WINNING PREEMPTION AND DAMAGES UNDER FEDERAL ENVIRONMENTAL LAW

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The federalization of environmental law since the 1970s has resulted in a comprehensive regulatory scheme in most areas of environmental law, in which federal and state-delegated federal programs occupy the field. Localities and states, however, increasingly legislate in the environmental arena contrary to federal and/or state law, regulations and permits. While federal environmental law typically provides a role for states and localities, state and local environmental laws cannot conflict with the federal regime.[1] In the same vein, local laws cannot conflict with state environmental laws, regulations and programs. Accordingly, courts have found preemption of many state and local laws in conflict with major environmental statutes, including the Clean Water Act[2], Clean Air Act, FIFRA, RCRA[3], ESA[4] and CERCLA[5].

Businesses and individuals whose lawful activities under federal environmental laws are curtailed by state or local regulations can challenge them and win damages in some cases. Before waiting to defend an enforcement action brought by state or local officials, declaratory judgment actions can be brought to have conflicting laws invalidated on the basis of preemption. If the offending law severely impacts a business activity, preemption claims can be joined with 42 U.S.C. § 1983 and § 1988 claims, based on Commerce Clause grounds, enabling a plaintiff to recoup damages and attorneys' fees. While states and localities typically are not deterred by the prospect of preemption litigation, the possibility of paying damages and attorneys' fees can prompt favorable resolution of disputes over state and local environmental regulations.

Preemption Under the Environmental Laws

The preemption doctrine is based on the Supremacy Clause of the United States Constitution and is a long-standing legal principle. Preemption ensures that self-interested local governments do not undermine the legitimacy and effectiveness of controlling federal and state laws.[6] There are three types of preemption: express, field, and conflict preemption.[7] Under express preemption, federal or state law prohibits states and/or localities from legislating on the subject matter.[8] 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.[9] Finally, under conflict preemption, the most important prong, a law or ordinance may be preempted to the extent it conflicts with a federal or state statute.[10] These categories are not distinct but often overlap, and a given case may turn as much on the court's view of the practical consequences of the conflicting laws as on a legal analysis under the preemption doctrine.[11]

The United States Supreme Court is giving increasing attention to federal environmental preemption. In 2004, the Court applied preemption under the Clean Air Act to invalidate rules promulgated by a California regional authority in *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*[12] The plaintiff Engine Manufacturers Association challenged the regional air district's purchase rules for fleet operators, which effectively prohibited the purchase of all diesel-fueled vehicles. The Court held that the local rules were preempted by the Clean Air Act, which provides in part:

> [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.[13]

The Court reasoned, "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." In a similar ruling under the Clean Air Act, 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 Clean Air Act, as it was in "actual conflict" with Congress' selected method of controlling sulfur dioxide emissions.[14]

In its October 2004 term, the Supreme Court will address preemption under another major environmental statute, the federal pesticide law (FIFRA). FIFRA provides that: "a State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."[15] The case now before the Court, *Dow Agrosciences v. Bates*, will review the Fifth Circuit's decision that farmers' state law tort claims against a herbicide manufacturer alleging that the herbicide they purchased damaged their crops were preempted by FIFRA, since a finding of tort liability could compel the manufacturer to alter the directions for use on its label, which had been approved by the EPA.[16]

Bolstering Preemption Claims with § 1983 and Commerce Clause Claims

Civil actions may be brought under 42 U.S.C. § 1983 when deprivation of any federal right occurs by a person acting "under color of state law."[17] Under § 1988(b), a "prevailing party" in a § 1983 suit may also recover attorneys' fees.[18] The Supreme Court has explicitly allowed § 1983 suits on dormant Commerce Clause grounds: "[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."[19] The typical claim follows the *Pike v. Bruce Church* test, asserting that the local or state law imposes an excessive burden in relation to its intended public benefit, and hence that the law is an unlawful burden on interstate commerce.[20] Environmental and land use cases often involve rights of interstate commerce (e.g., the ability to manufacture or sell goods) that can provide the basis for dormant Commerce Clause claims brought under § 1983, which in turn can often be coupled with preemption claims.

A party injured by an illegal local environmental or land use regulation may thus sue not only for preemption, but also under § 1983 for violated constitutional rights.[21] Courts have broadly interpreted both "persons" and "prevailing parties," allowing suits against state and local governments as "persons"[22] and interim awards of attorneys' fees.[23]

Prospective § 1983/§ 1988 suits and awards of attorneys' fees to a plaintiff may persuade a defendant to settle.

Preemption in Action

Preemption litigation can be pursued quickly and economically because the issues for decision are often legal and do not require discovery. The impact of local environmental regulations on a business may also justify a preliminary injunction. The recent case of *O'Brien v. Appomattox County* illustrates a successful litigation strategy combining claims for federal and state preemption and damages under § 1983.[24]

In *O'Brien*, eleven farmers challenged two ordinances restricting their use of treated sewage sludge (biosolids) as a fertilizer. The farmers were using biosolids under a federal nationwide permit under the Clean Water Act and a state environmental permit issued specifically for their farms. The defendant County passed zoning and police power ordinances that effectively blocked the use of biosolids, under the guise of legislating additional regulations to improve on federal and state regulations. The farmers, with the cooperation of businesses that managed the biosolids, brought suit in federal court to preempt the ordinances and sought injunctive relief and damages. Their complaint included counts for federal preemption, state preemption, Commerce Clause, Equal Protection, § 1983 and state constitutional claims.

Shortly after filing suit, the farmers won a preliminary injunction barring enforcement of the challenged ordinances.[25] The court found that the plaintiffs likely would prevail on their state law preemption claim and that, among other factors, the public interest favored the status quo of allowing plaintiffs to continue operations under existing federal and state environmental approvals. The plaintiffs' Clean Water Act, state law preemption and § 1983 Commerce Clause damage claims subsequently survived motions to dismiss.[26]

Without taking any significant discovery, the plaintiffs then sought summary judgment on their federal and state preemption claims, seeking to permanently void the ordinances before a trial on their damages claim. The court granted summary judgment on state law preemption and permanently enjoined the County's ordinances. Accordingly, the court stated that it did not reach the farmers' federal CWA preemption claims seeking the same result.

Without securing a ruling on their federal preemption or Commerce Clause claims, the plaintiffs were nonetheless able to leverage their victory on state law preemption into a settlement payment by the county of a significant amount of their attorneys' fees. The plaintiffs filed a motion for a pre-trial interim award of attorney's fees under § 1988, based on an argument that they were a prevailing party under federal law since the ruling on state law grounds mooted their federal claim. Facing a substantial motion for attorney's fees, the County quickly agreed to pay the farmers $225,000 to settle the entire case.[27]

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.[28] 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.

Conclusion

Preemption and § 1983 claims, used together, are potent tools against improper state and local efforts to supplant or countermand federal and state environmental controls.[29] As the *O'Brien v. Appomattox County* case study shows, a litigation strategy employing preemption claims and the threat of damages and attorneys' fees provides significant incentives for government defendants to settle such cases. The flexibility of preemption arguments also allows advocates to explain to courts how carefully calibrated federal regulatory programs should not be undermined by a patchwork of state and local actions.

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1 Many of the major federal environmental laws allow state and local regulation that is not "less strict." *See, e.g.*, Endangered Species Act, 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); RCRA, 42 U.S.C. §6929 (allowing states and localities to impose "more stringent," but not "less stringent," requirements than RCRA). *But see Man Hing*, note 4, *infra*; *Blue Circle*, note 3, *infra*.

2 *See, e.g., Azurix v. DeSoto County*, No. 2-01-CV-428 FTM-29 DNF (M.D. Fla. Sept. 7, 2001) (granting preliminary injunction against local biosolids ordinance based on likely federal preemption under Clean Water Act).

3 *See, e.g., Blue Circle Cement, Inc. v. Bd. of County Comm.*, 27 F.3d 1499, 1508 (10th Cir. 1994) (holding under RCRA that "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"); *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986) (finding county ordinance banning the storage, treatment, and disposal of certain hazardous wastes preempted by RCRA); *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 345-46 (4th Cir. 2001) (striking down provisions of state law discriminating against foreign-generated MSW as in conflict with RCRA and dormant Commerce Clause).

4 *See, e.g., Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760, 764 (9th Cir. 1983) (holding ESA preempted state's prohibition against animal products traders who had secured all necessary federal permits); *Strahan v. Coxe*, 127 F.3d 155, 167-68 (1st Cir. 1997) (noting preemptive import of ESA broadly-defined "person").

5 *See, e.g., Fireman's Fund Ins. Co. v. City of Lodi*, 296 F. Supp. 1197, 1213-19 (E.D. Cal. 2003) (finding CERCLA preemption of city ordinance provisions that, among other things, immunized city from contribution, and imposed joint and several liability on others for all of city's response costs).

6 *See Int'l Paper v. Ouellette*, 479 U.S. 481, 496 (1987). Accordingly, preemption of conflicting laws will be avoided only if Congress did not intend to legislate in a traditional area of local or state concern. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-486, 495 (1996).

7 See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Franklin County v. Fieldale Farms*, 507 S.E.2d 460, 461-62 (Ga. 1998) (noting "state law may preempt local law expressly, by implication, or by conflict").

8 "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. State preemption is drawn from similar state constitutional or statutory provisions.

9 *Crosby*, 530 U.S. at 372, *citing United States v. Locke*, 529 U.S. 89, 115 (2000).

10 *Id.* Such a conflict will be found either "when it is impossible to comply with both state and federal law," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142143 (1963), or where the challenged state or local law "stands as an obstacle to the accomplishment of the full purposes and objectives of federal law," *Silkwood v.Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

11 *See English v. General Elec. Co.*, 496 U.S. 72, 79-80 (2000) (noting "field pre-emption may be understood as a species of conflict pre-emption" because both are based on conflicting state and federal law).

[12] 124 S. Ct. 1756, 1761-62 (2004).

[13] *Id.* at 1761, citing 42 U.S.C. § 7543(a). While there was an express preemption clause at issue in the CAA context, the Court also found conflict preemption to support the holding. *See* note 11, *supra*.

[14] *Clean Air Markets Group v. Pataki*, 338 F.3d 82, 84, 86-87 (2003).

[15] 7 U.S.C. § 136v(b).

[16] 332 F.3d 323 (5th Cir. 2003). To date, most courts have ruled that any state legislation or state court tort judgment that could cause a registrant to alter its federally approved pesticide label is preempted. *See, e.g., Oken v. Monsanto*, 371 F.3d 132, 1314-15 (11th Cir. 2004) (finding personal injury claim for inadequate labeling against an insecticide manufacturer preempted by FIFRA, declining to extend Supreme Court's decision in *Medtronic* (involving medical devices) to the FIFRA context).

[17] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." 42 U.S.C. § 1983. *See Maine v. Thiboutot*, 448 U.S. 1, 3-4 (1980).

[18] The 11th Amendment immunizes states and state officials sued in their official capacity from damages claims (absent waiver), including under § 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). However, there are two important exceptions. First, suit may be brought under § 1983 for injunctive or declaratory relief; then, if successful, a "prevailing party" may still bring a claim under §1988 for attorneys' fees. *Id.*; *see Maher*, note 26, *infra*. Second, in limited circumstances, state officials may be sued in their "individual" or "personal" capacity as "persons" under § 1983. *See Hafer v. Melo*, 502 U.S. 21 (1991).

[19] *Dennis v. Higgins*, 498 U.S. 439, 447-51 (1991).

[20] 397 U.S. 137, 145-46.

[21] *See, e.g., Waste Management Holdings*, 252 F.3d at 348. *But cf.*, note 21, *supra* (although 11th Amendment did not entirely bar suit, governor was not a proper defendant, lacking a specific duty to enforce the challenged statutes).

[22] *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978).

[23] *See Maher v. Gagne*, 448 U.S. 122, 132-33 n.15 (1980). Under *Maher*, where a plaintiff prevails on grounds for which no attorneys' fees are available, including state law grounds, and the court finds it unnecessary to reach the plaintiff's alternative § 1983 grounds, the plaintiff may still be deemed a "prevailing party" under § 1988 and may be entitled to attorney's fees.

[24] 293 F.Supp.2d 660 (W.D. Va. 2003). For more information on the case, contact the author.

[25] *O'Brien v. Appomattox County*, 213 F.Supp.2d 627 (W.D. Va. 2002), *aff'd*, 2003 WL 21711347 (4th Cir. 2003).

[26] *O'Brien v. Appomattox County*, 2002 WL 31663227 (W.D. Va. 2002).

[27] The *O'Brien* case is part of a larger trend in Virginia and elsewhere favoring preemption of local biosolids laws. *See, e.g., Recyc., Inc. v. Spotsylvania County*, 2004 WL 316954 (Va. Cir. Ct. 2004) (striking down county zoning ordinance restricting biosolids use); *Franklin County*, 507 S.E.2d at 464 (local duplicate permit system, not authorized by state general law, was preempted by implication); *Talbot County v. Skipper*, 620 A.2d 880, 885-86 (Md. 1993); *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); see also *Hydropress Environmental Servs., Inc. v. Twp. of Upper Mount Bethel*, 836 A.2d 912 (Pa. 2003) (striking down another restrictive ordinance on *ultra vires* grounds because township exceeded its powers).

[28] *See, e.g., Waste Management Holdings*, 252 F.3d at 348 n.12 (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 (2002).