Preemption Litigation Strategies Under Environmental Law

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The expansion of environmental law since the 1970s has resulted in comprehensive regulatory schemes in many areas of environmental law in which federal or state programs effectively occupy the field. Localities and states, however, sometimes legislate in the environmental arena in ways that some regulated entities believe can be inconsistent with or impede operations under federal and/or state law, regulations, and permits. Similarly, state tort lawsuits seeking compensation for personal and environmental injuries may challenge activities undertaken pursuant to permits and established regulations. Accordingly, preemption law at both the federal and state levels must weigh and decide among the competing positions of federal, state, and local regulators, private and public regulated entities, and personal injury claimants.

Environmental practitioners should have a basic command of preemption issues, including their use as a sword (lawsuits to enjoin local ordinances or state laws that conflict with higher law, whether state or federal) and shield (dispositive motions that tort claims are barred because of preemption by state or federal law). Environmental law is a rich field for preemption disputes regarding both offensive and defensive preemption, as recently illustrated by the U.S. Supreme Court's 2005 trimming of tort claim preemption under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005). In addition, and often overlooked, is the ability of preemption plaintiffs to seek damages and attorney fees when their claim can be coupled with a cause of action under 42 U.S.C. § 1983, particularly under the dormant Commerce Clause.

The preemption doctrine is a long-standing legal principle based on the Supremacy Clause of the United States Constitution and analogous state constitutional and statutory provisions. Article VI of the U.S. Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, § 2.

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The law of preemption ensures that self-interested subsidiary governments do not undermine the legitimacy and effectiveness of the higher and controlling law. *See generally* J. O'Reilly, Federal Preemption of State and Local Law: Legislation, Regulation and Litigation (2006).

There are three types of preemption: express, field, and conflict preemption. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000); *Franklin County v. Fieldale Farms*, 507 S.E.2d 460–461 (Ga. 1998) ("state law may preempt local law expressly, by implication, or by conflict"). Under express preemption, the text of federal or state law prohibits states and/or localities from legislating on all or part of the subject matter. The remaining two types fall under the heading of implied preemption. Under field preemption, the federal or state regulatory scheme is so comprehensive that it occupies the field and leaves no room for supplemental state (or local) law. Finally, under conflict preemption, a law or ordinance may be preempted to the extent it conflicts with a federal or state statute. Such a conflict will be found either "when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citations omitted).

These categories are not distinct and often overlap, and laws may be invalidated on more than one type of preemption grounds. Congressional intent is the "ultimate touchstone" for any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The law of preemption thus requires the court to review closely the competing federal, state, or local statutes and tort claims. The outcome will usually rest on the statutory language rather than preemption principles, resulting in hundreds of decisions over the past decades that are difficult to reconcile. Nevertheless, as a practical matter, preemption claims can often be decided on motions to dismiss or summary judgment with minimal or no discovery.

Federal Preemption of State and Local Law

Much preemption litigation under federal environmental laws focuses on state and local efforts to regulate on the same environmental subjects. Major federal environmental statutes

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provide a role for states and localities, but state and local environmental laws cannot conflict with the federal regime. Through "savings clauses," federal environmental laws typically allow state and local regulation that is not "less strict." *See, e.g.*, Endangered Species Act (ESA), 16 U.S.C. § 1535(f) (states may pass laws to conserve wildlife, as well as "take" laws that are "more restrictive . . . but not less restrictive" than the ESA); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6929 (allowing states and localities to impose "more stringent," but not "less stringent," requirements than RCRA). In the same vein, local laws cannot conflict with state environmental laws, regulations, and programs. *See, e.g.*, *O'Brien v. Appomattox County*, 293 F. Supp. 2d 660 (W.D. Va. 2003) (county ordinance that regulated land application of biosolids to the point of being a *de facto* ban conflicted with the state biosolids program).

A key question that arises in environmental preemption is whether the stricter state or local regulations allowed under the federal law's savings clause go too far and conflict with federal law that may encourage the regulated activity or render compliance with federal law and regulations impossible. For example, when confronted with a local ordinance that barred a cement kiln facility from burning hazardous wastes as a fuel, the Tenth Circuit ordered the district court to weigh carefully whether the local ordinance was legitimately targeted at an environmental problem or was a "sham." The court wrote that, under RCRA, "ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by [federal law] will ordinarily be preempted." *Blue Circle Cement, Inc. v. Bd. of County Comm.*, 27 F.3d 1499, 1508 (10th Cir. 1994).

Even where federal environmental law expressly preempts state and local law, disputes arise regarding the extent of the preemption and the subjects covered. A recently concluded preemption challenge to air regulations in California, which includes a 2004 Supreme Court decision, illustrates the intricacies of many preemption cases. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252–55 (2004). The plaintiffs, the Engine Manufacturers Association and Western States Petroleum Association, challenged the regional Air District's purchase rules for fleet operators, which effectively prohibited the purchase of all diesel-fueled vehicles. The Clean Air Act (CAA) provides that:

> [n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.

Id. at 252, *citing* 42 U.S.C. § 7543(a). The defendant Air District argued that the fleet rules escaped preemption because they were indirect "purchase restrictions" rather than direct vehicle emissions "standards." The Supreme Court noted that the rules' commands to fleet operators and accompanying threatened sanctions for noncompliance effectively functioned as emission controls on the manufacture and sale of new motor vehicles and engines and were a prohibited "standard relating to the control of emissions." *Id.* at 255. In addition, the Court reiterated an important premise in preemption analysis that allows the court to consider the aggregate effect of allowing legislation contrary to the federal scheme: "if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." *Id*; *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation").

While the Supreme Court's ruling was a substantial preemptive rebuke of the Air District's fleet rules, related preemption issues remained alive on remand. Indeed, the district court again attempted to dismiss the suit, adopting the Air District's supplementary argument that the particular fleet rules applicable to California's own state and local government fleet purchases were valid under the "market participant" doctrine. 2005 U.S. Dist. LEXIS 45389 (C.D. Cal. May 5, 2005) *[and]* 2005 U.S. Dist. LEXIS 45388 (C.D. Cal. Sept. 21, 2005). The district court found that these rules specific to state and local government purchases were better characterized as "proprietary" rather than "regulatory" and that the CAA did not preempt state and local authorities from making particular vehicle purchase decisions in the market as a private entity would. On appeal, the Ninth Circuit agreed with this holding. 498 F.3d 1031, 1047–48 (2007). However, the Ninth Circuit again remanded, as the district court failed to analyze whether the rules applicable to private and federal fleet operators were preempted. *Id.* at 1048–49. The appellate court observed that in a challenge to a multifaceted law, the plaintiffs need not show that every provision was invalid; rather, the district court must analyze and sever any valid provisions from those that are preempted. *Id.* Moreover, the Air District's pledge to voluntarily not enforce the objectionable latter rules was insufficient to moot the case. *Id.* at 1049 n.6. On February 8, 2008, the district court entered a final order adopting the parties' settlement, whereby the Air District's rules will only apply to state and local government purchases, as well as private companies operating under a contract, license, or franchise with states or localities.

The ferment of legislative activity on air pollution and climate change has spurred other federal/state clashes that play out as preemption cases under the CAA. For example, in the emissions trading context, the Second Circuit in 2003 found that New York's Air Pollution Migration Law, which sought to limit sales of emission allowances to upwind states, was preempted under Title IV of the CAA, as it was in "actual conflict" with Congress' selected method of controlling sulfur dioxide emissions. *Clean Air Markets Group v. Pataki*, 338 F.3d 82, 86–87 (2d Cir. 2003). A California federal court applied express and field preemption under Title II of the CAA to invalidate state agency air-quality regulations governing ocean-

going vessels. *Pac. Merch. Shipping Ass'n v. Cackette*, 2007 U.S. Dist LEXIS 67165 (E.D. Cal. Aug. 30, 2007). In contrast, in light of the Supreme Court's decision in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), preemption arguments have been less successful in challenging California's promulgation of, and other states' subsequent adoption of, greenhouse gas emissions standards for new automobiles. *See Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 398–99 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstone*, 2007 U.S. Dist. LEXIS 91309 at *111–14 (E.D. Cal. Dec. 11, 2007). These cases' findings of no preemption, however, are contingent upon California obtaining a waiver from the U.S. Environmental Protection Agency (EPA) to adopt its more restrictive vehicle greenhouse gas emission standards. Given that this waiver was recently denied by EPA, CAA preemption issues in this area will correspondingly continue to be litigated.

Clashes over the reach of state and local environmental authority will continue to play out in the courts.

Other major environmental statutes besides the CAA also present opportunities for preemption challenges to inconsistent state and local laws. For example, in 2005, the Eighth Circuit found North Dakota water-quality standards were preempted because they conflicted with U.S. Army Corps of Engineers authority under the Clean Water Act (CWA) and Flood Control Act of 1994. *In re Operation of the Mo. River Sys. Litig*, 418 F.3d 915 (8th Cir. 2005). The Tenth Circuit, in 2006, similarly found that the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA's) comprehensive scheme preempted New Mexico's efforts to collect natural resource damages, as such state suits "would seriously disrupt CERCLA's principle aim of cleaning up hazardous wastes." *New Mexico v. Gen. Elec.*, 467 F.3d 1223, 1248 (10th Cir. 2006). Indeed, the court specifically noted that the mere existence of saving clauses under CERCLA did not suggest that Congress intended to "undermine CERCLA's carefully crafted NRD scheme." *Id.* at 1247. Federal preemption of state and local laws has also occurred under RCRA, *see, e.g.*, *Blue Circle, supra*, and the ESA, *see, e.g., Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760, 764–765 (9th Cir. 1983) (striking down state's prohibition against animal product trade where all necessary federal permits had been obtained).

Preemption also has prompted important recent cases in the energy, communications, and land use fields. For example, courts have struck down state efforts to regulate nuclear safety and waste, finding field preemption under the Atomic Energy Act. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004); *United States v. Manning*, 434 F. Supp. 2d 988 (E.D. Wash. 2006) (striking down measure passed by statewide ballot initiative). Similarly, multiple courts have rescinded state and local regulations governing siting and construction of natural gas pipelines and facilities, finding field preemption under the Natural Gas Act and the Federal Energy Regulatory Commission regulations (including as amended by the Energy Policy Act of 2005.) *Northern Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817 (8th Cir. 2004); *AES Sparrows Point LNG, LLC v. Smith*, 470 F. Supp. 2d 586 (D. Md. 2007). *But see AES Sparrows*, 2007 U.S. Dist. LEXIS 45535 (D. Md. Jun. 22, 2007) (upholding subsequent, more limited ordinance). In 2006, the Ninth Circuit held that the federal Pipeline Safety Improvement Act preempted Seattle's safety standards imposed on a corporation's hazardous liquid pipelines, finding that neither public policy nor waiver arguments were proper in the preemption context. *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 882–83 (9th Cir. 2006). Finally, recent cases have invalidated local, purportedly environmental and safety regulatory schemes regulating or banning the construction of wireless telecommunications facilities as expressly preempted by the federal Telecommunications Act of 1996. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007); *Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325 (D.N.M. 2007). Clashes over the reach of state and local environmental authority will continue to play out in the courts, at least as long as state legislatures and Congress fail to make the tough political choices to demark and enforce the boundaries of regulatory authority in a decentralized, federal system.

Federal Preemption of Common Law Tort Claims

Another prime battleground for preemption involves tort claims. With the increase of environmental regulation at the federal and state levels, tort defendants can argue that the regulatory scheme should supplant common law causes of actions for damages. However, preempting tort claims generally is more difficult than preempting a state or local law. First, tort claims will be fact-specific and involve at least several causes of action that would have to be preempted. Second, courts are often hesitant to deprive an injured party of a day in court, particularly where there is no strong alternative remedy for the party. *See, e.g.*, J. Hendricks, *Preemption of Common Law Claims and the Prospects for FIFRA: Justice Stevens Puts the Genie Back in the Bottle*, 15 Duke Environmental Law & Policy Forum 65 (Sept. 2004). Many cases involving preemption of tort claims arise in the product liability field, where

manufacturing and safety specifications often are driven by government requirements. In the leading case of *Geier v. American Honda Motor Company*, 529 U.S. 861, 865 (2000), the Supreme Court held that regulations promulgated under the National Motor Vehicle Safety Act that allow automobile manufacturers to choose between different types of passive restraints preempted a tort claim based on the manufacturer's alleged negligence for not choosing air bags. Like many environmental laws, the Act contained a savings clause, which in this statute provided that compliance with a federal safety standard did not exempt a manufacturer from common law liability. Importantly, the Court ruled that "the savings clause (like the express pre-emption provision) does not bar the ordinary working of conflict preemption principles." *Id.* at 869; *see generally* J. Jacobson and R. Herbig, *The Transformation of Preemption Law*, For The Defense, 40 (Dec. 2007).

In the environmental arena, two principal Supreme Court cases, the 1987 decision in *Int'l Paper v. Ouellette* and the 2005 ruling in *Bates v. Dow Agrosciences*, help define preemption of tort claims under the federal environmental statutes. The plaintiffs in *Int'l Paper* were Vermont residents who brought a nuisance suit in Vermont state court against a company across Lake Champlain in New York State that was discharging wastewater effluent into the lake pursuant to a permit under the CWA. International Paper held a National Pollution Discharge Elimination System (NPDES) permit, administered by New York State under a formal delegation from EPA. The Supreme Court ruled that "the application of Vermont law against [International Paper] would allow [plaintiffs] to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act." 479 U.S. 481, 494 (1987). Applying a preemption analysis, the Court voided all Vermont claims for compensatory, punitive, and injunctive relief. The Court stressed that the plaintiffs still had remedies, including a CWA citizen suit and a lawsuit under New York law, because a common law suit under New York law would be consistent with New York's delegated authority under the Act to administer its NPDES program. *Int'l Paper*, therefore, was something of a pyrrhic victory for the nuisance suit defendant because it was still exposed to a tort lawsuit, albeit under a different state's law. But the strong statements in *Int'l Paper* that tort liability can undermine the CWA's regulatory scheme leaves ample room for argument that on a fact-specific basis certain tort claims may be preempted. *See, e.g., Wyatt. v. Sussex Surry LLC,* 482 F. Supp. 2d 740 (E.D. Va. 2007) (rejecting claim for purposes of removal to federal court that the CWA completely preempted a tort suit regarding biosolids).

The *Bates* decision arguably showed more solicitude for the role of state juries in deciding disputes over the safety and stewardship of pesticides and may mark somewhat of a retrenchment from the expansive preemption highlighted in *Geier*. *See* W. Davis and R. Haecker, *Preemption in Products Liability Cases: An Analysis of Federal Product Preemption Under FIFRA and* Bates v. Dow Agrosciences 74 Defense Counsel Journal 119 (Apr. 2007). The *Bates* plaintiffs were farmers alleging that the pesticide supplied by the defendant for crop-protection purposes caused crop injuries. Lower courts, consistent with much precedent under FIFRA, dismissed tort claims in light of FIFRA's express preemption clause that precluded state law imposing additional or different labeling requirements from the federal pesticide labels approved by EPA. The *Bates* lower courts and other courts had ruled that tort verdicts against pesticide manufacturers would induce defendants to alter their pesticide labels, thus imposing a state law requirement for labeling preempted by FIFRA. The Supreme Court's *Bates* decision in 2005 narrowed this analysis and called into question the willingness, generally, of the Court to preempt state tort claims.

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Bates ruled that state tort claims against pesticide manufacturers would only be preempted if the state claim satisfied two conditions: "First, it must be a requirement '*for labeling or packaging*'; rules governing the design of a product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is '*in addition to or different from those required under this subchapter*.'" 544 U.S. at 444, *quoting* 7 U.S.C. § 136v(b). *Bates* suggested that causes of action that "parallel" federal requirements, such as prohibitions on misbranding of a pesticide, can survive preemption analysis. *Id.* at 447. Since *Bates*, two court of appeals decisions have ruled broadly that many tort claims regarding pesticides, including defective design, defective manufacture, negligent testing and breach of warranty, do not implicate labeling requirements and therefore are not preempted. *See, e.g., Mortellite v. Novartis*, 460 F.3d 483 (3d Cir. 2006).

On February 20, 2008, the Supreme Court revisited the reach of its holding in *Bates* in a preemption case involving tort claims in the context of federal regulation of medical devices. *Riegel v. Medtronic*, No. 06-179, 2008 U.S. LEXIS 2013 (Feb. 20, 2008). In an 8–1 decision, the Court held that tort claims challenging the safety and effectiveness of a catheter were preempted by the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA). While the decision was limited to the MDA context and ostensibly preserved some common law claims as permitted under *Bates*,

the opinion suggests that, unless Congress provides otherwise, the Court will interpret "state requirement" in a preemption clause to include tort claims. *Id.* at *20–22. Given that several other environmental statutes employ this same term, *Riegel* may have broader preemption significance going forward.

Bolstering Preemption Claims with § 1983 and the Dormant Commerce Clause

An often overlooked tool that complements preemption law in environmental litigation is the dormant Commerce Clause. U.S. Const. art. I, § 8, cl. 3. The Supreme Court has long recognized and affirmed that the Constitution's express grant of power to Congress to regulate interstate commerce also simultaneously constitutes an implicit ban on state and local regulation of articles in interstate commerce. Specifically, the dormant Commerce Clause operates to bar state and local laws that discriminate against interstate commerce, either facially, in their purpose, or in their effect. *Granholm v. Heald*, 544 U.S. 460, 476 (2005). In addition, a local or state law cannot impose an excessive burden in relation to its intended public benefit and hence inflict an unlawful burden on interstate commerce. *Pike v. Bruce Church*, 397 U.S. 137, 145–46 (1970). Environmental and land use cases often involve rights of interstate commerce (e.g., the ability to manufacture or sell goods, including raw materials and waste, or to alter the land and natural resources) that can provide the basis for dormant Commerce Clause claims that challenge the legality of local ordinances or state laws or regulations.

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The dormant Commerce Clause is a powerful litigation tool that can be coupled with traditional preemption claims under federal or state statutes. Significantly, a dormant Commerce Clause violation provides a cause of action under the federal civil rights law 42 U.S.C. § 1983, allowing an award of damages, injunctive relief, and attorney fees. *Dennis v. Higgins*, 498 U.S. 439, 447–51 (1991) ("[T]he Commerce Clause of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations"). At the outset, a plaintiff need only satisfy a low bar to show that the dormant Commerce Clause applies, namely to show that a regulation impacts an article in interstate trade and that Congress has not clearly and expressly authorized the state or local government action causing the impacts. *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983). Supreme Court dormant Commerce Clause cases involving environmental issues have included the seminal, widely followed decision that garbage is an article in interstate commerce and states may not forbid out-of-state waste, *Philadelphia v. New Jersey*, 437 U.S. 617, 628–29 (1978) (overturning "the attempt by one State to isolate itself from a problem common to many [disposal of solid waste]"). Moreover, in the rare instance where a discriminatory, total ban on an article in interstate commerce has survived strict scrutiny, the Supreme Court has required compelling evidence of environmental harm and that the purported local purposes "could not adequately be served by available nondiscriminatory alternatives." *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986) (upholding ban on out-of-state live baitfish).

City of Los Angeles v. Kern County: *Preemption in Action*

A recent case from the Central District of California illustrates how preemption and accompanying § 1983 litigation can be pursued speedily, efficiently, and with maximum impact. In *City of Los Angeles v. Kern County*, 2006 U.S. Dist. LEXIS 81417 (C.D. Cal. Oct. 24, 2006), a coalition of local government and private plaintiffs damaged by a county ordinance successfully pursued claims for preemption, preliminary and permanent injunctive relief, and damages and attorney fees under the dormant Commerce Clause and § 1983. The plaintiffs consisted of Southern California public entities and their contractors that engaged in land application of biosolids (treated sewage sludge) to farmland, a widespread method of biosolids recycling. The biosolids provided most of the fertilizer needs for the farmers, who were also plaintiffs in the lawsuit, to raise feed crops for local dairies. Activists criticized the application of out-of-county, urban waste products to the farmland and promoted a countywide ballot initiative to impose a ban on land application of biosolids in Kern County. While styled as a neutral environmental safety measure, the ban and the political campaign for its passage only targeted and affected the plaintiffs' recycling of biosolids that were generated outside the county. As a result of the ban, the plaintiffs faced the prospect of shifting their biosolids recycling operations to farther destinations, even other states, or else adopting other disposal or management options, such as landfilling or composting the biosolids. Moreover, the ban only applied in the unincorporated areas of Kern County, while permitting incorporated cities within Kern to land apply biosolids.

Responding to this threat to the existence of their operations, businesses, and the entire biosolids management scheme

in California, the plaintiffs filed a complaint in federal court seeking injunctive and declaratory relief from the ordinance. The complaint featured three federal counts and three state counts: federal CWA preemption, state preemption under the California Integrated Waste Management Act (CIWMA) and California Water Code, federal dormant Commerce Clause and Equal Protection violations, and state police power violations. Shortly after filing, the plaintiffs moved for a preliminary injunction. Kern County simultaneously moved to dismiss the entire complaint. The court decided to dismiss the CWA and state Water Code preemption claims but denied the motion on the remaining claims. The court then granted a preliminary injunction to plaintiffs based on three of their four remaining claims, except for the Equal Protection claim. 462 F. Supp. 2d 1105 (C.D. Cal. 2006). Specifically, the court granted a preliminary injunction on the state law preemption claim "because it thwarts recycling activities specifically promoted by the . . . CIWMA" and on the dormant Commerce claim "because it was enacted in part for the purpose of protecting the reputation of Kern's agricultural products and specifically to exclude out-of-county biosolid commerce." *Id.* at 1108–09, 1114–15, 1117.

Shortly thereafter, without having to take any significant discovery, the parties cross-moved for summary judgment. The court granted the plaintiffs summary judgment on their CIWMA claim, ruling that the local biosolids ban impermissibly conflicted with and frustrated the state scheme favoring biosolids recycling over disposal. *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 888–898 (C.D. Cal. 2007). The court dismissed Kern County's last-minute attacks on the plaintiffs' standing to raise preemption claims, reaffirming broad standing to bring preemption claims for those who show a risk of an imminent injury stemming from the challenged law. *Id.* at 888–90. The court again agreed with plaintiffs that the ban was preempted because it "thwarts the CIWMA's express purpose of promoting recycling of wastes such as biosolids before other methods of disposal." *Id.* at 890. The court also rejected Kern's attempt to flip the preemption analysis on its head by arguing that the CWA expressly authorized the ban and thus the preemption holding itself would conflict with federal law. Instead, the court noted that Kern's premise was faulty in that "merely because the Clean Water Act does not preempt local bans on land application does not mean that it expressly authorizes them despite state constitutional limitations to the contrary." *Id.* at 894.

On this latter note, the court also granted the plaintiffs summary judgment on the dormant Commerce Clause claim, finding that the ban illegally discriminated against the plaintiffs' operations, both in purpose and effect, while lacking any express, clear authorization from Congress. *Id.* at 881–88. The ban failed strict scrutiny because (1) it discriminated against and shifted all of its significant burdens on the unrepresented, out-of-county plaintiffs, (2) Kern County offered no evidence of local benefits, (3) Kern's own biosolids activities remained unaffected, and (4) clear alternatives to the ban existed. *Id.* Consequently, the court permanently enjoined the ban.

Finally, based on their victories at the preliminary injunction and summary judgment stages, the private plaintiffs (but not the public entities) filed a substantial claim in the district court for their attorney fees under §§ 1983 and 1988. In another opinion, the court formally declared that the plaintiffs were "prevailing parties" and rejected Kern's arguments that the plaintiffs were not entitled to any fees because of the participation of public entities in funding the lawsuit. *City of Los Angeles v. County of Kern*, 2007 U.S. Dist. LEXIS 81696 (C.D. Cal. Oct. 25, 2007).

Los Angeles v. Kern County is part of a larger trend favoring preemption of local biosolids laws. Indeed, a similar result was reached in *O'Brien v. Appomattox County*, where eleven farmers successfully challenged two county ordinances restricting their use of biosolids as a fertilizer, under the guise of legislating additional health and safety regulations. *See* 293 F. Supp. 2d 660 (W.D. Va. 2003); 213 F. Supp. 2d 627 (W.D. Va. 2002), *aff'd,* 2003 WL 21711347 (4th Cir. 2003); 2002 WL 31663227 (W.D. Va. 2002). The plaintiffs' CWA, state law preemption, and § 1983 Commerce Clause damage claims survived motions to dismiss, and the farmers subsequently won preliminary and then permanent injunctive relief on the state law preemption claim. Without securing a further ruling on their federal preemption or Commerce Clause claims, the plaintiffs, under § 1988, were able to leverage their victory on state law preemption into a settlement payment by the county of $225,000 for their attorney fees. *See also Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003) (striking down most local biosolids restrictions because they conflicted with state requirements).

Practitioners considering pursuing environmental preemption and § 1983 damage claims should evaluate whether the preempting statute itself conveys a federal "right" that may give rise to a § 1983 claim in addition to dormant Commerce Clause claims. *See, e.g., Waste Mgmt. Holdings v. Gilmore,* 252 F.3d 316, 348 n.12 (4th Cir. 2001) (holding that the federal vessel documentation provisions, 46 U.S.C. §§ 12103, 12106, conferred a right in the form of license for vessels to operate freely in each state's waters subject only to the legitimate exercise of a state's police powers); *cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 290–91 (2002) (finding that the Family Educational Rights and Privacy Act of 1974 (FERPA) did not confer any rights enforceable under § 1983). Likewise, the Equal Protection Clause of the United States Constitution and its state counterparts can provide a basis for § 1983 damage claims when local ordinances discriminate against certain business activities.

Preemption, dormant Commerce Clause, and § 1983 claims are potent tools against improper state and local efforts to supplant or countermand federal and state environmental controls. As the *Los Angeles v. Kern* case study shows, a litigation strategy employing federal and state constitutional and statutory claims, a broad coalition of affected stakeholders as plaintiffs, and the threat of damages and attorney fees can readily topple illegal local laws. By contrast, using preemption as a shield in the tort arena can be more challenging, but the potential reward to defendants of dismissal or narrowing of claims requires that such defenses be attempted whenever possible. At the least, motions practice over preemption can clarify critical issues regarding the standard of care established by federal and state regulations.