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FEDERAL COMMON LAW OF NUISANCE IN INTRASTATE WATER
POLLUTION DISPUTES

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

The Fourth Circuit evaded an opportunity to clarify the availability of federal common law actions to abate interstate water pollution. Consequently, federal common law actions may still be possible despite the Federal Water Pollution Control Act Amendments of 1972 (FWPCA of 1972).¹

In *Committee for the Consideration of the Jones Falls Sewage System v. Train*,² a group of Maryland residents sought to enjoin a Baltimore sewage plant from adding new customers to its system.³ The plant was already overloaded, and untreated sewage overflowed into a tributary of the Chesapeake Bay.⁴ Appellants neglected to allege that the pollution had an interstate effect.⁵ Because city and state officials had complied with the requirements of the FWPCA of 1972, no claim under the statute was possible;⁶ the citizens' group therefore based its request for an injunction on an asserted federal common law right. The district court dismissed for lack of jurisdiction.⁷ The Court of Appeals found jurisdiction to hear the suit, dismissed for failure to state a claim upon which relief could be granted, and *held*: Private citizens have no federal common law right to enjoin intrastate pollution.⁸

The recent history of federal common law actions to abate water

1. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

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

3. *Id.* at 1011 (Butzner, J., dissenting).

4. *Id.* at 1007.

5. *Id.* at 1009-10. Because they showed that Jones Falls Stream was navigable, appellants thought it unnecessary to allege an interstate effect. Navigable waters are covered under the Act. *See* Supplemental Brief for the Appellants on Rehearing at 36, *Committee for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006 (4th Cir. 1976). Congress intended to define "navigable waters" as broadly as the Constitution would allow. [1973 Current Developments] 3 ENVIR. REP. (BNA) 1240.

6. 33 U.S.C. § 1342 (Supp. V 1975).

7. *Committee for the Consideration of the Jones Falls Sewage Sys. v. Train*, 375 F. Supp. 1148 (D. Md. 1974) (lack of federal question).

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

pollution is confused. In *Erie Railroad v. Tompkins*,⁹ the Supreme Court held that, except in matters governed by the Constitution or by acts of Congress, the law to be applied in any case is the law of the state.¹⁰ *Erie* therefore ended the era of federal general common law,¹¹ but signalled the beginning of a "new federal common law."¹² This new federal common law arises from two independent sources—important national interests implicitly or explicitly recognized by the Constitution, and federal statutes.¹³ Illustrative of the first source is the federal common law governing issues such as admiralty,¹⁴ foreign relations,¹⁵

9. 304 U.S. 64 (1938).

10. *Id.* at 78. In *Erie*, the Court based its decision on constitutional grounds. See Friendly, *In Praise of Erie—and the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 383-98 (1964). But cf. Clark, *State Law in Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278 (1946) (constitutional discussion in *Erie* is dictum).

11. 304 U.S. at 78.

12. See Friendly, *supra* note 10, at 405-22.

13. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). In this case, decided the same day as *Erie*, the Court used federal common law to determine the apportionment of an interstate river between two states. See also *Wheeldin v. Wheeler*, 374 U.S. 647, 651 (1963) (Douglas, J.) (since *Erie*, creation of federal common law is restricted); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (federal common law implements the Constitution and federal statutes, and is conditioned by them); Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 12 (1975) (courts must look to a statute, treaty or the Constitution as authority for creation of substantive federal law). See generally R. CRAMTON, D. CURRIE, & H. KAY, *CONFLICT OF LAWS CASES—COMMENTS—QUESTIONS* 929-58 (2d ed. 1975); H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 756-832 (2d ed. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler 1973); C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 60 (3d ed. 1976); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Monaghan, *supra*; Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964); Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 HARV. L. REV. 966 (1946); Comment, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964).

14. Federal common law is created to effectuate the grant of admiralty and maritime jurisdiction in U.S. CONST. art. III, § 2. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). See Comment, *supra* note 13, at 327. But see Currie, *Federalism and Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158. See generally Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

15. See, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968); *Banco Nacional de Cuba v.*

and disputes between states.¹⁶ The need for federal rules to protect federal constitutional interests in these areas outweighs the presumption in favor of state law.¹⁷

Courts interpreting federal statutes may generate federal common law when it is clear that Congress intended the federal courts to fill gaps left in the statute.¹⁸ Although courts have not precisely defined the conditions in which such federal common law gap-filling is appropriate,¹⁹ relevant circumstances include situations in which questions of federal rights and duties are involved;²⁰ the extent to which the

Sabbatino, 376 U.S. 398 (1964). See generally Edwards, *The Erie Doctrine in Foreign Affairs Cases*, 42 N.Y.U.L. REV. 674 (1967); Henkin, *The Foreign Affairs Power of the Federal Courts*: Sabbatino, 64 COLUM. L. REV. 805 (1964); Moore, *Federalism and Foreign Relations*, 1964 DUKE L.J. 248.

16. Friendly, *supra* note 10, at 408 n.119 (Constitution requires the fashioning of federal common law when the interstate nature of a dispute makes the application of either state's law inappropriate); Monaghan, *supra* note 13, at 14 (presumption of the Constitution is that federal law should be used to settle interstate disputes); Note, *The Federal Common Law*, *supra* note 13 (concept of national sovereignty dictates a nationwide solution to interstate disputes). See, e.g., *Texas v. New Jersey*, 379 U.S. 674 (1965); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951); *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953); *Kansas v. Missouri*, 322 U.S. 213 (1944); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Kentucky v. Indiana*, 281 U.S. 163 (1930); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971). *But cf.* C. WRIGHT, *supra* note 13, § 60 (the use of federal common law to settle interstate disputes is not mandated by the Constitution).

17. See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (federal agents violated fourth amendment rights); *Bell v. Hood*, 237 U.S. 678 (1946) (violation of fourth and fifth amendment rights); Hill, *The Lawmaking Power of the Federal Constitution: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, *supra* note 13, at 1088-89.

18. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 530 (1954) (federal courts may fill statutory gaps by developing uniform federal decisional rules); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, *supra* note 13, at 1090; Note, *The Federal Common Law*, *supra* note 13, at 1522.

19. When fashioning federal common law, courts should follow, not formulate, congressional policy by finding evidence in the legislative history or scheme that demonstrates a congressional judgment that federal law should govern the issue before the court. Note, *The Competence of Federal Courts to Formulate Rules of Decision*, *supra* note 13, at 1092; Note, *The Federal Common Law*, *supra* note 13, at 1522.

20. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (federal substantive law fashioned to promote the overall statutory purpose); *Murphy v. Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609 (2d Cir. 1967) (federal right to inspect list so that voting privileges granted by Home Owners Loan Act of 1933, 12 U.S.C. §§ 1461-1468 (1970) are mean-

subject is governed by federal statute(s);²¹ the overall purpose of the statutory scheme;²² and, a jurisdictional grant to the federal courts.²³

ingful); *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F. Supp. 644 (E.D. Wis. 1975) (bank has federal common law rights implied by the Home Owners Loan Act of 1933, 12 U.S.C. §§ 1461-1468 (1970)).

For cases where federal common law has been created to protect the federal government's "proprietary" interests, see *Howard v. Lyons*, 360 U.S. 593 (1959) (validity of federal officer's defense when charged with a tort in the line of duty); *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380 (1947) (interpretation of a clause of crop insurance contract); *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961) (clause interpretation affecting liability of U.S.).

21. When the policy of the law in a field is dominated by federal statutes, legal relationships in the field not directly governed by the statutes are deemed governed by federal law. *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

An example of this is the comprehensive federal regulation of common carriers engaged in interstate telephone and telegraph transmission that has resulted in a federal common law of torts. See, e.g., *Western Union Tel. Co. v. Speight*, 254 U.S. 17 (1920) (carrier's liability for negligence); *Western Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920) (carrier's liability for negligence); *Postal-Telegraph Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919) (validity of contract provision on carrier's negligence liability); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968) (remedy for tort or breach of contract against carrier); *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940) (carrier's liability to person defamed by transmission of a libelous message).

22. To advance the overall purpose of a federal statutory scheme, courts have implied civil remedies for those injured because of a statutory violation by another. See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975) (federal prohibition on campaign spending, 18 U.S.C. § 610 (1970)); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (Securities & Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh (1970)); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916) (Safety Appliance Act, 45 U.S.C. §§ 1-16 (1970)); *Fitzgerald v. Pan Am. World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956) (Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 977 (repealed 1958)); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947) (Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970)).

See also Note, *Implying Federal Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Comment, *Environmental Protection: A Limited Expansion of the Citizen's Role*, 12 WASHBURN L.J. 54 (1972):

Four prerequisites appear necessary to an implied cause of action: a statutory policy must be furthered by the right implied; the plaintiff must be within the class of persons the statute seeks to protect; the right asserted must not be protected by other remedies; and, the plaintiff's injury must be the result of another's breach of a statutory duty.

Id. at 59 (footnotes omitted).

23. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (29 U.S.C. § 185(a) (1970) is a "command" to courts to fashion substantive law to answer collective bargaining problems not covered by statute). See, e.g., *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Local 721, United Packinghouse, Food & Allied Workers v. Needham Packing Co.*, 376 U.S. 247 (1964); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962). See also *United States v. Republic Steel Corp.*, 362 U.S. 482 (1970) (jurisdiction granted by § 17 of Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403-404, 406-409, 411-416, 418 (1970)); *Deckert v. Independence Corp.*, 311 U.S. 282 (1940)

When the statute implicitly authorizes it, federal courts develop a body of federal common law to implement the scheme intended by Congress.²⁴

The leading case discussing the federal common law of water pollution is *Illinois v. City of Milwaukee*,²⁵ in which the Supreme Court found that Illinois could sue under federal common law to enjoin a public nuisance originating outside the state, but polluting property within Illinois. The Court discussed two possible sources for this right without specifying the weight attaching to either. First, the federal interest in controlling water pollution on interstate or navigable waters required the Court to fill the gaps in federal water pollution statutes.²⁶ Although the 1965 FWPCA contained no provision granting a state the right to bring a cause of action, the Court noted that the common law remedy would complement the policy of the statute.²⁷ If the *Illinois* result rested primarily on this statutory justification, the 1972 amendments may have mooted the holding, since the amended Act is intended to provide comprehensive remedies for water pollution abatement.²⁸ In *Illinois*, the Court recognized that subsequent federal regulations might preempt the federal common law of nuisance; until that time, however, federal courts were "empowered to appraise the equities of suits alleging creation of a public nuisance by water pollution."²⁹

(jurisdiction granted by § 22(a) of Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970)); Comment, *supra* note 13 (jurisdictional grant in the Constitution gives courts power to create substantive law in admiralty and interstate cases); notes 14 & 16 *supra* and accompanying text.

24. The courts' filling of statutory gaps is illustrated by the body of federal common law that has been fashioned to answer issues in the area of, but not directly answered by, the Federal Employers' Liability Act, 45 U.S.C. §§ 1-60 (1970). See, e.g., *Hogue v. Southern Ry.*, 390 U.S. 516 (1968) (validity of release under FELA); *Dice v. Akron, C. & Y. Ry.*, 342 U.S. 359 (1952) (jury questions in FELA suit); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (sufficiency of complaints in FELA suits); *Ellis v. Union Pac. R.R.*, 329 U.S. 649 (1947) (standard of care in FELA case); *Jesionowski v. Boston & M. R.R.*, 329 U.S. 452 (1947) (*res ipsa* doctrine in FELA suits); *Brady v. Southern Ry.*, 320 U.S. 476 (1943) (sufficiency of evidence in FELA case).

25. 406 U.S. 91 (1972).

26. *Id.* at 101-04, 105 n.6.

27. *Id.* at 104. See 33 U.S.C. §§ 1151-1175 (1970). *Illinois* was decided under the FWPCA before the 1972 amendments were enacted. The Court in *Illinois* referred to 33 U.S.C. § 1160(b), which specifies that state and interstate action to abate pollution is not displaced by federal enforcement, in determining that Illinois' action was not precluded by the statute. A similar provision appears in the 1972 amendments, 33 U.S.C. § 1370 (Supp. V 1975).

28. See note 42 *infra* and accompanying text.

29. 406 U.S. 91, 107 (1972).

The second rationale for the *Illinois* result was that, even without a specific jurisdictional grant, the Constitution implicitly requires federal courts to resolve interstate disputes concerning states' rights in interstate water pollution cases.³⁰ Even before *Erie*, courts had developed "a body of federal common law by which a nuisance in one state which infringes upon the environmental and ecological rights of another state may be abated."³¹ When neither state's law provides impartial relief, federal common law, accommodating both state and national interests,³² recognizes a state's cause of action. If the federal common law in *Illinois* were derived from the constitutional interest in federalism, rather than from a federal statute, it would extend only to parties asserting states' rights in interstate water.³³ The Supreme Court has not stated whether the *Illinois* common law right arose from this recognized body of federal common law or from the authority of a statute which has since been amended.³⁴

The ambiguity of the *Illinois* opinion has caused confusion in the lower courts.³⁵ While one district court held that only sovereigns have

30. *Id.* at 104-08. See, e.g., *Arizona v. California*, 373 U.S. 546, 562 (1963); *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945); *Kansas v. Colorado*, 206 U.S. 46, 98 (1907).

31. *Committee for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976). See, e.g., *New Jersey v. New York City*, 283 U.S. 473 (1931) (state can be enjoined from polluting the coastal waters of another state); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (state enjoined from utilizing a method of water drainage that adversely affected neighboring state); *New York v. New Jersey*, 256 U.S. 296 (1921) (state can be enjoined from dumping material into harbor that polluted waters of neighboring state); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (private business enjoined from discharging noxious fumes that polluted air of neighboring state); *Missouri v. Illinois*, 200 U.S. 496 (1906) (state has right to enjoin neighboring state's sanitation district from polluting water that flowed into plaintiff state). See also *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (private business enjoined from dumping chemicals that polluted coastal waters of neighboring state).

32. *Monaghan*, *supra* note 13, at 14; 1972 *Wis. L. REV.* 597. Federal common law can also provide relief when application of a single state's law is impractical.

33. See note 16 *supra* and accompanying text. States have "quasi-sovereign" ecological rights. See note 31 *supra* and accompanying text.

34. See Comment, *Common Law Environmental Liability Under Federal Statutes*, 11 *F.* 778 (1976); Note, *Federal Common Law and Interstate Pollution*, 85 *HARV. L. REV.* 1439 (1972); Comment, *Federal Common Law in Interstate Water Disputes*, 1973 *U. ILL. L.F.* 141; 77 *DICK. L. REV.* 451 (1973); 2 *ENVTL. L. REP.* 10168 (1972); 10 *Hous. L. REV.* 121 (1972); 7 *SUFFOLK L. REV.* 790 (1973); 1972 *Wis. L. REV.* 597. See also *Massachusetts v. United States Veterans Administration*, 541 F.2d 119, 122-23 (1st Cir. 1976).

35. See, e.g., *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d

federal common law rights to abate water pollution,³⁶ another court allowed any party to seek abatement of pollution of interstate or navigable water based on federal common law.³⁷ A third district court recognized a state's federal common law right to enjoin a private business' intrastate pollution of an interstate body of water;³⁸ the Eighth Circuit, however, dismissed a similar claim because plaintiff failed to allege an interstate effect.³⁹ Most courts have sustained the federal government's federal common law right to abate pollution of navigable water by private sources.⁴⁰

This judicial inconsistency may be due to the enactment, since *Illinois*, of the FWPCAA of 1972⁴¹ which creates a comprehensive scheme to establish and administer water pollution standards. "[A]lthough [the Act] technically amend[s] the FWPCA of 1965, for all practical purposes [it] replaces all federal water pollution control statutes."⁴²

36. *United States v. Lindsay*, 357 F. Supp. 784, 794 (E.D.N.Y. 1973) (dicta) (court denied without prejudice defendant New York City's request to dismiss United States federal common law claim; court thought rule on the merits inappropriate because FWPCAA was not fully operational at the time of the suit).

See also *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1039 (7th Cir. 1975) (if pleadings do not allege interests of any sovereign or interstate parties, jurisdictional questions of the case are not necessarily answered by *Illinois*).

37. *United States v. Ira S. Bushey & Sons*, 346 F. Supp. 145 (D. Vt. 1972), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973).

38. *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556 (N.D. Ill. 1973) (FWPCA did not abolish the federal common law of nuisance); see *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036 (7th Cir. 1975) (district courts have jurisdiction over federal common law claim to abate intrastate pollution of navigable water).

39. *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975) (relief granted on other grounds) ("Federal nuisance law contemplates, at a minimum, interstate pollution of air or water").

40. See, e.g., *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672 (D.N.J. 1973), *cert. denied*, 420 U.S. 927 (1975); *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556 (N.D. Ill. 1973); *United States v. Ira S. Bushey & Sons*, 346 F. Supp. 145 (D. Vt. 1972), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973). But see 15 B.C. INDUS. & COM. L. REV. 795 (1974) (federal government's use of federal common law is inconsistent with FWPCA and FWPCAA of 1972); 14 B.C. INDUS. & COM. L. REV. 767 (1973) (federal government should utilize statutory, not common law, remedies).

41. See generally Ipsen & Raisch, *Enforcement Under the Federal Water Pollution Control Act Amendments of 1972*, 9 LAND & WATER L. REV. 369 (1974); McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195 (1973); 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. INDUS. & COM. L. REV. 672 (1973).

42. McThenia, *supra* note 41, at 202. But see Comment, *supra* note 41, at 673 n.6.

Under the FWPCAA of 1972 the federal government sets limits for pollutant discharges, although states may establish more stringent standards.⁴³ A state has jurisdiction over its own waters and boundary waters;⁴⁴ if a state chooses to enforce its own, and consequently the federal, standards, it must create a pollution discharge permit system.⁴⁵ Failure by a state to act promptly to enforce water quality standards automatically results in federal intervention.⁴⁶

The FWPCAA of 1972 authorizes private citizen actions in federal district court to enforce statutory effluent limitations.⁴⁷ Any citizen⁴⁸ may bring an action against any person alleged to have violated the effluent limitation⁴⁹ or against the federal administrator for failing to perform a nondiscretionary act.⁵⁰ Courts may grant injunctions, impose

43. 33 U.S.C. § 1370(1)(B) (Supp. V 1975).

44. 33 U.S.C. § 1370(2) (Supp. V 1975).

45. 33 U.S.C. § 1342 (b) (Supp. V 1975).

46. 33 U.S.C. § 1319 (Supp. V 1975).

47. 33 U.S.C. § 1365 (Supp. V 1975). The statute provides:

(a) Except as provided in subsection (b) of this section, 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 chapter 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 chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Other subsections of § 1365 are concerned with notice (b), venue (c), litigation costs (d), other citizen rights (e), effluent limitations (f), citizen defined (g), and civil actions by a state governor (h).

48. Citizen means any person(s) "having an interest which is or might be adversely affected." 33 U.S.C. § 1365(g) (Supp. V 1975). See S. REP. NO. 1236, 92d Cong., 2d Sess., reported in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess. 328-29 (1973), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3776, 3823. See also *Sierra Club v. Morton*, 405 U.S. 727 (1972).

49. See 33 U.S.C. § 1342(k) (Supp. V 1975) (issuance of a permit under § 1342 is "compliance" with § 1365).

50. 33 U.S.C. § 1365 (Supp. V 1975). See, e.g., *E.I. duPont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975), *rev'd in part on other grounds*, 97 S. Ct. 965 (1977); *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036 (7th

civil penalties,⁵¹ or both. The citizen suit provision also has a "saving clause" which preserves citizens' rights and remedies not granted by the statute:⁵² "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief"⁵³

The FWPCA of 1972 also permits private parties to seek judicial review of an administrative action.⁵⁴ Application for review must be made within ninety days of the administrator's contested action.⁵⁵ Action of the administrator which could have been reviewed, and was not, is immune from subsequent judicial review.⁵⁶

Cir. 1975); *Natural Resources Defense Council v. Train*, 396 F. Supp. 1386 (D.D.C. 1975); *Sun Enterprises, Ltd. v. Train*, 394 F. Supp. 211 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (1976); *Montgomery Environmental Coalition v. Fri*, 366 F. Supp. 261 (D.D.C. 1973).

51. 33 U.S.C. § 1365(a) and (d). The citizens' provision of the FWPCA of 1972 is modeled after the Clean Air Act Amendments of 1970 (42 U.S.C. § 1857h-2 (1970)). One of the primary differences is this authorization, under § 1365, for the courts to impose civil remedies.

52. It should be noted . . . that the section [§ 1365] 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.

S. REP. NO. 414, 92d Cong., 1st Sess., *reported in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972*, 93d Cong., 1st Sess. 1499 (1973), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3746-47.

33 U.S.C. § 1365(e) has been successfully invoked as maintaining a citizen's right to bring an enforcement action under other federal jurisdictional statutes, *e.g.*, 28 U.S.C. § 1331(a) or 5 U.S.C. §§ 701-06, besides § 1365. This can be important if the citizen has lost the right to suit under § 1365(a) because of noncompliance with § 1365(b). *See, e.g.*, *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975); *Conservation Soc'y v. Secretary of Transp.*, 508 F.2d 927 (2d Cir. 1975), *vacated*, 423 U.S. 809 (1975), *rev'd on other grounds*, 531 F.2d 637 (2d Cir. 1976).

53. 33 U.S.C. § 1365(e) (Supp. V 1975).

54. 33 U.S.C. § 1369(b)(1) (Supp. V 1975). *See, e.g.*, *E.I. duPont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975), *rev'd in part on other grounds*, 97 S. Ct. 965 (1977); *American Iron and Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975); *American Meat Inst. v. EPA*, 526 F.2d 442 (7th Cir. 1975); *CPC Int'l, Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975). *See also* S. REP. NO. 414, 92d Cong., 1st Sess., *reported in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972*, 93d Cong., 1st Sess. 1503 (1973), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3750-51.

55. 33 U.S.C. § 1369(b)(1) (Supp. V 1975).

56. 33 U.S.C. § 1369(b)(2) (Supp. V 1975).

In *Committee for the Consideration of the Jones Falls Sewage System v. Train*,⁵⁷ the Fourth Circuit declined to consider whether, in light of the FWPCA of 1972, there is currently a federal common law right of action to abate interstate water pollution. The court reasoned that federal common law is necessary to resolve interstate water pollution controversies only when application of either state's law would be inequitable.⁵⁸ In this case the court applied Maryland law because it would not be inequitable: the controversy was local, required no vindication of a state's rights, and—on plaintiff's allegations—involved no interstate effect.⁵⁹ Furthermore, *Illinois* only recognizes a right to assert a state's rights,⁶⁰ and therefore does not apply to private parties.⁶¹

Although federal interest in water pollution is apparent,⁶² the policy of the FWPCA of 1972 is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"⁶³ The court suggested that appellants turn to the state for relief since the saving clause preserved their right to do so.⁶⁴ Noting that plaintiffs were barred from proceeding under the FWPCA of 1972,⁶⁵ the *Jones* court concluded that "it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates."⁶⁶

The dissent argued for the preservation of earlier federal common law rights enunciated in *Illinois*.⁶⁷ The statute's grant of federal jurisdiction for citizen enforcement combined with the saving clause⁶⁸ suggests

57. 539 F.2d 1006 (4th Cir. 1976).

58. *Id.* at 1008.

59. *Id.* at 1010.

60. *Id.* at 1009 n.8. The court, citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), stated that a state need not be a party if the state's rights are implicated. *But see* Joint Supplemental Brief for Appellees and Intervenor at 67, *Committee for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006 (4th Cir. 1976) (only sovereigns can seek relief under *Illinois*).

61. Suits by the United States government might be an exception to this rule, said the court, but suggested this proposition may be questionable since the enactment of the FWPCA of 1972. *See* 539 F.2d at 1009 n.7. *See also* note 40 *supra* and accompanying text.

62. 539 F.2d at 1009.

63. *Id.* (quoting 33 U.S.C. § 1251(b) (Supp. III 1973)).

64. 539 F.2d at 1009 n.9. *See* 33 U.S.C. § 1365(e) (Supp. V 1975).

65. 539 F.2d at 1009. *See* note 6 *supra* and accompanying text.

66. 539 F.2d at 1009.

67. *Id.* at 1011.

68. *Id.* at 1012-13. *See* 33 U.S.C. § 1365(a) & (e) (Supp. V 1975).

that Congress intended to retain the federal common law in actions to abate pollution in navigable waters.⁶⁹ The dissent reasoned that the federal interest in water pollution is pervasive and is not dependent on state law.⁷⁰

The dissent's primary disagreement with the majority, however, lay in its reading of *Illinois*. According to the dissent, *Illinois* does not limit the common law right to abate public nuisances to suits by state governments.⁷¹ Rather, it holds that the federal common law may fill statutory gaps with uniform rules to advance the statute's purpose and grant relief not included in the statutory remedies.⁷² The dissent concluded that appellants should amend their complaint to allege an interstate effect. The district court should then decide on the merits appellants' right to federal common law relief.⁷³

While the court's holding in *Jones* is not incorrect, the opinion is incomplete. The *Jones* opinion lacks understanding of the federal common law and avoids the crux of the problem. To assess the validity of a claim based on federal common law a court must make two determinations: first, it must decide whether either the Constitution or an act of Congress demonstrates a federal interest in the party's claim;⁷⁴ and, second, if it finds a federal interest, it must decide whether it is adequately protected by state law or requires application of federal common law.⁷⁵

Rather than analyzing the validity of appellant's claim, the court dismissed it by distinguishing *Jones* from *Illinois* and by assuming that the *Illinois* result rested solely on the constitutional interest in preserving the federal structure. If this interpretation of *Illinois* is correct, *Illinois* provides no support for a private federal common law right of action to abate water pollution.⁷⁶ The federalism rationale requires interstate pollution, the involvement of state rather than private interests,

69. 539 F.2d at 1011.

70. *Id.* at 1012.

71. *Id.* at 1014.

72. *Id.*

73. *Id.* at 1016.

74. Note, *The Competence of Federal Courts to Formulate Rules of Decision*, *supra* note 13, at 1099. See note 13 *supra* and accompanying text.

75. Note, *supra* note 22, at 294; Note, *The Federal Common Law*, *supra* note 13, at 1522.

76. See note 16 *supra* and accompanying text.

and a finding that application of state law would be either inequitable or impractical. *Jones* does not meet these criteria.

On the other hand, the majority did not adequately refute appellant's contention that *Illinois* also rested on the theory that courts may fashion federal common law remedies to fill the gaps in federal statutes.⁷⁷ Instead, the court avoided the issue by relying on plaintiff's failure to allege pollution of interstate waters.⁷⁸ The court did acknowledge that Jones Falls Stream is a tributary of Chesapeake Bay;⁷⁹ pollution of the Stream results in pollution of Chesapeake Bay, an interstate body of water. Consequently, the interstate effect of polluting Jones Falls Stream, while not alleged, is apparent. In the same way the court avoided the question, addressed by the dissent, of whether the FWPCAA of 1972 created or preserved federal common law rights of action by private parties.

To ascertain what common law rights can be derived from the FWPCAA of 1972 requires a determination whether federal common law is necessary to fill its gaps. A finding that the statutory scheme would be frustrated or that the federal interest would not be protected by state law would justify the creation of federal common law.⁸⁰ Here, appellant was asking a federal court to develop a federal common law rule that would require the abatement of pollution permitted by the FWPCAA of 1972.⁸¹ The statute creates two private rights of action: one, a citizen suit provision for enforcement of effluent standards;⁸² and, two, a provision for judicial review of administrative decisions.⁸³ Other than these explicit exceptions, Congress did not intend citizens to litigate water pollution control disputes under federal law.⁸⁴ Citizen suits are part of the enforcement system created by the FWPCAA of

77. Supplemental Brief for Appellants on Rehearing at 18, Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976).

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

79. *Id.* at 1007.

80. See notes 18-24 *supra* and accompanying text.

81. See note 6 *supra* and accompanying text.

82. 33 U.S.C. § 1365 (Supp. V 1975).

83. 33 U.S.C. § 1369 (Supp. V 1975). See notes 54-56 *supra* and accompanying text.

84. Congress expressed concern at cluttering the federal courts with citizen suits, thus it provided certain technical limitations to both provisions providing for citizen action. See Reath, *Pollution—The Right of Private Enforcement in the Courts*, 43 PA. B.A.Q. 238, 242 (1972).

1972,⁸⁵ but the legislative history does not indicate that Congress intended to authorize the federal courts to create a separate system of standards and enforcement.⁸⁶

Citizens seeking to abate pollution not enjoined under the FWPCAA of 1972 may litigate their complaints under state law. The FWPCAA of 1972 provides for such citizen suits by permitting states to impose more stringent standards,⁸⁷ and by preserving common law rights to seek relief under state law.⁸⁸ Congress' failure to preempt *state* law, however, does not support the *Jones* plaintiff's argument that the door is therefore open to *federal* common law. Neither the legislative history nor the administrative scheme of the FWPCAA of 1972 support this contention.⁸⁹ By carefully defining the role of both federal and state governments in the administration of the FWPCAA of 1972, the filling of any statutory gaps is left to state law.⁹⁰

85. See notes 47 & 54 *supra* and accompanying text.

86. Section 505 [§ 1365] would not substitute a 'common law' or court developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [*sic*] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such an effluent control provision.

S. REP. NO. 414, 92d Cong., 2d Sess., reported in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess. 1497 (1973), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3745.

See Zener, *Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 790 (E. Dolgin & T. Guilbert ed. 1974).

87. See note 43 *supra* and accompanying text.

88. See notes 52 & 53 *supra* and accompanying text.

89. The legislative history demonstrates that the regulatory scheme was deliberately designed to provide for citizen participation in the FWPCAA of 1972. Congress sought to accomplish this by providing for: (1) public participation in the development of effluent standards, § 1251(a), (2) making permit applications and permits issued under § 1342 public records, § 1342(j), (3) federal enforcement, § 1319, (4) judicial review of Administrator's actions, § 1369(b), and, (5) the citizen suit provision for enforcement actions, § 1365. H.R. REP. NO. 911, 92d Cong., 2d Sess. 132 (1972), reported in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess. 753, 819 (1973). See *Proposed Amendments to the Water Pollution Control Act: Hearings on H.R. 11,896 Before the House Committee on Public Works*, 92d Cong., 1st Sess., reported in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess. 1111-1251 (1973).

In answer to a question expressing concern about citizens filing suits without reference to the EPA standards, Russell E. Train, Chairman, Council on Environmental Quality, responded: "We have felt it very important that citizen's suits be directed to enforcing standards set by law and regulation rather than hypothetical standards which are not related to statutory and regulatory enactment, and I think that this is an important matter to keep in mind." *Id.* at 1153.

90. 33 U.S.C. § 1251(b) (Supp. V 1975). See *Ohio v. Wyandotte Chem. Corp.*, Washington University Open Scholarship

Citizens' ability to enjoin intrastate water pollution not enjoined under the FWPCAA of 1972 is therefore limited to appellate review of administrative actions⁹¹ and to litigation under state law.⁹² It has been suggested, however, that the rule in *Illinois* does permit a federal common law cause of action for a citizen in one state who seeks to abate pollution in another state.⁹³ The pitfalls of *Jones* might have been avoided had a citizen of another state brought suit alleging that the pollution of Jones Falls Stream created a nuisance in his state. Such a suit would have raised the larger constitutional and statutory questions discussed, but not clearly decided, in *Illinois*.

In holding that there is no body of federal common law that confers rights upon private citizens to enjoin intrastate pollution not enjoined under the FWPCAA of 1972, the Fourth Circuit found that this statute expresses the extent of federal interest in intrastate pollution. The more important question concerning interstate actions remains unanswered.

401 U.S. 493 (1971); Boger, *The Common Law of Public Nuisance in State Environmental Litigation*, 4 ENV'TL AFF. 367, 367 (1975).

91. In *Jones* the appellees alleged that the appellants failed to exercise these rights. See Joint Supplemental Brief for the Appellees and the Intervenor Appellees at 16-17. But the appellants claimed they were misled by the state into believing that the permit in question was only a temporary permit, and therefore they did not challenge it within 90 days after its issuance. See Reply Brief for the Appellants at 1-2.

92. See generally Davis, *Theories of Water Pollution Litigation*, 1971 WIS. L. REV. 738; Maloney, *Judicial Protection of The Environment: A New Role for Common-Law Remedies*, 25 VAND. L. REV. 145 (1972); Trumbull, *Private Environmental Legal Action*, 7 U.S.F.L. REV. 27 (1972) (Michigan's new laws concerning citizen environmental rights); Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734 (1970) (civil remedies for violation of state regulations).

93. 77 DICK. L. REV. 451, 456-58 (1973); 2 ENV'TL L. REV. 10,168, 10,172 (1972).