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Topic: Environmental Justice: Examining Environmental Protection Agency's Compliance and Enforcement of Title VI and E.O. 12,898 as it relates to the EPA Final Coal Ash Rule

Introduction

Pacific Legal Foundation is dedicated to the defense of the use and rights of private property, and has extensive experience in the intersection between constitutional property law and federal environmental law. PLF has successfully litigated multiple cases in the Supreme Court of the United States in the areas of property rights and the federal Clean Water Act, including *Nollan v. California Coastal Commission*,[1] *Rapanos v. United States*,[2] *Sackett v. EPA*,[3] and *Koontz v. St John's River Water Management District*.[4] PLF is currently litigating an additional Clean Water Act case, *Hawkes v. U.S. Army Corps of Engineers*,[5] in the Supreme Court. PLF attorneys have also frequently testified to Congress on issues involving both property rights and the Clean Water Act.

These remarks address the Commission's second question, from the perspective of identifying state common law remedies available to those who's health and/or homes are harmed by industrial pollution. Federal environmental laws have had the (perhaps unintended) consequence of limiting certain federal legal remedies for those who are harmed by industrial pollution. For many situations, however, state common law remedies for nuisance, trespass, and negligence provide robust means of obtaining both injunctive relief and damages. And, these state law-based causes

[1] 483 U.S. 825 (1987).
[2] 547 U.S. 715 (2006).
[3] 132 S. Ct. 1367 (2012).
[4] 133 S. Ct. 2586 (2013).
[5] 782 F.3d 994 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015).

of action can provide relief without treading the constitutionally suspect path[6] of raising disparate impact claims in the environmental context. Where federal environmental laws have displaced federal common law claims for trespass and nuisance, or prevent full protection of neighboring homes and human health due to statutory bars on certain types of claims, the Commission may consider recommending that Congress address this situation.

The key federal statutes these remarks address are the Clean Air Act, and the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA).

CERCLA's Statutory Bar on Challenges to Ongoing Cleanups

CERCLA authorizes the United States Environmental Protection Agency (US EPA) to identify parties potentially responsible for contaminated sites and to order that those parties engage in specified remedial actions to cleanup those sites. 42 U.S.C. § 9606(a). CERCLA reflects a congressional priority on ensuring diligent cleanup of contaminated sites by those most able to fund the work, and elevates this over complete judicial adjudication of which parties are responsible and to what extent. *See generally Burlington Northern and Santa Fe Ry.Co. v. U.S.*[7] CERCLA also expresses this priority by barring lawsuits which challenge the prescribed method of cleanup before it is completed. 42 U.S.C. § 9613(h) (Section 113(h)).[8]

The *Broward Garden Tenants Association* Decision

In *Broward Gardens Tenants Ass'n v. U.S. E.P.A.,*[9] the Eleventh Circuit held that Section 113(h) applies to constitutional challenges. In this case, predominantly African-American residents of a public apartment complex next to a city-operated landfill in Ft. Lauderdale, Florida, sued EPA and the city to challenge the manner of an EPA ordered and approved cleanup of the landfill.[10] Their complaint in federal court alleged that the public housing project "was established as part of an overall plan to racially segregate Ft. Lauderdale," that the cleanup plan was inadequate and would leave the plaintiffs exposed to continuing unsafe levels of dioxin and arsenic, and that execution of the cleanup as ordered would perpetuate de jure segregation.[11] The complaint pled causes of action for violations of the Fifth, Thirteenth, and Fourteenth Amendments, and Title VI of the Civil

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[6] A detailed critique of disparate impact theory is beyond the scope of these remarks, and the speaker understands that another witness will address this subject before the Commission today. In short, absent disparate treatment, making siting, permitting, cleanup, and enforcement decisions in the environmental arena to avoid disparate impacts based on race inevitably requires decision makers to actively consider race in their decision making. This is constitutionally suspect, to say the least.

[7] 556 U.S. 599 (2009).

[8] Section 113(h) reads, in pertinent part, that no "Federal court shall have jurisdiction under Federal law . . . to review *any* challenges to removal or remedial action" other than five enumerated exceptions (emphasis added).

[9] 311 F.3d 1066 (11th Cir. 2002)

[10] *Id*. at 1068.

[11] *Id*. at 1070.

Rights Act of 1964, 42 U.S.C. § 2000d, *et seq*.[12] The trial court dismissed all of these claims under Section 113(h)'s bar on challenges to any ongoing cleanup action.[13]

On appeal, the Tenants argued that Section 113 (h) does not apply to constitutional claims.[14] The Eleventh Circuit disagreed. The court first rejected an argument that the Section 113(h) bar should be read as only applying to cases brought by potentially responsible parties, noting that the plain text of the statute made no such distinction.[15]

Then, the Eleventh Circuit adopted a plain reading of the term "any" in Section 113(h), and concluded that the unlimited breadth of the prohibition encompasses any legal basis for challenge, constitutional or otherwise.[16] In applying Supreme Court precedent that a congressional intent to bar constitutional claims must be clear, the court wrote that the use of the term "any suit" made such an intent clear.[17]

Broward Garden Tenants relies on similar holdings from the Sixth Circuit in *Barmet Aluminum Corp v. Reilly,*[18] and the Tenth Circuit in an unpublished decision in *Aztec Minerals Corp. v. EPA*,[19] as well as the Eastern District of Michigan in *South Macomb Disposal Auth. v. United States EPA*.[20] *Broward Garden Tenants*, 311 F.3d at 1075. But the Eleventh Circuit also noted contrary decisions in *Reeves Bros., Inc. v. United States E.P.A.,*[21] and the unpublished decision in *Washington Park Lead Comm., Inc. v. United States EPA*.[22]

It is also noteworthy how the court responded to the Tenants' argument based on the canon of avoidance of absurd results. The essence of the Tenants' claim was that the clean-up would harm them, by leaving them subject to continuing exposures to arsenic and dioxin at levels that exceeded state health standards.[23] They argued that it would be an absurd result to read Section 113(h) as

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[12] *Id*.
[13] *Id*. at 1068.
[14] *Id*.
[15] *Id*. at 1072, n.6.
[16] *Id*. at 1075.
[17] *Id*. at 1075, n. 8. A more thorough textual analysis would also have noted that the five enumerated exceptions to the general removal of subject matter jurisdiction, *see* 42 U.S.C. § 9613(h)(1)-(5), argue against reading any other exceptions to the statutory bar.
[18] 927 F.2d 289, 292-94 (6th Cir. 1991).
[19] No. 98-1380, 1999 WL 969270, at *3 (10th Cir. Oct. 25, 1999).
[20] 681 F.Supp. 1244, 1252 (E.D. Mich 1988).
[21] 956 F.Supp. 665, 674-75 (W.D. Va 1995).
[22] In *Washington Park Lead Committee*, residents of a predominantly African-American public housing project were held to have standing to sue EPA for discrimination and continued segregation following EPA's decision in a CERCLA action to relocate the residents of privately owned housing from the area immediately surrounding a contaminated site, but not the residents of the public housing project. No. 2:98CV421, 1998 WL 1053712, at *1, 9 (E.D. Va. Dec. 1, 1998).
[23] 311 F.3d at 1075.

barring a constitutionally based challenge to a federal action which imposed such a result. The court may not have appreciated the irony of its response to this argument:

> CERCLA's general objective is to protect the public health and environment against improper disposal of hazardous wastes. Section 113(h) furthers that objective by preventing EPA remedial actions from being delayed by litigation. Given the litigiousness of our society, *the virtually limitless ability of lawyers to construct constitutional challenges*, and the protracted nature of litigation, it is not absurd for Congress to have assigned a higher priority to the prompt cleanup of a hazardous waste site than to the immediate adjudication of a claim challenging the remedial action.[24]

The court did acknowledge the tension between a policy of protecting human health through cleanup of toxic sites and preventing legal challenges to cleanups which threaten harm to human health, but concluded that the ability to challenge a cleanup after it was complete, and to pursue state court nuisance actions, resolved the tension.[25]

The court also observed that the Tenants had not put forward, until oral argument, the question whether Congress holds constitutional authority to preclude timely litigation of constitutional claims against federal agencies, and ruled that this argument was waived.[26] An interesting question, to be sure, which the Supreme Court first answered in the affirmative in *Ex parte McArdle*, 74 U.S. 506 (1869) (Congress may statutorily limit the appellate jurisdiction of the Supreme Court over habeas corpus petitions), and then backtracked on in *Baltimore & P.R. Co. v. Grant*, 98 U.S. 398, 399 (1878) (*Ex parte McArdle* "purely a partisan enactment").

The *G.E. v. E.P.A.* Decision

Two years later the D.C. Circuit addressed a similar question, holding that Section 113(h) does not bar constitutional challenges to CERCLA's structure, particularly its combination of precluding pre-enforcement review of orders and imposition of extreme financial penalties for non-compliance with orders.[27] The D.C. Circuit also began and ended its analysis with a finding that the scope of Section 113(h) is clear on its text, but came to the conclusion opposite that reached by the Eleventh Circuit.[28] In so doing, the court focused on the fact that the general term "any" (where the Eleventh Circuit began and ended) modifies a description of types of cases that is itself limited: challenges to removal or remedial actions, and enforcement orders related to response actions. Since GE was facially challenging the constitutionality of the CERCLA statute itself,

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[24] *Id*. at 1076 (citations omitted and emphasis added).
[25] *Id*. (citing *Clinton County Commissioners v. United States EPA*, 116 F.3d 1018, 1025, 3rd Cir. 1997).
[26] 311 F.3d at 1076, n.9.
[27] *General Elec. Co. v. E.P.A.*, 360 F.3d 188, 189 (D.C. Cir. 2004).
[28] *Id*. at 191.

rather than its specific application in a particular removal, remedial, or enforcement order, Section 113(h) did not bar its suit.[29]

G.E. v. E.P.A. relies on the First Circuit's decision in *Reardon v. United States*[30] and the Seventh Circuit's decision in *Employers Ins. of Wasau v. Browner*,[31] and distinguishes other cases, including *Barmet Aluminum* and *South Macomb Disposal Authority*,[32] that hold that Section 113(h) bars constitutional claims. 360 F.3d at 191-93. The D.C. Circuit concluded that these cases either deal with as-applied challenges to specific orders only, or do "not focus[] on the plaint text of § 113(h)."[33] Finally, *G.E. v. E.P.A.* addresses the issue of whether early litigation of constitutional questions would thwart congressional purpose under CERCLA, and concludes that it need not. "A decision on GE's due process claim that is favorable to GE would afford EPA an opportunity to provide due process review at an early stage. A decision rejecting GE's due process claim would remove a later impediment to EPA's enforcement action."[34]

Harmonizing *Broward Garden Tenants* and *G.E. v. E.P.A.*

While *G.E. v. E.P.A.* may appear to directly conflict with *Broward Garden Tenants*, there are grounds to read them coherently, which would leave plaintiffs such as the Tenants no better off. *G.E. v. E.P.A.* allows facial constitutional challenges to CERCLA, and agrees that Section 113(h) bars as-applied challenges to the kinds of EPA actions challenged in *Broward Garden Tenants*. General Electric was the potentially responsible party subject to impending EPA clean up orders.[35] The company's due process interest in the structure of the statute (administrative orders requiring significant financial expenditures, at the risk of similarly significant financial penalties) seems fairly straightforward, at least at the pleading stage.[36] It is not clear how the Tenants could have stated their Thirteenth and Fourteenth Amendment segregation claims as facial challenges to the CERCLA statute, as opposed to the as-applied claims to the specific remedial order which were brought.

So, barring direct conflict involving other federal circuits on whether Section 113(h) bars challenges to ongoing cleanups premised on constitutional grounds, the current state of the law

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[29] *Id*.
[30] 947 F.2d 1509, 1515 (1st Cir. 1991).
[31] 52 F.3d 656, 666 (7th Cir. 1995)
[32] *Broward Garden Tenants* cites both of these cases in support of its holding. *G.E. v. E.P.A.* does not cite *Broward Garden Tenants*, despite the fact that the D.C. District Court's decision under review in *G.E. v. E.P.A.* relied on *Broward Garden Tenants*. *G. E. v. E.P.A.*, 257 F. Supp.2d 8, 22 (D.C. Dist. 2003), rev'd by *G.E. v. E.P.A.*, 360 F.3d 188 (D.C. Cir. 2004)
[33] *Id*. at 193.
[34] *Id*. at 194.
[35] 257 F. Supp. 2d at 15.
[36] On remand and then subsequent appeal, both the D.C. District Court and D.C. Circuit held that General Electric's due process rights were not violated by EPA's power to issue unilateral administrative orders. See *General Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).

would bar as-applied federal constitutional challenges to such cleanups, while preserving state-law based actions for trespass and nuisance.

The Clean Air Act

Federal courts have, over time, fashioned federal common law remedies in certain situations, including a federal common law remedy for nuisance. Prior to the enactment of the Clean Air Act, this remedy was available to abate air quality nuisances involving interstate pollution and/or federal defendants.[37] The Supreme Court of the United States held in *American Electric Power Corp. v. Connecticut* that federal common law nuisance claims related to air pollution are displaced by the Clean Air Act.[38] It remained a matter of debate whether the Clean Air Act preempted or otherwise interfered with state law remedies such as trespass, nuisance, and negligence. A group of recent federal circuit decisions hold that the Act does not interfere with these remedies.

Quite recently, in companion decisions, the Sixth Circuit held that the Clean Air Act does not preempt state-based common law claims such as trespass, nuisance, and negligence. In *Merrick v. Diageo Americas Supply, Inc.*,[39] neighbors of a whisky distillery in Kentucky[40] brought a class action suit in federal court for trespass, nuisance, and negligence based on the distillery's ethanol emissions, which were regulated under the Clean Air Act.[41] The court based its decision in part on the fact that the Supreme Court has reasoned that the Clean Water Act preserves state common law claims, even though it preempts application of source state common law claims to out-of-state sources."[42] In *Little v. Louisville Gas & Elec. Co.*,[43] homeowners and other residents near a power plant brought various federal claims along with state law claims for nuisance, trespass, and negligence, alleging that coal ash emissions from the plant fell out on their properties and exposed them to arsenic, silica, lead, and chromium.[44] In both cases, in the face of arguments by defendants that the Clean Air Act preempted nuisance, trespass, and negligence claims brought under state law, the Sixth Circuit held to the contrary.[45]

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[37] *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); see also *Michigan v. U.S. Army Corps of Engineers*, 758 F.3d 892 (7th Cir. 2014) (states may bring federal common law public nuisance claims against federal agencies).

[38] 564 U.S. 410, 131 S. Ct. 2527, 2540 (2011).

[39] 805 F.3d 685 (6th Cir. 2015)

[40] Naturally.

[41] 805 F.3d at 689.

[42] *Id*. at 692 (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-98, 107 S. Ct. 805 (1987)) (quotation omitted).

[43] 805 F.3d 695 (6thCir. 2015).

[44] *Id*. at 698.

[45] *Merrick*, 805 F.3d at 686; *Little*, 805 F.3d at 698.

The decisions in *Merrick* and *Little* follow similar decisions from the Second and Third Circuits and the Supreme Court of Iowa.[46]

In *In re MTBE Prods. Liability Litigation*,[47] the Second Circuit held that the Clean Air Act does not preempt state law-based claims for MTBE groundwater contamination, despite Exxon's argument that MTBE is was a gasoline additive regulated under the Clean Air Act.[48] In *Bell v. Cheswick Generating Station*,[49] a class of residents sued a neighboring coal power plant under state common-law claims including nuisance, negligence, and trespass, based on allegations of emissions of coal ash from the plant.[50] The Third Circuit rejected the power plant operator's federal preemption argument based on the Clean Air Act.[51]

In *Freeman v. Grain Processing Corp.*,[52] the Iowa Supreme Court held that the Clean Air Act does not preempt the state law nuisance and trespass claims based on allegations of pollution and noxious odors emitted by a neighboring ethanol plant.[53]

Together, these decisions from the Second, Third, and Sixth Circuits,[54] plus the decision of the Iowa Supreme Court (located within the Eighth Circuit), and absent a contrary decision from any other circuit,[55] provide very strong authority for the proposition that the Clean Air Act does not interfere with state law remedies for nuisance, trespass, or negligence based on air pollution, including claims based on allegations of intrastate coal ash emissions.

Conclusion

Parties whose health, homes, or property are injured by intrastate coal ash emissions and other types of air pollution have robust common law remedies for trespass, nuisance, and negligence

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[46] See generally Matthew Morrison & Bryan Stockton, *Four Things You Need to Know about Courts' Rejection of Clean Air Act Preemption of State Common-Law Claims*, 46 Envtl. L. Rep. News & Analysis 10017 (2016).

[47] 725 F.3d 65, 96-104 (2d Cir. 2013).

[48] *Id*. at 96-104.

[49] 734 F.3d 188 (3rdCir. 2013), *cert. denied sub nom*. *GenOn Power Midwest, L.P. v. Bell*, 134 S. Ct. 2696 (2014).

[50] 734 F.3d at 189.

[51] *Id*. at 190.

[52] 848 N.W.2d 58, 69 (Iowa 2014).

[53] *Id*. at 69.

[54] A panel of the Fifth Circuit had ruled in *Comer v. Murphy Oil* that claims for nuisance, trespass, and negligence under Mississippi law, based on allegations of harm to the putative plaintiff class caused by global warming, were not preempted by the Clean Air Act. 585 F.3d 855, 878-79 (5th Cir. 2009). However, after granting en banc rehearing of the panel decision, the full court was unable to reach a quorum to either address the issue or reinstate the prior panel decision. 607 F.3d 1049, 1055 (5th Cir. 2010).

[55] *Merrick* distinguishes *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010), which holds that the Clean Air Act preempts common law nuisance claims brought under the law of one state against defendants emitting in other states. *Merrick*, 805 F.3d at 692.

under state law. These remedies provide a superior means of redressing these injuries than do constitutionally suspect disparate impact claims.

To the extent that the federal courts have held that the Clean Air Act preempts state common law nuisance and trespass claims and displaces federal common law nuisance claims, the Commission may wish to consider making recommendations to Congress on these topics. Similarly, the Commission may wish to raise any concerns with CERCLA's statutory bar on constitutional challenges to ongoing cleanups to Congress.