THE BATTLE OF LAKE CHAMPLAIN—INTERSTATE POLLUTION AND THE INADEQUACY OF THE JUDICIAL PROCESS: *VERMONT V. NEW YORK*

I

In December 1970 the State of Vermont brought suit against the State of New York and the International Paper Company (IPC), alleging that the defendants were responsible for a 300 acre sludge bed located on the bottom of southern Lake Champlain. The substance of Vermont's complaint was that the sludge bed polluted Lake Champlain, impeded navigation, and constituted a public nuisance. As a result, Vermont charged, citizens of Vermont were deprived of their rights to swim, fish, travel upon and enjoy the waters of Lake Champlain.[1] Vermont traced the origins of the sludge bed to waste materials discharged into the lake without treatment by International Paper Company's pulp and paper plant in Ticonderoga, New York. New York State was named as co-defendant because (1) as owner of the land along the bottom of Lake Champlain where the sludge bed was located, New York was "responsible for damages done as a result of the existence of the nuisance on its property;"[2] and (2) as exclusive regulator of the waters on the New York side of the lake the state had failed in its duty to "manage them in such manner as not to injure the property of others."[3] In a suit invoking the original jurisdiction of the United States Supreme Court, Vermont sought compensatory and punitive damages as well as decrees directing the defendants to remove the sludge bed and to cease discharging pollutants into the lake.[4]

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1. Complaint of State of Vermont *passim*, Vermont v. New York, *motion for leave to file bill of complaint granted*, 406 U.S. 186 (1972), *special master appointed*, 408 U.S. 917 (1972), *motion of United States for leave to intervene referred to special master*, 409 U.S. 1103 (1972), *proposed consent decree rejected*, 417 U.S. 270 (1973), *dismissed*, 419 U.S. 955 (1974), *costs of special master apportioned*, 419 U.S. 961 (1974).

2. Supplemental Brief of the State of Vermont in Support of Motion for Leave to File Complaint at 7, Vermont v. New York, 406 U.S. 186 (1972).

3. Complaint of State of Vermont, *supra* note 1, at 3.

4. Supreme Court jurisdiction was based upon 28 U.S.C. § 1251(a)(1970), which provides that the Supreme Court shall have original and exclusive jurisdiction over all controversies between two or more states. When the suit was announced, it was widely assumed that New York was named as a party in order to assure Supreme Court jurisdiction. However, as Attorney General Kimberly Cheney later pointed out, Vermont viewed New York as an

Many observers found the timing of the Vermont suit puzzling. International Paper Company had operated its Ticonderoga plant for forty-five years without any primary or secondary treatment facilities. By the time Vermont announced its suit IPC had already begun winding down operations at its Ticonderoga mill in preparation for a move to a new plant five miles north of the old site. The new complex, which cost seventy-six million dollars, was equipped with five million dollars worth of pollution control devices. Vermont officials, however, were concerned with the condition of the sludge bed which IPC planned to leave behind. In the view of these officials the degradation of Lake Champlain waters would not cease when discharges into the lake were halted. Instead, they advanced the proposition that the sludge bed, through disintegration and exertion of a great oxygen demand, was itself a source of pollution. In the years prior to the closing of the old mill they had sought to force the installation of primary treatment facilities and felt that IPC should dredge the sludge bed before commencing operations at its new plant.

Vermont brought its action against New York and IPC at the zenith of national environmental concern, and the suit thrust the state into the limelight of environmental controversy. The local and national media focused upon the novel aspect of the suit: Vermont was seeking damages and decrees concerning past pollution. The *New York Times* described the suit as "precedent seeking."[5] Vermont Attorney General Jeffords pointed out:

> Should we win, it would be a tremendous precedent in the field of conservation. There are hundreds of industries around the country sitting on sludge beds and other accumulated pollution developed over years of operation, but there is no body of law that can be used to clean them up.[6]

Thus, Jeffords and the media shaped public perception of the case: In the public's view of the suit the issue was whether industry

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"indispensable party" within the meaning of FED. R. CIV. P. 19, since New York owned the land along the bottom of Lake Champlain. K. Cheney, Report on the Origins, Conduct and Settlement of Vermont v. New York and International Paper Company 5(1974). Part II (B) of this note discusses the choice of law implications inherent in original jurisdiction suits.

5. N.Y. Times, Dec. 6, 1970 at 62, col. 1.

6. *Id.*

would be held accountable for past damage done to the environment. As a matter of law, however, the issue was whether the sludge bed constituted a present and future threat to the environment. Under elementary principles of tort law, if the sludge bed was merely a product of past harm and was not itself a source of pollution, no court would have the authority to order its removal.[7]

Legal observers noted a more sophisticated question raised by the case: To what extent had Congressional legislation preempted the field of water pollution control and precluded the further development of federal common law as a means of regulating water pollution? The same day that the Supreme Court granted Vermont's motion for leave to file a bill of complaint, the Court issued its landmark decision in *Illinois v. City of Milwaukee*.[8] In that case the Court refused to invoke its original jurisdiction in a case involving alleged pollution of Lake Michigan, but in remitting the case to a district court, stressed that federal statutes had not preempted the field and that federal courts were still free to apply federal common law in cases concerning the pollution of interstate bodies of water.[9] Thus, observers saw in *Vermont v. New York* a challenge to the Supreme Court to deal creatively with modern problems of water pollution, and an opportunity for the Court to develop a substantive body of law in this area.

The Supreme Court never rendered a substantive decision in the case. After the Court granted Vermont's motion for leave to file a complaint[10] a Special Master was appointed.[11] Seventy-five days of detailed trial testimony, most of it highly technical in nature, followed, but the litigation culminated in an out of court settlement between the parties in 1974. The settlement did not call for a dredging of the sludge bed. Rather, it reflected a decision made by Vermont during the course of litigation to redirect its efforts in the suit to the control of pollution emanating from IPC's new plant. This decision was based upon findings made during the summer of 1972,

7. *See* W. Prosser, Law of Torts 602-04 (4th ed. 1971).

8. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

9. *Id.* at 107.

10. 406 U.S. 186 (1972).

11. 408 U.S. 917 (1972). The Special Master was R. Ammi Cutter, a former Justice of the Supreme Judicial Court of Massachusetts.

when the Vermont Water Resources Department conducted tests upon the sludge bed in preparation for the upcoming litigation. The tests did not bode well for Vermont's case; they revealed no clear evidence that the old sludge bed alone was a source of ongoing pollution. However, during the course of these tests the engineers made an inadvertant but alarming discovery: Discharges from the new plant were accumulating in parts of the lake and a new sludge bed was in its formative stage.[12] Given the lack of conclusive evidence concerning the issue of the old sludge bed and the evidence indicating the deleterious effects of discharges from the new plant, Vermont amended its complaint and subsequently sought the restriction of discharges from the new factory.[13] When Vermont Attorney General Kimberly Cheney announced the settlement between the parties in September 1974, he admitted that the nuisance conditions of the old sludge bed had "nearly disappeared," adding that "this abrupt change was unanticipated."[14]

Under the terms of the settlement the suit was dismissed without prejudice,[15] and IPC agreed to pay Vermont $500,000 for use in maintaining the water quality of Lake Champlain.[16] In the key portion of the agreement dealing with water pollution, IPC stipulated that it would reduce the phosphoric content of its effluent discharges to .5 milligrams per liter.[17] This limitation on the amount of phosphorus to be discharged was considered vital to Vermont not only because the phosphorus itself was harmful, but also because

12. Phone conversation with Wally McLane, Nov. 26, 1975. Mr. McLane is a sanitary engineer with the Water Quality Division of the Vermont Agency of Environmental Conservation. He was one of the engineers who conducted the tests which revealed the potential for the development of a new sludge bed.

13. In its amended complaint Vermont also sought the abatement of air pollution emanating from the new plant. The settlement decree stipulated that IPC would halt all such pollution before November 1, 1975. Agreement of Settlement Between the State of Vermont and International Paper Company 7, 33-37 (1974) [hereinafter cited as Settlement]. Last summer, however, Vermont officials agreed to a one-year extension of this deadline, citing IPC's good faith efforts to comply with the settlement agreement.

14. K. Cheney, *supra* note 4, at 18.

15. Settlement, *supra* note 13, at 1.

16. This agreement was tantamount to an outright payment of $500,000 since in 1975 the state planned to expend $1.5 million on Lake Champlain projects, and the settlement agreement made clear that $500,000 of this money could come from the payment made by IPC. *Id.* at 8,9.

17. *Id.* at 37.

the engineers at that time considered a limitation on phosphoric content to be tantamount to a limitation on the amount of suspended solids which would be discharged into the lake.[18]

There can be little doubt that Vermont has reaped few tangible benefits from its costly litigation. Subsequent events have proven that the suit as originally brought was misdirected. The sludge bed adjacent to the old Ticonderoga plant is no longer a source of pollution.[19] In addition, present attempts to control water pollution at the new plant are not based upon the terms of the settlement, but instead revolve around the National Environmental Protection Agency's administration of the Federal Water Pollution Control Act (FWPCA).[20]

It does not necessarily follow, however, that it was a mistake to bring the original action. In 1970 the condition of the water of southern Lake Champlain was intolerable and it was not clear that conditions would improve merely by the cessation of discharges from the old plant. The FWPCA was an unproven weapon in the fight against water pollution and the 1972 amendments to the Act, which are the main sources of its present effectiveness, had not yet been passed. All possible avenues of administrative relief had been exhausted, and from the perspective of Vermont officials the judicial process appeared to be a viable means of seeking redress for harm caused by IPC pollution. The common law doctrine of public nuisance, the willingness of the federal courts to apply federal common law in interstate nuisance cases, and the possibility of invoking the original jurisdiction of the Supreme Court appeared to facilitate

18. Large amounts of phosphorus are damaging to aquatic life because they accelerate the eutrification process, thereby depleting the lake's oxygen supply. The Vermont officials felt that a limitation on the amount of phosphorus to be discharged was also a limitation on the amount of suspended solids since phosphorus was a vital ingredient in the treatment process. However, as a later section of this note points out, IPC has unexpectedly substituted a different chemical in its treatment process, and the limitation on phosphorus no longer serves as a limitation on the total amount of suspended solids discharged into the lake. *See* text accompanying notes 86-87, *infra*.

19. In the words of John Pyper, Commissioner of the Vermont Agency of Environmental Conservation, "the condition of the old sludge bed has stabilized." Phone conversation, Nov. 26, 1975.

20. FEDERAL WATER POLLUTION CONTROL ACT, *as last amended by* FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Pub. L. No. 92-500, § 104, 86 Stat. 816; 33 U.S.C. § 1254 [hereinafter cited as FWPCA]. *See* Part IV of this note, *infra*.

the attainment of a satisfactory judicial remedy in the case. When viewed in this context, the decision on the part of Vermont officials to seek a judicial settlement of the dispute appears to have been a reasonable one.

Vermont v. New York raises many questions concerning the adequacy of the judicial process as a means of dispute settlement in water pollution cases. The litigation was both complex and costly. At the time of settlement Vermont had officially expended $550,000 in prosecuting the suit.[21] This figure was well beyond the original estimate, and was a primary factor in Vermont's decision not to pursue further litigation.[22] The case presented many interesting substantive and procedural questions which are worthy of further inquiry.[23] However, neither the litigation nor the settlement that followed ultimately resolved the legal issues in the case or the overall dispute between the parties.

This note presents an overview of the events surrounding the litigation of *Vermont v. New York* by isolating and analyzing various stages of Vermont's effort to curb IPC pollution of Lake Champlain. The purpose of this overview is to evaluate the case in terms of the role of the judicial process in resolving disputes concerning water pollution when inadequate administrative remedies cause victims of pollution to seek judicial relief. Part II examines the factors which led the State of Vermont to seek a judicial remedy: Section A traces Vermont's unsuccessful efforts to gain administrative relief in the years prior to the suit,[24] and Section B analyzes the strength

21. K. Cheney, *supra* note 4, at 39. This figure has been questioned by present Attorney General M. Jerome Diamond, who believes the true figure is closer to $700,000. Interview, at Vermont Law School, Oct. 20, 1975.

22. Common sense dictates that this immense cost of pursuing a judicial remedy would encourage a settlement. In a phone conversation on February 26, 1976 Kimberly Cheney stated that the cost was a "primary consideration" in accepting the settlement terms.

23. For example, (1) the issue of past damages in water pollution cases; (2) the advisability of a state suing on behalf of its citizens for damages to its natural resources; (3) corporate manipulation of local and state regulatory agencies; (4) the failure of the Supreme Court to accept the responsibility of monitoring the settlement (as originally proposed, the Court would have appointed a Master to oversee the settlement; in its only substantive opinion in the case the Court refused to accept this role, 417 U.S. 270 (1973)); (5) forum shopping problems inherent in original Supreme Court jurisdiction; (6) the use of expert testimony in pollution cases; (7) the role of Special Masters in Supreme Court litigation.

24. An exhaustive study of Vermont's attempt to gain administrative relief was written

of Vermont's legal claim in terms of both substantive and procedural law. Part III analyzes the results of the litigation, focusing upon the factors which led to the settlement, the terms of the settlement, and the factors which made the settlement an inadequate resolution of the conflict between the parties. Part IV briefly summarizes the current status of pollution control efforts directed at discharges from IPC's new plant.

II

A. *Lake Champlain Pollution, The Failure of Administrative Remedies, and the Decision to Sue*

When Vermont announced its suit in December 1970 no one seriously contested the fact that the water of southern Lake Champlain was polluted. A local ferry boat captain later commented that the water was "a slimy brown liquid that smelled strictly like rotten eggs,"[25] and a 1962 survey of visitors to Ticonderoga listed pollution as the most often mentioned characteristic of the area.[26] Below the surface of the lake a sludge bed of massive proportions had accumulated. The condition of the lake water reflected the fact that untreated wastes from paper making factories had been steadily discharged into the lake since 1882.[27] In 1925 the International Paper Company bought the Ticonderoga Chemical Paper and Pulp Company and subsequently has been the only paper producer discharging into southern Lake Champlain.[28]

The people most affected by IPC pollution, the residents of Ticonderoga, never took any serious action against the mill. Ticonderoga was and is a company town. The IPC plant employed over 1,000 people during the 1960's, 700 of whom were Ticonderoga resi-

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in 1972. M. PROVINE, LAW AND POLITICS IN INTERSTATE POLLUTION (Cornell University Program on Science, Technology, and Society, Case Study Series, No. 5 (1972)) [hereinafter cited as PROVINE REPORT]. Part II(A) of this note adds little to the facts compiled by Ms. Provine. Instead it briefly summarizes the events which preceded Vermont's resort to the courts, relying primarily on sources cited in the Provine report.

25. N.Y. Times, June 23, 1971 at 47, col. 1.

26. A. REED, TICONDEROGA: A GENERAL PLAN FOR THE TOWN AND VILLAGE 187 (1962).

27. The abundance of poplars and other softwoods around Ticonderoga makes the area ideal for paper production.

28. The IPC plant in Ticonderoga actually discharged into Ticonderoga Creek, about 2 miles south of Lake Champlain. The Creek flows into the lake, carrying discharged particles.

dents. In addition, the plant paid forty percent of Ticonderoga's tax revenues and its annual payroll was nine million dollars.[29] The Mayor in the early 1970's was an IPC executive, and the local newspaper was a staunch supporter of IPC. When company officials in December 1967 announced that the new mill would be built near Ticonderoga (Vermont, New Hampshire, and Maine also submitted proposed sites), the *Ticonderoga Sentinel* printed the headline "Merry Christmas!! Mill To Be In Ticonderoga."[30]

Vermont first expressed an interest in paper mill pollution of Lake Champlain as early as 1904, when Governor McCullough requested the U.S. Geological Survey to investigate the effects of discharges reaching the lake via Ticonderoga Creek.[31] It was not until the 1960's, however, that Vermont actively sought to stem IPC pollution. In 1961 a group of Vermont residents petitioned Governor Rockefeller to take action against IPC.[32] In July 1965 Governor Hoff wrote to Governor Rockefeller concerning the slow progress of New York's efforts to abate IPC pollution of Lake Champlain.[33] New York's water pollution statute,[34] which established ambient water quality standards, had been enacted sixteen years earlier but IPC had yet to submit realistic preliminary plans for the installation of a primary water treatment facility. Lieutenant Governor Wilson replied that "New York officials are both aware of the problem and are acting to solve it." Wilson assured Governor Hoff that construction of primary treatment facilities would begin by May 1966.[35] Four months later it appeared that Hoff's letter had had its intended effect: New York State's Commissioner of Health Ingraham signed an order directing that IPC begin construction of the new facilities by May 1966, and complete the facilities within one year there-

29. Ticonderoga Sentinel, Dec. 21, 1967, at 4, col.1.

30. *Id.* at 1, col.1. For a more detailed description of the relationship between Ticonderoga and IPC see PROVINE REPORT, *supra* note 24, ch.1.

31. K. Cheney, *supra* note 4, at 1.

32. *Id.* at 2.

33. Letter from Governor Hoff to Governor Rockefeller, July 29, 1965.

34. WATER POLLUTION CONTROL, N.Y. PUB. HEALTH LAW § 1220 (McKinney 1971) (repealed 1975). South Lake Champlain's designated best usage was labelled "fishing". When New York authorities finally attempted to force the installation of treatment facilities their action was based on the fact that the oxygen demand of IPC discharges seriously endangered aquatic life in the lake.

35. Letter from Lieutenant Governor Wilson to Governor Hoff, Aug. 5, 1965.

after.[36] In a modification of its order a short time later, however, the Department of Health directed IPC to install secondary water treatment facilities in addition to the primary facilities. The date set for completion of both sets of facilities was July 1970.[37] IPC officials ignored the order to install these facilities because they planned to move to a new plant less than one year after the July 1970 deadline. They correctly assumed that IPC would be allowed to continue operations without these facilities. Thus, when the old mill closed in April 1971 none of its discharges had ever been treated by either primary or secondary waste treatment facilities, despite the fact that IPC pollution had been subject to regulation under New York State's water pollution statute since 1948.

After New York authorities refused to enforce their water pollution statute Vermont officials sought relief from the federal government. Since 1948 federal control of water pollution has centered around the Federal Water Pollution Control Act.[38] Prior to the passage of its 1972 amendments the Act consisted primarily of state-developed ambient quality standards. Thus federal law followed the same pattern as the 1948 New York statute: Discharges from an existing point source were regulated only when they caused the water quality of a relevant body of water to fall below the designated ambient level.[39]

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36. Order of the New York State Department of Health (Nov. 3, 1965). The primary treatment facility ordered by the Department would have reduced the discharge of settleable solids by 75-95% and would have therefore significantly reduced the mill's contribution to the sludge bed. L. ALLEN, E. KAUFMAN & J. UNDERWOOD, PAPER PROFITS: POLLUTION IN THE PULP AND PAPER INDUSTRY 24 (1971) [hereinafter cited as ALLEN].

37. Modified Order of the New York State Department of Health (Dec. 30, 1966). The secondary treatment was necessary to reduce oxygen demand in the discharged waste. Primary treatment significantly reduces the amount of solids released into the water; it only reduces the oxygen demand of the waste materials by about 25%. Secondary treatment reduces oxygen demand by up to 95%. ALLEN, *supra* note 36. Pursuant to this modified order IPC initiated a pilot program designed to develop the best method of secondary treatment. This pilot program was the only concerete action taken by IPC as a result of the Department of Health's order to install primary and secondary treatment facilities at the Ticonderoga plant by July, 1970. For a more detailed analysis of New York State's inaction concerning IPC pollution see PROVINE REPORT, *supra* note 24, chs. 1-3.

38. FWPCA, *supra* note 20.

39. This method regulates whole bodies of water rather than individual polluters. The 1972 amendments to the act fundamentally altered this system by establishing effluent limitations for individual point sources. *Id.*; *see* Part IV, *infra*. *See generally* Ipsen & Raisch,

In 1965 the Federal Water Pollution Control Administration was established to oversee the implementation of state water quality standards. From the outset of its operations, time and manpower considerations forced the Administration to concentrate on states which, unlike New York, had not yet set any standards.[40] Its resources were further taxed when Congress transferred ultimate water pollution control from the Department of Health, Education and Welfare to the Department of the Interior in 1966.[41] The fact that the Administration was concerned only with ambient standards and the problems inherent in implementing new regulatory mechanisms combined to prevent any meaningful regulation of IPC discharges.

When in 1967 IPC announced its plans to move to a new plant Vermont's concerns increasingly focused on the problem of the sludge bed which IPC planned to leave behind. In an attempt to resolve the issue Vermont requested an interstate conference in 1968 on Lake Champlain pollution.[42] At the conference it was agreed that the Army Corps of Engineers would be asked to conduct an investi-

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Enforcement Under the FWPCA Amendments of 1972, 9 LAND & WATER L. REV. 369 (1974); Comment, *Judicial Review and the 1972 Amendments to the Federal Water Pollution Control Act: And Who Shall Guard the Guards?*, 68 NW. U.L. REV. 770 (1974); Note, *The Federal Water Pollution Control Act Amendments of 1972*, 1973 WISC. L. REV. 893.

40. As Health Education and Welfare Secretary Quigley commented:

> If a State has, in fact, set standards, and is making an effort to apply them, clearly I think, considering the limitations on time and manpower and moneys that are available, the prudent decision would be to make our efforts felt in other parts of the country where they would do more good.

Water Pollution Control Hearings on the Water Quality Act of 1965 Before the House Comm. on Public Works, 89th Cong., 1st Sess. 65 (1965).

41. The disorder within the FWPCA as late as 1967 is illustrated by the Agency's bungling of the Lake Champlain classification scheme. New York classified the best usage of the lake as fishing. When Vermont submitted its standards in 1967 it labelled the lake's best usage bathing, and stated that the water was acceptable for drinking with appropriate treatment. The FWPCA approved both the New York and Vermont standards despite their obvious inconsistencies and despite the fact that the Act assumed standards of each state would be identical.

42. Under federal law a pollution receiving state could request an interstate conference; if the conference did not produce satisfactory results a public hearing was held; if the hearing also failed to produce satisfactory results the U.S. government could sue the polluter on the basis of the conference's findings. 33 U.S.C. § 1160(d)(1970) *as amended*, 33 U.S.C. § 1311 *et seq.* (1972). Vermont, New York, the Department of the Interior, and the New England Interstate Water Pollution Control Commission were represented at the 1968 and 1970 Conferences.

gation of the feasibility of sludge removal and report back to a second conference in 1970. At the second conference in June 1970, the Army Corps of Engineers reported that the sludge bed could be dredged and dumped upland, carried to the middle of the lake and dropped in deep water, or covered with sand. The conference voted, with disagreement from New York, to recommend removal of the sludge bed to dry land. When IPC and New York requested further study of the issue, Secretary of the Interior Walter Hickel refused their request and threatened to sue IPC if plans were not made to dredge the sludge bed.[43] This course of events was radically altered in November, however, when President Nixon abruptly fired Hickel. In the confusion which followed Hickel's departure, no federal officials were willing to sue IPC.

In a final effort to force IPC to remove the sludge bed Vermont attempted to delay the paper company's plans to transfer its operations to the new mill. In this manner the state hoped to gain sufficient leverage to tie the opening of the new plant to an agreement by IPC to dredge the sludge bed. The 1970 Water Quality Improvement Act required that applicants for federal discharge licenses receive permission from their own state and from other states which will be "affected" by the discharge.[44] Secretary Hickel had ruled that Vermont would be "affected" within the meaning of the statute, and therefore had the right to demand a public hearing on the advisability of issuing a discharge permit to IPC.[45] In November 1970, however, IPC requested the Army Corps of Engineers to grant it permission to dump wastes into Lake Champlain without a permit. The Corps had this power pursuant to a seldom invoked provision of the Refuse Act of 1899.[46] On November 29 the Corps informed

43. Letter from Sec. of the Interior Walter J. Hickel to Henry L. Diamond, Nov. 18, 1970. The study of the Army Corps of Engineers and Hickel's subsequent threat to sue IPC lent support to Vermont's claim that the sludge bed was an ongoing source of pollution. The Corps study, however, concentrated on the issue of whether the sludge could be removed and in effect dodged the issue of whether it would in fact continue to damage the ecosystem of the lake. Thus a crucial issue was obscured and Vermont increasingly assumed that the sludge bed would continue to be a threat to the water quality of the lake.

44. 33 U.S.C. § 1160 (1970) *as amended*, 33 U.S.C. § 1131 *et seq.* (1972).

45. Burlington Free Press, Nov. 13, 1970 at 1, col. 4.

46. Rivers and Harbor Act of 1899, 33 U.S.C.A. § 407(1970). Section 13 of this Act, known as the Refuse Act, prohibits the disposal of waste materials into navigable waters without a permit from the Secretary of the Army. Although the Act was originally aimed at

IPC that it did not have time to pass upon the permit application, but that the Army "will not consider the initiation of operations at the new plant on December 1 an improper act of the company."[47] In the opinion of the Vermont Water Resources Commissioner the Corps action was "just a simple matter of one agency of the federal government telling us to go to hell."[48]

In the process of exploring possible administrative relief Vermont's assertion that the sludge bed would prove to be an ongoing source of pollution had been supported by the Army Corps of Engineers and Secretary of the Interior Walter Hickel. From Vermont's perspective in December 1970, IPC had managed to manipulate state and federal agencies in a successful attempt to avoid installation of treatment facilities at its Ticonderoga plant, and was in the process of abandoning a 300 acre sludge bed which would continue to damage Vermont waters for years to come. In August 1970 Vermont Attorney General Jeffords had warned that if New York and IPC continued to procrastinate concerning the removal of the sludge bed Vermont would be forced to seek court action. At that time Jeffords stated that Vermont had but three alternatives: (1) to urge New York to change its policy; (2) to continue to operate under the unsatisfactory federal administrative machinery; (3) to take direct legal action against IPC.[49] By December, Hickel's departure had enabled IPC to at least temporarily avoid dredging the sludge bed and the action of the Army Corps of Engineers had assured IPC of

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preventing obstructions to navigation, the Supreme Court in 1966 held Section 13 to be a pollution statute as well. United States v. Standard Oil Co., 384 U.S. 224 (1966). In the years which followed environmentalists increasingly relied on the Refuse Act in limiting discharges into navigable bodies of water. In the case of IPC, however, the Act served as a means of circumventing the permit requirement. Under the 1972 Amendments to the FWPCA, pollution permit issuance functions have been shifted from the Army to the EPA. *See* E. HANKS, A. TARLOCK, J. HANKS, ENVIRONMENTAL LAW AND POLICY, 1070-71, 1086-89(1974). This episode is another example of how Vermont suffered from defects in the federal regulatory scheme which have since been cured.

47. Letter from Robert E. Jordan to IPC Vice President Ralph Kittle, Nov. 29, 1970. For a more detailed description of Vermont's attempts to utilize federal administrative machinery to curb IPC pollution, *see* PROVINE REPORT, *supra* note 24, chs. 2-4.

48. N.Y. Times, Dec. 6, 1970 at 62, col. 1.

49. Statement of Vermont Attorney General James Jeffords, Aug. 25, 1970. In his statement Jeffords referred to "the cumbersome federal administrative machinery" and "the increasing feeling that the federal government, New York, and IPC may be in the 'sludge bed' together." *Id.*

a smooth transition to its new plant. Faced with these facts Jeffords announced that Vermont would seek leave to file a bill of complaint in the United States Supreme Court. After years of entanglement in state and federal regulatory schemes, the State of Vermont sought a judicial remedy based on the common law doctrine of nuisance.

B. *Vermont's Legal Claim*

In its suit Vermont sought damages for past harm caused by IPC pollution, the removal of the sludge bed in order to prevent future harm, and the abatement of water and air pollution at the new IPC plant. Vermont based its action on the common law doctrine of public nuisance. The Second Restatement of the Law of Torts defines public nuisance as "an unreasonable interference with a right common to the general public" and states that it includes interferences with the "public comfort," such as obstruction of a navigable stream.[50] Specifically excluded from this doctrine are injuries done to specific members of the public or to private property. Thus the Supreme Court has stated that actions will not be allowed "where it appears that the suit brought in the name of the state is in reality for the benefit of particular individuals."[51]

Vermont's complaint carefully described the cause of action as one of public rather than private nuisance. Damages were claimed on the grounds that New York and IPC were liable (1) for injury suffered by the citizens of Vermont in their use of public areas within Vermont and (2) for injury to the natural resources of Vermont. The first ground is the classic public nuisance cause of action

50. RESTATEMENT (SECOND) OF TORTS § 812B (Tent. Draft No. 17, 1971). Older definitions of public nuisance usually assumed that the interference with the common right was criminal in nature. *See* W. PROSSER, *supra* note 7, at 583-84. The RESTATEMENT, by using the term "unreasonable" in lieu of "criminal", significantly broadened the scope of public nuisance actions. Maloney, *Judicial Protection of the Environment: A New Role for Common Law Remedies*, 25 VAND. L. REV. 145, 155-56 (1972). *See generally* Bryson & Macbeth, *Public Nuisance, The Restatement (Second) of Torts and Environmental Law*, 2 ECOL. L. Q. 241 (1972).

51. Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 446 (1945). In Zahn v. IPC, 53 F.R.D. 430 (D. Vt. 1971), *aff'd.* 414 U.S. 291 (1973), the U.S. District Court dismissed an attempted class action suit by owners of property on Lake Champlain because all members of the alleged class could not in good faith allege the $10,000 damage figure required in diversity actions.

in which the state claims on behalf of the general public for the invasion of rights which are common to the public. This cause of action covers damage to the public's opportunity to boat, fish, and swim. The second ground covers damage to fish injured by pollution and to interests in air and water which the state retains as quasi-sovereign.[52] Thus Vermont exercised a right the Supreme Court has consistently granted to the states—the right to bring suit to protect the interests of its general citizenry from threatened harm.[53]

The choice of law problems inherent in the case were of cruical importance to Vermont. At the time the suit was brought Vermont was on uncertain legal ground in its attempt to have federal common law govern the issues involved in its complaint. In *Ohio v. Wyandotte Chemical Corporation*[54] the Supreme Court stated in dictum in a footnote[55] that when a state sues an out of state polluter in an attempt to abate pollution emanating from outside its borders, the federal district courts would be bound by the rule of *Erie R.R. v. Tompkins*[56] to apply state law.[57] Vermont apparently hoped to

52. Memorandum from Angus MacBeth to John Hansen, June 1972. *See generally* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 669-83 (1959) for a discussion of state actions on behalf of citizens.

53. Missouri v. Illinois and the Sanitary District of Chicago, 180 U.S. 208 (1901); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Wyoming v. Colorado, 259 U.S. 419 (1922); Hawaii v. Standard Oil of California, 405 U.S. 251 (1972). In its brief in support of its motion to file a bill of complaint Vermont cited Mr. Justice Holmes' famous explanation of the rationale for the doctrine:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.

Georgia v. Tennessee Copper Co., 206 U.S. at 237.

54. 401 U.S. 493 (1971).

55. *Id.* at 498-99 n.3.

56. 304 U.S. 64 (1938). In *Erie* Mr. Justice Brandeis stated, "[t]here is no federal general common law." *Id.* at 78. The same day the Court issued its opinion in *Erie*, however, Brandeis recognized that *Erie* did not foreclose all federal common law. In Hinderlider v. La Plata River and Cherry Ditch Co., 304 U.S. 92, 110 (1938) he declared, "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." In the years before and after *Erie* the federal courts have frequently utilized federal common law in resolving interstate disputes, and "[t]his progression of decisions has resulted in a body of substantive rules for application in suits between states which can only be termed 'federal interstate common law.'" Note, *State Ecological Rights Arising Under*

avoid this possibility[58] by naming New York as a defendant, hence invoking the original jurisdiction of the Supreme Court.[59] Whereas a lower federal court would likely feel compelled to follow the dictum in *Wyandotte*, original jurisdiction gave the Supreme Court an opportunity to consider the matter anew, or at least distinguish Vermont's claim from that of Ohio in the *Wyandotte* case. One obvious distinction was the fact that the Vermont action involved a dispute between two states. It is often posited that when invoking its original jurisdiction in actions between states the Supreme Court is dealing with issues "inherently federal" and hence is free to apply federal common law.[60]

Federal Common Law, 1972 WISC. L. REV. 597, 603. *See generally* Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

57. Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439-40 (1972). *See generally* Note, *The Expansion of Federal Common Law and Federal Question Jurisdiction to Interstate Pollution*, 10 HOUSTON L. REV. 121 (1972); Note, *Federal Common Law Applicable to Interstate Pollution Cases*, 7 SUFFOLK U.L. REV. 790 (1973).

58. If the suit was brought in a federal district court located in New York the *Wyandotte* case required the court to deal with the issues in the case in the same manner as would a New York court. This presented obvious problems for Vermont. A defense often used in nuisance actions is explicit or implied "legislative authority" to do the acts said to constitute a nuisance. See W. PROSSER, *supra* note 7, at 606-607. A New York court could have viewed the New York State legislature's passage of the WATER POLLUTION CONTROL ACT and the subsequent administration of that act by a state administrative agency as an implicit legislative approval of IPC discharges. The state agency's tolerance of IPC's actions may well have been viewed by the court as a determination that the IPC action was "reasonable" in the circumstances and hence not a nuisance.

59. Of course, Vermont originally did have legitimate claims against the State of New York and state officials viewed New York as an "indispensible party" within the meaning of FED. R. CIV. P. 19. *See* note 4, *supra*. Exclusive original jurisdiction under 28 U.S.C. §1251(a)(1970) depended upon a finding by the Court that New York was a bona fide defendant. If the Court found that Vermont had failed to state a cause of action against New York it could still exercise its original jurisdiction under 28 U.S.C. §1251(b)(1970), which provides that the Court "shall have original but not exclusive jurisdiction of all actions or proceedings by a State against citizens of another state." In cases involving pollution of interstate waters the Court has generally refused to exercise its original jurisdiction under 28 U.S.C. §1251(b)(1970) when there is another forum available to the parties. Ohio v. Wyandotte Chemical Corp., 401 U.S. 493 (1971); Illinois v. City of Milwaukee, 406 U.S. 91 (1972). In the event Vermont sued only IPC, federal district courts would have jurisdiction under 28 U.S.C. 1331(a)(1970). *See generally* Ficken, *Wyandotte and Its Progeny: The Quest for Environmental Protection Through the Original Jurisdiction of the Supreme Court*, 78 DICK. L. REV. 429 (1974), for a discussion of the implications of the plaintiffs' failure to gain Supreme Court jurisdiction in *Wyandotte* and *City of Milwaukee* and the significance of the Court's acceptance of jurisdiction in *Vermont v. New York*.

60. *See* notes 53, 56, *supra*. Thus in a contract action involving a dispute between two states the Supreme Court held: "Where the States themselves are before this Court for the

The choice of law issues in the case were resolved the same day the Court granted Vermont's motion for leave to file a bill of complaint. In *Illinois v. City of Milwaukee*,[61] the Court reaffirmed the power of the federal courts to fashion federal common law concerning the pollution of interstate bodies of water:

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. . . . When we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . .[62]

Thus Vermont was assured that even if the Supreme Court refused to recognize New York as a proper defendant and therefore would not exercise its original jurisdiction, the suit could be brought in a federal district court which would be free to apply federal common law.

III

A. *Pressures to Settle*

The common law doctrine of public nuisance provided Vermont with ample legal ground on which to sue New York and IPC. In order to establish a public nuisance claim, Vermont had to prove (1) that its interests in the water or wildlife of Lake Champlain were damaged; (2) that the action or inaction of New York and/or IPC was the proximate cause of this damage; and (3) that New York and IPC had acted unreasonably.[63] The difficulty with suits of this kind by private individuals or states against corporate polluters lies in the difficulty of proving the facts.

Each of the above issues could be proven only by detailed com-

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determination of a dispute between them, neither can determine their rights, *inter sese*, and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved." Kentucky v. Indiana, 281 U.S. 163, 176-77 (1930). *See generally* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 1325-35 (1965).

61. 406 U.S. 91 (1972).

62. *Id.* at 103.

63. *See generally* W. PROSSER, *supra* note 7, at 571-613.

pilation of data and the extensive use of expert testimony to explain this data.[64] An example of the complexities and expense involved in this type of proceeding occurred when Vermont sought to prove merely that the sludge bed was located on the Vermont side of Lake Champlain. Vermont found it necessary to introduce into evidence earth satellite photographs of the lake and to present testimony by Dr. Linde of the University of Vermont to explain to the special master how these photographs illustrated that the sludge particles were located in Vermont.

In addition, Vermont had to prove that its interests in the lake were damaged, a task which required detailed findings concerning the effects of pollution upon the aquatic life and water quality of the lake. Particularly troublesome was the issue of proximate cause. In its answer IPC alleged that discharges by the paper mill prior to IPC ownership in 1925 contributed to the damage sustained by the lake, as did discharges from a nearby graphite company and raw sewage discharges by the Village of Ticonderoga.[65] Refuting or minimizing these allegations required vast amounts of time and money.

Finally, Vermont had to prove that IPC's actions were "unreasonable." Of particular relevance here was the state of pollution control technology in the industry as a whole and the costs of implementing this technology in Ticonderoga. Once again, Vermont was forced to expend time and money in an attempt to prove complex issues. When settlement was announced Vermont had not yet completed the presentation of its case. Nevertheless, there had been seventy-five days of trial testimony resulting in almost 16,000 pages of transcript and 275 exhibits.

In complex cases involving highly technical evidence the corporate polluter enjoys immense advantages. While the plaintiff is usually unfamiliar with the technical issues which must be proven and must also carry the burden of proof, the corporate defendant usually employs personnel with a ready knowledge of most of the scientific issues involved in the case. In addition, the successful

64. *See generally* Sive, *Securing, Examining and Cross-Examining Expert Witnesses in Environmental Cases*, 68 MICH. L. REV. 1175 (1970).

65. Answer of Defendant International Paper Company at 5, Vermont v. New York, 406 U.S. 186 (1972).

corporation is apt to have superior financial resources. Most significant in this context is a comparison of IPC's net earnings from 1971 to 1974 with the State of Vermont's budget for those years:

	'71	'72	'73	'74
IPC NET EARNINGS[66] (millions) (income in working capital included)	91.3	182.5	177.5	343.0
V. STATE BUDGET[67] (millions)	249	266	293	309

These figures illustrate that by 1974 IPC's net earnings exceeded the State of Vermont's entire budget by more than thirty million dollars, an indication that IPC was better able to bear the expense of litigation. While Vermont's interests in the suit were represented by a severely strained Attorney General's office,[68] IPC hired the prestigious New York City firm of Davis, Polk, and Wardwell.[69]

Various factors led to the settlement agreement. Vermont's predicament was obvious. It had expended over half a million dollars in bringing the suit but had no guarantee of victory. The old sludge bed clearly had stabilized, and the state was uncertain of the willingness of the Supreme Court to set stringent standards against industrial polluters absent a congressional mandate.[70] In addition,

66. IPC Consolidated Statement of Earnings, MICROFICHE, (1971-74). In her study Ms. Provine points out that in 1970 IPC sold over 10%— OF THE PAPER SOLD IN NORTH AMERICA AND WAS 52ND ON FORTUNE MAGAZINE'S *LIST OF 500 LARGEST AMERICAN CORPORATIONS*. She also cites the following excerpt from ALLEN, *supra* note 36, which describes the effects IPC's size had on company attitudes toward pollution:

> This lumbering giant has been among the last paper companies to recognize its need for pollution control action. While smaller companies have innovated and developed pollution control equipment over the last 25 years, International Paper has retreated behind the 'untouchability' of its power and size.

PROVINE REPORT, *supra* note 24, at 7.

67. Official Vermont Budget Figures, Office of Management and Budget (1971-74).

68. Present Attorney General M. Jerome Diamond has commented that during the IPC suit "five of our fifteen full time employees were engaged with the IPC case and everything else suffered." Interview, at Vermont Law School, Oct. 20, 1975.

69. A Vermont attorney described the Davis, Polk team as "overwhelming at first" and told of the "chilling feeling" he would have when he sat across a table from "Taggert's Army," the name Vermont attorneys gave the defense team headed by experienced trial attorney Taggert Whipple and consisting of at least six or seven attorneys. This same attorney admitted that several of Vermont's expert witnesses got "beat up" while under cross-examination by the skillful Davis, Polk attorneys and described their intimidating use of computers in dealing with scientific facts.

70. Several Vermont attorneys who worked on the case mentioned the sobering impact the energy crisis in the fall of 1973 had on the atmosphere surrounding the IPC suit.

the 1972 amendments to the FWPCA had given the federal water pollution control effort added strength.[71] With this background, and faced with the prospect of expending an additional $150,000 completing the litigation,[72] it is not surprising that Vermont actively sought some type of settlement agreement.[73]

IPC also had significant incentive to seek a settlement. The *New York Times* characterization of the Vermont suit as "precedent seeking" was not without justification. From IPC's perspective the suit meant much more than the amount of damages it might have to pay Vermont. The company operates over eighty paper mills in the United States. Above all IPC wished to avoid a judicial decision advancing the public's right to compensation for harm caused by past pollution.[74]

B. *The Settlement Agreement*

The settlement agreement was announced on September 24, 1974.[75] Its terms stipulated that IPC would pay Vermont $500,000 to be used "solely for the purpose of protecting and preserving the natural environment of Lake Champlain Basin."[76] In addition, IPC

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71. *See* Part IV, *infra*.

72. This estimate was made by Kimberly Cheney. Phone conversation, Feb. 26, 1976.

73. When he announced the settlement Kimberly Cheney cited the following factors which influenced Vermont's decision to settle the case: (1)Vermont was unlikely to prevail in its attempt to have the sludge bed removed; (2)the willingness of IPC to cooperate in solving pollution problems at its new plant; (3)the high costs of pursuing further litigation; (4)the risks and costs of proceeding were not warranted in view of the certain results guaranteed by the settlement. K. Cheney, *supra* note 4, at 33.

74. Two IPC officials have admitted in private conversation that this factor was a major consideration in the decision to settle.

75. Earlier in the year the Supreme Court rejected a consent decree identical to the eventual settlement in terms of the substantive obligations of the parties. The decree called for the appointment of another Special Master to police the execution of the decree. The Court refused to accept the responsibility of overseeing the settlement because of the practical difficulties involved and the fact that such a judicial role had no relation to the performance of the Court's constitutional functions under Article III of the United States Constitution. Vermont v. New York, 417 U.S. 270 (1974).

76. Settlement, *supra* note 13, at 8-9. At the time of the settlement Vermont planned to spend over six million dollars in the next seven years on projects related to Lake Champlain. $500,000 of this sum could come from the money IPC paid Vermont. K. Cheney, *supra* note 4, at 36-37. When the suit was dismissed the Supreme Court ordered Vermont to pay $20,000 for the costs of the special master; IPC was ordered to pay $30,000. Vermont v. New York, 419 U.S. 961 (1974).

agreed to certain discharge standards at its new plant which limited the total oxygen demand of IPC's waste water effluent and the amount of total phosphorus IPC could discharge into the lake. Other substantive provisions of the agreement concerned air emissions from the new plant,[77] and in a separate agreement New York promised to give top priority to the construction of a sewage treatment plant for the Village of Ticonderoga.[78] Vermont was given the right to periodically inspect and conduct tests at the new IPC plant, and enforcement of the agreement was based on a system of arbitration under which a South Lake Referee was vested with "the same power and authority as an arbiter acting pursuant to federal law."[79] Decisions of the Referee could be appealed to a three member Appeal Board.[80]

In announcing the settlement Attorney General Cheney stated that its terms accounted for "the particular views of the Special Master and consequently the probable outcome of the case [in the event litigation had been completed]."[81] Mr. Cheney may have been correct in terms of any substantive decision of the Court. However, the settlement does not have many of the consequences of a Court decision. The settlement "shall not constitute an adjudication or finding on any issue of fact or law,"[82] and its provisions "shall not be construed as, nor shall they operate as, an admission that the company has or has not violated any law or regulation or otherwise committed a breach of duty at any time. . . ."[83] Another general provision of the agreement states that the terms of the settlement "shall not be construed as applicable to, or in any way providing a precedent with respect to, any other mill, installation, facility, or location."[84] Thus aside from the substantive provisions of the agree-

77. Settlement, *supra* note 13, at 33-37.

78. Agreement of Settlement Between the State of Vermont, the State of New York, International Paper Company, and the United States of America, 7 (1974). The United States had intervened in the case as an interested party in 1972. 409 U.S. 1103 (1972). Its original goal was to oppose the dredging of the sludge bed; due to the settlement it never presented evidence in the case. *See* note 85, *infra*.

79. Settlement, *supra* note 13, at 22.

80. *Id.* at 23.

81. K. Cheney, *supra* note 4, at 33-34.

82. Settlement, *supra* note 13, at 3.

83. *Id.* at 17.

84. *Id.* at 16.

ment the settlement fulfilled goals of both parties: Vermont was reimbursed for most of its vast expenditure in the case and IPC avoided the establishment of any precedent that would damage its operations at other facilities across the country.[85]

Unfortunately for Vermont, however, the substantive terms of the settlement reflect the superior technological background IPC officials enjoyed *vis-à-vis* Vermont representatives. When Mr. Cheney announced the settlement, he stressed the importance of the provisions limiting the phosphoric content of IPC's discharges. At the time of settlement, Vermont officials believed that limiting the phosphoric content of discharges was an indirect means of limiting the amount of suspended solids in such discharges, since phosphorus played a key role in the treatment process.[86] IPC has frustrated this purpose of the settlement, however, by the introduction of a new treatment process in which phosphoric acid plays a lesser role in preparing suspended solids for discharge into the lake. Sanitary Engineer Wally McLane explains that by substituting a chemical known as TG-10 for phosphoric acid IPC has been able to maintain the amount of suspended solids in its discharges while at the same time complying with the literal requirements of the settlement. According to Mr. McLane, this action was "unforeseen" by Vermont engineers and officials when the settlement was negotiated.[87]

The limitation on the amount of phosphoric acid IPC could discharge into the lake was considered one of the few tangible benefits Vermont gained from the suit. The manner in which IPC has

85. In addition to the above safeguards, the agreement contained a recognition by the United States that IPC contended that the discharge limitations in the agreement went beyond "the best practicable control technology currently available" and "the best available technology economically achievable"; that IPC agreed to the phosphoric limitations by reason of the "special characteristics of South Lake Champlain"; and that the discharge limitations agreed to by IPC would not be used by the U.S. as a basis or justification for EPA effluent guidelines or emission regulations. Agreement of Settlement Between the State of Vermont, the State of New York, International Paper Company, and the United States of America 14-15 (1974).

86. The day the settlement was announced Mr. Cheney estimated that the limitation of phosphoric discharges would cause a reduction in suspended solids discharges by 700 to 800 per cent. K. Cheney, *supra* note 4, at 6.

87. Phone conversation with Wally McLane of the Water Quality Division of the Vermont Agency of Environmental Conservation, Dec. 4, 1975. Mr. McLane declined to speculate whether IPC officials were aware of this alternative when the settlement was negotiated.

managed to circumvent the purpose of this limitation epitomizes a problem which may be inherent in any litigation between a state or private parties and major industrial corporations. Vermont citizens could see, taste, and smell IPC pollution; however, when state officials ventured outside their own field into areas involving special technical expertise they were unable to compete with corporate representatives well versed in such matters. Considerations such as these are undoubtedly what led Attorney General M. Jerome Diamond to, in effect, close the case of *Vermont v. New York*. When asked if he would request funds from the legislature to go to court in the event IPC breached the settlement agreement, Mr. Diamond replied in the negative: "Unlike the State of Vermont, a company such as IPC has the money to pump into litigation for years to come."[88]

C. *The Effectiveness of Litigation as a Method of Dispute Settlement in the Case*

The events which preceded Vermont's decision to sue, the actual litigation in the case, and the settlement agreement underline the importance of existing federal legislation concerning water pollution control. Vermont did not seek judicial relief until it had exhausted all possible administrative relief at the local, state, and federal levels. IPC dominance in the Village of Ticonderoga precluded significant controls at the local level.[89] The State of New York, despite the existence of a water pollution control statute stronger than those enacted in most states, refused to take meaningful action against IPC pollution.[90] Federal legislation prior to 1972 focused upon ambient water quality instead of regulating discharges

88. M. Jerome Diamond, in response to inquiry during a job symposium at Vermont Law School, Oct. 20, 1975. Since the suit was dismissed without prejudice Vermont could theoretically once again bring suit. However, Mr. Diamond has made clear that he would not even contest an outright breach of the terms of the settlement. This stance for the moment precludes a tantalizing option which may be open to Vermont—that is, the possibility that "unforeseen circumstances" (the introduction of TG-10 into the treatment process) may be sufficient grounds for rescission of the settlement agreement, or at least a renegotiation of part of the agreement.

89. *See* text accompanying notes 29-30, *supra*.

90. *See* text accompanying notes 34-37, *supra*.

from individual point sources,[91] and bureaucratic confusion paralyzed the federal enforcement effort.[92]

The common law doctrine of public nuisance,[93] coupled with the willingness of the federal courts to apply federal common law in interstate pollution cases,[94] provided Vermont with a legal basis sufficient to allow court action against New York and IPC. Although a legal remedy existed, practical considerations made the attainment of the legal remedy extremely difficult. As the plaintiff in a nuisance action, Vermont had the burden of proof in the case.[95] Given the many complex facts, which required the presentation of highly technical and detailed testimony, the state was hard pressed to meet this burden. Vermont was opposed by a party with superior financial resources and with numerous employees with a ready grasp of the technological issues involved in the case. These factors made it impractical for Vermont to continue litigating the case to a conclusion on the merits. Furthermore, the inequality of access to resources handicapped Vermont in its effort to negotiate an advantageous settlement. This factor is probably one of the principal reasons that the settlement failed to serve as an effective means of regulating the conflict between the parties.

Had the case been litigated to conclusion, there is a serious question as to whether a judicial decree could have provided a meaningful remedy. Much has been written concerning the role of the courts in protecting the environment.[96] Aside from the practical problems of proof and expense, many commentators question the advisability of judicial involvement in this area of lawmaking. Environmental reform raises issues concerning the allocation of eco-

91. *See* text accompanying notes 38-40, *supra*.

92. *See* text accompanying notes 40-47, *supra*.

93. *See* Part II(B), *supra*.

94. *Id.*

95. *See generally* Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (M. Baldwin & J. Page eds. 1970); Comment, *Role of the Judiciary in the Confrontation With the Problems of Environmental Quality*, 17 U.C.L.A. L. REV. 1070 (1970).

96. *E.g.* Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429 (1970); Note, *Water Pollution: Role of the Courts*, 1972 WASH. U. L. Q. 291; Whitney, *The Case for Creating A Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973).

nomic burdens among various segments of society and involves basic changes in industrial production; such functions are more appropriately within the legislative rather than the judicial domain.[97] Other factors weighing against reliance on judicial remedies in resolving substantive environmental issues include the court's lack of expertise in a highly complex field,[98] the fact that most pollution does not damage particular individuals to an extent which warrants a law suit but nevertheless exacts a high cost from society as a whole,[99] and doubts that pollution is amenable to the *ad hoc* solution embodied in judicial review.[100]

Vermont brought its action at the height of national environmental debate and before the 1972 amendments to the Federal Water Pollution Control Act. It is noteworthy that this same period witnessed the Supreme Court's decision in *Illinois v. City of Milwaukee* and numerous law review writings on federal common law remedies in the field of water pollution.[101] A leading trial attorney in the environmental field has stated:

> Every piece of enlightened social legislation that has come down in the past 50 or 60 years has been preceded by a history of litigation in which lawyers around the country have focused forcibly the attention of the legislature on the inadequacies of existing legislation.[102]

Vermont v. New York illustrates the difficulty inherent in trying to resolve disputes over water pollution through litigation. Nevertheless, suits such as *Vermont v. New York* and *Illinois v. City of Milwaukee* undoubtedly helped signal the need for the more extensive federal legislation embodied in the 1972 amendments to the Federal Water Pollution Control Act.

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97. *Water Pollution: Role of the Courts*, *supra* note 96, at 310.

98. The Supreme Court mentions this consideration and the resultant problem of an increased Court workload in Ohio v. Wyandotte Chemical Corp., 401 U.S. at 497-98, 501-03 (1971).

99. Krier, *supra* note 96, at 456.

100. *Water Pollution: Role of the Courts*, *supra* note 96, at 305.

101. *See* note 57, *supra*.

102. Victor J. Yannocone, Jr.; Cahn, *Environmentalists Blaze Legal Trail to Preserve Nature*, Christian Science Monitor, Oct. 2, 1969, at 3, col. 1. Cited from Krier, *supra* note 96, at 452.

IV

At the present time IPC discharges into Lake Champlain are not controlled by the terms of the settlement. Instead, the discharges are regulated by the Environmental Protection Agency (EPA) pursuant to the 1972 amendments to the FWPCA.[103] The 1972 amendments represent a marked change in regulatory philosophy. Instead of concentrating on the water quality of whole bodies of water, the Act now regulates pollution emanating from individual point sources. The 1972 amendments established a "National Pollutant Discharge Elimination System" under which polluters must receive a permit from the EPA Administrator before they discharge effluents into navigable waters.[104] The requirements for discharge limitations are stated in terms of compliance with "the best practicable control technology economically achievable" by 1977 and with the "best available technology economically achievable" by 1983.[105] The EPA translates these general standards into more specific discharge limitations through the issuance of regulations.[106]

IPC currently has a permit application pending before the EPA Region II office in New York City. Pursuant to Section 402(k) of the FWPCA a discharger is allowed to continue to operate its plant pending final determination on its application for a permit. Vermont participates in the permit application process as an "affected"

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103. FWPCA, *supra* note 20. *See generally* McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195 (1973); Note, *Federal Water Pollution Control Act Amendments of 1972: Effective Controls At Last?* 39 BROOKLYN L. REV. 403 (1972); Note, *Federal Water Pollution Control Act Amendments of 1972: Ambiguity As A Control Device*, 10 HARV. J. LEG. 565 (1973).

104. F. GRAD, ENVIRONMENTAL LAW §3.03 (1971). This text presents an in-depth analysis of the 1972 Amendments and compares them to pre-1972 federal law. The EPA interprets the term "navigable waters" to include "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. §209.102(d)(1)(1975). For a discussion of the EPA definition and its ramifications see Ablard & O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VERMONT L. REV. (1976).

105. FWPCA §301.

106. FWPCA §304. *See* Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459, 468-69 (1973). Mr. Smith points out that the basic difference between the 1977 and 1983 standards is that the former refer to treatment at the "end of the pipe" while the latter refer to the entire manufacturing process at the plant.

state,[107] and currently its interests are represented by the Water Resources Department. An Assistant Vermont Attorney General monitors the proceedings on behalf of the Vermont Attorney General's office. Agreement has now been reached concerning all discharge limitations except the total amount of suspended solids which IPC may discharge into the lake. Thus a problem which Vermont believed it had taken care of in the settlement agreement remains a source of conflict. Vermont's position is that a ceiling on discharges of 6,800 pounds per day is "practicable" within the meaning of the Act.[108] IPC counters that this figure is impossible to meet and on peak days currently discharges approximately 17,000 pounds of suspended solids.[109] The parties are now awaiting the scheduling of an adjudicatory hearing on the matter.

The fact that IPC still discharges pollutants into Lake Champlain without a permit four years after passage of the 1972 amendments signals certain weaknesses in the federal administrative mechanism. Nevertheless the amendments have drastically altered the framework of water pollution control. Polluters are now individually regulated by extensive federal guidelines. With the exception of the suspended solids issue, Vermont has been satisfied with the EPA discharge limitations. The disagreement concerning suspended solids focuses upon whether IPC will be allowed to discharge up to 6,800 or 17,000 pounds daily; it is noteworthy that at the peak of IPC pollution in the mid 1960's over 55,000 pounds of suspended solids were discharged daily into Lake Champlain.[110]

Most importantly, the EPA guidelines and regulations now set the type of standards Vermont and other plaintiffs in water pollution cases found so difficult to establish in a court of law. Victims of pollution seeking relief will no longer begin their quest in a vacuum—the EPA has done much of the necessary "legwork." In *Illinois v. Milwaukee* Mr. Justice Douglas, writing for the court, observed that "[i]t may happen that new federal laws and new

107. FWPCA §402.

108. Phone conversation with Greg Studen, Vermont Assistant Attorney General, March 4, 1976.

109. *Id.*

110. A.L. Caron, New York State Department of Health Memorandum for Record, Jan. 15, 1963. Cited from PROVINE REPORT, *supra* note 24, at 3.

federal regulations may in time pre-empt the field of federal common law of nuisance."[111] The 1972 amendments to the FWPCA have not entirely preempted the field,[112] and the federal common law of nuisance remains a weapon in the environmentalist arsenal. Nevertheless, the practical difficulties inherent in nuisance actions against corporate polluters, coupled with the presence of the evolving federal regulatory scheme, make it likely that there will be precious little development of substantive federal common law in the field of water pollution.

Vermont v. New York was expected to generate new law. An aggressive, ecologically aware state brought suit in the United States Supreme Court against a corporate polluter responsible for the degradation of the waters of beautiful Lake Champlain. Four years later, in announcing the settlement agreement, the Vermont Attorney General stated that although "some legal scholars, and those committed to environmental protection, would have welcomed a Supreme Court ruling," he would "not risk the public money of Vermont on the outside chance that some benefit might accrue to the taxpayers of some other state." "In the final analysis," the Attorney General continued, "the establishment of a purely legal precedent would mean little to Vermont. . . ."[113]

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111. Illinois v. City of Milwaukee, 406 U.S. 91, 107(1972).

112. The 1972 Amendments state that "[i]t is the policy of Congress to recognize, preserve and protect the primary responsibilities and right of the states to prevent, reduce, and eliminate pollution." FWPCA §1251(b). At least one court has specifically ruled that the amendments do not preempt federal common law nuisance actions. Illinois *ex rel.* Scott v. Milwaukee, Wisconsin, 366 F. Supp. 298 (N.D. Ill. 1973). *See* HANKS, TARLOCK, AND HANKS, *supra* note 46, at 824-26.

113. K. Cheney, *supra* note 4, at 8-9.