

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1233

TITLE INTERNATIONAL PAPER COMPANY, Petitioner V.  
HARMEL OUELLETTE, ET AL.

PLACE Washington, D. C.

DATE November 4, 1986

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(202) 628-9300  
20 F STREET, N.W.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 INTERNATIONAL PAPER COMPANY, :

4 Petitioner, :

5 V. : No. 85-1233

6 HARMEL QUELLETTE, ET AL. :

7 - - - - -x  
8 Washington, D.C.

9 Tuesday, November 4, 1986

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 12:59 o'clock p.m.

13 APPEARANCES:

14 ROY L. REARDON, ESQ., New York, New York; on behalf  
15 of the petitioner.

16 PETER F. LANGRICK, ESQ., Middlebury, Vermont; on behalf  
17 of the respondents.

18 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,  
19 Department of Justice, Washington, D.C.; on behalf of  
20 the United States as amicus curiae supporting  
21 respondents.

C O N T E N T S

ORAL ARGUMENT OF

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ROY L. REARDON, ESQ.,

on behalf of the petitioner

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PETER F. LANGROCK, ESQ.,

on behalf of the respondents

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LAWRENCE G. WALLACE, ESQ.,

on behalf of United States

as amicus curiae supporting respondents

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ROY L. REARDON, ESQ.,

on behalf of the petitioner - rebuttal

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1 PROCEEDINGS

2 CHIEF JUSTICE REHNQUIST: We will hear  
3 argument now in No. 85-1233, International Paper Company  
4 versus Quellette.

5 Mr. Reardon, you may proceed whenever you are  
6 ready.

7 ORAL ARGUMENT OF ROY L. REARDON, ESQ.,  
8 ON BEHALF OF THE PETITIONER

9 MR. REARDON: Mr. Chief Justice, and may it  
10 please the Court, this is a class action brought by  
11 citizens of Vermont who own property on the Vermont side  
12 of Lake Champlain. The State of Vermont is also a  
13 plaintiff in this case because of its property ownership  
14 on the same side. The petitioner here has a paper mill  
15 on the New York side of Lake Champlain and discharges  
16 effluent into Lake Champlain in connection with the  
17 manufacture of paper.

18 The petitioner is regulated by New York State,  
19 which is part of the procedure set up under the Clean  
20 Water Act which supplements the regulation which the Act  
21 provides initially by the EPA, the Federal EPA. In this  
22 particular case the permit is supervised in a very  
23 detailed way and the plant policed by the State of New  
24 York.

25 While there is a challenge in the case to the



1 manner in which the petitioner has performed under the  
2 permit the basic thrust of the lawsuit, at least in this  
3 phase, is a common law claim of nuisance. The  
4 plaintiffs here, the respondents in this Court, seek  
5 compensatory damages of \$20 million and punitive damages  
6 of \$100 million.

7 The petitioner moved to dismiss in the  
8 District Court, and basically the District Court held  
9 decision on that motion pending the resolution of what  
10 we refer to as Milwaukee III, which is the Seventh  
11 Circuit opinion which is referred to very fully in the  
12 briefs of both sides.

13 The motion to dismiss by the petitioner was  
14 predicated on the decisions of this Court in Milwaukee I  
15 and Milwaukee II and by reason of the amendments to the  
16 Clean Water Act in 1972. Now, as the Court has very  
17 fully discussed in its two opinions to which I have  
18 referred, the Act is an extremely comprehensive Act  
19 which covers the field with respect to pollution of  
20 navigable waters and interstate waters. There is  
21 basically regulation by the Federal Government. The Act  
22 permits supplementation of that on more or less a dual  
23 regulatory basis by the states with the states being  
24 able to take over and assume the regulation to the  
25 extent that the state regulation equals or exceeds in

1 terms of stringency what the Federal requirements are.

2 The Federal requirements are obviously  
3 technical in nature, dealing with the extent to which  
4 obvious discharges from manufacturing facilities are  
5 permitted to be injected into interstate waters. There  
6 is within the framework of this Act a very careful  
7 balance between the position of the Federal Government  
8 and the Federal regulation and the position of the  
9 source state, and provides amply for source state  
10 regulation, indeed for the total displacement of Federal  
11 regulation by enabling the states to take over to the  
12 extent that their requirements meet or exceed the  
13 requirements of the EPA.

14 Under the permitting procedure, to the extent  
15 one does not obtain a permit you are in fact in  
16 violation of the law and acting illegally. The  
17 permitting procedure if handled by the Federal  
18 Government basically calls upon the EPA to give adequate  
19 notice to those states, including the source state,  
20 which could be affected by the issuance of the permit,  
21 so everyone gets an opportunity to be heard within the  
22 framework of Federal regulation.

23 To the extent the states assume that role by  
24 reason of their own regulations, equal to or more  
25 stringent than those of the Federal Government, similar

1 notice is given to affected states, non-source states,  
2 so that they again may be given the opportunity to  
3 participate in the permitting procedure.

4 Now, within the framework of that Act it seems  
5 to me that there is before this Court two issues.  
6 Simply stated, the first issue is the extent to which  
7 Vermont law can be applied with respect to what has  
8 happened here and what is involved here, and secondly,  
9 the extent to which there may be jurisdiction within the  
10 Vermont courts to hear the matter under the provisions  
11 of the Clean Water Act.

12 QUESTION: You say when the state undertakes  
13 the job then it gives notice, and so on and so forth.  
14 Undertakes what job?

15 MR. REARDON: Undertakes the -- a state under  
16 the Act may assume the role of the authority which  
17 regulates the discharger in the source state.

18 QUESTION: In making the law or just -- or  
19 making its own law conforming to Federal standards?

20 MR. REARDON: Making its own standard provided  
21 it is equal to the Federal standard or more stringent.

22 QUESTION: But it is nevertheless a state  
23 law?

24 MR. REARDON: It is a state permitting  
25 procedure. It is the basic part of the Clean Water Act

1 that the state may do this in terms of regulation.

2 QUESTION: But if someone sues and says a  
3 discharge is not conforming with the law, is it state  
4 law that he is --

5 MR. REARDON: To the extent that --

6 QUESTION: -- acting under or not?

7 MR. REARDON: Well, to the extent that there  
8 is a challenge permitted directly by the Act, that  
9 challenge can come from a citizen.

10 QUESTION: Yes.

11 MR. REARDON: And to that extent the challenge  
12 would be based upon source state law as we see it in  
13 this particular case.

14 QUESTION: And that is what this -- that isn't  
15 what this case says?

16 MR. REARDON: Well, there is a very  
17 fundamental issue here with respect to what law is  
18 applicable with respect to the claims made by the  
19 plaintiffs in this case. We under -- starting at the  
20 beginning point of Milwaukee I, where this Court, we  
21 believe, concluded that interstate water pollution was a  
22 matter of Federal concern as to which Federal common law  
23 applied, and proceeding to Milwaukee II, where the Court  
24 stated, we believe that Federal common law had been  
25 displaced by the amendments to the Clean Water Act, we



1 come now to the conclusion that by reason of the  
2 amendments to the Clean Water Act, indeed, under the  
3 specific provisions with respect to where the suit  
4 should be brought, and indeed under general preemption  
5 principles, that the law of New York is applicable with  
6 respect to discharges from a New York source.

7 QUESTION: But why is any state law  
8 applicable? It is because Congress said it could be.

9 MR. REARDON: Congress --

10 QUESTION: Isn't that right?

11 MR. REARDON: -- within the basic framework of  
12 the Act, Your Honor, Congress has indicated that --

13 QUESTION: New York can --

14 MR. REARDON: -- we feel source state law is  
15 applicable, in this case New York.

16 QUESTION: Well, Congress says the source --  
17 the state may make the law for it.

18 MR. REARDON: Well, it really talks in terms  
19 of regulation as distinguished from making the law,  
20 but --

21 QUESTION: Yes, but you just told me the state  
22 could set the standards, too.

23 MR. REARDON: It does, Your Honor, the  
24 technological standards. Yes, Your Honor.

25 QUESTION: And I suppose you say that Congress

1 anticipated that the source state would set such  
2 standards if it undertook the job.

3 MR. REARDON: I do, indeed, Your Honor.

4 QUESTION: Mr. Reardon, did you say there was  
5 some suits reserved for the state courts?

6 MR. REARDON: Yes, Your Honor. Indeed --

7 QUESTION: Which are they?

8 MR. REARDON: Well, under the general  
9 framework of the statute, you may bring a suit within  
10 the source state either in the state or the Federal  
11 court if you are an injured party. Our position would  
12 be that you may bring such a suit.

13 QUESTION: Perhaps I misunderstood you. I  
14 thought you said there were some kinds of suits that  
15 could be brought only in state court.

16 MR. REARDON: No, Your Honor.

17 QUESTION: I am sorry.

18 QUESTION: Is there any reason --

19 QUESTION: Excuse me. What if (inaudible)  
20 citizens of different states -- citizens of the same  
21 state?

22 MR. REARDON: If it is citizens of the same  
23 state who are challenged --

24 QUESTION: They aren't -- say the suit is that  
25 here you have a permit under New York law and I claim

1 that you are violating the New York standards, and that  
2 is a claim under New York law, isn't it?

3 MR. REARDON: It is really a claim under the  
4 Act, Your Honor, because if you are proceeding --

5 QUESTION: You mean you could go right into  
6 Federal court on a claim like that if you live in the  
7 same state as the discharger?

8 MR. REARDON: Well, my understanding is that  
9 the Act provides that you must proceed within the  
10 district in which the source is located. Now, I think  
11 there can be diversity jurisdiction within the source  
12 state. On the other hand, if you have citizens of the  
13 same state I would believe you would be relegated to  
14 state court.

15 QUESTION: That is -- so it is not a Federal  
16 question in my example.

17 MR. REARDON: It would not be a Federal  
18 jurisdiction-based issue at that point, Your Honor.

19 QUESTION: All right.

20 MR. REARDON: It would be a challenge to  
21 whether or not there has been compliance with the permit  
22 as administered by the state.

23 QUESTION: And you take the position, Mr.  
24 Reardon, that even in a diversity suit that a Federal  
25 District Court could not entertain the action in the

1 State of Vermont --

2 MR. REARDON: Yes, Your Honor.

3 QUESTION: -- under this Act?

4 MR. REARDON: Yes, we do.

5 QUESTION: (Inaudible) to have to apply New  
6 York law.

7 MR. REARDON: Yes, Your Honor, we would say  
8 that under this particular provision it is our position  
9 that New York law would in fact apply rather than the  
10 law of Vermont.

11 QUESTION: Why do you say that it is a state  
12 law action? Wouldn't the suit be for violation of the  
13 Federal law?

14 MR. REARDON: Well, there can be two suits,  
15 Your Honor. Maybe I misunderstood His Honor's  
16 question. There can be a suit directly brought in  
17 accordance with the provisions of the Act under which a  
18 Governor or citizen may challenge compliance with a  
19 discharger's activities under the permit which is  
20 issued.

21 QUESTION: Right, and even though the level of  
22 discharge and the technological requirements are  
23 established by the state, if you violate that you are  
24 violating a Federal law, right, and the suit would be  
25 for violation of Federal law.



1 MR. REARDON: That is true, Your Honor.

2 QUESTION: So that even if you had two  
3 citizens from the same state you could bring it in  
4 Federal court.

5 MR. REARDON: On a Federal jurisdiction  
6 basis.

7 QUESTION: Well, now you have given two  
8 different answers to the same question.

9 MR. REARDON: Now I have given two different  
10 answers. I appreciate that, Your Honor. I guess  
11 perhaps what I was thinking of is the common law  
12 nuisance suit, which is also part of what is involved in  
13 this case, and the question --

14 QUESTION: Because that would solve the whole  
15 question of whether Vermont can apply its own law, if  
16 the only law that is applicable to this discharge is a  
17 Federal law. Well, whatever court you have to bring it  
18 in is going to apply Federal law.

19 MR. REARDON: With respect to the Federal  
20 claim, with respect to a violation of the permit.  
21 However, with respect to a common law claim, which is  
22 part of what we are dealing with here, we come to the  
23 question which is one of the basic questions in the  
24 case, the extent to which Vermont law can be applied by  
25 reason of the general scheme of the Act which suggests

1 that law other than the law of the source state has in  
2 fact been preempted, so that you wind up with a common  
3 law nuisance, as the Seventh Circuit in fact held, a  
4 common law nuisance case could lie in the state court of  
5 New York applying New York law, which would or could be  
6 a diversity case, and I believe that may be where I was  
7 misleading the Court in my earlier comments.

8 The irony of the situation --

9 QUESTION: Before you go on, in that New York  
10 State nuisance action I assume that New York State could  
11 have the standards of pollution that are necessary to  
12 sustain a nuisance action a good deal lower than the  
13 standards that it fixes for purposes of the Federal  
14 Water Pollution Act, couldn't it?

15 MR. REARDON: I would think that is possible,  
16 Your Honor, although I would think in application it  
17 would be unlikely, but I will concede it is possible.

18 QUESTION: Right, but it could. I mean, that  
19 is, unless you are a really bad polluter there is no  
20 nuisance action. You can be a polluter without being a  
21 nuisance. New York could write its law that way if it  
22 wanted to.

23 MR. REARDON: It could. The law of nuisance  
24 being as vague as it is, it is sort of difficult to be  
25 sure, but I will concede that for purposes of Your

1 Honor's question.

2 QUESTION: Because it wasn't a nuisance  
3 wouldn't mean that you wouldn't have another cause of  
4 action for violation of the permit.

5 MR. REARDON: That would be a different claim  
6 entirely, Your Honor.

7 QUESTION: Yes.

8 MR. REARDON: That is a separate and distinct  
9 claim, I would expect.

10 QUESTION: Mr. Reardon, I take it the Federal  
11 Government here takes the position that it is also  
12 possible to have a common law damages action in the  
13 State of Vermont --

14 MR. REARDON: It does, Your Honor.

15 QUESTION: -- based on whatever New York State  
16 has set as the pollution limit.

17 MR. REARDON: Yes, they suggest that that  
18 action proceeding in Vermont would look to New York's  
19 choice of law with respect to what law would apply.

20 QUESTION: Right, and that it could be in  
21 either Vermont State or Federal District Court.

22 MR. REARDON: They do say that. They limit  
23 that argument, however, Your Honor, as I understand it,  
24 with respect to a claim for compensatory damages, the  
25 theory being, which is a theory as to which we do not

1 agree, the theory being that that aspect of the claim  
2 would not be regulatory in nature, so to that extent,  
3 unlike abatement, and unlike punitive damages, a claim  
4 for compensatory damages being merely regulatory, the  
5 binding effect of the scheme of the Act in general,  
6 namely, to limit recourse to the source state law, would  
7 not be applicable.

8 QUESTION: And you plan to address that?

9 MR. REARDON: I do, Your Honor. I will do it  
10 now if it pleases the Court. I fundamentally see no  
11 reason why there should be the distinction which the  
12 government makes. The statutory scheme is very clear.  
13 Pollution of interstate waters has been held very  
14 specifically to be a problem of national dimension which  
15 the Federal court should address. The Congress did  
16 address it after studying the matter for many years and  
17 concluded that within the framework of the Act the  
18 source state and the Federal government would be the  
19 partnership that would regulate in a sensible way the  
20 control of pollution in the navigable rivers and streams  
21 and interstate waters of the United States.

22 Now, for a unique reason which I do not  
23 acknowledge as being valid the government here argues  
24 that because it's compensatory damages that it should be  
25 treated differently, that compensatory damages do not



1 interfere with this overall regulatory purpose. Well,  
2 if I may --

3 QUESTION: Does our -- does this Court's  
4 decision in Silkwood and Kerr-McGee have some relevance  
5 to that inquiry, do you suppose?

6 MR. REARDON: My understanding, if Your Honor  
7 please, of Silkwood is that it represents a basic  
8 reconciliation of two separate Federal laws, the first  
9 providing to the NRC or the Atomic Energy Commission or  
10 what have you the preemption, the regulation of safety  
11 within atomic energy facilities.

12 QUESTION: Well, I think the thrust of it is  
13 that tort remedies, state tort remedies may be  
14 compatible even with a comprehensive Federal regulatory  
15 scheme.

16 MR. REARDON: I would agree with that, Your  
17 Honor, but you must -- at least I feel I must read that  
18 case, taking into account that there was a Federal  
19 statute specifically dealing with this, to wit, Price  
20 Andersen, which I understood the Court to very  
21 specifically hinge its position on and find on the basis  
22 of that that there was a very clear and distinct  
23 determination by Congress that the tension created by  
24 the preemption of the safety issue in the atomic energy  
25 aspects had to be, and Congress had in fact reconciled

1 it with the equally compelling reason provided by  
2 statute and the legislative history that there should be  
3 private rights of action under state law, and that is  
4 not present here.

5 At least I don't see it. So that is the  
6 distinction, and I think it is a valid one in terms of  
7 Silkwood. So it is not the same situation in any  
8 respect, and I might say, Your Honor, this whole  
9 question of compensatory damages is most troubling when  
10 it comes in the context of a nuisance situation. The  
11 government makes the argument that compensatory damages  
12 is really economic, that it is only incidental.

13 Well, when you are accused of committing a  
14 nuisance, particularly in a situation such as this,  
15 where the defendant has committed millions of dollars  
16 toward putting up a plant and is a discharger complying  
17 every day and under the scrutiny of the state law and  
18 the state permitting authority, it is nonetheless faced  
19 with the possibility that it can and will have to meet  
20 all sorts of downstream common law nuisance claims and  
21 nuisance being so unique in the sense that it is not  
22 like any other tort.

23 The unique feature of nuisance is if the Court  
24 concludes there is in fact a nuisance, the great danger  
25 will be that the only relief is abatement. And if it

1 isn't abatement, if you do not abate, you run the risk  
2 of continuing damage every day you keep the nuisance in  
3 place, so to that extent in -- as distinguished from any  
4 other tort, when you are dealing with a tort of  
5 nuisance, you are dealing with something much more  
6 potent and as equally regulatory as the remedy of  
7 abatement or the remedy of punitive damages.

8 QUESTION: Mr. Reardon, had the Federal  
9 legislation never been passed -- just assume we never  
10 had any Federal legislation -- then you would have  
11 precisely the same problem, wouldn't you?

12 MR. REARDON: Well, if Federal legislation had  
13 not been passed, Your Honor, we would be operating under  
14 the Federal common law, because I believe Milwaukee I  
15 told us that Federal law controls in interstate  
16 disputes. To that extent --

17 QUESTION: Do you think -- even when it is  
18 purely private parties, you think that was clear?

19 MR. REARDON: I do, Your Honor. I don't think  
20 that makes a valid distinction, and I think the  
21 prevailing opinion or the only opinion in Milwaukee I  
22 indicates, I believe, that the character of the parties,  
23 as Justice Douglas said it, the character of the parties  
24 makes no difference in connection with this issue. So I  
25 don't think, whether it is a governmental body or a

1 state which is suing or whether it is a private party  
2 makes any difference in the sense of the application of  
3 the Federal common law pre --

4 QUESTION: So that in your view you should  
5 prevail unless the Federal legislation had the effect of  
6 creating an additional remedy for private citizens of  
7 Vermont that did not previously exist?

8 MR. REARDON: Yes, Your Honor, precisely.

9 QUESTION: Or unless the Federal law said we  
10 will let state common law control.

11 MR. REARDON: Yes, but it --

12 QUESTION: And if you say that New York  
13 nuisance actions are available --

14 MR. REARDON: In the source state, Your Honor,  
15 they are.

16 QUESTION: Yes. That wouldn't have been true,  
17 would it?

18 MR. REARDON: Yes, Your Honor.

19 QUESTION: It would have been true, yes, it  
20 would, under Milwaukee I because it is just the source  
21 state.

22 MR. REARDON: Yes, Your Honor. Someone could  
23 have brought that claim. It would have been --

24 QUESTION: No one in Vermont could have.

25 MR. REARDON: It would have been a Federal



1 law -- a Federal common law claim could have been  
2 brought in New York, yes. So, if I may harken back to  
3 the point that I was making with respect to the issue of  
4 nuisance and the government's distinction, I don't think  
5 it is a valid distinction.

6 Now, there are several other arguments upon  
7 which the District Court and the Second Circuit based  
8 its decision, and I would like to talk about the savings  
9 clauses of the Clean Water Act amendments which were  
10 passed in 1972, and to begin with, as Justice Stevens  
11 was developing in questions to me, it is our position  
12 that even prior to Milwaukee I, an issue with respect to  
13 interstate waters, resolution of disputes in that area  
14 would have been covered by the Federal common law.

15 Even before Milwaukee I there was a decision  
16 of this Court in Hinderlider which we have referred to  
17 in the briefs which suggest in such disputes, disputes  
18 with respect to interstate waters, they are resolved by  
19 seeking to determine under the guidance of Federal  
20 common law.

21 When you talk about savings clauses,  
22 chronologically, I think it is important to appreciate  
23 the fact that the Milwaukee I decision came down in  
24 April of 1972. The Clean Water Amendments were passed  
25 in October of 1972. As of the time Milwaukee I came

1 down, it, I believe, flatly said that there are no  
2 rights within the states to seek to impose the laws of  
3 the states with respect to issues dealing with  
4 interstate water pollution.

5 That being the case, and Federal law being  
6 dominant, as of the time the statute was passed I  
7 respectfully suggest that there was nothing to say.  
8 There were no state remedies which could exist under  
9 Milwaukee I. The remedies with respect to such disputes  
10 were limited to resort to the Federal common law.

11 QUESTION: Do you think Milwaukee I ruled out  
12 a suit in a state court claiming state remedies?

13 MR. REARDON: Yes, Your Honor, I do. I think  
14 the Federal common law. Now, are we talking about an  
15 interstate body of water, Your Honor?

16 QUESTION: An interstate body of water in the  
17 same sense that Hinderlider versus LaPlata was.

18 MR. REARDON: Yes, Your Honor, because I think  
19 it would represent an attempt by a state to impose its  
20 law in a unitary way with respect to a controversy that  
21 was interstate and more Federal in character than would  
22 be permissible.

23 QUESTION: That is easy to see where it is,  
24 let's say the source of pollution is New York and it is  
25 easy to see how Milwaukee I would prevent Vermont from

1 applying its law to a New York polluter.

2 Would Milwaukee I necessarily prevent New York  
3 from applying its law to a New York source that is  
4 polluting in Vermont? I mean, the rationale of the case  
5 is interstate conflict, and there is no interstate  
6 conflict here. New York is applying its law to a  
7 polluter within New York, and allows a Vermont citizen  
8 to sue in New York courts for the pollution. Would  
9 Milwaukee I have prevented that?

10 MR. REARDON: No, I think it is the  
11 application of the law of another state --

12 QUESTION: Of Vermont.

13 MR. REARDON: -- Into the law of the source  
14 state which would be prescribed, Your Honor. Yes.

15 QUESTION: Right.

16 MR. REARDON: In any event, the point that I  
17 was making is that as of the time of the passage of the  
18 Act there were no state statutes under our  
19 interpretation, no state rights to be saved. I might  
20 also say that the burden of the legislative history upon  
21 which those who make this argument rely is legislative  
22 history which was generated prior to the decision of  
23 this Court in Milwaukee I, so it is really not helpful  
24 to look at that legislative history to ascertain the  
25 intention of Congress, particularly since Milwaukee I

1 was in place before the law was in fact passed.

2 The two particular savings provisions to which  
3 the courts below have referred, the first is the citizen  
4 suit provision and the second is the state authority  
5 provision. With respect to the citizen suit provision  
6 that provision, as this Court pointed out in Milwaukee  
7 II, is almost identical if not actually the same as many  
8 other statutes on the books with respect to  
9 environmental matters, so that it is not really capable  
10 of providing any guidance with respect to the specific  
11 intention of Congress when it passed these amendments to  
12 the Clean Water Act as to what it intended to save, what  
13 was there, or what the future might be in terms of the  
14 law.

15 The same is true with respect to Section  
16 5.10. Section 5.10 has been held again by this Court to  
17 relate simply to matters dealing with the source state,  
18 and I might also say that a section of the law prior to  
19 the amendments in 1972 quite comparable to this was not  
20 believed at the time Milwaukee I was decided to have any  
21 effect. There was a comparable statute on the books and  
22 when Justice Douglas's opinion came out in Milwaukee I,  
23 it gave no heed to that provision as preserving states'  
24 rights.

25 With the Court's permission I would very much



1 like to reserve the few remaining minutes for rebuttal.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
3 Reardon. We will hear next from you, Mr. Langrock.

4 ORAL ARGUMENT OF PETER F. LANGROCK, ESQ.,

5 ON BEHALF OF RESPONDENTS

6 MR. LANGROCK: Mr. Chief Justice, and may it  
7 please the Court, what we have here is a private  
8 nuisance action brought by citizens of the state of  
9 Vermont against a New York corporation which was removed  
10 from Vermont courts to the Federal court based on  
11 diversity of jurisdiction.

12 We are seeking compensatory damages for actual  
13 damages done to property owned by my clients. We are  
14 seeking punitive damages and we are seeking injunctive  
15 relief if under usual theories of equity jurisprudence  
16 injunctive relief is appropriate. We are suggesting to  
17 this Court that Vermont law in the Vermont courts or the  
18 Vermont Federal court in this case is appropriate.

19 In full candor the solicitor's position is  
20 such that they ask for a division in effect of Vermont  
21 law and New York law based upon the compensatory versus  
22 punitive injunctive relief. We don't think that will  
23 make any difference in our case. As far as we know  
24 Vermont law and New York law are identical on the  
25 question of private nuisance, in effect that unless this

1 Court holds that we are cut off from all remedies, the  
2 damages done to our properties, that the position of the  
3 court below should be affirmed.

4 The reason that we think Vermont law applies  
5 is, first of all, under traditional choice of law  
6 provisions. We think the Act preserves it. There are  
7 the saving clauses 1370 and 1365(e). There is the  
8 legislative history. We don't read the Milwaukee cases  
9 as changing that, and we think whatever analysis of  
10 Federal preemption, either express or implied, by the  
11 petitioner is incorrect.

12 What I would like to do first is talk about  
13 the saving clause itself and the legislative history.  
14 Quite clearly the legislative history says that a  
15 private damages, private action damages is to be  
16 preserved. I think one of the questions --

17 QUESTION: You are referring to in-state,  
18 though.

19 MR. LANGROCK: Excuse me?

20 QUESTION: I mean, that is not clearly  
21 referring to an interstate cause of action.

22 MR. LANGROCK: We are saying whatever existed  
23 at common law or statutory state. And we have to go  
24 with whatever was existing. And certainly the private  
25 nuisance going back to Tennessee -- Georgia versus

1 Tennessee Copper was recognized in interstate pollution  
2 type cases.

3 QUESTION: That's right. But what Milwaukee I  
4 said is that there wasn't any, and that was before the,  
5 statute was passed.

6 MR. LANGROCK: Milwaukee I said, if I  
7 understand the way the holding of that was set forth in  
8 Justice Rehnquist's opinion in Milwaukee II, was that a  
9 state could no longer depend on Federal common law, or  
10 that held a state had to go to Federal common law to  
11 abate a nuisance, and that was the only holding. And  
12 when the Federal Clean Water Act came along, then  
13 Milwaukee II came down. Milwaukee II says you have a  
14 minimum standard that is set by Congress, and we are not  
15 going to create in the Federal courts a superlegislature  
16 to impose a higher minimum standard. But it certainly  
17 did nothing to displace any other existing state law  
18 that we can see, either expressly or by Federal  
19 preemption.

20 QUESTION: I understand, but what state law  
21 did you have? Once you said that there is no state law  
22 on the matter but only Federal common law, what state  
23 law was preserved by these preservation clauses?

24 MR. LANGROCK: Either -- if we are damaged  
25 under a nuisance theory prior to Milwaukee I we have an

1 action, a state court action. Milwaukee I could be read  
2 to say you no longer have that, or you can say that was  
3 an original jurisdiction case. We are creating it to  
4 deal with that problem and we don't know where that  
5 opinion would have gone because six months later we have  
6 the Federal law in a narrow band, not a comprehensive  
7 statute, really, but a narrow band of problems comes and  
8 directly deals with the problem of Milwaukee I.

9 QUESTION: Well, you say it is essential to  
10 your case then that we read Milwaukee I very narrowly.

11 MR. LANGROCK: No, you could also say that you  
12 have created a whole Federal common law of private  
13 nuisance. I don't think that is necessary. But I don't  
14 think --

15 QUESTION: If we do say that then you don't  
16 have a suit on Vermont law or on New York law.

17 MR. LANGROCK: That is correct. We would have  
18 to go back to the development. What would have  
19 happened --

20 QUESTION: On Vermont law, anyway, right.

21 MR. LANGROCK: What would have happened, as  
22 Justice Stevens pointed out, had Milwaukee I gone into  
23 its full growth before the passage of the Act we don't  
24 know, but it seems to me that if -- there is no  
25 authority that I know of for cutting off our rights as



1 injured parties. Yet I think looking at the scope of  
2 the Act might be worthwhile.

3 This is an Act which deals not with all water  
4 pollution of navigable waters. It deals only with a  
5 minimum standard, a floor imposed upon the states. The  
6 purpose of the Act, it is not a license to allow  
7 pollution, but the purpose of the Act was to, as set  
8 forth in the statute itself, to eliminate all pollution  
9 by 1985. And so given that narrow network, that this  
10 was such that all Milwaukee II did in interpreting  
11 Milwaukee I as far as I can see is say Federal courts,  
12 don't superimpose your judgment on Congress by saying we  
13 are having higher limitations, but it says nothing about  
14 all the rest of that body of law out there.

15 QUESTION: It still says we are still talking  
16 about Federal common law. Whatever you do choose to --

17 MR. LANGROCK: If Milwaukee I is read as  
18 creating all Federal law and replacing all state law,  
19 then we lose on the state law claim. If, however, at  
20 that point we then have a Federal common law claim to  
21 deal with the type of nuisances we have, and then we  
22 would have to read Milwaukee II a little bit more  
23 narrowly and let that go.

24 If you don't read them that way what you have  
25 done is abolished a right of action, a claim or property

1 right which is traditional in the states, and there is  
2 no intention that Congress intended to do that, and we  
3 hope this Court would not intend to do that.

4 The Federal preemption analysis which really I  
5 have gone into here --

6 QUESTION: There would be a -- wouldn't there  
7 be an action based on a claimed violation of the  
8 permit?

9 MR. LANGROCK: Except for the Sea Clammers,  
10 Your Honor. We could as individuals, citizen suit or an  
11 administrator, go in and try to enforce the permit. We  
12 claim in our suit that there are violations of the  
13 permit. We claim that the permit itself does not  
14 absolve us from the injury we receive, and the  
15 legislative history suggests that that type of cause of  
16 action is preserved.

17 QUESTION: Well, so you don't say you don't  
18 have a remedy. You just say you don't have a remedy to  
19 enforce standards higher than the permit.

20 MR. LANGROCK: We don't have --

21 QUESTION: If the violation -- if you proved a  
22 violation of the permit and proved that that violation  
23 was causing you damage, you would recover something.

24 MR. LANGROCK: I don't think so, because under  
25 Sea Clammers there is no newly created right based upon

1 the Federal statute or private cause of action. All we  
2 can do is go in and enforce the permit. Here we are  
3 suggesting really it is the traditional eminent domain  
4 concept of nuisance law that you have a polluter and you  
5 have an injured party, and the Court in its equity  
6 jurisprudence has to make a decision whether to use  
7 injunctive relief or damages enough to pay for it.

8 But we don't let somebody pollute and damage  
9 this person without some sort of compensation.

10 QUESTION: Well, Sea Clammers said that the  
11 statutory remedies given private parties foreclosed any  
12 other private remedies, I take it.

13 MR. LANGROCK: I don't read it --

14 QUESTION: Well, it foreclosed a 1983 remedy,  
15 didn't it?

16 MR. LANGROCK: Yes, it did, but we are not --

17 QUESTION: It foreclosed -- It said Congress  
18 didn't intend any private remedies other than what it  
19 provided for.

20 MR. LANGROCK: I don't think, Your Honor, it  
21 reached the position of a private nuisance case.

22 QUESTION: Well, but it reached a position of  
23 as private suit under 1983.

24 MR. LANGROCK: That's correct, Your Honor.

25 QUESTION: Which would have given a remedy in

1 damages which the statutory suit would not.

2 MR. LANGROCK: The analysis of 1983 I think is  
3 particular and peculiar to that case. I don't think  
4 that that case can be held by analysis to cover all  
5 common law state nuisance cases.

6 QUESTION: So you say Congress intended to  
7 foreclose any private remedies except damage remedies.

8 MR. LANGROCK: What I am saying is that  
9 Congress --

10 QUESTION: But not a damage remedy under 1983.

11 MR. LANGROCK: Congress did not deal with 1983  
12 or the Sea Clammers in the legislative history. It  
13 quite clearly said in its legislative history that this  
14 Act and the meaning of this permit will not bar rights  
15 for people who are actually injured. Essential to our  
16 case is that we meet the standards, and they are  
17 difficult standards, of a private nuisance under common  
18 law, under the law of the State of Vermont, the law of  
19 the State of New York, or in the unique situation if we  
20 broadly read Milwaukee I under a Federal common law,  
21 which I don't think is necessary or the appropriate  
22 reading of that.

23 QUESTION: Well, even if you said that you are  
24 entitled to a damage suit perhaps the only kind of a  
25 damage suit you are entitled to is one in which you



1 prove a violation of the permit.

2 MR. LANGROCK: That would be -- that might be  
3 the case, Your Honor, if that were a license --

4 QUESTION: Because the statutory scheme is  
5 such that people give -- New York is given a permit  
6 consistent with Federal standards.

7 MR. LANGROCK: Your Honor, the Federal  
8 standards put forth are minimum standards. The job of  
9 this whole statute is not to allow pollution but to  
10 eliminate it.

11 QUESTION: But it has allowed -- it allows New  
12 York to set higher standards.

13 MR. LANGROCK: That's right.

14 QUESTION: And you say it allows Vermont to  
15 set higher standards also.

16 MR. LANGROCK: Yes, it does.

17 QUESTION: For dischargers in a foreign  
18 state.

19 MR. LANGROCK: It does in the case, at least,  
20 Your Honor, of a private right of action, but in any  
21 case even if that -- even if New York law applies we  
22 win.

23 QUESTION: You mean a New York nuisance law.

24 MR. LANGROCK: That's right.

25 QUESTION: Even though there is no violation

1 of the permit.

2 MR. LANGROCK: That's right. There's specific  
3 language. The regulations indicate that a permit does  
4 not give you a right to violate any rights under, I  
5 think it is 122.5.

6 The legislative history talks in terms of  
7 that, and it is part of looking at the scheme. This was  
8 a scheme to start at a base level to eliminate  
9 pollution, encouraging the states by their own  
10 experiments in their own laboratories to go further. It  
11 wasn't to displace rights. It wasn't to take away  
12 rights of people who are being damaged by pollution. I  
13 mean, Congress didn't come in and say we want to stop  
14 these plaintiffs who have been hurt from collecting  
15 damages against International Paper Company. That  
16 wasn't in there at all.

17 And so whatever state law existed has to be  
18 preempted by the Court's own tests --

19 QUESTION: What about an injunction?

20 MR. LANGROCK: An injunction? That again,  
21 Your Honor, we think it is appropriate if it meets the  
22 usual standards of equitable jurisprudence. The case --  
23 there is the Boomer case in New York, which says when  
24 you have got a cement plant with 300 employees and you  
25 have all these matters, we don't give an injunction

1 because we can deal with damages. The furtherance of  
2 this Act makes the polluter make the choice, the  
3 economic choice of either paying more to clean up his  
4 plant if possible or paying damages for the person --

5 QUESTION: But you don't think there is any  
6 flat rule on your getting an injunction against these  
7 dischargers whether they are consistent with the permit  
8 or not?

9 MR. LANGROCK: I don't think there is any flat  
10 rule. I think that for a private party who is being  
11 injured -- you might take a situation where there is a  
12 very limited factual pattern where the damage to that  
13 individual, even though meeting the Federal permits, was  
14 so great and so outrageous as opposed to a very minor  
15 inconvenience for the polluter that the Court might  
16 grant that. It may only be a matter of a small change.  
17 But in this situation factually it would appear that  
18 this comes closer to the type of problem that you had in  
19 the situation in Boomer where you had a cement factory.

20 QUESTION: Here is the problem with that. It  
21 is clear from the structure of the Act that the  
22 polluting state, the source state was to have the main  
23 call on what the level of protection was going to be  
24 both as to permitting, since they would set the permit  
25 level, and also as to whether they want to go above that

1 level in their own domestic law.

2 Now, it is one thing to say that the source  
3 state can adopt some domestic law allowing injunctions  
4 even when the permit is not violated, but if you allow  
5 the non-source state to do that you are in effect  
6 allowing the non-source state to do the same thing as  
7 permitting the plant, because you can't operate without  
8 a permit. Similarly, you can't operate if you have an  
9 injunction from a Vermont court.

10 MR. LANGROCK: I understand that. Again, I  
11 want to point out that we can get an injunction at  
12 whatever level under New York law for our particular  
13 case, but responding to your question --

14 QUESTION: Yes. Well, I am just talking about  
15 Vermont law right now.

16 MR. LANGROCK: It seems to me that there is  
17 nothing in this Act which -- if we took away Illinois --  
18 Milwaukee I, Milwaukee II, and this Act, where would we  
19 be? We would be having states dealing with state common  
20 law with regard to their rights. We would have the same  
21 type of situation that we had in Georgia versus  
22 Tennessee Copper.

23 We have to then look to what displaces it.  
24 There is nothing that says that the State of New York  
25 because it has this minimal permit process has the right



1 to dump sewage, to dump pollutants onto Vermont, and  
2 here is a perfect example. These are boundary waters.  
3 This pipe that dumps it out at the lake is within feet,  
4 100 feet, 200 feet, of the Vermont border, and to give  
5 permanent -- to say that New York can pollute all it  
6 wants to at some level at the cost of Vermont is to give  
7 a preeminent position to the polluting state rather than  
8 the receiving state.

9 QUESTION: But that is what the statute does.  
10 The statute does give a preeminent position to the  
11 source state, and if you want to protect against that  
12 perhaps some residual Federal common law can prevent  
13 against it, but to say that Vermont can step in and  
14 interpose its own law to prevent it is contrary to the  
15 scheme of the Act, isn't it?

16 MR. LANGROCK: I don't think so. I think the  
17 Act responds and says we want to stop pollution. Here  
18 is a minimum for all. It is stopgap. We go to the  
19 states. If we are going to replace the state law that  
20 existed in Tennessee Copper where -- there has to be a  
21 preemption from some reason. Where does -- this Act  
22 certainly doesn't say we preempt it.

23 QUESTION: Why does the Act just allow  
24 neighboring states to come in in an advisory capacity to  
25 comment upon the permit levels? It doesn't permit them

1 the right to establish permit levels with respect to  
2 pollution that is coming in their direction. They can  
3 only advise, and the source state sets the levels.  
4 Doesn't that indicate that they are supposed to have --

5 MR. LANGROCK: That's correct, Your Honor, but  
6 part of the whole scheme is that we are not going to  
7 have anybody superimpose a minimum level, raise the  
8 floor, whether it be the Federal courts or the out of  
9 state, for purposes of a permit process. This does not,  
10 however, prohibit the traditional common law  
11 jurisprudence, in our case nuisance law, maybe even  
12 injunctive relief, from being applied. When we deal  
13 with a state, if we are dealing with a state  
14 apportionment as opposed to state injunctive relief,  
15 there may be --

16 QUESTION: Well, it doesn't make a whole lot  
17 of sense. You mean the Federal Government goes to the  
18 trouble of saying that Vermont cannot work its will  
19 through the permitting process but it is perfectly okay  
20 if they do it through nuisance law? I would consider  
21 that to be a conflict with the Federal scheme.

22 MR. LANGROCK: My reading of the Federal  
23 scheme is much narrower here.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
25 Langrock.

1 We will hear now from you, Mr. Wallace.

2 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,  
3 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE  
4 SUPPORTING RESPONDENTS

5 MR. WALLACE: Thank you, Mr. Chief Justice,  
6 and may it please the Court, at the outset I would like  
7 to clarify the difference between the kind of case we  
8 have before us and cases that are brought under what are  
9 called the citizens' suit provisions of the Federal  
10 Act. There is such a provision.

11 It is set forth in the appendix to the  
12 petition for certiorari at Page A-51, the citizens suit  
13 provision to enforce standards under permits issued  
14 under the Federal Act, and those suits can be brought  
15 regardless of whether the permit is issued by EPA or by  
16 a state which has been authorized under the Federal Act  
17 to issue permits so long as it meets the Federally  
18 prescribed standards and adds whatever additional  
19 standards it wishes to add.

20 Those citizen suits enable the plaintiff to  
21 get injunctive relief to require compliance with the  
22 permit, and they --

23 QUESTION: (Inaudible.)

24 MR. WALLACE: Yes, they are.

25 QUESTION: Even though it is a state permit

1 and the state has jacked up the standards?

2 MR. WALLACE: Well, the District Courts are  
3 given Federal question Jurisdiction right in this  
4 provision, Section 1365, Page A-51. And the other  
5 relief that can be secured is civil penalty relief. We  
6 have discussed this on Page 14 of our brief, and we show  
7 there that any civil penalties secured are shown by the  
8 legislative history to be payable to the Federal  
9 Treasury, not to the plaintiffs in such cases, and this  
10 Court held in the Sea Clammers case in 453 US that there  
11 is no implied right of action under the Federal statute  
12 for damages by someone claiming to be damaged by  
13 violation of the permit standards nor can a 1983 suit be  
14 brought.

15 What the Court did not address in Sea Clammers  
16 and what is before the Court today is whether suits can  
17 be brought under state nuisance law for damages and for  
18 other relief, and that is what we are here to address.  
19 Our answer to whether the Court of Appeals correctly  
20 decided this case is yes and no, but mostly yes, and  
21 certainly yes in its result of refusing to order  
22 dismissal of the complaint, and if the Court please, I  
23 will briefly summarize our position and then proceed to  
24 the reasons why.

25 We agree that a state court and by extension a



1 Federal court sitting in diversity jurisdiction can  
2 entertain respondents' state law claims for compensatory  
3 damages, punitive damages, and injunctive relief, and as  
4 to compensatory damages the Court sitting in Vermont can  
5 and should apply either Vermont or New York law,  
6 depending on Vermont's choice of law rules, but as to  
7 punitive damages or injunctive relief we believe the  
8 effect of the Federal law is to preserve only the law of  
9 the source state and thus to require the Vermont court  
10 to apply New York law, including New York choice of law  
11 principles.

12 Now, this may, particularly in the damages  
13 remedies, bounce back to Vermont law if the New York  
14 courts would apply this, but this is not merely an  
15 academic question, because it identifies where the  
16 legislative jurisdiction lies, which state legislature  
17 would have the power to supersede the rule of decision.

18 QUESTION: Compensatory damages in your view,  
19 Mr. Wallace, might be awarded under Vermont law?

20 MR. WALLACE: That is our view. And that is  
21 perhaps the most difficult question in the case as we  
22 see it.

23 QUESTION: It is actually less important for  
24 purposes of this case than it is for in-state  
25 pollution. I assume that you would take the same

1 position with regard to in-state pollution, and you  
2 would say that the state of New York can have a nuisance  
3 action -- well, you'd say it could do it both for  
4 compensatory and for injunctive relief, couldn't you?

5 MR. WALLACE: Yes, and for punitive damages --

6 QUESTION: And for punitive damages.

7 MR. WALLACE: -- If it wished. That is clear  
8 to us. To us the clearest aspect of the case is that  
9 the authority of the source state to exceed the Federal  
10 Act's requirements in any of these respects remains  
11 unimpaired. We don't think the principle of Milwaukee I  
12 ever was intended to limit the source state's authority  
13 to deal with in-state pollution.

14 QUESTION: Mr. Wallace, it would help me  
15 understand the government's position if I suggested a  
16 specific concrete example. The Federal Act applies to  
17 any waterway. I don't think it is even limited on its  
18 face to navigable waters. So that every state on the  
19 Mississippi and Missouri Rivers, for example, if I  
20 understand your position correctly, could apply its own  
21 state common law of nuisance to obtain injunctions and  
22 compensatory damages against a manufacturer that  
23 happened to have a plant somewhere on that river, with  
24 the result that there may be ten or twelve or more  
25 states with different regulatory standards.

1 Is that the government's position?

2 MR. WALLACE: It is with respect to  
3 compensatory damages.

4 QUESTION: And injunctions?

5 MR. WALLACE: Not injunctions. Not injunctive  
6 relief. We have said that the Vermont court, while it  
7 can entertain the case, has to apply New York law with  
8 respect to injunctive relief. That seems to us to be --

9 QUESTION: With respect to compensatory  
10 damages a company would have to comply, for example,  
11 with a dozen different standards, despite the Federal  
12 Act?

13 MR. WALLACE: Well, what we are saying with  
14 respect to compensatory damages is that even though  
15 there is compliance with the Federal Act if -- and the  
16 discharger must remain free to remain in business, if he  
17 is actually damaging someone, and that can be proved in  
18 court, and the standards of a nuisance action are meant,  
19 then he will have to bear the cost for any actual injury  
20 that unreasonably results under the nuisance law if it  
21 can be proved that he caused it and if it meets the  
22 standards of unreasonable conduct under nuisance law and  
23 the fact that there was a Federal permit under the  
24 Federal Act would certainly be relevant to the  
25 reasonableness of what occurred.

1 QUESTION: Well, if another state had -- under  
2 its tort law there was strict liability for water  
3 pollution, you would say that may be enforced also. Not  
4 just a nuisance question.

5 MR. WALLACE: As long as it were only  
6 compensatory damages --

7 QUESTION: Yes.

8 MR. WALLACE: -- and there were --

9 QUESTION: You prove the injury and collect  
10 your money.

11 MR. WALLACE: Prove the injury and cause of  
12 the injury.

13 QUESTION: Yes.

14 MR. WALLACE: We don't believe that the  
15 Federal law --

16 QUESTION: Even though the polluter was living  
17 up to all of the provisions of his permit?

18 MR. WALLACE: That is correct. It seems to us  
19 that that has to be the result so long as the source  
20 state were willing to apply its law that way.

21 QUESTION: But the source state -- what do you  
22 do with Milwaukee I? Suppose New York has established  
23 its nuisance law in such a fashion that it says it can't  
24 be a nuisance so long as it is complying with the  
25 Federal standards that we promulgated. Now, that is the



1 rule that New York wants. All right, Vermont comes in  
2 and says, we disagree with that, even though you do  
3 comply with the standards, we think it is a nuisance in  
4 Vermont. Now, isn't that precisely the kind of a  
5 situation that Milwaukee I was worried about and tried  
6 to avoid by saying this is a matter that ought to be  
7 handled by Federal common law?

8 MR. WALLACE: We don't believe it is, Mr.  
9 Justice. Milwaukee I addressed the problem of another  
10 state other than the source state trying to abate the  
11 operation in the source state, trying to order that an  
12 operation authorized in the source state be discontinued  
13 or changed in some way.

14 QUESTION: You think it is perfectly okay if  
15 they make them pay continuing damages every day for the  
16 continuing pollution, so long as they don't say stop?  
17 That's the line?

18 MR. WALLACE: If they are unreasonably causing  
19 injury under that state's law, which protects the people  
20 being injured --

21 QUESTION: Well, strike unreasonably. If they  
22 are causing injury under that state's law.

23 Are you applying a Federal unreasonably  
24 standard to that state's law

25 MR. WALLACE: No, I --

1 QUESTION: Okay, so if they are causing injury  
2 under that state's law --

3 MR. WALLACE: There is not a Federal standard,  
4 but there are Federal constitutional limitations on what  
5 states can do against out of state sources. There are  
6 limitations in the Federal Constitution against state  
7 discrimination against out of state businesses both --  
8 under the commerce clause. There is the Article IV  
9 privileges and immunities clause. There are equal  
10 protection limitations. The state is not wholly  
11 unlimited and, of course, Congress can always limit it  
12 further, but what is apparent in the Act is that  
13 Congress meant to preserve damage remedies, and as this  
14 Court held in Silkwood, and the Court was unanimous with  
15 respect to compensatory damages that even though there  
16 is a comprehensive Federal regulatory scheme, if that  
17 scheme did not provide for damages for persons injured,  
18 the ordinary assumption is that Congress continued to  
19 rely on state law to provide for the damages.

20 QUESTION: But the Interstate problem is not  
21 extant there, is it?

22 MR. WALLACE: It is not, which is the reason  
23 we think the punitive damages situation is different,  
24 because as in Silkwood we think punitive damages were  
25 preserved in this scheme, but only in the source state,

1 and Silkwood did not address the problem of interstate  
2 punitive damages which seems to us to come within the  
3 Milwaukee I principle of a regulatory measure, and there  
4 isn't the same compelling need to recognize the  
5 interstate punitive damages because punitive damages are  
6 still available if the source state is willing to  
7 provide them. It isn't a question of all or nothing.

8 QUESTION: Mr. Wallace, may I just follow up  
9 with one question on this? As I understand the  
10 government's position, the receiving state retains the  
11 compensatory damage remedy but it is precluded -- this  
12 is where you differ with the District Court -- it is  
13 precluded from the abatement and the punitive damage  
14 remedy.

15 MR. WALLACE: Exactly.

16 QUESTION: And in your view what is the legal  
17 source, not the practical argument, of that preclusion?  
18 Is it the statute? Is it Milwaukee I? Or did it never  
19 exist?

20 MR. WALLACE: It is ultimately the principle  
21 of Milwaukee I because as we read Milwaukee II what  
22 Milwaukee II said was that the provisions, and they are  
23 elaborated in Milwaukee II much more than we did in our  
24 brief, the provisions for the affected states'  
25 participation in the process give the affected state

1 sufficient recourse under the Federal Act that it no  
2 longer should have to resort to Federal common law and  
3 the need to create Federal common law has been  
4 superseded by the ability of the affected state under  
5 the Federal Act to influence the standards that are to  
6 be applied so it no longer has to resort to Federal  
7 common law for abatement, but Milwaukee II never said  
8 that the Federal Act changed the inhibitions that  
9 Milwaukee I recognized on out-of-state regulation that  
10 necessitated resort to a Federal common law in the first  
11 place in the abatement context.

12 QUESTION: So you are saying that before  
13 Milwaukee I was ever decided it would have been  
14 permissible for the receiving state to bring an  
15 abatement action in a punitive damage claim?

16 MR. WALLACE: Well, it was an open question.  
17 Milwaukee I answered the question, and --

18 QUESTION: And of course you don't think it  
19 answered the question of a private compensatory damage  
20 suit.

21 MR. WALLACE: We don't believe so.

22 QUESTION: And if we read -- you say this is  
23 the most difficult issue, and the reason it is difficult  
24 is that how broadly do you read Milwaukee I?

25 MR. WALLACE: That is correct. We don't see



1 any --

2 QUESTION: Whether or not Federal law, Federal  
3 common law completely preempted all actions in  
4 interstate pollution cases.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Wallace.

7 Mr. Reardon, do you have something more? You  
8 have three minutes left.

9 ORAL ARGUMENT OF ROY L. REARDON, ESQ.,  
10 ON BEHALF OF PETITIONER - REBUTTAL

11 MR. REARDON: Thank you, Your Honor.

12 If I may, I would like to just carry on with  
13 the hypothetical that Justice Powell proposed because I  
14 think it highlights the dilemma for the discharger, and  
15 you take the discharger in Montana at the headwaters of  
16 the Mississippi under the government's theory can be  
17 sued by all of those 18 or so states along the  
18 Mississippi under the common law of any of those states  
19 for compensatory damages, and that is the tragedy of  
20 permitting these individual states to use their own law  
21 to circumvent the intention of the Act.

22 QUESTION: Yes, but your example kind of cuts  
23 the other way, because there is not much pollution in  
24 Montana that is going to go all the way to Louisiana.

25 MR. REARDON: No, I will agree with that, Your

1 Honor, but there is an expert in Louisiana who is  
2 waiting to say that there is, and that is my problem.

3 (General laughter.)

4 QUESTION: I don't think you would take his  
5 case on a contingent basis, though.

6 MR. REARDON: That is the very practical  
7 dilemma which we face.

8 Incidentally, before Milwaukee I, Hinderlider  
9 was in place, and as I read that case it flatly says  
10 interstate disputes with respect to water. That wasn't  
11 pollution, that was sharing of water. Clearly a common  
12 issue, though, Your Honor, because a discharge and  
13 pollution is a sharing of interstate waters in the same  
14 sense as usage is. It is the same thing part and  
15 parcel.

16 With all due respect, Sea Clammers obviously,  
17 as we interpret it, does not permit a private suit for  
18 violation of the Act, but we are not trying to deny  
19 these plaintiffs a right to sue in the source state  
20 using source state law and to recover for the nuisance  
21 which they suggest has taken place here.

22 QUESTION: And relying on New York law?

23 MR. REARDON: Relying on -- and relying on New  
24 York law and relying upon actually what the statute  
25 itself provides in terms of the forum and in terms of

1 the law to be applied.

2 QUESTION: New York courts would normally give  
3 a remedy to -- under New York law to injury caused  
4 outside the state by conduct occurring inside the  
5 state?

6 MR. REARDON: It would, Your Honor.

7 QUESTION: That's it, whether it is a water  
8 case or not?

9 MR. REARDON: Well, I must -- let me answer  
10 that fully because there is an issue that I would like  
11 to raise with Your Honor, and that is the extent, and  
12 you get into this when you deal with property issues,  
13 cases relating to injury to property, whether you have a  
14 transitory action or not a transitory action, which is a  
15 minefield of difficulty going way back to 1811, when  
16 Justice Marshall wrote a decision in the Livingston case  
17 and dealt with the doctrine which has really been eroded  
18 over the course of years that there should be no --

19 QUESTION: So Vermont, the Vermont plaintiff  
20 could come over to New York and not only get  
21 compensatory damages but punitive damages?

22 MR. REARDON: Yes, Your Honor, if New York  
23 would provide for it. Yes.

24 QUESTION: Why not in Vermont? Why can't he  
25 sue in Vermont on the same cause of action in Vermont

1 court?

2 MR. REARDON: The Vermont plaintiff?

3 QUESTION: Yes.

4 MR. REARDON: Basically because the statute  
5 provides a scheme under which the source state is the  
6 place to go.

7 QUESTION: Yes, but --

8 QUESTION: This is not a statutory cause of  
9 action. He is suing on a state cause of action.

10 MR. REARDON: I understand that, Your Honor,  
11 but for the same reason that the Mississippi  
12 hypothetical creates the tragedy you see there, the same  
13 would be true if you permitted that plaintiff to  
14 circumvent, to go around and do by the back door --

15 QUESTION: He is not circumventing -- he sues  
16 in a Vermont court and he says I am suing under New York  
17 law. This is a diversity action and we are going to  
18 apply New York law. Wouldn't that be permissible?

19 MR. REARDON: No, Your Honor. We respectfully  
20 submit it would not be, that he would have to sue in the  
21 source state because that is the forum that the law  
22 suggests is appropriate for dealing with this problem  
23 under 505(c) of the Act, and if you lose that --

24 QUESTION: Well, it is one thing to say he  
25 couldn't apply Vermont law, but it is certainly another



1 thing to say that he couldn't sue in Vermont, and as  
2 long as he can get jurisdiction over his defendant why  
3 couldn't he apply New York law?

4 MR. REARDON: It is not a matter of personal  
5 jurisdiction. We don't challenge that. We are in  
6 Vermont. We challenge it on the basis of what the  
7 statutory scheme in fact permits, Your Honor, or  
8 suggests ought to be the way forum is resolved, keeping  
9 and enabling the discharger to understand where it is he  
10 is going to be challenged.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Reardon.

13 The case is submitted.

14 (Whereupon, at 2:01 o'clock p.m., the case in  
15 the above-entitled matter was submitted.)  
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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1233 - INTERNATIONAL PAPER COMPANY, Petitioner V. HARMEL

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OUELLETTE, ET AL.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)