An Agricultural Law Research Article

Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution

Part 2

by

Andrew Jackson Heimert

Originally published in ENVIRONMENTAL LAW
27 ENVTL. L. 403 (1997)

E. Concluding Thoughts

State courts rarely hold common-law claims to be preempted when a new statute involves the same area of law. An intent to preempt common law must clearly appear in the law or be necessary to the effective implementation of the statute. Even then, a statute may not preempt common law when doing so would violate equal protection or due process. Commentators provide mixed support for the preemption of common law by statute, dividing on the issue of whether legislative standards should define the duty of care. Pollution permits, however, do not entirely fit within the duty-of-care framework. Rather, permits provide a mechanism to help reduce pollution. Their purpose is to ensure that a source will meet technology standards and will not overly increase ambient pollution. The duty of care imposed by statutes is to the environment as a whole, not to individual landowners.

The principle drawback of a system that conjoins regulation with nuisance is that each polluter must look to two (or more) authorities rather than one to ascertain whether it is in compliance. Moreover, the latter authority is the relatively unpredictable judicial system. An ex ante permit is relatively easy to comply with: one knows the requirements before one begins to operate. In contrast, a judge and jury almost certainly will not rule until several years after operations have commenced. Money may have been invested and jobs filled—balances that may be upset by a court finding a nuisance and directing compensation. Furthermore, different juries may impose vastly different penalties on companies in similar cases. The deterrent effect may be minimal if the likelihood of suit and the amount of damages are sufficiently random so that a company cannot take any action that reduces the likelihood of a suit. In addition, litigation costs may place a drag on a company, possibly diverting resources from other pollution control efforts.

The reliance claim is strongest if the permit contains an express guarantee. There is, however, no reason to provide such a guarantee to any permittee. If a polluter knows that she is subject to nuisance suits, then any reliance claims necessarily fail. In essence, the permit fulfills only the polluter's obligation to the government and to any ambient standards that the government wishes to attain. More troubling is the risk a company takes in being open to suit. This risk should be no greater, however, than it was before any of the pollution acts were passed. Is it now more troubling to force a polluter to bear some risk than it was fifty years ago? Moreover, if the company does not bear the risk of the permitting authority being wrong about the emissions constituting a nuisance, then the public does: it must suffer pollution that it would not otherwise have to.

The caprice of jury awards also presents difficulties. It, however, is symptomatic of greater problems in the tort world. Wild fluctuations in awards do not seem a reason to eliminate them entirely. They do provide a reason for a broader reform to rationalize these awards, be it through a judge's or appellate court's oversight, or even legislative standards for damage recoveries.

There are two possible components to a nuisance claim—technology and location. One might require a polluter to use the best technology to reduce her emissions in order to avoid being adjudged a nuisance. Because the CAA and CWA specify the proper technology, claims of nuisance for using inadequate technology might be preempted by the Acts. Unfortunately, nuisance law does not automatically allow a polluter to fulfill her duty solely by using the best technology.[306] Furthermore, a finding of nuisance would not necessarily command the use of better technology, although it could militate for reduced production or moving the factory. Alternatively, the company's cheapest route might be to pay damages.[307] At most, then, the specific technology requirements eliminate one variable—given a certain level of pollution, where should a plant locate to minimize harm?

The decision by Congress to focus on nationally uniform standards may be considered an explicit policy choice, one that rejects the location concerns that nuisance law addresses. If it is an explicit policy choice, then any policies that encourage differences in treatment across locations would be contrary to that policy. Congress's primary goal in passing the CAA and CWA was to reduce pollution. There may have been legitimate equality fears in achieving these goals. Perfect equality could have been reached by directing a certain level of expenditure on environmental control everywhere. A "bounded" equality would require approximately what Congress has done: some differences in cutbacks, but differences that are not too great. The validity of this view depends upon whether one considers the resulting uniform standards a conscious policy choice or simply a necessary legislative expedient. Congress clearly contemplated that states *could* enact stricter standards. It was just unwilling to impose those higher standards itself. Furthermore, if this choice was necessary simply to pass the bill, then its claim to being a policy decision is weaker.[308] Finally, the uniformity view converts an anti-pollution law into a pro-growth bill that encourages economic development by conferring licenses to pollute a certain amount at the expense of the environment—a reversal of the law's original purpose. The CAA and CWA provided a solution to the collective action problem among states that had precluded them from acting unilaterally to improve environmental conditions. Nothing in the Acts, however, suggests that the states' agreement to overcome this problem should mean they can no longer act unilaterally to clean their own environment.

If the CAA and CWA were to give as much heed to location as zoning ordinances do, then the claims for complete preemption would be

---

306 *See, e.g.*, Jost v. Dairyland Power Coop., 172 N.W.2d 647, 650, 652 (Wis. 1969).

307 An award of damages would *not* require a court to decide what technology is best, or to engage in the "expert" balancing an administrative agency is supposedly capable of performing. This would be left to the company, which should have as much (or better) information about how to reduce pollution as EPA.

308 For example, can one say that it is the "policy" of the government to spend huge amounts of money in West Virginia, or is that the result of certain senators holding positions that enable the insertion of such spending into bills that need their support?

stronger.[309] The individualized attention that nuisance litigation can provide a particular land-use dispute exceeds the capacity of the CAA and CWA to consider all situations. A modification of the statutory scheme to incorporate greater consideration of location might obviate these concerns. However, the extent to which the Acts try to preserve freedom of location seems borne out of politicians' fears of losing industry to other areas, so such a modification is unlikely.[310] Nuisance law can fill the interstices left by politicians' inability to force a consideration of location.[311] The failure of the CAA and CWA to meet the ambient goals provides some justification for arguing that nuisance law should not be preempted. Once polluters can complete compliance with nationally promulgated standards, they will have a stronger case for preemption. This Article has questioned whether ambient standards alone create sufficient incentives for locating so as to minimize nuisances. While it is difficult to argue persuasively that nuisance law would be a better mechanism than an administrative alternative, the argument is made much more easily when that alternative does not yet exist.

This Article does not contend that injunctions would be appropriate when there is compliance with an applicable permit. In most cases the hardship of the injunction would greatly outweigh its benefit. Damages, however, are a different story. They create a redistribution of wealth but do not themselves reduce social utility.[312] Damages merely shift some of the gains reaped from producing pollution to those harmed by its release.

Consequently, awarding damages also diminishes the certainty that permits create. Given the high cost of building a facility, such an effect could negatively impact societal growth through over-deterrence. The certainty that a permit system provides, however, often amounts to assuring freedom from suit, which, in and of itself, cannot justify a regulatory scheme that excludes nuisance suits. If the polluter is warned that compliance with a permit only constitutes compliance with the pertinent act's requirements, the polluter can hardly say he has not been warned of the other possible "requirements" deriving from nuisance suits. The threat of suit should make companies more willing to engage in calculations to determine the likelihood of suits. The idea of preserving nuisance remedies is not to encourage suits, but to discourage siting and conduct that gives

---

309 Recall, however, that compliance with zoning ordinances does not necessarily create a complete defense to claims of nuisance. *See supra* note 51.

310 *See* James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—And Why It Matters*, 54 MD. L. REV. 1226, 1235 (1995) (quoting Richard B. Stewart, *History & Policy Analysis*, 31 STAN. L. REV. 1159, 1173 (1979)) ("'[T]here are serious political obstacles to congressional agreement on nonuniform measures which would permit greater economic development in some states than others. Members of Congress would also be reluctant to confer on administrative officials discretion to impose non-uniform measures.'").

311 *Cf.* Huber, *supra* note 236, at 334 (preserving tort remedies can create a safety valve for regulatory inadequacies).

312 Litigation costs are a net drain. They may be less costly than a more complex administrative process that incorporates location. They are, of course, more costly than no administrative process at all.

rise to such suits. In conclusion, to assume that nuisance will overdeter seems a most peculiar proposition, given its historical inability to control pollution adequately.

V. INTERSTATE POLLUTION

The previous Parts of this Article claimed that federal and state statutory pollution controls aim primarily to limit the output of pollution. These controls do not, however, pay great heed to the effects pollution has and, consequently, to the location of pollution. In contrast, nuisance law specifically addresses the effects of pollution and considers location. The justifications for statutory preemption of nuisance law fail to outweigh the benefit that supplemental pollution control through nuisance law can provide. Interstate pollution presents similar issues. In fact, the federal efforts at statutory pollution control grew out of a desire to control interstate pollution.[313]

Well before Congress became serious about the comprehensive statutory control of pollution, the U.S. Supreme Court developed a body of "federal common law" to adjudicate pollution disputes between states. After passage of the current Clean Water and Clean Air Acts the issue of preemption of this federal common law arose. The Supreme Court decided first that the CWA preempted federal common law,[314] and subsequently that the CWA preempted state common law except that of the pollution's source state.[315] The logic of these decisions suggests the same result for the Clean Air Act (CAA). This Part traces the history of federal common law and the effects of the CAA and CWA on that common law as well as the common law developed by states.

A. Federal Adjudication of Interstate Pollution Disputes

The Supreme Court first acknowledged federal jurisdiction and federal common law for interstate water disputes in a disagreement over the

---

313 *See* Clean Air Act, Pub. L. No. 88-206, § 5, 77 Stat. 392, 396-99 (1963) (codified as amended at 42 U.S.C. § 7403 (1994)) (establishing complicated procedure to adjudicate disputes between states over air pollution); Federal Water Pollution Control Act, Pub. L. No. 660, ch. 518, § 8(c)-(g), 70 Stat. 498, 504-05 (1956) (repealed by Pub. L. No. 92-500, 86 Stat. 818 (1972)) (establishing complicated conference procedure to adjudicate desired abatement of interstate water pollution).

Congress apparently assumed that intrastate pollution primarily constituted a state issue. Therefore, only pollution that traveled interstate created an externality that Congress appropriately should address. Congress manifested this belief by granting primacy to states in enforcing the subsequent, more comprehensive acts. *See* 33 U.S.C. § 1342(b) (1994); 42 U.S.C. § 7410 (1994); *see also supra* Part IV.A. The notable exception to this is pollution of navigable waters, which themselves are a channel of interstate commerce and therefore subject directly to regulation even under a limited reading of the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. *See* Rivers and Harbors Appropriations Act, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (prohibiting discharge of refuse into navigable waterways).

314 City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

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

apportionment of the Arkansas River.[316] This federal common law provided a neutral federal rule, needed because "[e]ach state stands on the same level with all the rest."[317] The Court recognized that a state "can impose its own legislation on no one of the others, and is bound to yield its own views to none."[318] This forced the Court "to settle th[e] dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them."[319] The Court felt its rule was "what may not improperly be called interstate common law."[320]

The Court soon thereafter applied its interstate common law[321] to adjudicate an air pollution dispute. Georgia sought to enjoin the Tennessee Copper Company "from discharging noxious gas from their works in Tennessee over the plaintiff's territory," which led to the "wholesale destruction of forests, orchards, and crops" within the state.[322] Although both parties argued the case as if it were a private-nuisance dispute, the Court rejected the analogy, finding "[t]he very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief [to be] wanting."[323] Most of the affected territory was privately owned, making Georgia a relatively disinterested party; consequently, the land actually owned by Georgia had sustained only minimal pecuniary damage.[324] The Court instead portrayed the suit as one by a state "in its capacity as quasi-sovereign," which entails "an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."[325] Therefore, "the last word as to whether its mountains shall be stripped of their forests and

316 Kansas v. Colorado, 185 U.S. 125 (1902). The lack of alternatives for interstate disputes compelled the Court to grant jurisdiction. *Id.* at 143-44 (stating that "[t]he states of this Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties."). The litigation between the two states over the Arkansas River has continued for over 90 years. *See* Kansas v. Colorado, 115 S. Ct. 1733, 1738 (1995) (recounting initial litigation mentioned herein, subsequent litigation, and disagreement over the interstate compact formed).

317 Kansas v. Colorado, 206 U.S. 46, 97 (1907).

318 *Id.* The Court rejected the potential alternative, noting that "[i]f the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court." *Id.* at 98.

319 *Id.*

320 *Id.*; *see also* North Dakota v. Minnesota, 263 U.S. 365, 388 (1923). In *North Dakota v. Minnesota*, the Supreme Court exercised its original jurisdiction to hold that Minnesota may reasonably alter a watercourse despite possibly raising water levels in North Dakota lake, causing crop damage. *Id.*

321 At this time courts were to employ a general "federal common law" to adjudicate diversity cases. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (contract validity); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (restraint of trade). The Court abandoned in most instances the use of federal common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (tort). These issues are more fully addressed *infra* Part VI.A.1.

322 Georgia v. Tennessee Copper Co., 206 U.S. 230, 236 (1907).

323 *Id.* at 237.

324 *Id.*

325 *Id.*

its inhabitants shall breathe pure air" inheres in the state.[326] Georgia, according to the Court, sued not as a property owner, but as the ultimate protector of its citizens' property interests.[327]

The Court emphasized—as it had in *Kansas v. Colorado*—that "[w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests."[328] First, because a state could "not lightly . . . be required to give up quasi-sovereign rights for pay," it might "insist that an infraction of [its rights] shall be stopped."[329] Equity, not law, furnished the appropriate remedy. Second, the "[s]tates . . . did not sink to the position of private owners" by uniting,[330] which made the Court unwilling to engage in the balancing of equities usually employed to adjudicate disputes between private parties.[331] Instead, it felt obliged to follow a state's determination whether

> the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests or its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.[332]

The Court—as had some state courts—concentrated on the effects of the pollution. The focus of the Court's attention was firmly fixed upon the burden placed on a state forced to endure the ill effects of a neighbor's pollution.[333] Moreover, although a balancing of equities might have dictated that the activity continue, the Court nonetheless issued an injunction.[334]

---

326 *Id.*

327 It seems that a class action might well achieve the same result today.

328 *Id.*; *see also* Missouri v. Illinois, 200 U.S. 496, 520-21 (1906) ("It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court.").

329 *Tennessee Copper*, 206 U.S. at 237.

330 *Id.* at 237-38.

331 *Id.* at 238.

332 *Id. But see id.* at 240 (Harlan, J., concurring) (stating that Court should not treat state differently than private plaintiff but rather should apply same standards).

333 The Court confronted many of the same issues when it considered interstate water pollution in *Missouri v. Illinois*, 200 U.S. 496 (1906). There, the Court considered "a question of the first magnitude[:] whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity." *Id.* at 521. It sidestepped this issue, however, because to decide it in "one blow by an irrevocable fiat would be at least premature." *Id.* On the facts the Court could find no nuisance created by the sewage treatment plant, and noted that perhaps the plant had improved the quality of the water. *See id.* at 522-26; *see also* New York v. New Jersey, 256 U.S. 296, 301-02, 309-12 (1921) (finding that although suit for injunction against proposed sewage treatment discharge pipe was proper, evidence was insufficient for injunction to issue).

334 *Tennessee Copper*, 206 U.S. at 238.

The *Tennessee Copper* Court's rule allowed states to protect their borders from invasions of pollution more forcefully than a private party could defend her property. The Court discarded the usual standards of reasonable use and interference that might normally have applied between private parties in favor of a heightened interstate standard that favored affected states.[335] This conception of state property rights may only reflect a bygone era of federalism, but it does suggest that states gave up less in their "contract"—the Constitution—than the average citizen gives up in her implied contract allowing her to hold property rights subject to reasonable use and interference.[336]

Federal common law survived the initial development of the CAA and CWA.[337] But in 1972, the continuing vitality of federal common law was challenged in the Supreme Court in *Illinois v. City of Milwaukee (Milwaukee I)*.[338] Illinois alleged that Milwaukee's sewer system continued to discharge substantial amounts of untreated sewage into Lake Michigan, the currents of which brought pollution to Illinois' shores.[339] Illinois sought to invoke the Supreme Court's original jurisdiction to enjoin the alleged nuisance.[340] The Court agreed that Illinois advanced a federal claim, but it refused to exercise its original jurisdiction and directed the state to file instead in a federal district court.[341]

The Court explained that when it "deal[s] with air and water in their ambient or interstate aspects," federal common law controls.[342] Furthermore, federal common law was "not inconsistent with the Water Pollution Control Act" as it then stood.[343] Quoting *Georgia v. Tennessee Copper Co.*[344] extensively with approval, the Court explained that federal common law applies to interstate pollution disputes because of the nature of the object.[345] Although the standards established would necessarily be

---

335 A skeptical reader might argue that the Court established this rule simply because the facts so overwhelmingly indicated a nuisance. *See id.* at 238-39 ("[T]he sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case . . . ."). *But see id.* at 238 (expressing greater sensitivity to state's claim than it would to private party).

336 *See supra* text accompanying note 16.

337 Lower federal courts had confirmed the application of federal common law to interstate-pollution disputes as recently as 1971. *See* Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971).

338 406 U.S. 91 (1972) (*Milwaukee I*).

339 *Id.* at 94.

340 *Id.*

341 *Id.* at 98-101.

342 *Id.* at 103.

343 *Id.* at 103-04. The remedies that the Federal Water Pollution Control Act (FWPCA) provided at the time were "not necessarily the only federal remedies available." *Id.* at 103.

344 206 U.S. 230 (1907).

345 406 U.S. at 105 & n.6. It is not clear (and becomes less so in subsequent cases) whether all pollution is of a federal nature, or if only pollution that is potentially interstate is accorded federal status. The *Milwaukee I* Court reversed its recent intimation that state nuisance law would govern whenever suit was brought in either a state or federal forum. *See* Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 500 (1971) (rejecting Ohio's motion to invoke the Court's original jurisdiction for lack of institutional competence and because Ohio's

federal and uniform, noted the Court, federal courts could refer to state precedent for assistance in determining what constituted a nuisance.[346] Thus, "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 a neighbor."[347] The Court therefore suggested, as it had in *Tennessee Copper*, that affected states continued to enjoy a broad right to enjoin pollution from source states.

B. Statutory Enactments to Address Interstate Pollution

Shortly after *Milwaukee I* reaffirmed federal common law and directed Illinois to file its case in district court,[348] Congress passed the FWPCA.[349] At this point, the CAA had already become law, which the Court at first glance found did not preempt common law.[350] Both the CAA and CWA instituted provisions that address interstate pollution, which this Part explains.

1. Interstate Air Pollution Remedies

The CAA addresses interstate pollution through two provisions. First, each state's state implementation plan (SIP) must contain adequate provisions to preclude sources from emitting pollutants that will either "contribute significantly to nonattainment" of ambient standards[351] or "interfere with measures required to . . . prevent significant deterioration" in other states.[352] The Act enforces these requirements by directing each state that proposes to permit a new source to provide written notice to all states for which the source may affect ambient pollutant levels already in excess of the national ambient air quality standards (NAAQS),[353] or cause to exceed NAAQS.[354]

---

courts "would decide [the controversy] under the same common law of nuisance upon which [the Court's] determination would have to rest").

346 406 U.S. at 107.

347 *Id.*

348 *Id.* at 108.

349 Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1387 (1994)). The Court had anticipated this very possibility, noting that it might need to reconsider its decision because of potential federal preemption. *Milwaukee I*, 406 U.S. at 107 ("It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.").

350 *See* Washington v. General Motors Corp., 406 U.S. 109, 114-15 & n.4 (1972) (limiting preemption to specific provisions such as motor vehicle standards).

351 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994).

352 *Id.* § 7410(a)(2)(D)(i)(II).

353 *Id.* § 7426(a)(1)(B). If the source operates so as to contribute to nonattainment or interfere with the requirement of prevention of significant deterioration (PSD), EPA may require it to reduce emissions to cure these flaws. *Id.* § 7426(c); *see also id.* § 7413(d) (allowing EPA to assess civil penalties for a violation of SIP).

354 The PSD standards stipulate that "[n]o major emitting facility . . . may be constructed in any area to which [the PSD requirements] appl[y] unless" it can be shown that it will not cause pollution in violation of NAAQS in *any* region or cause an increase in pollution greater than the increment allowable under PSD. *Id.* § 7475(a), (a)(3)(A)-(B) (emphasis ad-

The interstate mechanism creates a limited right in clean air. If a downwind state is not in attainment, then no upwind state may grant permits that allow significant increases in the downwind state's ambient pollution levels.[355] The downwind state may, therefore, only block outside sources of air pollutants when an upwind state will substantially interfere with its attempts to reduce ambient levels to NAAQS. When a downwind state is already in attainment, no upwind state may use up the downwind state's PSD increment.[356] The downwind state, however, could not halt a source that would use only part of the increment.[357] This means that infra-incremental pollution is up for grabs.[358] The combination of the two rules means that a downwind state must always endure insubstantial increases in the amount of pollution. Furthermore, neither requirement protects a state from already-permitted sources in other states that contribute to the downwind state's pollution. Thus, once the permit has been obtained, or if the source does not need a permit, the downwind state must endure the pollution.

The CAA provides a second mechanism for downwind states to influence interstate pollution. The Act allows a state's governor to petition EPA to create a commission when it believes that interstate transportation of pollutants "contributes significantly to a violation of" NAAQS.[359] The commission is to include each concerned governor, several EPA officials, and

---

ded). Thus, this creates a provision parallel to section 126(a)(1)(B), applicable instead to sources built in attainment areas.

EPA initially construed section 165 to allow preconstruction review of all major sources that would affect ambient levels in an attainment area. *See* 43 Fed. Reg. 26,388, 26,397-98 (June 19, 1978). The D.C. Circuit partially struck down this construction of the CAA, finding that the requirements could be applied only if the source would affect an attainment area in *another* state, reasoning that the statement of purpose for the PSD requirements codified in section 160(4) was to prevent emissions from any source from interfering with another state's SIP for PSD. Alabama Power Co. v. Costle, 606 F.2d 1068, 1082-84 (D.C. Cir. 1979). A modification to this decision acknowledged that the necessary authority could be found in section 161 (authority initially disavowed by EPA, *see id.* at 1083), which requires SIPs to contain provisions to prevent significant deterioration in any region. Alabama Power Co. v. Costle, 636 F.2d 323, 367 (D.C. Cir. 1980); *see also* David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. REV. 740, 794 (1983) ("EPA has never issued a regulation interpreting the 1970 Act's ambiguous directive that sources in one state not interfere with another state's achievement of the ambient air standards. . . . To compensate for its failure to remedy this problem, EPA allows states to ignore pollution from other states in determining the adequacy of their plans" (footnotes omitted).).

355 *See supra* note 353.

356 *See supra* note 354.

357 *Id.*

358 *Cf.* Connecticut v. EPA, 696 F.2d 147, 166-67 (2d Cir. 1982) (finding EPA could permit New York emissions that would affect Connecticut air because Connecticut had yet to establish a baseline from which to measure PSD).

359 42 U.S.C. § 7506a (1994); *see also* Air Pollution Control Dist. of Jefferson County, Ky. v. EPA, 739 F.2d 1071, 1093 (6th Cir. 1984) (noting that while Congress did not intend to prohibit de minimis contributions by one state to violations of NAAQS in another, the language of the CAA indicates that states may not allow emissions that "significantly contribute" to violation of NAAQS in another state (citing Connecticut v. EPA, 696 F.2d at 164)).

state pollution control officials.[360] The commission may then request EPA to find that a state's SIP is inadequate and direct its modification.[361]

2. Interstate Water Pollution Remedies

When a state contemplates issuing a permit that "may affect . . . the quality of water in another state," the permitting state must provide notification to the other state.[362] If the affected state determines that the "discharge will affect the quality of its waters so as to violate any water quality requirements," the affected state may request and obtain a hearing from the permitting state.[363] The affected state may also submit written recommendations to the permitting state.[364] A permit must be conditioned "in such a manner . . . to insure compliance with applicable water quality requirements[;]" otherwise the permit may not be issued.[365]

The Supreme Court addressed the problem of state permitting in the context of interstate water pollution in *Arkansas v. Oklahoma*.[366] Arkansas sought a permit for discharges into the upstream portion of the Illinois River.[367] Oklahoma, however, had designated the Illinois River from the Arkansas border as "scenic," and therefore deserving of strong protection.[368] Because the portion in Oklahoma was not in compliance, Oklahoma sought to preclude any new discharges that might hamper its cleanup efforts.[369] While acknowledging that a downstream state's standards become federal for purposes of upstream permitting, the Court denied the downstream state the power to determine whether the discharge *would* affect the waters.[370] To the contrary, a downstream state must rely

---

360 42 U.S.C. § 7506a(b)(1) (1994).

361 *Id.* § 7506a(c).

362 33 U.S.C. §§ 1341(a)(2), 1342(b)(3) (1994).

363 *Id.* § 1341(a)(2). This right of participation, however, only extends to discharges that will have an actual effect on waters not in compliance. There is no remedy available to protect waters in compliance. Furthermore, if a state fails to act, there may be little a private party can do to remedy the situation retroactively.

364 *Id.* § 1342(b)(A).

365 *Id.* § 1341(a)(2).

366 503 U.S. 91 (1992).

367 *Id.* at 95.

368 *Id.* at 96 n.2 (quoting OKLA. STAT. tit. 82, § 1452(b)(1) (Supp. 1989)). Oklahoma sought to prevent "degradation . . . in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance." *Id.*

369 Oklahoma v. EPA, 908 F.2d 595, 620 (10th Cir. 1990), *rev'd sub nom.* Arkansas v. Oklahoma, 503 U.S. 91 (1992). There are at least two possible reasons a state may seek to limit other states from polluting its waters. When the state's waters are dirtier than allowable they must be cleaned. The state therefore faces the difficult task of allocating the cleanup burden among pollution sources, a task made even more difficult if a source outside the state is contributing because it is a source which the state has little power to force to reduce its pollution. The result is that in-state sources must reduce their discharges more than they would otherwise have to because of the presence of foreign pollution and that fewer new sources will be able to discharge pollution. Alternatively, a state may seek to limit foreign pollution because its waters are cleaner than its standards require. The state may want to keep its waters that clean or it may wish to preserve an increment of allowable pollution for its own sources, present or future.

370 *Arkansas*, 503 U.S. at 110.

on EPA's determinations to protect its own water quality,[371] since "'affected states occupy a subordinate position to source states in the federal regulatory program.'"[372] The Court held that EPA's finding that the discharges would have at most only a theoretical impact, not actual or measurable, not to be arbitrary.[373] Thus, the CWA shifted the affected-state bias of earlier years to a polluting state bias.

EPA, by its own rule, considers the effect that a discharge will have on a downstream state, but will refuse to issue a permit only if no permit conditions could ensure compliance with the applicable water quality standards.[374] The *Arkansas* Court found that nothing in the CWA precluded EPA's reading of the Act.[375] It denied Oklahoma the power to wield such a veto over the permit even though its waters were already out of compliance.[376] Therefore, regardless of a state's motivations for keeping out foreign pollution, its rights under the NPDES permitting scheme remain limited.

C. The Post-Pollution Act Withdrawal of Federal Common Law

1. Water Pollution

The comprehensive new air and water pollution statutes created questions as to whether previously existing federal common-law causes of action survived or had been supplanted by statute. The Supreme Court's prediction in *Illinois v. City of Milwaukee (Milwaukee I)*[377] that the federal common law preemption issue would arise again[378] came true in 1981, when the Court granted certiorari to decide "the effect of [the CWA] on the previously recognized cause of action."[379] *Milwaukee II* recognized

---

371 *Id.* at 105-07 (1992). The Court declined to decide whether the CWA mandated EPA to make such considerations. *Id.* at 104.

372 *Id.* at 100 (quoting International Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987)); *see also* Tennessee v. Champion Int'l Corp., 709 S.W.2d 569 (Tenn. 1986) (holding Tennessee could not enjoin pollutants emanating from source in North Carolina with valid permit from that state despite effluents causing violations of Tennessee water quality standards), *vacated*, 479 U.S. 1061 (1987).

373 *Arkansas*, 503 U.S. at 110-11. The conclusion of the Administrative Law Judge was that no "detectable change in water quality" would arise from the discharges. *Id.* at 112.

374 40 C.F.R. § 122.4(d) (1996).

375 503 U.S. at 110.

376 *Id.* at 111. The discharges purportedly would have no actual effect on water quality, simply a theoretical one. *Id.* at 112. One might argue that a state that soils its own nest has no right to keep others from similarly soiling it. This logic misses the point if a state is legitimately trying to reduce pollution within its waters but is having its progress impeded by pollution from other states.

377 406 U.S. 91 (1972).

378 *Id.* at 107.

379 City of Milwaukee v. Illinois, 451 U.S. 304, 308 (1981) (*Milwaukee II*). Lower courts had followed *Milwaukee I* until this time, applying federal common law to cases of interstate pollution. *See* City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1010, 1021 (7th Cir. 1979) (holding that the discharge of pollutants into interstate river gave rise to federal common-law claim, using *Milwaukee I* as guidance). Disagreement among the circuit courts arose, however, over whether federal common law applied to a state seeking to enjoin discharges within its own state. *Milwaukee I* apparently left unclear whether it was the

the historical bias against federal common law, finding it appropriate only in limited circumstances.[380] "Federal common law is a 'necessary expedient'" until Congress legislates over a particular field.[381] However, once Congress passes a statute to cover that area, "the need for such an unusual exercise of lawmaking by federal courts disappears."[382] Congress need not explicitly "proscribe[ ] the use of federal common law,"[383] but simply needs to have its legislative scheme "speak directly to a question."[384] The Court carefully distinguished this analysis from that which it would undertake in considering the preemption of state common law by federal statute.[385] While the Court presumes that state common law survives unless preempted by "clear and manifest" congressional statements, it employs the opposite presumption when federal common law is at issue.[386]

The Court went on to explain further its conclusion that the CWA had preempted the "vague and indeterminate nuisance concepts and maxims of equity jurisprudence" and supplanted them with "a comprehensive regulatory program supervised by an expert administrative agency."[387] It found that the CWA "establish[ed] an all-encompassing program of water pollution regulation. *Every* point source discharge [was] prohibited unless covered by a permit."[388] This comprehensiveness meant that there was "no basis for a federal court to impose more stringent limitations than those under the regulatory regime by reference to federal common law."[389]

The CWA, therefore, had obviated the need for federal courts to supply their own pollution standards because Congress had already done so. The Court's holding hinges on the assumption that all pollution not expressly regulated necessarily is lawful. In other words, by requiring certain

---

character of the pollution or the status of the litigants that determined whether federal common law applied. *Compare* Illinois v. Outboard Marine Corp., 619 F.2d 623, 628-29 (7th Cir. 1980) (stating that *Milwaukee I* suggests federal common law should apply to pollution in all navigable waters and that it would be anomalous to allow another state to sue under federal common law but require source state to rely on its own law), *vacated and remanded*, 453 U.S. 917 (1981), *with* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1009-10 (4th Cir. 1976) (en banc) (noting that there was no reason for federal common law in intrastate dispute when the state had issued a permit for the discharge), *and* Reserve Mining Co. v. EPA, 514 F.2d 492, 520-21 (8th Cir. 1975) (en banc) (rejecting the use of federal common law in intrastate-pollution disputes).

380 *Milwaukee II*, 451 U.S. at 312-14.

381 *Id.* at 314 (quoting *Jones Falls*, 539 F.2d at 1008).

382 *Id.*

383 *Id.* at 315.

384 *Id.* (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

385 *Id.* at 316.

386 *Id.* at 316-17. The greater deference the Court accords state common law derives from its "'regard for the . . . federal system, including the principle of diffusion of power . . . as a promoter of democracy.'" *Id.* at 316 (quoting San Diego Bldg. Trades Council v. Garman, 359 U.S. 236, 243 (1959)).

387 *Id.* at 317.

388 *Id.* at 318 (footnote omitted).

389 *Id.* at 320. The Court believed that "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." *Id.*

sources of pollution to reduce their emissions or discharges a specific amount, all remaining pollution not so controlled is presumptively lawful. This, however, was not true under nuisance law, where pollution—although constituting a nuisance—might go unabated because no one had sufficient incentive to bring suit. Similarly, polluters who could not be enjoined still might owe damages under the "incomplete privilege" theory, and therefore, their pollution would not be considered lawful, even though it might continue.[390]

The Court labored to characterize the CWA as comprehensive and thus fully occupying the field of water pollution control. It phrased the central question to be "whether the field has been occupied, not whether it has been occupied in a particular manner."[391] To advance this point, the Court posed and answered the question of "what inadequacy in the treatment by Congress the courts below rectified."[392] The district court's "stricter effluent limitations . . . [did] not 'fill[ ] a gap' in the regulatory scheme, [but] . . . w[ere] simply providing a different regulatory scheme."[393] Under this interpretation, the alleged inadequacy of the Act "does not suffice to create an 'interstice' to be filled by federal common law."[394] Stated differently, the Court's conclusion becomes: although the congressional response to a problem may not address all concerns, such as effects and location, Congress's action precludes all other possible responses.[395]

The question remains: what did Congress really "address" through the CWA? Admittedly, the CWA attempted to control water pollution; success would reduce water pollution's harmful effects on humans. The CWA's regulatory mechanism, however, addresses only indirectly the actual effects of pollution. It operates on the assumption that by regulating discharges, the Act will ameliorate the effects of pollution. Thus, by reducing total discharges, total exposure should decline.[396] This plainly had not oc-

---

390 *See supra* note 43.

391 *Id.* at 324.

392 *Id.* at 324 n.18.

393 *Id.*

394 *Id.* at 325 n.18.

395 The idea here is not that common law should be used to enforce statutory rights. Citizen suits allow interested parties to enforce the terms of the Act. Instead the point is that other common-law rights exist separate and apart from the statute—such as freedom from unreasonable pollution—that the statute does not itself vindicate because it only addresses the output of pollution.

396 *See* Weyerhauser Co. v. Costle, 590 F.2d 1011, 1023 n.6 (D.C. Cir. 1978) ("It is well recognized that EPA can use pollution parameters that are not harmful in themselves, but act as indicators of harm."). *Milwaukee II* suggested that the continued use of federal common law would upset the legislatively enacted balance between pollution costs and abatement costs. *See Milwaukee II*, 451 U.S. at 317 ("Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence . . . ."). Therefore, "no room [remained] for courts to attempt to improve upon that program with federal common law." *Id.* at 319.

The Court also argued that 33 U.S.C § 1365(e) (1994) (preserving common-law remedies) referred only to citizen suits; preemption of federal common law stemmed from the

curred in the case of Milwaukee's sewage system discharges—the CWA did not remedy the problem. As the dissent noted in *Milwaukee II*, federal common law "assured each State the right to be free from unreasonable interference with its natural environment and resources when the interference stems from another State or its citizens."[397] The Court, however, converted this right into a right only to seek compliance with the CWA.

Milwaukee II did not address the applicability of state common law to interstate pollution disputes.[398] Both *Milwaukee II*, on remand,[399] and *Ouellette v. International Paper Co.*[400] considered whether state nuisance law remained available to challenge interstate pollution. The use of state law, however, demands a choice: apply either the common law of the state in which the discharge is made or the law of the state in which the pollution's effects are suffered. Illinois, in *Milwaukee III*, argued that prior to *Milwaukee I* Illinois's common law would have applied to discharges reaching its shores from other states.[401] It reasoned that Illinois' common law was supplanted by federal common law in *Milwaukee I*, which in turn evaporated upon passage of the 1972 FWPCA (per *Milwaukee II*), reinstat-

---

pervasive nature of the rest of the Act. *See Milwaukee II*, 451 U.S. at 329 ("No one, however, maintains that *the citizen-suit provision* pre-empts federal common law" (emphasis added).). This reasoning was called into question in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), where the Court held that private remedies were not available even when a polluter was violating its discharge permit. *Id.* at 18. Because the citizen-suit provision allowed suits to enjoin violations, a nuisance suit would not add a remedy, but simply would provide a duplicate means of enforcing the same law. In other words, using nuisance law to redress violations of the CWA would not necessitate any change in standards. Therefore, a court would not need to substitute its judgment for that of the CWA; it would enforce the provisions through either mechanism. Despite this conclusion, the Court still held that nuisance remedies were preempted. Furthermore, while *Milwaukee II* eliminated equitable relief, *Sea Clammers* ended use of federal common law to recover damages suffered as a result of violations of the CWA's effluent restrictions. *See id.* at 22. Thus, not only did the Court read the CWA to create a scheme of regulation under which the effluents allowed presumptively were not a nuisance, it also eliminated the entire cause of action. *See id.* at 31 (Stevens, J., dissenting in part) ("The effect of [*Milwaukee II*] was to make . . . compliance with the requirements of the Clean Water Act a complete defense to a federal common-law nuisance action for pollution damage. . . . Today, the Court . . . holds that even noncompliance with the requirements of the Clean Water Act . . . is a defense to a federal common-law nuisance claim.").

397 *Milwaukee II*, 451 U.S. at 335 (Blackmun, J., dissenting). The dissent sharply disagreed with the majority's analysis of common-law preemption, arguing that Congress had been regulating water pollution as early as 1899 and nearly as specifically in 1981 as the regulations existing in 1948. *Id.* at 338 & nn.5-6. The dissent further relied upon section 505(e), 33 U.S.C. § 1365(e) (1994), which appears to provide an anti-preemption statement.

398 In *Milwaukee II* the Court noted that Illinois had also sought remedies under Illinois common law. 451 U.S. at 310. The Seventh Circuit found that only federal common law applied, and thus deleted the state-law claims. 551 F.2d 151, 156 (7th Cir. 1979). Although Illinois briefed the issue of state law applicability, the Court refused to rule on this issue. *See Milwaukee II*, 451 U.S. at 310 n.4.

399 Illinois v. City of Milwaukee, 731 F.2d 403 (7th Cir. 1984) (*Milwaukee III*), *cert. denied*, 469 U.S. 1196 (1985).

400 602 F. Supp. 264 (D. Vt.), *aff'd*, 776 F.2d 55 (2d Cir. 1985) (per curiam), *rev'd*, 479 U.S. 481 (1987).

401 731 F.2d at 406-07.

ing Illinois' common law to address interstate pollution.[402] Milwaukee countered that *Milwaukee I* made federal common law exclusive and thereby precluded the application of state common law to out-of-state discharges.[403] The FWPCA subsequently eliminated federal common law (which had already replaced state common law) leaving no common law to apply to out-of-state discharges.[404]

The *Milwaukee III* court reasoned that the dispute required an apportionment of Lake Michigan.[405] Such an apportionment implicated federal concerns that had been addressed by the permitting scheme of the CWA.[406] For a state to impose its nuisance law on an out-of-state discharger would allow it to impose "more stringent limitations" than the federal "agreement" provided for.[407] The Seventh Circuit explained that Illinois should have enforced its interests through the permitting process, something it failed to do when the permits were issued to the Milwaukee sewer system.[408] The court acknowledged, however, that the CWA did not preempt use of common law or state statutes in the state of discharge, a remedy which would be available to an out-of-state plaintiff on equal terms as one in-state.[409] It explained that "[f]or a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. . . . It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water."[410] Apparently a state could unilaterally choose to allow interference with the administration of its own permit program by allowing nuisance suits, but no other state could so interfere.

Ouellette concerned International Paper's operation of a paper mill on the New York shore of Lake Champlain.[411] The plaintiffs owned property on the Vermont shore and alleged that discharges from the mill "fouled the waters" and "interfer[ed] with the use and enjoyment of the[ir] property" both for farming and residing.[412] The district court confronted an issue

---

402 *Id.*

403 *Id.* at 407.

404 *Id.*

405 The court was positively Coasean. *See id.* at 410 ("The discharge of effluents into interstate waters as a consequence of sewage treatment is a use of the lake, as is its use for drinking water or recreation. . . . [T]he limited resource of Lake Michigan must be equitably apportioned among the [uses and states].").

406 *Id.*

407 *Id.*

408 *Id.* at 412 n.5, 413 ("[The permit] process seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters. Illinois' failure to participate in that process cannot now justify unilateral application of Illinois law to these discharges."); *see also supra* Part V.B (discussing interstate permitting issue).

409 *See id.* at 414 (citing 33 U.S.C. § 1365(e) (1994)).

410 *Id.*

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

412 602 F. Supp. at 266. The plaintiffs also alleged that the mill discharged pollution in excess of the amounts permitted under its NPDES permit. *Id.*

essentially identical to that which the court considered in *Milwaukee III*: can plaintiffs in an affected state apply their state's nuisance law to discharges from another state?[413]

The *Ouellette* court differed in its characterization of the question, thinking it not to be (as had the *Milwaukee III* court) whether the CWA implicitly preempted state law, but rather the extent to which the Act explicitly authorized "resort to state common law."[414] In other words, *Milwaukee III* construed the CWA to be sufficiently comprehensive so that it left only source-state common-law standing; *Ouellette* considered the CWA to preserve specifically certain actions. Although prior to *Milwaukee II* federal common law automatically "governed such disputes,"[415] 33 U.S.C. § 1370[416] granted states the power to adopt stricter limitations than those provided by the CWA and therefore authorized resort to state common law.[417] Moreover, section 505(e) evinced a generalized intent to preserve common-law rights of action,[418] which the district court reasoned counseled for resort to choice-of-law principles.[419] In the instant case, those rules could militate for the application of Vermont law to the pollution emanating from New York.[420] Furthermore, the court reasoned, application of an affected state's nuisance law, with the inclusion of damage remedies, creates no conflict with the Act, but rather "supplements the standards and limitations imposed by the Act."[421] Unlike the *Milwaukee III* court, the *Ouellette* court found that the CWA allowed a state to apply its own standards to protect its citizens regardless of the pollution source's location.

The district court placed substantial reliance on its finding that Congress did not indicate that "the NPDES permits confer an absolute right to discharge to the extent allowed by the permit" to justify its conclusion.[422] Although it acknowledged that an affected state was unable to impose its own legislative standards on the out-of-state source, a state would remain

---

413 *Id.* at 268.

414 *Id.*

415 *Id.*

416 The section states:

> [N]othing in this chapter shall 1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce A) any standard or limitation respecting discharges of pollutants, or B) any requirement respecting control or abatement of pollution . . . [unless it] is less stringent than [those required] under this chapter . . . .

33 U.S.C. § 1370 (1994).

417 602 F. Supp. at 268.

418 *Id.*; *see supra* note 194 and accompanying text; *infra* Part VI.A.

419 The court considered and rejected two other possible interpretations of this subsection. *Ouellette*, 602 F. Supp. at 268. First, it could apply to only those waters not covered by the CWA. *Id.* at 269. The court found this unlikely because the Act consciously covers as much water as possible. *Id.* Alternatively, the section could preserve only the common law of the state from which pollution emanated, the interpretation offered in *Milwaukee III*. *Id.* This interpretation, thought the court, was unduly cramped. *Id.*

420 *See id.* at 270.

421 *Id.* at 271.

422 *Id.*

free to impose its nuisance laws on out-of-state dischargers when the discharges reach the affected state.[423] The court sang a familiar refrain from early nuisance law: despite a license to conduct a particular activity, the license does not confer immunity upon that activity regardless of its location.[424] Because "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," its "intrusion on the sovereignty of the polluter's state is purely incidental."[425] The fact that pollution crosses state lines did not change this basic principle.

After summary affirmance of *Ouellette* by the Second Circuit,[426] the Supreme Court granted certiorari to resolve the conflict between *Ouellette* and *Milwaukee III*.[427] The Court rejected the argument that section 505(e)[428] precluded preemption—finding that the subsection only meant the citizen-suit provision did not preempt common law—while it noted that the pervasiveness of the CWA could (but did not necessarily) preempt the affected state's common law.[429] First, the Court explained that the CWA's permitting system gave downstream states only a limited right of participation in permit hearings. Congress, therefore, had determined that "affected states occup[ied] a subordinate position to source States in the federal regulatory program."[430] Next, the Court recounted that its precedent dictated preemption "when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[431] To make this determination, the Court examined the "goals and policies" of the CWA to ascertain whether the CWA had preempted the affected state's common law.[432]

The Court rejected the contention that because the "ultimate goal" of the CWA "is to eliminate water pollution," no state law preemption should occur.[433] It reasoned that when state laws interfere with the mechanism by which federal law attempts to achieve its end, the latter preempts the former, because Congress is entitled to specify the *exclusive* means to attaining the end it desires.[434] The Court explained that the permitting process involves multiple considerations, including effluent types, compli-

---

423 *Id.*

424 *See supra* Part II.B.3. The location of the pollution should not be excused just because it crosses state lines.

425 *Id.* at 271-72; *see also id.* at 272 (finding that the application is no more intrusive on another state's sovereignty "than the application of one state's product liability law to a manufacturer located in another state").

426 776 F.2d 55 (2d Cir. 1985) (per curiam), *rev'd*, 479 U.S. 481 (1987).

427 475 U.S. 1081 (1986), *granting cert. to* 776 F.2d 55.

428 33 U.S.C. § 1365(e) (1994); *see supra* note 194.

429 International Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987).

430 *Id.* at 491.

431 *Id.* at 492 (citing Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 713 (1985)).

432 *Id.*

433 *Id.* at 494.

434 *Id.*

ance schedules, available technologies, and effects on waterways.[435] Making a source liable under another state's laws would be improper in light of these "complex decisions."[436] Subjecting a source to out-of-state nuisance laws "would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits."[437]

At the extreme, subjecting the polluter to liability from another state would cause a polluter "to change its methods of doing business and controlling pollution . . . . [and] also could require the source to cease operations by ordering immediate abatement. . . . even though the source had complied fully with its state and federal permit obligations."[438] Thus, "[t]he 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."[439] That outcome would remove from the system the "predictability" and "efficiency" that the CWA sought to create—"[t]he application of numerous States' law would only exacerbate the vagueness and resulting uncertainty" already present in nuisance law.[440]

In contrast, New York was free to apply its nuisance law to help control pollution from within its state. If it were to do so, this remedy would be available to out-of-state plaintiffs on equal terms as for in-state plaintiffs.[441] The Court believed that this resolution was consistent with the CWA because it "does not disturb the balance among federal, source-state, and affected-state interests."[442] Since the Act frees a state to impose stricter standards on its own sources,[443] a state may accomplish this end either through its nuisance law or by statute and regulation. Other states, however, have no right to affect sources outside the state through the CWA;[444] therefore, they should have no similar ability to affect sources through nuisance law. Furthermore, allowing suits only under source-state nuisance law would "prevent[ ] a source from being subject to an indeterminate number of potential regulations."[445] Instead, a source would only need to look at a "single additional authority, whose rules should be relatively predictable."[446]

---

435 *Id.*

436 *Id.* at 495.

437 *Id.*

438 *Id.*

439 *Id.*

440 *Id.* at 496. *But see* Ouellette v. International Paper Co., 602 F. Supp. 264, 271 (D. Vt.) ("The goal of the [Clean Water Act] is not finality; rather, it is the elimination of the discharge of pollutants."), *aff'd*, 776 F.2d 55 (2d Cir. 1985) (per curiam), *rev'd*, 479 U.S. 481 (1987).

441 479 U.S. at 497.

442 *Id.* at 499.

443 33 U.S.C. § 1316(c) (1994).

444 *Id.* § 1342.

445 479 U.S. at 499.

446 *Id.* The Court's opinion vacillates between considering nuisance law to be crystalline and hopelessly unclear. *Compare id.* (single state's rule should be "relatively predictable")

The dissent strenuously disagreed with the majority's choice-of-law rationales,[447] arguing that "when the purpose of the tort law is to ensure compensation of tort victims" then it is proper to apply the law of the state in which the tort occurred.[448] They could find no reason why the "traditional interest of the affected state, involving the health and safety of its citizens" should not be protected.[449] Absent a "clear and manifest purpose," a federal law should not displace such state law.[450] The CWA, contended the dissent, did not provide such clear intent and the legislative history supported that point.[451]

The majority's opinion presents, in essence, two justifications for its decision. First, the CWA and the permitting process made a comprehensive cost-benefit balancing that should not be disturbed through the application of another state's nuisance law.[452] Second, the purpose of the CWA is to control sources while creating predictable means for polluters to ascertain compliance.[453] The first rationale militates for the preemption of

---

with id. at 496 ("nuisance standards often are 'vague' and 'indeterminate'") *and id.* at 496 n.17 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'" (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984)). If nuisance is inherently unpredictable, and the goal of the CWA is "predictability," *id.* at 496, then the Act should also preempt a source state's nuisance law. *See id.* at 507 (Brennan, J., dissenting) ("[T]he affected State's nuisance law is not more 'vague' and 'indeterminate' than the source State's nuisance law."). If, to the contrary, nuisance law is "relatively predictable," *id.* at 499, or predictability is not a concern, then there is no reason to rule it out on these grounds. Moreover, if the EPA's cost-benefit balancing should not be second-guessed, *id.* at 495, then any state's nuisance law will have a disruptive effect. Finally, the Court's reasoning suggests that the more clear a state's nuisance law is, the more justified it would be in applying it to an out-of-state discharger.

447 The dissent actually contended that the issue presented was narrower, arguing that the only necessary question to answer was whether *any* state's common law could be applied, and that the Court should, therefore, affirm the district court's denial of International Paper's motion to dismiss the nuisance claim. 479 U.S. at 500-01 (Brennan, J., dissenting). The dissent reasoned that nothing in the pleadings presented a choice-of-law question and that nothing in the record indicated that the nuisance law of New York and Vermont differed, both of which made the majority's further-reaching decision improper. *Id.*

448 *Id.* at 502. Brennan reviewed two theories of choice of law. First, the traditional rule, which focuses on a state's "strong interest in redressing injuries to its citizens." Second, the modern rule, which looks at whether the law's purpose is to control conduct, in which case the standards of the state in which the conduct occurred should apply, or to compensation, which militates for application of victim's state's law. *See id.* at 502 n.1.

449 *Id.* at 502. Interestingly, New York choice-of-law principles might have directed the application of Vermont's law. *See id.* at 508 n.3 ("'Where tortious conduct occurs in one jurisdiction and injury in another, as is the case here, the law of the place of injury applies'" (quoting Bing v. Halstead, 495 F. Supp. 517, 520 (S.D.N.Y. 1980)).). This academic point might not matter, as the majority noted that any law that referred to an affected state's law would be preempted, making a choice-of-law rule such as that adduced by the dissent inapplicable. *See id.* at 499 n.20 ("Therefore, if, and to the extent, the law of a source State requires the application of affected-state substantive law on this particular issue, it would be pre-empted as well."). Apparently a state that wishes to confuse its polluters by subjecting them to standards of another state may not do so consistently with the CWA.

450 *Id.* at 503.

451 *Id.* at 503-04.

452 *Id.* at 493-94.

453 *Id.* at 496-97.

all nuisance law, whether that of the source state or of the affected state, *and* even when the pollution is purely intrastate.[454] This Article has argued, however, that the CWA's analysis is not comprehensive because the technology requirements completely omit considerations of location, and the ambient requirements address the location from which pollution emanates inadequately and then mainly by reference to the historical dirtiness of the area.[455]

The second justification, creating predictable requirements, also fails if nuisance law is viewed as a protection against unreasonable interference with land.[456] The Court seemingly views nuisance law as a means of placing direct controls on sources—the classic view of unreasonable use of land. Under this view of nuisance law the Court is right: why should courts impose direct limitations on sources when the statute already does so?[457] However, nuisance law in the industrial age has focused on protecting people from unreasonable interference with the enjoyment of land. It is the interference that gives rise to the action, not the improper use of land. The controls sources must consequently place on their emissions are incidental to their choice of location, which causes the harm about which nuisance law is concerned. Nuisance law appropriately treats sources differently—those that pollute away from people, or in industrial areas, should not be required to cut back their pollution as much as those whose pollutants more unjustly affect people. The predictability that the Court reads the CWA to create eliminates the locational considerations nuisance law forces polluters to make.

2. Air Pollution

The Supreme Court has yet to address whether the CAA preempts federal or state common law.[458] It would, however, likely apply much of the reasoning from *Milwaukee II* and *Ouellette*. The greatest similarity between the two Acts is the technology requirements. Both Acts stipulate that sources use some prescribed level of pollution-reduction equipment as the primary means of achieving the Acts' goal. If the justification for preemption relies on the expert setting of technology by EPA, then the Court should reach the same result for the CAA as it did for the CWA. The differences between the Acts are unlikely to alter the result. For example,

---

454 Perhaps the preemption of nuisance law for intrastate pollution is an issue left to each state. Nonetheless it remains problematic for a state to argue that the interferences created by its own nuisance law are sufficiently lesser in degree than another state's nuisance law that only the latter should be preempted. Perhaps a state that has preempted its own nuisance law could justify its claim that the other state should not apply theirs to pollution emanating from the former state.

455 *See supra* Part III.B.2, III.C.3.

456 *See supra* Part II.

457 How does one then explain that virtually every state takes the opposite view as manifested by its preservation of nuisance law, and many by statute, not just judicial arrogation?

458 Although *Washington v. General Motors Corp.*, 406 U.S. 109 (1972), suggested the CAA did not preempt nuisance law, the more involved analysis the Supreme Court has subsequently given to the CWA makes it unlikely that this holding would survive a reconsideration of the CAA's preemptive effect on nuisance law.

the CWA more comprehensively covers sources than does the CAA.[459] For covered sources, however, preemption justifications are just as strong under each Act—only noncovered sources present a problem.[460] The Acts also set ambient levels differently. The CWA directs states to determine uses for bodies of water,[461] which allows states to determine how much pollution should be allowed in any particular water. In contrast, the CAA establishes national ambient levels for air pollution, although these may be made more strict by states.[462] States, therefore, must take additional action to lower ambient level requirements under the CAA. This probably makes preemption a more troubling proposition for the CAA, as legislative inertia may lead states not to reconsider ambient standards, whereas the CWA requires states to think about each body of water. Overall, however, the Acts' minor differences are not likely to lead the court to come to a different conclusion about the preemptive effect of the CAA than it did for the effect of the CWA.

One circuit has partially addressed the preemption issue, and another considered it but found it unnecessary to decide. In *New England Legal Foundation v. Costle*, a New York utility sought a variance from New York's state implementation plan (SIP) in order to use high sulfur coal in its plant.[463] EPA granted the variance.[464] A Connecticut environmental group, fearing greater amounts of pollution coming across Long Island Sound, sought an injunction through federal nuisance law.[465] The Second Circuit, relying on *Milwaukee II*, found that EPA's administrative approval of the coal countenanced preemption of the federal common law claim; otherwise the actions spawned would be counterproductive.[466] The court did not decide whether the CAA preempted all nuisance law, or just if the administrative approval had created a defense.

The Ninth Circuit also considered the issue of federal common-law nuisance for air pollution in *National Audubon Society v. Department of Water*.[467] The Society brought a nuisance action to restrain California's Water Department from undertaking actions that would create substantial particulate matter pollution.[468] Because the air pollution would potentially travel interstate, the Society argued federal common law should apply.[469]

---

459 New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981), *aff'g* 475 F. Supp. 425 (D. Conn. 1979).

460 Because the CAA regulates sources whose emissions exceed a certain amount, no source could pollute with complete impunity. However, preemption would create free reign for small sources to pollute. Perhaps unpermitted sources could not claim the protection that a permit would afford larger sources holding valid permits.

461 33 U.S.C. § 1313(d) (1994).

462 *See* 42 U.S.C. § 7409 (1994) (discussing NAAQS); *id.* § 7410(k)(1)(A) (discussing a state's power to impose more stringent requirements).

463 435 F. Supp. at 429-30.

464 *Id.* at 435.

465 *Id.* at 440; *see also* 475 F. Supp. 425 (D. Conn. 1979).

466 666 F.2d at 31-33.

467 869 F.2d 1196 (9th Cir. 1989).

468 *Id.* at 1198.

469 *Id.*

The Court of Appeals rejected this theory because the controversy did not involve one state seeking to challenge pollution in another state.[470] Having found federal common law inapplicable, the court declined to consider the preemptive effect of the CAA on federal common law.[471]

In a vigorous dissent, Judge Reinhardt argued that because clean air is an inherently federal interest, federal common law should apply.[472] He would apply federal common law regardless of the plaintiff's residence—the nature of the pollution determines the applicable common law.[473] Reinhardt then considered whether the CAA preempted the federal common law he would apply. He argued that because the CAA "does not control emissions from *every* source, but only from those sources that are found to threaten the air quality standards promulgated by the EPA," there should be no preemption.[474] Reinhardt likened the CAA regime to that under the pre-1972 FWPCA, which concentrated primarily on ambient standards and less on point-source emissions regulation.[475] Because federal common law survived that regime, he reasoned that it should under the CAA as well.

The regime that the Supreme Court likely would implement would prohibit states from applying their common law to air pollution sources emitting from out of state. A downwind plaintiff, therefore, has only two options. One is to show that the additional emissions will contribute significantly to nonattainment or that it will use up the PSD increment.[476] Alternatively, a downwind plaintiff may turn to the nuisance law of the source state, which may require entry into a hostile forum. This option, too, may not carry great efficacy if that state has low nuisance standards. Furthermore, it may not provide the optimal deterrent.[477]

---

[470] *Id.* at 1205. The court stated:

> It appears that the Court considers only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control, and therefore subject to resolution according to federal common law.

Id. The holdings in water pollution are not so certain: *Milwaukee I* spoke of air and water pollution as inherently interstate, *see supra* notes 342-47 and accompanying text, but other lower courts limited application of federal common law to interstate disputes, *see supra* note 379.

[471] 869 F.2d at 1205.

[472] *Id.* at 1207-08 (Reinhardt, J., dissenting). "Because a federal interest is implicated, I believe that the pollution need not also be interstate in nature." *Id.* at 1209 (Reinhardt, J. dissenting). This recalls the uncertainty left in *Milwaukee I* over whether pollution that *could* be interstate, but was not in the case *sub judice*, nonetheless was a matter of federal concern, and therefore governed by federal common law. *See supra* note 345.

[473] *Id.* at 1211 (Reinhardt, J. dissenting).

[474] *Id.* at 1213 (Reinhardt, J., dissenting) (emphasis in original) (citing New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981)).

[475] *Id.* (Reinhardt, J., dissenting).

[476] *See supra* Part V.B.1.

[477] *See infra* Part VI.A.

VI. Choosing the Common Law to Apply to Interstate Disputes

A court may choose to apply one of three possible common laws to interstate pollution. The first possibility is federal common law, which the Supreme Court has generally eliminated.[478] It does however, remain a credible alternative for pollution because of its neutrality. The problem it suffers from, however, is that it is available only to a plaintiff suing a defendant from a different state; it does not cover all pollution, a problem discussed in the first subsection below. The other two choices are: 1) application of the nuisance law of the source state, and 2) application of the nuisance law of the affected state. The second subsection discusses the leeway that a court enjoys in choosing between these two and suggests some considerations that a court might make in selecting one or the other.

A. Preemption of Nuisance Law

1. Statutory Preemption of Federal Common Law

In *City of Milwaukee v. Illinois (Milwaukee II)*,[479] the majority relied in part on Congress's universally avowed intent to create "comprehensive" water pollution legislation.[480] This comprehensiveness led the Court to conclude that the Clean Water Act (CWA) preempted federal common law.[481] The dissent chided the majority for its "extremely strained reading" of the citizen suit's apparent anti-preemption provision.[482] It pointed to several passages in the legislative history to support its point.[483] This subpart addresses the dissent's argument more fully.

The CWA's citizen suit provision states that "[n]othing 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."[484] On its face, this provision suggests that nuisance law remains as a supplementary (or alternative) enforcement mechanism for attacking pollution. It also suggests that compliance with the CWA's effluent or CAA's emission limitations alone does not provide a defense to a nuisance suit.

The CWA's legislative history supports these assumptions. The Senate Report explains that "the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other

---

478 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

479 451 U.S. 304 (1981).

480 *Id.* at 317-19.

481 *Id.* at 319-20.

482 *Id.* at 342 (Blackmun, J., dissenting); *see also* Glicksman, *supra* note 5, at 163 ("It is hard to imagine a more cryptic way of expressing an intent to preempt federal common law than to expect the intent to be derived by negative implication from a statement that nothing in the very section creating a new statutory private remedy has a preemptive effect.").

483 451 U.S. at 343, 344 n.17.

484 33 U.S.C. § 1365(e) (1994). The Clean Air Act (CAA) contains an identical provision, except for its substitution of the word "emission" for "effluent." 42 U.S.C. § 7604(e) (1994).

remedies would remain available."[485] The Report contrasts citizen suits pursuant to the Act—for which "[a]n alleged violation of an effluent control limitation or standard[ ] would not require reanalysis of technological in [sic] other considerations at the enforcement stage"[486]—with common law nuisance suits—for which "[c]ompliance with requirements under th[e] Act would not be a defense to a[n] . . . action for pollution damages."[487] Not surprisingly, the Act's strong language has led at least one commentator to conclude that the drafters of the CWA did not intend to preempt common-law remedies.[488]

---

485 S. REP. No. 92-414, at 81 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746-47 *and in* 2 CWA HISTORY, *supra* note 165, at 1415, 1499 (1973). The Report notes that the section is modeled on the similar provision in the 1970 Clean Air Act amendments. S. REP. No. 92-414, at 79, *reprinted in* 1972 U.S.C.C.A.N. at 3745, *and in* 2 CWA HISTORY, *supra* note 165, at 1497.

486 S. REP. No. 92-414, at 79, *reprinted in* 1972 U.S.C.C.A.N. at 3745, *and in* 2 CWA HISTORY, *supra* note 165, at 1497.

487 S. REP. No. 92-414, at 81, *reprinted in* 1972 U.S.C.C.A.N. at 3746-47, *and in* 2 CWA HISTORY, *supra* note 165, at 1499. The history is imprecise on this point, as it vacillates between compliance having legal and equitable consequences and compliance lacking these consequences. The Report states that the promulgation of "clear and identifiable requirements . . . should provide manageable and precise benchmarks for enforcement." S. REP. No. 92-414, at 81, *reprinted in* 1972 U.S.C.C.A.N. at 3747, *and in* 2 CWA HISTORY, *supra* note 165, at 1499. Furthermore, "Section 505 would not substitute a 'common law' or court-developed definition of water quality." S. REP. No. 92-414, at 79, *reprinted in* 1972 U.S.C.C.A.N. at 3745, *and in* 2 CWA HISTORY, *supra* note 165, at 1497. However, the Report asserts that "[e]nforcement of pollution regulations is not a technical matter beyond the competence of the courts." S. REP. No. 92-414, at 81, *reprinted in* 1972 U.S.C.C.A.N. at 3747, *and in* 2 CWA HISTORY, *supra* note 165, at 1499. It seems that the Senate was not questioning judicial competence to determine matters of enforcing the legislative requirements, and in particular, to determine whether the equipment was attached and whether appropriate ambient levels had been established. Therefore, for citizen suits, a court simply would adjudicate whether the defendant had complied with the Act. For nuisance suits, in contrast, a court would not necessarily refer to the Act's requirements in assessing the character of the pollution. Just as citizen suits would not incorporate common-law principles, common law would not adopt legislative standards of due care and reasonableness set by the Act's requirements. The upshot is that this provision of the CWA presumably left two entirely separate enforcement regimes, each of which would rarely refer to the other.

488 Glicksman, *supra* note 5, at 186-87 ("Th[ese] statement[s] reflect[ ] more than a congressional refusal to take a position on the state common-law preemption issue; [they are] an affirmative recognition that state common-law rights and remedies were meant to survive enactment of the federal statute."). Glicksman contends that the nonpreemption provisions would logically apply to *federal* common law as well. *Id.* However, he argues that the *Milwaukee II* Court held the legislative history inconclusive on this point, making the Court's historic presumption for preemption of federal common law operative, while leaving intact state common law, for which the Court employs a presumption of non-preemption. *Id.* at 186-87 n.369. Glicksman's argument is unpersuasive, given that Congress should have been aware of the *Milwaukee I* decision, which expressly provided for federal common-law remedies in specific cases. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 337 (1981) (Blackmun, J., dissenting) ("Congress cannot be presumed to have been unaware of the relevant common-law history, any more than it can be deemed to have been oblivious to the decision in [*Milwaukee I*]. . . ."); Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). The legislative history does, however, pre-date the *Milwaukee I* decision, although passage of the CWA does not. If Congress intended to preserve common-law remedies, it

Legislative history does not persuade everyone.[489] If neither language nor history convince, two questions remain to be answered. First, should the CWA preempt federal common law?[490] Although *Milwaukee II* held that it did, that result does not answer the question of whether the Court reached the correct result. Second, if the Act preempts federal common law, which state's law should a court employ in adjudicating an interstate pollution nuisance claim? The rationale behind preserving federal common law does not necessarily militate for a particular choice of law for the state law question, therefore, this Article separates its answers to the two questions.[491]

If only state nuisance law regulates pollution, each state might apply nuisance law to preclude any foreign source from causing pollution within the state, in order to "protect" its citizens and advantage its own industry. This theoretical justification for federal common law suggests that it is designed like the Commerce Clause is, to prevent tariff wars between states over interstate pollution. States cede their control over nuisance law to a neutral federal common-law standard to avoid the discrimination that could otherwise occur,[492] just as they allow the federal government to regulate interstate commerce.[493] The use of federal common law thus

---

would likely have included *all* such remedies, as appropriate to the interstate or intrastate character of the pollution at issue. To hold that while Congress was aware of federal common law's availability, Congress nonetheless preempted it while stating that the Act preserved (other) common-law remedies stretches credulity. The statutory history, therefore, when combined with the text of the statute itself, lends support to the argument that *all* common law remained available after passage of the CWA and that the appropriate type of common law (federal or state) applies to the appropriate circumstance. *See* Dexter & Schwarzenbart, *supra* note 235, at 659 ("[I]f the states previously possessed federal common-law rights with respect to their waters, nothing in the Act should be construed as preempting those rights.").

489 *See, e.g.*, Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 401 (1994) ("Justice Scalia has harshly criticized the Court's reliance on legislative history as an aid in interpreting statutes.").

490 While the discussion herein focuses on preemption of nuisance remedies for water pollution, the arguments apply with equal force (except as noted) to preemption of nuisance actions for air pollution by the CAA.

491 *See infra* Part VI.B.

492 Glicksman posits that the use of a downstream state's law in its own courts would give the appearance (if not the reality) of a bias towards local interests. Glicksman, *supra* note 5, at 201.

493 *See* Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 615 (1985) (explaining that state laws may not discriminate against interstate commerce: "Thus, for instance, consumers in the state can cause as much 'waste' of natural resources as consumers outside the state. . . . Or, waste dumped in a state can have the same adverse effect on health and environment in the state whether the waste originates in the state or in another state."); *see also* Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) (holding state's surcharge for disposal of out-of-state solid waste within Oregon violated Commerce Clause); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (holding state's prohibition on importation of solid waste from other states violated Commerce Clause). *See generally* Stanley E. Cox, *What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky as Case Study in the*

avoids the problem of states discriminating against pollutants flowing from other states.[494]

The first problem with the uniformity explanation is that federal common law may unnecessarily supplant state nuisance law that does not discriminate against out-of-state sources. The actual likelihood of a "war" is remote, and Commerce Clause objections could be raised to any such rules that are discriminatory in fact.[495] These other mechanisms that can be used to prevent the application of unfair laws reduce the need to eliminate the applicability of all state laws, simply because some might present problems. The second shortcoming of the uniformity explanation is that federal common law does not regulate all pollution.[496] If only uniform rules can satisfy federal interests, then those rules logically should apply to all pollution;[497] however, they do not, as federal common law applies only to interstate pollution.

Alternatively, federal common law may derive from the fact that an interstate dispute over pollution would likely invoke the diversity jurisdiction of federal courts.[498] Interstate controversies, as such, belong in federal court. The original constitutional justification for diversity jurisdiction (although unclear) probably derives from the assumption that federal courts are less likely to discriminate against residents of other states than are state courts.[499] In order to decide such disputes uniformly, however,

---

Waste Wars, 83 KY. L.J. 551, 555 (1994) ("[O]nly those state regulatory efforts which impose evenhanded burdens on the local citizenry rather than serve as a pretext for discrimination against out-of-state waste stand a reasonable chance of surviving constitutional attack.").

494 Bleiweiss, *supra* note 244, at 60; Dexter & Schwarzenbart, *supra* note 235, at 658; *cf.* Shay S. Scott, Comment, *Combining Environmental Citizen Suits and Other Private Theories of Recovery*, 8 J. ENVTL. L. & LITIG. 369, 407 (1993) (noting most environmental lawyers prefer federal forum because judges are more insulated from local popular sentiment and thus more independent).

495 Glicksman, *supra* note 5, at 210-11. Glicksman would reject any Commerce Clause challenge unless the rules were explicitly different for out-of-state polluters than for in-state sources, or if the rules otherwise excessively burdened interstate commerce. *Id.* at 211.

496 *See* Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or *interstate* aspects, there is a federal common law. . . ." (emphasis added)). *But see* National Audubon Soc'y v. Department of Water, 869 F.2d 1196, 1209 (9th Cir. 1989) (Reinhardt, J., dissenting) ("Because a federal interest [in clean air] is implicated, I believe that the pollution need not also be interstate in nature."). It appears that no state court has applied federal common law to adjudicate a nuisance dispute.

497 Pollution does not change its character simply by crossing state lines. It would therefore seem strange to have one rule for pollution coming from within the state and another for pollution coming from without. This objection is similar to the one raised against federal common law in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (there is no "'transcendental body of law outside of any particular state but obligatory within it'" (quoting Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

498 28 U.S.C. § 1332(a)(1) (1994) (conferring diversity jurisdiction on federal district courts to decide controversies between citizens of different states).

499 Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 79 (1993) ("[T]he consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts."); Delores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1672

federal courts would need to develop their own "general" law, like that instituted by the Supreme Court in *Swift v. Tyson*.[500] Federal nuisance law, under this justification, simply constitutes a branch of the federal common law deriving from *Swift*.[501]

Federal common law for interstate pollution, however, creates the same discrimination problem as did the general law used in diversity cases prior to *Erie Railroad Co. v. Tompkins*.[502] In *Erie*, the Supreme Court reconsidered the problems created by its earlier institution of a separate general law applicable in diversity actions. That general law "introduced grave discrimination by non-citizens against citizens" and "rendered impossible equal protection of the law."[503] The discrimination stemmed from the ability of noncitizens to elect a federal or state forum, and therefore federal or state law, when suing a defendant in State X. Citizens of State X, in contrast, would be unable to invoke diversity jurisdiction (and hence federal common law) against that same defendant, and therefore had but one rule of law available to them.[504] Thus, "[i]n attempting to promote uniformity of law throughout the United States, the doctrine [ ] prevented

(1992) ("The traditional explanation for the grant of diversity jurisdiction in federal trial courts has been that the Founding Fathers feared 'possible unfairness by state courts, state judges and juries, against outsiders.'" (quoting Burford v. Sun Oil Co., 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting))).

[500] 41 U.S. (16 Pet.) 1, 19 (1842).

[501] A third possibility exists: federal common law may constitute a rule for disputes when the plaintiff is a state. Diversity jurisdiction does not extend to controversies in which a state is a plaintiff. 28 U.S.C. § 1332 (1994); Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 499 n.3 (1972). The Supreme Court, therefore, may be the exclusive forum for state-as-plaintiff cases. *See* 28 U.S.C. § 1251(b)(3) (1994) (conferring original jurisdiction on Supreme Court to hear actions commenced by a state against citizens of another state); *Wyandotte*, 401 U.S. at 500. However, in *Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972), the Court adopted the reasoning of *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971) (holding that interstate pollution raises federal question for which district courts have jurisdiction under 28 U.S.C. § 1331 (1970)), which had questioned the Court's exclusive jurisdiction to hear such cases. The Supreme Court eliminated the federal common law of nuisance prior to deciding whether federal common law was available to a private party, thereby leaving this question unresolved. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11 n.17 (1981).

[502] 304 U.S. 64 (1938).

[503] *Erie*, 304 U.S. at 74-75; *see also* DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL 494-544 (5th ed. 1989) (discussing *Erie* problem and principles used to decide which law applies in diversity cases). One could avoid the discrimination problem by allowing only federal common law to govern pollution disputes, regardless of the status of the litigants or the forum selected. *See, e.g.*, National Audubon Soc'y v. Dep't of Water, 869 F.2d 1196, 1207-08 (9th Cir. 1989) (Reinhardt, J., dissenting) (arguing federal common law applies to pollution because clean air is a federal interest). This possibility, however, was rejected by *Ouellette*'s recognition that state nuisance remedies survive to a limited degree. International Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987).

[504] *See Erie*, 304 U.S. at 75; *see also* Illinois v. Outboard Marine Corp., 619 F.2d 623, 628-29 (7th Cir. 1980) (holding that it was anomalous to allow another state to sue under federal common law but require source state to use its own common law), *vacated*, 453 U.S. 917 (1981).

the uniformity in the administration of the law of the State."[505] Because the Supreme Court has rejected a general federal common law in most areas, there seems no reason to make an exception in the context of pollution on the ground of encouraging uniformity.

2. *Federal Statutory Preemption of State Common Law*

The Supreme Court willingly infers preemption of federal common law from congressional enactments concerning that field of law. However, the Court less readily reads federal statutes to preempt state common law.[506] Federal law may preempt state common law in one of three ways. First, Congress may explicitly state its intent to preempt.[507] Second, Congress may enact "a 'scheme of federal regulation . . . so pervasive'" that a court may infer congressional intent for exclusive federal regulation.[508] Third, preemption may occur when the state law actually conflicts with the federal law such that compliance with both is impossible, or where the state law creates "an obstacle to the accomplishment and execution" of the federal law.[509]

The CAA and CWA cannot be read to preempt state common law by explicit statement because neither Act contains any statement reflecting congressional intent to preempt state law. To the contrary, they may explicitly preserve state law remedies.[510] Although Congress indubitably had the power to preempt state law under the Commerce Clause,[511] it chose not to, opting instead for a joint federal-state arrangement while illustrating a concomitant intent not to preempt state law.[512] Therefore, discus-

---

[505] *Erie*, 304 U.S. at 75.

[506] City of Milwaukee v. Illinois, 451 U.S. 304, 316-17 (1981).

[507] English v. General Elec. Co., 496 U.S. 72, 78 (1990); Glicksman, *supra* note 5, at 196-97.

[508] *English*, 496 U.S. at 79 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (alteration in original); Glicksman, *supra* note 5, at 198-99.

[509] *English*, 496 U.S. at 78 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); Glicksman, *supra* note 5, at 200-10.

[510] *See* 33 U.S.C. § 1365(e) (1994); 42 U.S.C. § 7604(e) (1994).

[511] Glicksman, *supra* note 5, at 173-75. Neither the Tenth Amendment, *see id.* at 175-79, nor more general Due Process concerns stemming from the absence of a compensatory provision in the Acts, *see id.* at 179-82, have limited this power.

[512] *Id.* at 185-92; *see supra* notes 485-88 and accompanying text (discussing legislative history of CWA). Glicksman recognizes the argument that preemption enhances the legitimacy of a statutory scheme because preemption centralizes the technological decision making in one superior authority. Glicksman, *supra* note 5, at 192. He counters this position by positing that retaining common-law remedies as a supplement promotes increased public participation in the pollution-control process, which, in turn, creates the perception that such policy decisions are open and accessible to all. *Id.* at 193. Retaining common-law remedies also enhances individual liberty, argues Glicksman, by providing a separation of powers function, both horizontally (between judicial and executive) and vertically (between state and federal). *Id.* at 193-94. More generally, as he puts it, retaining common law fosters decentralized decision making. *Id.*; *cf.* Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 406-10 (1995) (advocating creation of community committees to represent neighborhoods in toxic waste facility siting decisions). Finally, retaining common law allows indi-

sion of how far an explicit statement carries preemption is immaterial when considering the CAA and CWA.[513]

Preemption could also be inferred because of the "pervasiveness" of the Acts. However, the *Milwaukee II* Court implicitly recognized that the preemptive effect of the CWA was limited to interstate pollution cases because intrastate pollution cases are governed by the statutory language that allows states to enact stricter standards.[514] Therefore, the second rationale for federal preemption of state law—an implicit congressional intent for exclusive federal regulation—also does not apply. To the contrary, the Acts recognize both state participation and states being authorized to impose stricter standards. The language of the Acts simply does not suggest any intent to create exclusive federal regulation and uniform standards.

The third basis upon which a court may hold state law to be preempted involves two facets: 1) the impossibility of compliance with both state and federal law, or 2) the obstruction of federal law's execution through enforcement of state law. A question that has arisen under the first prong was whether federal labeling requirements for pesticides prohibit states from imposing damages for a failure to warn. In *Ferebee v. Chevron Chemical Co.*[515] the District of Columbia Circuit concluded that compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[516] which mandated that warning labels be placed on pesticides, does not automatically allow a company to "escape its duty to warn" under state tort law.[517] The court explained that "[t]he fact that EPA has determined that [defendant's] label is adequate for purposes of FIFRA does not compel a jury to find that the level is adequate for purposes of state tort law as well. The purposes of FIFRA and those of state tort law may be quite distinct."[518] For example, state law may balance costs and benefits differently, as "there is no reason a state need strike the same balance on these difficult questions as EPA."[519] Also, a state may wish to use its tort law to advance its compensatory goals.[520] In light of these considerations, the *Ferebee* court held that while it could compel the com-

---

viduals to continue to protect against intrusions upon their property. Glicksman, *supra* note 5, at 194.

513 *See, e.g.*, Cippollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992) (preemptive scope of cigarette labeling act "governed entirely by the express language" of statute).

514 33 U.S.C. § 1370 (1994); 42 U.S.C. § 7416 (1994).

515 736 F.2d 1529 (D.C. Cir. 1989).

516 Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994).

517 736 F.2d at 1537.

518 *Id.* at 1540 (emphasis omitted); *cf.* Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992) (holding that while liability could not be based on insufficiency of pesticide label's content, it could be based on insufficient dissemination of the labels). *But see* Papas v. Upjohn Co., 985 F.2d 516, 518-19 (11th Cir. 1993) (finding that FIFRA labeling requirement explicitly preempts common-law failure-to-warn claims), *vacated*, 505 U.S. 1215 (1992).

519 736 F.2d at 1540.

520 *Id.*

pany to comply with its FIFRA requirements, the statute did not preempt damages claims grounded in state tort law.[521]

The purpose of the federal labeling standard under FIFRA is, in part, to create uniformity throughout the states and thereby to eliminate the need for a national company to comply with fifty different labeling standards. Similarly, the CWA and CAA provide discernible standards that presume to obviate the need for complying with a multiplicity of state requirements. Nonetheless, *Ferebee* establishes that because state tort law may have other goals, such as compensation, preemption should not occur. Similarly, applying a state's tort law to pollution nuisances has the direct goal of compensation, and the indirect effect of encouraging better locational decisions. Thus, application of the *Ferebee* court's reasoning to CWA and CAA pollution cases suggests that the federal law should not preempt actions based in tort law in order to meet other legitimate goals.

To decide the obstacle prong of its third test for preemption, the U.S. Supreme Court looks to how similar the activity being regulated by state tort law is to that being regulated by the federal statute. For example, *English v. General Electric Co.*[522] held that a state may hear a claim of intentional infliction of emotional distress stemming from a retaliatory discharge in a nuclear power plant.[523] Although the federal government exclusively regulates nuclear safety—the law contains provisions both for reporting safety violations and procedures to protect workers from retaliation for making reports—a state may still apply its own cause of action to redress harms stemming from a retaliatory discharge.[524] The Court explained that the only area that the federal act was designed to preempt was "state regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation."[525] Because the application of the state's tort law did not have a "direct and substantial effect on the decisions" relating to such safety, it did not enter into the realm of law preempted by federal statute.[526]

English does not directly justify the non-preemption of nuisance law, but it does illustrate the extent to which different federal and state regulatory goals can coexist and thereby avoid the need for preempting state law. The federal pollution laws regulate technology requirements and ambient standards. Nuisance law, in contrast, addresses compensation and location. Admittedly, the imposition of nuisance-law sanctions on a source

---

521 *Id.* at 1541. *But see* Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 959 F.2d 158, 162 (10th Cir.) ("A business choice between paying damages and changing the label is only notional."), *vacated*, 506 U.S. 910 (1992). Reducing pollution to comply with nuisance standards will, of course, still allow a company to meet its permit obligations. Nuisance and statute do not present a case of forcing polluters to choose between two mutually exclusive alternatives.

522 496 U.S. 72 (1990).

523 *Id.* at 90.

524 *Id.* at 82-83.

525 *Id.* at 84.

526 *Id.* at 85; *see also* Silkwood v. Kerr-McGee, 464 U.S. 238, 250-51 (1984) (holding that Congress could preempt different state regulatory requirements for nuclear safety, while still allowing state-law remedies for persons injured by radiation in a nuclear power plant).

could have a "direct and substantial effect" on its emission of pollutants; more importantly, however, it should encourage a different location for the emissions and compensate those unreasonably burdened by the pollution. Furthermore, because both the CAA and the CWA explicitly allow states to set more stringent standards, no claim can be made strongly that the application of the more restrictive state laws would upset the goal of federal uniformity. Any balance upset would be a state's own—that which it had struck regarding the advantage of preserving state nuisance law. This balance, of course, does not seem a matter of federal concern.

Glicksman suggests that a refusal to preempt state common law allows one state to interfere with the policy determinations of the other.[527] His exploration of other potential remedies—participation in the permitting process,[528] use of citizen suits,[529] or a tax-and-compensation regime[530]—leads Glicksman to conclude that the preemption of state common law "poses at least as great a threat to state sovereignty and individual liberty as it was designed to avoid."[531] On balance, preemption seems to create as substantial problems as it avoids. From a policy stand-

---

527 Glicksman, *supra* note 5, at 203-04. In his example, Glicksman proposes that a downstream state resorting to its own nuisance law would interfere with the interest balancing the upstream state had already conducted prior to allowing the discharges. *Id.* However, the upstream state, by allowing the discharge, equally interferes with the balance already struck by the downstream state. *Cf. id.* at 204 ("[T]he preemption of [the downstream state's] more stringent common-law standards may result in a net loss of individual liberty in light of the Supreme Court's recognition of the fundamental importance to a state's sovereignty of its ability to protect its environment from externally imposed harm.").

Glicksman notes that there are spillover effects that neither state will take into account when setting its policy. *Id.* The upstream state will ignore the health effects of its policy on the downstream state and the downstream state will disregard the "economic burdens" its stricter laws could place on the upstream state. *Id.* at 203 n.434; *see also* Stewart, *supra* note 274, at 243 n.15 ("Bargaining among states is also a poor mechanism for resolving interstate disputes involving non-market spillovers. Upwind or upstream states enjoy a decisive but undeserved advantage in such negotiation. When spillovers, such as acid rain, are widespread and involve many states, the large number of participants makes successful bargaining difficult. Even where small numbers are involved, strategic behavior can produce deadlock.").

528 Glicksman, *supra* note 5, at 205; *see also supra* Part V.B. Glicksman contends these remedies are inadequate. Glicksman, *supra* note 5, at 205.

529 Glicksman, *supra* note 5, at 205. However, it is unclear whether a citizen suit could be used to impose the downstream state's stricter standards on the upstream state. *Id.* The remaining alternative is the use of the upstream state's nuisance law, which presents problems both of a hostile forum and lower stringency. *Id.* at 206.

530 *Id.* This would simply provide a method by which to compensate individuals for the harms they suffer, but would only redistribute money *within* the state from those who suffered less to those who suffered more from the other states' pollution. Because the tax would not be imposed on the upstream polluters, it would provide no deterrent effect on their behavior. Such a scheme admits that the upstream state holds an entitlement to pollute the air or water at the level it does, but avoids the question of whether the upstream state should have such a right. *Cf.* Stewart, *supra* note 91, at 1227 ("[A] state's claim to autonomy is entitled to respect only insofar as it allows a like autonomy for sister states. Accordingly, a state should not be entitled to invoke the principle of local self-determination against federal controls where that state generates significant spillovers which impair the corresponding ability of sister states to determine the environmental quality they shall enjoy.").

531 Glicksman, *supra* note 5, at 206.

point, therefore, preemption, notwithstanding the increased complexity it would create, does not seem to pose as great a problem as the *Ouellette* majority contends.

B. The Choice of Law Question

The previous subpart argued that the rationale for preempting downstream or downwind states' nuisance law does not enjoy great support from case law or policy justifications. To the contrary, a strong argument can be made for the preservation of both source- and affected-state nuisance law for interstate pollution. When two states' laws are available to apply to a case, a court must employ some rule to select between them.[532] This subpart explains that the constitutional constraints upon a court's choice about which state's law to apply are minimal. These broad limits, as delineated by the Supreme Court, allow a court almost always to select either state's law. Although an extensive discussion of choice-of-law principles would go beyond the focus of this Article, and is therefore left to another day for a comprehensively considered exposition,[533] this Section nonetheless offers some observations about general choice-of-law considerations in making the nuisance-law choice. These considerations, when combined with the policy purpose for nuisance law advanced by this Article, lead to the conclusion that the application of a downstream state's law is appropriate in cases of interstate pollution. The purpose of this Section is not to prove that choice-of-law principles demand that a forum[534] apply a downstream state's nuisance law, but rather to demonstrate that a policy argument for its application exists.

The Supreme Court eliminated virtually all due-process restrictions upon state courts against applying any interested state's law in *Allstate Insurance Co. v. Hague*.[535] In *Hague*, the plaintiff sought to increase her insurance payout for her husband's death in a motorcycle accident by having the court apply Minnesota law, as opposed to Wisconsin law.[536] Her

---

[532] If states have identical common-law principles that guide their courts, then this decision should not matter greatly, because identical rules should lead, in theory, to identical results given any set of facts. *See, e.g.*, BRAINERD CURRIE, *Notes on Methods and Objections in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 178-79 (1963) [hereinafter SELECTED ESSAYS] ("The problem would not exist if this were one world, with an all-powerful central government. It would not exist . . . if the independent sovereignties in the real world had identical laws. So long, however, as we have a diversity of laws, we shall have conflicts of interest among states.").

[533] For more information on choice-of-law principles, see generally ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW (4th ed. 1986).

[534] A federal court sitting in its diversity jurisdiction should apply the choice-of-law rules of the forum state, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), thus making unimportant to a choice-of-law determination whether the case is brought in state or federal court.

[535] 449 U.S. 302 (1981).

[536] *Id.* at 312. Minnesota law allowed the "stacking" of insurance coverage, which allows a person to recover the sum of the maximum amount of coverage on each of the insured's vehicles, even though the accident involved only one of the owner's vehicles. Wisconsin law did not permit this practice. *Id.* at 320.

husband was killed while riding his Wisconsin-registered motorcycle on a Wisconsin highway, during a time at which both he and his wife were domiciled in Wisconsin. The Minnesota trial court applied its state's choice-of-law rule, a version of "interest analysis,"[537] and selected its forum's law, reasoning that Minnesota law expressed a policy preference for increasing insurance coverage and it had sufficient contacts to the parties to apply its law, notwithstanding the much greater number of contacts between the parties and Wisconsin.[538] The Supreme Court upheld the trial court's choice on the ground that it did not offend due process.[539]

The Court's explanation of its holding relied heavily upon the facts that the decedent was employed in Minnesota and commuted on Minnesota roads during the work week,[540] and also that the plaintiff had subsequently moved to Minnesota and established permanent residence, thereby creating another contact.[541] The Court further noted that the defendant conducted significant amounts of business within Minnesota. Minnesota therefore had a legitimate interest in regulating the defendant's conduct and the defendant should have expected that Minnesota's laws would apply to it. As a result, the defendant could be subjected reasonably to Minnesota law.[542] The Court held, after a consideration of all these facts, that the application of Minnesota law to the case comported with the minimum requirements of due process.[543] After *Hague*, therefore, a state need show only a minimal level of contact with the parties and a legitimate state interest in order to apply its law constitutionally.

The minimal constraints that *Hague* places on a court choosing among laws should allow a court to choose to apply either the upstream or downstream state's law. A court may use an older, more formalistic choice-of-law principle such as the rule of situs, which holds that disputes affecting property should be resolved by reference to the law of the jurisdiction in which the property is situated,[544] or *lex loci delicti*, which directs application of the law of the jurisdiction in which the injury occurred.[545] Most courts, however, have moved away from these rules to-

---

[537] Although an extensive discussion of interest analysis would go beyond the scope of this Article, the interested reader should see generally SELECTED ESSAYS, *supra* note 532, for several in-depth analyses of this choice-of-law approach.

[538] A state can obtain personal jurisdiction over an out-of-state polluter on the basis of the harms occurring in the state. *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 500 (1972) (acknowledging Ohio jurisdiction over foreign polluters because substantial harm within state created contact).

[539] 449 U.S. at 320.

[540] *Id.* at 313-14.

[541] *Id.* at 318-19. The Court explained that the plaintiff's change of residence was not an effort to avoid Wisconsin's law, since she had filed her claim prior to her move. *Id.* at 319.

[542] *Id.* at 317-18.

[543] *Id.* at 320.

[544] *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 413 (3d ed. 1986) (calling the situs rule, which applies the law of the site of the property in dispute, the "most monolithic of all choice-of-law rules").

[545] *See, e.g.*, Young v. Masci, 289 U.S. 253, 258 (1933) ("Liability for a tort depends upon the law of the place of the injury . . . . A person who sets in a motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be

ward more modern approaches that consider more than the location of injury,[546] and those older principles therefore command limited continued vitality. Such modern considerations include the extent to which application of a state's laws advances its policy interests,[547] and the effort to choose the "better rule of law."[548] The older principles militate for application of the downstream state's law, as the injury at issue occurred in the plaintiff's state, which is also where the property is located. The modern principles are more ambiguous and generally allow a court to make its choice on policy grounds.

To the extent a court bases its choice on policy justifications, it would advance this Article's proffered purpose for nuisance law best by choosing the downstream state's law. Any state can assert a policy interest in allowing or prohibiting a certain amount of pollution. Differences in laws among states likely will reflect differences of public opinion regarding the relative costs and benefits of pollution. A court could choose the stricter of the two laws if its goal was to reduce pollution (or punish polluters) as much as possible. Conversely, it could apply the more lax of the two laws if it liked pollution (or businesses that pollute). The principle behind such a choice, however, reflects solely a desire to advance a pro- or anti-pollution policy: if you hate pollution, punish it as much as possible; if you don't, go easy on it. The better principle would choose the law by reference to either the plaintiff's or defendant's location, because it is location that determines what obligations and protections each party expects. Because nuisance law focuses principally on the burdens placed on the plaintiff's land, it is the plaintiff's expected protection, which is determined by her state's law, that should guide the court's choice of law.

The upstream state's interest in applying its nuisance law to pollution whose damage occurs out of state should principally be that it wishes to control the conduct of its polluters. Nuisance law is in part about sanctioning unreasonable conduct, and a state may want to apply its nuisance law to effect this goal. A state may legitimately claim that the standards of conduct to which its polluters must conform should not differ simply because a polluter's pollution travels across state lines. Only by using the affected state's law can uniformity of required conduct be ensured. Upstream states, however, have an opportunity to control their polluters' conduct by enforcement of regulations. Statutes address directly the conduct of polluters. To the extent a state wants to control the conduct of its polluters, it can achieve this better by statute than through applying nui-

---

made liable for that injury [in the latter state.]"); Friedrich Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969) (arguing that lex loci should guide choice of law in interstate torts).

546 *See, e.g.*, Peter Hay, *The Situs Rule in European and American Conflicts Law—Comparative Notes*, *in* PROPERTY LAW AND LEGAL EDUCATION 109, 120 (Peter Hay & Michael H. Hoeflich eds., 1988) ("The recognition that property claims arise in contexts which do not implicate situs interests . . . increasingly leads situs courts to consider the application of the law more significantly related to the parties and the claim.").

547 *See, e.g.*, LEFLAR ET AL., *supra note* 533, § 106, at 295-98.

548 *Id.* § 107, at 298-300.

sance law. It seems disingenuous for a state to argue that its nuisance law should be applied because of its conduct-regulating interest when it has an ample opportunity to control conduct directly through statute. Therefore, the upstream state's best argument for the choice of its nuisance law lacks great strength.

In contrast, there is ample policy justification for the choice of a downstream state's law. Nuisance law imposes effectively strict liability on polluters whose discharges burden property unreasonably.[549] Consequently, an affected state's claim to protecting its citizens carries substantial relative weight, because the imposition of strict liability implies that the reasonableness of the tortfeasor's conduct is irrelevant. Moreover, the strict-liability nature of nuisance suggests that its purpose is not to control conduct directly, further weakening the upstream state's law's claims of superiority. Nuisance law considers principally the harm suffered from pollution. The affected state's laws should more consistently, and in a more principled manner, assess whether the harm alleged constitutes a nuisance in that jurisdiction.[550] The reason for this is that state law has determined how much protection from pollution landowners should enjoy. If nuisance law in a downwind state is generous (or penurious) to nuisance plaintiffs, this should help form the expectations of landowners for protection from pollution. Therefore, we can expect the outcomes of cases under the downstream state's law to reflect that state's balance that it has struck between pollution and polluters.

The importance of using the downstream state's law comes from its reflection of the value that that state's citizens place on pollution. If that state's citizens favor pollution, as manifested in its laws, then social welfare is increased by encouraging polluters to emit in such a way that more pollution lands in that state. Conversely, if a state's laws evince a strong distaste for pollution, then using its nuisance law will provide incentives to out-of-state polluters to locate in a way that minimizes their pollution that affects people in that state. If the policy rationale behind preserving nuisance law is, as this Article has argued, to encourage more efficient location choices, a court should choose the nuisance law of the state whose law best reflects the value of the pollution's harm, and thus provides the most accurate incentives to locate efficiently.

Although both states may claim a legitimate fear that another state could apply its laws discriminatorily to its polluters or harmed parties, the neutral application of legal principles should limit these problems. A state's laws likely will care little about the extent of liability they impose on out-of-state dischargers.[551] But a state must apply the law evenhand-

---

549 *See supra* notes 43-46.

550 *Cf.* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 732-33 (1973) (proposing use of contemporary *community* standards to determine unneighborliness of activity).

551 *See supra* note 527 and accompanying text; *see also* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2351 (1996) ("[S]tates have an incentive to induce their sources to locate close to their downwind borders, for example, through the use of tax incentives or subsidies, so that the bulk of the effects of the

edly, and therefore the magnitude of this concern should be small. Likewise, a discharging state's law very likely aims to protect from liability its polluters, and likely seeks to control conduct only to the extent that pollution harms its residents.[552] Again, however, the neutral application of its rules should also minimize unfairness concerns.[553] Therefore, fears about discriminatory judicial decisions should not change greatly the analysis that follows.

Expanding the hypothetical presented in Part IV.B to incorporate state borders illustrates how application of the affected state's law deters the harms stemming from pollution more accurately. A plant choosing where in State A to locate faces potential suits from in-state plaintiffs, as before. It now also faces the possibility of other states' citizens suing for damages. Further suppose that the two states (call the other B) have, in effect, different nuisance law regimes. These differing laws have developed over time as a reflection of their state's citizen preferences, and therefore should reflect each state's citizens' views as to what does and does not constitute a nuisance.

If the source state's law is used in an interstate nuisance action, then the new plant can locate within State A essentially without regard to other states' citizens' preferences. No matter where the plant locates, its pollution will be judged under the same source-state nuisance standards. So far as the operator is concerned about liability, the borders of the state extend as far as its pollution will carry. Consequently, a city in State B, otherwise identical to City C, presents identical potential liability as City C did in the original hypothetical. The citizens of each state are considered by

---

pollution is externalized."); *cf.* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1597 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states.").

552 *See* Stewart, *supra* note 91, at 1227 ("State decision-making is likely to disregard spillovers whose costs will be borne by other states."); Stewart, *supra* note 274, at 243 ("The despoliation by one state of others' resources is not disciplined by market forces."); *cf.* Mank, *supra* note 512, at 406 ("EPA or a state agency should ignore political jurisdictions to the extent possible to prevent the 'state line syndrome' in which waste disposal facilities are frequently proposed for political subdivisions bordering another state."); Stan Millan, Commentary, *Is Clean Water Only for Those at the Top?*, 8 J. LAND USE & ENVTL. L. 235, 236 (1992) ("There is a river pollution saying that epitomizes the problem in Louisiana, thousands of miles downstream of many other polluting states along the Mississippi River. The saying goes: 'We're at the end of a very long intestine, and you know what that makes us.'").

Not all costs can be spilled over, however. Presumably some pollution will have effects within the state in which it is emitted, unless the discharger locates itself right on an upwind border, or on a river flowing into another state. *But see* GILBERT M. MASTERS, INTRODUCTION TO ENVIRONMENTAL ENGINEERING AND SCIENCE 127, 131-33 (1991) (demonstrating how minimum dissolved oxygen, which leads to sludge, noxious gases, and fungal growths in rivers, occurs some distance downstream of effluent discharge point, rather than at discharge point itself); *id.* at 319-24 (demonstrating that peak in air pollutant concentrations can occur well downwind of emitter in stable air conditions).

553 There is one bias that may diminish the source state's claims here. Factories can locate on borders, and thereby determine where their pollution lands. In contrast, a state cannot move its borders away from polluters. Therefore, a state cannot avoid pollution simply by moving, while a polluter can avoid people by moving.

the polluter for purposes of liability to be identical. They should not be, however, if the states have different legal standards for nuisance.

Compare the source-state rule to a rule that employs the affected state's law. A source still needs to take account of the effects its pollution will have in other states. Now, however, it will assess those effects to the extent the harmed parties would be capable of recovery in their own state. In other words, if State B's nuisance standards evince a lesser desire to limit pollution (in other words, a greater toleration for pollution), the plant reduces its potential liability by locating to maximize the portion of its pollution's effects for State B's citizens. Consequently, the plant faces liability assessed in relation to the harms it actually imposes as measured by reference to the group that is being harmed.

From a social standpoint, the downstream-state rule encourages the plant to behave optimally, because it induces the polluter to cause harm where that harm is least valued. If State B is less concerned with pollution than State A, then factories should pollute State B more and State A less. Conversely, if State B's law controls pollution more strictly, then a polluter should be encouraged to reduce its pollution of State B's citizens. Because State B values clean water or air more highly, the polluter reduces her liability by limiting the harm she causes to people of that State. Since nuisance law contributes to pollution deterrence by imposing damages for harm created, it makes sense to measure that harm by reference to who is harmed.[554] A rule that uses the affected state's nuisance law better achieves such deterrence. Neither state's damages rule is inherently superior; one, however, bears a connection to the party being harmed: the law of the jurisdiction from which the harmed party hails.[555]

---

554 WEINTRAUB, *supra* note 544, at 303; *see also* CURRIE, *supra* note 532, at 179 ("[W]e attribute positive values to the principle of self-determination for localities and groups.").

555 The point here is not that one state cares more about pollution's harm than the other. Rather, the question is: given two states whose laws measure the harms of pollution differently, which state's law should a court apply? Affected states do not necessarily have stricter nuisance laws. Nonetheless, the affected state's law should be used, under this theory, even if it is less advantageous for nuisance plaintiffs. "Reasonableness" must be determined by reference to some polity's views. Given that the polity used must be one state's or the other's, a court needs to select between them. A citizen of state A has chosen to be in its community, and consequently has both the rights extended to all of state A's citizens as well as all their obligations. She therefore enjoys the right to be free from unreasonable pollution to the extent that citizens of state A think pollution unreasonable. State B (the source state) can make no similar claim to her allegiance, nor has she chosen to accept its mix of benefits and burdens.

Interstate compacts may provide the best mechanism to resolve the interstate pollution problem. One version of this is the Uniform Transboundary Pollution Reciprocal Access Act. The Act, if adopted by both the plaintiff's and defendant's jurisdiction, extends certain rights to the plaintiff in the suit. Those rights include standing in the source state's court, and rights commensurate with citizens of the source state, with the exception of choice-of-law rules. It denies, however, superior rights the plaintiff may hold by virtue of her being from a different jurisdiction. Thus, the effect is to establish the choice of the source state's law in interstate-nuisance lawsuits, as well as to extend citizen-suit privileges to citizens of other states. *See* COL. REV. STAT. §§ 13-1.5-101 to -109 (1995); CONN. GEN. STAT. § 51-351(b) (West 1995); MICH. COMP. LAWS §§ 3.1871-.880 (West 1995); MONT. CODE ANN. §§ 75-16-101 to -

Choosing to use the harmed state's nuisance law also avoids creating the anomalous situation of a harmed party having different remedies depending on where the source emits its pollutants. If a person has her home or farm damaged by pollution, the determinative factor as to whether she collects damages should hardly be what state the emissions come from. The harm to her does not depend on whether the emissions herald from her neighbor or from a neighboring state. However, a rule selecting the source state's law would force her to be concerned directly with the laws of the emitter's state. Choice, of course, of her state's law eliminates that very problem.

Nuisance law has developed so that it uses harm to determine what emission amounts are reasonable. It has come to disregard the efforts of polluters to conform their conduct to what is reasonable. Consequently, nuisance law is almost exclusively about harm. Therefore, to create a regime in which nuisance law optimizes deterrence of such harms, we should look to the rule of law that most accurately assesses those harms. A state's nuisance law should reflect that state's citizens' preference for pollution as compared to production, and therefore it will better assess whether redressable harms have been suffered, and if so, what the value of that harm is. Employing the affected state's nuisance law creates a seamless regime of pollution enforcement on the basis of effects, because a plaintiff may or may not obtain redress for a certain amount of pollution regardless of its source. Choosing the affected state's law would not run afoul of constitutional due process restrictions. Moreover, while no choice-of-law rule mandates its selection, if courts wish to advance the policy purpose of nuisance law's preservation, then they should consider the downstream state's law to advance that purpose better. In summary, the downstream state's law enjoys a stronger justification for its application when the goal of nuisance law is assumed to be to encourage efficient selection of polluters' locations.

VII. CONCLUSION

This Article has argued that pollution statutes incompletely attack pollution because they inadequately take the location of pollution into account. Pollution itself is not inherently bad, but only becomes so when it harms things, particularly humans. Therefore, pollution laws should concern themselves with optimizing the location of pollution so as to minimize its effects. Nuisance law contributes to the effort by creating incentives to locate sources of pollution wisely. Because nuisance law emphasizes the location in which pollution occurs, the imposition of liability through nuisance law should encourage sources to locate where they will cause less damage.

Although most states preserve their nuisance law despite pollution statutes, the Supreme Court has been less charitable. It has found that the

109 (1995); N.J. REV. STAT. §§ 2A:58A-1 to -9 (1995); OR. REV. STAT. §§ 468.076-.089 (1995); WIS. STAT. § 1444.995 (1995).

Clean Water Act (and by inference the Clean Air Act) has preempted both federal nuisance law and the nuisance law of the affected state. However, given the Court's decision in *Allstate v. Hague*, it seems likely that a court could apply the law of either interested state. While strong arguments can be made supporting either state's law, a court should choose the law which most fully comports with the objectives of both nuisance law and current environmental protection statutes. Maintaining the viability of nuisance law, even after comprehensive pollution control statutes, recalls the historical origins of pollution control. By allowing people to protect their homes and their land from unreasonable interference by pollution, we do nothing more than we have allowed for hundreds of years.

APPENDIX

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Alabama	ALA. CODE § 22-28-1 to 22-28-23 (1996).	ALA. CODE § 22-28-23(a) (1996) ("[N]othing in this section shall be construed to limit or abrogate any private remedies now available to any person for the alleviation, abatement, control, correction or prevention of air pollution or restitution for damages resulting therefrom."); Borland v. Sanders Lead Co., 369 So. 2d 523, 526 (Ala. 1979) (compliance with Act does not shield polluter from paying damages).	ALA. CODE § 22-22-1 to 22-28-14 (1996).	ALA. CODE § 22-22-9(o) (1996) ("Nothing contained or authorized in this chapter . . . shall be construed to impair or abridge or abrogate any cause of action which any person or class of persons may have by any other statutory or case law for the alleviation, abatement, control or prevention of pollution or for the restitution of damages resulting therefrom."). *But cf.* Burgess Mining & Constr. Corp. v. Alabama *ex rel.* Baxley, 312 So. 2d 842 (Ala. Civ. App. 1975) (state may not take action against polluter complying with laws).	No preemption.
Alaska	ALASKA STAT. §§ 46.14.010-46.14.990 (Michie 1996).	ALASKA STAT. § 09.45.230(b) (Michie 1996) (No nuisance action may be brought if the emission or discharge was expressly authorized and is not in violation of a term or condition of permit or statute.).	ALASKA STAT. §§ 46.03.050-46.03.120 (Michie 1996).	ALASKA STAT. § 09.45.230(b) (Michie 1996).	Preemption.
Arizona	ARIZ. REV. STAT. ANN. § 49-401 to 49-593 (West 1994 & Supp. 1996).	ARIZ. REV. STAT. ANN. § 49-467 (West 1994 & Supp. 1996) (no abridgement of common law to suppress nuisances).	ARIZ. REV. STAT. ANN. § 49-201 to 49-391 (West 1994 & Supp. 1996).	ARIZ. REV. STAT. ANN. § 49-206 (West 1994 & Supp. 1996) (no abridgement of common law to suppress nuisances).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Arkansas	ARK. CODE ANN. § 8-4-301 to 8-4-315 (Michie 1994).	ARK. CODE ANN. § 8-4-306(c) (Michie 1994) ("Nothing in this chapter shall be construed to prevent private actions under existing laws.").	ARK. CODE ANN. § 8-4-201 to 8-4-230 (Michie 1994).	ARK. CODE ANN. § 8-4-306(c) (Michie 1994) ("Nothing in this chapter shall be construed to prevent private actions under existing laws.").	No preemption.
California	CAL. HEALTH & SAFETY CODE §§ 41500-42708 (West 1996).	CAL. HEALTH & SAFETY CODE § 41509(d) (West 1996) (No order of board precludes "[t]he right of any person to maintain at any time any appropriate action for relief against any private nuisance."); Venuto v. Owens-Corning Fiberglas Corp., 99 Cal.Rptr. 350, 359 (Cal. App. 1971) (Source complied with air pollution regulations; however, "although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance."); People v. City of Los Angeles, 325 P.2d 639, 643 (Cal. App. 1958) ("There is nothing in the act which expressly or impliedly places in the state board or any regional board the *exclusive* power to declare that a nuisance exists or to take action to abate a nuisance" (emphasis added).).	CAL. WATER CODE §§ 13000-13390 (West 1996).	CAL. WATER CODE § 13002(e) (West 1996) (No state or regional board ruling is a limitation "[o]n the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in the Civil Code or for relief against any contamination or pollution.").	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Colorado	COLO. REV. STAT. §§ 25-7-101 to 25-7-512 (1989 & Supp. 1996).	COLO. REV. STAT. § 25-7-126(3) (1989) (Laws provide cumulative remedies and do not estop individuals from bringing actions).	COLO. REV. STAT. §§ 25-8-101 to 25-8 -703 (1989 & Supp. 1996).	COLO. REV. STAT. § 25-8-612(1) (1989) (remedies are cumulative); *id.* § 25-8-612(3) (nuisance actions not preempted).	No preemption.
Connecticut	CONN. GEN. STAT. §§ 22a-170 to 22a-194g (1995).	CONN. GEN. STAT. § 22a-6a(a) (1995) (Statutory remedy does not preclude recovery through other mechanisms).	CONN. GEN. STAT. §§ 22a-416 to 22a-484 (1995).	CONN. GEN. STAT. § 22a-6a(a) (1995) (Statutory remedy does not preclude recovery through other mechanisms.).	No preemption.
Delaware	DEL. CODE ANN. tit. 7, § 6002-6038 (1991 & Supp. 1996).	*See* Pottock v. Continental Can Co., 210 A.2d 295, 296 (Del. Ch. 1965) (Courts are not deprived of jurisdiction unless new remedy is equivalent and expressly exclusive, which older version of air pollution act was not).	DEL. CODE ANN. tit. 7, § 6002-6038 (1991 & Supp 1996).	*See* Pottock v. Continental Can Co., 210 A.2d 295, 296 (Del. Ch. 1965).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Florida	FLA. STAT. ch. 403.011-403.4154 (1995).	FLA. STAT. ch. 403.191(1) (1995) ("Nothing contained herein shall be construed to alter rights of action or remedies in equity or under the common law . . . nor shall any provisions of this act . . . be construed as estopping . . . [any] person affected by air or water pollution in the exercise of their rights in equity or under the common law . . . ."); *see* Florida *ex rel.* Shevin v. Tampa Elec. Co., 291 So. 2d 45, 47 (Fla. Dist. Ct. App. 1974) (public nuisance "not necessarily dependent upon technically established criteria for its resolution").	FLA. STAT. ch. 403.011-403.4154 (1995).	FLA. STAT. ch. 403.191(1) (1995); *see* Florida *ex rel.* Shevin v. Tampa Elec. Co., 291 So. 2d 45, 47 (Fla. Dist. Ct. App. 1974).	No preemption.
Georgia	GA. CODE ANN. §§ 12-9-1 to12-9-57 (1996).	J.D. Jewell, Inc. v. Hancock, 175 S.E.2d 847, 852 (Ga. 1970) (no preemption by statute).	GA. CODE. ANN. §§ 12-5-20 to 12-5-53 (1996).	GA. CODE ANN. § 12-5-46 (1996) ("Nothing in this article shall be construed to alter or abridge any right of action existing in law or equity, civil or criminal, nor shall any provision of this article be construed to prevent any person, as a riparian owner or otherwise, from exercising his rights to suppress nuisances or to abate any pollution.").	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Hawaii	HAW. REV. STAT. §§ 342B-1 to 342B-53 (1993 & Supp. 1995).	HAW. REV. STAT. 342B-53 (1993) ("No existing civil or criminal remedy for any wrongful action which is a violation of any statute or any rule of the department or the ordinance of any county shall be excluded or impaired by this chapter.").	HAW. REV. STAT. §§ 174C-1 to 174C-101, 342D-1 to 342D-60 (1993 & Supp. 1995).	HAW. REV. STAT. § 174C-15(c) (1993) ("No provision of this chapter shall bar the right of any injured person to seek other legal or equitable relief against a violator of this chapter."); *id.* § 342D-16 ("No existing civil or criminal remedy for any wrongful action which is a violation of any statute or any rule of the department or the ordinance of any county shall be excluded or impaired by this chapter.").	No preemption.
Idaho	IDAHO CODE §§ 39-101 to 39-130 (1993 & Supp. 1996).	IDAHO CODE § 39-108(8) (1993) ("No action taken pursuant to the provisions of this act or of any other environmental protection or health law shall relieve any person from any civil action and damages that may exist for injury or damage resulting from any violation of this act . . . ."); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 677-78 (D. Idaho 1986) (state not preempted from bringing nuisance action); Idaho v. Hanna Mining Co., 699 F. Supp. 827, 833-34 (D. Idaho 1987) (same), *aff'd*, 882 F.2d 392 (9th Cir. 1989).	IDAHO CODE §§ 39-3601 to 39-3639 (1993 & Supp. 1996).	IDAHO CODE § 39-108(7) (1993); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 677-78 (D. Idaho 1986); Idaho v. Hanna Mining Co., 699 F. Supp. 827, 833-34 (D. Idaho 1987), *aff'd*, 882 F.2d 392 (9th Cir. 1989).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Illinois	415 ILL. COMP. STAT. ANN. 5/1-1.5, 5/8-10 (West 1993 & Supp. 1996).	415 ILL. COMP. STAT. ANN. 5/45 (a) (West 1993 & Supp. 1996) ("No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this Act."); Decatur Auto Auction, Inc. v. Macon County Farm Bureau Inc., 627 N.E.2d 1129, 1130 (Ill. App. Ct. 1993) ("[T]he Act does not prohibit a suit being brought for common law nuisance."); City of Monmouth v. Pollution Control Bd., 313 N.E.2d 161, 163 (Ill. 1974) (Act provides remedies in addition to those provided at common law.); Illinois *ex rel.* Scott v. United States Steel Corp., 352 N.E.2d 225, 228-29 (Ill. App. Ct. 1976) (Attorney General not preempted from bringing nuisance action); *cf.* Rockford Drop Forge Co. v. Pollution Control Bd., 402 N.E.2d 602, 606-07 (Ill. 1980) ("We cannot say that the legislature contemplated that each regulation must be tailored to some common law decision on tort liability.").	415 ILL. COMP. STAT. ANN. 5/1-7.5, 5/11-13.3 (West 1993 & Supp. 1996).	415 ILL. COMP. STAT. ANN. 5/45(a) (West 1993 & Supp. 1996); Tamalonis v. City of Georgetown, 542 N.E.2d 402, 409 (Ill. App. Ct. 1989) (nuisance actions for sewage discharges expressly not preempted).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Indiana	IND. CODE §§ 455B.131 to 455B.151 (1995).	IND. CODE § 455B.111(5) (1995) (citizen suit provision does not restrict rights under common or statutory law); *see also* Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Ind. 1992) (statutory nuisance provision does not preempt common law remedies).	IND. CODE §§ 455B.171 to 455B.192 (1995).	IND. CODE § 455B.111(5) (1995); *see also* Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Ind. 1992).	No preemption.
Iowa	IOWA CODE §§ 455B.101 to 455B.151 (1995).	IOWA CODE § 455B.111(5) (1995) ("[Citizen suit provision] does not restrict any right under statutory or common law . . . .").	IOWA CODE §§ 455B.101 to 455B.117, 455B.171 to 455B.192 (1995).	IOWA CODE § 455B.111(5) (1995).	No preemption.
Kansas	KAN. STAT. ANN. §§ 65.3001-65.3028 (1992 & Supp. 1995).	KAN. STAT. ANN. § 65.3108 (1992) (no preemption of common law remedies).	KAN. STAT. ANN. §§ 65.3301-65.3329 (1992).	No explicit term.	No preemption.
Kentucky	KY. REV. STAT. ANN. §§ 224.20-050 to 224.20-765 (Michie 1995).	KY. REV. STAT. ANN. § 224.01-060 (Michie 1995) (Laws are "ancillary and supplementary" to preexisting laws.); Ohio River Sand Co. v. Kentucky, 467 S.W.2d 347, 349 (Ky. Ct. App. 1971) (no premption of common law).	KY. REV. STAT. ANN. §§ 224.70-100 to 224.70-140 (Michie 1995).	KY. REV. STAT. ANN. § 224.01-060 (Michie 1995).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Louisiana	LA. REV. STAT. ANN. §§ 30:2051- 30:2064 (West 1995 & Supp. 1997).	LA. REV. STAT. ANN. § 30:2026(c) (West 1995) ("[N]othing herein shal be construed to limit or deny any person's right to injunctive or other extraordinary and ordinary relief . . . ."); LA. REV. STAT. ANN. § 30:2026(d) (West 1995) ("The . . . remedies herein provided for shall be in addition to any such procedures and remedies authorized under the laws of this state.").	LA. REV. STAT. ANN. §§ 30:2071- 30:2088 (West 1995 & Supp. 1997).	LA. REV. STAT. ANN. § 30:2026(c), (d) (West 1995).	No preemption.
Maine	ME. REV. STAT. ANN. tit. 38, §§ 581-610A (West 1989 & Supp. 1996).	ME. REV. STAT. ANN. tit. 38, § 581 (1995) (act not intended to limit private rights of action).	ME. REV. STAT. ANN. tit. 38, §§ 361-537 (1989).	No provision.	No preemption.
Maryland	MD. CODE. ANN., ENVIR. §§ 2-101 to 2-707 (1996).	No provision.	MD. CODE. ANN., ENVIR. §§ 9-301 to 9-351 (1996).	MD. CODE. ANN., ENVIR. § 9-303 (1996) ("This subtitle does not take away the right of any person, as a riparian owner or otherwise, in equity, at common law, or under statutory law to suppress a nuisance or abate pollution.").	No preemption.
Massachusetts	MASS. GEN. LAWS ch. 111, §§ 142A-142E (1995).	MASS. GEN. LAWS ch. 111, § 142B (1995) (Whether one is regulated by pertinent department or not does not relieve one of potential liability for damages.).	MASS. GEN. LAWS ch. 21, §§ 26-53A (1995).	Nassr v. Massachusetts, 477 N.E.2d 987, 992 (Mass. 1985) (state clean water act intended to supplement common law, not replace it).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Michigan	MICH. COMP. LAWS §§ 324.5501 to 324.5708 (1995).	MICH. COMP. LAWS § 324.5540 (1995) (act provides additional and cumulative remedies and people still have right to supress nuisances); MICH. COMP. LAWS § 324.5541 (1995) (act does not preempt other laws).	MICH. COMP. LAWS §§ 324.3101 to 324.3906 (1995).	MICH. COMP. LAWS § 324.3116 (1995) (act supplements laws in force unless they are in direct conflict).	No preemption.
Minnesota	MINN. STAT. §§ 116.01-116.10, 116.60-116.67 (1995).	MINN. STAT. § 116B.12 (1995) (no preemption of common law allowing suits for emissions into air or water).	MINN. STAT. §§ 115.01-115.09 (1995).	MINN. STAT. § 115.08 (1995) (act shall not be construed as repealing any provision of law); *see also* MINN STAT. § 116B.12 (1995) (existing remedies remain in effect).	No preemption.
Missouri	MO. REV. STAT. §§ 643.010 to 643.192 (1995).	MO. REV. STAT. § 643.17 (1995) (no preemption of existing statutory remedies; violation cannot be used for benefit of anyone other than state enforcement authority).	MO. REV. STAT. §§ 644.006 to 644.141 (1995).	MO. REV. STAT. § 644.131 (1995) ("Nothing in [law] alters or abridges any right of action now or hereafter existing in law or equity, civil or criminal, nor is any provision . . . [to be] construed as prohibiting any person, as a riparian owner or otherwise, from exercising his rights to suppress nuisances."); Missouri *ex rel.* Dresser Indus. v. Ruddy, 592 S.W.2d 789, 793-94 (Mo. 1980) (holding common law not preempted because act intended to supplement common law and common law does not hamper enforcement of act).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Montana	MONT. CODE ANN. §§ 75-2-101 to 75-129 (1995).	MONT. CODE ANN. § 75-2-104, 75-2-104(4) (1995) ("Nothing in this chapter shall be contrued to . . . . abridge, limit, impair, create, enlarge, or otherwise affect substantively or procedurally the right of a person to damages or other relief on account of injury to person or property and to maintain an action or other appropriate proceeding.").	MONT. CODE ANN. §§ 75-5-101 to 75-641 (1995).	MONT. CODE ANN. § 75-5-102 (1995) (remedies cumulative; "chapter does not abridge or alter rights of action or remedies in equity or under the common law . . . nor . . . estop . . . [a] person, as owner of water rights or otherwise . . . to suppress nuisances or to abate pollution").	No preemption.
Nebraska	NEB. REV. STAT. §§ 81-1501 to 81-1513 (1994 & Supp. 1996).	*See* Botsch v. Leigh Land Co., 239 N.W.2d 481, 486 (Neb. 1976) ("[T]he fact that the Department of Environmental Control saw fit to ignore the air and insect pollution features cannot excuse [the nuisance's] maintenance. It may be noted that the statutes do not distinguish between rural and urban areas."); *cf.* Omaha Fish & Wildlife Club v. Community Refuse, Inc., 302 N.W.2d 379, 380-81 (Neb. 1981) (holding that the Environmental Protection Act does not preempt district court from sitting in equity to consider alleged zoning violations by proposed landfill).	NEB. REV. STAT. §§ 81-1501 to 81-1513 (1994 & Supp. 1996).	*See Botsch*, 239 N.W.2d at 486; *Omaha Fish*, 302 N.W.2d at 380-81.	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Nevada	NEV. REV. STAT. §§ 445B.100 to 445B.845 (1995).	NEV. REV. STAT. § 445B.600 (1995) ("[This section] does not abridge, limit, impair, create, enlarge or otherwise affect substantively or procedurally the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceeding therefor . . . .").	NEV. REV. STAT. §§ 445A.300 to 445A.955 (1995).	NEV. REV. STAT. § 445A.685 (1995) ("No remedy or sanction provided for in [this section] impairs any right which the director or any person has under any statute or common law.").	No preemption.
New Hampshire	N.H. REV. STAT. ANN. §§ 125C:1 to 125C:21 (1996 & Supp. 1996).	N.H. REV. STAT. ANN. § 125C:18 (1996) ("No existing civil or criminal remedy for any wrongful action which is a violation of any code or rule adopted hereunder shall be excluded or impaired by this chapter.").	N.H. REV. STAT. ANN. §§ 485A:1 to 485A:22a (1996 & Supp. 1996).	Urie v. Franconia Paper Corp., 218 A.2d 360, 362 (N.H. 1966) ("[T]hat what is authorized by law cannot be a public nuisance, but such authorization does not affect any claim of a private citizen for damages for injury . . . . [The Water Pollution Control Act] was not intended to abrogate or suspend protection of the rights of individual landowners to be free from private nuisance.").	No preemption.
New Jersey	N.J. STAT. ANN. §§ 26:2C-1 to 26:2C-36 (West 1996).	N.J. STAT. ANN. §§ 26:2C-21 (West 1996) ("No existing civil or criminal remedy for any wrongful action which is a violation of any code, rule, or regulation of the Commission shall be excluded or impaired by this act.").	N.J. STAT. ANN. §§ 58:10A-1 to 58:10A-60 (West 1992 & Supp. 1996).	No provision.	Suggests, by its omission, compliance may be a defense.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
New Mexico	N.M. STAT. ANN. §§ 74-2-1 to 74-2-17 (Michie 1978 & 1996).	Gonzalez v. Whitaker, 643 P.2d 274, 277-78 (N.M. Ct. App. 1982) (holding that the Environmental Improvement Act does not preempt common law).	N.M. STAT. ANN. §§ 74-6-1 to 74-2-17 (Michie 1978 & 1996).	N.M. STAT. ANN. § 74-6-13 (Michie 1978) ("[Act] provides additional and cumulative remedies to prevent, abate and control water pollution, and nothing abridges or alters rights of action or remedies in equity under the common law . . . estops the state or any . . . person as owner of water rights or otherwise . . . to suppress nuisances or to abate pollution.").	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
New York	N.Y. ENVTL. CONSERV. LAW §§ 19-0101 to 19-0923 (McKinney 1984 & Supp. 1997).	N.Y. ENVTL. CONSERV. LAW § 19-0703 (McKinney 1984) ("It is the purpose of this article to provide additional and cumulative remedies to prevent and abate air pollution . . . . Nothing in this article contained shall abridge or alter rights of action or remedies now or hereafter existing, nor . . . estop[ ] individuals . . . from the exercise of their respective rights to suppress nuisances . . . ."); State v. Town of Huntington, 325 N.Y.S.2d 674, 675-76 (N.Y. Sup. Ct. 1971) (holding that the remedies of the Act are not exclusive), *aff'd*, 326 N.Y.S.2d 981 (N.Y. App. Div. 1971).	N.Y. ENVTL. CONSERV. LAW §§ 17-0101 to 17-1909 (McKinney 1984 & Supp. 1997).	N.Y. ENVTL. CONSERV. LAW § 17-1101 (McKinney 1984) ("It is the purpose of [these titles] to provide additional and cumulative remedies to abate the pollution of the waters of the state and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor . . . estop . . . riparian owners or otherwise in the exercise of their rights to suppress nuisances . . . ."); State v. Schenectady Chem., Inc., 459 N.Y.S.2d 971, 979 (N.Y. Sup. Ct. 1983) (holding that the common law is not preempted by statute), *aff'd*, 479 N.Y.S.2d 1010, 1014 (N.Y. App. Div. 1984) (holding that the preemption argument "is without merit"); *see also* Leo v. General Elec. Co., 538 N.Y.S.2d 844, 847 (N.Y. App. Div. 1989) (holding that federal laws do not preempt state laws).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
North Carolina	N.C. GEN. STAT. §§ 143-211 to 143-213, 143-215.105 to 143.114C (1996).	No provision. ta]N.C. GEN. STAT. §§ 143-211 to 143-213, 143-214.1 to 143-215.37 (1996).	N.C. GEN. STAT. § 143-215.22 (1996) ("Nothing contained in this Part shall change or modify existing common or statutory law with respect to the relative rights of riparian owners concerning the use of surface waters in this State."); Biddix v. Henredon Furniture Indus., 331 S.E.2d 717, 723-24 (N.C. Ct. App. 1985) (holding that neither federal nor state clean water act preempts state common law because preservation of such claims strengthens the goal of clean water).	No preemption. *But see Biddix*, 331 S.E.2d at 724 (suggesting that compliance with an NPDES permit may be a defense to a civil nuisance action) (dicta).	
North Dakota	N.D. CENT. CODE §§ 23-25-01 to 23-25-10 (1991 & Supp. 1995).	No provision.	N.D. CENT. CODE §§ 61-28-01 to 61-28-08 (1995).	No provision.	Unclear.
Ohio	OHIO REV. CODE ANN. §§ 3704.01-3704.99 (Anderson 1996).	OHIO REV. CODE ANN. §§ 3704.09 (Anderson 1996) ("Nothing in this [Chapter] shall be construed to abridge, limit, or otherwise impair the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceedings therefor.").	OHIO REV. CODE ANN. §§ 6111.01-6111.99 (Anderson 1996).	OHIO REV. CODE ANN. §§ 6111.08 (Anderson 1996) ("[This chapter] does not abridge rights of action or remedies in equity or under the common law, nor does such chapter, or any act done under such chapter, estop the state, or any municipal corporation or person, as riparian owners or otherwise, in the exercise of their rights in equity or under the common law to suppress nusiances or to abate pollution.").	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Oklahoma	OKLA. STAT. tit. 27A, §§ 2-5-101 to 2-5-118 (1995).	OKLA. STAT. tit. 27A, § 2-3-506 (1995) ("It is the purpose of this Code [including air pollution control sections] to provide additional and cumulative remedies to prevent, abate, and control pollution. Nothing contained in this Code shall be construed to abridge or alter rights of action or remedies under the common law or statutory law . . . nor shall any provision of this Code, or any act done by virtue thereof, be construed as estopping the state, or any municipality or person in the exercise of their rights under the common law to suppress nuisances or to abate pollution. Nothing in this Code shall in any way impair or affect a person's right to recover damages for pollution.").	OKLA. STAT. tit. 27A, §§ 2-6-101 to 2-6-901 (1995).	OKLA. STAT. tit. 27A, § 2-6-104 (1995) ("It is the purpose of this article to provide additional and cumulative remedies to prevent, abate and control the pollution of the waters of the state. Nothing herein contained shall be construed to abridge or alter rights of action or remedies under the common law or statutory law . . . nor shall any provision of this article, or any act done by virtue thereof, be construed as estopping the state, or any municipality or person, as riparian owner or otherwise, in the exercise of their rights under the common law to suppress nuisances or to abate pollution.").	No preemption.
Oregon	OR. REV. STAT. §§ 468A.005 to 468A.992 (1996).	No provision.	OR. REV. STAT. §§ 468B.005 to 468B.500 (1996).	No provision.	Unclear.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Pennsylvania	PA. STAT. ANN. tit. 35, §§ 4001-4105 (West 1993 & Supp. 1996).	PA. STAT. ANN. tit. 35, § 4012.1a (West 1993) ("It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the air of this Commonwealth, and nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity or under the common law or statutory law, criminal or civil, nor shall any provision . . . be construed as estopping . . . persons . . . in the exercise of their rights under the common law . . . to suppresss nuisances . . . .").	PA. STAT. ANN. tit. 35, §§ 691.1 to 691.1001 (West 1993 & Supp. 1996).	PA. STAT. ANN. tit. 35, § 691.701 (West 1993) ("It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the waters of this Commonwealth, and nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision . . . be construed as estopping . . . persons . . . in the exercise of their rights under the common law . . . to suppresss nuisances . . . .").	No preemption.
Rhode Island	R.I. GEN. LAWS §§ 23-23-1 to 23-23-28 (1996).	No provision.	R.I. GEN. LAWS §§ 46-12-1 to 46-12-41 (1996).	No provision.	Unclear.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
South Carolina	S.C. CODE ANN. §§ 48-1-10 to 48-1-350 (Law. Co-op. 1987 & Supp. 1996).	S.C. CODE ANN. § 48-1-240 (Law. Co-op. 1987) ("It is the purpose of this chapter to provide additional and cumulative remedies to abate the pollution of the air and waters of the State and nothing herein contained shall abridge or alter rights of action . . . under the common law.").	S.C. CODE ANN. §§ 48-1-10 to 48-1-350 (Law. Co-op. 1987 & Supp. 1996).	S.C. CODE ANN. § 48-1-240 (Law. Co-op. 1987); Stoddard v. Western Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1207 (4th Cir. 1986) ("We see nothing in the Clean Water Act that presages a congressional intent to occupy the entire field of water pollution to the exclusion of state regulation." The state act's savings clause is "much broader and stronger" than the federal one.).	No preemption.
South Dakota	S.D. CODIFIED LAWS §§ 34A-1-1 to 34A-62 (Michie 1992 & Supp. 1996).	S.D. CODIFIED LAWS § 34A-1-54 (1992) ("Nothing in this chapter shall be construed to abridge, limit, or otherwise impair the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceedings therefor.").	S.D. CODIFIED LAWS §§ 34A-2-1 to 34A-124 (Michie 1992 & Supp. 1996).	S.D. CODIFIED LAWS § 34A-2-79 (Michie 1992) (providing that remedies are "additional and cumulative"; right to suppress nuisances not abridged).	No preemption.
Tennessee	TENN. CODE ANN. §§ 68-201-101 to 68-201-203 (1996).	TENN. CODE ANN. § 68-201-114 (1996) (providing that remedies are "additional and cumulative" and are not to be construed to abridge or alter preexisting rights).	TENN. CODE ANN. §§ 69-3-101 to 69-3-131 (1995 & Supp. 1996).	TENN. CODE ANN. § 69-3-118(b) (1995) (providing that remedies are cumulative; nothing (including permit) abridges common law).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Texas	TEX. HEALTH & SAFETY CODE ANN. §§ 382.001-382.096 (West 1992 & Supp. 1997).	TEX. HEALTH & SAFETY CODE ANN. § 382.004 (West 1992) (providing that laws have no effect on private remedies); Manchester Terminal Corp. v. Texas TX TX Marine Transp. Inc., 781 S.W.2d 646, 650, 652 (Tex. App. 1989) ("[T]he [Texas Clean Air] Act does not give the [board] express authority to allow commerical enterprises to engage in activities, which, under the common-law, constitute trespass or nuisance. Even if a commercial enterprise holds a valid statutory permit to conduct a particular business, the manner in which it performs the activity may give rise to an action for injunctive relief or damages." The trial court could allow equitable relief, or damages, along with compliance as remedies).	TEX. WATER CODE ANN. §§ 26.121 to 26.136 (West 1988 & Supp. 1997).	TEX. WATER CODE ANN. § 26.133 (West 1988) (providing that laws have no effects on private remedies); City of Odessa v. Bell, 787 S.W.2d 525, 531 (Tex. App. 1990) ("[U]nder the code, the right of an individual to pursue any available common-law remedy to abate, or to recover damages for, a condition of pollution or nuisance remains unaffected."); Atlas Chem. Indus. v. Anderson, 514 S.W.2d 309, 316 (Tex. App. 1974) ("[Despite a permit] [t]he costs of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers or shareholders, or both, and not by the injured individual."), *aff'd in part, rev'd in part*, 524 S.W.2d 681, 689 (Tex. 1974) (per curiam) (affirming compensatory damages but reversing exemplary damages).	No preemption.
Utah	UTAH CODE ANN. §§ 19-2-101 to 19-2-127 (1995 & Supp. 1996).	UTAH CODE ANN. § 19-2-116(2) (1995) (providing that the law does not abridge right to damages or other relief).	UTAH CODE ANN. §§ 19-5-101 to 19-5-120 (1995 & Supp. 1996).	UTAH CODE ANN. § 19-5-117(1)(a), (2) (1995) (providing that remedies are additional and cumulative and law does not abridge right to suppress nuisances).	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
Vermont	VT. STAT. ANN. tit. 10, §§ 551-576 (1984 & Supp. 1996).	No provision.	VT. STAT. ANN. tit. 10, §§ 1250-1283 (1984 & Supp. 1996).	VT. STAT. ANN. tit. 10, § 1276 (1984) ("Nothing in this subchapter shall be construed to affect, impair, or abridge the right of riparian or littoral owners or others to sue for damages or injunctions or exercise any other common law or statutory remedy to abate and recover damages for water pollution.").	No preemption.
Virginia	VA. CODE ANN. §§ 10.1-1300 to 101.1-1322.4 (Michie 1993 & Supp. 1996).	VA. CODE ANN. § 10.1-1320 (Michie 1993 & Supp. 1996) (providing that nothing in the chapter abridges right to collect damages for injury to property).	VA. CODE ANN. §§ 62.1-44.2 to 62.1-44.32 (Michie 1992 & Supp. 1996).	VA. CODE ANN. § 62.1-44.22 (Michie 1992) ("The fact that any owner holds or has held a certificate issued under this chapter shall not constitute a defense in any civil action involving private rights.").	No preemption.
Washington	WASH. REV. CODE §§ 70.94.011 to 70.94.990 (1996).	WASH. REV. CODE § 70.94.370(4) (1996) ("No provision of this chapter . . . is a limitation [o]n the right of any person to maintain at any time any appropriate action for relief against any air pollution.").	WASH. REV. CODE §§ 90.48.010 to 90.48.906 (1996).	WASH. REV. CODE § 90.48.150 (1996) ("This chapter shall not be construed as repealing any of the laws governing the pollution of the waters of the state, but shall be held and construed as ancillary to and supplementing the same and an addition to the laws now in force, except as the same may be in direct conflict herewith.").	No preemption.

State	Air Pollution Statute	Preemption	Water Pollution Statute	Preemption	Summary
West Virginia	W. VA. CODE §§ 22-5-1 to 22-5-17 (1994 & Supp. 1996).	W. VA. CODE § 22-5-3 (1994) ("Nothing contained in this article provides any person with a legal remedy or basis for damages or other relief not otherwise available to such person immediately prior to enactment of this article.").	W. VA. CODE §§ 22-11-1 to 22-11-28 (1994).	W. VA. CODE § 22-11-27 (1994) (providing that the remedies of article are additional and cumulative; provisions of article inure only to the benefit of the citizens of the state).	No preemption.
Wisconsin	WIS. STAT. §§ 144.30 to 144.426 (1995).	State v. Dairyland Power Coop., 187 N.W.2d 878, 880-81 (Wis. 1971) (finding that the statutory air pollution control scheme did not implicitly repeal statute allowing state to bring public nuisance actions).	WIS. STAT. §§ 144.02 to 144.27 (1995).	*See* Dairyland Power, 187 N.W.2d at 880-81 (finding that the statutory water pollution control scheme did not implicitly repeal the statute allowing the state to bring public nuisance actions).	No preemption.
Wyoming	WYO. STAT. ANN. §§ 35-11-201 to 35-11-212 (Michie 1977 & Supp. 1996).	WYO. STAT. ANN. § 35-11-904(g) (Michie 1977 & Supp. 1996) ("Nothing in this act shall in any way limit any existing civil or criminal remedy for any wrongful action arising out of a violation of any provision of this act or any rule, regulation, standards, permit, license, or variance or order adopted hereunder.").	WYO. STAT. ANN. §§ 35-11-301 to 35-11-311 (Michie 1977).	WYO. STAT. § 35-11-904(g) (Michie 1977 & Supp. 1996) ("Nothing in this act shall in any way limit any existing civil or criminal remedy for any wrongful action arising out of a violation of any provision of this act or any rule, regulation, standards, permit, license, or variance or order adopted hereunder.").	No preemption.