In the

Supreme Court of the United States

MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL., PETITIONERS, V. NATIONAL SEA CLAMMERS ASSN. ET AL.;	)	No. 79-1711
JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER, V. NATIONAL SEA CLAMMERS ASSN. ET AL.;	)	No. 79-1754
CITY OF NEW YORK ET AL., PETITIONERS, V. NATIONAL SEA CLAMMERS ASSN. ET AL.;	)	No. 79-1760
&	)	
ENVIRONMENTAL PROTECTION AGENCY ET AL., PETITIONERS, V. NATIONAL SEA CLAMMERS ASSN. ET AL.	)	No. 80-12

Washington, D.C.
February 24, 1981

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ORIGINAL

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ENVIRONMENTAL PROTECTION AGENCY ET AL., Petitioners, v. NATIONAL SEA CLAMMERS ASSOCIATION ET AL.	:	No. 80-12

Washington, D. C.

Tuesday, February 24, 1981

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 11:56 o'clock a.m.

APPEARANCES:

MILTON B. CONFORD, ESQ., Wilentz, Goldman & Spitzer, 900 Route 9, Woodbridge, New Jersey 07095; on behalf of the non-federal Petitioners in Nos. 79-1711, 79-1754 & 79-1760.

APPEARANCES (Continued):

ALAN I. HOROWITZ, ESQ., Assistant to the Attorney General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the federal parties as Petitioners in No. 80-12 and as Respondents in Nos. 79-1711, 79-1754 & 79-1760.

ROBERT P. CORBIN, ESQ., German, Gallagher & Murtagh, Suite 3100, 1818 Market Street, Philadelphia, Pennsylvania 19103; on behalf of the Respondents other than federal.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Middlesex County Sewerage Authority v. the National Sea Clammers.

Mr. Conford, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MILTON B. CONFORD, ESQ.,

ON BEHALF OF THE PETITIONERS

IN NOS. 79-1711, 79-1754 & 79-1760

MR. CONFORD: Mr. Chief Justice and may it please the Court:

This action present important questions as to the consequences of the adoption of recent comprehensive water pollution legislation. One of these statutes, commonly known as the Clean Water Act, adopted in 1972 is an extensive revision of previous federal water pollution legislation. The second statute involved, commonly known as the Ocean Dumping Act, adopted in 1972, and also amended in 1977.

This is an action brought by an association of fishermen claiming to have been injured by pollution of the ocean by some six or seven New Jersey sewerage agencies and several New York agencies, all public agencies.

The action of the plaintiff is couched in several counts, the major one, based upon violation of these statutes. The District Court of New Jersey granted summary

judgment to the defendants based upon jurisdictional and substantive grounds. The Court of Appeals for the 3rd Circuit reversed, and remanded for trial. Three issues evolved from the differences of opinion between the district court and the court of appeals, which this Court has certified for consideration today.

These are, first, whether there was an implied private remedy flowing from these statutes. Secondly, whether private parties' plaintiffs have standing to invoke the federal common law nuisance remedy declared by this Court in Illinois v. Milwaukee. And third, whether if there is such status for a private action it has been preempted by the Clean Water Act and the Ocean Dumping Act in relation to the complaint in this case.

In view of the time constraints that I am under in this matter, I propose with the Court's leave to address the second and third issues, on which I am opposed both by the Solicitor General and the respondents. The Solicitor General supports us only on the first issue, that concerning whether there was an implied cause of action.

QUESTION: He agrees with you that there is not?

MR. CONFORD: He agrees with us that there is not.

QUESTION: In which event the case is over?

MR. CONFORD: The case? No. If there is no implied cause of action there may be a federal common law

nuisance action.

QUESTION: I see. Yes.

QUESTION: But he disagrees with you on that?

MR. CONFORD: That is right. I turn to the second issue, which will be found to share a common rationale with the third issue as I develop it. That is, whether this Court should today declare that there is an across-the-board remedy available to anybody based on common law nuisance. An inquiry into that question cannot be approached without a consideration of the context of the comprehensive statutes as they now exist. In short the issue is, should this Court now declare that there is a broad-based, across-the-board, available-to-anybody, federal cause of action for nuisance in the context of the simultaneous existence of these comprehensive regulatory water pollution statutes? I submit that a consideration of the traditional, well-known bases for the Court enunciating federal common law should dictate that such a cause of action should not exist.

MR. CHIEF JUSTICE BURGER: We'll resume there at 1 o'clock on that point.

(Recess)

MR. CHIEF JUSTICE BURGER: Mr. Conford, you may continue.

MR. CONFORD: Mr. Chief Justice, and may it please the Court:

I should supplement what I said before the recess by indicating that all of the sewerage agencies in this case possessed United States EPA permits, both for the sewage effluent and the sewage sludge dumping which are complained of in this action.

Now, as I said before the recess, our conception of the applicability of federal common law should be approached in the context of the presently existing situation, not that which existed when this Court last decided this question in Illinois v. Milwaukee. What we are now confronted with is the question of whether federal common law should exist on an across-the-board basis in the context of the comprehensive regulatory mechanism which is constituted both by the Clean Water Act and the Ocean Dumping Act.

Our study of the occasions for declaring federal common law as declared by this Court lead us to the conclusion that there is no appropriate occasion now to declare federal common law of the extent demanded by the plaintiffs in this case. One illustration of traditional application of federal common law is where a state is a party to an action, either a state against another state or a state against citizens of another state. In that situation, based upon the Constitution, there being no statute applicable this Court by necessity has had to declare federal common law.

QUESTION: Well, is this an argument, Judge Conford?

In light of the statutes, there's just no room for that.

MR. CONFORD: What I'm trying to do, Justice Brennan, is to indicate that of the generally accepted criteria for applying federal common law, none is appropriate to the present situation.

QUESTION: Without regard to others? In any event, where there's a statute that regulates the subject matter.

MR. CONFORD: Where there's a statute?

QUESTION: A federal statute.

MR. CONFORD: Where there's a federal statute?

QUESTION: That displaces any room for federal common law.

MR. CONFORD: Except to the extent that it is thought necessary to supply statutory interstices. We maintain that in this case not only is there not the situation of a state party, but there is no occasion for applying interstices. What we have here is clearly not a situation of interstitial law. We have an alternate rival system attempted to be set forth: to wit, the federal common law of nuisance, under which a judge, as Justice Douglas said in the Milwaukee case, operates according to no fixed rules but he is the chancellor, exercising his informed judgment as to what should be.

QUESTION: Well, then that was said in the context -- or put it another way, was that said in the context of

a private party suit?

MR. CONFORD: No, it was said in the context of a state party suit. And that's why I say it is not applicable here.

QUESTION: Which began as an original jurisdiction case.

MR. CONFORD: Exactly. And the Court, in an effort to serve its policy of not taking original jurisdiction, labored to find an alternate basis for jurisdiction because of its felt need that a state affected by pollution coming from another state ought to be afforded a remedy.

Now, another common basis for applying federal common law or creating federal common law is when there is implicated a distinct federal policy, sometimes statutory and sometimes not, but the necessity of supplying uniformity so that the same rule applies in all circumstances, whether federal or state. We submit that that criterion for the creation of federal common law equally does not exist here.

QUESTION: Would that be illustrated by the Lincoln Mills kind of case?

MR. CONFORD: Yes. That was the determination that there should be an action to enforce an agreement to arbitrate.

QUESTION: And that it should be --

MR. CONFORD: Applied uniformly, whether --

QUESTION: Uniformly; nationally applicable.

MR. CONFORD: Nationally, whether the problem arose either in state or federal system.

QUESTION: Right.

MR. CONFORD: Now, clearly, that does not apply here, the objective of uniformity. When you have two systems, one, federal nuisance law and the other, a regulated statutory system, it's the opposite of uniformity. Depending upon the plaintiff's choice to go tort law or go statutory law, you can have two entirely different results. And even in the tort situation itself, there is a built-in factor against uniformity, because two federal district court judges hearing approximately the same kind of a nuisance case could arrive at different subjective judgments as to whether the conduct of the defendant was reasonable. So we submit, there again, there is no uniformity purpose in setting up these remedies side by side.

I can't think of any other appropriate federal law basis that would be applicable to these situations. I think having negated those which are generally understood and generally applicable, it must follow that it is not appropriate to create the federal common law remedy which our adversaries advocate.

Now, that leads me to the issue of preemption. We have an unusual type of preemption here. It is not

federal statute against state statute. It is federal statute against federal common law. For this purpose I assume for the sake of the argument that there would be a federal across-the-board common law remedy. The applicable rule in this situation is illustrated by Arizona v. California, in which this Court held that notwithstanding the fact that the Court had created a common law of equitable apportionment of waters in an interstate stream, nevertheless, when the Congress adopted specific legislation reallocating the distribution of the waters of the Colorado River, that settled the question and it supplanted federal common law of equitable apportionment of water.

QUESTION: The word, then, is either supplanted, displaced, whatever it is --

MR. CONFORD: Whatever it is --

QUESTION: But it's not preemption, because preemption is reserved usually, as you said, to state and federal controversies.

MR. CONFORD: But it's a type of preemption, and this Court has certified --

QUESTION: Well, maybe it would be easier to understand if we didn't use the word, preemption.

MR. CONFORD: Well, I think this Court certified the question in those terms, because Justice Douglas suggested in the Milwaukee case that a time might come when

comprehensive federal water pollution legislation might preempt the common law. I agree with you that conceptually it is not preemption, it's displacement, because Congress has the last word. If Congress decides that the law should be thus and so and it is contrary to pre-existing federal common law, that's it, and --

QUESTION: It's just like a superseding statute.

MR. CONFORD: Exactly. And we maintain that that is the situation here. Now, central to this inquiry is a question of, does the reorganization of the federal water pollution act, is it of a scope which should cause a different approach than that which existed when the rudimentary water pollution statute existed prior to 1972?

This Court has been instructed on that question by the very able opinion of Judge Tone in the 7th Circuit, in the Illinois-Milwaukee case which you heard in December, which contains a very comprehensive discussion of the differences between the rudimentary water pollution statute as it existed prior to 1972 and as it exists now. But I think the best and most pithy summary of what Congress intended to do and what Congress thought of the old statute is a quotation from the Senate Public Works Committee report on the 1972 amendments.

And here's what they said: "Water pollution control in the past has been all too often sporadic, inconsistent, and improvised on an ad hoc basis." They said,

"Our major purpose in adopting this legislation is to establish a comprehensive, long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike what the water pollution performance will be expected of them during the coming decade."

That states it better than I possibly could.

QUESTION: Before you finish with your argument, will you explain your position with regard to the savings clauses?

MR. CONFORD: Yes, I'll be glad to do that now. I was going to do it later.

The question is, does the savings clause in both of these statutes operate to compel the adoption of the previously existing federal common law of nuisance? I say it does not. In the first place, the reference is to statutes and common law. In my judgment the legislature did not actually mean federal common law when it said common law. When Congress talks about common law, ordinarily I think they mean state common law, general common law. Secondly --

QUESTION: Well, isn't that true throughout the law? Common law without any adjectives means -- does not embrace federal common law.

MR. CONFORD: You mean, whether it does?

QUESTION: Does not.

MR. CONFORD: It does not? That's my opinion.

Secondly, the argument that it means federal common law is hardly realistic in the light of the fact that the concept concerning federal common law in the water pollution area was only developed by this Court in 1972. This legislation was going through the legislature and had adopted this language before the Court spoke in 1972 in Illinois v. Milwaukee.

And, thirdly, if it were to be accepted for the sake of argument that it did mean federal common law, that then puts the ball back in this Court's jurisdiction, because it is for this Court to say what is appropriate federal common law in that context. And for the reasons which I have already developed indicating why federal common law in this area would be inappropriate, that takes care of the savings clause, I believe, completely.

Now, what they did mean by the savings clause, in my judgment, was state statutes and state common law. For example, the Water Pollution Act specifically invites states to participate by adopting more stringent regulations, by setting up area-wide water quality standards, and New Jersey, in fact, has adopted legislation along both of these lines. New Jersey adopted in 1977 both a water pollution control act consistent with the federal act, and an area --

QUESTION: I gather the test, whether the state rule, whether it's statutory or judicial, may operate, depends

on whether it's more stringent than the federal regulations.

MR. CONFORD: Exactly. But you could have state common law. For example, there could be a state nuisance action, there could be a state trespass action --

QUESTION: If it held up to a higher standard than the federal statute?

MR. CONFORD: The New Jersey courts could adopt the standards contained in the statute and in the regulations as appropriate standards for conduct in common law actions.

QUESTION: Or still more stringent?

MR. CONFORD: They would have to be more stringent as far as pollution permits are concerned, but they could, in this case, fill in interstices in the federal regulations. If there were a specific situation based upon water quality of a particular body of water that EPA had not regulated, the State of New Jersey could do so. And those standards would apply in a New Jersey state court common law action.

QUESTION: But are you saying that the state common law could only apply in an interstitial sense? What about a case in which the state seeks to impose a common law rule that is directly governed -- say, the federal permit says, ten parts and the state common law rule says --

MR. CONFORD: If it were inconsistent --

QUESTION: More strict? More strict? If you comply with both, by complying with state --

MR. CONFORD: It is permitted to be more stringent. The statute expressly permits it to be more strict.

QUESTION: Even though it's the state common law?

MR. CONFORD: State common law would come along if there were an action for trespass, an action for negligence, an action for nuisance based on water pollution.

QUESTION: It would not be a defense to the state common law action if there was compliance with a federal permit?

MR. CONFORD: I think so. I think so. The state statute could not supersede, could not be inconsistent with the federal statute or federal regulations except to the extent that a permit could be more stringent. The state could require a more stringent regulation, because the Clean Water Act expressly permits that.

Now, our adversaries would argue that there should not be preemption in the loose sense that I've been using the term preemption for the reason that all that the Clean Water Act and the Ocean Dumping Act purport to do is to set standards but not to affirmatively, but not to constitute an affirmative policy which would be impervious to a common law action.

QUESTION: Are you suggesting, from what you say, is it possible that each of the coastal states could have a standard more stringent than the federal with respect to

offshore?

MR. CONFORD: Only as to their territorial waters.

QUESTION: Inside? Not the offshore?

MR. CONFORD: Inside; not the ocean.

QUESTION: That's three-mile limit, isn't it, along the coast?

MR. CONFORD: I believe so, three miles from the shoreline. Evidence of the fact that Congress intended to give agencies involved in this situation, whether industrial or public, time and reasonable standards, not perfection, is evidenced by the fact that the Clean Water Act contains a very numerous set of time regulations. Certain things have to be done 180 days after the statute is adopted, certain things have to be done 300 days later. By 1977 the public sewerage agencies must achieve secondary treatment. By 1983 they must achieve what is described as the best practicable waste treatment technology over the life of the works. In the case of certain industrial pollutants that are particularly harmful -- I'm now paraphrasing -- Congress has said that there should be obtained the best available technology achievable to result in reasonable progress to elimination of pollution.

I therefore suggest that there is an affirmative congressional policy not only to permit these agencies to meet these standards, but to be given time. Congress realized

that a pollution situation which has developed for decades couldn't be solved overnight, that it was necessary to apply time stages in which these agencies could achieve the goal of approaching a pollution-free situation.

MR. CHIEF JUSTICE BURGER: You're now into your colleague's time.

MR. CONFORD: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Horowitz?

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

ON BEHALF OF THE FEDERAL PARTIES: PETITIONERS IN NO. 80-12; RESPONDENTS IN NOS. 79-1711, 79-1754 & 79-1760

MR. HOROWITZ: Mr. Chief Justice, and may it please the Court:

I would first like to address the issue of the existence of an implied private right of action under the Clean Water and the Ocean Dumping Acts. On this issue, the federal petitioners urge that the judgment of the Court of Appeals be reversed.

The Court of Appeals held that a private right of action should be implied under both of these statutes, apart from the citizen's suit provisions, thus enabling the respondents, because they allege economic injury from pollution, to bring this lawsuit both for injunctive and monetary relief and against both the dischargers of pollution and the Government agencies responsible for administering these

statutes. The standards for determining whether violations of a regulatory statute might form the basis for an implied private right of action are by now well-established by this Court.

The fundamental inquiry is into the congressional intent. And, as this Court noted in the Transamerica cases, when Congress explicitly provides one remedy for violations of a statute, it is strong evidence that it did not intend that another private remedy be implied. In this case there can be little doubt regarding Congress's intent. Both statutes contain detailed provisions authorizing suits by private parties as an aid to enforcement of the statutes. These provisions are modeled on a prototype enacted in the Clean Air Act Amendments of 1970 after extensive congressional debate.

I will focus here on the specific citizen suit provision of the Clean Water Act. I believe a similar analysis is applicable to the analogous provision under the Ocean Dumping Act. Section 505 of the Clean Water Act authorizes a citizen suit only in certain specified circumstances. A citizen may sue any discharger who is violating an effluent limitation established under the Act or a related order of the Administrator of EPA. The district courts have jurisdiction in such suits to enforce the limitation and to assess the civil penalties against the violator. A citizen may also sue the

Administrator himself to compel him to perform a mandatory duty under the statute. Moreover, the Act establishes certain specific procedural limitations on this action. These relate to notice that must be given to EPA prior to suit, to abstention from suit when the Government is pursuing its own enforcement remedies, and to venue.

There is simply no evidence nor any reason to believe that Congress intended to create by implication yet another private cause of action for claims that cannot be brought under the citizen suit provision, as plaintiffs' claims in this case concededly were not brought under the citizen suit provision.

The savings clause to which respondents point as authority for this implied right of action means simply what it says. Preexisting statutory rights and common law remedies are preserved. Thus, in these statutes, Congress's intent is clear. Congress carefully considered the extent to which it wished to create a private right of action, and it intended to create only the right that it specified.

Now, in our brief we have also discussed the other Cort v. Ash factors and I will mention here only that, for reasons explained there, it also counsels against the implication of a private right of action. I would like to note here, however, that a refusal to imply the private right of action sought by the respondents is quite consistent with the

purposes of these statutes.

The primary reason for the enactment of the Clean Water Act as well as the Ocean Dumping Act was to place certain federal limitations on effluent discharges into our nation's waters, and to provide for enforcement of these limitations. Congress carved out a role in this scheme for citizen participation but only as an aid to enforcement, for which the primary responsibility rests with the Federal Government. Congress did not deal specifically in these statutes with remedies to compensate individuals for pollution damage that they suffer except to note that the Act did not take away any existing remedies. Thus no private right of action to compensate the plaintiffs need be implied. Other remedies which were preserved by the savings clause are their recourse for the adverse effect of pollution that they suffer.

QUESTION: Mr. Horowitz, before you leave the savings clause, you construe it as applying only to preexisting remedies. Was there a previous -- prior to the enactment of the statute was there a remedy for violating an effluent standard? Isn't that a concept that was created by the statute?

MR. HOROWITZ: Well, I think the simplest explanation of that language in the statute is that the citizen suit provisions specifically refer to suits to enforce effluent limitations. That is the only type of suit that one might

have thought would have been preempted by that language. Therefore it seems to me reasonable that Congress used the words "effluent limitation" again in the savings clause, just to make it clear it's referring back to the original language in the citizen suit provisions. Now, certainly --

QUESTION: Is it your position that the savings clause did no more than preserve previously existing rights of action, whatever they may have been, if any?

MR. HOROWITZ: That's right.

QUESTION: Or that it had, it preserved some sort of private rights of actions, depending upon this very statute?

MR. HOROWITZ: Well, we don't think it -- it did not create any new causes of action.

QUESTION: The savings clause didn't, certainly?

MR. HOROWITZ: The savings clause didn't; right. But it intended to --

QUESTION: Preserve preexisting causes, if any?

MR. HOROTITZ: -- preserve every single action that had existed before. In other words, to make clear that the citizen suit provision was establishing a new private action limited to those --

QUESTION: Well, then, wasn't -- isn't Mr. Justice Stevens correct in suggesting that until this statute came along there was no such right of action? Even conceivably.

MR. HOROWITZ: The citizen suit provision refers to any other relief, it doesn't refer only to effluent limitations. It does refer to the phrase "effluent limitation" --

QUESTION: It does.

MR. HOROWITZ: -- but it said -- I don't think there were these effluent limitations prior to the enactment of the Clean Water Act.

QUESTION: There weren't; there were not. The concept didn't exist, did it?

MR. HOROWITZ: No, the concept didn't exist; that's correct. So that's right.

QUESTION: Well, you're referring to a nuisance suit, common law nuisance claim that's preserved? What is preserved? Would you give us some concrete illustrations?

MR. HOROWITZ: Well, certainly, the common law nuisance remedy was preserved; also any remedy relating to water pollution under any other statute. States that --

QUESTION: That's where you and Mr. Conford part company, at that point?

MR. HOROWITZ: As far as the federal common law, that's correct.

QUESTION: Was there a common law nuisance right of action in a federal court with no diversity --

MR. HOROWITZ: Yes, the Illinois v. Milwaukee case was decided prior to the passage of the statute --

QUESTION: Yes, I know, but the state was a plaintiff there. I'm talking about --

MR. HOROWITZ: The state was the plaintiff.

QUESTION: A private nuisance action. Was there any such thing? Do you know of any? Can you cite us any?

MR. HOROWITZ: No. Because the Illinois v. Milwaukee case was only decided a couple of months before it so far as I know.

QUESTION: Which was the state, the state was the plaintiff there.

MR. HOROWITZ: As far as I know, no private party had sought to invoke that decision prior to the enactment of this Act.

QUESTION: Well, then, what was there to save? What federal rule --

MR. HOROWITZ: Well, Congress was just making it clear that they were saving whatever there was to save.

QUESTION: Whatever existed.

QUESTION: Well, isn't there some truth to what Judge Conford said that the court more or less cast about for a reason to give the State of Illinois another forum in which to try its case than this one, by saying that federal common law was available?

MR. HOROWITZ: Well, the court gave many explanations for why it was implying common law. It didn't say

that this was to be applied, to be restricted only to cases that could otherwise be brought under the original jurisdiction, and the reason for finding the federal common law of nuisance was because of the overriding federal interest in interstate pollution; I mean, controlling interstate pollution. I don't know what the court's reasoning was, but they didn't say that they were doing it solely to divest themselves of original jurisdiction in that case.

The State of New York has argued in its brief that the federal common law of nuisance should be restricted to cases that could otherwise be brought under this Court's original jurisdiction, but I don't think there's any basis for that and I don't think that the reasons that the court gave in Illinois v. Milwaukee support that contention.

I guess I'm starting to get into the second issue here, and if I can just, if I could respond one more time to Mr. Justice Stevens' question: I don't think that that was the best way to draft the savings clause, but I don't think that the fact that they used the word "effluent" -- there is a rational explanation for their use of the words "effluent limitation."

QUESTION: Well, the rational explanation being that if there is another remedy created under this statute to enforce an effluent limitation, we don't want to tamper with that remedy. And you're saying, yes, but the only other

remedy under this statute is the citizen suit provision; there's no implied remedy.

MR. HOROWITZ: It just seems inconceivable that in enacting this detailed citizen remedy that Congress intended to imply some other remedy without saying so, and by doing it in this very mystical fashion, using the word "effluent limitation" in the savings clause.

QUESTION: But if you don't read it that way, that language is clearly superfluous. It would mean the same thing if you just took out "effluent standard limitations."

MR. HOROWITZ: The clause is drafted as broadly as possible. Congress just wanted to make it clear that they weren't taking away any other remedies. Now, but -- there may be some superfluities.

QUESTION: Although that doesn't answer the question about what remedies existed, if any.

MR. HOROWITZ: Right. Now -- well, let me get to that now, I guess.

On the issue of the federal common law of nuisance, federal petitioners urge affirmance of the Court of Appeals decision. Now, in Illinois v. Milwaukee, this Court recognized the applicability of the federal common law of nuisance to problems of interstate pollution because of the overriding federal interest. Putting aside for one moment the question of whether that's since been preempted by Congress, the

question here is whether that remedy is available to private parties, or whether it's to be restricted to a state, the context in which it was previously before the Court.

Extensive water pollution does not respect state boundaries as it travels through the water. Now, the Court gave several examples of previous decisions where it had noted that interstate pollution, both air and water, was an area that touched upon a federal interest and required implication of a federal remedy. In the words of Judge Friendly, "The interstate nature of the controversy here makes it inappropriate that the law of either state should govern." Now, given the existence of this federal common law, there is no reason why it should not be made available to private parties. This Court specifically noted in the Milwaukee case that the existence of a common law in that case was not the consequence of the fact that the plaintiff was a state. The interest in uniformity and difficulties in applying state law equally support the application of federal common law whether the plaintiff is the United States or a private party.

QUESTION: And will you tell me again what the basis of federal jurisdiction is?

MR. HOROWITZ: The basis of federal jurisdiction is under Section 1331(a), because there's a federal common law. The reason for the implication of the federal common law

is the need for a uniform standard to apply to an incident of interstate pollution, as pollution crosses individual state boundaries.

QUESTION: So a federal court has jurisdiction of a common law nuisance cause of action because of 1331?

MR. HOROWITZ: Right. It presents a federal question, the federal question being under the federal common law of nuisance.

QUESTION: And this is only because this is an interstate nuisance?

MR. HOROWITZ: Yes. Well --

QUESTION: Otherwise you'd overrule Erie v. Tompkins, wouldn't you?

MR. HOROWITZ: Well, I'm not seeking to overrule Erie v. Tompkins. There may be federal interests, for example, the United States as a plaintiff, that may be with or -- as an intrastate --

QUESTION: But that wouldn't be 1331 jurisdiction?

MR. HOROWITZ: Well, no.

QUESTION: That would be the other jurisdictional statutes --

MR. HOROWITZ: Certainly, where a private party brings a suit and there's no interstate effects, we agree that the federal common law of nuisance does not apply.

QUESTION: And a federal court would not have

jurisdiction, would it?

MR. HOROWITZ: No, because there's no federal question. The federal common law of nuisance does not apply. So a suit could not be brought in the federal court, it would be restricted to a state remedy.

Now, I'd like to make a couple points on the pre-emption argument which Judge Conford has focussed on. First of all, it is abundantly clear from these statutes that there was no intent to preempt the common law of nuisance, neither the Clean Water Act nor the Ocean Dumping Act. This is clear both from the legislative history and from the savings clause, and in the Clean Water Act the legislative history specifically referred to actions that have been brought under the federal common law of nuisance.

Now, the other bases that are ordinarily looked at for this Court for preemption, at least in the state context, also do not apply here. There is no conflict between the federal common law of nuisance remedy and these statutes.

Similarly, the fact that --

QUESTION: Why do you say that, when the federal statute provides for effluent limitations and specific permits and so forth, and a federal nuisance remedy could simply involve a single federal judge saying, well, I don't think the EPA or whoever it is that administers the effluent permits acted with sufficient stringency here. I'm going to reduce

the effluent limit.

MR. HOROWITZ: Well, I think that's -- considering the preemption clause I think it's important to draw a distinction between whether a cause of action for nuisance exists at all and what standards are to be applied on the merits in determining whether there's a nuisance. Now, this Court said in Milwaukee that the standards established under the federal acts will be highly relevant to determining whether a nuisance exists.

Now, if there's a permit -- and I should point out that in this case the complaint alleges that the discharges were in violation of permits, so there really is no defense at all because of the permit. If there's a permit, then that permit is relevant in determining whether there is a nuisance to the extent of what EPA considered in issuing the permit. Now, what --

QUESTION: Do you think that the federal judge could go beyond the permit and say, well, this permit allows too much effluent and under the common law of nuisance I'm going to say it's only half as much?

MR. HOROWITZ: Unless he found some deficiency in what EPA did, I wouldn't --

QUESTION: Well, isn't there a statutory review provision for EPA that a person dissatisfied by the permit issued can appeal EPA's actions?

MR. HOROWITZ: Yes. But there are gaps in the statute. The Clean Water Act does not control every kind of discharge. There are certain conditions listed in our brief in the Milwaukee case, but there are certain aspects of discharges that were not covered by --

QUESTION: Just one question, if I may, before you sit down. On this matter of uniformity that you seem to press, taking Mr. Justice Rehnquist's illustration: one district judge has imposed a more stringent standard; the one in the next district might go the other way. Is that not so? Another district judge in the same circuit? And until the circuit settled it, you'd have no uniformity.

MR. HOROWITZ: Well, perhaps there's a little confusion here. The choices, as I understand it, the municipal petitioners are not arguing that there is no nuisance remedy, the question is whether there is a federal remedy or whether the plaintiffs must resort to a state remedy. So if the goal of uniformity is advanced by having a federal remedy, in a case like this where you have pollution and pollution effects in two different states as well as in the ocean, if there's a federal remedy, this can all be resolved by one judge in one court in one action. If there are state remedies there will have to be a suit in New York, I suppose, a suit in New Jersey, possibly a suit in federal court. And the result may be three different determinations by three different

standards, all to the same conduct. So, in that sense, I think the uniformity rationale is much better served by federal action.

QUESTION: You wouldn't have any uniformity until finally all of these cases would work their way through the circuits by conflicts up to this Court. You may have two, three, five years before you'd have any uniformity in this field. Is that what you're saying?

MR. HOROWITZ: Well, you would have uniformity in a particular -- as far as a particular pollution incident. Now, it's possible that you would have a different standard applied in some suit in the State of Washington and in some suit in the State of Florida, but the Clean Water Act itself takes account of that sort of disparity. It entitles states to have their own more stringent limitations. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you. Mr. Corbin.

ORAL ARGUMENT OF ROBERT P. CORBIN, ESQ.,

ON BEHALF OF THE RESPONDENTS

NATIONAL SEA CLAMMERS ASSOCIATION ET AL.

MR. CORBIN: Mr. Chief Justice, and may it please the Court:

A brief review of the factual background of this case that is submitted is helpful to a full consideration of the significant environmental issues present.

My clients are the National Sea Clammers Association

and Mr. Gosta Lovgren, individuals who are commercial fishermen and ply their trade in the waters of the Atlantic Ocean immediately adjacent to the State of New Jersey. During the summer of 1976 there occurred what may be described as a rapid and massive growth of algae in the geographic area ranging from the southwest portion of Long Island to a point approximately due east of the southern tip of the State of New Jersey.

Specifically, what we complain about is that when this massive algal bloom died, it settled on the ocean floor creating a condition of oxygen deficiency or anoxia in and about the waters on the ocean floor. As a result, there was a tremendous amount of death and destruction to the marine and other life of the ocean, and particularly with respect to the ocean bottom dwellers who were not equipped to escape the blighted area.

The impact of this algal bloom was especially deleterious since July is the normal spawning season, so it had an impact not only on the existing stocks of fish and shellfish but future stocks of marine life in and about the blighted area. As a result of this the commercial fishing/clamming-related industries were virtually destroyed.

In their complaint we have alleged that this algal bloom resulted from two differing types of conduct. It was first alleged that the City of New York and various other

New York and New Jersey municipalities discharge sewage sludge and other waste materials, many of which are highly toxic, into the Hudson River and New York Harbor where it is then carried out into the Atlantic Ocean.

The second and somewhat different aspect of the causal part of this problem arises from the fact that various municipalities ostensibly under the aegis of the Army Corps of Engineers directly dump similar materials, including very highly toxic substances, directly into the Atlantic Ocean where it was actually transported out by boat and by barge.

Of the three issues that this Court designated to entertain argument on, we first present argument with respect to our position that the federal common law of nuisance has not been preempted since this Court's first recognition of that remedy in the leading decision of Illinois v. City of Milwaukee.

As we have indicated in our brief, there are at least three arguments which we maintain compel the conclusion that the federal common law of nuisance not only continues but is available for my clients in this case. First, an analysis of the two statutes, of the two environmental statutes with which we are involved. The Federal Water Pollution Control Act and its amendments, and the Marine Protection Research and Sanctuaries Act indicate that where Congress has chosen to preempt an area either entirely or partially, it has done

so expressly. To cite but two examples.

First, under the Federal Water Pollution Control Act, as I believe Judge Conford has already noted, the Federal Water Pollution Control Act has preempted the authority of a state, of any municipality within the state, or of any similar agency from adopting or enforcing -- yes, sir? -- from adopting or enforcing any effluent standard or limitation less stringent than that adopted pursuant to the authority of the federal statutes.

QUESTION: But can't that be read as simply preempting, federal law preempting state law and not necessarily precluding federal law preempting preexisting federal common law?

MR. CORBIN: I don't think so, Your Honor. I believe they would have been much more explicit. I would further suggest that that provision of the Federal Water Pollution Control Act must also be read in conjunction with the savings clause of that statute, which I believe is even clearer statutory language to this Court that they did not intend to preempt the rights and remedies that already existed at the time that the savings clause was enacted.

I would also submit that there is nothing in the savings clause which indicates, other than perhaps the misnomer which has been attached to it, to suggest that that only reserved rights and remedies which existed as of the time it

was enacted, as opposed to the rights and remedies which would grow out of a developing state or federal common law of nuisance or in other environmental areas --

QUESTION: Well, but, in the Illinois v. City of Milwaukee, the court was quite specific about stating that perhaps eventually federal common law would be superseded by a federal statute too.

MR. CORBIN: I would certainly concede, Your Honor, that that argument was made, but with respect, we would submit that if that time is ever going to come, it certainly hasn't come now. I think at the time the federal environmental statutes were enacted, at least a part of the congressional purpose and design was the recognition that the previously existing statutes were inadequate in a number of respects, not the least of which was the fact that whereas the previous emphasis for environmental protection was thrust upon the states, it was determined that for whatever reason the states were simply not carrying out those dictates.

I think that a careful reading of the provisions of the two statutes, the Clean Water Act and amendments, and the Ocean Dumping Act, indicates that the approach currently taken by Congress is to afford a full panoply of federal protection, but that that protection to be provided is not antagonistic but rather will be coextensive with the availability of private enforcement, particularly in the context

of this suit where you have individuals who are not just claiming that the water that was polluted smelled bad, that they couldn't fish or boat or enjoy other recreational activities normally attendant with the Atlantic Ocean. These men's businesses were destroyed.

QUESTION: Well, why didn't Congress simply endorse the common law of nuisance rather than provide for a whole series of effluent limitations and that sort of thing, and the EPA issues specific permits, and the Army Corps of Engineers to permit dumping, and allow review of each of those actions in federal courts?

MR. CORBIN: I would submit, respectfully, Your Honor, that indeed Congress did endorse precisely that, namely, the continued availability of the private damage remedy where damages can be shown. We have cited in our brief from the 1972 Senate report which considered the Federal Water Pollution Control Act and clearly and unambiguously indicated that the private damage remedy remains where damages could be shown, as indeed we maintain our clients can show. And they also indicated that compliance with the requirements of the Act would not be a defense to a common law action for damages.

So, I think, as I attempted to indicate earlier, Congress declared, took a completely different approach from the earlier approach. Yes, there would be a full panoply,

a comprehensive regulatory and statutory framework. Far from viewing the continued existence of a private remedy as being antagonistic to that, as I believe my opponent has suggested, Congress chose to permit that as a welcome conflict, if indeed there was a conflict.

QUESTION: Well, at the time that was formulated in Congress, had there been any cases affirming the existence of a private action for damages for nuisance in a federal court invoking independent federal jurisdiction of it?

MR. CORBIN: To my knowledge, Your Honor, there had been no such cases at that time. But we would submit that the savings clause cannot be read to mean that it only preserves rights which existed as of the date of its enactment. There is simply nothing to suggest that this Court today, in 1981, in evaluating our case, must determine what rights and remedies if any my clients had in 1972 when the statute was enacted, when there is nothing in the statutory language or in the legislative history that indicate that there was a time lock on a court's analysis as to --

QUESTION: Except for the misnomer, "savings clause," and you say it's a misnomer?

MR. CORBIN: Exactly.

QUESTION: A savings clause ordinarily is just that, a time lock, isn't it?

MR. CORBIN: I would agree that if it was a true

savings clause it would be that. Unfortunately, that misnomer, as I have phrased it, has been attached and, I believe, incorrectly.

QUESTION: Until this case, have there been independent actions by private parties for damages for nuisances invoking federal jurisdiction?

MR. CORBIN: Yes, there have, Your Honor. We cited one in our brief, if I may, the Byram River decision. Yes, Your Honor, the Byram River v. Village of Port Chester, a Southern District of New York decision from 1975. I might also add that --

QUESTION: Did that invoke federal jurisdiction under 1331?

MR. CORBIN: Yes, Your Honor. They held that standing to sue under --

QUESTION: It wasn't a diversity case?

MR. CORBIN: No, Your Honor. The specific jurisdiction for the district court was under the federal common law of nuisance.

QUESTION: So, it was thought, there held to involve a federal question?

MR. CORBIN: That's correct, Your Honor. I believe I was proceeding into the second point of our argument, namely, that the clauses -- I hesitate to use the word "savings clauses," but for want of a better phrase at that

time, if I may be permitted to use that, the savings clauses themselves and the legislative history, specifically the Senate report accompanying the Federal Water Pollution Control Act Amendment of 1972, we submit clearly and unamibiguously indicates that, yes, in a sense, these were savings clauses, because they most certainly preserved all rights and remedies existing as of the date the statute was enacted.

However, they do not have, as Mr. Justice Rehnquist has suggested, a time lock to preclude the continued availability of new rights and remedies which might be developed in the future by judge-made law under the federal common law of nuisance.

QUESTION: Isn't that an assumption, that Congress was buying a pig in a poke?

MR. CORBIN: I would not believe that to be the case, sir, particularly if one remembers the history of the development of this statute. The previous statute was, I believe, woefully inadequate both with respect to the scope of area covered as well as the inadequate remedies which were provided. Indeed, that was one of the very reasons cited by this Court in its decision in Illinois v. City of Milwaukee where there was not even a mandatory conciliation or arbitration type provision with respect to disputes over interstate pollution.

QUESTION: Well, in your Byram River case, supposing

there had been an effluent permit granted, and the district court said, we think EPA was just all off base here, and therefore we're going to cut the amount of effluent in half. Now, do you think that Congress welcomed that sort of conflict when it adopted the Water Pollution Control Act?

MR. CORBIN: Yes, I do, sir, and I would submit that that so-called conflict, we certainly recognize it as a real one, but would submit that the conflict of that nature already exists and indeed my opponent urges that it continue to exist. We submit that there is no greater conflict or potential conflict with respect to what we are asking than the situation exists under Illinois v. City of Milwaukee where in your example, if I may borrow it, sir, the judge says, well, I can't award damages, but I'm going to order you to completely stop dumping, and therefore be limited to injunctive relief. I believe that that capability, that potential for conflict, is indeed welcome.

To cite but another example, that under the Federal Water Pollution Control Act the states are free to adopt more stringent limitations, effluent limitations, than are prescribed, if at all, under the federal statute.

QUESTION: Well, what is the person who has the effluent permit supposed to do when the district judge tells him, no, you can only do half of what the EPA has told you you can do?

MR. CORBIN: Well, before that question is reached, sir, I believe that there is a further safeguard for that person, and that is particularly with respect to the standards to be applied to determine whether something is in violation of the federal common law of nuisance or, indeed, constitutes a public nuisance. Though we don't believe it's necessary for this Court to reach the issue, we would certainly be satisfied if this Court were to adopt the standard suggested by the 3rd Circuit which, as you know, was the restatement of torts, definition of a public nuisance.

Not only must the existence of the public nuisance be determined, but the comments, the official comments to that restatement provision suggest that where, as our opponents have suggested, there is a comprehensive legislative or regulatory framework which has been imposed to prescribe or regulate a given conduct, the courts are especially loath to describe the conduct regulated as being a violation of a common law. So I do not see that there would be any particular difficulty with a federal judge being confronted with that situation.

We will frankly concede that we have, even if this Court were to affirm the findings of thd 3rd Circuit, my clients have a difficult road ahead of them in terms of the evidentiary burdens to be overcome. We would only ask that we be given the opportunity to meet those burdens at trial.

One other comment which I wish to address with respect to the continued need for the federal common law of nuisance. As my opponent has indicated previously, the state authority to regulate to the extent to which it exists at all on the Atlantic Ocean goes no further out than the three-mile limit.

We have alleged in our complaint a situation where there is a certain degree of pollution within that three-mile limit, but there is also a certain degree of pollution from this algal bloom in the next area going geographically from the shore, and that is in the 12-mile-limit area.

We submit that the only law which can apply in that area within the 12-mile limit in which the states do not have any authority to regulate has to be the federal common law of nuisance, and indeed the geographic area, or at least a portion thereof, which was affected is precisely one of the remaining interstices in which the federal common law must apply.

QUESTION: Mr. Corbin, may I just ask -- I understand your common law theory, but your statutory theory, your implied cause of action theory, do you allege that the defendants violated the effluent limitation?

MR. CORBIN: Yes, we do, Your Honor. We -- our thrust is twofold. Contrary to the assertions in some of the briefs, it has never been established as a matter of record,

and indeed we intend to plead, as we have alleged, that permits under both statutes, the dumping permits under the Ocean Dumping Act and the permits to discharge the sewage and sludge, that those dumping and discharging activities were in violation of permits which were issued as well as the rules and regulations under which the permits are issued.

QUESTION: Are you still able to make those claims by giving the 60-day notice?

MR. CORBIN: Without giving the 60 days, or --

QUESTION: No, with, giving, say you did it, you gave notice today? Could you still make those claims?

MR. CORBIN: I believe we could. However, we may --

QUESTION: Why couldn't we have avoided the whole implied cause of action issue by having you give notice a couple of years ago?

MR. CORBIN: Well, the difficulty with that, Your Honor, as we argued unsuccessfully to the district court, somewhat more successfully to the 3rd Circuit -- as Your Honor may recall, the 3rd Circuit indicated that could have been an alternate basis to support our federal statutory claims. We filed our complaint in January of '77. The conduct about which we complain, and its effect, was over by the fall of 1977. It was rather futile to request an end to the activity that had already destroyed the fishing industry off the coast of New Jersey.

QUESTION: Oh, I see, and your 60-day -- that claim would not be a damage claim, would it?

MR. CORBIN: That's correct, sir. And, I may also add that neither of the two statutes permitted private damage claims.

Contrary to the assertions of Judge Conford that what we were seeking is a broad and far-ranging sort of relief, the relief which we request and which we submit we are entitled to under the federal common law of nuisance is going to involve a relatively small class of individuals.

We request this Court not to adopt the narrow and overly restrictive reading of the rationale of this Court's 1972 decision of Illinois v. City of Milwaukee. As that Court indicated, it was not merely the character of the parties, the fact that a plaintiff was suing a sovereign entity not within its own jurisdiction, that led the Court to apply the federal common law of nuisance.

The Court held there, and we maintain that holding is applicable here, that where there are, such as here, an involvement of an interstate waterway, particularly a situation where there is truly an interstice, or actually, a vacuum, with respect to the non-application of any other law other than the federal common law of nuisance, that certainly the rationale of the City of Milwaukee decision remains.

I believe my time has ended, unless there are

any questions. Thank you.

MR. CHIEF JUSTICE BURGER: Judge Conford, do you have anything further?

MR. CONFORD: Nothing further, sir; thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:34 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1711
MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL.,
V.
NATIONAL SEA CLAMMERS ASSOCIATION ET AL.

No. 79-1754
JOINT MEETING OF ESSEX AND UNION COUNTIES,
V.
NATIONAL SEA CLAMMERS ASSOCIATION ET AL.

No. 79-1760
CITY OF NEW YORK ET AL.,
V.
NATIONAL SEA CLAMMERS ASSOCIATION ET AL.

&

No. 80-12
ENVIRONMENTAL PROTECTION AGENCY ET AL.,
V.
NATIONAL SEA CLAMMERS ASSOCIATION ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Bill J. Gilbert