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FEDERAL PREEMPTION OF STATE LAW ENVIRONMENTAL REMEDIES AFTER *International Paper Co. v. Ouellette*

For the last two decades, courts have been grappling with the application of common law nuisance doctrines to interstate pollution disputes. The area has become particularly complex as both federal and state regulatory programs have evolved. Generally, regulatory programs do not provide relief for injured individuals, and plaintiffs often resort to the common law for a compensatory remedy. In interstate disputes, a basic issue is which jurisdiction's common law of nuisance applies.

Both federal and state law possibilities exist. On the state level, one could apply the law of the state affected by the migration of pollutants (affected state), or the law of the state from which the pollution emanated (source state). A third possibility is the application of a federal common law. Finally, one could also find that the federal regulatory program has preempted all common law remedies and the victim therefore should be left uncompensated. The United States Supreme Court recently addressed this problem in *International Paper Co. v. Ouellette.*[1]

The International Paper Co. (IPC) is located in the state of New York. It discharges a variety of effluents into Lake Champlain pursuant to a permit from the Environmental Protection Agency. The point at which effluents enter the lake is a short distance from the Vermont border. In 1978, a group of Vermont landowners and lessees filed a class action suit claiming that the discharges constituted a continuing nuisance[2] under Vermont common law. Specifically, they alleged that the pollutants made the water unhealthy and "smelly," thereby diminishing the value of their property. They sought over $100 million in compensatory and punitive damages as well as injunctive relief, which would have forced IPC to restructure its water treatment system. IPC moved for summary judgement, claiming that the Federal Water Pollution Control Act Amendments of 1972[3] (Clean Water Act) preempted

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1. 107 S. Ct. 805 (1987).

2. Generally, a private nuisance has come to be defined as unreasonable interference, whether intentional, reckless, negligent, or otherwise, with another's use and enjoyment of his land. See Abdella v. Smith, 34 Wis. 2d 393, 149 N.W.2d 537 (1967); Claude v. Weaver Constr. Co., 261 Iowa 1225, 158 N.W.2d 139 (1968); Nicholson v. Connecticut Half-Way House, Inc., 153 Conn. 507, 218 A.2d 383 (1966); Sans v. Ramsey Golf and Country Club, Inc., 29 N.J. 438, 149 A.2d 599 (1959); Morgan v. High Penn Oil Co., 28 N.C. 185, 77 S.E.2d 682 (1953). See also Restatement (Second) of Torts §§ 821-822 (1977).

3. 33 U.S.C. §§ 1251-1387 (1982).

any suit based on state law. The United States Supreme Court held that the Clean Water Act preempts the common law of the affected state to the extent that it would impose liability on a source of pollution located in another state. However, the court allowed victims of such pollution living in the affected state to sue under the law of the source state for relief.[4]

This article examines the rationale of *International Paper* and attempts to extend its interpretation of the Clean Water Act to both air and hazardous waste statutes. It concludes that after *International Paper*, only the common law of the source state should apply to interstate pollution disputes governed by the Clean Air Act,[5] which deals with air pollution regulation, and the Resource Conservation and Recovery Act[6] (RCRA), which deals with hazardous waste regulation. However, no such limitation should apply when the Comprehensive Environmental Response, Compensation, and Liability Act[7] (CERCLA) (dealing with hazardous waste clean-up) alone governs the dispute. In such situations, the law of either state could apply under normal choice of law rules. When both RCRA and CERCLA apply, RCRA should control the preemption question, thereby preempting the affected state's law.

I. Water Pollution Regulation

The goal of the Clean Water Act was to eliminate the discharge of pollutants into navigable waters by 1985.[8] While elimination of pollutants remains a goal, the 1972 Amendments allow discharges to continue under a technology-based permit system called the National Pollutant Discharge Elimination System[9] (NPDES). This system prohibits the discharge of effluents unless the "point source"[10] has obtained a permit

4. 107 S. Ct. 805 (1987). This issue is not without importance. Nuisance is determined by a standard of reasonableness, and this standard varies from state to state according to each state's environmental regulations and philosophy. Also, the effect each state gives to compliance with a permit may differ. For example, some states hold that a permit, by itself, is not intended to provide immunity from damage caused by the activity, so that nuisance claims are still viable. See Galaxy Carpet Mills, Inc. v. Massengill, 255 Ga. 360, 338 S.E.2d 428 (1986). Other states hold that an act expressly authorized cannot be a nuisance, since all interests are considered when making such authorizations. See Borough of Collegeville v. Philadelphia Suburban Water Co., 377 Pa. 636, 105 A.2d 722 (1954).

5. 42 U.S.C. §§ 7401-7642 (1982).

6. Id. at §§ 6901-91 (1982).

7. Id. at §§ 9601-75 (1982).

8. 33 U.S.C. § 1251.

9. Id. at § 1342.

10. Id. at § 1362(14). "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." In the context of this area of the law, "point source" also refers to the party discharging effluents.

from the EPA.[11] The permit must meet technological requirements promulgated under the Act, and the EPA Administrator may impose conditions on the permit to assure compliance such as data collection and reporting requirements.[12] A source state is allowed to impose more stringent standards, and even take over the permit authority as long as it has adopted the minimum EPA standards.[13] An affected state has only the right to notice of the proposed discharge in the source state, and the right to object and receive written reasons for the disallowance of those objections.[14] If the EPA Administrator determines that a state permit is outside of the guidelines of the Act, it may veto the state permit and issue its own.[15]

The sections of the Clean Water Act with the greatest potential impact on the preemption question in *International Paper* were the citizen suit provision[16] and the state law retention provision.[17] The citizen suit provision was designed primarily to clear up standing and amount in controversy problems with class action suits under Federal Rules of Civil Procedure Rule 23.[18] Instead of bringing a class action suit, the citizen suit provision allows an individual or group of individuals to sue on their own behalf to enforce a state or EPA permit. It also allows such individuals to compel the administrator to perform nondiscretionary duties under the Act.

The citizen suit section however, does not provide an action for individual personal or property damages. Instead, it includes a saving clause, which states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or State agency).[19]

The legislative history of this provision somewhat clarifies its meaning: "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with re-

11. Id. at § 1311.
12. Id. at § 1342(a)(1)-(2).
13. Id. at § 1342(b), 1370.
14. Id. at § 1342(b)(5).
15. Id. at § 1342(d).
16. Id. at § 1365.
17. Id. at § 1370.
18. Rule 23 provides that a member of a class may sue as a representative of that class.
19. 33 U.S.C. § 1365(e).

quirements under this Act would not be a defense to a common law action for pollution damages."[20]

In another section, the state law retention provision, the Act further defines the role the states are to play under this regulatory scheme by specifically preserving state authority over waters within the state. The state law retention provision reads:

> Except as expressly provided . . ., nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.[21]

The legislative history to this section indicates that Congress intended to allow the states to adopt and enforce effluent standards or any other requirement respecting control or abatement of water pollution more stringent than those established by the EPA.[22]

The case law in this area reflects the substantive changes of the 1972 Amendments. Before the enactment of the amendments, the Supreme Court decided *Illinois v. City of Milwaukee*[23] (*Milwaukee I*). Illinois claimed that local governments in Wisconsin were dumping raw sewerage into Lake Michigan and asked the Supreme Court to invoke its original jurisdiction over the dispute. The Court refused to exercise original jurisdiction, but held that the federal district court had the jurisdiction to hear the case under the federal common law of nuisance.[24] One of the major concerns in this case was that Illinois would not have a forum to protect its interests under the pre-1972 Act.[25] Therefore, a federal common law was created, also providing a forum in the federal district courts. The Supreme Court went even further in establishing federal control over these disputes, stating: "[t]he [pre-amended] Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters."[26]

Later that year Congress passed the Clean Water Act Amendments of 1972.[27] The amendments added the NPDES permit system and con-

20. 1972 U.S. Code Cong. & Admin. News 3746.
21. 33 U.S.C. § 1370.
22. Supra note 20, at 3749.
23. 406 U.S. 91, 92 S. Ct. 1385 (1972).
24. Id. at 93, 92 S. Ct. at 1388.
25. Id. at 104, 107, 92 S. Ct. at 1393, 1395. At that time, there were no requirements that the affected state receive notice or a hearing under § 1342.
26. Id. at 102, 92 S. Ct. at 1392.
27. Although the term "Clean Water Act" was not used in the 1972 amendments, the 1977 amendments refer to the 1972 amendments as such. The term is also generically used to refer to the Federal Water Pollution Control Act in its current form. "Clean Water Act," as used in this paper, will refer to the Federal Water Pollution Control Act and all amendments to date.

tained section 402, which, among other things, provided the affected state with the right to participate in the permit process. It also contained the citizen suit and its saving clause, as well as the state law retention provision. The effect this had on the Court's broad assertion of federal dominance in *Milwaukee I* remained unclear.

Illinois refused to participate in the subsequent Wisconsin permit proceeding as provided by the Clean Water Act. Instead the state pressed its claims in the district court under the federal common law of nuisance, pursuant to the holding in *Milwaukee I*. However, in *City of Milwaukee v. Illinois*[28] (*Milwaukee II*), the Supreme Court held that the 1972 Amendments had preempted the federal common law of nuisance. The Court reasoned that the statute created a comprehensive program of water pollution regulation. The problem that concerned the Court in *Milwaukee I*, that Illinois would be denied a forum, was no longer a concern, since Illinois could have protected its interests by participating in the permit process, but chose not to.[29]

As far as the saving clause in the citizen suit section was concerned, the Supreme Court held that although it prevented preemption based on that "section," it did not prevent the Act as a whole from preempting federal common law remedies.[30] The decision stated that the *state* law retention clause was not relevant to the issue of whether the *federal* common law could be used to impose conditions more stringent than that of the permit.[31]

Later that same year, the Supreme Court extended this reasoning to all federal implied rights of action. In *Middlesex County Sewerage Authority v. National Sea Claimers Association*,[32] the Supreme Court cited *Milwaukee II* and held more specifically that the only private rights of action included in the Clean Water Act were the citizen suits authorized by the Act, because all other actions under the federal common law were preempted. Citizen suits allow a plaintiff to demand enforcement of an NPDES permit, but they do not provide for damages or the power to enforce the standards of the *affected* state. Moreover, *Milwaukee II* now made it clear that the federal common law was unavailable.

Illinois apparently recognized the possibility that the 1972 amendments resurrected the application of state common law to interstate water pollution disputes. Despite the sweeping preemption language of *Milwaukee I*,[33] the state pressed its claim on Illinois common law, rather

28. 451 U.S. 304, 101 S. Ct. 1784 (1981).
29. Id. at 326-27, 101 S. Ct. at 1797-98.
30. Id. at 328-29, 101 S. Ct. at 1798-99.
31. Id. at 328, 101 S. Ct. at 1798.
32. 453 U.S. 1, 101 S. Ct. 2615 (1981).
33. See supra note 26 and accompanying text.

than the federal common law remedy that the *Milwaukee II* Court had rejected. It claimed that the law of the affected state was not preempted under the Clean Water Act. In fact, it argued, the state law retention provision[34] specifically preserved state law rights of action.

The Seventh Circuit in *Milwaukee III*[35] rejected these claims and, citing *Milwaukee I*, held that all state common law remedies in interstate water pollution disputes were preempted. Specifically, it applied the reasoning of *Milwaukee II* that the citizen suit saving clause applied only to the section on citizen suits and not to the entirety of the Act.[36] Then the court held that the state law retention clause applied only to activity occurring within the state's borders, and not to interstate pollution disputes.[37]

The following year, the Vermont federal district court ruled on the *International Paper* case.[38] This court disagreed with the Seventh Circuit and held that Congress did not intend to prevent the affected state from applying its law to interstate disputes. It reasoned that since decreasing the level of water pollution was the stated purpose of the Clean Water Act, compensatory awards could only further that goal. Therefore, the application of the affected state's common law was not in conflict with the Act.[39]

The Second Circuit affirmed, adopting the district court's reasons.[40] This presented a split in the circuits to the Supreme Court over whether the state common law remedies applied to interstate water pollution disputes. The Seventh Circuit had held that all state common law remedies were preempted by the Clean Water Act, while the Second Circuit held that none were.

In essence, the Supreme Court's position in *International Paper* is a compromise between the two circuits' positions. Writing for a five member majority,[41] Justice Powell concluded that the Clean Water Act

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34. See supra note 21 and accompanying text.

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

36. Id. at 414.

37. Id. at 413.

38. Ouellette v. International Paper Co., 602 F. Supp. 264 (D. Vt. 1985).

39. Id. at 269-71.

40. 776 F.2d 55 (2d Cir. 1985).

41. Justices Stevens, Brennan, Marshall, and Blackmun dissented in the holding that only the source state's nuisance law could be applied. Furthermore, Justice Stevens, whom Justice Blackmun joined, wrote that the Court's opinion should be considered advisory because the issue of what state's law should apply had not yet arisen in the litigation; the only issue before the court was whether the district court could entertain a common law nuisance suit against a point source in one state based on an injury suffered in another. According to all of the dissenters, the Court did not yet know whether the district court would have been required, under conflict of law rules, to apply the nuisance

preempted the common law of the affected state to the extent that it would impose liability on a point source located in another state.[42] He reasoned that the Act is "pervasive" in its regulatory scheme, encompassing all point sources and most bodies of water.[43] The Act also provides some remedies for violations, such as civil and criminal fines for permit violations,[44] and the citizen suit provision.[45] Justice Powell agreed with the Seventh Circuit that the state law retention clause applied only to intrastate water pollution activity and not to activity occurring outside of the state.[46] He reiterated the holding in *Milwaukee II* that the saving clause in the citizen suit section did not prevent the Act in its entirety from preempting other laws. The Court then held that this preemption included the law of the affected state.[47]

Justice Powell determined that the intent to preempt may be presumed when the legislation "leaves no room" for state regulation.[48] A state law is also preempted if it interferes with the methods by which the federal goals are to be attained.[49] In issuing a permit, he reasoned, the EPA Administrator or the source state's permit authority balances the goal of the Clean Water Act to eliminate water pollution against the costs incurred to accomplish it. Allowing an affected state to impose liability on a point source because it violated that state's more stringent standards would disrupt this balance of policy choices.[50] Since this method of accomplishing the federal purpose would be interfered with by the imposition of liability under the affected state's law, the Act preempted that law.

As interpreted by the majority, this rationale does not apply to the imposition of common law liability under the source state's law. The state law retention provision, since it applies to activities occurring within the source state's borders, authorizes that state to impose regulations

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law of New York anyway. Therefore, the decision was premature.

Given the recent resignation of Justice Powell, the future strength of the holding in *International Paper* could be called into question. If the dissenting justices consider the opinion "advisory," it is possible that they will not give the decision the deference normally accorded to prior Supreme Court opinions. Under this scenario, the position of the newest member, Justice Kennedy, will become important.

42. 107 S. Ct. at 816.

43. Id. at 812.

44. 33 U.S.C. § 1319.

45. 107 S. Ct. at 812.

46. Id.

47. Id. at 812-13.

48. Id. at 811 (citing Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)).

49. Id. at 813 (citing Michigan Canners and Freezers Ass'n v. Agricultural Mkt. and Bargaining Bd., 467 U.S. 461, 477, 104 S. Ct. 2518, 2527 (1984)).

50. Id.

or liability more stringent than that of the Clean Water Act.[51] Therefore, the only compensatory remedies available to private individuals for damages resulting from the discharge of water pollution must be found under the source state's law.

For the most part, a plaintiff's choice of forum is not upset by this rationale. He may sue in the courts of the affected state, or he may sue in the courts of the source state.[52] Since it is likely that there will often be diversity, the plaintiff may also sue in federal court. Whatever forum is chosen, however, must apply the substantive law of the source state to the dispute.

The remaining question to be faced is the extent to which this interpretation can be extended to other areas of environmental regulation, in particular the Clean Air Act, RCRA, and CERCLA.

II. AIR POLLUTION

Noting the close relationship between the Clean Water Act and the Clean Air Act, Professor Rogers stated that "[c]ross-citation in air and water cases 'is legion, so much so that the two regions in many ways can be viewed as a single body of evolving law.' "[53] Yet there are differences between the statutes that make it impossible to infer preemption from the Clean Air Act simply because the Court has done so in the Clean Water Act. If such a preemption is found to exist in the Clean Air Act, it must be found on its own terms.[54]

The primary purpose of the Clean Air Act is to protect the nation's air quality "so as to promote the public health and welfare."[55] To do this, the Administrator of the EPA is required to establish national ambient air quality standards (NAAQS) for any pollutants that may endanger the public's health or welfare.[56] Each state must submit an implementation plan (SIP), which regulates stationary sources by providing for "emission limitations, schedules, and timetables for compliance

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51. Id. at 814-15.

52. Under well settled principles of jurisdiction, a Vermont state court could hear the dispute, assuming it could get jurisdiction over the defendant. However, the substantive law to govern the dispute would be determined by choice of law rules.

The Court's holding in *International Paper* is a compromise between the Second and Seventh Circuits' positions in two respects. First, it allows the states, including the affected state, to exercise jurisdiction over the dispute. Secondly, it allows state common law remedies to supply compensation to victims of pollution, but only under the law of the source state. While a plaintiff in interstate disputes may not avail himself of the substantive law of his state, at least he is not required to travel to a distant and inconvenient forum.

53. 1 W. Rogers, Environmental Law—Air and Water § 3.1(A)(2) (1986).

54. United States v. Kin-Buc, Inc., 532 F. Supp. 699, 701 (D. N.J. 1982).

55. 42 U.S.C. § 7401(b)(1).

56. Id. at § 7409.

with such limitations."[57] These limitations, taken cumulatively, must be sufficient to attain the ambient standards. The plan must also assure that state agencies will have the proper resources and authority to enforce the plan.[58] The Administrator must approve the state plan if it meets the Act's minimum requirements.[59] If the plan is disapproved and the state does not correct the deficiencies, the EPA must amend the plan to do so.[60] Once the plan is approved, it becomes enforceable as federal as well as state law.[61]

As far as interstate migration of air pollution is concerned, the plan cannot allow pollutants to be emitted that will prevent the attainment of the ambient standards in another state.[62] Furthermore, a procedure is established that allows a state or political subdivision to petition the EPA to determine whether an out-of-state source has released or is threatening to release an air pollutant in excess of the NAAQS.[63]

In one important respect the Clean Air Act is not as pervasive as the Clean Water Act. Unlike the Clean Water Act, the Clean Air Act does not regulate all stationary sources of pollution. Instead, it designates certain air pollutants considered dangerous to the public health. The Act also provides for the establishment of national standards (the NAAQS) for those pollutants, which states are required to implement by regulating stationary sources. Pollutants for which no ambient air standards are applicable, but whose emissions are nevertheless anticipated to result in an increase in mortality or serious illness, may be deemed "hazardous" by the Administrator. These pollutants are subject to regulation by the NESHAP's—National Emission Standards for Hazardous Air Pollutants.[64] Other stationary sources emitting pollutants for which NAAQS or NESHAPs have not been established remain unregulated.[65]

The Act contains a state law retention clause somewhat different in wording from the Clean Water Act's state law saving provision:

> Except as otherwise provided . . . nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an

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57. Id. at § 7410(a)(2)(B).
58. Id. at § 7410(a)(2)(F).
59. Id. at § 7410(a)(2).
60. Id. at § 7410(c)(1).
61. Id. at § 7413(a).
62. Id. at § 7410(a)(2)(E).
63. Id. at § 7426(b).
64. Id. at § 7412.
65. K. Murchison, Interstate Pollution: The Need for Federal Common Law, 6 Va. J. Nat. Res. 1, 25 (1986).

> emission standard or limitation is in effect under an applicable implementation plan or section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.[66]

Notably missing from this provision is the qualifying clause found in the Clean Water Act: "with respect to the waters (including boundary waters) of such States."[67] This language, as interpreted in *International Paper*, allows the state to impose more stringent requirements only as to activity occurring within that state. There is no such limitation expressed by the above Clean Air Act language.

The Second Circuit, however, in *Connecticut v. E.P.A.*,[68] may have indicated how this section will be interpreted. The states of Connecticut and New Jersey objected to the EPA approval of a revision of a New York State Implementation Plan because the EPA failed to consider their state's more stringent requirements. The circuit court refused to overrule the EPA action because it found that the approval must only consider whether the plan meets the minimum Clean Air Act requirements, not the neighboring state's requirements.[69] While this case did not involve an attempt to impose common law liability on a source of air pollution in another state, it did include strong language implying the same interpretation of the Clean Air Act provisions as its counterpart in the Clean Water Act:

> Nothing in the Act, however, indicates that a state must respect its neighbor's air quality standards (or design its SIP to avoid interference therewith) if those standards are more stringent than the requirements of federal law.[70]

Of course, this case involved the administrative approval of a State Implementation Plan, not common law liability. Thus, it could easily be distinguished by a court willing to impose liability on an out-of-state source of air pollution.

If the section can be interpreted as, at a minimum, being indifferent as to the applicability of one state's nuisance law on an out-of-state source, then the focus shifts to other sections of the Act to see if preemption can nevertheless be implied. The Clean Air Act contains a citizen suit provision and saving clause virtually identical to that of the Clean Water Act. In contrast to the state law retention clause, the Clean

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66. 42 U.S.C. § 7416.
67. See supra note 21 and accompanying text.
68. 656 F.2d 902 (2d Cir. 1981).
69. Id. at 909.
70. Id.

Air Act's version of the citizen suit saving clause is exactly the same as its Clean Water Act counterpart.[71] Therefore, the saving clause is clearly susceptible to the same interpretation given to the Clean Water Act's provision in *International Paper.* The phrase "[n]othing in this section" qualifies the saving clause so that the entirety of the Act could preempt state law, even though nothing in the citizen suit section alone could do so.

This is precisely the position taken in *United States v. Kin-Buc*[72] and *Reeger v. Mill Service, Inc.*[73] Both of these cases held that after *Milwaukee II* and *National Sea Claimers*, the Clean Air Act preempted federal common law. While no cases have applied this rationale to the applicability of the saving clause to the affected state's common law, such a holding could reasonably be expected.

With the citizen suit saving clause probably receiving the same treatment as its counterpart in the Clean Water Act, and the state law retention clause at best ambiguous on the use of an affected state's common law to impose liability on an out-of-state source, the preemption question ultimately will be decided by the structure and purpose of the Clean Air Act. Historically, the Clean Air Act and the Clean Water Act have developed as sister statutes. For example, the Clean Air Act's ambient air quality standards were modeled after the Clean Water Act's water quality standards, which gave way to effluent limitations in the 1972 amendments.[74] This "cross-fertilization"[75] has resulted in a very similar statutory scheme. In both Acts, minimum federal standards are created that states are required to implement. Federal control is maintained through EPA enforcement mechanisms. Both Acts allow a state to enforce more stringent standards and to participate in the approval of other state's plans or permits. Both Acts give individuals standing through citizen suits to enforce state or federal standards. Moreover, it could be argued that the imposition of one state's liability law on an out-of-state source would interfere with the policy choices made in the other state's implementation plan, which was a primary concern of the Court in *International Paper.* In short, the statutes are sufficiently similar to extend the interpretation of the Clean Water Act in *International Paper* to the Clean Air Act.

However, as mentioned above, some pollutants are not regulated by the Clean Air Act. One of these pollutants is acid rain, which is formed in the atmosphere as a result of the combination of sulfur dioxide and

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71. 42 U.S.C. § 7604(e).
72. 532 F. Supp. 699, 703 (D. N.J. 1982).
73. 593 F. Supp. 360, 363 (W.D. Pa. 1984).
74. W. Rogers, supra note 53.
75. Id.

oxides of nitrogen, two forms of pollutants regulated by the EPA. Since acid "deposition" is not covered by the Act's interstate pollution provisions, the Clean Air Act does not regulate it.[76]

The reasoning that preempts the affected state's law is inapplicable to pollutants that are unregulated by the Clean Air Act. The regulatory scheme is undisturbed by the imposition of common law liability for releases of unregulated pollutants. Only in the situation where the pollutants in question are regulated by the Clean Air Act is the law of the affected state preempted.

III. Hazardous Waste Regulation

Two federal statutes deal with the regulation and clean-up of hazardous waste pollution. The Resource Conservation and Recovery Act (RCRA) is primarily prospective in nature and controls the disposal of hazardous wastes into regulated facilities. The Comprehensive Environmental Response, Compensatory and Liability Act (CERCLA) is primarily a remedial statute, establishing liability for the cleanup of hazardous waste sites.

A. *The Resource Conservation and Recovery Act*

RCRA was enacted primarily to deal with the growing problem of unsafe hazardous waste disposal sites.[77] Like the Clean Water Act and the Clean Air Act, it is generally prospective in nature, establishing fairly extensive regulations for those in the business of handling hazardous wastes. It does not provide private causes of action for damages,[78] although section 7003(a) has been construed as providing for recovery by the government of its "response" costs.[79] In short, although designed specifically to deal with hazardous waste disposal operations, RCRA is similar in many ways to the Clean Water Act.

RCRA initially provides that the EPA Administrator shall establish criteria for identifying hazardous waste, "taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors . . . ."[80] It then establishes specific standards of conduct for generators,[81] transporters,[82] and owners-oper-

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76. Glicksman, Federal Preemption and Private Legal Remedies for Pollution, 134 U. Pa. L. Rev. 121, 170 (1985).

77. 1976 U.S. Code Cong. & Admin. News pp. 6239-41.

78. Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985).

79. United States v. Northeastern Pharmaceutical, 810 F.2d 726 (8th Cir. 1986); 42 U.S.C. § 6973(a). See infra notes 109-11 and accompanying text for a discussion of "response" costs.

80. 42 U.S.C. § 6921(a).

81. Id. at § 6922.

82. Id. at § 6923.

ators of hazardous waste treatment, storage, and disposal facilities.[83] Like the Clean Water Act, the primary enforcement mechanism is a permit system,[84] and the RCRA prohibits any treatment, storage, or disposal of hazardous waste without such a permit.[85] In addition, the EPA is given inspection powers[86] and may issue compliance orders or request judicial enforcement of the Act.[87] Also, like the Clean Water Act, the states are allowed to adopt their own hazardous waste regulatory program, subject to EPA approval, which is to operate "in lieu of the Federal program."[88]

The Act also contains a state law retention clause:

> No State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations . . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations . . . .[89]

Like its counterpart in the Clean Air Act, and unlike its counterpart in the Clean Water Act, this provision contains no language that would indicate an intent to limit this authority to intrastate activity, nor any language indicating an intent that it should apply to interstate activity. It is silent on whether a state may use its common law under RCRA to impose liability on an out-of-state source of pollution. If a prohibition of such authority under *International Paper* is to be read into RCRA, it must come from other sections of the Act.

RCRA contains a citizen suit provision that is very similar to the Clean Water Act's provision.[90] More importantly, its saving clause is virtually identical to that of the Clean Water Act:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).[91]

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83. Id. at § 6924.
84. Id. at § 6925.
85. Id. at § 6925(a).
86. Id. at § 6927.
87. Id. at § 6928.
88. Id. at § 6926(b).
89. Id. at § 6929. See People v. Roth, 129 Misc. 2d 381, 492 N.Y.S.2d 971 (Suffolk Co. Ct. 1985) (States may impose more, but not less, stringent standards.).
90. Id. at § 6972.
91. Id. at § 6972(f).

The marked similarity of this provision to the Clean Water Act suggests the same interpretation as in *International Paper*. Therefore, this provision should prevent only preemption based on that section, but should have no effect on the ability of the Act as a whole to preempt state law to the extent that it conflicts with the regulatory scheme.

RCRA has been interpreted as preserving common law nuisance actions in interstate disputes under it.[92] In *Allied Towing v. Great Eastern Petroleum Corp.*,[93] the defendant, Publicker, faced with negligence and strict liability claims, contended that the legislative framework surrounding RCRA and CERCLA preempted state causes of action for damages. Publicker based this argument primarily on *Milwaukee II* and *National Sea Claimers*, which dealt with the Clean Water Act. The district court disagreed, holding that the saving clauses in both statutes reflect an intent to preserve common law damage actions in addition to RCRA and CERCLA.[94] The court ignored *Milwaukee III*'s suggestion that the citizen suit saving clause applied only to that section and not to the entirety of the Act. It also refused to follow the Seventh Circuit's holding in *Milwaukee III* that all state common law actions were preempted. Instead, it cited the Second Circuit's decision in *International Paper* and provisions of RCRA's legislative history and held that the Act itself contemplated preserving all state common law rights of action.[95]

It should be noted that *Allied Towing* was decided after the Supreme Court had granted writs in *International Paper*, but before a decision was rendered. If *International Paper*'s interpretation of the citizen suit saving clause is applied, then the effect of the provisions of RCRA and the legislative history cited by the district court in *Allied Towing* become limited to the citizen suit section only. Therefore, a more comprehensive view of the Act must be taken to resolve the preemption question.

RCRA is similar to the Clean Water Act both in structure and purpose. It allows the states to play a key role in implementation of the regulatory scheme. But most importantly, it contains a permit system like that of the Clean Water Act as the key enforcement mechanism. The *International Paper* Court ruled that the affected state's law was

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92. Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985); State v. Schenectady Chemicals, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984); State v. Monarch Chemicals, 90 A.D.2d 907, 456 N.Y.S.2d 867 (1982).

93. 642 F. Supp. 1339 (E.D. Va. 1986).

94. Id. at 1350-51.

95. Id. at 1351. "Although [we have] not prohibited a citizen from raising claims under state law in a [section 6972 RCRA] action, [we] expect courts to exercise their discretion concerning pendant jurisdiction . . . ." H.R. Rep. No. 98-198, 98th Cong., 2d Sess. 53; reprinted in 1984 U.S. Code Cong. & Admin. News 5576, 5612. See also 1984 U.S. Code Cong. & Admin. News at 54, reprinted at 5608. "[section 6972] of RCRA was intended to preserve the rights of litigants under any statute of [sic] common law, notwithstanding the passage of RCRA."

preempted because the imposition of liability under that state's law on an out-of-state source would interfere with the policy choices made in the permit process,[96] and the same concerns should be applicable here. It follows that RCRA should be interpreted, in light of *International Paper*, as preempting the affected state's law in interstate pollution disputes. But the common law of the source state should be retained, pursuant to the state law retention clause and the need for viability of the permit system.

B. The Comprehensive Environmental Response, Compensation, and Liability Act

Extending the rationale of *International Paper* to CERCLA is more problematic. Unlike the Clean Water Act, the Clean Air Act, or RCRA, CERCLA is a remedial rather than a regulatory statute.[97] It was enacted hurriedly in 1980 to deal with sites, such as the Love Canal, that were so dangerous that immediate clean-up action was required. CERCLA was passed as a compromise between three competing bills—House Reports 85 and 7020, and Senate Report 1480.[98] The result is that "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history."[99]

Despite this vagueness, two primary purposes of CERCLA are evident. First, the federal government is given the means to respond immediately and effectively to imminent dangers resulting from hazardous waste disposal. Second, the costs and responsibility for responding to these harmful conditions are to be borne by those responsible for causing the harmful conditions.[100]

CERCLA specifically provides that whenever there is a release or threatened release of any hazardous substance or pollutant presenting an imminent and substantial danger to the public health, the President may arrange for the removal of the dangerous substances and take any remedial action consistent with a national contingency plan.[101] Ordinarily the state in which the release occurs must first enter into a cooperation agreement with the federal government assuring all future maintenance and response actions.[102] The states are also required to provide at least

96. See supra note 50 and accompanying text.

97. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074 (1st Cir. 1986).

98. *Dedham*, 805 F.2d 1074 (1st Cir. 1986).

99. United States v. Mottolo, 605 F. Supp. 898, 902 (D. N.H. 1985).

100. United States v. Reilly Tar and Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

101. 42 U.S.C. § 9604(a)(1).

102. Id. at § 9604(c)(3).

ten percent of the funding for these response actions.[103] This often causes problems as some states have not provided such funding. If state funding is not provided, the President is authorized to respond to emergency situations without it.[104] Generally, however, a state is authorized to carry out any response action provided for in the Act if the President determines the state is capable.[105]

CERCLA then provides for the liability of responsible persons for response costs. Current owners and operators of the vessel or facility, any owner or operator at the time of disposal, any person who by agreement arranged for transportation for disposal or treatment of hazardous substances, and any person who accepted such substances for transport are liable for all costs of removal or remedial action incurred by the governmental authority.[106] These parties are also liable for any other cost of response incurred by any other person consistent with the national contingency plan,[107] damages to the United States for destruction of national resources, and the cost of a health effects study.[108]

In summary, these parties are liable for all "response" costs incurred. "Response" is defined as a generic term including both the removal and remedial action.[109] "Removal" includes the cleanup action, prevention of a threatened release, and all costs incident thereto.[110] "Remedial" includes those actions in addition to the removal actions to prevent migration, such as dredging, excavating, or diverting. It also includes the costs of permanent relocation of residents when the President determines this is preferable or necessary, and the costs of offsite transportation and storage of the hazardous substances.[111]

Finally CERCLA established the "Hazardous Substance Response Trust Fund,"[112] commonly known as the "superfund." This fund is to be used to pay the costs of the government's response until reimbursement can be obtained from those responsible.

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103. Id.
104. Id. at § 9604(a)(4).
105. Id. at § 9604(d)(1).
106. Although the distinction is not important for the preemption question, it may be helpful to explain more fully the operation of CERCLA. As far as the cleanup authority is concerned, the EPA may order private parties to clean up a site, or it may do so itself. In addition, private parties may conduct a cleanup consistent with the National Contingency Plan. As far as liability is concerned, the EPA may recover from responsible parties the response costs it incurred. If the cleanup was conducted by a private party, that party may also recover response costs from responsible parties to the extent that such costs were incurred consistently with the National Contingency Plan.
107. 42 U.S.C. § 9607(a).
108. Id.
109. Id. at § 9601(25).
110. Id. at § 9601(23).
111. Id. at § 9601(24).
112. Id. at § 9631.

The Act contains a number of saving provisions relevant to this inquiry. The first is found in section 114(a) dealing with the relationship of the Act to other laws: "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."[113] Unlike the saving clause found in other environmental statutes, this one clearly applies to the entire Act. However, like the state law retention clause found in the Clean Water Act, it is easily subject to the limitation that it saves only intrastate authority. Under this section, therefore, the law of the affected state could still be preempted even though the law of the source state has been retained.

The section providing for the effective date of the Act also contains a saving provision: "Nothing in this Chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants . . . ."[114] This section could be interpreted as saving the affected state's law. It specifically states that nothing in the entirety of the Act shall affect the liability of a person under "other" federal or state common law. It does not contain language that on its face limits the section to intrastate activities.

The Act in its original form did not provide for citizen suits, though it had been interpreted as providing for private rights of action for recovery of response costs.[115] In 1986, however, a citizen suit provision that included a saving clause was added.[116] The saving clause succinctly provides that the "Chapter does not affect or otherwise impair the rights of any person under Federal, State or common law . . . ."[117] Unlike all of the other citizen suit provisions examined (including those of the Clean Water Act, which were interpreted in *International Paper* as limited by the language "in this section"), this provision's saving clause is not limited only to "this section." Instead it applies to the entirety of the Act. Furthermore section 309 of the Act, which deals with the applicability of state prescription rules, applies to any action "brought under State law for personal injury, or property damages,"[118] clearly contemplating the use of state tort law to remedy such injuries.

In enacting CERCLA, Congress rejected proposed preemption and tort law provisions, and instead included section 301(e), which calls for

113. Id. at § 9614(a).
114. Id. at § 9652(d). The section goes on to specifically preserve strict liability doctrines in such disputes.
115. Walls v. Waste Resource Corp.,. 761 F.2d 311 (6th Cir. 1985).
116. 42 U.S.C.A. § 9659 (Supp. 1988). Pub. L. 99-499, § 206, Oct. 17, 1986, 100 Stat. 1703.
117. Id. at § 9659(h).
118. Id. at § 9658(a)(1).

a study of the adequacy of legal remedies and necessary reforms.[119] The completed study rejected the desirability of a federal cause of action for personal injury and property damages.[120] The language in section 309 and the above saving clause support this conclusion. The question is whether, in specifically preserving state law rights of action and implicitly rejecting federal rights of action for personal injury or property damages, the Act necessarily prefers one state's law over the other. The language "[n]othing in this *Act* shall affect or modify in any way" common law remedies indicates that it does not.[121] Furthermore, the policy choices present in RCRA, Clean Water Act and Clean Air Act dealing with source state authority to prospectively regulate environmental activity are not present in CERCLA, which is a remedial statute.

The courts that have faced the preemption issue under CERCLA have generally concluded that common law actions are preserved. The *Allied Towing* court refused to be influenced by the circuit court debate over the Clean Water Act's preemption of state nuisance law and held that the CERCLA did not preempt state causes of action for damages.[122] The Michigan Court of Appeals recently reached the same conclusion,[123] and a United States District Court in Louisiana held that an action filed under nuisance law not specifically alleging CERCLA violations was not brought under the Act and therefore could not constitute federal question jurisdiction.[124]

No cases have yet faced the issue of what state law would apply in interstate hazardous waste suits. There does not seem to be any reason why normal choice of law rules should not apply. The limited type of saving provisions and the basic policy concerns present in prospective environmental regulatory statutes are not present in a remedial statute such as CERCLA. Therefore, the rationale of *International Paper* should not apply.

C. *Relationship of RCRA to CERCLA*

The conclusion, therefore, is that the affected state's law should be preempted under RCRA, but not under CERCLA. The relationship between these two statutes, then, will control the preemption question.

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119. Id. at § 9651(e). See Light, Federal Preemption, Federal Conscription Under the New Superfund Act, 38 Mercer L. Rev. 643, 655 (1987); Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., Injuries and Damages from Hazardous Waste: Analysis and Improvement of Legal Remedies (Comm. Print. 1982).

120. Id. Light, supra note 119, at 656-57, Report, supra note 119, at 255-71.

121. 42 U.S.C. 9652(d).

122. *Allied Towing*, 642 F. Supp. at 1352.

123. Attorney General v. Thomas Solvent Co., 146 Mich. App. 55, 380 N.W.2d 53 (1985).

124. McCastle v. Rollins Environmental Services, 514 F. Supp. 936 (M.D. La. 1981).

CERCLA is extremely broad and could conceivably be extended to virtually all hazardous waste disputes. In relation to RCRA, its scope is limited by section 107(j). This section provides that "recovery by any person for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."[125] "Federally permitted release" is defined in section 101(10)(E) as "releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of [RCRA] from a hazardous waste treatment, storage or disposal facility . . . ."[126]

A number of problems arise under this exclusion. One problem is that very few hazardous waste facilities have received final permits. Most of the facilities in operation today are under "interim status" under section 3005(e) of RCRA.[127] This status is conferred on those facilities in operation that have applied for a final permit. During this interim period, the operation of the facility is regulated by RCRA and regulations promulgated thereunder in a similar, although less extensive, manner as those facilities under a final permit. The section further provides that any person owning or operating a facility under interim status "shall be treated as having been issued a final permit."[128]

The question to be answered is whether a release from a facility under interim status is included in CERCLA's section 107(j) exclusion. The argument for the exclusion is that RCRA requires those under interim status to be treated as having been issued a final permit, and those with a final permit are not liable under CERCLA. In effect, this would mean that CERCLA should apply only to inactive or abandoned waste sites.

The counterargument is that the Act specifically provides that only those facilities with a final permit get the benefit of the exclusion. This argument is more persuasive. First of all, CERCLA was enacted after RCRA. The drafters were aware of the interim status facilities, yet still specified only those in compliance with final permits. The legislative history of this section clearly indicates that the scope of the exclusion is to be limited only to those with final permits: "sites or facilities which have interim status under RCRA do not adequately utilize acceptable levels of technology, and do not qualify for the exclusion."[129]

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125. 42 U.S.C. § 9607(j).

126. Id. at § 9601(10)(E). The section also includes releases under the Clean Air Act and the Clean Water Act.

127. Id. at § 6925(e).

128. Id.

129. S. Rep. No. 848, 96th Cong., 2d Sess. 48 (1980). See also Mardan Corp. v. C.G.C. Music Ltd., 600 F. Supp. 1049 (D. Ariz. 1984) (CERCLA independent of and in addition to RCRA, and applies to active and inactive sites).

One case applying this rationale was *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc.*[130] Chemical Waste was an owner-operator of an interim status facility that was required to take corrective action under RCRA. Chemical Waste sued a hazardous waste generator for response costs contribution under CERCLA. RCRA does not allow an owner-operator to recover such costs from a generator. The generator argued that CERCLA could not be applied to a release from such a facility. The court held that CERCLA was not intended to be so limited, but was intended to broaden the liability of responsible parties. Allowing the contribution claim was consistent with this policy.

Another problem with the exclusion is that it applies only to those releases that comply with the final permit. Since the legislative history and the policy cited in *Armstrong* indicate that the exclusion should be interpreted strictly, releases in violation of such a permit would not get the exclusion. Therefore, CERCLA may be applied to any hazardous waste release except in the narrow instance where the release is from a facility in compliance with a final RCRA permit.[131]

As far as preemption of the affected state's law is concerned, the context in which RCRA applies becomes important. When RCRA applies

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130. 669 F. Supp. 1285 (E.D. Pa. 1987).

131. There may be a further question about the scope of the exemption. Section 107(j) provides that recovery of damages and response costs shall be pursuant to "existing law in lieu of *this section*." Applying the reasoning that the court applied in the citizen suit saving clause in *International Paper*, one could limit the exclusion to response costs or damages incurred under section 107. Under this rationale, the EPA could still issue an administrative order under section 106(a), which allows the EPA to order a private party to begin a response action when the release presents an "imminent and substantial endangerment" to the public health or welfare.

However, a private party seeking damages and response costs could not recover from other private parties under section 106. Only the EPA has such authority. Thus, this interpretation of section 107(j) does not affect the rationale of this paper, which is concerned with the law applicable to a suit brought by private individuals.

Furthermore, this interpretation is arguably incorrect. In United States v. Price, 577 F. Supp. 1103, 1113 (D. N.J. 1983), the court held that § 106 is dependent upon the substantive provisions, which explain liability in § 107. And in United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987), the court held that the only classes of persons liable under § 106 are the classes of persons identified in § 107. Moreover, the legislative history of this section provides that "the reported bill authorizes response to federally permitted releases, but requires costs to be assessed against the permit holder under the liability provisions of other laws, not [CERCLA]"; and "the determination of exactly what liability standards, defenses, or other rules apply will be made on a case-by-case basis pursuant to regimes other than that of [CERCLA]." S. Rep. No. 848, 96th Cong., 2d Sess. 46 (1980). It could be argued from this that Congress intended to create an exemption applying to the Act as a whole. See Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986) (CERCLA could only be applied when releases were not made under a permit, or in violation of a permit limitation). For an excellent discussion taking the position that the exclusion is limited to section 107, see Brennan and Hart, Federally Permitted Releases and Liability Under CERCLA, 16 Chem. Waste Lit. Rep. 172 (1988).

to a release from an interim status facility, or a release in violation of a final permit, CERCLA should also apply. The question should be whether the imposition of liability under the affected state's law would interfere with the purposes and methods of RCRA when there has not been compliance with a final permit. In other words, should RCRA preempt the affected state's law when CERCLA is also available and does not preempt that law?

RCRA should control. The imposition of liability under the affected state's law due to a release from an interim status facility sufficiently interferes with the regulatory scheme to infer preemption. The same is true for violations of a final permit. To hold otherwise would effectively nullify all but those portions of RCRA regulating releases in compliance with a final permit.

Logically, the focus should be on whether RCRA applies to the dispute, not whether CERCLA does. If RCRA applies, the affected state's law is preempted notwithstanding CERCLA. If RCRA does not apply, such as with an inactive or abandoned site, or illegal releases, only CERCLA applies. In these situations, nothing in CERCLA preempts the affected state's law.

IV. Conclusion

The holding in *International Paper* should be extended to both the Clean Air Act and RCRA. Like the Clean Water Act, both regulate prospectively. They both allow the states to play a supplementary role in regulating and imposing liability for personal injury or property damage. Also, they both contain language limiting the citizen suit saving clause to the citizen suit section alone. While the state law retention provisions are not limited by their language to intrastate activity, the Acts could supply such a limitation given the narrow effect of the citizen suit saving clauses. Finally, both Acts rely on prospective policy choices made in the source states to implement the regulatory scheme.

There may be exceptions to preemption under the Clean Air Act. Certain pollutants, such as acid rain, are not regulated by the Act. Suits relating to these unregulated pollutants could involve the law of the affected state without interfering with any policy choices made by the permit authority. In these situations, the affected state's law should not be preempted.

CERCLA, however, is a remedial statute. Its very purpose is to allocate liability for the clean-up of hazardous waste sites. Its numerous saving provisions specifically prevent the entirety of the Act from preempting common law remedies, and there are no significant policy choices made in the source state that would be interfered with by the imposition of liability under the affected state's law. Therefore, if ordinary choice of law rules require the application of the affected state's law, nothing in CERCLA prevents the courts from applying that law.

In situations where both RCRA and CERCLA apply, the question becomes more complicated. RCRA should control the preemption issue. If it applies, the affected state's law is preempted, notwithstanding the dual application of CERCLA. However, if only CERCLA applies, liability may be imposed under the affected state's law.

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