ENVIRONMENTAL LAW—PUBLIC TRUST—INJURY TO PUBLIC TRUST IS BASIS FOR AWARD OF DAMAGES—*State v. Jersey Central Power & Light Co.*, 125 N.J. Super. 97, 308 A.2d 671 (L. Div. 1973).

Jersey Central Power and Light Company is the operator of an atomic power plant located in Ocean County, New Jersey.[1] The plant generates electricity by means of an atomic reactor,[2] which uses water from the nearby Forked River to absorb the generated heat.[3] The heated water is subsequently discharged into Oyster Creek and Barnegat Bay, both of which are tidelands.[4] On January 28, 1972, the Oyster Creek nuclear generating station experienced an unscheduled shutdown.[5] However, the pump used to dilute the hot water from the power plant with cool water from Forked River continued to operate, thus accelerating the temperature drop of the waters of Oyster Creek.[6] The resulting sudden drop in water temperature from 50° F. to 40° F.[7] caused approximately 500,000 fish, predominantly menhaden, to die from thermal shock.[8]

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1 State v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97, 99, 308 A.2d 671, 672 (L. Div. 1973).

2 Although nuclear-powered electrical generators presently account for only four per cent of the nation's electrical generating capacity, it has been projected that they will account for approximately thirty per cent by 1985. *See* BUS. WEEK, Apr. 21, 1973, at 56.

For a discussion of thermal pollution from nuclear-powered electrical generating stations see D. NELKIN, NUCLEAR POWER AND ITS CRITICS 1-19, 108-22 (1971). As to the problem of thermal pollution of fish-bearing waters see Cairns, *Thermal Pollution—A Cause for Concern*, in ENVIRONMENTAL MANAGEMENT: SCIENCE AND POLITICS 179 (M. Gorden & M. Gorden eds. 1972); Morris, *The Problem of Thermal Pollution* and Wurtz, *Thermal Pollution: The Effect of the Problem*, in ENVIRONMENTAL PROBLEMS 123, 131 (B. Wilson ed. 1968).

3 State v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97, 99, 308 A.2d 671, 672 (L. Div. 1973).

4 *Id.*

5 *Id.* at 99-100, 308 A.2d at 672.

6 *Id.* at 100, 308 A.2d at 672. A power company representative, at a meeting between the Department of Environmental Protection (DEP) and the power company on March 3, 1973, described the shutdown as " 'unscheduled' and resulting from 'human error.' " Affidavit of Paul Hamer at 3, Plaintiff's Verified Complaint, State v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97, 308 A.2d 671 (L. Div. 1973) [hereinafter cited as Complaint].

7 State v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97, 100, 308 A.2d 671, 672 (L. Div. 1973).

8 *Id.* On January 30, 1972, Paul Hamer, Principal Fisheries Biologist in the Division of Fish, Game, and Shell Fisheries of the State Department of Environmental Protection, was notified of the fish kill. Mr. Hamer indicated that the DEP maintains a water temperature monitoring station which is situated approximately one-half mile below the generating station discharge point. This monitoring station was the source of the data which

In *State v. Jersey Central Power & Light Co.*,[9] the Department of Environmental Protection (DEP), on behalf of the state, filed a complaint consisting of three counts.[10] The first count was for the enforcement of N.J. STAT. ANN. § 23:5-28,[11] which prohibits discharge of deleterious substances into New Jersey's tidal waters on penalty of $6,000 per day for each violation.[12] The second count was resolved on motion at trial.[13] The third count was at common law for recovery of damages by the state as *parens patriae* for injury to wildlife such as the menhaden fish.[14]

Jersey Central moved to dismiss the third count on the ground that it failed to state a claim upon which relief could be granted.[15] The defendant contended that the state could not collect "money damages for destruction of fish in a wild state"[16] because it did not have "a proprietary right to the fish in its waters."[17] Additionally, it was argued that the state's proprietary interest in fish is "a qualified one limiting it to the enactment and enforcement of fish and game laws and regulations and no more."[18] However, Jersey Central did admit that the

was used to prove the occurrence of the temperature drop. On January 31, 1972, Mr. Hamer observed approximately 500,000 dead fish, primarily menhaden, located three-quarters of a mile below the power plant discharge point. Mr. Hamer also noted that on March 2, 1973, there was a meeting between representatives of the power company and the DEP "to discuss recurrent fish kills in Oyster Creek." Affidavit, Complaint, *supra* note 6, at 1-3.

9 125 N.J. Super. 97, 308 A.2d 671 (L. Div. 1973).

10 *Id.* at 98, 308 A.2d at 671.

11 N.J. STAT. ANN. § 23:5-28 (Supp. 1973-74) provides in pertinent part:

> No person shall put or place into, turn into, drain into, or place where it can run, flow, wash or be emptied into, or where it can find its way into any of the fresh or tidal waters within the jurisdiction of this State any petroleum products, debris, hazardous, deleterious, destructive or poisonous substances of any kind . . . . In case of pollution of said waters by any substances injurious to fish, birds or mammals, it shall not be necessary to show that the substances have actually caused the death of any of these organisms. A person violating this section shall be liable to a penalty of not more than $6,000 for each offense . . . .

12 125 N.J. Super. at 98, 308 A.2d at 671.

13 *Id.* at 98, 308 A.2d at 671-72. This count was for violation of N.J. STAT. ANN. § 58:10-23.6 (Supp. 1973-74), which requires prompt notification of any illegal discharge. Complaint, *supra* note 6, at 4.

14 125 N.J. Super. at 99, 308 A.2d at 672. The third count was a tort action which would be governed by the rules concerning jury trials, discovery, etc., whereas the first count was a summary action to recover a penalty imposed for violation of a statute. However, the parties agreed to waive these rules so that the counts could be tried together. *Id.*

15 *Id.*

16 Defendant's Brief in Support of Motion to Dismiss the Third Count of the Complaint at 2, State v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97, 308 A.2d 671 (L. Div. 1973) [hereinafter cited as Defendant's Brief].

17 Defendant's Brief, *supra* note 16, at 1.

18 *Id.* at 3.

state could maintain a claim for injunction under either the public trust doctrine or statutes enacted for the conservation of wildlife.[10] Decision on the motion for dismissal was reserved until a later date, at which time a written opinion was rendered.[20]

In denying the motion, the court held that the pumping of cold water into the warm tidal waters by the defendant constituted a violation of the state statute prohibiting introduction of any deleterious substance into the tidal or fresh waters of the state.[21] More significantly, it found that the state had the right and the fiduciary duty to collect damages for destruction of wildlife, which are part of the corpus of the public trust.[22]

The earliest known jurisprudential basis for the public trust doctrine discussed in the *Jersey Central Power & Light* decision is found in Roman civil law.[23] As this law evolved, the waters of the rivers and sea and the land thereunder were considered to be owned by the citizenry in common[24] and subject to the prerogatives of the Roman people

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19 *See id.* at 2-4.

20 125 N.J. Super. at 99, 308 A.2d at 672.

21 *Id.* at 100-01, 308 A.2d at 672-73. The court arrived at the determination that cold water introduced into an environment of warm water was a deleterious substance under N.J. STAT. ANN. § 23:5-28 (Supp. 1973-74) by looking to the legislative intent expressed at the public hearing on Senate Bills Nos. 299 and 300 (1968), by Assemblyman Chester Apy on behalf of Senator Alfred Beadleston, who introduced the bill. At the hearing Assemblyman Apy indicated that the basic purpose of the bill was

> to tighten up the requirements and restrictions in an effort to seek to end and evade the pollution of our waterways.
>
> Now, this has been done, I think, essentially in two ways, if you look at the bill. One, has been to emphasize and zero in, if you will, on the question not of what causes the pollution but of the end results. The intent is not to try to define, as the statutes presently do, that coal tar or sawdust or lime or anyone of these things is going to cause the contamination. Rather, the object of the legislation is to say that anyone who permits any injurious substances which have effects that are detrimental to the inhabitants of the waterways shall be responsible for doing it.
>
> Now, the other part of the bills that I direct your attention to is that, at the same time that this is done, there is taken out of existing legislation an exception which provides that someone shall not be deemed responsible if he shows that "every practical means has been used to prevent the pollution." Now this is being taken out. This will have the effect of tightening up the legislation.

Hearing on N.J. Sen. Bills No. 299 & 300 Before the Assembly Comm. on Air and Water Pollution and Public Health, at 2-3 (Feb. 26, 1968). For a discussion of the use of hearings to determine legislative intent see G. FOLSOM, LEGISLATIVE HISTORY 5 & n.7, 6 & n.12, 35 & n.60, 36-37 (1972).

22 *See* 125 N.J. Super. at 103, 308 A.2d at 674.

23 *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

24 Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571, 576 (1971).

for the important purposes of navigation and fishery.[25] The state was considered to be the guardian of the common ownership of the public.[26]

As the doctrine developed in Norman England, only the foreshore, which consists of the waters subject to the ebb and flow of the tide and the submerged land beneath, was considered to be subject to these public rights.[27] However, the advent of the dark ages and the accompanying decline in commerce and trade resulted in a weakening of public rights in these areas.[28] Title to the foreshore, which was considered alienable, was vested in the King.[29] It was not until restrictions were placed upon the crown by the Magna Carta that a shift occurred back to the favoring of public rights,[30] with the King becoming trustee of those rights for the people.[31]

With the transfer of the common law to the American colonies, the sovereign rights formerly vested in the King as trustee eventually devolved upon the states.[32] Although subsequent case law development has varied from state to state,[33] perhaps the best description of the doctrine as it now exists was enunciated by the Supreme Court in its important decision of *Illinois Central Railroad v. Illinois*,[34] where it stated that the title to the navigable waters of Lake Michigan held by Illinois was

> a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[35]

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25 JUSTINIAN, INSTITUTES 2.1 (T. Cooper transl. 1812).

26 Sax, *supra* note 23, at 475; Note, *supra* note 24, at 576.

27 *See* Hale, *De Jure Maris* in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 10-12 (F. Hargrave ed. 1787).

28 Note, *supra* note 24, at 577; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 764 (1970).

29 See Hall, *The Rights of the Crown*, in A HISTORY OF THE FORESHORE 667, 671-72 (3d ed. 1888).

30 Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388, 389; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 768 (1970).

31 *See* J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 23-24 (1847); Fraser, *Title to the Soil Under Public Waters —The Trust Theory*, 2 MINN. L. REV. 429, 434 (1918).

32 *See* Shively v. Bowlby, 152 U.S. 1, 18-26 (1894). The *Shively* opinion, which took over a year to write, offers an excellent discussion of the development of the public trust doctrine in both England and the United States.

33 *Id.* at 26.

34 146 U.S. 387 (1892).

35 *Id.* at 452. In *Illinois Central*, the Court upheld the repeal of a grant of submerged lands to the Railroad by the state of Illinois. The grant originally included all of

Other cases have sanctioned the application of the trust doctrine outside of the traditional areas of navigable waters and the submerged lands underneath. One of the early decisions to so hold was *Arnold v. Mundy*,[36] an 1821 New Jersey case in which the court held that not only the fish but also wild animals were among the common property belonging to all of the citizens.[37] Significantly, the court noted that since only "transient usufructuary possession"[38] could be had, actual title could not be vested in the people. Therefore, the responsibility of regulating and protecting the common property was placed upon the state as sovereign.[39]

Seventy-five years later, in *Geer v. Connecticut*,[40] the Supreme Court was faced with a case which concerned the validity of a Connecticut ordinance prohibiting the killing of certain fowl for purposes of conveying the animals beyond the state lines.[41] In upholding the constitutionality of the ordinance,[42] the Court recognized that wild animals were within a trust held for the people by the state.[43] Similarly, in *LaCoste v. Department of Conservation*,[44] the Court stated that wild animals were "owned by the State in its sovereign capacity for the common benefit of all its people."[45] Therefore, the responsibility of regulation and control was placed upon the state.[46]

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the submerged lands of Lake Michigan along the Chicago shoreline out to a distance of one mile. *Id.* at 450. The Court held that a grant of *all* lands under the navigable waters would be "absolutely void on its face," for the reason that a state could not relieve itself of the trust it held over these properties. *Id.* at 453.

The conveyance of property subject to these public rights has constituted one of the major problems in this area. *See generally* Sax, *supra* note 23, at 491-548.

36 6 N.J.L. 1 (Sup. Ct. 1821).

37 *Id.* at 71.

38 "Usufructuary" possession is that exercised by "[o]ne who has the usufruct or right of enjoying anything in which he has no property." BLACK'S LAW DICTIONARY 1713 (4th ed. 1951).

39 6 N.J.L. at 71.

40 161 U.S. 519 (1896).

41 *Id.*

42 *Id.* at 535.

43 *Id.* at 529. The Court stated:

> [T]he development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Id.

44 263 U.S. 545 (1924).

45 *Id.* at 549.

46 *Id.*

The majority opinion in *Toomer v. Witsell*[47] offered a confusing picture of the "sovereign ownership" theory. *Toomer* involved a challenge by citizens of Georgia to certain South Carolina statutes which regulated shrimp fishing in the three-mile zone off of its coast.[48] The Court disagreed with Georgia's argument that its "ownership" of the shrimp provided an exception to the privileges and immunities clause, thereby entitling it to discriminate against citizens of another state.[49] The Court did not totally reject this theory, however, but rather felt that such a policy was permissible so long as consistent with certain constitutional restrictions.[50] Justice Frankfurter, in his concurring opinion, offered clarification for the majority's conclusion. In an often quoted passage, he stated:

> A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.[51]

The court in *Jersey Central Power & Light*, after examining much of this prior case law, recognized that the fish were clearly within the corpus of the public trust, thereby giving rise to a remedy when injury is shown. However, the opposing parties in the action were not in agreement as to the nature of the remedy to be afforded. While Jersey Central did recognize the right of the state to injunctive or equitable relief in such a situation,[52] it challenged the state's right to collect damages on the ground that it had "an alleged lack of proprietary interest"

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47 334 U.S. 385 (1948).

48 *Id.* at 387-91.

49 *Id.* at 399-403. The Court, citing R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 197-202 (1954), distinguished between the Roman concepts of *dominium* and *imperium*. *Dominium* was defined as ownership, whereas *imperium* was deemed to be the power of the government to regulate. Originally, under Roman law, the power of the state over wild fish and game was *imperium*. 334 U.S. at 402 n.37.

50 334 U.S. at 402. Justice Vinson, speaking for the Court, stated:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

Id. (footnote omitted).

51 *Id.* at 408 (Frankfurter, J., concurring).

52 125 N.J. Super. at 102, 308 A.2d at 673. The court stated:

> Both sides recognize the right of the State, as *parens patriae* (which is to say, trustee), to injunctive relief in order to conserve the trust corpus from actions of a wrongdoer.

Id.

in the fish.[53] Two cases decided in other jurisdictions were offered by Jersey Central as support for its contention.[54]

In *Commonwealth v. Agway, Inc.*,[55] the state of Pennsylvania brought an action in trespass against the defendant asking monetary damages for the value of certain fish killed by pollutants which had been dumped into a creek.[56] The court affirmed a lower court's decision dismissing the complaint on the ground that the state did not have a sufficient "proprietary interest" in fish still in the wild state to support a claim for damages.[57] In doing so, the court also noted that the interest of the state was a "sovereign" one, which interest the court interpreted as being limited only to the authority to regulate.[58]

Similarly, in *State v. Dickinson Cheese Co.*,[59] the State Game and Fish Department of North Dakota brought an action claiming damages for the death of some 36,000 pounds of fish which had been killed as the result of whey being discharged into a river by the defendant.[60] Citing *Agway*, the court held that the state had only a sovereign interest in the wild fish, which was insufficient to support a civil claim for damages.[61]

The court in *Jersey Central Power & Light*, however, rejected the proprietary interest requirement as being unnecessarily restrictive of the concept of the public trust. Although recognizing that the state possessed only a sovereign interest in the fish,[62] the court, by appearing to equate the state's role as trustee with its role under the separate concept of the state as *parens patriae*,[63] found that a sovereign interest alone was sufficient to support a claim for damages:

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53 Defendant's Brief, *supra* note 16, at 1; *see* 125 N.J. Super. at 102, 308 A.2d at 679.

54 Defendant's Brief, *supra* note 16, at 4-5.

55 210 Pa. Super. 150, 232 A.2d 69 (1967).

56 *Id.* at 151, 232 A.2d 69-70.

57 *Id.* at 155, 232 A.2d at 71.

58 *Id.* The court noted:

> The Commonwealth has the power for the common good to determine when, by whom and under what conditions fish running wild may be captured and thus owned and the power to control the resale and transportation of such fish thereby qualifying the ownership of the captor. It has this power as a result of its sovereignty over the land and the people.

Id.

59 200 N.W.2d 59 (N.D. 1972).

60 *Id.* at 60.

61 *Id.* at 61.

62 125 N.J. Super. at 102, 308 A.2d at 673. This recognition can be derived from the statement by the court that fish were included in the public trust "as far as they are capable of ownership." *Id.*

63 The state demanded that the court order "the defendant to make whole the State of New Jersey, as trustee for the public, for damages to the aforementioned public re-

> [I]t would appear to this court unreasonable and injudicious to impose the fiduciary duties of a trustee upon the State while withholding the ability to have the corpus reimbursed for a dimunition [*sic*] attributable to a wrongdoer.[64]

Although the concepts of the public trust and *parens patriae* were used interchangeably in *Jersey Central Power & Light*, *parens patriae* developed independently of the public trust. *Parens patriae* in England referred to the King; in the United States it refers to the state as sovereign.[65] For the most part, the doctrine has been viewed as applying to the state's right to protect those who are incapable of caring for themselves.[66] However, in the United States within the last century the concept has developed to include those situations in which the state seeks compensation for damages to its "quasi-sovereign"[67] interests which are separate and apart from those injuries suffered individually by its citizens.[68]

The requirement that such an interest be independent of that of its citizens has its basis in the constitutional philosophy of standing to sue. The eleventh amendment has been construed to prohibit a suit by one state against another on behalf of its citizens who have a legally cognizable injury.[69] Although the eleventh amendment does not forbid

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sources." Complaint, *supra* note 6, at 5. However, in its brief in opposition to defendant's motion to dismiss, it was stated: "The State in the Third Count of the Complaint is seeking recovery as *parens patriae*, or 'parent of the country.'" Memorandum of Law on Behalf of the State of New Jersey at 7, State v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97, 308 A.2d 671 (L. Div. 1973). This claim for relief under the *parens patriae* doctrine in the Brief immediately followed three pages stating the claim of the state for damages in its capacity as trustee. Thus, the court, in its statement of the third count of the complaint, appeared to follow the state's lead in equating the two. The court noted that the state "seeks to recover an award at common law, as *parens patriae*, for damages done to wild life, e.g., menhaden fish." 125 N.J. Super. at 99, 308 A.2d at 672.

64 125 N.J. Super. at 102, 308 A.2d at 673-74.

65 BLACK'S LAW DICTIONARY 1269 (4th ed. 1951). *See, e.g., In re* Turner, 94 Kan. 115, 120-21, 145 P. 871, 872-73 (1915); McIntosh v. Dill, 86 Okla. 1, 9, 205 P. 917, 925 (1922).

66 Beverley's Case, 76 Eng. Rep. 1118 (K.B. 1603). English law gave guardianship of both idiots and lunatics to the King. While the King was responsible for the property of both idiots and lunatics, he did not have custodial responsibility for the person of the lunatic, whose condition was considered temporary. However, he did have such responsibility for the person of the idiot, whose condition was permanent. *Id.* at 1126.

67 Suits to protect the general welfare of the public are recognized as a valid function of a sovereign nation. Thus, it seems logical that an individual state as "quasi-sovereign" should also be able to assert such rights. Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193, 203 (1970).

68 *See* notes 73-82 *infra* and accompanying text.

69 Georgia v. Pennsylvania R.R., 324 U.S. 439, 446 (1945) (dictum); Massachusetts v. Missouri, 308 U.S. 1, 17 (1939); Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 394 (1938); Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277, 288-89 (1911); New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883).

such suits where there is a private party as a defendant, it would appear that this type of suit would also be barred because of the right to individual remedies such as class action suits.[70] The presence of these obstacles thus necessitates an independent interest on the part of the state. This interest has been argued to exist in either of two situations: (1) where the state itself clearly incurs an injury, such as the resulting effects of damage to the economy,[71] or (2) where the general public suffers an injury so that no one individual has legal standing to sue.[72]

This modern interpretation of *parens patriae*, affording a state relief for injury to a quasi-sovereign interest, was recognized by the Supreme Court in the case of *Missouri v. Illinois*.[73] *Missouri* involved a suit to enjoin a discharge of sewage by the defendants.[74] The Court observed "[t]hat suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies."[75] Additionally, the Court reasoned that since such sewage discharge could result in a "substantial impairment of the health and prosperity" of the affected towns, injury could result

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70 *See* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 677-78 (1959).

71 *See* Comment, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROB. 411, 413-17 (1970).

72 *Id.* at 417-18. Injury to the general public is also the basic prerequisite to bringing a suit under the common law theory of public nuisance. *See* W. PROSSER, LAW OF TORTS § 88 (4th ed. 1971). Except where a statute confers standing on an individual to bring an action against a public nuisance, the state is the only party that may prosecute an offender. Thus, while at first glance public nuisance actions would appear to be an effective deterrent against polluters, in actuality very few of these actions have been brought due to the efforts of industrial lobbies coupled with political pressures and a lack of initiative by government agencies. *See* Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1108-09 (1970). Also, the requirements of proof and the defenses which can be raised in a nuisance action present additional difficulties. W. PROSSER, *supra*, §§ 88, 91.

Case law also provides that an individual can recover damages for a public nuisance if he or she can show particular damage not suffered by the general public. *Id.* § 88, at 586-91. Success by an individual may raise the spectre of double recovery where a state is also bringing an action. *See* note 114 *infra*.

73 180 U.S. 208, 241 (1901). In two prior decisions, the Supreme Court had occasion to consider the future possibility of suits by the state as *parens patriae* for injury to quasi-sovereign interests. Louisiana v. Texas, 176 U.S. 1 (1900), indicated that Louisiana's quasi-sovereign interests gave her standing to sue to prevent injury to her citizenry from an embargo on commerce established by Texas. *Id.* at 22. The Court cited *In re* Debs, 158 U.S. 564 (1895), a case in which it was held that the federal government had the right to protect the general public from injury from a railroad strike by bringing suit for injunction. *Id.* at 586.

74 180 U.S. at 242-43.

75 *Id.* at 241.

to the entire state and, therefore, the state was the proper party to bring suit.[76]

In *Kansas v. Colorado*,[77] the Court recognized the concept of injury to the economy in a *parens patriae* suit. This was a case in which Kansas sought to enjoin Colorado from diverting the water of the Arkansas River for irrigation and mining purposes.[78] The Court held that Kansas had an interest "[b]eyond its property rights" since the economic welfare of the land bordering the Arkansas River affected the state's general welfare.[79] In another case decided that same day, the Court, in *Georgia v. Tennessee Copper Co.*,[80] again firmly maintained that to recover under the *parens patriae* doctrine a state must show injury to its own interests apart from that suffered by its inhabitants:

> This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.[81]

Subsequent cases have reaffirmed this criterion.[82]

While all of the earlier *parens patriae* cases were brought in equity to obtain injunctions for the purpose of protecting the quasi-sovereign interests of the state,[83] the concept of a *parens patriae* suit by a state to recover damages has only recently been recognized. In the 1945 case of *Georgia v. Pennsylvania Railroad*,[84] a *parens patriae* suit was brought by the plaintiffs in both equity and law—in equity to restrain the defendants from setting railroad freight rates so as to discriminate against Georgia locations in violation of the Sherman Act,[85]

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76 *Id.*

77 206 U.S. 46 (1907).

78 *Id.* at 47-48.

79 *Id.* at 99.

80 206 U.S. 230 (1907). This case involved a suit by Georgia to restrain Tennessee copper companies from discharging noxious gas into the air. *Id.* at 236.

81 *Id.* at 237 (emphasis in original).

82 Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 393 (1938) (denying leave to file for original jurisdiction where state was bringing action on behalf of particular individuals); Wyoming v. Colorado, 286 U.S. 494, 508-09 (1932) (overruling motion to dismiss suit which sought to enforce decree determining water rights between states); Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923) (enjoining state from enforcing statute curtailing sales to other states of natural gas produced within its borders); Maine v. M/V Tamano, 357 F. Supp. 1097, 1100 (D. Me. 1973) (denial of motion to dismiss count asking damage award under *parens patriae* doctrine); Hawaii v. Standard Oil Co., 301 F. Supp. 982, 986 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972) (suit by state for damages to its general economy).

83 *See* cases collected at notes 73-81 *supra* and accompanying text.

84 324 U.S. 439 (1945).

85 *See id.* at 443.

and at law for the resulting damages to the state's economy.[86] While allowing the state to continue its claim for injunctive relief,[87] the Supreme Court decided that since the rates under attack had been approved by the Interstate Commerce Commission, any award of damages would serve as an improper rebate, and thus in effect give an unfair advantage to the defendant companies over their competitors.[88] However, since the Court did not rule on the propriety of an award of damages under a *parens patriae* claim in other circumstances, the door was left open for future decisions.

The next case to deal with a *parens patriae* claim for damages was a 1969 Hawaii federal district court case, *Hawaii v. Standard Oil Co.*[89] Although subsequently reversed on other grounds by the Ninth Circuit, whose decision was affirmed by the Supreme Court,[90] the case is significant for its discussion of the prerequisites for recovery under *parens patriae.*

In *Standard Oil,* the state of Hawaii brought an antitrust action against certain oil companies, alleging violations of sections 1 and 2 of the Sherman Act.[91] In addition to requesting damages for injuries to its proprietary interests, Hawaii sought relief as *parens patriae* for harm to the " 'general welfare of the State and its citizens.' "[92] The

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86 *See id.* at 444.

87 *Id.* at 462.

88 *Id.* at 453.

89 301 F. Supp. 982 (D. Hawaii 1969), *rev'd on other grounds,* 431 F.2d 1282 (9th Cir. 1970), *aff'd,* 405 U.S. 251 (1972).

90 Both of the higher courts based their reversals on the ground that injury to the state's general economy was not an injury to business or property within section 4 of the Clayton Act, 15 U.S.C. § 15 (1970). At trial, Standard Oil had contended, *inter alia,* that damage to the economy was not "business or property" as provided in section 4. In rejecting this contention, the district court relied on Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906), which held that a public entity forced to pay higher prices did suffer an injury to its property. 301 F. Supp. at 988.

On appeal, the Ninth Circuit, assuming *arguendo* that the economy could suffer injuries as alleged, held on two related grounds that Hawaii's claim for damages did not fall within section 4 of the Act. First, the term "business or property" is to be construed in its ordinary sense, thus obviously excluding injury to the economy. Second, the court stated that injury to the economy was not a sufficiently direct interest to warrant recovery. Consequently, the court reversed the decision below and granted the motion to dismiss. Hawaii v. Standard Oil Co., 431 F.2d 1282, 1285-86 (9th Cir. 1970).

The Supreme Court affirmed on essentially the same grounds. It examined the legislative history of 15 U.S.C. § 15a, which provides for the recovery of damages by the United States for injury to its "business or property." Finding the intent of Congress in enacting this section to be to allow recovery only for injury to proprietary interests, the Court analogized to section 4 and denied recovery. Hawaii v. Standard Oil Co., 405 U.S. 251, 264-65 (1972).

91 301 F. Supp. at 983.

92 *Id.* (quoting from amended complaint). Among the injuries allegedly sustained

court, relying upon language found in the *Pennsylvania Railroad* case, held that a *parens patriae* action for damages was permissible and thus denied the defendants' motion to dismiss.[93]

To avoid the greater possibility of double recovery that might arise in a claim for damages,[94] the court reemphasized the criterion that in order for a state to recover under *parens patriae*, it must have an interest separate and apart from that of its individual citizens.[95] The *Standard Oil* decision also espoused an additional condition which required that a "substantial number" of citizens must be affected before a state may recover as *parens patriae*.[96] This requirement apparently was to avoid any possibility that the state was bringing an action on behalf of individual citizens.[97] While the court relied on the specific language of earlier *parens patriae* cases for support,[98] the necessity of such a requirement must be questioned. The extent and nature of the harm suffered should be the determining factor, rather than the number of citizens affected.[99]

The first decision to clearly permit an award of damages under the *parens patriae* doctrine for injury to the environment was *Maine v. M/V Tamano*,[100] a federal decision from the District of Maine which involved a spill of 100,000 gallons of oil into the Casco Bay.[101] The state sued for damages for injury to its coastal waters and marine life, as well as for clean-up costs and property damage.[102] As in *Standard Oil*, the defendants filed a motion to dismiss the count that asked for dam-

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were (1) wrongful extraction of revenues from the state, (2) increased taxes to offset loss of revenue, (3) wrongful restrictions of certain commercial opportunities, (4) hindrance of the full utilization of natural wealth, (5) reduction in competitive value of goods produced in Hawaii, (6) frustration of remedial efforts by the state, and (7) arresting of development by the Hawaiian economy. *Id.* at 983-84.

93 *Id.* at 988.

94 In the usual case with equitable remedies, the possibility of double recovery will not arise because of the very nature of the remedy. One party with standing is sufficient to obtain all the relief that is possible. However, the chance of double recovery could be great when actions for damages are filed by several parties. *See* Justice Marshall's majority opinion in the Supreme Court decision, 405 U.S. at 261-62.

95 301 F. Supp. at 988.

96 *Id.* at 986.

97 Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570, 586 (1970); Note, *supra* note 70, at 676.

98 301 F. Supp. at 986-87. The cases relied on were Kansas v. Colorado, 206 U.S. 46, 99 (1907), and Land O'Lakes Creameries, Inc. v. Louisiana State Bd. of Health, 160 F. Supp. 387, 389 (E.D. La. 1958).

99 Comment, *supra* note 71, at 418; Note, *supra* note 70, at 677.

100 357 F. Supp. 1097 (D. Me. 1973).

101 *Id.* at 1098.

102 *Id.* at 1098-99.

ages under the *parens patriae* doctrine.[103] In denying the motion, the court stated:

> If Maine can establish damage to her quasi-sovereign interests in her coastal waters and marine life, independent of whatever individual damages may have been sustained by her citizens, there is no apparent reason why the present action to recover such damage cannot be maintained. In the view of this Court, the complaint states a viable *parens patriae* cause of action . . . .[104]

Thus, *Tamano* adhered to the first requirement of *Standard Oil* and preceding cases. However, although it recognized that a substantial number of citizens had been affected, the court questioned the necessity for this prerequisite.[105]

While *Tamano* was expressly identified by the district court as a *parens patriae* action, the underlying rationale behind the decision in *Maryland v. Amerada Hess Corp.*[106] is not as easily discernible. *Amerada Hess* was identified as a *parens patriae* decision in the *Tamano* opinion.[107] However, *Amerada Hess* itself makes no express mention of the concept. Rather, the court's language is couched, as in *Jersey Central Power & Light*, in terms of the state having a sufficient proprietary interest as trustee for its citizens to maintain a suit for damages.[108]

The action arose when the state of Maryland brought suit to recover for damages sustained as a result of an oil spill into Baltimore Harbor.[109] The defendants contended, *inter alia*, in their motion to dismiss that the state, as trustee of the waters, did not have a proprietary interest which would sustain a claim for damages.[110] The court rejected this argument by noting that

> if the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered to bring suit to protect the corpus of the trust—i.e., the waters—for the beneficiaries of the trust—i.e., the public.[111]

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103 *Id.* at 1099.

104 *Id.* at 1102.

105 *Id.* at 1101.

106 350 F. Supp. 1060 (D. Md. 1972).

107 *See* 357 F. Supp. at 1102.

108 350 F. Supp. at 1066-67.

109 *Id.* at 1062.

110 *Id.* at 1066.

111 *Id.* at 1067. This language was quoted by the court in *Jersey Cent. Power & Light* in arriving at its decision. 125 N.J. Super. at 103, 308 A.2d at 674.

In reaching its decision, the court in *Amerada Hess* relied heavily on language from Geer v. Connecticut, 161 U.S. 519 (1896), and Toomer v. Witsell, 334 U.S. 385 (1948). 350 F. Supp. at 1066-67. For a discussion of these two cases, see notes 40-43 and 47-51 *supra* and accompanying text.

In arriving at its decision, the court in *Jersey Central Power & Light* appeared to utilize both the *parens patriae* concept and the alternative approach taken in the *Amerada Hess* decision. However, an examination of *parens patriae* has shown that the court could have relied solely on this doctrine as a vehicle for recovery. The requirement of a separate state interest should be satisfied in this particular instance because the harm was to the general welfare and thus no individual had standing to sue.[112] The earlier *parens patriae* cases afforded equitable relief essentially for this reason.[113] Consequently, relief in such situations should be extended to include damages since any fear of any double recovery will be alleviated by the lack of standing on the part of any one particular litigant.[114]

It was this type of *parens patriae* recovery which actually occurred in both *Jersey Central Power & Light* and *Amerada Hess*. Thus, if injury to the public at large is accepted as an adequate "separate state interest," then recovery of damages under both the *parens patriae* and public trust doctrines can be equated. However, the use of *parens patriae* will avoid the proprietary interest argument adopted by the defendants in both cases. Perhaps this was the underlying rationale of the *Jersey Central Power & Light* court in interjecting the *parens patriae* concept into what originally was an action brought under the public trust.[115]

Regardless of which doctrine is given primary emphasis, the measurement of the damages to be awarded presents certain problems. Placing a dollar value upon injury to the environment is concededly difficult.[116] Moreover, earlier cases provide little support. Both *Tamano* and *Amerada Hess* involved a motion to dismiss on the merits; denial of the motion left the issue of monetary damages to be resolved at trial.[117]

112 *See* note 72 *supra* and accompanying text.

113 Comment, *supra* note 71, at 418 n.44. *See* notes 73-81 *supra* and accompanying text.

114 As noted previously, an individual, if he can prove "particular damage," can collect damages even though the harm incurred is considered to be a public nuisance. *See* note 72 *supra*. This may present a possibility of double recovery where a state is simultaneously bringing an action under the public trust and *parens patriae* doctrines. One solution which has been offered to this problem is to deduct the damages recovered by the private litigants from the award recovered by the state. Maine v. M/V Tamano, 357 F. Supp. 1097, 1102 (D. Me. 1973).

Recently, some states have enacted statutes giving individual citizens standing to maintain suits in their courts to remedy harm to the "public trust" and other natural resources. *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1201 *et seq.* (Supp. 1973-74). However, as these statutes provide only for equitable relief, there can be no possibility of duplicating recovery.

115 *See* note 63 *supra*.

116 Comment, *supra* note 71, at 421.

117 *Tamano*, 357 F. Supp. at 1102; *Amerada Hess*, 350 F. Supp. at 1071.

The court in *Jersey Central Power & Light* recognized the difficulty in assessing damages when it stated that because "the environment may well have been adversely affected in many ways . . . the court cannot speculate as to the monetary value of these damages."[118] Instead, an award of $935 was made, based on the market value of the menhaden killed.[119] While market value may be adequate in measuring the loss of fish or wildlife, it is an insufficient standard to award damages for harm to the quality of the waters or the environment. Thus, the decision has left unresolved important questions concerning proof of damages—a necessary prerequisite to recovery.

However, the decision in *Jersey Central Power & Light* must still be considered an example of the law evolving to meet the exigencies of the time. As the court noted, it would be "unreasonable and injudicious" not to allow an award of damages to the state for violation of the corpus of the public trust.[120] This is particularly so in an era in which the quality of our environment is considered to be a critical issue. Although the court utilized the concept of *parens patriae* in addition to the public trust doctrine, if injury to the general welfare of the public is considered to be a separate state interest, then these concepts may be considered interchangeable. Additionally, it can be argued that such an approach will expand the present narrow scope of the public trust doctrine to include other areas of the environment.[121]

Thus, the *Jersey Central Power & Light* decision, while overlooking some of the distinctions between the *parens patriae* and the public trust doctrines, appears to be judicially sound. The problem of ascertaining damages, however, is one major question that was left unanswered. Barring any significant problems as to this issue in future cases, the *Jersey Central Power & Light* decision may well serve as precedent for another legal remedy in the protection of the environment.

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118 125 N.J. Super. at 103, 308 A.2d at 674.

119 *Id.*

120 *Id.* at 102, 308 A.2d at 673-74. One author has suggested that any monies collected by the state be put in the state treasury to be applied toward tax reductions. Comment, *supra* note 97, at 593 n.138.

121 Several authors have advocated that the courts should expand the trust doctrine to include the right to a clean environment. *See* 1 V. YANNACONE, B. COHEN & S. DAVISON, ENVIRONMENTAL RIGHTS & REMEDIES § 2:1 (1972); Sax, *supra* note 23, at 556-57; Cohen, *supra* note 30, at 393-94; Comment, *supra* note 72, at 1126-27.