Federal Common Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions

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FEDERAL COMMON LAW: JUDICALLY ESTABLISHED EFFLUENT STANDARDS AS A REMEDY IN FEDERAL NUISANCE ACTIONS

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I. INTRODUCTION

The United States Supreme Court, in Illinois v. City of Milwaukee,1 revitalized the federal common law of nuisance by ruling that certain suits alleging that water pollution created a public nuisance2 could be heard in federal courts on the basis of federal law. Although the Court did not reach the merits of Illinois’ claim for relief, it outlined some considerations to guide courts deciding claims based on federal nuisance law. The United States District Court for the Northern District of Illinois which subsequently heard the case on its merits made its rulings under the principles of the federal common law of nuisance.3 The district court found that Milwaukee’s sewage discharge into Lake Michigan did create a nuisance4 and ordered Milwaukee to comply with specific court-established effluent standards.5 The standards imposed by the court were nearly identical to those in effect under Illinois law for

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3 Illinois v. City of Milwaukee, No. 72 C 1253, at 14253 (N.D. Ill. oral order delivered July 29, 1977), appeal docketed, No. 77-2246 (7th Cir. argued May 24, 1978) (hereinafter cited as Oral Order with page references to the transcript prepared by the official reporter of the United States District Court, Northern District of Illinois, Eastern Division—the oral order is contained in pages 14207 to 14260).
4 See Oral Order, supra note 3, at 14231, 14246-47.
5 The court required that the discharges contain less than five milligrams per liter of deoxygenating wastes (BOD) and five milligrams per liter of suspended solids. Oral Order, supra note 3, at 14253.

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discharges into Lake Michigan from sources within Illinois. The court standards were also more stringent than those required by Wisconsin law.

This article will examine the Supreme Court's decision that federal common law could properly be applied in *Illinois v. City of Milwaukee.* Additionally, the standards for nuisance claims based on federal law will be explored. Then, the focus will turn to the district court decision, which actually relied on federal common law principles to reach the conclusion that Milwaukee would be required to meet specific effluent levels similar to those of Illinois. The ultimate question posed is whether the novel remedy awarded by the court is justified by the federal common law that served as the basis for the decision.

II. USE OF FEDERAL COMMON LAW

Federal courts are not free to apply federal common law to any case that may come before them. As section 34 of the Judiciary Act of 1789 provides:

> [The laws of the several states, except where the Constitution or treaties, or Acts of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply.]

In *Swift v. Tyson* the Supreme Court held that "the laws of the several states" contemplated by the Act did not include decisions of state courts. The Court held that state decisional law was not conclusive authority with respect to issues of nonstatutory law before a federal court; instead state decisions were considered to be only evidence of what the common law was. Consequently, when suits were brought in federal courts, the courts were not bound by state court decisions which did not depend "upon local statutes or

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4 Discharges are limited to a content exceeding neither four mg. BOD per liter nor five mg. suspended solids per liter. Ill. Pollution Control Bd. Rules and Regs., Ch. 3, § 404(d) (standards effective December 31, 1974).

7 Discharges are limited to a content not exceeding an average of 30 mg. per liter of BOD or 30 mg. per liter of suspended solids. Wis. Admin. Code, Ch. NR, §§ 210.10(1)(a), (b) (standards effective July 1, 1977).

8 406 U.S. 91 (1972).


12 Id. at 18.

13 Id.
local usages of a fixed and permanent operation." Thus, federal common law could diverge from the common law of the state in which the federal court sat and could develop independently of state law.

In 1938, the Supreme Court reversed *Swift v. Tyson* in *Erie Railroad v. Tompkins*. The decision in *Erie* did not affect the Judiciary Act of 1789 itself, but overruled the interpretation given to the phrase, "laws of the several states," by the Court in *Swift v. Tyson*. As the *Erie* Court stated:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

The holding of *Erie* did not preclude federal courts from deviating from state law in suits based on diversity jurisdiction, but it halted the independent development of a general corpus of common law in the federal courts.

However, despite the pronouncement against a federal general common law, the Court acknowledged that certain limited questions were still to be resolved by federal common law and not by state law. In an opinion delivered on the same day as *Erie* and written by Justice Brandeis, who also wrote the majority opinion in *Erie*, the Court dealt with one of the particular substantive areas in which federal common law applies, the apportionment of inter-

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14 *Id.* at 18-19.
15 304 U.S. 64 (1938).
16 *Id.* at 78.
17 Diversity jurisdiction is defined in 28 U.S.C. § 1332(a) (1976), which provides, in part: The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $10,000, exclusive of interests and costs, and is between—

1. citizens of different States;
2. citizens of a State, and foreign States or citizens or subjects thereof; and
3. citizens of different States and in which foreign States or citizens or subjects thereof are additional parties.

The Supreme Court has held that in certain situations, even though the *Erie* rule would require application of state law, federal courts should follow practices under federal law. *E.g.*, Hanna v. Plumer, 380 U.S. 460, 463-64 (1965) (service of process governed by Federal Rules of Civil Procedure rather than by state law); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535-38 (1958) (affirmative federal policy favoring jury trials overrode state policy that the judge be the factfinder).

state waters. The number and scope of such substantive areas have grown steadily.

Just as no simple test exists which governs the choice between the use of federal and state law in situations governed by the Erie rule, no pre-established formula determines whether federal common law will be applied in any particular case. Certain considerations are likely to invoke the use of federal common law, such as:

1. Issues involving a dispute between states or protection of a state's sovereign rights;
2. Issues related to the operation of federal statutory law or federal policy;
3. Issues affecting uniformity of law in areas where federal law applies;
4. Issues affecting the duties and operation of the federal government;
5. Questions arising under maritime and admiralty claims; and
6. Issues concerning international law.

A court may look to only one or several of the considerations when it decides whether to apply federal law. However, the mere presence of any of the issues listed above will not require a court to decide a case on the basis of federal common law.

Federal courts may draw on several sources when fashioning federal common law. Any prior federal decisions on point should be given due consideration; courts may analogize from principles within other federal decisions, including common law created prior to Erie Railroad v. Tompkins. In addition, courts may look to...

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18 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (apportionment of interstate waters decided on the basis of federal common law).
24 E.g., Ivy Broadcasting Co., Inc. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968).
25 E.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).
28 E.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
29 E.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).
federal statutes and regulations and their underlying policies. Federal statutes and regulations should serve as the primary guide for determining federal common law because federal law, by definition, is at issue. Since federal statutes are the clearest source of federal policy, any federal statute dealing with the same general subject as the matter before the court should be a starting point for fashioning federal common law. State law (including state common law) and regulations may also aid in forming federal common law. State law may even be so persuasive as to serve as the controlling principle in a federal common law decision. However, it is federal law rather than state law that is conclusive; any state law, principle or policy which may be used by the court is absorbed into the federal common law and is not an independent or distinct source of private rights. Thus, federal common law retains its federal character even if state law principles are part of the federal law; federal common law is independent of state law even though state law and regulations may be considered in the formulation of federal common law.

A. Illinois v. City of Milwaukee: Supreme Court Opinion

In Illinois v. City of Milwaukee, the Supreme Court formally added nuisance law, as applied to interstate navigable waters, to the post-Erie list of substantive areas governed by federal common law. In 1972, Illinois filed a motion for leave to file a bill of complaint in the United States Supreme Court, alleging that the Sewerage Commission of the City of Milwaukee, and others, were discharging raw or inadequately treated sewage into Lake Michigan. The motion was filed pursuant to 28 U.S.C. § 1251, which grants the Supreme Court original and exclusive jurisdiction over "all controversies between two or more States," and original, but not exclusive, jurisdiction over "all actions or proceedings by a State against the citizens of another State or against aliens."
The Court denied Illinois' motion on the grounds that political subdivisions of states were not "States" for the purposes of 28 U.S.C. § 1251(a)(1) and, since Wisconsin was not a necessary defendant in the dispute, the controversy was not under the exclusive jurisdiction of the Court. The Court further held that although it did have original jurisdiction under 28 U.S.C. § 1251(b)(3), if Illinois could sue in a federal district court, the Supreme Court could and would decline to exercise its original jurisdiction because an alternative federal forum was available.

The Supreme Court avoided the mandatory exercise of its original jurisdiction by holding that Illinois could sue in federal district court. District courts, pursuant to 28 U.S.C. § 1331(a), have original jurisdiction over civil actions where the matter in dispute arises under the "laws . . . of the United States." The City of Milwaukee Court held that "laws" under this section included claims founded on federal common law. Thus, the Court was stating that the nuisance claim presented a federal question which was a proper basis of jurisdiction for a federal district court.

The Court's decision that federal common law was an appropriate basis for resolving the dispute rested on two considerations. First, federal common law is an appropriate means to settle disputes in which the sovereign rights of one or more states is at issue. Second, in an area of law in which there is substantial federal interest and pervasive federal legislation and regulation, federal common law may govern claims not explicitly contemplated by statute. The reason for using federal common law in a particular case should be an important factor in forming a remedy on the basis of a federal common law decision.

1. Protection of Sovereign Rights and Interests

Federal common law is an appropriate and necessary means to

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42 Id. at 97.
43 Id. at 98.
46 Id. at 104-05.
47 Id. at 101-03 (1972). The opinion is not as explicit on this point as the opinion in Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968), which the City of Milwaukee Court quotes. 406 U.S. 91, 100 (1972).
48 For example, if the presence of conflicting sovereign rights were the reason for using federal common law in the first place, then the resulting federal common law remedy should not contravene those sovereign rights. Once the decision is made to apply federal common law, the reasons for raising it remain significant.
settle disputes between states. Since no state can impose its own law on another state, in such situations, the use of state law cannot resolve the conflict. Thus, federal courts have settled state boundary disputes independent of state law or federal statutes. In addition, federal common law has been implemented as a decisional basis for the allocation of interstate waters between states.

The right of a state to be free from injury caused by another state is a sovereign right protected by federal common law. The Supreme Court, in Missouri v. Illinois, held that it could properly grant relief when the activities of one state caused injury to another state. Missouri complained that Illinois discharged sewage mixed with water from Lake Michigan through an artificial channel and ultimately into the Mississippi River upstream from St. Louis. The complaint alleged that the discharges caused deposits in navigable waterways and created a health hazard for Missouri residents who drank or used the water. The Court denied relief for Missouri because Missouri could not satisfactorily prove the allegations, but it maintained that Missouri had alleged sufficient grounds for relief.

A year later, in Georgia v. Tennessee Copper Co., the Court granted an injunction against activities within one state that caused injury to another state even though the harmful activity was carried out by a private party and not by a state or pursuant to state authority. A copper works situated in Tennessee polluted the air with sulfurous emissions that caused harm within Georgia’s borders. Georgia was allowed to bring suit for an injunction to prevent continued pollution. The Court explicitly stated that the state’s claim was properly based on its sovereign rights, and that those rights included the right to be free from extra-territorial nuisances:

> When the States by their union made forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests... 

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44 E.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
45 See Kansas v. Colorado, 206 U.S. 46, 95 (1907).
46 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110-11, n.12 (1938).
48 180 U.S. 208 (1901) (demurrer overruled); 200 U.S. 496 (1906) (merits of case).
50 206 U.S. 230 (1907).
51 Id. at 237. Justice Holmes did not explain why he adopted the term “quasi-sovereign”
The decisions in *Missouri v. Illinois*\(^7\) and *Georgia v. Tennessee Copper Co.*\(^8\) demonstrate that the sovereign interests of a state extend beyond its property interests in boundary disputes and water apportionment cases. Also, the Supreme Court in *Tennessee Copper Co.* held that vindication of the sovereign rights of a single state was a sufficient basis for granting relief; a conflict between two states was not necessary for the exercise of federal judicial power.

The United States Court of Appeals for the Tenth Circuit resurrected federal nuisance law as a means of interstate water pollution abatement in *Texas v. Pankey*\(^9\). *Texas v. Pankey* was the first federal case after the decision in *Erie Railroad v. Tompkins*\(^10\) that held that federal common law should be recognized as a basis for granting relief against out-of-state activities causing a nuisance within the complaining state. The court reversed a federal district court of New Mexico which had dismissed a suit to enjoin certain New Mexico residents from polluting an interstate river with pesticide. Citing *Georgia v. Tennessee Copper Co.*,\(^1\) the opinion held that a state's "ecological" rights were included in the sovereign interests contemplated by *Georgia v. Tennessee Copper Co.*\(^2\) and that those rights presented a sufficient federal question to bring suit in federal district court.\(^3\)

The Court's unanimous opinion in *Illinois v. City of Milwaukee*\(^4\) drew heavily on the principles of state sovereignty considered in *Georgia v. Tennessee Copper Co.*\(^5\) Also, since *Tennessee Copper Co.* was a case involving air pollution, the former cases dealing with interstate water apportionment\(^6\) were invoked to demonstrate that states historically have had sovereign rights in interstate water. Therefore, the decision that federal common law is to be applied in situations similar to those of *Illinois v. City of Milwaukee* rests both

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\(^1\) 200 U.S. 496 (1906).
\(^2\) 206 U.S. 230 (1907).
\(^3\) 441 F.2d 236 (10th Cir. 1971).
\(^4\) 304 U.S. 64 (1938).
\(^5\) 206 U.S. 230 (1907).
\(^6\) Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971).
\(^7\) Id.
\(^8\) 406 U.S. 91 (1972).
\(^9\) 206 U.S. 230 (1907).
\(^10\) Specifically, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

See *e.g.*, note 52, *supra*. 

on the states’ sovereign rights to be free from outside nuisance and on the states’ traditional sovereign interests in interstate waters. The Supreme Court thus affirmed the reasoning of the opinion in Texas v. Pankey and quoted the Pankey court’s conclusion that a state’s nuisance claim should “be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.”

2. Federal Interest in the Purity of Interstate Waters

The opinion in Illinois v. City of Milwaukee implied that there was another reason for the use of federal common law in the case. Justice Douglas briefly traced the history of federal interstate water quality legislation from the Rivers and Harbors Act of March 3, 1899 to the then-current Federal Water Pollution Control Act, but did not offer a precise conclusion why the whole scheme was significant. He suggested that the record of legislation manifested a strong federal interest in the matter and/or that federal legislation was so pervasive that federal courts were justified in applying federal common law in such cases.

Courts have been especially predisposed to apply federal common law when activities of the federal government are at issue. This includes conflicts arising out of such governmental activities as making contracts, employing persons, and dealing with commercial paper because of the strong federal interests involved. Justification for the use of federal common law on the basis of a strong federal interest was most clearly stated in a footnote in the City of Milwaukee opinion:

[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. Certainly these same

\small\footnotesize{\textsuperscript{87} Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) (quoting Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971)).
\textsuperscript{88} Id. at 105, n.6 (1972). “Thus, it is not only the character of the parties that requires us to apply federal law.”
\textsuperscript{89} Id. at 101-03.
\textsuperscript{90} If the opinion only wishes to make the point that federal legislation does not preempt federal common law (id. at 104), it could have done so without the full survey of laws and comments such as “Congress has evinced increasing concern with the quality of the aquatic environment . . . .” Id. at 102.
\textsuperscript{91} See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). See text at note 26, supra.
\textsuperscript{92} Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947).
\textsuperscript{93} United States v. Standard Oil Co. of California, 332 U.S. 301 (1947).
\textsuperscript{94} Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).}
demands are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four states.\textsuperscript{76}

Thus, Justice Douglas implied that federal interest in interstate waters reinforced the decision to apply federal common law, and therefore that decision did not rest solely on the need to protect the sovereign rights of Illinois. One indication of federal interest in interstate waters is the amount of federal legislation governing those waters. The sketch of the federal statutory scheme may have been offered to demonstrate the strong federal interest in interstate waters.

Federal courts have also fashioned federal law in cases where federal legislation is pervasive.\textsuperscript{76} When federal statutory law does not completely preempt the operation of state law in a particular area, problems may still arise within "the penumbra of express statutory mandates."\textsuperscript{77} Federal courts may then settle the disputes in conformity with the policy of the appropriate federal legislation,\textsuperscript{78} even when the precise remedies are not mandated by Congress.\textsuperscript{79}

The City of Milwaukee opinion did not explicitly state that the amount of federal legislation pertaining to water quality warranted the application of federal common law. However, Justice Douglas devoted more than a page of the opinion to outline the related statutes. The chronicle of legislation was not necessary merely to reach the conclusion that a non-statutory remedy could be granted; the opinion suggested that the significant amount of federal legislation might serve as a reason for using federal common law.

Whether or not federal interest in interstate waters or the considerable federal water quality legislation would each independently justify the use of federal common law to resolve the dispute in Illinois v. City of Milwaukee, the opinion at least implies that the two points considered together serve as a reason to use federal common law.

III. FEDERAL NUISANCE LAW

After the Supreme Court dismissed Illinois' motion to proceed
under the Court's original jurisdiction, Illinois filed suit in the United States District Court for the Northern District of Illinois. The defendants challenged the court's jurisdiction and the venue of the suit but the court held that it had jurisdiction and that the venue was proper. Milwaukee then filed a motion to dismiss, arguing that the suit was preempted by federal statute. Although the Supreme Court had ruled that no federal statute preempted Illinois' claim, it acknowledged that new statutes and regulations may someday preempt the field of federal common law of nuisance. The Federal Water Pollution Control Act (FWPCA) was amended after the Supreme Court decision. However, the district court held that neither the amended FWPCA nor any other federal statutes preempted the suit.

A. Standards for Determining Whether a Nuisance Exists

Once the court finally reached the merits of the case, it had to determine whether a public nuisance existed and what remedy would be appropriate if Illinois could prove that a nuisance existed. The common law surrounding nuisance is divided under the two headings of private nuisance and public nuisance. A private nuisance affects a determinate number of persons and is defined to be an interference with the use and enjoyment of land. A public nuisance affects citizens generally and is a wrongful interference with legal rights and privileges of the public without particular regard for rights in land. Cause of action for a public nuisance normally lies in the hands of public authorities.
In any action concerning a public or private nuisance, any alleged interference must be found to be substantial and unreasonable to be a nuisance; mere invasion of a legal interest alone is not adequate ground for relief. In determining whether a nuisance exists a court will balance the equities involved in each particular case. In addition, the relief afforded will be largely determined at the discretion of the court. In making a determination whether the interference is unreasonable courts consider such elements as locale or character of the neighborhood, the social utility of the activity causing the interference, the gravity of the harm caused or threatened and the hardship which may result from any judgment.

Thus, in *Illinois v. City of Milwaukee* the district court had to weigh all the elements related to the alleged pollution of Illinois' waters by Milwaukee. In addition, since Illinois alleged nuisance under federal law, the court had to decide what standard of proof Illinois would have to meet to demonstrate that the interference was unreasonable. In civil actions in both state and federal court, plaintiffs usually must meet a standard of proof by a preponderance of evidence. The evolution of cases involving federal nuisance law leaves some doubt about the proper standard in federal courts.

**B. Standard of Proof in Federal Courts**

In *Missouri v. Illinois*, which has dominated federal nuisance law, the Supreme Court denied relief to Missouri because the allegations were not "clearly and fully proved." This high standard, which was required before the Court would enjoin the activities of a state, created a serious burden for any future complainants. In *Georgia v. Tennessee Copper Co.* the defendant was a private...
party, not a state. There the Court allowed an injunction after proof of the allegations by a preponderance of evidence. However, Justice Holmes, who wrote for the majority in both cases, maintained that Georgia’s proof by a preponderance of evidence satisfied the requirements of Missouri v. Illinois. Thus it is unclear whether the standard of “by a preponderance of evidence” is applicable in all federal nuisance cases, or whether two different standards, based on whether the defendant is a private individual or a state, exist.

The caution exercised by the Court in Missouri v. Illinois is warranted when a complaining party seeks to enjoin the activities of a state. However, when the defendant is a private party, the defendant has no rights as a sovereign and such a burdensome standard of proof is unwarranted. In suits against a private individual the same standard of proof as in civil suits between private parties, preponderance of evidence, should be applied.

The history of the federal nuisance cases supports the position that proof by a preponderance of evidence is sufficient when the defendant is not a state. Justice Holmes devoted three pages of his nine page opinion in Missouri v. Illinois to the problem of enjoining the activities of the defendant state, but he did not seem to question the power of the Court to enjoin the private defendant in his opinion in Georgia v. Tennessee Copper Co. He never had to consider any sovereign interests of the defendant in the latter case. Subsequent nuisance decisions have denied relief to states suing other states, but have granted injunctions when states sued private parties situated in other states, thereby implying that a lesser standard of proof is warranted in the latter cases.

Justice Holmes’ statement in Georgia v. Tennessee Copper Co. that proof by a preponderance of evidence satisfied the requirements of Missouri v. Illinois may merely mean that, in that case, Georgia had made a proper showing of harm. It is submitted that a proper showing of harm varies with the standard of proof. Missouri

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**Footnotes:**

98 Id. at 238.

99 A subsequent Supreme Court decision, which involved a state suing another state, interpreted Missouri v. Illinois as requiring proof by “clear and convincing evidence.” New York v. New Jersey, 256 U.S. 296, 309 (1921). See also North Dakota v. Minnesota, 263 U.S. 365, 374 (1923). Not all cases have adopted the “clear and convincing” language, but they have required a similar high standard. See, e.g., Nebraska v. Wyoming, 326 U.S. 599, 608 (1945).

100 Missouri v. Illinois, 200 U.S. 496, 518-21 (1906).


failed to convince the court because the standard of proof was so demanding. Georgia had the less demanding standard of proof by a preponderance of evidence and was thus able to satisfy the requirement of a proper showing of harm.

In *Illinois v. City of Milwaukee* the district court found that sewage discharged by Milwaukee created a nuisance, and that Illinois had proven its case by "clear and convincing" evidence. According to the court itself, satisfaction of the higher standard of proof was not necessary since Milwaukee's actions were not considered actions by a state and, therefore, proof by a preponderance of evidence would have sufficed to establish the existence of a nuisance. However, since the court found that Illinois met the more demanding standard of proof by clear and convincing evidence, the validity of the court's finding does not depend on any characterization of the defendant. Even if Wisconsin were deemed to be a party to the action the court could still grant relief.

IV. Appropriateness of the District Court Remedy

Once the district court made a finding that Milwaukee created a nuisance, attention then turned to what remedy would be fashioned. Although the Supreme Court instructed that the "informed judgment of the chancellor" would largely govern the results in such cases, the broad equity powers of the court are not without bound. The Supreme Court in *Missouri v. Illinois* recognized that a court must have some guidelines for its decisions:

> But of course, the fact that this court must decide does not mean that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly or implicitly recognized.

The "judgment of the chancellor" may largely determine the outcome, but the outcome should at least be consistent with federal common law principles.

A. District Court Remedy

The court established standards for Milwaukee's sewage dis-

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103 Oral Order, supra note 3, at 14231. See note 99, supra.
104 Id. at 14209.
105 Id. at 14253.
charge, requiring Milwaukee to achieve levels not to exceed five milligrams per liter of deoxygenating wastes (BOD) and five milligrams per liter of suspended solids.\textsuperscript{108} Illinois limits the content of discharges to four milligrams of BOD and five milligrams of suspended solids per liter of liquid.\textsuperscript{109} Wisconsin has less stringent standards, allowing thirty milligrams per liter of BOD\textsuperscript{110} and thirty milligrams per liter of suspended solids\textsuperscript{111} for wastewater discharged into Lake Michigan. The Wisconsin standards are similar to the applicable federal standards established by the Environmental Protection Agency (EPA) pursuant to FWPCA.\textsuperscript{112} Thus the court standards were more stringent than the Wisconsin and federal standards, and almost identical to the standards established by Illinois.

B. Guidelines for Fashioning a Remedy under Federal Common Law

By setting specific effluent standards, the district court deviated from a normal judicial course into the traditional province of legislatures and agencies.\textsuperscript{113} Although the court may exercise its discretion in an equity suit, the remedy should be warranted by some principle found in federal common law.\textsuperscript{114}

1. Judicial Guidelines

Although the Supreme Court did not reach the merits of Illinois' complaint, the opinion mentioned several principles that are relevant to a choice of a remedy under federal common law. The overriding principle expressed by the Court in \textit{Illinois v. City of Milwaukee} was that such suits would rely on the equity powers of the federal courts\textsuperscript{115} and thus "the informed judgment of the chancellor will largely govern."\textsuperscript{116} Two important consequences follow from such a view. First, since no fixed rules govern the choice of a

\textsuperscript{108} Oral Order, supra note 3, at 14253.
\textsuperscript{109} See note 6, supra.
\textsuperscript{110} See note 7, supra.
\textsuperscript{111} Id.
\textsuperscript{112} See 40 C.F.R. § 133 (1976).
\textsuperscript{113} See 40 C.F.R. § 133 (1976).
\textsuperscript{114} For a discussion that the use of federal common law is improper because the court must usurp legislative and administrative powers, see Note, Federal Common Law and Interstate Pollution, 85 Harv. L. Rev. 1439 (1972). See also Note, The Role of Courts in Technology Assessment, 55 Cornell L. Rev. 861 (1970).
\textsuperscript{115} See text at note 107, supra.
\textsuperscript{117} Id.
remedy,\textsuperscript{117} the remedy is not confined to those remedies explicit in statutory provisions.\textsuperscript{118} Second, the results will depend on the facts peculiar to the particular case before the court.\textsuperscript{119}

The Supreme Court stated that federal legislation may provide useful guidelines\textsuperscript{120} and that courts could also consider state standards in reaching a decision.\textsuperscript{121} The consideration of state standards in \textit{Illinois v. City of Milwaukee} is particularly important because the Court decided that a state could assert a claim based on its sovereign rights: "[A] State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."\textsuperscript{122} Although state law and regulations may be persuasive, federal law ultimately controls.\textsuperscript{123} Any state law, principle, or policy which may be used is absorbed into federal law and is not an independent or distinct source of rights\textsuperscript{124} because federal common law is the basis for the decision.

The district court could also look to other federal decisions for relevant principles, including federal common law created prior to \textit{Erie Railroad v. Tompkins}.\textsuperscript{125} However, the scope of federal nuisance law has not been fully explored.\textsuperscript{126} Thus other federal cases do not provide much specific guidance for fashioning remedies.

The court could disregard any compliance by Milwaukee with state and federal standards on the basis of the holding of \textit{New Jersey v. City of New York}.\textsuperscript{127} There the Supreme Court held that compli-
ance with federal statutes did not bar injunctive relief in a nuisance action. New York dumped garbage into the ocean which later invaded New Jersey waters and washed ashore on New Jersey beaches. The disposal itself did not take place in New Jersey waters. The Supreme Court awarded the injunction despite the fact that New York was in compliance with permits issued by the harbor supervisor pursuant to the Act of June 29, 1888. The Court held that New Jersey was entitled to abatement because the activity by New York City created a nuisance and relief was granted even though the activity was sanctioned by a federal statute. Thus both state and federal law may allow an activity, yet a court may order the practice halted if it creates a nuisance.

But New Jersey v. City of New York, and all of the other pre-Erie federal nuisance cases previously cited that reached the issue of a remedy, spoke only in terms of injunction, not regulation by the court. No direct precedent from prior cases supports the court’s remedy of imposing standards similar to Illinois’ effluent standards on Milwaukee. However, other sources of federal common law may justify the remedy.

2. Policy of Federal Legislation

If the Supreme Court in Illinois v. City of Milwaukee relied on the pervasiveness of federal water quality legislation as a reason for its decision that federal common law was applicable, then the statutory policy should be the primary source for fashioning a remedy. Even if the statutory scheme is not a reason for applying federal common law, federal statutes are the clearest source of federal policy and any federal statute that deals with the same subject should be a starting point for federal common law. The range of judicial inventiveness will be determined by the nature of the problem before the court and while the federal statutes will not mark the

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129 Id. at 482-83. A lawful activity may be conducted so as to amount to a nuisance. E.g., Mower v. Ashland Oil & Refining Co., 518 F.2d 659, 661 (7th Cir. 1975).
130 283 U.S. 473 (1931).
131 The post-Erie case of Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) which is closely analogous to Illinois v. City of Milwaukee and which relied on the new “specialized federal common law” as a basis for decision, also spoke only in terms of injunction.
bounds of common law remedies, the court-created remedies should be compatible with, and not in contravention of, the related statutes.

The Federal Water Pollution Control Act (FWPCA) is the most comprehensive statement of federal policy with respect to the control of water pollution. The FWPCA, which applies to Lake Michigan because the lake is a navigable interstate body of water, attempts to establish a comprehensive scheme for reducing pollution, preventing further pollution and improving the quality of the nation’s navigable waters. At the same time the Act attempts to recognize and preserve the primary rights and responsibilities of the states to control land and water development and use. Consequently, each state may adopt its own water quality standards under the Act. The Environmental Protection Agency (EPA) reviews the proposed standards from each state before they are approved under FWPCA. The Act itself does not set any specific standards for interstate waters, but if a state fails to adopt its own standards for interstate waters, or if EPA finds that a state’s proposed standards are inconsistent with FWPCA, the EPA administrator may establish the standards. The Act encourages interstate cooperation and uniform laws relating to water quality maintenance and improvement, but such uniformity has not yet been accomplished.

The overriding objective of the Act is to “restore and maintain the chemical, physical, and biological integrity” of the nation’s waters. The objective calls for the elimination of polluting discharges into navigable waters. The standards imposed by the court in *Illinois v. City of Milwaukee* force Milwaukee closer to the Act’s objective of pollution elimination because they are stricter than the

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139 *Id.*

140 *Id.* § 1253(a).

141 *Id.* § 1251(a).


143 *Oral Order, supra* note 3, at 14253.
Wisconsin standards. Although the court's remedy promotes FWPCA policy in this respect, Congress has chosen, "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. ..." Thus, if the statutory language implies that Wisconsin has a right to achieve the objective at a slower rate than any other state, the court's remedy seems to violate this right and, consequently, is in contravention of federal policy. The Act also explicitly excepts wastes from municipal treatment plants from its general language and takes a less demanding stance with regard to such pollution. The special consideration given to municipal plants does not prevent a finding of a public nuisance, but it may imply that Congress intended that the Act not be as strictly enforced with respect to such plants. If this is true, the imposition of stricter standards by the court in *City of Milwaukee* than those promulgated pursuant to FWPCA may be contrary to the policy of the Act.

On the other hand, the Act preserves the authority of the states to adopt standards which are more stringent than those already in existence. Such provisions encourage a state's efforts to achieve the goal of eliminating polluting discharges by gradually enacting stricter effluent standards. Unless states gradually adopt stricter water quality controls, the effective standard will remain at the level of the least demanding state standard and no progress will be made toward the Act's objective. In addition, achieving reduction of pollutants in discharges involves greater state and municipal expenditures and the risk that industries may leave the state rather than incur the additional expenses of compliance. States may not make such sacrifices in order to achieve cleaner water if the benefits of having cleaner water are diminished or erased by pollution from other states which have less restrictive standards. Therefore the rights of the states with more stringent standards should be protected at least to the extent that the quality of the water associated with such standards is preserved. Under this interpretation, the district court's remedy in *City of Milwaukee* is consistent with federal policy.

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147 Id. §§ 1311(a), 1311(b)(1)(B), 1314(d)(1) (1976); 40 C.F.R. § 133 (1976).
150 Cf. Stream Pollution Control Bd. of Indiana v. U.S. Steel Corp., 512 F.2d 1036, 1043 (7th Cir. 1975) (Congress intended a step-by-step improvement in quality of effluent discharge).
Although the Act defers to state sovereign rights, the statute directs the states to "prevent, reduce, and eliminate pollution." Therefore a wrongdoer should not be allowed to hide behind a claim of such rights when doing so would undermine the efforts of another state to exercise its rights to reduce pollution in compliance with FWPCA objectives.

While support for the district court remedy can be gleaned from the FWPCA, the Act as a whole lends equivocal support at best. Certain provisions in the statute do not support the remedy. In particular, municipal treatment plants are given special consideration and exemptions from certain provisions in the statute. EPA has promulgated national regulations for sewage plants, and the Wisconsin regulations conform to the EPA standards. Finally, responsibility for establishing effluent standards rests first with the states. Such contrary provisions do not forbid the remedy, but the support provided by the Act alone is not clear enough to justify setting specific standards.

C. Justification for the Remedy

A remedy that imposes court-created standards on Milwaukee that are similar to the stricter Illinois standards cannot be justified on the ground that Illinois is entitled to govern the interstate water within its boundaries. Illinois is only entitled to be free from an outside nuisance. Nor can the standards be imposed because they promote federal statutory policy since FWPCA policy does not clearly support such a remedy. Imposing the standards merely because they are more desirable would be a bold usurpation of legislative and administrative functions.

The district court did not explain the rationale behind its decision to impose specific numerical limitations on Milwaukee’s discharges. However, the standards would seem to be justified for either of two reasons:

1. The standards represented the most restrictive levels that were technically feasible.

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152 See Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976).
153 See note 147, supra.
155 See note 39, supra.
2. The standards represented the least restrictive levels which would achieve satisfactory abatement of the nuisance.

The first reason for imposing the standards takes the same approach as an injunction: insofar as it is possible, the activity (or the objectionable results of the activity) should be halted.\[^{158}\] The second reason is simply directed at the abatement of the nuisance: only the degree that reaches the level of nuisance should be forbidden and any activity which does not reach that level should be allowed.

1. Most Restrictive Standards that are Technically Possible

The first approach requires Milwaukee to meet the most restrictive standards possible. The decision must rest on a finding that any discharge would amount to a nuisance, but equitable considerations such as the cost and availability of alternatives and the social utility of the activity\[^{157}\] prevent an absolute injunction. This principle can be found in FWPCA which requires the application of the “best practical technology” to be used in eliminating pollution in certain instances.\[^{158}\] The objective of FWPCA is to eliminate all polluting discharges into navigable waters,\[^{159}\] but since Congress realized that all pollution could not be immediately eliminated given the current needs of society and present technology, all that is often required is the use of the “best practical technology.”

2. Least Restrictive Measure for Achieving Abatement

The second alternative requires a finding by the court that any discharge by Milwaukee containing levels greater than five milligrams of BOD and five milligrams of suspended solids per liter would create a nuisance. This alternative is more likely since a finding that any discharge amounts to a nuisance neglects the requirement that a public nuisance be an unreasonable interference with the rights and interests of the public. The district court quoted a passage from a case that stipulated that waters cannot be kept completely pure in populated areas,\[^{180}\] which implied that some pollution was reasonably to be expected.

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\[^{154}\] See Oral Order, supra note 3, at 14254.


\[^{158}\] E.g., 33 U.S.C. §§ 1281(b), 1311(b), 1316(a)(1) (1976).

\[^{159}\] See note 128, supra.

\[^{180}\] Oral Order, supra note 3, at 14242-43; the case is Barrett v. Mt. Greenwood Cemetery Assn., 159 Ill. 385, 390, 42 N.E. 891, 892 (1896).
Any degree of pollution below a level that would create a nuisance may still be undesirable, but should not be subject to further abatement by order of the court. Even if Milwaukee could reduce pollution far below the nuisance level, the court should only require that a level just below nuisance level be attained.

Under either of the latter two alternatives the standards would not be applied merely because they approximate the Illinois standards. The Illinois standards thus assume their proper role as a source for federal common law—they are persuasive, but not controlling. The Illinois standards may serve as a model for the court standards because they represent a feasible standard economically and technically, or because they provide evidence in a determination of what levels of contaminants will create a nuisance. The Illinois standards themselves are irrelevant to the rulings of law because the court's standards are a product of findings of fact. A different finding of fact may have resulted in standards dissimilar to the Illinois standards, with these dissimilar standards then being imposed.

V. CONCLUSION

By approving Texas v. Pankey\textsuperscript{181} and ruling that pollution of a state's waters by a foreign source is a matter of federal law, the Supreme Court revived the pre-Erie principles of federal nuisance law. The decision in Illinois v. City of Milwaukee also updated federal nuisance law because the Court held that not only could a suit be brought in federal court on the basis of a state's sovereign interest in the integrity of its interstate waters, but that the federal interest in the quality of interstate waters and the substantial amount of federal water quality legislation support the use of federal common law in such situations.

The district court's ruling is consistent with federal common law principles if the court's standards are seen as findings of fact aimed only at limiting the activities which created the nuisance. The district court held that the existence of a nuisance had been proven by clear and convincing evidence and that the nuisance had to be abated. Such a holding protects Illinois' sovereign rights not to be subjected to outside nuisance. Any sovereign rights that conceivably exist on the part of Wisconsin are not prejudiced because the holding merely states that a nuisance shall not be created; the ruling

\textsuperscript{181} 441 F.2d 236 (10th Cir. 1971).
only affects a tortfeasor. Since Illinois met the more demanding standard of proof by clear and convincing evidence, the district court remedy would also be effective against Wisconsin, if necessary. Finally, the objective of the FWPCA is promoted to the extent that pollution amounting to a nuisance is eliminated while the other provisions of the Act are not contravened. Thus the district court decision is compatible with the reasons for using federal common law and its remedy follows from the Supreme Court guidelines and the general principles of federal common law.