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Comment: Federal Common Law of Public Nuisance: An Expanding Approach to Water Pollution Control

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COMMENT

FEDERAL COMMON LAW OF PUBLIC NUISANCE: AN EXPANDING APPROACH TO WATER POLLUTION CONTROL

In 1972 the Supreme Court in Illinois v. City of Milwaukee *established the federal common law of public nuisance for the abatement of air and water pollution. Since that time, a conflict has arisen in the federal courts regarding the scope of this cause of action. This article discusses the federal common law nuisance doctrine as applied in water pollution cases and examines its inconsistent application by the federal courts of appeals. The author criticizes the restrictive approach that some courts have taken regarding the doctrine and advocates a more expansive use of the federal common law of nuisance for environmental protection.*

I. INTRODUCTION

Public awareness of the need to protect our environment from degradation and our natural resources from complete exhaustion is widespread. Historically, most of the protections have been initiated through federal[1] and state[2] environmental legislation, with key enactments designed to safeguard our air[3] and water[4] resources. Recently, however, the courts also have played an active role.[5] A significant element of this surge of judicial participation is the development of the federal common law of public nuisance.

The federal common law of public nuisance was created in 1972 by the United States Supreme Court in the landmark decision of

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1. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. §§ 2601—2629 (1976 & Supp. 1979); Ocean Dumping Act, 33 U.S.C. §§ 1401—1444 (1976 & Supp. 1979); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-10 (1976 & Supp. 1979); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321—4347 (1976 & Supp. 1979); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901—6987 (1976 & Supp. 1979).
2. *See, e.g.*, Maryland Environmental Policy Act, MD. NAT. RES. CODE ANN. §§ 1-301 to -305 (1974).
3. Clean Air Act, 42 U.S.C. §§ 7401—7706 (1976 & Supp. 1979).
4. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251—1376 (1976 & Supp. 1979).
5. *See, e.g.*, Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), *cert. granted*, 101 S. Ct. 314 (1980); Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980).

Illinois v. City of Milwaukee,[6] and primarily has been employed as a cause of action in water pollution cases.[7] The Supreme Court's unanimous decision in *Illinois v. Milwaukee*, however, furnished minimal guidance for the development of the federal nuisance law. As a result, "[t]he fresh clay thus handed the lower courts was so soft that their attempts to formulate a coherent body of law were halting, inconsistent, and often imbued with a judicial conservatism at odds with the progressive and innovative spirit of *Illinois*."[8]

From the ensuing confusion, a conflict emerged in the federal courts regarding the application of the federal common law of public nuisance in water pollution actions. Two positions have evolved from this controversy. One view supports a very narrow interpretation of *Illinois v. Milwaukee* that ultimately restricts the utilization of the federal nuisance law. The position of the United States Court of Appeals for the Fourth Circuit, first set forth in 1976,[9] exemplifies this restrictive approach. The opposing viewpoint advocates a more expansive reading of *Illinois v. Milwaukee*, finding that the pervasive federal interest in maintaining the quality of the nation's interstate and navigable waters mandates application of the federal nuisance doctrine in a water pollution controversy. Recent decisions of the United States Courts of Appeals for the Third[10] and Seventh[11] Cir-

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6. 406 U.S. 91 (1972). See text accompanying notes 59-77 *infra*. Illinois initiated the action in the United States Supreme Court. Refusing to extend its jurisdiction to hear the case, the Court remanded the action to the federal district court. 406 U.S. 91, 108 (1972). Plaintiff then filed suit in the United States District Court for the Northern District of Illinois. After several preliminary motions were discussed, 4 ENVIR. REP. (BNA) (Envir. Rep. Cases) 1849 (N.D. Ill. 1972); 366 F. Supp. 298 (N.D. Ill. 1973), the district court decided the case on its merits, 5 ENVIR. REP. (BNA) (Envir. Rep. Cases) 2018 (N.D. Ill. 1978). This decision was appealed to the United States Court of Appeals for the Seventh Circuit, which rendered its opinion in 1979. 599 F.2d 151 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). Because of the confusing procedural posture of this continuing litigation, the Seventh Circuit's decision will hereinafter be referred to as *Illinois v. Milwaukee II*.

7. *See, e.g.*, Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), *cert. granted*, 101 S. Ct. 314 (1980); United States *ex rel.* Scott v. United States Steel Corp., 365 F. Supp. 556 (N.D. Ill. 1973). Recently, the federal common law of public nuisance was applied in a suit alleging groundwater pollution. *See* United States v. Solvents Recovery Serv., 14 ENVIR. REP. (BNA) (Envir. Rep. Cases) 2010 (D. Conn. 1980). The federal common law of public nuisance also has been invoked in cases of air pollution. *See, e.g.*, New England Legal Foundation v. Costle, 475 F. Supp. 425 (D. Conn. 1979). For a discussion of the viability of the federal common law of public nuisance in interstate air pollution suits, see Poss, *Federal Common Law Suits to Abate Interstate Air Pollution*, 4 HARV. ENVIR. L. REV. 117 (1980).

8. Comment, *Seventh Circuit Interprets Federal Common Law of Nuisance to Authorize Municipalities to Sue for Damages*, 9 ENVT'L L. REP. (ELI) 10168, 10168 (1979).

9. *See* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976) (see text accompanying notes 83—100 *infra*). *See also* Massachusetts v. United States Veterans Administration, 514 F.2d 119 (1st Cir. 1976); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).

10. National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), *cert. granted*, 101 S. Ct. 314 (1980).

11. Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980).

cuits, applying the nuisance doctrine in innovative ways, reflect the far-reaching implications of this expanded approach for pollution control in general.

This comment explores and analyzes the development of the federal common law of public nuisance under both approaches to the Supreme Court's decision in *Illinois v. Milwaukee*.[12] Although some courts have breathed new life into the federal common law of nuisance, expanded application of this federal nuisance doctrine as a judicial tool for remedying water pollution will not go unchecked. Certain procedural and substantive barriers may preclude a claim for relief in a federal nuisance action. After reviewing the divergent approaches and the potential restraints, this comment recommends that courts confronted with a federal common law nuisance action adopt the more expansive approach in their application of the nuisance doctrine as a means to abate water pollution.

II. FEDERAL COMMON LAW OF PUBLIC NUISANCE

A. *Background: Federal Common Law in General*

To fully comprehend the federal nuisance doctrine, it is necessary to examine the general framework from which it emerged. Section 34 of the Judiciary Act of 1789 stipulated that "the laws of the several states . . . shall be regarded as rules of decision" in civil actions brought in the federal courts.[13] In *Swift v. Tyson*,[14] however, the United States Supreme Court interpreted the reference to state laws made in section 34 as excluding the decisional rules formulated by state courts.[15] The Court's narrow interpretation of section 34 provided the federal judiciary with a reason for developing a body of federal general common law and for applying it in suits brought in federal court, even when the federal common law differed substantially from the law of the state courts.[16]

For nearly a century, the rule of *Swift v. Tyson* remained intact until the Supreme Court overruled that decision in the seminal case

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12. For other discussions of the federal common law of public nuisance, see W. RODGERS, ENVIRONMENTAL LAW (1977); V. YANNACONE, B. COHEN & S. DAVISON, ENVIRONMENTAL RIGHTS AND REMEDIES 20—25 (Supp. 1980); Comment, *Federal Common Law and the Environment:* Illinois v. Milwaukee, 2 ENVT'L L. REP. (ELI) 10168 (1972).
13. Ch. 20, § 34, 1 Stat. 92 (1789). Subsequent revisions of the Act have not resulted in substantial changes of the original language. *See* 28 U.S.C. § 1652 (1976).
14. 41 U.S. (16 Pet.) 1 (1842).
15. *Id.* at 18—19. The term "laws" did include state statutes and long established local customs having the force of law. *Id.* at 18.
16. *Id.* at 18—19. There were primarily two benefits that the Court indicated would result from its decision: (1) a single body of common law to be applied by all federal courts; and (2) with all state courts following uniform federal decisions, a single body of substantive law for the entire country would be established. *Id.*

of *Erie Railroad v. Tompkins*.[17] Writing for a unanimous Court, Justice Brandeis declared: "There is no general federal common law."[18] Although this pronouncement apparently sounded the death-knell for the future growth of any federal common law, on the same day that *Erie* was handed down, the Court decided *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[19] basing its holding directly on federal common law.[20] *Hinderlider* therefore provided for the evolution of some "specialized federal common law."[21]

In the decades since *Hinderlider*, the substantive areas of law in which federal common law has been applied have expanded. They include, for example, obligations to or by the United States,[22] labor law,[23] regulations affecting interstate carriers,[24] unfair competition affecting interstate commerce,[25] and international affairs.[26] The justifications relied upon by the courts to fashion federal common law in these diverse areas and thus avoid the limits of *Erie* must be

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17. 304 U.S. 64 (1938). The suit in *Erie* involved a diversity action brought in New York to recover for injuries sustained by a pedestrian in Pennsylvania who was struck by an object projecting from a passing freight train. *Id.* at 69.
18. *Id.* at 78. As Justice Brandeis stated:
> Except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a Statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power on the federal courts.

Id. The federal courts, therefore, were restricted from applying federal common law in actions based upon diversity jurisdiction.
19. 304 U.S. 92 (1938). The suit involved a dispute between a state and an out-of-state corporation over the apportionment of the waters of an interstate stream. *Id.* at 95—98.
20. *Id.* at 110. The Court in *Hinderlider* determined that the issue of whether the water of an interstate stream must be apportioned between the two states through which it flows presented a federal question, requiring application of federal common law to settle the controversy, for "neither the statutes nor the decisions of either State can be conclusive." *Id.* The Court relied upon federal interstate common law.
21. *See* Friendly, *In Praise of* Erie — *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) [hereinafter cited as Friendly].
22. *See, e.g.*, Priebe & Sons, Inc. v. United States, 332 U.S. 406 (1947); United States v. County of Allegheny, 322 U.S. 174 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).
23. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
24. *See, e.g.*, Francis v. Southern Pac. Co., 333 U.S. 445 (1948).
25. *See, e.g.*, Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945 (2d Cir.), *cert. denied*, 358 U.S. 829 (1958); Dad's Root Beer Co. v. Doc's Beverages, Inc., 193 F.2d 77 (2d Cir. 1951).
26. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

considered within the context of our federal system of government.[27] The constraints of federalism—the allocation of power between the federal and state governments, with the general powers reserved to the states[28]—are relevant to the development of federal common law.[29] Generally, the powers of the federal government were granted to Congress, with that body employing its discretion in determining how to exercise its powers.[30] These federal powers are limited, however, and must be viewed "against the background of the total *corpus juris* of the states,"[31] because the exercise of these powers may override existing state law and diminish state power.[32] The expansion of federal common lawmaking by the federal courts strains this concept of federalism, for the judiciary "exercises an initiative normally left to Congress, ousts state law, and yet acts without the

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27. Various methods have been suggested for classifying the justifications for developing federal common law. *See* Friendly, *supra* note 21, at 421. Judge Friendly discussed four techniques used by the courts to create federal common law: (1) "spontaneous generation" of federal common law when important federal policy considerations are implicated; (2) an additional federal remedy implied from a federal statute; (3) construing a jurisdictional statute as providing the power to formulate substantive law; and (4) the normal filling of statutory interstices. *Id.*

In Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967), the author suggested four zones in which federal common law could be made freely, but outside of which state law must apply. These include: (1) cases in which a state is a party; (2) cases in maritime law; (3) cases involving the proprietary duties of the United States; and (4) cases in international affairs. *Id.*

Hill's zone analysis was criticized in Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1515, 1517—31 (1969) [hereinafter cited as Note]. Utilization of this approach only leads to proliferation of zones rather than clearly defined considerations to be analyzed in reference to the invocation of federal common law. *Id.* at 1516—17. Instead, a general presumption is suggested: application of state law is favored over federal decisional law. The author delineated three special categories of cases "undermining" this presumption in which federal common law can be developed: (1) cases in which the concept of national sovereignty dictates a single, practical solution; (2) cases in which Congress has delegated lawmaking authority, either explicitly or implicitly, to the courts; and (3) cases in which the federal courts are required to formulate remedies for breaches of federal law. *Id.* at 1519—26. In addition, the presumption in favor of state law is "overridden" when application of federal law is necessary to foster and encourage overriding federal interests or policies and to promote nationally uniform decisional rules. *Id.* at 1526—31.

28. U.S. CONST. amend. X. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

29. *See* Note, *supra* note 27, at 1517—31.

30. Monaghan, *The Supreme Court, 1974 Term — Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1, 11 (1975).

31. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 471 (2d ed. 1973).

32. *See* Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964). Federal law, including federal common law, would preempt state law by virtue of the supremacy clause, U.S. CONST. art. VI, § 2, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See generally Friendly, *supra* note 21.

political checks on national power created by state representation in Congress."[33] To legitimize displacement of state law, the federal courts must rely upon the Constitution, a statute, or a treaty to provide the source of authority for creating federal common law.[34]

On the other hand, the concept of national unity embodied in the basic principles of federalism justify the creation of federal common law. Nowhere is this more evident than in the use of federal common law in settling interstate disputes[35] or in resolving questions affecting relations with foreign nations.[36] Judicial power to fashion federal common law most often is gleaned from federal statutes.[37] In addition to filling statutory interstices, which is the most basic reason for initiating federal common lawmaking and is an unquestioned role of the federal courts,[38] the authority to establish federal common law has been inferred from federal statutes conferring jurisdiction,[39] and from those preempting state law, either explicitly or implicitly.[40] In still other instances, federal common law has been applied to further

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33. Monaghan, *The Supreme Court, 1974 Term — Foreward: Constitutional Common Law,* 89 HARV. L. REV. 1, 11 (1975).
34. *Id.* at 12. This is also required by the Rules of Decision Act, which provides that "[t]he laws of the several states, *except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide,* shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1976) (emphasis added).
35. *See, e.g.,* Vermont v. New York, 417 U.S. 270 (1974); Texas v. New Jersey, 379 U.S. 674 (1965); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
36. *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
37. *See* Note, *The Competence of Federal Courts to Formulate Rules of Decision,* 77 HARV. L. REV. 1084, 1089 (1964). The Constitution also provides a source for developing federal common law. It has been suggested that when considering the constitutional basis, perhaps too much emphasis has been placed on a textual analysis of the Constitution, and instead more explicit attention should be focused on "the method of inference from the structures and relationships created by the Constitution in all its parts or in some principle part." C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3—7 (1969). *Accord,* Monaghan, *The Supreme Court, 1974 Term — Foreward: Constitutional Common Law,* 89 HARV. L. REV. 1, 13 (1975) ("The Constitution is no less susceptible to interpretation through a consideration of its text, structure and purposes than are statutes."). An argument in favor of this approach was determinative of the Supreme Court's authority to create federal common law in interstate disputes, *see* Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972) ("basic interests of federalism") and in foreign relations, *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). When analyzed in a structural context, the Constitution can be viewed as authority for the creation of federal common law.
38. *See* 18 B.C. IND. & COM. L. REV. 929, 935 n.37 (1977).
39. The derivative power to create federal common law from a jurisdictional grant has been most significant in the area of admiralty. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ."). *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (creation of federal common law in the area of labor law because federal labor statute conferred jurisdiction on federal court).
40. *See, e.g.,* Pennsylvania v. Nelson, 350 U.S. 497 (1956) (Smith Act preempts state laws providing for registration of aliens).

an overriding federal interest or policy[41] or to fulfill the need for national uniformity regarding certain programs or actions.[42]

B. The Federal Nuisance Doctrine

The recognition of federal common law as a basis for abating environmental pollution has its roots in the early twentieth century. In *Missouri v. Illinois,*[43] the State of Missouri sought to enjoin the City of Chicago and the State of Illinois from discharging raw sewage through an artificial channel into waters eventually emptying into the Mississippi River. The Mississippi was a water source for the City of St. Louis, and thus the continued dumping, it was alleged, would endanger the health of Missouri citizens who drank or used the water.[44] The Supreme Court accepted the case under its original jurisdiction,[45] but declined to grant the relief sought because Missouri did not adequately prove its allegations.[46] The case is significant because the Court recognized the validity of a state's claim against another state for abatement of a public nuisance caused by pollution emanating from the defendant state. One year later, in *Georgia v. Tennessee Copper Co.,*[47] the Court again decided a pollution suit based on an assertion of public nuisance. In enjoining a private business from further discharging noxious fumes that were polluting the air of a neighboring state, the Court spoke of the "quasi-sovereign" right of a state to be free of a nuisance created by a source outside its borders and to protect its environment from degradation.[48] Not until 1971, however, did the general public nuisance theory expressed in these early cases emerge as a theory of federal common law.

In *Texas v. Pankey,*[49] the State of Texas sued to enjoin New Mexico ranchers from using a chlorinated camphor pesticide to pro-

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41. *See, e.g.,* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *See also* Note, *supra* note 27, at 1527—29.
42. *See, e.g.,* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* Note, *supra* note 27, at 1529—31.
43. 200 U.S. 496 (1906).
44. *Id.* at 497.
45. The Court's original jurisdiction is set forth in the U.S. CONST. art. III, § 2, cl. 2, which provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under Regulations as the Congress shall make.

See also 28 U.S.C. § 1251(a) (1976), which states: "The Supreme Court shall have original and exclusive jurisdiction of: (1) all controversies between two or more States . . . ."
46. 200 U.S. 496, 523—26 (1906).
47. 206 U.S. 230 (1907).
48. *Id.* at 237—38.
49. 441 F.2d 236 (10th Cir. 1971). For a further discussion of the *Pankey* decision, see Note, *Federal Common Law and Interstate Pollution,* 85 HARV. L. REV. 1439 (1972).

tect their rangelands from a caterpillar infestation. The state asserted that rainfall run-off would carry quantities of the chemical into a river that ultimately formed the water source for several municipalities in Texas.[50] In a bold and innovative decision, the United States Court of Appeals for the Tenth Circuit held that a state's quasi-sovereign ecological right to be free from the degradation of its environment and natural resources caused by pollution originating from sources outside the state's borders is an interest based in federal common law.[51] The court interpreted the Supreme Court's language in *Georgia v. Tennessee Copper Co.*[52] to support this conclusion. Although the Supreme Court had not recognized a federal source for the right, the Tenth Circuit reasoned that *Tennessee Copper* extended to this quasi-sovereign interest "a status of direct protectability and justiciability in relation to the Constitution."[53] The Tenth Circuit determined that "legal concepts and developments" occurring since *Tennessee Copper* justified the view that federal common law is the source of this state interest.[54] In concluding that a state's ecological right is a matter of federal concern, the court stated:

> Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a state against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of the State about its ecological conditions and impairments of them. . . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.[55]

After recognizing that the state's nuisance claim presented a federal question, the court held that the phrase "arises under the . . . laws . . .

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50. 441 F.2d 236, 237—38 (10th Cir. 1971).
51. *Id.* at 240.
52. 206 U.S. 230, 237 (1907).
53. 441 F.2d 236, 240 (10th Cir. 1971).
54. *Id.* The court, however, never explained what it had in mind when it referred to "developments" occurring since *Tennessee Copper.*
55. *Id.* at 241.

of the United States,"[56] as used in the federal question jurisdictional statute, encompassed federal common law.[57] Federal courts were therefore armed with the requisite jurisdictional basis upon which to hear suits containing federal common law claims.

Initially reluctant to follow the lead of the Tenth Circuit,[58] the Supreme Court eventually recognized and expanded the foundation laid in *Pankey* concerning the application of the federal common law of public nuisance in water pollution disputes. In 1972, the Court decided *Illinois v. City of Milwaukee*[59] and carved out an important area of specialized federal common law. This exception to the *Erie* doctrine encouraged the federal courts to participate more actively in environmental protection.

In *Illinois v. Milwaukee,* the State of Illinois instituted an action in the Supreme Court against four Wisconsin cities and two sewage commissions for their alleged discharges of inadequately treated waste into Lake Michigan, which had severely polluted this inter-

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56. 28 U.S.C. § 1331(a) (Supp. 1979). The federal question statute establishing jurisdiction in the federal courts provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and *arises under the Constitution, laws or treaties of the United States,* except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Id. (emphasis added).

57. 441 F.2d 236, 241—42 (10th Cir. 1971).

58. In Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971), the Supreme Court declined to exercise its original jurisdiction under 28 U.S.C. § 1251(b)(3) (Supp. 1979) and article III of the Constitution to hear a case brought by the State of Ohio complaining of a public nuisance resulting from mercury pollution of Lake Erie allegedly caused by three nonresident corporations. At the heart of its refusal was the Court's reluctance to offer itself as a tribunal of first impression. 401 U.S. at 504. The Court felt compelled to preserve its primary function as an appellate court. Thus, the Court held that its grant of original jurisdiction could be exercised at its discretion. *Id.* In refusing Ohio leave to file the complaint, the Court concluded that there were other forums available to the plaintiff and that the issues of the case arose under state common law and did not address questions relevant to federal law. *Id.* at 503—04. The Court never discussed application of federal common law. For further analysis of *Wyandotte,* see Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case,* 12 ARIZ. L. REV. 691 (1970); Comment, *Federal Common Law and the Environment:* Illinois v. Milwaukee, 2 ENVT'L L. REP. (ELI) 10168, 10170 (1972).

59. 406 U.S. 91 (1972). For further discussion of the case, see Campbell, Illinois v. City of Milwaukee: *Federal Question Jurisdiction Through Federal Common Law,* 3 ENV. L. 267 (1973); Comment, *Federal Common Law and the Environment:* Illinois v. Milwaukee, 2 ENVT'L L. REP. (ELI) 10168 (1972); Comment, *The Expansion of Federal Common Law and Federal Question Jurisdiction,* 10 HOUS. L. REV. 121 (1972); 49 DEN. L.J. 609 (1973); 77 DICK. L. REV. 451 (1973); 7 SUFFOLK L. REV. 790 (1973); 1972 WIS. L. REV. 597.

state body of water.[60] Although the Supreme Court declined to assume jurisdiction over the controversy,[61] the Court did not foreclose the federal system as a judicial forum and accordingly established jurisdiction in the lower federal courts. Following *Pankey*, the Court recognized that federal common law was sufficient to support federal question jurisdiction.[62] In arriving at this conclusion, the Court reasoned that the term "laws," as used in the federal question jurisdictional statute, embraced federal common law.[63]

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60. 406 U.S. 91, 93 (1972). In its discussion of the facts, the Court stated: "The cause of action alleged is *pollution by the defendants of Lake Michigan, a body of interstate water.* According to plaintiff, some 200 million gallons of raw or inadequately treated sewage and other waste materials are discharged daily into the lake in the Milwaukee area alone." *Id.* (emphasis added). As this statement of facts indicates, the Court was acting to diminish the pollution of an interstate body of water, and there was no suggestion by the Court that the federal nuisance cause of action it was fashioning stemmed from any interstate movement of pollution.
61. *Id.* at 93—98. As in Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971), the Court refused to compromise its primary function as an appellate tribunal. It distinguished the earlier decision, however, from its refusal in the present case, determining that *Wyandotte* "was based on the preoccupation with public nuisance under Ohio law, not the federal common law." 406 U.S. 91, 102 (1972). In its analysis, the Court also determined that Illinois' request to find the defendants "instrumentalities" of the State of Wisconsin was justified and thus the suit would be an action against Wisconsin and would invoke the Court's original jurisdiction. Although in the past, actions against public entities could be attributed to a state and thus warrant joinder of the state as a party defendant, such joinder is not mandatory. *Id.* at 96—97. In addition, the term "states" as used in 28 U.S.C. § 1251(a)(1) (Supp. 1979) — the statute conferring original jurisdiction on the Supreme Court when certain conditions exist — does not include a state's political subdivision. Rather, § 1251(b)(3) is the appropriate jurisdictional statute under which the Court has original, but not exclusive, jurisdiction in actions brought by a state against citizens of another state, municipalities, or other lesser political units. 406 U.S. at 98.
62. *Id.* at 98—101 (citing Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971)). The Court quoted the controlling principle set forth in *Pankey:*

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.

406 U.S. 91, 99—100 (1972) (quoting Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971)).
63. 406 U.S. 91, 100 (1972). The Court also discussed several earlier opinions in support of its conclusion. *Id.* For example, in Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968), the United States Court of Appeals for the Second Circuit held:

> [T]hat a cause of action similarly "arises under" federal law if the dispositive issues stated in the complaint require the application of federal common law. . . . The word "laws" in § 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction — to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights — is as applicable to judicially created rights as to rights created by statute.

Id. at 492 (citations omitted). *Accord,* Romero v. International Terminal Operating Co., 358 U.S. 354, 389 (1959) (Brennan, J., dissenting and concurring).

Despite its refusal to hear the case, the Court in *Illinois v. Milwaukee,* in an opinion authored by Justice Douglas, expressed its intention to extend federal common law to encompass public nuisances caused by the pollution of either interstate or navigable waters.[64] This newly created doctrine was announced by the Court in sweeping terms: "[W]hen we deal with air and water in their ambient or interstate aspects, there is federal common law."[65]

The Supreme Court discussed three justifications in support of its decision that environmental pollution of navigable and interstate waters constitutes a valid federal common law claim.[66] First, the Court pointed out that numerous federal statutes[67] indicate the existence of a substantial federal interest in maintaining the quality of the nation's interstate and navigable waters. This pervasive federal concern justifies application of federal common law, even though it is professed federal policy "to recognize, preserve, and protect the primary responsibilities of the States in preventing and controlling water pollution."[68] The Court held that "it is federal, not state, law that in the end controls the pollution of interstate or navigable waters."[69] Second, the Court noted that the remedies for water pollution prescribed by Congress in the Federal Water Pollution Control Act (FWPCA)[70] do not represent the only federal remedies available.[71] There are instances, as in the present case, when the relief sought would not be within the precise realm of the solutions prescribed by Congress. Therefore, an alternative avenue of relief would be made available through application of federal common law in addition to the FWPCA.[72] By acknowledging this alternative remedy, the Supreme Court intended that the federal nuisance action fill the gaps in the patchwork of federal and state statutes governing the control and abatement of water pollution. This remedy would allow the federal courts to settle water pollution dis-

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64. 406 U.S. 91, 99 (1972). "The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a). We hold that it does; and we also hold that § 1331(a) includes suits brought by a State." *Id.*
65. *Id.* at 103.
66. *Id.* at 101—07.
67. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 611—668(ee) (1976 & Supp. 1979); Fish and Wildlife Act, 16 U.S.C. §§ 742a, 760e (1976); Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401—467(e) (1976 & Supp. 1978); Federal Water Pollution Control Act, 33 U.S.C. §§ 1151—1175 (1972) (recodified at 33 U.S.C. §§ 1251—1376 (1976 & Supp. 1979)); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321—4347 (1976 & Supp. 1979).
68. Federal Water Pollution Control Act (FWPCA), Pub. L. No. 80—845, § 1(b), 62 Stat. 1155 (1948) (current version at 33 U.S.C. § 1251(b) (Supp. 1978)).
69. 406 U.S. 91, 102 (1972).
70. Pub. L. No. 80—845, 62 Stat. 1155 (1948) (current version at 33 U.S.C. §§ 1251—1376 (1976 & Supp. 1978)).
71. 406 U.S. 91, 103 (1972).
72. *Id.* at 104.

putes in conformity with the policies of the existing federal legislation. Finally, the Court implied that the interstate nature of the dispute presented a federal question necessitating resolution by application of federal common law.[73] In the past, suits brought by states concerning apportionment of interstate waters[74] and settlement of interstate boundaries[75] required the Court to apply federal common law.[76] Similarly, federal common law could be utilized to settle a dispute between a state and citizens of another state regarding the pollution of an interstate body of water. In effect, the Supreme Court in *Illinois v. Milwaukee* revived the federal interstate common law as a means of assuring impartial relief in interstate clashes, preserving the constitutional interest in federalism, and providing for uniform rules of decision.[77]

A federal common law nuisance doctrine cloaked in general and vague terms evolved from *Illinois v. Milwaukee*. The unanimous opinion is devoted to delineating the Court's justifications for fashioning this "specialized" federal law. Just which of the reasons, or combination of the reasons, is to be controlling or predominant is uncertain. Some courts have resolved this uncertainty by limiting application of the federal nuisance cause of action to factual settings analogous to the one that existed in *Illinois v. Milwaukee*.[78] Such an approach mandates that the suit be initiated by a state, rather than a private party, against another state or citizens of another state, that the plaintiff allege pollution of an interstate body of water, and that the plaintiff show that the effects of the pollution have crossed state boundaries and have harmed the complaining state. Other courts have resolved the ambiguity of the Supreme Court's opinion by interpreting *Illinois v. Milwaukee* as creating a broad policy doctrine designed to protect the nation's waterways and to abate water pollution.[79] Thus, the interpretive battle lines have been drawn: one side views *Illinois v. Milwaukee* as only indicating *when* the federal nuisance doctrine is applicable, while the other side reads the

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73. *Id.* at 104—07.
74. *See, e.g.*, Nebraska v. Wyoming, 325 U.S. 589 (1945); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Kansas v. Colorado, 206 U.S. 46 (1907).
75. *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
76. 406 U.S. 91, 105 (1972). *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
77. 406 U.S. 91, 105 n.6 (1972).
78. *See, e.g.*, Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976); Oswego Barge Corp., 439 F. Supp. 312 (N.D.N.Y. 1977); Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976), *aff'd sub nom.* East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2d Cir.), *cert. denied*, 434 U.S. 969 (1977).
79. *See, e.g.*, Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), *cert. granted*, 101 S. Ct. 31 (1980).

Supreme Court's decision as only indicating *why* the theory was created and as leaving the determination of when it is to be applied in a water pollution controversy up to the individual judges hearing cases involving a federal common law nuisance claim. Despite these divergent viewpoints, the Supreme Court's opinion continues to be the key precedent for the development of the federal common law of public nuisance in pollution abatement litigation.

III. APPLICATION OF THE FEDERAL COMMON LAW OF PUBLIC NUISANCE

One point that clearly emerged from *Illinois v. Milwaukee* was that a federal public nuisance claim is a viable cause of action when a state brings an action against another state or citizens of another state to abate the pollution of interstate or navigable waters that originated in the defendant state and has crossed state borders to affect the complaining state. This narrow result left several key questions unanswered,[80] including: (1) whether a non-governmental entity—*i.e.,* a private party—can institute a federal common law nuisance action; and (2) whether it is essential to a federal common law nuisance action that an interstate body of water be polluted by an extraterritorial source. Relying on a narrow interpretation of

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80. *See generally* W. RODGERS, ENVIRONMENTAL LAW 151 (1977); Glaeser, *Federal Common Law and Ocean Pollution: A Private Remedy for Oil Pollution Damage?*, 8 ENV. L. 1, 29—39 [hereinafter cited as Glaeser]. One question previously unanswered was whether the federal government could avail itself of the federal nuisance cause of action. The issue is now well settled in the affirmative. *See, e.g.,* United States *ex rel.* Scott v. United States Steel Corp., 365 F. Supp. 556, 558 (N.D. Ill. 1973) (United States is a permissible plaintiff because, like the state government, it has a proprietary interest in the water being polluted, and it has an interest in the development of a uniform standard); United States v. Stoeco Homes, 359 F. Supp. 672, 679 (D.N.J. 1973) (defendant's construction activities adversely affecting the navigable waters of the United States constitute an unlawful encroachment upon the public domain, amounting to a public nuisance in violation of federal common law, and, as such, are subject to abatement at the instance of the government), *vacated on other grounds,* 498 F.2d 597 (3d Cir. 1974); United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145 (D. Vt. 1972) (federal government's interest in water quality permitted United States to sue at federal common law to abate potential water pollution caused by corporations engaged in transporting oil across Lake Champlain), 363 F. Supp. 110 (D. Vt.), *aff'd mem.,* 487 F.2d 1393 (2d Cir. 1973), *cert. denied,* 417 U.S. 976 (1974).

The question of whether lesser political subdivisions, *i.e.,* municipalities, can bring a federal nuisance action also has been answered in the affirmative. *See, e.g.,* City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979). In *Evansville,* the defendant refiner discharged toxic chemicals into a river from which the plaintiffs drew water into their treatment plants. Plaintiffs, as municipal corporations, had to expend public funds to abate the pollution of an interstate waterway caused by the out-of-state defendant's discharges. *Id.* at 1010. Municipal and public corporations thus have a cause of action under the federal common law of nuisance. *See also* Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978).

One question remaining unanswered is whether the federal common law of public nuisance cause of action has been preempted by the FWPCA of 1972 and 1977. The Supreme Court has recently granted certiorari to consider this issue. City of Milwaukee v. Illinois, 100 S. Ct. 1310 (1980). See text accompanying notes 221—255 *infra.*

Illinois v. Milwaukee, courts advocating a restrictive approach to the federal common law of public nuisance have refused to permit private plaintiffs to institute a federal nuisance action and have limited application of the nuisance doctrine to suits alleging interstate pollution.[81] Several recent decisions, dealing squarely with these issues, however, have interpreted *Illinois v. Milwaukee* expansively, providing the federal courts with an opportunity to play a more active role in environmental protection.[82]

A. *Restricting the Nuisance Doctrine: The* Jones Falls *Case*

The progeny of *Illinois v. Milwaukee* includes *Committee for the Consideration of the Jones Falls Sewage System v. Train,*[83] a significant case for two reasons. First, it is important to Maryland because it expresses the Fourth Circuit's position on the federal common law of public nuisance. Second, and of equal significance, the Fourth Circuit's holding epitomizes the restrictive view towards application of the federal common law nuisance doctrine.

Jones Falls, a case of first impression for the Fourth Circuit, required the court to determine whether federal nuisance law would be applicable in a suit brought by private individuals seeking abatement of the polluting of an intrastate body of water. The suit was instituted by a group of private plaintiffs[84] against federal, state, and local agencies[85] to enjoin a local sewage treatment plant from dis-

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81. *See, e.g.,* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976) (see text accompanying notes 83—116 *infra*); Massachusetts v. United States Veterans Administration, 541 F.2d 119 (1st Cir. 1976); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).
82. *See* Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980) (see text accompanying notes 155—84 *infra*); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), *cert. granted,* 101 S. Ct. 314 (1980) (see text accompanying notes 132—54 *infra*).
83. 539 F.2d 1006 (4th Cir. 1976). For other discussions of this case, see Comment, *Two Circuits Scuttle Expansion of Federal Common Law,* 6 ENVT'L L. REP. (ELI) 10256 (1976); *Fourth Circuit Review — Federal Common Law of Nuisance for Water Pollution Abatement Confined to Interstate Controversies,* 34 WASH. & LEE L. REV. 590 (1977); 18 B.C. IND. & COM. L. REV. 929 (1977); 5 FORDHAM URB. L.J. 549 (1977); 13 WAKE FOREST L. REV. 246 (1977).
84. The plaintiff organizations were the Committee for the Consideration of the Jones Fall Sewage System, an association comprised of various neighborhood and community organizations; Cheswolde Neighborhood Association, Inc.; Cross Country Improvement Associations; and Mt. Washington Improvement Association. Also included were two individuals who resided in the vicinity of the Jones Falls Stream.
85. Named as defendants were Russell E. Train, EPA Administrator; Neil Solomon, Secretary of the Maryland Department of Health and Mental Hygiene; F. Pierce Linaweaver, Director of Baltimore City Department of Public Works; the Mayor and City Council of Baltimore City; C. Elmer Hopper, Jr., Building Engineer for Baltimore County; County Executive and County Council for Baltimore County; Carl M. Freeman, Trustee, Carl M. Freeman Associates, Inc.; and Ralph DeChiaro Enterprises, Inc. The last two defendants, who were applicants for hookups to the sewer system, successfully intervened.

charging untreated raw sewage into the Jones Falls Stream. After their initial action had become moot because of the state's compliance with federal law, the plaintiffs amended their original complaint to include a federal common law nuisance claim.[86] The federal district court, however, dismissed the case for lack of federal jurisdiction.[87] On appeal, the Fourth Circuit affirmed the lower court, holding that federal common law nuisance was inapplicable in a suit brought by a private party alleging only intrastate pollution.[88] In effect, the court narrowed the scope of the principles enunciated in *Illinois v. Milwaukee* and limited application of the nuisance doctrine to cases with factual settings similar to the 1972 case.

Writing for the five-judge majority, Judge Haynsworth conceded that some federal common law has evolved since *Erie* was decided in 1938.[89] He recognized the specialized federal common law of nuisance "as a necessary expedient" to resolve controversies arising when pollution originating in one state infringes upon the ecological and environmental rights of another state and the affected state is seeking extraterritorial relief.[90] In resolving such an inter-

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86. 539 F.2d 1006, 1008 (4th Cir. 1976). Initially, the plaintiffs were seeking to enjoin further sewage discharges into the Jones Falls Stream. *Id.* at 1007. The polluting activities, they alleged, violated the FWPCA by discharging sewage into Jones Falls without a permit. Suit was filed on December 5, 1973. It soon became apparent, however, that the plaintiffs would have no cause of action based on the statute because the Maryland Department of Public Works on October 9, 1973 had filed a timely and properly supported application to the United States Environmental Protection Agency (EPA) for a discharge permit issued pursuant to a provision of the FWPCA, § 402(k), 33 U.S.C. § 1342(k) (1976). That section provides that during the pendency of a timely and properly supported application, interim discharges shall not be in violation of the statute. It provides a source of immunity from the time the application is filed until the application's approval is finalized. After the suit had been filed in the district court, EPA actually issued a permit. 539 F.2d at 1007. Therefore, the interim discharges were in accordance with the regulatory scheme of the FWPCA and further discharges were permitted.

87. Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 375 F. Supp. 1148, 1153—55 (D. Md. 1974), *aff'd*, 539 F.2d 1006 (1976). The district court held that private parties are barred from invoking a federal common law of public nuisance cause of action. Only governmental entities are proper parties to bring a federal nuisance action. As there was no proper federal common law count in the present suit, there was no claim upon which to assert jurisdiction under § 1331(a). *Id.* at 1153. In reaching this conclusion, the court noted:

> Footnote 6 of Justice Douglas' opinion states that "it is not only the character of the parties that requires us to apply federal common law." This statement can be read in at least two different ways. It could mean a) that there were other considerations sufficient in themselves to require application of federal law, or b) that there were other federal interests which in addition to the character of the parties required the application of federal law although those other interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one.

Id. at 1154 n.12 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972)).

88. 539 F.2d 1006, 1010 (4th Cir. 1976).

89. *Id.* at 1008.

90. *Id.*

state dispute, application of the laws of either state would be inequitable. To avoid this inequity, the court reasoned that the federal common law of public nuisance would be appropriate as "an acceptable accommodation of state and national interests."[91] The court added another element to the interstate aspect of the nuisance doctrine. Relying upon a narrow precedent to support its position,[92] the court also required the complaining state to allege an interstate pollution effect.[93] The interstate character of the controversy, therefore, became twofold: there must not only be an interstate conflict, but also interstate movement of pollution. In addition to the interstate requirements, the majority determined that only when a state is the party seeking relief may a federal nuisance claim be invoked.[94]

Applying these requirements to the facts in *Jones Falls,* the Fourth Circuit found "neither the reason nor the necessity for the invocation of a body of federal common law."[95] Instead, the court found only an intrastate pollution effect in this local controversy between state and local public officials and Maryland citizens, which could be settled by applying Maryland law.[96] The Fourth Circuit majority observed that to the extent there is a federal interest in the controversy, it does not reach beyond that expressed in the Federal Water Pollution Control Act (FWPCA). In *Jones Falls,* however, the plaintiffs had no claim based upon the federal statute.[97]

The court also noted that the FWPCA foreclosed a federal common law claim.[98] Pollutants emanating from the sewage treatment plant were being discharged into the Jones Falls Stream pursuant to a permit authorized by the United States Environmental Protection Agency (EPA).[99] The action sought to be enjoined was therefore in accordance with statutory and regulatory requirements. The court concluded that "it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates."[100] In essence, the *Jones Falls* ma-

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91. *Id.* at 1008—09. Apparently, the state interest referred to is the quasi-sovereign right to a pollution-free environment, and the national interest referred to is the preservation of the concept of federalism.
92. Reserve Mining Co. v. EPA, 514 F.2d 492, 520—22 (8th Cir. 1975). The only reference in *Reserve Mining* to an interstate requirement was the following statement: "As formulated in Illinois v. City of Milwaukee . . . and Texas v. Pankey . . . federal nuisance law contemplates, at a minimum, interstate pollution of air or water." *Id.* at 520 (citations omitted).
93. 539 F.2d 1006, 1010 (4th Cir. 1976).
94. *Id.* at 1009, 1010.
95. *Id.* at 1009.
96. *Id.*
97. *Id.* at 1009—10.
98. *Id.*
99. *Id.* The FWPCA, § 402, 33 U.S.C. § 1342 (1976 & Supp. 1978), establishes a permit program to authorize controlled pollution discharges.
100. 539 F.2d 1006, 1009 (4th Cir. 1976).

jority determined that the FWPCA preempted a remedy formulated under the federal nuisance doctrine in order to avoid displacing federal statutory law with federal judge-made law.

The Fourth Circuit's decision stemmed from the court's view that the federal public nuisance law created by the Supreme Court was rooted in a constitutional interest in preserving the federal system. The court interpreted *Illinois v. Milwaukee* as indicating that the right to an environment free of pollution emanating from an out-of-state source is a quasi-sovereign interest belonging only to the states. Therefore, only a state can vindicate this right when it has been infringed upon by the effects of extraterritorial pollution. The characterization of the state as plaintiff thus was a prerequisite to a federal nuisance action. Reinforcing this view is the FWPCA's policy of rendering priority to the states to control and abate water pollution.[101] To allow federal nuisance suits to be brought by parties other than states would contradict this express federal policy recognizing the preeminence of state authority in pollution control.[102] Additionally, if private plaintiffs were entitled to bring an action against state and local governmental entities, this policy would be frustrated. Finally, protection of a state's quasi-sovereign interest from encroachment by extraterritorial pollution necessitates application of federal nuisance law to accommodate the pervasive interest in federalism. This state interest would be preserved best by requiring the federal courts to be the forum to resolve interstate litigation involving conflicting states' interests.

A well reasoned three-judge dissent, written by Judge Butzner, pointed out that the Supreme Court molded the nuisance doctrine to effectuate the federal policy of abating pollution of the nation's interstate and navigable waterways.[103] This broad policy is evidenced in federal statutes dealing with the country's natural resources and in state legislation compatible with these congressional mandates.[104] The federal common law of public nuisance, the dissent asserted, was fashioned to fill the statutory interstices of the FWPCA and to provide for uniform federal rules of decision in water pollution cases.[105]

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101. This policy is expressed in § 101(b), 33 U.S.C. § 1251(b) (Supp. 1978), which provides in part:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

102. Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1009 (4th Cir. 1976).

103. *Id.* at 1013 (Butzner, J., dissenting).

104. *Id.*

105. *Id.*

The dissent rejected the majority's conclusion that a state is the only proper plaintiff entitled to bring an action under federal common law and noted the Supreme Court's caution against confusing parties with the subject matter of the action: "[I]t is not only the character of the parties that requires us to apply federal law. . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law."[106] Judge Butzner asserted that the pollution of interstate or navigable waters presents a federal question. The nature of the controversy, rather than the characterization of the state as plaintiff, invokes jurisdiction in the federal district courts under 28 U.S.C. § 1331(a).[107] The dissent buttressed this argument by citing the citizen suit section of the FWPCA.[108] These provisions emphasize the federal nature of a citizen's action by granting a citizen the right to sue in federal court without regard to the citizenship of the parties or the amount in controversy. Moreover, the citizen suit provisions preserve common law remedies available to a plaintiff in addition to the relief prescribed in the statute. The dissent determined that the term "common law," as used in the citizen suit section, did not refer exclusively to state common law or preclude application of federal common law.[109] As the dis-

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106. Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972).

107. 539 F.2d 1006, 1014 (4th Cir. 1976) (Butzner, J., dissenting).

108. *Id.* at 1011—13. The citizen suit provision is found at § 505, 33 U.S.C. § 1365 (1976), and provides in part:

> (a) . . . any citizen may commence a civil action on his own behalf—
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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.
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> . . . .
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> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).
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> . . . .
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> (g) For the purpose of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

109. 539 F.2d 1006, 1013 (4th Cir. 1976) (Butzner, J., dissenting).

sent concluded, these provisions demonstrate "that Congress recognized that the pollution of navigable waters and their tributaries raises a federal question for which all federal law, including common law, is applicable."[110]

The dissent also rejected the limitation of federal common law to protection of only interstate bodies of water. Based on the expansive definition given navigable waters under the FWPCA,[111] the legislative history of the Act,[112] and federal regulations promulgated by the EPA,[113] the dissent concluded that the Jones Falls was a navigable body of water.[114] Relying upon Justice Douglas' broad language in *Illinois v. Milwaukee* that the federal common law of nuisance would protect both interstate and navigable waters,[115] Judge Butzner argued that the scope of federal common law of public nuisance should be extended to include pollution of intrastate waters.[116] *Illinois v. Milwaukee* was not the only source supporting this conclusion. Because federal common law draws its substance from federal statutory law, the expansion of the Act's coverage under the 1972 FWPCA amendments to include tributaries of navigable waters justifies extending federal common law protection to these tributaries.[117] Important, too, was the fact that Jones Falls flows into the Patapsco River, which eventually empties into the Chesapeake Bay, one of the nation's most valuable maritime resources.[118] The dissent found it unreasonable to assume that Congress could have expected all the water in the Bay to be recycled through treatment works to remove all the pollutants found in the Bay.[119] Moreover, it was unreasonable to expect persons affected by pollution of the Bay to trace the source of the pollution to one of the

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110. *Id. But see* 18 B.C. IND. & COM. L. REV. 929, 948—49 (1977).
111. The statutory definition is found in the FWPCA at § 502(7), 33 U.S.C. § 1362(7) (1976), and provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."
112. *See* S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 144, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3776, 3882, in which the conferees stated that they "fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."
113. The regulatory definition is found at 40 C.F.R. § 125.1(p)(2) (1975) (recodified at 40 C.F.R. § 122.3(t) (1979)).
114. 539 F.2d 1006, 1011 (4th Cir. 1976) (Butzner, J., dissenting).
115. Illinois v. City of Milwaukee, 406 U.S. 91, 99 (1972).
116. 539 F.2d 1006, 1013 (4th Cir. 1976) (Butzner, J., dissenting).
117. *Id.* The dissent, however, cited no statutory provisions expressly extending coverage to tributaries of interstate and navigable waters. The dissent may have interpreted the term navigable waters to encompass tributaries.
118. *Id.* at 1011. Judge Butzner emphasized the need to protect the Chesapeake Bay, the body of water ultimately affected by the polluting of the Jones Falls Stream system. This is best achieved by preventing discharges of pollutants into the Bay's tributaries. *Id.* at 1011—12.
119. *Id.*

numerous tributaries draining into this large body of water. The dissent noted that all these factors inevitably indicated that "the national interest in making the navigable waters of the United States wholesome and clean involves Jones Falls, even though Baltimore's sewage also has an intrastate effect on people who live near the stream."[120] As the dissent's pronouncements suggest, the interstate effect or the interstate character of the body of water are irrelevant when considering application of the federal common law of public nuisance to protect the nation's waterways.

The decision of the *Jones Falls* majority is subject to several criticisms. Most significantly, the court failed to consider alternative interpretations of *Illinois v. Milwaukee* and to examine more carefully the federal concern and policy toward the country's waters. By stressing the states' role in water pollution abatement, the Fourth Circuit circumvented the Supreme Court's directive that federal, not state, law predominates in anti-pollution efforts to protect interstate and navigable waters.[121] Moreover, the Fourth Circuit ignored the Supreme Court's language that suggested that the overriding interest in federalism and the need for a uniform rule of decision require invocation of federal common law, even when a state is not the plaintiff in a federal common law action.[122] Furthermore, the court erroneously stated that the federal nuisance law up to the time of *Jones Falls* never had been extended to controversies with parties other than states as plaintiffs[123] or to actions alleging water pollution with no interstate effect.[124] By determining that the FWPCA represents the ceiling of federal interest in controlling pollution of the nation's waters, the court in *Jones Falls* sidestepped Justice Douglas' intent to preserve federal common law actions in order to supplement congressional remedies to abate water pollution.[125]

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120. *Id.* at 1012.
121. Illinois v. City of Milwaukee, 406 U.S. 91, 102 (1972).
122. *Id.* at 105 n.6.
123. 539 F.2d 1006, 1009 (4th Cir. 1976). *See* Parsell v. Shell Oil Co., 421 F. Supp. 1275, 1281 (D. Conn. 1976) (though not addressing the issue directly, the court suggested that the federal nuisance action be extended to private plaintiffs, but even if it is, it should "be limited to suits involving pollution with an impact on more than one state"), *aff'd sub nom.* East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2d Cir.), *cert. denied*, 434 U.S. 969 (1977); Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1973) (court assumed jurisdiction over a suit brought by an environmental group, which also had a *river* as a plaintiff). The court in *Jones Falls* did suggest that perhaps the federal government could bring a federal common law nuisance action. 539 F.2d at 1009. *See* note 80 *supra*.
124. 539 F.2d 1006, 1009 (1976). *See, e.g.*, United States *ex rel.* Scott v. United States Steel Corp., 365 F. Supp. 556 (N.D. Ill. 1973); United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145 (D. Vt. 1972), 363 F. Supp. 110 (D. Vt.), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).
125. Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972). As Douglas stated, "[t]he remedies which Congress provides are not necessarily the only federal remedies available." *Id.*

Despite its shortcomings, *Jones Falls* remains intact as Fourth Circuit law.[126] Two other federal courts of appeals, however, have reached different conclusions with respect to two of the requirements the Fourth Circuit found essential to instituting a federal common law nuisance suit: the characterization of the plaintiff as a state[127] and the need to allege the pollution of an interstate body of water.[128]

B. Expanding the Scope of the Federal Nuisance Doctrine

1. Private Plaintiffs: The *Sea Clammers* Case

The character of the plaintiff in a federal common law nuisance action has been the subject of much discussion.[129] In the past, the courts have been reluctant to extend the federal nuisance cause of action to private parties,[130] though some progress has been made.[131] In the actions that were initiated by private plaintiffs, the courts usually dismissed the suits, relying on precedent rather than on a reasoned opinion justifying why these parties should be barred. The 1980 decision of the United States Court of Appeals for the Third Circuit in *National Sea Clammers Association v. City of New York*[132] marks the first instance in which a federal court has directly extended the federal nuisance action to private parties.

The plaintiffs in *Sea Clammers*, an association whose members' livelihood depends on harvesting fish and shellfish from the waters and sea beds of the Atlantic Ocean near New Jersey and New York, filed suit against federal, state, and local environmental agencies.[133] The association's complaint alleged that the defendants discharged or permitted to be discharged sewage and toxic waste into the ocean

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126. *See, e.g.*, Ancarrow v. City of Richmond, 600 F.2d 443, 445 (4th Cir. 1979) (citing Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976)).

127. *See* National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), *cert. granted*, 101 S. Ct. 314 (1980).

128. *See* Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980).

129. *See, e.g.*, Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976); Glaeser, *supra* note 80; Comment, *Federal Common Law of Nuisance Reaches New High Water Mark as Supreme Court Considers* Illinois v. Milwaukee II, 10 ENVT'L L. REP. (ELI) 10101, 10101—03 [hereinafter cited as Comment]; 18 B.C. IND. & COM. L. REV. 929 (1977); 26 EMORY L.J. 433 (1977); 13 WAKE FOREST L. REV. 246 (1977).

130. *See, e.g.*, Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976); Sevanda, Inc. v. Irwin, 10 ENVIR. REP. (BNA) (Envir. Rep. Cases) 2065 (D. Ga. 1976).

131. *See* note 123 *supra* (courts indicating that private parties could bring federal common law nuisance actions). *See also* note 80 *supra* (federal government and municipalities as plaintiffs in federal nuisance suits).

132. 616 F.2d 1222 (3d Cir.), *cert. granted*, 101 S. Ct. 314 (1980).

133. *Id.* at 1224.

or its tributaries which led to the uncommon, rapid growth of algae in these waters.[134] When the algae died and decomposed, an oxygen deficiency was created in the water near the ocean floor. As a result, much of the marine life, particularly shellfish, died because they were unable to flee the afflicted area.

The National Sea Clammers Association included in their complaint a federal common law nuisance claim. Although the federal district court dismissed all the federal counts,[135] the Third Circuit reversed, summarily holding that "the common law nuisance remedy recognized in *Illinois v. Milwaukee* is available in suits by private parties."[136] In arriving at its decision, the court cited the broad language of the Supreme Court indicating that the character of the parties in a federal common law action was not the sole requisite factor for creating a federal nuisance remedy.[137] The Third Circuit relied primarily upon the "overriding federal interest in the need for a uniform rule of decision"[138] as the rationale for fashioning a federal common law to abate water pollution.[139] In *Sea Clammers*, the plaintiffs were suing for damages to interstate ambient water. The court concluded that this presented an issue "as to which there is a clear and overriding federal interest in uniformity,"[140] thus necessitating application of federal nuisance law. Moreover, relegating the parties to the conflicting nuisance standards applied by the state courts "would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity."[141] In addition, the court stated that private plaintiffs should not only be permitted to bring federal common law nuisance actions, but should be encouraged to participate in the abatement of such nuisances in order to give full effect to the nuisance doctrine fashioned in *Illinois v. Milwaukee*.[142]

The unanimous Third Circuit decision in *Sea Clammers* recognized various independent justifications for establishing the federal common law of public nuisance, contravening the Fourth Circuit's emphasis in *Jones Falls* on the quasi-sovereign rights of states and the need to provide a federal forum in interstate disputes to preserve the pervasive interest in federalism.[143] *Illinois v. Milwaukee*[144] was

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134. *Id.* at 1224—25.
135. *Id.* at 1225.
136. *Id.* at 1233.
137. *Id.*
138. *Id.* (citing Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972)).
139. 616 F.2d 1222, 1233 (3d Cir.), *cert. granted*, 101 S. Ct. 314 (1980).
140. *Id.*
141. *Id.* at 1233—34.
142. *Id.* at 1234.
143. Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008—10 (4th Cir. 1976). See text accompanying notes 89—97 *supra*.
144. 406 U.S. 91 (1972).

the basis of the Fourth Circuit's position that a private party should not be permitted to initiate a federal nuisance action. The Supreme Court had permitted Illinois to maintain an action at common law by relying upon *Georgia v. Tennessee Copper Co.*[145] and *Texas v. Pankey*.[146] Both of these earlier cases depended upon the environmental-based state interest and the existence of an extraterritorial pollution effect to substantiate their holdings. By relying upon those decisions, the Supreme Court, in *Illinois v. Milwaukee*, indicated it attributed some weight to the characterization of the state as plaintiff in determining whether the invocation of federal common law would be appropriate in a water pollution case.

There were additional reasons enunciated in *Illinois v. Milwaukee*, however, for invoking federal common law.[147] Although these reasons were virtually ignored by the Fourth Circuit, the rationale employed by the Third Circuit was that the federal common law nuisance doctrine is applicable in cases alleging pollution of interstate and navigable waters to preserve uniformity of federal decisional rules.[148] The Third Circuit also implied that the federal interest in preserving the purity and quality of the nation's waters required invocation of the federal nuisance law. This is apparent from the court's references throughout its opinion to the need for applying federal common law when interstate waters are affected.[149]

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145. 206 U.S. 230 (1907).
146. 441 F.2d 236 (10th Cir. 1971).
147. 406 U.S. 91, 105 n.6 (1972). See text accompanying notes 66—77 *supra*.
148. 616 F.2d 1222, 1233 (3d Cir.), *cert. granted*, 100 S. Ct. 314 (1980).
149. *Id.* at 1224—25, 1233—34. "In the instant case, plaintiffs are suing for damages to interstate ambient waters, an issue as to which there is a clear and overriding federal interest in uniformity." *Id.* at 1233.

Although the court's holding indicated that the federal interest in interstate waters is one of the reasons for invoking the federal common law of nuisance, the court's decision could be interpreted as an extension of the federal nuisance cause of action to private parties only when there is an *interstate effect* alleged. The Third Circuit spoke in terms of the "interstate pollution" being asserted in the suit. *Id.* In addition, the court noted that failure to allege an interstate effect in Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) and in Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976) "proved fatal to plaintiffs seeking to base their suits on the federal common law nuisance remedy," 616 F.2d at 1234 n.35, and that the issue of concern in *Illinois v. Milwaukee* "was the need to apply uniform federal law where polluting activities of one state caused harm to another state." *Id.*

On the other hand, the court also noted that in *Illinois v. Milwaukee* "a unanimous Supreme Court recognized that there is a federal common law cause of action to abate pollution of interstate ambient water, notwithstanding the relief available under FWPCAA." *Id.* at 1230 n.21. Moreover, when discussing the National Sea Clammers Association's claim, the court stated that they have "sufficiently alleged pollution of *interstate waters*." *Id.* at 1234 (emphasis added). Furthermore, nowhere in the description of the facts did the court point to an allegation of pollution having an extraterritorial effect. Rather, the court stated that the plaintiff's complaint only asserted damage to the Atlantic Ocean and its tributaries and the sea life within the water. *Id.* at 1224—25. Apparently, the court used the term pollution of interstate waters interchangeably with the term interstate pollution.

The National Sea Clammers Association alleged pollution of the Atlantic Ocean, clearly an interstate body of water. Under these circumstances, application of the federal nuisance cause of action is appropriate to further an articulated federal concern to protect valuable water resources and to promote uniform decisional rules in water pollution cases. When combined, these goals form a strong argument in favor of federal nuisance suits brought by private attorneys general to protect water resources from the devastating effects of pollution.

Other sources support the Third Circuit's conclusion that private plaintiffs are entitled to bring a federal common law nuisance action. In *Jones Falls*, the dissent argued that the FWPCA's citizen suit provisions[150] reserve a private individual's right to sue on his own behalf to abate water pollution and preserve federal common law remedies as a means of relief.[151] Additionally, when a controversy crosses state borders, the interstate nature of the dispute transcends the jurisdiction of any state court and mandates the application of federal law, as evidenced in *Georgia v. Tennessee Copper Co.*[152] and *Texas v. Pankey*.[153] The application of federal common law in interstate water pollution suits, therefore, should not be confined to actions initiated by a state. Justice Douglas in *Illinois v. Milwaukee* suggested this conclusion by focusing on the nature of the dispute rather than the character of the parties involved.[154] When combined with the pervasive federal interest in abating and controlling water pollution, the need to use federal common law cannot be denied, even in actions instituted by private plaintiffs.

Two other considerations must also be addressed in the context of the right of private plaintiffs in interstate controversies. If a private party is denied the right to assert a federal common law public nuisance claim, a plaintiff in one state injured by pollution originating in another state may be subjected to the laws and the courts of the state from which the nuisance emanated. Moreover, if the state court were the only available forum for relief, an injured individual may be confronted with the problem of having an extraterritorial injunctive decree enforced. By expanding access to the federal courts to private parties asserting a federal nuisance claim, these inequitable results can be avoided.

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150. § 505, 33 U.S.C. § 1365 (1976); see text accompanying notes 108—10 *supra*.
151. Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1010—14 (4th Cir. 1976). (Butzner, J., dissenting).
152. 206 U.S. 230 (1907).
153. 441 F.2d 236 (10th Cir. 1971).
154. 401 U.S. 91, 105 n.6 (1972).

2. Pollution of Intrastate Navigable Waters: The *Outboard Marine* Case

Just as the Third Circuit broadened the scope of the nuisance doctrine to encompass private plaintiffs, the United States Court of Appeals for the Seventh Circuit, in *Illinois v. Outboard Marine Corp.*,[155] enlarged the scope of the nuisance doctrine by permitting a federal common law public nuisance action in cases involving the pollution of an intrastate navigable body of water. In *Outboard Marine*, the State of Illinois brought an action complaining of the defendant's discharges of toxic polychlorinated biphenyls (PCBs) from a plant within Illinois into Lake Michigan and its tributaries.[156] The state alleged that the PCBs caused environmental damage to the waters and endangered the health and welfare of Illinois' citizens.[157] Federal common law of public nuisance was the basis of one cause of action in the suit.[158] The federal district court, however, dismissed the federal common law count for failure to state a claim upon which relief could be granted.[159] Based on a narrow interpretation of *Illinois v. Milwaukee*, the district court concluded that there could be no federal common law cause of action because no interstate conflict or interstate pollution effect existed.[160] On appeal, the Seventh Circuit reversed the lower court and allowed a federal nuisance action even though the pollution was intrastate in nature and the suit was between a state and its own citizens.

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155. 619 F.2d 623 (7th Cir. 1980).

156. *Id.* at 624.

157. *Id.* The complaint sought an injunction to restrain Outboard Marine Corp. (O.M.C.) from further discharging PCBs from the Waukegan, Illinois plant, a mandatory injunction directing O.M.C. to study removal and disposal methods for the accumulated PCB-contaminated sediments, a mandatory injunction directing O.M.C. to remove and dispose of the PCB-contaminated sediments in North Ditch, Waukegan Harbor and Lake Michigan, and a similar injunction requiring removal of PCB-contaminated soil. The complaint also asked for civil penalties. *Id.*

158. *Id.* The state also sued under the FWPCA, 33 U.S.C. §§ 1251—1376 (1976 & Supp. 1978), and raised several pendant state claims based on the Illinois Public Nuisance Act, ILL. ANN. STAT. ch. 100½, §§ 1—29 (Smith-Hurd 1934 & Supp. 1980—1981), the Illinois Environmental Protection Act, ILL. ANN. STAT. ch. 111½, §§ 1001—1007.1 (Smith-Hurd 1977 & Supp. 1980—1981), the Illinois common law of nuisance, and the Illinois common law of trespass. 619 F.2d 623, 624 & n.4 (7th Cir. 1980).

159. 619 F.2d 623, 624 (7th Cir. 1980). Prior to the district court's disposition of the suit, the federal government filed an action in the same court against O.M.C., alleging the same PCB pollution effects of the same three bodies of water. The suit was brought under the Refuse Act, 33 U.S.C. § 407 (1970), and under the federal common law of public nuisance. 619 F.2d at 624. After Illinois' suit was dismissed, the Attorney General for Illinois filed a motion to intervene in the suit brought by the federal government. The federal district court judge, however, denied the motion for leave to intervene. It was from this order, and from the original dismissal order of Illinois' own action, that Illinois brought an appeal. *Id.*

160. 619 F.2d 623, 624 (7th Cir. 1980).

In reaching its decision, the Seventh Circuit focused upon the overriding federal interest in the nation's interstate and navigable waters and in the development of programs designed to prevent pollution of these natural resources.[161] The court concluded that it was these significant federal concerns, evident in the FWPCA, that initially prompted the Supreme Court to create the federal nuisance doctrine.[162] The purpose of applying federal nuisance law was "to fill the statutory interstices and to provide uniformity in controlling water pollution in either interstate or navigable waters of the United States."[163]

Integral to the court's ruling was its determination that the nuisance doctrine does not apply exclusively to interstate bodies of water, but also encompasses intrastate navigable waters.[164] This comports with Justice Douglas' language extending federal common law to protect "interstate *or navigable waters*."[165] Moreover, the concept of navigability has taken on new dimensions as the federal interest in navigable waters now extends beyond the commercial sense to include the purity and quality of waters.[166] The FWPCA expressly encompasses navigable, as well as interstate, waters under its protective shield.[167] Following its own directive to look to the Act for guidance in applying the federal common law of public nuisance in water pollution cases,[168] the Seventh Circuit concluded that the nuisance action should extend to protect an intrastate navigable body of water.[169]

The court noted the irrelevancy of whether the pollution affecting navigable or interstate waters originates from within a state or

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161. *Id.* at 626.
162. *Id.*
163. *Id.* at 630.
164. *Id.* at 626–30.
165. *Id.* at 626 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 99 (1972)) (emphasis added).
166. 619 F.2d 623, 626 (7th Cir. 1980). The Seventh Circuit derived the broad definition of "navigable waters" from the Supreme Court's use of the term in *Illinois v. Milwaukee* and also from the legislative history of the FWPCA and EPA regulations defining the term. *Id.* at 626–27. *See* notes 112–13 *supra.*
167. *See, e.g.*, § 101(a)(1), 33 U.S.C. § 1251(a)(1) (1976). This section states: "[I]t is the national goal that the discharge of pollutants into the *navigable waters* be eliminated by 1985; . . ." *Id.* (emphasis added).
168. *See* Illinois v. City of Milwaukee, 599 F.2d 151, 164 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). "In applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance." *Id.* Apparently, the Seventh Circuit was acting under the direction of the Supreme Court in Illinois v. City of Milwaukee, 406 U.S. 91 (1972). The Supreme Court noted that "[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision." *Id.* at 103 n.5. *Accord*, Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1013 (4th Cir. 1976) (Butzner, J., dissenting).
169. 619 F.2d 623, 629 (7th Cir. 1980).

from an extraterritorial source.[170] Interstate effect may inevitably occur,[171] but that factor cannot obscure the pervasive federal concern in protecting the quality and purity of the nation's interstate and navigable waters. The court concluded that:

> It is keeping therefore with the national program of protecting federal waters for the states to be allowed to sue one who has committed the federal tort of polluting federal waters within the state or on which the state borders. The applicable law, however, is federal and it should be uniform.[172]

The language of the Seventh Circuit indicates the desirability of uniform legal standards in water pollution cases as another goal encouraging the growth of federal common law nuisance. Several provisions of the FWPCA evidence the national policy favoring uniformity. These provisions include the section establishing national goals for eliminating pollution,[173] the section allowing for state enforcement if the state's standards comply with federal regulations,[174] the section permitting the EPA Administrator to enforce pollution limitations if a state fails to do so,[175] and the section providing that no state standard may be less stringent than the federal regulations.[176]

Not only did the court reject the position that a federal common law action requires that an interstate effect be alleged and an interstate body of water be polluted, but the Seventh Circuit also rejected the requirement that the nature of the dispute be interstate. The court asserted that "[t]here is no basis for putting a gloss on the Supreme Court holding that would restrict its application to situations in which one state complains of damages to its environment or ecology by a pollution source in another state."[177] To support this conclusion, the court developed several unique policy considerations that justify expanding the nuisance doctrine to encompass an intrastate dispute.[178] First, when pollution of interstate waters emanates from two sources, one in-state and one out-of-state, a single suit in federal court under federal common law would eliminate the poten-

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170. *Id.* at 627.
171. *Id.* at 628. In the court's own words: "Fish swim." *Id.*
172. *Id.*
173. § 101(a), 33 U.S.C. § 1251(a) (1976).
174. § 306(c), 33 U.S.C. § 1316(c) (1976).
175. § 309(a)(2), 33 U.S.C. § 1319(a)(2) (Supp. 1978).
176. § 510, 33 U.S.C. § 1370 (1976). Although not citing it, § 301(b), 33 U.S.C. § 1311(b) (Supp. 1978), providing for the promulgation of pollution guidelines also supports the court's finding of the desirability of uniform legal standards.
177. 619 F.2d 623, 629 (7th Cir. 1980).
178. *Id.* at 629–30.

tial of each polluter hiding behind the coattails of the other polluter by claiming that the other is the contributor of the most harmful effects.[179] Without the opportunity to institute a federal common law action, the affected party would be forced to file two suits — one in state court and one in federal court — which would provide fertile ground for such evasive maneuvers by the polluters. Second, a single action would promote economy of judicial administration and uniformity in result.[180] By allowing a single suit, a state could join with the federal government, as in the present case, to prevent pollution in that state. If consolidation into a single federal suit were not an option, multiple actions may end in contradictory results and require further litigation to reconcile the inconsistencies. Finally, permitting a state to sue in federal court would ensure that pollution controls would not be ignored by states eager to expand industrial development. The Seventh Circuit reasoned that "if . . . a state sues in federal court and aids in development of a comprehensive federal law of nuisance, the law can be enforced against polluters no matter where the pollution originates."[181] If a state must stand alone and develop its own strong common law of nuisance, this could lead to a mass exodus by industry to a less restrictive state and result in an unjust imbalance in the economic growth of the states.[182]

Although the plaintiff in *Illinois v. Outboard Marine Corp.* was a state and in several instances the court referred to a state's right to bring a federal common law action,[183] the court's holding could be extended to apply equally to an action filed by a private plaintiff. The Seventh Circuit accepted the limited role to be afforded states as plaintiffs, noting the Supreme Court's reliance in *Illinois v. Milwaukee* on the characterization of the state as plaintiff as only one criterion determinative of the applicability of the nuisance doctrine.[184] Additionally, two of the policy considerations raised by the Seventh Circuit in favor of federal common law actions are equally persuasive when the party instituting a federal nuisance action is a private party rather than a state. Preventing multiple pollution sources from having the opportunity to hide behind each other in multiple pollution suits in both federal and state courts, as well as providing for more efficient use of the judiciary and for more uniform court decisions, are worthwhile goals regardless of who the plaintiff

179. *Id.* at 629.
180. *Id.* at 630.
181. *Id.*
182. *Id.*
183. *Id.* at 627–29.
184. *Id.* at 626. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972).

is in the federal nuisance action. In light of the Seventh Circuit's general intent to expand the scope of the nuisance doctrine, and the court's recognition that the federal interest in preserving the quality of the nation's waters is the primary reason for the federal common law of nuisance, it would be anomalous to interpret the court's holding as limiting access to federal common law nuisance actions to states only.

IV. POTENTIAL RESTRAINTS

The recent Third and Seventh Circuit decisions clearly indicate the continuing role of the federal courts in the development of the federal common law of public nuisance. These circuits convincingly rebut the artificial barriers erected by those courts advocating a restrictive application of this federal cause of action.[185] At the present time, the Third and Seventh Circuits, "in their apparent rivalry to expand the limits of federal nuisance to the maximum permitted under *Illinois,* appear to be of the view that its reach is bounded only by the limitations on federal power under the Commerce Clause."[186] Nevertheless, several procedural and substantive restrictions exist which could impede the use of the federal common law nuisance doctrine in water pollution disputes.

A. Standing to Sue

It is beyond question that the federal courts have jurisdiction to hear federal common law public nuisance suits.[187] The question of whether a party can maintain an action in federal court, however, still must be analyzed in terms of the plaintiff's standing. Under the doctrine of parens patriae, a state is obligated to protect the health, welfare, and safety of its citizens or to prevent harm to state property.[188] When the pollution of an interstate or navigable body of water is affecting a state's citizens, whether the pollution is caused by one of the state's own citizens[189] or by a source in another state,[190] a state will have standing to sue as parens patriae. In the interstate pollution context, a state's standing to sue under a federal common law claim has been described in terms of the state's right to pro-

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185. *See, e.g.,* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976); Massachusetts v. United States Veterans Administration, 514 F.2d 119 (1st Cir. 1976); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).
186. Comment, *supra* note 129, at 10104.
187. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).
188. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4047 (1973).
189. *See* Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980).
190. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906).

tect its quasi-sovereign interest in an environment free of extra-territorial pollution effects.[191]

Private plaintiffs face a greater burden in establishing standing to sue in federal court in a federal nuisance action. To demonstrate that he has the requisite personal stake in the litigation,[192] a private plaintiff must show a concrete injury, either threatened or immediate, as a result of the defendant's alleged illegal action.[193] A private plaintiff must assert, therefore, that the pollution of the interstate or navigable water directly affects,[194] for example, his drinking water, the water he enjoys for recreational purposes, or the water in which he fishes to sustain his livelihood.[195] Additionally, the plaintiff must prove a causal relationship between the defendant's conduct and the plaintiff's alleged injury[196] or, in the alternative,[197] that the court's remedial powers would effectively redress the plaintiff's harm.[198]

Frequently in environmental litigation, the plaintiff maintaining the suit is an environmental association. It is uncontroverted that an association may have standing to vindicate whatever rights the organization itself may enjoy,[199] as well as the rights of its individual members.[200] When an organization is acting solely as a representative of its members, it must demonstrate an injury directly affecting its members, or any one of them, as opposed to an injury suffered by the public in general.[201] It is therefore necessary for the association to

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191. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).

192. *See* Baker v. Carr, 369 U.S. 186, 204 (1962), in which the court stated:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

Id. The standing requirement is derived from the case or controversy clause of art. III, § 2, cl. 1 of the Constitution.

193. Warth v. Seldin, 422 U.S. 490, 498—99 (1975); Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973).

194. *See* Warth v. Seldin, 422 U.S. 490, 508 (1975).

195. Analogous to the standing requirement mandating that the plaintiff allege an injury in fact is the need for a plaintiff in a federal common law nuisance action to demonstrate that the defendant is carrying on an activity that is causing a direct harm to a "cognizable interest" enjoyed by the complainant. *See* Illinois v. City of Milwaukee, 599 F.2d 151, 165 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). *Accord*, District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980) (plaintiff, District of Columbia, failed to demonstrate any harm to a cognizable interest resulting from the effluent discharges by a Maryland waste water treatment plant into the Rock Creek Stream, a body of water shared by both the District and Maryland). This requirement is relevant to the question of proximate causation. *Id.* at 864.

196. *See* Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

197. *See* Duke Power Co. v. Caroline Environmental Study Group, Inc., 438 U.S. 59 (1978).

198. *See* Linda R. S. v. Richard D., 410 U.S. 614 (1973).

199. *See* Warth v. Seldin, 422 U.S. 490, 511 (1975).

200. *See id.;* National Motor Freight Ass'n v. United States, 372 U.S. 246 (1963).

201. *See* Warth v. Seldin, 422 U.S. 490, 511 (1975).

satisfy the same standing requirements as an individual. To overcome this burden, the environmental organization must demonstrate that one or more of its members use or enjoy the affected water resource. In addition, the interests the organization is seeking to protect must be germane to the group's purpose and neither the claim asserted nor the type of relief sought may require the participation of individual members in the litigation.[202]

Whether a plaintiff can maintain a federal nuisance action depends on his standing to have the court decide the merits of the federal nuisance claim. A state will have minimal difficulties in establishing standing to sue, but a private party, whether an individual or an organization, may be unable to satisfy the preliminary standing requirements. Therefore, even in those circuits recognizing a private party's right to bring a federal common law action to abate water pollution, a private plaintiff still may be precluded from suing under the federal nuisance doctrine.

B. Sovereign Immunity

Another potential bar to a federal common law action initiated by private plaintiffs is the eleventh amendment.[203] Pursuant to the eleventh amendment, states are immune from suits in federal court brought by citizens of another state.[204] The immunity granted by the amendment extends to a suit in federal court by a private party against its own state.[205] Therefore, whether a private party is suing his own state to control the pollution of an intrastate body of water or suing another state to abate an interstate pollution effect, he will be barred from relief under a federal common law nuisance action by virtue of the eleventh amendment.

As an alternative course of action when a state is the defendant, a private party may bring an action in state, rather than federal, court. The eleventh amendment does not prohibit suits instituted against a state in the courts of another state.[206] If the plaintiff brings a suit in the courts of his own state or in the courts of the state where the pollution originated, he may be faced with the prospect of having the public nuisance analyzed under state common law principles.

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202. *See* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1976); Warth v. Seldin, 422 U.S. 490, 515 (1975).

203. The eleventh amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

204. *See Ex Parte* Young, 209 U.S. 123 (1908).

205. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

206. *See* Nevada v. Hall, 440 U.S. 410 (1979) (the eleventh amendment is merely a limitation on the judicial power of the United States).

This would contravene the intent of the Supreme Court in *Illinois v. Milwaukee* to apply a uniform federal nuisance standard.[207] Moreover, if the injured individual is successful in his action in the court of the polluting state, he may be confronted with the problem of having an extraterritorial injunctive decree enforced.

To avoid the immunity of the eleventh amendment, a private plaintiff may choose to bring suit in federal court against the appropriate state officer.[208] The amendment does not grant state officials immunity from federal claims when sued in their official capacities.[209] For example, a suit may be brought against the state officer or agency head charged with overseeing the operations of a waste treatment plant that discharges pollutants into an interstate or navigable body of water. Similarly, independent political subdivisions of a state also possess no immunity under the eleventh amendment.[210] When the proper nexus can be shown between a municipality and alleged water pollution, as where the pollution is emanating from a municipal waste treatment plant, the governmental entity may be sued in federal court by a private party based on a federal common law public nuisance claim. The defense of sovereign immunity, therefore, may not pose as serious a barrier as first appears.

C. *Suits in Equity*

The nature of the relief available in a federal nuisance suit may present a potential constraint to a federal common law nuisance action. The Supreme Court determined in *Illinois v. Milwaukee* that federal common law suits "will be equity suits in which the informed judgment of the chancellor will largely govern."[211] Although the relief contemplated by the Court requires federal judges to fashion a remedy by balancing the equities, the Court did not intend for the lower courts to be restricted to the traditional common law nuisance concepts when weighing the relevant factors and therefore refrained

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207. Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972).
208. *See Ex Parte* Young, 209 U.S. 123 (1908).
209. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974).
210. *See* Moor v. County of Alameda, 411 U.S. 693 (1973); County of Lincoln v. Luning, 133 U.S. 529 (1890).
211. 406 U.S. 91, 108 (1972). *But see* City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979). In *Evansville*, the Seventh Circuit ruled that the plaintiffs had adequately stated a federal common law nuisance claim for monetary damages. For a discussion of the case, see Comment, *Seventh Circuit Interprets Federal Common Law of Nuisance to Authorize Municipalities to Sue for Damages*, 9 ENVTL L. REP. (ELI) 10168 (1979).

from any discussion of the specific elements of the tort of nuisance.[212] On the contrary, a case-by-case approach was advocated, because "[t]here are no fixed rules that govern,"[213] and "the applicable federal common law depends upon the facts peculiar to the particular case."[214]

In light of the equitable nature of such suits, the courts must balance the relative harm a defendant will suffer in relation to the benefits bestowed upon a plaintiff if successful in his action.[215] A defendant's conduct pursuant to the applicable statutory and regulatory requirements, his value to the community, and the economic impact upon the polluter to further abate the pollution are all examples of the factors to be considered by the courts. When weighed against the potential benefits to a plaintiff, especially if the harm only affects a private party, the court may be persuaded to decide in favor of the defendant after reviewing all the circumstances.

The plaintiff in a federal common law nuisance action may be faced with substantial evidentiary burdens. He must establish the existence of the public nuisance and its adverse effects on a cognizable interest he enjoys.[216] In addition, the complainant must demonstrate that he is entitled to the relief sought and that the relief is an appropriate means to remedy the pollution effects.[217] The decision of the Seventh Circuit in *Illinois v. City of Milwaukee II*[218] suggested that proving the existence of an actual nuisance may be demonstrated with relative ease by showing the harmful effects of the pollution.[219] Nevertheless, a more difficult task may be establishing, under the balancing of the equities, that a specific remedy would be

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212. 406 U.S. 91, 106 (1972). It is worth noting that nowhere in its opinion did the Supreme Court instruct the federal courts to define the substantive elements of public nuisance in accord with state common law public nuisance requirements or the principles enunciated in the Restatement (Second) of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 821B (1979). For a case discussing the state public nuisance requirements in Maryland, see Adams v. Commissioners of Town of Trappe, 204 Md. 165, 102 A.2d 830 (1954).

213. 406 U.S. 91, 107 (1972).

214. *Id.* at 106.

215. *See, e.g.*, Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980); Renken v. Harvey Aluminum, Inc., 226 F. Supp. 169 (D. Or. 1963). *See generally* R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 244—47 (1978); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2942 (1973). While the determination of whether to issue an injunction generally involves a balancing of the equities, the balance is of less importance when the plaintiff is a sovereign entity. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907). When the pollution is endangering the public health, injunctive relief is proper without resorting to any balancing analysis. *See* Illinois v. City of Milwaukee, 599 F.2d 151, 166 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980); Harrison v. Indiana Auto Shredder Co., 528 F.2d 1107, 1122—23 (7th Cir. 1976).

216. Georgia v. Tennessee Copper Co., 206 U.S. 230, 238—39 (1907); Illinois v. City of Milwaukee, 599 F.2d 151, 165, 167—69 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980).

217. Illinois v. City of Milwaukee, 599 F.2d 151, 165—67, 169—77 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980).

218. 599 F.2d 151 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). See note 6 *supra*.

219. *Id.* at 167—69.

appropriate. As in *Illinois v. City of Milwaukee II,* the effect of a remedy requiring invocation of more stringent effluent limitations than those currently in force presented the plaintiffs with an evidentiary burden they were unable to sustain.[220]

D. Preemption

Perhaps the most significant restraint to the federal common law of nuisance is the possibility that it may be preempted by federal legislative or administrative action. The Supreme Court in *Illinois v. Milwaukee* recognized the potential effect of such governmental action.[221] Until preemption comes to pass, however, the Court emphasized the need for a federal nuisance action as an alternative source of relief and established in the federal courts the power to appraise the equities of suits alleging the creation of a public nuisance by water pollution.[222]

The Supreme Court adopted a narrow view towards the general preemptive effect of the pervasive legislation existing in the area of water pollution. This is clear from the Court's creation of the federal common law nuisance action. Further evidence of the Court's view is found in its justifications for fashioning federal common law.[223] The Court intended to fill statutory interstices in the existing legislative scheme and to provide a viable remedy when the relief sought is not within the scope of existing statutory remedies.

Not only does the federal legislation, the FWPCA in particular, fail to preempt federal common law nuisance actions, but in fact it provides for such a means of relief from water pollution. The argument proffered by Judge Butzner in his *Jones Falls* dissent,[224] that federal common law relief was retained explicitly under the language of the savings clause to the citizen suit provisions of the FWPCA,[225] emphasizes this point. The savings clause preserves a person's right to relief under common law remedies. Nothing in the legislative history of the FWPCA reveals that Congress intended to limit the term "common law" in this provision to state common law or to exclude federal common law remedies.

Although on its face the FWPCA has not preempted federal common law nuisance actions, it is crucial to determine whether compliance with the Act's statutory requirements and administrative

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220. *Id.* at 169—77.

221. 406 U.S. 91, 107 (1972). Since the initial printing of this comment, the Supreme Court has directly addressed the issue of preemption. *See* [1981] 49 U.S.L.W. 4445 (1980); note 245 *infra.*

222. 406 U.S. 91, 107 (1972).

223. *See* text accompanying notes 66—77 *supra.*

224. Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1012—13 (4th Cir. 1976) (Butzner, J., dissenting) (see text accompanying notes 108—10 *supra*); *accord,* Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979), *cert. granted,* 100 S. Ct. 1310 (1980).

225. § 505(e), 33 U.S.C. § 1365(e) (1976); *see* note 108 *supra.*

regulations preempts a federal common law action. In *Jones Falls*, the Fourth Circuit determined that it would be an anomaly to find that the activities complained of in the suit, condoned under the FWPCA's permit system,[226] could be challenged by a federal common law nuisance claim.[227] Because the federal nuisance action was created to fill statutory interstices when the legislation proved inadequate to resolve a water pollution controversy, compliance with the requirements of the FWPCA eliminates the need for judicial lawmaking. To hold otherwise would be an affront to the decision-making powers of the legislative branch protected by the separation of powers doctrine. Moreover, it would be contradictory to allow a plaintiff to challenge pollution that had been statutorily condoned.

The preemption issue may be avoided when a state is seeking to abate the pollution of an interstate or navigable body of water caused by a source totally within its own borders. A policy of the FWPCA is to recognize, preserve, and protect the primary responsibilities of the states in controlling and abating water pollution.[228] To effectuate this policy, the Act provides that the EPA may grant a state the authority to administer its own permit program under the National Pollutant Discharge Elimination System (NPDES)[229] and to regulate the pollution discharges of sources within its own jurisdiction. Moreover, a state may promulgate stricter water quality standards than those currently in force or stricter effluent limitations than those promulgated by the EPA.[230] Pursuant to these provisions, a state may be able to control the polluting effects of an in-state source without resorting to a federal common law nuisance action.

If a state has opted not to become a NPDES state, the preemption issue may become relevant. In non-NPDES states, the EPA is empowered to issue the requisite discharge permits[231] and to directly enforce effluent limitations for sources within the state.[232] An in-

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226. § 402(a), 33 U.S.C. § 1342(a) (1976 & Supp. 1978).
227. 539 F.2d 1006, 1009 (4th Cir. 1976).
228. § 101(b), 33 U.S.C. § 1251(b) (Supp. 1978); *see* note 101 *supra*.
229. Pursuant to § 402(a) of the FWPCA Amendments of 1972, 33 U.S.C. § 1342(a) (1976 & Supp. 1978), a National Pollutant Discharge Elimination System (NPDES) was established. The program requires the EPA Administrator to issue permits to polluting sources that allow these sources to discharge pollutants provided that the discharges will meet other necessary requirements prescribed by the Act. Section 402(b), 33 U.S.C. § 1342(b) (1976 & Supp. 1978), of the Act provides for state participation in the NPDES program and allows the states to administer their own permit program for regulating pollution discharges into navigable waters in their own jurisdiction. The state program must be approved by the EPA Administrator before being put into operation. *See generally* W. RODGERS, ENVIRONMENTAL LAW 451—62 (1977).
230. A state may choose to promulgate stricter standards or limitations pursuant to its authority under § 510, 33 U.S.C. § 1370 (1976) and § 303, 33 U.S.C. § 1313 (1976).
231. § 402(a), 33 U.S.C. § 1342(a) (1976 & Supp. 1978).
232. § 301(b), 33 U.S.C. § 1311(b) (1976 & Supp. 1978).

state polluting source that is complying with the applicable federal standards and discharging pollutants pursuant to an EPA-issued permit can assert that it is acting under color of federal statutory law that preempts federal common law actions. It is arguable that the only option available to alleviate pollution in this situation is for the state, acting pursuant to authority established by the Act,[233] to promulgate stricter pollution standards than those imposed by the EPA. A state may, nevertheless, choose to seek relief in federal court by instituting a federal common law public nuisance action. The state could invoke the savings clause of the citizen suit provision of the FWPCA,[234] claiming that the other means of relief available to it are provided by federal common law. Looking to the FWPCA for guidance in formulating a remedy under the federal nuisance doctrine, the plaintiff could seek to have more stringent standards imposed in light of the policy of the Act in general[235] and a state's power to do so as provided by the statute.[236]

The argument that the FWPCA preempts a federal common law nuisance action is convincing when a state attempts to abate the extraterritorial pollution effects caused by interstate water pollution. The primary scheme of the FWPCA requires all dischargers to comply with uniform technology-based effluent limitations.[237] To supplement water pollution control efforts, the Act establishes a procedure under which existing state water quality standards applicable to intrastate and interstate waters within a state's boundaries are to be maintained.[238] In addition, a state is required to "identify those waters within its boundaries for which the effluent limitations [promulgated pursuant to the Act] are not stringent enough to implement any water quality standard applicable to such waters."[239] To protect these designated waters, a state must establish the "total maximum daily load"[240] for the discharge of particular pollutants as specified by the EPA.[241] An inevitable result of these statutory provisions and the section of the FWPCA authorizing a state to adopt standards or limitations stricter than those prescribed under the Act,[242] is that some states will impose more stringent pollution con-

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233. § 510, 33 U.S.C. § 1370 (1976); § 303, 33 U.S.C. § 1313 (1976).
234. § 505(e), 33 U.S.C. § 1365(e) (1976); *see* note 108 *supra*.
235. § 101(a), 33 U.S.C. § 1251(a) (1976).
236. § 510, 33 U.S.C. § 1370 (1976); § 303, 33 U.S.C. § 1313 (1976).
237. § 301(b), 33 U.S.C. § 1311(b) (1976 & Supp. 1978).
238. § 303(a)—(b), 33 U.S.C. § 1313(a)—(b) (1976).
239. § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A) (1976).
240. § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (1976).
241. § 304(a)(2), 33 U.S.C. § 1314(a)(2) (1976).
242. § 510, 33 U.S.C. § 1370 (1976).

trol requirements than other states. One problem created by this imbalance is that pollution emanating from a source within a more lenient state will be carried by interstate waters into a more restrictive state and violate the higher water quality standards imposed by the more pollution control minded state. The state with stricter water quality standards may attempt to impose total maximum daily loads upon sources located in the more lenient state. Although the Act does not specifically prohibit this action,[243] a state's attempt to impose more stringent standards upon sources outside its jurisdiction would require an illegal extension of a state's police powers to another state and would raise serious issues of state sovereignty. In asserting its immunity to a federal nuisance action, the polluting source may claim that it is discharging pursuant to a properly issued permit, complying with the applicable effluent limitations, and is not violating any water quality standards of the state in which it is located.

The United States Court of Appeals for the Seventh Circuit, however, has refused to foreclose a state with more stringent pollution controls from seeking federal common law relief from the interstate effects of water pollution emanating from a state with less restrictive standards. In *Illinois v. City of Milwaukee II*,[244] the Seventh Circuit ruled that the FWPCA neither preempts federal common law nor limits the relief available in a federal nuisance action.[245] The court noted that the FWPCA authorizes a state to establish more stringent effluent limitations than those imposed under

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243. *See* § 303(d), 33 U.S.C. § 1313(d) (1976).

244. 599 F.2d 151 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). The opinion of the Seventh Circuit represents the latest decision in the litigation that began with Illinois v. City of Milwaukee, 406 U.S. 91 (1972). *See* Illinois v. City of Milwaukee, 5 ENVIR. REP. (BNA) (Envir. Rep. Cases) 2018 (N.D. Ill. 1978); Illinois v. City of Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973). See note 6 *supra*.

245. 599 F.2d 151, 162—63 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). Subsequent to the initial printing of this comment, the Supreme Court reviewed and reversed the decision of the Seventh Circuit. City of Milwaukee v. Illinois, [1981] 49 U.S.L.W. 4445 (1981). The Court held that, since *Illinois v. Milwaukee* was decided, Congress has thoroughly addressed this particular area of national concern — the control and prevention of water pollution — and has thereby eliminated the need for lawmaking by the federal courts. Congress' establishment of a comprehensive statutory scheme and regulatory program through the enactment of the 1972 amendments to the FWPCA "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 4449. Therefore, Illinois' right to a federal common law remedy was preempted by the passage of these amendments.

Analyzing the specific claims involved in the case, the Court first noted that the petitioners were discharging treated sewage pursuant to duly issued permits that incorporated the EPA-established effluent limitations. *Id.* The Court concluded from these facts that the problem of effluent limitations had been thoroughly addressed through the regulatory program established by Congress. Therefore, the federal courts lack the "authority to impose more stringent limitations under federal common law than those imposed by the

agency charged by Congress with administering this comprehensive scheme." *Id.* Similarly, sewer overflow points are regulated by the permit process and controlled by expert state and federal administrative agencies. *Id.* at 4450. The detailed outline for controlling the petitioners' sewer overflow points, which was delineated in the permits issued to the petitioners, clearly indicated to the Court that the overflow problem had been addressed. Moreover, when the petitioners violated their permits with respect to the conditions placed upon their sewer overflows, the responsible state agency brought an enforcement action against them. All these factors indicated that there was no statutory interstice to be filled by federal common law.

Invocation of federal common law by the lower federal courts was particularly inappropriate, the Court concluded, in an area as complex as water pollution control. *Id.* at 4451. Difficult technical issues make this area unsuited for the "sporadic" and "ad hoc" approach to water pollution control that would result from utilization of federal common law.

The Court also determined that, in the 1972 amendments, Congress provided a state whose waters may be adversely affected by the issuance of a permit in a neighboring state ample opportunity to seek redress. *Id.* When *Illinois v. Milwaukee* was decided, no forum existed in which Illinois could protect its interests unless federal common law was available. The administrative process created pursuant to the FWPCA now provides a state whose waters may be affected by the issuance of a permit the opportunity to participate in agency hearings regarding the granting of the permit. *See* § 402(b)(3), (b)(5), (d)(2)(A) & (d)(4), 33 U.S.C. § 1342(b)(3), (b)(5), (d)(2)(A) & (d)(4) (1976 & Supp. 1978). In view of the statutory scheme of relief, the Court concluded that it would be inconsistent with this scheme if federal courts could " 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them." 49 U.S.L.W. at 4451.

The Court rejected the respondents' argument that several provisions of the FWPCA express a congressional intent to preserve the federal common law remedy recognized in *Illinois v. Milwaukee*. *Id.* Section 510, 33 U.S.C. § 1370 (1976), provides that states can implement and enforce more stringent limitations than those adopted under the Act. Although the Court recognized that under § 510 state agencies, or even state courts through state nuisance law, have the authority to establish more stringent controls and to apply them to in-state pollution sources, the Court refused to find that this authority may be exercised through federal common law actions to establish stringent limitations applicable to out-of-state pollution sources. 49 U.S.L.W. at 4451—52. Standards set under federal common law are federal standards, and thus the authority of states to impose more stringent limitations under § 510 is irrelevant. *Id.* at 4452. The Court also rejected the view that § 505(e), 33 U.S.C. § 1365(e) (1976), the savings clause to the citizen suit provision, is to be broadly interpreted. Instead, the language of § 505(e) that "this section shall not restrict any right which any person (or class of persons) may have under . . . common law . . . to seek any other relief" was interpreted narrowly by the Court to mean only that nothing in the citizen suit provision should be read as precluding other remedies. Additionally, the Court was reluctant to read the reference in this section to "common law" as encompassing federal as well as state common law. Finally, in reviewing the legislative history of the FWPCA, the Court found no expression of congressional intent in support of the continued validity of federal common law. 49 U.S.L.W. at 4452—53.

Justice Blackmun, together with Justices Marshall and Stevens, dissented. The dissent refused to accept the view that Congress, in passing the 1972 FWPCA amendments, intended to cause an "automatic displacement" of the federal common law cause of action. *Id.* at 4453. Such a view fails to comprehend the unique role federal common law plays in resolving interstate disputes, and it ignores the Court's "frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies." *Id.* The majority's opinion also undermines the intent of the Court, as expressed in *Illinois v. Milwaukee*, to promote a more unified federal approach to alleviating the problems of interstate pollution. *Id.* at 4458. By eliminating the federal common law of nuisance, the Court is encouraging states to rely more on their own statutory and common law for assistance in filling the gaps in the federal scheme.

As a result of the Supreme Court's ruling in *City of Milwaukee v. Illinois*, it is apparent that a state seeking relief from interstate water pollution caused by an out-of-state source that is complying with the statutory and regulatory requirements is foreclosed from relief under the federal common law of public nuisance.

the Act itself.[246] The Seventh Circuit also discussed the statutory provision that warns against construing the Act in a manner that would limit the authority of any federal "officer or agency . . . under any other law . . . not inconsistent with [the] Act."[247] Interpreting this statutory language as encompassing the authority of the federal courts, the court concluded that, when read together with the provision authorizing the states to promulgate stricter standards, this provision clearly indicates that Congress did not intend to preempt the federal common law of nuisance.[248] Additionally, the Seventh Circuit agreed with the dissent in *Jones Falls* on the relevancy of the savings clause of the FWPCA citizen suit provision.[249] According to both opinions, that provision preserves a party's right to relief under existing state and federal common law remedies.[250]

After summarily rejecting the contention that compliance with the Act preempted a federal common law action,[251] the court dismissed the argument that the requirements prescribed by the FWPCA constitute a ceiling on the relief available in a federal nuisance action.[252] The court, however, did not ignore the statute in formulating an appropriate remedy. Rather than viewing the Act as constituting the ceiling on relief, the court concluded that the underlying policies and principles of the Act are relevant in determining the appropriate form of relief.[253] The minimum treatment standards imposed under the Act, therefore, are the appropriate starting point

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246. 599 F.2d 151, 162 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). The court was referring to § 510, 33 U.S.C. § 1370 (1976).
247. 599 F.2d 151, 162 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980) (quoting FWPCA § 311(a), 33 U.S.C. § 1371(a) (1976)).
248. 599 F.2d 151, 162 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980).
249. *Id.* at 163. *See* text accompanying notes 108—10 *supra*.
250. 599 F.2d 151, 163 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980); Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1013 (4th Cir. 1976) (Butzner, J., dissenting).
251. 599 F.2d 151, 163 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980) "We reject defendants' contention that compliance with a discharge permit issued under the Act is a defense in an action based on the federal common law of nuisance." *Id. But see* New England Legal Foundation v. Costle, 475 F. Supp. 425 (D. Conn. 1979) (compliance defense successfully raised in a federal common law nuisance action alleging interstate air pollution).
252. 599 F.2d 151, 163—64 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980).
253. *Id.* at 164. As the court stated:

> The conclusion that the Federal Water Pollution Control Act, as amended, does not preempt the federal common law of nuisance or limit the relief available in this case does not render the Act irrelevant. A statute that does not by its terms govern the case before a court may contain indications of the legislature's judgment on relevant issues of policy or provide an appropriate principle for decision of the case. In applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance.

Id.

from which to develop more stringent control levels when necessary. As the court stated in *Illinois v. City of Milwaukee II,*

> [If] requirements more stringent than those imposed [under the Act] are necessary to protect Illinois residents from the harm caused or threatened by the defendants' sewage discharges, plaintiffs are entitled to have the more stringent requirements imposed. We can think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests.[254]

The position of the Seventh Circuit that the more stringent standards be considered echoes the Supreme Court's statement in *Illinois v. Milwaukee* that "a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."[255] The Seventh Circuit's decision indicates that, in the interstate pollution context, a federal common law nuisance action may be the only federal relief available for protecting the higher standards of a more pollution control minded state. Additionally, accepting a less stringent standard of water pollution control makes little sense in view of the national interest in improving the overall quality of the nation's environment.

One final consideration deserves mention in a discussion of the ramifications of preemption. The federal courts' ability to formulate remedies under the federal common law of public nuisance could be severely restrained through amendments to the FWPCA. Explicit statutory language could limit the term "common law" in the citizen suit provision to state common law relief, specifically excluding federal common law remedies. Congress could validate the compliance defense by stating that compliance with EPA promulgated effluent limitations or stricter state standards incorporated into a discharge permit, fulfills a party's obligations and insulates a potential defendant from a federal nuisance action. On a broader scale, Congress could declare that the FWPCA and agency promulgated regulations constitute the definitive boundaries for controlling water pollution to the exclusion of any other means of relief for a party seeking to abate the pollution of an interstate or navigable body of water.

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254. *Id.* at 165.
255. 406 U.S. 91, 107 (1972).

V. CONCLUSION

The federal common law of public nuisance has developed substantially since 1972. It has become well entrenched as a means available to the federal judiciary for protecting the nation's interstate and navigable waters from the deleterious effects of pollution. Application of the federal common law of nuisance provides one innovative way for the federal courts to actively participate in environmental protection and to assure that the policies of the extensive federal legislative scheme designed to protect this country's water resources are effectuated. Over the years, the ambiguities inherent in the Supreme Court's *Illinois v. Milwaukee* opinion have been utilized by some courts to justify extending the application of the federal nuisance doctrine. The policy that has emerged as the predominant justification for fashioning this specialized federal common law is the overriding federal interest in controlling and abating the pollution of the nation's waterways. As some courts have recognized, this goal cannot be achieved by restricting application of the federal nuisance law exclusively to actions brought by states or other governmental entities or to actions brought to preserve the quality of interstate, rather than intrastate, waters.

Several well-reasoned decisions support the expansion of the federal common law nuisance principles.[256] These cases have considered more carefully the intent of the Supreme Court in fashioning the federal nuisance doctrine than those courts advocating a more restrictive approach. In light of the developments of the federal nuisance doctrine and the widespread public concern for environmental protection,[257] courts confronted with a water pollution action containing a federal nuisance claim must evaluate their position regarding the application of the federal common law of public nuisance with an eye toward continual expansion of the nuisance doctrine. Because federal nuisance actions are equity suits and thus require a balancing of all elements before the requisite relief can be determined, all relevant circumstances would have to be considered in fashioning the appropriate remedy. In addition, plaintiffs instituting a federal nuisance claim must still face other potential restraints — the standing requirement, the doctrine of sovereign immunity, and the preemp-

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256. *See* Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980) (see text accompanying notes 155—84 *supra*); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), *cert. granted*, 101 S. Ct. 314 (1980) (see text accompanying notes 132—54 *supra*); United States v. Solvents Recovery Serv., 14 ENVIR. REP. (BNA) (Envir. Rep. Cases) 2010 (D. Conn. 1980).

257. In a recent survey conducted by the Council on Environmental Quality (CEQ), the CEQ found that an overwhelming majority of Americans were concerned with the quality of the environment and supported continued governmental efforts toward cleaning-up and preserving the environment. COUNCIL ON ENVIRONMENTAL QUALITY, PUBLIC OPINION ON ENVIRONMENTAL ISSUES (1980).

tive effect of the FWPCA or other federal pollution control legislation — that may threaten the success of a federal common law nuisance action.

The federal common law of public nuisance has been extended into other areas of environmental concern, including air[258] and groundwater pollution.[259] Federal nuisance law may also be a viable source of relief in the campaign against abandoned hazardous waste dumps that threaten to contaminate surface and groundwater.[260] In view of the controversy among the federal courts of appeals as to the appropriateness of expanding this doctrine, further guidance from the Supreme Court regarding the bounds of the federal nuisance law is necessary. Protection of our environment from further degradation dictates that such guidance must encourage expansive application of the federal common law of public nuisance in litigation involving water pollution as well as in actions involving threats to other environmental resources.

Craig E. R. Jakubowics

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258. *See* New England Legal Foundation v. Costle, 475 F. Supp. 425 (D. Conn. 1979).
259. *See* United States v. Solvents Recovery Serv., 14 ENVIR. REP. (BNA) (Envir. Rep. Cases) 2010 (D. Conn. 1980).
260. Comment, *supra* note 129, at 10105.