In the Supreme Court of the United States

OCTOBER TERM, 1965

NO. 21, ORIGINAL

STATE OF WISCONSIN
Plaintiff

VS.

STATE OF MINNESOTA AND NORTHERN STATES POWER CO.,
Defendants

BRIEF ON BEHALF OF DEFENDANT NORTHERN STATES POWER COMPANY IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

RANDALL J. LEBOEUF, JR.
One Chase Manhattan Plaza
New York 5, New York
DONALD E. NELSON
ARTHUR R. RENQUIST
414 Nicollet Avenue
Minneapolis, Minnesota 55401
Attorneys for Defendant, Northern States Power Company

ALFRED E. FROH
JOSEPH S. STRAUSS
LEBOEUF, LAMB & LEIBY
Of Counsel

Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415

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QUESTIONS PRESENTED

1. Does the complaint that Wisconsin proposes to file, in which it seeks to enjoin construction of a steam generating plant in Minnesota that is lawful under Minnesota law and which has been approved by all interested state agencies, state a claim for which relief should be granted in an interstate action?

2. Does Wisconsin have standing to bring this action?

STATEMENT OF THE CASE

By this motion, Wisconsin moves for leave to file a complaint seeking to enjoin the construction by defendant Northern States Power Company ("Northern States") of a steam electric generating plant ("the plant") on the St. Croix River in the incorporated Village of Oak Park Heights and to enjoin the State of Minnesota from permitting such construction. Application to this Court (Mr. Justice Clark) for preliminary injunction was denied on June 28, 1965.

Factual Background

*The St. Croix River**

The St. Croix is a boundary river between the states of Minnesota and Wisconsin. It does not present a single, unvarying face during its 165 mile course; rather it shows both physical and evolutionary changes as it moves downstream. It is a substantially wild river from its source waters to Taylors Falls, about 51.8 miles above its confluence with the Mississippi River. This portion of the river is called "the Upper St. Croix." The continued existence of the Upper St. Croix in an unspoiled, primitive state is the result of the deliberate policy of Northern States, which has owned the land on both sides of the river for some 70 miles above Taylors Falls for the past 50 years. Northern States has no intent to change this policy (Senate Report No. 679, pp. 4-8, 23).

Below Taylors Falls, the St. Croix changes character,

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*The St. Croix, being the subject of pending Congressional legislation (S. 897) (see p. A-1 *infra)* has been recently thoroughly described in Senate Report No. 679, 89th Cong., 1st Sess. hereinafter cited as "Senate Report No. 679." For convenience, a copy of the bill (S. 897) to which the report refers is reprinted as Appendix A.

gradually at first and then drastically at Stillwater (about mile 25 above the Mississippi). Between Taylors Falls and Stillwater a three-foot navigation channel is maintained by the Corps of Engineers pursuant to Acts of Congress. Shoreline development for agriculture and recreation has taken place (Senate Report No. 679, pp. 11, 23).

From Stillwater down to the mouth, the waterway has no perceptible gradient, being part of the impondment and backwater created by dam No. 3 on the Mississippi River. This portion is known as Lake St. Croix (Senate Report No. 679, pp. 7, 11, 23; Wisconsin brief, p. 3). Also, pursuant to Congressional authorization a nine-foot navigation channel is maintained which is utilized for barge commerce. Shoreline development includes a harbor and waterfront facilities at Stillwater, and there are other incorporated municipalities (Senate Report No. 679, pp. 4, 11, 23).

Extensive industrial and commercial development occurs in an approximately four-mile stretch between Stillwater, Minnesota, and Hudson, Wisconsin. Railroad lines run along the Minnesota river bank and a portion of the east side of the river in this stretch and below. On the Minnesota river bank, or extending therefrom, there are a large window manufacturing plant, coal docks, a sewage plant, a phosphate storage warehouse, a railroad iceloading facility and many marinas. On the Wisconsin side near Hudson, and plainly visible from the river, there are railroad shops and other commercial structures. A railroad bridge crosses the river at Hudson, Wisconsin.

It is on Lake St. Croix, in the industrial and commercial stretch between Stillwater, Minnesota, and Hudson, Wisconsin, that Northern States is building its steam generating station in the incorporated Village of Oak Park Heights.

The Plant

As appears from the affidavit and documents which were submitted in opposition to the motion for preliminary injunction, Northern States and its subsidiary supply electricity to an area including portions of Minnesota, Wisconsin, North Dakota and South Dakota, and having a total population of 2,645,000. The Minneapolis-St. Paul area constitutes both the geographic center and the major load center of the entire area.

The rapid growth of this particular area has necessitated increased generating capacity, and the 550,000 kilowatt capacity of the plant will be essential to meet the 1968 projected load. No other plant could be constructed at this time, on any alternate site, in time to meet this 1968 load.

The plant site, acquired in installments since 1942 by Northern States, is approximately 20 miles from Minneapolis-St. Paul. The location of the plant will minimize the length of overhead high-voltage transmission lines required to serve that most important load center.* The plant will be in the incorporated Village of Oak Park Heights in an area which that Village has zoned for industrial use. The plant location is immediately south of the city of Stillwater, in which are located various industries; the site itself is bounded immediately on the north by a barge terminal and the Stillwater sewage plant, on the west by Minnesota State Prison and railroad facilities, and immediate-

*The technological problems which require high-voltage transmission lines to be overhead were detailed in the remarks of the chairman of the Federal Power Commission to the White House Conference on Natural Beauty, reprinted as Appendix 9 to the hearings before the subcommittee on Legislation of the Joint Committee on Atomic Energy, 89th Congress, 1st Session, on Proposed Amendment to Section 271 of the Atomic Energy Act of 1954, pp. 143-45.

ly to the south on the river is one of the world's largest plants for the manufacture of windows. The site itself presently contains an electric substation and a large propane storage tank. At this point, the site and river are crossed by two electric transmission lines. A copy of an aerial photograph of the area, which was part of the opposing papers on the preliminary injunction application, is annexed hereto as Appendix B.

The plant, which will cost $68,000,000 and is currently under construction, is a modern coal fired thermal-electric generating station. The plant will develop no hydroelectric power. The only significant use made of the St. Croix, other than as an artery of commerce for coal-carrying barges, will be for cooling water purposes. Pursuant to permit issued by the Minnesota Water Pollution Control Commission dated May 24, 1965 (see below), such cooling water must be returned to the St. Croix at a temperature not in excess of 86°F., and a cooling tower will be built to insure compliance with the permit. The plant design calls for electrostatic precipitators, which will remove 99% of the particulate matter from the stack discharge.

Regulatory Approvals

Pursuant to Minnesota Statutes, application was made to the Commissioner of Conservation of the State of Minnesota to withdraw water from Lake St. Croix for cooling water purposes, and application was made to the Water Pollution Control Commission of the state of Minnesota to discharge such water after use. Following extensive joint hearings, both applications were granted, subject to various conditions, including the requirement that the returned water temperature should never exceed 86°F., this being determined as a safe temperature which would cause no prob-

lems of thermal pollution.* Appeals from these orders are pending in the Minnesota state courts. Wisconsin appeared and presented several witnesses at the joint hearings, but has not joined in the appeal from the order of either Commission.

Acting independently, the State Board of Health of Minnesota made a determination that it sees no basis for objecting to the plant in so far as matters relating to air pollution are concerned.**

Pending Legislation

On September 8, 1965 the Senate passed, and sent to the House of Representatives for action, S. 897, "to provide for the establishment of the St. Croix National Scenic Waterway." Since the bill exempts from its provisions all land on Lake St. Croix within incorporated municipalities, it would not prohibit the construction of the plant. The bill (App. A) is more fully discussed at pp. 23-25, *infra.*

SUMMARY OF ARGUMENT

Construction of the plant without a license from the Federal Power Commission is clearly not a violation of the Federal Power Act because the plant is a non-hydroelectric project. The plant, which is being built on a commercial waterway, is designed to the highest modern standards, will serve a vital public need, and will not constitute a nuisance; particularly, Wisconsin fails to show any tangible injury of the magnitude that must prevail for this Court to

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*The permit issued by the Minnesota Department of Conservation is reprinted as Appendix C hereto. The permit issued by the Minnesota Water Pollution Control Commission is reprinted as Appendix D hereto.

**The determination of the State Board of Health of Minnesota is reprinted as Appendix E hereto.

intervene in disputes between states. Since Congress has substantially this very issue under active consideration, this Court should in its discretion decline to receive this complaint.

Nor does Wisconsin have any standing to sue herein. It does not allege any injury to it in a proprietary capacity, and since the facts alleged in the complaint do not indicate that the existence of the plant will cause any special injury to the welfare of Wisconsin citizens generally, Wisconsin can not sue as *parens patriae*. Wisconsin does not have standing to sue as *parens patriae* in respect of matters that are of national concern, such as the enforcement of the Federal Power Act. With regard to such matters, the Federal Government acts as *parens patriae*.

ARGUMENT

I.

The Complaint Proposed To Be Filed By Wisconsin Does Not State A Claim For Relief

A. The Federal Power Act does not require Northern States to obtain an FPC license for the construction of the proposed plant on the St. Croix River.

Wisconsin alleges in its proposed complaint (Par. XVI) and stresses in its brief (p. 18) that for Northern States to construct the proposed steam generating plant on the banks of the St. Croix River without obtaining a license from the Federal Power Commission would be a violation of the Federal Power Act, *16 U.S.C.* § 791a, *et seq.* (1964).

Wisconsin's contention is without merit. The plant that Northern States is building will generate electricity by

steam. All of the provisions of the Federal Power Act that deal with the licensing of power projects are contained in Part I of the Act, Sections 1-29, *16 U.S.C.* §§ 791a-823 (1964), and Part I applies only to plants using water power, not to plants generating power by steam and using water only for cooling purposes.

Just this year, in *FPC v. Union Electric Co.*, 381 U. S. 90 (1965), this Court expressed its recognition of the inapplicability of Part I of the Federal Power Act to steam generating plants. Holding that the FPC has jurisdiction under section 23(b) of the Federal Power Act, *16 U.S.C.* § 817 (1964), to license a pumped storage hydroelectric facility on a non-navigable stream if the electricity to be generated will be transmitted in interstate commerce and thereby affect such commerce, regardless of whether there is any effect upon navigability, the Court stated:

> "The respondent asserts that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23 (b), although located along a stream over which Congress has jurisdiction. Since the Commission's jurisdiction here rests solely on the interstate transmission of energy, there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use. The Court of Appeals, after noting that the generation of electric energy is a local or intrastate activity, concluded from this argument that '[t]he Commission's jurisdiction * * * must logically rest upon its delegated congressional jurisdiction over the interests of commerce on navigable waters.' 326 F. 2d at 551. On this reasoning either the Act should, but does not, require a license for a steam plant when situated on the navigable main-stream itself, or

> should not, but does, require a license for a hydroelectric plant, pumped storage or otherwise, situated on the mainstream but which has no demonstrable effect, or a beneficial effect, on navigability. The answer to this conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." 381 U. S. at 109-110 (footnotes omitted).

Legislative history and long-standing administrative interpretations support the distinction recognized by the Court. Part I of the Federal Power Act was originally enacted on June 10, 1920, *41 Stat.* 1063, as the Federal Water Power Act. In the First Annual Report of the Federal Power Commission, which had been created by the Federal Water Power Act, the FPC stated its interpretation of the extent of its jurisdiction under the Act as follows:

> "On neither the public lands and reservations nor on the waters of the United States is the jurisdiction of the Federal Power Commission as broad as the jurisdiction of Congress. The latter has authority over all forms of use; the Commission is limited to the consideration of projects designed to produce water power."
>
> FPC Annual Report (1921) p. 51.

During its first year of operation, the Commission was specifically asked whether its jurisdiction encompassed the licensing of transmission lines over public lands for transmitting power generated by steam, as it did the licensing of such lines transmitting hydropower. In concluding that it did not have jurisdiction, the Commission, by its chief counsel, stated that:

> "The scope of the Federal Water Power Act is indicated by its title as intending 'to provide for the improvement of navigation; *the development of water power*; the use of the public lands in relation thereto,' etc.
>
> * * * * *
>
> "I think it is fairly to be inferred from the context, as well as the circumstances surrounding the enactment of the legislation, that it was the purpose of Congress to confer exclusive jurisdiction on the Federal Power Commission, except as provided therein, over the matter of issuing licenses for power projects, or parts thereof, for the development of hydroelectric power, and that it was not intended to vest the Commission with jurisdiction over the public lands for other purposes. If this view be correct, it follows that where a proposed transmission line is in no way connected with a water-power project the Commission is without jurisdiction to license the same".
>
> FPC Annual Report (1921) pp. 155-156.

It is well settled that the construction by an administrative body of the statute that it is charged with administering is entitled to great weight, particularly when the construction originated almost contemporaneously with the enactment of the statute. This Court noted in *Norwegian Nitrogen Products Co. v. United States,* 288 U. S. 294, 315 (1933), that an administrative practice:

> "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

The reason for such a rule is obvious: When a commission begins operation under a newly enacted statute, it is generally familiar with the problems that the statute was designed to deal with and the deliberations of Congress while considering the legislation. Often the first members of the commission will have actually participated in the drafting of the legislation and in almost every instance they are chosen for the commission because of their knowledge of the subject of the legislation. Indeed, the Secretaries of Interior, Agriculture and War who ultimately became the first members of the Federal Power Commission virtually presided over the drafting of the Administration bill that eventually became the Federal Water Power Act. See *Kerwin, Federal Water-Power Legislation* 238 (1926). Each of them appeared before Congressional committees for the purpose of explaining and discussing the bill's provisions.

When in 1935 Congress decided to regulate the interstate transmission and sale at wholesale of electric energy, the Federal Water Power Act was made Part I of the Federal Power Act. Part II of the Federal Power Act, Sections 201-09, *16 U.S.C.* §§ 824-24h (1964), deals with the regulation of interstate transmission and wholesale sale of electric energy. In incorporating the Federal Water Power Act into the Federal Power Act, Congress did not make any change in its provisions relevant to the instant problem. In the face of the FPC's by then settled interpretation, Congress made no change to indicate that the coverage of Part I was to be expanded beyond water power projects.

On at least three recent occasions, the Federal Power Commission reaffirmed its interpretation of the coverage of Part I of the Federal Power Act and the extent of its licensing jurisdiction thereunder. Under the Rivers and Harbors Appropriation Act of 1899, *33 U.S.C.* § 401 (1964), Congressional approval must generally be obtained for the construction of a dam in a navigable waterway. Usually, when steam-electric power projects are involved, Congress refers applications for special acts to the Federal Power Commission for comments. In its unpublished report dated May 18, 1962 to the 87th Congress on H.R. 6789, a bill to "grant the consent of Congress for the construction of a dam across Savannah River between South Carolina and Georgia," the FPC stated:*

> "The Bureau of the Budget in its letters of April 10, 1962 to the Committees on Public Works of the House of Representatives and the Senate, in commenting on HR 6789 and S 1795, respectively, points out that there is a continuing trend toward larger sized steam-electric installations which will result in an increasing need for stream regulation to provide condenser water for such installations. Accordingly, Budget suggests that in view of the highly technical and complex problems involved in water resources development, the Congress may wish to give consideration to the matter of authorizing the Federal Power Commission to issue licenses under the Federal Power Act for the construction, operation and maintenance of diversion dams and other structures affecting water resources used in connection with steam-electric installations.
>
> "The Federal Water Power Act, approved June 10, 1920 (41 Stat. 1063) as amended, was made Part I

*A copy of the full Commission report is reprinted as Appendix F.

of the Federal Power Act, approved August 26, 1935 (49 Stat. 838). As indicated by the title of the 1920 Act, it created a Federal Power Commission to authorize and regulate the development of water power. Neither that act nor its subsequent amendments require the licensing or regulation of structures affecting water resources but used for steam-electric generation.

"The Commission endorses the Bureau of the Budget's suggestion."

In its 1964 Annual Report (pp. 5-6, 10-11), the FPC commented upon its legislative recommendations to the 89th Congress, that:

"The following proposals comprise the Federal Power Commission's legislative recommendations to the 1st session of the 89th Congress. Each proposal would strengthen either the Federal Power Act or Natural Gas Act and enable the Commission to more effectively meet its responsibilities under the acts. While the proposals are in the main renewals of the Commission's previous recommendations item 14 is a new recommendation and others, such as items 1, 6 and 9, have undergone some revision. There has been no attempt in this listing to assign any order of priority. The Commission feels that each item is significant in the particular area it would affect.

* * * * *

"9. Licensing of Water Diversion Facilities for Steam-Electric Plants.

"Amend the Federal Power Act to add a new part IV authorizing the Commission to license the construction and maintenance of water-diversion facilities in or along any navigable waters of the United States for use in connection with the operation of a plant

generating electricity by means of steam or other means except hydroelectric generation.

"At present the Commission's licensing jurisdiction under part I of the Federal Power Act is limited to projects for the generation of hydroelectric power. Increasingly in recent years plants for steam-electric generation have been built adjacent to navigable waters of the United States with diversion facilities in or along the stream to provide water for cooling purposes. Under existing law, such diversion facilities have required special authorizing legislation by the Congress. It is believed that the determinations of the relationship of the facilities to the comprehensive development of navigable waters of the United States can be made efficiently and promptly by this agency, which has performed the same function with respect to hydroelectric projects since 1920, and that Congress could be relieved of an increasingly burdensome task. Recognizing, however, that the scope of the controls to be exercised over steamplant-diversion facilities is less than that needed for hydroelectric projects, the proposed new part IV is more narrowly drawn than part I of the act and does not purport to impose the broad controls to which major hydroelectric projects are subject."

A public hearing concerning the proposed plant was held at Stillwater, Minnesota on December 10 and 11, 1964 by a Special Subcommittee of the Committee on Public Works, United States Senate. The Honorable Gaylord Nelson, Senator from Wisconsin, introduced into the record of that hearing a letter written by Lawrence J. O'Connor, Jr., acting chairman of the FPC, which made particular reference to the licensing jurisdiction of the Commission in relation to the proposed St. Croix plant, stating in pertinent part as follows:

"FEDERAL POWER COMMISSION
Washington, D. C., December 2, 1964

"HON. EDMUND S. MUSKIE,
Chairman, Special Subcommittee on Air and Water Pollution, Committee on Public Works, U.S. Senate, Washington, D. C.

"Dear Mr. Chairman: This is in response to your letter of November 24, 1964, requesting an outline of the responsibilities and authority of the Federal Power Commission, under existing law and practice, with respect to the effect on water quality of steam-electric powerplants constructed along interstate streams.

"The Commission's existing licensing jurisdiction, under the Federal Power Act (41 Stat. 1063, 16 U. S.C. 791-823), has been consistently held to be limited to hydroelectric projects. Steamplants constructed along interstate streams; such as, the plant proposed along the St. Croix River, therefore, are not subject to licensing by the Federal Power Commission. However, a steam-plant may often require a structure in the stream, along which it is located, to impound sufficient water to remove the excess heat from the powerplant and such a structure requires special authorizing legislation by Congress (33 U.S.C. 401). The plant proposed on the St. Croix is located on an existing reservoir formed by a Federal dam on the upper Mississippi River, and therefore, does not require such a structure. * * *"

The text of the complete letter is attached as Appendix G.

In response to the Federal Power Commission's recommendations, a bill (S. 2306, H.R. 10701, 89th Cong., 1st Sess.), has been introduced in Congress that would extend the Commission's licensing jurisdiction to include the licens-

ing of certain facilities in connection with steam generating plants on navigable waters of the United States. Of course, if the licensing powers of the Federal Power Commission were as Wisconsin contends, such a bill would be superfluous.

Thus, since its inception as a part of the Federal Water Power Act, Part I of the Federal Power Act has been construed by the Federal Power Commission and by this Court as applicable only to water power projects. Wisconsin's attempt at this late date to change the settled construction of the statute must necessarily fail. Northern States is not required to obtain a license from the Federal Power Commission for the steam generating plant that it is now constructing.

B. Wisconsin does not allege an actionable nuisance.

In addition to the claim that construction of the proposed plant without an FPC license will violate the Federal Power Act, Wisconsin seeks to enjoin construction of the plant upon the ground that the plant will destroy the "unique character of the St. Croix River Valley" (complaint, Par. XIV) and that "the area will suffer environmental pollution in that the natural beauty of the area would be affected and the recreational value of the St. Croix Valley will be destroyed" (complaint, Par. XV). Wisconsin does not state any facts in its complaint to indicate what recreational purposes the area around the proposed plant is presently devoted to. Wisconsin does not even allege in its complaint that the area is devoted to recreational purposes.

Every allegation that Wisconsin makes in its complaint and stresses in its brief relates to one central objection: In

the opinion of certain officials of the State of Wisconsin, the generating plant that Northern States is building on the St. Croix River to meet the demands of an area in dire need of expanding power resources, will not be pretty.*

Wisconsin makes perfectly clear the basis upon which it is asking this Court to act when it says in its brief (p. 15):

> "Wisconsin's concept of public welfare as applied to the St. Croix demands protection of unique, spiritual as well as aesthetic values—yes, of beauty."

On this basis alone, Wisconsin claims that the plant will constitute a nuisance which this Court should enjoin.

In several instances a state has sought to enjoin in this Court, as a nuisance offensive to its inhabitants, activities of a neighboring state or residents thereof. In such cases the Court has generally looked to the doctrine of nuisance as it has been developed in intrastate cases between private persons, but it has emphasized repeatedly that the magnitude of offense required to establish a cause of action in an interstate case is much greater than that which will support a cause of action between two private parties.

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*The complaint makes a passing and wholly conclusory reference in the final paragraph to air pollution and water pollution. No facts are alleged in support of such conclusion, and the complete failure of the Wisconsin Brief to argue these matters demonstrates that it was not intended to be taken seriously. Indeed, if Wisconsin really intended to obtain relief from alleged water or air pollution, it should have pursued the administrative procedures set forth in the Federal Water Pollution Control Act, *33 U.S.C.* § 466, *et seq.* (1964), as amended by the Water Quality Act of 1965, Pub. L. No. 234, 89th Cong., 1st Sess. (Oct. 2, 1965), or the Clean Air Act, *42 U.S.C.* § 1857, *et seq.* (1964). In this connection, it should also be noted that the plant has been approved by the Minnesota Water Pollution Control Commission, see pp. 5-6, *supra*, and that the Board of Health of the state of Minnesota has specifically found that the plant is not objectionable "insofar as matters relating to air pollution are concerned." See Appendix E.

Thus, in *Missouri v. Illinois,* 200 U. S. 496, 520-21 (1906), Missouri sought an injunction against the dumping of sewage by the city of Chicago into a canal that emptied into a tributary of the Mississippi River, because, it was alleged, the sewage eventually became mixed with the water supplies of various cities in the plaintiff State, causing danger to the health of the inhabitants thereof. The Court said:

> "* * * the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals.
>
> * * * * *
>
> "It is decided that a case such as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected sys-

tem of municipal law, and the fact that we have jurisdiction over controversies between States.

* * * * *

"Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. See *Kansas v. Colorado,* 185 U. S. 125."

In *North Dakota v. Minnesota,* 263 U. S. 365 (1923), North Dakota claimed that the defendant, by constructing cut-off ditches and straightening the Mustinka River, had ultimately caused the Bois de Sioux River to overflow and greatly injure a farming area in the plaintiff State. The Court said:

"The jurisdiction and procedure of this Court in controversies between States of the Union differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between States entirely independent, might be properly the subject of diplomatic adjustment."

263 U. S. at 372-73.

The Court in *Georgia v. Tennessee Copper Co.,* 206 U. S. 230 (1907), upon which Wisconsin places so much reliance, felt compelled to point out that:

"The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri*

> *v. Illinois,* 200 U. S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. *Missouri v. Illinois,* 180 U. S. 208, 241."
>
> 206 U. S. at 237.

The Court granted relief against the discharge by defendant of noxious gases over the plaintiff's territory, threatening "a wholesale destruction of forests, orchards and crops" (206 U. S. at 236) and possible danger to health. Aesthetic considerations were not even suggested in the Court's opinion. See also *New York v. New Jersey,* 256 U. S. 296, 309 (1921).

Accordingly, this Court in actions between States or between a State and a citizen of another state, has entertained actions to enjoin such conduct as the pollution of waters (*New York v. New Jersey,* 256 U. S. 296 (1921); *Missouri v. Illinois,* 180 U. S. 208 (1901)), diversion of waters from an interstate stream (*Wyoming v. Colorado,* 259 U. S. 419 (1922); *Kansas v. Colorado,* 185 U. S. 125 (1902)), the release of noxious gases (*Georgia v. Tennessee Copper Co.,* 206 U. S. 230 (1907)) and obstruction of a waterway (*Pennsylvania v. The Wheeling & Belmont Bridge Co.,* 54 U. S. 518 (1851)).

Northern States is not aware of any case of original jurisdiction in which this Court has enjoined conduct on aesthetic grounds. Indeed, to use the phraseology employed

by the Court in *Missouri v. Illinois, supra,* 200 U. S. 496, one can hardly imagine the style of architecture existing on the side of an interstate or international river becoming a *casus belli* between the neighboring states.

Even in traditional state law nuisance cases, courts have generally held that a nuisance does not arise from mere aesthetics. See *Bixby v. Cravens,* 57 Okla. 119 (1916); *Perry Mount Park Cemetery Ass'n v. Netzel,* 274 Mich. 97, 99 (1936) ("mere esthetics is beyond the power of the Court to regulate"); *Zey v. Long Beach,* 144 Wash. 582 (1927); *Prosser, Torts,* § 70 at 395 (2nd ed., 1955). The Courts have ordinarily refused to enjoin conditions that do not produce some tangible discomfort as distinguished from discomfort that depends on taste or imagination. See *Noel, Unaesthetic Sights as Nuisances,* 25 Corn. L.Q. 1 (1939). The annotation following 110 A.L.R. 1454, cited by Wisconsin (Wisconsin brief, p. 15) points out that "the controlling factor in the court's determination whether or not an outdoor automobile wrecking business is a nuisance appears to be the character of the community in which the business is to be carried on." *110 A.L.R.* at 1461. The site of the plant now being constructed is in a four mile stretch of the river which is commercial and industrial in nature. The plant itself is in the incorporated Village of Oak Park Heights in a section zoned industrial. The plant is immediately next to a huge window manufacturing plant. Its other adjoining neighbors are the State Penitentiary, railroad tracks, and the Stillwater sewage disposal plant. The plant is being constructed to fill a vital public need for electricity. These factors are all to be weighed by the courts in determining whether conditions or conduct complained of constitute a nuisance, comparing the gravity of the harm

with the reasonableness and utility of the defendant's conduct. See *Prosser, Torts,* § 70, 398-401 (2nd ed., 1955).

In *Stevens v. Rockport Granite Co.,* 216 Mass. 486, 488 (1914), the Supreme Judicial Court of Massachusetts stated:

> "The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all the circumstances. In a commonwealth like this, which depends for its material prosperity so largely on the continued growth and enlargement of manufacturing of diverse varieties, 'extreme rights' cannot be enforced. One who settles in a district, which possesses natural resources of a special kind, cannot prohibit the development of those resources merely because it may interfere in some degree with personal satisfaction or aesthetic enjoyment."

Northern States is constructing a generating plant that will supply additional electric energy to a rapidly expanding community with an urgent need for greater sources of power.

The complaint in this action makes no claim of any deficiency in the construction of the plant. No contention, whatsoever, is made that the plant is not being built to the highest standards to the end of preventing air pollution, water pollution or any noxious effect, nor are any factual allegations made indicating that any such effect will result. What the complaint seeks is a declaration by this Court that any electric generating station on Lake St. Croix in the incorporated Village of Oak Park Heights, no matter how carefully built and architecturally designed, constitutes a nuisance *per se* at that location.

Whether such a declaration might be appropriate on

some other river, or indeed even on the Upper St. Croix, is not in point here. The history and existing development of the area of the site of the plant, which has been zoned for industrial development and in which such development has taken place, clearly show that Lake St. Croix is and must remain a multi-purpose waterway. In fact, Congress has indicated an intent to manage the resource that is the St. Croix River in a manner far different from the scheme proposed by Wisconsin, which would limit its use only to "recreation and enjoyment of outdoor amenities and scenic beauty" (brief, p. 21). Specifically, Congress has recognized the difference between the Upper St. Croix and Lake St. Croix, including the fact that the latter is used as a multi-purpose resource. See Appendix A.

Pursuant to Congressional authorizations dating back to 1878, the section of the St. Croix below Taylors Falls, Minnesota has been improved for navigation. The section between the mouth of the river and Stillwater, Minnesota (Lake St. Croix) has been improved and is being maintained as a nine-foot waterway suitable for commercial barge traffic (Senate Report No. 679, pp. 11, 23). These improvements were made in contemplation of commercial development of Lake St. Croix (see Reports of the Chief of Engineers, United States Army, H.R. Doc. No. 378, 69th Cong. 1st Sess.; H.R. Doc. No. 184, 72d Cong., 1st Sess.). It is this navigation channel that the coal barges complained of by Wisconsin would be using. Clearly, in authorizing such improvement Congress did not intend that any restriction imposed for recreational usage of the river would preclude its commercial utilization. With regard to navigation on the nation's waterways, the powers of Congress are absolute and supersede all other interests. See

United States v. Appalachian Electric Power Co., 311 U. S. 377, 426-27 (1940); *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 62 (1913). Accordingly, use of Lake St. Croix for commercial navigation which Congress has sought to make possible can not be held to constitute an enjoinable nuisance.* See, *e.g.*, *Wisconsin v. Duluth*, 96 U. S. 379 (1877).

The Senate, in passing S. 897 (App. A) further recognized the multi-purpose development of Lake St. Croix. While such bill would preserve the Upper St. Croix "in a primitive condition" the bill's objective for the lower river is limited to promoting "recreational use" and "protecting, developing, and making accessible the nationally significant outdoor recreation resources" of the river. For these purposes, the Secretary of Interior is empowered to acquire property both above and below Taylors Falls; the conditions upon such acquisition are substantially different, however, in clear recognition of the different nature of the areas.

Above Taylors Falls, the only restriction on the Secretary is an acreage limitation. For the area below Taylors Falls, no acquisition can be made if the property was within an incorporated city, village or borough as of January 1, 1965. The Senate thus recognized the need to exempt

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*It should also be noted that the width of the channel maintained for navigation on Lake St. Croix is at least 200 feet (see H.R. Doc. No. 184, 72nd Cong., 1st Sess.). As can be seen from Appendix B, the channel is considerably wider at most points. Even the minimum width, however, is adequate for much more extensive commercial navigation than the barge traffic that will supply the plant. Furthermore, any aesthetic objections by Wisconsin relating to the barges, although irrelevant, should be vitiated by the fact that they will be run only on weekdays and prior to noon. Present boating traffic is most active on weekends and in the late afternoon and evening.

these areas, which have become urban, commercial, and industrial, from the riverway (Senate Report No. 679, pp. 1, 4) and thus allowed for such continued use. The generating plant is to be located on property which is and was on January 1, 1965 within the incorporated Village of Oak Park Heights.

In its brief (p. 12), Wisconsin states that it:

> "* * * is asking this court to apply basic nuisance principles to a mid-twentieth century setting and to apply them in accordance with mid-twentieth century social criteria. It is true to date, in the nuisance field, the courts in ordinary private litigation have usually insisted that damage to amenities and aesthetics were not sufficient reasons for nuisance injunctions. Today, however, society has become greatly concerned with amenities and aesthetics."

Northern States submits that the very mid-twentieth century social criteria whose importance is stressed by Wisconsin require the continued multi-purpose usage of Lake St. Croix in accordance with Congressional declarations of policy. The need for, and the utility of, additional generating facilities can not be questioned. Such facilities require water for their operations, and the Oak Park Heights site is a particularly advantageous one. Mid-twentieth century social criteria do not require that the progressive development of an entire community be precluded.

Wisconsin does not show that the plant will in any way interfere with present or proposed recreational or other uses of the St. Croix. Instead, Wisconsin objects to the proposed plant because, Wisconsin alleges, it will cause "environmental pollution" (complaint, Par. XV). By that term, Wisconsin apparently intends to suggest that the plant will present a drastic contrast to the wild beauty of

the surrounding countryside. Such is not the case. As noted, the area in which the plant is to be located is presently devoted to industrial uses. See pp. 3-5, *supra,* and Appendix B. Furthermore, Lake St. Croix has been developed for commercial navigation pursuant to Congressional authorizations, and it is used extensively for that purpose.

Wisconsin concedes that established legal principles do not justify the relief it is seeking. It frankly asks this Court to zone land in Minnesota, and to legislate in accordance with Wisconsin's aesthetic demands. Northern States submits that the social criteria which Wisconsin seeks to invoke do not support the result that it requests, but that, in any event, Wisconsin's complaint is one for the legislature, not for this Court.

Since Wisconsin does not allege either a claim for relief or any injury that will arise from the proposed plant and in light of the fact that Congress is presently considering legislation specifically dealing with conservation requirements in relation to the St. Croix River, this Court, in its discretion, should deny Wisconsin permission to file the proposed complaint.

II.

Wisconsin Does Not Have Standing to Bring This Action

Article III, Section 2, Clause 1 of the *United States Constitution* provides that "the judicial power shall extend" to the "Cases" and "Controversies" therein enumerated. If a party bringing an action in a federal court does not show a sufficient personal or representative interest in the outcome of the litigation, a justiciable case or controversy is not presented and the action must be dismissed for want

of jurisdiction. The sufficiency of the plaintiff's interest is spoken of in terms of whether or not plaintiff has "standing to sue." See generally *Hart & Wechsler, The Federal Courts and the Federal System,* 156-92, 255-58 (1953).

Wisconsin alleges in its complaint (Par. XVI) and stresses in its brief (p. 18) that construction of the proposed plant by Northern States without the issuance of a license therefore by the Federal Power Commission would be a violation of the Federal Power Act, *16 U.S.C.* § 791a, *et seq.* (1964). Such allegation, even if true, does not give Wisconsin standing to sue.

The enforcement provisions of the Federal Power Act, Sections 26 and 314, *16 U.S.C.* §§ 820, 825m (1964) provide, in pertinent part:

(Section 26)

> "The Attorney General may, on request of the commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this chapter or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of the Army, and to compel the performance of any condition imposed under the provisions of this chapter.
>
> * * * * *

(Section 314)

(a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the United States District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Upon application of the Commission the district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder."

The quoted provisions are the only ones providing for enforcement of the Federal Power Act. It seems clear that they do not give Wisconsin, or any other private party, a right to sue for a violation of the Act. Thus, in *Connor v. South Carolina Public Service Authority,* 91 F. Supp. 262 (E.D.S.C. 1950), wherein plaintiff landowners sought an

injunction against violation by defendants of the terms of a license issued by the Federal Power Commission under the Federal Power Act, the Court, dismissing the action, stated:

> "If, as is contended by the Plaintiffs, the raising of this water to a level of more than seventy-five feet is in violation of the license and is detrimental to the health and well being of the surrounding territory then it is the duty of the Federal Power Commission to take action. The Federal Power Act gives ample opportunity to parties interested to call these alleged improper acts to the attention of the Commission; and elaborate machinery is provided for the Commission to investigate, have hearings, issue directions, and if the licensee does not comply, take court action. But the enforcement of the license is a matter exclusively for the Federal Power Commission. And no right is given for a private individual to bring an [sic] And so I am definitely of the opinion that equitable action in the District Court. [sic] even if the powers given by the license under the Federal Power Act have been exceeded, this suit is not the proper way to remedy the situation."
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> 91 F. Supp. at 268-69.

Section 306 of the Federal Power Act, *16 U.S.C.* § 825e (1964), sets forth a procedure whereby private parties can complain to the Federal Power Commission of alleged violations of the Federal Power Act and requires that the Commission review such complaints. The procedure for enforcement of the Federal Power Act is similar to the enforcement procedure set forth in the National Labor Relations Acts, *29 U.S.C.* § 151, *et seq.* (1946), prior to the 1947 amendment thereof which expressly granted certain private remedies. Under the National Labor Relations

Acts complaints of unfair labor practices could be brought to the attention of the NLRB. The NLRB was given the power, after investigating complaints, to obtain an injunction against unfair labor practices. No private rights of enforcement were created. This Court considered the statutory scheme in *Amalgamated Utility Workers (CIO) v. Consolidated Edison Co.*, 309 U. S. 261 (1940), and concluded:

> "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."
>
> 309 U. S. at 265.

See also *International Longshoremen's & Warehousemen's Union, Local 6, C.I.O. v. Sunset Line & Twine Co.*, 77 F. Supp. 119 (N.D. Cal. 1948) (holding that even after the 1947 amendment court could not enjoin unfair labor practice upon suit of private party).

It is perfectly clear why private parties should not be permitted to sue to enforce the Federal Power Act. The Act is to be administered by the Federal Power Commission within the framework of a comprehensive plan for the development of the nation's waterways. In private litigation, a plaintiff would seek to substitute itself for the Commission in the enforcement of the Act and to have the Act administered by a court in accordance with the plaintiff's construction thereof. In a proper administrative setting, the Commission might conclude that, in light of the requirements of its comprehensive plan or its present docket, the complaining party's allegations do not present anything

more than a technical violation which is not a significant enough problem to warrant enforcement action. On the other hand, if it had jurisdiction the Commission might decide to issue a license upon conditions that would be acceptable to all concerned. A permanent injunction by a court would not permit such flexibility. The statutory scheme wisely calls for the application by the Commission of an informed and expert judgment and discretion to enforcement decisions.

Even if the provisions of the Federal Power Act did not preclude the enforcement thereof by private litigation, a party claiming a private right of action under such an act would be required to show special injury, something above and beyond the interest of every citizen in the administration of law. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940). As the Court stated in that case:

> "Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."
>
> 310 U. S. at 125.

Wisconsin does not show any injury at all to the state, either in a proprietary capacity or as quasi-sovereign.

Ordinarily, a state seeking to invoke the original jurisdiction of this Court will show an injury to a proprietary interest of the state. See, *e.g.*, *Alabama v. Arizona,* 291 U. S. 286 (1934); *Virginia v. West Virginia,* 206 U. S. 290 (1907); Note, *11 Stan. L. Rev.* 665, 671 (1959). In this action, however, Wisconsin does not allege facts showing injury to any proprietary interest of the State. Instead, Wisconsin states that "this is a suit by the state of Wiscon-

sin for an injury to it in its capacity of quasi-sovereign." Wisconsin brief, p. 9.

By its claim of a right to act in a quasi-sovereign capacity, Wisconsin appears to invoke the doctrine of *parens patriae,* which gives a state the right to sue as "trustee, guardian or representative of all her citizens." *Louisiana v. Texas,* 176 U. S. 1, 19 (1900). However, Wisconsin can not sue in that capacity with regard to matters of national concern covered by national legislation and administered by a national commission. Thus, as this Court stated in *FPC v. Oregon,* 349 U. S. 435, 449 (1955), in which the state of Oregon challenged the grant by the FPC of a license for a project that required a temporary diversion of waters and the construction of a reregulating dam in connection therewith:

> "In this reregulation of the flow of the stream, the Commission acts on behalf of the people of Oregon, as well as all others, in seeing to it that the interests of all concerned are adequately protected."

With respect to rights under federal law, it is the federal rather than the local governments that ultimately represents all of the citizens. Justice Burton stated for this Court in *First Iowa Hydro-Electric Coop. v. FPC,* 328 U. S. 152, 182 (1946), in which it was noted that a permit of the Iowa Executive Council for the construction of a power project was not required in addition to a license from the Federal Power Commission, that:

> "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."

In *Massachusetts v. Mellon,* 262 U. S. 447 (1923), the state of Massachusetts sued as *parens patriae* on behalf of her citizens to enjoin the enforcement of the Maternity Act. In dismissing the suit, this Court stated:

> "While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri v. Illinois,* 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."
>
> 262 U. S. at 485-86.

See also *Minnesota v. Benson,* 274 F. 2d 764 (D.C.Cir. 1960), in which the Court held that Minnesota did not have standing as *parens patriae* to attack a milk marketing order issued by the Secretary of Agriculture, which Minnesota alleged would have a serious adverse effect upon its economy.

The same considerations which deny Wisconsin any standing to sue for alleged violation of the Federal Power Act are applicable to its attempt to enjoin the plant as an alleged nuisance. Here also Wisconsin fails to show either injury to a proprietary right or the kind of invasion of interests for which states have traditionally been permitted to sue as *parens patriae.* The only "injury" alleged by Wisconsin is that the proposed steam generating plant will be offensive from an aesthetic viewpoint. The issuance or non-issuance of an FPC license does not affect the nature or extent of that injury or the number of people who will suffer therefrom.

This Court has been careful to limit the invocation of its original jurisdiction by a state as *parens patriae* to cases in which the injuries alleged are of such a nature and magnitude and are so widespread as to affect adversely the general welfare of the complaining state and its citizens, and where adequate relief could not be secured by actions brought by individual citizens. Thus, in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907), relied upon almost exclusively by Wisconsin in support of its claim of standing in a quasi-sovereign capacity, the state of Georgia was held to be entitled to relief against the pollution of its air "on a great scale" by the spread of noxious fumes from the defendant's operations in Tennessee and the concomitant damage that could result to vegetation and possibly even health over a large area of the plaintiff state. As stated by the Court:

> "Without any attempt to go into details immaterial to the suit, it is proper to add that we are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri v. Illinois,* 200 U. S. 496."
>
> 206 U. S. at 238-39.

Perhaps the most succinct statement of the rationale underlying the doctrine of *parens patriae* is contained in the opinion of this Court in *Missouri v. Illinois,* 180 U. S. 208, 240-41 (1901), a suit brought by the state of Missouri to restrain the city of Chicago from dumping its sewage into a channel through which it would eventually flow into the Mississippi River:

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.

"An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.

"The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, in-

cluding its commercial metropolis, would injuriously affect the entire State.

"That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

A State does not have standing to sue as *parens patriae,* if the interests alleged to be affected are those not of the citizens of the State generally but of particular individuals or a special group or class of citizens. See *Georgia v. Pennsylvania R.R.,* 324 U. S. 439, 446 (1945); *Massachusetts v. Missiouri,* 308 U. S. 1, 17 (1939); *Oklahoma ex rel. Johnson v. Cook,* 304 U. S. 387 (1938); *Oklahoma v. Atchison, T. & S.F. Ry.,* 220 U. S. 277, 286 (1911); *New Hampshire v. Louisiana,* 108 U. S. 76 (1883).

In *Oklahoma v. Atchison, T. & S.F. Ry., supra,* Oklahoma sought to enjoin the defendant railroad from charging higher freight rates in Oklahoma than in Kansas and to have the railroad's Oklahoma franchise, granted by act of Congress, cancelled on the basis of the higher rates charged in Oklahoma. In dismissing the suit, the Court stated:

"If after Oklahoma became a State the company still charged the Kansas rates on local business in Oklahoma, and if those rates would have been illegal under any state regulations, or were, in themselves, unreasonable and purely arbitrary, a controversy, in the constitutional sense, would have arisen between each shipper and the company, which could have been determined by suit brought by the shipper in the proper state court, or even in the proper Federal court, where the controversy, by reason of the grounds alleged by the shipper, was one of which the latter court, under

the statutes regulating the jurisdiction of the Federal courts, could take judicial cognizance. But, plainly, the *State,* in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma. The opposite view must necessarily rest upon the ground that the Constitution when conferring *original* jurisdiction on this court 'in all cases affecting ambassadors and other public ministers and consuls *and those in which a State is a party*' (Art. III, § 1), intended to include any and every judicial proceeding of whatever nature which the State may choose to institute, in this court, for the purpose of enforcing its laws, although the State may have no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws. In the present case, the State seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the State, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway."

* * * * *

"These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this court as defined by the Constitution.

> Under a contrary view that jurisdiction could be invoked by a State, bringing an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although, an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured.
>
> "We are of the opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally."
>
> 220 U. S. at 286-87, 289.

It is difficult to comprehend how the appearance of a generating plant erected on the Minnesota side of the St. Croix River, if in fact the plant were unattractive to some, could affect the welfare of the citizens of Wisconsin generally. Wisconsin does not allege that the plant or its operation will cause extensive physical damage to property in the State, danger to the health and comfort of a great number of its citizens, or a serious detrimental effect upon the State's economy, the only ways in which, up to the present time, a State's sovereign interests have been held to be sufficiently invaded for it to sue as *parens patriae* for the protection of its inhabitants. See, *e.g.*, *Georgia v. Pennsylvania*

R.R., 324 U. S. 439 (1945) (injury to the State's economy); *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907) (extensive damage to property); *Missouri v. Illinois*, 180 U. S. 208 (1901) (danger to health). Northern States has been unable to find any case in which the original jurisdiction of this Court was even sought to be invoked merely on aesthetic grounds. It seems clear that the only persons who could be deemed affected by the appearance of the plant on the banks of the St. Croix River at Oak Park Heights, Minnesota would be neighboring riparian owners over a very small area. Wisconsin does not have standing to sue, however, on behalf of such riparian owners, any more than Oklahoma was held to have standing to sue on behalf of shippers in *Oklahoma v. Atchison, T. & S.F. Ry.*, 220 U. S. 277 (1911). See *Kansas v. Colorado*, 206 U. S. 46, 99 (1907).

Moreover, the recreational values of a navigable stream are a matter of national, not merely local, concern. Indeed, Wisconsin in its brief (p. 22) affirmatively states that:

> "Minnesotians join Wisconsinites, people from the entire country come to the valley of the St. Croix, to its waters, to its banks be they in Minnesota or in Wisconsin seeking escape from the tensions of modern urban life. If this river is to be destroyed for recreational purposes or the recreational facilities of this river are depleted in any respect, it will cause irreparable injury to the State of Wisconsin, the riparian owners along the St. Croix River, *and the entire citizenry of the United States*" (emphasis supplied).

However, it is not Wisconsin, but the Federal Government that is the *parens patriae* of the citizenry of Wisconsin, Minnesota and of all of the other states with respect to this navigable river. As this Court has noted:

> "The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."
>
> *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 426-27 (1940).

This national planning clearly includes, where appropriate, considerations of recreational uses (*Namekagon Hydro Co. v. FPC*, 216 F. 2d 509 (7th Cir. 1954)). It is the Federal authority, acting through Congress, which alone can determine whether the interests of "the entire citizenry of the United States" require a limitation of the uses of a navigable stream to recreational purposes, or whether the national interest requires a broader development.

It is clear that Wisconsin envisages a development of Lake St. Croix for the benefit of "the entire citizenry of the United States" which differs from that intended by the Senate in passing S. 897. That bill, of course, may or may not become law. It does, however, indicate quite clearly the scope of Congressional concern with the St. Croix, and underlines most emphatically the fact that in this matter Congress, and not Wisconsin, must be *parens patriae* for all of us.

CONCLUSION

The complaint that Wisconsin moves for leave to file does not state a claim for relief, and on the face of the complaint it is clear that Wisconsin does not have standing to sue. Northern States respectfully submits that Wisconsin's motion for leave to file its complaint should be denied.

Respectfully submitted,

RANDALL J. LEBOEUF, JR.
One Chase Manhattan Plaza
New York 5, New York
DONALD E. NELSON
ARTHUR R. RENQUIST
414 Nicollet Avenue
Minneapolis, Minnesota 55401
Attorneys for Defendant, Northern States Power Company

ALFRED E. FROH
JOSEPH S. STRAUSS
LEBOEUF, LAMB & LEIBY
Of Counsel

APPENDICES

APPENDIX A

89th CONGRESS
1st Session

S. 897

IN THE HOUSE OF REPRESENTATIVES

September 9, 1965

Referred to the Committee on Interior and Insular Affairs

AN ACT

To provide for the establishment of the Saint Croix National Scenic Riverway in the States of Minnesota and Wisconsin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) (1) for the purpose of preserving the portion of the Saint Croix River, beginning at the dam near Taylors Falls, Minnesota, and extending upstream to the dam near Gordon, Wisconsin, and its Namekagon tributary in Wisconsin, as a wild river in a primitive condition, or restoring it as nearly as possible to such condition, in order to conserve its unique scenic and other natural values;

(2) for the purpose of promoting broad recreational use and more intensive types of recreational use of the portion of the Saint Croix River downstream from the dam near Taylors Falls, Minnesota, to its confluence with the Mississippi River; and

(3) for the purpose of protecting, developing, and making accessible the nationally significant outdoor recreation

resources of such river segments for the use and enjoyment of all of the American people, the Saint Croix National Scenic Riverway is hereby established. The boundaries of the Saint Croix National Scenic Riverway shall be as generally depicted on map numbered NRS-STC-7100-C, revised July 15, 1965, in seven sheets, and entitled "Proposed Saint Croix National Scenic Riverway Preliminary Boundary Plan". The Secretary may thereafter revise such boundaries from time to time, but the acquired lands and waters or interests therein within the revised boundaries may not exceed the limits mentioned in subsection (b) of this section.

(b) The Secretary of the Interior (hereinafter referred to as the "Secretary") may acquire lands and waters or interests therein for the Saint Croix National Scenic Riverway as follows:

(1) From the north end of the lake created by the dam on the Saint Croix River near Taylors Falls, Minnesota, upstream to the dam near Gordon, Wisconsin, the Secretary may acquire an average of not more than four hundred acres per mile;

(2) From the north end of the lake created by the dam on the Saint Croix River near Taylors Falls, Minnesota, downstream to its confluence with the Mississippi River, except for lands which are located within an incorporated city, village, or borough as of January 1, 1965, the Secretary may acquire an average of not more than three hundred and twenty acres per mile: *Provided,* That the Secretary's authority to acquire lands by condemnation, with the exception of not more than one thousand acres which may include not to exceed five miles of lake and river frontage that the

Secretary determines are needed for public access to the river, shall be suspended so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid zoning ordinance that is satisfactory to the Secretary;

(3) On the Namekagon tributary of the Saint Croix River, from above the dam at Lake Namekagon downstream to its confluence with the Saint Croix River, the Secretary may acquire an average of not more than three hundred and twenty acres per mile: *Provided,* That the Secretary's authority to acquire lands by condemnation along the lake created by the dam at Trego, Wisconsin, with the exception of not more than six hundred and forty acres which may include not to exceed two miles of lake frontage, shall be suspended so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid zoning ordinance that is satisfactory to the Secretary.

(c) The Secretary may acquire lands and waters or interests therein pursuant to subsection (b) by donation, purchase with donated or appropriated funds, exchange, or otherwise. In the exercise of his exchange authority the Secretary may accept title to any non-Federal property within the Saint Croix National Scenic Riverway, and in exchange therefor he may convey to the grantor of such property any federally owned property under his jurisdiction which he classifies as suitable for exchange or other disposal. The properties so exchanged shall be of approximately equal value: *Provided,* That the Secretary may accept cash from, or pay cash to, the grantor in order to equalize the values of the properties exchanged.

(d) Lands owned by the States of Wisconsin and Minnesota and Wisconsin county forest lands may be acquired by the Secretary only with the consent of such States, and the Secretary may agree with said States to refrain from exercising any authority to acquire lands not owned by the said States that are within the boundaries of an area administered by them, or proposed for such administration, for such time and upon such terms and conditions as he may deem to be in the best interests of the preservation and development of the area.

(e) The Secretary's authority to acquire lands by condemnation shall be suspended with respect to any lands within the Saint Croix National Scenic Riverway which are located within an incorporated city, village, or borough when such entities shall have in force and applicable to such lands a duly adopted, valid zoning ordinance that is satisfactory to the Secretary.

(f) The Secretary's authority to acquire improved property by condemnation shall be suspended, notwithstanding the absence of a valid zoning ordinance that is satisfactory to the Secretary, if the owner thereof uses such property solely for noncommercial residential use unchanged from the character of the use as it exists on the date of passage of this Act, and if any modification of the structures on the property is consistent with the standards regarding acreage, frontage, and setback requirements issued pursuant to section 2 of this Act. Such owner may sell, mortgage, lease, or devise said property, and such suspension shall remain in effect as long as such property is so used.

(g) The Secretary shall not exercise any authority to acquire county-owned lands within the Saint Croix National Scenic Riverway as long as the county is following a

plan for the management and protection of such lands that is satisfactory to the Secretary.

(h) (1) Any owner or owners (hereinafter in this subsection referred to as "owner") of improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial purposes for a definite term not to exceed twenty-five years, or, in lieu thereof, for a term ending at the death of the owner, or the death of his spouse, or the death of either of them. The owner shall elect the term to be reserved. The Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner.

(2) A right of use and occupancy retained pursuant to this subsection shall be subject to termination by the Secretary upon his determination that such use and occupancy is being exercised in a manner not consistent with the purposes of this Act and upon tender to the holder of the right an amount equal to the fair market value of that portion of the right which remains unexpired on the date of termination.

(3) The term "improved property", as used in this Act, shall mean a detached, one-family dwelling, the construction of which was begun before January 1, 1965 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures acces-

sory to the dwelling which are situated on the land so designated.

Sec. 2. (a) In order to carry out the provisions of section 1, the Secretary shall issue regulations, which may be amended from time to time, specifying standards that are consistent with the purposes of this Act for zoning ordinances which must meet his approval.

(b) The standards specified in such regulations shall have the object of (1) prohibiting new commercial or industrial uses other than commercial or industrial uses which the Secretary considers are consistent with the purposes of this Act, of all property within the Saint Croix National Scenic Riverway, and (2) promoting the protection and development for purposes of this Act of the land within the Saint Croix Scenic Riverway by means of acreage, frontage, and setback requirements.

(c) Following issuance of such regulations the Secretary shall approve any zoning ordinance or any amendment to any approved zoning ordinance submitted to him that conforms to the standards contained in the regulations in effect at the time of adoption of the ordinance or amendment. Such approval shall remain effective for so long as such ordinance or amendment remains in effect as approved.

(d) No zoning ordinance or amendment thereof shall be approved by the Secretary which (1) contains any provisions that he considers adverse to the protection and development, in accordance with the purposes of this Act, of the area comprising the Saint Croix National Scenic Riverway; or (2) fails to have the effect of providing that the Secretary shall receive notice of any variance granted un-

der, or any exception made to, the application of such ordinance or amendment.

(e) If any property, with respect to which the Secretary's authority to acquire by condemnation has been suspended according to the provisions of this Act, is made the subject of a variance under, or becomes for any reason an exception to, such zoning ordinance, or is subject to any variance, exception, or use that fails to conform to any applicable standard contained in the regulations of the Secretary issued pursuant to this section and in effect at the time of the passage of such ordinance, the suspension of the Secretary's authority to acquire such property by condemnation shall automatically cease.

Sec. 3. Any portion of the Saint Croix National Scenic Riverway which is within a national forest shall be administered in such manner as may be agreed upon by the Secretary of the Interior and the Secretary of Agriculture. Lands owned by an Indian tribe may be included in the Saint Croix National Scenic Riverway, with the consent of the Indian tribe involved, and with respect to such lands the Secretary may enter into a cooperative agreement with the Indian tribe to encourage the protection and development of such lands in accordance with the purposes of this Act. The cooperative agreement may provide that the Indian land will be developed and administered in accordance with the laws and rules applicable to the scenic riverway, subject to any limitations specified by the tribal council and approved by the Secretary.

Sec. 4. The Saint Croix National Scenic Riverway shall be administered, protected, and developed in accordance with the provisions of the Act of August 25, 1916 (39 Stat. 535; 16 U.S.C. 1 et seq.), as amended and supplemented;

except that any other statutory authority available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes of this Act.

Sec. 5. In furtherance of the purposes of this Act, the Secretary is authorized to cooperate with the States of Minnesota and Wisconsin, their political subdivisions, and other Federal agencies in formulating and implementing, through agreements or otherwise, comprehensive plans for the use, development, and conservation of the outdoor resources of the Saint Croix National Scenic Riverway.

Sec. 6. Nothing in this Act shall affect the jurisdiction or responsibilities of the States under other provisions of law with respect to fish and wildlife.

Sec. 7. The Federal Power Commission shall not authorize the construction, operation, or maintenance of any new dam or any project work unrelated to an existing project under the Federal Power Act (41 Stat. 1063), as amended (16 U.S.C. 791a et seq.), in the wild river segment of the Saint Croix National Scenic Waterway except as specifically authorized by the Congress.

Sec. 8. The Secretary shall cooperate with the Secretary of Health, Education, and Welfare, and with the appropriate State water pollution control agencies, to prepare and develop agreements for eliminating or diminishing the pollution of waters within the Saint Croix National Scenic Riverway.

Sec. 9. There are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this Act, not to exceed $6,500,000.

Passed the Senate September 8, 1965.

Attest: FELTON M. JOHNSTON,

Secretary.

APPENDIX B

ANDERSEN CORP.
STILLWATER PRISON
BAYPORT
OAK PARK HEIGHTS
NSP SITE
SEWAGE DISPOSAL
STILLWATER
MARINA
2600 FT.
S
N
ST. CROIX RIVER
TUG DOCKS
COAL DOCKS

APPENDIX C

STATE OF MINNESOTA
DEPARTMENT OF CONSERVATION

In the Matter of the Application of Northern States Power Company to appropriate water from the St. Croix River for use in cooling condensers in an electric power generating plant at Oak Park Heights, Washington County, Minnesota (P.A. 64-865S).

PERMIT

Upon the application of Northern States Power Company for a permit to appropriate water from the St. Croix River for use in cooling condensers in an electric power generating plant at Oak Park Heights, Minnesota, and pursuant to the Findings, Conclusions and Order thereon made by the Commissioner of Conservation on June 7, 1965, after due investigation, hearing and consideration as provided by law, there is hereby granted to said applicant a permit for the following purposes, in the manner and upon the terms and conditions hereinafter stated:

1. To continuously pump water from the St. Croix River at a maximum rate of 660 cubic feet per second for a maximum total annual appropriation of 361,000 acre feet, the place of appropriation being in Government Lots One (1) and Two (2), Section Two (2), Township Twenty-nine (29) North, Range Twenty (20) West, in Washington County, Minnesota, at the Village of Oak Park Heights for use in condenser cooling in an electric power generating plant to be known as Allen S. King Generating Plant,

Unit No. 1, and thereafter to return said water to the St. Croix River. All upon the following terms and conditions:

1. This permit shall not release the permittee from any liability or obligation imposed by Minnesota Statutes or local ordinances relating thereto and shall remain in force subject to all conditions and limitations now or hereafter imposed by law.

2. This permit is not assignable except with the written consent of the Commissioner of Conservation.

3. The Director of the Division of Waters shall be notified at least five days in advance of the commencement of the work authorized hereunder.

4. No change shall be made without written permission previously obtained from the Commissioner of Conservation, in the hydraulic dimensions, capacity or location of any items of work authorized hereunder.

5. The permittee shall grant access to the site at all reasonable times during and after construction to authorized representatives of the Commissioner of Conservation for inspection of the operation authorized hereunder.

6. This permit may be terminated by the Commissioner of Conservation, without notice, at any time he deems it necessary for the conservation of the water resources of the state, or in the interest of public health and welfare, or for violation of any of the provisions of this permit.

7. In all cases where the doing by the permittee of anything authorized by this permit shall involve the

taking, using, or damaging of any property, rights or interests of any other person or persons, or of any publicly owned lands or improvements thereon or interests therein, the permittee, before proceeding therewith, shall obtain the written consent of all persons, agencies, or authorities concerned, and shall acquire all property, rights and interests necessary therefor.

8. This permit is permissive only. No liability shall be imposed upon or incurred by the State of Minnesota or any of its officers, agents or employees, officially or personally, on account of the granting hereof or on account of any damage to any person or property resulting from any act or omission of the permittee or any of its agents, employees, or contractors relating to any matter hereunder. This permit shall not be construed as estopping or limiting any legal claims or right of action of any person against the permittee, its agents, employees, or contractors, for any damage or injury resulting from any such act or omission, or as estopping or limiting any legal claim or right of action of the state against the permittee, its agents, employees, or contractors for violation of or failure to comply with the provisions of the permit or applicable provisions of law.

9. This permit shall not be construed as establishing any priority of use.

10. Before construction thereof, the permittee shall obtain written approval of the Commissioner of Conservation of detailed plans for dams, dikes, pumps and other hydraulic structures authorized hereunder.

11. The permittee shall install such measuring devices as may be required by the Commissioner of Conservation to measure the levels of the St. Croix River at the permittee's power plant site and the rate of flow therein.

12. The permittee shall keep records of water pumped from the St. Croix River under this permit and shall report the same to the Commissioner in such form and frequency as he shall require.

13. The discharge of all water appropriated hereunder shall be in compliance with laws relating to water pollution and to all requirements of the Water Pollution Control Commission.

Dated at Saint Paul, Minnesota, this 7th day of June 1965.

WAYNE H. OLSON,
Commissioner of Conservation.

APPENDIX D

State of Minnesota
Water Pollution Control Commission

Pursuant to authorization of the Minnesota Water Pollution Control Commission on May 12, 1965, after due notice and hearing as provided by the applicable statutes, and based on findings of fact, conclusions and order of the Commission, a permit is hereby granted to the Northern States Power Company for the disposal of wastes from the proposed Allen S. King steam electric generating plant, unit no. 1, to be constructed and owned in Oak Park Heights, Washington County, and to discharge liquid wastes therefrom into the St. Croix River under the following conditions:

1. All industrial wastes and other wastes shall be treated as directed by the Commission and the discharge of such wastes shall be restricted to quantities and manner specified in the application made by the company and plans approved by the Commission unless otherwise specified by the Commission.

2. No raw sewage or treated sewage effluent shall be discharged to waters of the state from the plant site.

3. Plans and design data for all disposal systems needed at the plant site for the collection and adequate treatment of industrial wastes and other wastes originating at this site, and for effective containment of stored liquids and dumps, deposits or stockpiles of solid materials, for the prevention of water pollution to conform with the requirements of this permit, shall be submitted together with any other information needed for review by the Commission. All such plans shall

meet with the approval of the Water Pollution Control Commission and the systems be completed and ready for operation before operation of the steam electric generating plant is started.

4. The following standards of water quality and purity applicable to the effluent of the holding pond shall not be exceeded at the point of discharge from the pond:

pH value	6.5-9.5
Turbidity value	25
5-day biochemical oxygen demand	30 mg/1
Total suspended solids	30 mg/1

5. A maximum limit of 0.3 mg/1 of residual chlorine and temperature of 86° F shall not be exceeded in the mixed wastes or total effluent at the outfall of the condenser water canal. Cooling facilities shall be provided to insure compliance with this provision.

6. No industrial waste, or other wastes, treated or untreated, shall be discharged into the waters so as to cause any nuisance conditions, including, without limitation, the presence of substantial amounts of floating solids, scum, oil or dust sheens or slicks, suspended solids, discoloration, obnoxious odors, visible gassing, sludge deposits, slimes or fungus growths, or other offensive effects; or so as to cause any material increase in nitrogen, phosphorus or sulfur compounds or other plant nutrients or in any other chemical constituents; or cause any substantial change in any characteristics which may impair the quality of the water so as to render it objectionable or unsuitable for fish and wildlife or as a source of water for municipal,

industrial or agricultural purposes; or otherwise impair the quality of the waters for any other public use.

7. The company shall measure the quantity and characteristics of and sample and analyze the industrial wastes, other wastes, stored liquids and deposited materials at the plant site (including before, during, and after treatment or use) as may be requested by the Commission, and shall provide the Commission every month with a complete report on such measurements, samples and analyses, together with any other information relating to waste disposal or pollution control which may be requested.

8. Facilities for monitoring the quality of the receiving waters shall be provided and used as requested by the Commission. Results of the monitoring shall be reported to the Commission at monthly intervals.

9. The company shall cause to be made, without cost to the state, technical studies and investigations of the biota and quality and related matters pertaining to the waters of the state which receive the plant effluents, or which are in the immediate vicinity of the plant as may be requested by the Commission. Complete reports shall be submitted annually, or more frequently upon request.

10. Continuous operation of all the waste treatment works at their maximum capability consistent with practical limitations and maintenance needs of such works shall be maintained at all times when the plant is in operation and when necessary to provide treatment of the wastes by the terms of this permit.

11. No material changes shall be made in disposing,

treating or otherwise handling the industrial wastes, other wastes, stored liquids or deposited substances without first obtaining the approval of the Commission.

12. The company shall expeditiously make any changes in waste disposal, monitoring, and reporting practices, and provide any additional waste treatment works or disposal systems or other safeguards for the prevention of pollution upon the request of the Commission.

13. Liquid substances which could constitute a source of pollution of the waters of the state shall be stored in accordance with Regulation WPC 4. Other wastes as defined by M.S. 115.01, Subd. 4 shall not be deposited in any manner such that the same may be likely to gain entry into these waters. In any case where such substances, either liquid or solid, as a result of accident or natural catastrophe should gain entry into any waters of the state, it shall be the responsibility and duty of the company to immediately remove and recover all pollutional substances to the fullest extent reasonably possible under existing conditions.

Dated May 24, 1965.

Robert N. Barr, M.D., Secretary,
Water Pollution Control Commission.

APPENDIX E

Determination of the State Board of Health Regarding the Air Pollution Aspects of the Proposed Steam-Electric Plant at Oak Park Heights, Minnesota

The Board, recognizing its responsibility to the citizens of the State of Minnesota, has concerned itself with the evaluation of the potential air pollution and health problems that may be involved from the discharge of deleterious gases and particulate matter to the atmosphere subsequent to the construction and operation of a steam-electric generating plant by the Northern States Power Company at Oak Park Heights, Minnesota.

In the discharge of this concern, the Board has caused to be conducted two separate investigations of these matters. One of these was carried out by the Technical Assistance Branch of the Division of Air Pollution of the U. S. Public Health Service, and the other by Roy F. Weston, Inc., of Newtown Square, Pennsylvania, an engineering consultant firm. The reports of these investigations have been received and reviewed and the Board has made the following determinations:

1. It believes that both reports rendered in its behalf represent factual accounts and qualified engineering estimates of the air pollution potential of both stages of construction of this proposed installation.

2. It accepts as valid the conclusions of its consultants that the engineering design relating to the control and dispersal of emissions from the plant are the best available at the present development

of technology in this field within practical economic limits.

3. It judges that the levels of air contaminants that can be expected in the vicinity of the proposed site, as predicted from theoretical and experimental calculations, would not be more acceptable at any of the suggested alternate locations.

4. It recognizes that objections to the steam-electric plant as proposed are also being raised from the viewpoint of recreational use, conservation interests, and the desire for the preservation of the scenic value of this reach of the St. Croix River. The Board while appreciating these viewpoints does not believe it is its function to weigh these values in arriving at its conclusions.

5. It has been assured by the Northern States Power Company that an air quality monitoring system will be established for the detailed measurement of levels of particulate and gaseous contaminants that actually occur after operation of the facility is commenced to confirm the engineering design data and estimates, and that other action which may be found necessary to protect the public health and welfare will be taken.

6. It concludes that the atmospheric conditions that will result from the installation as proposed will not be inimical to the public health, that the limiting parameter for environmental contamination is the susceptability of certain vegetation and that only air sampling findings or evidence of vegetative damage can justify control action in addition to that being proposed.

BASED UPON THESE CONSIDERATIONS, THEREFORE, BE IT RESOLVED THAT AS SPECIFICALLY RELATES TO THE INITIAL 550,000 KILOWATT STEAM-ELECTRIC POWER PLANT PROPOSED BY THE NORTHERN STATES POWER COMPANY TO BE CONSTRUCTED AT OAK PARK HEIGHTS, MINNESOTA, THE BOARD SEES NO BASIS FOR OBJECTIONS TO THE FACILITY PLANNED INSOFAR AS MATTERS RELATING TO AIR POLLUTION ARE CONCERNED.

APPENDIX F

May 18, 1962

FEDERAL POWER COMMISSION
REPORT ON H R 6789-87th CONGRESS

A Bill, "To grant the consent of Congress for the construction of a dam across Savannah River between South Carolina and Georgia"

This bill would grant authority to the Duke Power Company to construct, maintain, and operate a dam about 297 miles above the mouth of the Savannah River between the States of South Carolina and Georgia.

The bill provides that work on the dam is not to be commenced until the plan therefor, including any modifications thereof, have been submitted to and approved by the Chief of Engineers and the Secretary of the Army, who may impose such conditions and stipulations as they deem necessary to protect the present and future interests of the United States.

It is further provided that the authority granted by the act is to terminate unless actual construction of the dam is commenced within four years and completed within seven years from the date of enactment.

The bill states that the proposed dam is to be used for the purpose of providing a pool for condenser water for a steam-electric plant. Use of the dam for the development of waterpower or the generation of hydroelectric energy is expressly excluded from the proposed authorization. In view of this limitation by the bill on the use of the proposed dam it would not come within the hydroelectric power project licensing jurisdiction of the Federal Power Commission under Part I of the Federal Power Act.

The last sentence of Section 1 of the bill undertakes to protect the United States from any claims of damage to the dam or its appurtenances "by reason of the future construction and operation by the United States of Hartwell Reservoir or any other Federal project upstream or downstream" from the proposed dam. In this connection it is noted that the site of the contemplated dam is in the reach of the Savannah River that would be inundated by the proposed Carters Island reservoir and power project. That project, with pool at elevation 480, was considered in Corps of Engineers' report prepared in 1960, but was not recommended for authorization. Consequently, in order to insure full protection of all interests of the United States in the planning and carrying out of possible future comprehensive water resources development of the Savannah River, including the Carters Island project site, we suggest that the following language be substituted for the last sentence (page 2, lines 14-21) of Section 1 of the bill:

> Upon thirty days notice from the Federal Power Commission, or other authorized agency of the United States, to said Duke Power Company, its successors or assigns, that any waterway improvement development will be interfered with by the existence of said dam, the said company, or its successors or assigns, shall alter or remove the dam, without expense to the United States, so as to prevent said interference and, upon failure to do so within a reasonable time, the authority hereby granted to construct, maintain, and operate said dam shall terminate; and any grantee or licensee of the United States, proposing to develop a power project at or near said dam, shall have authority to remove, submerge, or utilize said dam, under

such conditions as said Commission or other agency may determine, but such conditions shall not include compensation for the removal, submergence, or utilization of said dam. (Any reservoir of the United States or its licensee or permittee which would submerge or require removal of the dam herein authorized may be utilized for condenser water for a steam-electric plant by Duke Power Company and others, under such conditions and stipulations as the Chief of Engineers and the Secretary of the Army may impose for the protection of the interests of the United States.) Duke Power Company, its successors or assigns, shall hold and save the United States free from all claims for damage which may be sustained by the dam herein authorized, or damage sustained by the appurtenances of the said dam by reason of the construction or operation by the United States for flood control, the preservation or improvement of navigation, or for other purposes, of Hartwell Reservoir, Carters Island Reservoir, or any other federal, federally-assisted or federally authorized project upstream or downstream from said dam.

This suggested language is drawn along the lines of that carried in the legislation (61 Stat 675) which authorized Pennsylvania Power and Light Company to construct and maintain a dam on the Susquehanna River in a similar situation. It is also in general conformity with the terms and conditions usually prescribed in licenses issued by the Commission authorizing the construction, operation, and maintenance of hydroelectric project works.

In addition, we should like to point out that the above-suggested language makes it clear that any future reservoir

inundating the dam authorized by this bill could be utilized for condenser water for steam-electric plants, under appropriate conditions and stipulations imposed by the Chief of Engineers and the Secretary of the Army.

The Bureau of the Budget in its letters of April 10, 1962 to the Committee on Public Works of the House of Representatives and the Senate, in commenting on H R 6789 and S 1795, respectively, points out that there is a continuing trend toward larger sized steam-electric installations which will result in an increasing need for stream regulation to provide condenser water for such installations. Accordingly, Budget suggests that in view of the highly technical and complex problems involved in water resources development, the Congress may wish to give consideration to the matter of authorizing the Federal Power Commission to issue licenses under the Federal Power Act for the construction, operation and maintenance of diversion dams and other structures affecting water resources used in connection with steam-electric installations.

The Federal Water Power Act, approved June 10, 1920 (41 Stat 1063) as amended, was made Part I of the Federal Power Act, approved August 26, 1935 (49 Stat 838). As indicated by the title of the 1920 Act, it created a Federal Power Commission to authorize and regulate the development of water power. Neither that act nor its subsequent amendments require the licensing or regulation of structures affecting water resources but used for steam-electric generation.

The Commission endorses the Bureau of the Budget's suggestion. In addition to relieving the Congress of the burdensome task of considering the increasing requests for au-

thorization of projects to be used for steam-electric installations, it would also relieve prospective developers from the necessity of seeking specific enabling legislation for each proposal which will affect the water resources of the United States. But even more importantly, the administrative machinery would be available to handle the many necessary details and often conflicting uses in much the same manner as this Commission now handles them for non-federal water power developments, including project design, operating criteria, pool levels, location of the facilities, fish and wildlife preservation, provisions for recreational benefits and similar factors involved in water resources development.

A proposed amendment to the Federal Power Act to give the Commission appropriate licensing authority over such steam-electric facilities will be presented by the Commission in connection with its legislative program for 1963. However, we do not suggest that the Congress defer its consideration of the subject bill.

The Commission does not favor enactment of the bill in its present form. However, if it is amended as suggested above to fully protect future water resources development, the Commission would have no objection to its enactment.

FEDERAL POWER COMMISSION
(Sgd) L J O'Connor, Jr
By Acting Chairman

APPENDIX G

Federal Power Commission,
Washington, D.C., December 2, 1964.

Hon. Edmund S. Muskie,

Chairman, Special Subcommittee on Air and Water Pollution, Committee on Public Works, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in response to your letter of November 24, 1964, requesting an outline of the responsibilities and authority of the Federal Power Commission, under existing law and practice, with respect to the effect on water quality of steam-electric powerplants constructed along interstate streams.

The Commission's existing licensing jurisdiction, under the Federal Power Act (41 Stat. 1063, 16 U.S.C. 791-823), has been consistently held to be limited to hydroelectric projects. Steamplants constructed along interstate streams; such as, the plant proposed along the St. Croix River, therefore, are not subject to licensing by the Federal Power Commission. However, a steamplant may often require a structure in the stream, along which it is located, to impound sufficient water to remove the excess heat from the powerplant and such a structure requires special authorizing legislation by Congress (33 U.S.C. 401). The plant proposed on the St. Croix is located on an existing reservoir formed by a Federal dam on the upper Mississippi River, and therefore, does not require such a structure.

Under existing law, the Commission's responsibility for water quality standards is, therefore, limited to problems arising in connection with hydroelectric projects subject to

our licensing authority. The effect of a steamplant on water quality is different from the impact of a hydroelectric station. Water pollution problems associated with steam-electric plants are almost entirely limited to those that result from the temperature rise in surface water supplies that are used in cooling the steam condensers. Hydroelectric plants do not heat the water. Nevertheless, our experience and practice in this closely related activity may be of interest to the committee.

The Commission is authorized to license hydroelectric projects only to the extent that such projects "* * * will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes * * *" (Federal Power Act, section 10(a)). This standard is broad enough to comprehend the avoidance or minimization of pollution and the Commission does, in fact, give consideration to this problem in passing upon license applications.

Before issuing a license for a hydroelectric project, the Commission takes steps to assure that proper consideration is given to the viewpoints of all affected interests and to the needs of all other uses of the water resources involved.

The Commission notifies Governors and State and local agencies of applications for preliminary permits and licenses for hydroelectric projects and gives them an opportunity to submit comments. In addition, notices of filings of applications are published in local newspapers in the Federal Register. Before acting on an application, the Commission obtains the views and comments of the Department of

Health, Education, and Welfare on the water quality and public health aspects of proposed projects. It also requests the Secretaries of the Army, Agriculture, and the Interior to comment on the project as it affects their interests. The comments of these agencies, together with those received from State and local agencies, are considered by the Commission in determining whether to issue a license and in framing appropriate conditions in licenses issued for both new and constructed projects to meet the statutory standard of the most comprehensive development of the waterway for beneficial public uses including conditions relating to pollution. Ordinarily, if there are protests, a public hearing is held to afford all interested parties an opportunity to present their case on the record.

We believe it is fair to state that the projects which the Commission has licensed have, in total, greatly contributed to the effectiveness of our rivers in solving pollution problems. Many streams in their natural state have periods of extremely low flow during which they all but disappear. The Commission has taken specific action in the licensing of many projects to improve their usefulness in the interest of water quality control by including provisions in the license for minimum flow releases or other operating requirements. Storage reservoirs at hydroelectric projects are usually operated to regulate natural flows so as to supplement them during low-flow periods and thus increase the production of firm power. Such streamflow regulation frequently also will be beneficial to water quality control.

The Commission fully recognizes that there are occasions when the public is better served by retaining water resources in their natural state and foregoing waterpower development. An instance was the proposed power develop-

ment on the Namekagon River in Wisconsin. Notwithstanding the power benefits, the Commission denied a license to avoid impairment of unique recreational resources. Its action was sustained by the U.S. court of appeals, *Namekagon Hydro Company v. Federal Power Commission* (216 F. 2d 509 (C.A. 7, 1954)). The court there said that "Congress was aware that conflicting interests would, in all likelihood, be encountered when it formulated the statutory guides to be found in section 10(a) of the act."

I hope that the above information will prove helpful to the subcommittee. If you should desire further information, I shall be glad to furnish it.

Sincerely,

Lawrence J. O'Connor, Jr.,
Acting Chairman.