exist in the pollution of the Ohio River, as the Supreme Court found to exist in the pollution of Lake Michigan.

Addressing the nature of the relief requested, the Seventh Circuit considered, but rejected, the defendants' argument that the plaintiffs' request for damages rather than injunctive relief precluded the district court's exercise of jurisdiction. The court found no authority for this position and could find nothing in the Supreme Court's opinion in *Illinois v. Milwaukee* that would establish a request for equitable relief as a requisite for maintaining a claim under the federal common law of interstate water pollution or that would support the conclusion that equitable relief is exclusive to a claim of that nature. Moreover, the court pointed out that the relief sought by a litigant is not ordinarily determinative of whether he has a cause of action, this question being "analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. . . ."

*City of Evansville* is significant for several reasons. The Seventh Circuit at once enlarged the federal common law of nuisance well beyond the factual basis on which the doctrine had been formulated by the Supreme Court in *Illinois v. Milwaukee*. Not only was the doctrine interpreted by the court of appeals as extending beyond the states to municipal or public corporate plaintiffs, but also the nature of the remedy available was extended beyond actions to abate nuisances to those for money damages. While the Seventh Circuit's decision thus extends the Supreme Court's statement of federal common law in *Illinois v. Milwaukee*, it nevertheless appears to be a natural extension of it, given that problems of interstate pollution appear to present federal questions upon which state statutes or decisions may not be conclusive, regardless of the character of the parties or the nature of the relief sought. This decision is but one step removed from the further extension of the doctrine to private party plaintiffs.

36. *Id.* at 1017-18, citing 406 U.S. at 105 n.6.
37. *See* 604 F.2d at 1018.
38. *Id.* at 1019.
39. *Id.* at n.32. *Cf.* *Illinois v. Milwaukee*, 406 U.S. 91, 107-08 (1972), in which the Supreme Court described suits under the federal common law of nuisance as follows: "[F]ederal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. . . . [T]hese will be equity suits in which the judgment of the chancellor will largely govern."
City of Evansville is also important for the court's analyses of implied rights of action and citizen suit authority under federal statutes. Indeed, it may well have been the court's finding of the inapplicability of these statutes that sparked its efforts to enlarge the federal common law of nuisance.

Illinois v. Outboard Marine Corp.

Later in its 1979-80 term, the Seventh Circuit again had occasion to consider the common law of nuisance and used the occasion to further enlarge the doctrine. In Illinois v. Outboard Marine Corp., the first of two consolidated appeals, the court held that a state has a federal common law cause of action for nuisance against an in-state pollution source to prevent pollution of interstate or navigable waters. It construed the term "navigable waters" as consisting of "both the territorial seas and purely intrastate waters having no necessary interstate impact," including "tributaries" of such waters. The Seventh Circuit reversed the district court's decision and remanded the case.

Outboard Marine was an appeal from a district court dismissal of an action for injunctive relief and civil penalties by the State of Illinois against Outboard Marine Corporation. The state alleged in its complaint that OMC had discharged highly toxic polychlorinated biphenyls from its Illinois manufacturing facility into Waukegan Harbor, a tributary of Lake Michigan, and into Lake Michigan, causing contamination at levels that damaged water quality and bird life, threatened the health and welfare of Illinois residents, and impaired the usefulness of the lake as a public water supply and place of recreation. The action was founded essentially upon the federal common law of nuisance and the FWPCA. The complaint sought injunctive relief to restrain OMC from further PCB discharges and to require it to study, remove, and dispose of PCB contaminated sediments and soil. The complaint also sought civil penalties.

The district court dismissed the State's complaint despite finding that federal jurisdiction existed for the nuisance count. It held that the count failed to state a claim upon which relief could be granted because

43. 619 F.2d 623 (7th Cir. 1980).
44. The second appeal will be discussed at text accompanying notes 87-99 infra.
45. 619 F.2d at 623-24.
46. Id. at 627.
47. Id. at 628.
48. Hereinafter referred to as OMC.
49. Hereinafter referred to as PCBs.
50. 619 F.2d at 624.
the case involved a controversy between two Illinois residents and because there was no allegation of injury to, or from, another state. As to the FWPCA claim, the district court held it had no jurisdiction, since Illinois had not given the required sixty days notice to the United States Environmental Protection Agency or the defendant. The state appealed.

Reversing the lower court's ruling, the Seventh Circuit based its decision on the "broad policy considerations" expressed by the Supreme Court in Illinois v. Milwaukee. As in City of Evansville, the court of appeals again found persuasive the Supreme Court's observation that federal common law has been fashioned "when there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." Responding to this, the Seventh Circuit in Outboard Marine specifically found that "[t]he nation has a basic overriding federal interest in interstate and navigable waters and in developing a uniform program of protecting these national resources from pollution." This interest, it said, had been made explicit by the FWPCA.

The Seventh Circuit next defined the scope of the federal interest so identified, based upon its interpretation of the Supreme Court's intent in Illinois v. Milwaukee. It noted that the Supreme Court had placed no significance on the fact that the pollution involved there came from an out-of-state source. It also noted the Court's observation that federal common law applies when dealing with air and water in their "ambient or interstate aspects." However, central to the Supreme Court's decision, in the opinion of the Seventh Circuit, were the Court's repeated expressions of intent "to extend the application of the federal common law to public nuisances caused by the pollution of either 'interstate or navigable waters.'" The Supreme Court's use of the term "navigable waters," with all of its "implications," was perceived by the Seventh Circuit as being not just a "careless . . . choice

51. Id.
52. Hereinafter referred to as the USEPA.
53. Section 505 of the FWPCA, 33 U.S.C. § 1365 (1976), authorizes citizens suits for certain violations of the FWPCA on the condition that no such suit be commenced absent 60 days advance notice to the USEPA, the state in which the violation occurred, and the alleged violator.
54. 619 F.2d at 626.
56. 619 F.2d at 625, citing 406 U.S. at 105 n.6.
57. 619 F.2d at 626.
58. Id.
59. Id.
60. Id.
61. Id. (emphasis added).
of words,”62 but rather a significant suggestion of the breadth of its holding.63

The Seventh Circuit, therefore, construed the term “navigable waters” to apply to “both the territorial seas and purely intrastate waters having no necessary interstate impact, including tributaries of interstate navigable waters.”64 It found support for this view in the FWPCA’s broad definition of the term,65 and in one of its own recent decisions where it concluded that when applying the federal common law of nuisance, a court should look to the policies and principles of the Act for guidance.66 The Seventh Circuit concluded that the Supreme Court in Illinois v. Milwaukee intended to provide more than a forum for controversies between states; it intentionally “established, under federal common law, a right in tort for the pollution of interstate and navigable waters.”67

In delineating the relationship between federal and state interests under the federal common law of nuisance, the Seventh Circuit in Outboard Marine observed that federal concerns are not merely with navigability but also with purity and quality of the waters, as indicated by the expanded concept of “navigable waters” in the FWPCA.68 The court further acknowledged that states also have a clear interest in clean water and, consistent with the national program of protecting federal waters, they should be “allowed to sue one who has committed the federal tort of polluting federal waters within a state or on which the state borders.”69 It admonished, however, that federal law governs, and that it should be uniform.70

The Seventh Circuit distinguished Reserve Mining Co. v. Environmental Protection Agency71 and Committee for Consideration of Jones Falls Sewage System v. Train,72 two court of appeals cases which held that the federal common law should not be applied to intrastate pollu-

62. Id.
63. Id. at 626-27.
64. Id. at 627. The court also found that tributaries of interstate navigable waters should be included. Id. at 628.
65. Id. at 627 n.14.
66. 619 F.2d at 627, citing Illinois v. Milwaukee, 599 F.2d 151, 164 (7th Cir. 1979). Additional support was found in the legislative history of the FWPCA, which had been interpreted as indicating a congressional intention to give the term “navigable waters” the broadest possible constitutional interpretation. 619 F.2d at 627 n.14.
67. Id. at 628.
68. Id.
69. Id.
70. Id.
71. 514 F.2d 492 (8th Cir. 1975).
72. 539 F.2d 1006 (4th Cir. 1976).
tion of navigable waters. The court noted that while these cases involved purely intrastate pollution, the difference in *Outboard Marine* was that all states bordering on Lake Michigan were affected, although only one, Illinois, had sued OMC. However, after drawing this distinction, the Seventh Circuit held that it was not controlling. It relied instead upon its interpretation of the Supreme Court's holding in *Illinois v. Milwaukee*, as not being restricted to interstate disputes. The court further relied upon certain other decisions which it felt approached the "edge of the question." It reasoned that "[f]or forbidding Illinois to invoke federal nuisance law [in *Outboard Marine*] would create the anomaly that three states bordering Lake Michigan may sue to prevent pollution emanating from Illinois, but Illinois itself may not bring such an action."

Clearly, the Seventh Circuit's determination of the first appeal in *Outboard Marine* is very significant and may be expected to have far-reaching effects. The court construed the doctrine of a federal common law of nuisance governing pollution, as applying both to in-state parties and in-state pollution. In reaching this result, it characterized as "federal waters" all interstate or navigable intrastate waters, including territorial seas, and waters having no necessary interstate impact and their tributaries. It found an overriding federal interest in protecting these waters from pollution, the practical significance of which it described as follows:

When a pollution controversy arises, it is immaterial whether there is a showing of extra-territorial pollution effects. The issue is whether

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73. 619 F.2d at 628. In Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975), the Eighth Circuit rejected a common law nuisance claim in a Minnesota case involving intrastate air pollution. In Committee for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976), the Fourth Circuit reached a similar result in a case involving the alleged pollution of an intrastate waterway.

74. 619 F.2d at 629.

75. *Id*.

76. *Id*, citing Stream Pollution Control Board v. United States Steel Corp., 512 F.2d 1036 (7th Cir. 1975), in which the Seventh Circuit held that the complaint stated federal questions in a situation involving the attempt by an Indiana administrative body to use federal common law to abate pollution of an Indiana tributary to Lake Michigan; United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973), in which the district court upheld a joint federal and State of Illinois action brought under the federal common law of nuisance to prohibit pollutant discharges into Lake Michigan, while noting the federal government's "undoubted right to . . . protect the navigable waters from pollution." *Id.* at 558; United States v. Ira S. Bushey & Sons, 346 F. Supp. 145 (D. Vt. 1972), *aff'd mem.* 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974), affirming the district court's refusal to dismiss the federal government's claim according to the federal common law of nuisance, despite the fact that the government's complaint failed to allege an interstate pollutant effect. The district court in *Bushey & Sons* said that the federal government may sue to protect the "national interest in the quality of air and water in their ambient or interstate aspects." 346 F. Supp. at 149.

77. 619 F.2d at 629.
the dispute is a matter of federal concern. When it is, as in this case, federal courts should be accessible. The effect of the federal common law of nuisance is to fill the statutory interstices and to provide uniformity in controlling water pollution in either interstate or navigable waters or [sic] the United States. There is no strain on federalism.78

*Outboard Marine* thus builds upon *City of Evansville*, the two decisions having potentially enormous significance in what may be the evolution of the federal common law of nuisance governing pollution. Read together, they tell us several things. First, while the federal interest in pollution control is held to be an overriding one, federal, state and local governments all are acknowledged to have a stake in such control and may seek relief in federal court. Second, the relief sought may be equitable or legal in nature. Third, the federal common law of nuisance applies to water pollution which is interstate in nature, as well as to that which affects purely navigable intrastate waters and their tributaries. Fourth, while these decisions, and the Supreme Court's decision in *Illinois v. Milwaukee*, all dealt with matters of water pollution, there is nothing in them that would appear to deny the federal common law of nuisance to situations involving other forms of pollution. And, fifth, the reasoning employed seems clearly supportive of the further application of the doctrine to suits brought by private parties.

One wonders what the eventual relationship will be between the federal common law of nuisance, on the one hand, and federal environmental statutory and regulatory law, on the other. The Supreme Court in *Illinois v. Milwaukee*, decided in 1972, suggested that the federal common law may in time be preempted by the federal statutory scheme.79 Since that time, however, a very comprehensive statutory program has been enacted by Congress and, in large part, implemented by USEPA and the states. Now, in 1980, the Seventh Circuit in *Outboard Marine* tells us that the federal common law of nuisance will "fill the statutory interstices and provide uniformity in controlling water pollution."80 However, judging from the broad scope of these decisions, as the doctrine continues to evolve, it may well become controlling.

The federal common law defined by *Evansville* and *Outboard Marine* has the potential of developing into a judge-made system of

78. *Id.* at 630.
80. *Id.* As a practical matter, it should be noted that the problem in *Outboard Marine* was not a "statutory interstice," but the plaintiffs' failure to give the required 60 days advance notice for citizen suits under the FWPCA.
pollution control separate and distinct from the federal statutory scheme. As it develops, rules laid down by the courts may or may not be uniform with those of the administrative planners. The Seventh Circuit in these cases held only that the plaintiffs had stated claims under the federal common law of nuisance. It did not determine whether nuisances were proved to exist. This practical application of the doctrine to the facts of each case was left to the district court. The standards to be used by the district court in making these determinations remain to be seen. The possibility obviously exists for judge-made standards under the common law system either to be more or less stringent than those set by USEPA or by state agencies. 81 One wonders whether, in rendering decisions on common law nuisance claims, judges will rely on administratively set standards promulgated under the statutory framework or will set their own standards, based upon supporting technical evidence admitted at trial, in deciding whether or not a particular situation constitutes a nuisance? 82 It remains to be seen how the technical evidence the courts consider will compare with the technical data considered by federal and state agencies in setting environmental standards and limitations. As to the direction the courts may take, it is worth noting Justice Douglas's comment in Illinois v. Milwaukee, concerning the nature of future common law actions for nuisance: “There are no fixed rules that govern . . . ; these will be equity suits in which the informed judgment of the chancellor will largely govern.” 83

As a final note, one apparent inconsistency exists between the Seventh Circuit's opinions in City of Evansville and Outboard Marine. Comparing the language used by the two panels, it appears that in Evansville, the earlier of the two cases, the court interpreted the federal common law of nuisance as being limited to incidents of interstate pollution, while in Outboard Marine it interpreted the doctrine as ex-

81. See Illinois v. Milwaukee, 599 F.2d 151, 175-77 (7th Cir. 1979), in which the Seventh Circuit held that the FWPCA does not limit the relief that may be ordered under the federal common law of nuisance, but further held that the evidence admitted in that case was sufficient only to support part of the relief ordered (the elimination of overflows), and reversed as to the remaining relief (requirement to upgrade the treatment level to better than secondary treatment).

82. See Illinois v. Milwaukee, 406 U.S. 91, 107 (1972), in which the Supreme Court seemed to anticipate this problem, stating: “While federal law governs, consideration of state standards may be relevant . . . . Thus, a State with high 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.” In Outboard Marine, the Seventh Circuit interpreted the Supreme Court as having envisioned a “uniform floor,” whereby a state with pollution control standards more stringent than those of a neighboring state could enforce those standards under the federal common law of nuisance respecting interstate pollution. 619 F.2d at 628 n.16.

83. 406 U.S. at 107-08.
tending to incidents of purely intrastate nature. On at least seven occasions, the court identified the doctrine either as the “federal common law of nuisance governing interstate water pollution” or the “federal common law of interstate water pollution.” In four of those instances, it attributed the doctrine, as so identified, to the Supreme Court’s opinion in *Illinois v. Milwaukee*. Consistent with the fact that *Evansville* involved an interstate dispute, the Seventh Circuit’s express references to the doctrine appear to evidence a perception that, as formulated by the Supreme Court, it applied only to interstate pollution. Later, during the same term, the Seventh Circuit in *Outboard Marine* referred to the doctrine as a “federal common law of nuisance,” and specifically interpreted it as applicable to intrastate waters and their tributaries. While the case involved the alleged pollution of Lake Michigan, an interstate body of water, the court said that this fact was not controlling. Interestingly, although the cases were rendered during the same term of court, and both dealt with the federal common law of nuisance, the court in *Outboard Marine* never cited its earlier decision in *Evansville*.

**STATE INTERVENTION IN FEDERAL ACTIONS**

*Illinois v. Outboard Marine Corp.*

The second appeal in *Illinois v. Outboard Marine Corp.* involved a district court denial of a motion by the State of Illinois to intervene in a suit brought by the United States against OMC, for conduct similar to that involved in the first appeal. The Seventh Circuit reversed and remanded, holding that the State had a right to intervene in the federal suit.

Coincident with the State suit involved in the first appeal, the United States filed a complaint against OMC in the same district court, also alleging PCB discharges into the same three water bodies. The action was brought under the Refuse Act, the FWPCA, and the federal common law of nuisance. The complaint sought to enjoin further PCB contamination by requiring OMC to dredge and dispose of the contaminated sediments, and further sought civil penalties. The case was assigned to the same district judge as was handling the first suit.

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85. *See* id. at 1017-18.
86. 619 F.2d at 625.
87. *Id.* at 624, 632.
The State of Illinois subsequently moved to intervene in the federal action, contending in essence that a statutory right to intervene exists under the citizen suit provisions of section 505(b)(1) of the FWPCA. The district court denied the motion and the State appealed.

In support of its holding that intervention was proper, the court of appeals first observed that Federal Rule of Civil Procedure 24(a)(1), allows intervention "when a statute of the United States confers an unconditional right to intervene." The court turned to section 505(b)(1) of the FWPCA, which provides that "any citizen may intervene as a matter of right" in any action which USEPA or a state is "diligently prosecuting . . . to require compliance with [a] standard, limitation, or [administrative] order" under the FWPCA. It construed the words "citizen" in 505(b)(1) to mean a person having an affected interest, and "person" to include a state. It further construed the terms "standard" and "limitation" to include any unlawful act under section 301(a) of the FWPCA, the section which prohibits the discharge of any pollutant absent compliance with the FWPCA. Finally, the court of appeals observed that the United States had charged in its complaint that OMC's continuing discharge of PCBs was not in compliance with the permit issued to it under section 402 of the FWPCA, and that, therefore, the discharge violated section 301(a). Pursuant to this line of reasoning, the court held that the requirements of section 505(b)(1) had been met, and that the state was entitled to intervene as a matter of right.

The Seventh Circuit then considered, but rejected, OMC's argument that no violation of section 301(a) could occur absent the inclusion in OMC's NPDES permit of a standard or limitation promulgated by USEPA. The court acknowledged that the appeal involved the alleged violation of OMC's permit rather than a violation of a standard. However, citing an earlier decision, the court said that "promulgation of a separate effluent standard or limitation is not a prerequisite to enforcement of a permit under [section 402]."

90. 619 F.2d at 631.
92. 33 U.S.C. § 1342 (1976). This section authorizes the issuance of a National Pollution Discharge Elimination System permit for the discharge of any pollutant, on condition that the discharge will meet all applicable requirements of the FWPCA and conditions set by USEPA. Hereinafter such permit is referred to as an NPDES permit.
93. 619 F.2d at 631.
94. Id.
95. See United States Steel Corp. v. Train, 556 F.2d 822, 854-55 (7th Cir. 1977).
96. 619 F.2d at 631.
The court next summarily rejected OMC’s argument that the State’s intervention was barred by its recent holding in *City of Evansville v. Kentucky Liquid Recycling, Inc.*,97 that the citizen suit authority in section 505 of the FWPCA “does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages.”98 The court, finding that the State’s appeal involved current PCB pollution, responded that *City of Evansville* does not forbid intervention where violations are of a continuing nature or may arise in the future.99

The Seventh Circuit’s decision in the second appeal in *Outboard Marine* is significant in that it appears to be one of first impression for the interpretation of the FWPCA as allowing state intervention in a federal enforcement action for violation of an NPDES permit. The court reached this result, despite the fact that the express language of section 505 is directed to actions requiring compliance with an effluent standard or limitation, or an administrative order, rather than to those involving NPDES permit enforcement. This point was raised on appeal by OMC and rejected by the court. Not only will the decision stand as precedent for future state efforts to intervene in federal enforcement actions, but it will also broaden the scope of section 505 respecting intervention by private citizens. Clearly, the decision opens a new avenue for citizen participation in NPDES permit enforcement actions.

Lastly, the decision leaves unanswered the question whether state intervention is permissible in federal actions brought under the federal common law of nuisance. The government’s complaint in *Outboard Marine* was founded upon the Refuse Act, the FWPCA, and federal common law. However, the court of appeals’ decision was based exclusively upon its interpretation of the FWPCA as authorizing intervention as a matter of right under its citizen suits provision. The court declined to consider the two other bases advanced by the government. Thus, the decision does not speak to intervention in a strictly federal common law context where the issue, presumably, would be one of permissive intervention.

97. 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980).
98. Id. at 1014.
99. 619 F.2d at 631.
REGULATION OF INTRASTATE DREDGE AND FILL ACTIVITIES

*United States v. Byrd*¹⁰⁰ involved an appeal from an order granting the plaintiff United States' motion for summary judgment and from the judgment entered thereon, permanently enjoining defendant Donald Byrd and two other defendants "from placing any fill or other material of any kind into the waters of the adjacent or contiguous wetlands of Lake Wawasee, Indiana" absent a valid dredge and fill permit issued by the United States Army Corps of Engineers.¹⁰¹ Only defendant Byrd appealed. The Seventh Circuit affirmed, holding that the Corps could constitutionally exercise its permit-issuing authority over wetlands adjacent to intrastate lakes that are used by interstate travelers,¹⁰² and that the requirement of obtaining a Corps permit did not constitute a non-compensated taking of property under the fifth amendment.¹⁰³

The FWPCA prohibits the discharge into the waters of the United States of any "pollutant," including dredged soil, rock, sand and cellar dirt, absent *inter alia* an appropriate permit.¹⁰⁴ Section 414¹⁰⁵ authorizes the Corps to issue permits for the discharge of dredged or fill material. Pursuant to this authority, beginning in 1975, the Corps issued regulations setting forth a three-stage time schedule for asserting its permit authority.¹⁰⁶ Phase II of that schedule, the only one relevant here, was to become effective on July 1, 1976. It extended the Corps' authority to discharges of dredged or fill material into intrastate lakes used by interstate travelers for water-related recreational purposes and to fresh-water wetlands adjacent to such lakes.¹⁰⁷ However, the Corps' permit regulations also included an exception allowing any phase of the permit program to be advanced in time if the Corps District Engineer determined that water quality considerations dictated such action.¹⁰⁸

Byrd owned land bordering Lake Wawasee, a large fresh water lake used by interstate travelers and seasonal residents for water-related recreational purposes. Prior to June 15, 1976, he and other lakeshore landowners engaged in landfill projects to convert swamps

100. 609 F.2d 1204 (7th Cir. 1979).
101. Hereinafter referred to as the Corps.
102. 609 F.2d at 1210.
103. Id. at 1211.
107. See 33 C.F.R. 209.120(d)(2)(i)(g) and (h)(ii)(c) (1977).
bordering the lake into land suitable for residential development. These projects were performed without a Corps permit.

Because Byrd and other landowners began to accelerate their fill projects around Lake Wawasee prior to the effective date of Phase II of the Corps' regulations, the District Engineer held that the cumulative effect of their activities would threaten area wildlife and water quality. He therefore accelerated the Corps' authority over Lake Wawasee and its wetlands. On June 15, 1976, Byrd was notified to halt work on the projects until he obtained a Corps dredge and fill permit. Instead, he continued and on June 24, was notified again. Believing that the Corps had no jurisdiction until July 1, the original date of the Phase II program, he again accelerated his efforts. On June 28, 1978, the Government filed for an injunction in the district court. After the entry of a preliminary injunction, the Government moved for and was granted summary judgment and a permanent injunction prohibiting further landfill activity absent a Corps' permit.

On appeal, Byrd argued for the first time that Congress and the Corps lacked authority under the commerce clause of the United States Constitution to regulate activities on and around Lake Wawasee, an in-state body of water, even if the lake were used by interstate travelers for recreational purposes. Specifically, he challenged "the extension of federal power to a non-commercial entity which is not included in the traditional definition of navigable waters which may be controlled by the federal government."

The Seventh Circuit rejected Byrd's argument, finding first that the FWPCA defines the term "navigable waters" as meaning "the waters of the United States, including the territorial seas." It next found that the legislative history of the FWPCA established that Congress desired to give the term "navigable waters" the broadest possible constitutional interpretation, and that the term has been held to mean "all the waters within the geographic confines of the United States." Given this congressional intent, the court of appeals went on to note that the Constitution's grant of power to Congress under the commerce clause "has

109. 609 F.2d at 1208.
110. Id.
111. U.S. CONST. art. I, § 8, cl. 3 grants Congress power to:
    [R]egulate Commerce with foreign Nations, and among the several States, and with the
    Indian Tribes.
112. 609 F.2d at 1209.
114. 609 F.2d at 1209, citing United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th
    Cir. 1974).
come to mean that Congress may regulate activities which affect interstate commerce," particularly if such activities exert a "substantial economic effect on interstate commerce.")

Based upon this analysis, the Seventh Circuit determined that although Byrd’s activities were local, they could potentially exercise a substantial economic effect on interstate commerce, in that the destruction of the wetlands around Lake Wawasee "could significantly impair the attraction the lake holds for interstate travelers by degrading the water quality of the lake, thereby indirectly affecting the flow of interstate commerce." The court therefore concluded that under the commerce clause, Congress could constitutionally extend its regulatory control of navigable waters to wetlands which adjoin or are contiguous to intrastate lakes used by interstate travelers for water-related recreational purposes as defined by the applicable Corps regulation. It further found that the Corps regulations were reasonably related to congressional purpose as expressed in the FWPCA: the restoration and maintenance of the chemical, physical, and biological integrity of United States’ waters.

The Seventh Circuit next considered, but rejected, Byrd’s argument that the requirement that he obtain a Corps dredge and fill permit was tantamount to a taking of his property without just compensation in violation of the fifth amendment. The court said that a taking may never occur if Byrd applies for the permit and the Corps issues one. It reasoned that if Byrd’s permit application were denied, the reasons would be disclosed, and that judicial relief could be sought at that time, if appropriate. The court observed that Byrd must first exhaust his administrative remedies before the issue may be raised.

The court’s opinion in United States v. Byrd is interesting, although not unique, as an illustration of the court’s reasoning in applying federal regulatory authority to purely intrastate activities, in light of

117. 609 F.2d at 1210.
118. Id.
119. Id.
121. 609 F.2d at 1211.
122. Id.
somewhat analogous reasoning in *Outboard Marine*. There, the Seventh Circuit was confronted with a dispute between parties located in the same state concerning the alleged pollution of a tributary to Lake Michigan, Waukegan Harbor, and the lake itself. While the court's decision was premised upon the federal common law of nuisance, it relied heavily upon the FWPCA and its legislative history in construing the term "navigable waters" to include territorial seas, and purely intrastate waters and their tributaries.

By way of comparison, the Seventh Circuit in *Byrd* was confronted with dredge and fill activities in wetlands adjacent to a purely intrastate lake. In applying the Corps' permit authority under the FWPCA, the court observed again that the term "navigable waters" was to be interpreted broadly. However, avoiding much of the extended reasoning involved in *Outboard Marine*, it simply found that "navigable waters" means all the waters within the geographic confines of the United States. Having thus established a federal interest, the Seventh Circuit turned to Byrd's commerce clause argument, finding that landfill activity had a "potential" economic effect through impairment, by water quality degradation, of the attraction that the lake held for interstate travelers.

**CLEAN AIR ACT: ATTAINMENT DESIGNATION PROCESS**

*United States Steel v. United States Environmental Protection Agency* involved a petition for review of the USEPA's nonattainment designation of certain portions of northern Indiana as not being in compliance with the national ambient air quality standards, under the Clean Air Act. The Seventh Circuit denied the petition, rejecting both substantive and procedural challenges to the designation by petitioners United States Steel Corporation and Youngstown Sheet and Tube Company, which operated steel works in the affected area.

Section 108(a)(1) of the Clean Air Act requires USEPA to publish a list of each common air pollutant which "may reasonably be anticipated to endanger public health or welfare." It must then establish for each such pollutant national primary and secondary ambient air quality standards, the attainment and maintenance of which are neces-

123. 619 F.2d 623 (7th Cir. 1980).
124. See text accompanying notes 64-70 supra.
125. 609 F.2d at 1210.
126. 605 F.2d 283 (7th Cir. 1979), cert. denied, 100 S. Ct. 710 (1980).
necessary to protect the public health and welfare. Prior to the Clean Air Act Amendments of 1977, the states were given primary responsibility for developing implementation plans to achieve these standards by 1975. However, when this deadline proved impossible to meet, Congress in the 1977 Amendments delayed it to 1982 and established a combined state and federal implementation process to designate those geographic areas in which the national ambient air quality standards were being exceeded for any listed pollutant. The designation of an area within a state as "nonattainment" imposes upon the state the obligation to include in its implementation plan more stringent provisions to achieve the national standards than those required for areas in which air quality already meets or exceeds the standards. Accordingly, dischargers in areas designated nonattainment may be subject to greater restraints.

Section 107(d)(1) of the Clean Air Act sets forth the combined implementation process which requires each state to submit to USEPA within 120 days of the effective date of the 1977 Amendments that state’s list of the attainment status of all air quality control regions within its boundaries for each listed air pollutant. Within sixty days thereafter, USEPA was required to promulgate each such list with whatever modifications it deemed necessary. Those designations normally would constitute final agency action.

Pursuant to the foregoing requirements, the State of Indiana submitted its designation list to USEPA, and USEPA subsequently published its own list of attainment designations based upon Indiana’s submissions. In so doing, Indiana listed, and USEPA accepted, the designation as nonattainment areas of those portions of northern Indiana in which the petitioners operated steel mills. Importantly, however, USEPA, in publishing its designation list, made its designations effective immediately, followed by a sixty-day public comment period. The petitioners and other interested parties submitted documents during the comment period. Subsequently, USEPA affirmed its

139. Id.
The petitioners first challenged USEPA's promulgation of the northern Indiana designation on procedural grounds, contending that it violated the procedural requirements of section 553 of the Administrative Procedure Act, which requires notice and comment prior to the effective date of final agency rules. This contention, however, was rejected by the Seventh Circuit on two grounds: (1) USEPA had "good cause" to "postpone" the required comment period under two specific exemptions contained in section 553, and (2) the court lacked jurisdiction under the Clean Air Act to reverse for USEPA's alleged procedural error.

As to the first ground, the good cause exceptions, the Seventh Circuit said that section 553 contains two such exceptions which apply when a regulation is made effective before notice and comment. The first, section 553(b)(B), allows notice and comment to be dispensed with altogether, upon an agency finding that "notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest." This, the court characterized as an "impracticality standard" and the narrower of the two exemptions. USEPA, in publishing its designation list for northern Indiana, stated, as one of its reasons for making its designations effective immediately, that Congress had established a "tight time schedule on the designation process" which would be "impractical and contrary to the public interest to ignore." However, despite the near identity between this reason and the requirements of section 553(b)(B), the Seventh Circuit found that the statement "does not reveal on which of the two [good cause] provisions the agency was relying," and went on to consider both sections.

Examining the Administrative Procedure Act, the Seventh Circuit

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142. 605 F.2d at 285-86.
144. 605 F.2d at 287.
145. Id. at 286.
147. 605 F.2d at 286.
148. Id.
found a congressional intent for the section 553(b)(B) exemption to operate when regular rulemaking procedures would interfere with congressionally imposed time constraints.\textsuperscript{149} The court found that USEPA and the states were confronted by “tight statutory deadlines” for the designation process under the Clean Air Act,\textsuperscript{150} that the process itself was very time consuming, and that any delay would continue the “seriously adverse health consequences of nonattainment.”\textsuperscript{151} For these reasons, it held that USEPA had “good cause” under the “impracticality standard” contained in section 553(b)(B) to exempt its designations from the general requirement of prior notice and comment.\textsuperscript{152} In so doing, however, the court specifically broke with the Third and Fifth Circuits, which had allowed challenges to the same general designation list under similar circumstances.\textsuperscript{153}

The Seventh Circuit next considered the exemption contained in section 553(d)(3) which it found to be separate from the first, and broader in scope, based upon differences in the language of the two provisions and their legislative histories.\textsuperscript{154} Characterizing the 553(d)(3) exemption as requiring a showing of “demonstrable urgency,” the court held that the showing had been made based upon its findings that any delay in USEPA’s designation “would run the risk of delaying the formulation of state implementation plans and the consequent health detriment of delayed nonattainment.”\textsuperscript{155}

The court’s second reason for rejecting the petitioners’ procedural challenges was that the Clean Air Act itself precluded reversal of USEPA’s action. Relying upon section 307(d)(9) of the Act,\textsuperscript{156} which contains specific prerequisites for the reversal of certain forms of administrative action on procedural grounds, the court held that none of

\begin{itemize}
  \item \textsuperscript{149} \textit{Id.} at 287.
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} \textit{Id.} at 287-88.
  \item \textsuperscript{152} \textit{Id.} at 288-89.
  \item \textsuperscript{153} \textit{Id.} at 289 n.11, citing United States Steel v. EPA, 595 F.2d 107 (5th Cir. 1979), in which the Fifth Circuit remanded USEPA’s nonattainment designations on the ground that good cause did not exist for its failure to follow notice and comment procedures under the Administrative Procedure Act, 5 U.S.C. § 553 (1970); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979), in which the Third Circuit left the designations in effect except for the two petitioners in that case. More recently, in New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980), the D.C. Circuit joined the Fifth and Third Circuits in remanding the designations. And, in Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980), the Sixth Circuit joined the Seventh in upholding them. Despite the conflict between the circuits, the Supreme Court already has denied \textit{certiorari} in the Seventh Circuit decision, and USEPA is said to be unlikely to seek \textit{certiorari} in the others because it would be more efficient to repromulgate the designations.
  \item \textsuperscript{154} 605 F.2d at 289-90.
  \item \textsuperscript{155} \textit{Id.}
  \item \textsuperscript{156} 42 U.S.C. § 7607(d)(9) (Supp. II 1978).
\end{itemize}
the prerequisites for reversal had been satisfied. In so doing, however, the court had to interpret broadly the specific list of administrative proceedings to which section 307(d)(9) is made applicable, finding that "[a]rguably these [nonattainment] designations fit within the subsection's application."

The Seventh Circuit next considered, but rejected, the petitioners' substantive challenge to USEPA's nonattainment designation. The petitioners had argued essentially that the challenged designation was overbroad geographically, and that its failure to identify a smaller area was arbitrary and capricious in that it was not supported by an adequate factual basis. The designation was based upon both monitoring data and modeling studies which the petitioners attacked on several grounds. The court rejected the contention that USEPA's modeling studies were outdated, because the record failed to demonstrate any subsequent improvement in emissions. Furthermore, the petitioners failed to raise this objection during the comment period on the designation.

The court also rejected the petitioners' own modeling studies, the gist of which was that other sources were the principal contributors to the recorded excesses in air quality. It concluded that the air quality in the affected area did not meet applicable standards, and that this was sufficient to support the designations regardless of the source of noncompliance.

Finally, the Seventh Circuit rejected the petitioners' contention that USEPA should have adopted the recommendation of a USEPA employee, made after reading a United States Steel research study, that the designated nonattainment area should have been smaller in size. The court held that the existence of "probable excesses" in air quality within the designated area, as found by USEPA and conceded by the particular employee in a report, was sufficient to support the nonattain-

157. 605 F.2d at 291.
158. Id. at 290 n.12. The list, contained in section 307(d)(1), 42 U.S.C. § 7607(d)(1) (Supp. II 1978), consists of 13 specific forms of proceedings plus the general category of "other actions as the Administrator may determine." The Seventh Circuit interpreted two of these as necessarily including nonattainment designations. 605 F.2d at 291 n.12.
159. 605 F.2d at 292.
160. Id. In rejecting this contention, the court relied upon USEPA's interpretation and treatment of the designation process as "defining areas with problematic air quality and not merely pinpointing those areas which contain problematic sources." Id. at 293. The court said that the petitioners erroneously viewed the process as defining those areas in which the principal offending sources are contained. Id. at 292.
161. Id. at 293.
ment designation.\textsuperscript{162}

Perhaps the most significant aspect of \textit{United States Steel} was the Seventh Circuit’s concern for the tight time schedule contained in the Clean Air Act for attainment designations and state implementation planning. The court also demonstrated a corresponding concern for what it found to be the adverse impact on human health of continued nonattainment. These two factors were expressed repeatedly in its discussion and rejection of the petitioners’ procedural challenges.\textsuperscript{163}

Interestingly, the Seventh Circuit demonstrated a clear impatience with what it perceived to be the petitioners’ efforts to block USEPA’s nonattainment designation on procedural grounds. Stating that the new deadlines contained in the Clean Air Act Amendments of 1977 represented a congressional concern for the “seriously adverse health impact of continued nonattainment,” the court said, “[I]ronically, much of the congressional concern over delays in meeting ambient air quality standards was directed at the failure of the petitioners in this case to reach compliance.”\textsuperscript{164} In support of this conclusion, the court excerpted a passage from a House Report on the 1977 Amendments,\textsuperscript{165} in which representatives of the steel industry, including one from United States Steel, testified that none of their plants had achieved compliance with the emissions limits in nonattainment areas during the original five-year period set for compliance. The passage ends with the comment from a representative of Inland Steel Co.: “It sounds terrible. But these are hard value money expenditures.”\textsuperscript{166}

Anticipating the possibility of at least a further two-year delay in achieving compliance if the petitioners’ procedural challenges were upheld, the Seventh Circuit said, “Given that the strict deadlines [in the 1977 Amendments] were intended to force compliance by U.S. Steel and others, we are hesitant to allow U.S. Steel to again delay compli-

\textsuperscript{162} Id.

\textsuperscript{163} The Supreme Court’s denial of \textit{certiorari} in \textit{United States Steel} was accompanied by a lengthy dissenting opinion by Mr. Justice Rehnquist, with whom Justices White and Powell joined. \textit{See} 100 S. Ct. 710 (1980). For reasons expressed in his dissent, Mr. Justice Rehnquist felt that the Seventh Circuit grounds for rejecting the petitioners’ procedural challenges each “might merit \textit{certiorari} in its own right [but] in tandem they present a formidable candidate for review.” \textit{Id.} at 711. Suggesting that the Supreme Court may be avoiding a complex and uninteresting issue, he said, “The fact that the requirements of the Clean Air Act Amendments virtually swim before one’s eyes is not a rational basis, under these circumstances, for refusing to exercise our discretionary jurisdiction.” \textit{Id.}

\textsuperscript{164} 605 F.2d at 287 n.5.


\textsuperscript{166} 605 F.2d at 287 n.5.
ance through its procedural challenges." 167 While according the petitioners' procedural claims full and careful consideration, the court characterized them as intended to "continue the procrastination which Congress sought to end." 168 Thus, any future appellant before the Seventh Circuit whose appeal appears to the court to be designed to achieve the same end may well expect to find himself subjected to the same frigid judicial environment.

Finally, it is interesting to note that the Seventh Circuit raised as a threshold issue in United States Steel, but declined to rule on, the question of whether USEPA's action even constituted an exercise of rulemaking function subject to challenge on procedural grounds under section 553 of the Administrative Procedure Act. 169 Considering the Act's definition of a "rule" subject to challenge, and its applicable legislative history, the court found that "a designation, such as the one in this case, that applies solely to a specified, delimited situation" is not a rule. 170 It further likened USEPA's designation of nonattainment areas to the Secretary of Transportation's designation of areas in parks as necessary routes for highway construction, the latter having been held to be "plainly not an exercise of a rulemaking function." 171 Based upon this analysis, the Seventh Circuit concluded in a footnote that "the agency's designation of attainment areas would not be subject to the requirements of section 553" 172 of the Act. However, because USEPA had termed its designations to be rules, the court of appeals took the position that it need not reach the issue. 173

CLEAN AIR ACT: STATE IMPLEMENTATION PLANNING PROCESS

Illinois v. USEPA 174 was an action by the State of Illinois for judicial review of a Notice of Deficiency 175 issued by the USEPA in regard to the Illinois State Implementation Plan 176 under the Clean Air Act. 177

167. Id. (emphasis added). In a final comment on these challenges, the court stated: "We have already noted the Congressional concern manifest in the Clean Air Act that national attainment be achieved as quickly as practicable. This concern was reflected in the desire that the due administration of the statutory scheme not be impeded by endless litigation over technical and procedural irregularities." Id. at 290. (emphasis added).
168. Id. at 286 n.5.
169. Id. at 285 n.3.
170. Id.
172. 605 F.2d at 286 n.3.
173. Id.
174. 621 F.2d 259 (7th Cir. 1980).
175. The Notice appeared at 44 Fed. Reg. 40723 (July 12, 1979), and is set forth in an appendix to the court's opinion.
176. Hereinafter referred to as SIP.
The Notice found deficient those portions of the Illinois SIP, relating to sulfur dioxide and particulate emissions, that had been vacated by Illinois court action in September 1978. It requested that a SIP revision be developed or other action taken to correct the deficiencies within sixty days. The state contended on review that the USEPA had failed to follow proper rule-making procedures in issuing the Notice, denied that a SIP deficiency existed, and argued that the Notice was premature and improper. In the face of agreement of the parties that the Notice was reviewable under the Clean Air Act, the Seventh Circuit dismissed the action, finding that it involved no genuine case or controversy.

Section 109 of the Clean Air Act requires USEPA to establish nationwide primary and secondary ambient air quality standards to protect the public health and welfare, respectively. Section 110 requires each state to adopt and submit to USEPA for approval or disapproval a SIP which provides for the implementation, maintenance, and enforcement of both standards. One of the prerequisites of USEPA approval is that the state have authority to carry out its implementation plan. In 1972, USEPA substantially approved the Illinois SIP, which consisted in part of state emissions standards for particulate matter and sulfur dioxide. The standards had been adopted earlier by the Illinois Pollution Control Board under the Illinois Environmental Protection Act.

Subsequently, litigation developed in the Illinois courts which resulted in the invalidation of the subject state standards. In 1976, the Illinois Supreme Court held in Commonwealth Edison Co. v. Pollution Control Board that the standards had not properly been adopted under required state procedures. It, therefore, remanded them to the IPCB with instructions to comply with the required procedures or to develop substitute regulations. Following this decision, USEPA issued its first Notice of Deficiency in regard to the standards, in essence requesting Illinois to comply with the order of the Illinois Supreme Court.

In 1977, the IPCB responded by "validating" the subject stan-

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182. 621 F.2d at 263.
183. Hereinafter referred to as IPCB.
In the case of Ashland Chemical Co. v. Pollution Control Board, 187 that action was challenged and the standards again vacated on the ground that the IPCB had not followed the instructions of the Illinois Supreme Court in Commonwealth Edison. When the IPCB still had not adopted new standards by July 5, 1979, USEPA issued its second Notice of Deficiency on the theory that, as a result of the state court decisions, the Illinois SIP was not enforceable. Subsequently, Illinois filed its petition for review of this second Notice, thereby initiating the instant proceeding.

The Seventh Circuit noted in its opinion that both sides agreed that the Notice of Deficiency was reviewable under section 307(b)(1) of the Clean Air Act, 188 which authorizes judicial review of certain USEPA actions. While that section contains a general provision authorizing judicial review of “any other final action of the Administrator,” it does not specifically authorize judicial review of Notices of Deficiency. 189 This led the court to question whether the Notice involved constituted a final agency action subject to judicial review. It concluded, in essence, that it did not because the issuance of the Notice was an act preliminary to other required actions under the Act. 190

In reaching this conclusion, the Seventh Circuit relied upon the Supreme Court’s opinion in Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 191 for the principle that “administrative orders are not reviewable unless they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.” 192 Applying this principle to Illinois v. USEPA, the Seventh Circuit analyzed section 110 of the Act 193 and reviewed the language of the Notice involved. It concluded that the Notice only informed and requested that SIP deficiencies be corrected rather than ordered that corrective action be taken. 194 In support of this view, the court said that USEPA “lacks statutory authority to order the state to do anything about the alleged deficiencies.” 195 Instead, it found that under section

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189. The Seventh Circuit noted that the term “Notice of Deficiency” does not appear in the Clean Air Act in connection with the provision that “notification” be given to a state for a deficiency in its SIP. Rather, it found that the term had been fashioned by USEPA to implement the notification requirement. 621 F.2d at 261.
190. Id.
191. 333 U.S. 103 (1948).
192. Id. at 112-13.
194. 621 F.2d at 261.
195. Id.
110 the burden shifts to USEPA to develop an adequate SIP if a state submits an inadequate one. Consequently, the court found that a Notice of Deficiency is "only one step in an extended administrative process."196

The Seventh Circuit's reasoning in *Illinois v. USEPA*, although implicit in its opinion, was not expressly stated. This typified the opinion which lacks a clear conclusion, contains expressions of doubts and qualifications, and leaves one wondering whether the court was entirely certain of its own reasoning. Having decided the case on a purely jurisdictional point, the court demonstrated a nagging concern for the merits of the arguments that the parties sought to have adjudicated relative to the Notice of Deficiency. Thus, the impact of the opinion and its precedential value as a case of apparent first impression are lessened considerably. Lastly, the court indicated that the case itself was not sufficiently important to decide, thus leaving the impression that had the same issue been presented in a more attractive factual setting, the issue might have been decided.

**Conclusion**

The 1979-80 term of the United States Court of Appeals for the Seventh Circuit was marked by several substantial decisions in the environmental area. Its opinions in *City of Evansville* and *Outboard Marine* may be expected to have landmark significance in expanding the federal common law of nuisance governing pollution in terms of parties and issues. The further development of that doctrine may well encroach on administratively set standards and limitations. The Seventh Circuit's decision in *United States Steel* departs from those of at least three other courts of appeals in upholding a USEPA nonattainment designation as against alleged procedural irregularities. Moreover, the Court's comments in *United States Steel* as to what it viewed as a continual effort by industry to delay compliance with Clean Air Act requirements should constitute a clear warning of a hardening judicial attitude with regard to such procrastination. The court's opinion in the second appeal in *Outboard Marine* also was significant for allowing state intervention in a federal permit enforcement action. Its decisions in *Byrd* and *Illinois v. USEPA* were interesting, if not significant, the latter being a case of apparent first impression.

196. *Id.*
Review of the court's environmental opinions for its 1979-80 term demonstrates a careful concern for what is fast becoming one of the most complex areas of the law.