

1981

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Recommended Citation

William F. Haigney, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?*, 49 Fordham L. Rev. 500 (1981).

Available at: <https://ir.lawnet.fordham.edu/flr/vol49/iss4/11>

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NOTES

FEDERAL COMMON LAW AND WATER POLLUTION: STATUTORY PREEMPTION OR PRESERVATION?

INTRODUCTION

Pollution of the nation's water has become an increasing concern for government, industry, and the public.¹ Although the primary efforts at halting water pollution have been legislative,² courts also have been requested to resolve this environmental problem.³ In *Illinois v. City of Milwaukee*,⁴ the Supreme Court reaffirmed the well-established right of a state to assert a federal common law nuisance action for interstate water pollution.⁵ More importantly, the Court

1. Environmental Law Institute, *Federal Environmental Law 2* (1974); A Reitze, *1 Environmental Law 4-2* (1972); Jackson, *Foreword: Environmental Quality, The Courts, and The Congress*, 68 Mich. L. Rev. 1073, 1073-74 (1970); *Introduction to 1 Harv. Env'tl L. Rev.* at xvii-xviii (1976). "Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us." 118 Cong. Rec. 33692 (1972), reprinted in 1 Environmental Policy Division of the Cong. Research Serv., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 161 (1973) [hereinafter cited as *Legislative History*] (remarks of Sen. Muskie).

2. *E.g.*, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1976 & Supp. III 1979); Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1976); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1976 & Supp. III 1979); The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976 & Supp. III 1979).

3. *E.g.*, *Vermont v. New York*, 417 U.S. 270 (1974); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3043 (U.S. July 28, 1980) (No. 80-126); *United States v. Solvents Recovery Serv.*, 14 *Envir. Rep. Cases* (BNA) 2010 (D. Conn. 1980). The role of the judiciary in environmental disputes is largely confined to review of administrative decisions and statutory interpretation. *E.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). The federal common law of nuisance provides the most innovative exception. Comment, *Federal Common Law of Nuisance Reaches New High Water Mark as Supreme Court Considers Illinois v. Milwaukee II*, 2 *Env'tl L. Rep.* (ELI) 10101, 10101 (1980) [hereinafter cited as *High Water Mark*]; Note, *Federal Common Law and Interstate Pollution*, 85 *Harv. L. Rev.* 1439, 1439 (1972) [hereinafter cited as *Interstate Pollution*].

4. 406 U.S. 91 (1972).

5. *Id.* at 104-08; see *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901).

held that federal common law⁶ provides a jurisdictional basis for suing in federal district court.⁷

Some federal courts, however, interpreted the *Illinois* decision as a mandate from the Court to fashion a federal nuisance action applicable to all parties⁸ and all bodies of water.⁹ These extensions of

6. "Federal common law" has been defined as "[a] concept intriguing to legal theorists. Strictly speaking, [it is] a nonentity." Ballentine's Law Dictionary 461 (3d ed. 1969). In fact, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), held that "[t]here is no federal general common law". *Id.* at 78. There is, however, a body of "specialized federal common law." Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). Specialized federal common law develops only when "there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Illinois v. City of Milwaukee*, 406 U.S. at 105 n.6. See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System* 756-832 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]; C. Wright, *Handbook of the Law of Federal Courts* § 60 (3d ed. 1976); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024 (1967); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975); Note, *Choice of Law in Federal Bail Bond Contracts: Protecting Principles of Federalism*, 49 Fordham L. Rev. 133 (1980) [hereinafter cited as *Choice of Law*]; Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512 (1969) [hereinafter cited as *Federal Common Law*]; Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv. L. Rev. 1084 (1964) [hereinafter cited as *Competence of Federal Courts*]; Note, *Rules of Decision in Non-diversity Suits*, 69 Yale L.J. 1428 (1960) [hereinafter cited as *Rules of Decision*].

7. 406 U.S. at 100. The *Illinois* decision has prompted extensive commentary. E.g., Campbell, *Illinois v. City of Milwaukee: Federal Question Jurisdiction Through Federal Common Law*, 3 *Env'tl L.* 267 (1973); Comment, *Federal Common Law and the Environment: Illinois v. Milwaukee*, 2 *Env'tl L. Rep.* (ELI) 10168 (1972) [hereinafter cited as *Environment*]; Comment, *The Expansion of Federal Common Law and Federal Question Jurisdiction to Interstate Pollution*, 10 *Hous. L. Rev.* 121 (1972); Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 *Fordham Urb. L.J.* 549 (1977) [hereinafter cited as *Federal Common Law Remedies*]; 15 *B.C. Indus. & Com. L. Rev.* 795 (1974); 14 *B.C. Indus. & Com. L. Rev.* 767 (1973); 49 *Den. L.J.* 609 (1973); 77 *Dick. L. Rev.* 451 (1972); 52 *Neb. L. Rev.* 301 (1973); 7 *Suffolk U.L. Rev.* 790 (1973); 13 *Wake Forest L. Rev.* 246 (1977); 34 *Wash. & Lee L. Rev.* 590 (1977); 1972 *Wis. L. Rev.* 597.

8. *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1233-34 (3d Cir.) (private parties), *cert. granted sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12); *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979) (municipality), *cert. denied*, 444 U.S. 1025 (1980); *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1039 (7th Cir. 1975) (state agency); *Byram River v. Village of Port Chester*, 394 F. Supp. 618, 622 (S.D.N.Y. 1975) (river itself). Many courts have expanded the federal nuisance action to encompass the federal government. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 120 (D. Vt.), *aff'd mem.*, 487 F.2d 1393 (2d Cir.), *cert. denied*, 417 U.S. 976 (1973); *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973). Other

Illinois have occurred despite the passage of comprehensive federal water pollution legislation.¹⁰ Resort to the vagaries of "[p]oor old nuisance"¹¹ to control water pollution is especially disconcerting be-

courts, however, have indicated that the federal nuisance action is restricted to states. *Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 216 n.2 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971); *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1213 (D.N.J. 1978); *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd mem. sub nom.* *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 375 F. Supp. 1148, 1153 (D. Md. 1974), *aff'd*, 539 F.2d 1006 (4th Cir. 1976); *United States v. Lindsay*, 357 F. Supp. 784, 794 (E.D.N.Y. 1973).

9. *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 630 (7th Cir.) (all waters of United States), *petition for cert. filed*, 49 U.S.L.W. 3043 (U.S. July 28, 1980) (No. 80-126); *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1040 (7th Cir. 1975) (federal common law may extend "to all of our navigable waters"); *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973) (denied motion to dismiss federal common law claim based on intrastate water pollution). Most courts have restricted the federal nuisance action to interstate waters. *Ancarrow v. City of Richmond*, 600 F.2d 443, 445 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979); *Massachusetts v. United States Veterans Adm'n*, 541 F.2d 119, 123 (1st Cir. 1976); *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1010 (4th Cir. 1976); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 520-21 (8th Cir. 1975), *modified and remanded on other grounds*, 529 F.2d 181 (8th Cir. 1976); *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd mem. sub nom.* *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977).

10. The primary legislation governing water pollution is the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1976 & Supp. III). Originally enacted in 1949, the FWPCA has been amended seven times between 1956 and 1977. Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-890, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91; Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816; Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. To avoid confusion, this Note will refer to the present statute as the Clean Water Act (CWA).

11. Wright, *The Federal Courts and The Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 331 (1967). The law of nuisance has been aptly described as "perhaps [the most] . . . impenetrable jungle in the entire law." W. Prosser, *Handbook of the Law of Torts* § 86, at 571 (4th ed. 1971). Its application to modern environmental problems has been questioned. Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality Part I: State Pollution Control Programs*, 52 Iowa L. Rev. 186, 197 (1966); Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 Duke L.J. 1126, 1130-37; Schuck, *Air Pollution as a Private Nuisance*, 3 Nat. Resources Law. 475, 484-86 (1970); *Interstate Pollution*, *supra* note 3, at 1451-53; Note, *Environmental Law—The Nuances of Nuisance in a Private Action to Control Air Pollution*, 80 W. Va. L. Rev. 48, 81-85 (1977) [hereinafter cited as *Nuances of Nuisance*].

cause it was in response to the inadequacies of the common law that federal regulatory schemes were enacted.¹²

The *Illinois* litigation is again before the Supreme Court.¹³ The primary question on appeal is whether the Clean Water Act of 1972 (CWA) preempts the federal common law of nuisance.¹⁴ This Note contends that the CWA has, in certain situations, supplanted the federal common law in controlling pollution of our nation's water supply. The federal common law of nuisance, however, remains a vehicle for protecting our federal structure of government by providing an impartial means of adjudicating states' rights in interstate water resources.

I. BACKGROUND: HISTORY OF WATER POLLUTION CONTROL

Historically, the primary mechanism for controlling water pollution was the common law of nuisance.¹⁵ The case-by-case approach of common law, however, proved inadequate to deal with the modern pollution problems of our highly industrial society.¹⁶ In response to the *ad hoc* methodology of nuisance law¹⁷ and the increasing environ-

12. F. Grad, *Treatise on Environmental Law* § 3.03 (1977); Wright, *supra* note 11, at 331; see Environmental Law Institute, *supra* note 1, at 3-17. Hines, *supra* note 11, at 201-04.

13. *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *cert. granted*, 445 U.S. 926 (1980) (No. 79-408). On remand from the Supreme Court's original decision, the district court granted Illinois' request for an injunction. *Illinois v. City of Milwaukee*, 8 Env't'l L. Rep. (ELI) 20503 (N.D. Ill. 1978). The Seventh Circuit affirmed. *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979). The City of Milwaukee petitioned for certiorari, and it was granted. *City of Milwaukee v. Illinois* 445 U.S. 926 (1980) (No. 79-408).

14. *City of Milwaukee v. Illinois*, 48 U.S.L.W. 3279 (U.S. Sept. 11, 1979) (No. 79-408) (news summary of questions presented), *cert. granted*, 445 U.S. 926 (1980). The Supreme Court has decided to hear an appeal in another case presenting a similar question. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12). The question presented is whether a federal common law nuisance action for damages sustained from water pollution, if ever available to a private citizen, is preempted by the CWA. *Id.* at 314-15.

15. McRae, *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27, 37 (1948). Early nuisance cases involved diversion of water. *Id.* The nuisance action, however, was soon extended to conduct "infecting and corrupting" air and water. *William Aldred's Case*, 77 Eng. Rep. 816, 821 (K.B. 1611). Since *William Aldred's Case*, nuisance has been widely used in environmental litigation. Cartwright, *Handling of Air and Water Pollution Cases by the Plaintiff*, 9 Forum 639, 642-43 (1974).

16. Zener, *The Federal Law of Water Pollution Control*, in *Federal Environmental Law* 682, 789 (1974); Jackson, *supra* note 1, at 1076. Wright, *supra* note 11, at 331; Comment, *Equity and the Eco-system: Can Injunctions Clean the Air?*, 65 Mich. L. Rev. 1254, 1254-55 (1970); *Interstate Pollution*, *supra* note 3, at 1451-53.

17. See note 12 *supra* and accompanying text.

mental concerns of the nation,¹⁸ Congress, in 1949, enacted the Federal Water Pollution Control Act (FWPCA).¹⁹ Nevertheless, the FWPCA, although repeatedly amended,²⁰ remained an insufficient response to the nation's growing water pollution problem.²¹

Relying on a decentralized approach to water pollution control, the FWPCA entrusted the primary regulatory apparatus to the states.²² State decision-making, however, engendered a parochial approach to controlling pollution. Strong business pressures often forced states to set low water quality standards rather than lose important industries to states with more lenient environmental regulations.²³ Additionally,

18. 94 Cong. Rec. 8196 (1948) (statement of Sen. Mundt).

19. Act of June 30, 1948, Pub. L. No. 80-793, 62 Stat. 1154 (current version at 33 U.S.C. §§ 1251-1376 (1976 & Supp. I)). Although there had been previous federal statutes applicable to water pollution, they were limited to scope. *See, e.g.*, River and Harbor Appropriations Act of 1899, 33 U.S.C. § 407 (1976); Act of Aug. 21, 1916, 43 U.S.C. § 362 (1976); Oil Pollution Act, ch. 316, 43 Stat. 604 (1924) (repealed 1970).

20. *See* note 10 *supra*.

21. S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3674, reprinted in 2 Legislative History, *supra* note 1, at 1425; Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 Mich. L. Rev. 1103, 1105 (1970); Ipsen & Raisch, *Enforcement Under the Federal Water Pollution Control Act Amendments of 1972*, 9 Land & Water L. Rev. 369, 372 (1974); Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 14 B.C. Ind. & Com. L. Rev. 672, 674-77 (1973) [hereinafter cited as *Amendments*]. The FWPCA was so insufficient that federal authorities resorted to the Refuse Act of 1899, 33 U.S.C. §§ 401-415 (1976), as a means of controlling pollution. Ipsen & Raisch, *supra*, at 372; Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 766-69 (1971). The effectiveness of the Refuse Act, however, was seriously undermined soon after its resurrection. *See* *United States v. Pennsylvania Indus. Chem. Corp.*, 461 F.2d 468, 475-76 (3d Cir. 1972) (polluter cannot be convicted under Refuse Act for discharging without a permit), *modified on other grounds*, 411 U.S. 655 (1973); *Kalur v. Resor*, 335 F. Supp. 1, 11-12 (D.D.C. 1971) (federal authorities enjoined from issuing permits under the Refuse Act).

22. 33 U.S.C. § 1160 (repealed 1972). Pursuant to the FWPCA, states were responsible for developing water quality standards applicable to their waters. *Id.* § 1160(c)(1), (3). States were free to establish enforcement procedures regarding intrastate waters. S. Rep. No. 414, 92d Cong., 1st Sess. 2 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3669, reprinted in 2 Legislative History, *supra* note 1, at 1420. A conference procedure was available among state and federal authorities if a state's standards were unacceptably low 33 U.S.C. § 1160(c)(2) (repealed 1972). State enforcement was possible when a discharge resulted in a reduction of water quality below the established standard, *id.* § 1160(c)(5), but federal initiative was limited to interstate pollution endangering health or welfare, and then only after a six month wait and administrative hearings. *Id.* § 1160(f)(1). These procedures clearly limited the effectiveness of the Act. *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-03 (1976); *Amendments, supra* note 21, at 674-75.

23. *See* *National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1378 & n.19 (D.C. Cir. 1977); *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 709 (D.C. Cir. 1975); 117 Cong. Rec. 39678 (1971), reprinted in 2 Legisla-

state officials, less conscious of problems beyond their own jurisdiction, were often likely to disregard spillovers of pollutants into adjoining states.²⁴ Therefore, the FWPCA failed to resolve two major problems: protection of the quality of the nation's water supply,²⁵ and protection of the environmental integrity of the states.²⁶ Both these problems were addressed in *Illinois v. City of Milwaukee*,²⁷ and ironically, it was "[p]oor old nuisance"²⁸ that emerged as the only law then available to deal with the complexities presented.²⁹

A. Illinois v. City of Milwaukee

The *Illinois* litigation began when the State of Illinois, frustrated in its attempts to gain relief under the FWPCA,³⁰ alleged that four cities and two local sewage commissions of the State of Wisconsin were polluting Lake Michigan,³¹ an interstate body of water. Pursuant to section 1251(a)(1) of the United States Code, which vests in the Supreme Court original and exclusive jurisdiction over controversies between states,³² Illinois sought injunctive relief in the Supreme

tive History, *supra* note 1, at 1405 (remarks of Sen. Muskie), 118 Cong. Rec. 10240-41 (1972), reprinted in 1 Legislative History, *supra* note 1, at 452-53 (remarks of Rep. Reuss); *id.* at 10244, 10251, reprinted in 1 Legislative History, *supra* note 1, at 472, 475 (remarks of Gov. Wendell Anderson); *id.* at 10639, reprinted in 1 Legislative History, *supra* note 1, at 517 (remarks of Rep. Dingell), Wright, *supra* note 11, at 331-32.

24. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1227 (1977).

25. S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3674, reprinted in 2 Legislative History, *supra* note 1, at 1425 ("Federal water pollution control program . . . has been inadequate in every vital aspect."); McThernia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 Wash. & Lee L. Rev. 195, 200 (1973) ("The impotency of . . . prior legislation is beyond question.").

26. See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

27. 406 U.S. 91 (1972).

28. Wright, *supra* note 11, at 331.

29. 406 U.S. at 103.

30. Brief for Respondents at 23, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 22, 1980); Comment, *Federal Common Law in Interstate Water Pollution Disputes*, 1973 U. Ill. L.F. 141, 144 [hereinafter cited as *Water Pollution Disputes*]. For four years Illinois had attempted to resolve the controversy pursuant to the FWPCA, 33 U.S.C. § 1151 (1970) (repealed 1972). *Water Pollution Disputes*, *supra*, at 144-45. Enforcement under the FWPCA was cumbersome and time consuming, rarely resulting in court action. Ipsen & Raisch, *supra* note 21, at 372-75. McThernia, *supra* note 25, at 199-200; *Amendments*, *supra* note 21, at 674-75.

31. 406 U.S. at 93. Illinois alleged that the defendants were discharging "some 200 million gallons of raw or inadequately treated sewage" per day. *Id.*

32. The grant of original jurisdiction in U.S. Const. art. III, § 2, cl. 2, is implemented in 28 U.S.C. § 1251 (1976). This section provides, in part, that "[t]he Supreme Court shall have original and exclusive jurisdiction of . . . [a]ll controversies between two or more States." *Id.* § 1251(a)(1) (1976).

Court.³³ The Court concluded, however, that the defendants were merely political subdivisions of a state.³⁴ This distinction permitted the Court to explore potential alternative forums,³⁵ its jurisdiction over suits involving only one state being non-exclusive.³⁶ The Court reasoned that the finding of an adequate alternative forum would allow it to avoid the burden of trying this and similar original actions³⁷

33. 406 U.S. at 93.

34. *Id.* at 97. It is well-settled that a political subdivision is not the equivalent of a state. *E.g.*, *Bullard v. City of Cisco*, 290 U.S. 179 (1933); *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1868). Illinois also attempted to join the State of Wisconsin as a necessary party defendant. 406 U.S. at 94. Although, under appropriate pleadings, Wisconsin could have been joined as a defendant, its joinder was not mandatory. *Id.* at 97. If Wisconsin had been joined, it appears the Court would have heard the case because, only six weeks after *Illinois* was decided, the Court accepted jurisdiction over an interstate water pollution dispute involving two states. *Vermont v. New York*, 406 U.S. 186 (1972).

35. 406 U.S. at 98. The Court said that it would "honor" its original jurisdiction but "only in appropriate cases." *Id.* at 93. What is appropriate "necessarily involves the availability of another forum." *Id.*

36. 28 U.S.C. § 1251(b)(3) (1976). This section provides, in part, that the Supreme Court "shall have original but not exclusive jurisdiction of . . . [a]ll actions or proceedings by a State against the citizens of another State." *Id.* Traditionally, the Court construed its original jurisdiction as self-executing. *Florida v. Georgia*, 58 U.S. (17 How.) 478, 491-92 (1854); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 332-33 (1816); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Later cases upheld the power of Congress to grant concurrent jurisdiction to lower federal courts over cases arising under the Supreme Court's original jurisdiction. *Ames v. Kansas*, 111 U.S. 449, 469 (1884); *Gittings v. Crawford*, 10 F. Cas. 447, 449 (D. Md. 1838) (No. 5465). Federal courts, therefore, potentially have jurisdiction over cases involving a state, but such jurisdiction is not provided by 28 U.S.C. § 1251(b)(3) (1976). *C. Wright, supra* note 5, at 502. *See generally* Hart & Wechsler, *supra* note 6, at 242-87; *C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure* §§ 3525-3528 (1975 & Supp. 1980).

37. 406 U.S. at 93-94. The burden that original jurisdiction suits imposed on the Supreme Court is readily apparent from earlier cases. In *Arizona v. California*, 373 U.S. 546 (1963), for example, an interstate water dispute required 22 hours of oral argument, involved two successive Special Masters, and resulted in over 25,000 pages of transcripts. *Id.* at 551. Another interstate water dispute required 11 years for trial and argument before a final decree was issued. *Wyoming v. Colorado*, 259 U.S. 419, 496 (1922). Enforcement and supervision of the final decree required another 35 years of the Court's attention. *See Wyoming v. Colorado*, 286 U.S. 494 (1932) (suit to enforce 1922 decree); *Wyoming v. Colorado*, 298 U.S. 573 (1936) (modification of 1922 decree); *Wyoming v. Colorado*, 309 U.S. 572 (1940) (suit for contempt of 1936 decree; decree modified); *Wyoming v. Colorado*, 353 U.S. 953 (1957) (new decree on the merits). In a third interstate dispute, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), a modifiable decree issued in 1907 was finally vacated by the Court in 1938. *Georgia v. Tennessee Copper Co.*, 304 U.S. 546 (1938). *See generally* Hart & Wechsler, *supra* note 6, at 287; Note, *The Original Jurisdiction of the United States Supreme Court*, 11 *Stan. L. Rev.* 665, 697-98 (1959) [hereinafter cited as *Original Jurisdiction*]. The task involved in an original suit is especially onerous in light of the rising number of cases on the Court's docket. *See*

while still fulfilling its obligation under article III of the United States Constitution.³⁸

Interpreting the district courts' federal question jurisdiction³⁹ to include federal common law claims,⁴⁰ the Court held that Illinois' cause of action presented a federal question and was adjudicable in federal district court.⁴¹ Permitting Illinois to pursue a federal common law

The Supreme Court, 1972 Term, 87 Harv. L. Rev. 57, 310 (1973) (Court had 4,636 cases on its docket in 1972). The resulting time pressures have forced the Court to reconsider its role as a trial court. Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. Ill. L.F. 615, 626-27.

38. 406 U.S. at 93. Article III of the United States Constitution provides, in part, that "[i]n all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl. 2. "[I]t is a time-honored maxim . . . that a court possessed of jurisdiction generally must exercise it." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496-97 (1971) (citation omitted). The Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 403 (1821). The Court, however, also has an obligation to promote and further "the current role of [the] Court . . . as the final federal appellate court." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971). Therefore, the Court has exercised its discretion to deny its original jurisdiction. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam) (appropriate state forum); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) (same); *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939) (appropriate lower federal forum). See generally *Original Jurisdiction*, *supra* note 37, at 694-700.

39. Federal district courts have general federal question jurisdiction over all civil actions that arise "under the . . . laws . . . of the United States." 28 U.S.C. § 1331(a) (1976).

40. 406 U.S. at 100. The Court concluded that "§ 1331 jurisdiction will support claims founded upon federal common law." *Id.* Substantial lower court precedent existed for the Court's holding. *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971); *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486 (2d Cir. 1968); *Murphy v. Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609 (2d Cir. 1967); *Stokes v. Adair*, 265 F.2d 662 (4th Cir.), *cert. denied*, 361 U.S. 816 (1959); *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952). The *Illinois* Court apparently overruled its decision in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), which held that the federal maritime common law did not arise under the laws of the United States. *Id.* at 359-80. General maritime law, however, may be distinguished from federal common law. At the time 28 U.S.C. § 1331 (1976) was enacted, admiralty courts provided an adequate federal forum for maritime rights, and the *Romero* Court found little indication that Congress intended the district courts as alternative forums for maritime claims. 358 U.S. at 369; see 28 U.S.C. § 1333 (1976) (admiralty jurisdiction statute). Extension of the federal question jurisdiction to federal common law claims has been a subject of debate. See Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case*, 12 Ariz. L. Rev. 691 (1970); *Interstate Pollution*, *supra* note 3; 50 Tex. L. Rev. 183 (1971); 1972 Wis. L. Rev. 597.

41. 406 U.S. at 99-100. Diversity jurisdiction is not available to a state because a state is not considered a citizen of itself within the meaning of 28 U.S.C. § 1332 (1976). *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894). One commentator, however, has suggested that a state could commence a diversity action by utilizing its state agencies or attorney general as the lead plaintiff. *Interstate Pollution*, *supra* note 3, at 1459.

action in district court⁴² was deemed necessary to protect two distinct federal interests—purity of the nation's water supply⁴³ and states' quasi-sovereign interests in interstate water.⁴⁴ The Court noted that the existence of a federal common law remedy would be consistent with and, in fact, supplement the policy of the FWPCA by providing relief for violations of the Act.⁴⁵ Nevertheless, the Court warned that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."⁴⁶

B. *The CWA*

Six months after the *Illinois* decision, Congress passed the CWA.⁴⁷ Its passage was the culmination of more than three years of delibera-

42. One commentator has dismissed as dicta the Court's choice of federal common law as the rule of decision. F. Grad, *supra* note 12, § 3.03. It would seem, however, that the Court's holding was premised upon finding a federal right in favor of Illinois to sustain a lower federal court's jurisdiction. See notes 39-41 *supra* and accompanying text. Therefore, the choice of law was crucial to the Court's decision. "A court's stated and . . . necessary basis for deciding does not become dictum . . ." Friendly, *supra* note 6, at 385.

43. 406 U.S. at 101-02. The Court cited the broad range of existing federal statutes dealing with interstate waters as demonstrating a federal interest in the nation's waters. *Id.*

44. *Id.* at 105-07. The Court noted that a public nuisance created upon an interstate body of water could 'amount to a *casus belli* for a State lower down, unless removed,' *id.* at 107 (quoting *Missouri v. Illinois*, 200 U.S. 496, 521 (1906)), and that resort to the peaceful means of litigation to protect its quasi-sovereign interest was a rationale for federal court jurisdiction over such disputes. *Id.* at 107-08 & n.9; see Stewart, *supra* note 24, at 1229.

45. 406 U.S. at 103-04. The Court stated that "[t]he remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available." *Id.* at 103. The Court has implied injunctive relief for violations of a similar regulatory scheme. *E.g.*, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202-03 (1967) (Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-467 (1976)); *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960) (same); *Sanitary Dist. v. United States*, 266 U.S. 405, 428 (1925) (same).

46. 406 U.S. at 107. The legislative supremacy of Congress is well recognized. *E.g.*, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (federal maritime common law preempted by Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1976)); *Washington v. General Motors Corp.*, 406 U.S. 109, 115 (1972) (federal common law of nuisance may have been preempted by Clean Air Act, 42 U.S.C. §§ 7401-7642 (1976 & Supp. III 1979)); *Arizona v. California*, 373 U.S. 546, 563 (1963) (federal common law of equitable apportionment preempted by Boulder Canyon Project Act, 43 U.S.C. §§ 617a-617t (1976)); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 579 (1972) (federal common law of nuisance preempted by Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1976 & Supp. III 1979)), *modified on other grounds*, 541 F.2d 442 (1976); see Monaghan, *supra* note 6, at 10-11; Stewart, *supra* note 24, at 1228.

47. 33 U.S.C. §§ 1251-1376 (1976). The CWA was enacted on October 18, 1972. Pub. L. No. 92-500, 86 Stat. 816. "The [CWA], although technically amending the Federal Water Pollution Control Act of 1965, for all practical purposes replaces all

tion and compromise on how best to improve the FWPCA.⁴⁸ The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴⁹ Congress declared it the "national [goal] to eliminate the discharge of pollutants into the waters of the United States by 1985."⁵⁰ Furthermore, the CWA required, as an interim objective, the achievement of water quality sufficient for the protection and propagation of wildlife by 1981.⁵¹ To achieve these lofty goals, Congress created a legislative-administrative partnership, with Congress supplying the objectives and general guidelines and an expert administrative agency administering and implementing the specific regulatory programs.⁵²

The CWA directs the administrator of the EPA to set increasingly stringent effluent limitations⁵³ on a uniform nationwide basis.⁵⁴ The federal effluent limitations promulgated by the EPA would then constitute the minimum level of pollution control under the CWA.⁵⁵ When local conditions require, the EPA may set stricter regional standards to protect public water supplies, wildlife and agricultural uses, and recreational needs, provided the needs outweigh the economic costs.⁵⁶

To balance the interest in pollution free water with the competing interest in economic prosperity, Congress expressly provided for a gradual compliance timetable.⁵⁷ Additionally, the CWA directs the administrator, when setting effluent limitations, to consider the tech-

federal water pollution control statutes." McThernia, *supra* note 25, at 202. For a discussion of the effect of the CWA, see Ipsen & Raisch, *supra* note 21. McThernia, *supra* note 25; Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 Dick. L. Rev. 459 (1973); *Amendments*, *supra* note 21.

48. Ipsen & Raisch, *supra* note 21, at 374-75.

49. 33 U.S.C. § 1251(a) (1976).

50. H.R. Rep. No. 911, 92d Cong., 2d Sess. 71 (1972), *reprinted in* 1 Legislative History, *supra* note 1, at 758.

51. *Id.*, *reprinted in* 1 Legislative History, *supra* note 1, at 755.

52. 33 U.S.C. §§ 1251(d), 1361 (1976).

53. *Id.* § 1311, *construed in* EPA v. National Crushed Stone Ass'n, 101 S. Ct. 295, 300 (1980); E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 121 (1977).

54. 33 U.S.C. §§ 1311(b), 1316 (1976); S. Rep. No. 1236, 92d Cong., 2d Sess. 126 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3503, *reprinted in* 1 Legislative History, *supra* note 1, at 309; *see* Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1378 (D.C. Cir. 1977), Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 711 (D.C. Cir. 1975).

55. 33 U.S.C. § 1313(e)(3)(A) (1976). This section requires all states to meet the minimum federal effluent standards promulgated by the EPA. *Id.* *See generally* *Amendments*, *supra* note 21, at 717-19.

56. 33 U.S.C. § 1312(a) (1976).

57. *Id.* § 1362(17). The schedule of compliance sets a period within which a polluter must take remedial actions to comply with the effluent standards set in the applicable permit. *Id.*

nological feasibility of compliance.⁵⁸ The applicable effluent limitations are then incorporated into a national permit system, imposing legal obligations on each pollution discharger.⁵⁹ It is unlawful for any person to discharge pollutants without obtaining and complying with a permit.⁶⁰ In accordance with the policies of the CWA, all interested persons who may be affected by a discharger are entitled to notice and an opportunity for a hearing prior to the issuance of any permit.⁶¹

Congress also recognized "the primary responsibilities and rights of States to prevent . . . pollution."⁶² It enlisted the states in its battle against pollution by permitting the states to assume all regulatory duties over their intrastate waters provided the EPA has approved the program as complying with all federal standards.⁶³ Additionally, states are empowered to impose unilaterally more stringent standards upon their waterways as a matter of state law.⁶⁴

58. *Id.* § 1311 (1976 & Supp. III 1979). Congress chose to link the effluent standards to the ability of polluters to obtain pollution control technology. *Id.* Section 1311(b) provides a two-step procedure by which the administrator sets increasingly stringent standards. The first step, to be accomplished by 1977, requires polluters to obtain "the best practicable control technology currently available." *Id.* § 1311(b)(1)(A). The second step, to be accomplished by 1987, requires polluters to meet standards based on the application of "the best available technology economically achievable." *Id.* § 1311(b)(2)(F).

59. *Id.* § 1342 (1976), *construed in* EPA v. State Water Resources Control Bd., 426 U.S. 200, 205 (1976).

60. 33 U.S.C. § 1311(a) (1976), *construed in* Costle v. Pacific Legal Foundation, 445 U.S. 198, 202 (1980).

61. 33 U.S.C. § 1342(a)(1), (b)(3)-(b)(5), (j) (1976), *construed in* Costle v. Pacific Legal Foundation, 445 U.S. 198, 202 (1980). EPA decisions regarding the setting of federal effluent standards are subject to circuit court review. *Id.* § 1369(b)(1) (1976), *construed in* Montgomery Env'tl Coalition v. Costle, No. 79-1183, slip op. at 10-15 (D.C. Cir. Oct. 8, 1980); E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1036 (4th Cir. 1976), *modified on other grounds*, 430 U.S. 112 (1977); American Frozen Food Inst. v. Train, 539 F.2d 107, 129 (D.C. Cir. 1976).

62. 33 U.S.C. § 1251(b) (1976).

63. *Id.* § 1342(a)-(d), *construed in* Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 193-94 (1980); E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 119-20 & n.7 (1977); EPA v. State Water Resources Control Bd., 426 U.S. 200, 206-08 (1976). To institute its own permit program, a state must follow specific EPA procedures. 40 C.F.R. §§ 123.1-62 (1979). Once the agency approves the program, the federal permit program is suspended. 33 U.S.C. § 1342(c) (1976). The agency continues to receive copies of state permit applications and retains the right to veto state permits. *Id.* § 1342(d). It may, however, waive this notice requirement, *id.* § 1342(e), and the responsibility for supervising state programs. *Id.* § 1342(d)(3).

64. 33 U.S.C. § 1370 (1976). State standards are subject only to initial EPA approval. *Id.* § 1342. Further action by a state is subject only to the discretionary approval of the EPA. District of Columbia v. Schramm, 631 F.2d 854, 859 (D.C. Cir. 1980); Mianus River Preservation Comm. v. EPA, 541 F.2d 899, 909 n.24 (2d Cir. 1976). In contrast, the federal administrator may only require more stringent

Most importantly, the CWA strengthens the enforcement provisions of the FWPCA.⁶⁵ The CWA imposes criminal penalties on violators⁶⁶ and authorizes the EPA to bring civil proceedings "for appropriate relief, including a permanent or temporary injunction."⁶⁷ Congress also provided for two private rights of action⁶⁸ applicable to an individual as well as to a "State, municipality, commission, or political subdivision."⁶⁹ Any citizen⁷⁰ is empowered to bring an action against a person alleged to have violated any effluent limitation⁷¹ or against the federal administrator for failure to perform any non-discretionary duty.⁷² Courts may order the enforcement of the effluent standard,⁷³ require the administrator to perform his statutory duty,⁷⁴ and impose civil penalties against the violator.⁷⁵

federal standards if necessitated and cost justified, 33 U.S.C. § 1312(b) (1976), and then only after public hearings, *id.* § 1312(b)(1), and judicial review. *Id.* § 1369(b).

65. McThernia, *supra* note 25, at 204; *Amendments, supra* note 21, at 698; *Water Pollution Disputes, supra* note 30, at 144.

66. 33 U.S.C. § 1319(c) (1976). The criminal penalties include fines of up to \$25,000 per day for violations and imprisonment of up to one year for willful or negligent violations. *Id.*, *construed in United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1124 (3d Cir. 1979) (first use of CWA's criminal sanctions), *cert. denied*, 444 U.S. 1074 (1980). Despite the ability of the government to seek criminal sanctions under § 1319(c), the government has relied primarily upon civil restraints. *Id.*, Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 Am. Crim. L. Rev. 835, 836 (1973).

67. 33 U.S.C. § 1319(b) (1976). The CWA also provides the administrator with emergency power to seek immediate abatement of any discharge endangering livelihood or health regardless of statutory compliance. *Id.* § 1364.

68. *Id.* § 1365(a).

69. *Id.* § 1362(5), *construed in Massachusetts v. United States Veterans Adm'n*, 541 F.2d 119 (1st Cir. 1976).

70. 33 U.S.C. § 1365(g) (1976) defines "citizen" as "a person or persons having an interest which is or may be adversely affected." *Id.* The legislative history explicitly states that a person is adversely affected only if there is injury in fact. S. Rep. No. 1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3776, 3822-23, *reprinted in* 1 Legislative History, *supra* note 1, at 328-29. The injury could be to one's "[a]esthetic and environmental well-being," but it must be demonstrated "that the party seeking review [is] himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *see Currie, Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1273 (1977).

71. 33 U.S.C. § 1365(a)(1) (1976), *construed in Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977).

72. 33 U.S.C. § 1365(a)(2) (1976), *construed in EPA v. Water Resources Control Bd.*, 426 U.S. 200, 205 (1976).

73. 33 U.S.C. § 1365(a) (1976), *construed in United States v. Pennsylvania Env'tl Hearing Bd.*, 584 F.2d 1273, 1276, 1280-81 (3d Cir. 1978); *Sun Enterprises, Ltd. v. Train*, 394 F. Supp. 211, 215-24 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2d Cir. 1976).

74. 33 U.S.C. § 1365(a) (1976), *construed in Illinois ex rel. Scott v. Hoffman*, 425 F. Supp. 71, 77 (S.D. Ill. 1977); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1182, 1187-80 (D. Ariz. 1975).

75. 33 U.S.C. § 1365(a) (1976), *construed in United States v. Cutter Laboratories Inc.*, 413 F. Supp. 1295, 1297-98 (E.D. Tenn. 1976); *Sun Enterprises, Ltd. v. Train*,

II. PROTECTION OF THE FEDERAL INTEREST IN CLEAN WATER: PREEMPTION OF FEDERAL COMMON LAW

A fundamental and important principle of the American system of government is the doctrine of separation of powers.⁷⁶ With division of power, no governmental department can obtain arbitrary and unlimited strength.⁷⁷ To prevent judicial encroachment upon the functions of the legislature, the separation of powers doctrine has been scrupulously observed by the Supreme Court.⁷⁸ Courts are not free to substitute their own notions of how best to protect the interests of the nation once Congress has provided a statutory formula for dealing with a perceived federal problem.⁷⁹ "It is not for [courts] to compete with Congress or attempt to replace it as the Nation's law-making body."⁸⁰ Although courts have the power to fashion interstitial federal law⁸¹ to effectuate the policy expressed by

394 F. Supp. 211, 215-24 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2d Cir. 1976).

76. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-91 (1949); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933); *Springer v. Government of Philippine Islands*, 277 U.S. 189, 200 (1928); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1880). See generally J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 126-27 (1978); L. Tribe, *American Constitutional Law* §§ 2-1 to -4 (1978); Clark, *Separation of Powers*, 11 *Willamette L.J.* 1 (1974); Ely, *United States v. Lovett: Litigating the Separation of Powers*, 10 *Harv. C.R.-C.L. L. Rev.* 1 (1975); Symposium, *Separation of Powers*, 52 *Ind. L.J.* 311 (1977).

77. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) ("The Framers [of the Constitution] regarded the checks and balances [of a] tripartite Federal Government as a self-executing safeguard against the encroachment . . . of one branch at the expense of the other."); *United Public Workers v. Mitchell*, 330 U.S. 75, 91 (1947) ("By [the] mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority."); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 401 (1856) ("[N]either the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.").

78. *E.g.*, *TVA v. Hill*, 437 U.S. 153, 194-95 (1978); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 263 (1961); *Northern Sec. Co. v. United States*, 193 U.S. 197, 352 (1904); *Atkin v. Kansas*, 191 U.S. 207, 223 (1903); *Powell v. Pennsylvania*, 127 U.S. 678, 684-85 (1888); *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887).

79. *TVA v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought."); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978) (A court has "no authority to substitute [its] views for those expressed by Congress in a duly enacted statute."). The courts do not sit to revise legislative action. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949); *Northern Pac. Ry. v. North Dakota ex rel. McCue*, 236 U.S. 585, 599 (1915). Unless there is a clear abuse of congressional power, the courts have no authority to substitute their judgment for that of the legislature. *Gant v. Oklahoma City*, 289 U.S. 98, 102 (1933); *New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Comm'n*, 269 U.S. 244, 248 (1925).

80. *Collins v. Hardyman*, 341 U.S. 651, 663 (1951).

81. *Mishkin*, *supra* note 6, at 800. "[E]ffective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judi-

Congress,⁸² they "are not free to 'supplement' Congress' answer so thoroughly that [a statute] becomes meaningless."⁸³

It is clear that the CWA constitutes the federal law for maintaining the purity of the nation's waters. Because of the CWA's comprehensive regulatory scheme and pervasive enforcement procedures,⁸⁴ the federal interest in the nation's water supply is effectively protected.⁸⁵ Therefore, the need for a federal common law cause of action solely to further the federal interest in clean water no longer exists.⁸⁶

cial legislation,' rules which may be necessary to fill in interstitially [to] effectuate the statutory patterns enacted in the large by Congress." *Id.* This power arises because "Congress must often deal with . . . problems in a generic fashion." Stewart, *supra* note 24, at 1230. When "Congress has . . . provided enough federal law . . . appropriate remedies may be fashioned even though they rest on inferences." *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960). When fashioning federal common law, however, courts must follow, not formulate, congressional policy by finding a congressional judgment that federal law should govern. *Competence of Federal Courts*, *supra* note 6, at 1090; *Federal Common Law*, *supra* note 6, at 1522. "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed." *Ebert v. Poston*, 266 U.S. 548, 554 (1925). As the *Illinois* Court recognized, the federal common law is controlled by the statutory scheme of Congress, *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972), and must be consistent with that scheme. *Id.* at 103-04. The role of the courts in fashioning interstitial federal common law has received considerable attention. See generally R. Crampton, P. Currie, & H. Kay, *Conflict of Laws Cases - Comments - Questions* 929-50 (2d ed. 1975); Hart & Wechsler, *supra* note 6, at 756-832; Mishkin, *supra* note 6; *Choice of Law*, *supra* note 6.

82. *E.g.*, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 (1965); *Local 721, United Packinghouse, Food & Allied Workers v. Needham Packing Co.*, 376 U.S. 247, 250 (1964); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241 (1962); *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *Deitrick v. Greaney*, 309 U.S. 190, 200 (1940); *Board of Comm'rs v. United States*, 308 U.S. 343, 349 (1939). When the intent of Congress is ambiguous or not readily ascertainable, a court fashioning federal law must make two determinations. First, it must decide whether the act of Congress demonstrates a substantial federal interest in the party's claim requiring the application of federal law. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973); *Choice of Law*, *supra* note 6, at 133 n.2; *Competence of Federal Courts*, *supra* note 6, at 1099; *Rules of Decision*, *supra* note 6, at 1441-42. Second, if the federal interest in the litigation is substantial, the court must then fashion a rule of decision. Mishkin, *supra* note 6, at 803; Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. Chi. L. Rev. 823, 825 (1976) [hereinafter cited as *Adopting State Law*].

83. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

84. *Train v. City of New York*, 420 U.S. 35, 37 (1975); see notes 52-75 *supra* and accompanying text.

85. *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 532 (8th Cir. 1975), modified on other grounds, 529 F.2d 181 (8th Cir. 1976); F. Grad, *supra* note 12, § 3.03; Zener, *supra* note 16, at 790; 1977 Wash. L.Q. 164, 175-77.

86. Under similar regulatory schemes, courts have held that federal common law is preempted. See note 46 *supra*.

Some courts, however, have ignored the administrative and judicial procedures provided under the CWA and have continued to apply federal common law.⁸⁷ In *National Sea Clammers Association v. City of New York*,⁸⁸ for example, the Third Circuit reversed the district court's holding that a federal common law cause of action was not available to private parties.⁸⁹ The dispute involved the discharge of nutrient rich sludge by several New Jersey and New York municipalities.⁹⁰ The discharge caused a massive increase in algae that, after decomposition, caused damage to marine life upon which the plaintiffs depended for their livelihood.⁹¹ The plaintiffs, however, failed to provide notice of their intent to sue as required by the CWA,⁹² thus precluding their injunctive remedy under the Act. The Third Circuit, circumventing this statutory bar, validated the association's federal nuisance cause of action as an alternative basis for injunctive relief⁹³ and remanded the case to the district court.⁹⁴

87. *Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3043 (U.S. July 28, 1980) (No. 80-126); *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir.), *cert. granted sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12), *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *cert. granted*, 445 U.S. 926 (1980) (No. 79-408); *Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.N.J. 1978); *see California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181, 193 (9th Cir.) (dicta), *cert. denied*, 444 U.S. 864 (1979); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) (dicta), *cert. denied*, 420 U.S. 927 (1975); *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 119-20 (D. Vt.) (prior to regulations), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

88. 616 F.2d 1222 (3d Cir.), *cert. granted sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12).

89. *Id.* at 1235-36.

90. *Id.* at 1224-25. The EPA, the United States Army Corps of Engineers, the New York and New Jersey Departments of Environmental Conservation, and seven New York and New Jersey Sewerage Commissions were named as defendants. *Id.* at 1222.

91. *Id.* at 1224-25.

92. *Id.* at 1225. The CWA requires a citizen to give 60 days notice to the administrator, state officials, and the alleged violator before an action in district court may be commenced. 33 U.S.C. § 1365(b) (1976).

93. 616 F.2d at 1234. The court also implied a cause of action for damages under the CWA. *Id.* at 1228-31. Courts imply civil remedies to advance the overall purpose of legislation. *E.g.*, *Cort v. Ash*, 422 U.S. 66 (1975) (Federal Election Campaign Act, 18 U.S.C. § 610 (1970) (repealed 1976)); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-79z-6 (1976)); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916) (Safety Appliance Act, 45 U.S.C. §§ 1-16 (1976)). In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court provided a four-factor test to guide lower courts in creating private rights of action. *Id.* at 78. The Court, however, has noted that the *Cort* test was designed merely as a guide and that "[t]he central inquiry remains whether Congress intended to create . . . a private cause of

The Third Circuit's decision to ignore the carefully drafted provisions for injunctive relief goes beyond its limited lawmaking powers and constitutes a judicial incursion into the decision-making powers of a coordinate branch of government. The procedural requirements imposed by Congress were not designed as mere impediments to relief.⁹⁵ They embody an explicit congressional policy. The notice requirements were designed to "encourage and provide for agency enforcement"⁹⁶ and to prevent inconsistent judicial decrees that might result if both a citizen and the EPA brought actions simultaneously.⁹⁷ Prior notice permits the government to institute administrative action against a violator before the notice period expires,⁹⁸ thus obviating the need for private litigation. Permitting citizens to bring a federal action unconstrained by the notice requirements defeats the congressional compromise between general public enforcement and central agency control⁹⁹ and renders the citizen suit

action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979); *accord*, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979). Under this analysis, the Seventh Circuit, in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), held that no private cause of action could be implied by the CWA. This issue is on appeal to the Supreme Court. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n* 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12). See generally Note, *A New Direction for Implied Causes of Action*, 48 *Fordham L. Rev.* 505 (1980); Note, *Environmental Protection: A Limited Expansion of the Citizen's Role*, 12 *Washburn L.J.* 54 (1972).

94. 616 F.2d at 1238.

95. S. Rep. No. 414, 92d Cong., 2d Sess. 80 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3745, *reprinted in* 2 *Legislative History, supra* note 1, at 1498. (The notice provision "should not require notice that places impossible or unnecessary burdens on citizens" but merely require "information necessary to give a clear indication of the citizens' intent.").

96. *Id.* at 79, *reprinted in* [1972] U.S. Code Cong. Ad. News at 3745, *reprinted in* 2 *Legislative History, supra* note 1, at 1497.

97. 33 U.S.C. § 1365(b)(1)(B) (1976) (no suit may be initiated if United States is diligently pursuing an action against alleged violator). The potential for inconsistent results is demonstrated by the *National Sea Clammers* litigation. The EPA brought an enforcement action against one defendant, Westchester County, and obtained an order establishing a schedule for compliance. EPA Petition for Certiorari at 15 n.5, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, No. 80-12 (U.S., filed July 3, 1980). If a federal common law injunction is granted, the order procured by the EPA will effectively be overruled. *Id.*

98. S. Rep. No. 414, 92d Cong., 1st Sess. 80 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3745, *reprinted in* 2 *Legislative History, supra* note 1, at 1498; see *City of Highland Park v. Train*, 519 F.2d 681, 690-91 (7th Cir. 1975) (discussing similar notice requirements contained in citizen suit provisions of Clean Air Act, 42 U.S.C. §§ 7401-7642 (1976 & Supp. III 1979)), *cert. denied*, 424 U.S. 927 (1976); Steinberg, *Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision*, 12 *San Diego L. Rev.* 107, 132 (1974) (same).

99. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The *Moragne* Court cautioned against the use of common law when "the legislature . . . in order

provisions meaningless.¹⁰⁰ A court is not free to devise its own rules in a statutory field merely because its sense of justice impels it to do so;¹⁰¹ it "cannot supply what Congress has studiously omitted."¹⁰²

Another instance of judicial encroachment upon the legislative scheme is the use of federal common law by some courts to invalidate conduct permitted by the EPA.¹⁰³ In *National Sea Clammers*, for example, the City of New York had obtained a permit from the EPA to dredge and dump spoil in the offshore waters of the Atlantic Ocean.¹⁰⁴ The court, however, ignored the permit and allowed the association to pursue its federal common law cause of action.¹⁰⁵

Courts that have authorized federal common law claims despite a defendant's compliance with EPA regulations have misinterpreted

to promote other, conflicting interests, prescribe[s] with particularity the compass of the legislative aim." *Id.* at 392.

100. EPA Petition for Certiorari at 15, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, No. 80-12 (U.S., filed July 3, 1980); see *City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir. 1975) (notice provisions of Clean Air Act, 42 U.S.C. § 7604 (1976 & Supp. III 1979)), designed to promote agency enforcement and cannot be ignored), *cert. denied*, 424 U.S. 927 (1976); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700-01 (D.C. Cir. 1974) (ignoring notice provision would defeat congressional intent).

101. *TVA v. Hill*, 437 U.S. 153, 195 (1978) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'").

102. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959). "In the area covered by [a] statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Similarly, courts should not be free to prescribe rules for obtaining a federal injunction different from those prescribed by Congress. 14 B.C. Indus. & Com. L. Rev. 767, 783-84 (1973).

103. *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1230 (3d Cir.), *cert. granted sub nom.* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12); *California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181, 193, *cert. denied*, 444 U.S. 864 (1979); *United States v. Atlantic Richfield Co.*, 478 F. Supp. 1215, 1218-19 (D. Mont. 1979); cf. *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 120-21 (D. Vt.) (compliance with FWPCA does not preclude federal common law action), *aff'd mem.*, 487 F.2d 1393 (2d Cir.), *cert. denied*, 417 U.S. 976 (1973).

104. *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1224-25 (3d Cir.), *cert. granted sub nom.* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12). Plaintiffs did not dispute that the defendant's conduct was approved by the EPA and the Army Corps of Engineers. EPA Brief for Appellees at 16, *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir.), *cert. granted sub nom.* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12).

105. 616 F.2d at 1233.

Illinois. Although the *Illinois* decision recognized that the environmental statutes would not necessarily define the outer boundaries of federal common law,¹⁰⁶ the Court was merely attempting to provide federal remedies for violations of congressional policy when legislation failed to supply an explicit statutory sanction.¹⁰⁷ The Court did not create a substantive body of law existing outside of a statute, but an interstitial remedy to effectuate the policy of the FWPCA.¹⁰⁸ "There is a basic difference between filling a gap left by Congress' silence and rewriting [standards] that Congress has affirmatively and specifically enacted."¹⁰⁹ The setting of specific uniform federal standards is the ultimate decision of the EPA pursuant to its congressionally delegated authority.¹¹⁰ The substitution of judicially created standards, under the guise of an alternative federal cause of action, neither was intended by, nor is consistent with, the CWA.¹¹¹ Furthermore, it is an invasion of Congress' power for a court to find conduct authorized by the EPA illegal.¹¹²

106. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 n.5 (1972).

107. *Id.* at 103. The Court has supplied federal common law remedies in other instances when legislation had failed to do so. *E.g.*, *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §§ 401-426 (1976)); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-187 (1976)); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (Federal Reserve Act, 12 U.S.C. §§ 221-522 (1976)); *Deitrick v. Greaney*, 309 U.S. 190 (1936) (National Banking Act, 12 U.S.C. §§ 24-342 (1976)).

108. 15 B.C. Indus. & Com. L. Rev. 795, 806-07 (1974); 14 B.C. Indus. & Com. L. Rev. 767, 781 (1973); 26 Emory L.J. 432, 445 (1977). *Contra*, *Federal Common Law Remedies*, *supra* note 7, at 558-59; 13 Wake Forest L. Rev. 246, 253 (1977).

109. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

110. 33 U.S.C. §§ 1311(b), 1316 (1976); *see* S. Rep. No. 414, 92d Cong., 1st Sess. 60 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3726, *reprinted in* 2 Legislative History, *supra* note 1, at 1478.

111. S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3745, *reprinted in* 2 Legislative History, *supra* note 1, at 1497 ("Section [1365] would not substitute a 'common law' or court-developed definition of water quality."); S. Rep. No. 1236, 92d Cong., 2d Sess. 1236 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3745, *reprinted in* 1 Legislative History, *supra* note 1, at 309 ("[T]he intent of the Conferees is that effluent limitations . . . be as uniform as possible. The Administrator is expected to be precise in his guidelines . . ."). Both the EPA and Congress "felt it very important that citizen's suits be directed to enforcing standards set by law and regulation rather than hypothetical standards which are not related to statutory and regulatory enactment." *Proposed Amendments to the Federal Water Pollution Control Act: Hearings on H.R. 11896 Before the House Comm. on Public Works*, 92d Cong., 2d Sess. 239 (1972), *reprinted in* 2 Legislative History, *supra* note 1, at 1153 (statement of Russel Train).

112. *See* *New England Legal Foundation v. Costle*, 475 F. Supp. 425, 440-41 (D. Conn. 1979). In *Costle*, plaintiffs alleged that the defendant power station maintained a federal common law nuisance by burning high sulphur coal. The court noted, however, that the relief sought was, "in effect, an attack upon the validity of the

The danger presented by this type of judicial activism has not gone unnoticed.¹¹³ In *Committee for Consideration of Jones Falls Sewage System v. Train*,¹¹⁴ the court stated that

it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the [CWA] legitimates. . . . While the state courts are free to apply state nuisance law more rigidly, a federal court . . . may not turn to a supposed body of federal common law to impose stricter standards than the statute provides.¹¹⁵

Moreover, a court that orders the immediate cessation of polluting conduct destroys the economic considerations built into the CWA permit system.¹¹⁶ The result may be economic harm as detrimental to the general welfare as the pollution itself.¹¹⁷ Courts should not

EPA-approved variance . . . , [and thus] a challenge to the legality of the limitation itself." *Id.* at 441 n.21. Furthermore, the court noted that, under the Clean Air Act, 42 U.S.C. § 7426 (1976), the plaintiffs could have achieved administratively what they sought under the federal common law. 475 F. Supp. at 441 n.21. Similarly, persons injured by water pollution have a right to proceed administratively to attack any permit or standard set by the EPA, 33 U.S.C. § 1369(b) (1976), and to obtain judicial review of any final administrative decision. *Id.* Failure to comply with the administrative procedures bars judicial review. *Id.* § 1369(b)(2). Therefore, federal common law actions circumventing the administrative procedures of the CWA should be precluded. Zener, *supra* note 16, at 790 & n.460; see *McKart v. United States*, 395 U.S. 185, 193-95 (1969) (courts should not supply judicial relief when adequate administrative remedies exist); L. Jaffe, *Judicial Control of Administrative Action* 425 (1965) ("[t]he exhaustion doctrine [of administrative remedies] is . . . an expression of executive and administrative autonomy").

113. *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976); F. Grad, *supra* note 12, § 3.03; Zener, *supra* note 16, at 789-90; 26 *Emory L.J.* 432, 454-55 (1977); see *New England Legal Foundation v. Costle*, 475 F. Supp. 425, 441-42 (D. Conn. 1979).

114. 539 F.2d 1006 (4th Cir. 1976). In *Jones Falls*, city and state officials, operating a public waste treatment plant, permitted sewage to overflow. *Id.* at 1007. Because the overflow did not violate the limitations of their CWA permit, no claim under the statute was possible. *Id.* at 1010.

115. *Id.* at 1009 (footnote omitted).

116. See 33 U.S.C. § 1312(b) (1976) (Prior to establishing more stringent federal standards, the administrator must "hold a public hearing to determine . . . the economic and social costs of achieving any such . . . limitations."); S. Rep. No. 414, 92d Cong., 1st Sess. 47 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3713, reprinted in 2 *Legislative History, supra* note 1, at 1465 (Full weight should be given to "the projected economic costs of establishing" more stringent standards under this section.); *id.* at 43, reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3709, reprinted in 2 *Legislative History, supra* note 1, at 1461 ("[T]he Committee recognizes the impracticality of any effort to halt all pollution immediately.").

117. *Cf. Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1121 (7th Cir. 1975) (permanent injunction not granted because it would close auto shredding plant important to local economy); *Stockdale v. Agrico Chem. Co.*, 340 F. Supp. 244, 261 (N.D. Iowa 1972) (permanent injunction not granted because it would close phos-

disrupt the careful balance of interests entrusted to the expert administrative processes of the EPA.¹¹⁶

The citizen suit provision for injunctive relief must be deemed the exclusive federal remedy for pollution abatement.¹¹⁹ The CWA, however, does not supply a cause of action for damages incurred as a result of pollution.¹²⁰ Nevertheless, Congress' failure to provide for compensatory relief should not justify a reflexive creation of a federal common law action. A common sense reading of the statute's savings clause, and its legislative history, indicates that Congress did provide a mechanism for compensating injuries caused by polluting activities. The savings clause of the citizens' suit provisions declares that the CWA shall not "restrict any right which any person . . . may have under any statute or common law."¹²¹ The legislative history of the clause states that "[c]ompliance with [the] . . . Act would not be a

phate plant important to local economy); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 223, 257 N.E.2d 870, 872, 309 N.Y.S.2d 312, 315 (1970) (permanent injunction not granted because it would close \$45,000,000 cement plant employing 300 persons).

118. See Note, *Federal Common Law Suits to Abate Interstate Air Pollution*, 4 Harv. Envt'l L. Rev. 117, 131 (1980) [hereinafter cited as *Air Pollution*]. EPA regulations based on the "best available technology" should not be ignored in favor of common law theories of nuisance. *Id.* Water pollution control requires "a complex balancing analysis of factors that include economic, technical, and other considerations" requiring scientific expertise. 118 Cong. Rec. 33701 (1972), reprinted in 1 Legislative History, *supra* note 1, at 181 (remarks of Sen. Muskie); see Crampton & Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?*, 2 Ecol. L.Q. 407, 413-14 (1972). Litigation without prior administrative action is not the most rational approach to pollution control, Hines, *supra* note 11, at 200-01, because nuisance law does not provide an adequate conceptual framework for dealing with the complex problems associated with water pollution. *Interstate Pollution*, *supra* note 3, at 1451-52; see *Exxon Corp. v. City of New York*, 548 F.2d 1088, 1096 (2d Cir. 1977) (analysis of technological and scientific criterion of Clean Air Act, 42 U.S.C. §§ 7401-7640 (Supp. II 1978), sensibly delegated to EPA); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 223, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314-15 (1970) (courts lack adequate resources to develop a comprehensive means of controlling pollution). Because the EPA has "unique experience and expertise," *American Meat Inst. v. EPA*, 526 F.2d 442, 450 n.16 (7th Cir. 1975), courts should defer to its specialized knowledge in determining effluent standards and limitations. See *United States v. Western P.R.R.*, 352 U.S. 59, 64-65 (1956) (role of judiciary better suited to reviewing legal issues after factual determinations have been made by federal agencies).

119. See notes 70-74, 87-118 *supra* and accompanying text.

120. The EPA maintains that the CWA was designed, not as a remedial scheme, but as a preventive method of controlling pollution for the general public. EPA Petition for Certiorari at 12, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, No. 80-12 (U.S., filed July 3, 1980). Private actions for damages generally are not intended under such schemes. *Cannon v. University of Chicago*, 441 U.S. 677, 690 & n.13 (1979); *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205, 216-17 (1934); Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 291-92 (1963).

121. 33 U.S.C. § 1365(e) (1976).

defense to a common law action for pollution damages."¹²² Such a result could only be obtained if Congress intended the application of standards of conduct other than those fixed by the CWA. Under the statute, state law is not only expressly preserved,¹²³ it is the only law permitted to impose more stringent standards of conduct than those promulgated by the EPA.¹²⁴ This realization, coupled with the CWA's policy to preserve the state's primary role in controlling pollution, indicates that application of state common law was intended for parties seeking damages.¹²⁵

Furthermore, savings clauses can only preserve rights and remedies antedating a statute.¹²⁶ The CWA could not have saved a federal common law cause of action for damages that did not exist. Unlike the well-established federal common law created by the Supreme Court to protect the quasi-sovereign interests of the states from interstate pollution,¹²⁷ there was no established federal right to seek damages for polluting conduct when the CWA was enacted.¹²⁸ Therefore,

122. S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3746-47, reprinted in 2 Legislative History, *supra* note 1, at 1499.

123. 33 U.S.C. §§ 1365(e), 1370 (1976); see H.R. Rep. No. 911, 92d Cong., 2d Sess. 136 (1972), reprinted in 1 Legislative History, *supra* note 1, at 823 ("Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon urgent need for uniformity such as in section [1322(f)] relating to marine sanitation devices.").

124. 33 U.S.C. § 1370 (1976); see note 64 *supra*. Unlike the federal statute, which is designed to eliminate pollution gradually, state common law actions can be directed at immediate abatement as a matter of state law. *People ex rel. Scott v. United States Steel Corp.*, 40 Ill. App. 3d 607, 611, 352 N.E.2d 225, 228-29 (1976); *Metropolitan Sanitary Dist. v. United States Steel Corp.*, 30 Ill. App. 3d 360, 370, 332 N.E.2d 426, 433-34 (1975), *cert. denied*, 424 U.S. 976 (1976).

125. The well-established principles of state nuisance law should provide an adequate mechanism for redressing private injuries from water pollution. See generally Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 Harv. C.R.-C.L. L. Rev. 32 (1970); Juergensmeyer, *supra* note 11; Maloney, *Judicial Protection of the Environment: A New Role for Common-Law Remedies*, 25 Vand. L. Rev. 145 (1972); Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 Ariz. L. Rev. 107 (1968); Comment, *A Private Nuisance Approach to Hazardous Waste Disposal Sites*, 7 Ohio N.U. L. Rev. 86 (1980); Note, *Private Nuisance Law: Protection of the Individual's Environmental Rights*, 8 Suffolk U.L. Rev. 1162 (1974); *Nuances of Nuisance*, *supra* note 11.

126. *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1014 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); EPA Petition for Certiorari at 12, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, No. 80-12 (U.S., filed July 3, 1980); Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 Tex. L. Rev. 285, 300, 303 (1955).

127. See pt. III *infra*.

128. Even if *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), established a private federal common law cause of action for water pollution, see notes 106-108 *supra*

in drafting the savings clause, it is logical to assume that Congress was referring to state, not federal, law.

Arguably, the phrase "any . . . common law"¹²⁹ is sufficiently ambiguous to present a choice of law question. "In deciding whether rules of federal common law should be fashioned, . . . a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown."¹³⁰ Absent such a conflict, state law applies.¹³¹

The CWA clearly provides that state law meeting federal minimum standards is not only consistent with, but, under certain circumstances, actually supplants federal law.¹³² Moreover, utilization of state law to determine damages has little or no effect upon the federal regulatory scheme. A claim for damages, unlike enforcement

and accompanying text, Congress could not have intended to save it because *Illinois* was decided after passage of the CWA. The CWA was passed by the Senate on November 2, 1971, 117 Cong. Rec. 38888 (1971), and by the House on March 29, 1972. 118 Cong. Rec. 10831 (1972). *Illinois* was handed down on April 24, 1972. 406 U.S. at 91.

129. 33 U.S.C. § 1365(e) (1976).

130. *Miree v. DeKalb County*, 433 U.S. 25, 31 (1977) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)) (emphasis omitted). State law is presumed to apply unless federal concerns would conflict with its use. See *Choice of Law*, *supra* note 6, at 149 n.67. "[T]he inner logic of the federal system requires state solutions whenever they are feasible." *Federal Common Law*, *supra* note 6, at 1517 (footnote omitted); see *Mishkin*, *supra* note 6, at 814 & n.64; *Wechsler*, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of National Government*, 54 Colum. L. Rev. 543, 544-45 (1954); *Competence of Federal Courts*, *supra* note 6, at 1085.

131. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-92 (1973). *Wechsler*, *supra* note 130, at 544; *Choice of Law*, *supra* note 6, at 149 n.67; *Adopting State Law*, *supra* note 82, at 824-27. "That Congress may have constitutional power to make federal law displacing state substantive policy does not imply an equal range of power for federal judges." *Mishkin*, *Some Further Last Words on Erie—The Thread*, 87 Harv. L. Rev. 1682, 1683 (1974). "The political logic of federalism . . . supports placing the burden of persuasion on those urging national action." *Wechsler*, *supra* note 130, at 545. Only when a substantial federal interest exists in the litigation will state law be displaced. *Choice of Law*, *supra* note 6, at 144-45.

132. 33 U.S.C. §§ 1342(c), 1370 (1976). When a state institutes its own permit program under § 1342(b), the permits become "State, not Federal, actions." 118 Cong. Rec. 33761 (1972), reprinted in 1 Legislative History, *supra* note 1, at 262 (remarks of Rep. Wright); see *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980); *United States Steel Corp. v. Train*, 556 F.2d 822, 838-39 (7th Cir. 1977); *Mianus River Preservation Comm. v. EPA*, 541 F.2d 899, 906 (2d Cir. 1976); *Metropolitan Sanitary Dist. v. United States Steel Corp.*, 30 Ill. App. 3d 360, 371, 332 N.E.2d 426, 434 (1975), cert. denied, 424 U.S. 976 (1976). If the state sets effluent limitations under 33 U.S.C. § 1370 (1976), they are enforced by the state as a matter of state law. *Id.* § 1342(b)(7); see *Amendments*, *supra* note 21, at 714-20. Furthermore, 33 U.S.C. § 1370 (1976) has been construed to allow states to impose more stringent effluent standards through state common law nuisance actions. *People ex rel. Scott v. United States Steel Corp.*, 40 Ill. App. 3d 607, 611, 352 N.E.2d 225, 228-29 (1976).

actions brought pursuant to the CWA, fails to implicate directly the federal interest in controlling water pollution.¹³³ A damage action, presenting factual questions of injury and causation,¹³⁴ is far removed from the regulation of water pollution.¹³⁵ The question whether private parties may obtain damages involves the federal interest only insofar as it might be thought to advance indirectly pollution control.¹³⁶ The federal interest in a damage action, however, is so remote and speculative that no significant conflict exists and use of state law is appropriate.¹³⁷

133. *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281-82 (D. Conn. 1976), *aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977).

134. J. Krier, *Environmental Law and Policy* 209-10, 215-16 (1971); W. Prosser, *supra* note 11, § 88; Zener, *supra* note 16, at 788; *Nuances of Nuisance*, *supra* note 11, at 66-70. Generally, to recover damages in private nuisance the plaintiff must show (1) that a substantial interference with the use and enjoyment of his land occurred; (2) that the defendant's conduct was unreasonable or intentional; and (3) that the defendant's actions were the proximate cause of the interference. Note, *State Air Pollution Control Legislation*, 9 B.C. Ind. & Comm. L. Rev. 712, 717 (1968).

135. See *Miree v. DeKalb County*, 433 U.S. 25 (1977). The *Miree* Court found that, although a damage award might further the federal interest in aviation safety, it was "'far too speculative, far too remote a possibility to justify the application of federal law to [an area] essentially of local concern.'" *Id.* at 32-33 (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956)). Similarly, pollution injuries, like other essentially local private disputes, present no substantial issues of federal law. See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971); Woods & Reed, *supra* note 40, at 708. Absent a substantial federal interest, "[t]he determination by federal courts of the scope of [private remedies] involves the creation of a body of common law analogous to that repudiated in *Erie*." Carlson v. Green, 446 U.S. 14, 39 (1980) (Rehnquist, J., dissenting).

136. *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1282 (D. Conn. 1976), *aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977). The Supreme Court has concluded that, when private litigation essentially involves an area traditionally regulated by the state, such as pollution, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960), "[t]he exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 203 (1952)); see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 642, 647, 653 (1975); *Choice of Law*, *supra* note 6, at 143. "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress." *Miree v. DeKalb County*, 433 U.S. 25, 32 (1977) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). In *Miree*, the Court held that, because Congress had not provided a federal remedy, no federal common law remedy should be created. *Id.* at 32-33; see Carlson v. Green, 446 U.S. 14, 40 (Rehnquist, J., dissenting).

137. See *Miree v. DeKalb County*, 433 U.S. 25, 31-33 (1977) (damage action for breach of federal contract causing fatal airline crash governed by state law despite federal interest in airline safety); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68-69 (1966) (rights of private parties dealing in federal oil and gas leases issued under Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-237 (1976), decided under state

Some courts, in considering whether federal or state law should apply to damage actions brought pursuant to the CWA's savings clause, have selected federal law because it supplies a uniform rule of decision.¹³⁸ This approach fails to recognize that

there is no federal interest in uniformity for its own sake. The fact that application of state law may produce a variety of results is of no moment. It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens.¹³⁷

Before a court may fashion a uniform federal rule of decision, it must study the policies underlying a federal statute to determine whether the "absence [of uniformity] would threaten the smooth functioning of those consensual processes that federal . . . law is chiefly designed to promote."¹⁴⁰

The policies of the CWA are clearly designed to foster state law;¹⁴¹ nonuniformity is built into the statute.¹⁴² In a similar choice of law situation, the Supreme Court analyzed whether the policies of the Labor Management Relations Act required a uniform time limitation on actions brought under the provisions of the Act.¹⁴³ In applying state law, the Court said that

federal labor law is chiefly designed to promote . . . the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.¹⁴⁴

law); *In re Agent Orange*, No. 80-7079, slip op. at 10-12 (2d Cir. May 1, 1980) (damage action for injuries to Army personnel under federal chemical welfare program controlled by state law). See also *Choice of Law*, *supra* note 6, at 150-54.

138. *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1233-35 (3d Cir.), *cert. granted sub. nom.* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12); *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1017-18 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *cf.* *Board of Supervisors v. United States*, 408 F. Supp. 556, 562 (E.D. Va. 1976) (assumed jurisdiction over claim for damages based on federal common law), *appeal dismissed*, 551 F.2d 305 (4th Cir. 1977).

139. *In re Agent Orange*, No. 80-7079, slip op. at 11 (2d Cir. May 1, 1980) (citation and footnote omitted); *accord*, *Miree v. DeKalb County*, 433 U.S. 25, 28-29 (1977); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68-71 (1966); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702-04 (1966); *United States v. Yazell*, 382 U.S. 341, 354-57 (1966); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956).

140. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966).

141. 33 U.S.C. § 1251(b) (1976).

142. See note 132 *supra*.

143. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966).

144. *Id.* at 702.

Pollution damage actions present a similar choice of law problem. A damage action results only when the federal regulatory process has failed to abate pollution, the primary goal of the CWA.¹⁴⁵ Although damage actions may have a deterrent effect, they do not stop pollution; the pollutor merely pays the judgment as a license to continue polluting.¹⁴⁶ Disparate results in this area will not frustrate any policies or goals of the CWA.

III. PROTECTION OF THE FEDERAL INTEREST IN STATE SOVEREIGNTY: PRESERVATION OF INTERSTATE COMMON LAW

The federal common law adopted in *Illinois* to protect the federal interest in the purity of the nation's water has now been supplanted by the CWA.¹⁴⁷ Another independent federal interest recognized in *Illinois*, the interest in maintaining state sovereignty within a federal system,¹⁴⁸ has not been systematically addressed by federal legislation. This federal interest, however, has long been within the purview of the federal common law¹⁴⁹ and continues to provide states with a unique cause of action, a *parens patriae* suit,¹⁵⁰ to protect their quasi-sovereign interests in interstate resources.¹⁵¹

145. 33 U.S.C. § 1251(a) (1976).

146. *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1282 (D. Conn. 1976), *aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 230, 257 N.E.2d 870, 876, 309 N.Y.S.2d 312, 321 (1970) (Jasen, J., dissenting); *Esposito*, *supra* note 125, at 35; *Maloney*, *supra* note 125, at 148; *Nuances of Nuisance*, *supra* note 11, at 70-71 & n.162.

147. See pts. I(B), II *supra*.

148. *Illinois v. City of Milwaukee*, 406 U.S. 91, 104-05 (1972).

149. See, e.g., *Vermont v. New York*, 417 U.S. 270 (1974) (per curiam); *Texas v. New Jersey*, 379 U.S. 674 (1965); *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838). See generally *The Federalist* No. 80 (A. Hamilton), at 516-17 (Modern Library ed. 1937); *Friendly*, *supra* note 6, at 408 n.119; *Hill*, *supra* note 6, at 1030-32; *Monaghan*, *supra* note 6, at 13-14 & n.72; *Scott*, *The Role of the Supreme Court of the United States in the Settlement of Inter-State Disputes*, 15 *Geo. L.J.* 146, 162-63 (1927); *Woods & Reed*, *supra* note 40, at 708-09; *Federal Common Law*, *supra* note 6, at 1520; *Original Jurisdiction*, *supra* note 37, at 681.

150. When a state sues as *parens patriae*, it acts in its role as guardian and sovereign. *Black's Law Dictionary* 1003 (rev. 5th ed. 1979). See generally *Malina & Blechman*, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 *Nw. U.L. Rev.* 193, 197-209 (1970); Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 *Colum. L.J. & Soc. Prob.* 411, 411-13 (1970) [hereinafter cited as *State Protection*].

151. E.g., *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 447 (1945) (interstate transportation); *Wyoming v. Colorado*, 286 U.S. 494, 509 (1932) (interstate water); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (interstate natural gas); *New York v. New Jersey*, 256 U.S. 296, 301-02 (1921) (interstate water); *Georgia v. Ten-*

The use of a *parens patriae* suit to protect quasi-sovereign interests requires a state to show that it is asserting the general rights of the state and not the private interests of its citizens.¹⁵² The state must have "a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest."¹⁵³ Such a distinct interest arises only when the injury seriously jeopardizes the health, comfort, and welfare of the state as a whole.¹⁵⁴ Historically, when such an injury was demonstrated, the state, as a matter of sovereign right, was permitted to vindicate its interests in the Supreme Court.¹⁵⁵

"Interstate common law"¹⁵⁶ was developed by the Supreme Court as an equitable rule of decision for adjudicating disputes between neighboring states concerning their respective quasi-sovereign interests in interstate resources.¹⁵⁷ Although states may freely utilize

nessee Copper Co., 206 U.S. 230, 237 (1907) (interstate air), *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (interstate water).

152. *Georgia v. Pennsylvania*, 324 U.S. 439, 451 (1945), *Wyoming v. Colorado*, 286 U.S. 494, 509 (1932); *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-92 (1929); *Oklahoma v. Atchison, T. & S.F. Ry.*, 220 U.S. 277, 288-99 (1911), *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *Kansas v. Colorado*, 206 U.S. 46, 99 (1907); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900), *New Hampshire v. Louisiana*, 108 U.S. 76, 89-91 (1883). *Parens patriae* standing cannot "be invoked by a State merely because its citizens were injured." *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945).

153. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938), *accord*, *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

154. *E.g.*, *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945) (railroad rate-fixing damaged general economic welfare of the state), *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923) (statute requiring preferential treatment of West Virginia gas customers injured health and welfare of Pennsylvania), *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (pollution injured health and environment of state); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (sewage endangered health of citizens); see Malina & Blechman, *supra* note 150, at 203. *State Protection*, *supra* note 150, at 417.

155. Malina & Blechman, *supra* note 150, at 203.

156. The phrase "interstate common law" was coined by the Supreme Court to describe the body of federal common law developed to settle disputes involving the quasi-sovereign rights of states in interstate resources. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). Commentators have recognized that this federal common law is constitutionally compelled, and thus, distinct from other areas of federal common law. Friendly, *supra* note 6, at 408 n.119; Hill, *supra* note 6, at 1030-32, 1075-76, Monaghan, *supra* note 6, at 13-14 & n.72.

157. *Washington v. Oregon*, 297 U.S. 517, 524 (1936) (suit to enjoin water diversion); *New Jersey v. New York*, 283 U.S. 336, 342-43 (1931) (same), *Connecticut v. Massachusetts*, 282 U.S. 660, 669-71 (1931) (same); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (suit to enjoin discharge of sewage into water); *Kansas v. Col-*

resources within their borders,¹⁵⁸ the ecological rights of one state preclude the detrimental use by another of the resources shared by all.¹⁵⁹ When one state's exercise of its sovereign powers injured the quasi-sovereign interests of another, the Supreme Court, possessed of exclusive original jurisdiction, provided impartial federal rules of decision to adjudicate the conflicting interests.¹⁶⁰

Similar reasoning was adopted for interstate pollution disputes between a state and a citizen of another state brought under the Court's original, but nonexclusive, jurisdiction. In *Georgia v. Tennessee Copper Co.*,¹⁶¹ for example, the Court found that Georgia's quasi-sovereign interests in its environment should not be circumscribed by the inadequate pollution laws of its neighboring state.¹⁶² Conversely, the laws of the complaining state should not prevail over the economic and social policy decisions that permitted the defendant's conduct.¹⁶³ The basic tenets of federalism demand that no state "legislate except with reference to its own jurisdiction."¹⁶⁴

orado, 185 U.S. 125, 146-47 (1902) (suit to enjoin water diversion); *Missouri v. Illinois*, 180 U.S. 208, 241-45 (1901) (suit to enjoin discharge of sewage into water). For a collection of controversies between states under the Supreme Court's original jurisdiction, see *Original Jurisdiction*, *supra* note 11, at 708-18.

158. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 719 (1838).

159. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) ("One cardinal rule, underlying all the relations of the States to each other, is that of equality of right.")

160. *E.g.*, *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). "[W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent . . . of the rights of the two States becomes a matter of justiciable dispute." *Id.* at 97-98.

161. 206 U.S. 230 (1907). The State of Georgia sought the abatement of damaging smoke emissions from defendant's out-of-state factory. *Id.* at 236-37.

162. *Id.* at 237. Because of potential parochialism, Georgia could not have been constitutionally compelled to seek relief in the courts of Tennessee regardless of the remedies available. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793).

163. *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976); *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971); *The Federalist No. 80* (A. Hamilton); *Friendly*, *supra* note 6, at 408 n.119; *Monaghan*, *supra* note 6, at 12-14. The vested interests of either state would, of course, find their expression in state law. *Woods & Reed*, *supra* note 40, at 710. The offending state would surely want to protect the economic well-being of its citizens from a damaging injunction, while the victim state would surely want to protect the health and comfort of its citizens. The intergovernmental conflict that exists in such suits should be resolved by resort to an impartial arbiter. *Woods & Reed*, *supra* note 40, at 710-11; *Interstate Pollution*, *supra* note 3, at 1449; *e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945), *modified on other grounds*, 345 U.S. 981 (1953); *North Dakota v. Minnesota*, 263 U.S. 365, 372-74 (1923).

164. *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881); *accord*, *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). "Each State stands on the same level with all the rest.

The *Tennessee Copper* rationale remains an important principle of interstate relations. Interstate pollution still presents difficult questions of conflicting state economic and social policies.¹⁶⁵ Neither state should have these important policy decisions made for them by their neighboring state's government or courts.¹⁶⁶ The submission of these conflicts to the impartial rules of federal law is both a necessary rule of federalism¹⁶⁷ and a practical vehicle for maintaining national peace and harmony.¹⁶⁸ The *Illinois* decision simply reaffirmed the basic premise of *Tennessee Copper* that interstate pollution disputes implicating a state's quasi-sovereign interests be decided under federal law.¹⁶⁹ The only difference was diversion of these disputes to federal district courts.¹⁷⁰

The passage of the CWA raises the question whether common law derived from our constitutional structure of government survives a legislative act of Congress. Clearly, Congress may abrogate or sup-

It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Id.* at 97-98.

165. Stewart, *supra* note 24, at 1227-28; Woods & Reed, *supra* note 40, at 710; *Interstate Pollution*, *supra* note 3, at 1449; *Air Pollution*, *supra* note 118, at 117.

166. Committee for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976); Texas v. Pankey, 441 F.2d 236, 240-42 (10th Cir. 1971); Woods & Reed, *supra* note 40, at 700-01, 710; 1972 Wis. L. Rev. 597, 603-10. See also New Jersey v. New York, 283 U.S. 336, 342-43 (1931); Hill, *supra* note 6, at 1030-32; Monaghan, *supra* note 6, at 13-14 & n.72.

167. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475-76 (1793); Hart & Wechsler, *supra* note 6, at 18-19; Woods & Reed, *supra* note 40, at 705-06. The grant of original jurisdiction over disputes between a state and a citizen of another state implied federal power to create substantive rules of decision when the nature of the dispute made the application of state law inappropriate. See Friendly, *supra* note 6, at 408 n.119; Hill, *supra* note 6, at 1030-32; Scott, *supra* note 149, at 163-64; Stewart, *supra* note 24, at 1229; Woods & Reed, *supra* note 40, at 708-11; *Federal Common Law*, *supra* note 6, at 1520. Therefore, "[f]ederal common law and not the varying common law of the individual States is . . . entitled and necessary to be recognized as a basis for dealing . . . with the environmental rights of a State against improper impairment by sources outside its domain." *Illinois v. City of Milwaukee*, 406 U.S. 91, 108 n.9 (1972) (quoting *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971)).

168. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945) (Original jurisdiction was designed "so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and a citizen of another State."); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."); see *The Federalist* No. 80 (A. Hamilton), at 516-17 (Modern Library ed. 1937); Scott, *supra* note 149, at 158-59.

169. *Illinois v. City of Milwaukee*, 406 U.S. 91, 104-08, 107 n.9 (1972).

170. *Id.* at 100.

plant established common law rights and duties.¹⁷¹ Statutes that divest "preexisting rights or privileges will not be applied to the sovereign,"¹⁷² however, "without a clear expression or implication to that effect."¹⁷³ Interstate common law actions are not expressly precluded by the CWA. Indeed, they are implicitly preserved by the CWA's savings clause.¹⁷⁴ Legislative debates also demonstrate that Congress specifically focused on the interstate common law of nuisance¹⁷⁵ and concluded that enactment of the CWA would not limit or preclude this cause of action.¹⁷⁶

171. *Carlson v. Green*, 100 S. Ct. 1468, 1476 (1980) (Powell, J., concurring); *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Arizona v. California*, 373 U.S. 546, 564-66 (1963); *United States v. A & P Trucking Co.*, 358 U.S. 121, 124 (1958); *New Jersey v. New York*, 283 U.S. 336, 348 (1931). There is as presumption against abrogation when the common law rights of a sovereign are concerned. *Hancock v. Train*, 426 U.S. 167, 179 (1976); *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 224-25 (1957); *United States v. Wittek*, 337 U.S. 346, 358-59 (1949); *United States v. United Mine Workers*, 330 U.S. 258, 272 (1947); *Dollar Sav. Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1873); *United States v. Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1219 (D. Mont. 1979).

172. *Hancock v. Train*, 426 U.S. 167, 179 (1976) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 272 (1947)).

173. *Id.* (quoting *United States v. Wittek*, 337 U.S. 346, 359 (1949)).

174. 33 U.S.C. § 1365(e) (1976). Although it is not clear whether Congress envisioned interstate common law when drafting this section, Congress is presumed to be aware of all preexisting laws when enacting regulatory schemes. *United States v. Neustadt*, 366 U.S. 696, 707-08 (1961); *St. Louis I.M. & S. Ry. v. United States*, 251 U.S. 198, 207 (1920); *Illinois v. City of Milwaukee*, 599 F.2d 151, 163 (7th Cir. 1979), *cert. granted*, 445 U.S. 926 (1980) (No. 79-408); 4 C. Sands, *Sutherland's Statutes and Statutory Construction* § 50.01, at 268 (4th ed. 1974).

175. 118 Cong. Rec. 10780 (1972), *reprinted in* 1 *Legislative History, supra* note 1, at 688 (remarks of Rep. Dingell).

176. *Id.* at 33705-09. *reprinted in* 1 *Legislative History, supra* note 1, at 191-94 (remarks of Sen. Griffin). The legislative debates indicate a congressional awareness that "[f]ederal courts have . . . traditionally upheld the right of the States to protect the health and safety of their citizens." *Id.* at 10773, *reprinted in* 1 *Legislative History, supra* note 1, at 676 (remarks of Rep. Fraser). In fact, concern was expressed that the passage of the CWA would alter the outcome of *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975), a suit based, in part, on interstate common law. *Id.* at 33705, *reprinted in* 1 *Legislative History, supra* note 1, at 191 (remarks of Sen. Griffin). Senator Hart replied that "the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 will in no way be affected nor will any of the other counts under the existing Federal Water Pollution Control Act or *other law.*" *Id.* at 33713, *reprinted in* 1 *Legislative History, supra* note 1, at 211 (remarks of Sen. Hart) (emphasis added). This view was shared by Senator Muskie. *Id.* at 33706, *reprinted in* 1 *Legislative History, supra* note 300, at 192-93 (remarks of Sen. Muskie); Senator Muskie's views, as principal author of the CWA, are entitled to substantial weight. *Simpson v. United States*, 435 U.S. 6, 13 (1978); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977). In fact, in an interstate pollution

In the absence of an explicit congressional declaration to preclude previously existent common law actions, the Supreme Court has concluded that such a right "is not to be abrogated 'unless it be found . . . so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.'"¹⁷⁷ Interstate common law presents no "irreconcilable conflict"¹⁷⁸ with the policies of the CWA. The CWA's policies to "preserve and protect the primary . . . rights of States"¹⁷⁹ are, in fact, furthered by interstate common law. Although the CWA gives states the unique right to promulgate and enforce more stringent standards than those imposed by the EPA,¹⁸⁰ the Act does not provide a federal remedy for violations of those standards by transboundary pollution. Far from conflicting with the CWA, interstate common law serves as a vital supplementary mechanism for protecting states' quasi-sovereign interests in interstate water.¹⁸¹

The *Illinois*¹⁸² litigation presently before the Supreme Court dem-

dispute, the Supreme Court apparently recognized that interstate common law continues to exist despite the CWA. *Vermont v. New York*, 417 U.S. 270, 275 n.5 (1974) (per curiam).

177. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976) (quoting *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907)); *accord*, *Isbrandsten Co. v. Johnson*, 343 U.S. 779, 783 (1952).

178. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976).

179. 33 U.S.C. § 1251(b) (1976).

180. *Id.* § 1370. This section has been held to allow enforcement actions brought under state and federal common law. *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 630 (7th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3043 (U.S. July 28, 1980) (No. 80-126); *United States Steel Corp. v. Train*, 556 F.2d 822, 830 (7th Cir. 1977); *Homestake Mining Co. v. EPA*, 477 F. Supp. 1279, 1283-84 (D.S.D. 1979). The Seventh Circuit has found that 33 U.S.C. § 1370 (1976), in conjunction with 33 U.S.C. § 1365(e) (1976), "suggests, if it does not require, the conclusion that Congress did not intend to preempt the federal common law" applicable to states. *Illinois v. City of Milwaukee*, 599 F.2d 151, 162 (7th Cir. 1979), *cert. granted*, 445 U.S. 926 (1980) (No. 79-408).

181. Brief for the United States as Amicus Curiae at 27-29, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 3, 1980). The EPA has long viewed the interstate common law of nuisance as consistent with the CWA. *Reserve Mining Co. v. EPA*, 514 F.2d 492, 501 (8th Cir. 1975). Brief for the United States as Amicus Curiae at 28, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 3, 1980). In fact, conformance with EPA regulations does not "[a]uthorize any injury . . . or any infringement of Federal, State, or local laws or regulations." 40 C.F.R. § 122.11(d)(2) (1980). As the agency primarily responsible for enforcing the CWA, the EPA's views are entitled to substantial deference. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134-35 & n.25 (1977); *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *see EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 226-27 (1976); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975).

182. *Illinois v. City of Milwaukee*, 599 F.2d 151 (1979), *cert. granted*, 445 U.S. 926 (1980) (No. 79-408).

onstrates the utility and continued necessity of interstate common law. Pursuant to provisions of the CWA,¹⁸³ both Illinois and Wisconsin instituted their own water pollution control programs.¹⁸⁴ Both programs complied with minimum federal standards.¹⁸⁵ In fact, Illinois promulgated water quality standards for its portion of Lake Michigan that were more stringent than those set by the EPA.¹⁸⁶ Wisconsin, however, did not set similarly high standards of pollution control for waters within its jurisdiction.¹⁸⁷ When lake currents carried pollutants from Wisconsin to Illinois, the purpose and effect of Illinois' legislation was defeated.¹⁸⁸ The CWA, in addressing the problem of conflicting state programs, provides that a state whose waters are affected by discharges in another state may only recommend that the other state adopt more effective water quality standards or impose higher effluent limitations in particular permits.¹⁸⁹ Neither the federal courts nor the federal administrator are authorized to reject a state permit or a state water quality standard that is in compliance with the terms of the CWA and existing EPA regulations.¹⁹⁰ Therefore, the CWA, like the FWPCA before it, fails to provide a means of

183. 33 U.S.C. § 1342(a)-(d) (1976).

184. Brief for the United States as Amicus Curiae at 8, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 3, 1980).

185. *Id.*; see 33 U.S.C. § 1342(b)(1)(A) (1976) (all state programs must comply with federal standards).

186. Brief for the United States as Amicus Curiae at 8 n.16, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 3, 1980).

187. Compare Illinois Water Pollution Control Board Rules and Regulations ch. 3, §§ 101-1205 (1979), reprinted in 1 *Envir. Rep. State Water Laws* (BNA) 766:0501-0528 (1979), with Wisconsin Administrative Code ch. NR 102-297.13 (1978), reprinted in 2 *Envir. Rep. State Water Laws* (BNA) 951:1001-2092 (1979).

188. See Brief for Respondents at 23-25, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 22, 1980). The *Illinois* litigation illustrates the state's vulnerability to its neighbor's intrastate conduct. The State of Illinois' shoreline on Lake Michigan is located between Indiana's vast industrial belt (the steel mills of Gary, Hammond, and East Chicago) and the Milwaukee metropolitan area. *Id.* at 21. The distance between these areas is less than sixty miles. *Id.* Pollutants dumped into the lake easily flow in either direction into Illinois' waters. *Id.* at 22.

189. 33 U.S.C. § 1342(b)(3) (1976) (state may request public hearings and urge imposition of higher standards); *id.* § 1342(b)(5) (state may request administrator to veto permits and formulate new permit); *id.* § 1313(c) (state may request higher standards as necessary to protect state).

190. *District of Columbia v. Schramm*, 631 F.2d 854, 861-62 (D.C. Cir. 1980); *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 n.25 (7th Cir. 1979), cert. granted, 445 U.S. 926 (1980) (No. 79-408); *United States Steel Corp. v. Train*, 556 F.2d 822, 835 (7th Cir. 1975); *Homestake Mining Co. v. EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979); Brief for United States as Amicus Curiae at 31 n.43, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 3, 1980). See generally Note, *Jurisdiction to Review Informal EPA Influence Upon State Decision-Making Under the Federal Water Pollution Control Act*, 92 *Harv. L. Rev.* 1814 (1979).

protecting a state's quasi-sovereign interests in interstate water from pollution permitted in a neighboring state.¹⁹¹ Interstate common law fills this void in the federal scheme.¹⁹²

Clearly, the functioning of a federal system is best served by a nonparochial mechanism for addressing grievances between the laws and policies of several states.¹⁹³ Some commentators and courts, however, have argued that this rationale justifies application of interstate common law to all transboundary pollution disputes, including those affecting only private individuals.¹⁹⁴ These arguments fail to realize that a private individual, under most circumstances, has no concern in protecting the quasi-sovereign interests of a state.¹⁹⁵ The citizen usually complains of injury to his personal and aesthetic well-being.¹⁹⁶

Application of interstate common law to any interstate pollution dispute, regardless of the parties involved, does, however, find some

191. The failure of the FWPCA to provide an effective mechanism for protecting a state's quasi-sovereign interests was the primary impetus for the *Illinois* decision. *Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972). The failure of the CWA to address this issue adequately was crucial to the Seventh Circuit's decision to grant injunctive relief under interstate common law. *Illinois v. City of Milwaukee*, 599 F.2d 151, 163, 165 (7th Cir. 1979), *cert. granted*, 445 U.S. 921 (1980) (No. 79-405).

192. Brief for the United States as Amicus Curiae at 31, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 3, 1980); *Water Pollution Disputes*, *supra* note 1, at 160-61. See also Stewart, *supra* note 24, at 1229-30 (pollution spillovers require federal court adjudication until addressed by federal legislation, *Air Pollution*, *supra* note 118, at 143 (problem of conflicting state pollution standards under Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. III 1979), could be solved through use of interstate common law).

193. Hart & Wechsler, *supra* note 6, at 263-64; Stewart, *supra* note 24, at 1229; *Water Pollution Disputes*, *supra* note 30, at 160-61. Transboundary spillovers of pollutants inherently present the potential for interstate friction. Stewart, *supra* note 24, at 1228-30; Woods & Reed, *supra* note 40, at 710-11. Although actual armed intervention is inconceivable, dramatic political repercussions could be equally dangerous to interstate relations. Brief for Respondents at 13, 34-35, *City of Milwaukee v. Illinois*, No. 79-408 (U.S., filed Sept. 22, 1980). In fact, to defeat the effect of the *Illinois* decision, Wisconsin Congressmen made repeated attempts to legislatively overturn the ruling by amending the FWPCA. *Id.* at 78 n.16.

194. *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1234 (3d Cir.), *cert. granted sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 314 (1980) (Nos. 79-1711, 79-1754, 79-1760 & 80-12); *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1040 (7th Cir. 1975); *Byram River v. Village of Port Chester*, 394 F. Supp. 618, 622 (S.D.N.Y. 1975); Campbell, *supra*, note 7, at 272; *High Water Mark*, *supra* note 3, at 10104; *Environment*, *supra* note 7, at 10172; *Federal Common Law Remedies*, *supra* note 7, at 557.

195. 26 Emory L.J. 433, 440-41, 456 (1977); 1977 Wash. U.L.Q. 164, 169.

196. See W. Prosser, *supra* note 11, § 88, at 587-88. To recover for a public nuisance a plaintiff must show damages different in kind from those suffered by the public. *Burgess v. Tamano*, 370 F. Supp. 247, 250 (D. Me. 1973); Restatement (Second) of Torts § 821C (1979).

basis in a Supreme Court decision in which federal common law was utilized to resolve an interstate water dispute between private individuals. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,¹⁹⁷ Colorado and New Mexico had a compact detailing their respective rights to water in an interstate river.¹⁹⁸ The La Plata Company's rights in the river water, however, antedated the compact, and they brought suit to prevent interference with those rights.¹⁹⁹ The Supreme Court held that federal common law supplied the rule of decision despite the absence of a state as a party.²⁰⁰ In reaching this conclusion, the Court recognized that adjudication of the private litigants' rights to the river water would directly impact the quasi-sovereign interests of both New Mexico and Colorado.²⁰¹ The interests of the states were so inexorably bound to those of the private company it was as though the state were a party to the action.²⁰² Thus, the Court, in requiring the use of federal common law, looked to the private litigant's implication of his state's quasi-sovereign interests and not solely to the interstate nature of the dispute.²⁰³ Although it may be rare, when the public's health, comfort or welfare are endangered, and the private individual seeks vindication of the general wrong, the assertion of the state's quasi-sovereign rights would be well-founded, and an interstate common law cause of action should be available.²⁰⁴

197. 304 U.S. 92 (1938).

198. *Id.* at 95-96. The interstate compact between Colorado and New Mexico provided, *inter alia*, that, to make the most efficient use of the La Plata River during the summer months, the state administrators would have authority to direct the entire flow to each state on an alternating basis. *Id.* at 108.

199. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187 (1933), *rev'd*, 304 U.S. 92 (1938). The La Plata Company objected to the use of the river water under the interstate compact as it deprived the company of water for periods of 10 days at a time. *Id.* at 132, 239 P.2d at 188. The Colorado Supreme Court found that the company had a vested right to the river water and held that the state could not barter this right away in a compact that failed to provide compensation. *Id.*

200. 304 U.S. at 110-11.

201. *Id.*

202. *Id.* at 111. It has been noted that the cases the Court relied on, *id.* n.13, are not squarely on point. Hill, *supra* note 6, at 1075 n.246.

203. See Hill, *supra* note 6, at 1076 (choice of law in *Hinderlider* required by Constitution).

204. Ordinarily, a state will wish to bring suit, thus precluding intervention by its citizens. *New Jersey v. New York*, 345 U.S. 369, 374 (1953). "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. A suit by a private individual would most often occur when his state is polluting or permitting the pollution of an interstate body of water, to the detriment of the general welfare. *E.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304

A remaining question is whether federal common law should apply to municipalities.²⁰⁵ A municipality possesses no sovereign status²⁰⁶ and must be viewed as a private entity. Possessing the practical advantage of asserting the collective rights of its citizens, however, a municipality may have less difficulty persuading a federal court that the controversy implicates the rights of the state.²⁰⁷

Two recent decisions upheld a municipality's ability to pursue federal nuisance actions. In *City of Evansville v. Kentucky Liquid Recycling, Inc.*,²⁰⁸ the Seventh Circuit validated the city's cause of action for damages resulting from transboundary pollution of the municipal water supply.²⁰⁹ The court acknowledged that the CWA evinced no congressional intent to provide for a private cause of action for damages; the citizen suit provisions were exclusive.²¹⁰ The court, however, relying on *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,²¹¹ applied interstate common law, reasoning that "[t]he interests of the state in this interstate pollution dispute are implicated in the same way such interests were implicated in *Illinois v. Milwaukee*."²¹² The court's rationale for invoking interstate common law, however, is vitiated by its own finding that "plaintiffs do not seek to represent the 'quasi-sovereign interest' . . . or the ecological rights . . . of the state of Indiana."²¹³ In a better reasoned opinion, the District Court of New Jersey specifically relied upon a township's well-founded assertion of its state's quasi-sovereign interest in granting interstate common law relief. The *Township of*

U.S. 92 (1938) (state "bartered" away quasi-sovereign interests to detriment of its citizens); *Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.N.J. 1978) (state permitted local sewage districts to pollute coastal waters to detriment of its own economy). In such instances, the private suit should be allowed because the state has failed in its *parens patriae* role.

205. Compare *Board of Supervisors v. United States*, 408 F. Supp. 556, 566 (E.D. Va. 1976) (applies), *appeal dismissed*, 551 F.2d 305 (4th Cir. 1977) with *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1017 (7th Cir. 1979) (does not apply), *cert. denied*, 444 U.S. 1025 (1980) and *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1214 (D.N.J. 1978) (does not apply).

206. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Board of Supervisors v. United States*, 408 F. Supp. 556, 566 (E.D. Va. 1976), *appeal dismissed*, 551 F.2d 305 (4th Cir. 1977); *Air Pollution*, *supra* note 118, at 134.

207. See *Air Pollution*, *supra* note 118, at 134.

208. 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

209. *Id.* at 1019. The defendants allegedly discharged toxic chemicals into the sewer system, which eventually flowed into the Ohio River, the source of the plaintiffs' drinking supply. *Id.* at 1010.

210. *Id.* at 1012-16.

211. 304 U.S. 92 (1938). See generally 1A J. Moore, *Federal Practice* ¶ 0.320 (3d ed. 1980).

212. 604 F.2d at 1018.

213. *Id.* at 1017 (footnotes omitted).

*Long Beach v. City of New York*²¹⁴ dispute centered upon the same pollution that generated the *National Sea Clammers* litigation.²¹⁵ Unlike the claim brought by the National Sea Clammers Association, the township's claim rested on its assertion of the state's quasi-sovereign interest in the ocean waters.²¹⁶ The court stated that, although "the decision in *Illinois v. City of Milwaukee* should not be extended to encompass an action by a private person,"²¹⁷ the significant interests asserted by the township implicated the entire state, and were therefore sufficient to uphold the interstate common law claim.²¹⁸ It is apparent from the nature and extent of the pollution involved that more than the independent interests of the township's citizens were involved. The township claimed that if the pollution of the coastal waters of New Jersey continued, it would result in severe economic injury to the state as a whole.²¹⁹ The court's finding of a statewide impact²²⁰ demonstrates that the township's claim not only implicated its proprietary rights, but in fact, involved the general health and welfare of the entire state. This, and any similar finding by a court, would justify use of interstate common law.

CONCLUSION

Utilization of federal common law in derogation of the CWA's statutory scheme constitutes a clear violation of the separation of powers doctrine. Once Congress has supplied the legislative policies and national priorities in a statute, federal courts must adhere to its provisions. With the enactment of the CWA, Congress has clearly spoken on how best to protect the nation's waters. Federal courts have no common law powers to supercede this congressional mandate.

The CWA, however, fails to include an effective statutory solution to the problem of conflicting state water quality standards in interstate water. This serious deficiency in the federal regulatory scheme justifies the continued existence of a unique type of federal common law. Interstate common law, designed specifically to protect quasi-sovereign interests in interstate resources, was preserved by the

214. 445 F. Supp. 1203 (D.N.J. 1978).

215. *High Water Mark*, *supra* note 3, at 10102.

216. 445 F. Supp. at 1214.

217. *Id.* at 1213 (citation omitted).

218. *Id.* at 1214.

219. *Id.*

220. *Id.* ("The interests sought to be protected herein are ones which affect the entire state, both aesthetically and economically.").

CWA and provides a flexible and effective means of filling the void in the statute. Interstate pollution will continue to create tensions between states, a problem that can only be authoritatively resolved by federal intervention. Until Congress definitively addresses this problem, interstate common law must remain available to compel what interstate compromise fails to provide.

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