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FEDERAL COMMON LAW REMEDIES FOR THE ABATEMENT OF WATER POLLUTION

I. Introduction

As a result of the Supreme Court's landmark decision in *Illinois v. City of Milwaukee*,¹ federal common law, a new and potentially effective remedy, has been made available to parties seeking relief in water pollution cases in the federal courts. However, the possibility of non-sovereign parties using federal common law remedies to protect the waterways may be severely diminished as several federal courts have restricted such remedies to suits involving interstate waterways.² This Note will examine the effect of these decisions on the ability of parties to initiate waterway pollution suits based on the federal common law and consider whether such decisions correctly interpret the intent of *Illinois*.

II. Water Pollution and the Federal Common Law

The primary efforts at abating water pollution focus on statutory remedies.³ However, the present statutory approach can never be fully effective. For example, the Federal Water Pollution Control Act⁴ emphasizes the development of a regulatory scheme⁵ and does not permit the granting of civil damages to private parties.⁶ Furthermore, the statute regulates effluent discharges⁷ but cannot be used to control non-point sources⁸ of water pollution. In addition, citizens cannot use the statute to eliminate the discharge of pollutants into

1. 406 U.S. 91 (1972).

2. See Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (applying principles of *Illinois* to air pollution).

3. See, e.g., The Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376 (Supp. V, 1975); The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-41 (Supp. V, 1975).

4. 33 U.S.C. §§ 1251-1376 (Supp. V, 1975).

5. *Id.* § 1252(a).

6. A private citizen having an interest which is, or may be, adversely affected can only bring an action to enforce an effluent limitation or order issued by the Federal Environmental Protection Administrator or a state with respect to such effluent limitation. *Id.* § 1365.

7. *Id.* § 1312.

8. *Id.* §§ 1362(11)-(12). A non-point source is one which is not a "discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

navigable waters any sooner than the timetables set down in the Act.⁹ The common law, however, is free from the restrictions inherent in a statutory approach and equitable remedies offer the courts the flexibility to fashion effective relief to prevent the degradation of the nation's waterways.

The common law action for public nuisance provides citizens with an opportunity to seek relief since it addresses itself to acts or omissions which obstruct or cause inconvenience or damage to the public in the exercise of rights common to all.¹⁰ In such cases, courts will give great weight to public interests when balancing the equities and deciding petitions for injunctive relief¹¹ and awarding damages.¹²

The principles of common law are of particular utility in the federal courts since these courts are more likely to view the problem of water pollution in national rather than local terms. Consequently, the federal common law of public nuisance may represent a most effective tool for arresting the deterioration of our waterways.

III. The Emergence of Federal Common Law

The trend towards the creation of federal common law¹³ had seem-

9. See *id.* §§ 1251(a), 1311(b). See, e.g., *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006 (4th Cir. 1976) where the court noted:

Permitting an interim discharge of pollutants is in accordance with the comprehensive regulatory scheme of the Federal Water Pollution Control Act Amendments of 1972. Its ultimate objective is the elimination of all water pollution. Purity however, is not to be achieved or required instantaneously. Instead the Act establishes a series of steps which impose progressively stricter standards until the final elimination of all pollutant discharges is achieved, that being envisioned for the year 1985.

Id. at 1007-08.

10. J. STEPHEN, *GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 105 (1890).

11. Public interests have been held to outweigh all other considerations. See, e.g., *Virginian Ry. v. System Federation*, 300 U.S. 515, 552 (1937); *Radich v. Kruly*, 226 Cal. App. 2d 683, 38 Cal. Rptr. 340 (Ct. App. 1964). Ordinances and licenses do not protect a nuisance from injunction by their mere existence. A license or statutory authorization carries with it no immunity if a nuisance is created. See *Commerce Oil Ref. Corp. v. Miner*, 281 F.2d 465, 468 (1st Cir. 1960). Some courts have held that the investment of a polluter in its activity can never outweigh its neighbors' rights to clean air and water. See *American Smelting & Ref. Co. v. Godfrey*, 158 F. 225, 230-34 (8th Cir. 1907); *United States v. Luce*, 141 F. 385, 416 (C.C. Del. 1905).

12. *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933); *Sussex Land & Live Stock Co. v. Midwest Ref. Co.*, 294 F. 597, 605 (8th Cir. 1923).

13. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), held that the federal courts were free to adopt and apply general principles of federal common law in all matters that were not specifically regulated by local statutes.

ingly been reversed by *Erie Railroad Co. v. Tompkins*¹⁴ when Mr. Justice Brandeis stated that there was no "federal general common law."¹⁵ The matter, however, was not fully resolved by *Erie* because in another decision¹⁶ handed down that same day, Mr. Justice Brandeis used "federal common law." Despite this uncertainty, Mr. Justice Jackson perhaps best clarified the character of federal common law in *D'Oench, Duhme & Co. v. FDIC*:¹⁷

Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon sources of the common law in cases such as the present.

Accordingly, there has been a willingness, even after *Erie*, to fashion federal common law.¹⁸ In *Textile Workers Union v. Lincoln Mills*¹⁹ the Supreme Court held that the federal common law could be applied to suits involving violations of contracts between an employer and a labor union²⁰ and that courts could fashion such law through judicial inventiveness from the policy of the national labor law.²¹ The Second Circuit Court of Appeals in *Ivy Broadcasting Co. v. AT&T Co.*²² went further and applied federal common law on the sole basis of extensive federal regulation. In *Ivy* the federal interest in telephone companies was held to be so strong and the regulation of such companies so comprehensive that a remedy for tort and

14. 304 U.S. 64 (1938).

15. *Id.* at 78.

16. *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Mr. Justice Brandeis stated: "Whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110.

17. 315 U.S. 447, 471-72 (1942). (Jackson, J., concurring).

18. For a further discussion concerning the use of the federal common law, see Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

19. 353 U.S. 448 (1957).

20. The Court stated: "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Id.* at 457.

21. *Id.* at 456-57.

22. 391 F.2d 486 (2d Cir. 1968).

breach of contract was held to exist under federal common law even though federal statutes provided no such remedies.²³

More significantly, federal common law was recently made explicitly available for water pollution cases in *Illinois v. City of Milwaukee*.²⁴ The state of Illinois sought leave to file a federal court complaint for polluting Lake Michigan against four cities in Wisconsin, and the sewerage commissions of both the city and county of Milwaukee. Illinois alleged that it prohibited and prevented such discharges into the lake and that the resultant water pollution caused by the defendants' failure to take comparable measures constituted a public nuisance.²⁵ Although the Court did not decide the merits of the case since it declined to exercise its original jurisdiction, it stated that the issues of the case could be litigated under the principles of federal common law in the appropriate district court.²⁶

Illinois involved interstate water pollution, but the decision indicates that the scope of federal common law should not be restricted solely to those facts. Writing for a unanimous Court, Mr. Justice Douglas stated that "[w]hen we deal with *air and water* in their *ambient* or interstate aspects, there is a federal common law"²⁷ Furthermore, the Supreme Court repeatedly expressed its intention to extend the application of federal common law to public nuisances caused by the pollution of either "interstate or navigable waters,"²⁸ regardless of the jurisdictional amount²⁹ or the character of the parties.³⁰ In so concluding, the Court recognized that the pollution of the waterways, whether interstate or just navigable, presented a federal question.³¹

23. *Id.* at 490.

24. 406 U.S. 91 (1972).

25. *Id.* at 93.

26. *Id.* at 98-101. This holding was perhaps anticipated by *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), which permitted the State of Texas to bring an action in federal district court, under federal common law, to enjoin New Mexico residents from polluting the Canadian River. *Id.* at 242. The Court in *Illinois* also overruled its previous decision in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971).

27. 406 U.S. at 103 (emphasis added).

28. *Id.* at 99, 102, 104.

29. The court stated that the considerable interests in the purity of our waters put the jurisdiction amount of 28 U.S.C. § 1331(a) beyond question. *Id.* at 98.

30. See text accompanying notes 63-68 *infra*.

31. The Court stated: "The question is whether pollution of interstate or navigable waters

The Court was of course cognizant of the existing statutes³² designed to combat water pollution, but it was also aware of their deficiencies:³³

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. . . . There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern.

Thus, although it conceded that the existing statutes might serve as useful guidelines to the federal courts, the *Illinois* Court indicated that these statutes will not necessarily set the boundaries of federal common law³⁴ in areas such as water pollution control.

IV. The Restrictive Reading of *Illinois*

Despite the broad language of *Illinois*, several recent lower court decisions have taken a restrictive view of the scope of the federal common law. In *Reserve Mining Co. v. EPA*,³⁵ the federal government, several states and several environmental groups brought an action against a Minnesota iron ore processing company to prevent it from discharging its wastes into nearby Lake Superior (an interstate body of water) and into the air of neighboring Minnesota villages.³⁶ The Eighth Circuit Court of Appeals summarily rejected the federal common law nuisance action to prevent the air pollution. It viewed *Illinois* as applying only to instances where the pollution source of one state harmed the environment of another³⁷ and found

creates actions arising under the 'laws' of the United States within the meaning of § 1331(a). We hold that it does." 406 U.S. at 99.

32. The Court noted the existence of the Federal Water Pollution Control Act. *Id.* at 102-04.

33. *Id.* at 107-08. In *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556 (N.D. Ill. 1973), the court held that the amendment of the Federal Water Pollution Control Act did not oust the federal courts from their federal common law jurisdiction. *Id.* at 559.

34. 406 U.S. at 103 n.5.

35. 514 F.2d 492 (8th Cir. 1975).

36. *Id.* at 499-500.

37. *Id.* at 520-21. The court found that the pollution of Lake Superior was controlled by

that the trial evidence indicated only that the air in Minnesota villages was affected by the waste emanating from the Minnesota processing company.³⁸

The Fourth Circuit reached a comparable decision in *Committee for the Consideration of the Jones Falls Sewage System v. Train*.³⁹ In *Jones Falls*, a group of Maryland citizens living near Jones Falls, an intrastate navigable waterway, sought to enjoin the granting of new sewage hookups to the existing Baltimore sewage system, which was already dumping a substantial amount of untreated raw sewage into Jones Falls.⁴⁰ Since no statutory remedy was available under the Federal Water Pollution Control Amendments of 1972,⁴¹ a federal common law claim was asserted.

Although Jones Falls qualified as a part of the navigable waters of the United States,⁴² the court refused to apply federal common law since no interstate controversy was presented. The majority conceded that there was a body of federal common law where one state infringed upon the environmental and ecological rights of another state⁴³ but it concluded that state law was sufficient for the resolution of a local dispute.⁴⁴

The *Jones Falls* dissent viewed the discharge of pollutants into navigable streams in a much broader light.⁴⁵ Although Baltimore's dumping of raw sewage had an intrastate effect on those living near Jones Falls, the dissent opined that such dumping adversely affected the national interest of making all "navigable" waters clean.⁴⁶ The dissent also reasoned that the protection of such interstate resources as the Chesapeake Bay could best be achieved by prevent-

the Water Pollution Control Act and granted the plaintiffs an abatement order under that Act. *Id.* at 527-29.

38. *Id.* at 520-21.

39. 539 F.2d 1006 (4th Cir. 1976).

40. *Id.* at 1010-11.

41. *Id.* at 1007. A discharge permit had been applied for by the Baltimore officials and the statute provided that during the pendency of such an application discharges would not violate the statute. Furthermore, during the pendency of this litigation, the state agency, with the authorization of the Environmental Protection Agency, actually issued a discharge permit. *Id.*

42. *Id.* at 1011.

43. *Id.* at 1008.

44. *Id.* at 1009.

45. *Id.* at 1012-16 (Butzner, J., dissenting).

46. *Id.* at 1012 (Butzner, J., dissenting).

ing the discharge of pollutants into its intrastate tributaries, including Jones Falls.⁴⁷ Thus it interpreted the broad language of *Illinois* as permitting the use of the federal common law in cases involving either intrastate or interstate navigable waters.⁴⁸

Other federal courts have similarly attempted to ascertain the scope of the federal common law principles announced in *Illinois*. These courts have generally indicated an awareness of the scope of the navigable waters problem but they have often refrained from resolving it.⁴⁹ For example, in *Board of Supervisors v. United States*,⁵⁰ the United States District Court for the Eastern District of Virginia expressed its uncertainty as to the scope of the federal common law in actions involving intrastate pollution. Accordingly, it offered no solution to the problem, but merely expressed a willingness to afford to plaintiff "an opportunity . . . to amend its complaint relating to the interstate nature of the pollution . . ."⁵¹

The Supreme Court's decision in *Illinois* explicitly stated that federal common law actions could be maintained to abate pollution in navigable bodies of water.⁵² Furthermore, in later decisions in which it noted *Illinois*, the Court has exhibited no intention to narrow the scope expressed in its original decision.⁵³ Additionally, on remand, the *Illinois* district court used the Supreme Court's

47. *Id.* The dissent relied on the dictum of *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976), which stated that Congress had shifted its emphasis in the 1972 amendments to the Water Pollution Control Act from legislating water quality standards of bodies of water to the elimination of the discharge of pollutants. 539 F.2d at 1012 n.7 (Butzner, J., dissenting).

48. 539 F.2d at 1013-14 (Butzner, J., dissenting).

49. See, e.g., *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1040 (7th Cir. 1975); *Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 216 n.2 (6th Cir. 1974), cert. denied, 419 U.S. 997 (1975). But see *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672 (D. N.J. 1973), vacated on other grounds, 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). In *Stoeco Homes, Inc.* the federal government sought to enjoin a housing developer from conducting dredging, fill and construction operations in South Harbor, a man-made lagoon measuring 125 feet wide, about one-half mile in length and approximately seven to eleven feet deep. *Id.* at 674-76. The court applied federal common law solely because the intrastate polluted waters in question were navigable. *Id.* at 679.

50. 408 F. Supp. 556 (E.D. Va. 1976).

51. *Id.* at 562.

52. See note 28 *supra*.

53. See, e.g., *Vermont v. New York*, 417 U.S. 270, 275 n.5 (1974); *Zahn v. International Paper Co.*, 414 U.S. 291, 302 n.11 (1973); *Washington v. General Motors*, 406 U.S. 109, 112 n.2 (1972).

"interstate or navigable waters" language.⁵⁴ Therefore, any attempt to circumvent the Court's language appears to be contrary to the Court's decision in *Illinois*.

The federal common law extends beyond the abatement of pollution in exclusively interstate bodies of water. The *Illinois* Court's choice of the term "navigable waters" is significant since the term has been broadly defined by statute as the waters of the United States, including the territorial seas.⁵⁵ The courts, consistent with the intent of Congress,⁵⁶ have given⁵⁷ this definition the broadest possible constitutional interpretation.

The Supreme Court in *Illinois* specifically stated that the pollution of interstate or navigable waters came under the federal question statute.⁵⁸ Consequently, the federal nature of the dispute conferred jurisdiction on the federal courts. This is certainly appropriate since federal common law draws its substance from the Constitution and the federal laws.⁵⁹ Moreover, there has been a trend in environmental law legislation toward greater federalization⁶⁰ to the extent that the 1972 Water Pollution Control Act now represents a

54. *Illinois ex rel. Scott v. Milwaukee*, 366 F. Supp. 298, 299-300 (N.D. Ill. 1973), understood the Supreme Court as "holding that pollution of interstate or navigable water could be abated under a federal common law claim based on nuisance and that such action was one 'arising under' the laws of the United States within the meaning of 28 U.S.C. § 1331(a) and within the jurisdiction of the federal district courts." *Id.* at 299.

55. 33 U.S.C. § 1362(7) (Supp. V, 1975).

56. S. CONF. REP. No. 1236, 92d Cong., 2d Sess., reprinted in [1972] 2 U.S. CODE CONG. & AD. NEWS 3776. The conferees fully intended to give the term "navigable waters" the broadest constitutional interpretation unencumbered by agency determinations which had been made or might be made for administrative purposes. *Id.* at 3822.

57. *California ex rel. State Water Resources Control Bd. v. EPA*, 511 F.2d 963 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976), interpreted the statutory definition as extending the Water Pollution Control Act Amendments to their constitutional limit to include all tributaries of rivers which, when combined with other waters or systems of transportation, would have a substantial effect on interstate commerce, so that any activity on such waters or pollution discharges into such streams would be regulated without regard to whether the particular discharges on individual streams discernably affected interstate commerce. *Id.* at 964-65 n.1. See also *National Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), which held that Congress, by the statutory definition, asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the commerce clause, and accordingly that the term was not limited to the traditional test of navigability. *Id.* at 686.

58. 406 U.S. at 99.

59. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

60. Note, *Clearing Muddy Waters: The Evolving Federalization of Water Pollution Control*, 60 Geo. L.J. 742 (1972).

comprehensive federal scheme for controlling water pollution.⁶¹ Thus, the Supreme Court in *Illinois* intended to do more than merely provide a forum for controversies between states.⁶²

V. Availability of Federal Common Law to Private Parties

Once it is established that environmental suits may be brought under federal common law, there is some question as to who may bring such suits. While courts have generally been more willing to grant federal or state governments relief in water pollution cases, there is nothing within the jurisdictional statute to restrict such actions to disputes between sovereignties.⁶³ Furthermore, by de-emphasizing the character of the parties that seek federal common law remedies, the Supreme Court in *Illinois* opened the way to private suits when it stated:⁶⁴

Thus, it is not only the character of the parties that requires us to apply federal law. . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law.

Additionally, the Water Pollution Control Act specifically authorizes citizens' suits and provides that such suits be brought in federal district court, without regard to the citizenship of the parties or the amount in controversy.⁶⁵ The Act also specifically preserves common law remedies.⁶⁶ Since federal common law draws its substance from such statutes, citizens should be able to bring federal common law actions on their own behalf, subject to the requirements of standing and the substantive law of public nuisance actions.

61. See, e.g., the following provisions of the 1972 amendments: 33 U.S.C. § 1251(a) (Supp. V, 1975) (establishing national goals for the elimination of pollution); *Id.* § 1316(c) (allowing state enforcement if its standards comply with federal regulation); *Id.* § 1319(a)(2) (allowing the Administrator to enforce pollution limitations if a state fails to); *Id.* § 1370 (providing that no state standard may be less stringent than the federal regulations).

62. *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976).

63. 28 U.S.C. § 1331(a) (1970) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

64. 406 U.S. at 105 n.6.

65. 33 U.S.C. § 1365(a) (Supp. V, 1975).

66. *Id.* § 1365(e).

Jones Falls did not permit a private party to bring a common law action of nuisance.⁶⁷ The United States District Court for the District of Connecticut in *Byram River v. Port Chester*,⁶⁸ however, took a contrary view. Although that action was ultimately dismissed for lack of personal jurisdiction, the court recognized that it had federal common law jurisdiction over the action even though it was brought by private persons.⁶⁹

VI. Conclusion

The Court in *Illinois* expressed the view that there is a federal interest in the abatement of pollution of interstate and navigable waters. When an intrastate controversy arises, the issue is not whether state law is sufficient for the resolution of such a dispute.⁷⁰ Rather, the issue is whether such disputes are of federal concern. If they are, the federal courts must be available to complainants.

The availability of federal common law remedies would not undercut a state's recognized, primary role in water pollution control.⁷¹ But, under *Illinois*, "it is federal, not state, law that in the end controls the pollution of interstate or navigable waters."⁷² The effect of federal common law, therefore, is ultimately to fill any statutory interstices⁷³ and to provide a measure of uniformity⁷⁴ to the rules governing the waters, either interstate or navigable, of the United States.

Increasing the availability of the federal courts, even to suits instituted by private parties, would not have the effect of opening the floodgates to environmental litigation. In order to maintain such an action, complainants would first have to satisfy standing require-

67. 539 F.2d at 1010.

68. 7 ENVIR. REP. 1127 (D. Conn. 1974).

69. *Id.* at 1128. The view permitting private parties to institute federal common law actions is bolstered by the court's statement in *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973), to the effect that the granting of jurisdiction in such cases did not require a controversy between sovereignties.

70. 539 F.2d at 1009.

71. 33 U.S.C. § 1251(b) (Supp. V, 1975) provides "It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . ."

72. 406 U.S. at 102.

73. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

74. 406 U.S. at 105 n.6, 107 n.9.

ments⁷⁵ and overcome the inherent restrictions of public nuisance actions.⁷⁶ Additional limitations on recovery of attorney's fees⁷⁷ and the requirements for bringing class actions will similarly restrict the number of cases brought under federal common law.

James D. Kakoullis

75. Under article III of the Constitution a litigant must show the existence of a real case or controversy against his adversary. He must further demonstrate a sufficient personal stake in the result of the dispute. *Baker v. Carr*, 369 U.S. 186 (1962). Furthermore, an individual asserting an environmental claim must show that he personally is threatened with immediate or possible injury, and that he is not merely interested in the problem. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

76. A private individual has no action for the invasion of a purely public right, unless his damage is in some way distinguishable from that sustained by the general public. See *Bouquet v. Hackensack Water Co.*, 90 N.J.L. 203, 101 A. 379 (1917); *Alexander v. Wilkes-Barre Anthracite Coal Co.*, 254 Pa. 1, 98 A. 794 (1916). The private individual's damage must be different in kind, rather than in degree, from that shared with the public. See *Smedberg v. Moxie Dam Co.*, 148 Me. 302, 92 A.2d 606 (1952). This distinction is of particular importance in environmental suits since most courts limit the private individual's right to recover the damages which he personally sustains on the rationale that pollution is a public problem which the courts cannot effectively deal with in litigation between private parties. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

77. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) held that environmental interest litigants are not entitled to an award of attorney fees for promoting public interests absent statutory authorization. See 4 *FORDHAM URBAN L.J.* 211 (1975).

