Preemption of State Common Law Remedies by Federal Environmental Statutes: *International Paper Co. v. Ouellette*

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**INTRODUCTION**

In 1981, the United States Supreme Court eliminated "all opportunities"\(^1\) for a private plaintiff to obtain monetary or injunctive relief under federal law for injuries caused by water polluters regulated under the 1972 amendments to the Federal Water Pollution Control Act (now called the Clean Water Act).\(^2\) In a pair of opinions that year the Court held, first, that the Clean Water Act preempts private actions for damages under the federal common law of nuisance\(^3\) and, second, that the Clean Water Act does not impliedly authorize a private right of action for damages.\(^4\) Neither of the two opinions, however, addressed the question of what remedies still existed under state law, in light of the Clean Water Act's authorization of private enforcement through citizen suits.\(^5\) Given that many other federal environmental statutes contain identical citizen suit provisions,\(^6\) the extent to which the Clean Water Act preempts state law remedies may indicate how federal environmental statutes supersede state remedies in general.

In *International Paper Co. v. Ouellette*,\(^7\) the Supreme Court clarified the extent to which state common law remedies are preempted by the Clean Water Act. The Court held that although the Act does not pre-

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empt nuisance suits against point source polluters,8 a court entertaining such a suit must apply the common law of the state where the discharging source is located.9 The Court reasoned that common law suits under the law of the source state are consistent with the structure of the Clean Water Act,10 which allows states to set discharge standards more stringent than those adopted at the federal level.11 In contrast, the Court concluded, subjecting dischargers to the potentially conflicting nuisance standards of multiple states would undermine the permit scheme of the Clean Water Act.12 The Court thus reversed both the district court and the court of appeals, which held that the nuisance law of the state affected by water pollution may be applied in a private lawsuit against an out-of-state polluter.13 The Court instead followed the Seventh Circuit's reasoning in City of Milwaukee v. Illinois (Milwaukee III)14 that the Clean Water Act precludes application of the law of the state where the injury occurred if the polluter resides in another state.15

Section I of this Note discusses the relevant provisions of the Clean Water Act, reviews the analysis of the Seventh Circuit Court of Appeals in Milwaukee III, and describes both the factual background and the district court's holding in Ouellette. Section II reviews the Supreme Court's holding in Ouellette, including the majority opinion and the two partial dissents. Section III analyzes the implications of the Court's holding and argues that Congress should explicitly authorize private damage actions under both the Clean Water Act and other federal environmental statutes.

I
BACKGROUND
A. The Clean Water Act

The Clean Water Act has been described by the Supreme Court as "an all-encompassing program of water pollution regulation" designed "to establish a comprehensive long-range policy for the elimination of water pollution."16 The statute establishes national permit requirements

8. The statute defines a point source as "any discernible, confined and discrete conveyance," such as a pipe or flood channel, "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1982).
10. Id. at 814-16.
14. 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985) [hereinafter Milwaukee III].
15. Id. at 414.
for the discharge of pollutants into interstate and navigable waters and directs the Environmental Protection Agency to set effluent standards on an industry-by-industry basis. A state may establish its own permit system, so long as the state's effluent discharge standards are at least as stringent as the federal standards. Before issuing a permit to a discharger, both the federal government and the source state (if it has a permit program) must give notice and an opportunity to be heard to those states that may be affected by the discharger's effluent. The source state must certify that the permit complies with its own discharge standards before the federal government can issue a permit under the Clean Water Act.

The Clean Water Act contemplates a role for the state in regulating effluent discharges and in private litigation over water pollution disputes. Section 510(1) of the statute explicitly preserves state authority to regulate water pollution as long as state standards are at least as stringent as the federal standards they are supplanting. Preservation of state authority is further clarified by section 510(2), providing: "[N]othing in this chapter shall ... (2) 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." In addition, section 505 of the statute, which also provides for citizen suit enforcement of the Clean Water Act, contains a savings clause covering suits outside of the Clean Water 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 (including relief against the Administrator or a State agency).

The major dispute in Ouellette revolved around the congressional intent

17. The definition of waters subject to Clean Water Act regulation is very broad, as the Court held in United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985) (regulation of navigable waters under Section 404 of the Clean Water Act extends to wetland areas). The Court noted:

Congress chose to define the waters covered by the Act broadly. ... Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.


19. Id. §§ 1342(b)-(c), 1370(1) (1982).
20. Id. §§ 1341(a)(2), 1342(b)(5).
21. Id. § 1341(a)(1).
22. Id. § 1370(1).
23. Id. § 1370(2).
24. Id. § 1365(e).
behind the savings clause in section 505 and the state authority provision in section 510(2).

B. The Seventh Circuit Decision in Milwaukee III

The Seventh Circuit decision in Milwaukee III culminated over a decade of litigation in the federal courts, including two major Supreme Court decisions. The decision in Illinois v. City of Milwaukee (Milwaukee I) \(^{25}\) creating a federal common law of nuisance for interstate water pollution disputes, was handed down just prior to the adoption of the 1972 amendments to the Federal Water Pollution Control Act. Illinois had petitioned the Supreme Court for leave to file a complaint under the Court's original jurisdiction, alleging that pollution by Milwaukee and other Wisconsin cities into Lake Michigan constituted a public nuisance.\(^{26}\) The Supreme Court held that the federal common law of nuisance should apply to the litigation because state common law remedies were preempted by "the interstate character of the dispute."\(^{27}\) Milwaukee I found that the pre-1972 statute made it "clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters."\(^{28}\) The Court applied federal common law because "federalism and the federal interest in a uniform rule of decision required the application of federal law."\(^{29}\) The Court denied without prejudice the motion to file an original action, remitting the action "to an appropriate district court."\(^{30}\)

Illinois refiled its claim in the United States District Court for the Northern District of Illinois, which held a trial to determine liability under federal law.\(^{31}\) The district court found that the Wisconsin cities were dumping substantial quantities of sewage into the lake, threatening both the recreational use of the lake and the drinking quality of the water.\(^{32}\) The district court ordered the cities to change their sewage dumping equipment and practices.\(^{33}\)

On appeal, the Seventh Circuit affirmed the judgment in part.\(^{34}\) The court ruled that the Clean Water Act had not preempted federal common law nuisance suits, but held that "[i]n applying the federal common law of nuisance in a water pollution case, a court should not ignore the

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26. Id. at 93.
27. Id. at 103.
29. Id.
30. 406 U.S. at 108.
32. Id. at 167-69.
33. Id. at 169-70.
34. Id.
Act but should look to its policies and principles for guidance." The court of appeals reversed the district court's injunction to the extent that its effluent limitations were more stringent than those under the permit.

In the *Milwaukee II* decision, the Supreme Court vacated the order of the district court. The Court held that the Clean Water Act had preempted federal common law suits to abate water pollution. The Court found that the 1972 amendments, adopted just six months after the decision in *Milwaukee I* but long before the trial in the district court, had occupied the field of water pollution control so as to leave "no basis for a federal court to impose more stringent limitations . . . by reference to federal common law." The Supreme Court remanded to the Seventh Circuit, which consolidated the case with a suit by an Illinois resident complaining of pollution by the city of Hammond, Indiana.

The *Milwaukee II* decision was unclear, however, on whether state common law remedies were preempted by the Clean Water Act. Illinois argued in a separate petition for *certiorari* that if the Clean Water Act preempted federal common law, state law could no longer be preempted by federal common law and consequently would be available under the holding in *Milwaukee I*. The Court expressly reserved this question in *Milwaukee II*, and later denied Illinois' separate petition.

Illinois again raised the issue of preservation of state common law claims in the Seventh Circuit remand from *Milwaukee II*. In *Milwaukee III*, the court of appeals decision on remand from *Milwaukee II*, the court held that the Clean Water Act precluded a suit under the common law of any state except that in which the alleged polluter was located. In reaching that conclusion, the court first discussed the reasons given by the Supreme Court in *Milwaukee I* for finding that federal common law preempted state law in the field of interstate water pollution. The court of appeals noted that the Supreme Court continued to cite *Milwaukee I* for the proposition that state law did not apply in interstate disputes where state interests conflicted. The court determined that the reasons stated in *Milwaukee I* for applying federal, not state, common law also forbade applying state common law to out-of-state dischargers under the new regime of the Clean Water Act, unless such suits were preserved

35. *Id.* at 164.
36. *Id.* at 173-77.
38. *Id.* at 317-32.
39. *Id.* at 320.
40. *Milwaukee III*, 731 F.2d at 405-06.
42. 451 U.S. at 310 n.4.
under the statute.\textsuperscript{45}

The court of appeals then construed the state law and private suit savings clauses in the Clean Water Act.\textsuperscript{46} First, the court found that “in light of the structure of the [Clean Water Act], with its emphasis upon the role of the state where the discharge . . . occurs,”\textsuperscript{47} section 510(1) of the Clean Water Act does not allow the application of one state’s nuisance law in another state.\textsuperscript{48} The court then held that although section 510(2) preserves the right of a state to regulate discharges into its own waters, the statute does not allow the state to exercise jurisdiction over activities occurring outside its boundaries, even if those activities pollute the waters of the state.\textsuperscript{49} The court reasoned that because \textit{Milwaukee I} had effectively preempted state common law remedies for interstate water pollution disputes prior to the adoption of the 1972 amendments, the state authority provision of section 510(2) could not have preserved a right on the part of the state to regulate out-of-state polluters.\textsuperscript{50} Finally, the court viewed it as “implausible” that the savings provision for private suits in section 505(e) was meant to confer a right on a citizen of a foreign state to seek a limit on a pollution source applying the law of the foreign state, since such a result “would lead to chaotic confrontation between sovereign states.”\textsuperscript{51}

\textbf{C. Setting of the Vermont Lawsuit}

The Supreme Court’s decision in \textit{Ouellette} is the latest salvo in a protracted dispute dating back to the early 1970’s. Vermont initially filed an action in the United States Supreme Court against the state of New York and International Paper Company (IPCo) alleging that IPCo’s discharge of waste into Lake Champlain\textsuperscript{52} constituted a nuisance to Vermont residents.\textsuperscript{53} A settlement agreed to by Vermont, New York, the Environmental Protection Agency, and IPCo imposed strict effluent limitations on IPCo and required IPCo to make extensive changes in its discharge techniques. Vermont, in return, agreed to dismiss the suit.\textsuperscript{54} The settlement agreement included provisions preserving private actions

\textsuperscript{45} \textit{Id.} at 410-11.
\textsuperscript{46} \textit{See supra} text accompanying notes 22-24 for the language of the clauses.
\textsuperscript{47} \textit{Milwaukee III}, 731 F.2d at 413.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 414.
\textsuperscript{52} Lake Champlain forms a major part of the border between Vermont and New York. IPCo’s plant is located in Ticonderoga, New York, along the lake shore.
by Vermont residents for future violations by IPCo.\textsuperscript{55}

The litigation at issue in \textit{Ouellette} began in 1978 when owners of land on the Vermont shore of Lake Champlain brought a class action in Vermont state court. Asserting claims similar to those made in the previous suit, the plaintiffs alleged that IPCo's discharges into the lake constituted a compensable nuisance.\textsuperscript{56} The plaintiffs also alleged that IPCo had violated its permit under the Clean Water Act.\textsuperscript{57} The plaintiffs sought damages and an injunction ordering IPCo to move its water intake pipes closer to its discharge pipes.\textsuperscript{58} After the action was removed to federal district court in Vermont, IPCo moved to dismiss the nuisance claim\textsuperscript{59} on the basis that the holding in \textit{Milwaukee II} preempted state common law claims. At the court's suggestion, the parties agreed that a decision on IPCo's motion to dismiss be deferred until the Seventh Circuit had decided the preemption issue on remand in the \textit{Milwaukee III} litigation.\textsuperscript{60}

\textbf{D. The District Court Opinion in Ouellette}

The district court, after waiting for the Seventh Circuit decision in \textit{Milwaukee III}, decided not to follow the lead of the court of appeals. Instead, the district court held that a suit to abate interstate water pollution may be brought in a state other than one where the effluent source is located and may be decided by application of the nuisance law of the state where the pollution damage occurs.\textsuperscript{61} After reviewing the analysis in \textit{Milwaukee III}, the district court concluded that the Seventh Circuit had answered the wrong question. "The issue presented . . . is not whether Congressional legislation preempted state statutory and common law as it relates to interstate water pollution. . . . Rather, the . . . question is the extent to which Congress authorized, either expressly or implicitly, resort to state common law in a situation such as this."\textsuperscript{62}

As the district court noted, there are three ways to interpret the Clean Water Act's state authority and private suit saving clauses in light of the \textit{Milwaukee I} and \textit{Milwaukee II} decisions.\textsuperscript{63} The most restrictive view is that the only state common law suits preserved were those involv-


\textsuperscript{57} \textit{Id}.

\textsuperscript{58} \textit{Id}.

\textsuperscript{59} A second cause of action based on air pollution discharges was not included in the motion to dismiss and not considered by the Supreme Court. 107 S. Ct. at 807 n.2.

\textsuperscript{60} 602 F. Supp. at 263.

\textsuperscript{61} \textit{Id} at 268.

\textsuperscript{62} \textit{Id}.

ing waters not covered by the Clean Water Act. No court has adopted this reading of the savings clauses. The intermediate view, adopted by the Seventh Circuit in *Milwaukee III*, is that the Clean Water Act preserves a state's nuisance law only with respect to discharges within the state. The district court in *Ouellette* adopted the most liberal view: that the Clean Water Act also preserves the nuisance law of the state where the injury occurred.64

The district court rejected the most restrictive view because it would make the savings clause almost meaningless. The Clean Water Act's applicability to "navigable waters" of the United States,65 covers the vast majority of the nation's waters. Restricting the application of state law to only those waters outside the Clean Water Act's jurisdiction would leave most persons without a private remedy for injuries caused by water pollution, since the Clean Water Act neither expressly nor impliedly provides for a private right of action for damages.66

The district court cited the discussion of section 505(e) in the Senate report on the Clean Water Act amendments in support of its interpretation:

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.67

If the Clean Water Act had preempted all common law remedies for pollution in waters under the Clean Water Act's jurisdiction, there would be no rights to be reserved, and the Senate language would refer to non-existent causes of action. Thus, the court reasoned, Congress must have intended to allow some common law suits for pollution also regulated by the Clean Water Act.68

The district court cited four reasons for disagreeing with the Seventh Circuit's intermediate position. Most importantly, the district court

64. *Id.* at 269.
65. *See supra* note 17.
interpreted the legislative history of the 1972 amendments very differently. The district court specifically rejected the conclusion from Milwaukee III that the savings clause could not preserve state remedies that the Supreme Court had held to be preempted. As the Supreme Court noted in Milwaukee II, most of the legislative activity surrounding the 1972 amendments occurred prior to the decision in Milwaukee I. At the time the committee reports on the 1972 amendments were issued, Congress presumably did not know that state law remedies would be preempted by a federal common law right not yet recognized by the Supreme Court. According to the district court, Congress most likely assumed that state common law still applied to interstate water pollution disputes, as the Supreme Court had held in Ohio v. Wyandotte Chemicals Corp. The district court thus found it "completely reasonable to assume" that Congress intended to preserve precisely the type of lawsuit at issue in Ouellette and Milwaukee III.

Second, the district court viewed the Seventh Circuit's analysis of the savings clause as "logically inconsistent." Since Milwaukee I held that any state's law "was ill-suited" to resolve interstate water pollution disputes, the Seventh Circuit opinion implies that Congress could not have preserved the right to sue for common law damages in either the affected state or the source state. Yet the Seventh Circuit recognized a common law action under the law of the source state.

The district court also charged the Seventh Circuit panel with "deviat[ing], without legislative authorization, from well-settled choice of law principles." The court found no reason under the Clean Water Act not to apply the normal rule that a federal court in a diversity action must apply the choice of law rules of the state in which the court sits.

69. Id. For a discussion of this issue in Milwaukee III, see supra text accompanying note 50.
70. Milwaukee II, 451 U.S. at 327 n.19.
72. 401 U.S. 493 (1971). The Court in Wyandotte dismissed Ohio's motion for leave to file an original complaint to abate a nuisance caused by the dumping of mercury into Lake Erie. Id. at 495. The Court suggested that an action brought by a state to abate a nuisance caused by an out-of-state water pollution source could be brought only under state common law. Id. at 498 n.3 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). The district court opinion in Ouellette can be interpreted as an attempt to restore the basis for the Wyandotte rule.
73. Ouellette, 602 F. Supp. at 270.
74. Id.
75. Id. at 271.
76. Id. See Milwaukee III, 731 F.2d at 413, for the Seventh Circuit's analysis on this point.
77. Ouellette, 602 F. Supp. at 270.
78. Id. (citing Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)). The traditional choice of law rule in a tort case is that a court should apply the law of the state where the injury occurred. Note, supra note 63, at 681. A more modern approach is the interest analysis approach: if the primary purpose behind the liability rule is to regulate the defendant's con-
Finally, the district court in *Ouellette* viewed the decision in *Milwaukee III* as an attempt to resolve a nonexistent conflict between the savings clause and the objectives of the remainder of the Clean Water Act.\(^7\) In the district court’s opinion, applying common law nuisance remedies in suits against water pollution sources would not “as a practical matter, interfere with the objectives of the act” but would “merely *supplement* the standards and limitations imposed by the Act.”\(^8\) Allowing suits under state common law, the court reasoned, would not lead to a “chaotic confrontation between sovereign states”\(^9\) because the common law standards are not tantamount to direct state regulation of the pollution source.\(^10\) Indeed, the availability of damages against an out-of-state polluter would not prevent the discharge as long as the polluter is willing to pay the damages.\(^11\) The court argued that a remedy based on nuisance law is designed to redress the plaintiff’s injuries and any impact on the sovereignty and regulatory authority of the source state would be incidental.\(^12\) The district court, therefore, found no conflict between the state law remedy and goals of the Clean Water Act, and consequently denied the defendant’s motion to dismiss.\(^13\)

The Second Circuit affirmed the district court’s order per curiam “essentially for the reasons set forth in Chief Judge Coffrin’s thorough opinion.”\(^14\) The Second Circuit disagreed only with a point regarding the construction of the prior settlement agreement.\(^15\)

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\(^7\) *Ouellette*, 602 F. Supp. at 271.

\(^8\) *Id.*

\(^9\) *Id.* (quoting *Milwaukee III*, 731 F.2d at 414).

\(^10\) *Id.*


\(^12\) *Id.*

\(^13\) A state’s nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare and property rights of its own residents. The application of state law in this situation is no more intrusive on the sovereignty of foreign states than the application of one state’s product liability law to a manufacturer located in another state. *Id.* at 271-72 (citations omitted).

\(^14\) *Id.* at 274.

\(^15\) The district court also ruled that the plaintiffs’ suit was not barred by the settlement agreement in *Vermont v. New York* (see supra text accompanying notes 52-55), and that the plaintiffs had made sufficient allegations to justify the suit on a public nuisance theory. *Ouellette*, 602 F. Supp. at 274.


\(^17\) *Id.*

One other court has examined whether the Clean Water Act preempts state remedies in interstate disputes. The Tennessee Supreme Court agreed with the Seventh Circuit and affirmed the dismissal of an action brought in Tennessee state court under statutory and nui-
II
THE SUPREME COURT OPINION

A unanimous Supreme Court affirmed the denial of the motion to dismiss, holding that a private nuisance suit could be maintained in federal court in Vermont against a water pollution source in New York.\footnote{88} On the choice-of-law issue, however, a bare majority reversed the district court and held that the nuisance law of the source state, New York, must be applied.\footnote{89} Justice Powell wrote for the majority that included Justices Rehnquist, White, O'Connor, and Scalia.

Justice Stevens, joined by Justice Blackmun, argued in partial dissent that the Court should not have reached the issue of which state law ought to apply. In support of that position, Justice Stevens noted that there was no evidence before the Court as to whether or not Vermont's conflict-of-law rules might require the application of New York law or, indeed, whether there was in fact any difference between New York and Vermont nuisance law.\footnote{90} Justice Brennan, in a separate opinion joined by Justices Marshall and Blackmun, also argued that the Court need not have determined which state law to apply, but went on to disagree with the majority's analysis and to construe the statute in favor of the application of Vermont law.\footnote{91}

A. The Majority

The majority adopted much of the reasoning set forth in \textit{Milwaukee III}. Looking first to the regulatory framework under the Clean Water Act,\footnote{92} the Court noted that a state may require a federal discharge permit to impose limitations more stringent than the federal standards\footnote{93} and that a federal permit cannot be issued unless the source state certifies that the permit complies with that state's standards.\footnote{94} The Court termed the Clean Water Act "a regulatory 'partnership' between the Federal Govern-

\footnotesize{\begin{itemize}
  \item \text{\footnote{88} 107 S. Ct. at 809.}
  \item \text{\footnote{89} 107 S. Ct. at 812-13.}
  \item \text{\footnote{90} \textit{Id.} at 820-21 (Stevens, J., dissenting in part).}
  \item \text{\footnote{91} \textit{Id.} at 816-20 (Brennan, J., dissenting in part).}
  \item \text{\footnote{92} For a discussion of the major provisions, see \textit{supra} text accompanying notes 16-24.}
  \item \text{\footnote{93} 107 S. Ct. at 810 (citing 40 C.F.R. \textsection 122.1(f) (1986)).}
  \item \text{\footnote{94} \textit{Id.} (citing 33 U.S.C. \textsection 1341(a)(1) (1982)).}
\end{itemize}}
ernment and the source State." 95 By contrast, "the affected State only has an advisory role in regulating pollution that originates beyond its borders." 96 The Court thus concluded that the Clean Water Act's provisions "make it clear that affected States occupy a subordinate position to source States in the federal regulatory program." 97 The Court also reasoned that the pervasiveness of the regulatory scheme and the inherently federal nature of interstate water pollution disputes 98 left no room for any state remedies except those expressly preserved by Congress. 99

Although the Court conceded that the Clean Water Act's savings clause for private suits 100 manifested congressional intent to preserve some state causes of action with respect to waters within the Clean Water Act's jurisdiction, 101 the Court held that the Clean Water Act preempted the application of Vermont law. "[I]f 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.'" 102

The majority offered two related reasons for finding a conflict between the goals of the Clean Water Act and the application of an affected state's nuisance law in a private suit. First, application of the law of the affected state against an out-of-state polluter would allow the affected state to circumvent the Clean Water Act's discharge standards and permit system. 103 If the nuisance standards of the affected state required a greater level of pollution control than the federal standards or the standards of the source state, the polluting source would be subject to damages and an injunction even though it had complied with all permit requirements. "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." 104 The majority concluded that the policy choices of the federal government and the source state should not be overridden by the law of the affected state. 105

95. Id.
96. Id.
97. Id. at 811.
98. See Milwaukee I, 406 U.S. at 107 (discussing the inherently federal nature of interstate water pollution disputes).
100. 33 U.S.C. § 1365(e) (1982).
101. 107 S. Ct. at 812-13. In other words, the Court rejected the most restrictive view of the effect of the savings clause. See supra text accompanying notes 64-68.
103. Id. at 813.
104. Id.
105. Id. If the plaintiff were suing only for damages, rather than an injunction, the polluter could elect to continue to discharge under its federal or source state permit and pay the damages. The law of the affected state would not affect the choice of effluent standards by the source state in that situation. See infra text accompanying notes 145-51 for a discussion of the
Second, the Court feared that the application of the nuisance law of an affected state to an out-of-state source would "undermine the important goals of efficiency and predictability in the permit system." A source could be subject to the nuisance laws of a number of different states sharing the source state's navigable waterway. Such a regulatory scheme would make it extremely difficult for a source to predict the standard to which it would be bound, even if it had a federal or state discharge permit. By ensuring that the interests of affected states are considered in the permit process, the Court said, Congress has decided how to balance "the often competing concerns of those affected by the pollution." The Court concluded that the savings clause should not be read to undermine that decision.

The Court further agreed with the decision of the court of appeals in Milwaukee III that suits applying the nuisance law of the source state are consistent with the structure and goals of the Clean Water Act and thus are preserved under the savings clause. The source state has the authority under the Clean Water Act to establish a more stringent permit program than required under the federal statute, if it so desires. Therefore, the Court observed, Congressional intent would not be frustrated by a suit under the source state's nuisance law. The source state could impose more stringent discharge requirements either through a permit requirement or by the application of state nuisance law. Even if the source state's nuisance law did not track identically the permit standards, the pollution source would have to look to only one competing standard, rather than several, to determine its obligation.

B. Justice Brennan's Partial Dissent

Justice Brennan argued that the Court erred in holding that the Clean Water Act preempted Vermont nuisance law. He concurred only in the Court's holding that the diversity action should not be dismissed from the district court. Agreeing with the opinion of Justice Stevens, Justice Brennan criticized the Court for reaching the issue of

Justice Department's proposal to preempt the application of the affected state's law only in a claim for injunctive relief.

106. 107 S. Ct. at 813.
107. Id. at 814. The Court notes the example of a source in Minnesota discharging into the Mississippi River; in theory the source could be subject to nuisance suits under the laws of nine different downstream states. Id. at n.17.
110. Id. at 815.
111. 33 U.S.C. §§ 1342(b)-(c), 1370(1) (1982).
112. 107 S. Ct. at 814.
113. Id. at 815.
114. Id. at 816 (Brennan, J., dissenting in part).
115. Id. at 820-21 (Stevens, J., dissenting in part).
which state law should apply in the suit: the record suggested that New
York and Vermont nuisance law did not even conflict with each other.\footnote{116} He went on, however, to argue that Congress did intend the common law of the affected state to apply.

Justice Brennan could find nothing in the Clean Water Act that alters the normal rule that a district court should apply the choice-of-law rules of the state where the court sits.\footnote{117} The affected state, he noted, has an interest in redressing tort injuries that occur within the state, and this interest survives the adoption of a federal regulatory statute absent a clear congressional intent to supersede those remedies.\footnote{118} Justice Brennan emphasized that the savings clause in section 505 does not expressly limit the scope of common law actions preserved and thus does not manifest congressional intent to preempt any subclass of common law remedies.\footnote{119}

Justice Brennan also took issue with the majority's conclusion that the Clean Water Act implicitly preempted the application of the affected state's law. He argued that the statute does contemplate the application of state common law controls to supplement the Act's permit process.\footnote{120} Congress, he noted, did not expressly preempt state remedies by the statute.\footnote{121} Indeed, Congress expressly preserved common law rights based on standards more stringent than under the statute.\footnote{122} Justice Brennan asserted that a federal statute does not preempt state law if that law furthers the statute's primary purpose and if the statute preserves state authority in an area traditionally regulated by states.\footnote{123}

\footnote{116. \textit{Id.} at 816 (Brennan, J., dissenting in part).}
\footnote{119. \textit{Id.} at 818 (Brennan, J., dissenting in part).}
\footnote{Justice Brennan also disagreed with the majority on construction of the actual words of section 505(e). The majority asserted that the section "merely says that 'nothing in this section,' i.e., the citizens-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." \textit{Id.} at 812. Justice Brennan responded that Congress used the phrase because section 505 is the provision of the Act that deals with private suits. "Congress was reemphasizing that a State's authority over private suits, involving state common law, was not affected by the Act." \textit{Id.} at 817 n.2 (Brennan, J., dissenting in part).}
\footnote{120. \textit{Id.} at 818 (Brennan, J., dissenting in part).}
\footnote{121. \textit{Id.} (Brennan, J., dissenting in part).}
\footnote{122. \textit{Id.} (Brennan, J., dissenting in part).}

\textit{PG&E} involved a challenge to a California statute that forbade the granting of a state site permit to nuclear power plants unless it had been adequately demonstrated that there was a viable disposal method for the nuclear waste produced by the plant. The Court found no preemption of the state statute by the federal Atomic Energy Act, since the California statute purported to regulate plant siting only on grounds of the economic problems associated with
Justice Brennan also accused the majority of "overstating" the conflict between Vermont nuisance law and the purposes of the Clean Water Act. New York, he pointed out, was still free to place minimum standards on sources within its borders provided that those standards at least matched the federal standards. A polluter then could elect to follow the federal permit standards or the standards of the source state and pay the damages, or he could follow the standards of the most stringent of the affected states to ensure no liability anywhere. Justice Brennan responded to the majority's concern that application of the affected state's law would result in unpredictable standards for pollution sources by noting that under the Court's holding a source still would be subject to the "indeterminate" nuisance standards of the source state and would be unable to plead compliance with either the state's or the Act's effluent guidelines as a complete defense to a common law nuisance suit.

Justice Brennan concluded that even if New York law should apply, it did not follow that New York substantive law should be applied unless New York choice-of-law rules required it. He noted that the conflicts rules were as much a part of the law as the rest of the state's laws. Furthermore, if the concern of the majority was to ensure that the source state has primary responsibility to regulate internal discharges, "nothing prevents . . . a source State . . . from choosing to impose, under conflict-of-law principles, the affected State's nuisance law."

III
DISCUSSION
A. Preemption of State Common Law Actions

In International Paper Co. v. Ouellette, the Supreme Court applied established doctrines of federal statutory preemption of state law remedies. Although Justice Brennan suggests in his partial dissent that, under the Court's reading of the statute, Congress must have "revolutionize[d] state conflict-of-law or tort law principles" to preempt the law of affected states but not of source states, his criticism sweeps too broadly. Rather, the main problems with the majority opinion are that it misreads the legislative history of the Clean Water Act and overstates the argu-

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125. 107 S. Ct. at 819 (Brennan, J., dissenting in part).
127. 107 S. Ct. at 820 (Brennan, J., dissenting in part) (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 5 (1971)).
128. Id. (Brennan, J., dissenting in part).
129. Id. at 819-20 (Brennan, J., dissenting in part).
ment that the statute would be undermined if water pollution sources were exposed to liability under the nuisance standards of multiple states. Congress probably did not even consider whether common law actions should be restricted to only the source state. In addition, the Court’s rationale for inferring such an intent is untenable on a practical level.

1. Express Preemption

The touchstone of federal preemption analysis is the determination of congressional intent.\textsuperscript{130} Congress can preempt state law in two ways: it can expressly preempt state law by statutory language, or it can impliedly preempt state law by adopting a statute inconsistent with the application of state law.\textsuperscript{131} The Clean Water Act does not expressly preempt state nuisance law. In fact, the savings clause states that an action under “any . . . common law”\textsuperscript{132} is preserved, and does not distinguish on its face between the law of source states and the law of other states.\textsuperscript{133}

Neither the Seventh Circuit panel in \textit{Milwaukee III} nor the majority in \textit{Ouellette} claims that Congress clearly intended to preempt the application of state common law to out-of-state pollution sources. The clear purpose of the savings clause in Section 505(e) was to “negate the inference” that the only private suits for water pollution violations allowed would be citizen suits to enforce the Clean Water Act’s permit standards.\textsuperscript{134}

2. Implied Preemption

When Congress has not displaced state law expressly, state law is preempted only to the extent that “it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”\textsuperscript{135} Of course, it is possible for a polluter to comply with both state nuisance standards and the federal or state effluent standards simultaneously by complying with the more stringent requirement.\textsuperscript{136} The Court focused instead on the second prong of the implied preemption test.

\begin{itemize}
\item[130.] Chevron USA, Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984), \textit{cert. denied}, 471 U.S. 1140 (1985).
\item[131.] Glicksman, \textit{supra} note 1, at 183-84.
\item[132.] 33 U.S.C. § 1365(e) (1982).
\item[133.] Glicksman, \textit{supra} note 1, at 196-97.
\item[134.] International Paper Co. v. Ouellette, 107 S. Ct. 805, 812 (1987) (“the saving clause negates the inference that Congress ‘left no room’ for state causes of action”).
\item[136.] 107 S. Ct. at 819 (Brennan, J., dissenting in part). A state nuisance standard less stringent than the federal discharge standards clearly must be preempted by the Act, since the Act requires all states to adopt the federal standards as a minimum. \textit{Id.} (Brennan, J., dissenting in part).
\end{itemize}
The legislative history of the Clean Water Act suggests that Congress never considered the exact issue raised in Ouellette and Milwaukee III. The language in the Senate report of the bill\textsuperscript{137} says only that compliance with the Clean Water Act would not be a defense in a private damage action. There is no indication that Congress intended that private damage actions be limited to the law of the source state.\textsuperscript{138}

Since Congress explicitly preserved state common law actions and did not preclude an award of damages even if the pollution source complied with the Clean Water Act's provisions, Congress most likely did not intend to preempt the affected state's law. In Silkwood v. Kerr-McGee Corp.,\textsuperscript{139} the Court found that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted."\textsuperscript{140} The Court accordingly held that the Atomic Energy Act did not preempt a state punitive damage remedy for injuries in the nuclear industry because Congress had not expressly indicated its intent to preempt the state law remedy.\textsuperscript{141} In fact, the Court pointed out that provisions of the implementing regulations of the Atomic Energy Act expressly contemplated the award of punitive damages under state law.\textsuperscript{142} The Court in Ouellette should have read the Clean Water Act in a similar manner because the addition of the savings clauses reflects congressional intent to retain all state damage actions. Nowhere is there a stated intention to retain only the common law actions of source states.

The Court in Ouellette believed, however, that a broad reading of the savings clause would undermine the purposes of the "carefully drawn statute," and thus contravene congressional intent.\textsuperscript{143} The Court based its holding on neither the explicit words of the Clean Water Act nor the legislative history, but upon its predictions of the negative effects that allowing nuisance suits under the law of any affected state would have on the regulatory scheme of the Clean Water Act. Neither of the negative effects described by the Court justifies the erosion of state common law remedies that the majority's holding involves.

\textsuperscript{138} Glicksman, supra note 1, at 196-97.
\textsuperscript{140} Id. at 255.
\textsuperscript{141} Id.
\textsuperscript{142} "The waivers set forth . . . above do not apply to . . . [a]ny claim for punitive or exemplary damages." Id. at 255 n.17 (quoting 10 C.F.R. § 140.91 app. A (1983)).
\textsuperscript{143} 107 S. Ct. at 812.
a. Indirect Regulation of Out-of-State Sources

The majority first claims that application of Vermont nuisance law would circumvent the permit system under the Clean Water Act and allow Vermont indirectly to regulate New York sources. The Court could easily have solved this problem by adopting the compromise position suggested by the Justice Department in its *amicus* brief. This compromise would limit liability under the affected state's nuisance law to compensatory damages, while denying punitive damages or injunctive relief. Consequently, the nuisance law of the affected state would not interfere with the Clean Water Act because it would require only that the polluter pay for the damages that occur despite the polluter's compliance with the Clean Water Act. Under the Justice Department's proposal, a court could grant an injunction or award punitive damages only if such relief were authorized by the common law of the source state.

The Court rejected this proposal both because Congress did not explicitly authorize the "splitting" of the remedy in common law actions for water pollution and because even the award of compensatory damages might force a change in the polluter's behavior. The Court is correct in one respect: Congress did not mandate that only compensatory damage actions should be allowed under state common law. The legislative history of the savings clause, however, suggests that Congress primarily meant to preserve suits for damages. Furthermore, if compliance with the Clean Water Act does not constitute a defense to a nuisance suit, then an award of damages under the source state's law also may be inconsistent with the permit scheme under the Clean Water Act. Adoption of the Justice Department's proposal would have preserved the balance between the Clean Water Act's permit program and compensation for private out-of-state parties, as the savings clause intended.

b. Application of Multiple Standards to Water Pollution Sources

The majority in *Ouellette* also feared that allowing a water pollution source to be sued under the law of the affected state would harm "the

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144. *Id.* at 813.
146. *Id.* at 27-28.
147. 107 S. Ct. at 815 n.19 (citing *Silkwood*, 464 U.S. at 255).
148. *Id.*
150. The Court's best response to this criticism is that application of only the source state's nuisance law to the polluter will require him to follow only one additional standard rather than several. 107 S. Ct. at 815.
important goals of efficiency and predictability in the permit system," since the polluter would be subject to the law of any state that shared the relevant body of water. Yet, as both Justices Brennan and Stevens point out, there is nothing to suggest that there is any difference between nuisance law in New York and in Vermont. Indeed, it may be that nuisance law standards in a number of states are quite similar with respect to water pollution.

Furthermore, the majority appears to neglect the practical fact that, even if the law of the affected state were not preempted, a plaintiff would still have to overcome a number of obstacles in order to receive a damage award. A potential plaintiff in the affected state would have to establish personal jurisdiction and proper venue to reach the polluter. The suit also may be barred by the plaintiff's failure to exhaust administrative remedies or by the court's deference to the primary jurisdiction of an administrative agency. Of course, the plaintiff would have to establish that the polluter caused the injuries alleged. Finally, the choice-of-law rules in the state where the action was filed may dictate application of the law of the source state.

The choice-of-law problem, a crucial issue in Justice Brennan's partial dissent in Ouellette, deserves close analysis. Justice Brennan correctly interprets the majority holding in Ouellette as prescribing a federal choice-of-law rule in the absence of a specific Congressional mandate. As the Court held in Richards v. United States, in the absence of "persuasive evidence to the contrary" the courts should not assume that Congress has specified a federal choice-of-law rule for litigation related to a federal statute. Thus, Richards implies that the Court should not find

152. 107 S. Ct. at 813.
153. Id. at 816 (Brennan, J., dissenting in part).
155. See Note, supra note 63, at 674-76 for a detailed discussion of these issues and relevant authorities.
156. Id. at 683-88.
157. See infra text accompanying note 171 for further discussion of the causation problem.
158. Note, supra note 63, at 677-83.
159. 107 S. Ct. at 820 (Brennan, J., dissenting in part).
160. Id. at 816-18 (Brennan, J., dissenting in part).
162. Id. at 13. Richards held that, under the Federal Tort Claims Act, federal courts should apply the conflict rules of the state where the negligent act occurred to determine what substantive law to apply. Id. The Court determined that the statutory language directing the courts to apply the "law of the place" where the act occurred, 28 U.S.C. § 1346(b) (1982), was intended to include the "whole law" of that "place," i.e., including the conflicts rules. 369 U.S. at 11.
preemption of state conflict-of-law rules absent a statutory provision.\(^ {163} \)

Application of the law of either the source state or the affected state would satisfy the requirements of both the due process and full faith and credit clauses of the Constitution.\(^ {164} \) Beyond that, the choice of which state's nuisance law to apply would depend upon which conflict-of-law test the forum state applied.\(^ {165} \) Under the modern "interest analysis" test, the competing policies and interests of the states are compared to determine which state's law to apply.\(^ {166} \) Under this test, the affected state's interest in compensating its citizens and protecting their health would be weighed against, for example, the source state's interest in regulating pollution sources without discouraging industrial and economic growth.\(^ {167} \) To the extent that the interests of the source state are furthered by uniform application of the federal standard, that should also

163. 369 U.S. at 14.

Justice Brennan also is wrong, however, when he asserts in his dissent that "[e]ven if the Court's conclusion that New York law should apply is correct, it does not logically follow that New York nuisance law must be applied." 107 S. Ct. at 820 (Brennan, J., dissenting in part). If Congress did intend to preempt the application of Vermont substantive law to a New York polluter, it clearly would not want that intent frustrated by the application of Vermont substantive law through the use of New York choice-of-law rules.

164. The Supreme Court has held that, consistent with the Constitution, a person may be liable for an injury in a different state than where the culpable conduct occurred. Young v. Masci, 289 U.S. 253, 258-59 (1933).

A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury . . . . [A] person acting outside the state may be held responsible according to the law of the state for injurious consequences within it.

Id. For a detailed discussion, see Note, supra note 63, at 677-81.

165. One scholar, in an exhaustive study of the 51 American jurisdictions, found that as of 1983 seven different conflict-of-law tests were being applied in the various state courts. Kay, Theory into Practice: Choice of Law in the Courts, 34 MERCER L. REV. 521 (1983). Professor Kay found that 22 jurisdictions apply the traditional "vested rights" test (application of the law where the injury occurred), two use the "interest analysis" test proposed by Professor Currie (discussed further infra in text accompanying notes 166-70), 13 use the rule of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (a compromise between the two major competing rules, see infra note 166), and the remainder use some other variation or hybrid. Id. at 591-92.

166. Note, supra note 63, at 681. The Restatement formulates the test as follows:

Choice of Law Principles.

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

167. Note, supra note 63, at 682.
enter into the analysis.¹⁶⁸

If the interests of the source state are significant, choice-of-law poli-
cies may not always lead to the application of the nuisance law of the
affected state.¹⁶⁹ If the source state's permit standards were more strin-
gent than the affected state's nuisance standards, the interest analysis test
probably would favor application of the affected state's law, since the
lower standard is all that would be required to redress a private litigant's
injury.¹⁷⁰ Inasmuch as frustration of the congressional purposes behind
the Clean Water Act can occur only if the common law nuisance stan-
dard of the affected state is more stringent than either the federal or
source state's standards, application of normal state choice-of-law rules
in fact may lead to the desired result.

A plaintiff who survives the procedural hurdles still would have to
prove that the damages alleged were caused by the defendant. The
Court's example of a pollution source in Minnesota¹⁷¹ illustrates the diffi-
culty of proving causation. For the polluter to be held liable in New
Orleans under Louisiana law, the plaintiff would have to show that the
discharge in Minnesota was the actual and proximate cause of the alleged
injury, rather than any intervening source. The proof problems for a
case involving the Mississippi River undoubtedly would be severe. Of
course, the plaintiff would face this problem whether the suit were de-
cided under Minnesota or Louisiana law.

Since the probability of a source being held to a more stringent dis-
charge standard will be low, the possibility of conflict between the federal
discharge standards under the Clean Water Act and the nuisance stan-
dards of the downstream affected states is also likely to be low. The
Court's example proves too much. Actions under the common law of the
affected state are not likely to disrupt the Clean Water Act's regulatory
scheme to a more significant degree than actions under the common law
of the source state.

B. A Simpler Solution: Statutory Rights of Action

The problem in Ouellette arose because Congress did not specify
what private actions were preserved under the savings clause of the Clean

¹⁶⁸ These considerations fall under the Restatement mandate to consider such factors as
"the relevant polices of other interested states" (§ 6(2)(e)) and "certainty, predictability and
uniformity of result") (§ 6(2)(f)). Supra note 166.

¹⁶⁹ There are a number of choice-of-law rules that might be applied by different states in
a nuisance suit over interstate water pollution. See supra note 165. The actual result those
rules might generate is beyond the scope of this analysis. It is sufficient to note that the rules
do not necessarily require that the law of the affected state be applied.

¹⁷⁰ Under the Restatement test, the interest of the state where the injury occurred is
usually the most significant factor to be considered in a conflict-of-law problem. Kay, supra
note 165, at 556.

¹⁷¹ 107 S. Ct. at 814 n.17.
Water Act. The clause merely preserves private rights "which any person . . . may have under any statute or common law." 172 The Supreme Court has held, however, that the Clean Water Act preempts federal common law and that it does not create a private right of action for damages. *Milwaukee II* eliminated the application of federal common law in private water pollution damage actions. 173 In *Middlesex County Sewerage Authority v. National Sea Clammers Association* 174 the Court held that there was no private right of action under the Clean Water Act except for the citizen suit provision, which only allows for prospective relief to enforce effluent standards. 175 The *Middlesex* Court reasoned that the elaborate private enforcement provisions under section 505 made untenable the claim that "Congress intended to authorize by implication additional judicial remedies for private citizens" under the Clean Water Act. 176 The Court rejected the argument that the savings clause in section 505(e) preserved other remedies within the Clean Water Act itself. 177 The Court thus refused to imply an action for damages under the statute.

Under the Court's holding in *Ouellette*, the plaintiffs in *Middlesex* still would be able to file a nuisance suit in federal court in New York or New Jersey, invoking the court's diversity jurisdiction. New York sewer-age authorities would be subject to New York nuisance law and New Jersey authorities would fall under New Jersey law. Subjecting different defendants to differing nuisance standards would be confusing, especially since those standards may not match the effluent standards under the federal or the state permit program.

Congress could extricate litigants from this legal quagmire by creating a strict liability private cause of action for damages under the citizen's suit provision of the Clean Water Act. Under this scheme, compliance with either the federal effluent discharge standards or a more stringent state standard would constitute a complete defense to a suit for injunctive relief, but compensatory damages would still be awarded if the plaintiff could prove that the defendant's discharges caused the alleged injuries. Damages would be awarded without reference to the common law of either the source or the affected state. Strict liability for water pollution would extend the current common law, which recognizes such

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174. 453 U.S. 1 (1981). *Middlesex* involved a suit brought in New Jersey District Court against the federal government and the states of New York and New Jersey. The plaintiffs complained that the dumping of sewage into the Hudson River was causing damage to the local fishing industry. The plaintiffs based their claims on the Clean Water Act, the Marine Protection, Research, and Sanctuaries Act, federal common law, state tort law, and a number of other state and federal statutes. *Id.* at 5 n.6.
176. 453 U.S. at 14.
177. *Id.* at 15 ("It is doubtful that the phrase 'any statute' includes the very statute in which this statement was contained.")
liability for "abnormally dangerous activities."  178

The creation of a statutory right to damages without fault would have a number of advantages over the current application of state law. It would induce water pollution sources to internalize the costs of their discharges, which would promote efficient resource allocation.  179 In addition, this federal cause of action would provide incentives for sources to develop new effluent control technologies at a faster rate than under the current regulatory incentives.  180 Finally, it would ease the problems faced by federal courts in determining the applicable state nuisance law in an interstate water pollution suit.  181 Interstate water pollution cases would arise solely under the Clean Water Act rather than under the "vague and indeterminate nuisance concepts"  182 of multiple states that were so troubling to the Court in Ouellette.

Other commentators have made similar proposals for a private right of damages under the Clean Water Act. They recommend that Congress effectively overrule Milwaukee II by explicitly authorizing federal common law for interstate water pollution suits.  183 While this proposal also would give injured parties the opportunity to redress their injuries without impinging upon the regulatory framework of the Clean Water Act, suits under federal common law would require the development of a uniform federal nuisance standard to supplement the statutory effluent standards. Discharging sources still would experience uncertainty as to whether compliance with statutory discharge standards would absolve them of damage liability. Furthermore, it is quite conceivable that a district court operating under federal common law could order an injunction against a source that is in compliance with statutory standards. By contrast, the strict liability scheme proposed here would allow a source to discharge in accordance with federal or state permit standards without fear of judicial intervention. The discharger, who likely is in a far better position than a court or even a regulatory agency to judge the costs of more stringent controls, would elect to discharge at the most efficient level above the minimum regulatory standards, based on potential damage liability.  184

178. See Restatement (Second) of Torts §§ 519-520 (1977).

179. Cost internalization is a term used in economics to describe the process by which a business is forced to pay for, and thus consider in its profit calculation, the costs imposed on the rest of society by its polluting activities. This process eliminates the "market failure" caused by pollution. A. Freeman III, R. Haveman & A. Kneese, The Economics of Environmental Policy 71-76 (1973).


184. Strict liability should fall on the party most likely to know the costs and benefits of the liable activity, since that party will make the best choice as to whether the activity is
The legislative solution proposed in this section would eliminate the problem of states directly regulating out-of-state sources because affected states would be unable to enforce their own more stringent statutory or nuisance standards on interstate polluters. Vermont, for example, could not force IPCo to follow Vermont's pollution discharge standards because compliance with the New York standards would be a complete defense in a suit for an injunction. Since a pollution source would need to follow the standards of but a small number of affected states, Congress by creating a private damage action could ensure that the residual costs of pollution activities do not fall on the citizens of the affected state. Congress thereby would strike a balance similar to that represented by the Justice Department's proposal in its amicus brief. A source would be required to follow only the standards of the federal government and/or the source state. The source would, however, be subject to liability for monetary damages to residents of the affected state.

C. Impact on Other Environmental Regimes

While the Supreme Court's decision in *International Paper Co. v. Ouellette* does not "revolutionize state conflict-of-law or tort law principles," it very well might determine the common law standards for suits brought under other federal environmental statutes. As the Court pointed out in *Milwaukee II*, the savings clause in section 505(e) of the Clean Water Act is nearly identical to language found in many federal environmental statutes. The logic of *Ouellette* implies, therefore, that private damage actions brought under these other statutes are preempted to the extent that they apply state law to an out-of-state source and thereby interfere with a comprehensive federal permit process.

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185. See *supra* text accompanying notes 152-71 for the argument as to why the nuisance laws of only a few affected states are likely to be applied.

186. The Court argues that many other states could suffer damages by the action of a polluter in the source state and thus bring suit. 107 S. Ct. at 814 n.17 (nine states on the Mississippi river). The Court's example highlights the necessity of strengthening the provisions for the affected states to challenge the source state's permit (33 U.S.C. § 1341(d)(2) (1982)), and/or to obtain a remedy for the damage caused.


189. 451 U.S. at 328 n.21.


191. Glicksman, *supra* note 1, at 222-23, argues that the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act should not be read as preempting federal or state common law remedies of affected states in interstate disputes.
Solid waste pollution control will not be affected greatly. The Resource Conservation and Recovery Act of 1976\(^{192}\) (RCRA) establishes a federal hazardous waste program that requires a permit from the federal government or an authorized state before one can engage in treatment, storage, or disposal of hazardous wastes.\(^{193}\) States may issue permits only if their requirements are at least as stringent as the federal standards, although they may adopt more stringent standards.\(^{194}\) Under RCRA's citizen suit provisions, any person may sue to enforce a permit\(^{195}\) or to enjoin activity "which may present an imminent and substantial endangerment to health or the environment."\(^{196}\) These provisions do not prevent the citizen from seeking other relief "under any [other] statute or common law."\(^{197}\) In sum, since the structure of RCRA directly parallels the Clean Water Act, it probably would be analyzed in the same way that the Clean Water Act was in _Ouellette_. The problem of solid waste control is, however, land-based and more likely to be limited to a single state. Consequently, lower courts have refused to establish a federal common law of solid waste nuisance because it does not pose any federalism problems and because federal common law was preempted by RCRA and CERCLA.\(^{198}\) Due to the contained nature of solid waste disposal, a solid waste disposer rarely will cause out-of-state injuries. Consequently, conflicting state nuisance standards are not a problem.

Air pollution, on the other hand, is more analogous to water pollution. The Clean Air Act\(^{199}\) adopts an approach to pollution control simi-

\(\text{\textsuperscript{193}}\) Id. § 6925.
\(\text{\textsuperscript{194}}\) Id. § 6929 (Supp. III 1985).
\(\text{\textsuperscript{195}}\) Id. § 6972(a)(1)(A).
\(\text{\textsuperscript{196}}\) Id. § 6972(a)(1)(B).
\(\text{\textsuperscript{197}}\) Id. § 6972(f) (1982).

CERCLA, also known as Superfund, refers to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1987). Until 1986, CERCLA did not have a citizen suit provision of its own, although it did provide for a private third party to recover hazardous waste cleanup costs. See Gaba, _Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action under CERCLA_, 13 ECOLOGY L.Q. 181 (1986). Under the recent Superfund reauthorization, a citizen suit provision has been established, allowing civil actions "against any person . . . who is alleged to be in violation of any standard, regulation, requirement, or order . . . effective pursuant to [the statute]." 42 U.S.C.A. § 9659 (West Supp. 1987).
lar to that of the Clean Water Act.\textsuperscript{200} The basic federal air quality standards\textsuperscript{201} are translated into emissions limitations by state implementation plans.\textsuperscript{202} The federal air quality standards may be superseded by more stringent state standards, if the source state so desires.\textsuperscript{203} The Clean Air Act also provides for interstate cooperation to control the interstate drift of pollutants that degrade the air quality in affected states. The source state is required to provide notice to and allow comments from all affected states regarding sources that may cause violations of air quality standards in the affected states.\textsuperscript{204} Finally, the federal air quality standards can be enforced privately through a citizen suit provision.\textsuperscript{205}

If the \textit{Ouellette} rule were applied to air pollution cases, there would be a greater potential for conflict between state law and federal regulation than in the case of solid waste. Air pollution is similar to water pollution in that there is a significant chance that a source in one state will impact on the air quality of another state.\textsuperscript{206} Indeed, the Clean Air Act explicitly recognizes this problem.\textsuperscript{207} As the problem of acid rain moves into the spotlight of environmental concern, the role of private enforcement will be crucial in forcing air pollution sources to cover the costs of discharges. Since federal common law is preempted by the Clean Air Act,\textsuperscript{208} and since there is no independent right of private action for damages under the Clean Air Act,\textsuperscript{209} the application of state law would be necessary to redress these injuries. As with water pollution, problems of establishing jurisdiction and proving causation in an air pollution nuisance case would diminish the possibility of conflict between the multi-

\textsuperscript{200} See generally id. §§ 7401-7428 (1982) (air quality and emissions limitations provisions).
\textsuperscript{201} Id. § 7409.
\textsuperscript{202} Id. § 7410.
\textsuperscript{203} Id. § 7416. One court has held, however, that the Act does not require a state to design its own state implementation plan to ensure compliance with another state's air quality standards, if those standards are more stringent than federally required. Connecticut v. EPA, 656 F.2d 902, 909 (2d Cir. 1981).
\textsuperscript{205} 42 U.S.C. § 7604(e) (1982).
\textsuperscript{207} 42 U.S.C. § 7604(e) (1982).
\textsuperscript{209} Reeger v. Mill Serv., Inc., 593 F. Supp. 360, 363 (W.D. Pa. 1984) ("We find the regulatory scheme under the federal Clean Air Act to be similar to that of the acts considered in \textit{Middlesex} and therefore apply the same principle of preemption.").
plicity of state standards and the federal regulatory scheme.\textsuperscript{210} The Clean Air Act may also be in need of an explicit private right of action for damages.\textsuperscript{211}

CONCLUSION

\textit{International Paper Co. v. Ouellette} at last closes the book on what private damage lawsuits will be allowed for plaintiffs injured by interstate water pollution. The case, however, leaves prospective plaintiffs with an inadequate remedy for damages caused by out-of-state polluters. It also leaves affected states with little control over pollution coming to their states from sources regulated by federal law. This result may lead to greater regulatory efficiency, but it will decrease incentives for cleanup.

Through its holdings in \textit{Milwaukee II, Middlesex County,} and \textit{Ouellette}, the Court has painted into a corner the plaintiff seeking damages for water pollution. Congress could rescue the private plaintiff, and still maintain the primacy of federal regulation, by enacting a strict liability private action for damages under the Clean Water Act and other federal environmental statutes, such as the Clean Air Act, and by making that statutory remedy exclusive.

\textsuperscript{210} See supra text accompanying notes 152-71.

\textsuperscript{211} See generally Fisher, supra note 206; Note, supra note 206 (discussing private rights of action under the Clean Air Act).