Worthy of Their Name? Addressing Aquatic Nuisance Species with Common Law Public Nuisance Claims

Christopher Grubb
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INTRODUCTION

Long before modern federal environmental laws were enacted by Congress, common law public nuisance claims were an important means of addressing the impacts from pollution that crossed state lines ("transboundary pollution"). More recently, the Supreme Court has held that common law public nuisance claims are displaced by modern federal environmental laws such as the Clean Water Act ("CWA") and Clean Air Act ("CAA") that comprehensively regulate water and air pollution.

The role of common law public nuisance claims to address emerging environmental issues that are either incompletely or inadequately regulated is less clear. For example, public nuisance claims regarding the impacts from aquatic nuisance species may provide a valuable remedy for injured plaintiffs. The question of whether such claims are displaced by federal law is the focus of this article.

Part I of this Note discusses whether aquatic invasive species can be considered a public nuisance and will trace the existing legal framework for

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1. See Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (copper company in Tennessee enjoined from creating public nuisance in Georgia through emissions of noxious gasses) [hereinafter "Georgia I]].


3. The term "aquatic nuisance species" has been defined as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural or recreational activities dependent on such waters." 16 U.S.C. § 4702(a) (2006). The term "invasive species" has been defined as "alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health." Exec. Order No. 13,112, 64 Fed. Reg. 6183 (Feb. 3, 1999). This paper will use these terms interchangeably.
addressing aquatic invasive species. Part II summarizes developments in common law public nuisance cases involving interstate water and air pollution and the Supreme Court’s displacement jurisprudence. Part II also suggests that such common law public nuisance claims will be displaced where Congress has enacted a comprehensive scheme to regulate the pollution at issue. Part III argues that displacement should not be applied to a currently pending interstate common law public nuisance case involving Asian carp. Part IV concludes by arguing that interstate common law public nuisance claims involving aquatic invasive species should generally be available to plaintiffs because Congress has not enacted a comprehensive regulatory scheme to address these species that is comparable to the Clean Water Act and Clean Air Act.

I. THE PROBLEM OF AQUATIC NUISANCE SPECIES IN THE UNITED STATES

A. Aquatic Nuisance Species as a Public Nuisance

Most invasive species make their way into the United States as the result of human activity: through intentional or unintentional introductions, or through human caused habitat modifications that enable a species to gain a foothold in a new area. There are at least 4,500 invasive species that have established populations in the United States. The Great Lakes are home to more than 180 aquatic invasive species. The National Invasive Species Council ("NISC") has described the threat associated with invasive species in this way:

Invasive species... may prey upon, displace or otherwise harm native species. Some invasive species also alter ecosystem processes, transport disease, interfere with crop production, or cause disease in animals or humans; affecting both aquatic and terrestrial habitats. For these reasons, invasive species are of national and global concern.


5. Id. at 3.


8. Id. at 7.
In addition to causing vast ecological damage, invasive species also exact an economic toll. One recent study put the cost of dealing with invasive species at $120 billion annually, or about $1100 per household.\(^9\) Zebra mussels, which have a tendency to clog the water intake pipes of power plants around the Great Lakes, can cost each infested power plant $3 million each year.\(^10\) Invasive plant species cause at least two to three billion dollars in annual crop damage in the United States.\(^11\) Aquatic invasive species introduced to the Great Lakes by shipping have been estimated to cost the region at least $200 million annually.\(^12\)

A public nuisance is “an unreasonable interference with a right common to the general public.”\(^13\) The U.S. experience with two aquatic invasive species, Asian carp\(^14\) and the zebra mussel, demonstrate that public rights in navigation, bathing, and fishing\(^15\) may be harmed by the introduction of aquatic invasive species. Asian carp have caused extensive damage to ecosystems in the United States and currently threaten the Great Lakes.\(^16\) First introduced to clean aquaculture facilities in the southern United States, in the 1980s Asian carp escaped and have advanced through the Mississippi River, Illinois River, and have been found within miles of Lake Michigan.\(^17\) In parts of the Illinois River, Asian carp make up over ninety

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\(^10\) Id. (citing Brian Leung et al., An Ounce of Prevention or a Pound of Cure: Bioeconomic Risk Analysis of Invasive Species, PROC. OF THE ROYAL SOC'Y OF LONDON SERIES B: 269 BIOLOGICAL SCIENCES 2407–2413 (2002)).

\(^11\) NATIONAL INVASIVE SPECIES COUNCIL, supra note 7, at 4 (citing DAVID C. BRIDGES, CROP LOSSES DUE TO WEEDS IN THE UNITED STATES (Weed Science Society of America ed., 1992)).


\(^13\) Restatement (Second) of Torts § 821B(1) (1979).

\(^14\) For the purposes of this article, the term “Asian carp” will include both bighead carp and silver carp.

\(^15\) See Restatement (Second) of Torts § 821B cmt. g (“[T]he pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.”).

\(^16\) See ASIAN CARP REGIONAL COORDINATING COMMITTEE, http://asiancarp.org/background-threat/ (last visited Feb. 6, 2011) (“Bighead and silver carp escaped into the wild in the 1980s and have been swimming northward ever since, overwhelming the Mississippi and Illinois River systems . . . The Great Lakes are at serious risk from Asian carp.”).

percent of the biomass. Asian carp, which can weigh up to 100 pounds, interfere with public rights in navigation due to their penchant for jumping out of the water in the presence of engine noise from passing boats. The sheer quantity of fish flying through the air is enough to make navigation unsafe in invaded areas, and indeed some boaters have been injured after being hit by a jumping carp.

In a different but equally destructive way, the zebra mussel has impacted U.S. waterways to the detriment of the public’s right to fish and bathe. Zebra mussels—small mollusks native to eastern Europe—were first discovered in the Great Lakes in the 1980s, and it is widely believed they were introduced as a result of ocean-going shipping on the Great Lakes. Zebra mussels have had a profoundly negative impact on the food web of the Great Lakes and can disrupt commercial and recreational boating. In addition, the shells of dead zebra mussels, which can be extremely sharp, have so extensively littered some beaches on the Great Lakes as to severely constrain the public’s right to enjoyment of the waterway.

The Asian carp and zebra mussel make clear that invasive species have harmed rights common to the public. Unfortunately, Congress has had difficulty addressing their introduction and spread through legislation.

B. The Existing Legal Framework to Address Aquatic Invasive Species

The regulatory landscape relevant to the control of invasive species has been described as a “largely uncoordinated patchwork of laws, regulations, policies, and programs,” and it has not been effective in stopping their introduction and spread. One significant component of this “patch-
work” is the Lacey Act of 1900. The Lacey Act was adopted in an attempt to restore populations of certain bird species that were being harmed, in part, by introductions of non-native species. In its current form, the Lacey Act authorizes the United States Fish and Wildlife Service (“USFWS”) to prohibit the importation and interstate transport of a list of species deemed “injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States . . . .” The USFWS has made several attempts over the years to place a blanket prohibition on the importation of all species, allowing only those species found on a “low-risk list.” However, substantial opposition from the pet industry defeated such proposals. Today, unless a species is regulated by another law, or is found on the USFWS list of injurious species, importation into the U.S. is allowed.

The Lacey Act has been criticized as being ineffective in stopping the importation and spread of invasive species in the U.S. The brunt of the criticism is aimed at the Lacey Act’s approach of allowing the importation of all species except for those found to be injurious, as opposed to prohibiting the importation of all species except those found to be low-risk. Additionally, the Lacey Act has been criticized for not placing enough species on the list, for the length of time required to list a species, for only being effective for those few species not already in the U.S. when listed, and for failing to fund the USFWS adequately. Despite being in effect for over 100 years, the Lacey Act’s list of injurious species contains only seventeen taxa that are denied importation, and critics argue that hundreds if not thousands more taxa are injurious and should be prohibited. Critics have also noted that “[t]he listing time has generally increased from [less than one] year in the mid-[twentieth] century to a mean of at least 4.8 years for taxa (n = 4) that were pending listing as of March 1, 2007.” Further, many of the species found on the list were already present in the United States at the
time they were listed, and the Act has done nothing to stop their spread.36 Thus, critics have come to the conclusion that “[t]he contemporary threat of invasive species has far outstripped current authority and practices under [the Lacey Act].”37

In addition to the Lacey Act, the Nonindigenous Aquatic Nuisance Prevention and Control Act of 199038 (NANPCA) represents another attempt by Congress to address the impacts of invasive species. NANPCA was passed in the wake of the discovery of the zebra mussel in the Great Lakes.39 Recognizing the risk posed by introductions of invasive species like the zebra mussel, Congress set out to “prevent [the] unintentional introduction and dispersal of nonindigenous species into waters of the United States through ballast water management and other requirements.”40

Congress attempted to achieve its goal in large part by directing the Secretary of the U.S. Department of Homeland Security to issue regulations applicable to ships with ballast water tanks operating on the Great Lakes.41 Congress instructed that the regulations require such ships to: a) conduct ballast water exchange (BWE) on waters beyond the exclusive economic zone (EEZ), b) conduct BWE on other waters where the BWE would not pose a threat of infestation, or c) utilize an alternative ballast water management method if the Secretary determines that such methods are as effective as BWE.42 In 1996, Congress passed the National Invasive Species Act (“NISA”), which amended NANPCA, most notably by directing the Secretary to issue “voluntary guidelines” that essentially mirrored the Great Lakes provisions but were applicable nationwide.43

As of this writing, the Coast Guard has promulgated ballast water regulations pursuant to NANPCA as amended by NISA.44 Ships visiting ports in the Great Lakes that “carry ballast water” must conduct BWE outside the EEZ, retain their ballast water on board the ship, or use an accepted alternative ballast water management method.45 The regulations also require ships that are coming into U.S. waters from beyond the EEZ, and that are carry-

36. Id. (“For the few taxa that have been prohibited entry, more than half were already present in the US at the time of listing, and spread occurred for most established species subsequent to listing. Thus, the listing process does not seem to have accomplished the intended goal, even for the majority of the very few taxa that were listed.”).
37. Id. at 359.
39. USGS, supra note 22 (Zebra mussels were discovered in the Great Lakes in 1988).
40. 16 U.S.C. at § 4701(b)(1).
41. Id. at § 4711(b).
42. Id. at § 4711(b)(2).
43. Pub. L. 104-332, 110 Stat 4073, 4077–4079 (Oct. 26, 1996) (now codified as § 4711(c)).
45. Id. at § 151.1510(a).
ing ballast water that was taken on less than 200 nautical miles from any shore, to conduct BWE, retain the ballast water onboard the ship, or use an alternative ballast water management method. In addition, the St. Lawrence Seaway Development Corporation, an arm of the U.S. Department of Commerce, now requires ships entering the U.S. portion of the St. Lawrence Seaway in the “No Ballast on Board” (NOBOB) condition to conduct saltwater flushing before entering the seaway.

However, despite the existing ballast water laws and regulations, new aquatic invasive species have continued to make their way into the Great Lakes. At least sixteen such species have been found in the Great Lakes since passage of NISA. Recognizing the shortcomings of the existing regulatory framework, some in Congress have unsuccessfully attempted to pass legislation that would require ocean-going ships to install treatment technology that would kill organisms residing in the ship’s ballast water. Some environmental advocates have taken a different approach to the problem by arguing that the U.S. EPA must regulate ballast water discharge as a point source discharge under the CWA.

Soon after passage of the CWA, the EPA promulgated a regulation that exempted “discharges incidental to the operation of a vessel” from permit requirements under the Act. In Northwest Environmental Advocates v. United States Environmental Protection Agency, the court held that the regulation was not authorized by the CWA because the statute’s plain language prohibited such discharges. In a later proceeding focused on the appropriate remedy for EPA’s ultra vires action, the court instructed the EPA to create a replacement regulation within two years. The EPA has since issued a “Vessel General Permit.” The regulations include two technology-based effluent limitations, which require BWE for ocean-going

46. Id. at § 151.2035(b).
47. Such vessels, which usually contain residual amounts of water and sediment that can harbor invasive species, have proved to be a vexing problem for regulators. See Johengen, et. al., Assessment of Transoceanic NOBOB Vessels and Low-Salinity Ballast Water as Vectors for Non-Indigenous Species Introductions to the Great Lakes 6 (Apr. 2005), available at http://www.glerl.noaa.gov/res/projects/nobob/products/NOBOBFinalReport20050415.pdf.
48. 33 C.F.R. § 401.30(f).
49. See NOAA, supra note 6.
50. Id.
53. 40 C.F.R. § 122.3(a).
ships and saltwater flushing for ships in the NOBOB condition.57 The regulation also includes a water quality-based effluent limitation, which requires, "Your discharge must be controlled as necessary to meet applicable water quality standards in the receiving waterbody or another waterbody impacted by your discharges."58 However, the EPA indicates that it "generally expects that compliance with the other conditions in this permit . . . will control discharges as necessary to meet applicable water quality standards."59 Except for the loosely defined water quality-based effluent limitation, to the extent that the VGP is consistent with what is already required by NANPCA and its associated regulations, and by the St. Lawrence Seaway Development Corporation regulations, it essentially maintains the status quo.

In short, invasive species remain a tremendous problem in the U.S., harm rights shared by the public, and Congress has had little success controlling them. Many aquatic invasive species may unquestionably be considered a public nuisance. The ecological and economic impacts from invasive species generally, as well as the specific experience with Asian carp and the zebra mussel, make it clear that such species often cause impacts that harm rights common to the public such as navigation, bathing, and fishing. Indeed, it is telling that one of the primary statutes to address aquatic invasive species in the United States refers to these species as a nuisance in its title: The Nonindigenous Aquatic Nuisance Prevention and Control Act.60 The remainder of this article addresses whether impacts from invasive species can be addressed by the common law of public nuisance given the Supreme Court's jurisprudence in the field.

II. HISTORY AND DEVELOPMENT OF COMMON LAW PUBLIC NUISANCE CLAIMS FOR TRANSBOUNDARY POLLUTION IMPACTS

A. Water Pollution

The Chicago River looms large in the history of common law public nuisance claims over transboundary water pollution, being the epicenter of

58. Id. at 2.3.1.
59. Id.
60. 16 U.S.C. Ch. 67 (2010).
what is regarded as the first,\textsuperscript{61} as well as one of the most recent, of such claims.\textsuperscript{62} The first such case arose after Chicago famously reversed the flow of the Chicago River in 1900, sending its sewage toward St. Louis instead of into Lake Michigan.\textsuperscript{63} Missouri sued Illinois on a theory of public nuisance for alleged harms resulting from the increased sewage pollution it would have to bear.\textsuperscript{64} In its demurrer to the complaint, Illinois argued, in part, that Missouri could not be entitled to the equitable relief it desired because it was not clear that the sewage from Chicago would become a nuisance to the residents of Missouri.\textsuperscript{65} Although the Court in Missouri I focused primarily on jurisdictional issues, its response to Illinois’ argument with respect to the public nuisance claim presaged its ultimate decision to overrule the demurrer, “Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?”\textsuperscript{66} In Missouri II the Court ultimately concluded that Missouri had failed to prove that Illinois’ actions had caused an increase in typhoid fever in St. Louis.\textsuperscript{67}

At the time of Missouri I and Missouri II, there was little in the way of federal water pollution regulation.\textsuperscript{68} However, by the time the State of Illinois sued the City of Milwaukee on a public nuisance theory,\textsuperscript{69} Congress had passed “numerous laws touching interstate waters,”\textsuperscript{70} including most recently, amendments to the Federal Water Pollution Control Act.\textsuperscript{71} However, the Court noted that “[t]he remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress.”\textsuperscript{72} Although the Court found that the suit was not properly within its original jurisdiction,\textsuperscript{73} it held

\begin{itemize}
  \item \textsuperscript{63} Missouri v. Illinois, 180 U.S. 208, 212 (1901) [hereinafter “Missouri I”].
  \item \textsuperscript{64} \textit{Id.} at 214.
  \item \textsuperscript{65} \textit{Id.} at 242-243.
  \item \textsuperscript{66} \textit{Id.} at 243.
  \item \textsuperscript{67} 200 U.S. 496 at 526.
  \item \textsuperscript{68} \textit{But see} Rivers and Harbors Act of 1899 ch. 425, § 13, 30 Stat. 1121, 1152 (current version at 33 U.S.C. § 407 (2009)).
  \item \textsuperscript{69} Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) (Illinois alleged Milwaukee’s sewage discharges were polluting Lake Michigan) [hereinafter “Milwaukee I”].
  \item \textsuperscript{70} \textit{Id.} at 101.
  \item \textsuperscript{71} Pub. L. 87-88, July 20, 1961, 75 Stat. 204.
  \item \textsuperscript{72} \textit{Milwaukee I}, 406 U.S. at 103.
  \item \textsuperscript{73} \textit{Id.} at 101.
\end{itemize}
that Illinois could go forward in federal district court with its common law public nuisance suit.\textsuperscript{74} The Court reasoned that in cases of interstate air and water pollution "there is a federal common law,"\textsuperscript{75} and that the Federal Water Pollution Control Act as it existed in early 1972 expressly did not displace such suits.\textsuperscript{76} After Illinois subsequently filed suit in the District Court for the Northern District of Illinois, the district court ruled in favor of Illinois.\textsuperscript{77} On appeal, the Seventh Circuit affirmed in part and reversed in part\textsuperscript{78}, and the Supreme Court granted certiorari.\textsuperscript{79}

In \textit{Milwaukee II}, the Supreme Court held that the recent passage of the Clean Water Act displaced federal common law in the field of water pollution.\textsuperscript{80} Initially, the Court noted that unlike state courts, federal courts are not general common law courts empowered to create their own rules of decision.\textsuperscript{81} The Court described the limited circumstances in which federal common law may be created and applied: "When Congress has not spoken to a particular issue, however, and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law."\textsuperscript{82} In cases where "Congress has spoken," the Court explained that its commitment to the separation of powers would prevent it from creating new federal common law.\textsuperscript{83}

The \textit{Milwaukee II} Court found that Congress had created an "all encompassing program of water pollution regulation" in passing the Clean Water Act.\textsuperscript{84} The Court found that the CWA and its associated regulations specifically addressed the effluent limitation, sewage overflow, and combined sewer issues raised by Illinois.\textsuperscript{85} The Court made two other observations worth noting. First, the Court opined that because the field of water pollution was so technically complex, its regulation was best placed in the hands of the authorized administrative agency that possessed the necessary

\textsuperscript{74} Id. at 108.
\textsuperscript{75} Id. at 103 (citing Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971)).
\textsuperscript{76} Id. at 104 (noting that § 10(b) of the Act expressly encouraged state and interstate action to combat water pollution, and that such action shall not be displaced by federal enforcement action).
\textsuperscript{78} Id. at 304–305.
\textsuperscript{79} Id. at 307–308.
\textsuperscript{80} Id. at 317.
\textsuperscript{81} Id. at 312 (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)).
\textsuperscript{82} Id. at 313 (citations and footnote omitted).
\textsuperscript{83} Id. at 315 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).
\textsuperscript{84} Id. at 318.
\textsuperscript{85} Id. at 319–323 (The Court explained that "[a]lthough a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law.").
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expertise, rather than in the hands of a federal common law regime where regulation would inevitably be "sporadic" and "ad hoc." 86 Second, the Court emphasized that the basis for the Milwaukee I Court’s ruling—that federal statutory law did not provide Illinois a forum in which to protect its interests—was no longer applicable because the CWA provided Illinois with ample opportunity to seek redress. 87

The question left open by Milwaukee II—whether state common-law nuisance suits involving transboundary water pollution were displaced by the CWA—was subsequently addressed by the Court in International Paper Co. v. Oullette. 88 In Oullette, landowners on the Vermont side of Lake Champlain, which borders both Vermont and New York, sued a paper company on the New York side of the lake. 89 The landowners sued under Vermont law alleging the paper company was creating a continuing nuisance through its discharges of water pollution to the lake, allegedly harming plaintiffs’ property values. 90 The Court held that public nuisance lawsuits are preempted by the CWA when brought under the common law of the state affected by the pollution, but not when brought under the law of the state where the pollution originated. 91 The Court described how a ruling that would allow common law nuisance suits under the affected state’s laws would conflict with the broad goals and purposes of the CWA:

If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. The affected State’s nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State. Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits. . . . The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources. 92

In contrast, the Court held that a nuisance suit brought under the source state’s law would not conflict with the CWA for two reasons. 93 First, the CWA specifically allows source states to adopt more stringent

86. Id. at 325 (internal quotations omitted).
87. Id. at 325–326.
89. Id. at 483–484.
90. Id.
91. Id. at 493–494.
92. Id. at 495.
93. Id. at 497.
pollution control requirements, including through state nuisance law.\textsuperscript{94} Second, unlike the “indeterminate number of potential regulations” emanating from suits in a regime allowing suits under affected-states’ nuisance law, lawsuits based on source-state law would not conflict with the CWA’s goals of efficiency and predictability because a pollution source would need only to comply with the pollution control requirements of the CWA and the source state’s common law.\textsuperscript{95}

\textbf{B. Air Pollution}

One year following MissourI I, the Court heard a common law public nuisance case involving transboundary air pollution.\textsuperscript{96} In Georgia I, the State of Georgia sued two copper companies located in Tennessee seeking an injunction to prevent the companies from discharging sulfuric acid gas that was causing harm to the forests, orchards, and crops in parts of Georgia.\textsuperscript{97} Writing for the Court, Justice Holmes noted that although the case had been argued as if it were a case between two private parties, if it really were such a case Georgia would lose because it owned very little of the property being damaged.\textsuperscript{98} However, the Court recognized that Georgia, as a quasi-sovereign, “has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”\textsuperscript{99} The Court explained,

\begin{quote}
It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains . . . should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.\textsuperscript{100}
\end{quote}

The Court held that Georgia had proven its case under the requirements of MissourI I,\textsuperscript{101} gave the copper companies a reasonable time to abate the nuisance, and invited Georgia to return if the copper companies’ efforts failed to stop the noxious gasses.\textsuperscript{102}

Prior to the Supreme Court’s recent decision in AEP, the Court of Appeals for the Fourth Circuit came close to ruling that the Clean Air Act

\begin{thebibliography}{99}
\bibitem{94} Id. at 497–499.
\bibitem{95} Id. at 499.
\bibitem{96} Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907).
\bibitem{97} Id. at 236.
\bibitem{98} Id. at 237.
\bibitem{99} Id.
\bibitem{100} Id. at 238.
\bibitem{101} Id. at 238–239.
\bibitem{102} Id. at 239.
\end{thebibliography}
displaced common law public nuisance claims involving air pollution.\textsuperscript{103} In \textit{TVA}, the State of North Carolina sued the Tennessee Valley Authority alleging that the impacts on North Carolina residents from emissions of air pollution at TVA’s coal-fired power plants in Alabama and Tennessee constituted a public nuisance.\textsuperscript{104} A federal district court enjoined TVA from continuing the public nuisance and ordered it to install costly emissions control equipment at its coal-fired power plants.\textsuperscript{105} On appeal, the Fourth Circuit reversed the district court, holding that “[i]t is not open to this court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states and permit holders in favor of the nebulous rules of public nuisance.”\textsuperscript{106}

The court identified several reasons for its holding. First, like the Court’s analysis of the CWA in \textit{Milwaukee II}, the \textit{TVA} court similarly found that the CAA represented a comprehensive regulatory scheme for air pollution.\textsuperscript{107} The court read \textit{Ouellette} as strongly cautioning against allowing such common law public nuisance suits in a field so extensively regulated.\textsuperscript{108} Second, the court found that the district court had violated \textit{Ouellette} by improperly applying affected-state law instead of source-state law.\textsuperscript{109} Third, the court said that even if it were found that the district court had properly applied source-state law, the fact that the TVA’s power plants were in compliance with CAA permits suggested there was no public nuisance.\textsuperscript{110} The court summarized its position, writing,

No matter how lofty the goal, we are unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes, a method which would chaotically upend an entire body of clean air law and could all too easily redound to the detriment of the environment itself.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{103}North Carolina v. Tennessee Valley Authority, 615 F.3d 291, 302 (4th Cir. 2010) (“We need not hold flatly that Congress has entirely preempted the field of emissions regulation.”).
\item \textsuperscript{104}Id. at 297.
\item \textsuperscript{105}Id. at 298.
\item \textsuperscript{106}Id. at 306.
\item \textsuperscript{107}See id. at 298–301 (describing the CAA at length to demonstrate its comprehensive approach to regulating air pollution).
\item \textsuperscript{108}Id. at 303 (“We can state, however, with assurance that \textit{Ouellette} recognized the considerable potential mischief in those nuisance actions seeking to establish emissions standards different from federal and state regulatory law and created the strongest cautionary presumption against them.”).
\item \textsuperscript{109}Id. at 309 ("[The district court's] decision was tied so tightly to the North Carolina Clean Smokestacks Act that it violates \textit{Ouellette}'s directive that source state law applies to interstate nuisance suits.")
\item \textsuperscript{110}Id. at 309–310 (noting that both Alabama and Tennessee nuisance laws say there is no abatable nuisance where an activity is expressly licensed or authorized by law).
\item \textsuperscript{111}Id. at 312.
\end{itemize}
Most recently, in *AEP*, the Supreme Court held that the CAA displaced federal common law public nuisance claims seeking abatement of carbon dioxide emissions from fossil fuel fired power plants.112 In *AEP*, eight states and New York City, along with a group of three nonprofit land trusts, sued four private companies and the Tennessee Valley Authority under the federal common law of public nuisance and alternatively under state tort law.113 The plaintiff-respondents alleged that the carbon dioxide emissions associated with the defendant-petitioners’ power plants contributed to global warming, thereby causing an unreasonable interference with public rights.114 All plaintiffs sought injunctive relief requiring caps on the carbon emissions of the defendant-petitioners’ power plants.115

Beginning with the oft-quoted premise that “[t]here is no federal general common law,” the Court nonetheless acknowledged that a number of decisions of the Court both pre- and post-*Erie* “have approved federal common law suits brought by one State to abate pollution emanating from another State.”116 However, the Court cautioned that it had not yet decided whether private citizens or political subdivisions of a State could maintain a federal common law nuisance action to abate out-of-state pollution, and that it had never held that a State may sue “to abate any and all manner of pollution originating outside its borders.”117

Turning to the displacement question, the Court had little problem finding that the CAA displaced federal common law, particularly in the wake of *Massachusetts v. EPA*.118 According to the Court, the test for whether federal legislation displaces a federal common law cause of action “is simply whether the statute ‘speak[s] directly to [the] question’ at issue.”119 The Court rejected the position of plaintiffs and the Second Circuit that federal common law public nuisance claims to abate carbon dioxide emissions are not displaced by the CAA until the EPA exercises its regula-

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113. *Id.* at 2533–2534. Because the Second Circuit did not reach the question, and none of the parties briefed the issue, the court left open for consideration on remand the issue of whether plaintiffs could proceed under state nuisance law. *Id.* at 2540.
114. *Id.* at 2534.
115. *Id.*
117. *Id.* at 2536.
118. See *id.* at 2537 (“*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act ‘speaks directly’ to emissions of carbon dioxide from defendants’ plants.” (internal citations omitted)).
tory authority by setting standards governing such emissions from power plants. The Court wrote that

'[t]he critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing §7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency’s expert determination.121

Finally, echoing TVA, the Court found that the CAA’s reliance on the EPA as an expert agency also supported the Court’s displacement holding.122

C. When is Displacement Appropriate?

From the foregoing cases, the following rules govern displacement of common law public nuisance claims for impacts from transboundary pollution: Federal common law claims are displaced where 1) Congress has enacted a comprehensive scheme to regulate the pollution at issue, or 2) there would otherwise be a forum available for the remedy sought. In cases where Congress has acted and the nuisance claim is brought under state tort law, the claim must be brought under the laws of the state which is the source of the pollution and a ruling in favor the plaintiff must not conflict with the enacted regulatory scheme.

Federal legislation will preempt state law only where there is “evidence of a clear and manifest purpose” to do so.123 However, because federalism concerns do not come into play when the question is whether an act of Congress displaces federal common law, such displacement will be more readily found.124 The simple act of Congress passing laws in a given field, however, does not lead to the conclusion that those laws preempt federal common law.125 For example, the precursor to the CWA at issue in Mil-

120. Id. at 2538.
121. Id. at 2538–2539 (the court added that the EPA’s judgment in the rulemaking would “not escape” judicial review).
122. Id. at 2539–2540 (noting that “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order,” and that “federal district judges . . . lack authority to render precedential decisions binding other judges, even members of the same court.”).
124. Id. at 317 (“Indeed . . . we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.”) (internal quotation and footnote omitted).
125. Illinois v. City of Milwaukee, 406 U.S. 91, 108 n.9 (1972) (quoting Texas v. Pankey, 441 F.2d 236, 241–242 (10th Cir. 1971) (“Until the field has been made the subject of comprehensive legislation
"Milwaukee I" was found not to preempt federal common law because the remedy sought by Illinois was not within the scope of remedies provided by Congress at that time, and the statute had explicitly provided that "inter-state action to abate [transboundary water pollution]... shall not be displaced." Thus, a federal statute should not be held to occupy a given field if it represents less than a comprehensive attempt to regulate in a given field, and/or includes a "savings clause" for federal common law causes of action.

III. COMMON LAW PUBLIC NUISANCE CLAIMS SHOULD BE AVAILABLE TO REMEDY IMPACTS FROM AQUATIC INVASIVE SPECIES

Generally speaking, common law public nuisance claims for impacts from aquatic invasive species should not be considered to be displaced by federal law. Aquatic invasive species such as the zebra mussel and Asian carp have caused significant interference with rights held in common by the public such as fishing, bathing, and boating. The Congressional response to preventing the spread of invasive species has been ad hoc and largely unsuccessful. In short, the regulatory landscape currently in place to address aquatic invasive species is more akin to the water pollution statutes discussed in "Milwaukee I" than to the comprehensive regulatory statutes at issue in "Milwaukee II" and AEP.

In Michigan v. U.S. Army Corps of Engineers, the State of Michigan brought a lawsuit to prevent the spread of Asian carp into the Great Lakes under the federal common law of public nuisance. The case provides an instructive example of how an argument that such a claim is displaced by federal law might unfold.

A. Background

Chicago's decision to reverse the flow of the Chicago River and its subsequent development of the Chicago Area Waterway System ("CAWS") had the effect of connecting two major waterways that were previously unconnected: the Mississippi River system and the Great
Lakes. While this connection has allowed for the free flow of commercial goods via shipping, it also represents a pathway for aquatic invasive species introduced into the Great Lakes watershed to extend their reach throughout the extensive Mississippi watershed, and vice versa. In response to concerns about the spread of aquatic invasive species between the two watersheds, the U.S. Army Corps of Engineers ("Corps") has constructed and is operating an electric dispersal barrier in the Chicago Sanitary and Ship Canal ("CSSC"). Unfortunately, DNA testing has indicated the presence of Asian carp between the electric barrier and Lake Michigan, and at least one live Asian carp has been found above the barrier.

In 2010, the State of Michigan and other states bordering the Great Lakes twice petitioned the Supreme Court to issue a preliminary injunction against the State of Illinois and the Corps to increase their efforts to prevent the spread of Asian carp. These petitions were both failures. Michigan has since brought an action against the Corps and the Metropolitan Water Reclamation District of Greater Chicago ("MWRD") in the District Court for the Northern District of Illinois. Most controversially, in its motion for preliminary injunction, Michigan requested the temporary closure of locks connecting Lake Michigan and the CAWS, except as needed

128. See id. at *2.


131. Michigan, 2010 WL 5018559 at *7 & n.10 ("There have been sixty positive eDNA samples taken from above the barrier.").

132. Id. at *7 ("[O]n June 22, 2010, a single, live bighead carp was recovered from Lake Calumet, north of the O'Brien Lock and Dam, six miles from Lake Michigan (and above the barrier.").


136. Id.
to protect public health and safety, which would likely have the effect of preventing commercial and recreational navigation between the two waterways. The suit was brought, in part, under the federal common law of public nuisance.

B. The Parties' Arguments

Michigan argued that the waters of the Great Lakes are held in trust by the states bordering the lakes for the benefit of the public, and that the public's rights in those waters include, inter alia, fishing, boating, commerce, and recreation. Because the evidence, according to Michigan, suggests that if Asian carp were to enter the Great Lakes they would cause substantial harm to those public rights, the Corps and MWRD's operation of the CAWS in a way that is likely to allow Asian carp to invade the Great Lakes constitutes a continuing public nuisance.

The Corps argued that Michigan's public nuisance claim is displaced by federal law. In the Corps' view, its operation of the CAWS is congressionally authorized by several statutes that instruct it to facilitate navigation on the waterway. Specifically, the Corps points to provisions of congressional appropriations legislation that have provided funding to the Corps to "operate and maintain" the CAWS "in the interest of navigation." The Corps also points to provisions of NANPCA that it says allow the Corps to "incorporate" measures to prevent aquatic invasive species into its "ongoing operations" in operating the CSSC. Thus, according to the Corps, "Congress has spoken," and common law public nuisance claims like Michigan's are displaced.

MWRD, an entity chartered by the State of Illinois, which is responsible for operating navigation locks separating Lake Michigan from the CAWS, points to the Restatement (Second) of Torts for the proposition that conduct that would be a public nuisance at common law, but which is fully authorized by law, will not subject an actor for tort liability. MWRD

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137. Id. at 31-32.
138. Id. at ¶ 1.
139. Id. at ¶ 85.
140. Id. at ¶ 87, 89-91.
141. Federal Defendant's Motion in Opposition to Plaintiff's Preliminary Injunction Motion, Michigan v. U.S. Army Corps of Eng'rs (No. 1:10-cv-04457) at 23-25. Although defendants have other arguments about why Michigan's nuisance claim should fail, those arguments are outside the scope of this article.
142. Id. at 24-25 (citing 95 Stat. 1135, 97 Stat. 301, and 60 Stat. 634).
143. Id. at 25 (citing 16 U.S.C. §§ 4722(i)(3)(A), (B)(ii)).
144. Metro. Water Reclamation Dist. of Greater Chicago's Response in Opposition to Plaintiff's Motion for Preliminary Injunction and Plaintiff's Brief in Support of Motion for Preliminary Injunction.
argues that it is "charged [by statute] with the duty of collecting, transporting, and treating sanitary and waste water, and maintaining the area waterways—all in the name of protecting the local public health," and that it otherwise complies with applicable laws.\(^\text{145}\) Therefore, its operations cannot be considered a public nuisance. MWRD also relies extensively on \(\text{TVA}\) to argue that Michigan’s public nuisance claim should be held displaced.\(^\text{146}\) According to MWRD:

In \(\text{TVA}\), North Carolina was dissatisfied with the air quality standard authorized by Congress, established by the [EPA], and implemented through state permits, and it requested that the federal courts impose a different set of standards. \([^\text{TVA}\text{ at *}15\)]\). Similarly, in the instant case, the Plaintiffs are dissatisfied with the federally authorized measures being made by the Corps and other federal agencies, as well as the measures being implemented by the State of Illinois, other local agencies, and the [MWRD], in addressing the [Asian carp].\(^\text{147}\)

\section{C. The Court’s Ruling}

On December 2, 2010, Judge Robert M. Dow, Jr. issued an opinion in the case.\(^\text{148}\) Although the court agreed with Michigan that its common law nuisance claim was not displaced by federal law, it denied Michigan’s motion for a preliminary injunction, writing that Michigan had demonstrated only a modest likelihood of success on their public nuisance claim and that the evidence did not support the existence of an "unreasonable nuisance as a result of Defendants’ actions or inactions in maintaining and operating the CAWS."\(^\text{149}\) The court also included a discussion of the \(\text{TVA}\) case, suggesting that, as in \(\text{TVA}\), Defendants’ activities are authorized by the government.\(^\text{150}\) As a result, the court was reluctant to enjoin such government-authorized activity for constituting a public nuisance.\(^\text{151}\)

The court relied on \textit{Milwaukee I} and \textit{Milwaukee II} to evaluate whether federal law displaced Michigan’s common law nuisance claim.\(^\text{152}\) The Court wrote:

\(^{145}\) \textit{Id.} at 25.
\(^{146}\) \textit{Id.} at 25–29.
\(^{147}\) \textit{Id.} at 26–27.
\(^{149}\) \textit{Id.} at *21.
\(^{150}\) \textit{Id.} at *22–24.
\(^{151}\) \textit{Id.}
\(^{152}\) \textit{See id.} at *18–20.
Apparent comprehensiveness of Congressional legislation is only one indication of displacement. While there appeared to be comprehensive legislation on the subject of water pollution in Milwaukee I, for there to be displacement, the comprehensive legislation also must address the problem at issue and do so specifically to displace the common law.\textsuperscript{153}

In the court’s judgment, the federal statutes identified by the Corps and MWRD “do not comprehensively and specifically address the threat of an Asian carp invasion of Lake Michigan through the CAWS . . . nor do they provide a specific mandate or methods for adequately addressing the threat.”\textsuperscript{154} While the court acknowledged that NANPCA speaks to the threat of aquatic nuisance species in the CAWS, it dismissed the NANPCA provisions as not representing a comprehensive approach to preventing the spread of Asian carp.\textsuperscript{155} Further, the court did not agree that the statutes identified by Defendants cover Michigan’s claims or provide an adequate remedy to Michigan.\textsuperscript{156} Thus, the court rejected Defendants’ displacement claims, writing that “[a]t present, this is a Milwaukee I case, not a Milwaukee II case.”\textsuperscript{157}

Although the court sided with Michigan on the preemption issue, Defendants persuaded the court that, as in TVA and New England Legal Foundation v. Costle\textsuperscript{158}, their government-authorized activity should not be held to constitute a public nuisance.\textsuperscript{159} The court wrote that, even if the evidence pointed more convincingly to an existing or imminent threat of injury, Michigan would have to deal with the problem that courts are typically reluctant to enjoin government-authorized activity as a public nuisance.\textsuperscript{160} The court analogized the instant case to TVA, noting that in both cases “the

\begin{footnotes}
\item 153. Id. at *19.
\item 154. Id. at *20.
\item 155. Id.
\item 156. Id.
\item 157. Id.
\item 158. 666 F.2d 30, 33 (2d Cir. 1981).
\item 159. Indeed, the court acknowledged its application of the rule was the functional equivalent of finding displacement by clarifying in a footnote that
\begin{quote}
\text{[n]}one of this discussion of the TVA and Costle cases is meant to suggest that the federal common law tort of public nuisance is preempted by any of the existing laws that pertain to the management and operation of the CAWS or the authority of the Corps to deal with the Asian carp problem. Nor should this discussion be viewed as suggesting that a public nuisance claim against a federal agency can never succeed. Nevertheless, the concerns identified by the Fourth Circuit in TVA and the Second Circuit in Costle are significant, and any plaintiff seeking mandatory injunctive relief against a federal agency in circumstances like those present in those cases (and this one) must come to grips with those concerns.
\end{quote}
\item 160. Id. at *22 (quoting New England Legal Found. v. Costle, 666 F.2d 30, 33 (2d Cir. 1981); see also RESTATEMENT (SECOND) OF TORTS § 821B cmt. F (“Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.”)).
\end{footnotes}
parties to the litigation agree on the end—in that case, ‘the desirability of reducing air pollution’; here, preventing the establishment of a self-sustaining population of Asian carp in Lake Michigan—but dispute the ‘most effective means’ to that end.”\textsuperscript{161} The court acknowledged that the statute and regulations at issue in \textit{TVA} were far more comprehensive and specific to the air pollution issues in that case than those at issue in the instant case.\textsuperscript{162} However, the court found the Fourth Circuit’s opinion in \textit{TVA} instructive because both cases involved public nuisance claims in response to “complex environmental problem[s] as to which Congress and federal agencies have spoken in some fashion.”\textsuperscript{163}

The court was convinced that Congress and federal agencies had spoken on the issue of the Defendants’ operation of the CAWS in the face of Asian carp advancing toward the Great Lakes.\textsuperscript{164} According to the court, Congress had instructed the Corps to operate the CAWS in the interest of navigation, to incorporate measures to prevent the spread of ANS into ongoing operations of the CAWS, and to take any additional emergency measures it deemed necessary to prevent Asian carp from entering the Great Lakes.\textsuperscript{165} In addition, the court noted that, “it is readily apparent from the executive and legislative activity in the few months since this lawsuit was commenced that the White House and Congress have focused their attention on the Asian carp issue and that further federal . . . initiatives are under consideration.”\textsuperscript{166}

Underlying the court’s discussion, and of major concern to the Fourth Circuit in \textit{TVA}, are policy considerations about the appropriate role for courts and administrative agencies in the realm of complex environmental issues.\textsuperscript{167} The court agreed with the Fourth Circuit that federal courts should refrain from applying the “omnibus” tort of public nuisance, especially in the context of complex environmental problems, where Congress or delegated agencies have already given their considered judgment to the issue. In this vein, the court wrote:

[I]t would be equally difficult to conceive of the “all purpose” public nuisance tort as an appropriate vehicle for the imposition of mandatory

\begin{itemize}
\item \textsuperscript{161} \textit{Michigan}, 2010 WL 5018559 at *22 (internal citations omitted).
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id. at *23–24.}
\item \textsuperscript{165} \textit{Id. at *23.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id. (“[T]he Fourth Circuit’s teaching that ‘courts in this highly technical arena respect [sic] should respect the strengths of the agency processes on which Congress has placed its imprimatur’ remains relevant.” (citing North Carolina v. Tennessee Valley Authority, 615 F.3d 291, 305–306 (4th Cir. 2010))).}
\end{itemize}
injunctive relief that would substitute the Court’s views of an appropriate plan of action for Defendants’ judgment on the basis of the balancing of competing interests and concerns at issue in the management and operation of the CAWS. Any court-ordered relief along the lines requested by Plaintiffs very likely would affect lock operations, lake-water diversion, water quality, navigation, flood control, and of course isolating, capturing or killing Asian carp. All of these matters already are addressed, at least in some fashion, by existing statutes, regulations, rules, ordinances, and/or management policies, and remain subject to additional measures that may be imposed by Congress and/or the Asian Carp Director.\textsuperscript{168}

Thus, the court’s reluctance to enjoin the Defendant’s congressionally authorized activities as public nuisance activities, coupled with Michigan’s failure to persuade the court of an existing or imminent threat of harm, led the court to deny Michigan’s motion for a preliminary injunction.

\textbf{D. Analysis of the Court’s Opinion}

\textit{1. Displacement}

The court clearly answered the displacement question correctly. The discrete legislative provisions relied upon by the Corps are a far cry from the “all encompassing program . . . of regulation” at issue in \textit{Milwaukee II}. The first two statutes relied upon by the Corps are provisions of annual appropriations legislation that provided funding to the Corps to operate facilities in the CSSC “as . . . necessary to sustain through navigation from Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River.” The provisions of NANPCA relied upon by the Corps do not mandate that any efforts to prevent aquatic invasive species introductions between the two watersheds must not interfere with navigation. Rather, Congress instructed the Corps to

\begin{quote}
investigate and identify environmentally sound methods for preventing and reducing the dispersal of aquatic nuisance species between the Great Lakes-Saint Lawrence drainage and the Mississippi River drainage through the Chicago River Ship and Sanitary Canal, including any of those methods that could be incorporated into the operation or construction of the lock system of the Chicago River Ship and Sanitary Canal.\textsuperscript{169}
\end{quote}

One could read the word “including” in the above phrase to indicate that Congress did not necessarily want the Corps to exclude methods that might not be capable of incorporation into the lock system of the CSSC. Further, one could interpret the above phrase to mean Congress wanted the Corps to consider use of the locks themselves (i.e., closing them) as a means of preventing and reducing the dispersal of aquatic invasive species

\textsuperscript{168} \textit{Id.} at *24 (footnote omitted).

between the two waterways. Although not mentioned by the Corps, Congress has also authorized the Corps to conduct “a feasibility study of the range of options and technologies available to prevent the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins through the Chicago Sanitary and Ship Canal.”

Finally, the Corps’ argument that Congress has displaced any federal common law nuisance claims to the extent it has instructed the Corps to operate the CAWS to sustain navigation is diminished by other Acts of Congress that authorize the Corps to make changes to its operations in the name of improving the environment. Specifically, Congress has authorized the Corps to review water resources projects constructed by the Secretary to determine the need for modifications in the structures and operations of such projects for the purpose of improving the quality of the environment in the public interest and to determine if the operation of such projects has contributed to the degradation of the quality of the environment.

Thus, it is simply not clear from the statutes advanced by the Corps that Congress has “announce[d] [its] considered judgment” on the issue in this case: whether the Corps’ actions, by arguably failing to prevent the introduction of Asian carp into the Great Lakes, can give rise to a common law cause of action.

2. The Restatement Rule

The court may have overplayed its hand in its conclusion that Michigan failed to overcome the restatement rule that “conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.” The court’s application of the reasoning employed in TVA and Costle is weakened by the significant underlying factual and regulatory differences in Michigan. As the court acknowledged, the regulatory setting in TVA was a world apart from that involved in the instant case. The discrete provisions of statutes identified by the Corps and MWRD are simply incomparable to the comprehensive system of air pollu-

172. Id.
175. See id. at *22 (“To be sure, the rules and regulations at issue in TVA were more comprehensive (and specific) than those at issue here . . . .”).
tion regulations embodied by the Clean Air Act at issue in *TVA*. Unlike the Corps and MWRD, the TVA’s air emissions had been specifically approved through a permitting process pursuant to a comprehensive federal statute.

The following hypothetical demonstrates what would be a more apt comparison between the two sets of defendants. Assume for the moment that *TVA* occurred in a pre-Clean Air Act world. Faced with a public nuisance claim against it, TVA would likely be unable to successfully argue that its congressionally authorized duty to provide low cost electricity to the citizens of the Southern U.S. means it should not be subject to public nuisance liability for interstate air pollution. On these facts, a court could not reasonably apply the restatement rule that it should refrain from enjoining TVA’s air pollution as a public nuisance because TVA had an unrelated duty to provide electricity. Likewise, the *Michigan* Defendants’ failure to prevent the spread of Asian carp should not be considered beyond the reach of an injunction merely because unrelated and less-than-comprehensive statutes authorize them to operate the CAWS. Thus, the court should have more forcefully rejected any comparison between the *Michigan* defendants and TVA because federal common law applies “[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards.”

In addition to *TVA*, the court points to *Costle* as exemplifying application of the restatement rule. In *Costle*, plaintiffs alleged that a power company’s practice of burning high sulfur fuel oil to create electricity was creating a nuisance. As in *TVA*, the court pointed out that defendant’s practice was specifically approved by the EPA pursuant to its authority under the Clean Air Act. However, there the EPA affirmatively decided to authorize the power company’s practice by approving a variance to New York’s state implementation plan under the Clean Air Act. Those actions are of a wholly different character from what passes for “fully authorized” in the instant case.

First, except for a provision in the Corps’ fiscal year 2009 appropriation (the “Section 126 authority”), the statutes that the court points to for

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179. *Id.* at 31–32.

the proposition that the Defendants' conduct is fully authorized all pre-date
the threat of Asian carp reaching the Great Lakes.181 The court seems to be
on shaky ground to the extent it relies on statutes passed before the current
threat as evidence that Defendants' conduct has been fully authorized. Se-
cond, although the Section 126 authority was passed specifically in re-
response to the Asian carp threat, that provision is only temporary,182 and is
written at such a level of generality,183 as to call into question whether, stand-
ing alone, it can justify application of the restatement rule. Third, this
reliance is further undermined by the fact that Congress has also instructed
the Corps to review its projects to determine the need for modifications
necessary to protect the environment.184

Ultimately, the court's conclusion on this point seems to reflect an un-
derstandable reluctance to wade into the murky waters of technically com-
plex environmental issues that are being considered through "'[an] agency
process on which Congress has placed its imprimatur.'"185 However, the
court's efforts to compare the instant case to TVA and Costle are strained.
Judicial restraint certainly makes sense in the context of the extensive regu-
latory structure established by Congress in the Clean Air Act, at issue in
those cases. Such restraint is much less justified in the context of the scant
legal framework established by Congress to prevent the spread of Asian
carp into the Great Lakes through the CAWS. There is no dispute that ad-
ministrative agencies today do much of the work that common law courts
used to, especially in the realm of environmental law. But where Congress
and administrative agencies have yet to squarely address an issue like that
involved in Michigan, courts should heed the command of Milwaukee I that
federal common law applies.186 That would seem to be the case here.

Shortly before this note went to press, the Seventh Circuit issued an
opinion upholding the district court's refusal to grant preliminary injunctive

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181. Id. at *23. (citing Act of Dec. 4, 1981, Pub. L. No. 97-88, § 107, 95 Stat. 1135 (CSSC to be
operated "in the interest of navigation"); Act of July 30, 1983, Tit. I, Ch. IV, 97 Stat. 301 (Chicago
Lock); River and Harbors Act of 1946, Pub. L. No. 79-525, 60 Stat. 634 (July 24, 1946) (same, for
O'Brien lock). (emphasis added to dates)).
182. The Section 126 authority is limited to "the 1-year period beginning on the date of enactment
183. The Section 126 authority authorizes the Secretary of the Army to undertake, "such modifi-
cations or emergency measures as [he] determines to be appropriate, to prevent aquatic nuisance species
from bypassing the [electric barrier] and . . . to prevent aquatic nuisance species from dispersing into
the Great Lakes." Id.
185. Michigan, 2010 WL 5018559 at *23 (quoting North Carolina v. Tennessee Valley Authority,
615 F.3d 291, 305-306 (4th Cir. 2010)).
F.2d 236, 241-242 (10th Cir. 1971)).
relief. While a full analysis of the Seventh Circuit’s opinion is beyond the scope of this note, the opinion was well reasoned and warrants a few remarks. In a unanimous opinion for a three judge panel, Judge Diane Wood agreed with the lower court that the common law public nuisance claim was not displaced by federal law, writing that “[f]or better or for worse, congressional efforts to curb the migration of invasive species, and of invasive carp in particular, have yet to reach the level of detail one sees in the air or water pollution schemes.” However, Judge Wood suggested that the extent of federal agency action to prevent the Carp from entering the Great Lakes “might add up to displace as a matter of fact any role that equity might otherwise play.” The court was persuaded that the balance of harms favored the defendants because several of the plaintiff’s proposed remedies were problematic and the court questioned how much additional protection would be afforded beyond the agency actions that are already being undertaken. Notably, however, Judge Wood wrote that its conclusions were based on the “current state of play” and that the district court “would have the authority to revisit the question whether an exercise of its equitable powers is warranted” if the agencies became complacent or other new evidence came to light.

E. Summary

The experience in the U.S. with zebra mussels and Asian carp demonstrate that impacts from aquatic invasive species often unreasonably interfere with rights commonly held by the public such as boating, bathing, and fishing. As such, the common law of public nuisance should be available to remedy these impacts. Further, such public nuisance claims should generally not be held to be preempted by federal law because Congress has not yet passed comprehensive legislation to address the impacts from aquatic invasive species.

Michigan provides a recent demonstration of such a case. There, Plaintiffs sought an injunction, alleging that Defendants’ failure to take more aggressive actions to prevent the spread of Asian carp into the Great Lakes constituted a public nuisance. While the court agreed with Plaintiffs that their common law public nuisance claim was not displaced by the statutes at issue in the case, it held that Plaintiffs had failed to prove an exist-

188. Id. at *35.
189. Id. at *91.
190. Id. at *66-*99.
191. Id. at *99.
ing or imminent threat of harm. Further, the court relied on the restatement rule that courts are reluctant to enjoin conduct that is authorized by law as a public nuisance. However, the court’s reliance on the rule of restraint may have been misplaced. The court’s conclusion that the defendants’ conduct was “fully authorized” by statute was less convincing than the Clean Air Act-permitted conduct at issue in the cases cited by the court.

CONCLUSION

Aquatic invasive species like the Asian carp have caused grave ecological and economic harm across the United States. Yet, despite the extent of the existing and anticipated damage, Congress and the federal agencies’ efforts to get a handle on the problem through legislation and delegated regulatory authority can only be described as piecemeal and ineffective. Historically, the common law of public nuisance served as an important tool for providing a remedy to plaintiffs who have suffered an injury due to transboundary pollution. More recently, courts have established that such common law public nuisance claims will be displaced where Congress has comprehensively regulated in a field. Indeed, as Michigan shows, some courts have recently applied rules of judicial restraint to reject such common law claims even in the absence of comprehensive regulation.

While the common law of public nuisance may not be the most effective means of addressing many complex environmental issues, it nonetheless should remain available where Congress has failed to establish a better system, as in the case of addressing impacts from aquatic invasive species. Until Congress acts more thoroughly to address these impacts, fairness and Supreme Court precedent command that the doors of the judicial system remain open to such claims.

192. Judges have understandably questioned, for example, “whether expert witnesses in bench trials can replicate the sources that EPA can bring to bear.” North Carolina v. Tennessee Valley Authority, 615 F.3d 291, 304 (4th Cir. 2010).