
NATURAL RESOURCES JOURNAL

Volume 28
Issue 4 *Fall 1988*

Fall 1988

Preemption of Private Remedies in Interstate Water Pollution Disputes: International Paper Company v. Oullette

Stacey Goodwin

PREEMPTION OF PRIVATE REMEDIES IN INTERSTATE WATER POLLUTION DISPUTES: *INTERNATIONAL PAPER COMPANY V. OULLETTE*

INTRODUCTION

International Paper Co. v. Oullette (*IPC*)[1] addresses the preemptive effect of federal statutory law controlling interstate water pollution on state causes of action in nuisance. The question presented to the United States Supreme Court in *IPC* was "whether the [Clean Water] Act preempts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York."[2] Although in previous cases the Supreme Court had ruled that federal common law of nuisance applied to interstate water pollution,[3] then later held that federal statutory law preempted federal common law,[4] the Court had declined to address the application of state common law until *IPC*.[5] As a result, a split arose in the circuit courts regarding application of state law to interstate water pollution conflicts.[6]

In *IPC*, the Supreme Court resolved the split by deciding that the Clean Water Act precludes application of an affected state's common law against an out-of-state polluter.[7] By preempting application of an affected state's common law, the Supreme Court ostensibly clarified the law governing interstate water pollution. In reality, the Court left the litigation waters as murky as ever. While the Court affirmatively decided that the Clean Water Act preempts the common law of the *affected* state, it did not adequately address the implied distinction between applying the common law of an "affected" state (impermissable) and a "source" state (permissable).[8] Nor did the Court satisfactorily describe alternative remedies for aggrieved individuals.

1. International Paper Co. v. Oullette, 107 S. Ct. 805 (1987) ("IPC").

2. Id. at 807.

3. Illinois v. City of Milwaukee (1972).

4. See, City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 101 S. Ct. 1784 (1981); Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1 (1981).

5. 451 U.S. at 310, n.4.

6. In the Seventh Circuit, the Court of Appeals held that state law was completely preempted by federal statute. Illinois v. City of Milwaukee, 731 F.2d 403 (7th Cir. 1984). The Vermont Federal District Court held that state common law remedies were not preempted. Oullette v. International Paper Co., 602 F. Supp. 264 (D. Ver. 1985), aff'd, per curiam, 776 F.2d 55 (1985).

7. 107 S. Ct. at 813.

8. A source state is the state in which pollution is discharged into interstate waters. An affected state is one where pollution in interstate water from an out-of-state source causes damage or adverse effects.

CASE BACKGROUND

Factual

International Paper Company operates a pulp and paper mill on Lake Champlain near Ticonderoga, New York. Vermont lies on the other side of Lake Champlain from the mill. The citizens on the Vermont side own properties primarily used for residential purposes as well as for farming and businesses such as marinas.[9] The Vermont property owners claimed that the discharged pollutants from the paper mill made the lake waters "foul, unhealthy, smelly, and . . . unfit for recreational use."[10] The resulting injury was a diminution of the Vermont property values.

Procedural

In 1970, Vermont sued New York and International Paper Company under the United States Supreme Court's original jurisdiction.[11] Vermont claimed that New York and International Paper Company were responsible for the deposit of sludge and pollution in Lake Champlain, which constituted a public nuisance. A special master presented the Court with a consent decree proposing that a lake master would police the execution of a settlement. The Court denied the proposal on the ground that the states should settle the dispute by interstate compact or by agreement of the parties.[12]

Although the state of Vermont did enter into settlement agreements,[13] those agreements did not prevent a class consisting of the state of Vermont and various citizens from pursuing a private cause of action against International Paper Company for public nuisance under state common law. One of Plaintiff's causes of action alleged in part that 1) discharges from the mill constituted a continuing nuisance; and 2) International Paper Company violated its National Pollutant Discharge Elimination System (NPDES) permit.[14] Plaintiffs sought money damages totaling $120 million, and an injunction. International Paper Company moved to dismiss. It argued that 1) the paper mill was in compliance with its NPDES permit; 2) federal rather than state law was controlling; and 3) if Congress intended to allow any state common law action, it also intended that such a suit

9. Oullette, 602 F. Supp. at 266.

10. 107 S. Ct. at 807.

11. Comment, State Law Remedies for Interstate Water Pollution: The Legacy of Illinois v. Milwaukee, 16 ELR 10136 (June 1986); Vermont v. New York, 417 U.S. 270 (1974).

12. 417 U.S. at 277–78.

13. Oullette, 602 F. Supp. at 272–74. In the settlement agreements, the state of Vermont agreed to forbear from bringing suit against International Paper Company or from proposing stricter effluent limitations so long as the paper mill abided by those set forth. The agreements did not extend to harm suffered after Oct. 29, 1974, and in no way restricted the claims and rights of Vermont citizens.

14. Id. at 266. Other allegations in the suit are not pertinent to this Note.

must be brought in the courts and under the laws of the state where the discharge occurred (in other words, the source state).[15]

GENERAL BACKGROUND

Congress and the federal courts have grappled for decades with environmental problems, including the broad issue of federal preemption of state law in interstate water pollution regulation. In general, Congress may occupy an area of law that falls within its powers under the Commerce Clause, to the exclusion of any state law or federal common law.[16] In areas where Congress has not exclusively occupied the field, state law may also be preempted to the extent it conflicts with federal law.[17] Additionally, Congress may explicitly except state law governing specific sub-areas in a field otherwise occupied by federal law.

Congress regulates various sources of pollution through its broad exercise of the Commerce Clause.[18] The Supreme Court has agreed with lower federal courts which "uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effect in more than one State."[19]

In the area of interstate water pollution, the scope and significance of Congressional preemption became increasingly important as the seriousness of the problem and need for regulation grew. Congress first enacted the Federal Water Pollution Control Act (FWPCA) in 1948.[20] The preemptive limits of the Act were highlighted in a 1972 Supreme Court case.[21] The opinion of the *Milwaukee I* Court was that the basic interests of federalism, and a need for uniformity, required application of federal

15. Id.

16. United States Constitution, art. I § 8, cl. 3; see Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190 (1983).

17. See, e.g., PG&E (cited in note 16), Silkwood v. Kerr-McGee Corp, 464 U.S. 238 (1984); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). For a thorough discussion of federal preemption in the context of pollution regulation, see Glicksman, Federal Preemption and Private Legal Remedies for Pollution, 134 U. Pa. L. Rev. 121 (1985).

18. Congress regulates pollutions through statutes such as the Clean Air Act, 42 U.S.C.A. § 7401; National Environmental Policy Act of 1969, 42 U.S.C. § 4321; Toxic Substance Control Act, 15 U.S.C. § 2601 (as well as many others.)

19. Hodel v. Virginia Surface Min. & Reclam. Assn., 452 U.S. 264, 282 (1981); see also, Glicksman at 175 (cited in note 17).

20. Act of June 30, 1948, 62 Stat. 1155. The original act emphasized the state's role in enforcing water quality standards.

21. Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (Milwaukee I). The state of Illinois filed suit against four cities and two local sewerage commissions of the state of Wisconsin. Defendants' sewers overflowed with heavy rains, causing raw sewage and other wastes to be discharged into Lake Michigan. Illinois sought abatement of the public nuisance.

law.[22] In applying the FWPCA to the situation, the Court stated, "[T]he Act makes clear that it is federal, not state law that in the end controls the pollution of interstate . . . waters."[23]

However, the *Milwaukee I* Court found that the federal statute did not adequately occupy the field of interstate water pollution because no remedy was available to Illinois under the Act. Because the Court found the interests of federalism to be paramount over state law, it decided that federal common law remedies in nuisance should be applied to fill in any gaps left by Congress in the FWPCA. The Act proved to be inadequate: Congress amended it in 1972, five months after the *Milwaukee I* decision.[24] Congress extensively revised the Act, and added a comprehensive, national regulatory system.[25]

In 1981, with the reappearance of the dispute between Illinois and the City of Milwaukee, the Supreme Court ruled that the FWPCA Amendments were extensive enough to preempt federal common law nuisance suits for interstate water pollution, in favor of statutory remedies now provided.[26] "The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."[27] The analysis in determining whether federal common law was superceded rested on the assumption "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[28]

The Court's initial concern in *Milwaukee I* had been that Illinois did not have any forum in which to protect its interests unless federal common law was created. In the 1972 Amendments, Congress not only created a

22. 406 U.S. at 105. The Supreme Court's initial interpretation of the Act was that the state law of the state within which pollution caused a nuisance was controlling in interstate water pollution disputes. Ohio v. Wyandotte Chemical Corp., 401 U.S. 493 (1971), overruled, Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

23. 406 U.S. at 102.

24. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92,500, 86 Stat. 816, 33 U.S.C. § 1251 (codified as amended at 33 U.S.C. § 1251-1376 (1982)). The Amendments restructured the Act around a permit system for pollution discharges into navigable waters.

25. 33 U.S.C. § 1341–45.

26. The Court stated:

> We conclude that . . . Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts . . . but rather has occupied the field through the establishment of a comprehensive regulatory program. . . . The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters" . . . and found inadequate to supplant federal law.

451 U.S. at 317. Middlesex County Sewerage Auth. v. Nat. Sea Clammers, 453 U.S. 1 (1981); Glicksman, 134 U. Pa. L. Rev. 121 (1985).

27. 451 U.S. at 319.

28. Id. at 317.

regulatory structure that comprehensively governed pollution discharges into navigable waters, it also "provided ample opportunity for a state affected by decisions of a neighboring state's permit-granting agency to seek redress."[29] The forum for the pursuit of claims regarding stringency of standards is before the expert agencies controlling the permit process.

Although the 1972 Amendments preempted federal common law, the *Milwaukee II* decision distinguished preemption of state law as an issue not yet before the court.[30] While the FWPCA is the exlusive source of federal law, Congress recognized and encouraged "the primary responsibilities and rights of States to prevent, reduce and eliminate pollution."[31] Central to this goal is the FWPCA's permit structure, the National Pollutant Discharge Elimination System (NPDES).[32]

Permits are issued by either the Environmental Protection Agency or by states that establish a permit program at least as strict as the federal program.[33] It gives the states power to adopt and administer more stringent standards than those used in the federal administration of effluent discharge permit programs. Where a state chooses to implement its own program, the Act provides for affected states to voice objections to the standards set.[34] The federal administrator of NPDES has oversight authority over the state programs.[35] However, the statute does not indicate that objections from another state would necessarily be sufficient grounds for denial of a permit by either the source state or the federal official. While the statute encourages the development of uniform (and perhaps more stringent) state laws as well as cooperation among the states, it does so within the comprehensive confines of federal regulation.

Thus federal law is paramount except to the extent it expressly permits recourse to state law. In interpreting the FWPCA's degree of preemption, the courts have focused on two sections—Section 510 and Section 505(e).[36] The first declares that a State's rights or jurisdiction governing state waters (including boundary waters) will not be affected except through specific federal provisions within the FWPCA.[37] The second section states, "nothing in this *section* shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent

29. 451 U.S. 326 (citing § 402(b)(3), 33 U.S.C. § 1342(b)(3).

30. See 451 U.S. at 319, n.14. The appellate court had also declined to address the state law claims. Illinois v. City of Milwaukee, 599 F.2d 151, 171 n.53 (7th Cir. 1979).

31. 33 U.S.C. § 1251(b).

32. 33 U.S.C. § 1342–1345. NPDES provides for a nationwide system of permits for all entities which discharge pollutants into navigable waters.

33. 33 U.S.C. § 1342(a)(5), 33 U.S.C. § 1342 (b).

34. 33 U.S.C. § 1342(b).

35. 33 U.S.C. § 1342(b).

36. 33 U.S.C. § 1370(2) and 33 U.S.C. § 1365(e).

37. 33 U.S.C. § 1370(2).

standard or limitation or to seek any other relief."[38] What types of state common law remedies the FWPCA allows depends on the interpretation of these provisions. For instance, the *Milwaukee II* Court did not find this section applicable to federal law. It was only relevant to the effect of citizen's suits, not the Act as a whole.[39]

When the *Milwaukee II* Court remanded the case, the Seventh Circuit ruled that the saving clause referred only to application of the common law of the state in which the discharge occurred.[40] The court interpreted the section to cover only the right and jurisdiction of a state to regulate water within its boundaries. That interpretation is based on the premise that states have never had a right to regulate or exercise jurisdiction over extraterritorial waters.[41] Accordingly, the Seventh Circuit interpreted the saving clause to apply only to regulation of discharges that occur inside the state.[42] It followed that the FWPCA preempted application of the injured state's common law cause of action, because its courts had no jurisdiction to regulate discharges occurring in another state.[43]

To allow an injured state to do so would effectively give that state regulatory power over another state. The *Milwaukee Seventh Circuit Court* reasoned that providing remedies in an injured state imposed that state's water pollution standards and regulations upon the citizens of the source state. Such an application of common law directly affects the apportionment of water use by imposing higher costs on polluters, with the same result as if more stringent permit standards had been imposed.[44] Dischargers would have to meet the regulatory and common law standards imposed not only by their own state, but by all downstream states affected by the discharge (such questions arise as: how far downstream can you go before the system is no longer affected?). The court envisioned chaotic confrontations between states and an end to the uniformity and cooperation made possible by the FWPCA.[45] When Illinois appealed the Seventh Circuit's ruling on the application of state common law, the Supreme Court denied certiorari.[46]

In the meantime, the Vermont Federal District Court had essentially the same issue before it with the *Oullette* case.[47] Could plaintiffs pursue state common-law nuisance remedies against defendant's continuing dis-

38. 33 U.S.C. § 1365(e), emphasis added.
39. 451 U.S. at 328–29.
40. Illinois v. Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984) (Milwaukee 7th).
41. Id. at 413.
42. Id.
43. Id. at 414.
44. 731 F.2d at 410.
45. Id. at 414.
46. Scott v. City of Hammond, 469 U.S. 1196, 105 S. Ct. 979 (1985) (consolidated with the Illinois case).
47. Oullette, 602 F. Supp. 264.

charge of effluent? The issue was not the existence of federal preemption (already a given), but the "extent to which Congress authorized, either expressly or implicitly, resort to state common law in a situation such as this."[48] The district court delayed ruling until the Seventh Circuit reached a decision in the Illinois-Milwaukee dispute, before reaching its own conclusions.

In contrast to the Seventh Circuit's ruling, the Vermont court held that the common law remedies of the injured state were not preempted under FWPCA.[49] The court found it "inconceivable that Congress intended to deprive a party injured by water pollution of all compensation for that injury."[50] It rejected the Seventh Circuit's interpretation that the savings clause and citizens' suit provisions of the Act only applied a state's nuisance law to in-state discharges, rather than those from another state.[51] It based its decision on the view that Congress had not drawn distinctions between in-state and out-of-state sources of pollution in providing for additional remedies. The court viewed the saving clause and accompanying state authority clause as supplements to the Act and its permit system.[52] Using state common law remedies did not directly impose the full regulatory powers of one state upon the citizens of another state. Rather, its use was merely a means of redress to a specific, injured private party.[53] The district court's decision was affirmed per curiam by the Second Circuit Court of Appeals.[54] The Supreme Court granted certiorari from the Second Circuit in order to resolve the conflict between the Seventh and Second Circuits.[55]

CASE ANALYSIS

After hearing the *IPC* case, the Supreme Court resolved the Circuit split in favor of the Seventh Circuit's logic. The *IPC* Court first looked to the 1972 Amendments and found them sufficiently comprehensive to raise the presumption that Congress intended to preempt all state law actions unless expressly preserved.[56] Looking at the permit structure of the FWPCA, the Court focused on the role of "source" and "affected" states in the permit process. The court concluded that affected states held only an advisory role in regulating pollution that is discharged pursuant to the regulations of and within the boundaries of the source state.[57]

48. Id. at 268.
49. Id. at 274.
50. Id. at 269.
51. Id.
52. Id. at 271.
53. Id. at 271.
54. 776 F.2d 55 (2d Cir. 1985).
55. 475 U.S. 108 (1986).
56. 107 S. Ct. at 811.
57. Id. at 810.

With that background in mind, the Court viewed the issue in terms of whether Vermont law (the affected state law) conflicted with federal law, and thus was preempted. The Court held that in addition to comprehensive regulation of interstate water pollution, the FWPCA provided its own remedies.[58] By the Court's interpretation, the state law remedies "saved" by the statute were applicable only within the constraints of the statutory remedies—that is, the citizens-suits provisions.[59] Therefore, the existence of the savings clause in no way precluded preemption of state law remedies by the Act itself. The issue remaining was whether the use of state law remedies interfered with the methods and goals of the FWPCA and were preempted for that reason.

The Court ruled that in this case the application of Vermont law against IPC would allow the state of Vermont and its citizens to circumvent the NPDES permit system, and upset the interests addressed by the Act.[60] Their conclusion was based on the opinion that if a polluter in New York was held liable for violations of Vermont's standards, the polluter would be forced to comply with those standards. If a downstream state's permit standards are more stringent, then that state effectively regulates the out-of-state sources, thereby infringing on the sovereignty of the source state.[61]

The Court did not address the obverse of this argument. Once remedies are viewed as a regulatory tool, rather than a supplement to regulation, any variations in standards inevitably lead to one state being held hostage to the policies of the other.[62] The consequence of the Supreme Court's decision is to transform minimum upstream standards into the maximum standards for a stream system.

Additionally, the Court did not address the inconsistency of its decision when the affected and source states maintain comparable standards. The logical conclusion of this decision would dictate that even though identical regulatory and common law standards exist, application of the affected state's law equals indirect regulation inconsistent with the structure and goals of the FWPCA, while application of the source state's law is an acceptable supplement to the regulatory process.

The Court's second rationale was that application of an affected state's law undermines the efficiency and predictability of the permit system. According to the Court, chaos would reign if permit holders had to act

58. Id. at 812. These remedies include civil and criminal penalties for permit violation, and "citizens suits" which allow individuals to compel the EPA to enforce a permit. (citing 33 U.S.C. § 1319(a), 1365(a), (h)). What is foreboding about the whole issue is that there is no mention of private remedies available to individuals for damages resulting from the discharge of effluent into interstate water.

59. 107 S. Ct. at 812.

60. Id. at 813.

61. Id.

62. See Tennessee v. Champion International Corp., 709 S.W.2d 569 (1986), 576–580 (Drowata, J., dissenting).

in accordance not only with permit standards, but also with all downstream states' common law standards of nuisance (classified by the Court as "vague" and "indeterminate" laws).[63]

The Court did find that the FWPCA does not preclude a claim brought under the laws of the source state.[64] A source state has the authority to set higher standards than those of the federal government, if the state chooses to administer its own permit program. In addition, allowing application of the source state's common law subjects a polluter to one known or predictable standard of liability, rather than indeterminate and vague standards.[65]

The Court continued, "[m]oreover, States can be expected to take into account their own nuisance laws in setting permit requirements."[66] The effect of this conclusion is inconsistent with the FWPCA. If states equate nuisance laws with permit standards, compliance with a permit could preclude *per se* a nuisance action. Legislative history is clear that Congress did not intend such a result.[67] If Congress had intended the interpretation drawn by the *IPC* Court, then there would have been no reason to enact a savings clause at all. The end result of that interpretation, however, is that injured parties are effectively left without a remedy if they are damaged by out-of-state discharges.

CONCLUSION

Although the Court resolved the split between Circuits as to whether an affected state may apply its common law in determining remedies for citizens injured by an out-of-state polluter, it did so by drawing artificial distinctions between affected and source states. The Court's decision also precludes remedies altogether where a source state equates permit standards with its common law standards, even though an injury to an affected state and its citziens may be substantial. If a source state's common law principles are inadequate to address water pollution disputes, injured parties are left with no recourse. This decision represents a step backward in effectuating the FWPCA's policy of eliminating water pollution in interstate waters.

STACEY GOODWIN

63. 107 S. Ct. at 814.

64. Id.

65. Id. at 815.

66. Id.

67. "It should be noted, however, that [the savings clause] would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." [S. Rep. No. 92-414, 92d Cong., 2d Sess. 81, accompanying 33 U.S.C. 1365(e)]. Oullette v. International Paper Co., 602 F. Supp. 264, 269 (D.Ver. 1985); see also, Comment, State Law Remedies at 10,141 (cited in note 11).