10-1986

International Paper Company v. Ouellette

Lewis F. Powell Jr.

Grant

This decision conflicts with CA 7's latest decision in ~~Ma~~ Ill v. City of Milwaukee (pollution of Lake Michigan) - case that has been here twice.

Q is whether the Fed Act preempts application of state common law of nuisance.

PRELIMINARY MEMORANDUM

March 21, 1986 Conference Bob
List 1, Sheet 3

No. 85-1233 ok

INTERNATIONAL PAPER CO.
(New York based interstate polluter)

v.

OUELLETTE et al. ok
(Vermont property owners)

Cert to CA2 (Kaufman, Pratt, Miner) (per curiam)

Federal/Civil

Timely

1. SUMMARY: Petr contends that the Federal Water Pollution Control Act, 33 U.S.C. §1253 et seq. (FWPCA) precludes preempts a state common law nuisance action against an alleged polluter of an interstate body of water in the courts and under the law of a state other than that in which the discharge occurs.

GRANT - Bob Pool Winter DOS

2. FACTS AND DECISIONS BELOW: Resps are citizens of Vermont who own property on the shores of Lake Champlain, aninterstate body of water. In 1978, resps filed suit in a Vermont court against petr, a New York Corporation that operates a paper mill on the shore roughly opposite resps' property. Claiming that the discharges from the mill had fouled their properties, resps sought nearly $120 million in damages and various forms of injunctive relief. According to petr, the relief sought would "require it to completely restructure its water treatment system." Petn at 2. Although the complaint advanced a variety of legal theories, the only one still at issue is the claim that petr's conduct constituted a "continuing nuisance" under the common law of Vermont.

Petr successfully sought removal to Federal District Court. (D.Vt. Coffrin, CJ). After a protracted battle over class certification, petr moved for dismissal pursuant to FRCP 12(c) and 56(b). Upon the suggestion of the court, the parties agreed to postpone argument on the motion until after the CA7 rendered its decision in Illinois v. City of Milwaukee, 731 F.2d 403 (1984), cert. denied sub nom. Scott v. City of Hammond, 105 S.Ct. 979 (1985).

a. The Milwaukee Litigation. The CA7's decision in Milwaukee was the final chapter in a protracted suit concerning pollution of Lake Michigan. Initially, Illinois had sought to invoke this Court's original jurisdiction to resolve a complaint that Milwaukee had discharged inadequately treated sewage into the lake. In the course of declining to exercise original jurisdiction, the

Court held that a federal common law of nuisance governed the suit. 406 U.S. 91, 105 (1972). Illinois promptly brought suit in ND Ill, and the DC granted the relief sought. Shortly thereafter, Congress amended the FWPCA to establish a new system of federal regulation under which it is illegal for anyone to discharge pollutants into the nation's waters except pursuant to a permit. The CA7 affirmed the DC, holding that "it is federal common law and not state statutory law that controls this case" and rejecting the claim that the FWPCA had preempted federal common law. 599 F.2d, at 177 n.53. This Court vacated and remanded, holding that federal common law had been displaced by the FWPCA's comprehensive regulatory scheme. 451 U.S. 304 (1981).

On remand, Illinois argued that even though federal common law was now clearly preempted, it could still sue under state statutory and common law unless the FWPCA manifested a clear intent to preempt such law. Relying on various "savings provisions" in the federal act, Illinois asserted that such an intent was clearly lacking. Illinois placed particular reliance on §1365(e), which 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." The CA7 rejected the argument. It concluded that §1365(e) merely preserved the right to bring suit against a discharger in the courts of the state from which the discharge came and under the laws of that state ("State I"). But the Court found it "implausible that Congress meant to confer any right on the state claiming injury

(State II) or its citizens to seek enforcement of limitation on discharges in State I by applying the statutes or common law of State II." 731 F.2d, at 414. Any contrary conclusion, the court observed, would violate the value of federal uniformity embodied in the FWPCA.

Illinois petitioned for cert, and the Court CVSGed. The SG argued that the CA7's analysis was entirely correct and urged the Court to deny cert. The SG observed that the Court's decisions in the area "left no doubt that the law of one state could not be relied upon to abate a discharge in another state." Br. of SG in 84-21 at 7. (He did note that the suit no longer contained a live claim for damages, and declined to address any questions of the permissible reach of state law in such a case; id., at 12 n.10.) The SG also agreed with the CA7's suggestion "that a suit based on the law of the state of discharge would not be preempted." Id., at 13. The Court denied cert, Justices White and Blackmun dissenting without opinion. Justice Powell did not participate. 9 such

b. The DC Opinion. Having awaited the CA7's opinion, the DC expressly declined to follow its reasoning or analysis. The crucial question was not whether the FWPCA preempted state law. For, there was no question that federal law governed interstate pollution disputes. The question instead was whether federal law authorized, either expressly or implicitly, resort to state common law in the circumstances of the case. Disagreeing with the CA7, the DC concluded that it did. In addition to §1365(e), quoted above, the DC relied on §1370, which provides that "nothing in this chapter shall ... be construed as impairing or in any

manner affecting any right or jurisdiction of the States with respect to the waters ... of such States." The CA7 had construed these provisions to "preserve a state's nuisance law only as it applies to discharges emanating from within that state." Petn A-13. The better view, the DC concluded, was that "the Act authorizes actions to redress injury caused by water pollution of interstate waters through the laws of the state in which the injury occurred,." Id. After examining the course of the FWCPA's legislative history in conjunction with the timing of this Court's pronouncement in Milwaukee I, the DC observed: "Given the law during the time of the FWPCA's framing, it is completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B. It thus seems inescapable that Congress, by passage of [§1370 and §1365(e)] intended to preserve such an action." A-15. Moreover, the DC observed, the CA7's holding was incongrous. According to the CA7, these "savings provisions" could not have "saved" Illinois's "right" to bring an action under Illinois law because, at the time of enactment, there was no such right to "save." This was so, the CA7 believed, because, under Milwaukee I, federal common law had already occupied the field by the time of the FWPCA's enactment. If that were truly the case, the DC noted, there could be no possible authority for suit in Wisconsin Court under Wisconsin law. Yet the CA7 would apparently find such a suit permissible.

The DC also observed that the CA7's opinion created a bizarre choice of law rule under which a state must apply the law of the state from which the pollution emanates regardless of the forum's choice of law rules. Finally, the DC noted that the CA7's concern about "chaotic confrontations between sovereign states" was inapt given that the present suit involved private parties. While an injunction to abate the nuisance would, to some degree, have an effect on the regulatory framework of the state in which the polluter was located, such effect would be purely "incidental."

The DC certified its ruling for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The CA2 affirmed in a two paragraph PC, which adopted the reasoning of the DC in all respects material to this petn.

3. CONTENTIONS: Petr contends that the decision below has generated a circuit split on an issue of profound national importance: whether the FWPCA authorizes a state law nuisance action against an alleged polluter other than in the courts and under the law of the state in which the discharge occurs. The decision below exposes industries that discharge effluents into interstate waters to the varying statutory and common laws of all the states whose boundaries touch on those waters. Accordingly, the decision gives rise to the possibility of irreconciliable conflicts in the legal obligations to which they will be subject. Given that the 48 contiguous states have borders contiguous with bodies of interstate water, the issue presented is sure to be a recurring one.

On the merits, petr adopts the reasoning of the CA7 in Milwaukee. The CA2 was simply wrong in suggesting that, at the time of the FWPCA's enactment, Congress believed that there was any state law cause of action for interstate pollution. Thus, there is no basis for the linch pin of the CA2's analysis--that the savings provisions were enacted at a time when Congress assumed that state law could apply to interstate water disputes.

The CA2's suggestion that a contrary holding would be at odds with conventional choice of law principles misses the point entirely. As the SG pointed out in his amicus brief in Milwaukee, there is no question that federal law governs in this context. If that law requires application of the law of the state of the discharger rather than resort to the forum's choice of law principles, there is no inconsistency with the principle of Klaxon v. Stentor, 313 U.S. 487 (1941) (requiring a federal court sitting in diversity to apply choice of law principles of forum state).

Finally, the fact that the case involves only private parties is irrelevant. The impact of the decision below on New York is more than "incidental." More importantly, the federal interests in uniformity and predictability simply do not turn on the nature of the parties. None of the decisions of this Court in this area even hint at such a distinction.

Resp, adopting the reasoning below, maintains that permitting the suit to proceed in a Vermont Court under Vermont common law is fully consistent with the letter and history of the statute as well as with this Court's pronouncements in the area. The

contention that the suit can only proceed in a New York Court has no logical basis other than an "insulting" fear that the DCVt will yield to local bias. The contention that New York rather than Vt. law should apply is a red herring since there is no evidence at all that there is any difference between the common law of nuisance in these states.

Nor, resp contends, is the alleged circuit split a basis for granting cert as the CA7's decision is distinguishable in several important respects: 1) This is a suit between private parties; 2) this is a suit for damages and abatement rather than for direct regulation of the effluent levels discharged by a polluter in a sister state; and 3) federalism concerns are significantly diminished in the context of what boils down to an ordinary tort suit.

4. DISCUSSION: This looks like a grant to me. The case presents a clean circuit split on an issue of obvious national importance. While it is true that in some respects the CA7's decision in Milwaukee is distinguishable, it is far from evident how the distinctions relied on by resp are of any significance. Resp is wrong in suggesting that either the reasoning or the language of Milwaukee is limited to circumstances in which a state is suing a state. Indeed, in one of the consolidated cases before the CA7, the plaintiff was a private party. Moreover, although the opinion hedged a bit, the CA7 stated: "It is clear that the federal nature of the problem, and the basic interests of federalism do not depend on the case being a state versus a state case." 731 F.2d, at 407. Nor does the fact that resps are seeking money damages distinguish the case from Milwaukee. Al-

though the parties before it were not seeking money damages, the CA7 strongly suggested that ordinary tort principles should never apply in interstate pollution suits. Id., at 411 n.3. In any event, resps here are seeking injunctive relief in addition to damages.

Somewhat troubling is the contention that none of this makes any difference since New York and Vermont have the same common law of nuisance. Even if that were the case, which is far from clear, the fact remains that the CA7 and CA2 have reached precisely the opposite conclusion on whether the law of the state of injury can ever apply in a suit against an out-of-state polluter of interstate waters. Regardless of whether New York and Vt. law are in fact in conformity, this issue seems certworthy.

Another CVSG is certainly an option here. But, unless the SG's position has changed in the last 14 months, that course is not likely to be especially fruitful. As noted, the SG's last submission did expressly decline to address the applicability of the FWPCA to a pure damages action. Because, however, resps are also seeking injunctive relief, I doubt the government's postition would be any different in the circumstances of this case. Even if it were, it seems to me that its postition would only bear on the merits and not on whether the case was certworthy.

Although a CVSG certainly couldn't hurt, I recommend a GRANT.

There is a response.

March 21, 1986

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 85-1233

INTERNATIONAL PAPER CO.

vs.

QUELLETTE

Note - The flat conflict between CA7 & CA2 & DC here - Memo. p 9

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.	SG views	✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											
.....													

September 23, 1986

INTERNA GINA-POW

85-1233 International Paper Co. v. Ouellette (CA2)

MEMO TO FILE:

The actors in this drama are the plaintiffs below (respondents here), Vermont residents who own property in Vermont on Lake Champlain. Defendant below, petitioner here, is the International Paper Co., the largest in the United States, that operates a paper mill across the Lake near the famous French and Indian War site of Ticonderoga. I inject here that Lake Champlain is one of the most beautiful and historic of our eastern lakes.

Respondents brought this suit for damages and an injunction in which it was alleged that pollution of the waters of Lake Champlain - an interstate lake - by petitioner's paper mill constituted a "continuing nuisance". The suit was brought originally in state court, and was removed to the DC of Vermont (Chief Judge Coffrin, presiding). Petitioner moved to dismiss the complaint pursuant to Rules 12(c) [Motion for Judgment on the Pleadings], and Rule 56(c) [Summary Judgment]. Petitioner contended (i) that its paper mill was operating pursuant to a permit issued by the National Pollutant

Discharge Elimination System (NPDES) that permitted discharges of specified amounts; and (ii) that federal rather than state law applies to interstate water pollution; and (iii) that the Federal Water Pollution Control Act (FWPCA), preempted the field of water pollution abatement, thus barring any claim brought under federal law or state common law for interstate water pollution.

The DC, in a full opinion, concluded that the FWPCA authorizes actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred; and that the respondent's complaint stated a cause of action for common law nuisance. In reaching this conclusion, the DC recognized that it created a conflict - at least in part - with CA7's decision in Illinois v. City of Milwaukee, 731 F.2d 403 (1984), cert. denied by this Court. In that case, CA7 concluded that §1365(e) of the FWPCA merely preserved the right to bring suit against a water polluter in the courts of the state from which the discharge of the pollution occurred, and also pursuant to the laws of that state (sometime referred to as "state I"). The DC in this case rejected the reasoning of CA7, although it did note

that here only private parties are involved whereas in Milwaukee the states of Wisconsin and Illinois also were involved. Nevertheless, the rationale of CA7 with respect to which law controls conflicts with the conclusion reached in the present case that the law of Vermont (State II) controls.

Petitioner's brief, prepared by one of New York's better law firms (Simpson, Thatcher and Bartlett), relies - of course - on the Milwaukee case. Petitioner emphasizes policy goals. It points out, with a reason, that the DC and CA2 in this case have "adopted a construction of FWPCA, and of this Court's precedents, that would produce a parochial patchwork of conflicting multistate regulation of interstate waters, and of 'point sources' that discharge into such waters." It was noted that such a reading of the federal statute would defeat the purpose of a comprehensive system of federal and source state regulation of the discharge of pollutants into interstate waters. Emphasis also is placed on the practical problems that the decisions below would cause. A company like petitioner may discharge a fluid into the waters of an interstate lake that has boundaries on several states. If, as would be entirely possible if not

likely, the common and statutory laws of these states may vary so that such a company - even though its discharge was legal under federal standards - nevertheless could face damage suits based on the differing laws of several states. This argument has substantial appeal.

Nevertheless, and I must say to my surprise, the SG has filed an amicus brief strongly supporting affirmance of the basic holding of the courts below. I should have said above that CA2, in a brief PC, affirmed the Vermont DC except in respects not presently relevant. The SG first notes that respondent's complaint did not contend that only the nuisance law of Vermont must be applied. Rather, apparently the complaint can be read as relying on whichever state nuisance law may apply under federal preemption principles and state choice of law rules. The SG then notes that the Clean Water Act expressly preserves New York common law in a case such as this, and that therefore a Vermont federal court sitting in Vermont had jurisdiction to apply New York law. On this basis alone, the SG concludes that the DC correctly denied petitioner's motion to dismiss.

As the courts below did not confine their rejection of petitioner's motion to this basis, the case presents

the more difficult question whether federal law has preempted the availability in this action of Vermont's nuisance law. The SG concludes, for reasons not entirely clear to me at this time, that the decision below could be read as holding that "either New York or Vermont law could govern all aspects of this case, depending solely on Vermont's choice of law principles", citing Klaxon Coe v. Stentor Electric Co., 313 U.S. 487. The SG states that this view - while unnecessary to the result in this case - is "erroneous in its broad and unlimited scope". The SG then makes this distinction:

> "Respondents may not rely on Vermont nuisance law to support either an abatement remedy or a punitive damages award, unless New York law would itself call for application of Vermont law. In the Clean Water Act Congress deliberately assigned the federal government and the source state (New York) the preeminent roles in fashioning effluent limitations and standards ... applicable to source of interstate pollution." (Br. 6).

But a claim for compensatory relief based on Vermont nuisance law is not subject to the "same federal preemption limitations. The Federal Clean Water Act and its legislative history explicitly preserve any otherwise applicable state common law damage remedies, even when a discharger of a pollutant is in compliance with federal

regulations." The SG was not "unaware of the problems presented to an interstate discharger" created by this view that permits the application of varying state laws to the same pollution. But this is a "policy choice" that should be left for Congress.

* * *

This case is a difficult one for me. I would like a memorandum with my clerks recommendations. I have not examined the two federal statutes primarily at issue, and am particularly interested in whether the SG's interpretation of them - in the light of preemption principles - is reasonable. I agree that the views of the courts below, now adopted in major part by the SG, places companies like International Paper into difficult positions. We have a number of large lakes in this country on which several states have borders, and I suppose it is quite possible that the nuisance laws of these states - both common and statutory - vary widely. I am interested in the distinction the SG draws between compensatory and punitive damages.* If his view of the Clean Water Act in this respect is correct, the case will be a great deal easier for me. It ~~would~~ may make sense for

* On further reflection, I find it difficult to agree with the SG's distinction.

parties like respondents to recover compensatory damages, but there are strong reasons of fairness against permitting punitive damages. In this case, for example, it appears that petitioner is in full compliance with the Clean Water Act and could have had no clear idea whether additional steps must be taken to prevent being held liable under the common law or statutory law of adjoining states. Thus, there hardly could have been any "malicious" or grossly negligent conduct by petitioner.

LFP, JR.

adl 10/02/86

Fill

Reviewed 10/2. A carefully reasoned memo that fairly weighs the three competing views — those of Petr., Respt. (Vt); and S.G. Andy would Reverse, though recognizing that no answer is clearly right. See p 15-17

BENCH MEMORANDUM

To: Mr. Justice Powell October 2, 1986

From: Andy

Re: International Paper Co. v. Ouellette, No. 85-1233

Argument: Tuesday November 4, 1986

Cert to the CA2 (Kaufman, Pratt, Miner)

QUESTION PRESENTED

The question presented is whether the Federal Water Pollution Control Act authorizes a common law suit brought in Vermont court under Vermont law, where the source of the alleged injury is located in New York.

I. BACKGROUND

Lake Champlain forms part of the boundary between New York and Vermont. International Paper Co. ("IPC") is a corporation located on the NY side of the lake, resps are property owners on the Vt shore. Resps filed a class action suit against petr in 1978, alleging that IPC was creating a "continuous nuisance" by discharging pollution-causing effluents into the lake. Resps asked for $20 million in compensatory damages, $100 million in punitive damages, plus injunctive relief which would require petr to restructure its water treatment system.

A word about the statutory background is necessary to set the stage for this dispute. The discharge of effluents into interstate waters is regulated by the Federal Water Pollution Control Act, 33 U.S.C. §1251, et. seq. (1982) ("FWPCA"). Under the Act, the Environmental Protection Agency establishes minimum discharge standards which a corporation (the "source") is required to meet to obtain a federal operating permit. The state in which the source is located (the "source state") then has the option to set more stringent discharge standards, in which case the state standards supersede the federal requirements. For purposes of this case we may assume that IPC met all of the federal and NY permit requirements.

EPA sets standards

"Source state" may set higher standard

Petr met all fed & NY standards

The FWPCA contemplates a lesser role for states which share the waterway with the source, even those these states may be harmed by the pollution (the "affected states"). Before the federal permit is issued, the affected states may lodge a protest to the proposed standards with the EPA. A state may not,

however, block the issuance of a permit or establish a permit system of its own.

In response to the class action complaint, petr moved for judgment on the pleadings and summary judgment, claiming that common law suits are preempted by the FWPCA. IPC's argument was based on a trio of pollution cases involving Illinois and the City of Milwaukee. In Milwaukee I, this Court created a federal common law remedy for injuries caused by interstate water pollution. Illinois v. Milwaukee, 406 U.S. 91 (1972). Although the issue was not presented directly, it was clear from the decision that this federal remedy preempted all state common law actions. Congress noted, however, that future legislation could abbrogate the need for federal common law. Id., at 107.

Congress then passed detailed amendments to the FWPCA in 1972. Consequently, the Court in Milwaukee II ruled that the federal government now had "occupied the field" of pollution regulation, and that therefore federal common law was preempted. 451 U.S. 304 (1982). The Court specifically declined to rule whether state actions remained viable in light of the amendments.

Finally in Milwaukee III, the CA7 ruled that the effect of the two Supreme Court decisions was to preempt state common law actions as well. 731 F.2d 403 (CA7 1984), cert. denied sub nom, Scott v. City of Hammond, 105 S. Ct. 979 (1985). The CA7 reasoned that Congress could not have intended to allow each state along an interstate waterway to impose its own law on the source, thereby establishing a liability standards beyond what was required by the permit. The only exception, said the CA7,

was that common law actions could be maintained in the source state using source state law. IPC argued in its motions that under the decision and reasoning in Milwaukee III, resps were barred from filing suit in any state except NY.

The Vt district court rejected the CA7's conclusions and denied the motions. The dc began by acknowledging that the regulation of interstate water pollution normally is a matter of federal law. The question, said the court, was whether the FWPCA preserved state common law rights. The dc looked to 2 sections of the 1972 FWPCA amendments for its answer: §1370 states that

> nothing in this chapter shall ... be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the [boundary waters] of such States.

In addition, §1365(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.... (emphasis added).

The dc held that these two provisions (collectively, the "savings clause") made it clear that Congress did not preempt the field entirely. The court noted that at the time the savings clause became part of the FWPCA, interstate water disputes still were governed by state law. The dc thus found it "completely reasonable" to assume that Congress intended to preserve all common law actions, even those filed in the affected states. The court rejected the CA7's conclusion that the savings clause merely preserved the right to sue in the source state under

source state law. The dc found no support for this distinction in either the statute or the Milwaukee opinions.

The dc hypothesized that the CA7's exception for source-state claims was an attempt to reconcile the plain language of the savings clause with the perceived problems of allowing the law of several states to regulate the actions of a single source. The dc concluded that these concerns were exaggerated, finding that state common law actions would have only an "incidental" effect on pollution regulation. The court also distinguished this case from the Milwaukee decisions, noting that here the dispute involved two private parties, thereby removing any danger of one state interfering with another's sovereign interests.

Private parties only

The CA2 affirmed the dc holding and reasoning in a short, unpublished opinion.

II. DISCUSSION

The parties agree that interstate water pollution is primarily a matter of federal law. There also is no disagreement that the FWPCA permits some type of state common law action to supplement federal remedies. The only issue is whether and when an action may be brought under the law of an affected state.

Only Q is whether & when an action may be brought by a private party of a non-source state

Petr, resp, and the SG naturally have different ideas about the degree to which the FWPCA allows common law suits. Their respective positions are outlined below; unfortunately, none provides a completely satisfactory solution. (I agree)

A. Only in the "Source" State (view of Petr.)

IPC adopts the reasoning of the CA7 in Milwaukee III. Petr argues that the FWPCA precludes all common law suits except those filed in the source state under source-state law. IPC says its position is supported by precedent, legislative history, and sound public policy.

The first prong of petr's argument is that the savings clause should be interpreted narrowly. IPC claims that the clause did not "save" any right to file suit in an affected state, because by the time 1972 amendments were passed, state common law had been preempted completely by federal common law. See Milwaukee I, 406 U.S., at 107 & n. 9. Petr concedes that prior to Milwaukee I, state law arguably controlled interstate water pollution disputes. See Ohio v. Wyandotte Chemical Co., 401 U.S. 493, 498 n. 3. (1971) (similar pollution dispute in federal court "would have to be adjudicated under state law." [citing Erie]). But Milwaukee I was decided 6 months before final passage of the amendments; Congress thus must have been aware that at the time the savings clause became law, there was no reserved state right of action.

IPC next asserts that if the savings clause did not preserve state suits, the authority to do so must be implied from the FWPCA. Petr claims, however, that it is inconsistent with the statutory scheme to find such a right. Congress clearly intended to give primary responsibility for setting pollution standards to the EPA and the source state. If each affected state were allowed to impose its own laws on the source, this intent is

frustrated because sources will be forced to adjust their discharge levels to comply with the most stringent liability standard imposed by state common law. The permits cease to establish the permissible level of discharge, and thus become superfluous. Surely Congress did not intend to establish an elaborate permit system to regulate pollution, while at the same time leaving open the possibility that a single source may be regulated by each state along the waterway.

Finally, a contrary rule would subject the source to a variety of amorphous and possibly inconsistent common law standards from the affected states. See Milwaukee III, 713 F.2d at 414 (allowing common law suits would make it "virtually impossible" to predict standards for liability). It is unreasonable to expect a source to monitor all the common law developments in each affected state, and to constantly adjust its discharge level accordingly.

Because of these concerns, says IPC, the most logical reading of the savings clause is that Congress only intended to preserve the right to bring common law suits under source state law. This reading preserves the EPA/source-state partnership, and is consistent with the statutory scheme of allowing source states to impose more stringent controls on pollution. It also subjects the source to only one body of common law, avoiding the confusion and possibly inconsistent results that would come from a series of decisions from the various states.

Although petr raises legitimate concerns, I am unpersuaded by large parts of its argument. First, I think it is speculative

to assert that Congress meant to "save" the decision in Milwaukee I in the 1972 amendment. The savings clause was drafted and debated in both Houses of Congress before Milwaukee I was decided, and petr does not cite any legislative history to show that Congress noted or discussed the change in the law before the amendments were passed. As the Court recognized in Milwaukee II:

> It is difficult to argue that particular provisions [in the amendment] were designed to preserve a federal common law remedy not yet recognized by this Court [in Milwaukee I].
> ...
> During the legislative activity resulting in the 1972 Amendments ... this Court's decision in Ohio v. Wyandotte Chemical Corp. ... indicated that state common law would control a claim such as [the one in the present case]. 451 U.S., at 327 n. 19. (emphasis in original).

IPC's better argument is that the decision below allows affected states to override the "statutory permit system" by requiring the source to serve several masters. Congress wanted the source states to control its own pollution standards, but the Vt dc decision allows other states to frustrate that goal. New York, for example, may have made a reasoned ~~to~~ decision to allow "X" amount of effluent discharge. This level may be the same as the federal standard or it may be higher; regardless, it represents NY's judgment of how to balance the competing interests of clean water, costs to industry, competing uses of the water, etc. A Vermont nuisance suit, however, trumps the NY decision. A company such as IPC will now have to set its discharge level to satisfy Vt's calculation of what level of pollution is "correct" (i.e., what level will avoid liability). This almost surely interferes with what Congress contemplated.

This is a compelling argument, perhaps even a decisive one; nevertheless, there are flaws in petr's reasoning. First, nothing in the language of the savings clause or the legislative history indicates that suits from citizens of affected states are barred. More specifically, there is no support for petr's proposed distinction between source-state and affected-state claims. All indications are to the contrary; as one Senate Report stated, the savings clause:

> would specifically preserve any other rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages. S. Rep No. 92-414, 92d Cong., 1st Sess 81 (1971) (emphasis added).

Second, IPC overplays its hand in arguing that the decision of the Vt. dc will render the federal permit system superfluous. I agree that common law suits have the potential to override the standards set in the permits, but this is equally true whether the common law suit is filed in the affected state or in the source state. A NY judicial decision has the same potential to frustrate the decision made by the EPA and the NY legislature as does a Vt judgment. (In other words if the EPA sets the discharge level at "X", and NY sets the level at "X-1", the NY courts still may find common law liability unless the discharge is "X-2" or lower.) The interference with the permit system occurs when any state common law suits are allowed, not simply those filed in affected states. Petr does not explain why Vt suits will interfere with the permit scheme, but why the NY suits will not.

Point
Other industries are subject to varying state laws. But does Petr. do business in Vt.?

Finally, it is hard to see why we should be concerned that IPC may be subjected to varying laws from affected states. Other types of industry routinely are required to comply with disparate state laws when they engage in interstate commerce. Car manufacturers, for example, must meet higher emission standards in California than in Nevada. There is no reason to think that companies which pollute interstate waterways are less able to adapt to different laws which regulate a single type of conduct than any other type of business. So while the policy concerns about subjecting IPC to inconsistent Vt law are legitimate, they should not be the exclusive consideration when determining the scope of the savings clause.

B. All State Actions Authorized

Resps takes the most expansive view of the savings clause. They maintain that as long as jurisdiction otherwise is proper, any common law suit may be brought in any affected state under that state's law. This position is appealing in some respects, but does not answer the concerns raised by petr.

To a large extent resps' arguments are the obverse of the IPC claims discussed above. Resps start with the premise that this type of dispute would have been governed by state law before the 1972 amendments, and that consequently the savings clause preserves the action now. A diversity tort suit normally is governed by the law of the state in which the injury occurs, Young v. Mancusi, 289 U.S. 253, 258-59 (1933), raising a presumption in this case that Vt is a proper forum. Resps argue

that the only way for IPC to overcome this presumption is to prove that the FWPCA explicitly preempts a common law remedy.

This Court has found federal preemption in two types of situations relevant to this case. First, preemption is presumed when the "scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Hillsborough County, Fla., v. Automated Medical Laboratories, 105 S. Ct. 2371, 2375 (1985). Second, state law is nullified to the extent it "actually conflicts" with the federal statute.[1] *Ibid*.

Resps persuasively argue that the FWPCA is not so comprehensive that Vt law is preempted. Both the savings clause and the provision allowing source states to impose higher permit standards prove that Congress "left some room" for supplemental state regulation. It is not enough for IPC to show that sound policy considerations lead to an inference of preemption; Congress must have made a relatively clear statement that federal law provides the exclusive remedy. Id., at 2377. Resps argue that here there was no such statement, and that therefore Vt retains its traditional power to protect its environment and the health of its citizens.

---

[1] The Court also has found preemption when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." 105 S. Ct. at 2375 (citation omitted). The parties do not argue this point separately, and so neither do I. It strikes me that this standard is covered fully by examining whether the federal statute is so comprehensive that there is no room for state regulation, and whether there is an actual conflict between state and federal law.

It seems, however, that a Vt nuisance suit against a New York source does conflict with the the FWPCA. As mentioned, the only role contemplated for affected states is that they may comment and object to the proposed permit levels set by the EPA or the source state. If Vt citizens may bring a nuisance suit, however, they obtain a more powerful voice in setting pollution levels than the FWPCA provides. Resps thus will be able to direct the behavior of polluting companies indirectly through lawsuits, when they could not do so directly under the Act.

Vt — not the Fed. Comm. would set pollution levels

More importantly, certain common law remedies could eviscerate the FWPCA permit system. Resps in this case are asking for injunctive relief; if successful, they could force IPC either to restructure its discharge system or to shut down. IPC must account for this possibility when making its business decisions, despite its compliance with federal and NY permit requirements. Even if injunctions were not allowed, a $100 million judgment against IPC surely would cause the company to change its behavior to reduce the discharge, thus forcing the desired abatement.

The bottom line is that by reading the savings clause as narrowly as petr suggests, out-of-state citizens have no rights, which is inconsistent with the plain language of the statute. If the statute is read broadly, however, affected-state citizens may circumvent the statutory scheme, which is contrary to the obvious Congressional intent. Consequently, the SG offers a third alternative, one that makes its own policy judgment about the proper level of out-of-state enforcement.

SG's compromise

C. Allowing Compensatory Damages Only

The SG agrees that Vt. citizens should be permitted to bring suits against NY polluters, even under Vt. law. Because of the concerns outlined above, however, the SG would place an important qualification on this right. If an action is for compensatory damages, argues the SG, the suit is authorized by the savings clause. The suit is preempted, however, if the action is for punitive damages or for injunctive relief to force an abatement of the pollution.[2]

SG's resolution

The first part the SG's claim is similar to that raised by petr. Amicus argues that the issuance of an injunction would conflict with the FWPCA because it would allow affected states to impose their own discharge standards on the source, regardless of the wishes of the EPA or the source state. The FWPCA forbids an effort by affected states to supplement the federal permit requirements, but this is precisely the result of a Vt injunction. The Vt dc rejected this argument, finding that an abatement remedy would not interfere with the Act because the goal of both the FWPCA and a nuisance suit is to prevent pollution. The SG argues that this conclusion is misguided: simply because the goal of a state law is consistent with the

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[2]The SG further qualifies the rule by stating that any suit may be brought under Vt law if the New York "choice of law" statute so provides. The parties spend some time discussing the effect of the different choice of law rules, without shedding much light on how this case should be resolved. I do not discuss the choice of law issue in this memo, because I think it is both confusing and relatively unimportant.

federal law does not mean that there is no conflict. A state law also is preempted if it conflicts with the federal statutory mechanisms designed to meet that goal. See Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board, 467 U.S. 461, 477 (1984); SG Brief at 21-22.

The SG does not claim that all suits are similarly barred, even though it concedes there is "considerable force" to the argument that "actions" should be preempted vel non, rather than individual remedies. The SG maintains that while injunctive remedies should be preempted, compensatory damages should be recoverable under Vt common law. The distinction, said the SG, is that compensatory damages do not "regulate" the behavior of a source, and thus does not interfere with the federal/source-state partnership contemplated by the FWPCA. In theory the only role of compensatory damages is to require a source to pay for the external costs it creates by its pollution. Because these damages do not give a source a significant incentive to change its behavior, they are not inconsistent with the FWPCA's ability to regulate pollution.

Punitive damages, on the other hand, encourage the source to alter its conduct. The SG argues that if an affected state has the power to punish a source, it effectively is regulating that source's discharge level. Punitive damages therefore are more like injunctive relief than like compensatory damages, and accordingly should not be allowed in any action except those under NY law.

The SG proposes a neat solution, but not a perfect one. The biggest problem is that there is no support for this division of remedies in the statute or legislative history. The second problem is that the distinction between compensatory and punitive damages strikes me as artificial. The difference to the source between paying money to compensate and paying to atone for outrageous behavior is one of degree, not kind. While compensatory damages are easier to quantify and therefore create less uncertainty, the result to the source is the same: it must pay higher costs to conduct the same business than it would absent the liability. If IPC, for example, has to pay huge amounts of compensatory damages, it presumably will change its business practices or water treatment system so that it will discharge fewer effluents than it did before the nuisance suit was filed. It is unclear why this incentive is not "regulatory" as well.

But no support for SG in statute or leg. hist

III. SUMMARY AND RECOMMENDATION

The best argument for each position is easy to summarize. Resps claim that the plain language of the savings clause preserves a common law suit under Vt law, and that there is no indication that the FWPCA preempts such a suit. Petrs, on the other hand, say that common law suits will be so disruptive of the regulatory scheme established by statute that Congress must have intended to restrict state actions to source-state courts. The SG agrees that Vt has jurisdiction to consider claims for compensatory damages, but argues that injunctive relief or

punitive damages ultimately regulate the source's conduct and interfere with the permit system, and therefore are preempted. It is easy to attack or defend each of these positions.

I do not know what the right answer is in this case. The SG presents the most attractive solution for this particular dispute, but I am afraid that an attempt to distinguish among remedies will cause confusion among lower courts in subsequent preemption decisions. If the Court adopts the SG's recommendations, it may be prudent to emphasize that "splitting" remedies for preemption purposes is not favored. I also am dubious about the substantive difference between compensatory and punitive damages. Given the complete lack of statutory authority for the SG's position, this type of distinction perhaps should be drawn by Congress rather than the courts.

no statutory authority for SG's position

I tentatively recommend that the Court find in favor of petr, and rule that common law actions from affected states are preempted. Despite the clear language of the savings clause, it would be illogical for Congress to have preserved the right to evade the careful dictates of the FWPCA. If Vt courts may issue an injunction to prevent further discharge from a NY source, the permit system is nullified. If IPC is held liable for $100 million in damages -- despite its compliance with the federal and NY permits -- the regulatory scheme has been frustrated. As the Court stated in Milwaukee II:

Andy would find preemption

> The fact that the language of [the savings clause] is repeated *in haec verba* in the citizen suit provisions of a vast array of environmental legislation indicates

> that it does not reflect any considered judgment about what remedies were previously available or continue to be available under any particular act. 451 U.S. at 329 n. 22 (emphasis added).

The Court should not read the savings clause so literally that it leads to a result inconsistent with the rest of the FWPCA.

I recommend that the decision of the CA2 be reversed.

3

File L.F.P.

Preliminary Note 10/2

85-1233 International Paper Co v. Ouellette, et al (CA 2)

The suit: Resps., residents of Vt. on Lake Champlain, brought this common law nuisance suit in DC of Vt. against Petr. [on N.Y. side of Lake] for polluting the lake waters. They sought an injunction plus $20 million of compensatory & $100 million of punitive damages

The Fed statute: Federal Water Pollution Control Act (Act) regulates the discharge of effluents into interstate waters. Under the Act, the EPA establishes minimum discharge standards to obtain a federal permit. The "source state" (N.Y.) has the option to set more stringent standards.

Under statute "source state" may set higher standards

Ask: Petr has complied. It is conceded that Petr has met all Fed & N.Y. permit requirements.

DC & CA 2. On summary judg., DC rejected Petr's argument that the Fed Act preempted all common law suits. DC disagreed with CA 7's decision in ~~Mil~~ Milwaukee III, & relying on two sections of Act (referred to collectively as the "saving clause"), found that Congress had intended to preserve all common law actions. CA 2 aff'med ~~in~~ in a brief op., accepting DC reasoning.

[There is language in our decision in Milwaukee II that supports Petr's ~~[illegible]~~ preemption argument, as CA 7 found]

(See next ~~p~~ page)

85-1233 Int. Paper Co case (cont.)   p 2.

Brief summary of the positions of the Petr., the Respt, and the SG:

1. Petr: Common law suits, that may vary among several States that border on an interstate water ways, would be seriously disruptive of the Fed. regulatory program and contrary to a major purpose of the Act. Also, would impose the burden & uncertainty for riparian owners of being subject to different standards - & injunctions as well as damages. This would be esp. true where as here, if Respt win, Petr could be enjoined from operating its plant until it met Vt's as yet unspecified standards. In addition, Respt claim $120 of compensatory & punitive damages.

Does ~~this~~ Fed Act apply to Rivers? - eg Miss River?

Plant shut down

2. Respt. Rely heavily of the language of the "Saving Clause" in §§1370 & 1365 of Act, & some language in legislative history, to effect that Act did not restrict the right any person has "under any statute or common law to seek ~~enforcement~~ ... any other relief".

3. SG's compromise: Vt. has juris to consider common law claims ~~for~~ for compensatory damages, but not for punitive damages or for injunctive relief. But there is no support for SG's views in language or history of the Act.

not a tenable position

November 4, 1986

To: Justice Powell

From: Andy

Re: International Paper v. Ouellette, No. 85-1233

This case involves the preemptive effect of the federal permit system for water pollution control on the common law of non-source states. You asked me to determine which bodies of water were subject to the permit requirement. The short answer: all of them. A permit is required before a source may discharge pollution into any navigable water. The Clean Water Act defines "navigable water" to mean "the waters of the United States" 33 U.S.C. §1362(7). The word "navigable" was intentionally omitted from the definition, in order to give the Act the widest possible scope. See R. Zener, Guide to Federal Environmental Law, 62 and n. 3 (1981) (citing legislative history). The Act would appear to cover even intra-state rivers and lakes. Thus any source that discharges into the Mississippi River, Lake Champlain, or small streams has to get a permit. The concerns about subjecting these sources to conflicting laws from affected states remains.

Rudy

85-1233 INTERNATIONAL PAPER v. OUELLETTE Argued 11/4/86

Reardon (Petr) (Simpson, Thatcher)

Relies on Milwaukee v Ill

Clean Water Act is comprehensive but permits source state to impose more stringent regulation

1st issue: extent to which Vt law may be applied

2nd issue: juris of Vt. ct.

N.Y. ~~is~~ - the "source" ~~st~~ state - may set higher

Under ~~the~~ statute ~~one~~ one may bring a suit in state ct. of source state.

As to SG's position, Petr. finds no basis for distinguishing bet. compensatory & punative damages.

SOC asked whether ~~[illegible]~~ Silkwood doesn't support CA2's holding - as Silkwood approved a state law negligence suit despite broad regulation of nuclear plants.

[See CA7's op in Ill v. Milwaukee, 731 F2d ~~[illegible]~~ 403, at p 410]

Langrock (Resp)

Add little to the brief of Resp.

Wallace (SG)

SG agrees a state ct. may entertain state law claim for injunction & compensatory damages relief. Vt. law may be applied.

Relies on Silkwood (but there was no interstate problem in Silkwood)

Reardon (Reply)

GTP 11/6/86

83-1233 Int. Paper Co

SG's distinction makes little sense

In Milwaukee v. Ill II we held that Clean Water Act preempted federal common law of nuisance. Also preempts state law.

Our opinion repeated said that the Act "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert adm. agency"

451 U.S. at 317

Purpose was to preempt state law that could vary widely. Fed common law is uniformly applied.

Aff 9-0 on many different grounds.

No. 85-1233 International Paper v. Ouellette Conf. 11/7/86

The Chief Justice Affm as modified

Fed law has not preempted all state law. Vt DC may not be entirely right but case should go to trial.

Fed. Act does save certain state law.

Agree with SG. Would not allow injunctions — nor punative damages

Justice Brennan Aff in

Fed Act does not preempt all state nuisance laws.

Milwaukee II leave this open.

Fed act was not designed to limit states from imposing stricter standard.

SG's position is unsound. Moreover, the TC has not yet imposed punative damages or injunctive relief.

Justice White Aff in part.

I don't understand why he would aff in

Act expressly permits a source state to set higher standards

OK for Vt to bring a diversity suit to apply N.Y. law.

Difference bet. a source state and other states

x x y

9 J 9 wrote, talk to BRW

Justice Marshall Aff in

Agree with WJB

Justice Blackmun Aff in - agree with WJB

No leg. hist ~~to~~ supports right of state to impose

No distinction here between compensatory & punitive damages

Justice Powell Aff in to permit case to go to trial.

See my notes. I agree with B.R.W that only the law of the ~~source~~ state apply.

I would say that D.C erred in applying common law of Vt.

JUSTICE STEVENS Affirm

Not clear that there is a difference between source state & other states.

note: (B.N.W. noted that before even the source state may impose higher standards it must go through prescribed procedures)

Nothing in statute that prevents other states from setting higher standards.

JUSTICE O'CONNOR Affirm - but decide which state law applies

Milwaukee I applied fed. common law. Then II preempted fed common law.

Under principles of Milwaukee only fed common law would have applied.

JUSTICE SCALIA Affirm but say Vt may apply only N.Y. law

Only issue is whether Vt may apply

may apply Vermont law.

N.Y. law - source state - applies in Vt.

Fed common law prevents Vt. from applying Vt law - only N.Y. law.

File

International Paper Co. v. Ouellette, No. 85-1233

Andy's outline

Question Presented

The case involves preemptive effect of Fed. Water Pollution Control Act. Question is whether Vermont courts may apply Vt. law in suit against NY pollution source.

I.

A. Procedural History

(1) identity of parties, beginning of dispute

(2) decision of Vt. dc, conflict with Milwaukee III (CA7)

(3) granted cert; now affirm decision not to dismiss, but modify opinion below; must apply law of the source state

B. Regulatory Background

(1) Law is ambiguous on what law controlled before 1970s; federal c/l (Hinderlider), then suggestion of state law (Wyandotte)

(2) Milwaukee I decision -- federal c/l applied

(3) Amendments to FWPCA, then Milwaukee II -- no more fed. c/l

(4) description of FWPCA structure

a) requirement of federal permit

b) option of source state to impose higher requirements

c) lesser role for affected states

II.

(1) When will federal statute preempt state law?

(2) is there preemption here? (emphasis on comprehensive structure of Act)

(3) there is tension between preemptive scope and plain language of savings clause (SC)

a) must be some content to SC; "any person, any law"

b) Vt dc and CA2 ruled that SC should be read to allow affected states to impose own laws

(4) Although a close case, cannot read SC that broadly

a) Congress could not have intended to let SC interfere with goals and structure of Act

b) this would be result if allowed Vt law to apply

(5) DC reading conflicts with permit system

a) conflicts single source to a variety of laws

b) would give affected states control over discharge

c) interferes with federal/source state partnership

d) (possibly footnote?) SG argues that should distinguish between remedies; no support in the statute for the position

e) conclusion: can't impose affected state law on source state

(6) Question remains as to what state actions are not preempted

a) at minimum, can sue in source state under source state law; this applies whether injured party is resident of Vt or NY

HAB concern

b) also can sue if NY law itself requires application of Vt law; no interference with federal/source state partnership

III.

Summary: decision not to grant summary judgment is affirmed; resp may sue in Vt dc, but only if use NY law.

Ouellette (CA7 decision)

Justice Powell:

Here is the CA7 discussion of the savings clause provision of the FWPCA.

except for provisions expressly protecting the interests of other states, and in the light of the conflict and confusion which could result from any different construction, we conclude that this provision refers to the right of a state with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state.

Section 1370(2) requires that except as expressly provided nothing in FWPCA shall be construed as impairing or in any manner affecting any right or jurisdiction

the competing claims of states in the environmental quality of interstate waters. Illinois' failure to participate in that process cannot now justify unilateral application of Illinois law to these discharges. If Illinois desires more stringent protection from out-of-state discharges, it must turn in the first instance to the EPA and federal law for the equitable accommodation of its interests.

6. On its face it is arguable that § 1370 contemplates only legislatively or administratively prescribed state standards. The Supreme Court has suggested, however, that it may refer to effluent limitations imposed as a result of court decrees under the common law of nuisance.

In fact the Senate Report on the FWPCA Amendments of 1972 stated with respect to the saving clause:

"It should be noted, however, that the section would specifically preserve any rights or remedies under any *other* law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S.Rep. No. 92–414, p. 81 (1971) (emphasis added).

s with respect to the waters
undary waters) of such states.
ests that because the discharg-
nsin and Indiana cause an ad-
within the boundary waters of
provision saves its jurisdiction
laws so as to regulate activity
and Indiana in order to avoid
the future. We read *Milwau-*
ding that Illinois law could not
his situation so that there was
urisdiction to be saved. In any
he light of the structure of
the potential conflict and con-
think Congress intended no
more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters.[7]

Subsection (e) of § 1365, authorizing a suit for enforcement in the federal judicial district in which the source is located, contains similar saving clause language:

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

See also S.Rep. No. 92–451, pp. 23–24 (1971) (Report on the MPRSA) (the citizen-suit provision does not restrict or supersede "any other right to legal action which is afforded the potential litigant in any other statute or the common law").

It might be argued that the phrase "any effluent standard or limitation" in § 505(e) [33 U.S.C. § 1365(e)] necessarily is a reference to the terms of the FWPCA. We, however, are unpersuaded that Congress necessarily intended this meaning. The phrase also could refer to state statutory limitations, or to "effluent limitations" imposed as a result of court decrees under the common law of nuisance.

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 16 n. 26, 101 S.Ct. 2615, 2624 n. 26, 69 L.Ed.2d 435 (1981).

7. Under this interpretation, § 1370(2) is not reduced to a nullity. The provision ensures that states retain their power to regulate discharges within their "waters (including boundary waters)." *See supra* n. 1.

CA7 File 85-1233

any other relief (including relief against the Administrator or a State agency).

The Supreme Court concluded this subsection is common language accompanying citizensuit provisions and ... means only that the provision of such suit does not revoke other remedies. It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizen suits does not do so.

Milwaukee II, 451 U.S. at 329, 101 S.Ct. at 1798.

This provision may well preserve a right under statutes or the common law of the state within which a discharge occurs (State I) to obtain enforcement of prescribed standards or limitations, and we see no reason why such a right could not be asserted by an out-of-state plaintiff injured as a result of the violation. However, it seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II. Such a complex scheme of interstate regulation would undermine the uniformity and state cooperation envisioned by the Act. For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless. In our opinion Congress could not have intended such a result.

Savings clause limited to "source" state

There is nothing to suggest that the actions before us were brought to seek enforcement of an effluent standard or limitation. In any event we think that the reference in § 1365(e) to statute or common law, like the reference to right or jurisdiction of a state in § 1370, is to a statute or the common law of the state in which the discharge occurs.[8]

VI. CONCLUSION

A. *Milwaukee Case*

Illinois asks us to affirm the district court judgment on the basis of the Illinois state law claims. It has not sought to enforce an effluent limitation under Wisconsin statutory or common law nor sought to enforce federal limitations as provided for under the 1972 FWPCA. Because we hold that the logic of *Milwaukee I* and *Milwaukee II* and the 1972 FWPCA preclude the type of application of state law sought by Illinois in the area of interstate water pollution, the judgment of the district court is reversed and the case remanded for dismissal.

B. *Illinois v. Hammond*

The pleadings in this case and the *Scott* case make it clear that the causes of action asserted rely on the application of Illinois statutory and common law. Nothing in the pleadings suggests a resort to Indiana law or the 1972 FWPCA. The order of the district court is reversed and the case remanded for dismissal.

C. *Scott v. Hammond*

There is an additional reason for dismissal of the *Scott* complaint, apart from the preclusive effect of 1972 FWPCA on a cause of action based on the Illinois law of nuisance. He has not alleged harm of a kind different from that suffered by other members of the public exercising the right common to the general public which was

8. This construction is consistent with this court's former reading of the saving clause. In *U.S. Steel Corp. v. Train*, 556 F.2d 822, 830 (7th Cir.1977) we said, "Congress has chosen not to preempt state regulation when the state has decided to force *its industry* to create new and more effective pollution control technology." (Emphasis added.)

November 17, 1986

85-1233 International Paper v. Ouellette

MEMORANDUM TO THE CONFERENCE:

The Chief Justice has assigned the above case to me to draft a Court opinion. I will be happy to undertake this if there is a majority for the view I expressed at Conference.

My Conference notes indicate that all nine of us voted to affirm in whole or in part. As the Chief Justice noted he would "affirm and modify". The principal question, as I view the case, is whether - and to what extent if any - federal law has preempted state law. In my view the District Court in Vermont had jurisdiction to try this case, but could apply only New York state law in addition to federal law. The only applicable state law in a case of this kind is that of the source state. If this view prevails, we would affirm as modified, and the case would be remanded for trial. Our opinion would make clear that the Vermont common law of nuisance is not applicable.

I believe there are at least five votes for the foregoing view, but before undertaking an opinion I would like to confirm this understanding. I would appreciate hearing from you.

L.F.P., Jr.

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 17, 1986

85-1233 - International Paper v. Ouelette

Dear Lewis,

I agree with your views that this case may be tried in Vermont and that the applicable law is that of New York.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

File

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

I thanked him & will look more closely at this when I work on the opinion.

November 18, 1986

RE: No. 85-1233 - International Paper v. Ouellette

Dear Lewis:

LFP

My view is that the federal district court in Vermont could not apply Vermont law, but could apply New York law. There are various routes to this result, and I am unlikely to stick upon which route you choose. In fact, I confess to have altered my own position several times. It seems to me, however, that the following analysis is the most honest:

(1) Milwaukee I held that federal common law governs interstate pollution -- and the opinion meant to displace both the receiving state's and the source state's law. (Though I suppose it could be said that only the former was necessary to the decision, I cannot imagine a court-created rule to the effect that both a federal common-law nuisance remedy and a Wisconsin nuisance remedy were available.)

(2) Milwaukee II held that the Federal Water Pollution Control Act supplants federal common law, but did not reach the issue "whether state law is also available," 451 U.S., at 310 n.4. I would read that reservation as leaving open the question whether the FWPCA overruled Milwaukee I so as to allow certain state remedies.

(3) 33 U.S.C. §1370 provides that the FWPCA does not "in any manner affect[] any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States" (emphasis added). In my view, this does not preclude any effect of the Act upon Milwaukee I, which dealt not with the jurisdiction of the states over their own waters, but with their jurisdiction over the waters of other states -- that is, Illinois' jurisdiction to reach acts of pollution occurring in Wisconsin waters, and Wisconsin's jurisdiction to compensate or prevent damage occurring in Illinois waters. I would find in the Act clear indication that Milwaukee I is to be adhered to insofar as jurisdiction of receiving states is concerned, and is to be departed from insofar as jurisdiction of source states is concerned, returning to source states the power to provide damages for

injury done elsewhere. I find the former (the intent not to alter Milwaukee I's exclusion of jurisdiction of the receiving states) in those provisions that give receiving states a purely advisory role in the setting of standards; it would be entirely inconsistent to allow them to trump the standards by adopting stricter standards for damage actions against out-of-state pollution. And I find the latter (the intent to alter Milwaukee I's exclusion of the jurisdiction of the source states) both in the recognition that standards prescribed by the source states will affect receiving states, and in the permission for source states to adopt higher pollution criteria for in-state damage actions. There is no conceivable reason why the latter should apply only in-state and not out-of-state as well.

Sincerely,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 18, 1986

Re: 85-1233 International Paper v. Ouellette

Dear Lewis,

I agree with you that the Vermont common law of nuisance is inapplicable in this case although the suit can be tried in Vermont.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 19, 1986

Re: No. 85-1233, International Paper Co. v. Ouellette

Dear Lewis:

I find myself in disagreement with your position. I continue to believe that the FWPCA does not pre-empt non-source state nuisance law and that the normal choice of law principles should apply in this case. At the very least, if New York law is to be applied, that law should include the New York choice of law principles which seem to me, for now, to designate the law of Vermont as the applicable law.

Sincerely,

Harry

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 18, 1986

Re: No. 85-1233 International Paper v. Ouelette

Dear Lewis,

I am in substantial agreement with your views in this case.

Sincerely,

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 18, 1986

Re: No. 85-1233 - International Paper v. Ouellette

Dear Lewis,

I adhere to my view that the federal Water Pollution Control Act does not alter choice of law principles. Thus the District Court in Vermont should apply Vermont law if this is consistent with traditional choice of law rules. If, however, a majority of the Court concludes that New York law must be applied, I may not choose to dissent.

Sincerely,

WJB Jr. /dmh

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 24, 1986

Re: 85-1233 - International Paper v. Quellette

Dear Lewis:

At present I do not believe there is any federal rule of law that preempts Vermont's common law of nuisance while preserving New York's. More importantly, I am very much opposed to fashioning a new rule of law any sooner than necessary. The only judgment under review is an affirmance of the District Court's order denying the defendant's motion to dismiss. There has been no showing that there is any difference between New York and Vermont law. It is, accordingly, not necessary to write an advisory opinion on this subject at this stage of the litigation.

In my opinion, the fact that we may have granted certiorari improvidently is not an adequate justification for abandoning normal rules of judicial restraint. In short, although you may persuade me otherwise, I do not expect to be one of your five votes.

Respectfully,

John P.S.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 24, 1986

Re: No. 85-1233-International Paper v. Quellette

Dear Lewis:

I lean toward the views expressed in John Stevens' letter of November 24th.

Sincerely,

T.M.

Justice Powell

cc: The Conference

L.F.O.
Reviewed 11/27
Keep in file

International Paper Co. v. Ouellette, No. 85-1233

FIRST DRAFT
11/26/86

This case involves the preemptive scope of the Federal Water Pollution Control Act. 33 U.S.C. §1251 et seq. (FWPCA or Act). The question presented is whether the Act preempts a common-law nuisance suit filed in a Vermont Court under Vermont law, when the source of the alleged injury is located in New York.

I

Lake Champlain forms part of the border between the states of New York and Vermont. Petitioner International Paper Company (IPC) operates a pulp and paper mill on the New York side of the Lake. In the course of its business IPC discharges a variety of effluents into the Lake

through a diffusion pipe. The pipe runs from the mill through the water toward Vermont, ending a short distance before the state boundary line that divides the Lake. Respondents are a group of property owners who reside or lease land on the Vermont shore. In 1978 the owners filed a class action suit against IPC, claiming that the discharge of effluents constituted a "continuing nuisance" under Vermont common law. Respondents alleged, inter alia, that the pollutants made the water "foul, unhealthy, smelly, and ... unfit for recreational use," thereby diminishing the value of their property. App. 29. The owners asked for $20 million in compensatory damages, $100 million in punitive damages, and injunctive relief that would require IPC to restructure part of its water

Andy - Does record show how far the boundary line is from the Vermont shore? The lake is quite wide at most places

Any evidence as to cost of this to IPC? Or does this come later?

treatment system.[1] The action originally was filed in State Superior Court, and then later was removed to Vermont Federal District Court.

IPC moved for judgment on the pleadings and summary judgment, claiming that respondent's suit was preempted by the Federal Water Pollution Control Act. With the parties' consent, the District Judge deferred a ruling on the motion pending the decision by the Seventh Circuit Court of Appeals in a similar case involving Illinois and the city of Milwaukee. In that dispute, Illinois filed a nuisance action against the city under Illinois statutory and common law, seeking to abate the alleged pollution of Lake

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[1] The complaint also requested monetary and injunctive relief for air pollution allegedly caused by the IPC mill. App. 35-36. This claim is not before the Court.

Michigan. Illinois v. Milwaukee, 731 F.2d 403 (CA7 1984) (Milwaukee III), cert. denied sub nom., Scott v. City of Hammond, 469 U.S. 1196 (1985). The ~~Seventh Circuit~~ Court of Appeal ultimately dismissed Illinois' claim, finding that the FWPCA precluded the application of one state's law against a pollution source located in a different State. The decision was based in part on the Court's conclusion that the application of different state laws to a single "point source"[2] would seriously interfere with the carefully devised regulatory system established by the FWPCA. Id., at 414. The ~~Seventh Circuit~~ court concluded that the only suits that were not preempted were those alleging violations of the laws of the polluting or source State. Id., at 413.

Under - it may help the reader to have a note here to effect that Milwaukee I & II will be discussed in Part II.

not the "circuit"

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[2] A "point source" is defined by the FWPCA as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." §502(14), 33 U.S.C. §1362(14); see 40 CFR

(Footnote continued)

IPC argued that the holding in Milwaukee III was dispositive in this case. The Vermont District Court disagreed and denied the motion to dismiss. Ouellette v. International Paper Co., 602 F. Supp. 264 (Vt. 1985). The ~~District Judge~~ court acknowledged that interstate water pollution normally is governed by federal law. ~~He~~ It found, however, that two sections of the FWPCA explicitly preserve state-law rights of action. First, §510 of the Act provides:

> "[Except as expressly provided] nothing in this chapter shall ... be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. §1370.

In addition, §505(e) states that

(Footnote 2 continued from previous page)
§122.2 (1986). ~~There is no~~ It is not dispute that IPC is a point source within the meaning of the Act.

> "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...." 33 U.S.C. §1365(e).

The District Court held that these two provisions (together, "the saving clause") made it clear that federal law did not preempt entirely the rights of States to control pollution. Therefore the question presented, said the Court, was which types of state suits Congress intended to preserve. ~~The Court~~ It considered three possibilities:[3] first, the saving clause could be construed to preserve state law only as it applied to waters not covered by the FWPCA. But since the Act

Andy - follow the form Book or to where to capitalize & how to refer to courts. May ~~[illegible]~~ style may not be right

[3] For a discussion of each of the three interpretations of the saving clause, see Note, City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution, 1982 Wisc. L. Rev. 627, 664-671.

applies to virtually all surface water in the country,[4] the District Court summarily rejected this possibility. Second, the saving clause might preserve state nuisance law only as it applies to discharges occurring within the same state; under this view a claim could be filed against IPC under New York law, but not under Vermont law. This was the position adopted by the Seventh Circuit in Milwaukee III. The Vermont Court nevertheless rejected this option, finding that "there is simply nothing in the Act which suggests that Congress intended to impose such

Andy: This is not clear to me. Is this different from the source state?

Court of Appeals for the

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[4] While the Act purports to regulate only "navigable waters," this term essentially covers all surface bodies of water, even if they are not navigable in the traditional sense. See FWPCA §502(7), 33 U.S.C. §1362(7) (defining navigable waters as "the waters of the United States"); 1 Legislative History of FWPCA Amendments of 1972, at 250 (House Consideration of Conference Committee Report). See also United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1324-1325 (CA6 1974) (requiring permit for non-navigable tributary).

limitations on the use of state law." 602 F. Supp., at 269.

The District Court therefore adopted the third interpretation of the saving clause, and held that a state action to redress interstate water pollution could be maintained under the law of ~~the~~ each state in which the injury occurred. Ibid. The Court was unpersuaded by the concern expressed in Milwaukee III that the application of out-of-state law to a point source would conflict with the FWPCA. There was no interference with the procedures established by Congress, said the District Court, because a State's "imposition of compensatory damage awards and other equitable relief for injuries caused ... merely supplement the standards and limitations imposed by the Act." Id., at 271 (emphasis in original). The Court also found that

the use of state law did not conflict with the ultimate goal of the FWPCA, since in each case the objective was to decrease the level of pollution. Ibid.

The District Court certified its decision for interlocutory appeal, see 28 U.S.C. §1292(b), and the Second Circuit affirmed for the reasons stated by the District Court. Ouellette v. International Paper Co., 776 F. 2d 55, 56 (CA2 1985) (per curiam). We granted certiorari to resolve the conflict between the Second and the Seventh Circuits on this important issue of federal preemption. ___ U.S. ___ (1986). We now affirm the denial of IPC's motion to dismiss, but reverse the lower Court's decision to the extent it permits the application of Vermont law to this litigation. For the reasons outlined below, we hold that when a court considers a

that is subject to the FWPCA,
state-law claim concerning interstate water pollution, ~~it~~
the court
must apply the law of the State in which the point source
is located.

II

A brief review of the regulatory framework is necessary to set the stage for this case. Until fairly recently, the use and misuse of interstate water was governed primarily by federal common law. See, e.g., Hinderlider v. La Plata Co., 304 U.S. 92, 110 (1938) (water apportionment); Missouri v. Illinois, 200 U.S. 496 (1906) (water pollution).[5] This principle was called into question in 1971, however, when the Court suggested in

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[5] Accord, North Dakota v. Minnesota, 263 U.S. 365 (1923); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (air pollution); see also Illinois v. City of Milwaukee, 406 U.S., at 104-107 (1972) (Milwaukee I); Glicksman, Federal Preemption and Private Legal Remedies for Pollution, 134 U. Pa. L. Rev. 121, 152-155 (1985); Note, City of Milwaukee, supra, 630-636.

dicta that an interstate dispute between a state and a private company should be resolved by reference to state nuisance law. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 499 n. 3 ("an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law" (citing Erie)).

In 1972 we had occasion to address this issue in the first of two Supreme Court cases involving the dispute between Illinois and Milwaukee. In Milwaukee I, the State moved to file an original action in this Court, seeking to enjoin the city from discharging sewerage into Lake Michigan. Illinois v. City of Milwaukee, 406 U.S. 91 (1972). The Court's opinion in that case affirmed the ~~notion~~ view that the regulation of interstate water pollution is primarily a matter of federal, not state, law, thus

Andy - I have not reread it

overruling the contrary suggestion in Wyandotte.[6] 406 U.S., at 102 n. 3. The Court was concerned, however, that the existing version of the FWPCA was not sufficiently comprehensive to resolve all interstate disputes that were likely to arise. Milwaukee I therefore held that these cases should be resolved by reference to federal common law; the implicit corollary of this ruling was that state common law was preempted. See Id., at 107 n. 9; Milwaukee III, 731 F. 2d, at 407. The Court noted, though, that future action by Congress to regulate water pollution might preempt federal common law as well. 406 U.S., at 107.

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[6] Although the Court's opinion could be read as distinguishing the rather than overruling that part of Wyandotte, a later decision made it clear that state common law did not survive Milwaukee I. See Milwaukee II, 451 U.S. 304, 327 n. 19 (1981); see also, Glicksman, Federal Preemption, supra, at 156 n. 176.

~~Shortly~~ thereafter Congress ~~passed~~ adopted comprehensive amendments to the FWPCA. We considered the impact of the new legislation when Illinois and Milwaukee returned to the Court several years later.[7] City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (Milwaukee II). There the Court noted that the amendments were a "'complete rewriting'" of the statute considered in Milwaukee I, and that they were "'the most comprehensive and far reaching'" provisions that Congress ever had passed in this area. 451 U.S., at 317-318 (citations to legislative history omitted). Consequently, the Court held that federal

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[7] In Milwaukee I the motion to file an original action was denied, but we ruled that Illinois could maintain an action in federal district court. The State then filed suit in Illinois District Court, alleging that the City was liable for creating a public nuisance under both federal and Illinois common law. The complaint also alleged a violation of the State Environmental Protection Act. Milwaukee II, 451 U.S., at 310 and n. 4.; see Milwaukee III, 731 F. 2d, at 404.

Andy - Unless you quote it subsequently, lets have a note here that includes the expansive language as to occupying the field

legislation now occupied the field, preempting all federal common law. The Court left open the question of whether injured parties still had a cause of action under state law. Id., at 310 n. 4. Therefore the case was remanded for further consideration; the result on remand was the Seventh Circuit decision in Milwaukee III, discussed supra.

One of the key features of the 1972 amendments is the establishment of the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to regulate the discharge of polluting effluents. FWPCA §402, 33 U.S.C. §1342; see generally EPA v. State Water Resources Control Board, 426 U.S. 200, 205-208 (1976) (describing NPDES system). Section 301 of the Act generally prohibits the discharge of any effluent into a

navigable body of water unless the source has obtained an NPDES permit from the Environmental Protection Agency. The permits establish detailed effluent discharge standards and a compliance schedule for each source.

Note that schedules may vary

The amendments also recognize that the States should have a significant role in protecting their own natural resources. §101(b), 33 U.S.C. §1251(b). Therefore if the State in which a point source is located (the source State) wishes to impose more stringent discharge levels, the Act authorizes that State to impose its own permit requirement. §402(b), 33 U.S.C. §1342(b). The state standards are subject to EPA approval, but once this approval is obtained the State becomes the primary regulating authority, and the federal permit requirements are superseded. §402(c), 33 U.S.C. §1342(c). Thus while

under clear language of the Act

the FWPCA establishes a regulatory "partnership" between the federal government and the source State, ~~each~~ the point source, ~~only~~ is required only to meet a single set of discharge standards.

(i.e. the sources of the discharge)

While source States ~~have~~ formerly had a strong voice in regulating their own pollution, the FWPCA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given notice and the opportunity to object to the proposed standards at a public interest hearing. §401(a)(2), 33 U.S.C. §1341(a)(2); Milwaukee III, 731 F. 2d, at 412. An

Under - I see this a place to say this? And is the State role important at all now? See last sentence in this part II - p 18

affected State has similar rights to be consulted before the source state issues its own permit; the source State must send notification, and must consider the objections and recommendations of the affected States before taking action.[8] §402(b); 33 U.S.C. §1342(b). Significantly, however, an affected State does not have concurrent authority for setting the final standards, since it may not block the issuance of the permit on its own. Cf. §402(b)(5); 33 U.S.C. §1342l(b)(5). Also, an affected state may not establish a separate permit system to

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[8] For a more detailed description of the permitting system, see R. Zener, Guide to Federal Environmental Law 61-88 (1981).

Although the record in this case is unclear, it appears that during the time relevant to this case IPC was operating under a federal NPDES permit. App. 29-30. A draft of the permit was submitted to Vermont as an affected State, and the State plus other interested parties objected to the proposed discharge standards. Id., at 65-66. The EPA held a hearing that apparently was attended by IPC and at least some of property owners.

Has EPA acted? I thought the N.Y. standards had been approved?

regulate an out-of-state source. Lake Erie Alliance for Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 526 F. Supp. 1063, 1074-1075 (W.D. Pa.), aff'd, 707 F.2d 1392 (CA3 1983), cert. denied, 464 U.S. 915 (1983); State v. Champion International Corp., 709 S.W. 2d. 569 (Tenn. 1986), cert. pending, No. 86-57. Thus the Act makes it clear that affected States occupy a subordinate position in the ~~Congressional scheme for~~ federal regulatory program ~~regulating pollution.~~

Andy - I prefer not to use "scheme". It connotes some "plotting", etc

III

With this regulatory framework in mind, we turn to the ~~main~~ issue presented: whether the Act preempts Vermont common law to the extent that law may impose liability on a New York point source. We begin the analysis by noting that it is not necessary for a federal statute to provide

explicitly that particular state laws are preempted. Hillsborough County, Florida v. Automated Medical Laboratories, ___ U.S. ___, ___ (1985). Although preemption will not be inferred lightly,[9] it may be presumed when the federal legislation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary regulation." Ibid., (quoting Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Also, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Ibid., (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

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[9] See Rice v. Sante Fe Electric Co., 331 U.S. 218, 230 (1947) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); Milwaukee II, 451 U.S., at 312; see also Silkwood v. Kerr-McGee, 464 U.S. 238, 255 (1984).

A

As we noted in Milwaukee II, ~~there is no question~~ that the 1972 Act amendments were designed to bring about a comprehensive and far-reaching revision of water pollution regulation. 451 U.S., at 318 and n. 12. ~~In fact,~~ During the Congressional debate one Senator described the provisions as the "most comprehensive legislation ever developed in its field." Id., at 318 (citation to legislative history omitted). Even a cursory review of the amendments supports this characterization. The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. The FWPCA also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected states)

to compel the EPA to enforce a permit.[10] Given this, and given our prior ruling that the control of interstate pollution is primarily a matter of federal law, Milwaukee I, 406 U.S., at 107, it seems clear that an injured party must look to the Act to discover what remedies are available.

This conclusion does not end out inquiry, ~~however,~~ because while Congress plainly intended to dominate the field of pollution regulation, the saving clause ~~shows~~ indicates that it did not want to eliminate all other ~~players~~ actions. Respondents ~~in this case~~ argue that the saving clause provides the necessary federal authorization for their claim, since the

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[10] §309(a), 33 U.S.C. §1319(a); §505(a),(h), 33 U.S.C. §1365(a),(h); see generally, Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1, 13-14 (1980) (discussing "elaborate" remedial provisions).

clause preserves both the State's right to regulate its waters and an injured party's right to seek relief under "any statute or common law." §505(e); 33 U.S.C. §1365(e) (emphasis added). There ~~admittedly~~ also is language in the legislative history to support this broad interpretation. A Senate Report accompanying the amendments says: "if damages could be shown, other remedies [besides a citizen suit] would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 92-414, at 81. Moreover, respondents note that after reviewing the legislative history, the District Court found no evidence that Congress intended to alter traditional tort law doctrine, ~~which~~ that allows a party to bring suit in the State where the injury occurred. See

Young v. Masci, 289 U.S. 253, 258-259 (1933). In light of the "plain" meaning of the saving clause, it is argued, a federal court sitting in Vermont must be allowed to apply the law of that state. See Klaxon v. Stenor Electric Co., 313 U.S. 487 (1941).

Although we agree that Congress ~~meant~~ intended to preserve some state suits, we cannot accept ~~this~~ respondents' expansive reading of the saving clause. As with any statutory interpretation question, the Court must be guided by the goals and policies of the entire Act, rather than by a single sentence or provision. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). After examining ~~the FWPCA~~ this Act as a whole, its purpose, and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious

This is especially true with respect to a federal enactment as comprehensive as the FWPCA.

interference with the "full purposes and objectives of Congress." See Hillsborough, supra, at ___. ~~Because~~ We do not think ~~that~~ Congress intended to undermine ~~a~~ their major ~~detailed~~ regulatory statute through a general saving clause. We therefore hold that the FWPCA precludes a court from applying ~~affected state~~ the of an affected state law against an out-of-state source.

The application of Vermont law to this dispute would conflict with the FWPCA in several respects. Most significantly, it would allow the affected state to circumvent the Act's permit system. As discussed in Part II, supra, the FWPCA delegates the authority to set discharge levels only to the EPA and the source state. Before either of these bodies issues a permit it must address a host of technical and policy questions, including the

Andy - I think I might mean there are various types of discharges - eg some that affect only fish - eg problem in Chesapeake Bay ?? 25

or simply different levels for different categories of effluents

current state of technology, and how to reconcile the proposed level of pollution with the competing uses of the water. If a New York source ~~is~~ were liable for violations of Vermont law, ~~however, Vermont effectively can~~ that law could in effect override both the permit requirements and the policy decisions made by the source state and approved by the EPA. The law of any affected state could require ~~setting~~ more stringent discharge levels than the ~~permit~~ approved permit requirements, ~~requires, and then~~ holding the source liable if it fails to reach these ~~levels~~ requirements. The affected state's courts then could liability, the point source at a minimum would have to change its method of doing business; at worst, the source would have to cease operations if the affected-state court ordered abatement. We note that this ability to ~~control~~ regulate the discharge of an out-of-state source could be exercised

Andy - & feel free to improve the form (e.g. perhaps two sentences rather than one compound sentence. Also, if I am right about types of discharges & that may require different standards, then could be an important point. Is this apparent from what EPA has approved for N.Y.?? Compliance schedules certainly vary.

Andy - as I read up to here in this very well written draft, I assume you will emphasize later that if Act were construed as VT. DC does, in III B there could be a number of P28 state setting different standards. CAT in III would this result.

by other states where the full source - as here - is ~~even though the source might be~~ in compliance with ~~all~~ both the New York ~~State~~ and federal permits.[11]

The Act plainly does not grant affected States this regulatory power. ~~The FWPCA~~ It sets forth in detail the role of the affected states in the permit process: they are entitled to notice and a chance to be heard, but otherwise they do not have the authority to determine the standards that a source must meet. The ruling of the Vermont District Court thus would allow the affected states to do indirectly what they may not do directly. By holding IPC liable for millions of dollars in damages, or ~~by ordering~~ by enjoining the operation of a plant until ~~a restructure of the water treatment system, the Vermont~~ is required by the Act to also an opportunity to be heard and its method of controlling effluent are restructured, the Vermont

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[11] The rule established by the court below would have the ~~ironic~~ effect of allowing an affected State to set discharge standards without consulting with the source State, even though the source State ~~must~~ give the affected State the chance to comment before issuing its permit.

Court could change the company's behavior just as surely as if IPC had been regulated by federal or New York statute. It would be odd for Congress, after establishing an elaborate permit system that sets definite discharge standards, and after defining the role of both source and affected states, to then leave the door open to common-law suits that easily could undercut the procedures created by the Act.[12]

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[12] The United States, as amicus curiae, agrees that affected states should not have the power to regulate an out-of-state point source. But the Government argues that not all claims based on affected state law should be precluded. It would draw a distinction between suits seeking injunctive relief or punitive damages on the one hand, and compensatory damages on the other. The Government suggests that claims seeking the former type of relief may be brought only under source-state law, while those seeking compensatory relief may be brought under the law of the State where the injury occurred. Amicus claims that abatement and punitive damages would interfere with the FWPCA because they regulate the source's conduct; damages that simply compensate, it is argued, only require the source to pay the external costs created by the pollution. The Government cites Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), for the proposition that in some cases a court might find preemption of certain remedies and not others.

We decline the government's invitation to draw a line

(Footnote continued)

Andy - Some of my prior editing was done before I read sub-part B. Change that editing where you think that desirable.

B

A second problem created by the decision below is that under its rea- soning a source would be subject to a variety of common-law rules established by the different States that share an interstate waterway. The source would be responsible for complying with the often "vague" and "indeterminate" nuisance standards imposed by each

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(Footnote 12 continued from previous page) between the types of relief sought. First, there is no suggestion of such a distinction in either the Act or the legislative history. As the Court noted in Silkwood, unless there is evidence that Congress meant to preempt a particular remedy, it is assumed that the full cause of action under state law is available. Id., at 255. Second, we also think it would be unwise to treat compensatory damages differently in this case, given the peculiar nature a nuisance suit. Unlike many tort claims, here there is the potential for ongoing liability for a continuing injury, which ultimately could have the same effect as an abatement order. Thus the interference with the FWPCA permit system would remain.

The Government's reliance on Silkwood is misplaced. In that case the Court upheld the application of state tort remedies, including punitive damages, against an allegation that state claims were preempted by the Atomic Energy Act. The Court refused to distinguish between the types of relief sought, despite a claim that punitive damages should be treated differently because they have a "regulatory" effect. The opinion suggests that if such a distinction is to made, it should be done be Congress rather than the Court. Id., at 257-258.

defer this until we see what dissent of Scalia says.
I'm not fond of Silkwood but it is a Court decision & I will use it if & when necessary.

affected States of several, even if those standards impose inconsistent or technologically impractical burdens.[13] As the Seventh Circuit noted in Milwaukee III:

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless." 731 F. 2d, at 414.

It is extremely unlikely that Congress ~~envisioned~~ intended — to say the least — such a chaotic system of regulation. The history of the 1972 amendments shows that ~~they~~

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[13] See Milwaukee II, 451 U.S., at 317 nuisance law is "vague" and "indeterminate"); W. Prosser, Law of Torts 571 (4th ed. 1971) ("There perhaps is no more impenetrable jungle in the entire law than that which surrounds the word "nuisance"). The possibility that a source will have to meet several different standards is relatively small in this case, since Vermont is the only State that shares Lake Champlain with New York. Consider, ~~however~~, for example a plant that discharges effluents into the Mississippi River. A source located in Minnesota theoretically could be subject to the common law of any of the nine downstream States. See Webster's New Geographical Dictionary 769.

Good!

legislators were interested in establishing Congress intended to establish "clear and identifiable" discharge standards. See S. Rep. 92-414, at 81.[14] This goal would be frustrated if sources were answerable to a number of independent authorities located beyond their borders the varying nuisance laws of several affected States.

The Vermont Court considered these difficulties, but nonetheless found that the imposition of Vermont law was consistent with the Act. The Court reasoned that because the state law of Vermont and the FWPCA have the same ultimate goal, eliminating pollution, preemption is unnecessary. The Court also concluded that its decision did not conflict with the permit system, since respondents' claim is

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[14] "The citizen suit provision [§505] is consistent with principles underlying the ... Act, that is, the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for performance." 2 Legis. History 1499.

Andy - If I am right in the views expressed in the left margin, I suggest you rewrite the ¶ below.

designed simply to redress a particular injury rather than to impose a separate regulatory standard. 602 F. Supp., at 271-272.

There is no doubt that the ultimate purpose of the FWPCA is to eliminate pollution, 33 U.S.C. §1251(a), it does not follow, however, that all state nuisance laws that serve this goal necessarily are compatible. A state law also is preempted if it interfe

bring about t

& Freezers As

467 U.S. 461,

conflict betw

affected Stat

Andy - I have fouled up the two sentences beginning with last sentence on p 31. Perhaps there should be retained in our next draft with some editing as I have indicated

unpersuaded by the lower Court's conclusion that the nuisance remedies do not have a "regulatory" impact on the

Andy - If "pollution" defined in the Act? If so add a note. My understanding is that there are various types & degrees of "pollution". Also, as in the case under the Pure Air Act, the complete elimination of acid water pollution is a goal unlikely to be achieved for decades. If I am right about this, there must be something to this effect in the legislative history & possibly in court opinions. This inevitable delay in achieving the goal also means that progress in the states will vary depending upon various obvious factors.

Put in a note.

Andy - No doubt the dissent will say - as the DC did - that a nuisance suit does not "regulate". Do you & Leslie think we should address this briefly now or await dissent.

source. Regardless of the reason for subjecting IPC to Vermont common law, the ~~probable~~ effect of either damages or an injunction is that the company would be required to ~~modify its~~ adopt additional or different means of pollution ~~discharge level to avoid future liability~~ control from those required by the Act. See Perez v. Campbell, 402 U.S. 637, 651-652 (1971) (effect, rather than purpose, of state statute governs preemption analysis). Because the authority to regulate a source's discharge of polluting effluents ~~conduct~~ was granted by Congress exclusively to the federal government and the source State, the Act preempts a Vermont-law cause of action against a New York source.

I may have struck out your two sentences to ...

Andy - This seems obvious. I'm inclined to omit.

Andy - I'd not use word "conduct" in this context. We may have used it elsewhere in this draft. If so, let's adhere to language more compatible with the Act's language.

IV

Our decision that Vermont law is inapplicable does not leave the respondents in this case without a remedy. The only suits that are precluded are those that may require ~~interfere~~ standards of effluent control that are incompatible ~~with the federal interests advanced by the Act;~~ with those prescribed pursuant to the Federal Act. The saving

clause specifically preserves other state actions. Nothing in the Act, for example, bars respondents from bringing a nuisance claim pursuant to New York law. By its terms the FWPCA allows States to impose ~~tougher~~ standards on in-state sources, and in Milwaukee II we recognized that this authority may include the right to impose ~~higher~~ common-law as well as higher statutory restrictions. 451 U.S., at 328 (suggesting that "States may adopt more stringent limitations ... through state nuisance laws, and apply them to in-state dischargers."); see also Committee for Jones Falls Sewerage System v. Train, 539 F. 2d 1006, 1009 and n. 9 (CA4 1976) (FWPCA preserves common law suits filed in source state). The application of New York common law to IPC does not fall within the Act's preemptive scope, because it neither

subjects the source to ~~an indeterminate number~~ the nuisance laws of other states, ~~regulatory bodies~~, nor otherwise intrudes on the federal/source-state ~~partnership~~ and special relationship. Affected parties therefore remain free to seek redress for the harm caused by interstate pollution, provided ~~that they apply~~ the law of the source State is applied.[15]

The Vermont Court concluded that this distinction between source-state and affected-state law is contrary to the language of the saving clause, ~~which~~ that ~~preserves~~ reads as preserving state suits without qualification. 602 F. Supp., at 269. We

[15] Nothing in our decision, of course, affects respondents' right to pursue ~~the~~ remedies ~~currently~~ that may be provided by the Act. If, as alleged, IPC also is violating the terms of its permit, respondents may bring a citizen suit provision to ~~force~~ compel compliance. §505, 33 U.S.C. §1365. Respondents ~~in this case~~ also had the opportunity to protect their interest before the fact by commenting and objecting to the the proposed permit standard. See Milwaukee II, 451 U.S., at 326 (Act provides "ample" opportunity for affected States to protect their rights).

think, however, that this interpretation reads more into the clause than Congress intended. The lower Court's reasoning might be persuasive if Congress had considered the possibility of subjecting sources to affected-State law, despite the inconsistency with the rest of the Act. See Silkwood, 464 U.S., at 256. But as we said in Milwaukee II:

> "The fact that the language of [the saving clause] is repeated in haec verba in the citizen-suit provisions of a vast array of environmental legislation ... indicates that it does not reflect any considered judgment about what remedies were previously available or continue to be available under any particular statute." 451 U.S., at 329 n. 22.

Nothing in the legislative history indicates that Congress considered the issue now before us, and thus we do not

further its intent by construing the saving clause in a way that conflicts with the Act as a whole.[16]

IPC asks us ~~to go one step further and~~ to hold that all state-law suits also must be brought in New York courts. ~~The~~ As the company cites little authority and no compelling justification for ~~its~~ this position, ~~and consequently we see no reason to find~~ we find no basis for holding that Vermont is an improper forum.[17] IPC apparently believes that because a cause of action is

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[16] See Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907) (savings clause cannot be construed in a way that is inconsistent with remainder of statute; "In other words, the Act cannot be held to destroy itself"); see generally F. McCaffrey, Statutory Construction §62 (1953) (general savings provision does not apply when it is contrary to remainder of statute).

[17] IPC suggests that judges and juries may not have the proper "perspective" to evaluate a claim filed by its own citizens against an out-of-state source. Cert. Petn. at 6 and n. *. We reject this contention. One of the original reasons for allowing federal courts to hear diversity claims was to protect against this type of local bias. See Barrow Steamship Co. v. Kane, 170 U.S. 100, 111 (1898); 3 J. Elliot, Debates on the Federal Constitution 533 (1854) (remarks of James Madison). A source also need not be concerned about a suit filed in a state court, since presumably the action could be removed on diversity grounds.

preempted, judicial jurisdiction over the claim is affected as well. But the Act preempts laws, not courts. In the absence of statutory authority to the contrary,[18] we ~~refuse to depart from the well-settled rule~~ the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State.

V

The District Court correctly denied IPC's motion for summary judgment and judgment on the pleadings. Nothing in the Act prevents a district court sitting in an affected State from hearing a common-law nuisance suit, provided that jurisdiction otherwise is proper. The Court

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[18] Cf. §505(c)(1), 33 U.S.C. §1365(c)(1) (citizen suit to enforce permit must be brought in judicial district where source is located).

below erred, however, in concluding that it could apply Vermont law in this litigation. The FWPCA plainly shows that claims based on affected-state law are incompatible with the Act's comprehensive regulation of water pollution, and accordingly are preempted.

The Second Circuit decision of the Ct/Appeals is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

Circulated: DEC 8 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–1233

INTERNATIONAL PAPER CO., PETITIONER *v.*
HARMEL OUELLETTE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case involves the preemptive scope of the Clean Water Act, 33 U. S. C. § 1251 *et seq.* (CWA or Act).[1] The question presented is whether the Act preempts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York.

I

Lake Champlain forms part of the border between the states of New York and Vermont. Petitioner International Paper Company (IPC) operates a pulp and paper mill on the New York side of the lake. In the course of its business, IPC discharges a variety of effluents into the lake through a diffusion pipe. The pipe runs from the mill through the water toward Vermont, ending a short distance before the state boundary line that divides the lake.

Respondents are a group of property owners who reside or lease land on the Vermont shore. In 1978 the owners filed a class action suit against IPC, claiming, *inter alia*, that the discharge of effluents constituted a "continuing nuisance" under Vermont common law. Respondents alleged that the

[1] The statute was originally named the Federal Water Pollution Control Act. Congress changed the name of the statute in 1977. 33 U. S. C. § 1251 note.

pollutants made the water "foul, unhealthy, smelly, and . . . unfit for recreational use," thereby diminishing the value of their property. App. 29. The owners asked for $20 million in compensatory damages, $100 million in punitive damages, and injunctive relief that would require IPC to restructure part of its water treatment system.[2] The action was filed in State Superior Court, and then later removed to Federal District Court for the District of Vermont.

IPC moved for summary judgment and judgment on the pleadings, claiming that the Clean Water Act preempted respondents' state law suit. With the parties' consent, the District Judge deferred a ruling on the motion pending the decision by the Seventh Circuit Court of Appeals in a similar case involving Illinois and the city of Milwaukee. In that dispute, Illinois filed a nuisance action against the city under Illinois statutory and common law, seeking to abate the alleged pollution of Lake Michigan. *Illinois* v. *Milwaukee*, 731 F. 2d 403 (CA7 1984) *(Milwaukee III)*, cert. denied sub nom., *Scott* v. *City of Hammond*, 469 U. S. 1196 (1985).[3] The Court of Appeals ultimately remanded the case for dismissal of Illinois' claim, finding that the CWA precluded the application of one State's law against a pollution source located in a different State. The decision was based in part on the Court's conclusion that the application of different state laws to a single "point source"[4] would interfere with the carefully devised regulatory system established by the CWA. *Id.*, at 414. The Court also concluded that the only suits that

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[2] The complaint also sought monetary and injunctive relief for air pollution allegedly caused by the IPC mill. App. 35–36. This claim is not before the Court.

[3] The decisions in *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972) *(Milwaukee I)*, and *City of Milwaukee* v. *Illinois*, 451 U. S. 304 (1981) *(Milwaukee II)*, are discussed in Part II, *infra*.

[4] A "point source" is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U. S. C. § 1362(14); see 40 CFR § 122.2 (1986). It is not disputed that IPC is a point source within the meaning of the Act.

were *not* preempted were those alleging violations of the laws of the polluting, or "source," State. *Id.*, at 413–414.

IPC argued that the holding in *Milwaukee III* was dispositive in this case. The Vermont District Court disagreed and denied the motion to dismiss. *Ouellette* v. *International Paper Co.*, 602 F. Supp. 264 (1985). The Court acknowledged that federal law normally governs interstate water pollution. It found, however, that two sections of the CWA explicitly preserve state-law rights of action. First, § 510 of the Act provides:

> "Except as expressly provided . . . , nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U. S. C. § 1370.

In addition, § 505(e) states:

> "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 . . . ." 33 U. S. C. § 1365(e).

The District Court held that these two provisions (together, "the saving clause") made it clear that federal law did not preempt entirely the rights of States to control pollution. Therefore the question presented, said the court, was which *types* of state suits Congress intended to preserve. It considered three possibilities:[5] first, the saving clause could be construed to preserve state law only as it applied to waters not covered by the CWA. But since the Act applies to virtu-

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[5] For a discussion of each of the three interpretations of the saving clause, see Note, City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution, 1982 Wisc. L. Rev. 627, 664–671.

ally all surface water in the country,[6] the District Court rejected this possibility. Second, the saving clause might preserve state nuisance law only as it applies to discharges occurring within the source State; under this view a claim could be filed against IPC under New York common law, but not under Vermont law. This was the position adopted by the Court of Appeals for the Seventh Circuit in *Milwaukee III*. The Vermont Court nevertheless rejected this option, finding that "there is simply nothing in the Act which suggests that Congress intended to impose such limitations on the use of state law." *Ouellette* v. *International Paper Co.*, *supra*, at 269.

The District Court therefore adopted the third interpretation of the saving clause, and held that a state action to redress interstate water pollution could be maintained under the law of the State in which the injury occurred. 602 F. Supp., at 269. The Court was unpersuaded by the concern expressed in *Milwaukee III* that the application of out-of-state law to a point source would conflict with the CWA. It said there was no interference with the procedures established by Congress because a State's "imposition of compensatory damage awards and other equitable relief for injuries caused . . . merely *supplement* the standards and limitations imposed by the Act." *Id.*, at 271 (emphasis in original). The Court also found that the use of state law did not conflict with the ultimate goal of the CWA, since in each case the objective was to decrease the level of pollution. *Ibid.*

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[6] While the Act purports to regulate only "navigable waters," this term has been viewed as covering all surface bodies of water, even if they are not navigable in the traditional sense. See 33 U. S. C. § 1362(7) (defining navigable waters as "waters of the United States"); House Consideration of H. Res. 1146 (Oct. 4, 1972), 1 Legislative History of Water Pollution Control Act Amendments of 1972, at 250 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 250 (1973) (hereinafter Leg. Hist.); see also *United States* v. *Ashland Oil & Transp. Co.*, 504 F. 2d 1317, 1324–1325 (CA6 1974) (requiring permit for non-navigable tributary).

The District Court certified its decision for interlocutory appeal, see 28 U. S. C. § 1292(b), and the Court of Appeals for the Second Circuit affirmed for the reasons stated by the District Court. *Ouellette* v. *International Paper Co.*, 776 F. 2d 55, 56 (CA2 1985) *(per curiam)*. We granted certiorari to resolve the Circuit conflict on this important issue of federal preemption. —— U. S. —— (1986). We now affirm the denial of IPC's motion to dismiss, but reverse the decision below to the extent it permits the application of Vermont law to this litigation. We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located.

II

A brief review of the regulatory framework is necessary to set the stage for this case. Until fairly recently, federal common law governed the use and misuse of interstate water. See, *e. g.*, *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110 (1938) (water apportionment); *Missouri* v. *Illinois*, 200 U. S. 496 (1906) (water pollution).[7] This principle was called into question in 1971, when the Court suggested in dicta that an interstate dispute between a state and a private company should be resolved by reference to state nuisance law. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 498, n. 3 (1971) ("[A]n action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law.") (citing *Erie R. Co.* v. *Tompkins*, 309 U. S. 64 (1938)).

We had occasion to address this issue in the first of two Supreme Court cases involving the dispute between Illinois

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[7] Accord, *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); cf. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907) (air pollution); see also *Milwaukee I*, 406 U. S., at 104–107; Glicksman, Federal Preemption and Private Legal Remedies for Pollution, 134 U. Pa. L. Rev. 121, 152–155 (1985); Note, 1982 Wisc. L. Rev., *supra* n. 5, at 630–636.

and Milwaukee. In *Milwaukee I*, the State moved for leave to file an original action in this Court, seeking to enjoin the city from discharging sewage into Lake Michigan. *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972). The Court's opinion in that case affirmed the view that the regulation of interstate water pollution is a matter of federal, not state, law, thus overruling the contrary suggestion in *Wyandotte*.[8] *Id.*, at 102, n. 3. The Court was concerned, however, that the existing version of the Act was not sufficiently comprehensive to resolve all interstate disputes that were likely to arise. *Milwaukee I* therefore held that these cases should be resolved by reference to federal common law; the implicit corollary of this ruling was that state common law was preempted. See *id.*, at 107, n. 9; *Milwaukee III*, 731 F. 2d, at 407. The Court noted, though, that future action by Congress to regulate water pollution might preempt federal common law as well. 406 U. S., at 107.

Congress thereafter adopted comprehensive amendments to the Act. We considered the impact of the new legislation when Illinois and Milwaukee returned to the Court several years later.[9] *City of Milwaukee* v. *Illinois*, 451 U. S. 304 (1981) *(Milwaukee II)*. There the Court noted that the amendments were a "'complete rewriting'" of the statute considered in *Milwaukee I*, and that they were "'the most comprehensive and far reaching'" provisions that Congress

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[8] Although the Court's opinion could be read as distinguishing rather than overruling that part of *Wyandotte*, a later decision made it clear that state common law actions did not survive *Milwaukee I*. See *Milwaukee II*, 451 U. S., at 327, n. 19 (1981); see also Glicksman, 134 U. Pa. L. Rev., *supra* n. 7, at 156, n. 176.

[9] In *Milwaukee I* the Court denied a motion to file an original action but ruled that Illinois could maintain an action in federal district court. The State then filed suit in Illinois District Court, alleging that the city was liable for creating a public nuisance under both federal and Illinois common law. The complaint also alleged a violation of the State Environmental Protection Act. See *Milwaukee II*, 451 U. S., at 310, and n. 4.; *Milwaukee III*, 751 F. 2d, at 404.

ever had passed in this area. *Id.*, at 317–318 (citations to legislative history omitted). Consequently, the Court held that federal legislation now occupied the field, preempting all *federal* common law. The Court left open the question of whether injured parties still had a cause of action under *state* law. *Id.*, at 310, n. 4. The case was remanded for further consideration; the result on remand was the decision of the Court of Appeals for the Seventh Circuit in *Milwaukee III*, discussed *supra*.

One of the primary features of the 1972 amendments is the establishment of the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to regulate the discharge of polluting effluents. 33 U. S. C. § 1342; see generally *EPA* v. *State Water Resources Control Board*, 426 U. S. 200, 205–208 (1976) (describing NPDES system). Section 301 of the Act generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency (EPA). The permits establish detailed discharge standards for the various effluents a source produces, and a compliance schedule pursuant to which the source must meet these standards.

The amendments also recognize that the States should have a significant role in protecting their own natural resources. 33 U. S. C. § 1251(b). Therefore, if a source State such as New York wants to impose more stringent discharge levels, the Act authorizes that State to adopt its own permit standards. § 1342(b). The state standards are subject to EPA approval, but once this approval is obtained the State becomes the primary regulating authority, and the federal permit requirements are superseded. § 1342(c). Thus while the CWA establishes a regulatory "partnership" between the Federal Government and the source State, under the Act a point source is only required to meet a single set of discharge standards.

While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given notice and the opportunity to object to the proposed standards at a public interest hearing. 33 U. S. C. § 1341(a)(2); *Milwaukee III*, 731 F. 2d, at 412. An affected State has similar rights to be consulted before the source State issues its own permit; the source State must send notification, and must consider the objections and recommendations submitted by other States before taking action.[10] § 1342(b). Significantly, however, an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. § 1342(d)(2). Also, an affected State may not establish a separate permit system to regulate an out-of-state source. See § 1342(b) (State may establish permit system for waters "within *its* jurisdiction" (emphasis added), *Lake Erie Alliance for Protection of the Coastal Corridor* v. *U. S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074–1075 (WD Pa.), aff'd, 707 F. 2d 1392 (CA3 1983), cert. denied, 464 U. S. 915 (1983); *State* v. *Champion International Corp.*, 709 S. W. 2d 569 (Tenn. 1986), cert. pending,

[10] For a more detailed description of the permit system, see R. Zener, *Guide to Federal Environmental Law* 61–88 (1981).

Although the record in this case is unclear, it appears that during the time relevant to this case IPC was operating under a federal NPDES permit. App. 29–30. A draft of the permit was submitted to Vermont as an affected State, and Vermont as well as other interested parties objected to the proposed discharge standards. *Id.*, at 65–66. The EPA held a hearing that IPC and at least some of the respondents apparently attended.

No. 86–57. Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.

III

With this regulatory framework in mind, we turn to the question presented: whether the Act preempts Vermont common law to the extent that law may impose liability on a New York point source. We begin the analysis by noting that it is not necessary for a federal statute to provide explicitly that particular state laws are preempted. *Hillsborough County, Florida* v. *Automated Medical Laboratories*, 471 U. S. 707, —— (1985). Although courts should not lightly infer preemption,[11] it may be presumed when the federal legislation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary regulation." *Ibid.* (quoting *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). In addition to express or implied preemption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978). Such a conflict will be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County* v. *Automated Medical Laboratories*, *supra*, at —— (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)).

A

As we noted in *Milwaukee II*, Congress intended the 1972 Act amendments to "establish an all-encompassing program of water pollution regulation." 451 U. S., at 318. We observed that congressional "views on the comprehensive na-

[11] See *Rice* v. *Sante Fe Electric Co.*, 331 U. S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Milwaukee II*, 451 U. S., at 312; see also *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255 (1984).

ture of the legislation were practically universal." *Id.*, at 318, n. 13 (citing to legislative history). An examination of the amendments amply supports these views. The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. The CWA also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected States) to compel the EPA to enforce a permit.[12] In light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, *Milwaukee I*, 406 U. S., at 107, it is clear that the only state suits that remain available are those specifically preserved by the Act.

Although Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress "left no room" for state causes of action. Respondents read the language of the saving clause broadly to preserve both a State's right to regulate its waters, 33 U. S. C. § 1370, and an injured party's right to seek relief under "any statute *or common law*," § 1365(e) (emphasis added). They claim that this language and selected portions of the legislative history compel the inference that Congress intended to preserve the right to bring suit under the law of any affected-state.[13] We cannot accept this reading of the Act.

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[12] See 33 U. S. C. § 1319(a), § 1365(a), (h); see generally, *Middlesex County Sewerage Authority* v. *National Sea Clammers Assoc.*, 453 U. S. 1, 13–14 (1980) (discussing "elaborate" remedial provisions).

[13] A Senate Report accompanying the amendments states: "[I]f damages could be shown, other remedies [in addition to a citizen suit] would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." 2 Leg. Hist. 1499. Respondents also note that after reviewing the legislative history, the District Court found no evidence that Congress intended to alter the traditional tort law principle that a party may bring suit in the State where the injury occurred. See *Young* v. *Masci*, 289 U. S. 253, 258–259 (1933).

As with any statutory interpretation question, the Court must be guided by the goals and policies of the entire Act, rather than by selected sentences or provisions. *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975). This is especially true with respect to a federal enactment as comprehensive as the CWA. After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the "full purposes and objectives of Congress." See *Hillsborough County* v. *Automated Medical Laboratories*, *supra*, at ——. Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause,[14] we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

B

In determining whether Vermont nuisance law "stands as an obstacle" to the full implementation of the CWA, it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal. See *Michigan Canners & Freezers Ass'n* v. *Agricultural Mkt. & Bargaining Bd.*, 467 U. S. 461, 477 (1984). In this case the application of Vermont law against IPC would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.

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[14] We noted in *Milwaukee II:*

"The fact that the language of [the saving clause] is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation . . . indicates that it does not reflect any considered judgment about what other remedies were previously available or continue to be available under any particular statute." 451 U. S., at 329, n. 22.

By establishing a permit system for effluent discharges, Congress implicitly has recognized that the goal of the CWA—elimination of water pollution—cannot be achieved immediately, and that it cannot be realized without incurring costs. The EPA Administrator issues permits according to established effluent limitations and water quality limitations, that in turn are based upon available technology, 33 U. S. C. § 1314, and competing public and industrial uses, § 1312(a). The Administrator must consider the impact of the discharges on the waterway, the types of effluents, and the schedule for compliance, each of which may vary widely among sources. If a State elects to impose its own standards, it also must consider the technological feasibility of more stringent controls. Given the nature of these complex decisions, it is not surprising that the Act limits the right to administer the permit system to the EPA and the source States. See § 1342(b).

An interpretation of the saving clause that preserved actions brought under an affected State's law would disrupt this balance of interests. If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. The affected State's nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected state. Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits. This case illustrates the problems with such a rule. If the Vermont Court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. In suits such as this, an affected-state court

also could require the source to cease operations by ordering immediate abatement. Critically, these liabilities would attach even though the source had complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other states could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.[15]

Application of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system. The history of the 1972 amendments shows that Congress intended to establish "clear and identifiable" discharge standards. See S. Rep. 92–414, p. 81 (1971), 2 Legislative History of Water Pollution Control Act Amendments of 1972, at 250 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 250 (1973).[16] As noted above, under the reading of the saving clause proposed by respondents, a source would be subject to a variety of common-law rules established by the different States along the interstate waterways. These nuisance standards often are "vague" and "indeterminate."[17] The application of

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[15] The interpretation of the Act adopted by the Courts below also would have the result of allowing affected States effectively to set discharge standards without consulting with the source State, even though source States are required by the Act to give affected States an opportunity to be heard and a chance to comment before issuing a permit.

[16] "The citizen suit provision [§ 505] is consistent with principles underlying the . . . Act, [which are] the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for performance." 2 Leg. Hist. 1499.

[17] See *Milwaukee II*, 451 U. S., at 317; see also W. Prosser, *Law of Torts* 571 (4th ed. 1971) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance."). The possibility that a source will have to meet a number of different standards is relatively small in this case, since Vermont is the only State that shares Lake Champlain with New York. But consider, for example, a plant that discharges effluents into the Mississippi River. A source located in Min-

numerous States' laws would only exacerbate the vagueness and resulting uncertainty. The Court of Appeals in *Milwaukee III* identified the problem with such an irrational system of regulation:

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless." 731 F. 2d, at 414.

It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.

Nothing in the Act gives each affected State this power to regulate discharges. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution. It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

C

Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondents without a remedy. The CWA precludes only those suits that

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nesota theoretically could be subject to the nuisance laws of any of the nine downstream States.

may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State. By its terms the CWA allows States such as New York to impose higher standards on its own point sources, and in *Milwaukee II* we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions. 451 U. S., at 328 (suggesting that "States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-state dischargers"); see also *Committee for Jones Falls Sewerage System* v. *Train*, 539 F. 2d 1006, 1009, and n. 9 (CA4 1976) (CWA preserves common law suits filed in source State).[18]

An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law.[19] First, application of the source

[18] Nothing in our decision, of course, affects respondents' right to pursue remedies that may be provided by the Act. If, as was also alleged in respondents' complaint, IPC is violating the terms of its permit, respondents may bring a citizen suit to compel compliance. 33 U. S. C. § 1365. Respondents also had the opportunity to protect their interests before the fact by commenting and objecting to the proposed standard. See *Milwaukee II*, 451 U. S., at 326 (Act provides "ample" opportunity for affected States to protect their rights).

[19] The District Court concluded that the interference with the Act is insignificant, in part because respondents are seeking to be compensated for a specific harm rather than trying to "regulate" IPC. *Ouellette* v. *International Paper Co.*, 602 F. Supp. 264, 271–272 (Vt. 1985). The Soliciter General, on behalf of the United States as *amicus curiae*, adopts only a portion of this view. He acknowledges that suits seeking *punitive* or *injunctive* relief under affected-state law should be preempted because of the interference they cause with the CWA. The Government asserts that *compensatory* damages, however, may be brought under the law of the State where the injury occurred. The SG reasons that compensatory damages only require the source to pay for the external costs created by the pollution, and thus do not "regulate" in a way inconsistent with the Act. The Government cites *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238

State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.

IPC asks the Court to go one step further and hold that all state-law suits also must be brought in source-state *courts*. As petitioner cites little authority or justification for this position, we find no basis for holding that Vermont is an improper forum. Simply because a cause of action is preempted does not mean that judicial jurisdiction over the claim

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(1984), for the proposition that in certain circumstances a court may find preemption of some remedies and not others.

We decline the Government's invitation to draw a line between the types of relief sought. There is no suggestion of such a distinction in either the Act or the legislative history. As the Court noted in *Silkwood*, unless there is evidence that Congress meant to "split" a particular remedy for preemption purposes, it is assumed that the full cause of action under state law is available (or as in this case, preempted). *Id.*, at 255. We also think it would be unwise to treat compensatory damages differently under the facts of this case. If the Vermont Court determined that respondents were entitled to the relief requested, the result would be that IPC would be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory. See *Perez* v. *Campbell*, 402 U. S. 637, 651–652 (1971) (effect rather than purpose of a state statute governs preemption analysis). As discussed *supra*, this result would be irreconcilable with the CWA's exclusive grant of authority to the Federal Government and the source State.

is affected as well; the Act preempts laws, not courts. In the absence of statutory authority to the contrary,[20] the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State.

IV

The District Court correctly denied IPC's motion for summary judgment and judgment on the pleadings. Nothing in the Act prevents a court sitting in an affected State from hearing a common-law nuisance suit, provided that jurisdiction otherwise is proper. Both the District Court and the Court of Appeals erred, however, in concluding that Vermont law governs this litigation. The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution. The Act preempts state law to the extent that the state law is applied to an out-of-state point source.

The decision of the Court of Appeals is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[20] Cf. 33 U. S. C. § 1365(c)(1) (citizen suit to enforce permit must be brought in judicial district where source is located).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1986

No. 85-1233 International Paper Co. v. Harmel Ouellette, et al.

Dear Lewis:

Please join me.

Sincerely,

WEB

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

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THE CHIEF JUSTICE

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pages 1, 3, 5, 7, 8, 11, 16
stylistic changes throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

Circulated: _____

Recirculated: 12/22/86

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-1233

INTERNATIONAL PAPER CO., PETITIONER *v.*
HARMEL OUELLETTE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case involves the pre-emptive scope of the Clean Water Act, 33 U. S. C. § 1251 *et seq.* (CWA or Act).[1] The question presented is whether the Act preempts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York.

I

Lake Champlain forms part of the border between the states of New York and Vermont. Petitioner International Paper Company (IPC) operates a pulp and paper mill on the New York side of the lake. In the course of its business, IPC discharges a variety of effluents into the lake through a diffusion pipe. The pipe runs from the mill through the water toward Vermont, ending a short distance before the state boundary line that divides the lake.

Respondents are a group of property owners who reside or lease land on the Vermont shore. In 1978 the owners filed a class action suit against IPC, claiming, *inter alia*, that the discharge of effluents constituted a "continuing nuisance" under Vermont common law. Respondents alleged that the pollutants made the water "foul, unhealthy, smelly, and . . .

[1] The statute also is known as the Federal Water Pollution Control Act. See note following 33 U. S. C. § 1251.

unfit for recreational use," thereby diminishing the value of their property. App. 29. The owners asked for $20 million in compensatory damages, $100 million in punitive damages, and injunctive relief that would require IPC to restructure part of its water treatment system.[2] The action was filed in State Superior Court, and then later removed to Federal District Court for the District of Vermont.

IPC moved for summary judgment and judgment on the pleadings, claiming that the Clean Water Act pre-empted respondents' state law suit. With the parties' consent, the District Judge deferred a ruling on the motion pending the decision by the Court of Appeals for the Seventh Circuit in a similar case involving Illinois and the city of Milwaukee. In that dispute, Illinois filed a nuisance action against the city under Illinois statutory and common law, seeking to abate the alleged pollution of Lake Michigan. *Illinois* v. *Milwaukee*, 731 F. 2d 403 (1984) *(Milwaukee III)*, cert. denied, 469 U. S. 1196 (1985).[3] The Court of Appeals ultimately remanded the case for dismissal of Illinois' claim, finding that the CWA precluded the application of one State's law against a pollution source located in a different State. The decision was based in part on the Court's conclusion that the application of different state laws to a single "point source"[4] would interfere with the carefully devised regulatory system established by the CWA. 731 F. 2d, at 414. The Court also concluded that the only suits that were *not* preempted were

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[2] The complaint also sought monetary and injunctive relief for air pollution allegedly caused by the IPC mill. App. 35–36. This claim is not before the Court.

[3] The decisions in *Illinois* v. *Milwaukee*, 406 U. S. 91 (1972) *(Milwaukee I)*, and *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981) *(Milwaukee II)*, are discussed in Part II, *infra*.

[4] A "point source" is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U. S. C. § 1362(14); see 40 CFR § 122.2 (1986). It is not disputed that IPC is a point source within the meaning of the Act.

those alleging violations of the laws of the polluting, or "source," State. *Id.*, at 413–414.

IPC argued that the holding in *Milwaukee III* was dispositive in this case. The Vermont District Court disagreed and denied the motion to dismiss. 602 F. Supp. 264 (1985). The Court acknowledged that federal law normally governs interstate water pollution. It found, however, that two sections of the CWA explicitly preserve state-law rights of action. First, § 510 of the Act provides:

> "Except as expressly provided . . . , nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U. S. C. § 1370.

In addition, § 505(e) states:

> "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 . . . ." 33 U. S. C. § 1365(e).

The District Court held that these two provisions (together, "the saving clause") made it clear that federal law did not pre-empt entirely the rights of States to control pollution. Therefore the question presented, said the court, was which *types* of state suits Congress intended to preserve. It considered three possibilities:[5] first, the saving clause could be construed to preserve state law only as it applied to waters not covered by the CWA. But since the Act applies to virtually all surface water in the country,[6] the District Court

[5] For a discussion of each of the three interpretations of the saving clause, see Note, *City of Milwaukee v. Illinois:* The Demise of the Federal Common Law of Water Pollution, 1982 Wis. L. Rev. 627, 664–671.

[6] While the Act purports to regulate only "navigable waters," this term has been construed expansively to cover waters that are not navigable in the traditional sense. See *United States* v. *Riverside Bayview Homes*, —— U. S. —— (1985); 33 U. S. C. § 1362(7) (defining navigable waters as

rejected this possibility. Second, the saving clause might preserve state nuisance law only as it applies to discharges occurring within the source State; under this view a claim could be filed against IPC under New York common law, but not under Vermont law. This was the position adopted by the Court of Appeals for the Seventh Circuit in *Milwaukee III*. The Vermont Court nevertheless rejected this option, finding that "there is simply nothing in the Act which suggests that Congress intended to impose such limitations on the use of state law." 602 F. Supp., at 269.

The District Court therefore adopted the third interpretation of the saving clause, and held that a state action to redress interstate water pollution could be maintained under the law of the State in which the injury occurred. *Ibid.* The Court was unpersuaded by the concern expressed in *Milwaukee III* that the application of out-of-state law to a point source would conflict with the CWA. It said there was no interference with the procedures established by Congress because a State's "imposition of compensatory damage awards and other equitable relief for injuries caused . . . merely *supplement* the standards and limitations imposed by the Act." 602 F. Supp., at 271 (emphasis in original). The Court also found that the use of state law did not conflict with the ultimate goal of the CWA, since in each case the objective was to decrease the level of pollution. *Ibid.*

The District Court certified its decision for interlocutory appeal, see 28 U. S. C. § 1292(b) (1982 ed., Supp. III), and the Court of Appeals for the Second Circuit affirmed for the reasons stated by the District Court. 776 F. 2d 55, 56 (1985) *(per curiam)*. We granted certiorari to resolve the Circuit conflict on this important issue of federal pre-emption. 475 U. S. —— (1986). We now affirm the denial of IPC's motion

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"waters of the United States"); 118 Cong. Rec. 33756–33757 (1972), 1 Legislative History of Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 250 (1973) (hereinafter Leg. Hist.).

to dismiss, but reverse the decision below to the extent it permits the application of Vermont law to this litigation. We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located.

II

A brief review of the regulatory framework is necessary to set the stage for this case. Until fairly recently, federal common law governed the use and misuse of interstate water. See, *e. g.*, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938) (water apportionment); *Missouri* v. *Illinois*, 200 U. S. 496 (1906) (water pollution).[7] This principle was called into question in the context of water pollution in 1971, when the Court suggested in dicta that an interstate dispute between a state and a private company should be resolved by reference to state nuisance law. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 499, n. 3 (1971) ("[A]n action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law") (citing *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)).

We had occasion to address this issue in the first of two Supreme Court cases involving the dispute between Illinois and Milwaukee. In *Milwaukee I*, the State moved for leave to file an original action in this Court, seeking to enjoin the city from discharging sewage into Lake Michigan. *Illinois* v. *Milwaukee*, 406 U. S. 91 (1972). The Court's opinion in that case affirmed the view that the regulation of interstate water pollution is a matter of federal, not state, law, thus

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[7] Accord, *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); cf. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907) (air pollution); see also *Milwaukee I*, 406 U. S., at 104–107; Glicksman, Federal Preemption and Private Legal Remedies for Pollution, 134 U. Pa. L. Rev. 121, 152–155 (1985); Note, 1982 Wis. L. Rev., at 630–636.

overruling the contrary suggestion in *Wyandotte*.[8] 406 U. S., at 102, n. 3. The Court was concerned, however, that the existing version of the Act was not sufficiently comprehensive to resolve all interstate disputes that were likely to arise. *Milwaukee I* therefore held that these cases should be resolved by reference to federal common law; the implicit corollary of this ruling was that state common law was preempted. See *id.*, at 107, n. 9; *Milwaukee III*, 731 F. 2d, at 407. The Court noted, though, that future action by Congress to regulate water pollution might preempt federal common law as well. 406 U. S., at 107.

Congress thereafter adopted comprehensive amendments to the Act. We considered the impact of the new legislation when Illinois and Milwaukee returned to the Court several years later.[9] *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981) *(Milwaukee II)*. There the Court noted that the amendments were a "'complete rewriting'" of the statute considered in *Milwaukee I*, and that they were "'the most comprehensive and far reaching'" provisions that Congress ever had passed in this area. 451 U. S., at 317–318 (citations to legislative history omitted). Consequently, the Court held that federal legislation now occupied the field, preempting all *federal* common law. The Court left open the question of whether injured parties still had a cause of action under *state* law. *Id.*, at 310, n. 4. The case was remanded for further consideration; the result on remand was the decision of the

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[8] Although the Court's opinion could be read as distinguishing rather than overruling that part of *Wyandotte*, a later decision made it clear that state common law actions did not survive *Milwaukee I*. See *Milwaukee II*, 451 U. S., at 327, n. 19; see also Glicksman, *supra*, at 156, n. 176.

[9] In *Milwaukee I* the Court denied a motion to file an original action but ruled that Illinois could maintain an action in federal district court. The State then filed suit in Illinois District Court, alleging that the city was liable for creating a public nuisance under both federal and Illinois common law. The complaint also alleged a violation of the State Environmental Protection Act. See *Milwaukee II*, *supra*, at 310, and n. 4.; *Milwaukee III*, 731 F. 2d, at 404.

Court of Appeals for the Seventh Circuit in *Milwaukee III*, discussed *supra*.

One of the primary features of the 1972 amendments is the establishment of the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to regulate the discharge of polluting effluents. 33 U. S. C. § 1342; see generally *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205–208 (1976) (describing NPDES system). Section 301(a) of the Act, 33 U. S. C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency (EPA). The permits contain detailed effluent limitations, and a compliance schedule for the attainment of these limitations.

The amendments also recognize that the States should have a significant role in protecting their own natural resources. 33 U. S. C. § 1251(b). The Act provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U. S. C. § 1342(b). The Administrator retains authority, however, to block the issuance of any permit to which he objects. § 1342(d). Even if the Federal Government administers the permit program, the source State may require discharge limitations more stringent than those required by the Federal Government. See 40 CFR § 122.1(f) (1986). Before the Federal Government may issue an NPDES permit, the Administrator must obtain certification from the source State that the proposed discharge complies with the State's technology-based standards and water quality-based standards. 33 U. S. C. § 1341(a)(1). The CWA therefore establishes a regulatory "partnership" between the Federal Government and the source State.

While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given notice and the opportunity to object to the proposed standards at a public hearing. 33 U. S. C. § 1341(a)(2); *Milwaukee III*, *supra*, at 412. An affected State has similar rights to be consulted before the source State issues its own permit; the source State must send notification, and must consider the objections and recommendations submitted by other States before taking action.[10] § 1342(b). Significantly, however, an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. § 1342(d)(2). Also, an affected State may not establish a separate permit system to regulate an out-of-state source. See § 1342(b) (State may establish permit system for waters "within *its* jurisdiction" (emphasis added), *Lake Erie Alliance for Protection of Coastal Corridor* v. *U. S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074–1075 (WD Pa. 1981), aff'd, 707 F. 2d 1392 (CA3), cert. denied, 464 U. S. 915 (1983); *State* v. *Champion International Corp.*, 709 S. W. 2d 569 (Tenn. 1986), cert. pending, No. 86–57. Thus the Act

[10] For a more detailed description of the permit system, see R. Zener, Guide to Federal Environmental Law 61–88 (1981).

The IPC was operating under a federal NPDES permit. App. 29–30. A draft of the permit was submitted to Vermont as an affected State, and Vermont as well as other interested parties objected to the proposed discharge standards. *Id.*, at 65–66. Thereafter, New York obtained permitting authority under 33 U. S. C. § 1324(b) and it now administers the permit.

makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.

III

With this regulatory framework in mind, we turn to the question presented: whether the Act pre-empts Vermont common law to the extent that law may impose liability on a New York point source. We begin the analysis by noting that it is not necessary for a federal statute to provide explicitly that particular state laws are pre-empted. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 713 (1985). Although courts should not lightly infer pre-emption,[11] it may be presumed when the federal legislation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Ibid.* (quoting *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). In addition to express or implied pre-emption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978). Such a conflict will be found when the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County* v. *Automated Medical Laboratories, supra*, at 713 (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)).

A

As we noted in *Milwaukee II*, Congress intended the 1972 Act amendments to "establish an all-encompassing program of water pollution regulation." 451 U. S., at 318. We observed that congressional "views on the comprehensive nature of the legislation were practically universal." *Id.*, at

[11] See *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Milwaukee II*, 451 U. S., at 312; see also *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255 (1984).

318, n. 12 (citing legislative history). An examination of the amendments amply supports these views. The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. The CWA also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected States) to compel the EPA to enforce a permit.[12] In light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, *Milwaukee I*, 406 U. S., at 107, it is clear that the only state suits that remain available are those specifically preserved by the Act.

Although Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress "left no room" for state causes of action. Respondents read the language of the saving clause broadly to preserve both a State's right to regulate its waters, 33 U. S. C. § 1370, and an injured party's right to seek relief under "any statute *or common law*," § 1365(e) (emphasis added). They claim that this language and selected portions of the legislative history compel the inference that Congress intended to preserve the right to bring suit under the law of any affected-state.[13] We cannot accept this reading of the Act.

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[12] See 33 U. S. C. §§ 1319(a), 1365(a), (h); see generally, *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13–14 (1980) (discussing "elaborate" remedial provisions).

[13] A Senate Report accompanying the amendments states: "[I]f damages could be shown, other remedies [in addition to a citizen suit] would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499. Respondents also note that after reviewing the legislative history, the District Court found no evidence that Congress intended to alter the traditional tort law principle that a party may bring suit in the State where the injury occurred. See *Young* v. *Masci*, 289 U. S. 253, 258–259 (1933).

To begin with, the plain language of the provisions on which respondents rely by no means compels the result they seek. Section 505(e) merely says that "nothing *in this section*," *i. e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude preemption of state law by other provisions of the Act. Section 510, moreover, preserves the authority of a State "with respect to the waters (including boundary waters) of such State[]." This language arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i. e.*, discharges from within the State. The savings clause then, does not preclude preemption of the law of an affected State.

Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact preempts an action based on the law of an affected State. Cf. *City of Rome* v. *United States*, 446 U. S. 156, 199 (1980) (POWELL, J., dissenting) ("We resort to legislative materials only when the congressional mandate is unclear on its face"). After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the "full purposes and objectives of Congress." See *Hillsborough County* v. *Automated Medical Laboratories*, *supra*, at 713. Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause,[14] we conclude that the CWA

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[14] We noted in *Milwaukee II:*

"The fact that the language of [the saving clause] is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation . . . indicates that it does not reflect any considered judgment about what other remedies were previously available or continue to be available under any particular statute." 451 U. S., at 329, n. 22.

precludes a court from applying the law of an affected State against an out-of-state source.

B

In determining whether Vermont nuisance law "stands as an obstacle" to the full implementation of the CWA, it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal. See *Michigan Canners & Freezers Assn.* v. *Agricultural Marketing & Bargaining Bd.*, 467 U. S. 461, 477 (1984). In this case the application of Vermont law against IPC would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.

By establishing a permit system for effluent discharges, Congress implicitly has recognized that the goal of the CWA—elimination of water pollution—cannot be achieved immediately, and that it cannot be realized without incurring costs. The EPA Administrator issues permits according to established effluent standards and water quality standards, that in turn are based upon available technology, 33 U. S. C. § 1314, and competing public and industrial uses, § 1312(a). The Administrator must consider the impact of the discharges on the waterway, the types of effluents, and the schedule for compliance, each of which may vary widely among sources. If a State elects to impose its own standards, it also must consider the technological feasibility of more stringent controls. Given the nature of these complex decisions, it is not surprising that the Act limits the right to administer the permit system to the EPA and the source States. See § 1342(b).

An interpretation of the saving clause that preserved actions brought under an affected State's law would disrupt this balance of interests. If a New York source were liable

for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. The affected State's nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State. Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits. This case illustrates the problems with such a rule. If the Vermont Court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. In suits such as this, an affected-state court also could require the source to cease operations by ordering immediate abatement. Critically, these liabilities would attach even though the source had complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.[15]

Application of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system. The history of the 1972 amendments shows that Congress intended to establish "clear and identifiable" discharge standards. See S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499.[16] As noted

[15] The interpretation of the Act adopted by the Courts below also would have the result of allowing affected States effectively to set discharge standards without consulting with the source State, even though source States are required by the Act to give affected States an opportunity to be heard and a chance to comment before issuing a permit.

[16] "The citizen suit provision [§ 505] is consistent with principles underlying the . . . Act, [which are] the development of clear and identifiable requirements. Such requirements should provide manageable and precise

above, under the reading of the saving clause proposed by respondents, a source would be subject to a variety of common-law rules established by the different States along the interstate waterways. These nuisance standards often are "vague" and "indeterminate."[17] The application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty. The Court of Appeals in *Milwaukee III* identified the problem with such an irrational system of regulation:

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless." 731 F. 2d, at 414.

It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.

Nothing in the Act gives each affected State this power to regulate discharges. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and

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benchmarks for performance." S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499.

[17] See *Milwaukee II*, 451 U. S., at 317; see also W. Prosser & W. Keeton, Prosser and Keeton on Torts 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'"). The possibility that a source will have to meet a number of different standards is relatively small in this case, since Vermont is the only State that shares Lake Champlain with New York. But consider, for example, a plant that discharges effluents into the Mississippi River. A source located in Minnesota theoretically could be subject to the nuisance laws of any of the nine downstream States.

balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution. It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

C

Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondents without a remedy. The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State. By its terms the CWA allows States such as New York to impose higher standards on its own point sources, and in *Milwaukee II* we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions. 451 U. S., at 328 (suggesting that "States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-state dischargers"); see also *Committee for Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006, 1009, and n. 9 (CA4 1976) (CWA preserves common law suits filed in source State).[18]

[18] Nothing in our decision, of course, affects respondents' right to pursue remedies that may be provided by the Act. If, as was also alleged in respondents' complaint, IPC is violating the terms of its permit, respondents may bring a citizen suit to compel compliance. 33 U. S. C. § 1365. Respondents also had the opportunity to protect their interests before the fact by commenting and objecting to the proposed standard. See *Milwaukee II*, *supra*, at 326 (Act provides "ample" opportunity for affected States to protect their rights).

An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law.[19] First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Sec-

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[19] The District Court concluded that the interference with the Act is insignificant, in part because respondents are seeking to be compensated for a specific harm rather than trying to "regulate" IPC. 602 F. Supp. 264, 271–272 (Vt. 1985). The Soliciter General, on behalf of the United States as *amicus curiae*, adopts only a portion of this view. He acknowledges that suits seeking *punitive* or *injunctive* relief under affected-state law should be pre-empted because of the interference they cause with the CWA. The Government asserts that *compensatory* damages, however, may be brought under the law of the State where the injury occurred. The SG reasons that compensatory damages only require the source to pay for the external costs created by the pollution, and thus do not "regulate" in a way inconsistent with the Act. The Government cites *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984), for the proposition that in certain circumstances a court may find pre-emption of some remedies and not others.

We decline the Government's invitation to draw a line between the types of relief sought. There is no suggestion of such a distinction in either the Act or the legislative history. As the Court noted in *Silkwood*, unless there is evidence that Congress meant to "split" a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available (or as in this case, pre-empted). *Id.*, at 255. We also think it would be unwise to treat compensatory damages differently under the facts of this case. If the Vermont Court determined that respondents were entitled only to the requested compensatory relief, IPC might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory. See *Perez* v. *Campbell*, 402 U. S. 637, 651–652 (1971) (effect rather than purpose of a state statute governs pre-emption analysis). As discussed, this result would be irreconcilable with the CWA's exclusive grant of authority to the Federal Government and the source State. Cf. *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile*, 450 U. S. 311, 324–325 (1981).

ond, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.

IPC asks the Court to go one step further and hold that all state-law suits also must be brought in source-state *courts*. As petitioner cites little authority or justification for this position, we find no basis for holding that Vermont is an improper forum. Simply because a cause of action is pre-empted does not mean that judicial jurisdiction over the claim is affected as well; the Act pre-empts laws, not courts. In the absence of statutory authority to the contrary,[20] the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State.

IV

The District Court correctly denied IPC's motion for summary judgment and judgment on the pleadings. Nothing in the Act prevents a court sitting in an affected State from hearing a common-law nuisance suit, provided that jurisdiction otherwise is proper. Both the District Court and the Court of Appeals erred, however, in concluding that Vermont law governs this litigation. The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution. The Act pre-empts state law to the extent that the state law is applied to an out-of-state point source.

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[20] Cf. 33 U. S. C. § 1365(c)(1) (citizen suit to enforce permit must be brought in judicial district where source is located).

The decision of the Court of Appeals is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 22, 1986

85-1233 - International Paper Co. v. Ouelette

Dear Lewis,

Please join me.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

December 22, 1986

Re: No. 85-1233 - International Paper v. Ouellette

Dear Lewis:

Much obliged for the changes. I continue to join.

Sincerely,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 31, 1986

No. 85-1233 International Paper Co. v. Ouellette

Dear Lewis,

Please join me.

Sincerely,

Sandra

A count !!

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 7, 1987

Re: No. 85-1233 - International Paper Co. v. Ouelette

Dear Lewis:

After much consideration, I decided that I ought to write separately, I will circulate a draft soon.

Sincerely,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 12, 1987

Re: No. 85-1233 - International Paper Co. v. Ouellette

Dear Bill:

Please join me in your concurring and dissenting opinion.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 12, 1987

Re: No. 85-1233, International Paper Co. v. Ouellette

Dear Bill:

Please join me in your opinion concurring in part and dissenting in part.

Sincerely,

Harry

Justice Brennan

cc: The Conference

January 20, 1987

SP1 SALLY-POW

85-1233, International Paper Co. v. Ouellette

This case is here from the U.S. Court of Appeals for the Second Circuit.

Petitioner operates a paper mill on the New York shore of Lake Champlain. Respondents are property owners whose land is located across the Lake on the Vermont shore. Respondents brought suit in the Vermont District Court, claiming that the mill was discharging pollutants into the Lake, and that this caused a "continuing nuisance" under Vermont law.

Under present procedures authorized by the Clean Water Act, petitioner has obtained a permit to make these discharges in accord with both New York and federal law.

Two questions are presented: First, whether the Vermont court has jurisdiction. And second, whether in light of the provisions of the Clean Water Act, the nuisance law of Vermont may be applied when the source of pollution is in New York?

Petitioner moved for summary judgment, claiming that under the Clean Water Act, the suit could be maintained only in N.Y. —

only be maintained in New York - the state in which the mill is located. The District Court denied petitioner's motion, and the Court of Appeals ~~for the Second Circuit~~ affirmed.

For the reasons stated in our opinion filed today, we agree that the property owners ~~(the respondents)~~ could maintain this action in the Vermont federal court. We also ~~find~~, however, that the courts below erred in holding that the case could be decided under the nuisance law of Vermont.

Under the Clean Water Act, ~~the~~ New York as source state, ~~- i.e. the state in which the pollution originates -~~ has authority to must issue a permit consistent with both federal ~~law~~ and state law, ~~as it has done~~.

The Clean Water Act is a comprehensive regulatory statute applicable to navigable waters in every state. We think The act preempts all inconsistent state laws. ~~We think~~ It would interfere with the enforcement of the federal act if every affected state could apply its own law. We therefore conclude, ~~hold~~ that to the extent that Vermont law differs from that of New York, it is preempted.

Accordingly,

Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals, and remand for further proceedings consistent with our opinion.

JUSTICE BRENNAN has filed an opinion concurring in part and dissenting in part in which JUSTICES MARSHALL and ~~JUSTICE~~ BLACKMUN have joined. JUSTICE STEVENS has filed an opinion concurring in part and dissenting in part in which JUSTICE BLACKMUN has joined.

85-1233 International Paper v. Ouellette (Andy)

LFP for the Court 11/17/86
1st draft 12/8/86
2nd draft 1/9/87
Joined by CJ 12/10/86
BRW 12/22/86
AS 12/22/86
SOC 12/31/86
WJB concurring in part and dissenting in part
1st draft 1/8/87
2nd draft 1/13/87
3rd draft 1/15/87
Joined by HAB 1/12/87
TM 1/12/87
HAB 1/15/87
JPS concurring in part and dissenting in part
1st draft 1/14/87
WJB will write separately 1/7/87

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

March 2, 1987

Honorable Frank D. Wagner
Supreme Court of the United States
Reporter
Washington, D.C. 20543

Re: International Paper Co. v. Ouellette,
No. 85-1233 (January 21, 1987)

Dear Mr. Wagner:

In the Court's opinion in the above case, in which the United States appeared as amicus curiae, the Court appears to have inadvertently addressed a controversial legal issue not raised or argued in the case -- an issue on which the lower courts are significantly divided.

On page 10 of the slip opinion, the Court's opinion states: "The CWA also provides its own remedies, including civil and criminal fines for permit violations, and 'citizen suits' that allow individuals (including those from affected States) to compel the EPA to enforce a permit. 12/." The second half of this sentence addresses an issue -- whether the Clean Water Act "citizen suit" provision authorizes a suit to compel the EPA to enforce a permit -- which is the subject of ongoing litigation in the lower courts and over which the lower courts have sharply divided. Compare Sierra Club v. Train, 557 F.2d 485, 488-491 (5th Cir. 1977) (no citizen suit to compel EPA permit enforcement); Zemansky v. EPA, 24 Env't Rep. Cas. (BNA) 1447, 1448 (D. Alaska 1986) (same); National Wildlife Federation v. Ruckelshaus, 21 Env't Rep. Cas. (BNA) 1776, 1780 (D. N.J. 1983) (same); and Caldwell v. Gurley Refining Co., 533 F. Supp. 252, 255-257 (E.D. Ark. 1982) (same) with South Carolina Wildlife Federation v. Alexander, 457 F. Supp. 118 (D. S.C. 1978) (citizen suit may compel EPA permit enforcement); Greene v. Costle, 577 F. Supp. 1225 (W.D. Tenn. 1983) (same); and Illinois v. Hoffman, 425 F. Supp. 71, 76-77 (S.D. Ill. 1977) (same).

We suggest that the sentence could be revised to state: "The CWA also provides its own remedies, including civil and criminal fines for permit violations, and 'citizen suits' that allow individuals (including those from affected States) to sue for injunctions to enforce the statute. 12/." This would simply repeat the language contained in the Court's prior opinion in Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 13-14 (1980), which the Court cites in footnote 12 on page 10 of the slip opinion in Ouellette. See Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. at 14 ("These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes.").

Sincerely,

Charles Fried

Charles Fried
Solicitor General

cc: Peter F. Langrock
Langrock, Sperry, Parker & Wool
Drawer 351
Middlebury, VT 05753

Merideth Wright
Assistant Attorney General
Pavilion Building
Montpelier, VT 05602

Roy L. Reardon
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York City, NY 10004

Supreme Court of the United States
Reporter of Decisions
Washington, D. C. 20543

March 3, 1987

Honorable Lewis F. Powell, Jr.
Associate Justice

Re: International Paper Co. v. Ouellette, No. 85-1233

Dear Justice Powell:

I am in receipt of the enclosed letter from Solicitor General Fried, in which he indicates his belief that the above opinion inadvertently addressed a controversial legal issue not raised in the case. I await your instructions as to how you wish me to proceed.

Respectfully,

Frank D. Wagner
Reporter of Decisions

Enclosure

Supreme Court of the United States
Reporter of Decisions
Washington, D. C. 20543

March 5, 1987

File

Honorable Charles Fried
Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

Re: International Paper Co. v. Ouellette
No. 85-1233

Dear Mr. Fried:

I have conveyed your March 2 letter on the above to Justice Powell, and am authorized to tell you that your suggested resolution will be adopted in the Preliminary Print.

Sincerely,

Frank D. Wagner
Reporter of Decisions

March 5, 1987

85-1233 International Paper v. Ouellette

MEMORANDUM TO CONFERENCE:

I enclose page 10 of the Court's opinion in the above case, with two language changes suggested to the Reporter, Frank Wagner, by the Solicitor General.

The Solicitor General is correct that it has not yet been decided whether the Clean Water Act authorizes a "citizens' suit" to compel the EPA to enforce a permit.

Absent objection, I will request the Reporter to make these changes.

L.F.P., Jr.

lfp/ss

cc: Frank D. Wagner, Esquire

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 5, 1987

95-1233 International Paper v. Ouellette

MEMORANDUM TO CONFERENCE:

I enclose page 10 of the Court's opinion in the above case, with two language changes suggested to the Reporter, Frank Wagner, by the Solicitor General.

The Solicitor General is correct that it has not yet been decided whether the Clean Water Act authorizes a "citizens' suit" to compel the EPA to enforce a permit.

Absent objection, I will request the Reporter to make these changes.

L.F.P., Jr.

lfp/ss

cc: Frank D. Wagner, Esquire

ture of the legislation were practically universal." *Id.*, at 318, n. 12 (citing legislative history). An examination of the amendments amply supports these views. The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. The CWA also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected States) to ~~compel the EPA~~ to enforce ~~a permit~~.[12] In light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, *Milwaukee I*, 406 U. S., at 107, it is clear that the only state suits that remain available are those specifically preserved by the Act.

Although Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress "left no room" for state causes of action. Respondents read the language of the saving clause broadly to preserve both a State's right to regulate its waters, 33 U. S. C. § 1370, and an injured party's right to seek relief under "any statute *or common law*," § 1365(e) (emphasis added). They claim that this language and selected portions of the legislative history compel the inference that Congress intended to preserve the right to bring suit under the law of any affected-state.[13] We cannot accept this reading of the Act.

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[12] See 33 U. S. C. §§ 1319(a), 1365(a), (h); see generally, *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13–14 (1980) (discussing "elaborate" remedial provisions).

[13] A Senate Report accompanying the amendments states: "[I]f damages could be shown, other remedies [in addition to a citizen suit] would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499. Respondents also note that after reviewing the legislative history, the District Court found no evidence that Congress intended to alter the traditional tort law principle that a party may bring suit in the State where the injury occurred. See *Young* v. *Masci*, 289 U. S. 253, 258–259 (1933).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Grimes — I've dictated a letter to my Clerk.

March 5, 1987

Re: 85-1233 International Paper v. Ouellette

Dear Lewis,

I agree we should make the requested changes. This is the type of late change we discussed not long ago in Conference that we said should require that all parties to the case receive a copy of the revised opinion. No doubt the Clerk can see to that.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

March 6, 1987

85-1233 International Paper v. Ouellette March 6, 1987

Dear Joe:

At the suggestion of the Solicitor General, we have made a minor change in the language on p. 10 of the Court's opinion.

My understanding is that the Reporter's Office will incorporate this change in a new printing. When this is done, the Conference recently agreed that it would be a good idea to send a copy of the revised opinion to all of the parties in the case.

I am sending a copy of this letter to the Reporter, Frank Wagner, who will let you know when the revised opinion copies are available.

Sincerely,

Joseph F. Spaniol, Jr., Esq.

cc - Frank Wagner, Esq.

Copies to the Conference

LFP/vde

Supreme Court of the United States
Reporter of Decisions
Washington, D. C. 20543

Andy !?

March 17, 1987

Honorable Lewis F. Powell, Jr.
Associate Justice

Re: International Paper Co. v. Ouellette,
No. 85-1233

Dear Justice Powell:

I am in receipt of the enclosed, suggesting yet another solution to the problem noted in Solicitor General Fried's letter of March 2, 1987. I await your instructions.

Respectfully,

Frank D. Wagner
Reporter of Decisions

March 31, 1987

85-1233 International Paper v. Ouellette

Dear Frank:

I do not think the change suggested by Mr. Reardon is necessary. I suggest you write him along the following lines:

> "I have brought to the attention of Justice Powell the change you suggested. His view is that, having already agreed to the change proposed by the Solicitor General, a further change in this sentence is not necessary. We do appreciate your bringing it to our attention."

If you have any question about this, Frank, do not hesitate to talk to me.

Sincerely,

Frank D. Wagner, Esquire
Reporter of Decisions

lfp/ss