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make its determination only by carefully weighing the significance of the burden placed on interstate commerce against the benefit such legislation provides for the State.

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Environmental Law—Water Pollution Remedies—Application of Federal Common Law of Public Nuisance to Intrastate Stream Pollution—Committee for Consideration of Jones Falls Sewage System v. Train.¹ The Committee for the Consideration of the Jones Falls Sewage System, together with private individuals and several neighborhood associations, brought suit in federal district court against the United States Environmental Protection Agency (EPA), various individuals and state, municipal, and county agencies² to halt the discharge of sewage into the Jones Falls Stream³ from the local sewage system treatment plant.⁴ The plaintiffs alleged that substantial amounts of untreated raw sewage were flowing into the stream as a result of the insufficient capacity of the treatment plant, causing unacceptable levels of coliform and fecal bacteria in the stream.⁵ The suit was initially brought under the citizen suit provision of the Federal Water Pollution Control Act Amendments of 1972,⁶ which permits citizens to sue any person who has violated the effluent standards established under the Act.⁷ The plaintiffs sought injunctive relief

¹ 539 F.2d 1006 (4th Cir. 1976) (*en banc*).

² 375 F. Supp. 1148, 1149 (D. Md. 1974). The following defendants were named in addition to Russell Train, the Administrator of the United States Environmental Protection Agency: F. Pierce Linaweaver, individually and as Director of the Baltimore City Department of Public Works; Mayor and City Council of Baltimore City; C. Elmer Hoppert, Jr., individually and as Buildings Engineer for Baltimore County; and County Executive and County Council of Baltimore County. *Id.* The court later permitted Carl M. Freeman, Trustee, Carl M. Freeman Associates, Inc., and Ralph DeChiaro Enterprises, Inc. to intervene as defendants. 387 F. Supp. 526, 527 (D. Md. 1975).

³ 375 F. Supp. at 1149. From its origin in Baltimore County the Jones Falls Stream flows through parts of the City of Baltimore, into the Patapsco River, and ultimately into Chesapeake Bay via the Baltimore Harbor. *Id.*

⁴ 375 F. Supp. at 1149.

⁵ Plaintiffs alleged that in 1973 the plant's capacity was exceeded by three million gallons of sewage per day. 539 F.2d at 1010 (Butzner, J., dissenting).

⁶ 33 U.S.C. §§ 1251 *et seq.* (Supp. V 1975).

⁷ 33 U.S.C. § 1365 (Supp. V 1975), the citizen suit provision, confers jurisdiction on the district courts. Section 1365(a) provides:

(a) Authorization: jurisdiction.

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

against alleged violations of effluent standards⁸ caused by the discharge of sewage by defendant City of Baltimore Department of Public Works.⁹ The district court dismissed the claims for injunctive relief,¹⁰ finding that the defendants were immune from suit for violation of an effluent standard under section 1342(k) of the Act,¹¹ by vir-

(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 districts 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.

⁸ Section 1365(f) of the Act defines "effluent standard" for the purposes of citizen suits as follows:

(f) Effluent standard or limitation.

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

33 U.S.C. § 1365(f) (Supp. V 1975).

⁹ See 375 F. Supp. 1148, 1149 (D. Md. 1974). A claim for such relief is permitted under § 1365(a)(1). See note 7 *supra* for text of that provision.

Plaintiffs also claimed that the Administrator of the EPA had failed to perform allegedly non-discretionary duties required by §§ 1253(a), 1255(d), 1318(a), 1319, and 1364 of Title 33, 387 F. Supp. 526, 528 (D. Md. 1975). A citizen suit against the Administrator is permitted by § 1365(a)(2) of Title 33. See note 7 *supra*. In a subsequent hearing on a motion to dismiss this claim, the district court upheld the claim insofar as it sought to compel the Administrator to perform duties under §§ 1242(a), 1255(d) and 1318(a), but dismissed that part of the complaint seeking to compel the Administrator's performance under §§ 1319 and 1364. *Id.* at 530-31. These claims were not adjudicated in the court of appeals decision, which addressed only the question whether plaintiffs might allege a cause of action under the federal common law of nuisance.

¹⁰ 375 F. Supp. 1148, 1153 (D. Md. 1974).

¹¹ 33 U.S.C. § 1342(k) (Supp. V 1975). Section 1342(k) essentially provides that a discharge shall not be a violation of the Act if an application for a discharge permit has been made, but not yet acted upon.

§1342(k) Compliance with permits.

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with section 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

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tue of their application, prior to the commencement of the suit, for a National Pollution Discharge Elimination System permit.¹²

As a result of the district court's dismissal of the action for failure to state a claim for injunctive relief under the federal statute, the plaintiffs were deprived of a basis for federal court jurisdiction. To remedy this situation they sought to amend their complaint to state a cause of action under the federal common law of public nuisance,¹³ thereby presenting the district court with a federal question upon which the court could base its continued jurisdiction over the suit.¹⁴ The district court rejected plaintiffs' claim, however, holding that it lacked subject matter jurisdiction because there existed no nuisance claim under federal common law in a suit brought by private par-

¹² 375 F. Supp. 1148, 1149-53 (D. Md. 1974). Defendant City of Baltimore Public Works applied to the EPA for a discharge permit for the Back River waste water treatment plant on October 4, 1973. *Id.* at 1150. Suit was not commenced until December 1973. *Id.* at 1149. While the suit was pending the defendants received a permit from the Maryland Department of Public Works, with the authorization of the EPA. 539 F.2d at 1007.

¹³ 375 F. Supp. 1148, 1153 (D. Md. 1974). A nuisance may be generally defined as an unreasonable interference which causes substantial harm to the injured party's interest. *See* 6A AMERICAN LAW OF PROPERTY § 28.23 (A.J. Casner ed. 1954). Private nuisances are related to a possessory interest in land, while public nuisances cover a wide range of activities which in some way affect adversely the public health or welfare. *Id.* The American Law of Property distinguishes the two types of nuisance as follows: 'Such interferences as unreasonably affect the quiet and peaceable enjoyment of one's land are . . . private nuisances Behavior, on the other hand, which impairs the health, safety, morals and comfort of the general community without necessarily harming particular property rights in any special way is a public nuisance.' *Id.* (footnotes omitted).

¹⁴ *See* 375 F. Supp. 1148, 1153 (D. Md. 1974). The Supreme Court has ruled that the federal district courts have jurisdiction over common law nuisance claims as a federal question under 28 U.S.C. § 1331(a) (1970). *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972).

The plaintiffs' attempt to amend their complaint raised an interesting jurisdictional question. Under § 1365(a) of the Federal Water Pollution Control Act Amendments of 1972, the district court has jurisdiction over a suit for violation of the statute without regard to the amount in controversy. 33 U.S.C. § 1365(a) (Supp. V 1975). However, at the time of suit in order for the district court to have jurisdiction to hear a federal question under 28 U.S.C. § 1331(a), the amount in controversy had to be shown to be greater than \$10,000. 28 U.S.C. § 1331(a) (1970). The *Jones Falls* case thus raised the question whether the plaintiffs must allege the jurisdictional amount to remain in federal court when they originally came into court on a basis not requiring such a showing. The dissent raised this point and urged that it be briefed on remand. 539 F.2d at 1013 n.11 (dissenting opinion). After the case was decided, however, § 1331(a) was amended to remove the jurisdictional amount requirement in suits against an administrative agency. 28 U.S.C.A. § 1331(a) (Dec. 1976 Pamph. 4, Part 2). Thus, the plaintiffs in *Jones Falls* would have been able to maintain their federal common law claim in the district court. The question raised by the dissent would still be at issue, however, in suits brought under the Federal Water Pollution Control Act against private individuals. As to whether plaintiffs in that instance could make the requisite showing, see *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972), for the notion that the interest in the maintenance of clean water is sufficient to meet the jurisdictional amount requirement of 28 U.S.C. § 1331(a).

ties.¹⁵ The district court concluded that a federal common law nuisance claim was limited to actions brought by governmental entities.¹⁶

The plaintiffs appealed this determination to the United States Court of Appeals for the Fourth Circuit, which heard the case *en banc*. The appeal squarely presented the court for the first time with the question whether the federal common law of nuisance could be applied in a suit by private individuals seeking to abate pollution of an intrastate stream.¹⁷ A majority of the court in an opinion by Chief Judge Haynsworth affirmed the district court opinion, and HELD: the federal common law of nuisance may not be applied to a suit instituted by private parties to abate pollution of an intrastate stream.¹⁸ The majority ruled that the federal common law of nuisance applied only to those cases seeking "the abatement of public nuisances in interstate controversies where the complainant is a state and the offenders are creating extraterritorial harm."¹⁹ The majority thus found that plaintiffs had failed to set forth a federal common law claim because there was no claim of right by a state and because the controversy was intrastate in nature, with no allegation of an out-of-state effect.²⁰ The majority further declared that the federal courts could not use federal common law in a local controversy to impose stricter standards than those established by the Federal Water Pollution Control Act Amendments.²¹

A strong three judge dissent argued that federal common law should be applicable to such suits and urged that the case be remanded to the district court. The dissenting judges construed the federal common law nuisance doctrine broadly, arguing first that it applied to all navigable waters rather than only those which are interstate,²² and second that such a nuisance claim could be brought by private parties as well as by governmental entities.²³ The dissent con-

¹⁵ 375 F. Supp. 1148, 1153-55 (D. Md. 1974). The court based its decision on its interpretation of *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). 375 F. Supp. at 1153-55.

¹⁶ *Id.* at 1153.

¹⁷ 539 F.2d at 1007.

¹⁸ *Id.* The court based its decision not on a lack of jurisdiction, however, but upon a determination on the merits that plaintiffs' amended complaint failed to state a claim upon which relief could be granted. *Id.* at 1008. The effect of the court of appeals decision, therefore, in contrast to that of the district court, was not to find that the federal courts lack subject matter jurisdiction over private party federal common law nuisance suits, but rather that the federal courts in the exercise of their jurisdiction may determine that the private parties have failed to state a claim for which relief may be granted. The case is thus presented in a Rule 12(b)(6) posture under the Federal Rules of Civil Procedure.

¹⁹ 539 F.2d at 1009. The court admitted, however, that a state was not a necessary party to a federal common law nuisance suit, if its interests were sufficiently involved in the action. *Id.* at n.8. Other courts have limited federal common law nuisance suits to governmental entities rather than to states. See cases cited at note 77 *infra*.

²⁰ 539 F.2d at 1010.

²¹ *Id.* at 1009.

²² *Id.* at 1013 (dissenting opinion).

²³ *Id.* at 1014 (dissenting opinion).

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tended that the Federal Water Pollution Control Act Amendments exhibit a federal policy in favor of private party suits under federal common law.²⁴ The dissent also found that the expansion of the Federal Water Pollution Control Act to cover tributaries of navigable waters, and the broad definition of navigable waters in statutes, regulations and case law demonstrated that federal common law nuisance need not be restricted to interstate waters.²⁵ The dissent concluded accordingly that the pollution of Jones Falls, as a navigable water, presented a federal question over which the district court had jurisdiction.²⁶

The importance of the decision in *Jones Falls* lies primarily in its restrictive effect upon the use of the federal common law of public nuisance. The case stands as the latest attempt to narrow the federal common law of nuisance which was broadly enunciated by the Supreme Court in *Illinois v. City of Milwaukee*.²⁷

In *City of Milwaukee* the Supreme Court held that a federal common law nuisance claim alleging pollution of an interstate body of water may be brought by a state, and that the district courts have jurisdiction over such a claim as a federal question.²⁸ The case left open, however, the questions of whether the right to pursue a federal common law nuisance claim was limited to states,²⁹ and whether the claim could be made only with respect to pollution of interstate bodies of water.³⁰ The ambiguities left unresolved in *City of Milwaukee* have produced a body of decisions in the district courts and the courts of appeals as to 1) who may bring a federal common law public nuisance suit and 2) what must be the nature of the body of water in ques-

²⁴ *Id.* at 1012-13 (dissenting opinion).

²⁵ *Id.* at 1011, 1013 (dissenting opinion).

²⁶ *Id.* at 1014 (dissenting opinion). The dissenting judges also considered the question whether the Federal Water Pollution Control Act Amendments preempted the use of federal common law in the area of water pollution, an argument made by the defendants, *id.* at 1011 (dissenting opinion), but not addressed by the majority opinion. The dissent urged that the question of preemption be resolved on remand with due regard given to the functions of the federal common law to provide uniform rules and to fill in statutory interstices. *Id.* at 1010, 1014 (dissenting opinion). This preemption problem was recognized when the Supreme Court expounded the common law public nuisance doctrine in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). The Court in *City of Milwaukee* observed that eventually statutory law might preempt the common law of nuisance, but held that the then current act, the Federal Water Pollution Control Act, 33 U.S.C. § 1151 *et seq.* (1970), did not do so. 406 U.S. at 107. Later cases, including decisions since the Federal Water Pollution Control Act Amendments of 1972 were enacted, have continued to hold that the common law is not preempted by the statute. See, e.g., *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 558-59 (N.D. Ill. 1973); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 149-50 (D. Vt. 1972), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

²⁷ 406 U.S. 91 (1972).

²⁸ *Id.* at 99.

²⁹ See *id.* at 91.

³⁰ See *id.*

tion.³¹ The *Jones Falls* case specifically addresses these issues, both of which emphasize the delicate problem of the federal-state relationship in the area of environmental enforcement.

This note will briefly consider the authority of federal courts to create substantive common law and will then examine the federal common law of nuisance created by the Supreme Court in *Illinois v. City of Milwaukee*. The questions whether the federal common law nuisance doctrine is limited to suits brought by governmental entities or to suits seeking the abatement of pollution in interstate waters will be analyzed in light of the majority and dissenting opinions in *Jones Falls*. Finally, it will be submitted that in light of the federal policies in the water pollution control area, the majority in *Jones Falls* was correct in its limitation of the federal common law nuisance doctrine to governmental entities, but was incorrect in its determination not to apply the doctrine to pollution of intrastate navigable waters.

I. THE FEDERAL COMMON LAW OF NUISANCE

In spite of the announced demise of "federal general common law" in *Erie Railroad Co. v. Tompkins*,³² the federal courts in the decades since that landmark decision have fashioned federal common law in certain specialized areas. This development has been particularly notable in such fields as commercial³³ and labor law,³⁴ although most recently, some significant progress has been evidenced with respect to environmental concerns.³⁵ Because of the general reluctance since *Erie*

³¹ See, e.g., *Reserve Mining Co. v. EPA*, 514 F.2d 492, 520 (8th Cir. 1975), modified on other grounds, 529 F.2d 181 (8th Cir. 1976); *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1039-40 (7th Cir. 1975); *Board of Supervisors v. United States*, 408 F. Supp. 556, 562 (E.D. Va. 1976); *United States v. Lindsay*, 357 F. Supp. 784, 794 (E.D. N.Y. 1973); *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 149 (D. Vt. 1972), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

³² 304 U.S. 64 (1938). *Erie* overruled the long-standing doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had permitted the federal courts in diversity jurisdiction cases to distinguish between questions of a "local" nature, in which state law was binding on the federal courts, and "question[s] of a . . . general nature," in which the federal courts could apply a general body of law. *Id.* at 18. *Erie's* rejection of *Swift* was emphatic:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78.

³³ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455-56 (1942); *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940).

³⁴ See, e.g., *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

³⁵ See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) and cases cited in note 31 *supra*.

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to create federal common law, the federal courts have had to find some compelling rationale to bypass the operation of state law. Generally the courts have used one of four techniques to create this "specialized federal common law":³⁶ 1) the filling in of statutory interstices;³⁷ 2) the implication of additional remedies from a federal statute;³⁸ 3) the derivation of a power to make substantive law from a jurisdictional grant;³⁹ and 4) the "spontaneous generation" of federal substantive law when important federal policy considerations so dictate.⁴⁰ Particularly in the case of the so-called spontaneous generation of substantive federal common law, a court's decision to create federal law is underscored by considerations of the need for uniformity in the field,⁴¹ and of the existence of a federal policy or interest which

³⁶ Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405, 421 (1964) (hereinafter Friendly).

³⁷ Federal judicial lawmaking by filling in statutory interstices is the most basic form of common lawmaking and is an undisputed role of the federal courts. See, e.g., *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), in which Mr. Justice Holmes in dissent expressed his understanding of federal judicial lawmaking: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Id.* at 221. See also Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026-27 (1967).

³⁸ In the remedies cases the problem is generally to determine what parties are entitled to relief from a statutory violation or whether relief in a form other than that statutorily mandated may be obtained. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964) (implying a private remedy for an individual stockholder who claimed to suffer harm from a corporation's violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970)); *United States v. Republic Steel Corp.*, 362 U.S. 482, 491-92 (1960) (implying injunctive relief from violations under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.* (1970), where the Act provides only for fines and imprisonment for such violations); *Board of County Comm'rs v. United States*, 308 U.S. 343, 349 (1939) (the question whether a judgment in an action by the United States to recover county tax payments on behalf of an Indian should include interest on the illegally exacted payments must be determined by judicial implication from the grant of the existing federal right).

³⁹ The derivation of federal common lawmaking power from a jurisdictional grant has been an important factor in creating federal common law in the areas of admiralty, suits between the states, and labor. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WESCHLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 786 (2d ed. 1973). In the landmark case, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court implied from the jurisdictional grant in section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1970), an authorization to create federal common law and to fashion that law in accordance with the policy expressed in federal statutory law. 353 U.S. at 450-51, 456-57.

⁴⁰ See Friendly, *supra* note 36, at 421.

⁴¹ Perhaps the most important case representative of this latter group of "policy" cases is *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). In *Clearfield* the Supreme Court held that federal common law must govern questions involving the United States as an issuer of commercial paper because of the need for uniformity in such a complex area. *Id.* at 366-67.

[R]easons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application

would be furthered by judicial lawmaking.⁴²

In the environmental protection area, the Supreme Court has focused on policy considerations in formulating federal common law. *Illinois v. City of Milwaukee*,⁴³ the leading Supreme Court case in federal nuisance law, exemplifies these policy considerations.⁴⁴ In *City of Milwaukee* the state of Illinois presented the United States Supreme Court with a motion to file a bill under the Court's original jurisdiction for abatement of a public nuisance created by the dumping of

of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Id. at 367. See also *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 490-91 (2d Cir. 1968) (questions concerning interstate communications must be resolved by a uniform federal common law).

⁴² See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-59 (1942); *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁴³ 406 U.S. 91 (1972). *Illinois v. City of Milwaukee* represents a fundamental change in the Supreme Court's view of the federal courts' role in environmental nuisance cases, and therefore is the appropriate starting point for discussion. The case implicitly overruled a 1971 case, *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971), in which the Court had refused to exercise its original jurisdiction over a suit by Ohio against extra-territorial polluters. See 406 U.S. at 102 n.3. In *Wyandotte* the Court remitted the case to the state court, ruling that the federal district courts lacked either diversity or federal question jurisdiction, and further stating as dictum that if a federal district court could obtain jurisdiction over the controversy, it would be obliged to apply state law to the question. *Wyandotte*, 401 U.S. at 498 n.3.

For a history of public nuisance as an environmental remedy, see Note, 14 B.C. IND. & COM. L. REV. 767 (1972-73).

⁴⁴ The *City of Milwaukee* Court also asserted that the basic interests of federalism and the desire for uniform rules which underlie action to abate pollution of an interstate body of water required the application of federal common law to the controversy. 406 U.S. at 105 n.6. This concern for uniformity, however, played a much smaller role in the Court's decision to apply federal common law than did the Court's consideration of the federal policy toward water pollution control. The Court further observed that the use of federal common law to abate pollution creating a public nuisance was not inconsistent with the Federal Water Pollution Control Act, since section 10(b) of the Act stated that "State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action." 406 U.S. at 104, quoting § 10(b) of the Federal Water Pollution Control Act, 33 U.S.C. § 1160(b) (1970) (since amended). The decision to permit Illinois to pursue its nuisance claim was therefore in accord with expressed federal policy.

On the need for uniformity as a basis for federal common law creation, see also Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case*, 12 ARIZ. L. REV. 691 (1970) (hereinafter Woods & Reed), in which the authors advocated the use of the federal district courts as an alternative forum to the Supreme Court in interstate pollution cases involving a state as a party. *Id.* at 701. The authors argued that such suits called for the application of federal common law, because of the federal interest in resolving interstate conflicts and the need for a uniform approach to problems concerning interstate waters. *Id.* at 703-06, 711-12. The authors also argued that the policy of federal water pollution control legislation made appropriate the use of federal common law in such cases. *Id.* at 713-14. It is interesting to note

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raw and inadequately treated sewage into Lake Michigan by four Wisconsin cities, an impermissible activity under Illinois law.⁴⁵

The Court held that, although it had original jurisdiction over the suit, such jurisdiction was not necessarily exclusive.⁴⁶ In order to decline to exercise jurisdiction, however, the Court had to find a basis for federal jurisdiction in the district court.⁴⁷

Since the district court could not obtain jurisdiction based on diversity of citizenship,⁴⁸ the only possible basis for district court jurisdiction was a determination that Illinois' nuisance claim was a federal common law claim arising under the laws of the United States under 28 U.S.C. § 1331(a).⁴⁹ The Court's determination that the suit presented a federal question was based on two premises. The Court first determined that claims under federal common law as well as claims based upon statutes are claims under the laws of the United States for

that when the Supreme Court in *City of Milwaukee* established the federal district court, applying federal common law, as the appropriate forum for Illinois' public nuisance claim, it minimized the interest in uniformity and the federalism concern and looked more to the policy exhibited by federal environmental legislation. See 406 U.S. at 101-04 & 105 n.6. But see text at notes 81-85 *infra* where it is suggested that the Court nevertheless relied heavily on the fact that the state was a party to the suit in choosing to apply federal common law to the controversy.

⁴⁵ 406 U.S. at 93. Plaintiffs alleged that about 200 million gallons of sewage and other wastes were dumped daily in the Milwaukee areas. *Id.*

⁴⁶ *Id.* at 98, 108. The circumstances in which the Supreme Court may maintain original jurisdiction are set forth in 28 U.S.C. § 1251 (1970). That section provides:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

The Supreme Court in *City of Milwaukee* found that political subdivisions of a state are not "states" for the purposes of § 1251(a)(1), and that the state of Wisconsin was not a necessary party to the suit. 406 U.S. at 98. Hence the Court found that Illinois' suit against Wisconsin cities did not fall under the exclusive jurisdiction of § 1251(a). *Id.*

⁴⁷ 406 U.S. at 93.

⁴⁸ A suit between a state and a citizen of another state, in the instant case a political subdivision of that state, is not considered to be a suit between "citizens of different states" under the diversity statute. *Id.* at 97 n.1. The diversity section, 28 U.S.C. § 1332(a)(1) (1970), provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States. . . .

⁴⁹ Federal question jurisdiction is placed in the district courts under 28 U.S.C.A. § 1331(a) (Dec. 1976 Pamph. 4, Part 2) which provides:

the purposes of Section 1331(a).⁵⁰ Secondly, the Court found that the jurisdictional amount was met because of the interest in having clean interstate waters.⁵¹

The Court's decision that Illinois should be permitted to seek relief under federal common law was based on its view of the federal policy toward pollution of interstate waters as discerned from congressional legislation. The Court found that federal legislative enactments since the Rivers and Harbors Appropriation Act of 1899⁵² had become increasingly strong in their control over pollution.⁵³ The Court noted that the 1899 Act had been extended and strengthened by the enactment of both the National Environment Policy Act of 1969,⁵⁴ which established a federal policy to promote harmony between man and the environment,⁵⁵ and the Federal Water Pollution Control Act.⁵⁶ The Federal Water Pollution Control Act, as then amended,⁵⁷ declared as its purpose the improvement of the nation's water resources and the institution of a national policy of water pollution control,⁵⁸ and to this end provided that the pollution of interstate or navigable waters was subject to abatement.⁵⁹ Additionally the Court found "an increasing [congressional] concern with the quality of the

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

⁵⁰ 406 U.S. at 99. The Court relied upon *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 389, 393 (1959) (Brennan, J., dissenting and concurring); *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971); *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 492 (2d Cir. 1968). 406 U.S. at 99-100.

⁵¹ 406 U.S. at 98. "The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)." *Id.*

⁵² 33 U.S.C. § 401 *et seq.* (1970). The 1899 Act in part prohibited the discharge of refuse other than sewage into any navigable water or tributary thereof. *Id.* at § 407. Section 407 provides:

It shall not be lawful to throw . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water

⁵³ 406 U.S. at 101.

⁵⁴ Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. § 4321 *et seq.* (1970)).

⁵⁵ 42 U.S.C. §§ 4321, 4331 (1970).

⁵⁶ Ch. 758, 62 Stat. 1158 (1948) (codified with amendments at 33 U.S.C. § 1151 *et seq.* (1970), current version at 33 U.S.C. § 1251 *et seq.* (Supp. V 1975)).

⁵⁷ 33 U.S.C. § 1151 *et seq.* (1970).

⁵⁸ 33 U.S.C. § 1151(a) (1970) provided: "The purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution."

⁵⁹ 33 U.S.C. § 1160(a) (1970) provided:

(a) Pollution of waters subject to abatement.

The pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollu-

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aquatic environment"⁶⁰ as evidenced by the Fish and Wildlife Act of 1956,⁶¹ which declared a congressional policy to manage properly the nation's fish and wildlife resources,⁶² and by the Fish and Wildlife Coordination Act,⁶³ which declared its purpose to be the recognition of the importance of the nation's wildlife resources.⁶⁴ In the Court's view, these enactments expressed a strong congressional policy of maintaining control over the environment and of actively encouraging the abatement of pollution in the nation's waterways.

While the Court noted the express declaration in section 1(b) of the Federal Water Pollution Act that it shall be federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution,"⁶⁵ it nevertheless found that under the Act federal law ultimately prevails.⁶⁶ The Court thus found that the trend of federal legislation and the specific policy of the Federal Water Pollution Control Act indicated a federal policy toward water pollution control which supported the development of federal common law.

In addition to adhering to statutory federal policy, the allowance of a federal common law claim in *City of Milwaukee* was also in accord with earlier Supreme Court cases and with post-*Erie* federal common law cases. Earlier public nuisance cases and water apportionment cases brought under the Court's original jurisdiction indicate that historically the Court has applied federal common law in such suits brought by a state.⁶⁷ The Court relied particularly on *Georgia v. Tennessee Copper Co.*,⁶⁸ an early air pollution case in which the Supreme Court held that the state as a quasi-sovereign could demand relief from extra-territorial pollution in the federal courts.⁶⁹ Granting injunctive relief to Georgia, the Court found that the state could assert rights in its quasi-sovereign capacity against citizens in other states, where private citizens might lack such standing.⁷⁰ The *Tennessee Copper* case is an example, then, of the kind of assistance which the federal courts may

tion is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in this chapter.

⁶⁰ 406 U.S. at 102.

⁶¹ Ch. 1036, 70 Stat. 1119 (codified at 16 U.S.C. §§ 742a-j (1970)).

⁶² *Id.* at 742(a).

⁶³ 16 U.S.C. §§ 661-666c (1970).

⁶⁴ *Id.* at § 661.

⁶⁵ Ch. 758, 62 Stat. 1155 (1948) (codified with amendments at 33 U.S.C. § 1151(b) (1970)).

⁶⁶ 406 U.S. at 102. "But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters." *Id.*

⁶⁷ See cases cited in 406 U.S. at 104-07.

⁶⁸ 206 U.S. 230 (1907). In the *Tennessee Copper* case the state of Georgia sued to abate air pollution caused by a private company in Tennessee which was seriously damaging Georgia's forests, orchards, and crops. *Id.* at 236.

⁶⁹ *Id.* at 237-38.

⁷⁰ *Id.* at 238.

provide to the states to encourage state action to abate pollution. That the Supreme Court was willing to provide such assistance in the absence of manifestations of congressional policy suggests that the fashioning of a federal remedy would be even more appropriate when a clear federal policy has been expressed, as was true at the time *Illinois v. City of Milwaukee* was decided. The *Tennessee Copper* case thus served as a useful model for the modern creation of federal common law, since its result was in accordance with the policy expressed in the Federal Water Pollution Control Act.

In contrast to the *Tennessee Copper* case, however, the *City of Milwaukee* decision did not rely on the Court's original jurisdiction to permit Illinois' nuisance claim. Instead, it shifted the focus of common law nuisance cases by finding that the claim presented a federal question. In so doing, the Court looked to the recent opinion of the United States Court of Appeals for the Tenth Circuit in *Texas v. Pankey*.⁷¹ In *Pankey* the court of appeals found that the state of Texas was entitled to bring a federal common law nuisance claim against private citizens in New Mexico to abate pollution in a stream flowing through the two states.⁷² The court determined that a state has a "quasi-sovereign ecological right" under federal common law to be free from extraterritorial interference with its environment.⁷³ As to the exercise of this right, the court held that such a suit need not be brought under the Supreme Court's original jurisdiction and commended the state's institution of an action in district court as showing a concern not to overburden the Supreme Court.⁷⁴

In *City of Milwaukee* the Supreme Court thus derived a modern federal common law of nuisance from both pre-*Erie* federal common law cases and modern federal common law cases, and from the general federal policy toward water pollution control. The Court expressed this doctrine in very general terms: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . ."⁷⁵ This enunciation of a broad doctrine, however, must be considered in light of the fact that *Illinois v. City of Milwaukee* was a suit brought by a state to abate pollution of an interstate body of water.⁷⁶ Thus the case is susceptible to two interpretations. Narrowly construed, *City of Milwaukee* simply holds that a state has a cause of action under the federal common law of nuisance to sue another state instrumentality for pollution of an interstate, navigable body of water. Under such a view, despite the Court's policy discussion, the character of the parties and of the body of water being polluted are seen as determinative factors in the Court's decision to provide Illinois with a federal forum. Broadly construed, however, the holding in *Il-*

⁷¹ 441 F.2d 236 (10th Cir. 1971).

⁷² *Id.* at 237-40.

⁷³ *Id.* at 240.

⁷⁴ *Id.* at 239.

⁷⁵ 406 U.S. at 103.

⁷⁶ *Id.* at 93.

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Illinois v. City of Milwaukee suggests that the federal interest in maintaining the purity of the nation's waters gives rise to a federal common law cause of action to abate water pollution, regardless of the character of the injured party or whether the water polluted is an interstate body. Under such an interpretation the case may be viewed essentially as a broad policy decision.⁷⁷

II. PERMISSIBILITY OF SUITS BY PRIVATE PLAINTIFFS

A. Majority View in Jones Falls

In the majority's opinion, the rationale supporting the application of federal common law in *Pankey* and *City of Milwaukee* were absent where a private party, not a state, sought relief under federal common law. Since the *Pankey* and *City of Milwaukee* cases pitted the interests of one state against another, the majority viewed those cases as requiring the application of a body of law which would not treat unfairly the interests of either state.⁷⁸ Accordingly, the majority found that the application of federal common law in a case where one state "infringes upon the environmental and ecological rights of another

⁷⁷ Since *Illinois v. City of Milwaukee*, several federal district courts have expanded the scope of the federal common law nuisance action to include suits brought by both the federal government and local governments. See, e.g., *Board of Supervisors v. United States*, 408 F. Supp. 556, 562 (E.D. Va. 1976) (county board of supervisors permissible plaintiff in federal common law nuisance suit); *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973) (federal government permissible plaintiff in federal common law nuisance suit); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 149-50 (D. Vt. 1972), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974) (same). But see *United States v. Lindsay*, 357 F. Supp. 784, 794 (E.D.N.Y. 1973), in which the district court, while delaying a ruling on the merits of the adequacy of a federal common law nuisance claim by the federal government, suggested, but did not hold, that the nuisance remedy developed in *Illinois v. City of Milwaukee* was restricted to suits between states.

In the limited instances where the courts have articulated the reasons for this expansion, they have found that the governmental unit has a proprietary interest in the polluted waters similar to that of a state. *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 148-49 (D. Vt. 1972), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974). In the case of extension of the doctrine to suits by local governments, while no rationale has been expressed, it may be argued that a local governmental unit has a similar proprietary interest to that of the state and federal governments. See text at notes 88-97 *infra* for a discussion of this proprietary interest rationale.

Since *City of Milwaukee*, the few lower courts to consider the question have held that the federal common law nuisance doctrine applies only to cases involving interstate bodies of water. *Reserve Mining Co. v. EPA*, 514 F.2d 492, 520 (8th Cir. 1975), *modified on other grounds*, 529 F.2d 181 (8th Cir. 1976). See, e.g., *Board of Supervisors v. United States*, 408 F. Supp. 556, 562 (E.D. Va. 1976). See text at notes 129-31 *infra* for a discussion of the *Reserve Mining* case. The usefulness of these cases in resolving the unanswered question of *Illinois v. City of Milwaukee* is questionable, however, since they largely fail to advance a reasoned basis for their approach.

⁷⁸ 539 F.2d at 1008.

... is an acceptable accommodation of state and national interests."⁷⁹ Additionally, the majority found that despite the federal interest indicated in the Federal Water Pollution Control Act Amendments in interstate and navigable waters, the thrust of the Act is toward state action to abate pollution.⁸⁰ Where the plaintiffs were private citizens suing their own sovereign, the court was thus unable to find a need for federal intervention based upon either a desire to insure fairness to conflicting interests or upon a sufficient federal interest in water pollution control.

The majority's first conclusion that the development of federal common law in the water pollution control area was based upon a consideration of the state interests involved appears justified in light of the analysis used in recent federal common law nuisance cases. The Supreme Court's reliance in *Illinois v. City of Milwaukee* on *Georgia v. Tennessee Copper Co.*⁸¹ and *Texas v. Pankey*⁸² indicates the important weight the Court gave to the state character of the plaintiff in its decision to permit Illinois to bring a suit to abate pollution under federal common law. For example, in *City of Milwaukee*, the Supreme Court quoted a part of the *Tennessee Copper* decision which specifically distinguished such a nuisance suit by a state from an action by a private party.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted ... by the act of persons beyond its control If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties ⁸³

It is significant that the Court relied on such language in making its determination that Illinois could maintain a suit at common law, since the language of *Tennessee Copper* makes clear that the state character of the plaintiff was the determinative factor which enabled it to bring suit. In *Texas v. Pankey* the Court of Appeals for the Tenth Circuit specifically limited its creation of federal common law to providing a right to an aggrieved state to halt pollution by foreign citizens.⁸⁴ The *City of Milwaukee* Court's reliance on the case again indicates that despite its vague language the Court followed a rationale in permitting Illinois' suit which was based in large part on the right of the states to maintain their sovereignty as against foreign states and citizens.

⁷⁹ *Id.* at 1008-09.

⁸⁰ *Id.* at 1009.

⁸¹ 206 U.S. 230 (1907). See text at notes 68-70 *supra* for discussion of the case.

⁸² 441 F.2d 236 (10th Cir. 1971). See text at notes 71-74 *supra* for a discussion of the case.

⁸³ 406 U.S. at 104-05, quoting *Tennessee Copper Co.*, 206 U.S. at 238.

⁸⁴ 441 F.2d at 241. The state character of the plaintiff was central to the court's discussion, as shown below.

As the field of common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal stat-

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The *Jones Falls* majority's second ground of decision, its view that the Federal Water Pollution Control Act Amendments are supportive of state action, is also buttressed by the Supreme Court's decision in *Illinois v. City of Milwaukee*. The Court's upholding of Illinois' claim in that case may be seen not so much as an expansion of federal activity in the water pollution control area, but rather as an attempt to strengthen the state's enforcement activity. Indeed, the Court itself stated that permitting a federal common law nuisance suit was not inconsistent with the Federal Water Pollution Control Act, since the use of federal common law served the policy of the Act to encourage state pollution abatement practices.⁸⁵ By contrast, in the *Jones Falls* case, the application of federal common law to permit suit *against* the state would operate to discourage the state's participation in water pollution control.

Despite the strong support in the language of *Illinois v. City of Milwaukee* for the proposition that the state character of the plaintiff is a prerequisite to a federal common law nuisance action, the Court's decision also sets forth alternative bases for applying federal common law which do not rely on the character of the plaintiff. In a footnote to its opinion the Court asserted that the desire for uniform rules and the basic interests of federalism which underlie actions to abate pollution of an interstate body of water also required the application of federal law to the controversy.⁸⁶ Thus, it may reasonably be contended that *City of Milwaukee* leaves open whether the state character of the plaintiff is a prerequisite to the decision to fashion a federal remedy or whether it is only one of many factors which influenced the Court's decision.

While considerations of uniformity and federalism initially suggest alternatives to requiring a state plaintiff for the creation of federal common law, neither the concern for uniformity nor the federal interest in dispute resolution appears very significant in cases in which a state is not a party. In the instant case, the federal interest in providing a disinterested forum to disputing states is obviously inapplicable. More importantly, however, the application of federal common law to favor a private citizen over a state would upset the federal/state relationship contemplated by the Federal Water Pollution Control Act Amendments.⁸⁷ The state character of a plaintiff then

ute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law *Id.* at 240.

The *Pankey* court also based its decision to apply federal common law on a need for uniformity in the law, but again the court focused on the desirability of a uniform rule with regard to "the environmental rights of a State against improper impairment by sources outside its domain." *Id.* at 241.

⁸⁵ 406 U.S. at 104.

⁸⁶ *Id.* at 105 n.6.

⁸⁷ The federal policy to encourage state pollution abatement activity is set forth in § 1251(b) of Title 33, 33 U.S.C. § 1251(b) (Supp. V 1975). For a discussion of the

does seem to be a prerequisite to the creation of a federal common law remedy.

This conclusion is buttressed by a review of the cases following *Illinois v. City of Milwaukee*. These cases have expanded the applicability of the federal common law nuisance doctrine but do not support any such expansion in the *Jones Falls* case. For example, in both *United States ex rel. Scott v. United States Steel Corp.*⁸⁸ and *United States v. Ira S. Bushey & Sons, Inc.*,⁸⁹ federal district courts found that the United States has a cause of action under federal common law to sue private parties to abate a nuisance created by pollution of an interstate body of water.⁹⁰ In both of these decisions, the district courts relied on the existence of the federal proprietary interest in interstate and navigable waters in permitting the United States to maintain its suit.⁹¹ The source of the federal proprietary interest was found in the policy statements expressed in the Federal Water Pollution Control Act⁹² and in the 1972 Amendments⁹³ thereto.

In a more recent case, *Board of Supervisors v. United States*,⁹⁴ a district court did not question the right of a county board of supervisors

concerns of federalism which demand application of federal common law in suits by states, see Woods & Reed, *supra* note 44, at 703-06, 711-12.

⁸⁸ 356 F. Supp. 556 (N.D. Ill. 1973).

⁸⁹ 346 F. Supp. 145 (D. Vt. 1972), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

⁹⁰ *Scott*, 356 F. Supp. at 558; see *Bushey*, 346 F. Supp. at 149-50.

⁹¹ In *United States Steel* the United States District Court for the Northern District of Illinois upheld a complaint filed by the state of Illinois and the United States against United States Steel Corporation to abate under the federal common law of nuisance the discharge of waste water from a plant located within the state into Lake Michigan. 356 F. Supp. at 558. The court upheld the common law cause of action in reliance upon *Illinois v. City of Milwaukee*. *Id.* The district court found that the United States was a permissible plaintiff in a federal common law nuisance suit, since like the state government, it had a proprietary interest in the water being polluted. *Id.* The court further found that the federal government's interest in the development of a uniform standard permitted the government to bring suit under common law nuisance. *Id.* For a discussion arguing that the federal government should not have been permitted to bring suit, see Note, 15 B.C. IND. & COM. L. REV. 795 (1973-74).

In *United States v. Ira S. Bushey & Sons, Inc.*, the United States District Court for the District of Vermont upheld a complaint brought by the United States against corporations engaged in transporting oil across Lake Champlain. 346 F. Supp. at 146-48. The complaint sought a permanent injunction requiring defendants to follow certain safety regulations in order to diminish the possibility of further oil spills into the Lake. *Id.* at 146-47. The court held that the complaint stated a claim under the federal common law of nuisance and found that the federal government's interest in water quality permitted the United States to sue at federal common law to abate water pollution. *Id.* at 148-49. "The national interest in the quality of air and water in their ambient or interstate aspects has been manifested in executive statements, congressional legislation, and administrative agency regulation. It is settled that the Attorney General by virtue of his office may sue to protect that federal interest." *Id.* at 149 (footnotes omitted).

⁹² Ch. 758, 62 Stat. 1155 (1948), as most recently amended by 79 Stat. 903 (1965) and codified at 33 U.S.C. § 1151(a) (1970).

⁹³ 33 U.S.C. § 1251 (Supp. V 1975).

⁹⁴ 408 F. Supp. 556 (E.D. Va. 1976).

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to sue to abate a public nuisance under federal common law.⁹⁵ While the court fails to explain its apparent lack of concern about mechanically extending the *City of Milwaukee* doctrine to local government units,⁹⁶ the extension may be rationalized under the proprietary interest theory used to apply the common law nuisance doctrine in suits by the federal government. As a local governmental unit, a county board of supervisors has a proprietary interest in the air and waters of the county. While such an interest is more circumscribed than the federal government's proprietary interest, the interests are nevertheless similar in nature and would equally serve as a basis from which to construct a federal common law right of action.⁹⁷

The proprietary interest approach taken by these recent cases provides no basis for upholding the private party federal common law claim in the *Jones Falls* case. As private parties, the plaintiffs in *Jones Falls* clearly lack the governmental proprietary interest upon which those cases rely. A private citizen's interest in promoting a uniform federal rule, while it arguably does exist, may not be so readily asserted by him as it may be by the federal government. While it is a logical result to find that the federal government and perhaps local governments have the same rights as do state quasi-sovereigns, it becomes far more difficult to infer from *City of Milwaukee* that the citizens of a state possess a right which has been developed to protect the state in its capacity as a quasi-sovereign. Thus in *Jones Falls* the policies which led to the use of federal common law in *United States Steel* and *Bushey* are inapposite: the private party plaintiffs in *Jones Falls* cannot allege a

⁹⁵ *Id.* at 562. In that case the District Court for the Eastern District of Virginia held that it had jurisdiction to hear a claim in common law nuisance brought by a county board of supervisors against the District of Columbia for operating a prison, located upon land legally held by the United States, so as to cause a nuisance by polluting air and water in the county. *Id.* at 559, 561-62. The court did not even question the county board's right to bring suit, but merely interpreted *City of Milwaukee* to mean "that the law to be applied in common law actions to abate pollution is federal law." *Id.* at 562. The district court did raise the issues of preemption of common law and the necessity of the waters being interstate before refusing a motion to dismiss the common law count of the complaint for failure to state a cause of action. *Id.*

⁹⁶ *Id.*

⁹⁷ While the language of the decision in the *City of Milwaukee* case does not phrase its decision in terms of a "proprietary interest," its reliance on case law which upheld the quasi-sovereign right of the states to demand relief from pollution suggests a rationale which considers the proprietary nature of the plaintiff's interest. See discussion of the *City of Milwaukee* Court's reliance on *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), in text at notes 81-84 *supra*.

Because the *Board of Supervisors* controversy essentially involves two states, the decision to permit suit under federal common law in that case can also be seen as reflecting the federal court's desire to provide the parties with a fair forum. Such a problem is not presented in *Jones Falls*, in which the private party plaintiffs may readily seek relief in state court under state nuisance doctrine. See 539 F.2d at 1009. It should be noted, however, that plaintiffs may be unsuccessful in state court, since the charge might be defended successfully on the basis of the permit to dump waste which the City of Baltimore obtained in accordance with the Federal Water Pollution Control Act Amendments.

proprietary interest in the polluted waters, and they lack the federal government's interest in the promotion of a uniform national standard.

The majority's interpretation of the federal common law nuisance doctrine also avoids the complicated interplay between federal common and statutory law and the notice problem which would result were the plaintiff in *Jones Falls* permitted to bring suit in federal court. With the enactment of the Federal Water Pollution Control Act, the states were put on notice as to their roles and responsibilities in water pollution enforcement. In the instant case the state of Maryland was given to understand that it could continue to dump municipal sewage as long as it acquired a permit under the Act.⁹⁸ Were the federal district court to declare impermissible that which a statute constitutionally permits, a significant notice problem would result, since the meaning of the statute would become extremely unclear. In the *Jones Falls* case, the notice problem is exacerbated by the fact that the state is a party. The state, having been required to follow the federal statute, should not then be placed in the position of having to defend in federal court its activities carried out pursuant to the federal statute against its own citizens. Chief Judge Haynsworth accordingly raised the problem in his opinion:

Indeed, 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. The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the Environmental Protection Agency. The Congress and the Executive Department, acting through the Environmental Protection Agency, have declared their conduct lawful until the time for the application of more restrictive standards. While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides.⁹⁹

It would thus appear that in *Jones Falls* permitting the public nuisance action would be tantamount to an overruling of Congress.

B. *Dissenting View*

The dissent in *Jones Falls* disagreed with the majority's interpretation of *Illinois v. City of Milwaukee* and argued that the federal common law nuisance doctrine is not limited to actions brought by governmental entities.¹⁰⁰ The dissent read *City of Milwaukee* as not ex-

⁹⁸ See 539 F.2d at 1007.

⁹⁹ *Id.* at 1009 (footnote omitted).

¹⁰⁰ *Id.* at 1012-14 (dissenting opinion).

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pressly limiting federal common law nuisance suits to actions brought by states.¹⁰¹ Under the dissent's reading, the *City of Milwaukee* nuisance doctrine was generally fashioned from policies derived from federal law and compatible state law concerning water pollution control.¹⁰² The dissent understood the purpose of its creation to be to fill in statutory interstices in the Federal Water Pollution Control Act Amendments and to provide uniform rules for water pollution abatement.¹⁰³ The dissent further noted that the citizen suit provisions of the Federal Water Pollution Control Act Amendments¹⁰⁴ exhibit a federal policy to permit suits by private parties to abate water pollution under federal common law.¹⁰⁵ The dissent derived this policy from the grant of a right to sue, coupled with the express preservation of all other statutory and common law rights outside the Act which private individuals might have.¹⁰⁶ Finally, having found "neither a substantive nor a jurisdictional barrier to a citizen's reliance on federal common law,"¹⁰⁷ the dissent suggested that the only possible barrier to plaintiffs' maintenance of the suit would be a lack of standing.¹⁰⁸

An analysis of the dissent's approach suggests that the dissent focuses on the basic federal common law principles set forth in *Illinois v. City of Milwaukee*, without considering whether the creation of federal common law in *Jones Falls* would serve those same purposes. Thus the dissent's statement that *City of Milwaukee* is not expressly limited to states is, of course, correct; but the Supreme Court's use of authority in that case, together with its facts, strongly suggests that the position of the state as an aggrieved sovereign was a determinative factor in the Court's decision to formulate a remedy under federal common law.¹⁰⁹

Similarly, while the dissent is correct in its statement that in *City of Milwaukee* the Court expressly found a policy that federal law should be controlling in the area of water pollution control, the Court also found that federal law expressed a policy to encourage state pollution control.¹¹⁰ Hence in *City of Milwaukee* the creation of federal common law was in accord with these two federal policies. Neither of these policies would be served, however, by the application of federal

¹⁰¹ *Id.* at 1013 (dissenting opinion).

¹⁰² *Id.* (dissenting opinion).

¹⁰³ *Id.* (dissenting opinion).

¹⁰⁴ 33 U.S.C. § 1365 (Supp. V 1975). See note 7 *supra* for text of that section.

¹⁰⁵ 539 F.2d at 1012-13 (dissenting opinion).

¹⁰⁶ *Id.* 33 U.S.C. § 1365(a) (Supp. V 1975) grants citizens the right to sue under the Act. See note 7 *supra* for text of that section. The savings clause, 33 U.S.C. § 1365(e) (Supp. V 1975), provides: "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)."

¹⁰⁷ 539 F.2d at 1014 (dissenting opinion).

¹⁰⁸ *Id.* at 1014-16 (dissenting opinion).

¹⁰⁹ See text at notes 81-84 *supra*.

¹¹⁰ 406 U.S. at 102, 104.

common law in the *Jones Falls* case. Creating federal common law would not serve to set federal law above state law, but would instead replace federal statutory law with federal common law. Furthermore, the creation of federal common law in *Jones Falls* clearly could not be based on the second federal goal of encouraging state pollution control activity.

Accordingly, the extension of federal common law nuisance to suits by private parties in the *Jones Falls* case may not be based on a consideration of federal environmental policy. Nor, despite the dissent's argument to the contrary, may a formulation of federal common law be grounded on a need for interstitial lawmaking or on a jurisdictional mandate derived from the Federal Water Pollution Control Act Amendments. In *Illinois v. City of Milwaukee* the creation of federal common law fulfilled the classic function of filling in statutory interstices by creating a right of action for Illinois where the statutory mechanism for resolving a water pollution dispute was inadequate.¹¹¹ In *Jones Falls*, however, the dispute does not involve an interstitial area in the statute which requires judicial lawmaking. The Federal Water Pollution Control Act Amendments provide for the permit program under which the defendants' polluting activity is occurring, and further provide for immunity from suit for those operating under the permit program.¹¹² Because the statute has set forth this permit program and immunity, the application of federal common law in *Jones Falls*, by opposing the statute, would not lead to greater uniformity in the law, but would instead make the federal law on water pollution control less uniform.

A consideration of the Federal Water Pollution Control Act Amendments similarly fails to reveal a policy which would permit private parties to sue under federal common law to abate water pollution. The jurisdictional grant in section 1365(a) of the Act provides that jurisdiction shall be in the federal courts, regardless of diversity of citizenship or the amount in controversy.¹¹³ This jurisdiction, however, is expressly limited to suits for violations of the statute or administrative orders and for the Administrator's failure to perform non-discretionary acts or duties.¹¹⁴ The jurisdictional grant thus serves two purposes: 1) it makes clear that private citizens have a right of action for statutory violations, thereby eliminating the necessity of implying such a right; and 2) it eliminates the jurisdictional amount requirement which private individuals would have to meet in certain instances were they to sue under the district court's federal question jurisdiction.¹¹⁵ The jurisdictional grant, however, does not create a general right to sue in federal court for the pollution of navigable

¹¹¹ *Id.* at 102-03.

¹¹² 33 U.S.C. § 1342 (Supp. V 1975). See note 11 *supra* for text of that section.

¹¹³ 33 U.S.C. § 1365(a) (Supp. V 1975). See note 7 *supra* for text of that section.

¹¹⁴ *Id.*

¹¹⁵ See 28 U.S.C.A. § 1331(a) (Dec. 1976 Pamph. 4, Part 2). See note 49 *supra* for text of that section.

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waters. Hence nothing in the limited jurisdictional grant of section 1365 makes possible an inference of an express policy to create federal common law to govern questions of water pollution. Nor does the existence of a savings clause in the statutory grant of jurisdiction suffice as a basis for federal judicial lawmaking. The dissent in *Jones Falls* argues that the savings clause of the Act, section 1365(e),¹¹⁶ refers to actions at federal common law as well as at state law.¹¹⁷ This fact is insufficient in and of itself, however, as a ground for suit under federal common law. Section 1365(e) does not create a right of action, but rather simply reserves any previously existing right of action. It still remains for the court to determine whether in fact the plaintiffs have a common law right which they may pursue.

The dissent's arguments in favor of creating federal common law in the *Jones Falls* case thus fail to consider the policy distinctions which require differing results in suits brought by governmental entities and private parties. An analysis of *Illinois v. City of Milwaukee* and more recent cases leads to the conclusion that federal judicial lawmaking in the nuisance area has taken place in response to the legitimate interests of governmental entities in the waters within their sovereign control. Furthermore, the policy expressed in the Federal Water Pollution Control Act Amendments cannot encourage federal common lawmaking which denigrates the role of the state in water pollution control. The majority's restriction of the federal common law nuisance doctrine to governmental entities in *Jones Falls* accordingly rests on an understanding of the policy and function of the federal common law of nuisance.

III. PERMISSIBILITY OF FEDERAL COMMON LAW NUISANCE SUIT TO ABATE POLLUTION OF INTRASTATE WATERS

The question whether the federal common law nuisance doctrine is limited to interstate bodies of water has been raised in few federal courts since *Illinois v. City of Milwaukee*.¹¹⁸ As previously noted, these lower federal courts for the most part have limited the doctrine to interstate waters. Following the trend set by the courts examining the question to date, a majority of the Fourth Circuit in *Jones Falls* found that the federal common law of nuisance could not be applied to abate pollution in an intrastate body of water.¹¹⁹ Relying on its interpretation of *City of Milwaukee* and on the recent decision of the Eighth Circuit in *Reserve Mining Co. v. EPA*,¹²⁰ the majority held that

¹¹⁶ 33 U.S.C. § 1365(e) (Supp. V 1975). See note 106 *supra* for text of that clause.

¹¹⁷ 539 F.2d at 1013 (dissenting opinion).

¹¹⁸ *Reserve Mining Co. v. EPA*, 514 F.2d 492, 520 (8th Cir. 1975), *modified on other grounds*, 529 F.2d 181 (8th Cir. 1976). See, e.g., *Board of Supervisors v. United States*, 408 F. Supp. 556, 562 (E.D. Va. 1976).

¹¹⁹ 539 F.2d at 1008-10.

¹²⁰ 514 F.2d 492 (8th Cir. 1975), *modified on other grounds*, 529 F.2d 181 (8th Cir. 1976).

the intrastate nature of the *Jones Falls* case made it inappropriate for the application of federal common law, since the controversy was entirely local and there was no out-of-state effect alleged.¹²¹ The court argued that because of the nature of the dispute, state law was adequate to resolve the controversy.¹²² Finally the majority found that the federal interest in the waters of Jones Falls extended only as far as the Federal Water Pollution Control Act Amendments, upon which plaintiffs had failed to make a claim.¹²³ The dissent, on the other hand, contended that the federal common law of nuisance could be applied in controversies involving intrastate waters.¹²⁴ The dissent thus interpreted *Illinois v. City of Milwaukee* broadly to include navigable as well as interstate waters.¹²⁵ The dissent further argued that the expansion in the 1972 Amendments to the Federal Water Pollution Control Act to cover tributaries to navigable waters should similarly expand the scope of the federal common law.¹²⁶ Finally, the dissenting judges found that the broad definition of navigable waters used in the Act, the regulations thereto, and recent case law would include Jones Falls Stream as a navigable water.¹²⁷

An analysis of precedent on the question of permissibility of nuisance suits involving intrastate navigable waters does not satisfactorily resolve the dispute between the majority and the dissenting judges in *Jones Falls*. The language of *Illinois v. City of Milwaukee* leaves the question of navigable versus interstate waters unresolved. Throughout its opinion the Supreme Court uses the two terms interchangeably.¹²⁸ Moreover, a review of the few recent cases interpreting *Illinois v. City of Milwaukee* provides little guidance as to the proper interpretation of the case. In the only other circuit to decide specifically the question of interstate versus navigable waters, *Reserve Mining Co. v. EPA*,¹²⁹ the Court of Appeals for the Eighth Circuit interpreted *City of Milwaukee* as limited to interstate waters.¹³⁰ However, the court disposed of the federal common law claim summarily, neither explaining its in-

¹²¹ 539 F.2d at 1009.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1011-14 (dissenting opinion).

¹²⁵ *Id.* at 1010, 1013 (dissenting opinion).

¹²⁶ *Id.* at 1013 (dissenting opinion).

¹²⁷ *Id.* at 1010, 1011 (dissenting opinion).

¹²⁸ See, e.g., 406 U.S. at 99.

¹²⁹ 514 F.2d 492 (8th Cir. 1975), modified on other grounds, 529 F.2d 181 (8th Cir. 1976).

¹³⁰ *Id.* at 520. The court refused to find the federal common law of nuisance applicable in a suit by the United States, the states of Minnesota, Michigan, and Wisconsin, and several environmental groups against the Reserve Mining Company to halt the discharge of taconite tailings into Lake Superior. *Id.* at 499-500, 520. The Court asserted, "As formulated in *Illinois v. City of Milwaukee* . . . and *Texas v. Pankey*, . . . federal nuisance law contemplates, at a minimum, interstate pollution of air or water." *Id.* at 520 (citations omitted). Accord, *Board of Supervisors v. United States*, 408 F. Supp. 556, 559, 562 (E.D. Va. 1976) (complaint alleging federal common law nuisance ordered amended to allege the interstate character of the pollution).

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interpretation of *City of Milwaukee*, nor considering what policy reasons should restrict the federal common law nuisance remedy to the abatement of pollution in interstate waters.¹³¹ Although no court has specifically held that *City of Milwaukee* should be interpreted to include navigable waters, the Court of Appeals for the Seventh Circuit, while not deciding the question, has observed that the language in the *City of Milwaukee* decision may extend to all navigable waters.¹³² The limited analysis presented by these cases accordingly can help little in determining whether a broad or narrow interpretation of *City of Milwaukee* should govern the creation of federal common law in nuisance suits to halt pollution of intrastate waters. Resolution of the question therefore requires a consideration of the Federal Water Pollution Control Act Amendments and the interpretation which the courts have given to their navigability requirement.

In light of the broad scope of the Federal Water Pollution Control Amendments, the broad statutory definitions of navigable waters, and the liberal construction of navigable waters by the federal courts in recent cases, the view espoused by the dissent in *Jones Falls*, and apparently shared by the Seventh Circuit, that the federal common law nuisance doctrine may apply to intrastate navigable waters seems to be more in accord with federal policy. The history of the federal legislation on water pollution control indicates the expanded role which the federal government has taken over the years with respect to pollution control in navigable waters. Since the Federal Water Pollution Control Act was first enacted, its jurisdiction has been expanded from interstate to navigable waters. The Rivers and Harbors Appropriation Act of 1899,¹³³ the first federal legislation in the field, was itself a strong congressional declaration of interest in the preservation of the nation's navigable waters. Section 13 of the Act, commonly known as the Refuse Act, prohibited the discharge of refuse, except for sewage, into any navigable water or into any tributary thereof from which the refuse might flow into the navigable waters.¹³⁴ The Rivers and Harbors Appropriation Act changed the previously existing rule of *Wil-*

¹³¹ 514 F.2d at 524. It should be noted, however, that the court's rejection of the plaintiffs' federal common law claim did not affect the outcome of the case, since the court found that the discharge violated Minnesota law and could therefore be enjoined as a public nuisance. *Id.*

¹³² *Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1040 (7th Cir. 1975). The court there held that the federal district court had jurisdiction to hear a claim seeking abatement under federal common law of the pollution of the Grand Calumet River, a navigable waterway and a tributary of Lake Michigan, an interstate body of water. The court specifically noted the references in *City of Milwaukee* to interstate or navigable waters and observed: "Those references may well imply that the federal common law of public nuisance extends to all of our navigable waters, and perhaps to all tributaries of interstate waters." *Id.* at 1040.

¹³³ Ch. 425, 30 Stat. 1151 (1899) (current version codified at 33 U.S.C. § 401 (1970)).

¹³⁴ Rivers and Harbors Appropriation Act of 1899, ch. 425, § 13, 30 Stat. 1152 (1899) (current version codified at 33 U.S.C. § 407 (1970)).

lamette Iron Bridge Co. v. Hatch,¹³⁵ in which the Supreme Court had held that there was no federal common law which prohibited nuisances or interferences in navigable waters entirely within a state.¹³⁶ The Court expressly declared that to bring the question within federal jurisdiction would require a direct act of Congress.¹³⁷ The Rivers and Harbors Appropriation Act, first enacted three years following *Wil-lamette*, may thus be seen as the first indicator of congressional concern over navigable waters.

The history of the Federal Water Pollution Control Act also demonstrates a continual expansion of federal jurisdiction over the nation's waters. In 1948 Congress enacted the Water Pollution Control Act.¹³⁸ The 1948 Act spoke entirely in terms of interstate waters. Section 2(a) of the Act provided, "The Surgeon General shall . . . prepare or adopt comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries thereof. . . ."¹³⁹ In 1961 the Act was then amended to extend jurisdiction over navigable as well as interstate waters. Section 8(a) of the Act, as amended, provided, "The pollution of interstate or navigable waters in or adjacent to any State or States . . . which endangers the health or welfare of any persons, shall be subject to abatement"¹⁴⁰

The changing declaration of policy in the Act similarly shows the changed congressional intent to protect navigable, as well as interstate waters, from pollution. In the original 1948 Act, the declared policy was to "recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution."¹⁴¹ In 1965 the Act was amended to state a policy in which the federal government took a more active role. "The purpose of this Act is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution."¹⁴²

The most recent amendment to the Act dramatically shows the change in the scope of federal involvement in the nation's waters since the passage of the act in 1948. The 1972 Amendments to the Act expressly declare its goals in terms of navigable waters.

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act-

¹³⁵ 125 U.S. 1 (1888).

¹³⁶ *Id.* at 8.

¹³⁷ *Id.*

¹³⁸ Ch. 758, 62 Stat. 1155 (1948).

¹³⁹ Water Pollution Control Act, ch. 758, § 2(a), 62 Stat. 1155 (1948).

¹⁴⁰ Federal Water Pollution Control Act, Pub. L. 87-88, § 7, 75 Stat. 204, 207-08 (1961).

¹⁴¹ Water Pollution Control Act, ch. 758, § 1, 62 Stat. 1155 (1948).

¹⁴² Water Quality Act of 1965, Pub. L. 89-234, § 1, 79 Stat. 903 (1965).

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(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 ¹⁴³

Accordingly, a review of the federal legislation enacted during the past three decades makes evident an increased federal commitment to participating in pollution control of navigable as well as of interstate waters.

This conclusion is buttressed by an analysis of the actual language of the most recent amendments. The use of the phrase navigable waters is in no way restricted in the Federal Water Pollution Control Act Amendments of 1972. This is in decided contrast to earlier versions of the Act. Thus, the use of the phrase "interstate or navigable waters" by the Supreme Court in its pronouncement of the federal common law nuisance doctrine in *Illinois v. City of Milwaukee* may be viewed not as an ambiguous, unclear statement by the Court as to the scope of the doctrine, but rather as a phrase directly taken from the language of the Act which would most directly express the policy of the Act as it was at that time. However, as the policy of the Federal Water Pollution Control Act has changed to include the protection of navigable waters, so should the federal common law of nuisance change, especially since it is created in light of the congressionally expressed policy in the area.¹⁴⁴

Both the Federal Water Pollution Control Act Amendments and the regulations promulgated thereunder by the Environmental Protection Agency have broadly defined "navigable waters." Section 1362(7) of the Federal Water Pollution Control Act Amendments defines navigable waters as " . . . the waters of the United States, including the territorial seas."¹⁴⁵ An examination of the legislative history further reveals that Congress intended a broad construction to be given to "navigable waters."¹⁴⁶ The federal regulations defining "navigable waters" promulgated by the Environmental Protection Agency are additional evidence of the breadth with which that term has been defined.¹⁴⁷ The regulations specifically include tributaries of navigable

¹⁴³ Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, § 2, 86 Stat. 816 (1972).

¹⁴⁴ 539 F.2d at 1013 (dissenting opinion).

¹⁴⁵ 33 U.S.C. § 1362(7) (Supp. V 1975).

¹⁴⁶ S. CONF. REP. NO. 92-1236, 92d Cong., 2d Sess. 144, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3776, 3821-22.

¹⁴⁷ 40 C.F.R. § 125.1(p) (1976) provides:

- (p) The term "navigable waters" includes:
 - (1) All navigable waters of the United States;
 - (2) Tributaries of navigable waters of the United States;
 - (3) Interstate waters;
 - (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
 - (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
 - (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

waters as navigable waters.¹⁴⁸

Recent case law further indicates that the "navigable waters" test has been so broadened as to place little, if any, limitation on federal control over water pollution.¹⁴⁹ Since the scope of the federal statute has been held to include navigable waters, federal common law based on a federal policy derived from the statute should be subject to the same broad parameters.

In light of this recent expansion of federal interest in navigable waters, the mere fact that a common law nuisance suit alleges pollution of an intrastate stream should not deprive the federal courts of jurisdiction over the controversy. This is so because the federal interest in the purity of the nation's waters extends to all navigable waters. Since the federal common law is derived from the federal policy in the pollution control area, it is appropriate to construe expansively the scope of the nuisance doctrine in light of legislative policy and judicial interpretation of the statutes from which that policy is derived.

CONCLUSION

The majority opinion in *Jones Falls*, by restricting the federal common law nuisance doctrine to suits involving governmental entities, upholds the position of the state's role in environmental control as against the federal government. Such a result here affirms the policy of the Federal Water Pollution Control Act Amendments to support state participation in the environmental area. The majority view, however, that the scope of a federal common law nuisance suit is limited to interstate waters, while not affecting the outcome of the *Jones Falls* case, appears to be an improper restriction in light of the federal government's interest in navigable waters.

The decision in *Jones Falls* is a fair one in that it does not force a state into the untenable position of following the Federal Water Pollution Control Act Amendments with the understanding that it has fulfilled its responsibility under the statute, only to discover itself open to suit by private parties in the federal courts. The decision, however, does strike a blow against environmental enforcement. The plaintiffs in this case have only the alternative to sue for relief in state court. Such a suit will be difficult to maintain in light of the available state defense that it was following federal law. Indeed, it would be difficult for a state court to declare an activity expressly permitted by federal law to constitute a public nuisance under state law.

It is submitted, however, that environmental enforcement should not be achieved by a judicial process that leaves the states uncertain as to their responsibilities. Such a result cannot lead to consistency or uni-

¹⁴⁸ 40 C.F.R. § 125.1(p)(2) (1976).

¹⁴⁹ E.g., *California ex rel. State Water Resources Control Bd. v. EPA*, 511 F.2d 963, 964 n.1 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976); *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1323-25 (6th Cir. 1974); *United States v. Holland*, 373 F. Supp. 665, 671-73 (M.D. Fla. 1974).

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formity in the federal law. More stringent environmental standards should be mandated, as in the past, by Congress, thereby providing clear notice to the states of their roles and responsibilities in cleaning up the environment.

CAROL GLAUBMAN KROCH

Estate Tax — Charitable Deduction: Cemetery not a Charitable Organization — *Child v. United States*¹—Elizabeth M. Haas died in January, 1969 leaving a sizeable estate which was disposed of by will. Among the will's provisions were bequests to two non-profit cemetery associations — the Watertown Cemetery Association and the Grove Cemetery Association² — which offered burial services to any person able to pay the standard fees. The executor of the estate³ claimed that both bequests were deductible under section 2055(a)(2) of the Internal Revenue Code (Code)⁴ for purposes of assessing the federal estate tax.⁵ This section permits deduction of bequests to organizations which "are organized and operated exclusively for . . . charitable purposes."⁶ The Internal Revenue Service, however, did not allow either bequest as a deduction. The executor paid the assessed tax under pro-

¹ 540 F.2d 579 (2d Cir. 1976), *cert. denied* 97 S. Ct. 1104 (1977).

² One bequest of \$25,000 was made to the Grove Cemetery Association, and another bequest, of half of the residual estate was made to the Watertown Cemetery Association. The latter bequest was valued at approximately 2.5 million dollars. Both cemetery associations are non-profit organizations, governed by the N.Y. NOT-FOR-PROFIT CORP. LAW, § 1401 (McKinney 1970), *as amended* (McKinney Supp. 1976-77). Since the Grove Cemetery Association did not join in the appeal, the Second Circuit limited its discussion to the issues raised by the Watertown Cemetery Association. 540 F.2d at 582-84. This note refers primarily to the Watertown Cemetery Association, but the principles discussed are applicable to both Associations.

³ Ruth Child was co-executor of the Haas estate and was co-plaintiff, along with the National Bank of Northern New York. Mrs. Child died during the pendency of the suit, leaving the bank as sole executor. The Watertown Cemetery Association also joined as co-plaintiff in the suit. 540 F.2d at 580-81 & n.1. An unsuccessful petition for certiorari was filed with the Supreme Court, under the name National Bank of Northern New York v. United States, 97 S. Ct. 1104 (1977).

⁴ I.R.C. § 2055(a)(2) provides, in its relevant parts, for deductions from the value of the gross estate for bequests:

to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office . . .

⁵ 540 F.2d at 581.

⁶ I.R.C. § 2055(a)(2). The executor also claimed that the cemetery associations qualified as religious organizations. 540 F.2d at 581. The claim was based on the fact that religious services were conducted in the burial process, and that burial itself is a religious activity. The district court dismissed this claim, and the court of appeals affirmed. *Id.* at 584. A claim that conducting religious services in a cemetery makes the cemetery corporation one organized for religious purposes has no support in authority,