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International Paper Co. V. Ouellette: Uneasy Resolution of Which State's Law to Apply in Interstate Water Pollution Disputes

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**INTERNATIONAL PAPER CO. V. OUELLETTE: UNEASY
RESOLUTION OF WHICH STATE'S LAW TO APPLY
IN INTERSTATE WATER POLLUTION
DISPUTES**

INTRODUCTION

Until 1972, no Supreme Court decision specifically had ruled on the issue of what law to apply in interstate water pollution disputes. In *Illinois v. City of Milwaukee* ("Milwaukee I"),¹ the Court held that the specialized federal common law of nuisance applied in these actions.² However, the Court handed down that opinion six months before Congress amended the Clean Water Act ("CWA" or "Act").³ When the related *City of Milwaukee v. Illinois* ("Milwaukee II")⁴ case came before the Supreme Court in 1981, the Court opined that Congress' 1972 amendments to the CWA had preempted the application of federal common law in such suits.⁵ The question of whether injured parties still had a cause of action under state law was not decided.⁶ Six years later, in *International Paper Co. v. Ouellette*,⁷ the Supreme Court ultimately held that when pursuant to the CWA a court asserts jurisdiction over a state law claim regarding interstate water pollution, the source State's law controls.⁸

International Paper further consolidated a difficult area of the law which, before the *Milwaukee II* ruling, had apparently found some uniformity in the application of the federal common law of nuisance. However, despite the majority's decision in *Milwaukee II*, three justices dissented from the Court's holding that Congress intended to preempt federal common law in this area.⁹

1. 406 U.S. 91 (1972). In that case, Illinois filed a motion for leave to file a bill of complaint against, among others, the city of Milwaukee, seeking to abate alleged pollution of Lake Michigan. *See id.* at 93.

2. *See id.* at 107. The Supreme Court refused to exercise its original jurisdiction over the case because a district court's "powers are adequate to resolve the issues." *Id.* at 108.

3. *See* Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1971) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986)). The Clean Water Act, also called the Federal Water Pollution Control Act ("CWA" or "Act"), was adopted in 1948 and amended several times. *See* R. ZENER, GUIDE TO FEDERAL ENVIRONMENTAL LAW 59-60 n.1 (1981). The 1972 Amendments represented a total rewriting of the Act. *See id.*

4. 451 U.S. 304 (1981).

5. *Id.* at 317-19.

6. *Id.* at 310 n.4.

7. 479 U.S. 481 (1987).

8. *Id.* at 487.

9. *See Milwaukee II*, 451 U.S. 304, 332 (1981) (Blackmun, J., dissenting, joined by Justices Stevens and Marshall); *see also* R. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 163-67 (1985), (discussing why it is unlikely that Congress intended to preempt application of federal common law in interstate water pollution suits.)

This Note analyzes the current state of the law in determining interstate water pollution disputes. Part I discusses the history of this area of the law. Part II examines the present case, *International Paper Co. v. Ouellette*, especially in light of the action taken on the *Milwaukee* cases. Part III concludes by considering the Supreme Court's majority and dissenting opinions, proposing that despite reservations by certain jurists and commentators, the CWA does indicate that in state law claims pertaining to interstate water pollution the source State's law applies in disputes subject to the CWA.

I. THE LAW OF INTERSTATE WATER DISPUTES

The development of the federal common law of nuisance as applied to interstate pollution disputes can be traced back to the early 1900's, starting with the Supreme Court decisions handed down in *Missouri v. Illinois*,¹⁰ a case involving interstate water pollution,¹¹ and *Georgia v. Tennessee Copper Co.*,¹² a case involving interstate air pollution.¹³ These cases required consideration of three major concerns of the Court: first, preserving the balance of power between the Supreme Court and state government;¹⁴ second, providing an arena for the peaceful resolution of interstate suits;¹⁵ and third, allowing a State the opportunity to protect

10. 180 U.S. 208 (1901), 200 U.S. 496 (1906).

11. 200 U.S. 496, 517 (1906). In *Missouri v. Illinois*, Missouri sought injunctive relief to stop Illinois from dumping raw sewage into a canal that emptied into the Desplaines River, which in turn flowed into the Illinois River, which emptied into the Mississippi River. Since Illinois law authorized the disposal of untreated sewage into the River, no state law claim was available to Missouri. *Id.* at 517-19. The Supreme Court carefully considered whether to enjoin the dumping, since to do so would override the decision of the Illinois Legislature to permit it, and also would establish a powerful new precedent in such interstate nuisance actions. *Id.* at 519-20. Consequently, the Court held that it would hear only those cases which were of an extremely serious nature. *Id.* at 521. In this instance, the Court determined that not only were the allegations serious enough for it to entertain jurisdiction, but that doing so would satisfy its concern with providing a forum in which to settle interstate disputes peacefully. *Id.* at 520-21.

12. 206 U.S. 230 (1907).

13. 206 U.S. 230, 236 (1907). In this leading air pollution case, the State of Georgia claimed that the Tennessee Copper Co. had emitted "noxious gas" which had caused damage to the woods and plant-life in Georgia. *Id.* Despite Georgia's allegation that a continuing public menace was a common law crime in both States, Tennessee had not taken action against the company. *Id.* at 231 (argument for State of Georgia). The Supreme Court enjoined the pollution, reasoning that the States have a right to protect their natural resources from unreasonable interference stemming from another state or its citizens. *See id.* at 237.

14. *See Missouri v. Illinois*, 200 U.S. 496, 519 (1906). ("The Constitution gives this court original jurisdiction in cases in which a State shall be a party . . . Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature."); *see also Note, City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 Wis. L. REV. 627, 631-33 (discussing concerns of the Supreme Court addressed in early interstate nuisance disputes).

15. *See* U.S. Constitution art. III, § 2, cl.1: "The judicial power shall extend to

its environmental integrity.¹⁶

Missouri v. Illinois and Tennessee Copper Co. mark the beginning of the application of the federal common law of nuisance to interstate pollution disputes. This trend was not interrupted by the 1938 *Erie R.R. Co. v. Tompkins*¹⁷ decision, which held that "[t]here is no federal general common law" in diversity cases.¹⁸ On the same day that the Supreme Court decided *Erie*, it stated in *Hinderlider v. La Plata Co.*¹⁹ that federal common law applied in certain areas.²⁰

In 1948, Congress passed the first Federal Water Pollution Control Act.²¹ That Act was not as all-encompassing or specific as the 1972 statute and subsequent amendments enforced today.²² Because the Supreme Court entertained jurisdiction over *Milwaukee I* before Congress had passed the 1972 amendments, the Court was guided by the less detailed 1948 Act in unanimously holding that federal common law applies in interstate nuisance disputes.²³

. . . controversies between two or more States. . ."; see also *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923) (Jurisdiction over controversies between States "was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force"); *Kansas v. Colorado*, 206 U.S. 44, 85 (1938) (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 743 (1907)) ("All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do, settle the controversies between them."); *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906), ("It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of this court."); and Note, *supra* note 14, at 631.

16. See *Milwaukee I*, 406 U.S. 91, 101-02 (1972); *Georgia v. Tennessee Copper Co.*, 206 U.S. at 237-38 (1907), ("When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. . . . [T]he alternative to force is a suit in this court.") (citation omitted); and Note, *supra* note 12, at 631-32.

17. 304 U.S. 64 (1938).

18. *Id.* at 78 (emphasis added).

19. 304 U.S. 92 (1938).

20. *Id.* at 110. In this case concerning the interpretation of a "compact" between Colorado and New Mexico involving the use of the waters of the La Plata River, the Supreme Court stated: "[W]hether the water of an interstate stream must be apportioned between the two States is a question of federal common law." The Court did not mention *Erie*.

21. See *Zener*, *supra* note 3 at 59-60.

22. See *id.*

23. 406 U.S. at 104. The Court denied Illinois' "motion to file a bill of complaint" under the Court's original jurisdiction, but ruled that Illinois could maintain an action in federal district court. *Id.* at 108. The State then filed suit in Illinois federal district court, alleging that the city was liable for creating a public nuisance under both federal and Illinois common law. In addition, the complaint alleged a violation of the State Environmental Protection Act. See *Illinois v. City of Milwaukee III*, 731 F.2d 403, 404, *cert. denied*, 469 U.S. 1196 (1985).

In his article, *In Praise of Erie- And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964), Judge Friendly classified the techniques used to create specialized

In *Milwaukee I*, the Supreme Court declined to exercise original jurisdiction, despite its recognition of the existence of a potential federal common law claim for abatement of a nuisance caused by interstate water pollution.²⁴ Nine years later, the case came back to the Court on appeal.²⁵ Notwithstanding that a number of cases had been decided according to the dictates of *Milwaukee I*,²⁶ the Supreme Court majority in *Milwaukee II* overruled the earlier decision, determining that the 1972 CWA, enacted just six months after the Court had reached its earlier decision, preempted such application.²⁷

This change in direction of the development of interstate water pollution law was reaffirmed in another 1981 Supreme Court decision, *Middlesex County Sewerage Authority v. National Sea Clammers Association*,²⁸ a case involving alleged violations of the CWA and the

federal common law as: (1) spontaneous generation in situations where critical federal policies are overriding; (2) the implication of "a private federal cause of action from a statute providing other sanctions"; (3) [the construction of] "a jurisdictional grant as a command to fashion federal law"; and (4) "the normal judicial filling of statutory interstices." The Supreme Court used a combination of these techniques in deciding that the federal common law of nuisance applied in *Milwaukee I*. First, the Court concluded that because of the many statutes that Congress had passed in order to preserve the Nation's waters, environmental protection was an important national policy. Consequently, the Supreme Court spontaneously generated federal common law in this area of important public policy. *Milwaukee I*, 406 U.S. 91, 101-03 (1972).

Secondly, the Court determined that the remedies provided by Congress were not the only federal remedies available, stating that "it is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Id.* at 103 (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957)). Thus, the use of federal common law filled the gaps of the federal water pollution statutes.

The Court also found support for this use of the federal common law in *Missouri v. Illinois* and *Tennessee Copper Co.* (evidently the Court was not concerned that these cases were decided before *Erie*), finding that States should not be subjected to pollution from exterior sources, and that when they are so exposed, they should have a peaceful arena in which to resolve such disputes. *Milwaukee I*, 406 U.S. 91, 104-05 (1972). Finally, the Supreme Court discussed the benefit of having a uniform standard in interstate nuisance disputes. *Id.* at 107 n.9.

However, the Court noted that future action by Congress to regulate water pollution might preempt federal common law as well. *Id.* at 107. In addition, this judgment effectively overruled part of a Supreme Court decision handed down less than one year earlier, which indicated that state common law would control a claim such as *Illinois v. See Milwaukee II*, 451 U.S. 304, 327 n.19 (1981) (*Milwaukee I* overruled *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971)).

24. *Milwaukee I*, 406 U.S. 91, 106-08 (1972).

25. *Milwaukee II*, 451 U.S. 304 (1981).

26. See Glicksman, *supra* note 9, at 153, n.158.

27. See 451 U.S. at 317-19; see also Note, *supra* note 14 at 53-57. In *Milwaukee II*, the Court quoted from the Legislative History in which the Congress had recognized that the 1948 "Federal water pollution control program . . . has been inadequate in every vital aspect." S. REP. NO. 414, 92d Cong. 2d Sess. 10, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3758. The Court stated that in enacting the amendments, Congress intended to establish an all-encompassing program of water pollution control, and the Court made extensive references to the Congressional Reports in determining that this statute had replaced the application of federal common law in interstate water disputes. See *Milwaukee II*, 451 U.S. 304, 318-19 (1981).

28. 453 U.S. 1 (1980).

Marine Protection Research and Sanctuaries Act (MPRSA) of 1972.²⁹ In a decision with two Justices dissenting, the Supreme Court held that neither Act implies a private right of action independent of its citizen suit provisions, and reemphasized that the federal common law of nuisance had been preempted in the area of water pollution by the CWA.³⁰

Thus, with the exception of the citizen suit provisions, *Milwaukee II* and *National Sea Clammers* have eliminated all opportunities for private persons to seek damages under federal law for injuries caused by activities regulated under the CWA.³¹

Justices Blackmun and Stevens strongly dissented in both decisions, and were joined by Justice Marshall in *Milwaukee II* in asserting that "federal common law displacement rests . . . on a faulty assumption."³² Justice Blackmun wrote that the original reasons for applying the federal common law of nuisance in interstate water pollution cases were dispositive.³³ Furthermore, Justice Blackmun stated that it "should not be taken as presumptive evidence, let alone conclusive proof" that Congress intended to preempt previous approaches to controlling interstate water pollution merely because in 1972 Congress again addressed the complex issue of purifying the nation's waters.³⁴ Justice Blackmun also stated that as the organization designated by Congress to regulate the CWA, the Environmental Protection Agency's (EPA),³⁵ "continued reliance on federal common law is firmly grounded in the language and structure of the language, [and] I fail to see how the Court can so lightly disregard its interpretation."³⁶

In *National Sea Clammers*, Justice Blackmun joined with Justice Stevens in asserting that the majority's appraisal of the intent expressed by Congress in the CWA and the MPRSA with respect to the federal common law was wrong.³⁷ Justice Stevens also reaffirmed Justice Blackmun's dissent in *Milwaukee II*.³⁸

Thus, the Justices' views on the federal common law of nuisance and interstate water pollution are far from uniform. *International Paper* is

29. See *id.* at 4. In that case, the National Sea Clammers Association, an organization of fishermen and clamdiggers who harvested off the coasts of New York and New Jersey, brought suit in federal district court against various governmental entities and officials from New York, New Jersey, and the federal government, claiming damage to fishing grounds caused by ocean dumping of sewage and other waste. See *id.* at 4-5. The Association sought injunctive and declaratory relief and compensatory and punitive damages under both the federal common law of nuisance, the CWA and the MPRSA, 33 U.S.C. §§ 1401 *et seq.* (1982)

30. 453 U.S. at 15-22.

31. See Glicksman, *supra* note 9, at 121.

32. *Milwaukee II*, 451 U.S. 304, 333 (1981).

33. *Id.* at 347.

34. *Id.* at 342.

35. See 33 U.S.C. § 1251(d) (1982).

36. *Milwaukee II*, 451 U.S. at 347.

37. *National Sea Clammers*, 453 U.S. 1, 22 (1980) (Stevens, J., dissenting, joined by Justice Blackmun).

38. See *id.* at 31.

the latest Supreme Court case in which the majority of the Court continues to refine its interpretation of how the CWA regulates interstate water disputes.

II. *INTERNATIONAL PAPER CO. V. OUELLETTE*

The holding reached by a bare majority in *International Paper* elucidates the Supreme Court's interpretation of how the CWA balances the right of an affected State to protect its environment from pollution caused outside the jurisdiction, against a source State's right to regulate its pollution in light of other policy interests. The Court already had determined in *Milwaukee II* that the CWA reserved to the States the right to use their laws, provided that they did not set standards less stringent than those established under the CWA.³⁹ But the remaining question which the Court finally determined in *International Paper* was which State's law to apply. Upon close examination of the statute and legislative history, the majority held that when a court considers a state law claim concerning interstate water pollution which is subject to the CWA, the court must apply the law of the source State.⁴⁰

A. *Factual Background*

Lake Champlain forms a natural partial boundary between the States of Vermont and New York. In 1978, property owners on the Vermont side filed a class action against the International Paper Company (IPC).⁴¹ They alleged that the discharge of effluents into the lake from an IPC pulp and paper plant operating on the New York shore made the water "foul, unhealthy, smelly and . . . unfit for recreational use", which in turn diminished the value of the Vermont land, and brought an action for a "continuing nuisance" under Vermont state law.⁴²

IPC moved for dismissal for failure to state a cause of action pursuant to Rule 12(c) and Rule 56(b) of the Federal Rules of Civil Procedure, claiming that the CWA preempted the property owners' state law action. The parties agreed that the court should defer judgment on this motion until the Court of Appeals for the Seventh Circuit had ruled on a similar case involving interstate water pollution, *Illinois v. City of Milwaukee* ("*Milwaukee III*").⁴³

39. See *Milwaukee II*, 451 U.S. at 327-29.

40. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987).

41. *Id.* at 484. Although originally filed in Vermont State Superior Court, the action subsequently was removed to Federal District Court for the District of Vermont. *Id.*

42. *Id.* In addition to seeking injunctive relief requiring IPC to modify its water treatment system, the owners sought compensatory damages and punitive damages. *Id.*

43. 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

In the *Milwaukee I* decision, 406 U.S. 91 (1972), after ruling that the specialized federal common law of nuisance applied in interstate water pollution disputes, the Supreme Court declined to exercise jurisdiction, because a lower court action was available, and remanded the case. See *id.* at 107-08.

When the case again came before the Supreme Court nine years later as *Milwaukee II*,

The Seventh Circuit remanded *Milwaukee III* for dismissal of Illinois' claim, holding that the CWA did not allow one State to apply its law against a pollution source found in another State.⁴⁴ The court reasoned that applying a different State's laws to a single "point source"⁴⁵ would disrupt the "carefully devised" regulatory system established by the CWA.⁴⁶ In addition, the court held that the only suits not preempted by the Act were those claiming violations of the polluting State's laws.⁴⁷

The Vermont District Court hearing *International Paper*, however, disagreed with the Seventh Circuit's decision and denied the motion to dismiss.⁴⁸ While the court acknowledged that federal law usually governs interstate water pollution disputes, it also determined that Sections 510 and 505(e) of the 1972 CWA Amendments (collectively known as "the saving clause") expressly preserve state law rights of action.⁴⁹

In holding that the saving clause established that federal law does not totally preclude individual States' rights to control pollution, the district court examined three possible interpretations to determine what kind of state actions Congress did intend to preserve.⁵⁰ The first interpretation views the saving clause as preserving state law only as it applies to waters which are outside of the CWA's jurisdiction.⁵¹ However, since the Act applies to practically all of the nation's surface waters,⁵² the court re-

451 U.S. 304 (1981), the Court overruled its previous decision, due to the enactment of the CWA, and again remanded the case. *See id.* at 317-32.

Ultimately, as *Milwaukee III*, the case came before the Seventh Circuit Court of Appeals, which held that a source State's law applies in interstate water disputes. *See Milwaukee III*, 731 F.2d 403, 414 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

44. *See* 731 F.2d at 413-14.

45. *See* 33 U.S.C. § 1362(14) (1982), which defines "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

46. *See* 731 F.2d at 414.

47. *See id.* at 413-14.

48. *Ouellette v. International Paper Co.*, 602 F. Supp. 264 (D. Vt. 1985), *aff'd*, 776 F.2d 55 (2d Cir. 1985), *rev'd in part*, 479 U.S. 481 (1987).

49. *Id.* at 268-69. Clean Water Act, Pub. L. No. 92-500, § 510, 86 Stat. 816, 893 (1971) (codified as amended at 33 U.S.C. § 1370 (1982)) states:

"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."

Clean Water Act, Pub. L. No. 92-500, § 505(e), 86 Stat. 816, 889 (1971) (codified as amended at 33 U.S.C. § 1365(e) (1982)) states 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 . . ."

50. *Ouellette*, 602 F. Supp. 264, 268, *aff'd*, 776 F.2d 55 (2d Cir. 1985), *rev'd in part*, 479 U.S. 481 (1987). For a discussion of the three interpretations of the saving clause, see *Note*, 1982 Wis. L. Rev. at 664-71.

51. *See Ouellette*, 602 F. Supp. at 268.

52. Although the CWA purports to regulate just "navigable waters," this term has been interpreted broadly to include waters that are not navigable in the traditional sense. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-35 (1985); Clean Water Act, Pub. L. No. 92-500, § 502(7), 86 Stat. 816, 886 (1971) (codified as amended at 33 U.S.C. § 1362(7) (1982)) (defining navigable waters as "waters of the United States").

jected this extremely narrow view.⁵³

The second interpretation sees the saving clause as preserving state nuisance law in the State where the discharge is located.⁵⁴ While the Seventh Circuit followed this reasoning in *Milwaukee III*,⁵⁵ the Vermont District Court rejected it, stating that "there is simply nothing in the Act which suggests that Congress intended to impose such limitations on the use of state law."⁵⁶

Instead, the District Court followed the third and most expansive interpretation: that the State affected by another State's discharge may apply its own nuisance law to determine the appropriate remedy.⁵⁷ The court concluded that this method of resolving interstate water pollution disputes would not conflict with the objectives of the CWA because the States' "imposition of compensatory damage awards and other equitable relief for injuries caused . . . merely *supplement* the standards and limitations imposed by the Act."⁵⁸

The Court of Appeals for the Second Circuit affirmed the decision of the Vermont District Court,⁵⁹ and the Supreme Court granted certiorari to resolve the split between the Circuits on this aspect of federal preemption.⁶⁰

In a 5 to 4 decision, the Supreme Court affirmed the denial of IPC's motion to dismiss, but reversed the District Court's decision that Vermont law applied.⁶¹ The Court essentially agreed with the rationale adopted by the Seventh Circuit in *Milwaukee III*.⁶² Accordingly, the Supreme Court held that the source State's law must be applied when a court considers a state law claim concerning interstate water pollution which is subject to the CWA.⁶³

B. *Rationale of the Supreme Court*

In reaching its decision in *International Paper*, the Supreme Court reaffirmed the proposition that a federal statute need not explicitly establish that particular state laws are supplanted.⁶⁴ While courts should not quickly decide that state law is preempted,⁶⁵ when a federal statute is "sufficiently comprehensive to make reasonable the inference that Con-

53. *Ouellette*, 602 F. Supp. at 269.

54. *Id.* at 268.

55. *See* 731 F.2d at 714.

56. *Ouellette*, 602 F. Supp. 264, 269, *aff'd*, 776 F.2d 55 (2d Cir. 1985), *rev'd in part*, 479 U.S. 481 (1987).

57. *See id.*

58. *Id.* at 271 (emphasis in original).

59. 776 F.2d 55, 56 (1985) (per curiam).

60. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

61. *See id.* at 487.

62. *See id.* at 492-94.

63. *See id.* at 487.

64. *See id.* at 491; *see also* *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

65. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 491 & n. 11 (1987).

gress 'left no room' for supplementary state regulation," preemption may be presumed.⁶⁶ Besides express or implied preemption, a state law is void to the extent that it "actually conflicts with a . . . federal statute."⁶⁷ This conflict arises when the state law "stands as an obstacle to the accomplishment or execution of the full purposes and objectives of Congress."⁶⁸

The Supreme Court looked to the goals and policies of the CWA and observed that while the ultimate objective of the CWA is to eliminate water pollution, other concerns, such as state policies, must be considered in its application.⁶⁹ Since the elimination of water pollution "cannot be achieved immediately, and . . . cannot be realized without incurring costs,"⁷⁰ the Court reasoned that the intent of Congress was to establish a system in the CWA to regulate the discharge of pollutants while accommodating legitimate state interests.⁷¹

Accordingly, the Court stated that an important aspect of the CWA is the requirement that usually a point source must obtain a National Pollutant Discharge Elimination System (NPDES)⁷² permit from the EPA before it may release any effluents into a navigable body of water.⁷³ Each permit contains specific pollution limitations and a compliance schedule for satisfying such provisions.⁷⁴

The Court also noted the CWA's acknowledgment of the critical role every State should play in assuring its own environmental integrity.⁷⁵ The Federal Government may allow a State to oversee the NPDES program regarding point sources situated within the State, provided the EPA Administrator finds that such proposed state program observes the CWA's requirements.⁷⁶ Whether its permit program is regulated by

66. *Hillsborough County*, 471 U.S. at 713 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *See International Paper*, 479 U.S. at 491.

67. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *See International Paper*, 479 U.S. at 491; *Hillsborough County*, 471 U.S. at 713.

68. *Hillsborough County*, 471 U.S. at 713 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see International Paper*, 479 U.S. at 491-92.

69. *See International Paper*, 479 U.S. at 494-95.

70. *See id.* at 494.

71. Clean Water Act, Pub. L. No. 92-500, § 301, 86 Stat. 816, 844, (1971) (codified as amended at 33 U.S.C. § 1342 (1982)). *See S. REP. NO. 414*, 92d Cong., 2d Sess. 43, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3710 ("The committee emphasizes that this section is not to be construed as reducing any water quality effluent requirements imposed as a result of . . . state law"). *See generally EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205-08 (1976) (describing NPDES system). For a detailed description of this system see *Zener, Guide to Federal Environmental Law* at 61-88.

72. *See* 33 U.S.C. § 1342.

73. *See International Paper v. Ouellette*, 479 U.S. 481, 489 (1987); *see also* Clean Water Act, Pub. L. No. 92-500, § 402(a), 86 Stat. 816, 880 (1971) (codified as amended at 33 U.S.C. §§ 1311(a), 1342(a) (1982)).

74. *See* 33 U.S.C. § 1342.

75. Clean Water Act, Pub. L. No. 92-500, § 101(b), 86 Stat. 816, 816 (1971) (codified as amended at 33 U.S.C. § 1251(b) (1982)).

76. *See International Paper*, 479 U.S. at 489.

either federal or state administration,⁷⁷ a source State may require more strict discharge limitations than those specified by the federal government.⁷⁸ In addition, the source State must provide the administrator with a certificate that the intended discharge is in accord with the State's water quality-based and technology-based criteria, before receiving an NPDES permit from the Federal Government.⁷⁹

While source States play a significant part in regulating their own pollution, the CWA provides a much smaller role for affected States sharing interstate waterways with the source State.⁸⁰ Although it might be harmed by pollution originating outside its borders, an affected State only has an advisory role in regulating such discharges.⁸¹ Before a federal permit may be issued, every affected State receives notice and the opportunity to oppose the proposed standards at a public hearing.⁸² Likewise, before a source State may issue a permit, it must give notice to potentially affected States, and consider their objections and recommendations.⁸³

However, the Court declared that "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."⁸⁴ No affected State may establish a separate permit system to control an out-of-state source.⁸⁵ Thus, the majority determined that source States are intended to play a greater role in the federal regulatory program than affected States.⁸⁶

The Supreme Court then declared that the CWA applies to all point sources and essentially all bodies of water, and since it sets forth the

77. *Id.* at 490.

78. See 40 CFR § 122.1(f) (1987).

79. Clean Water Act, Pub. L. No. 92-500, § 401(a), 86 Stat. 816, 877 (1971) (codified as amended at 33 U.S.C. 1341(a)(1) (1982)).

80. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987).

81. *Id.*

82. *Id.*; see also Clean Water Act, Pub. L. No. 92-500, § 401(a)(2), 86 Stat. 816, 878 (1971) (codified as amended at 33 U.S.C. § 1341(a)(2) (1982)); and *Milwaukee III*, 731 F.2d at 412.

83. See Clean Water Act, Pub. L. No. 92-500, § 402(b)(3),(4),(5), 86 Stat. 816, 881 (1971) (codified as amended at 33 U.S.C. § 1342(b)(3),(4),(5) (1982)).

84. *International Paper*, 479 U.S. at 490-91; see also Clean Water Act, Pub. L. No. 92-500, § 402(b)(6), 86 Stat. 816, 881 (1971) (codified as amended at 33 U.S.C. § 1342(b)(6) (1982)).

85. See Clean Water Act, Pub. L. No. 92-500, § 402(b), 86 Stat. 816, 880-81 (1971) (codified as amended at 33 U.S.C. § 1342(b) (1982)) (state may establish permit system for waters "within its jurisdiction" (emphasis added)); *Lake Erie Alliance for Protection of Coastal Corridor v. United States Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074-75 (W.D. Pa. 1981), *aff'd*, 707 F.2d 1392 (3d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983); *Tennessee v. Champion Int'l Corp.*, 709 S.W.2d 569 (S.Ct. Tenn. 1986), *cert. granted*, 479 U.S. 1061 (1987).

86. *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

procedures for obtaining a permit as well as its own remedies,⁸⁷ "it is clear that the only state suits that remain available are those specifically preserved by the Act."⁸⁸

In deciding this way, the Court relied upon two 1987 amendments, Section 505(e),⁸⁹ which says that "[n]othing in this section shall affect an injured party's right to seek relief under state law",⁹⁰ and Section 510,⁹¹ which preserves a State's authority "with respect to the waters (including boundary waters) of such State."⁹² The Court based its interpretation of the statute on the "language [of the statute which] *arguably* limits the effect of the clause to discharges flowing directly into a State's own waters, i.e. discharges from within the State."⁹³ The Court further reasoned that the application of an affected State's nuisance law to a point source in another State would effectively override the EPA's permit requirements and the policy choices made by source States in adopting their own standards.⁹⁴

In addition, the Court stated that to subject a source State to regulation by affected States would make for a confusing system, since there might be a number of affected States along an interstate waterway, and if they all had different standards, the source State could be liable for nuisance in one affected State but not another.⁹⁵

The Supreme Court concluded by holding that although the Vermont property owners should not bring claims under Vermont nuisance law, they could bring an action under New York nuisance law.⁹⁶ Application of the source State's law would neither upset the balance among federal, affected-state and source-state interests, nor subject a source to an indeterminate amount of potential regulations.⁹⁷ Finally, the Court held that the case could be heard in Vermont, since "the Act preempts laws, not courts."⁹⁸ "In the absence of statutory authority to the contrary,"⁹⁹ the

87. Clean Water Act, Pub. L. No. 92-500, § 402(b)(7), 86 Stat. 816, 881 (1971) (codified as amended at 33 U.S.C. § 1342(b)(7) (1982)).

88. *International Paper*, 479 U.S. at 492.

89. Clean Water Act, Pub. L. No. 92-500, § 505(e), 86 Stat. 816, 889 (1971) (codified as amended at 33 U.S.C. § 1365(e) (1982)).

90. *Id.*

91. *See* Clean Water Act, Pub. L. No. 92-500, § 510, 86 Stat. 816, 893 (1971) (codified as amended at 33 U.S.C. § 1370 (1982)).

92. *Id.*

93. *International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (emphasis added). Conversely, the statute "arguably" could be interpreted as applying to discharges from outside the State's waters, which would mean that the affected state's law *would* apply against an out-of-state polluter. Thus, an important foundation of the Court's rationale rests on the ambiguous word "arguably."

94. *See International Paper*, 479 U.S. at 495.

95. *Id.* at 496-97.

96. *Id.* at 497-98.

97. *Id.* at 498-99.

98. *Id.* at 499-500.

99. *Cf.* Clean Water Act, Pub. L. No. 92-500, § 505(c)(1), 86 Stat. 816, 889 (1971) (codified as amended at 33 U.S.C. § 1365(c)(1) (1982)) (citizen suit to enforce permit must be brought in judicial district where source is located).

rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State."¹⁰⁰

C. *Dissenting Opinions*

Despite the unanimous opinion that the CWA does not preempt a private nuisance suit filed in an affected State's court when the source of the alleged injury is located in another State,¹⁰¹ four Justices dissented from the Court's view that an affected State's court must apply the source State's nuisance law.¹⁰²

In Justice Brennan's dissenting opinion, he argued that since Vermont and New York private nuisance law are the same, and Vermont is the only State to share Lake Champlain with New York, there was no need to make a choice of law determination.¹⁰³ Justice Brennan then asserted that even if the question of applicable state law had arisen, nothing in the CWA preempts the usual two-step analysis undertaken by federal district courts to determine which State's law to apply in interstate tort actions.¹⁰⁴ Thus, he concluded that the CWA's "plain language clearly indicates that Congress wanted to leave intact the traditional right of the affected State to apply its own tort law when its residents are injured by an out-of-state polluter."¹⁰⁵

In Justice Stevens' dissenting opinion, he averred that since the parties to the action had not asked the District Court to decide which substantive law would govern, the Supreme Court should not hand down an advisory opinion determining that the District Court must apply the substantive law of the State in which the source of water pollution is located.¹⁰⁶ In conclusion, Justice Stevens stated: "One cannot help but wonder what has happened to the once respected doctrine of judicial restraint. Just as this Court does not sit to edit the opinions of lower courts, . . . it also does not sit to draft advisory opinions for the possible future guidance of other courts."¹⁰⁷

III. ANALYSIS OF THE SUPREME COURT'S OPINION

International Paper, as the most recent of *Milwaukee II*'s Supreme Court progeny, stands for the proposition that the source State's law is controlling in interstate water pollution disputes.¹⁰⁸ Yet the close ruling in this case indicates the concern of some of the Justices with the direc-

100. *International Paper v. Ouellette*, 479 U.S. 481, 500 (1987).

101. *See id.* at 500, 509.

102. *See id.* at 500 (Brennan, J., joined by Blackmun and Marshall, JJ., concurring in part and dissenting in part); *see also id.* at 508, (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

103. *Id.* at 501.

104. *See id.* at 501-02 & n.1.

105. *International Paper Co. v. Ouellette*, 479 U.S. 481, 504 (1987).

106. *Id.* at 509-10.

107. *Id.*

108. *Id.* at 487.

tion in which the Court's determination in *Milwaukee II* is headed. For example, Justice Brennan, who had voted with the *Milwaukee II* majority that the CWA precludes application of the federal common law of nuisance in interstate water disputes,¹⁰⁹ dissented in *International Paper*.¹¹⁰ He argued that nothing in the CWA requires application of the source State's law in such instances, and the majority's ruling upset traditional state tort law principles.¹¹¹

Justices Blackmun, Marshall and Stevens, on the other hand, questioned whether the CWA really does preempt application of the federal common law of nuisance in interstate water disputes.¹¹² Thus, further examination of the Act, and of excerpts from the Congressional hearings held during its formulation, might shed more light on Congress' intent regarding these areas.

In *Milwaukee II*, the Supreme Court held that the CWA precluded application of federal common law in this specific area.¹¹³ As its foundation, the Court observed that preemption of federal common law by a federal statute is premised on the doctrine of the separation of powers, and "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."¹¹⁴

The Supreme Court then determined that the CWA extended federal statutory control to all point source discharges, and Congress had intended to address comprehensively the issue of water pollution control through this statute.¹¹⁵ The Court held that these amendments did not constitute just another statute merely "touching interstate waters"¹¹⁶, and thus were inadequate to preempt federal common law.¹¹⁷ To the contrary, these amendments constituted a "total restructuring" and "complete rewriting" of the water pollution legislation existing at the time that *Milwaukee I* was before the Supreme Court.¹¹⁸ The Court added that the language in its 1975 *Train v. City of New York* decision "was obviously correct when it described the 1972 Amendments as establishing 'a comprehensive program for controlling and abating water pollution.'"¹¹⁹

The Court further supported its interpretation in noting the inclusion of all point sources within the purview of the statute.¹²⁰ A mandatory

109. *Milwaukee II*, 451 U.S. 304, 317-19 (1981).

110. *International Paper Co. v. Ouellette*, 479 U.S. 481, 500-08 (1987).

111. *Id.* at 500-04.

112. *See Milwaukee II*, 451 U.S. 304, 332-333 (1981) (Blackmun, J., dissenting).

113. *Id.* at 332.

114. *Id.* at 317.

115. *See id.* at 317-18.

116. *Milwaukee II*, 451 U.S. 304, 317-18.

117. *Id.*

118. *Id.* at 317. The Court referred to the statements of a number of Congressmen in supporting its contention that these views on the comprehensive nature of the legislation were practically universal. *Id.* at 319.

119. *Id.* at 318 (quoting *Train v. City of New York*, 420 U.S. 35, 37 (1975)).

120. *See id.* at 318.

permit is necessary for a point source discharge to be legal, "which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals."¹²¹ Compliance with this specific procedure would promote the elements of "efficiency and predictability"¹²² that are critical to attaining the express Congressional goal which, at the time of the 1972 amendments, was to eliminate water pollution by 1985.¹²³

For instance, efficiency (or uniformity) would be facilitated since once a discharger obtains a permit, his responsibilities and liabilities are settled and he can plan his business more accurately.¹²⁴

Predictability (or finality) of approach would never be achieved so long as each State¹²⁵ could set up its own discharge standards.¹²⁶ However, since some flexibility in maximum state effluent limitations is politically desirable, and provided such standards were at least as strict as the minimum federal standards,¹²⁷ this system provides the most uniform way to attain it (absent federal common law), due to the uniformity in procedure and remedies.¹²⁸

Finally, in *Milwaukee II* the Supreme Court refuted arguments that the saving clause expressed a Congressional intent to preserve federal common law remedies.¹²⁹ The Court explained that although Section 510 of the 1972 amendments permits States to adopt stricter effluent limitations than those adopted under the CWA, that provision does not mean that States can establish more stringent limitations through federal courts by using federal common law.¹³⁰ Moreover, the saving clause means only that nothing in the citizen suit section itself shall affect a person's rights "under any statute or common law" to seek enforcement of limitations or standards, or to seek "other relief".¹³¹

121. *Milwaukee II*, 451 U.S. 304, 318 (1981).

122. See 479 U.S. at 496; see also Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. at 664 n.281.

123. Clean Water Act, Pub. L. No. 92-500, § 101, 86 Stat. 816, 816 (codified as amended at 33 U.S.C. § 1251(a)(1) (1982)).

124. See Note, 1982 WIS. L. REV. at 666.

125. "The term '[s]tate' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands." Clean Water Act, Pub. L. No. 92-500, § 502(3), 86 Stat. 816, 886 (1971) (codified as amended at 33 U.S.C. § 1362(3) (1982)).

126. See Note, 1982 WIS. L. REV. at 666.

127. Clean Water Act, Pub. L. No. 92-500, § 510, (1971) (codified as amended at 33 U.S.C. § 1370 (1982)).

128. See Note, 1982 WIS. L. REV. at 667. The majority further supported its decision that the CWA has preempted federal common law in the area of interstate water pollution by referring to language in *Milwaukee I*, where the Court had said that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Milwaukee I*, 406 U.S. 91, 107 (1972). In *Milwaukee II*, evidently, the Court decided that the CWA satisfied the criteria for doing so. *Milwaukee II*, 451 U.S. 304, 317-19 (1981).

129. See *Milwaukee II*, 451 U.S. at 320.

130. See *id.* at 328.

131. *Id.* at 328.

In sum, the majority determined that the saving clause has no effect beyond Section 1365, and the rest of the CWA can preempt federal common law remedies.¹³² Thus, the Court held that the CWA supplanted application of the federal common law of nuisance in water pollution suits.¹³³

In dissent, Justice Blackmun stated that the CWA did not preempt use of federal common law in such disputes.¹³⁴ Calling the majority's reading of the statute "extremely strained" and "at odds with the manifest intent of Congress to permit more stringent remedies under both federal and state [common law],"¹³⁵ Justice Blackmun's dissent viewed the Court's ruling as an unjustified "license to supplant all legal remedies outside the Act itself. . . ."¹³⁶

The dissent also discussed the "disturbing aspect" of the Court's elimination of federal common law application in interstate water pollution suits.¹³⁷ Rather than promoting a more uniform federal approach to this issue, Justice Blackmun felt that the majority's ruling "will lead States to turn to their own courts for statutory or common law assistance in filling the interstices of the federal statute."¹³⁸ Therefore, the majority's preemption ruling, based partly on its view of the CWA as "comprehensive,"¹³⁹ and its belief that water pollution control is particularly unsuited to a "sporadic," "ad hoc" federal common law approach¹⁴⁰ suggests the possibility of fifty different state law standards instead of one uniform federal common law standard.¹⁴¹

The CWA does not expressly state that use of the federal common law of nuisance is preempted in interstate water disputes.¹⁴² Nevertheless, one can argue that the fact that Congress has not amended the CWA so as to neutralize the Supreme Court's interpretation in *Milwaukee II*, in the relatively substantial period of approximately eight years since the Court so ruled, would indicate at the least Congressional ratification of such an interpretation, even if Congress did not intend initially for the CWA to be so construed. This argument is particularly persuasive in light of the recent focus on the environment, and with the overwhelming passage, over President Reagan's veto, of the 1986 Amendments.¹⁴³ Had Congress wanted to establish that the CWA was intended to preempt the

132. *Id.* at 305.

133. *See id.* at 317-19.

134. *See Milwaukee II*, 451 U.S. 304, 332-54 (1981) (Blackmun, J., dissenting).

135. *Id.* at 342. *But see Milwaukee II*, 451 U.S. at 329 n.22.

136. *Id.* at 342.

137. *Id.* at 353.

138. *Id.* at 353-54.

139. *Milwaukee II*, 451 U.S. 304, 318 (1981).

140. *Id.* at 325.

141. *But see id.* at 315 n.8.

142. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987).

143. Congress overrode the Presidential Veto with a vote of 86 to 14 in the Senate, 133 CONG. REC. S.1708 (daily ed. Feb. 4, 1987) and a vote of 401 to 26 in the House, 133 CONG. REC. H.525-26 (daily ed. Feb. 3, 1987).

federal common law of nuisance in the area of interstate water pollution, this would have been an appropriate time statutorily to so state.

Since the Supreme Court had not received any Congressional indication that the majority had ruled incorrectly in *Milwaukee II*, in *International Paper* the Court held that the Act establishes the application of a source State's law in interstate water disputes not covered by the CWA.¹⁴⁴ That ruling advances the objectives of predictability and efficiency,¹⁴⁵ for while 56 different sets of effluent standards *could* be applied in such actions,¹⁴⁶ at least *when* to apply which standard now is definite.

This interpretation of Congressional intent concerning interstate water pollution suits makes sense when balancing Congress' aim to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters against assuring a State's economic well-being by not imposing extreme environmental restrictions on industrial plants and the like.¹⁴⁷ This is a political concern which the Supreme Court noted is more properly overseen by Congress.¹⁴⁸ By establishing minimum federal standards and a procedure to eliminate water pollution, the CWA allows each State to follow national regulations as well as to set its own policy priorities.

Production plants tend to employ a relatively large amount of people, and the injunctive relief respondents sought in *International Paper* would have, at the least, caused reconstruction of the mill, resulting in, at best, the temporary lay-off of workers. Shutting down the mill for any length of time would have produced a detrimental effect on the community's economy, and courts have been reluctant to enforce injunctions in such instances.¹⁴⁹

At first glance, it might seem that since the historic police powers of the States include maintaining their own environmental integrity, an affected State should be able to halt the influx of effluents from outside.

144. See *International Paper*, 479 U.S. at 493-97.

145. *Id.* at 496.

146. See *Note*, 1982 WIS. L. REV. at 667; see also *International Paper*, 479 U.S. at 496-97.

147. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 494-95 (1987); Clean Water Act, Pub. L. No. 92-500, § 302(a)(b), 86 Stat. 816, 846 (codified as amended at 33 U.S.C. § 1312(a)(b)-(1),(2) (1982)).

148. *International Paper*, 479 U.S. at 497.

149. For example, similar to the paper mill in *International Paper*, defendant's cement plant in the intrastate case *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), was a large employer, tax-payer and industry in the town. The New York Court of Appeals denied the injunction, although it allowed the one-time action for permanent damages. *Id.* at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319.

In addition, before the federal Supreme Court handed down its decision in *International Paper*, the Supreme Court of Tennessee followed the same reasoning as the Seventh Circuit in *Milwaukee III*, and held that Tennessee could not exercise jurisdiction over a South Carolina paper mill operating under an EPA approved permit, even though the mill's discharges produced deleterious effects in Tennessee. *Tennessee v. Champion International Corp.*, 709 S.W.2d 569, 574-76 (S. Ct. Tenn. 1986), *vacated*, 479 U.S. 1061 (1987).

However, such a State is given the opportunity to express its concerns before a source State receives its permit.¹⁵⁰ In fact, an affected State is not exercising its policing responsibilities if it does not participate in this procedure. Therefore, while an affected State cannot force a source State to follow an affected State's policy dictates, it can make its views known, and if they have sufficient merit, the EPA Administrator will not issue a permit to the source State.¹⁵¹

Finally, despite the dissenters' objection to the suppression of traditional state tort law, the Supreme Court has held that since Congress can preempt state law in any area within the scope of its power under the commerce clause, it can preempt state law in the area of water control.¹⁵² Thus, although the ruling in *International Paper* greatly changes the future of state tort actions involving water pollution, the certainty which this holding brings to a complex area of the law advances the Congressional objective of purifying the Nation's waters without undermining the economic security of any State.¹⁵³

150. See *Tennessee*, 709 S.W. 2d at 574-76; *International Paper*, 479 U.S. at 490-91.

151. Clean Water Act, Pub. L. No. 92-500, § 401(a)(2), 86 Stat. 816, 878 (1971) (codified as amended at 33 U.S.C. § 1341(a)(2) (1982)).

152. See *FERC v. Mississippi*, 456 U.S. 742, 759-66 (1982).

153. *International Paper* undoubtedly also will have an effect on the outcome of interstate air pollution suits. Courts have noted certain differences between the CWA and the Clean Air Act (CAA) 42 U.S.C. §§ 7401 *et seq.* (1982). See *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 701-02 (D.N.J. 1982) (holding that, even though the CAA, unlike the CWA, does not regulate all stationary emission sources of pollutants, the CAA preempts the federal common law of nuisance because "Congress addressed the problem of air pollution" through the establishment of a comprehensive regulatory program); see also *New England Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981).

However, the major structural approaches of both statutes are comparable. For instance, each contains pollution limitations based on the cost and feasibility of control technology, and air and water quality standards based on the impact of air and water pollution on the quality of the ambient air and water. See 42 U.S.C. §§ 7410, 7411 (1982) (CAA); 33 U.S.C. §§ 1313, 1314 (1982) (CWA). Moreover, the CWA and the CAA are notably similar in a number of sections. See, e.g., publication of criteria documents, 42 U.S.C. § 7408(a)(2), (b)(1), (d) & (f) (1982) (CAA); 33 U.S.C. § 1314(a)(1), (a)(2), (a)(3) & (b) (1982) (CWA); standards of performance for new resources, 42 U.S.C. § 7411(a) & (b) (1982) (CAA); 33 U.S.C. § 1316(a) & (b) (1982) (CWA); regulation of hazardous or toxic pollutants, 42 U.S.C. § 7412(c) (1982) (CAA); 33 U.S.C. § 1317(c) (1982) (CWA); inspections, monitoring, and entry, 42 U.S.C. § 7414(a), (c) & (b) (1982) (CAA); 33 U.S.C. § 1318(a), (c) & (b) (1982) (CWA); exercise of emergency power, 42 U.S.C. § 7603(a) (1982) (CAA); 33 U.S.C. § 1364(a) (1982) (CWA); citizen suits, 42 U.S.C. § 7604(a), (b), (c), (d) & (e) (1982) (CAA); 33 U.S.C. § 1365(a), (b), (c), (d) & (e) (1982) (CWA); federal procurement, 42 U.S.C. § 7606 (1982) (CAA); 33 U.S.C. § 1368 (1982) (CWA); preemption, 42 U.S.C. § 7416 (1982) (CAA); 33 U.S.C. § 1370 (1982) (CWA); reports to Congress, 42 U.S.C. § 7613 (1982) (CAA); 33 U.S.C. § 1375(a) (1982) (CWA); interstate pollution abatement, 42 U.S.C. § 7426 (1982) (CAA); 33 U.S.C. § 1342 (1982) (CWA); judicial review, 42 U.S.C. § 7607(a), (b)(2) & (c) (1982) (CAA); 33 U.S.C. § 1369(a), (b)(2) & (c) (1982) (CWA); international pollution abatement, 42 U.S.C. § 7415 (1982) (CAA); 33 U.S.C. § 1320(a) (1982) (CWA). Therefore, it would appear that as *International Paper* requires that the source State's law be applied in interstate water suits, by analogy, the source State's law should apply in interstate air disputes.

CONCLUSION

In sum, the Supreme Court decision in *International Paper* has far-reaching effects in the areas of both environmental and tort law. While the dissenters were opposed to the holding that the source State's law governs in interstate water actions not covered by the CWA, the majority's opinion made the Court's *Milwaukee II* ruling that the Act preempts application of federal common law in such suits much more coherent.

The majority's interpretation in *International Paper* appears to follow closely the dictates of the CWA, for not only would the goal of eliminating pollution of the Nation's waters be achieved more slowly if uncertainty existed as to which law to apply in interstate water disputes, but other important concerns, such as economic security, would be undermined. Hence, *International Paper* has further clarified a complex area of the law, and has set a pattern for courts to follow in future environmental suits.

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