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FEDERAL WATER POLLUTION REMEDIES: NON-STATUTORY REMEDIES ARE ELIMINATED

A state's jurisdiction generally stops at the borders of the state. Water and water pollution, however, flow unimpeded across state boundaries. Control of interstate water pollution thus requires some sort of uniform regulation. Congress attempted to meet this need in 1948 when it enacted the Federal Water Pollution Control Act.¹ Despite subsequent revisions, this Act proved inadequate to control water pollution.² In 1972, the failure of the Act to alleviate the problem of water pollution prompted the Supreme Court to attempt a judicial solution to the problem. In *Illinois v. City of Milwaukee*,³ the Court established that there existed a federal common law of nuisance which gave federal courts federal question jurisdiction to hear and resolve water pollution disputes.⁴ The efficacy of the Court's solution will never be known, for later in 1972 Congress passed the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA).⁵ This Act established a comprehensive nationwide program of water pollution control; but like any statute, it did not provide a remedy for every situation. The question thus arose whether additional remedies could be implied from the provisions of the statute.

A plaintiff who sought relief for injuries caused by water pollution appeared to have three interrelated federal remedies: the federal common law of nuisance, the provisions of the FWPCAA, and additional private remedies implied from the provisions of the FWPCAA. There was no question that the remedies available under the FWPCAA were valid—Congress had specifically provided them. The other two remedies, though, were part of what is called the specialized federal com-

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1. Act of June 30, 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948).
2. Ipsen & Raisch, *Enforcement Under the Federal Water Pollution Control Act Amendments of 1972*, 9 LAND & WATER L. REV. 369, 374-75 (1974).
3. 406 U.S. 91 (1972) [hereinafter cited in text as *Milwaukee I*]. Mr. Justice Douglas delivered the opinion of the unanimous court.
4. *Id.* at 98-101. Justice Douglas noted that "[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)." Title 28 U.S.C. § 1331(a) (1976) provides, as it did in 1972, in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."
5. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1376 (1976) [hereinafter cited as FWPCAA]). Though the 1972 legislation took the form of amendments to the Federal Water Pollution Control Act of 1965, "for all practical purposes [it] replace[d] all federal water pollution control statutes." McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195, 202 (1973).

mon law.⁶ Since the federal common law of nuisance was intended to fill a statutory void, it became unclear whether Congress displaced or pre-empted the doctrine when it partially filled the void. Further, it was uncertain whether the doctrine still existed to the extent that the FWPCAA failed to provide complete relief. It was also unclear whether it was proper to imply further relief from the FWPCAA itself when such a deficiency occurred.

In 1981, in *City of Milwaukee v. Illinois and Michigan*,⁷ a renascent *Milwaukee I*, the Supreme Court determined that the FWPCAA had indeed displaced the federal common law of nuisance, at least to the degree that the two doctrines overlapped. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*,⁸ the Court decided that the FWPCAA had completely pre-empted the federal common law of nuisance. Further, the Court ruled that the remedies provided by the FWPCAA were exclusive; no additional remedies could be implied from the Act. This comment will examine the three federal water pollution remedies, and the two cases which reduced them to one.

THE FEDERAL COMMON LAW OF NUISANCE

One source of specialized federal common law arises from the need to protect important national interests, implicitly or explicitly recognized by the Constitution, independent of any

6. Although *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), established that there was no general federal common law, a case decided the same day as *Erie*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), used federal common law to resolve a dispute concerning apportionment of interstate waters. Thus, as Judge Friendly said, "[t]he clarion yet careful pronouncement of *Erie*, 'There is no general federal common law,' opened the way to what, for want of a better term, we may call specialized federal common law." Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405 (1964) (footnote omitted).

The Supreme Court has created "specialized" federal common law where there is some federal policy or interest which would be served by the creation and there is a need for uniformity in the field. Note, *Application of the Federal Common Law of Public Nuisance to Intrastate Stream Pollution*, 18 B.C. IND. & COM. L. REV. 929, 934-35 (1977). Though the Court has used a variety of techniques to create federal common law, there seem to be two basic sources for the doctrine: 1) federal statutes, and 2) important national interests which the Constitution explicitly, or more likely, implicitly recognizes. Comment, *Federal Common Law of Nuisance in Intrastate Water Pollution Disputes*, 1977 WASH. U.L.Q. 164, 165 (1977). See generally Friendly, *supra*; Mowe, *Federal Statutes and Implied Private Actions*, 55 ORE. L. REV. 3 (1976); Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980).

7. _____ U.S. _____, _____, 101 S. Ct. 1784, 1792-93 (1981) [hereinafter cited in text as *Milwaukee II*].

8. _____ U.S. _____, _____, 101 S. Ct. 2615, 2625 (1981) [hereinafter cited in text as *Sea Clammers*].

federal statutes.⁹ The Supreme Court has created this type of common law in situations involving commercial paper issued by the United States,¹⁰ international relations,¹¹ and interstate water disputes,¹² among others. The creation of federal common law of greatest importance to this comment occurred in *Milwaukee I*.¹³ There, the Supreme Court held that there is a federal common law of nuisance which could be used to settle disputes concerning pollution of "interstate or navigable waters."¹⁴

The dispute in *Milwaukee I* arose out of the City of Milwaukee's discharge of inadequately treated sewage into Lake Michigan.¹⁵ Illinois sought to enjoin the city from allowing further untreated discharges.¹⁶ The decision in the case did not resolve the dispute, for the case was argued before the Court as a motion to grant original jurisdiction to hear the case, not as the final step of an appeal.¹⁷ The Court could refuse to exercise original jurisdiction only if some alternative federal forum were available to Illinois.¹⁸ Since diversity jurisdiction was unavailable, the only reasonable alternative for federal jurisdiction was federal question jurisdiction.¹⁹ The Court determined that actions brought to abate pollution of "interstate or navigable waters" were actions arising under the "laws" of the United States within the meaning of Section 1331.²⁰ Thus a unanimous Court²¹ recognized the existence of

9. See Hazen, *supra* note 6, at 1375-82; Comment, *Federal Common Law of Nuisance in Intrastate Water Pollution Disputes*, *supra* note 6, at 165.

10. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943).

11. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964).

12. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, *supra* note 6, at 110; *Nebraska v. Wyoming*, 325 U.S. 589, 616-17 (1945).

13. See note 3 *supra*.

14. *Id.* at 103-04.

15. *Id.* at 93.

16. *Id.*

17. *Id.* Article III, § 2, cl. 2, of the Constitution provides: "In all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction." Original jurisdiction is obligatory on the Court when a state sues another state, but discretionary if a state sues citizens of another state. 28 U.S.C. § 1251 (1976). The Court decided that a political subdivision of a state is not a "state" within the meaning of this statute, so original jurisdiction in a suit between a state and a city of another state is discretionary. *Illinois v. City of Milwaukee*, *supra* note 3, at 93, 97-98. A state is not a citizen of itself for purposes of diversity jurisdiction, *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894), so Illinois could not sue Milwaukee in federal court on that basis.

18. *Illinois v. City of Milwaukee*, *supra* note 3, at 98. In other words, the Supreme Court still has original jurisdiction if a state sues a city, but it shares that jurisdiction with the federal district courts. The Court could not refuse to exercise original jurisdiction unless there was some basis for federal court jurisdiction.

19. 28 U.S.C. § 1331 (1976). The relevant text of this statute is set out in note 4 *supra*.

20. *Illinois v. City of Milwaukee*, *supra* note 3, at 99-100. The Court said that there was no reason not to give "laws" its natural meaning and concluded that federal common law, as well as statutes, could support federal question jurisdiction under Section 1331.

21. *Id.* at 92.

a federal common law of nuisance which gave federal district courts federal question jurisdiction to hear interstate water pollution disputes.²²

The source of the doctrine was not entirely clear. It might have been based on filling the interstices of the then existing federal water pollution statutes.²³ Alternatively, the source of the doctrine might have been the national interest in solving disputes concerning interstate waters.²⁴ Finally, the source might have been the national interest in navigable waters.²⁵ Furthermore, the scope of the federal common law of nuisance was not clear.²⁶ The most critical question about the doctrine, though, was what was necessary to fulfill Justice Douglas' prophecy: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."²⁷

Soon after the decision in *Milwaukee I*, Illinois followed the Court's suggestion and initiated a suit based on the federal common law of nuisance in the United States District Court for the Northern District of Illinois.²⁸ The case moved slowly through the judicial system and eventually returned to the Supreme Court in 1981.²⁹ The circumstances surrounding *Milwaukee II* were much the same as those in *Milwaukee I*, and the members of the Court were virtually the same as those who had unanimously decided *Milwaukee I*.³⁰ One crucial factor had changed during the interim between the two cases, however, in October of 1972, when the FWPCA were adopted.³¹ The primary issue before the Court in *Milwaukee II*, therefore, was

22. *Id.* at 104-05.

23. *Id.* at 101-03.

24. *Id.* at 105-07. The Court said that rights in interstate streams were recognized as federal questions, *id.* at 105, so federal law was appropriate for that reason, as well as for the reason that a state was suing. *Id.* at 105 n.6.

25. *Id.* at 99. In discussing federal question jurisdiction the Court said the "question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a)." *Id.* (emphasis added).

26. Did the doctrine only apply to interstate streams? Did the doctrine apply only when a state was a plaintiff? Could the courts grant only prospective relief? See generally Comment, *Federal Common Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions*, 7 B. C. ENV'T'L AFF. L. REV. 293 (1978); Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 FORDHAM URB. L.J. 549 (1977); Comment, *Federal Common Law in Interstate Water Pollution Disputes*, 1973 U. ILL. L.F. 141 (1973).

27. *Illinois v. City of Milwaukee*, *supra* note 3, at 107.

28. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1788.

29. *Id.* at 1789-90.

30. Only Justice Douglas, the author of *Milwaukee I*, was missing and had been replaced by Justice Stevens.

31. See note 5 *supra*.

the effect of the FWPCAA on the federal common law of nuisance.³²

THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The Federal Water Pollution Control Act Amendments became law on October 18, 1972.³³ The Federal Water Pollution Control Act was first enacted in 1948³⁴ and evolved through several different legislative approaches before the 1972 amendments.³⁵ These various approaches to water pollution control were largely unsuccessful, so the 1972 amendments essentially superseded the previous statutes and created a new and comprehensive approach to water pollution control.³⁶ The prior federal legislation had attempted to use water quality standards to make individual waters "clean enough to support one or more beneficial uses, such as swimming, fishing, water supply, and irrigation."³⁷ As a result, compliance with the water quality standards could be judged only on a case-by-case survey of the effects of an individual discharger's impact on the ambient water quality of a particular body of water.³⁸ In contrast, the regulatory focus of the 1972 amendments was not on ambient water quality, but on effluent limitations.³⁹

The objective of the FWPCAA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴⁰ In order to achieve this objective, the Act states the following goals, among others:

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.⁴¹

32. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1787.

33. *See* note 5 *supra*.

34. *See* note 1 *supra*.

35. *See* Ipsen & Raisch, *supra* note 2, at 369-74.

36. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1792-93. *See also* Ipsen & Raisch, *supra* note 2, at 374-77.

37. Ipsen & Raisch, *supra* note 2, at 375.

38. *Id.* This approach was "technically, legally and administratively difficult." *Id.*

39. *Id.*

40. FWPCAA § 101(a), 33 U.S.C. § 1251(a) (1976).

41. FWPCAA § 101(a)(1), (2), 33 U.S.C. § 1251(a)(1), (2) (1976).

The mechanics by which the Act seeks to achieve these goals are beyond the scope of this article.⁴² In brief, except as authorized by a permit granted under the provisions of the Act, "the discharge of any pollutant by any person shall be unlawful."⁴³ The term "discharge of a pollutant" is defined broadly as: "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."⁴⁴ Thus the general prohibition against discharge of pollutants applies only to "point sources."⁴⁵ The Act does not control non-point sources because of the practical difficulties of identifying and controlling their effects.⁴⁶ Still, the Act has broad application since the term "navigable waters" is defined as "the waters of the United States, including the territorial seas."⁴⁷ Finally, although a state cannot adopt standards or limitations less stringent than those provided in the Act, a state is free, in most circumstances, to impose more stringent limitations.⁴⁸

The provisions of the FWPCA most important to this comment are those which provide for administrative and private enforcement of the Act. The methods of administrative enforcement are set out in Section 309.⁴⁹ In general, once the

42. For overviews of the Federal Water Pollution Control Act Amendments of 1972, see generally Ipsen & Raisch, *supra* note 2; McThenia, *supra* note 5; Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459 (1973); Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 14 B. C. IND. & COM. L. REV. 672 (1973).

43. FWPCA § 301(a), 33 U.S.C. § 1311(a) (1976). Section 402 of the Act, codified at 33 U.S.C. § 1342 (1976), provides for permits to be granted by the EPA, or the authorized state agency, which authorize the discharge of pollutants pursuant to certain conditions. These permits are part of the National Pollutant Discharge Elimination System, so they are commonly referred to as NPDES permits.

44. FWPCA § 502(12), 33 U.S.C. § 1362(12) (1976).

45. Point sources are defined as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

FWPCA § 502(14), 33 U.S.C. § 1362(14) (1976).

46. Ipsen & Raisch, *supra* note 2, at 382.

47. FWPCA § 502(7), 33 U.S.C. § 1362(7) (1976). It is generally recognized that the term is not to be restricted to include only waters that are navigable in fact; instead, the term is to be given its broadest possible construction. SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, *reprinted in* SENATE COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 178 (Comm. Print 1973) [hereinafter cited as LEGISLATIVE HISTORY]. HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, *id.* at 250.

48. FWPCA § 510, 33 U.S.C. § 1370 (1976).

49. FWPCA § 309, 33 U.S.C. § 1319 (1976).

Administrator of the Environmental Protection Agency, or the authorized state agency, determines that there exists a violation of a permit, she can either: 1) issue to the violator an order to comply with the terms and conditions of the permit, or 2) bring a civil action against the violator for appropriate relief, including a permanent or temporary injunction.⁵⁰ Furthermore, a violator can be assessed civil and criminal penalties.⁵¹

Citizen Suits

The FWPCA provides for private citizens to participate in the enforcement procedure:

any citizen may commence a civil action on his own behalf—

- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.⁵²

The violation of an "effluent standard or limitation" includes unlawful acts under the general prohibition and violations of NPDES permits.⁵³ The term "citizen" is defined as "a person or persons having an interest which is or may be adversely affected."⁵⁴ Thus, in order to sue under the citizen suit provision a plaintiff must assert that she herself was injured or will be injured as a result of the violation, in accordance with the standing requirements of *Sierra Club v. Morton*.⁵⁵ The federal

50. FWPCA § 309(a), (b), 33 U.S.C. § 1319(a), (b) (1976).

51. FWPCA § 309(c), (d), 33 U.S.C. § 1319(c), (d) (1976).

52. FWPCA § 505(a), 33 U.S.C. § 1365(a) (1976).

53. FWPCA § 505(f), 33 U.S.C. § 1365(f) (1976).

54. FWPCA § 505(g), 33 U.S.C. § 1365(g) (1976).

55. 405 U.S. 727 (1972). The injury asserted can be a non-economic injury to an environmental interest: "the interest alleged to have been injured 'may reflect 'aesthetic, conservation, and recreational' as well as economic values.'" *Id.* at 738. Further, the fact that the environmental injury asserted is shared by many other citizens does not prevent any

district courts are granted jurisdiction to hear citizen suits, irrespective of the amount in controversy or citizenship of the parties.⁵⁶

Limitations on Citizen Suits

There are several important limitations on the availability of citizen suits. At least sixty days prior to commencing an action against a violator, a prospective plaintiff must provide the EPA Administrator, the state in which the alleged violation occurs, and the alleged violator with notice of the alleged violation.⁵⁷ The prospective plaintiff also must give at least sixty days notice to the Administrator prior to commencing an action against her.⁵⁸ The purpose of the notice requirement is to allow the Administrator, the state, and the alleged violator an opportunity to abate the violation.⁵⁹ Further, the notice provision indicates that Congress intended for the primary responsibility for enforcement to reside in the EPA and state agencies; citizen enforcement is allowed only if the primary enforcers fail to fulfill their responsibilities.⁶⁰ A further limitation that can act both as a deterrent and an incentive to citizen suits is the provision allowing the court to "award costs of litigation (including reasonable attorney and expert witness fees) to *any* party, whenever the court determines such award is appropriate."⁶¹ Further, if a temporary restraining order or preliminary injunction is sought, the court can require the plaintiff to file a bond or other security in accordance with Federal Rule of Civil Procedure 65(c).⁶²

Another limitation is that a private citizen cannot initiate a suit if:

one citizen from asserting her individual injury as the basis of the suit. *Id.* at 734. An organization can assert the injuries of its members. *Id.* at 739. Injury in fact, to individual persons, however, must be asserted; mere expertise, special interest, or concern will not be sufficient to establish "adverse effect." *Id.* at 739-40.

That the Sierra Club v. Morton "injury in fact" test was to be the standard for determining if a party qualifies as a "citizen" is made clear by the Conference Report on the 1972 Amendments. See CONF. REP. NO. 92-1236, 92d Cong., 2d Sess. 145-46, *reprinted in* LEGISLATIVE HISTORY, *supra* note 47, at 328-29.

56. FWPCA § 505(a), 33 U.S.C. § 1365(a) (1976). The court can enforce the permits or orders, or order the Administrator to perform her duties. Further, the court can assess civil penalties against the violator as provided in Section 309(d). *Id.*

57. FWPCA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (1976).

58. FWPCA § 505(b)(2), 33 U.S.C. § 1365(b)(2) (1976).

59. Ipsen & Raisch, *supra* note 2, at 414.

60. *Id.*

61. FWPCA § 505(d), 33 U.S.C. § 1365(d) (1976) (emphasis added).

62. FWPCA § 505(d), 33 U.S.C. § 1365(d) (1976). The rule provides that no temporary restraining order or preliminary injunction can be obtained unless the applicant provides security for the payment of costs and damages to parties who are wrongfully enjoined or restrained. FED. R. Civ. P. 65(c).

the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.⁶³

This provision is not entirely clear, but it appears that despite the language "diligently prosecuting," a citizen is precluded from instituting a separate citizen's suit if the Administrator or State has initiated any enforcement action—whether or not the citizen considers the "diligence" adequate.⁶⁴ Furthermore, it appears from the language of the statute that a citizen can intervene as a matter of right only if the Administrator has initiated an enforcement action in federal court.⁶⁵ If the state has commenced an enforcement action in state court, there is arguably no intervention of right because the court is not "a court of the United States."⁶⁶

The citizen suit provision also includes the limitation that a citizen suit can be commenced only against one "who is alleged to be in violation" of a permit or order.⁶⁷ Thus, a citizen cannot bring an action to enjoin a potential violation.⁶⁸ It should also be noted that even if a violation and damage has already occurred, a court can only enforce the order or permit and assess civil penalties; it can not award damages to the injured plaintiff.⁶⁹ Finally, as long as a discharger is in compliance with the terms and conditions of a permit issued pursuant to the act, he is deemed in compliance for purposes of the citizen suit provisions, and for the general prohibition provisions.⁷⁰ Irrespective of harm caused by the pollution, he is immune to both citizen suits and enforcement actions by the Administrator.

The Savings Clause of the Citizen Suit Provision

An element of the citizen suit provision which figured greatly in the controversies in both *Milwaukee II* and *Sea Clammers* is the "savings clause." This clause provides:

63. FWPCA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1976).

64. Ipsen & Raisch, *supra* note 2, at 415.

65. FWPCA § 505(a)(2), 33 U.S.C. § 1365(a)(2) (1976).

66. Ipsen & Raisch, *supra* note 2, at 415.

67. FWPCA § 505(a)(1), 33 U.S.C. § 1365(a)(1) (1976).

68. Ipsen & Raisch, *supra* note 2, at 413.

69. FWPCA § 505(a), 33 U.S.C. § 1365(a) (1976).

70. FWPCA § 402(k), 33 U.S.C. § 1342(k) (1976).

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).⁷¹

One of the critical issues in *Milwaukee II* was whether the whole Act, or only "this section" could not restrict other rights of action.⁷² In *Sea Clammers*, one of the key issues was whether the fact that the savings clause preserves the rights of "any person"⁷³ (while the citizen suit provision confers the right to sue only on the more restricted "citizens")⁷⁴ is indicative of a Congressional intent to create a right of action for parties with no economic injury to sue in the general public interest, while leaving the rights of economically injured parties unaffected.⁷⁵ A further issue involving the savings clause was whether the clause preserved rights under *any* statute, including implied rights under the FWPCAA, or whether it preserved rights only under any *other* statute.⁷⁶

Impact of the Federal Water Pollution Control Act Amendments of 1972

Since the FWPCAA followed so closely on the heels of *Milwaukee I*, the lower federal courts were not entirely certain whether the Act had pre-empted the federal common law of nuisance. Subject to various limitations, though, the majority of courts which directly considered the question found that federal common law still existed.⁷⁷ The primary concerns of

71. FWPCAA § 505(e), 33 U.S.C. § 1365(e) (1976).

72. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1797-1800. The Court also discussed, but did not decide, whether "common law" included *federal* common law. *Id.* at 1798.

73. The Act defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." FWPCAA § 502(5), 33 U.S.C. § 1362(5) (1976).

74. The citizen suit provision defines citizen as a person who has an "interest which is or may be adversely affected." FWPCAA § 505(e), 33 U.S.C. § 1365(e) (1976).

75. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2623-25.

76. *Id.* at 2624.

77. *See, e.g.,* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008-09 (4th Cir. 1976) ("We may take as established that there is a body of federal common law by which a public nuisance in one state which infringes upon the environmental and ecological rights of another state may be abated" but "it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates."); *California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181, 193 (9th Cir. 1979), *cert. denied*, 444 U.S. 864 (1979) (dismissed for failure to state a claim, but stated that federal common law claim not affected); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3rd Cir. 1974), *cert.*

the lower federal courts were the questions identified earlier: whether the federal common law of nuisance applied only to interstate streams;⁷⁸ whether the doctrine could be invoked by private parties, as well as States;⁷⁹ and whether the courts could use the doctrine to award damages, as well as injunctive relief.⁸⁰ Some lower federal courts also examined the question of whether the citizen suit provision of the FWPCA provided the exclusive method of citizen enforcement of the Act, or whether other private rights of action could be implied from the provisions of the Act.⁸¹ The Supreme Court settled all of these issues in *Milwaukee II* and *Sea Clammers*.

PRIVATE RIGHTS OF ACTION IMPLIED FROM FEDERAL STATUTES

Since the citizen suit provision of the FWPCA was subject to so many limitations, and since the provision did not authorize courts to award damages, some plaintiffs asked courts to imply additional remedies from the provisions of the FWPCA. Implied private rights of action are based on the idea that "disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."⁸² The reach of judicially implied remedies has varied through the years as the Court has attempted to define a standard for

denied, 420 U.S. 927 (1975) (dicta, federal common law of nuisance not pre-empted); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 630 (7th Cir. 1980), *vacated*, 49 U.S.L.W. 3978 (U.S. June 30, 1981) (federal common law of nuisance fills statutory interstices).

78. *Compare* *Illinois v. Outboard Marine Corp.*, *supra* note 77, at 630 (interstate effect immaterial), *with* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, *supra* note 77, at 1009 (interstate effect must be alleged).
79. *Compare* *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281-82 (D. Conn. 1976), *aff'd mem. sub nom.* *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977) (only states can invoke the federal common law of nuisance), *with* *United States v. Stoeco Homes*, *supra* note 77, at 611 (U.S. government can invoke federal common law of nuisance), *and* *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979), *cert. denied sub nom.* *Louisville and Jefferson County Metropolitan Sewer District v. City of Evansville*, 444 U.S. 1025 (1980) (if state's interests are implicated, a municipality can invoke the federal common law of nuisance), *and* *Byram River v. Village of Port Chester*, 394 F. Supp. 618, 622 (S.D.N.Y. 1975) (allowed private corporation and private individual, as well as municipal corporation, to invoke federal common law of nuisance).
80. *Compare* *Parsell v. Shell Oil Co.*, *supra* note 79, at 1281-82 (no damages), *with* *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1223, 1235 (3d Cir. 1980), *rev'd sub nom.* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8.
81. *Compare* *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 699-700 (D.C. Cir. 1974) *and* *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 83-84 (2d Cir. 1975) (both cases held that failure to comply with the 60-day notice provision of Section 505(b) was not a bar to a private suit), *with* *City of Highland Park v. Train*, 519 F.2d 681, 690-91 (7th Cir. 1975) (failure to comply with the notice provision in the substantially similar Clean Air Act citizen suit provision was absolute bar to private suit).
82. *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39 (1916).

determining when implication is proper.⁸³ By 1975, when it decided *Cort v. Ash*,⁸⁴ the Supreme Court appeared to have fashioned a workable test.

Cort defined several factors which must be considered in deciding whether to imply a private remedy from a statute which did not expressly provide one. These factors are:

- 1) is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? . . .
- 2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . .
- 3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . .
- 4) is the cause of action one traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?⁸⁵

The *Cort* factors seemed to represent a fair synthesis of the various *ad hoc* approaches the Court had taken in the past,⁸⁶ though the fourth factor had never before been applied directly.⁸⁷

Cases decided subsequent to *Cort* utilized the factors it suggested, but as was emphatically declared in *Touche Ross and Co. v. Redington*,⁸⁸ the *Cort* factors were relevant but not binding on the Court. In *Redington*, Justice Rehnquist asserted that the *Cort* factors were not all entitled to equal weight; instead, the "central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."⁸⁹ Under the *Redington* analysis, if a court can

83. See generally Hazen, *supra* note 6; Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33 (1979); Mowe, *supra* note 6; McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976); Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

84. 422 U.S. 66 (1975) [hereinafter cited in text as *Cort*].

85. *Id.* at 78 (emphasis in original) (citations omitted).

86. *Id.*

87. See Hazen, *supra* note 6, at 1359; McMahon & Rodos, *supra* note 83, at 191.

88. 442 U.S. 560, 575 (1978) [hereinafter cited in text as *Redington*].

89. *Id.*

not find any evidence of a legislative intent to create a private remedy, it is bound by that conclusion, and cannot move on to consider the remaining *Cort* factors.⁹⁰ In *Redington*, the Court also enunciated principles of statutory construction for courts to apply when the legislative history is silent or ambiguous.⁹¹ These principles further limit the implication of private remedies.

After *Redington*, legislative intent is the primary, and perhaps determinative, inquiry in judicial implication of private remedies. The obvious inconsistency between legislative intent to provide a private remedy, and the failure to so provide which makes judicial implication necessary, indicates that only rarely will a court be free to imply a private right of action. Certainly if the statute provides an express remedy, whether administrative or a limited private right, courts must be reluctant to imply an additional remedy.⁹² While the recent constriction of the field of implied remedies has been fairly severe, the doctrine still has some vitality.⁹³ By the summer of 1981, though, it was clear that the Supreme Court was weary of handling cases brought under the doctrine, and was determined to limit its scope.⁹⁴ It was in this atmosphere that the National Sea Clammers Association asserted their claim to a private right of action for damages

90. *Touche Ross & Co. v. Redington*, *supra* note 88, at 576. See *Steinberg*, *supra* note 83, at 42-43.

91. *Touche Ross & Co. v. Redington*, *supra* note 88, at 569-74. These principles are (1) if a statute is aimed at the prevention of future harm, rather than redressing injuries, caused by violation of the statute, implication should not occur; (2) if other sections of the same act which surround the statute in question expressly contain private remedies, implication should not occur since the inference is Congress knew how to provide a remedy if it wished to do so; (3) if another statute provides an express civil remedy that is aimed at the same type of conduct as the statute at issue, and the two statutes were passed contemporaneously, a court should not imply a remedy that "is significantly broader than the remedy that Congress chose to provide." *Id.* at 574.

92. *Id.* at 574; *Cort v. Ash*, *supra* note 84, at 79.

93. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979). One commentator, *Hazen*, *supra* note 6, at 1384, argues that the Supreme Court is likely to continue to imply private rights of action under certain civil rights and securities statutes, and only rarely under other types of statutes.

94. See, e.g., Justice Powell's dissent in *Cannon v. University of Chicago*, *supra* note 93, at 741. That case was the only Supreme Court case since *Cort v. Ash*, *supra* note 84, to find an implied private right of action in a federal statute. In all the other post-*Cort* cases in which the Court has been asked to imply a private remedy from a federal statute, the Court has declined to do so. See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, ___ U.S. ___, 101 S. Ct. 2061 (1981); *California v. Sierra Club*, ___ U.S. ___, 101 S. Ct. 1775 (1981); *Universities Research Ass'n v. Coutu*, ___ U.S. ___, 101 S. Ct. 1451 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, *supra* note 88. This list is not complete.

which would be implied from the provisions of the Federal Water Pollution Control Act.⁹⁵

THE SUPREME COURT LIMITS FEDERAL REMEDIES FOR WATER POLLUTION

City of Milwaukee v. Illinois and Michigan

On May 19, 1972, less than one month after the decision in *Milwaukee I*, Illinois again filed suit against Milwaukee.⁹⁶ Before the case went to trial, Milwaukee obtained an NPDES permit for its discharges, but failed to comply fully with its conditions.⁹⁷ The authorized Wisconsin state agency brought an enforcement action in state court.⁹⁸ On May 25, 1977, the state court ordered Milwaukee to meet the conditions of the permit and set up a timetable for constructing facilities to handle overflows.⁹⁹ On July 29, 1977, the federal district court judge in Illinois found that Illinois had proved the existence of a nuisance under the federal common law.¹⁰⁰ The judge issued an order requiring Milwaukee to meet effluent limitations far more stringent than those in the NPDES permit and enforcement order, and to eliminate overflows sooner than required by the enforcement order.¹⁰¹ The Court of Appeals for the Seventh Circuit reversed the lower court to the extent that it had imposed more stringent effluent limitations, but upheld the timetable for elimination of overflows.¹⁰² The court expressly ruled, however, that the FWPCA had not pre-empted the federal common law of nuisance, though the Act could provide guidance to courts in deciding cases under the federal law of nuisance.¹⁰³

The Supreme Court in *Milwaukee II* was quick to point out that Justice Douglas had recognized in *Milwaukee I* that it

95. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2622. The claim was also based on the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1976), which is substantially similar to the Federal Water Pollution Control Act Amendments of 1972 in its relevant sections.

96. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1788. *Milwaukee I* was decided on April 24, 1972. *Illinois v. City of Milwaukee*, *supra* note 3.

97. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1789.

98. *Id.*

99. *Id.*

100. *Illinois v. City of Milwaukee*, No. 72 C 1253 (N.D. Ill., oral order delivered July 29, 1977). See *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1789. The judge ruled that both the discharge of inadequately treated sewage and the discharge of untreated sewage from sewer overflows constituted a nuisance.

101. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1789.

102. *Illinois v. City of Milwaukee*, 599 F.2d 151, 177 (7th Cir. 1979).

103. *Id.* at 163, 164, 173.

“may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.”¹⁰⁴ The Court then emphasized that the power of federal courts to develop their own rules of decision is extremely limited.¹⁰⁵ If Congress has not directly addressed a particular issue, though, there may be a need for federal courts to develop federal common law if there is a “significant conflict between some federal policy or interest and the use of state law.”¹⁰⁶ Even then, though, the Court emphasized that federal common law is “subject to the paramount authority of Congress,”¹⁰⁷ and can be displaced by Congressional action on the specific question.¹⁰⁸ The Court thus framed the issue before it not as whether Congress intended to displace the federal common law, but as whether any Congressional legislation had spoken directly to the question previously governed by federal common law.¹⁰⁹ The Court stated that the concerns which cause it to require clear Congressional intent before finding pre-emption of state law are not present when it must decide whether Congress has “displaced” federal common law.¹¹⁰

Justice Rehnquist, writing for the majority, had little trouble finding that Congress had totally occupied the field of water pollution control through the enactment of the FWPCA.¹¹¹ The comprehensive nature of the Act convinced the Court that there was no room for federal courts to establish water pollution standards based on the federal common law of nuisance.¹¹² With respect to effluent limitations, the Court overruled the circuit court’s assertion that a federal court could impose effluent limitations more stringent than those authorized by a valid permit.¹¹³ The Court further ruled

104. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1788 (quoting *Illinois v. City of Milwaukee*, *supra* note 3, at 107).

105. *Id.* at 1790.

106. *Id.* (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

107. *Id.* (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)).

108. *Id.* at 1791.

109. *Id.* at 1791-92. The dissent argued that such an approach resulted in “automatic displacement” of federal common law without regard to its important function in resolving interstate disputes. *Id.* at 1801 (Blackmun, J., dissenting). The majority responded that even in the context of interstate disputes, “[w]hen Congress has spoken its decision controls.” *Id.* at 1791-92 n.8.

110. *Id.* at 1792.

111. *Id.* Joining with Justice Rehnquist in the majority were Chief Justice Burger, Justice Brennan, Justice Stewart, Justice White, and Justice Powell. Justice Blackmun wrote a dissenting opinion in which Justice Marshall and Justice Stevens joined.

112. *Id.* at 1792-93.

113. *Id.* at 1794.

that although the permits did not address specific pollutant concentrations in the sewage overflows, they did address the degree to which overflows should be prevented. These permits, coupled with the enforcement action which the state agency brought, indicated that there was no room for federal common law to impose stricter standards.¹¹⁴ The Court noted that when a federal court imposes stricter standards than those established by a permit duly authorized by the FWPCAA, it is "not 'filling a gap' in the regulatory scheme, it [is] simply providing a different regulatory scheme."¹¹⁵

Finally, the Court considered the question of whether the ability of the states to establish standards stricter than those adopted under the FWPCAA and the savings clause of the citizen suit provision combine to show a Congressional intent to preserve the federal common law.¹¹⁶ The Court distinguished between the ability of a state to adopt more stringent standards pursuant to the FWPCAA, which it then would apply to in-state dischargers, and the ability of a state to ask a federal court to employ federal common law to impose more stringent standards on an out-of-state discharger. The Court held that Section 510 of the Act contemplates only the first situation and does not authorize the second.¹¹⁷

Nor did the Court find the savings clause of the citizen suit provision to be indicative of Congressional intent to preserve the federal common law of nuisance. Although the Court was reluctant to indulge in "the unlikely assumption that the reference to 'common law' in § 505(e) includes the limited *federal* common law as opposed to the more routine state common law,"¹¹⁸ it was able to do so, nonetheless, and still find that the savings clause did not prevent the displacement of the federal common law of nuisance. That decision was based on the Court's interpretation of the part of the savings clause which states "[n]othing in this section shall restrict" rights which existed under common law.¹¹⁹ The Court stated that the proper interpretation of the savings clause limits its application to the citizen suit provision. According to the Court, the

114. *Id.* at 1794-96.

115. *Id.* at 1796 n.18.

116. *Id.* at 1797. See text accompanying notes 48-50 *supra*.

117. *Id.* at 1798.

118. *Id.* (emphasis in original).

119. *Id.* (quoting FWPCAA § 505(e), 33 U.S.C. § 1365(e) (1976) (emphasis in original)).

fact that Congress did not intend for the citizen suit provision to supplant formerly available federal common law does not mean that the remainder of the FWPCA did not supplant it.¹²⁰

Justice Blackmun wrote a spirited dissent which emphasized the value of federal common law as a means of resolving interstate disputes and as a supplement to Congressional action.¹²¹ The tenor of his dissent indicates that Justice Blackmun interpreted the Court's holding as completely eliminating the federal common law of nuisance in the field of water pollution.¹²² Though the language of the majority encourages that conclusion, the holding apparently is limited to the situation before the Court: NPDES permits had been issued, an enforcement order had been obtained to rectify violations of those permits, and the discharger apparently was complying with the enforcement order.¹²³ The clarion pronouncement "federal common law has been displaced," was carefully modified by the words "in this case."¹²⁴ Whether the federal common law survived as a remedy for one seeking injunctive relief or damages against a discharger who was in violation of the conditions of her permit, or some other provision of the Act, remained unclear. That question would be answered succinctly in *Sea Clammers*.

Middlesex County Sewerage Authority v. National Sea Clammers Association

The National Sea Clammers Association, an association of commercial fishermen, sued multiple defendants in the United States District Court for the District of New Jersey, seeking injunctive relief and damages.¹²⁵ The plaintiffs alleged that the various defendants were responsible for discharging into the Atlantic Ocean pollution which caused severe economic harm to the plaintiffs.¹²⁶ The plaintiffs sued under a variety of theories, including the federal common law of nuisance and im-

120. *Id.*

121. *Id.* at 1801 (Blackmun, J., dissenting).

122. *Id.* at 1811.

123. *Id.* at 1792-95, 1800.

124. See Friendly, *supra* note 6, at 405.

125. National Sea Clammers Ass'n v. City of New York, 12 ERC 1118, 1119-20 (D.N.J. 1978).

126. *Id.* at 1118-19; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, *supra* note 8, at 2618 n.4. It was alleged that the pollution spurred the growth of an algal bloom. When the bloom died, it created an oxygen deficiency which caused the death of large amounts of marine life, especially the shellfish which plaintiffs harvested for a living.

plied rights of action.¹²⁷ The federal district court rejected both of these theories.¹²⁸ The United States Court of Appeals for the Third Circuit reversed and held that the citizen suit provision of the FWPCAA was not the exclusive remedy for violations of the Act.¹²⁹ The court reasoned that persons who suffer economic or other tangible harm from violations of the FWPCAA have an implied private right of action under the statute, independent of the citizen suit provision, which is preserved by the savings clause.¹³⁰ The court also ruled that the federal common law of nuisance not only existed, but was available to private parties to use to sue for damages.¹³¹

The Supreme Court's decision in *Sea Clammers*, written by Justice Powell, reiterated that in determining whether a private right of action should be implied from a statute, the principal inquiry is into legislative intent.¹³² To define that intent the Court first considered the statutory language. The language which the Court found most illuminating was that of the enforcement provisions.¹³³ The Court considered the various administrative and citizen enforcement provisions¹³⁴ to be so elaborate that they precluded finding Congressional intent to authorize additional remedies to be implied from the acts.¹³⁵

The Court also rejected the circuit court's ruling that the savings clause preserved implied rights of action. First the Court dismissed the circuit court's distinction between injured and non-injured parties. The Supreme Court held that the citizen suit provision, based as it is on the *Sierra Club v. Morton* standing theory, provides ample opportunity for suits based on the public interest, as well as on economic harm, and does not distinguish between the two.¹³⁶ Further, the Court

127. *Id.* at 1119.

128. *Id.* at 1121, 1123-24.

129. *National Sea Clammers Ass'n v. City of New York*, *supra* note 80, at 1226-28.

130. *Id.* at 1228-31.

131. *Id.* at 1233-34.

132. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2622. See text accompanying notes 89-91 *supra*.

Joining with Justice Powell in the majority opinion were Chief Justice Burger, Justice Brennan, Justice Stewart, Justice White, Justice Marshall, and Justice Rehnquist. Justice Stevens wrote an opinion concurring in part and dissenting in part in which Justice Blackmun joined.

133. *Id.* at 2633.

134. See text accompanying notes 50-52 *supra*.

135. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2625.

136. *Id.* at 2624-25.

found it unlikely that the part of the savings clause which preserved rights under "any statute" was referring to the very statute in which those words appeared. The savings clause, therefore, provides no evidence of Congressional intent to imply private rights of action.¹³⁷

The Court also looked briefly at the legislative history of the FWPCAA, but found it to be devoid of any Congressional intent to imply private remedies. Both the language of the Act and its legislative history convinced the Court that Congress intended that no remedies beyond those expressly granted should be implied. The Court thus held that there was no implied private right of action under the FWPCAA.¹³⁸

The Court also examined the issue of whether the federal common law of nuisance had been pre-empted in the field of ocean pollution. Since the ocean waters involved were clearly interstate waters, and since it was at least alleged that permit conditions had been violated, the implicit issue was whether the federal common law of nuisance still existed, at least as a remedy when an interstate discharger is in violation of the FWPCAA. Citing *Milwaukee II*, the Court dispatched that issue with this authoritative statement: "The Court has now held that the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCAA."¹³⁹ In short, the Court left no doubt as to the effect of the FWPCAA. With few exceptions, the FWPCAA provides the paramount and exclusive remedy for those who are injured by water pollution. To say that the Court made muddied waters clear, however, would be inaccurate.

CONSIDERATION OF THE COURT'S DECISIONS

Implied Private Rights of Action

With the earlier discussion of implied private rights of action in mind, it is hardly surprising that the Court refused to imply a private right of action from the provisions of the FWPCAA. In recent years, the Court has consistently refused

¹³⁷. *Id.*

¹³⁸. *Id.* at 2625.

¹³⁹. *Id.* at 2627. Since the federal common law of nuisance no longer existed in the field of water pollution, the Court found it unnecessary to determine whether a private party can invoke the doctrine to sue for damages.

to imply private rights of action from federal statutes. Only in the rare cases where the stringent requirements of *Cort* and *Redington* are satisfied will such actions be implied. The *Redington* analysis requires a determination of whether Congress intended to authorize additional remedies by implication.¹⁴⁰ Clearly, courts rarely can find an implied private right of action through this approach since the "legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention."¹⁴¹ Indeed, criticism of the Court's analysis on those grounds is unlikely to trouble a Court which has written: "In view of these express provisions for enforcing the duties imposed by [the Act], it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'"¹⁴²

In *Sea Clammers*, the Court found no legislative intent to allow private rights of action to be implied from the FWPCAA; moreover, the Court did not consider the savings clause to express such an intent.¹⁴³ The legislative history of the 1972 amendments is lengthy and not without ambiguity. On the basis of this legislative history, it is possible to argue with the Court's determination of legislative intent. Nevertheless, the Court probably is correct in its ultimate result, for it also could have refused to imply a private remedy on other grounds. Even if the Court had applied the arguably more liberal *Cort* factors,¹⁴⁴ *Sea Clammers* would have been an improper case for judicial implication of private remedies. The first *Cort* factor asks whether the statute was enacted for the especial benefit of a particular class to which the plaintiff belongs.¹⁴⁵ That question must be answered by examining the language of the statute.¹⁴⁶ As Justice Stevens recognized in his concurring opinion in *Sea Clammers*, the substantive provisions of the FWPCAA, and its broad authorization of citizen suits, indicate that the Act was "enacted for the protection of the general

140. *Touche Ross & Co. v. Redington*, *supra* note 88, at 575.

141. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2629 (Stevens, J., concurring in part and dissenting in part).

142. *Transamerica Mortgage Advisers, Inc. v. Lewis*, *supra* note 94, at 20 (1979) (quoting *Cannon v. University of Chicago*, *supra* note 93, at 742 (Powell, J., dissenting)).

143. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2623-25.

144. See text accompanying notes 84-86 *supra*.

145. See text accompanying note 84 *supra*.

146. *Cannon v. University of Chicago*, *supra* note 93, at 689.

public," not for a special class.¹⁴⁷ Because of the policies it has recently enunciated, the Court was correct in refusing to imply a private right of action from the provisions of the FWPCA.

Even if one questions the policy of limiting implied private rights of action in general, the Court probably was justified in so limiting them under the FWPCA. The Act does bestow rights on the general public, and does provide the public with some means of enforcing those rights. Congress did not completely overlook private enforcement.

It is also true that allowing implied private rights of action under the FWPCA possibly could frustrate the purposes of the Act. The Act allows citizen suits only under certain conditions. By bringing implied actions, not only could plaintiffs avoid those conditions, they could abuse the Act in a way which Congress sought to avoid:

Concern was expressed that some lawyers would use Section 505 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.¹⁴⁸

Limiting implied rights of action does further the intent and policy of the Act. In truth, one suing in the general public interest has little reason not to comply with the citizen suit provisions.¹⁴⁹ Nor could such a person reasonably complain that the remedies provided by the citizen suit provisions are inadequate.¹⁵⁰ Only one who suffers actual and specific harm, different from the harm shared by the public in general, is

147. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2633 (Stevens, J., concurring in part and dissenting in part).

148. S. REP. NO. 414, 92d Cong., 1st Sess. 81, *reprinted in* LEGISLATIVE HISTORY, *supra* note 47, at 1499.

149. Individual citizens may not have the resources to finance a suit, but such a limitation exists in all litigation situations.

150. Abatement of the violation should satisfy the public interest since the level of pollution allowed by a NPDES permit presumably is consistent with the public interest.

burdened by the Court's refusal to imply a private remedy from the FWPCAA. Since the Act does not provide for damages, this class of plaintiffs must turn elsewhere for a remedy. Thus, while the elimination of implied remedies alone is reasonable, the elimination of those remedies *and* the remedies available under the federal common law of nuisance is unreasonable and inequitable.

The Federal Common Law of Nuisance

The Court's decision in *Milwaukee II* was correct in several respects. Federal courts are ill-equipped to set water pollution standards. The field is a complex one in which the courts have no technical expertise.¹⁵¹ A case-by-case approach is inefficient and unpredictable since a court must balance the equities in each case, making it almost impossible to establish a uniform standard.¹⁵² Further, the various interests in water pollution standards may be too diverse for a court to consider and balance on the particular facts before it.¹⁵³

Another major weakness of the case-by-case approach is its lack of certainty. Until a discharger is sued, she cannot be sure what standard will be applied to her.¹⁵⁴ Certainly a discharger has the right to rely on standards determined and applied by an expert administrative agency. Once an administrative standard is established, a discharger can be assessed criminal and civil penalties for willfully violating that standard.¹⁵⁵ Yet, if a discharger invests in the equipment to comply with the administrative standard, she might face just as severe a penalty if a court orders her to meet more stringent standards that would require her to invest in completely different equipment. Such uncertainty and conflict are intolerable and violate the purposes of the FWPCAA.

All of the above criticisms of the federal common law of nuisance are justified. A federal court should not be able to set

151. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1796.

152. *Id.*

153. Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1453 (1972).

154. Zener, *The Federal Law of Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 788 (E. Dolgin and T. Guilbert eds. 1974).

155. FWPCAA § 309(c), (d), 33 U.S.C. § 1319(c), (d) (1976). Criminal penalties can be up to \$25,000 per day of violation and up to one year in prison, or both, for a first conviction, and up to \$50,000 per day of violation and up to a two year prison term, or both, for a subsequent conviction.

water pollution standards more stringent than those set by the proper agency. Nor should a federal court enjoin a discharger who is complying with the terms of her permit or enforcement order. The administrative agency, subject to the minimum standards established by the FWPCA, has the expertise to promulgate proper standards. Once those standards are set, dischargers have a right to rely on them. To the extent that *Milwaukee I* and the federal common law of nuisance conflict with the FWPCA and standards established under it, the FWPCA must control. To that extent, *Milwaukee II* is correctly decided.

Justice Douglas foresaw that federal statutes some day might displace the federal common law of nuisance, and the Court was correct to find such displacement in the *Milwaukee II* fact situation. As interpreted in *Sea Clammers*, however, *Milwaukee II* goes too far. The FWPCA should displace the federal common law of nuisance where the two conflict: essentially, courts cannot establish any water pollution standards, more or less stringent than the FWPCA, nor can they enjoin conduct which is sanctioned under the Act. To say, however, that the FWPCA entirely displaces the federal common law of nuisance ignores the important *supplemental* role the doctrine could play in water pollution control. After the enactment of the FWPCA, the federal common law of nuisance was no longer valuable as a means of regulating interstate water pollution. The Court, however, should have preserved the doctrine as a means of redressing injuries caused by water pollution.

THE NEED FOR THE FEDERAL COMMON LAW OF NUISANCE

The factual circumstances in *Milwaukee II* were ideal for illustrating the inadequacy of federal courts as makers of water pollution standards. In contrast, *Sea Clammers* presented a situation which illustrates the important role federal courts still could play in water pollution control. Not only had the plaintiffs alleged that the defendants were not complying with their permits, they also alleged damages directly attributable to the water pollution caused by such non-compliance.¹⁵⁶ While federal courts are poorly equipped to

¹⁵⁶ *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra* note 8, at 2618-19.

establish water pollution standards, they certainly are well equipped to determine liability and redress injuries. The FWPCA serves an important function in establishing and enforcing a comprehensive program of water pollution control. The federal common law of nuisance could have served an important function in redressing the injuries of those who are harmed by water pollution. The two roles would not have conflicted; in fact, they would have complemented each other in achieving the goals of the FWPCA.

Rather than eliminating the federal common law of nuisance, the Court should have examined its distinct utility and simply confined the doctrine to the areas it would best serve. For example, since the FWPCA provides a comprehensive minimum standard of water pollution control which protects federal interests in navigable waters,¹⁵⁷ there probably is no need for the federal common law of nuisance to apply to all navigable waters. Victims of purely intrastate pollution are assured a minimum level of protection, and probably can receive adequate redress for injuries through the state common law of nuisance. Though one could argue that the comprehensive nature of the FWPCA indicates a Congressional intent to pre-empt state common law, this law probably still exists to some degree. Certainly the savings clause, though confined to the citizen suit provision, applies to state law.¹⁵⁸ Also, state law is deemed pre-empted only if there exists an express Congressional intent to pre-empt.¹⁵⁹ Since intrastate actions do not pose jurisdictional and choice-of-law problems, state law should provide adequate relief. Thus, the scope of the federal common law of nuisance could have been limited to interstate water pollution disputes.

The Court also could have prohibited federal courts from using the doctrine to establish any pollution standards. The FWPCA clearly prohibits such interference. Further, the Court could have held that compliance with a permit or enforcement order would preclude a court from enjoining dischargers from polluting. Indeed, the Court might have eliminated injunctions as a remedy, even when a permit is violated, since the FWPCA provides that remedy. Using the

157. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1792-93.

158. *Id.* at 1798.

159. *Id.* at 1792.

federal common law of nuisance only to avoid the procedural requirements of the citizen suit provision arguably would frustrate the policy of those provisions.¹⁶⁰

When a private citizen, a state, or any other injured party seeks damages for injuries caused by a discharger in another state, however, they should have some effective remedy to redress their harm. The federal common law of nuisance could provide that remedy. Indeed, because of jurisdictional problems, it may well be the only available remedy in some circumstances. Instead of eliminating the doctrine, the Court should have limited the federal common law of nuisance to the admittedly few situations where it would be the most effective remedy: where a plaintiff seeks damages for injuries sustained from interstate water pollution.

*The Supplemental Role of the
Federal Common Law of Nuisance*

The citizen suit provision of the FWPCA does provide a means for citizens to enforce the provisions of the Act. It does not, however, provide for damages to an injured party.¹⁶¹ The fact that Congress enacted a provision that would allow injunctive relief should not indicate that it intended to preclude all other relief. Indeed, there is ample indication that Congress foresaw the provision not as a form of private remedy but as a means of enforcement: "The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service. . . ."¹⁶² The nature of the citizen suit is not compensatory. That is why Congress recognized that the savings clause:

Would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.¹⁶³

160. The notice provisions are designed to allow the Administrator, State, and discharger to try and solve the problem first. Further, the ability of the Court to award attorney's and expert's fees acts as an important check on frivolous suits.

161. Even where civil penalties are assessed as a result of the citizen suit, the money recovered goes to the government, not to the citizen-plaintiff. S. REP. NO. 414, 92d Cong., 1st Sess. 79, reprinted in LEGISLATIVE HISTORY, supra note 47, at 1497.

162. *Id.* at 1499.

163. *Id.*

Clearly the federal common law of nuisance should have been preserved by this provision. Awarding damages pursuant to the doctrine would not violate Congressional intent. The doctrine existed prior to and independent of the FWPCAA, so it should qualify as "other law." This prior existence also indicates that indulging in the presumption that "common law" includes federal common law is perfectly sensible.¹⁶⁴ The federal common law of nuisance, subject to the limitations noted above, could only complement the citizen suit provision. The possibility of having to pay damages would be another incentive for a discharger to comply with the Act voluntarily.

Even if the savings clause is limited to the citizen suit provision, it is hard to find Congressional intent to preclude invoking the federal common law of nuisance to redress injuries. If, as the Court decided, the savings clause is confined to the citizen suit provision,¹⁶⁵ to that extent it still preserves the federal common law of nuisance. That would leave only the administrative enforcement provisions as remedies under the Act. Those provisions, though comprehensive, do not address compensation. They hardly mandate a conclusion that Congress intended to preclude injured parties from recovering damages for injuries caused by water pollution. The comprehensive nature of the Act indicates there is no room for courts to establish standards or enjoin approved conduct.¹⁶⁶ The only private remedy provided by the Act, however, expressly preserves other common law actions for damages.¹⁶⁷

So long as those remedies are limited to damages, there seems to be no reason to distinguish between state and federal common law. If the remainder of the Act is sufficiently comprehensive so as to preclude federal common law damages, it might also preclude state common law damages. It would be anomalous indeed, if a remedial statute such as the FWPCAA served to insulate completely dischargers from suits for damages. The stated purpose of the Act is to clean up the nation's waters, not to limit the liability of the nation's dischargers.¹⁶⁸ If the savings clause means anything, it must

164. See *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1798.

165. *But see* *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1805 (dissenting opinion), where Justice Blackmun argued that "this section" simply prevented "pre-existing rights of action from being subjected to the procedural and jurisdictional limitations imposed by" the citizen suit provision.

166. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1792-93.

167. FWPCAA § 505(e), 33 U.S.C. § 1365(e) (1976).

168. FWPCAA § 101(a), 33 U.S.C. § 1251(a) (1976).

mean that although other sections of the Act might preclude courts from setting their own pollution standards, the remedies provided by the Act will not prevent courts from awarding damages for violations of the common law—state *and* federal.

From a plaintiff's viewpoint, the failure to provide damages is the primary weakness of the citizen suit provision. In a wholly intrastate situation, that weakness might be insignificant, if state nuisance actions are preserved. In an interstate context, though, that weakness can be critical. For example, the FWPCA authorizes states to establish more stringent standards than the minimum standards authorized by the EPA.¹⁶⁹ Further, it is established that compliance with a permit only insulates a discharger from actions brought pursuant to the Act;¹⁷⁰ compliance is no defense to a common law action for damages.¹⁷¹ Compliance with a NPDES permit, however, is compliance for the purposes of the citizen suit provision.¹⁷² Thus, a state with more stringent standards than the minimum, and citizens of that state, are unable to invoke the citizen suit provisions to impose that state's standards on a discharger in another state, so long as the discharger complies with her state's standards.¹⁷³ Though the first state and its citizens may be harmed by the water pollution, and though they must bear the economic burden of cleaning up that pollution, they are unable to enjoin it.

The situation described above could produce other conflicts for which the FWPCA provides no remedy. The dischargers in the state with more stringent standards are subject to citizen suits for failure to meet those standards. In addition, they may be subject to state common law nuisance actions, even if they comply with their permits. A common law nuisance action by plaintiffs from the more stringent state against dischargers in the more lenient state, absent a federal common law of nuisance, would have to overcome several jurisdictional and conflicts-of-law hurdles to be successful.¹⁷⁴

169. FWPCA § 510, 33 U.S.C. § 1370 (1976).

170. FWPCA § 402(k), 33 U.S.C. § 1342(k) (1976).

171. S. REP. NO. 414, 92d Cong., 1st Sess. 81, reprinted in LEGISLATIVE HISTORY, *supra* note 47, at 1499. See also 40 C.F.R. § 122.13(c) (1981), an EPA regulation which states that compliance with a permit does not authorize injuries to private rights.

172. FWPCA § 402(k), 33 U.S.C. § 1342(k) (1976).

173. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1795-96.

174. See Comment, *Federal Common Law in Interstate Water Pollution Disputes*, *supra* note 26, at 141-42.

All things being equal—as they admittedly never are— an industry which had to discharge water pollution would have a clear economic advantage if it located in the more lenient state. Its investment in water pollution control equipment would be less, and, since the standards are easier to meet, it is arguably less likely to be subject to an injunction, fines, or nuisance suits for failure to comply with those standards.

Thus, the more stringent state and its citizens suffer from the more lenient state's standards, and so do the industrial dischargers in the more stringent state. These inequities are not addressed by the FWPCAA; in part they are caused by it. The question of who should pay for damages caused by interstate water pollution, because of the economic inequities discussed above, arguably requires a uniform answer. The FWPCAA does not address the question,¹⁷⁵ and the federal interest in interstate water pollution is unquestionably great.¹⁷⁶ Even under the *Milwaukee II* Court's formulation, the issue seems to be a proper one for federal common law.¹⁷⁷

Advantages of Federal Common Law of Nuisance Actions

The *Milwaukee II* Court is correct when it describes the FWPCAA as comprehensive.¹⁷⁸ Yet, Congress and the EPA are not omniscient; there are problems which have not been provided for in the Act. Admittedly, some problems were not addressed because they did not seem significant to Congress. Still, the fact that Congress chose not to address those problems makes the need for the federal common law of nuisance that much greater.¹⁷⁹

Non-point sources are a good example of congressional omission. The FWPCAA does not establish standards for controlling non-point source water pollution.¹⁸⁰ These sources include types of pollution such as construction run-off, salt water intrusion, agricultural sources (soil run-off and pesticides), and

175. *But see* FWPCAA § 402(b)(5), 33 U.S.C. § 1342(b)(5) (1976). This section does contain provisions allowing a state to object to actions of a neighboring state before a standard is set or a permit is granted. Once the action is taken, however, there is no provision for redress of injuries caused by the pollution allowed.

176. The FWPCAA is the most obvious indication of concern.

177. *See* *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1790-91. *See also* *Zener*, *supra* note 154, at 790.

178. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1792-93.

179. *Id.* at 1807 n.21 (Blackmun, J., dissenting). *See also* Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, *supra* note 26, at 549-50.

180. *Zener*, *supra* note 154, at 769; *Ipsen & Raisch*, *supra* note 2, at 382.

urban run-off.¹⁸¹ All of these sources vary with local features such as topography and soil type, making it difficult to set up uniform standards.¹⁸² The difficulty of their regulation does not render these sources any less harmful,¹⁸³ and parties injured by them should be able to redress their damages. The rationale of *Milwaukee II* was that the FWPCAA displaced the federal common law of nuisance to the degree that it spoke to a particular problem.¹⁸⁴ When *Sea Clammers* interpreted that concept to say the problem was "water pollution" and the FWPCAA spoke to the entire field,¹⁸⁵ it produced the anomalous result that the FWPCAA also displaced the federal common law of nuisance by *not* speaking to a problem.

A corollary to the problem just discussed is that the FWPCAA is slow to change. The Act was enacted only after extensive research and numerous hearings and debates. New problems, neither consciously excluded nor anticipated by Congress when it enacted the FWPCAA, will need to be addressed by the Act, or other acts, in the same fashion.¹⁸⁶ The federal common law of nuisance, however, could provide a flexible and timely solution. The solution provided would be aimed not at regulation of the new problem, but at providing damages for those who are injured as a result of the lack of regulation.

Even when the problem is covered by the FWPCAA, a citizen suit will often be unavailable or inadequate as a remedy. As was noted earlier, if the Administrator or state has initiated an enforcement proceeding, a citizen may not commence a separate proceeding.¹⁸⁷ The citizen suit provision allows the citizen to intervene as a matter of right in a federal court proceeding, but apparently she has no recourse if the action is brought in state court.¹⁸⁸ Even if the state or

181. Zener, *supra* note 154, at 769-70; HARRIS, JEFFREY, & STEWART, INTERSTATE ENVIRONMENTAL PROBLEMS 64-68 (1974).

182. Zener, *supra* note 154, at 769-70; Ipsen & Raisch, *supra* note 2, at 382.

183. A case that preceded the enactment of the FWPCAA, but which was directly relied on in *Milwaukee I*, Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), arose out of Texas' attempt to abate water pollution caused by insecticide spraying in New Mexico. See also HARRIS, JEFFREY, & STEWART, *supra* note 181, at 64-68.

184. City of Milwaukee v. Illinois and Michigan, *supra* note 7, at 1793.

185. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, *supra* note 8, at 2627.

186. For example, immediate regulations to control acid rain currently are considered to be premature by government officials. Research over five to ten more years, they contend, should be conducted before imposing regulations. [1981] 12 ENVIR. REP. (BNA) 282, 411-12.

187. FWPCAA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1976).

188. Ipsen & Raisch, *supra* note 2, at 415.

Administrator is proceeding slowly, or toward a solution less satisfactory than the citizen would seek, the citizen apparently has no choice but to accept whatever result the enforcement action brings.¹⁸⁹ A citizen who is suffering special and unique injuries should be free to sue for the redress of those injuries, even if she is barred from suing for their termination.

A citizen suit may be impractical in situations where the harm has already occurred. In *Sea Clammers*, for example, the violations occurred over a period of time with no apparent injury. When the algal bloom suddenly died and caused extensive injuries to the plaintiffs, it was too late for injunctive relief to be of any value.¹⁹⁰ There would be no point in one who has already suffered injury giving the required notice and following the required procedures to obtain relief which will not redress the injury. An action for damages under the federal common law of nuisance would be the only remedy worth pursuing.

Relieving truly injured plaintiffs of the duty of complying with the notice and attorney fee provisions of the Act¹⁹¹ would neither frustrate the purposes of the FWPCA nor encourage abuses the Act sought to prevent. The self-limiting nature of the law of nuisance should insure that only valid suits are brought. The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."¹⁹² Since the harm is shared by the public as a whole, "[i]n order to recover damages in an individual action for public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."¹⁹³ The injury must be different not just in degree, but in its actual manifestation as

189. *Id.*

190. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, *supra* note 8, at 2621 n.14.

191. FWPCA § 505(b), (d), 33 U.S.C. § 1365(b), (d) (1976).

192. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1977). Comment g describes interference with a public right as interference with a right common to all members of the public, not interference with a particular use of land. The example provided is pollution of a stream. Water pollution which deprives a few riparian owners of the use of the water on their land is not a public nuisance; "if, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of a community of the right to fish, it becomes a public nuisance." *Id.*, Comment g. *Sea Clammers* would seem to present a textbook case of public nuisance.

193. *Id.* § 821C(1).

well.¹⁹⁴ Pecuniary loss can qualify as a different kind of harm.¹⁹⁵

One who suffers an injury in common with the public could not invoke the doctrine; she would have to comply with the citizen suit provisions of the Act. Only one who alleges special harm, like the commercial fishermen in *Sea Clammers*, could seek damages under the doctrine. Since the Act does not provide for damages, but expressly retains them as a remedy in a common law suit,¹⁹⁶ the plaintiff would not be circumventing the Act or frustrating its purposes. Instead, she would be seeking her only available remedy through a means authorized by the Act and consistent with its purposes. A plaintiff who has suffered no special injury and is seeking only to circumvent the procedural requirements of the Act most likely would be unable to qualify as a proper plaintiff under the public nuisance doctrine.¹⁹⁷ The limitations of the doctrine keep it consistent with and complementary to the FWPCAA.

The concept of public nuisance attempts to strike a balance between activities useful to the public in general, but harmful to particular individuals:

The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore . . . [l]iability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.¹⁹⁸

When Congress has struck the balance by defining a certain level of water pollution as acceptable to the public as a whole, it is not unreasonable for an individual who suffers a specific harm, not shared by the public, to seek compensation for her injuries.

194. *Id.*, Comment b.

195. *Id.*, Comment h. Again, *Sea Clammers* provides a textbook example. The following is Illustration 11 of Comment h: "A pollutes public waters, killing all of the fish. B, who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B can recover for the public nuisance."

196. S. REP. NO. 414, 92d Cong., 1st Sess. 81, reprinted in LEGISLATIVE HISTORY, *supra* note 47, at 1499.

197. Similar arguments would apply to one suing under the doctrine of private nuisance. See RESTATEMENT (SECOND) OF TORTS § 821 D, E, F (1977).

198. PROSSER, LAW OF TORTS § 87 (4th ed. 1971) (quoting RESTATEMENT OF TORTS § 822 Comment j) (1939).

The public as a whole receives the benefits of the polluting industries, and their rights in public waters are protected to a certain degree by uniform pollution controls imposed on those industries. An individual who suffers special harm so that the general public can obtain the benefits from the polluting industry should be free to seek compensation for that harm. This reasoning is especially true at a time when it is argued that water pollution controls need to be relaxed for the good of the public. The costs of some water pollution control regulations, it is said, outweigh the benefits they confer.¹⁹⁹ If that is so, one who was receiving the particular limited benefits of "over-regulation" should be allowed some compensation from the costs purportedly saved in return for the increased harm she must endure when standards are relaxed. The federal common law of nuisance would be the only practical means by which many persons or states could receive that compensation.

State Common Law of Nuisance

Another issue raised in *Milwaukee II*, but not answered by the Court, was whether state common law of nuisance could be used to abate interstate water pollution.²⁰⁰ Since the federal common law of nuisance is no longer available, it seems clear that states will attempt to enforce their pollution standards against out-of-state polluters.²⁰¹ While the Court is more reluctant to find Congressional pre-emption of state common law than federal common law,²⁰² many of the arguments against using the federal common law to establish water pollution standards also apply to state common law.²⁰³ Most significantly, a state court which establishes pollution standards, as opposed to enforcing standards in an action brought pursuant to the Act, is simply substituting its judgment for that of the properly authorized expert agency.²⁰⁴ It is likely, therefore, that when the Court does consider the effect of the FWPCA on

199. [1981] 12 ENVIR. REP. (BNA) 62.

200. Illinois petitioned the Court for certiorari on the issue of whether state law was available as a remedy. The Court denied certiorari. 49 U.S.L.W. 3863 (U.S. May 19, 1981).

201. Justice Blackmun predicts a similar result. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1811 (Blackmun, J., dissenting).

202. *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1792.

203. For example, state court judges do not possess the technical expertise to establish water pollution standards; nor can they entertain all competing interests in the context of a single case. Further, state court judgments which establish standards more stringent than those in a NPDES permit undermine predictability.

204. See *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1796 n.18.

state law, it will find state law has been pre-empted to some degree.²⁰⁵

It is hoped that when the Court considers the question it will do so with substantial deference to the needs of the states. The common law of nuisance is an important supplement to the FWPCAA. It should be preserved, at least to the degree it awards damages, to encourage citizens and states to undertake litigation against violators of the FWPCAA. At a time when enforcement by the EPA is hampered by budget constraints, such encouragement is necessary to insure that the goals of the FWPCAA are fulfilled.

CONCLUSION

The FWPCAA established a national goal of elimination of water pollution. To achieve that goal the Act provides comprehensive methods of water pollution regulation and enforcement of those regulations. In light of these comprehensive provisions, federal courts should not be free to establish different regulations or to imply new methods of enforcement. Thus, implied rights of action to enforce the FWPCAA, and federal common law nuisance actions which seek to enjoin approved conduct, properly were eliminated by the Supreme Court.

The FWPCAA, however, did not address the question of compensation for those who are injured by water pollution. Since the FWPCAA is a remedial statute, it is inconceivable that Congress intended to insulate dischargers from liability for injuries caused by their pollution. Yet, the Court's recent decisions in *Milwaukee II* and *Sea Clammers* effectively do just that. In limited circumstances, the federal common law of nuisance could play an important supplemental role in achieving the goals of the FWPCAA. By eliminating the doctrine rather than limiting it, the Supreme Court has produced a result, insulation from liability, that patently frustrates the goals of the FWPCAA.

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205. A state might argue that when Section 510 of the Act, codified at 33 U.S.C. § 1370 (1976), authorizes a state to adopt and enforce effluent limitations more stringent than those authorized by the Act, it necessarily authorizes state courts to do so, as well. It is not clear how the Court would react to this argument in an intrastate context. See *City of Milwaukee v. Illinois and Michigan*, *supra* note 7, at 1798. It seems clear, however, that the Court would reject the argument in the context of a state court attempting to impose more stringent limitations on a discharger in another state who is complying with that state's standards. *Id.*