ENVIRONMENTAL REGULATION AND THE FEDERAL COMMON LAW OF NUISANCE: A PROPOSED STANDARD OF PREEMPTION

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The federal common law of nuisance dates back to the early twentieth century when, without labelling it as such, the Supreme Court created common law to resolve interstate air and water pollution controversies.[1] In 1971, the Tenth Circuit became the first to apply the federal common law label in *Texas v. Pankey*.[2] There the State of Texas sought relief from harm to its waters allegedly caused by pesticide runoff from New Mexico farmland.[3] In the absence of a statutory remedy, the Tenth Circuit invoked federal common law, holding that "[it] and not the varying common law of the individual States is . . . a basis for dealing . . . with the environmental rights of a State against improper impairment by sources outside its domain."[4] The next year, in *Illinois v. City of Milwaukee* (*Milwaukee I*),[5] another interstate pollution dispute, the Supreme Court endorsed the *Pankey* approach, saying that "[w]hen we deal with air or water in their ambient or interstate aspects, there is a federal common law."[6]

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1. *See, e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906).

2. 441 F.2d 236 (10th Cir. 1971).

> "[It] is plain that some [demands of a state for relief from tortious injuries] must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court."
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> The source or basis itself for such a quasi-sovereign ecological right, in a State's position as part of the general political Union, was not discussed, but the right apparently was regarded as having existence in the common law and as being entitled to remedy within common law principles.

Id. at 240 (citations omitted) (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (Holmes, J.)).

3. *See* 441 F.2d at 237-38.

4. *Id.* at 241.

The court found jurisdiction over the controversy under section 1331(a) which gives federal courts jurisdiction over controversies "arising under the laws of the United States." 28 U.S.C. § 1331(a) (1976). The court interpreted that statute to include federal common law. 441 F.2d at 242.

5. 406 U.S. 91 (1972).

6. *Id.* at 103.

Ten years later, however, in *City of Milwaukee v. Illinois* (*Milwaukee II*),[7] the Court found that the 1972 Amendments to the Federal Water Pollution Control Act (FWPCA),[8] enacted just a few months after the *Milwaukee I* decision, had extinguished the need for the federal common law of nuisance in the interstate water pollution field.[9] The Court held that the strengthened Act superseded the power of the federal courts to develop separate substantive law in this area.[10] A few weeks after *Milwaukee II*, in *Middlesex County Sewerage Authority v. National Sea Clammers Association* (*Sea Clammers*),[11] the Court reiterated this holding in broad language, declaring that no federal common law remained in the entire water pollution field.[12]

Part I of this article traces the development of the federal common law of nuisance from its beginning in *Milwaukee I*, through its development by the lower courts during the next decade, and finally through its curtailment in *Milwaukee II*.[13] Part II examines the apparent scope of that curtailment. That Part finds an important distinction between polluting activities that require federal permits and other, less regulated activities, a distinction that the Supreme Court has so far ignored.[14] Part II thus concludes that the Supreme Court's language in *Sea Clammers* was unnecessarily broad and should be read narrowly. Part III argues that although the Court reached the correct result in *Milwaukee II* and *Sea Clammers*, it wrote those opinions too broadly because its analysis was incomplete. Therefore, Part III proposes a standard for determining the applicability of federal common law.[15] Part IV tests this standard against various hypothetical situations that would fall outside the purview of existing federal permit systems. Part IV concludes that the federal common law of nuisance is still needed as a remedy in two situations: (1) illegal water pollution for which no civil redress is provided by statute, and (2) pollution of other, less comprehensively regulated areas.[16]

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7. 451 U.S. 304, 101 S. Ct. 1784 (1981).

8. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980)). The amended Act and the further amendments enacted in 1977, Pub. L. No. 95-217, 91 Stat. 1566, are also known as the "Clean Water Act."

9. 101 S. Ct. at 1793.

10. *Id.* at 1792, 1793.

This ruling reversed several lower federal courts, which had ruled that the Amendments did not preempt the federal common law. United States v. Stoeco Homes, Inc., 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Illinois *ex rel.* Scott v. City of Milwaukee, 366 F. Supp. 298, 301 (N.D. Ill. 1973); United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556, 559 (N.D. Ill. 1973); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 119-21 (D. Vt. 1972), *aff'd*, 487 F.2d 1393 (2d Cir. 1973) (mem.), *cert. denied*, 417 U.S. 976 (1974).

11. 453 U.S. 1, 101 S. Ct. 2615 (1981).

12. 101 S. Ct. at 2627.

13. *See infra* text accompanying notes 17-144.

14. *See infra* text accompanying notes 145-71.

15. *See infra* text accompanying notes 172-92.

16. *See infra* text accompanying notes 193-243.

I. DEVELOPMENT OF THE FEDERAL COMMON LAW OF NUISANCE

The groundwork for a special federal common law was laid many years ago by *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[17] Since *Hinderlider,* courts have fashioned federal common law "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism."[18]

In developing a federal common law of nuisance, the courts have been guided by common law principles of public nuisance.[19] Those principles have long since established that a public nuisance is a substantial,[20] unreasonable[21] interference with a right common to the general public,[22] for which public officials may obtain relief. Private individuals may also obtain damages or injunctive relief, but only if they can demonstrate an injury that is different in kind from that suffered by the general public.[23] This Part of the article explores the way in which the federal courts use the federal common law of nuisance in pollution controversies.

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17. 304 U.S. 92, 110 (1938).

18. *Milwaukee I,* 406 U.S. at 105 n.6.

19. Public nuisance is conceptually quite distinct from private nuisance, despite their similarity in name. RESTATEMENT (SECOND) OF TORTS § 40, at 84 (1977). The latter refers to an interference with the plaintiff's "use and enjoyment" of his or her land. W. PROSSER, LAW OF TORTS, § 89, at 591 (4th ed. 1971). *See also* RESTATEMENT (SECOND) OF TORTS § 821D (1977).

20. W. PROSSER, *supra* note 19, at 577. The plaintiff may have to show that the harm continued or recurred over a long period, although other factors may also establish the substantiality of the interference. *Id.* at 579. *See, e.g.,* Grover v. City of Manhattan, 198 Kan. 307, 312, 424 P.2d 256, 260 (1967) (single coyote bite was not a nuisance because the coyote was out of its pen only on that one occasion).

21. W. PROSSER, *supra* note 19, § 87, at 580. In determining whether the defendant's conduct was reasonable, courts frequently weigh the probability and gravity of the interference with the plaintiff's interest against the social utility of the defendant's conduct. *Id.* at 581. *See, e.g.,* Meyer v. Kemper Ice Co., 180 La. 1037, 1043-47, 158 So. 378, 380 (1934) (no recovery because noise from icehouse not unreasonable); Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 182-90, 155 A. 280, 283-85 (1931) (plant enjoined from emitting unnecessary and unreasonable "smoke, odors, gas, smudge, noises and vibrations"). *But see* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

22. W. PROSSER, *supra* note 19, at § 88, at 585. A situation may be found to be a public nuisance if it threatens the public health, *see, e.g.,* Ajamian v. Township of North Bergen, 103 N.J. Super. 61, 70-71, 246 A.2d 521, 525-26 (N.J. Super. Ct. Law Div. 1968), *aff'd,* 107 N.J. Super. 175, 257 A.2d 726 (N.J. Super. Ct. App. Div. 1969) (mem.), *cert. denied,* 398 U.S. 952 (1970) (unsanitary building found to be a public nuisance); the public safety, *see, e.g.,* Browning v. Belue, 22 Ala. App. 437, 437, 116 So. 509, 510 (Ala. Ct. App. 1928) (vicious dog could be a public nuisance); or the public comfort, *see, e.g.,* State v. Primeau, 70 Wash. 2d 109, 112-13, 422 P.2d 302, 305 (1966) (piggery that produced obnoxious odors held to be a public nuisance).

23. W. PROSSER, *supra* note 19, § 88, at 584. *See also* National Audubon Soc'y, Inc. v. Johnson, 317 F. Supp. 1330, 1335 (S.D. Tex. 1970); Taylor v. Barnes, 303 Ky. 562, 564, 198 S.W.2d 297, 298 (1946); Prosser, Private Action for Public Nuisance, 52 VA. L. REV. 997 (1966); Retinger, Individual's Right to Injunction in a Private Nuisance Suit, 19 KAN. L. REV. 549 (1979).

A. Milwaukee I

Throughout the Milwaukee litigation, Illinois complained that the City of Milwaukee, Wisconsin was discharging untreated and inadequately treated sewage into Lake Michigan.[24] Illinois sought to bring the *Milwaukee I* suit directly in the Supreme Court in 1972,[25] but the Court declined to exercise original jurisdiction over the case.[26] Citing *Pankey* with approval,[27] it held that Illinois could bring an action in federal district court under the federal common law of nuisance, and remitted the case to be filed in district court.[28]

The Court acknowledged that a multitude of existing federal statutes addressed water pollution,[29] but ruled that the remedy sought was "not within the precise scope of remedies prescribed by Congress."[30] As the Court saw it, Illinois' claim fell into a gap in the existing federal statutory scheme.[31] In holding that the federal common law of nuisance provided a federal cause of action on Illinois' claim, the Court noted that "the remedies which Congress provides are not necessarily the only federal remedies available."[32]

In recognizing a cause of action based on federal common law of nuisance, the *Milwaukee I* Court applied an interests analysis. In that analysis, the Court emphasized three factors as requiring application of federal law.

First, in *Milwaukee I* a state government sued a political subdivision of another state. This created the possibility of friction between states.[33] There is a federal interest in interstate suits because a plaintiff state may

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24. *See, e.g., Milwaukee II,* 101 S. Ct. at 1788.

25. Illinois invoked the Supreme Court's original and exclusive jurisdiction over controversies between two or more states, 28 U.S.C. § 1251(a)(1) (1976 & Supp. IV 1980), and its original, but not exclusive, jurisdiction over proceedings brought by one state against the citizens of another state, *id.* § 1251(b)(3). The Court refused to read the term "state" to include political subdivisions, but it did consider political subdivisions to be "citizens"; it therefore concluded that its original jurisdiction over the *Milwaukee I* case fell under section 1251(b)(3), and was not exclusive. 406 U.S. at 98.

26. 406 U.S. at 108.

27. *Id.* at 103, 107 n.9.

28. *Id.* at 108.

The Court found that the district court had jurisdiction under 28 U.S.C. § 1331(a) (1976). 406 U.S. at 100-01. It held that the "considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount" of $10,000, *id.* at 98, and that federal common law represents "laws" of the United States within the meaning of section 1331(a), *id.* at 99.

29. 406 U.S. at 101-02. The Court mentioned six statutes through which Congress had asserted a federal interest in interstate water quality, including the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-426 (1976 & Supp. IV 1980); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980); and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1976).

30. 406 U.S. at 103.

31. *Id.*

32. *Id.*

33. *Id.* at 93.

be able to obtain a measure of environmental improvement at an economic cost borne entirely by nonresidents.[34] The Court indicated that where this potential for friction exists, a federal court, rather than a state court, should resolve the controversy.[35] There are also strategic problems with conducting a suit in the courts of one of the contestant states.[36] Furthermore, the Supreme Court has never ruled that the full faith and credit clause[37] requires state courts to enforce foreign equitable decrees, and state courts generally assume that the clause does not require that; therefore, unless interstate pollution suits are heard in a federal forum, they may result in unenforceable judgments.[38]

The second factor that supported a federal rule in *Milwaukee I* was the interest that the federal government had demonstrated in interstate water pollution control.[39] The Court pointed to various federal statutes and Supreme Court decisions as evidence of this interest.[40]

Finally, the *Milwaukee I* Court noted that a uniform rule of decision would benefit both federal and state interests.[41] Without a uniform federal rule, a defendant state might have conflicting judgments entered against it by courts of surrounding states. In Milwaukee's case, state courts in Illinois, Indiana, and Michigan might order the city to take inconsistent steps toward abatement.

B. Lower Court Developments, 1972-1981

During the ten years following *Milwaukee I,* lower federal courts struggled to define the scope of the newly created cause of action.[42] The

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34. *See* Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts,* 6 HARV. ENVTL. L. REV. 241, 245 (1982).

35. *See* 406 U.S. at 97-98.

36. Without a federal forum, a state plaintiff has only two options. It can bring suit in the courts of the defendant's state, but this option is not likely to appeal to the plaintiff, who will naturally suspect that the courts and juries of the defendant's state will favor the defendant. *See* Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 500 (1971). Also, sovereign immunity doctrines may bar suing another state in its own courts. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-34 to -35 (1978). A plaintiff state may alternatively sue in its own courts if its long-arm statute gives them jurisdiction over the defendant. *See* Nevada v. Hall, 440 U.S. 410 (1979). However, bias is no less likely against the defendant here than it was against the plaintiff above.

37. U.S. CONST. art. IV, cl. 1.

38. Note, *Federal Common Law and Interstate Pollution,* 85 HARV. L. REV. 1439, 1458 n.62 (1972).

39. *See Milwaukee I,* 406 U.S. at 103-06.

40. *See id.*

41. *Id.* at 107 n.9 (quoting Texas v. Pankey, 441 F.2d 236, 241-42 (10th Cir. 1971)).

42. *See, e.g., In re* Oswego Barge Corp., 439 F. Supp. 312, 322 (N.D.N.Y. 1977), *rev'd on other grounds,* 664 F.2d 327 (2d Cir. 1981); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 120 (D. Vt. 1973), *aff'd,* 487 F.2d 1393 (3d Cir. 1973) (mem.).

See generally Campbell, *Illinois v. City of Milwaukee: Federal Question Jurisdiction Through Federal Common Law,* 3 ENVTL. L. 267 (1973); Note, 13 WAKE FOREST L. REV. 246 (1977); Comment, 26 EMORY L.J. 433 (1977); Comment, 1977 WASH. U.L.Q. 164; Comment, *The Expansion of Federal Common Law and Federal Question Jurisdiction to*

Supreme Court offered little help in *Milwaukee I*, stating only that "[t]here are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."[43] The lower courts confronted a variety of open questions regarding substantive standards, standing, and appropriate remedies.

Several courts turned to the Restatement of Torts in an attempt to define the substantive nature of the new tort.[44] The Restatement defined a public nuisance as "an unreasonable interference with a right common to the general public."[45] The Supreme Court had given no further guidance than that "consideration of state standards may be relevant."[46]

In fleshing out the definition, courts required that the pollution be continuous, or at least recurrent.[47] One district court concluded that, as a matter of law, a single oil spill affecting the St. Lawrence Seaway for 122 days could meet this requirement.[48] Another district court[49] applied a similar standard, saying:

> [T]he pollution here has been of a recurring nature, although not continuous, producing long-lasting effects and substantial detriment upon the public right, with the actor . . . knowing or having reason to know of that effect.[50]

Interstate Pollution, 10 HOUS. L. REV. 121 (1972). *See also* Note, *supra* note 38, at 1458-59 (suggesting that, as an alternative to using the federal common law of nuisance, plaintiff states could gain access to federal courts by having the state attorney general or pollution agency bring suit in the name of the state, or by basing the suit on an alleged constitutional violation).

43. 406 U.S. at 107-08.

44. *See, e.g.*, National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1234 (3d Cir. 1980), *rev'd on other grounds sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2614 (1981); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 120 (D. Vt. 1973), *aff'd*, 487 F.2d 1393 (3d Cir. 1973) (mem.).

45. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

46. 406 U.S. at 107.

In *In re Oswego Barge Corp.*, the court noted that "[t]here does not appear to be any substantial differences [sic] between these federal common law principles and the New York law of common nuisance (non-criminal)." 439 F. Supp. at 322 n.9 (comparing 66 C.J.S. *Nuisances* § 18 (1950) and United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 120 (D. Vt. 1973), *aff'd*, 487 F.2d 1393 (3d Cir. 1973) (mem.) with 42 N.Y. JUR. *Nuisances* § 18 (1965)).

47. *See, e.g., In re* Oswego Barge Corp., 439 F. Supp. 312, 322 (N.D.N.Y. 1977), *rev'd on other grounds*, 664 F.2d 327 (2d Cir. 1981) (under federal common law notions, a public nuisance is by nature continuous or recurring).

48. *Id.* The court cited the Sixth Circuit's holding in E. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38 (6th Cir. 1943), that even a single isolated event that was foreseeable and preventable might constitute a nuisance. 439 F. Supp. at 322.

49. United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 120 (D. Vt. 1973), *aff'd*, 487 F.2d 1393 (3d Cir. 1973) (mem.).

50. *Id.* at 121.

The *Bushey* court also explicitly held that intent is not a necessary element of the cause of action, *id.* at 120, and that violation of a statute is an "important factor" in the required finding of unreasonableness, *id.* at 120-21.

The circuits split on whether the federal common law cause of action required a showing of interstate effects. The Fourth[51] and Eighth[52] Circuits held that interstate effects were required.[53] In *Illinois v. Outboard Marine Corp.*, the Seventh Circuit rejected that approach and reversed a district court dismissal of a complaint brought by Illinois against an Illinois corporation that was polluting Lake Michigan.[54] The corporation contended that Illinois' suit was barred because the pollution originated within the state's own borders.[55] The Seventh Circuit distinguished the Fourth and Eighth Circuit decisions on the ground that each had involved wholly intrastate effects, while *Outboard Marine* concerned pollution that affected all of the states on the lake.[56] Yet, the court refused to base its decision on this distinction.[57] Rather, it squarely held that *Milwaukee I* did not require interstate effects:

> Basically, the Supreme Court established, under federal common law, a right in tort for the pollution of interstate and navigable waters . . . . But the term "*interstate or navigable waters*" encompasses all federal waters, even tributaries of intrastate navigable waters. Federal concern is not just in navigability but in the purity and quality of the waters. This is reflected in the expanded concept of "navigable waters" [given by Congress in the legislative history of the 1972 Amendments]. It is explicit in the goal of the 1972 Amendments "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[58]

Standing emerged as another controversial issue during the decade-long flowering of the federal common law of nuisance. Because *Milwaukee I* had involved a state plaintiff, the Supreme Court's holding there clearly meant that states had standing to sue under the federal common law of nuisance. Nor was there any question that such standing extended to the United States[59] and to municipalities.[60] There was strong disagreement, however, whether private plaintiffs should have standing.

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51. Committee for the Consideration of the Jones Falls Sewerage Sys. v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976).

52. Reserve Mining Co. v. EPA, 514 F.2d 492, 520 (8th Cir. 1975) (en banc), *modified sub nom.* Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir.), *modified sub nom.* United States v. Reserve Mining Co., 543 F.2d 1210 (8th Cir. 1976).

53. *See also* Ancarrow v. City of Richmond, 600 F.2d 443 (4th Cir.), *cert. denied*, 444 U.S. 922 (1979); Mitchie v. Great Lakes Steel Division, 495 F.2d 213 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971); Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976), *aff'd mem. sub nom.* East End Yacht Club v. Shell Oil Co., 573 F.2d 1289 (2d Cir. 1977); Board of Supervisors v. United States, 408 F. Supp. 556 (E.D. Va. 1976).

54. 619 F.2d 623, 629-630 (7th Cir. 1980), *vacated and remanded on other grounds*, 514 U.S. 3152 (1981) (mem.).

55. *Id.* at 623.

56. *Id.* at 628-29.

57. *Id.* at 629.

58. *Id.* at 626-27 (emphasis added) (quoting *Milwaukee I*, 406 U.S. at 107).

59. *See, e.g.*, United States v. Stoeco Homes, Inc., 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *Bushey*, 363 F. Supp. at 120-21.

60. *See, e.g., City of Evansville*, 604 F.2d at 1019; Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1213 (D.N.J. 1978).

Part of the controversy arose from an ambiguous passage in the Supreme Court's *Milwaukee I* opinion, which stated that "it is not only the character of the parties that requires us to apply federal law."[61] In *National Sea Clammers Association v. City of New York,* the Third Circuit interpreted this language to authorize a grant of standing to private litigants, "[i]n order to give full effect to the federal common law of nuisance recognized in [*Milwaukee I*]."[62] Other courts, however, refused to grant standing to private plaintiffs.[63]

During the post-*Milwaukee I* period, courts also examined the availability of damages under the federal common law of nuisance. *United States v. Illinois Terminal Railway* arose from an attempt by the United States to recover the cost of removing an obstruction to navigable waters.[64] In holding that federal common law enabled a plaintiff to obtain monetary damages as well as injunctive relief, the district court cited two factors:[65] the overriding federal interest in maintaining safe navigable waters, and the breadth of the remedies available under the River and Harbors Appropriation Act of 1899.[66]

C. Milwaukee II

1. Developments in the Milwaukee Litigation after Milwaukee I

Just months after *Milwaukee I,* Congress passed the 1972 Amendments to the Federal Water Pollution Control Act.[67] The Amendments established the National Pollutant Discharge Elimination System (NPDES),[68] which requires permits for all discharges into the nation's waters. Milwaukee obtained NPDES permits from the Wisconsin Department of Natural Resources, as authorized by the Environmental Protection Agency (EPA), but was unable to comply with their terms.[69] The Wisconsin Department of Natural Resources brought an enforcement

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61. 406 U.S. at 105 n.6.

62. 616 F.2d 1222 (3d Cir. 1980), *rev'd on other grounds sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2614 (1981). *Accord* Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975) (granting standing *inter alia* to a private corporation and a private individual who owned land on the riverbank.)

63. *See, e.g., Long Beach,* 445 F. Supp. at 1213 ("It is agreed that the decision in [*Milwaukee I*] should not be extended to encompass an action by a private person") (dictum); *Committee for Jones Falls,* 539 F.2d at 1010; Parsell v. Shell Oil Co., 421 F. Supp. 1275, 1280-81 (D. Conn. 1976), *aff'd,* 573 F.2d 1289 (1st Cir. 1977).

64. 501 F. Supp. 18 (E.D. Mo. 1980).

65. *Id.* at 21. *Accord* City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008, 1019 (7th Cir. 1979) ("[T]he remedies appropriate for the violation of duties imposed under the federal common law of water pollution will necessarily depend upon the facts in a particular case."), *cert. denied,* 444 U.S. 1025 (1980).

66. 33 U.S.C. §§ 403, 406 (1976).

67. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980)).

68. *Id.* §§ 1311, 1342.

69. *Milwaukee II,* 101 S. Ct. at 1789.

action in state court,[70] as contemplated by the Act.[71] In 1977 the state court issued a judgment and set a timetable for Milwaukee to fulfill the requirements of its permits.[72]

In the meantime, Illinois had brought suit in the Northern District of Illinois seeking abatement of the pollution.[73] The district court held that Milwaukee's discharges constituted an abatable nuisance and imposed more demanding requirements and more stringent deadlines than the state agency had ordered in the NPDES permit proceeding.[74]

The Seventh Circuit affirmed in part and reversed in part.[75] It ruled that the 1972 Amendments had not preempted the federal common law of nuisance, but that "[i]n applying the federal common law of nuisance in a water pollution case, a court should . . . look to [the Act's] policies and principles for guidance."[76] The court of appeals reversed insofar as the effluent limitations that the district court imposed on treated sewage were more stringent than those in the NPDES permits and the applicable EPA regulations.[77] However, it upheld the district court's order to eliminate all overflows and the construction schedule designed to implement that order, even though that order went beyond permit requirements.[78]

Milwaukee argued in the Seventh Circuit that even if the 1972 Amendments did not on their face preempt the common law, compliance with a discharge permit issued under the Act constituted compliance with common law requirements as a matter of law.[79] The court of appeals rejected this argument on the basis of two provisions in the Act: (i) section 505(e),[80] which is a savings clause in the Act's citizen suit provisions that preserves other forms of relief available to litigants under any statute or common law;[81] and (ii) section 510,[82] which allows the states to impose more stringent effluent limitations than those required under the Act.[83] The court read these provisions as indicating that Congress intended to preserve the law-making power of the federal judges, because section 511(a) of the Act expressly preserved the authority of "*any* officer or agency of the United States."[84]

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70. *Id.*
71. 33 U.S.C. § 1342(h).
72. *See Milwaukee II*, 101 S. Ct. at 1789.
73. Illinois *ex rel.* Scott v. City of Milwaukee, 366 F. Supp. 298, 299 (N.D. Ill. 1973).
74. *See* Illinois v. City of Milwaukee, 599 F.2d 151, 155 (7th Cir. 1979).
75. *Id.* at 177.
76. *Id.* at 164.
77. *Id.* at 176.
78. *Id.* at 170.
79. *Id.* at 163.
80. 33 U.S.C. § 1365(e) (1976).
81. *See* 599 F.2d at 164.
82. 33 U.S.C. § 1370 (1976).
83. *See* 599 F.2d at 162.
84. *Id.* (quoting 33 U.S.C. § 1371(a) (1976)) (emphasis added).

2. Milwaukee II

In *Milwaukee II*,[85] the Supreme Court squarely rejected the analysis of the Seventh Circuit. The Court held that the 1972 Amendments to the Federal Water Pollution Control Act had eliminated the need for a federal common law of nuisance for interstate water pollution.[86]

Justice Rehnquist, writing for the majority, reiterated the basic proposition that "[f]ederal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision."[87] He noted that the decision to displace state law by enacting federal law is generally made by Congress, not the federal judiciary.[88] The limited role of special federal common law, he observed, allows federal courts to resolve conflicts between state law and a special national interest "when Congress has not spoken."[89]

The Court distinguished between two types of preemption: that of state law by federal law, under the supremacy clause of the federal Constitution,[90] and that of federal common law by federal statutory law, under separation of powers principles.[91] Whereas the inquiry into the federal preemption of state law assumes that state law is not preempted unless Congress clearly intended to preempt it,[92] the inquiry into the preemption of federal common law by federal statutory law begins with the assumption "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[93]

Milwaukee II involved the latter type of preemption. Had Congress expressly preempted the federal common law of water pollution in the 1972 Amendments, there would be no question that the *Milwaukee I* cause of action had been nullified. But neither the Amendments nor their legislative history explicitly discussed Congress's intent regarding federal common law of nuisance.[94]

Despite this dearth of the kind of evidence traditionally used to establish congressional intent, Justice Rehnquist couched his *Milwaukee*

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85. 101 S. Ct. 1784 (1981).

86. *Id.* at 1792.

87. *Id.* at 1790.

88. *Id.* (citations omitted).

89. *Id.*

90. U.S. CONST. art. VI, cl. 2. *See generally* L. TRIBE, *supra* note 36, at §§ 6-23 to -27.

Congress may preempt state law either by an explicit statutory provision or by implication. Implied preemption occurs when state and federal law cannot be reconciled or when Congress, through statutory structure or legislative history, indicates a "clear and manifest purpose" to occupy a given field. *Id.*

91. *See generally* L. TRIBE, *supra* note 36, at § 3-31.

92. 101 S. Ct. at 1792 (citations omitted).

93. *Id.* Some lower courts and commentators have interpreted this language to express a rebuttable presumption that federal statutes preempt federal common law. *See In Re* Oswego Barge Corp., 664 F.2d 327, 335-44 (2d Cir. 1981).

94. Though section 505(e), 33 U.S.C. § 1365(e) (1976), preserves citizen rights under common law, it does not expressly mention *federal* common law.

II analysis in terms of implied intent.[95] This aspect of his opinion contrasts sharply with the approach that other federal courts, including the *Milwaukee I* Court, had taken in deciding whether to recognize a federal common law claim. The *Milwaukee I* approach focused on the relative need for federal versus state common law, rather than Congress's intent to preempt federal common law.[96]

Justice Rehnquist identified five factors supporting the Court's conclusion that Congress implicitly intended the 1972 Amendments to preempt the federal common law of interstate water pollution by filling the existing regulatory gaps.[97] First the the Court noted the way in which Congress viewed the Amendments. The legislative history is replete with references to the comprehensiveness of the Amendments.[98] Proponents of the legislation remarked, for example, that it was intended to be a complete reworking of FWPCA, and would establish "an all-encompassing program of water pollution regulation."[99] After reviewing the legislative history, the Court concluded that Congress viewed the Act as a "comprehensive regulatory program" rather than as a more modest statute of the sort that the *Milwaukee I* Court had found inadequate to supplant federal common law.[100] The Court saw "the establishment of such a self-consciously comprehensive program" as strong evidence that Congress felt that there was "no room for courts to attempt to improve on that program with federal common law."[101] As the dissenters pointed out, however, it is not necessarily true that a "comprehensive" Act is "exclusive" of common law development.[102]

The second factor that the Court found indicative of Congress's intent was that Congress had empowered an expert administrative agency, the Environmental Protection Agency, to supervise and direct its pollution control scheme.[103] At least for known point source discharges, Congress subjected every discharger in the nation to the administrative apparatus it set up by prohibiting every discharge not covered by a permit.[104] To the extent that EPA promulgated regulations

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95. *See* 101 S. Ct. at 1792-1800.

96. *See supra* text accompanying notes 24-41.

97. 101 S. Ct. at 1792-98.

98. *See* citations at 101 S. Ct. at 1792-93

99. *Id.*

100. *Id.* at 1792.

101. *Id.* at 1793.

102. *Id.* at 1805 n.13 (Blackmun, J., dissenting). The dissenters construed sections 510 and 511, 33 U.S.C. §§ 1370, 1371 (1976 & Supp. IV 1980), which allow for the imposition of stricter controls by both state and federal authorities, to mean that the common law had similarly been reserved a role in the overall scheme. 101 S. Ct. at 1805. The dissenters pointed to explicit statements in the legislative history of the Amendments, statements which implied that Congress intended to preserve federal common law actions. *Id.* at 1805-06.

103. 101 S. Ct. at 1794-95. *See generally* 33 U.S.C. §§ 1251(d), 1311 (1976 & Supp. IV 1980).

104. *See* 33 U.S.C. § 1311(a) (1976).

establishing specific effluent limitations, all discharge permits were to incorporate those limitations as conditions.[105] In this way, the expert agency was to implement federal control of water pollution.

The Court next examined whether the administrative agency had acted pursuant to its authority.[106] All of Milwaukee's discharges were covered by duly issued permits,[107] which incorporated the "specific effluent limitations established by EPA regulations,"[108] and the Wisconsin Department of Natural Resources had brought actions to rectify permit violations.[109] In light of EPA's active involvement, the Court saw little reason for the federal courts to intervene.[110]

Fourth, the Court noted the availability of an alternate federal forum in which Illinois could have sought relief.[111] Justice Rehnquist acknowledged the concern expressed in *Milwaukee I* that Illinois could not protect its interest in a neutral forum unless federal law was available.[112] The 1972 Amendments, however, included new provisions allowing a state to challenge the actions of a neighboring state's permitting agency.[113] A state must give a neighboring state whose waters may be affected notice of the permit application and opportunity to object.[114] Both the neighboring state and EPA must receive notice and a statement of reasons if the permitting state decides not to accept completely the recommendations of the neighboring state.[115] EPA may veto any permit issued by a state when waters of another state may be affected.[116] Illinois had been notified when Milwaukee sought its permits, but failed to exercise its right to comment.[117] Nor did Illinois request that EPA veto the permit that Wisconsin had issued to Milwaukee.[118] Thus, Illinois had had an alternate forum available for its complaint; however, it failed to take advantage of that forum.

The fifth and final factor that the Court relied upon in determining Congress's intent was Congress's apparent belief that the complexity of the subject required an expert administrative body.[119] The Amendments gave EPA and state agencies the authority to apply their expertise to the highly technical decisions involved in selecting water quality standards

105. *See id.* § 1311(e).
106. 101 S. Ct. at 1795.
107. *Id.* at 1793-94.
108. *Id.* at 1794.
109. *Id.* at 1795.
110. *Id.*
111. *Id.* at 1796-97.
112. *Id.* at 1796 (citing 406 U.S. at 104, 107).
113. 33 U.S.C. § 1342 (1976 & Supp. IV 1980).
114. *Id.* § 1342(b)(3).
115. *Id.* § 1342(b)(5).
116. *Id.* § 1342(d)(2).
117. 101 S. Ct. at 1797.
118. *Id.*
119. *Id.* at 1796.

and issuing individual discharge permits.[120] Justice Rehnquist found powerful support for the need for an expert decisionmaker in the candid admissions by the district court that it had had difficulty following the technical issues of the case.[121] The legislative history of the Amendments indicated that Congress thought past approaches to water pollution control had been "sporadic" and "*ad hoc*,"[122] and Justice Rehnquist called these terms "apt characterizations of any judicial approach applying federal common law."[123]

The Court rejected the Seventh Circuit's conclusion[124] that federal common law was preserved by the Act's savings clause in the citizen suit provision, section 505(e).[125] The *Milwaukee II* Court construed section 505(e) literally, as applying *only* to the section 505 citizen suit provision, rather than to the entire Act.[126] Thus, the Court explained, although Congress intended that the citizen suit provisions would not preclude other remedies, it bore no such intent for the Act as a whole.[127]

The Court also rejected the Seventh Circuit's analogy between federal common law and the states' regulatory powers under section 510.[128] Justice Rehnquist stated that "[a]ny standards established under federal

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120. *See generally* 33 U.S.C. §§ 1251(d), 1311 (1976 & Supp. IV 1980).

121.

> [T]he District Court noted: "It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would certainly be less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be . . . ."

101 S. Ct. at 1796 (quoting App. to Petition for Cert. at F-4).

122. S. REP. NO. 414, 93d Cong., 1st Sess. 95, *reprinted in* 2 STAFF OF SENATE COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1511 (Comm. Print 1973).

123. 101 S. Ct. at 1796. *See also id.* at 1792 ("Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence.").

124. *See supra* text accompanying notes 80-84.

125. 33 U.S.C. § 1365(e) (1976).

126. 101 S. Ct. at 1798.

127. *Id.*

Justice Blackmun, joined in dissent by Justices Marshall and Stevens, argued that the federal common law of nuisance is derived from several fundamental principles that cannot be casually disregarded. *Id.* at 1801-03 (Blackmun, J., dissenting). First, where legal controversies arise among the states, the Constitution vests in the federal courts the power and obligation to resolve them. *Id.* at 1801 (Blackmun, J., dissenting). Second, the states have a long-recognized right to be free from unreasonable impairment of their natural resources. *Id.* (Blackmun, J., dissenting). Their entry into the Union made the forcible abatement of such nuisances impossible but created an avenue of recourse in the federal courts. *Id.* at 1802 (Blackmun, J., dissenting). Third, where federal law recognizes that certain rights are entitled to be protected but fails, even in an intensively regulated area, to protect them, federal common law fills the interstices in the statutory framework. *Id.* at 1802-03 (Blackmun, J., dissenting). In the dissenters' opinion, the 1972 Amendments were intended to preserve these principles, not to abrogate them. *Id.* at 1804 (Blackmun, J., dissenting).

128. *See supra* text accompanying notes 82-84.

common law are federal standards, and so the authority of States to impose more stringent standards under section 510 would not seem relevant."[129] The opinion completely ignored the Seventh Circuit's discussion of how section 511(a) had preserved federal powers.[130]

Milwaukee II focused entirely on Congress's intent regarding preemption and refused to inquire into the need for federal common law. The Court thus abandoned its own prior analysis in *Milwaukee I*. A few weeks later in *Sea Clammers*, the Court applied its *Milwaukee II* preemption holding in sweeping terms, and again failed to employ a *Milwaukee I* interests analysis.[131]

D. Sea Clammers

In *Sea Clammers*, an organization of people who fished off the coasts of New York and New Jersey brought suit in federal court against various federal and state governmental agencies for discharging or permitting the discharge of sludge and other wastes into the ocean. The plaintiffs alleged that the discharge was harming their fishing grounds and interfering with their ability to earn a livelihood.[132] The disposal was taking place pursuant to permits issued under the NPDES provisions of FWPCA[133] and the ocean dumping provisions of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA).[134] The plaintiffs based their claim on both the federal statutes[135] and the federal common law of nuisance and sought both damages and injunctive relief.[136]

The district court entered summary judgment for the defendants, holding *inter alia* that the federal common law of nuisance is not available to private plaintiffs.[137] The Third Circuit reversed, holding that private parties could sue under the common law of nuisance.[138] Arguing from

129. 101 S. Ct. at 1797-98.

130. *See supra* text accompanying note 84.

131. Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 101 S. Ct. 2615 (1981). *Milwaukee II* left open the question of what happens to state nuisance law, which is arguably unavailable if federal common law is applicable, *see* 101 S. Ct. at 1790 n.7; Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 ARIZ. L. REV. 691, 697 & n.28 (1970), when federal common law is precluded. That question is currently being litigated in *Milwaukee II*, on remand from the Supreme Court, and consolidated cases. Scott v. City of Hammond, No. 80 C 4563 (7th Cir. filed Oct. 9, 1981). For purposes of this article, the author assumes that state common law nuisance actions will be available. *Cf.* Scott v. City of Hammond, 519 F. Supp. 292 (N.D. Ill. 1981) (holding that the Federal Water Pollution Control Act does not preempt state common law).

132. *See* 101 S. Ct. at 2618-19.

133. 33 U.S.C. §§ 1311, 1342 (1976 & Supp. IV 1980).

134. 33 U.S.C. §§ 1401-1421 (1976 & Supp. IV 1980).

135. *See infra* note 159.

136. *See* 101 S. Ct. at 2619 & n.6.

137. *See id.* at 2619.

138. National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980), *modified sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615 (1981).

language in *Milwaukee I* to the effect that the overriding federal interest in having a uniform rule of decision required the Court to apply federal common law,[139] the Third Circuit went on to state that:

> The need for uniformity . . . is no less a concern where individuals are harmed by the polluting activities of states or their subdivisions. To hold that plaintiffs may not avail themselves of this remedy is to leave open the possibility that this pollution will continue unabated.[140]

The court of appeals also found sufficient allegations of particular harm to the plaintiffs to permit them to recover damages.[141]

The Supreme Court emphatically disagreed with the Third Circuit, and summarily dismissed the federal common law claim on the authority of *Milwaukee II*.[142] Without elaborating on either the *Milwaukee II* holding or the standard for determining whether federal common law applies, Justice Powell wrote simply that the Court had held in *Milwaukee I* "that the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [FWPCA]."[143] After comparing MPRSA to FWPCA and finding the two statutes nearly identical in their regulatory approach to their respective subject matters, the Court similarly ruled that there was "no cause for different treatment of the [ocean dumping] pre-emption question."[144]

II. Current Scope of the Federal Common Law of Nuisance

Sea Clammers[145] stated that "the federal common law of nuisance in *the area of water pollution* is *entirely pre-empted* by the more comprehensive scope of the Federal Water Pollution Control Act, which was completely revised soon after [*Milwaukee I*]."[146] Despite the breadth of this language, its appropriate construction is open to question since much of it was arguably dictum. While that language appears to indicate that FWPCA and MPRSA preempted any common law claim involving water pollution, such a reading may be unwarranted.

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139. 616 F.2d at 1233 (citing *Milwaukee I*, 406 U.S. at 105 n.6). The Third Circuit also cited *Milwaukee I*'s discussion of the character of the parties. *Id.*

140. *Id.* at 1234 n.35.

141. *Id.* at 1235.

142. *Sea Clammers*, 101 S. Ct. at 2627.

Justice Stevens, joined by Justice Blackmun, dissented from most of the majority opinion. *Id.* at 2631-32 (Stevens, J., dissenting). Justices Stevens and Blackmun, joined by Justice Marshall, had dissented in *Milwaukee II* as well. 101 S. Ct. at 1800 (Blackmun, J., dissenting).

143. 101 S. Ct. at 2627.

144. *Id.*

145. *Sea Clammers*, 101 S. Ct. 2615 (1981).

146. *Id.* at 2627 (emphasis added) (citing *Milwaukee II*, 101 S. Ct. 1784 (1981)).

A. Construing Milwaukee II *and* Sea Clammers

The Court's own analysis of congressional intent in *Milwaukee II* does not support the *Sea Clammers* language. Of the five factors that Justice Rehnquist presented as evidence that Congress intended the 1972 Amendments[147] to be exclusive, four are linked directly to active agency involvement in implementing the Act.[148] In other words, most of the evidence of congressional intent relates specifically to the NPDES program, not to the Act as a whole. To be sure, the NPDES permitting program, with its incorporated generic effluent limitations, is the heart of the regulatory scheme adopted in 1972. Certain activities regulated by the Act, however, do not fall within this permit program. Statutorily forbidden pollution, by its very nature, is not subject to the Act's permitting apparatus,[149] yet may have been subject to the federal common law of nuisance before *Milwaukee II* was decided.

Justice Rehnquist's fifth factor was the inference that he drew from the "comprehensiveness" of the 1972 Amendments, namely that Congress intended its comprehensive program to exclude all related common law development.[150] Although the legislative history indicates that members of Congress viewed the amended FWPCA as comprehensive,[151] this is an insufficient basis upon which to find a complete preemption of federal common law. Simply because the federal water pollution control legislation was restructured in 1972 and made more comprehensive, it was not thus made *ipso facto* exclusive, or so comprehensive as to leave no unregulated interstices. The dissent strongly urged that it was not.[152]

The *Milwaukee II* decision emphasized that the Act had directly addressed the specific problem there at issue, namely sewage discharges from a municipal treatment works.[153] Milwaukee's discharges were subject to generic effluent limitations developed by EPA, and the plants themselves were covered by discharge permits issued and enforced by the state.[154] Thus, the *Milwaukee II* situation presented an attractive candidate for a finding of preemption.[155]

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147. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980)).

148. *See supra* text accompanying notes 97-123. The only factor that was not linked directly to EPA's active role was Congress's view of the Amendments as comprehensive.

149. Examples include illegal "midnight dumping," *see, e.g.*, City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), and non-permitted accidental spills.

150. Writing for the majority, Justice Rehnquist stated that "[t]he establishment of such a self-consciously comprehensive program . . . *strongly suggests* that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee II*, 101 S. Ct. at 1793 (emphasis added). He then turned to the facts relating to the particular NPDES permit that was before the Court and held that Congress had spoken the last word on the abatement of pollution from NPDES sources. *Id.* at 1793-94.

151. *See supra* text accompanying notes 99-101.

152. *See supra* note 101.

153. 101 S. Ct. at 1793-94.

154. *Id.* at 1794-95.

155. *But see* Stewart, *supra* note 34. Professor Stewart criticizes *Milwaukee II* as "unsatisfactory" on the ground that FWPCA is "unlikely to meet Illinois's concerns." *Id.*

Sea Clammers involved a similar controversy. The defendants held permits issued by EPA and the Army Corps of Engineers to discharge and dispose of their wastes in the ocean pursuant to both FWPCA and MPRSA.[156] As the Court noted,

> The exact nature of respondents' claims under these two Acts is not clear, but the claims appear to fall into two categories. The main contention is that the EPA and the Army Corps of Engineers have permitted the New Jersey and New York defendants to discharge and dump pollutants in amounts that are not permitted by the Acts. In addition, they seem to allege that the New York and New Jersey defendants have violated the terms of their permits.[157]

Because of procedural defects in the plaintiffs' case,[158] these alleged violations were never reviewed on their merits. Had those claims been found valid, presumably the defendants would have been ordered to comply with the terms of the permits.[159] As *Sea Clammers* actually came before the Court, however, its factual setting was closely analogous to that in *Milwaukee II:* it involved a regulated activity, fully reviewed and permitted by an expert administrative agency.[160]

These fact patterns suggest a narrow reading of the preemption cases, which would comport with the Court's conclusion that it is inappropriate to superimpose federal common law upon active regulatory programs. Under such a reading, the cases simply reveal a healthy respect for the NPDES and ocean dumping permit programs. The preclusion of federal common law remedies within the bounds of these federal permit programs merely eliminates the uncertainty that results from the concurrent availability of common law judgments and statutory standards and sanctions. Moreover, allowing the courts to entertain federal common law claims regarding regulated activities would entail a judicial oversight of expert administrative decisionmaking that Congress probably did not intend.

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at 260. He notes that "[t]he Act aims to ensure that all municipalities adopt a minimum, nationally uniform level of pollution control, but Illinois complained that this minimum level of control did not ensure adequate water quality in its portion of Lake Michigan." *Id.* Under this assessment, the *Milwaukee II* situation would appear to be an arguably less compelling candidate for preemption.

156. *See supra* text accompanying notes 133-34.

157. *Sea Clammers*, 101 S. Ct. at 2622.

158. Both FWPCA, 33 U.S.C. § 1365(b)(1)(A), and MPRSA, *id.* § 1415(g)(2)(A), contain citizen suit provisions, which allow for private enforcement actions if administrative agencies fail to comply with the statutes. Both provisions require that plaintiffs give 60 days notice before filing such suits; the *Sea Clammers* plaintiffs failed to do so, and the citizen suit remedy was thus unavailable to them. *See* National Sea Clammers Assoc. v. City of New York, 616 F.2d 1222, 1225 (3d Cir. 1980).

159. *See* 33 U.S.C. § 1415(g) (1976).

160. The main issue in *Sea Clammers* was not whether federal common law of nuisance existed, but whether implied private rights of action were available to private plaintiffs. For a fuller discussion of this issue, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1223-25 (1982).

The *Milwaukee II* ruling that Congress intended the 1972 Amendments to provide exclusive federal control over interstate water pollution would be reasonable if limited to exclusive control over activities regulated through discharge permits.[161] Likewise, the *Sea Clammers* application of *Milwaukee II* would be reasonable if similarly limited. As interpreted in *Sea Clammers,* however, the *Milwaukee II* ruling extended much further than the federal permit programs,[162] and appears to be unjustifiably broad.

B. Beyond the NPDES Permitting Program

As an illustration of the soundness of the narrow reading of *Milwaukee II,* consider water pollution outside of the scope of the NPDES program. The Act absolutely prohibits such discharges.[163] It prohibits them, however, primarily to subject the discharger to its regulatory apparatus and to ensure that the discharger complies with its permit program.[164]

In this respect, the 1972 Amendments changed little about the legislative scheme already in place. Before 1972, any pollution of interstate or navigable waters that endangered health or human welfare was subject to abatement by state or federal officials.[165] In addition, the discharge of specific categories of pollutants was *per se* illegal[166] or subject to regulation by the President.[167] The 1972 Amendments made all non-permitted pollutant discharges illegal.[168]

This change in the treatment of non-permitted discharges hardly compares to the strengthened regulation of permitted discharges at issue in *Milwaukee II* and *Sea Clammers.* Whereas the new law proscribed certain non-permitted discharges that formerly were only "abatable," it subjected permitted discharges to a comprehensive regulatory structure. Under the NPDES program, expert agencies review every point source discharge on a case-by-case basis and design a discharge permit uniquely conditioned to the circumstances.[169] They police compliance with the

161. The lower federal courts were already refraining from exercising their equitable powers when an alleged source of "nuisance" pollution was operating within the bounds of a federal permit. *See, e.g.,* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976); New England Legal Found. v. Costle, 475 F. Supp. 425 (D. Conn. 1979), *aff'd,* 632 F.2d 936 (2d Cir. 1980), *aff'd,* 666 F.2d 30 (2d Cir. 1981).

162. Note that the Court reached its *Sea Clammers* decision without the assistance of briefing or argument regarding the effect of *Milwaukee II.* The parties had briefed and argued the *Sea Clammers* case well before the Court announced the *Milwaukee II* decision.

163. 33 U.S.C. § 1311 (1976 & Supp. IV 1980).

164. 101 S. Ct. at 1793.

165. Pub. L. No. 91-224, § 102, 84 Stat. 91 (1970) (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980)).

166. *Id.*

167. *Id.*

168. 33 U.S.C. § 1311 (1976 & Supp. IV 1980).

169. *Id.* § 1312(a) (1976).

permits by reviewing discharge monitoring data submitted by the dischargers, as well as by conducting their own sampling program.[170] They also enforce the program through administrative and judicial actions.[171] This pervasive administrative structure underlay the Supreme Court's preemption holdings in *Milwaukee II* and *Sea Clammers*.

Although the examination of congressional intent in those two decisions led the Court to conclude that the 1972 Amendments preempted some of the federal common law of water pollution, such an examination would not support a similar conclusion regarding all federal common law. Specifically, the change in the law regarding non-permitted discharges was not significant enough to indicate a congressional intent to preempt federal common law relative to such discharges.

III. A Proposed Test for Determining Whether Federal Common Law Applies

The Supreme Court's approach to determining whether federal common law is applicable seems unduly opaque and incomplete. The Court decided *Milwaukee I* and *Milwaukee II* on the basis of different inquiries, and neither opinion articulated an overall test or placed its particular inquiry in overall perspective. This Part describes a test for the creation or extinguishment of federal common law incorporating the criteria set forth in both *Milwaukee I* and *Milwaukee II*. The proposed test has two prongs: (1) a *Milwaukee II*-type analysis of congressional intent, and (2) a *Milwaukee I*-type interests analysis.

Under this standard, courts should acknowledge the need for — and allow causes of action to be based on — federal common law of nuisance whenever a field of law presents *both* significant federal interest in a uniform rule of decision *and* no congressional intent to preclude the application of such a federal rule. Because some factual settings can be resolved more readily under one criterion than the other, courts may consider either question first. If either question is answered in the negative, the inquiry ends and the court must reject the common law cause of action.

The *Milwaukee I* prong is essentially an interests analysis that balances federal and state interests in having their own laws apply to particular controversies.[172] The *Milwaukee II* discussion of implied congressional intent to override the federal common law[173] represents the other prong. Although *Milwaukee II* skirted the inquiry into the need for federal common law, it did not overrule *Milwaukee I*. Congressional intent to preempt federal common law, where clear, controls. Where Congress's intent is not clear, however, and where there is a "significant conflict

170. *Id.* § 1318(a) (1976 & Supp. IV 1980).
171. *Id.* § 1319.
172. *See supra* text accompanying notes 24-41.
173. *See supra* text accompanying notes 94-123.

between some federal policy or interest and the use of state law,"[174] federal courts should create federal common law in order to ensure that federal objectives are not thwarted.[175]

A. Analysis of Congressional Intent

Congressional intent is a logical starting point in many factual settings, because once a court determines that Congress has expressed its intent regarding the use of federal common law, that intent controls and all inquiry ends.[176] In analyzing implied intent, however, the danger is that a court may misread Congress's actual intent. If the court mistakenly finds an implicit congressional intent to preclude a federal common law remedy, the result is the denial of such remedy without inquiry into the need for it.

In order to avoid an erroneous decision based solely upon an analysis of congressional intent that is not clearly discernible, a court should look for either an express savings or preemption provision in the statute or express and uncontroverted evidence of preemptive intent in the legislative history. If neither is present, the court should proceed to an interests analysis.

B. Analysis of Federal Interests

A court should assess the need for a uniform federal rule of decision by balancing federal and state interests. The relevant federal interests are in providing an unbiased forum for the resolution of interstate disputes and in protecting federal interests in the subject matter.

Litigation between a state and an out-of-state opponent creates a tension in the federal system. This tension is aggravated by the absence of a federal forum in which the parties can resolve the controversy. Not only may the defendant perceive bias in the forum state's court, but variations between the substantive law of the plaintiff's state and that of the defendant state may present a difficult choice-of-laws problem.[177] These difficulties can be avoided by allowing the plaintiff access to the federal courts, which would provide an unbiased forum and would apply uniform substantive law.

In addition to minimizing interstate tension, uniformity of rule may be necessary to effect a federal interest in the subject matter. The *Milwaukee* litigation is illustrative.[178] The federal government has a substantial interest in the water quality of Lake Michigan, a major interstate

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174. *Milwaukee II*, 101 S. Ct. at 1790 (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

175. U.S. CONST. art. VI, cl. 2. *See supra* note 90.

176. *See supra* text accompanying notes 91 & 93.

177. *See generally* J. MARTIN, CONFLICTS OF LAWS (1978).

178. *See supra* text accompanying note 156.

body of navigable water that is important to commerce, food production, and recreation. Congress demonstrated this interest in the 1965 Water Act, which established general federal control over discharges that lowered water quality in navigable waters.[179] This federal interest in the water quality of Lake Michigan could not be adequately protected by the "varying common law of the individual states"[180] without minimum federal water quality standards. Therefore, in *Milwaukee I,* the Supreme Court endorsed the application of the federal common law of nuisance. When the *Milwaukee II* Court reconsidered the situation in light of the 1972 Amendments to FWPCA, the NPDES permit program had provided the needed maximum limits on pollutant discharges. State laws could only impose more stringent water quality requirements,[181] and thus inconsistent nuisance rulings by the various states bordering Lake Michigan did not threaten the attainment of a certain minimum water quality level in the lake. Federal common law was no longer needed.[182]

Opposing the factors that favor a federal rule of decision are the states' interests in having their own laws apply. States have developed detailed bodies of law in areas of traditional local concern; imposing federal law in these areas may significantly disrupt a state's regulatory scheme.[183] A state's interest in applying its laws in areas of less local concern merits less weight, but federalism principles require that it too be included in the balance.[184] Thus, the relevant state interests are in preserving the structure of state regulation in areas of traditional local concern, and in avoiding the displacement of state law in other areas.

Federal common law will not apply unless "a significant conflict between some federal policy or interest and the use of state law . . . [is] specifically shown . . . ."[185] Thus, to balance conflicting federal and state interests properly, a court should consider whether the application of potentially inconsistent state laws would conflict with federal objectives.[186] If it finds a substantial conflict, that is, one that would undermine

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179. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965) (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980)).

180. Texas v. Pankey, 441 F.2d 236, 241-42 (10th Cir. 1971).

181. *See* 33 U.S.C. § 1370 (1976).

182. *But see supra* note 155.

183. *See* United States v. Yazell, 382 U.S. 341, 352-53 (1966); United States v. Brosnan, 363 U.S. 237, 241-42 (1960).

184. *See generally* Note, *The Preemption Doctrine: Shifting Perspective on Federalism and the Burger Court,* 75 COLUM. L. REV. 623 (1975).

185. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); *see Milwaukee II,* 101 S. Ct. at 1790.

The Rules of Decision Act mandates that state law be applied unless there is an expression of contrary legislative intent, 28 U.S.C. § 1652 (1976), or a showing that state law conflicts significantly with federal interests or policies, Georgia Power Co. v. Sanders, 617 F.2d 1112, 1116 (5th Cir. 1980).

186. General preemption principles, which could help guide a court in making this assessment, have been more narrowly applied over the past decade than previously. *See generally* Note, *supra* note 184.

the federal objectives, it should apply federal common law.[187] If it finds a less serious conflict, it should weigh the relative importance of the federal and state interests outlined above, and decide accordingly.

C. Coordinating the Two Analyses

The factors relevant to the congressional intent analysis and the federal interests analysis may overlap. For example, the availability of an alternate federal forum demonstrates an absence of the need for federal common law to resolve interstate clashes.[188] But if the alternate forum was created by statute, that may also indicate that Congress intended that it represent the complete remedy. The Supreme Court inferred such a conclusion in *Milwaukee II*.[189]

Federal legislation is also significant to both questions although it may suggest opposite answers to each. The *Milwaukee I* Court found a major federal interest in interstate water pollution based principally on the enactment of federal legislation aimed at the problem.[190] On the other hand, legislation that directly regulates the challenged activity may indicate that Congress believes that it has prescribed all necessary federal rules on the subject, thus implicitly precluding federal common law.[191] Apparently, congressional activity generates a narrow band of federal common law, bounded on one side by insufficient showing of federal interest and on the other by comprehensive regulation of the field.

For certain types of claims, federal common law can be readily precluded under one prong of the test without resort to the other. For example, where Congress has expressly made statutory remedies exclusive, a court's perception of a need for common law is irrelevant, even if the need seems great. An equally clear corollary case involves intrastate pollution of non-navigable waters.[192] Here there is little, if any, evidence of Congress's intent on the matter, but a federal interest sufficient to warrant special federal common law is clearly lacking.

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187. *See* United States v. County of Allegheny, 322 U.S. 174, 182-83 (1944) (supremacy clause dictates federal rule in conflict).

188. *See supra* text accompanying notes 33-37.

189. *See supra* text accompanying notes 95-101.

190. *See* 406 U.S. at 101-03; *supra* text accompanying notes 38-39.

191. The *Milwaukee I* Court itself predicted that:

> It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance . . . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with [alleged interstate water pollution].

406 U.S. at 107 (quoting Texas v. Pankey, 441 F.2d 236, 241-42 (10th Cir. 1971)).

In *Milwaukee II*, Justice Rehnquist found the 1972 Amendments to be exactly the kind of comprehensive legislation that *Pankey* and *Milwaukee I* had suggested might eventually supplant the special federal common law that those cases created. 101 S. Ct. at 1793.

192. Federal powers are limited to navigable interstate waters.

In many situations, however, the courts will have to apply both elements of the standard, because neither analysis alone will yield a conclusive answer. Courts should be free to apply the analyses in any order that seems appropriate and efficient under the circumstances.

IV. Applying the Proposed Standard

This Part of the article applies the proposed standard for federal common law applicability to several fact situations, some real and some hypothetical. First, the test is applied to the *Milwaukee I, Milwaukee II,* and *Sea Clammers* situations to compare its results with those of the Supreme Court. Next, it is applied to real and hypothetical water pollution situations beyond the NPDES and ocean dumping permit programs, for which *Milwaukee II* and *Sea Clammers* imply that federal common law is also precluded. Last, it is applied to situations regulated by federal environmental statutes other than FWPCA, for which the *Milwaukee II* and *Sea Clammers* decisions leave the availability of federal common law in doubt.

A. Milwaukee I

At the time *Milwaukee I*[193] was decided, the Court concluded that the pollution there at issue represented harm to a federal interest that federal legislation alone was inadequate to prevent. The FWPCA demonstrated the federal interest in controlling pollution of interstate or navigable waters, but did not prescribe sufficient standards to protect this interest from transborder harm.[194] This conflict between the national goal of protecting navigable waters and reliance on varying state law was serious enough to require application of federal common law *per se,* because application of state laws could have prevented achievement of the federal goal.

Even if the conflict were considered less serious, for instance if most state laws were sufficiently stringent to protect navigable waters, federal common law should still have prevailed. On balance, the specific need for an adequate, uniform pollution control rule was substantially greater than the states' general interest in seeing their own laws control interstate and navigable waters within their boundaries. Furthermore, forcing the State of Illinois and the City of Milwaukee to litigate in a state court would have created serious tension in the federal system of sovereign states.[195]

Thus, application of the proposed test to the *Milwaukee I* fact situation would have produced the same result as that reached by the Supreme Court.

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193. *See Milwaukee I,* 406 U.S. at 102-03, 107.
194. *See supra* text accompanying notes 24-41.
195. *Id.*

B. Milwaukee II

In *Milwaukee II*'s consideration of the 1972 Amendments,[196] the Court found that Congress had again expressed a federal interest in protecting interstate and navigable waters. There was much evidence that Congress viewed the Act as comprehensive, but the majority opinion failed to acknowledge that the legislative history contained little indication that Congress viewed it as exclusive.[197] Indeed, given that Congress must have been aware of the *Milwaukee I* ruling when it passed the 1972 Amendments, it arguably endorsed that ruling by enacting the 1972 bill without expressly preempting federal common law. In any event, because Congress's actual intent regarding preemption of federal common law was not clear, the Court should have evaluated the need for federal common law.

With the installation of the NPDES permit program as the new driving force in the Act, the conflict between the achievement of federal goals and the application of state laws was substantially reduced. Now the federal NPDES permit program controlled the maximum discharge levels from Milwaukee's sewerage facilities.[198] States were free to impose only more stringent limits; therefore, application of the varying laws of the states bordering Lake Michigan would not interfere with achievement of the minimum water quality levels contemplated by the federal program. Although the tension between the various states was still present, this factor alone was not a compelling enough reason for federal courts to intervene. Moreover, Congress expressly authorized the states to impose more stringent standards if they so desired.

In addition, the 1972 Amendments contained provisions for interstate dispute resolution at the permitting stage.[199] Although Illinois had not taken advantage of these mechanisms, it would still have been appropriate to consider them in evaluating the need for common law.

Since the new Act provided protection for the federal interest in a minimum water quality standard and in a neutral forum for interstate disputes, federal common law was no longer needed to control permitted point source discharges. Again, the two-part analysis discussed above produces the same result as the Supreme Court decision: in this instance, federal common law of nuisance was indeed preempted.[200]

C. Sea Clammers

The elimination of the *Milwaukee I* conflict by implementation of the NPDES program applied with equal force to the *Sea Clammers* litigation.[201] In addition, the ocean dumping permit program of MPRSA,

196. 101 S. Ct. at 1792-98.
197. *See supra* text accompanying notes 97-102.
198. *But see* Stewart, *supra* note 34.
199. *See supra* notes 114-17 and accompanying text.
200. *But see* Stewart, *supra* note 34.
201. *Sea Clammers*, 101 S. Ct. 2615 (1981).

with its similar regulatory structure, safeguarded the federal interest in protecting the water quality of ocean waters.[202]

Even the tension between states was less severe in *Sea Clammers* than in the Milwaukee litigation because one party was a private rather than a governmental entity.[203] The MPRSA contains no interstate dispute resolution provisions analogous to those in the FWPCA,[204] but that difference should not alter the result in any event, because the *Sea Clammers* plaintiff was a private party.

As in *Milwaukee II*, the analysis of congressional intent and federal interests in federal common law produces a result that agrees with the Supreme Court's opinion that federal common law should not be applied in *Sea Clammers*.

D. Non-Permitted Discharges

The FWPCA prohibits all discharges to navigable waters except those authorized by permits issued under the Act. But prohibited or not, illegal discharges occur, albeit sporadically. One situation that results in non-permitted discharges is the illegal dumping of pollutants by "midnight dumpers" who hope to evade the law and the cost of land-based waste disposal.[205] In *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*,[206] a refiner of toxic chemicals was sued for illegally dumping pollutants into the Ohio River, from which the plaintiff city drew its water supply. The Seventh Circuit approved the application of federal common law.[207] The standard proposed herein supports this result.

As with *Milwaukee I, Milwaukee II,* and *Sea Clammers,* this case presented a federal interest in protecting the quality of interstate and navigable waters. Because the "midnight dumping" was not within the NPDES system, no expert agency calculated the effect this discharge would have on river water quality or conditioned it by imposing generic or individual discharge limits. Nor was it subject to ongoing monitoring or reporting requirements. Thus, although the discharge was illegal under the 1972 Amendments, little in the new legislation protected the federal interest in clean water from this kind of pollution.

On balance, the need for uniform standards to protect interstate waters outweighed any interests the states might have in controlling the quality of navigable waters flowing through or past their borders.[208] Although FWPCA provides for civil and criminal penalties for unauthorized

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202. 33 U.S.C. §§ 1401-1445 (1976 & Supp. IV 1980).

203. *See supra* text accompanying notes 132-41.

204. 33 U.S.C. § 1342 (1976 & Supp. IV 1980). *See supra* text accompanying notes 113-17.

205. Good hazardous waste management can cost 10 to 40 times as much as unsatisfactory methods. U.S. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY — 1977, at 47-48 (1977) (8th Annual Report).

206. 604 F.2d 1008 (7th Cir. 1979).

207. *Id.* at 1017.

208. *See supra* text accompanying note 39.

discharges,[209] those remedies would not enable the *Evansville* plaintiff to recover damages. Nor would the common law of various states necessarily provide a minimum standard of protection for this federal interest. The federal interest in uniform treatment of interstate waters thus extends to damage awards as well as to regulatory systems, requiring the application of federal common law of nuisance. Yet if the *Sea Clammers* blanket preemption ruling were applied literally to all water pollution situations, the federal interests would be left to the incidental care of state laws.[210]

E. Air Pollution

In another case decided the same day as was *Milwaukee I*, the Supreme Court suggested that the federal common law of nuisance extended to air pollution as well as to water pollution.[211] Whether the Clean Air Act[212] is as comprehensive as FWPCA is a close question.[213] Unlike FWPCA, however, the Clean Air Act regulates only those emission sources that the states find will threaten national ambient air quality standards.[214] As in FWPCA, Congress did not expressly endorse or preclude the availability of federal common law for air pollution controversies.[215] Nor, as with FWPCA, can Congress's intent readily be inferred from the legislative history. Consequently, in reviewing federal common law of nuisance claims for air pollution injuries, courts should evaluate the need for federal rules in each factual setting. In many, where an expert agency acting pursuant to its authority has issued permits or otherwise approved specific emisson rates, federal courts will be justified in withholding federal common law remedies.[216] Where, however, nuisance claims are brought against non-permitted emissions, the balancing test proposed in this article should be applied.

The controversy over interstate (and international) acid rain illustrates the similarities and differences between the Clean Air Act and FWPCA. Acid rain forms in the atmosphere as the result of sulfur dioxide pollution, which may be transported in the atmosphere for several hours

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209. 33 U.S.C. § 1319 (1976 & Supp. IV 1980).

210. Suits alleging non-permitted discharges by a state or municipality would bring into play considerations of interstate tension. *See supra* note 36

211. *See* Washington v. General Motors Corp., 406 U.S. 109 (1972).

212. 42 U.S.C. §§ 7401-7642 (1976 & Supp. IV 1980).

213. *See* New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981); Connecticut v. Long Island Lighting Co., 535 F. Supp. 546 (E.D.N.Y. 1982).

214. *See* 42 U.S.C. § 7410(a)(2)(D).

215. The Clean Air Act's citizen suit provision, 42 U.S.C. § 7604, is closely analogous to that of FWPCA, 33 U.S.C. § 1365. Both state that the citizen suit provision does not "restrict any right which any person . . . may have under any statute or common law to seek . . . any other relief."

216. Either equitable self-restraint doctrines or common law preemption theory apply. *See supra* note 41 and accompanying text; *see also New England Legal Foundation*, 666 F.2d 30 (2d Cir. 1981).

or days.[217] Under the Clean Air Act, neither acid rain nor sulfates (an intermediate form) are directly regulated. Sulfur dioxide is regulated, but only to the degree that each individual state chooses to impose emission restrictions in order to achieve the national ambient levels required.[218] The federal law requires merely that states do not exceed national ambient air quality standards.[219] Thus, in virtually all states, major emitters of sulfur dioxide are directly regulated by the state while smaller emitters are not. Furthermore, existing scientific information about acid rain is insufficient to demonstrate direct causal connections between upstream polluters and acid rain, which may form as much as several hundred miles away.[220] Thus, disputes over interstate acid rain are aggravated by uncertainties about cause and effect.

In applying the proposed test to the problem of acid rain, an analysis of congressional intent yields little fruit. Congress did not expressly make its statutory remedies exclusive here any more than it did in FWPCA.[221] The question of implicit congressional intent is as difficult here as in the water pollution field. Arguably, the Clean Air Act is both more and less comprehensive: more, in that it contains provisions aimed specifically at interstate pollution control; and less, in that it does not explicitly deal with the acid rain problem, and that not all known emitters of sulfur dioxide are under the direct supervision of an expert permit-granting agency.

The second analysis, of the need for federal common law of nuisance, is far more instructive. Congress's interest in controlling interstate air pollution, including acid rain, is demonstrated by its enactment of complex, extensive federal legislation. The Clean Air Act contains the most extensive provisions for interstate cooperation and protection of any of the major federal pollution control laws.[222] Section 110(a)(2)(E) mandates that state implementation plans contain "adequate provisions (i) prohibiting any stationary source . . . from . . . prevent[ing] attainment or maintenance by any other State . . . or . . . interfer[ing] with measures required . . . to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with [section 126] relating to interstate pollution abatement . . . ."[223] Furthermore, section 126 provides for interstate notice of anticipated transborder impacts, and a mechanism whereby neighboring states can petition the EPA for a finding that section 110 has been violated.[224]

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217. For background on the acid rain problem, *see generally* Lee, *Interstate Sulfate Pollution: Proposed Amendments to the Clean Air Act*, 5 HARV. ENVTL. L. REV. 71 (1981).

218. *See generally* 42 U.S.C. 7410 (1976 & Supp. IV 1980).

219. *Id.*

220. [13 Current Dev.] ENV'T REP. (BNA) 421 (July 30, 1982).

221. *See supra* text accompanying notes 99-102.

222. *See* 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW 2-125 (1981).

223. 42 U.S.C § 7410(a)(2)(E).

224. *Id.* § 7426.

The federal goal of a minimum national level of air quality does not require a federal common law rule of decision governing interstate pollution by regulated pollutants, because states must meet the national ambient standards for these. By-products, such as acid rain, that are not directly regulated by the Clean Air Act, present a different situation. There, a uniform federal rule is probably necessary to help reduce acrimonious interstate disputes.[225] However, EPA's view that scientific knowledge on the subject is insufficient to justify rational regulation[226] may suggest that there is likewise insufficient information to allow for rational judicial decisionmaking.

Balanced against what appears to be a strong need for federal common law controlling interstate air pollutants is the relatively weak interest of each state in having its own laws apply. Interstate air pollution is not one of the areas of traditional local concern for which federal supervention would disrupt the operation of local government sovereignty. On balance, federal common law of nuisance should be available in interstate acid rain controversies, although the appropriate remedies in each case may be difficult to construct for a time because of the poor state of current scientific knowledge.

F. Hazardous Waste Disposal

The Resource Conservation and Recovery Act (RCRA)[227] created an ambitious program for regulating the transport, treatment, and disposal of hazardous waste. RCRA requires that all handlers of hazardous waste obtain and comply with permits issued by EPA or authorized state agencies.[228] Because the statute aims to prohibit the discharge of hazardous waste, there are no provisions for discharge permits.

Section 7003 of RCRA, the "imminent hazards" provision, authorizes the United States to bring actions against the owners of hazardous waste dump sites.[229] But this provision can hardly be described as comprehensive because by its terms it addresses only a select group of acute environmental hazards.

Hazardous waste disposal sites usually threaten bodies of water. Under a broad preemption reading of *Sea Clammers*, federal common law of nuisance would be unavailable in such contexts. However, Congress specifically stated that it intended section 7003 to codify common law principles.[230] Courts have split as to whether section 7003 has actual

225. EPA is unlikely to help resolve such controversies because it, like other federal agencies, is reluctant to become embroiled in such controversies. Stewart, *supra* note 34, at 261.

226. *See* [13 Current Dev.] ENV'T REP. (BNA) 494 (Aug. 13, 1982).

227. 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980).

228. *Id.* §§ 6922-6925.

229. *Id.* § 6973.

230. *See* S. REP. No. 172, 96th Cong., 2d Sess. 5 (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5023. *See also* Report of the House Committee on Interstate and Foreign Commerce 31 (Comm. Print 86-IFC-31, Oct. 1979).

substance,[231] or whether it merely authorizes the filing of lawsuits with substantive liability being determined according to previously applicable federal and state common law.[232]

If section 7003 is construed as substantive, the question still remains whether Congress intended that federal common law apply to pollution resulting from hazardous waste leakages. After *Milwaukee II,* such federal common law might be held extinguished by FWPCA. If it is determined that Congress has not spoken clearly on this question, the need for federal common law remedies should be balanced. Some situations should fall within common law remedies.

The question may be only academic since the passage in 1980 of federal "Superfund" legislation.[233] Like RCRA,[234] Superfund contains an imminent hazard provision, which covers hazards presented by "actual or threatened release of a hazardous substance."[235] In Superfund, Congress expressed its intent to preserve other remedies by including a broadly worded savings clause, which states that "[n]othing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law . . . ."[236] Any action that could have previously been brought under RCRA's imminent hazard provision can presumably now be maintained under Superfund's imminent hazard provision, without the same preemption concern.

Courts construing federal common law of nuisance claims in the hazardous waste context, however, have not reached this conclusion. To date, the only two federal district courts to decide the preemption question with regard to RCRA and Superfund found the federal common law preempted.[237] Both courts, however, overlooked an important distinction between FWPCA and Superfund. In *Milwaukee I,* one important argument against preemption was that section 505(e), the savings clause in

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231. United States v. Diamond Shamrock, 17 Env't Rep. Cas. (BNA) 1329 (N.D. Oh. 1981); *see also* United States v. Reilly Tar & Chemical Co., 17 Env't Rep. Cas. (BNA) 2110 (D. Minn. 1982) (order denying motion to dismiss).

232. United States v. Solvents Recovery Service, 496 F. Supp. 1127, 1133-39 (D. Conn. 1980); United States v. Midwest Solvent Recovery Inc., 484 F. Supp. 138 (N.D. Ind. 1980). *See generally* Hinds, *Liability under Federal Law for Hazardous Waste Injuries,* 6 HARV. ENVTL. L. REV. 1, 18-19 (1982).

233. Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. §§ 9601-9657 (Supp. IV 1980).

234. 42 U.S.C. § 6973 (1976 & Supp. IV 1980).

235. 42 U.S.C. § 9606(a) (Supp. IV 1980).

236. *Id.* § 9652.

237. *See* United States v. Price, 523 F. Supp. 1055, 1069 (D.N.J. 1981) ("The comprehensive nature of the schemes established by the RCRA and the [Superfund] require [this court] to conclude that, if federal common law ever governed this type of activity, it has since been preempted by these statutes."); City of Philadelphia v. Stepan Chemical Co., 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,915 (E.D. Pa. Aug. 14, 1982) (*inter alia* granting defendant's motions for judgment on the pleadings) (holding that Superfund and RCRA preempt common law); *see also* United States v. Outboard Marine, No. 78-C-1004 (N.D. Ill. Oct. 8, 1982).

FWPCA, expressly preserved all common law actions, including federal actions.[238] The Supreme Court rejected this argument because this clause provides: "nothing *in this section* shall restrict any right . . . under any statute or common law . . . ."[239] The savings clauses of several other environmental statutes were drafted in nearly identical terms.[240] But since Congress broadened the language of Superfund's savings clause to provide that nothing in the *entire Act* preempts state *or federal* laws, its intent on this question seems clear. Due to the federal interest in a federal rule for this area, and the desire of Congress to save other remedies for hazardous waste pollution, federal common law of nuisance should remain applicable in this field.

RCRA contains no provisions allowing one state to participate in the program of its neighboring states. Thus, there is a potential for interstate conflicts over appropriate hazardous waste standards. This potential for conflict lends additional support to the argument for application of a federal common law standard.

V. Conclusion

The United States Supreme Court mandated the application of federal common law of nuisance to interstate water pollution disputes in 1972, and in 1981 held that same common law extinguished by the 1972 Amendments to the Federal Water Pollution Control Act. Neither decision adequately defined the test for determining when federal common law should be an available cause of action to plaintiffs in one state harmed by pollution emanating from another state. Furthermore, the more recent opinion left in doubt the actual scope of its preemption holding.

This article has attempted to define the test implicit in the 1972 and 1981 Supreme Court decisions and has suggested a two-step analysis of the applicability of federal common law. By applying this proposed test to the fact situations before the Court, the article concluded that the preemption holdings reached by the Court were correct, but that the scope of this preemption should not be as broad as some of the Court's language implies. As applied to various hypothetical interstate pollution situations, the test derived from the decisions in *Milwaukee I* and *Milwaukee II* indicates that federal common law should still be available in many circumstances.

238. *See supra* text accompanying notes 80 & 126-27.
239. *See supra* note 80 (emphasis added).
240. *See Milwaukee II*, 101 S. Ct. at 1798 n.21.