



PUBLIC-NUISANCE RULINGS UNDERMINE NATIONAL CLEAN AIR ACT ENFORCEMENT AND FEDERAL PREEMPTION

by Richard O. Faulk

The battle over federal Clean Air Act (“CAA”) preemption continues to rage in the nation’s courts—and until the United States Supreme Court decides to review the issue, the answer will probably remain unresolved. Although a group of slightly older cases held that the CAA preempts state tort actions from proceeding¹—recent decisions have reached precisely the opposite conclusion.² Importantly, however, the cases rejecting CAA preemption seem to have put the legal “cart before the horse” by bypassing Congress’ purposes to preclude a preemptive result.

The *Merrick* Controversy

The controversy in *Merrick v. Diageo Americas Supply Inc.*³ illustrates the recent trend. In *Merrick*, ethanol-laden emissions allegedly arose from facilities that distill and age whiskey. The facility operated pursuant to a permit that capped emissions from its distillation facilities. Allegedly, emissions from the facilities caused “whisky fungus”—a black-colored substance resulting from the combination of ethanol and condensation—that interfered with neighbors’ use and enjoyment of their property. The neighbors sought damages for negligence, nuisance, trespass, and injunctive relief. The facility’s owner moved to dismiss the action and argued that the neighbors’ claims were preempted by the CAA. The district court refused to dismiss the nuisance and trespass claims and certified its ruling for interlocutory appeal to the U.S. Court of Appeals for the Sixth Circuit.

On appeal, the facility owner argued that the nuisance and trespass claims conflicted with the CAA’s methods for regulating emissions and that allowing such claims to proceed would frustrate Congress’ purposes and objectives. Similar arguments were rejected in two earlier CAA preemption cases, *Bell v. Cheswick Generating Station* and *Grain Processing Corporation v. Freeman*. After reviewing the authorities, the *Merrick* panel held that the CAA’s “state’s rights savings clause” preserved the plaintiffs’ right to seek relief.

¹ See *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010) (“TVA”); *Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012); and *United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274, 296-97 (W.D. Penn. 2011).

² See *Merrick v. Diageo Americas Supply Inc.*, 805 F.3d 685 (6th Cir. 2015); *Little, et al. v. Louisville Gas & Electric Co., PPL Corp.*, 805 F.3d 695 (6th Cir. 2015); *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014); and *Grain Processing Corporation v. Freeman*, 848 N.W.2d 58 (Iowa 2014), *cert. denied*, 135 S. Ct. 712 (2014).

³ 805 F.3d 685 (6th Cir. 2015).

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This holding relied on the same U.S. Supreme Court authority that *Bell* and *Freeman* used to justify their decisions—the High Court’s ruling in *International Paper Co. v. Ouellette*.⁴ In *Ouellette*, the Court held that the Clean Water Act’s (CWA) savings provision preserved nuisance claims based on intrastate water pollution.⁵ Because the CWA’s and CAA’s savings provisions are “materially indistinguishable,” the *Merrick*, *Bell*, and *Freeman* courts held that the CAA’s savings clause preserved state tort remedies too.⁶

Conflicts with Supreme Court Authority

The Sixth Circuit’s adoption of *Ouellette* as controlling authority undermines the reliability of its holding. In fact, the *Merrick*, *Bell*, and *Freeman* courts each committed the same error by prematurely applying the CAA’s savings clause *before conducting a proper conflict-preemption analysis*. As a result, all three decisions conflict with Supreme Court authority that precludes reliance on savings clauses to preserve common-law claims from preemptive conflicts with Congress’ objectives.

In *Geier v. American Honda Motor Co.*,⁷ the High Court precluded the use of savings clauses to “bar the ordinary working of conflict preemption principles.”⁸ According to *Geier*, courts must first determine whether a preemptive conflict with Congress’ purposes exists. If such a conflict is identified, state actions cannot be “saved.” Otherwise, the savings clause would permit the law to “defeat its own objectives” and allow the law to “destroy itself.”⁹ Under such circumstances, common-law claims are preempted *even if the federal statute contains a savings clause*.

By bypassing *Geier*’s requirements, the *Merrick*, *Bell*, and *Freeman* courts misconstrued the Supreme Court’s decision in *Ouellette*. *Ouellette* was decided only after an inquiry into Congress’ purposes, and the Court expressly stated that it was “guided by the goals and policies of the Act” in reaching its decision.¹⁰ Properly construed, *Ouellette*’s holding is not justified by the CWA’s savings clause, but rather by *Ouellette*’s conflict-preemption analysis—an analysis that *Merrick*, *Bell*, and *Freeman* did not adequately pursue.

Performing a Proper Conflict-Preemption Analysis

The *Merrick*, *Bell*, and *Freeman* courts should have followed the reasoning of a decision that properly performed a conflict-preemption analysis in an analogous case: *North Carolina ex rel. Cooper v. Tennessee Valley Authority*.¹¹ In *TVA*, the Fourth Circuit held that controlling air pollution with “vague public nuisance standards” is inconsistent with the CAA’s regulatory system.¹² The court observed that “[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark,”¹³ and explained that Congress “opted rather emphatically for the benefits of agency expertise in setting standards for emissions controls,” especially in comparison with “judicially managed nuisance decrees.”¹⁴

Foreshadowing the Supreme Court’s reasoning in *American Electric Power Co., Inc. v. Connecticut*,¹⁵ the Fourth Circuit concluded that “we doubt seriously that Congress thought a judge holding a twelve-day bench trial

⁴ 479 U.S. 481 (1987).

⁵ *Id.* at 497-98.

⁶ *Merrick*, 805 F.3d at 692.

⁷ 529 U.S. 861 (1999).

⁸ *Id.* at 869.

⁹ *Id.* at 872 (citing *Texas & Pacific R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

¹⁰ 479 U.S. at 493.

¹¹ 615 F.3d 291 (4th Cir. 2010).

¹² *Id.* at 302.

¹³ *Id.* at 304.

¹⁴ *Ibid.*

¹⁵ 131 S. Ct. 2527 (2011).

could evaluate more than a mere fraction of the information that regulatory bodies can consider.” As a result, the TVA court held that “conflict preemption principles” caution against “allowing state nuisance law to contradict joint state-federal rules so meticulously drafted.”¹⁶

Merrick, Bell, and Freeman provide compelling examples of how nuisance suits conflict with Congress’ purposes in the CAA. Indeed, *Merrick, Bell, and Freeman* have already realized the daunting dilemma prophesied by Judge Wilkinson in *TVA*:

Attempting to simultaneously resolve air pollution issues using common law claims will condone the use of multiple standards throughout the nation. In various states, facilities already subject to an EPA-sanctioned state permit could be declared ‘nuisances’ when a judge in Iowa sets one standard, a judge in a nearby state sets another, and a judge in another state sets a third. Such a scenario ultimately leads one to question ‘[w]hich standard is the hapless source to follow?’¹⁷

Such a scenario strikes at the structural heart of the CAA, namely, the Act’s allocation of priorities and responsibilities within a permitting system grounded in economic stability and “cooperative federalism.” In the process of considering the authority of *TVA*, it is important to focus on the dispositive congressional purpose which *Merrick, Bell, and Freeman* failed to consider—the importance of the *economic* objectives and incentives that balance and guarantee the stability of the CAA’s permitting system.

Congress’ Preemptive Economic Purpose

One of Congress’ principal purposes under the CAA is “to ensure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.”¹⁸ Indeed, the history of environmental regulation reflects that “[e]conomic incentives have assumed a prominent position among the tools for environmental management,” and [n]owhere is this role more explicit than in the 1990 Clean Air Amendments.”¹⁹

The 1990 amendments authorized the EPA’s permitting programs, which provide specific standards governing air pollution within the regulated community. The EPA’s permitting system reflects a “maturing” process influenced by the increasing costs of pollution control:

When large reductions in pollution are easy, everyone can afford to be lenient about how a baseline is measured or how different methods of pollution are compared. As the easy reductions play out, that leniency fades. *As competition heats up, the certainty, predictability, and evenhandedness of pollution reduction requirements become centrally important.*²⁰

Since failing to prevent pollution and voluntary industry collaboration were not viewed as acceptable options, the “last hope” for the “future of pollution prevention” was a “level playing field among companies undertaking (or failing to undertake) pollution prevention.”²¹ Since this option is “indispensable” to effective pollution control, the government recognized that its role was “to provide that level field.”²²

¹⁶ 615 F.3d at 303. See also *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff’d on other grounds*, 718 F.3d 460 (5th Cir. 2013) (State nuisance claims would require court to determine “what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is practical, feasible, and economically viable,” a task “entrusted by Congress to the EPA.”).

¹⁷ 615 F.3d at 302 (citing *Ouellette*, 479 U.S. at 496 n. 17).

¹⁸ 42 U.S.C. § 7470 (3).

¹⁹ Robert C. Anderson and Andrew Q. Lohof, *The United States Experience with Economic Incentives in Environmental Pollution Control Policy* iii (Env. L. Inst. 1997).

²⁰ Frederick R. Anderson, *From Voluntary to Regulatory Pollution Prevention*, THE GREENING OF INDUSTRIAL ECOSYSTEMS, 98, 102 (Nat’l Academy Press 1994) (emphasis added).

²¹ *Id.* at 103.

²² *Ibid.*

Congress acted to establish the “level playing field” with the 1990 amendments to the CAA, which specifically incorporated pollution prevention into the fabric of EPA operations. Since their authorization in 1990, permits issued pursuant to the CAA have remained one of the EPA’s most important tools for air pollution control. Simultaneously, they have also served as trustworthy guideposts for regulated parties in the planning and execution of business operations. The reliability, predictability, certainty, and finality of CAA permits provide the stability needed for businesses to make investments that improve and expand their facilities and empower the development and improvement of their products. By providing clear regulatory standards to guide the regulated community’s conduct, strong incentives to conform to those standards, and a secure permitted environment within which businesses conduct their operations, EPA made great strides in reducing and controlling air pollution.²³

Nuisance lawsuits against permit holders threaten this progress by undermining the carefully balanced economics of EPA’s permitting authority under the CAA. Once permits are issued, they provide sufficient regulatory certainty and finality for industries to make the necessary capital investments to ensure compliance without sacrificing competitiveness.

In this way, the CAA’s regulatory process provides an “informed assessment of competing interests”—an assessment that is “not limited to environmental benefits,” but which also considers a broad array of other factors, including “our nation’s energy needs and the possibility of economic disruption.”²⁴ The resulting equilibrium provides definitive pollution controls which can be relied upon for future business planning and operations.

By contrast, common-law lawsuits view the issues from a narrower perspective and entail unpredictable economic results. Unlike regulatory agencies, which apply clear standards to derive specific requirements for compliance, nuisance lawsuits have liability standards which are notoriously vague.²⁵ Since the evidence, rulings, and outcomes can vary according to the unique record of each case, consistent results cannot be guaranteed even between similar facilities. In the process of exercising such vast regulatory powers via tort litigation, courts “exceed the legitimate limits of both their authority and their competence.”²⁶

Conclusion

The Sixth Circuit in *Merrick* failed to evaluate the impact of nuisance litigation on Congress’ stated purposes. In the CAA, Congress insisted that improvements be made consistent with economic growth and predictable standards. The CAA’s permitting system was designed to balance those priorities. Although the text of the CAA demonstrates these conjoined goals, *Merrick*, as did the *Freeman* and *Bell* decisions, failed to appreciate their importance. As a result of this “cart before the horse” reasoning, these courts have erroneously allowed common-law remedies to trump Congress’ economic objectives.

²³ See generally, EPA, *The Clean Air Act—Highlights of the First 40 Years* (Sept. 2010), available at http://epa.gov/oar/caa/Clean_Air_Act_40th_Highlights.pdf (last visited Mar. 12, 2014); EPA, *The Clean Air Act: Highlights of the 1990 Amendments*, available at <http://www.epa.gov/clean-air-act-overview/clean-air-act-highlights-1990-amendments> (last visited Dec. 16, 2015); Remarks of Lisa P. Jackson, former EPA Administrator, on the 40th Anniversary of the Clean Air Act, <http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/7769a6b1f0a5bc9a8525779e005ade13!OpenDocument> (last visited Dec. 16, 2015).

²⁴ 131 S. Ct. at 2538-39.

²⁵ See generally, Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom: The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 947-951 (2007).

²⁶ See James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005).