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THE SUFFOLK SYNDROME: A CASE STUDY IN PUBLIC NUISANCE LAW

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I. INTRODUCTION

On August 1, 1986, lightning struck and damaged a tank of hydrochloric acid at the Suffolk Chemical Company plant in Chapin, South Carolina, spilling several thousand gallons of acid and releasing a vapor cloud. The spill forced evacuation of the nearby community. Remarkably, the incident occurred on the fifth day of hearings before the South Carolina Department of Health and Environmental Control (DHEC) to determine whether the plant should be closed as a public nuisance. It brought the hearings to an abrupt halt.

The hearings ultimately resumed, but the parties settled the case without the need for a legal decision. Suffolk agreed, without admitting liability or the State's authority, to close the plant permanently. Although the issues presented were never resolved, the case challenged the State's ability to protect its citizens and environment and pushed Suffolk and DHEC toward a legal test of regulatory power ultimately depending on the remedy sought: the permanent closure of an industrial plant.

This article examines why the State based its case for closure on a public nuisance theory when DHEC had clear authority and extensive enforcement powers under a number of state and federal environmental statutes and regulations. Although DHEC cited numerous environmental statutes during its case, the thrust of the State's enforcement effort was the abatement

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of a public nuisance. The thesis of this article is that nuisance law survives today amid apparently comprehensive federal and state environmental regulations because of its nearly infinite flexibility and adaptability and its inherent capacity to fill gaps in statutory controls. Nuisance law retains a singular capacity to strengthen and be strengthened by the continued development of environmental regulations.

This article examines the relationship between nuisance law and environmental law in the context of one case study. It is not intended to be an in-depth study or comprehensive survey of either area of law.

II. NUISANCE LAW

Scholars have called nuisance law the “common law backbone of modern environmental and energy law.”¹ A nuisance is an unreasonable interference with an individual’s interests in the use and enjoyment of land or an unreasonable interference with rights common to the general public.² The former is a private nuisance; the latter is a public nuisance and is the primary subject of this article. For a private nuisance action to lie, the interference must be either “intentional and unreasonable, or unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”³ An interference is unreasonable when: (1) the gravity of the harm outweighs the utility of the actor’s conduct, or (2) the harm caused by the conduct is serious, and the financial burden of compensating injured persons would not make continuation of the conduct unfeasible.⁴ Determining when an interference with a public right is unreasonable depends upon whether: (1) the conduct involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) the conduct is proscribed by statute, ordinance, or regulation; or (3) the conduct is of a continuing nature or has produced a permanent or long-lasting effect and has a

1. See W. RODGERS, ENVIRONMENTAL LAW § 2.1, at 100 (1977).

2. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 86, 87, at 618-19 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

3. RESTATEMENT (SECOND) OF TORTS § 822 (1979) [hereinafter RESTATEMENT].

4. *Id.* § 826.

significant effect upon the public right.⁵ In addition to being unreasonable, the interference must be substantial,⁶ which is defined as a significant harm to another person.⁷ Thus, the rights of the person offended by the conduct are balanced against those of the offender.⁸

The power to abate nuisances is an essential aspect of the police power, an ancient and fundamental element of the government's duty to protect its citizens. This power may be exercised in different forms by the legislature, the executive, or the judiciary. Legislation in many states addresses the prevention and abatement of nuisances. Statutes may define and prohibit public nuisances in general terms⁹ or define specific activities as public nuisances.¹⁰ Although particular legislation may provide remedies and sanctions,¹¹ ultimate authority to abate nuisances rests with the courts. The judiciary, using its inherent powers at law and in equity with the traditional remedies of damages and injunction, proceeds on an ad hoc basis to determine what constitutes a nuisance with or without the aid of legislation.¹²

Traditionally, health authorities have been vested with the power to declare and abate nuisances dangerous to public health.¹³ The abatement power may extend to the restriction or

5. *Id.* § 821B.

6. PROSSER AND KEETON, *supra* note 2, § 88, at 626.

7. *Id.*

8. Klar, *Recent Developments in Canadian Law: Torts*, 17 OTTAWA L. REV. 325, 388 (1985).

9. For example, see OHIO REV. CODE ANN. § 3767.01(C) (Anderson 1988), which provides: "'Nuisance' means that which is defined and declared by statutes to be such . . ." See also S.C. CODE REGS. 61-46 (1976) (defining nuisance as "whatever is dangerous to human health" and offering many examples).

10. See, e.g., OHIO REV. CODE ANN. § 6111.04 (Anderson Supp. 1988):

No person shall cause pollution or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state, and any such action is hereby declared to be a public nuisance, except in such cases where the director of environmental protection has issued a valid and unexpired permit . . .

See also *id.* §§ 3767.01-99 (defining a variety of activities as nuisances, including maintaining houses of prostitution and obscenity, obstruction of waterways, and defiling springs and wells).

11. See, e.g., *id.* §§ 3767.01-99 (remedies and sanctions include injunctions, taxes, sale of property, criminal prosecution).

12. Public nuisance was a common-law crime, as well as a tort. See RESTATEMENT, *supra* note 3, § 821B comment b (1979).

13. 39 AM. JUR. 2D *Health* § 24 (1968).

prohibition of a business that is dangerous to the public health¹⁴ and to the destruction of private property.¹⁵

Nuisance law is uniquely adaptable to changing times. Since public nuisance is not susceptible of precise definition, it has been applied to a wide variety of activities allegedly injurious to the public health, safety, and welfare. For example, courts have found public nuisances to include such things as the keeping of diseased animals,¹⁶ storing explosives,¹⁷ shooting fireworks in the streets,¹⁸ practicing medicine unlawfully,¹⁹ maintaining a house of prostitution²⁰ or a gambling house,²¹ bullfighting,²² using public profanity,²³ making loud noises,²⁴ producing odors, smoke dust, and vibrations,²⁵ obstructing a highway or navigable waterway,²⁶ and being a common scold.²⁷ At times a nuisance appears to be anything that society views as intolerable. In fact, one South Carolina court has defined nuisance as “anything which works hurt, inconvenience, or damage; anything which essentially interferes with the enjoyment of life or property.”²⁸ This

14. *Id.* § 25.

15. *Id.* § 41. See also *Pereplechikoff v. City of Los Angeles*, 174 Cal. App. 2d 697, 345 P.2d 261 (1959) (city has authority to demolish dilapidated hotel); *Hebron Savings Bank v. City of Salisbury*, 259 Md. 294, 269 A.2d 597 (1970) (if city demolishes mortgaged house, mortgagee entitled to compensation only if house not nuisance); *Burns v. Mayor of Midland*, 247 Md. 548, 234 A.2d 162 (1967) (city has authority to demolish dangerous building).

16. See, e.g., *Browning v. Belue*, 22 Ala. App. 437, 116 So. 509 (1928); *Patterson v. Rosenwald*, 222 Mo. App. 973, 6 S.W.2d 664 (1928).

17. See, e.g., *State v. Excelsior Powder Mfg. Co.*, 259 Mo. 254, 169 S.W. 267 (1914).

18. See, e.g., *Landau v. City of New York*, 180 N.Y. 48, 72 N.E. 631 (1904).

19. See, e.g., *State ex rel. Collet v. Scopel*, 316 S.W.2d 515 (Mo. 1958).

20. See, e.g., *State v. Navy*, 123 W. Va. 722, 17 S.E.2d 626 (1941).

21. See, e.g., *State ex rel. Williams v. Karston*, 208 Ark. 703, 187 S.W.2d 327 (1945); *State ex rel. Johnson v. Hash*, 144 Neb. 495, 13 N.W.2d 716 (1944).

22. See, e.g., *State ex rel. Att’y Gen. v. Canty*, 207 Mo. 439, 105 S.W. 1078 (1907).

23. See, e.g., *Wilson v. Parent*, 228 Or. 354, 365 P.2d 72 (1961).

24. See, e.g., *People v. Rubinfeld*, 254 N.Y. 245, 172 N.E. 485 (1930); cf. *State v. Turner*, 198 S.C. 487, 18 S.E.2d 372 (1942) (playing of music not a nuisance per se but may become one by reason of noise it makes to annoyance of neighborhood).

25. See, e.g., *Transcontinental Gas Pipe Line Corp. v. Gault*, 198 F.2d 196 (4th Cir. 1952); *Soap Corp. v. Reynolds*, 178 F.2d 503 (5th Cir. 1950); *State v. Primeau*, 70 Wis. 2d 109, 422 P.2d 302 (1966).

26. See, e.g., *Pilgrim Plywood Corp. v. Melendy*, 110 Vt. 12, 1 A.2d 700 (1938); cf. *Sloan v. City of Greenville*, 235 S.C. 277, 111 S.E.2d 573 (1959) (enclosure by construction of overhanging building).

27. See, e.g., *Commonwealth v. Mohn*, 52 Pa. 243 (1866); cf. *State ex rel. Burgum v. Hooker*, 87 N.W.2d 337 (N.D. 1957) (loan shark).

28. See *Neal v. Darby*, 282 S.C. 277, 295, 318 S.E.2d 18, 23 (Ct. App. 1984).

amorphous and mutable quality seems to vex legal scholars more than it does the courts.²⁹ Yet this adaptability explains nuisance law's survival in environmental litigation.

III. ENVIRONMENTAL REGULATION

Congress has enacted legislation in all areas of environmental law. The following are major federal statutes classified by the type of pollution they address:

A. Water Pollution

Clean Water Act (CWA)³⁰

B. Drinking Water

Safe Drinking Water Act (SDWA)³¹

C. Groundwater

SDWA, CWA, Resource Conservation and Recovery Act (RCRA),³² Comprehensive Environment Response, Compensation, and Liability Act (CERCLA)³³

D. Solid and Hazardous Waste

SDWA, RCRA, CERCLA (Superfund),
Toxic Substances Control Act (TOSCA)³⁴

E. Air Pollution

Clean Air Act³⁵

In general, the Clean Air Act regulates emissions of air contaminants, the Clean Water Act protects water quality by regulating the discharge of pollutants into water, and RCRA protects land and groundwater by regulating the disposal of solid and hazardous waste. CERCLA, commonly known as Superfund, aims at correcting serious environmental problems existing despite regulation, and it focuses on releases and threatened releases of hazardous substances. The term "Superfund" refers to the trust fund established by the Act to provide money for cleaning sites contaminated with hazardous substances. The

29. See PROSSER AND KEETON, *supra* note 2, § 86, at 616 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'").

30. 33 U.S.C.A. §§ 1251-1376 (West 1986 & Supp. 1988).

31. 42 U.S.C.A. §§ 300f-300j-11 (West 1983 & Supp. 1988).

32. *Id.* §§ 6901-6987.

33. *Id.* §§ 9601-9675.

34. 15 U.S.C.A. §§ 2601-2654 (West 1983 & Supp. 1988).

35. 42 U.S.C.A. §§ 7401-7642 (West 1983 & Supp. 1988).

Safe Drinking Water Act protects underground sources of drinking water from contamination by underground injection of wastes.

With the exception of CERCLA and TOSCA, these acts follow a common pattern. Each creates a pollution-control program and gives the Environmental Protection Agency (EPA) the power to implement the program by setting national pollution control standards, issuing permits, and taking enforcement actions. The acts specify various administrative powers, including the power to hold hearings, issue orders, impose penalties, and investigate potential and actual sources of pollution. These powers fall into three broad categories: (1) rulemaking powers, which allow the setting of national standards; (2) licensing powers, which control polluting activities through issuance and denial of permits; and (3) enforcement powers, which allow the enforcement of standards and permit limits. Enforcement possibilities include: (1) strict liability and civil penalties for violation of permit conditions, orders, or standards; (2) administrative orders and injunctions to enforce statutory provisions; (3) criminal penalties for intentional violations.

All major federal environmental statutes also contain almost identical "citizen suit" provisions. These provisions authorize "any person" or "any citizen," in his own behalf, to commence a civil action in federal district court to enforce the statute's provisions.³⁶ Through these citizen suit provisions, the acts provide for private, as well as government, enforcement.

Finally, the acts are similar in that they typically provide for delegation of administrative work to the states, provided the states have an equivalent program. State statutes parallel the federal statutes by providing for similar state pollution-control programs with similar powers for state environmental agencies such as DHEC.

For example, the South Carolina Pollution Control Act³⁷ prohibits any discharge or release of wastes into the state's envi-

36. See Toxic Substances Control Act § 20, 15 U.S.C.A. § 2619 (West 1982 & Supp. 1988); Clean Water Act § 505, 33 U.S.C.A. § 1365 (West 1986 & Supp. 1988); Safe Drinking Water Act § 2, 42 U.S.C.A. § 300j-8 (West 1983); Resource Conservation and Recovery Act § 7002, 42 U.S.C.A. § 6972 (West 1983 & Supp. 1988); Clean Air Act § 7604, 42 U.S.C.A. § 7604 (West 1983); Comprehensive Environmental Response, Compensation and Liability Act § 310, 42 U.S.C.A. § 9659 (West Supp. 1988).

37. S.C. CODE ANN. §§ 48-1-10 to -350 (Law. Co-op. 1987).

ronment, unless in compliance with a DHEC permit.³⁸ DHEC is given regulatory authority to establish standards for water and air quality, discharges of water pollutants, and emissions of air contaminants.³⁹ Permits are required for the construction and operation of pollution sources,⁴⁰ and DHEC may issue, deny, revoke, suspend, and modify these permits once issued.⁴¹ DHEC may also enforce the Act and regulations through administrative orders or judicial process.⁴² Violations are subject to civil and criminal penalties.⁴³ With this authority, DHEC qualifies for federal authorization under both the Clean Air Act and Clean Water Act. DHEC also has used similar powers under the state Hazardous Waste Management Act⁴⁴ and state Safe Drinking Water Act⁴⁵ to qualify for authorization under RCRA and the federal Safe Drinking Water Act.

CERCLA is unique among the federal statutes. It primarily creates a remedial program rather than a preventive regulatory program. CERCLA empowers the federal government to respond to releases of hazardous substances into the environment either by requiring removal and cleanup by responsible parties or by undertaking remedial activities itself and seeking reimbursement from the responsible parties.⁴⁶ It creates sweeping potential liabilities for persons who generate, transport, treat, store, or dispose of hazardous substances.⁴⁷

Congress substantially revised CERCLA in 1986 by passing the Superfund Amendments and Reauthorization Act,⁴⁸ commonly known as SARA. SARA created a new regulatory program under Title III, the Emergency Planning and Community Right-to-Know Act.⁴⁹ This legislation subjects industries to an array of

38. *Id.* § 48-1-90(a).

39. *Id.* §§ 48-1-40, -50(23), -60.

40. *Id.* § 48-1-110.

41. *Id.* § 48-1-50(5).

42. *Id.* §§ 48-1-50, -120, -130, -150, -220.

43. *Id.* §§ 48-1-320, -330.

44. S.C. CODE ANN. §§ 44-56-10 to -330 (Law. Co-op. 1976 & Supp. 1988).

45. S.C. CODE ANN. §§ 44-55-10 to -100 (Law. Co-op. 1976).

46. 42 U.S.C.A. §§ 9604, 9606, 9607 (West 1982 & Supp. 1988).

47. *See, e.g.*, *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

48. Pub. L. No. 99-499, 100 Stat. 1613 (1987) (codified at 42 U.S.C.A. §§ 9605-9975 (West Supp. 1988)).

49. 42 U.S.C.A. §§ 11001-11050 (West Supp. 1988).

reporting requirements relating not only to releases of hazardous substances but also to inventories and hazard communication standards.⁵⁰ These requirements are designed to prepare communities and emergency response authorities for the contingencies of chemical accidents.

State participation is an important component of CERCLA but not in the same manner as under the other statutes. No general plan exists for development of equivalent state programs or for delegation of administrative authority to state environmental agencies. Nevertheless, some states have enacted varied statutes similar to CERCLA.⁵¹

By identifying potential avenues of pollution and establishing a general program of controls for specific sources, federal and state environmental regulation attempts to prevent pollution problems *before* they occur. In contrast, nuisance law is largely a case-by-case method of reacting to such problems *after* they occur.

IV. CASE STUDY: SUFFOLK CHEMICAL COMPANY

A. *Plant History*

In 1979 Suffolk Chemical Company, a division of United Chemicals, Inc., began operation of a modestly sized chemical plant near Chapin, South Carolina, a small community outside Columbia. Its operations began without incident and were limited to the receipt, repackaging, and distribution of various chemicals. Because Suffolk was merely a distribution plant and — at least in theory — did not generate, treat, or dispose of any waste, the state did not require the company to obtain permits for environmental activities.⁵²

In January 1981 DHEC was notified of the presence of caustic materials in a small wet-weather stream, a ditch that flowed from the Suffolk plant through neighboring property and ultimately into a tributary of Lake Murray. Investigation revealed

50. See *id.* §§ 11021-11023.

51. *E.g.*, COLO. REV. STAT. §§ 25-16-101 to -201 (1982 & Supp. 1988); KAN. STAT. ANN. §§ 65-3452 to -3459 (1985 & Supp. 1987); MICH. COMP. LAWS ANN. §§ 299.601-.611 (West 1984 & Supp. 1988); MONT. CODE ANN. §§ 75-10-701 to -715 (1987); S.C. CODE ANN. §§ 44-56-160 to -200 (Law. Co-op. 1976 & Supp. 1988).

52. See *infra* notes 62-64 and accompanying text.

that a large quantity of sodium hydroxide⁵³ had been released into the stream. Containment and cleanup of the spill took several weeks. The spill apparently resulted from damage to a valve on a sodium hydroxide tank and was aggravated by employees' efforts to wash out the spilled caustic material, which thereby flushed larger quantities into the wet-weather stream.

This incident prompted further investigation that revealed that Suffolk had an unpermitted lagoon on site for disposing of drum washwater. In June 1981 DHEC issued to Suffolk the first of a series of administrative consent orders that addressed the sodium hydroxide spill, the unpermitted lagoon, and other subjects, including a smaller spill of potassium hydroxide⁵⁴ into the same wet-weather stream. The order made no findings of fact or conclusions of law. It did, however, recite DHEC's jurisdiction over the subject matter and the parties. The order directed Suffolk to take certain corrective actions, including development of an appropriate spill prevention, control, and countermeasure plan, as well as construction of an adequate containment system to hold any materials that might be spilled on site.

In early 1982 DHEC issued another administrative order addressing still more "incidents," including a spill of 1, 1, 1-trichloroethane,⁵⁵ and revising the schedule for completion of the containment structure. This order also recognized the possibility, apparently expressed by Suffolk management, that the plant would be closed for business reasons. The order did not require closure, but mentioned voluntary closure as an option that would release the company from certain responsibilities and incur others.

In August 1982 two chlorine gas leaks occurred in rapid succession, causing consternation in the community in the first instance and an evacuation in the second.⁵⁶ The result was an

53. Sodium hydroxide, commonly known as caustic soda or lye, is an important commercial caustic. It is highly corrosive to animal and vegetable tissue and is listed as a hazardous substance under CERCLA. *See* 40 C.F.R. § 302.4 table 302.4 (1987).

54. Potassium hydroxide, also known as caustic potash, is similar in properties to sodium hydroxide. It is extremely corrosive and is a listed CERCLA hazardous substance. *See id.*

55. 1, 1, 1-trichloroethane, also known as methyl chloroform, is an organic compound used as an industrial solvent. It is irritating to eyes and mucous membranes and is listed as a CERCLA hazardous substance because of toxicity. *See id.*

56. Chlorine is a dense, greenish-yellow, distomic gas with many uses including disinfection and purification of water and the manufacture of bleach and synthetic chemi-

emergency order from DHEC requiring the plant to cease operation and to show cause why it should not be closed permanently. After a formal hearing on the emergency order, DHEC allowed the company to reopen the plant and resume part of its operations. DHEC conditioned reopening upon completion of the containment structure required by the previous order. Chlorine gas operations were not allowed to resume until Suffolk had instituted new management, personnel training, and safety procedures to satisfy both DHEC and the community. Before the end of 1982, the plant was in full operation again.

Because the emergency order and emergency hearing were confined to a narrow set of issues and were resolved, at least temporarily, to the satisfaction of both parties, they did not delve deeply into the question of DHEC's authority to close the plant. As an emergency measure, the order seemed well founded on express statutory authority to deal with public health and environmental catastrophes. Section 44-1-140 of the South Carolina Code, as amended, empowers DHEC to make "orders and rules to meet any emergency not provided for by general rules and regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other danger to the public life and health."⁵⁷ The state Pollution Control Act also contains an emergency powers provision:

Whenever the Department finds that an emergency exists requiring immediate action to protect the public health or property, the Department, with concurrent notice to the Governor, may without notice or hearing issue an order reciting the existence of such an emergency and requiring that such action be taken as the Department deems necessary to meet the emergency.⁵⁸

Although the emergency order recited the existence of a nuisance dangerous to public health, the chief question at the hearing was the existence and nature of the emergency, rather than the authority to deal with it.

After two relatively uneventful years, DHEC again received

cal. It is toxic and is a listed CERCLA hazardous substance. *See id.*

57. S.C. CODE ANN. § 44-1-140 (Law. Co-op. 1976).

58. S.C. CODE ANN. § 48-1-290 (Law. Co-op. 1987).

reports of a spill of an unknown substance into the wet-weather stream in August 1985. Investigators found that the substance was a caustic-type material, apparently bleach manufactured as a by-product of the chlorine operations at the plant. The extent and effects of the spill were strikingly similar to those of the sodium hydroxide spill of 1981. The incident revived concerns, which had lain relatively dormant, about safety of the plant's operations.

On September 8, 1985, pressure inside a railroad tank car of hydrochloric acid⁵⁹ at the plant caused a sudden spill onto the ground and sent a large vapor cloud into the atmosphere. The Chapin community was evacuated. Later in the evening the cloud dissipated, and the evacuation ended, but fear and anger remained. No emergency order was issued, but attention was directed toward the permanent closure of the Chapin plant.

On October 13, 1985, following another relatively small chlorine gas leak, DHEC issued an order cataloging the incidents at the plant, listing the compliance and enforcement measures taken and requiring the plant to cease operations permanently. The order recited numerous violations of state environmental statutes and regulations, but more importantly, it declared the Suffolk plant a public nuisance, dangerous to the public health.

Predictably, Suffolk appealed the order through the administrative process. Because no pending, imminent threat could be established easily, DHEC did not attempt to close the plant pending the appeal. In December 1985, however, following the discovery of several other problems including the adjacent storage of incompatible chemicals in a warehouse, DHEC issued another emergency order. This order did not require immediate closure, but it did direct Suffolk to begin removing chemicals from the site and to cease accepting any new shipments of chemicals. Following another emergency hearing, a DHEC hearing officer modified the emergency order, mandating correction of the specific deficiencies noted and restricting the plant's hours of operation for the duration of the administrative appeal.

During the months of discovery and other prehearing proce-

59. Hydrochloric acid is a strong, highly corrosive acid, sometimes known as muriatic acid. It is colorless or slightly yellow and fumes in air. It can cause severe chemical burns and is toxic by ingestion and inhalation. It is a listed CERCLA hazardous substance. See 40 C.F.R. § 302.4 table 302.4 (1987).

dures, incidents continued to occur. None, however, were of catastrophic proportions. On August 1, 1986, the fifth day of administrative hearings, as testimony was underway, lightning struck a large outdoor storage tank containing several thousand gallons of hydrochloric acid. A valve on the tank was destroyed. The tank's contents were released into a containment area, and a large cloud of hydrochloric acid vapors was released into the air. Authorities again evacuated the Chapin community, and DHEC abruptly terminated the hearings. The containment structure did not contain all of the material, and some of the acid surfaced outside the containment area. Other than the vapor cloud, however, there was no evidence that any liquid had escaped the plant property. The company voluntarily ceased its regular operations until cleanup was complete.

After several weeks of additional hearings, but before a report had been issued by the hearing officer, Suffolk agreed with DHEC to close the plant permanently. The settlement precluded resolution of the legal issues that had been debated vigorously during the course of hearings. Nevertheless, two issues remain of interest in defining the relationship between public nuisance law and environmental law. They are: (1) the choice of action issue — whether nuisance law provides any rights or remedies not otherwise available to the government or private citizens under environmental statutes; and (2) the choice of forum issue — whether an administrative agency, such as DHEC, has the authority to bring these issues to a conclusion through its own administrative process and independently order the final remedy without recourse to the courts.

B. Choice of Action

1. Environmental Statutes

DHEC has broad powers under the South Carolina Pollution Control Act⁶⁰ and the South Carolina Hazardous Waste Management Act.⁶¹ These acts grant DHEC the full range of administrative powers typical under environmental statutes. DHEC also administers the major environmental programs

60. S.C. CODE ANN. §§ 48-1-10 to -350 (Law. Co-op. 1987).

61. S.C. CODE ANN. §§ 44-56-10 to -510 (Law. Co-op. 1976 & Supp. 1988).

under the federal statutes described above. These powers and programs, however, had surprisingly limited applicability to the situation at Suffolk. Because the plant was a distribution center, it did not need DHEC permits to operate per se. In fact, few regular, planned activities at the plant required permits.

The Pollution Control Act requires a permit for any discharge of waste into the environment⁶² and for the construction or operation of a waste disposal system or air contaminant source.⁶³ The Hazardous Waste Management Act requires a permit for the storage, treatment, or disposal of hazardous waste.⁶⁴ The plant, however, did not routinely generate waste products requiring permits for treatment or disposal, and it did not operate any continuing sources of air contaminants or water pollution. Much of DHEC's regulatory interest related to, or resulted from, spills of plant materials. For example, DHEC required a permit to construct and operate the spill containment structure because Suffolk used it as a disposal system to handle materials that, when spilled, would constitute waste. Although Suffolk could be expected to spill materials from time to time, spills were not intended to be a part of daily operations at the plant.

Similarly, a discharge permit issued by DHEC under the National Pollutant Discharge Elimination System (NPDES)⁶⁵ was intended primarily to cover run-off and spilled materials that would be collected in, and discharged from, the containment system rather than wastewater generated as a routine part of a production process. Suffolk rarely discharged wastewater under this permit; instead, it collected the wastewater and transported it for disposal at an off-site facility owned by a public entity. It thereby avoided the necessity for providing treatment of the wastewater to comply with the permit's effluent limitations.

Because of its limited regulatory authority over Suffolk's operation, DHEC had no assurance that it could require closure

62. S.C. CODE ANN. § 48-1-90(a) (Law. Co-op. 1987).

63. *Id.* § 48-1-110(a).

64. S.C. CODE ANN. § 44-56-60 (Law. Co-op. Supp. 1988).

65. Under § 402 of the Clean Water Act, 33 U.S.C.A. § 1342 (West 1986 & Supp. 1988), the EPA or any authorized state may issue a permit allowing the discharge of pollutants into waters of the United States otherwise prohibited by the Act. 33 U.S.C.A. § 1311(a) (West 1986). The permit program is known as the National Pollutant Discharge Elimination System (NPDES).

of the plant simply by revoking a permit. The plant did not need a permit to operate in the first place, and those permits that were necessary were collateral to the plant's main production process. This distinguished the case from the otherwise strong support for DHEC's action that was established in *Barker Industries v. South Carolina Department of Health & Environmental Control*.⁶⁶ In *Barker Industries* DHEC had revoked a permit to operate a waste-disposal system at a small chemical plant. Because the plant routinely generated waste, it could not operate without some method of waste disposal. Revocation of Barker's waste disposal permit forced closure of the plant even though Barker, like Suffolk, did not need a permit to operate a chemical plant per se. Revocation of Suffolk's permits might have posed serious difficulties for the company, but revocation alone would not necessarily have forced plant closure. Prior to August 1986 DHEC regulation of Suffolk had been an ad hoc exercise of enforcement power through a series of administrative orders. Whether this exercise of power could include simply ordering the plant to close was an open question, at least insofar as the Pollution Control Act and Hazardous Waste Management Act were concerned. Nevertheless, DHEC asserted that its order to close the plant was the next logical step in exercising the same enforcement powers.

If the plant had been operating under a DHEC permit, DHEC could have revoked the permit, thus forcing plant closure as a sanction against repeated violations of an enforcement order or statute. In dealing with Suffolk, DHEC's logic was that a plant operating without a permit should fare no better when it repeatedly violates an enforcement order or statute. But to some extent that reasoning is counter-intuitive because the legislature has allowed precisely that result by not requiring a permit to operate the plant in the first place.

The Pollution Control Act does give DHEC the general power to "abate, control and prevent pollution"⁶⁷ and specifically authorizes DHEC to prohibit a discharge of pollutants into the waters of the state.⁶⁸ Several of the incidents at Suffolk constituted discharges of pollutants into the waters of the state —

66. 287 S.C. 424, 339 S.E.2d 136 (Ct. App. 1985).

67. S.C. CODE ANN. § 48-1-20 (Law. Co-op. 1987).

68. *Id.* § 48-1-130.

for example, the 1981 sodium hydroxide spill and the 1985 bleach spill. DHEC, of course, could order Suffolk to cease any further discharges. Suffolk then could easily respond by agreeing to cease any further discharges since it did not plan them in the first place. The order alone would not force closure of the plant unless DHEC established that the discharge of pollutants was an inevitable result of plant operations. Courts may be skeptical of promises of future good conduct from parties with established track records of violation,⁶⁹ and South Carolina courts have held that present compliance does not erase extensive past violations.⁷⁰ Even so, the likelihood of recurrence is a legitimate issue of fact underlying the possibility of closure through an order to cease discharge.

The Pollution Control Act prohibits any discharge or release of wastes into the environment — land, air, or waters — without a permit from DHEC.⁷¹ Virtually any spill by Suffolk could be asserted as a violation of this prohibition, the sanctions for which include civil penalties⁷² and, if intentional or negligent, criminal penalties.⁷³ Penalties are imposed either by DHEC, through an administrative order, or by a court.⁷⁴ The Act also authorizes injunctions to prevent violations.⁷⁵ Nowhere, however, does the Act expressly provide that plant closure is an appropriate remedy or sanction for an unlawful discharge. Arguably, neither DHEC nor a court could order closure relying solely on the Pollution Control Act, unless closure could be proven necessary to prevent further violations.

Both the Pollution Control Act and Hazardous Waste Management Act contain emergency provisions authorizing DHEC to take virtually any action necessary to protect the public in the

69. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953) (holding that a court's power to grant injunctive relief survives discontinuance of the illegal conduct and that it is the "duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption").

70. *Barker Indus. v. South Carolina Dep't of Health & Env'tl. Control*, 287 S.C. 424, 426, 339 S.E.2d 136, 137 (Ct. App. 1985); *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 186, 332 S.E.2d 539, 540-41 (Ct. App. 1985).

71. S.C. CODE ANN. §§ 48-1-90(a) (Law. Co-op. 1987).

72. *Id.* § 48-1-330.

73. *Id.* § 48-1-320.

74. *Id.* §§ 48-1-50 (1), (5), (11).

75. *Id.* § 48-1-50(4).

event of an environmental emergency or imminent hazard.⁷⁶ The difficulty in applying these emergency powers to Suffolk was the basic prerequisite for their exercise: the existence of a bona fide emergency. When the emergency situation ceases, the emergency power may die with it. DHEC could, and did, argue that the power to meet an emergency, coupled with its other enforcement powers, implies authority to take actions necessary to prevent an emergency from occurring or recurring; however, the question remained whether DHEC could justify ordering *permanent* closure of the plant as a measure necessary to meet or prevent an emergency.

Closure of a business for environmental violations is not unprecedented. In *Lloyd A. Fry Co. v. Utah Air Conservation Committee*⁷⁷ the Utah Supreme Court upheld the power of the Utah Air Conservation Committee, in an administrative proceeding, to order a polluter either to apply for a variance from Utah's air pollution regulations or to close its facility. Like Suffolk, Fry committed statutory violations, creating air pollution that would "unreasonably interfere with the enjoyment of life or use of property."⁷⁸ The court specifically ruled that the air pollution statute was not an improper delegation of legislative power and that an administrative proceeding was the appropriate enforcement vehicle under the Utah statute.⁷⁹ The chief distinction of *Lloyd A. Fry Co.* is that Fry's emission merely violated an opacity standard.

In 1986 the Delaware Supreme Court upheld a similar, but more drastic, enforcement action by the Secretary of the State Department of Natural Resources and Environmental Control. In *Formosa Plastics Corp. v. Wilson*⁸⁰ the court upheld immediate *prehearing* revocation of Formosa's environmental permits, causing closure of its plant, even though the plant was not then known to be in violation of any standards.⁸¹ In particular, the court noted Formosa's "long record of flouting environmental regulations, the two recent severe [vinyl chloride monomer]

76. *Id.* § 48-1-290.

77. 545 P.2d 495 (Utah 1975).

78. *Id.* at 499 (emphasis deleted).

79. *See id.* at 498-99, 500-01.

80. 504 A.2d 1083 (Del. 1986).

81. *See id.* at 1087, 1090.

emissions and the chronic dysfunction of the emission monitoring system.”⁸² This record supported the Secretary’s conclusions that the company “could not be relied on to operate the plant in a safe and environmentally sound manner.”⁸³ The Delaware court also stated that “a catastrophe need not happen before a State official can take reasonable emergency action to thwart a reasonably apparent imminent threat to the public.”⁸⁴

The Secretary’s power to revoke permits was not expressly granted by statute.⁸⁵ The court, however, had little difficulty inferring it from the power to issue the permits and from the very general power to enforce the statute.⁸⁶ The Delaware court’s reasoning could apply to DHEC as well, although in that case it is not clear that the permit revocation was permanent or that the court would have upheld the Secretary’s power had no permits been involved.

Superficially, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980⁸⁷ appears tailored to cases such as Suffolk’s. Most, and perhaps all, of the releases that occurred at Suffolk were releases of hazardous substances that could trigger liability under CERCLA and response actions by the government. Even so, CERCLA primarily contemplates actions to remove an immediate threat and actions to remedy long-term contamination.⁸⁸ The most serious threats at Suffolk were the gas leaks, specifically the chlorine and hydrochloric acid leaks that dissipated on their own without any governmental cleanup. In this regard, the response authorities under CERCLA lack some effectiveness against a vanishing threat, that is, recurring incidents that leave no residual contamination. Ironically, these incidents at the Suffolk site needed no remedial action short of plant closure to guarantee that they would not occur again.

CERCLA would have authorized action by the federal gov-

82. *Id.* at 1090.

83. *Id.* DHEC Commissioner Robert S. Jackson made remarkably similar conclusions in the Suffolk case.

84. *Id.* at 1090. DHEC Commissioner Jackson, in a deposition in the Suffolk case, stated that the agency did not “have to have bodies in the street before [it] act[s].” *Id.*

85. *See* DEL. CODE ANN. tit. 7, §§ 6001-6060 (1983 & Supp. 1988).

86. 504 A.2d at 1088-89.

87. 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1988).

88. *See id.* § 9604.

ernment to force Suffolk to clean up or pay for a cleanup of soil and groundwater contamination that may have been caused by the chemical spills.⁸⁹ This cleanup, however, would not automatically result in plant closure. Thus, CERCLA seemed to fall short. The government's response authorities under CERCLA are broad. Nevertheless, no court yet has held that they include the authority to require an operating chemical facility to terminate its operations permanently when there is no continuing release of hazardous substances, other pollutants, or contaminants presenting an imminent danger to the public health or welfare. Furthermore, the abatement authorities under CERCLA are powers of the federal government and not of the state.⁹⁰ Although South Carolina has a state Superfund law, DHEC's powers under it appear to be no greater than the federal government's under CERCLA.⁹¹

In short, environmental statutes placed an array of enforcement powers at DHEC's disposal. On the other hand, none of them seemed to anticipate the Suffolk syndrome: the recurring emergency that comes and goes without a trace and the recurring violations of law at a plant that needs no license to operate.

2. Public Health Powers

As the state health department, DHEC possesses the broad powers traditionally held by such agencies to protect public health from disease and other threats. Its enforcement capabilities, however, are limited. Violations typically lead only to misdemeanor prosecutions within the jurisdiction of a magistrate's court.⁹² DHEC can seek injunctive relief to prevent violations of public health regulations and has a general power under the state's public health statute to make "separate orders and rules to meet any emergency not provided for by general rules and

89. There was evidence at the hearing relating to soil and groundwater contamination at the Suffolk site. In the settlement order, Suffolk agreed to assess the extent of contamination to determine if any cleanup would be necessary.

90. See *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049 (2d Cir. 1985).

91. S.C. CODE ANN. § 44-56-200 (Law. Co-op. 1976) provides that "the provisions of Section 107 of [CERCLA] . . . are incorporated and adopted herein as the law of this State."

92. See *id.* § 44-1-150.

regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other danger to the public life and health."⁹³ Thus, the statute codifies the common-law power of health authorities to suppress and abate nuisances, the power that DHEC principally relied on to close Suffolk Chemical Company's plant in Chapin.

Traditionally, health authorities have been vested with the power to declare and abate nuisances dangerous to the public health. The abatement power may extend both to the restriction or prohibition of a business that is dangerous to the public health and to the destruction of private property. These facets of nuisance law and the police power are crucial because the existence of a public nuisance may authorize the use of the police power to destroy private property without compensation to the owner; if there is no nuisance, plant closure may constitute a "taking" under the power of eminent domain, requiring compensation.⁹⁴

By statute, the General Assembly has expressly granted to DHEC these traditional powers of health departments to abate nuisances: "The Department of Health and Environmental Control is invested with all the rights and charged with all the duties pertaining to organizations of like character and shall be the sole advisor of the State in all questions involving the protection of the public health within its limits."⁹⁵ The traditional powers to suppress nuisances are preserved in the Pollution Control Act:

93. *Id.* § 44-1-140.

94. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court stated:

The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Id. at 491 n.20. "Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Id.* at 492 n.22. But see 2 J. SACKMAN & P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 6.07 (rev. 3d ed. 1985) ("There is no greater magic in the word 'nuisance' than there is in 'police power,' and neither expression can be used as a cloak to cover an invasion of the constitutional rights of private property.") Sackman and Nichols may be other examples of legal scholars who are more vexed by nuisance law than are the courts. See *supra* text accompanying note 29.

95. S.C. CODE ANN. § 44-1-110 (Law. Co-op. Supp. 1988).

Nothing herein contained shall be construed to postpone, stay or abrogate the enforcement of the provisions of the public health laws of this State and rules and regulations promulgated hereunder in respect to discharges causing actual or potential hazards to public health nor to prevent the Department of Health and Environmental Control from exercising its right to prevent or abate nuisances.⁹⁶

One immediate appeal of the nuisance concept in a case such as this is the ease with which it embraces both public health and environmental concerns. Under the public health statute, DHEC has defined nuisances by regulation.⁹⁷ This regulation includes subjects that typically are regulated under environmental authority, as well as public health authority, and state environmental departments have asserted nuisance claims in many cases in conjunction with environmental enforcement actions.

History has demonstrated that nuisance claims may be used in conjunction with statutory causes of action and may support or be supported by a statutory claim. For example, in *Stoddard v. Western Carolina Regional Sewer Authority*⁹⁸ the plaintiff brought a state common-law nuisance claim in federal court along with a citizen suit under the Clean Water Act. He alleged violations by the Sewer Authority of the effluent limitations of its NPDES permit and sought civil penalties. He also, however, asserted that the effluent from the Sewer Authority's treatment plant had polluted the lake on which he lived and had created a nuisance condition for which he sought damages. The nuisance claim allowed the court to consider aspects of the sewage discharge that it otherwise might not have properly considered in a citizen suit since they did not relate to effluent limitations in the Authority's discharge permit. The nuisance conditions in the lake were caused largely by nutrients (phosphorus and nitrogen) in the wastewater, but the Authority's permit placed no limits on the discharge of nutrients. Therefore, no permit violations existed. The citizen suit was based largely on violations of the fecal coliform limits in the permit, and this claim entitled the plaintiff to request a civil penalty. A penalty is payable to the United States Treasury, however, and not to the plaintiff in a

96. S.C. CODE ANN. § 48-1-280 (Law. Co-op. 1987).

97. See S.C. CODE REGS. 61-46 (1976).

98. 784 F.2d 1200 (4th Cir. 1986).

citizen suit. The plaintiff's nuisance claim allowed him to expand the statutory cause of action to recover damages to both himself and his property.

On the other hand, a nuisance claim may be directly supported by provisions of a related statute. In *New York v. Shore Realty Corp.*⁹⁹ the State asserted a common-law public nuisance action for abatement of a hazardous waste problem in addition to its claims under CERCLA for the recovery of response costs. In allowing the State's nuisance claim, the Second Circuit noted that Shore Realty's continuing violations of state hazardous waste statutes constituted a nuisance per se. In the Suffolk case, DHEC could use the same theory against Suffolk because recent authority in South Carolina stands for the same proposition. In *Neal v. Darby*¹⁰⁰ the court of appeals found that a solvent reclamation company's landfill was a public nuisance for two reasons: its proximity to residential areas and a primary drinking water source, as well as its influence on the public. Distinguishing between nuisance per accidens and nuisance per se, the court noted that if an activity is in a remote and unfrequented locality, it will not be a nuisance per se unless *malum in se* — or wrong in itself. Otherwise, to be a nuisance per se the activity must take place where members of the public are likely to come within the range of its influence. The court also implicitly recognized that the real question in nuisance cases is whether the activity is a public nuisance at all and not whether it is a nuisance per se or per accidens. Once a court concludes that a nuisance exists, the label it places on the nuisance is immaterial. Violation of a state environmental statute may constitute *malum in se* and, thereby, be a public nuisance.

Shore Realty cited a previous New York case, *State v. Schenectady Chemicals, Inc.*¹⁰¹ In *Schenectady Chemicals* the New York Supreme Court held that the State had proved a nuisance claim against a chemical company whose dumping of chemical wastes caused surface and groundwater problems fifteen to thirty years later.¹⁰² The suit arose because the chemical

99. 759 F.2d 1032 (2d Cir. 1985).

100. 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984).

101. 117 Misc. 2d 960, 459 N.Y.S.2d 971 (Sup. Ct. 1983), *modified*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984).

102. 117 Misc. 2d at 960, 459 N.Y.S.2d at 971.

company had refused to pay its portion of the cleanup costs.¹⁰³ Unlike *Shore Realty*, however, the *Schenectady Chemicals* court held that the State did not prove a statutory violation.¹⁰⁴

The *Shore Realty* court cited the modified opinion of *Schenectady Chemicals*¹⁰⁵ for the notion that “release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law.”¹⁰⁶ For example, a statute may establish a public right to clean air and water and a standard of conduct with respect to that right, such as effluent limitations under the NPDES. Violation of that statute, then, would constitute a public nuisance. Rather than preempting common-law nuisance, the proliferation of statutory environmental controls simply provides additional grounds for proving the existence of public nuisances.

Courts tend to accept the proposition that violation of a statute is nuisance per se without discussion or any apparent qualifying criteria. Yet not all statutory violations will constitute public nuisances. Borrowing from the idea of *negligence* per se, some simple criteria may be helpful in governing the *nuisance* per se concept.¹⁰⁷ First, the purpose of the statute should be examined. If the interests the statute is designed to protect do not fall within the scope of those traditionally implicating a nuisance claim — such as public health, safety, peace, comfort, or convenience — then a violation of the statute should not constitute a nuisance per se. For example, failure to file a tax return would not constitute a nuisance per se because violation of tax laws does not implicate an interest traditionally protected by nuisance law.

Second, the statute should create a specific standard by which the defendant’s conduct or activity can be measured. A general prohibition on nuisance activities will not suffice because the plaintiff must prove the nuisance in order to prove a violation of the statute. On the other hand, a statute prohibiting sew-

103. *Id.* at 962, N.Y.S.2d at 974.

104. *Id.* at 964, N.Y.S.2d at 977.

105. 103 A.D.2d 33, 479 N.Y.S.2d 1010.

106. 759 F.2d at 1051 (citing *Schenectady Chemicals*, 103 A.D.2d at 37, 479 N.Y.S.2d at 1013).

107. See RESTATEMENT, *supra* note 3, §§ 286, 288.

age discharges in excess of specified numeric levels prescribes a specific measure of a defendant's performance.

Third, the interests asserted by the plaintiff must be among those nuisance-type interests protected by the statute. If the plaintiff is a governmental official or agency seeking abatement of a public nuisance, however, this element is less important and can be satisfied as long as the official or agency asserts a public right protected or established by the statute.

Fourth, the statutory violation should injure or threaten the nuisance interests asserted by the plaintiff. This element requires that the claim focus on a particular statutory prohibition or requirement and not merely on the broader provisions of an entire act. For example, the unlawful discharge of pollutants in violation of the Clean Water Act could support a nuisance claim, but the falsification of reports, also prohibited by the Act, would not.

The gist of these criteria is that a nuisance per se is still a nuisance claim, not a different cause of action, and that there should be no "nuisance in the air" any more than there is "negligence in the air."¹⁰⁸ Under these criteria, if a court finds that a statute specifies a standard of conduct for the defendant to protect a plaintiff from nuisance conditions and further finds that the defendant has threatened the protected interest by violating that standard, then the court may be justified in finding a nuisance per se.¹⁰⁹ If not, the defendant still may be guilty of maintaining a nuisance, but not a nuisance per se, based on the statutory violation. Of course, the plaintiff still must prove injury and proximate cause, and the court then must consider the extent of injury and the appropriate remedy. The court, however, need not consider the reasonableness and value of the defendant's activity compared to its undesirable effects because the statute would establish, as in case of negligence per se, a conclusive presumption of unreasonableness. Of course, if the statute expressly defines the prohibited conduct as a nuisance, the court need not

108. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) (quoting F. POLLOCK, A TREATISE ON THE LAW OF TORTS 455 (11th ed.)).

109. The Restatement of Torts suggests some additional criteria for determining when negligence per se should *not* apply. See RESTATEMENT, *supra* note 3, § 288. Among them is whether a statute is intended to protect exclusively the general public or the state. These criteria would seldom, if ever, bar the use of nuisance per se in case of a public nuisance challenged by a public authority.

engage in this analysis at all.

One advantage of establishing nuisance per se is that the plaintiff should have an easier time with the question of remedy. If the nuisance arises because of statutory violations, a court should be easily convinced to enjoin the conduct. Once the legislature has determined that certain activities are unlawful, a court does not need to balance equities or weigh the value of allowing those activities to continue; the legislature already has performed that balancing.

Nevertheless, a finding of a nuisance per se at the Suffolk plant would not necessarily have resulted in plant closure. The individual releases of hazardous substances were what gave rise to the nuisance claim. If the releases were violations of statute, they would constitute a nuisance per se, but the plant's existence and operation, otherwise lawful, would not necessarily be a nuisance per se. Only by the frequency and probable recurrence of such statutory violations could DHEC assert that they were an inherent and inevitable feature of the plant and that its entire continued operation was a nuisance per se. In *Shore Realty* the court referred to the defendant's *continuing* violations of the New York Environmental Conservation law by its storage and disposal of hazardous waste without necessary permits.¹¹⁰ It would be difficult to prove that a nuisance exists on the basis of a single statutory violation and still more difficult to prove that an otherwise lawful activity is a nuisance per se without demonstrating a continuing pattern of operation in violation of law. Without that demonstration, the chances of securing the remedy of plant closure are severely lessened.

The broad array of available remedies gives the nuisance claim its greatest value to the government in conjunction with a statutory enforcement action. In its case against Suffolk Chemical Company, DHEC's ultimate goal was permanent plant closure. While other remedies — such as civil penalties and temporary corrective actions — were available, DHEC felt that they were inadequate. DHEC selected public nuisance not merely as an additional claim but as an umbrella cause of action over all its other claims. DHEC could assert both violations of various statutes and regulations as well as the independent existence of

110. See 759 F.2d at 1051.

a public nuisance. It also could claim that the statutory and regulatory violations constituted a nuisance per se. By stating its case in this fashion, DHEC could argue that the statutory remedies for the statutory violations included plant closure as a means of pollution abatement. Further, it could argue that a nuisance claim independently justified plant closure as a means of nuisance abatement. Overall, DHEC could argue forcefully that statutory violations coupled with a nuisance per se clearly authorized closure of the plant to abate pollution and the public nuisance and to prevent the continued existence or recurrence of conditions that were unlawful and harmful to the environment and to the public.

Of course, DHEC's position raised difficult questions of fact. These included, above all, convincing the hearing officer, the DHEC board, and a reviewing court not only that Suffolk's plant was a public nuisance but that the incidents associated with its operation in the past were an inevitable and inherent feature of its operations that would continue if the plant were not closed.

C. *Choice of Forum*

The second issue raised by DHEC's efforts to close Suffolk Chemical's plant is the choice of forum. If DHEC could overcome the first obstacle, the choice of action, it still would be questioned for choosing to adjudicate its claims within its own administrative process instead of in court.

An administrative agency has only those powers conferred by the legislature.¹¹¹ Unlike a court, it has no inherent powers.¹¹² An agency's powers, however, include not only those expressly conferred but also those that must be implied for the agency to carry out its duties effectively.¹¹³ These rules are well settled and easily stated in South Carolina, but their application is not as

111. See *Triska v. Department of Health & Env'tl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) (citing *South Carolina Tax Comm'n v. South Carolina Tax Bd.*, 278 S.C. 556, 560, 299 S.E.2d 489, 491 (1983)).

112. See *Carolina Water Serv. v. South Carolina Public Serv. Comm'n*, 272 S.C. 81, 87, 248 S.E.2d 924, 927 (1978); *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948).

113. See *City of Columbia v. Board of Health & Env'tl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987).

easily resolved.¹¹⁴ DHEC has no specific statutory power to order an operating facility to close; that authority exists, if at all, only by implication from its more general express powers. Therefore, to pursue its chosen course of action in an administrative forum, DHEC had to demonstrate its power to act directly without the assistance of the courts.

Initially, one might ask why DHEC would choose the administrative forum, possibly inviting a challenge to its jurisdiction. Several reasons might explain this choice. First, the choice gave DHEC some tactical advantages. It exercised greater control over the forum, had greater familiarity with procedures, and, theoretically, had greater control over the timing of the hearing and of prehearing matters. Second, the choice made greater use of agency expertise. In an administrative proceeding, agency employees are more likely to be accepted as experts with less laborious demonstration of qualifications simply because of their internal value to the agency. Furthermore, an agency hearing officer or governing board often is wary of creating a credibility problem for the agency by finding that its own officials or employees are not qualified as experts in the areas of their employment. The agency also could reduce its evidentiary burden by taking official notice of technical or scientific facts within its expertise, matters that might require laborious testimony in court.¹¹⁵

A third, more policy-oriented reason to choose the agency forum is the desire to work the problem into a "regulatory" mode by achieving an administrative order rather than a court order. DHEC used this method in the past to achieve a measure of control over Suffolk. By the entry of a number of administrative orders after incidents at the plant, DHEC ostensibly had established jurisdiction over part of Suffolk's operations. Whether or not it succeeded in closing Suffolk's plant permanently, DHEC would have more control in the future over the implementation and enforcement of its own orders than a court order. Thus, the choice of the administrative forum may have been for the purpose of clearly establishing DHEC's jurisdiction

114. Within one month's time in 1987, the supreme court decided two cases involving DHEC's implied powers, one in favor of the agency, *City of Columbia*, 292 S.C. 199, 355 S.E.2d 536, and one against the agency, *Triska* 292 S.C. 190, 355 S.E.2d 531.

115. See S.C. CODE ANN. § 1-23-330(4) (Law. Co-op. 1986).

over Suffolk's operations.

A final reason for selecting the agency forum was the need to demonstrate that DHEC had carefully and exhaustively considered the facts and the law before declaring the plant to be a public nuisance. As a matter of internal policy and practice, the agency might have felt that an order from its governing board, issued after full administrative hearings and affirmatively declaring the Suffolk plant a public nuisance, would place it in the best posture in any subsequent judicial proceeding. If the order needed to be taken to court for enforcement, the findings of the DHEC board would carry substantially greater weight than the agency's bare allegation of nuisance in a complaint filed in court in the first instance. This last reason for choosing the agency forum rests upon DHEC's understanding of the distribution of power in South Carolina between the courts and administrative agencies and its interpretation of the intent of the General Assembly and the mandates of the supreme court.

Under the common-law primary jurisdiction doctrine, a court will decline to hear a case until an administrative agency with specialized statutory jurisdiction over the subject has considered it.¹¹⁶ This is so even though the court may have concurrent jurisdiction.¹¹⁷ The doctrine of primary jurisdiction is related to the doctrine of exhaustion of administrative remedies. The doctrine of primary jurisdiction is distinguishable, however, in that typically it is invoked in a dispute between private parties, whereas exhaustion is required before a citizen may challenge the agency itself in court.¹¹⁸

In *South Carolina Public Service Authority v. Carolina Power & Light Co.*¹¹⁹ the South Carolina Supreme Court followed the primary jurisdiction doctrine without calling it by name. The court held that the plaintiff public service authority could not bring an original action in court to enjoin activities of the defendant power company because resolution of the dispute would require a determination of the utility's service areas. This issue, according to the court, was a "regulatory matter which has been placed within the original jurisdiction of the Public Service

116. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.1 (2d ed. 1983).

117. See *id.*

118. See *infra* notes 121-135.

119. 244 S.C. 466, 137 S.E.2d 507 (1964).

Commission, and over which the courts have no jurisdiction except by way of review.”¹²⁰ *Carolina Power & Light* manifests the court’s tendency to defer to agencies on matters within their jurisdiction.

This tendency more often has been manifested in the court’s decisions on exhaustion of remedies. In *Meredith v. Elliott*¹²¹ the court deemed it “well settled in this State that generally the exhaustion of administrative relief available to a party is necessary before the party can seek redress in the courts.”¹²² *Meredith* was decided before enactment of the Administrative Procedures Act (APA)¹²³ in 1976;¹²⁴ the APA, however, expressly preserves the requirement of exhaustion of remedies before judicial review.¹²⁵ The South Carolina Court of Appeals recently applied the exhaustion doctrine in the enforcement context when DHEC brought an action to enjoin the operation of a restaurant without a license.¹²⁶ The defendant raised his alleged entitlement to the license as a defense, claiming DHEC had acted unconstitutionally. The court of appeals rejected the argument because the defendant had not pursued the administrative process by allowing DHEC to make a decision to grant or deny the license. The court noted that the “evaluation of the adequacy of a sewage disposal system [the specific point of contention in the case] is uniquely within the competency of DHEC, not the courts”¹²⁷ and admonished the trial judge for displacing the administrative process by considering technical issues that the leg-

120. *Id.* at 477, 137 S.E.2d at 511.

121. 247 S.C. 335, 147 S.E.2d 244 (1966).

122. *Id.* at 343, 147 S.E.2d at 248. *See also* Columbia Developers, Inc. v. Elliott, 269 S.C. 486, 238 S.E.2d 169 (1977) (exhaustion required when action presents mixed questions of fact and law). *But see* Andrews Bearing Corp. v. Brady, 261 S.C. 533, 201 S.E.2d 241 (1973) (exhaustion not required when action raises only a pure issue of law); Greenville Baptist Ass’n v. Greenville County Treasury, 281 S.C. 325, 315 S.E.2d 163 (Ct. App. 1984) (exhaustion not required when agency has acted without jurisdiction).

123. S.C. CODE ANN. §§ 1-23-10 to -400 (Law. Co-op. 1986 & Supp. 1988).

124. 1976 S.C. Acts 671. The Act was completely rewritten and re-enacted in 1977. *See* 1977 S.C. Acts 176.

125. S.C. CODE ANN. § 1-23-380(a) (Law. Co-op. 1986), provides that “a party who has exhausted all administrative remedies available within the agency . . . is entitled to judicial review under this article and Article 1.”

126. *See* South Carolina Dep’t of Health & Env’tl. Control v. Armstrong, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987).

127. *Id.* at 215, 359 S.E.2d at 305.

islature had committed to DHEC's discretion.¹²⁸ The opinion termed the lack of developed evidence before the trial court "symptomatic of the fact that the administrative process was not completed."¹²⁹

Case law on the nature of judicial review of agency actions, especially after enactment of the South Carolina Administrative Procedures Act,¹³⁰ seems to establish further the supreme court's definite preference for full administrative resolution of agency issues. The court seems concerned that matters requiring agency judgment and expertise are addressed thoroughly and that a complete agency record is made prior to review by a court.¹³¹ In the context of judicial review, of course, this preference is fully supported by, and consistent with, the APA. The supreme court has described this preference in constitutional terms,¹³² which strongly suggests that it would look favorably upon administrative prosecution of enforcement matters prior to seeking court enforcement.¹³³ This approach also suggests that judicial enforcement of administrative orders, like judicial review of their validity, would be based on a complete agency record.¹³⁴ The circuit courts, thus, are spared many technical issues, as well as the questions frequently arising in the enforcement context that require the exercise of specialized judgment and discretion in fashioning remedies.¹³⁵

Like many other agencies, DHEC has been granted many specific regulatory powers by statute and a general power of ad-

128. See *id.* at 215-16, 359 S.E.2d at 305.

129. *Id.* at 214, 359 S.E.2d at 305.

130. S.C. CODE ANN. §§ 1-23-10 to -400 (Law. Co-op. 1986 & Supp. 1988).

131. See, e.g., *Midlands Util., Inc. v. South Carolina Dep't of Health & Envtl. Control*, 287 S.C. 483, 339 S.E.2d 862 (1986) (review confined to agency record); *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981) (court not to substitute judicial discretion and judgment for that of agency better equipped to decide technical factual issues); see also *South Carolina Dep't of Health & Envtl. Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987).

132. See *Guerard*, 276 S.C. 521, 280 S.E.2d 539 (1981).

133. Cf. *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1982) (noting that judicial review of exercise of preliminary administrative discretion to begin investigation would create delays in administrative proceedings).

134. See *id.* (complaint seeking to enjoin preliminary administrative investigation fails to present justiciable controversy; noting that judicial review of administrative discretion would bring many preliminary questions into court that otherwise would be handled in ordinary course of administrative process).

135. See *Armstrong*, 293 S.C. 209, 359 S.E.2d 302.

judication for implementing those specific powers.¹³⁶ The Pollution Control Act gives South Carolina courts concurrent jurisdiction to entertain actions brought by DHEC to enforce provisions of the Act and DHEC regulations, permits, and orders.¹³⁷ Initial use of the administrative process, followed by judicial enforcement of agency orders only when necessary, is fairly routine within DHEC. The Suffolk case, however, raises two questions regarding application of this procedure. First, does the remedy sought, plant closure, fall outside DHEC's administrative jurisdiction? Second, does invocation of the public nuisance doctrine, based at least in part on DHEC's public health authorities, limit DHEC's administrative jurisdiction?

In some cases, the powers granted to DHEC under the Pollution Control Act specify particular remedies. DHEC, for example, can issue an order to discontinue a discharge of pollutants into state waters or to correct an undesirable level of air contaminants.¹³⁸ The Pollution Control Act, however, does not provide an exhaustive list of the types of orders that DHEC may issue. It gives DHEC the authority to conduct hearings, take evidence, and make findings and determinations.¹³⁹ Those determinations subsequently may be enforced in court, and violation of any DHEC order may be grounds for civil and criminal penalties.¹⁴⁰ This may be taken as a broad grant of adjudicative power — the power to make decisions case-by-case to implement the statute.¹⁴¹ The adjudicative power has been called a “customary and vital tool in the functional operations of present day administrative agencies,”¹⁴² and this authority in the Act, unspecific as it is, can only be such a tool.

136. See S.C. CODE ANN. § 48-1-50(1) (Law. Co-op. 1987).

137. *Id.* § 48-1-50(4).

138. *Id.* §§ 48-1-120, -130.

139. *Id.* § 48-1-50(1).

140. *Id.* §§ 48-1-50(4), -320, -330.

141. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1946) (“[A]n administrative agency must be equipped to act either by general rule or by individual order. . . . And the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”); see also *Pennsylvania Dep’t of Env’tl. Resources v. Butler County Mushroom Farm*, 499 Pa. 509, 454 A.2d 1 (1982) (statutory grant of agency authority construed to include power to implement authority). DHEC possesses general rule-making power as well, S.C. CODE ANN. § 48-1-30 (Law. Co-op. 1987), and thus may use both rule-making and adjudication in its “function of filling in the interstices of the Act.” *Chenery*, 332 U.S. at 202.

142. *Butler County Mushroom Farm*, 499 Pa. at 512, 454 A.2d at 3.

Nevertheless, the Act cannot be read as granting DHEC an unrestricted power to hold hearings and make determinations of any kind. One key to interpreting the scope of DHEC's adjudicative power may be found in the state supreme court's pronouncement on implied powers in *Beard-Laney, Inc. v. Darby*.¹⁴³ "Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the *field* which the regulations may cover."¹⁴⁴ In other words, the grant of adjudicative power is a procedural grant; the agency must possess substantive jurisdiction over the field in which it exercises its procedural powers.

DHEC's substantive jurisdiction under the Pollution Control Act is defined in its broadest terms in two sections of the Act. Section 48-1-100 gives DHEC "jurisdiction over the quality of the air and waters of the State of South Carolina . . . [and] jurisdiction over those matters involving real or potential threats to the health of the people of South Carolina."¹⁴⁵ Section 48-1-20 gives DHEC the "authority to abate, control and prevent pollution."¹⁴⁶ The supreme court has said that "DHEC is charged with the responsibility of insuring that the waters of the State are as free of pollutants as possible. The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public."¹⁴⁷ A liberal reading of DHEC's general adjudicative authority is warranted. Careful attention, however, should be given to the specific regulatory controls provided in the statute, such as permits for discharge, construction, and operation, and the specific remedies at issue. In *Triska v. Department of Health & Environmental Control*¹⁴⁸ the court rejected DHEC's arguments for a broad construction of its powers, partly because it did not believe that the remedy in question — revocation of a certification under section 401 of the Clean Water Act — was available within the framework of federal law, state law,

143. 213 S.C. 380, 49 S.E.2d 564 (1948).

144. *Id.* at 389, 49 S.E.2d at 567 (emphasis in original).

145. S.C. CODE ANN. § 48-1-100 (Law. Co-op. 1987).

146. *Id.* § 48-1-20.

147. *City of Columbia v. Board of Health & Envtl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987).

148. 292 S.C. 190, 355 S.E.2d 531 (1987).

or DHEC regulations relating to such certifications.

Logically, DHEC's determination under its general adjudicative enforcement powers ordinarily may include whatever remedy is appropriate to the violation in question. When the remedy is permanent closure of the facility, however, and that closure is not based on the revocation of a permit or some other routine form of regulatory control, the availability of that remedy becomes a serious question because of its resemblance to a "taking" of property.¹⁴⁹ Because, in the Suffolk case, DHEC chose to rely in large part on public nuisance to authorize the remedy of closure, the "taking" question could be avoided. Even so, the second question — whether that time-honored public health and welfare doctrine could be invoked within the administrative jurisdiction created by the Pollution Control Act — had to be faced.

The public health powers provided to DHEC do not spell out the full panoply of regulatory authority typical of modern environmental statutes, including the Pollution Control Act. In fact, enforcement often proceeds through misdemeanor charges filed in the magistrate's court. The health law does authorize DHEC to conduct hearings,¹⁵⁰ to take various other actions, and, as mentioned above, to make orders to suppress nuisances.¹⁵¹ On the other hand, the law says very little about administrative procedure. While the powers of state health authorities long have included the power to abate nuisances, in some instances by direct order,¹⁵² the statute does not clearly define how these traditional powers are to be exercised in the light of modern administrative law practice. For a case such as Suffolk's to be brought solely on the basis of a public nuisance dangerous to the public health, a simple approach would be for the agency to declare the plant a nuisance and immediately bring an action in court in the first instance to enjoin the nuisance.

The statutes creating DHEC, which merged the State Board of Health and the Pollution Control Authority into one agency, provide some suggestions about how to reconcile DHEC's health

149. See *supra* note 94 and accompanying text.

150. S.C. CODE ANN. § 44-1-50 (Law. Co-op. 1976).

151. *Id.* § 44-1-140.

152. See S.C. CODE REGS. 61-46 (1976).

powers and its environmental powers.¹⁵³ In 1971 the General Assembly added two paragraphs to section 14 of the Pollution Control Act¹⁵⁴ in an attempt to delineate the separate jurisdictions of the Pollution Control Authority and the Board of Health:

The Pollution Control Authority shall be the agency of State government having jurisdiction over the quality of the air and waters of the State of South Carolina. They shall develop and enforce such standards as may be necessary governing emissions or discharges into the air, streams, lakes or coastal waters of the State, including waste water discharges.

The State Board of Health shall be the Agency of State Government having jurisdiction over those matters involving real or potential threats to the health of the people of South Carolina, including the handling and disposal of garbage and refuse; septic tanks; and individual or privately owned systems for the disposal of offal and human or animal wastes; *provided*, that where the effluent from privately owned sewage disposal systems serving more than two hundred fifty houses shall discharge into a stream or lake of the state, no permit to operate shall be issued by the Board of Health without agreement of the Pollution Control Authority.¹⁵⁵

The Authority and the Board were merged in 1973 with no amendment to section 14.¹⁵⁶ In 1975 the legislature amended several sections of the Pollution Control Act¹⁵⁷ to substitute "Board" or "Department" of Health and Environmental Control for "Authority." In the 1976 recodification, section 14 turned up as code section 48-1-100 with "Department" inserted in both of the above-quoted paragraphs, obliterating the distinction.¹⁵⁸

153. See Reorganization Plan No. 10, 1973 S.C. Acts 390 (codified at S.C. CODE ANN. §§ 44-1-10 to -70 (Law. Co-op. 1976)).

154. S.C. CODE ANN. § 48-1-100 (Law. Co-op. 1987).

155. 1971 S.C. Acts 410, at Part II, § 9 (emphasis in original).

156. See 1973 S.C. Acts 390.

157. 1975 S.C. Acts 203. Section 14 was not affected by the amendment.

158. See S.C. CODE ANN. § 48-1-100 (Law. Co-op. 1987). The substitution of "Department" in § 48-1-100 was not accomplished through any act of the legislature. It apparently was the idea of the editors of the new code, but the General Assembly implicitly ratified the change when it adopted the 1976 code as "the only general statutory law of the State." 1977 S.C. Acts 95. The change was necessary in any event if § 48-1-100 was to make sense after the merger, and the original legislative intent was clear in the act merging the agencies, transferring "[a]ll of the functions, powers and duties" of the Board of Health and Pollution Control Authority to DHEC. See 1973 S.C. Acts No. 390 § 5 (codified at S.C. CODE ANN. § 44-1-50 (Law. Co-op. 1976)).

Likewise, the 1976 recodification replaced the words "State Board of Health" with DHEC in section 31 of the Pollution Control Act.¹⁵⁹ Section 31 formerly read:

Nothing herein contained shall be construed to postpone, stay or abrogate the enforcement of the provisions of the public health laws of this State and rules and regulations promulgated hereunder in respect to discharges causing actual or potential hazards to public health nor to prevent the *State Board of Health* from exercising its right to prevent or abate nuisances.¹⁶⁰

If the environmental controls of the Pollution Control Act did not limit the powers of the Board of Health as a separate agency to abate nuisances, then surely the controls would not limit the powers of the combined environmental and health agency to do the same.

With the merger of the two agencies, joint exercise of their previously separate powers was inevitable because of the overlap of environmental and health concerns. When the subject of concern implicates both environmental regulations and public health regulations, DHEC seems to be free to use its administrative powers under the Pollution Control Act to deal with a problem in one proceeding. It need not deal with a fragment through the administrative process and another fragment through the courts, which would raise difficult issues of collateral estoppel and inconsistent enforcement actions in different fora. Many of DHEC's powers under the public health laws, of course, have no relationship to environmental protection. Their implementation under the administrative powers and procedures of the Pollution Control Act would be wholly inappropriate. A public nuisance claim based on violations of the environmental statutes, on the other hand, is the perfect case for concurrent exercise of health and environmental authority. The simultaneous exercise of the power to abate nuisances and the power to abate pollution supports administrative enforcement through the administrative process.

159. See S.C. CODE ANN. § 48-1-280 (Law. Co-op. 1987).

160. 1970 S.C. Acts 1157 § 31 (emphasis added).

V. LIMITS ON APPLICABILITY OF THE SUFFOLK SYNDROME

The most obvious factors limiting the usefulness of DHEC's theories against Suffolk Chemical are the differing regulatory powers granted by state law to environmental agencies in different states. In some states, the environmental agency may have little or no explicit authority to deal with public nuisances; in others, its authority may be even more explicit than that delegated to DHEC. An environmental agency may be granted powers that would render recourse to public nuisance law unnecessary. Furthermore, if the agency in question lacks broad general adjudicative power, the administrative forum for resolution may be unavailable, forcing the agency to pursue its nuisance claim in court.

In most states, the environmental agency is not also the state health agency. Only a handful of states currently combine the two regulatory structures.¹⁶¹ This factor limits, to some extent, the authority of a purely environmental agency to address matters that broadly affect the public health and safety if they do not also fall within the scope of the agency's environmental regulation. Nuisance abatement may be a power expressly granted to another agency. Such a grant of authority might imply a limit on the environmental agency's authority in the same area.

In addition to the variations found among state regulatory structures and powers, state statutes and regulations may limit the flexibility of the nuisance doctrine, ironically, by defining it. If an environmental statute defines a violation of its provisions as a public nuisance, it may open the door to all the remedies and procedures available to deal with public nuisances, or it may limit the available remedies to those specifically provided in the statute. Statutes and regulations defining nuisance in specific terms may be construed to limit the concept only to those terms mentioned. Statutes construed in this manner sap one of nuisance law's greatest strengths: its adaptability to new situations.

This also raises a question about whether common-law nuisance may be preempted by federal or state statute. A federal common law of nuisance, based on common-law principles of

161. Those states include Arizona, Colorado, Hawaii, Idaho, Kansas, Montana, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, and Utah.

public nuisance,¹⁶² began with two early twentieth-century Supreme Court cases. In *Missouri v. Illinois*¹⁶³ Missouri alleged that the state of Illinois caused typhoid fever in St. Louis by dumping raw sewage into a canal flowing to the Mississippi River. In *Georgia v. Tennessee Copper Co.*¹⁶⁴ Georgia alleged harm to its forests from noxious sulfur dioxide fumes from the Tennessee Copper Company. In both cases, the Court invoked common law to deal with air and water pollution disputes.

In 1972 the Supreme Court again found a federal common law “when we deal with air or water in their ambient or interstate aspects” in *Illinois v. City of Milwaukee (Milwaukee I)*.¹⁶⁵ The Federal Water Pollution Control Act Amendments (FWPCA) of 1972,¹⁶⁶ however, were enacted a few months after *Milwaukee I*.

In 1981 the Court found in *City of Milwaukee v. Illinois (Milwaukee II)*¹⁶⁷ that the FWPCA, as amended, eliminated the need for the federal common law of nuisance in the area of interstate water pollution. A few weeks after *Milwaukee II*, the Court reinforced this holding in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,¹⁶⁸ abolishing federal common law from the area of water pollution. These two cases bring into question the use of the federal common law of nuisance as a cause of action in federal courts in all areas of environmental law in which legislation has been enacted — including solid and hazardous waste, air pollution, drinking water and groundwater contamination, nuclear waste, and water pollution. They do not, however, question the continued viability of public nuisance as a cause of action in state enforcement.

Courts typically have read *Milwaukee II* as holding that relevant federal environmental statutes have replaced the federal

162. Comment, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41, 43 (1983).

163. 200 U.S. 496 (1906).

164. 206 U.S. 230 (1907).

165. 406 U.S. 91, 103 (1972).

166. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C.A. §§ 1251-1376 (West 1986 & Supp. 1988)). The Act was further amended in 1977 by the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C.A. §§ 1251-1376) (West 1986 & Supp. 1988)). With the 1977 amendments, the name of the Act was changed to the Clean Water Act.

167. 451 U.S. 304 (1981).

168. 453 U.S. 1 (1981).

common law of nuisance. The Clean Air Act, RCRA, and CERCLA have been held to preempt federal common law in various applications.¹⁶⁹ Nonetheless, *Milwaukee II* might be inapplicable in some cases. Moreover, federal common law should not be replaced by statute if the argument can be made that: (1) the subject matter of a particular case does not fall within a federal statute; (2) the statute is not sufficiently comprehensive to remedy the problem; (3) the act does not contain a citizen suit provision and, therefore, provides no adequate remedy; or (4) Congress showed its intent through a broadly worded savings clause.

Although federal common-law nuisance is no longer viable for all practical purposes, the Supreme Court has ruled that state common-law nuisance claims may survive. In *International Paper Co. v. Ouellette*¹⁷⁰ the Court rejected the argument that the Clean Water Act preempted a nuisance claim under state common law for interstate water pollution. The Court did hold that, as required by the legislative and regulatory scheme of the Act, the claim must be governed by the law of the state in which the pollution source is located, but, otherwise, state common law remains intact.¹⁷¹ On remand, the district court found that the state common-law nuisance claim was not preempted by the Clean Air Act.¹⁷² State common-law nuisance claims are still viable claims in federal court if pendent to a federal statutory claim. For example, the courts in *Stoddard v. Western Carolina Regional Sewer Authority*¹⁷³ and *Environmental Defense Fund, Inc. v. Lamphier*¹⁷⁴ allowed pendent state law nuisance claims in citizen suits for violations of the Clean Water Act and RCRA, respectively.

The defendant in *Stoddard* argued that the South Carolina regulatory scheme embodied in the Pollution Control Act and adopted pursuant to the Clean Water Act preempted state common-law remedies for a nuisance that amounted to a taking of

169. See, e.g., *Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360 (W.D. Pa. 1984) (Clean Air Act); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) (RCRA, CERCLA).

170. 479 U.S. 481 (1987).

171. *Id.* at 491-97.

172. See *Ouellette v. International Paper Co.*, 666 F. Supp. 58 (D. Vt. 1987).

173. 784 F.2d 1200 (4th Cir. 1986).

174. 714 F.2d 331 (4th Cir. 1983).

property without compensation.¹⁷⁵ The Fourth Circuit held that neither the Pollution Control Act nor the Clean Water Act supplants common law and that, instead, the Pollution Control Act expressly preserves remedies not provided by the statute itself.¹⁷⁶ Common-law nuisance is still a viable cause of action in both federal and state courts in South Carolina.¹⁷⁷

Lamphier is another Fourth Circuit case in which the district court found the defendants guilty of violating federal and state antipollution statutes and of maintaining a common-law nuisance. In this case, the defendants co-owned a farm in Virginia on which they dumped industrial wastes.¹⁷⁸ Two private environmental groups filed a complaint against them under the citizen-suit provision of RCRA.¹⁷⁹ The state intervened, appending state law claims to the action. The district court then issued an injunction ordering the defendants to comply with hazardous waste regulations and awarded fees and costs. A claim seeking civil penalties was voluntarily dismissed at trial.

On appeal the defendants contended that Virginia's hazardous waste statute preempted the state common law of nuisance. They analogized their situation to *National Sea Clammers*, in which the FWPCA was held to supersede the federal common law of nuisance.¹⁸⁰ The court disagreed, saying that Virginia law requires proof from the express or implied language of the statute of its intent to change the common law.¹⁸¹ Further, it held that the defendants failed to provide that proof.

Stoddard and *Lamphier* highlight the advantage of bringing both a citizen suit for violations of the pertinent federal statute and a pendent state common-law nuisance claim. An injunction, attorneys' fees, and civil penalties may result from winning the

175. See 784 F.2d at 1206.

176. See *id.* at 1207 (citing S.C. CODE ANN. § 48-1-240 (Law. Co-op. 1987)). "[N]othing herein contained shall abridge or alter rights of action in the civil courts or remedies existing in equity or under the common law or statutory law . . ." *Id.* (emphasis deleted).

177. The New York court in *State v. Schenectady Chems., Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984), also had rejected the contention that common-law nuisance actions had been preempted by statutory procedures for pollution abatement. See *id.* at 38, 479 N.Y.S.2d at 1014.

178. 714 F.2d at 333.

179. 42 U.S.C.A. § 6972 (West 1983 & Supp. 1988).

180. See 714 F.2d at 337.

181. See *id.*

citizen suit; damages can also be awarded through the nuisance claim.

The availability of DHEC's course of action to private citizens for a private nuisance action, or to private citizens pursuing a public nuisance action, is debatable. It is unlikely that private citizens will be able to use the administrative forum or the powers of an administrative agency to redress private grievances. Furthermore, a private citizen may not have the government's motivations for choosing the agency forum.

In contrast, if a citizen asserts a public nuisance claim, he may be able to use the administrative arena to a greater extent either by initiating an administrative proceeding in his own right, if possible, or by prompting the agency to initiate proceedings and attempting to intervene. The latter situation, in fact, occurred in the Suffolk Chemical case. A number of citizens and local governmental units in the Chapin area urged DHEC to begin an enforcement action. When proceedings were initiated, several of the governmental units were allowed to intervene. The intervenors actively participated in the proceedings and played a major role in the development of the case. At the same time, several individuals did, in fact, file a lawsuit in the circuit court for Lexington County requesting damages and closure of the plant on their own. The lawsuit was settled at the same time as the administrative proceeding.

Even if the private plaintiff has access to the administrative forum, the agency can grant him only limited relief. Rarely will an administrative body have authority to award damages to a private party. The administrative proceeding may result in an abatement order or assessment of a civil penalty, but to recover damages, the citizen generally will have to pursue his remedy in court.

Another significant limitation on the use of nuisance to obtain closure of a plant such as Suffolk is the simple recognition that a court is less likely to find permanent closure of an industrial facility to be an appropriate remedy for a private nuisance than for a public nuisance. A private citizen asserting even a public nuisance claim is perhaps less likely to obtain closure as a remedy than will the government.

One final limitation on the applicability of the Suffolk situation to other cases may be the difficulties of proving not only that a public nuisance exists, but also that plant closure is the

only adequate remedy. Even if a nuisance is proved, counsel for a defendant will, and should, offer every lesser alternative as a means of abatement. By its nature, nuisance law requires that each case be evaluated on its facts, both regarding the existence of a nuisance in the first instance and then the imposition of an appropriate remedy. Whenever lesser means of abatement appear reasonable and adequate, the drastic remedy of permanent closure of an active business will be inappropriate.

VI. CONCLUSION

The use of nuisance law, a common-law, after-the-fact approach to control of environmental problems, presents an interesting contrast to modern environmental regulation, a prospective method of controlling environmental problems. Of particular interest are the ways in which the two approaches are used together. Although violation of environmental regulations may constitute a public nuisance, the inapplicability of environmental regulations, or compliance with those that do apply, does not eliminate potential liability for public nuisance. The choice of nuisance as a cause of action by a plaintiff, in particular a government agency, may alert defense counsel to a government's perceived weakness in its own statutory regulatory powers.

Nuisance law continues to remain useful to plaintiffs and irritating to defendants because it is a "moving target," not susceptible of precise definition. Perhaps this moving target is an appropriate counter to the "vanishing threat" of the Suffolk syndrome, the recurring environmental incident that threatens immediate harm but leaves no residual damage in its wake.

The Suffolk case was settled, and the legal issues it raised remain unresolved. Its practical impact may be significant, however, simply in terms of its result. Without resolution of the legal issues concerning its authority, the State succeeded in obtaining permanent closure of the plant, wielding public nuisance law as its primary weapon. Public nuisance law survives even in the midst of what appears to be comprehensive environmental regulation because of its ability to adapt to its surroundings when environmental regulations cannot. The plaintiff who overlooks nuisance as a potential cause of action may forego his strongest weapon; the defendant who overlooks nuisance as a potential liability may be unaware of his greatest danger.