Pace Environmental Law Review

Volume 1
Issue 1 *1983*

Article 7

January 1983

Milwaukee v. Illinois: An Interstate Water Pollution Dispute

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I. Introduction

The growing public concern about water pollution has prompted Congress to enact laws to curb destruction of our nation's waters.[1] After reaffirming[2] the long established right of states[3] to bring federal common law[4] of nuisance actions[5] for interstate water pollution disputes, the United States Supreme Court announced in *Milwaukee v. Illinois*[6] that Congress implicitly extinguished this remedy when it enacted the Federal Water Pollution Control Act Amendments of 1972[7] (the 1972 Amendments). The issue presented by this sudden reversal is whether the Court erred in proscribing the use of federal common law to resolve interstate water pollution disputes.

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1. Concern over water pollution prompted Congress to enact the Federal Water Pollution Control Act of 1948. This Act has been amended many times. 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

2. Illinois v. Milwaukee, 406 U.S. 91 (1972).

3. See generally Missouri v. Illinois, 200 U.S. 496, 520, 526 (1906). Although Missouri could not prove that a health hazard was created by Illinois's sewage discharge into navigable waters, the Court held that relief, based on public nuisance, could be granted when activities of one state caused injury in another state.

4. Federal common law is "a body of a decisional law developed by the federal courts, untrammeled by state court decisions." Black's Law Dictionary 550 (5th ed. 1979).

5. See W. Prosser, The Law of Torts, 583-91 (4th ed. 1971); W. Rogers, Environmental Law, 102-49 (1977). Common law nuisances are classed as private or public. A private nuisance is a substantial and unreasonable interference with the use and enjoyment of land. Liability is premised on substantial harm and either money damages or equitable relief can be sought. A public nuisance is an unreasonable interference with a right common to the general public. Substantial harm must be proved. To determine liability, the court "balances the equities" by weighing the extent and character of the injury, the utility of the offending activity, the state of the art in controlling the hurt, and the impracticality in avoiding the invasion. The remedy, usually pursued by officers of the state, is equitable.

6. Milwaukee v. Illinois, 451 U.S. 304 (1981).

7. Id. at 318-19. See supra note 1.

II. *Milwaukee v. Illinois:* The Facts

In 1972, Illinois filed a complaint[8] under the original jurisdiction of the Supreme Court.[9] Four Wisconsin cities and two sewage commissions were named as defendants. The complaint alleged that pathogen-containing[10] sewage was being dumped by the Milwaukee sewage system into the interstate waters of Lake Michigan, where it was contaminating Illinois drinking water and creating a health hazard to swimmers.[11] Defendants allegedly were polluting the lake by allowing overflows of raw sewage from their sewer systems and discharges of inadequately treated sewage from their treatment plants to enter the lake.[12]

The Court declined to exercise jurisdiction because the defendant political subdivisions were not "states" within the meaning of 28 U.S.C. § 1251 (a)(1),[13] and also because Wisconsin was not a "necessary" party to the action and, therefore,[14] the controversy did not come within the Court's exclusive jurisdiction.[15] The Court held that the term "laws," under 28 U.S.C. § 1331,[16] which creates the original jurisdiction of the federal district courts, embraces claims founded on federal

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8. Illinois v. Milwaukee, 406 U.S. 91.

9. Original jurisdiction is jurisdiction in the first instance as distinguished from appellate jurisdiction. Black's Law Dictionary 991 (5th ed. 1979); 28 U.S.C. § 1251 (1976) provides that:

> (a) The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States; . . . (b) The Supreme Court shall have original but not exclusive jurisdiction of: . . . (3) all actions or proceedings by a State against the citizens of another State . . . .

10. Pathogens are any agents that cause disease, especially a microorganism such as bacterium or fungus. The American Heritage Dictionary of the English Language 960 (New College ed. 1979).

11. Illinois v. Milwaukee, 599 F.2d 151, 169 (7th Cir. 1979); Milwaukee v. Illinois, 451 U.S. at 309.

12. Illinois v. Milwaukee, 406 U.S. at 93.

13. Id. at 98; see supra note 9, 28 U.S.C. § 1251 (a)(1) (1976).

14. Illinois v. Milwaukee, 406 U.S. at 97.

15. See supra note 9.

16. Illinois v. Milwaukee, 406 U.S. at 100; 28 U.S.C. § 1331(a) (1976) provides that:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States . . . ."

common law as well as those of statutory origin. Since federal common law applies to air and water in their ambient and interstate aspects,[17] the issue could be litigated in federal district court.[18] The availability of another forum meant that the Court did not have to exercise its original jurisdiction. The Court reviewed the Federal Water Pollution Control Act (the Act) and stated that, although the remedy sought by Illinois had not been authorized by Congress, "[it] is not uncommon for federal courts to fashion federal law where federal rights are concerned."[19] The Court concluded that "[it] may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."[20]

Five months after Illinois filed suit in federal district court, and six months after the Supreme Court held that Illinois could bring a federal common law of nuisance action in the district courts, Congress enacted the 1972 Amendments.[21] While the district court case was pending, the Wisconsin Department of Natural Resources (DNR), the state permit-issuing agency,[22] brought an action in Wisconsin state court[23] to compel Milwaukee to comply with the permit. The state court's judgment required that discharges from the treatment plants comply with the effluent limitations[24] in the

17. Illinois v. Milwaukee, 406 U.S. at 103; air pollution is governed largely by the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857-1858(a) (1976 & Supp. V 1981). See generally W. Rogers, Environmental Law 354-55 (1977). The 1972 Amendments to the Federal Water Pollution Control Act draw heavily on the Clean Air Amendments since the same congressional committees and leaders were instrumental in drafting both Acts.

18. Illinois v. Milwaukee, 406 U.S. at 108.

19. Id. at 103 (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957)).

20. Illinois v. Milwaukee, 406 U.S. at 107.

21. Milwaukee v. Illlinois, 451 U.S. at 310-11.

22. The 1972 Amendments establish a National Pollutant Discharge Elimination System (NPDES) under 33 U.S.C. § 1342 (1976). Section 1342 allows delegation of the permit program to states that can demonstrate adequate authority to administer it. The EPA delegated NPDES authority to the Wisconsin Department of Natural Resources (DNR), the permit-issuing agency.

23. Milwaukee v. Illinois, 451 U.S. at 311.

24. Effluent limitations are "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biologi-

permits and set a timetable for additional treatment plant construction to control sewage overflows.[25] After the state court entered this judgment, the federal district court issued a ruling which specified effluent limitations[26] for treated sewage and a construction timetable to eliminate overflows which went beyond the terms prescribed by the state permits[27] and the enforcement order of the state court.[28]

The Court of Appeals for the Seventh Circuit affirmed the district court's order and timetable to eliminate overflows, but reversed as to the effluent limitations that exceeded permit requirements.[29] The Supreme Court granted *certiorari* and reversed the Seventh Circuit, holding that the 1972 Amendments preempted the previously recognized federal common law cause of action.[30]

III. Background: General Principles of Law

A. *Federal Common Law*

Despite the Court's ruling in *Erie Railroad Co. v. Tompkins*[31] that federal courts are not general common law courts, the Court expressly applied federal common law in an opinion handed down the same day as *Erie*.[32] In *Erie,* the Court reversed its earlier holdings whereby federal courts

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cal and other constituents which are discharged from point sources . . . ." 33 U.S.C. § 1362(11) (1976)

25. Milwaukee v. Illinois, 451 U.S. at 311-12.

26. See supra note 24.

27. Each permit specifies effluent limitations. The permit holder may not discharge beyond the terms specified in his permit.

28. Milwaukee v. Illinois, 451 U.S. at 312.

29. Illinois v. Milwaukee, 599 F.2d at 157, 177 (7th Cir. 1979).

30. "We therefore conclude that no federal common-law remedy was available to respondents in this case." 451 U.S. at 332.

31. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). This was a diversity action brought in New York to recover for injuries sustained by a pedestrian on a railroad right-of-way in Pennsylvania when he was struck by an object protruding from a passing freight train.

32. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). The opinion was written by Mr. Justice Brandeis, who also wrote the *Erie* opinion. The Court declared, "whether the water of an interstate stream must be apportioned between two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." Id. at 110.

fashioned substantive rules of law for application to controversies brought under federal diversity jurisdiction. The *Milwaukee* Court mistakenly looked to the holding in *Erie* and ignored the fact that *Erie* is distinguishable as a diversity case which discusses negligence in a tort action involving private parties. In this area, federal courts must follow state decisional law and cannot create federal common law. *Erie,* however, does not address an area of dominant federal concern as does *Milwaukee v. Illinois.*

Before *Milwaukee v. Illinois,* federal courts held that a federal statute dealing with the same subject matter as the matter before the court should be the starting point for fashioning federal common law.[33] Since legislation is often incomplete, interstitial federal lawmaking has become a basic responsibility of the federal courts.[34] However, when a statute occupies the field, the courts are not free to supplement Congress.[35] The separation of powers, fundamental to our government, precludes judicial preemption of congressional action.[36] When a federal court declares a rule of decision in an area of congressional competence, it assumes a role ordinarily left to Congress, ousts state law, and acts without the political checks on national power created by state representation in

33. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 69 (1966). The Court held that "if there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law." See J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). The courts should provide remedies as necessary to effectuate Congress's purpose.

34. Miree v. DeKalb County, 433 U.S. 25, 35 (1977) (Burger, J., concurring). See Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 798-800 (1957). "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation', rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted . . . by Congress."

35. Arizona v. California, 373 U.S. 546, 565 (1963). "When Congress exercises its Constitutional powers over waters, the courts cannot substitute their own notions of an 'equitable apportionment' for an apportionment chosen by Congress."

36. G. Gunther, Cases and Materials in Constitutional Law 384 (10th ed. 1980). The founders allocated national authority among the executive, legislative, and judicial branches. Separation of power is symbolized by distinct treatment of each branch in Articles I, II, and III of the Constitution. The Constitution reveals that separation is not absolute. Together with explicit restraints and overlaps are areas of uncertainty and blurred boundary lines.

Congress.[37] The threshold question in *Milwaukee v. Illinois* is whether Congress intended to preclude this unusual exercise of judicial lawmaking when it enacted the 1972 Amendments.[38]

B. *The 1972 Amendments*

Before the 1972 Amendments were enacted, the Federal Water Pollution Control Act of 1965[39] established water quality standards which specified acceptable levels of pollution for interstate navigable waters as the primary way to control pollution.[40] The 1972 Amendments sought to replace the cumbersome and ineffective enforcement of this program, which focused on tolerable effects rather than on prevention.[41]

In the 1972 Amendments, Congress declared national goals mandating that the discharge of pollutants into navigable[42] waters be eliminated by 1985.[43] The Amendments intro-

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37. Monaghan, The Supreme Court 1974 Term, 89 Harv. L. Rev. 1, 11 (1975); Cf. Mobil Oil Corp. v. Higginbothem, 436 U.S. 618, 625 (1978). Courts are not free to prescribe rules for obtaining a federal injunction different from those prescribed by Congress.

38. Where the legislation contains no express intent as to the continued application of federal common law, an unexpressed legislative intent must be reconstructed to determine if it is to be implied. See Note, The Limits of Implied Constitutional Damages Actions: New Boundaries for *Bivens,* 55 N.Y.U. L. Rev. 1238, 1248-49 (1980).

39. This was also known as the Water Quality Act of 1965, Pub. Law 89-234, 79 Stat. 903 (1965).

40. EPA v. State Water Resources Control Bd., 426 U.S. 200, 202 (1976). See W. Rogers, Environmental Law 415-16 (1977).

> [A] water quality standard consists of water quality criteria, designated uses, and a plan of enforcement ... Water quality criteria ... are ... permissible amounts of pollutants allowed in a defined water segment ...
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> Designated uses are accomplished by assigning segments of water to certain classes and defining the classes by reference to use. Thus, Class A waters must be suitable for recreation, and Class B waters suitable 'for the growth and propagation of fish ....' The enforcement plans ... were typically vague directives to a particular source, such as to install 'secondary treatment or its equivalent....'

41. EPA v. State Water Resources Control Bd., 426 U.S. at 203.

42. United States v. Ashland Oil and Transp. Co., 504 F.2d 1317 (6th Cir. 1974). In 1972, Congress redefined the term "navigable waters" to mean the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7) (1976).

43. 33 U.S.C. § 1251(a)(1) (1976).

duced major changes in setting and enforcing standards to abate and control pollution.[44] In addition to achieving acceptable standards of water quality, the Amendments aimed at achieving maximum "effluent limitations"[45] at "point sources."[46] This goal was to be attained by specific dates[47] through technology-based levels of treatment.[48] The Amendments established the National Pollution Discharge Elimination System (NPDES),[49] making it unlawful to discharge pollutants without first obtaining a permit issued by the Environmental Protection Agency (EPA) and complying with the permit's terms.[50] The EPA is authorized to delegate to the states authority to issue NPDES permits and administer their own programs.[51] These programs are subject to EPA veto for noncompliance with conditions set forth in the Amendments.[52] Although dischargers must meet the minimum effluent limitations prescribed in the Act and in EPA regulations, states may enact more stringent limitations.[53] State agencies must notify the EPA of all permits issued, and if the waters of another state may be affected, the other state must be informed so that it can submit written recommendations. If

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44. Milwaukee v. Illinois, 451 U.S. at 318-19.

45. See supra note 24.

46. Point source is defined in 33 U.S.C. § 1362(14) (1976) as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

47. The specific dates are included in a "schedule of compliance." 33 U.S.C. § 1362(17) (1976).

48. EPA v. State Water Resources Control Bd., 426 U.S. at 204 n.11.

49. 33 U.S.C. § 1342 (1976).

50. Id.

51. 33 U.S.C. § 1251(b) (1976) states: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."

52. 33 U.S.C. § 1342(c)(1) (1976). The EPA may require modifications or revision of a submitted program.

53. 33 U.S.C. § 1370 (1976). The opinion in Milwaukee v. Illinois refers to this as § 510, which is the designation used in the Statutes at Large. The parallel United States Code citations for the sections to which reference is made in the opinion are: Section 402—33 U.S.C. § 1342; § 505—33 U.S.C. § 1365; § 510—33 U.S.C. § 1370; § 511—33 U.S.C. § 1371.

these recommendations are not adopted, the issuing state must give a written explanation to both the complaining state and the EPA.[54] The EPA may veto the issuance of a permit if the waters of another state may be affected.[55] The Administrator of the EPA may intervene in an emergency to protect the health or economic livelihood of people faced with a water pollution hazard.[56] The Act spells out enforcement procedures[57] and includes a provision for citizen suits.[58]

The Act was amended in 1977[59] to provide for public hearings for objections to the issuing state's permit. If a hearing is not requested within ninety days, or an acceptable permit is not issued, the EPA may issue the permit.[60] The EPA was authorized, under certain conditions, to extend compliance dates.[61] The 1977 Amendments also directed the EPA to conduct a study and report to Congress on the "status of combined sewer overflows in municipal treatment works operations" to determine whether new legislation is needed to address this problem.[62]

In its 1981 decision, the *Milwaukee* Court set the outer limits for bringing actions against industry in pollution disputes. Federal common law nuisance suits can no longer be brought if industry complies with the 1972 Amendments. The Act is scheduled for review in 1983, at which time industry will try to exert its influence to ease the burdens imposed by the 1972 Amendments.

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54. 33 U.S.C. § 1342.

55. Id.

56. W. Rogers, Environmental Law, 536 (1977).

57. 33 U.S.C. § 1319 (1976).

58. 33 U.S.C. § 1365 (1976). Section 505(e) provides that "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)."

59. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1981).

60. 33 U.S.C. § 1342.

61. 33 U.S.C. § 1311(g),(h),(i) (Supp. V 1981).

62. 33 U.S.C. § 1375(c) (Supp. V 1981).

IV. Decision of the Court

In 1979, the Court of Appeals for the Seventh Circuit ruled that the 1972 Amendments did not preempt federal common law of nuisance actions to resolve interstate water pollution disputes.[63] In 1981, however, the Supreme Court decided that no federal common law remedy is available to Illinois.[64] The Court reconciled its 1972 decision in *Illinois v. Milwaukee*[65] by noting that unless federal common law was created in the earlier case, Illinois would not have had any forum in which to protect its interests.[66] By a divided vote, the majority of the Court held that this remedy should no longer be available because the 1972 Amendments, which establish a comprehensive regulatory program[67] supervised by an expert administrative agency,[68] left no interstices to be filled by federal common law.[69]

The Court held that because federal courts are not general common law courts, it is unnecessary for Congress to show a clear and manifest intent to proscribe federal judicial law.[70] It is sufficient that Congress has enacted a comprehensive program[71] which provides satisfactory relief from the

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63. Illinois v. Milwaukee, 599 F.2d 151.

64. Milwaukee v. Illinois, 451 U.S. 304.

65. 406 U.S. 91 (1972).

66. 451 U.S. at 325; 406 U.S. at 103. The remedy sought by Illinois was not within the scope of remedies provided by Congress prior to the enactment of the 1972 Amendments. The Amendments completely revised the prior Act, which was both cumbersome and inadequate.

67. See 451 U.S. at 318 & n.12. The Court relies heavily upon congressmen's remarks about the legislation.

68. Id. at 317. "We conclude that . . . Congress has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." Id. at 325. The Court herein expresses doubt as to the judiciary's ability to comprehend complex technical problems.

69. Id. at 323. "There is no 'interstice' here to be filled by federal common law."

70. Id. at 316-17. The Court concludes that despite the existence of jurisdiction, federal courts cannot apply federal rules absent an applicable Act of Congress. Because the judiciary is insulated from democratic pressures, federal rules of national concern should be enacted by the people through their congressional representatives.

71. Id. at 315. This was pointedly recognized in Illinois v. Milwaukee, 406 U.S. at 107.

problem addressed. The appropriate standards to apply should be left to the legislature.[72]

The dissent argued that the Court failed to recognize the unique role federal common law plays in resolving interstate disputes and in implementing congressional will in the fulfillment of federal policies which require a uniform rule of decision.[73] Noting a clear intent in the statutory language not to foreclose prior causes of action,[74] the dissent concluded that federal common law should be available to effect a reconciliation of the differences when a state with high water quality standards is threatened by the less stringent regulatory scheme of a neighboring state.[75]

V. Analysis of the Decision

When Congress fully addresses a problem, the imposition of federal common law is unnecessary and unjust. If a discharger relies upon a permit which sets effluent limitations, federal common law should not contradict or add to the statutory scheme. The majority of the *Milwaukee* Court convincingly argues that the 1972 Amendments not only improve prior legislation, but also authorize enforcement procedures which now make it difficult to find omissions in the statute.[76]

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72. Id. at 326, where the Court notes that it would be inconsistent with the statutory scheme if the courts applied their own rules after permits had been issued and permittees have relied upon them. See Envtl. L. Inst., Fed. Envtl. L., 788 (1974). Because federal common law evolves on a case by case basis, no discharger will know what standards are applicable to his operation until sued and the court balances the equities.

73. Milwaukee v. Illinois, 451 U.S. at 334-35.

74. Id. at 339-40. The dissent states that the majority puts a strained reading on the statutory language of § 505 by saying that "this section" permits preexisting remedies, but the rest of the statute does not. See S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in (1972) U.S. Code Cong. & Ad. News 3668, 3746-47. "[T]his section would specifically preserve any rights or remedies under any law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages."

75. Milwaukee v. Illinois, 451 U.S. at 351.

76. 451 U.S. 304.

Despite the 1977 Amendment's authorization to the EPA to conduct studies so that Congress can determine whether new legislation is needed,[77] there is little room left for improvement in an act whose goal is the elimination of pollutants from the nation's waters by 1985.[78] The problem lies rather in the complex "state of the art" construction projects mandated by the Act, which take many years to complete and require extensive financing.[79] Government cutbacks in funding and delays in construction, rather than inadequacies in the Act, are to be blamed for failure to achieve the Act's goals.[80]

Contrary to the dissent's argument that the statutory scheme is inadequate,[81] the 1972 Amendments deal directly with the abatement of interstate water pollution. The EPA Administrator must be apprised of all permits issued and can void any permit not in compliance with the Act.[82] A state whose waters are affected by the less stringent requirements of another state is notified of any permit applications and has an opportunity to be heard both by written recommendations to the permitting state and to the Administrator, and, if necessary, at a public hearing on the permit application.[83] If a stalemate develops between the states, the EPA can issue its own permit.[84] Also, the Administrator may sue to enjoin any imminent health hazards.[85] The 1972 Amendments thus pro-

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77. 33 U.S.C. § 1375(c).

78. 33 U.S.C. § 1251(a)(1).

79. 33 U.S.C. § 1281(b) (1976) provides that "[w]aste treatment management plans and practices shall provide for the application of the best practicable waste treatment technology. . . ."

80. W. Rogers, Environmental Law 471 (1977). The 1977 Amendments (Clean Water Act), as well as the 1981 Amendments, provide for extensions of deadlines for industry to be equipped with the technology required by the Act. 33 U.S.C. § 1311(b) (Supp. V 1981). They call for an economic balancing test which includes "consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived . . . ." 33 U.S.C. § 1314(b)(4)(B) (Supp. V 1981).

81. Milwaukee v. Illinois, 451 U.S. at 352.

82. 33 U.S.C. § 1342.

83. 33 U.S.C. § 1342(b)(3) (1976).

84. 33 U.S.C. § 1342(d)(4) (Supp. V 1981).

85. 33 U.S.C. § 1364(a) (Supp. V 1981).

vide administrative redress not previously available, and make unnecessary the federal common law of nuisance remedy which supplemented prior pollution abatement statutes.

The dissent argued[86] that because the Act permits states to impose stricter standards than those set by the EPA, the federal courts should be able to reconcile these differences. Although the statute is unclear as to whether the Administrator can veto a permit on grounds other than noncompliance with the statute, it would be inequitable to impose stricter standards than those relied upon by the discharger. A complaining state should not be permitted to force an out-of-state discharger, whose permit requirements may be more stringent than the Act requires, to comply with the standards the complaining state has set for itself. Because neither state should be subjected to the laws of the other,[87] or be subjected to *ad hoc* judicial decisions, the statutory scheme provides a satisfactory solution in an impartial manner.

At no time during this lengthy litigation did Illinois avail itself of statutory redress through participation in public hearings or through written recommendations to Wisconsin and to the EPA.[88] Illinois's claim that these statutory opportunities are not mandatory[89] is no reason to allow an alternative route through federal common law. Illinois's argument that the remedies afforded under the 1972 Amendments were not available at the time the suit was commenced in 1972[90] is also unpersuasive in light of the five-year permit review cycle. Milwaukee's permit was reviewed some time between 1972 and 1981, at which time Illinois could have invoked the available statutory remedies.

VI. Conclusion

The 1972 Amendments to the Federal Water Pollution Control Act made a major contribution to the abatement of

86. Milwaukee v. Illinois, 451 U.S. at 351.
87. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).
88. Milwaukee v. Illinois, 451 U.S. at 326.
89. Id. at 345.
90. Id.

water pollution. Although courts have the power to fashion federal common law to effectuate congressional policy, they are not free to substitute their own notions of how best to protect national interests once Congress has acted. Because the 1972 Amendments provide a comprehensive program to deal with interstate water pollution, the application of federal common law, which once filled a void in the statute, can no longer be justified.

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