2013 IL App (2d) 121193-U
No. 2-12-1193
Order filed October 2, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHICAGO TITLE LAND TRUST CO., Trustee U/T/A Dated April 12, 1972 and Known as Trust No. 558,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-L-556
JON DeRAEDT,	)	
Defendant-Cross-Appellant.	)	
(Chicago Title Land Trust Co., Plaintiff-Appellee v. Algus Real Estate, LLC, et al., Defendants-Appellants and Cross-Appellees).	)	Honorable Keith F. Brown, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing portions of counterclaim: federal law preempted the majority of the state counterclaims, where the sought-after remedies directly conflicted with federal agency's orders. However, the trial court erred in dismissing the portions of the counterclaim alleging trespass of water (and requesting damages for the loss of agricultural use, but not the portion requesting damages for the cost of drain tile repairs), where those claims were not preempted by federal law and where there existed material factual issues. Affirmed in part and reversed in part; cause remanded.

¶ 2 This interlocutory appeal arises from the trial court's dismissal of a counterclaim filed in a trespass suit concerning two adjacent properties in Maple Park that contain a federally-protected wetland. In September 2012, plaintiff, Chicago Title Land Trust Co., as Trustee U/T/A dated April 12, 1972 and Known as Trust No. 558 (and for the benefit of certain members of the Strom family (the Stroms)), sued Algus Real Estate, LLC (owner of an adjacent property), Arthur Gustafson (Algus's principal), Jon DeRaedt (a lessee of both the Stroms and Algus), and Richard Brummel (DeRaedt's drain tile contractor) for trespass to property. In its complaint, Chicago Title alleged that DeRaedt and Brummel entered the Strom property at Algus's and Gustafson's request and destroyed several water-control structures and the portion of the federally-protected wetland that was on the Strom property.

¶ 3 The United States Army Corps of Engineers (Army Corps) investigated the trespass incident and issued several orders that required Chicago Title and Algus to take certain actions with respect to the portions of the wetland on their respective properties.

¶ 4 Precipitating a separate appeal (No. 2-12-1291) which is not at issue here, DeRaedt also filed a counterclaim in the trespass suit, arguing that Chicago Title and the Stroms had wrongfully impeded the flow of water from the Algus property across the Strom property. The Stroms moved to dismiss DeRaedt's counterclaim. The trial court granted the motion, finding that DeRaedt, who was a farm tenant/lessee, not an owner, on the Algus property, lacked standing to prosecute his claims. The court subsequently found, pursuant to Rule 304(a) that, as to counts I through III of DeRaedt's pleading, there was no just reason to delay enforcement or appeal of its order. DeRaedt appealed in a separate appeal.

¶ 5 Precipitating the present appeal, Algus filed a counterclaim in the trespass suit, raising the Illinois Drainage Code (Drainage Code) (70 ILCS 605/1-1 *et seq.* (West 2012)) and common-law drainage claims (or, as the parties term it, trespass of water) and arguing that the Stroms had wrongfully impeded the flow of water from the Algus property across the lowland Strom property. The Stroms moved to dismiss Algus's counterclaim (735 ILCS 5/2-619(a)(9) (West 2012)), arguing that the Army Corps' administrative action under the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. § 1251 *et seq.* (2012)) preempted Algus's claims under the Drainage Code and the common law. The trial court granted the Stroms' motion (dismissing counts I through IV) and made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement or appeal of the order. Algus appeals, arguing that federal law does not preempt its state law claims and that certain factual issues precluded dismissal of his counterclaim. We affirm in part and reverse in part.

¶ 6 I. BACKGROUND

¶ 7 The Strom property, located at 7N411 Route 47, is bounded by Route 47 on the west and Silver Glen Road on the south. It consists of about 19 acres and has been owned by various members of the Strom family (or by land trusts established by them) since 1959. The Algus property lies to the east and north of the Strom property. The Algus property is on higher land than the Strom property and water flows, via drain tile, from the Algus property to the Strom property and then to Virgil Creek.

¶ 8 In 1991, Gustafson purchased the Algus property, titling it to Algus Packaging, Inc. In 2006, Gustafson transferred title to Algus. The wetland area that is partially on both properties has existed since at least the 1960s. It is marshy and wooded and, thus, has never been cultivated on either

property. The border between the Strom and Algus properties in the wetland was marked by a concrete weir/head wall, which was located on the Strom side of the boundary. The weir's top was flush with the ground level at the boundary (about 976 feet above sea level).

¶ 9 In about 1967, the Strom family worked with the Department of Agriculture to build a pond within the wetland (the center or original pond). The surface level of the center pond was 971.7 feet. In 2004, the Stroms installed a second pond (the swamp pond) to the east of the center pond. The swamp pond was located between the weir and the center pond and had an elevation of 975 feet that was maintained by a standpipe drain. The swamp pond drains, when necessary, into the center pond and then into Virgil Creek. In 2007, the Strom family expanded the center pond (that portion of which is called the westernmost pond). Warren Strom averred that the changes to the ponds on the Strom property did not alter the flow of water across it.

¶ 10 DeRaedt is a tenant on both the Strom and Algus properties and has farmed on them since about 1996. The Algus property contained a drain tile system since at least 1996. The tile terminated near the weir that marked the boundary of the two properties. In his affidavit, Warren Strom averred that, on October 5, 2009, DeRaedt entered the Strom property with Brummel, an excavator, and: (1) ripped out and destroyed the concrete weir; (2) dug a four-foot-deep trench from the Algus property to the Strom's swamp pond, connecting the drain tile with the swamp pond; and (3) toppled a standpipe (which maintains the elevation level of the water) in the Strom's swamp pond. This apparently resulted in more water flowing through the drain tile and more draining out of the swamp pond. Warren Strom discovered DeRaedt and Brummel and demanded that they leave the Strom property. The Stroms subsequently terminated DeRaedt's lease/tenancy (which was originally to expire on February 28, 2010).

¶ 11 Subsequently, the Army Corps, which regulates the discharge of dredged or fill material into United States waters (33 U.S.C. § 1344 (2012)), investigated the incident. On December 10, 2009, it issued a cease-and-desist order to John Strom on the basis of its representative's observation that unauthorized in-stream pond construction and sidecasting caused "fill and/or dredged material [to be] discharged into an Advanced Identification (ADID #3467) wetland and a tributary of Virgil Ditch #2 located on your property" in violation of section 301 of the Clean Water Act (33 U.S.C. § 1311 (2012)). It ordered that initial corrective measures be taken (33 C.F.R. § 326.3(d) (2012)), including the removal of all fill and/or dredge material from the wetland and stream and "restor[ation of] the site to its original condition."[1]

¶ 12 Also on December 10, 2009, the Army Corps issued its first cease-and-desist order to Gustafson, asserting that, as a result of unauthorized piping and filling of Virgil Ditch #2 running through the wetland located on the Algus property, "fill and/or dredged material has been discharged into an Advanced Identification (ADID #3467) wetland and a tributary of Virgil Ditch #2 located on" the Algus property in violation of section 301 of the Clean Water Act. The Army Corps ordered

[1]The Army Corps further ordered that Strom submit: (1) within 10 days of his receipt of the order, a written statement of his intent to comply with the order; (2) within 30 days, a plan to restore the site to its original condition; and (3) within 60 days, written certification that the site had been restored to its original condition. The letter also warned that violators could be subject to civil or criminal penalties and fines of up to $32,500 per day or imprisonment. Also, the failure to comply with the order could result in enforcement action by the United State Environmental Protection Agency (EPA), which has independent enforcement authority under the Clean Water Act.

that initial corrective measures be taken, including the removal of all fill and/or dredge material from the wetland and stream and "restor[ation of] the site to its original condition."[2]

¶ 13 The Stroms hired KAM Solutions, P.C., to investigate the concrete weir's age. In a June 14, 2011, report, KAM opined that the concrete weir was likely constructed in the 1930s and not in 2003 as Gustafson had alleged. They also hired EnCAP, Inc., an environmental consulting firm, to assess the wetland issues on their property; it subsequently issued its proposal. (EnCAP proposed that the wetland be restored and that the following enhancements be made: "an additional 0.77 acres of emergent wetland, 1.72 acres of wet mesic prairie, and 0.5 acres of wildlife food plot [to be] integrated into the woodland ecosystem that is currently maintained and managed by the Strom family.")

¶ 14 On July 25, 2011, the Army Corps issued a second cease-and-desist letter to Gustafson concerning the unauthorized piping and filling of a tributary of Virgil Ditch #2 and removal of a weir altering the hydrology in the wetland located on the Algus property. The Army Corps noted that its representative had observed, on December 8, 2009, that fill and/or dredged material from the tile work and weir removal had discharged into the wetland and tributary. The letter noted that the Army Corps had reviewed the June 14, 2011, KAM Engineering report provided by the Strom family and that the Army Corps concurred with its findings concerning "the historic presence of the subject weir, as well as previous findings of the 976' elevation." The Army Corps stated that its records showed that the piping and weir removal had not been authorized and, thus, violated section 301 of the Clean Water Act. It ordered Gustafson to cease and desist all work on the project and to take

[2]The letter also contained the same deadlines and penalty warnings as those contained in the letter sent to Strom.

initial corrective measures, including removal of "all objectionable material from this wetland and restor[ation of] the site to its original condition." It further ordered that, within 10 days of receipt of the letter, Gustafson: (1) "replace the weir at the recommended location and elevation;" (2) remove the drain tile from the wetland; and (3) "restore the tributary channel."[3]

¶ 15 On August 15, 2011, Gustafson wrote to the Army Corps, stating that he intended to remove the objectionable material from the wetland, have the weir replaced to the 976-foot elevation, abandon the drainage tile through the wetland, and restore the tributary channel through it.

¶ 16 On August 31, 2011, John Strom executed an after-the-fact permit application with the Army Corps, "proposing to compensate for impacts." On October 21, 2011, Strom and the Army Corps entered into a settlement agreement. (The agreement notes with respect to the Strom property that "an existing pond was expanded, and a new pond with a berm and water control structure were constructed within" the wetland without authorization and impacting 0.27 acres of wetland.) The agreement provides that, to mitigate for the environmental impacts that resulted from the unauthorized activity, "Strom shall construct the mitigation area as proposed" by his consultants (EnCAP, Inc.) to "provide [an additional] 0.77 acres of emergent wetland, 1.72 acres of wet mesic prairie, and 0.5 acres of wildlife food plot integrated into the wooded wetland ecosystem" on the site. The agreement further noted that it did not affect or relieve Strom of responsibility to comply with any federal, state, or local law or regulation. An accompanying letter issuing a permit for the foregoing work states that the proposed work "effectively resolves your violation under Section 404 of the Clean Water Act."

[3]The letter also contained the penalties warnings noted above.

¶ 17 Turning to the trial court proceedings, on September 30, 2011, Chicago Title sued DeRaedt, Algus, Gustafson (and subsequently Brummel) for trespass on the Strom property that resulted in alleged damages to the land, drainage system, and detention ponds. In his answer, DeRaedt admitted that he entered the Strom property and replaced the clay drain tile with plastic drain tile and made other modifications (including lowering the standpipe in the swamp pond by two to three inches), but denied that they were illegal because he was attempting to remove silt due to blockage of the natural flow of water, and because the overflow standpipe in the east pond was too high, thereby stopping water from flowing off the Algus property and moving downstream.[4] DeRaedt and Algus filed counterclaims against Chicago Title and other parties.[5]

¶ 18 A. DeRaedt's Counterclaim

¶ 19 On November 23, 2011, DeRaedt filed a third-party complaint, seeking injunctive relief and damages due to alleged flooding on the Algus property caused by certain improvements to the Strom property. The Stroms moved to dismiss DeRaedt's complaint, arguing that DeRaedt, as a lessee, not an owner, lacked standing to sue under the Drainage Code.

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[4]DeRaedt alleged that he "lowered the level of the east pond by 30" to the natural elevation of the land at the border between the Gustafson and Strom Farms. DeRaedt remediated the damage caused by the construction of the east pond by replacing some of the silted clay tile with modern plastic tile. The lowering of the water level by 30" in the east pond and replacement of the silted tile were all in good agricultural practices in farming and drainage practices in Illinois."

[5]Specifically, Chicago Title, Strom family members (John, Leland, Lucas, and Warren), and Kane County.

¶ 20 The trial court dismissed certain counts of DeRaedt's (subsequently) amended third party complaint with prejudice and other counts without prejudice. The court also made a finding under Rule 304(a) that there was no just reason to delay an appeal of the dismissal of three of the counts. DeRaedt appealed in a separate appeal.

¶ 21 B. Algus's Counterclaim

¶ 22 On April 30, 2012, Algus filed its four-count counterclaim at issue in this appeal. In count I, Algus sought injunctive relief for alleged violations of the Drainage Code. Algus claimed that the water detention ponds (and pond drain pipes and earthen berms) constructed on the Strom property raised the water level in the drainage areas on the Algus property, causing silt to fill the covered drain tiles on the Algus property and interfere with and block the natural flow of water in the tiles and causing flooding on the Algus property and damaging the property used for agricultural purposes. Algus further alleged that the ponds were built without permission from Kane County (in violation of a 2002 conservation deed to maintain the property as an easement for agricultural purposes in perpetuity),[6] without the Army Corps' approval, and without Algus's consent. It argued that DeRaedt acted to repair the drainage. 70 ILCS 605/2-11 (West 2012) ("The owner of any land connected to or protected by such a mutual drain or levee may, at his own expense, go upon the lands upon which the drain or levee is situated and repair the drain or levee, and he shall not be liable for damage to lands or crops unless he is negligent in performing the work."). In count II, Algus sought damages for trespass of water under the Drainage Code for the costs of its repairs and the value of the property lost for agricultural purposes.

[6]70 ILCS 605/2-5 (West 2012).

¶ 23 In counts III and IV, Algus sought injunctive relief (including the removal of the standpipe and ponds built without Kane County's and Algus's permission and restoration of all wetlands destroyed by the ponds, drainpipes, and berms to their natural state) and damages for trespass (seeking the cost of its repairs and value of property lost for agricultural purposes).

¶ 24 On June 20, 2012, Chicago Title and the Stroms moved to dismiss Algus's counterclaim. 735 ILCS 5/2-619(a)(9) (West 2012), arguing that the Army Corps' actions under the Clean Water Act preempted Algus's state law claims. Specifically, Chicago Title and the Stroms argued that the Army Corps' orders were inconsistent with the relief Algus sought in the trial court; that the Army Corps made findings adverse to Algus, such as that the weir was constructed in the 1930s, not in 2003 as Algus had claimed; that the Army Corps determined that Algus is not entitled to drain its wetland; and that the Army Corps issued an order requiring the Strom ponds to be kept at certain elevations. The trial court granted the motion, dismissing all four counts of Algus's counterclaim with prejudice; it further made a Rule 304(a) finding. Algus appeals.

¶ 25 II. ANALYSIS

¶ 26 Algus argues that the trial court erred in dismissing, pursuant to section 2-619, its counterclaim. It asserts that: (1) its counterclaims are not preempted by the federal Clean Water Act; and (2) factual issues precluded dismissal. For the following reasons, we conclude that certain portions of Algus's counterclaim are preempted by federal law (counts I and III), but that its trespass of water claims (counts II and IV), wherein it seeks damages for the value of the property it lost for agricultural purposes (and not that portion seeking the cost of its drain tile repairs), are not preempted and that factual issues precluded dismissal of those claims.

¶ 27 A section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts that a defense outside the complaint defeats it. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005). Specifically, section 2-619(a)(9) permits involuntary dismissal where the claim is barred by "other affirmative matter." 735 ILCS 5/2-619(a)(9) (West 2012); see also *Joseph Construction Co. v. Board of Trustees of Governors State University*, 2012 IL App (3d) 110379, ¶17 (preemption is an affirmative matter appropriately raised in a section 2-619 motion). When ruling on such motions, a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them (*Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 23-24 (2004)), but a court cannot accept as true mere conclusions unsupported by specific facts (*Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009)). We review *de novo* a dismissal under section 2-619. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). Further, questions of federal preemption also present questions of law that are subject to *de novo* review. *Board of Education, Joliet Township High School District No. 204 v. Board of Education, Lincoln Way Community High School District No. 210*, 231 Ill. 2d 184, 194 (2008).

¶ 28 *(1) Preemption*

¶ 29 Preliminarily, Algus argues that its counterclaim is not preempted by the Clean Water Act because the Stroms' settlement agreement provides that the Army Corps' after-the-fact approval of the pond construction and other improvements on the Strom property remain subject to state or local law; thus, the Army Corps' action cannot conflict with Algus's state law claims. For several reasons, we reject this claim. First, the settlement agreement directly affects only the parties who entered into it, namely, the Stroms and the Army Corps. See, *e.g.*, *In re Marriage of S.D.*, 2012 IL App (1st) 101876, ¶47 (settlement agreement is a contract and its terms are binding on the parties). Second,

the provision, which states that the agreement does not affect or relieve Strom of responsibility to comply with any federal, state, or local law or regulation, merely clarifies to the Stroms the scope of the Army Corps' jurisdiction and generally notifies the Stroms that they may not ignore other laws or regulations. (In addition to this provision, the accompanying letter issuing the after-the-fact permit states that the proposed mitigation work "effectively resolves" the Stroms' Clean Water Act violation.) Finally, the statement, in and of itself and without any additional language addressing the interplay between federal and state law, does not affect the preemption analysis.

¶ 30 Turning to the central issue on appeal, Algus alternatively argues that its counterclaim is not preempted by federal law because the Army Corps' administrative action does not conflict with the Drainage Code or common law. For the following reasons, we conclude that some, but not all, of Algus's claims are preempted. We hold that those that claim a trespass of water onto its land that allegedly caused the loss of agricultural use of the land are not preempted.

¶ 31 The preemption doctrine is derived from the supremacy clause of article VI of the United States Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Thus, state law is null and void if it conflicts with federal law. *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 39 (2010).

¶ 32 Federal law preempts state law under the supremacy clause in any one of the following three circumstances: (1) express preemption—where Congress has expressly preempted state action; (2) (implied) field preemption—where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from the state realm; or (3) (implied) conflict

preemption—where state action actually conflicts with federal law. *Sprietsma v. Mercury Marine*, 197 Ill. 2d 112, 117 (2001). In the present case, only conflict preemption is at issue.

¶ 33 Conflict preemption occurs when: (1) it is physically impossible for a private party to comply with both state and federal requirements; or (2) state law stands as an obstacle to accomplishing and executing Congress's full purposes and objectives (*i.e.*, authorizes conduct that federal law forbids). See *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 18 (2006); see also *PLIVA v. Mensing*, 131 S. Ct. 2567, 2579 (2011) (the impossibility test assesses "whether the private party could independently do under federal law what state law requires of it."); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects").

¶ 34 The purpose of the Drainage Code is to insure that waters will not accumulate on higher land because of acts or omissions of landowners of lower elevation. *Bellati v. Allspach*, 79 Ill. App. 2d 44, 47-48 (1967). The Clean Water Act's goal is to eliminate water pollution. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). The federal statute "anticipates a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). It provides for two sets of water quality measures: (1) effluent limitations, which are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances that are discharged from point sources (33 U.S.C. §§ 1311, 1314 (2012)); and (2) water quality standards that (a) generally are promulgated by the states and establish the desired condition of a waterway (though the EPA must approve revisions to a state's water standards) and (b) supplement effluent limitations

so that point sources may be further regulated to prevent water quality from falling below acceptable levels (33 U.S.C. § 1313 (2012)). *Id.*

¶ 35 Section 404(a) of the Clean Water Act grants the Army Corps the power to issue permits for the discharge of *fill material* into the navigable waters at specified disposal sites. 33 U.S.C. § 1344(a) (2012). (The EPA, however, has authority under section 402 to issue permits for the discharge of *pollutants*. 33 U.S.C. § 1342(a) (2012).) The discharge of dredged or fill material into navigable waters without a permit violates the Clean Water Act, which defines navigable waters as "waters of the United States, including the territorial seas" (33 U.S.C. §1362(7) (2012)) and, by regulation, includes wetlands (33 C.F.R. §328.3(a); 40 C.F.R. § 230.3(s) (2012)).

¶ 36 According the Algus, the three actions the Army Corps issued in this case addressed only fill and/or dredged material that had been discharged into the wetland and a tributary of Virgil Ditch #2 and required that all such fill be removed from the wetland and stream. Algus argues that none of the Army Corps' actions are concerned with or mention (as does Algus in its pleading) drainage, impeding water flow, trespass to adjacent property by flooding or damages or injunctive relief for such an occurrence. Further, Algus contends that its counterclaim does not address discharges and deposits in wetlands. Rather, it concerns the "interruption of the flow of water from a dominant tenement to a servient tenement, impeding the flow of water from one property to the other in such a way that water is backed up on to another owner's property, flooding occurs and damages are sustained." Algus notes that its causes of action for drainage, nuisance, and trespass issues are based on the Drainage Code and the common law. The counterclaims also concern how to address a continuing trespass to property from backed up water on a permanent basis through injunctive relief.

These are, Algus contends, typical state civil issues and they are not preempted by the Clean Water Act.

¶ 37 To review, Algus sought, in count I, injunctive relief for alleged violations of the Drainage Code. Algus claimed that the water detention ponds (and pond drain pipes and earthen berms) constructed on the Strom property raised the water level in the drainage areas on the Algus property, causing silt to fill the covered drain tiles on the Algus property and interfere with and block the natural flow of water in the tiles, and further causing flooding on the Algus property and damaging crops. Algus further alleged that the ponds were built without permission from Kane County (in violation of a 2002 conservation deed to maintain the property as an easement for agricultural purposes in perpetuity), without the Army Corps' approval, and without Algus's consent. In its prayer for relief, Algus primarily sought: (1) a temporary injunction, enjoining the Stroms from maintaining the two ponds, drain pipes, and berms on the Strom property; and removal of the standpipe until all of the ponds were removed and the land restored to its original level and grade; (2) the ultimate removal of any ponds, pond drain pipes, and berms built without Algus's or the Army Corps' approval; and (3) restoration of all wetlands that were destroyed by the building of the ponds, pond drain pipes, and berms on the Strom property to their natural state. (In count III, Algus sought the same relief for the Stroms' alleged common-law trespass by flooding.) In count II, Algus sought trespass damages under the Drainage Code for the costs of its repairs (*i.e.*, replacing the blocked covered drain tiles with new covered drain tiles) and the value of the property it lost for agricultural purposes. (In count IV, Algus sought the same relief for the Stroms' alleged common-law trespass).

¶ 38 Thus, in summary, Algus alleged in its counterclaim that the illegal pond construction on the Strom property caused flooding on the Algus property (because the raised water levels caused silt to block the Algus drain tiles). Algus sought: (1) removal of the ponds, pond drain pipes, and berms that were built without its (or the Army Corps or the county's) permission; (2) restoration of all of the wetlands that were destroyed by the aforementioned building; (3) damages for repairs to its property; and (4) damages for the lost of property for agricultural purposes.

¶ 39 In the orders/actions it issued in with respect to the alleged trespass on the Strom property and work on the Algus property, the Army Corps ordered that: (1) Strom, in exchange for an after-the-fact permit approving the expansion of the pond system within the wetland on his property, construct a mitigation area; and (2) due to unauthorized tile work and the weir removal (that resulted in fill and/or dredged material discharging into the wetland and the tributary on his property), Gustafson restore the Algus site "to its original pre-violation condition," requiring him to remove all objectionable material from the wetland, "replace the weir" at the 976-foot elevation level and recommended location, "remove the drain tile from the wetland," and "restore the tributary channel." We further note that, in his letter to the Army Corps, Gustafson stated that he intended to comply with the Army Corps' order, including replacing the weir, abandoning the drain tile through the wetland, removing objectionable material from the wetland, and restoring the tributary channel through the wetland.

¶ 40 The Stroms acknowledge that the discharge of fill material could be curbed by the Army Corps and EPA and the flooding may be a violation of state drainage laws. However, here, they urge, that is not the case because the relief Algus seeks directly conflicts with the Army Corps' orders and the Clean Water Act because neither Algus nor the Stroms can comply with both the

Army Corps' July 25, 2011, order and a judicial order granting Algus the relief it seeks. Thus, state law must give way, and the trial court, it asserts, rightly dismissed Algus's claims.

¶ 41 Algus contends that the Army Corps did *not* order it to completely remove the drain tile on the Algus property; rather, it must replace the new perforated tile it put in place with solid tile as was previously in place. On this point, we agree with Algus that the Army Corps letter states that the drain tile be removed and that it appears that the agency is referring to the new tile; however, this of no significance to this appeal because it remains impossible for the parties to comply with both the Army Corps' orders and the relief Algus requests in its counterclaim. The Army Corps approved an after-the-fact permit for the expansion and addition of ponds on the Strom property. Algus's primary complaint in its counterclaim is that the illegal pond construction on the Strom property caused flooding on Algus' property (because the raised water levels caused silt to block the Algus drain tiles). Clearly, Algus's prayer that the trial court order the removal of the ponds and restoration of the site to its original condition directly conflicts with the Army Corps' orders approving the pond construction and expansion (after the fact) because it is impossible to comply with both the federal directive and the relief Algus requests.

¶ 42 As to all but its claim that the trespass of water from the Strom property caused the loss of agricultural use of some of the Algus land, we also reject Algus's argument that there is no conflict because the Army Corps' actions concerning the Strom property do not mention drainage, impeding water flow, or damages for such actions. Algus prayed for damages for the costs it incurred in replacing the drain tile on its property; however, this conflicts with the Army Corps' order that it remove that tile (because the agency did not authorize the installation of the new tile).

¶ 43 Algus relies on *Metropolitan Sanitary District of Great Chicago v. United States Steel Corp.*, 30 Ill. App. 3d 360 (1975), in support of its argument that federal and state law address different issues. In that case, an Illinois sanitary district instituted proceedings against a corporation, alleging that the corporation's Gary, Indiana, operation was polluting Lake Michigan waters. Its complaint asserted state statutory and common-law nuisance claims. The corporation moved to dismiss or, alternatively, stay the proceedings pending completion of administrative proceedings before the EPA. The corporation based its argument on the doctrines of primary jurisdiction and exhaustion of administrative remedies. *Id.* at 361-62. The EPA had issued a permit to the corporation allowing the discharge of certain industrial materials, and the corporation subsequently requested an adjudicatory hearing on the permit. Arguing that the federal agency was required to make the same factual determinations as were presented to the trial court, the corporation argued that water quality issues required coordinated and coherent solutions and urged the trial court to invoke the primary jurisdiction of the federal agency and require the sanitary district to exhaust its administrative remedies (by joining and participating in the adjudicatory hearing).

¶ 44 The trial court denied the motion, and the corporation appealed. On appeal, the court affirmed, noting that the 58-page permit the EPA issued to defendant imposed limitations on the discharge of 15 industrial wastes by defendant into Lake Michigan and the Grand Calumet River. *Id.* at 363, 375. The court also noted that the plaintiff sanitary district had "statutory authority [to seek injunctive relief by nuisance abatement] to prevent pollution of any waters from which a water supply may be obtained by any city, town or village within the District." *Id.* at 366. It noted that the federal clean water statute reiterated the continuing rights of states and municipalities to protect their waters by more stringent requirements than any adopted under federal law. *Id.* at 370. Thus, the

court held that the doctrine of primary jurisdiction did not apply to stay the trial court proceedings. *Id.* Critically, it determined that the federal and trial court proceedings addressed different issues: the federal proceeding concerned a permit that approved continuing pollution, whereas the trial court proceeding involved an attempt to terminate the pollution. *Id.* Further, the method and manner of reaching the clean water goal was different in the two jurisdictions. *Id.* at 369. The hearings before the federal agency concerned a permit that allowed continued pollution of the water for a certain period, whereas the trial court proceedings concerned total abatement. *Id.* at 370.[7] The court also rejected defendant's argument that plaintiff was required to exhaust administrative remedies, noting that the doctrine did not apply to the case because abatement of nuisance was not an issue "cognizable by the administrative body." *Id.* at 376.

¶ 45 Here, Algus argues that, just as the federal and state courts in *U.S. Steel* addressed different issues, the Army Corps and the Drainage Code and common law utilize different approaches to different problems of water rights and drainage. It notes that, in enacting the Clean Water Act, Congress intended that much of the administration and enforcement devolve to the states and that each state assume primary responsibility for programs within its jurisdiction. 33 U.S.C. § 1251(b) (2012);[8] *Valstad*, 357 Ill. App. 3d at 923-24; see also 33 U.S.C. § 1365(e) (2012) (citizen suit

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[7]The court also rejected the defendant's arguments that the EPA was the more specialized tribunal that could address the complex and voluminous scientific, technological, and economic facts and do so in a timely manner and that this would provide for consistency and uniformity of determinations. *Id.* at 372-73.

[8]"It is the policy of the Congress to recognize, preserve, and protect the primary

provision provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."). Thus, Algus reasons, the Clean Water Act is *in addition to* the state statutory and common law rights vested in any person to institute and prosecute necessary court actions. Algus also argues that its counterclaim does not address the same subject matter as the Army Corps' action: the Army Corps' actions address discharges and deposits in wetlands, whereas Algus's counterclaims concern: (1) the interruption and impeding of the flow of water; (2) flooding; and (3) damages that are sustained. The drainage, nuisance, and trespass causes of action, Algus insists, are based on the Drainage Code and common law and the counterclaims concern how to address a continuing trespass to property from backed up water on a permanent basis through injunctive relief. It contends that these are all traditional state law issues that are not preempted by the Clean Water Act.

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responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution." 33 U.S.C. § 1251(b) (2012).

¶ 46 As to Algus's primary, but not all, claims, we disagree and conclude that *U.S. Steel* is distinguishable. First and foremost, the *U.S. Steel* court did not conduct a preemption analysis, which is at issue here, but addressed the application of the primary-jurisdiction and exhaustion-of-administrative remedies theories. Second, the issues in *U.S. Steel* addressed by the EPA and the state court and the methods that were or would be adopted by them to address the pollution differed: the EPA permit allowed continued pollution for a certain time and the judicial proceeding involved complete abatement of the pollution. Here, however, the Army Corps' and Algus's goals are essentially the same: to restore the sites to their original condition and further, in Algus's case, to stop the flooding on its property. Algus seeks to stop the flooding of its property due to the blockage of drain tile that is supposed to remove water from its property. Similarly, the Army Corps determined that the unauthorized pond expansion and construction on the Strom property and the unauthorized installation of new drain tile on the Algus property and the removal of the weir altered the hydrology in the wetland, causing fill or dredged material to pollute the wetland. It ordered: (1) removal of the ponds, pond drain pipes, and berms that were built without its (or the Army Corps') permission; (2) restoration of all of the wetlands that were destroyed by the aforementioned building; and (3) (statutory) damages for repairs to its property. The fact that the manner in which this goal is to be accomplished conflicts as between the Army Corps and Algus (*i.e.*, maintenance of the ponds with creation of a mitigation area, versus pond removal) does not make this case similar to *U.S. Steel* because, under conflict preemption analysis, which the *U.S. Steel* court did not undertake, federal law preempts certain of Algus's claims.

¶ 47 We further reject Algus's argument that there is no conflict between the (stricter) relief it seeks (presumably damages) and the Army Corps' required action (*i.e.*, injunctive) because the Clean

Water Act allows the states to impose higher standards on their own point sources. In *International Paper*, upon which Algus relies, the Supreme Court addressed whether the Clean Water Act preempted a Vermont-law nuisance suit filed by Vermont property owners, where the source of the injury, a pulp and paper mill operator that discharged effluents into Lake Champlain, was in New York. The Supreme Court held that a court considering a state-law claim concerning interstate water pollution that is subject to the Clean Water Act must apply the law of the state in which the point source is located. *International Paper*, 479 U.S. at 487. The court noted that the Clean Water Act prohibits only those lawsuits that may require incompatible effluent controls; the statute's savings clause, however, preserves other state suits and does not bar a nuisance suit based on the source state's law. *Id.* at 497. Rejecting the proposition that it find preempted some remedies but not others, the court stated that neither the statute nor the legislative history suggested this distinction. "[U]nless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available (or as in this case, pre-empted)." *Id.* at 499 n.19 (rejecting suggestion that request for punitive or injunctive relief be found preempted and that compensatory damages actions be found permissible because, under the case, they do not regulate/interfere with the federal statute; court refused to "draw a line between the types of relief sought").

¶ 48 Algus contends that, pursuant to *International Paper*, state suits may seek compensatory damages, injunctive relief, and punitive damages without the preemption of one remedy but not another. It argues that its claims do not conflict with federal law if a remedy based on the Drainage Code and common law is more stringent than the Army Corps' orders. The Army Corps' orders, it notes, require compliance with state or local law or regulation, and *International Paper* holds that

there is no conflict with a stricter standard. Algus does not point to any specific, stricter, Illinois clean water *standard*. Its argument is primarily focused on the *remedies* it seeks. In any event, the remedies it generally seeks are not more *stringent* than the Army Corps' directions; with one exception noted below, they directly *conflict* with its orders. Stated differently, both the Army Corps and Algus seek restoration of the wetland to its original condition, but the methods by which these goals would be accomplished are drastically different. *Id.* at 494 ("state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal.").

¶ 49 We further conclude that Algus' trespass claims in counts II and IV of its counterclaim that allege that changes on the Strom property impeded the flow of water and caused water to "trespass" onto the Algus property and damage the property used for agricultural purposes, this claim is not preempted by federal law. The Army Corps' orders do not address or attempt to remedy any damages caused by the initial flooding allegedly caused by the changes on the Strom property. This conclusion does not run afoul of *International Paper*'s proscription of remedy splitting for a given cause of action, because the claim here is separate from the others raised by Algus and addressed by the Army Corps' orders. The trespass claims, therefore, were improperly dismissed.

¶ 50 In summary, the Clean Water Act preempts all but the portions of Algus's counterclaim that seek damages for the value of the property lost for agricultural purposes.

¶ 51 *(2) Factual Issues*

¶ 52 Next, Algus argues that factual issues precluded dismissal of its counterclaim. These include issues concerning the properties' history, drainage, flooding, crop and land damage, and other issues. Algus relies on various affidavits it attached to its response to the Stroms' motion to dismiss, which included Warren Strom's affidavit. Algus's affidavits address the timing of flooding on the Algus

property, the weir's condition, and the location of the drainage tile. In light of our holding that federal law preempts all but the portions of the counterclaim addressing the loss of agricultural use, we address only that (*i.e.*, non-preempted) aspect of Algus's argument and, for the following reasons, we agree that the trial court erred in dismissing those (non-preempted) portions of the counterclaim.

¶ 53 The affidavits and other filings clearly raise material factual issues in this case concerning the nature of any flooding on the Algus property, the actions taken on the Strom property (and by whom) that may have caused such flooding, and the extent of any damages affecting agricultural use.

¶ 54 In summary, we conclude that the trial court did err in dismissing certain portions of Algus's counterclaim.

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part and reversed in part and the cause is remanded.

¶ 57 Affirmed in part and reversed in part; cause remanded.