OUELLETTE v. INTERNATIONAL PAPER CO.: FOLLOWING THE PAST, IMPROVING FOR THE FUTURE

Pollution of our nation's water poses a great threat to the interests of government, industry, and the public.[1] Although federal legislation such as the Clean Water Act[2] is the primary means to eradicate water pollution, courts also play an instrumental role in the fight for cleaner water.[3] In cases of interstate pollution, courts frequently face the difficult problem of how to redress injury to an affected state[4] and still maintain a comprehensive, uniform system of federal pollution regulation.[5] In *International Paper Co. v. Ouellette*[6] the United States

1. A senate committee found that "many of the Nation's navigable waters [were] severely polluted, and major waterways near the individual and urban areas [were] unfit for most purposes." S. REP. No. 414, 92d Cong., 1st Sess. 7 (1971).

2. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1972). The Clean Water Act (CWA) prohibits the discharge of water pollutants into navigable waters without a permit issued by the Environmental Protection Agency (EPA). The Act sets federal minimum standards of water quality, permitting source states to make their standards even more stringent. Congress stated the goals of this legislation as "restoration and maintenance of chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1972). Congress stated the Act's goal in § 1251(a)(1): "[T]he discharge of pollutants into navigable waters [shall] be eliminated by 1985." *Id.*

3. *See generally* U.S. v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1986) (discharge of dredged fill materials allowed only by permit); Quivira Min. Co. v. United States E.P.A., 765 F.2d 126 (10th Cir.), *cert. denied*, 474 U.S. 1055 (1985) (CWA intended to protect as much water as possible); U.S. v. Ottati and Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985) (discharge of waste chemicals into navigable water without permit violated CWA).

4. *See* 33 U.S.C. § 1342 (1972) (describing the rights and powers of an affected state under the CWA permit system (NPDES)). The United States Supreme Court in International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987) indicated that "affected" states are those "that share an interstate waterway with the source." *Id.* at 810. A "source" state is the point of pollution discharge. *Id.* at 808. The CWA defines a "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1982).

5. 33 U.S.C. § 1342. Difficulty arises in this situation because under the CWA guidelines, a source state may only impose more stringent discharge requirements than those mandated by the Act. An affected state may issue only an advisory opinion at the

Supreme Court held that although the Clean Water Act (CWA) preempts the imposition of Vermont nuisance law on a New York pollution source, the Act allows the affected state to pursue an interstate water pollution claim in its own courts applying the source state's law.[7]

In *Ouellette*, Vermont landowners filed a class action against International Paper Company (IPC), a New York paper mill, claiming that IPC discharged pollutants into a shared border lake, thus polluting Vermont waters and creating a nuisance under Vermont common law.[8] The plaintiff landowners alleged that the pollution decreased their property value and prevented use of the lake for recreational purposes.[9] The plaintiffs sought compensatory and punitive damages and an injunction requiring restructure of IPC's water treatment system.[10] The United States District Court for the District of Vermont[11] ruled that the CWA's saving clause[12] did not allow complete federal preemption; consequently, the court allowed the plaintiffs to pursue their claim

time of the permit's issuance to the source-state company. An affected state may not use its own law against a point source in another state because such a legal imposition would usurp Congress' desire for a uniform, comprehensive federal system. *Id.*

6. 107 S. Ct. 805 (1987).

7. *Id.* at 816. The Court found that the claimants' residence in another state should not completely bar recovery. Therefore, claimants were allowed to sue in Vermont courts using the law of New York, the location of the point source. *Id.*

8. *Id.* at 807. IPC argued that its New York-issued permit required only that it comply with New York pollution standards, not those of Vermont. *Id.*

9. *Id.*

10. *Id.* The landowners also sought monetary and injunctive relief for air pollution allegedly emitted by the mill. *Id.*

11. The defendant removed the action from Vermont Superior Court to the United States District Court for the District of Vermont. *Id.*

12. The "saving clause" consists of two provisions in the Clean Water Act which preserve state action in cases of interstate water pollution. Section 510 of the Act states: "[e]xcept as expressly provided . . ., nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370 (1972). *See* State of Minnesota v. Hoffman, 543 F.2d 1198, 1208 (8th Cir. 1976) (section 1370 ensures that states may adopt more stringent standards than those required by the Act). Section 505(e) states: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." 33 U.S.C. § 1365(e) (1972).

The district court interpreted the savings clause to mean that a state may use its law if it was the site of the actual injury. 107 S. Ct. at 809.

against the New York paper mill using Vermont common law.[13] The Court of Appeals for the Second Circuit affirmed the decision, adopting the opinion of the District Court.[14] On writ of certiorari,[15] the Supreme Court affirmed in part,[16] reversed in part, and remanded the case. The Court held that in an interstate water pollution claim subject to the CWA, the court of an affected state may only utilize the source state's law, but may hear the case in its own courts.[17]

In 1948, Congress passed the original Federal Water Pollution Control Act (FWPCA).[18] This statute allowed the federal government to comprehensively regulate the nation's water.[19] Further, the Act allowed courts to supplement and possibly preempt federal common law in cases of interstate water pollution.[20]

In 1971, the Supreme Court first contemplated applying a state common law remedy to an interstate water pollution case.[21] In *Texas v.*

13. 602 F. Supp. 163, 174 (D. Vt.), *aff'd*, 776 F.2d 55 (2d Cir. 1985), *rev'd*, 107 S. Ct. 805 (1987).

14. 776 F.2d 55, 56 (2d Cir. 1985) (*per curiam*), *rev'd*, 107 S. Ct. 805 (1987).

15. 475 U.S. 1081 (1986).

16. International Paper Co. v. Ouellette, 107 S. Ct. 805, 807 (1987). The Supreme Court affirmed the district court's dismissal of IPC's motion for summary judgment, which claimed that the Clean Water Act preempted the landowners' state law suit. *Id.*

17. *Id.* at 809.

18. Act of June 30, 1948, ch. 758, 62 Stat. 1155. The Federal Water Pollution Control Acts of 1972, 33 U.S.C. §§ 1251-1376 (1982) (known as the CWA) supercedes the 1948 Act.

19. *See* Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 104-06 (1972) (recognition of interstate water pollution as a federal question demanding federal regulation).

20. Before 1938, federal courts derived their greatest power to control interstate water pollution through federal common law. *See* Note, *Preemption of Federal Common Law—City of Milwaukee v. Illinois*, 31 DEPAUL L. REV. 201, 201-02 (1981) [hereinafter Note]. In 1938, federal common law involved any cases decided by a federal court which did not apply state law. *Id.* In Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) the Supreme Court stated that federal courts may only derive common law power from the states. *Erie*, however, did not completely abolish federal common law. In Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92, 111 (1938), the Court held that in cases involving interstate water, federal common law could be applied. Thus, federal common law applied only in narrow and specialized cases. Federal common law still existed at the time of the 1948 Federal Water Pollution Control Act. *See* Note, *State Common Law Actions and Federal Pollution Control Statutes: Can They Work Together?*, 1986 U. ILL. L. REV. 609, 635 (1986).

21. In Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 499 (1971), the Supreme Court's dicta suggests that a court may use state nuisance law to decide an interstate pollution case involving a state and a private company.

Pankey,[22] the United States Court of Appeals for the Tenth Circuit applied federal common law rather than state law. In *Pankey*, Texas residents sought to enjoin New Mexico pesticide manufacturers from dumping chemicals that eventually leaked into the plaintiffs' water supply.[23] The court held that a state can protect its waters from out-of-state polluters only by using the federal common law of nuisance,[24] unless a federal statute preempted the common law.[25]

One year later, in *Illinois v. City of Milwaukee* (*Milwaukee I*),[26] the U.S. Supreme Court applied federal rather than state common law to an interstate water pollution case. The State of Illinois alleged that the dumping of raw and maltreated sewage into Lake Michigan violated Illinois water pollution standards and created a common law nuisance.[27] The Supreme Court ruled that federal rather than state common law governs interstate nuisance and pollution actions.[28] The Court did not perceive a conflict between the federal common law and the CWA.[29] The Court noted two possible consequences of the holding. First, a federal statute may eventually preempt the federal common law of nuisance in interstate water pollution cases.[30] Second,

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22. 441 F.2d 236 (10th Cir. 1971).

23. *Id.* at 237.

24. *Id.* at 240. The Court relied on Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907). In that case the Supreme Court prohibited further sulfuric emissions from a Tennessee copper smelting plant which resulted in the pollution of Georgia airspace.

25. Texas v. Pankey, 441 F.2d 236, 240 (1971). Circuit Judge Harvey M. Johnson gave the court's rationale:

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.

Id.

26. 406 U.S. 91 (1972).

27. *Id.* at 93. The State of Illinois also sought to enjoin four other Wisconsin cities and a Wisconsin sewage treatment plant from further dumping. *Id.*

28. The Supreme Court stated: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as *Texas v. Pankey*, 441 F.2d 236, recently held." 406 U.S. at 103.

29. *Id.* at 104. *See* City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979) (following *Milwaukee I*, which held that the CWA did not preempt existing federal common law).

30. 406 U.S. at 107. The Supreme Court stated:

> It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that comes to pass,

controversies may arise when one state seeks to uphold its more stringent water quality standards against a state with less demanding requirements.[31]

The Court's prediction of preemption became reality when Congress extensively amended the Clean Water Act in 1972[32] to eliminate the deficiencies of past legislation.[33] Congress imposed more explicit effluent discharge standards[34] and created the National Pollution Discharge Elimination System (NPDES) to regulate pollution discharge through a federal permit system, subject to source state approval.[35] The NPDES resulted in a "regulatory partnership"[36] between the source state and the federal government.[37]

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federal courts will be empowered to appraise the equities of the suits alleging creation of a nuisance by water pollution.

Id.

31. *Id.* at 107-08. The Court exposed the deficiencies in existing interstate water pollution law when it stated:

A state with high water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of its neighbor. There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern.

Id.

32. Federal Water Pollution Control Amendments of 1972, §§ 101-516. Congress passed the amendments just five months after the *Milwaukee I* decision. *See* Note, *supra* note 20, at 206-09.

33. *See* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 1425 [hereinafter cited as LEG. HIST.]. Congress stated that "[t]he national effort to abate and control water pollution has been inadequate in every vital aspect. . . ." *Id.* The Committee on Public Works found: 1) many of the country's navigable waters were unfit for almost any purpose; 2) rivers were the major sources of ocean pollution, and 3) lakes and other contained waterways aged significantly due to this pollution. *Id.*

34. Possible violation of effluent limitations are now measured at the site, or point source, of the pollution discharge. 33 U.S.C. § 1311(e) (1972). The 1972 amendment defines an effluent limitation as "any restriction established by a State or Administrator on quantities . . . and concentrations of chemical[s] . . . which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11) (1972).

35. *See* E.P.A. v. California *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205-08 (1976). NPDES permits are first secured through the EPA, but states may issue their own NPDES permits subject to EPA approval. To receive approval, a state program must comply with the EPA's pollution guidelines and be supported by adequate authority which proves that the program will achieve the desired anti-pollution ends. *Id.*

36. International Paper Co. v. Ouellette, 107 S. Ct. 805, 810 (1987). *See infra* note 37 for explanation of "regulatory partnership."

37. 33 U.S.C. § 1341(a)(1) (1972). Federal issuance of an NPDES permit hinges on

Nine years after *Milwaukee I*, the Supreme Court conclusively proclaimed the CWA to be the preeminent authority in interstate water pollution.[38] In *City of Milwaukee v. Illinois* (*Milwaukee II*)[39] the Supreme Court found that Congress intended the CWA to fully encompass all federal regulation of water pollution, thus preempting the federal common law.[40] To find preemption,[41] the Court relied on the legislative history of the 1972 amendments,[42] the existence of the Environmental Protection Agency (EPA),[43] and the comprehensiveness of the regulatory scheme.[44]

While dispensing with federal common law, the *Milwaukee II* Court refused to address whether the CWA preempts state common law actions.[45] However, the Seventh Circuit Court of Appeals answered this

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the source state's approval. A state may deny a permit to any applicant failing to meet state water pollution standards. *Id.*

38. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 318 (1981). The Court stated: "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation." *Id.*

39. 451 U.S. 304 (1981).

40. *Id.* at 317. *But see* Hunt, *Uniformity is the Solution to Water Pollution*, 23 S. TEX. L.J. 417, 438-39 (1982) (federal common law may supplement the CWA when legislation fails to fully address the pollution controversy).

41. *Id.* at 319. Specifically, the Court stated:

> The establishment of such a self-consciously comprehensive program, 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.

Id.

Milwaukee II's emasculation of federal common law spread to other areas of environmental law. *See* United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982) (Clean Air Act preempted federal common law of nuisance); Connecticut v. Long Island Lighting Co., 535 F. Supp. 546 (E.D.N.Y. 1982) (Clean Air Act displaced federal common law).

42. *Milwaukee II*, 451 U.S. at 318. In particular, the Court cited statements of Representative Mizell and Senator Randolph, who described the Amendments as "the most comprehensive and far-reaching water pollution legislation which we have ever drafted." *Id.* (citing 1 S. REP. NO. 414, 92d Cong., 2d Sess. at 95, 1 LEG. HIST. at 369). Senator Randolph stated: "It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment." *Id.* (citing 2 LEG. HIST. at 1269). Generally, the Court stated that these views of the legislation were almost universal. *Id.*

43. *Id.* at 325 (Court deference to agency expertise).

44. *Id.* at 316-19 (establishment of a far-reaching regulatory system with specific pollution standards precludes Court's interpretations).

45. *Milwaukee II*, 451 U.S. at 312. In addition to the question of federal common law preemption, Illinois presented the Supreme Court with the question whether the

question affirmatively in *Illinois v. City of Milwaukee* (*Milwaukee III*).[46] The court held that in cases of interstate water pollution, the CWA precluded the use of an affected state's law to determine the source state's liability.[47] The court rejected the argument that Illinois common law, rather than the law of the source state, must apply because the Clean Water Act supplanted federal common law.[48] The court reasoned that the structure of the Clean Water Act, which emphasizes the role of the source state, and the potential for conflict and confusion in applying the affected state's law, precluded the use of Illinois' more stringent water pollution standards.[49] The court noted, however, that the affected state may pursue its claim in its own state courts if the court applied the source state's law.[50]

In *State v. Champion International Corp.*[51] the Supreme Court of Tennessee followed the basic principles stated in *Milwaukee III*,[52] but deviated from the Seventh Circuit's suggestion that a claim could be pursued in the affected state's courts.[53] The *Champion* court held that an affected state has no state or federal cause of action against a paper mill possessing a source state's permit which complies with the Clean Water Act.[54] Although the court expressed sympathy for the plight of

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CWA preempted relief under state common law. The Court later refused to address the state common law preemption issue in a separate denial of certiorari. 451 U.S. 982 (1981).

46. 731 F.2d 403 (7th Cir. 1984). On remand from the Supreme Court, the Seventh Circuit consolidated *Milwaukee II* with two cases containing similar facts involving Illinois' common law nuisance claims against Indiana polluters. *See* Illinois v. Sanitary District of Hammond and Scott v. City of Hammond, 519 F. Supp. 292 (N.D. Ill. 1981) (interstate water pollution cases brought by the State of Illinois and an Illinois resident against an Indiana city and its municipal corporation).

47. Illinois v. City of Milwaukee, 731 F.2d 403 (7th Cir. 1984).

48. Wisconsin was the source state in this case. *Id.* at 406-07.

49. *Id.* at 413.

50. *Id.* at 414.

51. 708 S.W.2d 569 (Tenn. 1986). In *Champion*, the State of Tennessee and its environmental officials sought an injunction and civil penalties against a North Carolina paper mill. The state claimed that the North Carolina mill impermissibly polluted a river which flowed into Tennessee. *Id.* at 570.

52. *Id.* at 575 (advocating the need for a comprehensive federal system of water pollution regulation). *See* Illinois v. City of Milwaukee, 731 F.2d 403, 413 (7th Cir. 1984).

53. *See supra* note 50 and accompanying text (an affected state may use its own courts when applying source state law).

54. *Id.* at 575. The court believed that the state should honor its membership in a national program such as the NPDES. *Id.*

the affected state,[55] it believed that the opportunity for the affected state's input prior to permit issuance,[56] coupled with the need for federal regulatory uniformity, justified barring the affected state's action.[57]

In *International Paper Co. v. Ouellette*[58] the Supreme Court developed the principles established in *Milwaukee II* and *Milwaukee III*.[59] Writing for the majority,[60] Justice Powell stated that a federal statute can generally preempt state law only when preemptive intent is clear and the state law impedes the objectives of Congress.[61] The Court then enumerated specific reasons for preempting Vermont common law.[62] First, because Vermont only had common law jurisdiction over discharges from within the state,[63] the Act's plain language did not allow the application of Vermont law to a New York point source, despite the Act's saving clause.[64] Second, the Court concluded that Congress could not have envisioned a saving clause that allowed an affected state to circumvent the comprehensive federal regulatory system and impose its own law upon an out-of-state point source.[65]

The Court next examined the goals and policies of the CWA.[66] Jus-

55. *Id.*

56. The CWA allowed an affected state to make recommendations and objections while the source state considered issuing a CWA permit. *See supra* note 4 (rights of an affected state in the NPDES permit system). The *Champion* court believed that this input opportunity was sufficient to preclude later action by an affected state. *Champion*, 709 S.W.2d at 576.

57. *Id.* at 576.

58. 107 S. Ct. 805 (1987).

59. *Id.* at 811. *See supra* notes 39-44, 46-50 and accompanying text.

60. Four justices dissented in *Ouellette*. Of those dissenting, Justices Stevens and Blackmun believed that the question of whether to use Vermont law against a New York polluter was moot because the district court never decided which state's substantive law governs the suit. 107 S. Ct. at 820-21 (Brennan, J., dissenting).

61. *Id.* at 811. *See* Hines v. Davidowitz, 312 U.S. 51, 67 (1941). *See also supra* note 2, regarding the objectives of the Clean Water Act.

62. *Ouellette*, 107 S. Ct. at 812-15. These reasons included the plain language of the Act, desired uniformity of the permit system, and the presence of a remedy under source-state law.

63. *Ouellette*, 107 S. Ct. at 812. The Court cites § 510 of the Act, which maintains state authority with respect to the waters, including boundary waters, of the state. The Court argued that the language presumably limits state jurisdiction to discharges made within the state. *Id.*

64. *See supra* note 12, regarding the content and use of the saving clause.

65. *Id.*

66. *Id.* at 812-14 (restoring and maintaining chemical, physical and biological balance of national waters).

tice Powell found that imposing an affected state's law on an out-of-state company would circumvent the CWA by enabling the affected state to indirectly govern the source state.[67] The Court found that this was contrary to Congress' intent.[68] Further, the Court stated that applying the affected state's law to an out-of-state source would adversely affect the efficiency and uniformity of the permit system by potentially subjecting a pollution source to the laws of several different states.[69] The Court also reasoned that the vagueness of state common law would turn to chaos a once orderly and specifically standardized system.[70] Finally, the majority found that precluding the application of an affected state's law will not leave the affected state without a remedy.[71] The Court held that applying the source state's law in the affected state's court[72] allows redress of the affected state's injuries, while simultaneously preserving the predictability[73] and balance[74] which Congress intended.[75] In this way, courts can equitably resolve the claims of all parties involved.[76]

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67. *Id.* at 813. The Court stated that if Vermont law regulated a New York point source, the New York company would be forced to change its business practices and pollution control methods to avoid punishment by an affected state. *Id.* The result, the Court concluded, would be an affected state regulating another state's point source without the standards and requirements established by the CWA. *Id.*

68. *Id.* at 814 (use of affected state law would destroy the uniformity which Congress envisioned).

69. *Id.* In a footnote, the Court illustrated the dangers in applying affected state common law. For example, a Minnesota source on the Mississippi River could theoretically be subject to the common law of nine separate states. *Id.*

70. *Id.* at 814. The Court, citing *Milwaukee III*, 731 F.2d 403 (7th Cir. 1984), expressed reservations about using such vague common law claims as "nuisance" in a system which promulgated very specific, exacting minimum pollution standards. The addition of state common law, the Court concluded, would be the very antithesis of Congress' objectives in enacting the CWA. Applying state law would result in a return to the same vague, indeterminate water pollution regulation standards that Congress sought to eliminate through the CWA. *Id.*

71. *Id.* The Court concluded that the saving clause allowed affected residents a remedy using source state law. *Id.*

72. This allowance demonstrates how *Ouellette* built upon the dictum of *Milwaukee III*. Residents of affected states may now use source state law in affected state courts to pursue their claim against another state's point source. *Id.* at 816.

73. *See supra* note 5 and accompanying text (limitations on the use of affected state law under the CWA).

74. *See supra* note 35 and accompanying text regarding the partnership which Congress intended to exist between the state and federal governments.

75. *Ouellette*, 107 S. Ct. at 815.

76. *Id.* at 816. The Court stated: "We find no basis for holding that Vermont is an

While the dissent[77] agreed that the CWA does not preempt an interstate water pollution suit filed by an affected state,[78] Justice Brennan argued that the affected state's law should be applied against the New York industry for four reasons.[79] First, because the Act did not explicitly preempt state common law,[80] preemption could not be inferred.[81] Second, Justice Brennan cited evidence in the legislative history that Congress did not intend the CWA to be the exclusive remedy for water pollution damage.[82] Third, affected state law should be applied because it had the same primary purpose as the CWA—eliminating water pollution.[83] Finally, Justice Brennan stated that Vermont law validly supplemented the CWA because the state's standards were more stringent than those in the Act.[84] Thus the dissent, characterizing this as a conflict of laws case, decided in favor of Vermont, the situs of the actual injury.[85]

The *Ouellette* decision adds to the existing principles of *Milwaukee III*.[86] The Court's holding allows interstate water pollution claims to be heard in the hospitable confines of the affected state's court while

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improper forum. Simply because a cause of action is preempted does not mean that judicial jurisdiction over the claim is affected as well; the Act preempts laws, not courts." *Id.*

77. *See supra* note 60.

78. 107 S. Ct. at 817 (Brennan, J., dissenting).

79. *Id.* at 818-19.

80. Both the majority and dissent cite almost identical language in the Act, but interpret it differently. The majority restricted allowable state common law remedies to those of the source state. *Id.* at 812 n.13. The dissent drew no such distinction, interpreting common law remedies to mean those of either source or affected states. *Id.* at 818 (Brennan, J., dissenting).

81. *Id.* at 818 (Congress wanted to preserve the traditional right of a state to use its own law when one of its residents is injured by an out-of-state polluter).

82. *See* S. REP. NO. 414, 92nd Cong., 1st Sess. 81, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 3246 (stating that compliance with the CWA would not be a defense to a suit for pollution damages brought under common law).

83. *Ouellette*, 107 S. Ct. at 819 (Brennan, J., dissenting). The dissent relied on the Supreme Court's holding in Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission, 461 U.S. 190, 221-23 (1983).

84. *Ouellette*, 107 S. Ct. at 819 (Brennan, J., dissenting). Justice Brennan concluded that a state law would conflict with existing federal legislation only if it imposed compliance standards less stringent than the CWA. *Id.*

85. *Id.* at 820. The dissent, viewing the issue as one of conflict of laws, believed that Vermont law should apply because the injury occurred in Vermont. *Id.*

86. *See supra* notes 46-50 and accompanying text.

still applying the source state's law.[87] *Ouellette* maintains the uniform system of regulation envisioned by Congress[88] and allows an affected state to receive compensation for damages incurred from an out-of-state polluter.[89] The Court's holding provides the most equitable solution for both affected and source states by broadly reading the CWA.[90] Though greater state action would aid in eliminating water pollution, the resulting state power and regulatory chaos would contradict Congress' original intention to create a comprehensive federal regulatory system.[91]

Ouellette reaffirms Congress' desire for uniformity and predictability under the CWA. By reversing the second circuit's holding that an affected state may use its own common law in an interstate water pollution action, the Court preserved the CWA's continuity while avoiding a harsh result.[92] The Supreme Court's preservation of a uniform water pollution regulatory scheme assures industries and affected parties a just forum and predictable regulations for adjudication of interstate water pollution actions.

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87. *Ouellette*, 107 S. Ct. at 815.

88. *See supra* notes 38 and 41.

89. *See supra* note 76 and accompanying text.

90. *See* Note, *State Common Law Actions and Federal Pollution Control Statutes: Can They Work Together?*, 1986 U. ILL. L. REV. 609, 638-40 (1986) (CWA displaces federal but not state common law).

91. *See supra* note 41.

92. *See supra* notes 51-57 and accompanying text (discussing the result in *Champion*).