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SAVING PRIVATE REMEDIES: *BELL v. CHESWICK GENERATING STATION ARMS* PROPERTY OWNERS WITH A PRIVATE CAUSE OF ACTION AGAINST ENERGY COMPANIES

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“[T]he rights of persons, and the rights of property are the objects for the protection of which Government was instituted.”¹

I. INTRODUCTION

The fundamental rights to own and protect property are staples of the American dream.² However, as countless industrial facilities continue to develop, air pollution increasingly infringes on citizens’ rights to enjoy their private properties.³ In response to increased litigation arising from

* J.D. Candidate, 2015, Villanova University School of Law; B.A. 2011, Wake Forest University. This Casebrief is dedicated to my family for their constant love and support. Additionally, this Casebrief would not have been possible without the unwavering encouragement and advice of my friends. Lastly, a special thanks to the editors of the *Villanova Law Review* for their insight and suggestions during the writing process.

1. GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF JAMES MADISON* 116 (2003) (quoting James Madison, fourth President of the United States, who asserted government was instituted to protect rights of persons and property).

2. See STEVEN EDWARD HORN, *PROPERTY AND DEMOCRACY: AUTHORITY IN FOUR AMERICAN PROPERTY-RIGHTS REGIMES* 7 (2008) (“[M]odern liberals suggest that . . . property ownership is a fundamental right”); MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 26–27 (2009) (“Privileges or Immunities Clause of the Fourteenth Amendment guarantees to the American citizen ‘among other things, the fundamental rights of life, liberty and property’”); THE CATO INST., *CATO HANDBOOK FOR POLICYMAKERS* 345 (7th ed. 2009), available at <http://object.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2009/9/hb111-34.pdf> (“America’s Founders understood clearly that private property is the foundation not only of prosperity but of freedom itself. Thus, through the common law, state law, and the Constitution they protected property rights—the rights of people to freely acquire, use, and dispose of property.”).

3. See Jim Efstathiou, Jr., Andrew Harris & Sophia Pearson, *Missouri Lawyer Brings Nuisance Claims to Fracking Arena*, BLOOMBERG (June 11, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-06-11/missouri-lawyer-brings-nuisance->

(771)

such pollution, energy companies have increasingly argued that federal environmental laws preempt related state laws.⁴

In the context of air pollution suits, polluters argue their compliance with comprehensive federal regulations under the Clean Air Act (CAA) shields them from liability under state law.⁵ This preemption defense is problematic in light of the limited right of recovery afforded to property owners under the CAA.⁶ Under the CAA, property owners are unable to seek damages if air pollution adversely impacts their property.⁷ The preservation of state common law claims is thus necessary to arm landowners with a means to protect their property interests.⁸ Accordingly, an analysis of whether the CAA preempts state common law is significant because state common law is the primary means by which plaintiffs may seek redress from polluters.⁹

claims-to-fracking-arena.html (describing nuisance claims against fracking companies); see also Earl Hagström, *Hydraulic Fracturing Litigation Is on the Rise*, SEDGWICK LAW (Sept. 2011), <http://www.sdma.com/hydraulic-fracturing-litigation-is-on-the-rise-09-19-2011/> (explaining increase in fracking litigation).

4. See *Third Circuit Finds Clean Air Act Does Not Preempt Toxic Tort in Pennsylvania*—Bell v. Cheswick Generating Station, PHILA. TOP INJURY LAWYER BLOG (Sept. 19, 2013) [hereinafter *CAA Does Not Preempt Toxic Tort*], <http://www.philadelphiatopinjurylawyerblog.com/2013/09/third-circuit-finds-clean-air.html> (stating that federal preemption has “become a popular way for large, powerful entities to try to avoid personal injury lawsuits”).

5. See, e.g., Bell v. Cheswick Generating Station, 734 F.3d 188, 189 (3d Cir. 2013) (stating defendant’s contention that “because the Plant was subject to comprehensive regulation under the [CAA], it owed no extra duty to the [plaintiffs] under state tort law”).

6. See 42 U.S.C. § 7604(a), (e) (2012) (providing right to citizen suit enforcement but no right to compensatory damages except through common law); see also JJ England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENVTL. L. 701, 703 (2013) (noting that CAA “provides no means for an aggrieved party to seek compensatory damages from a polluter under any circumstances except through its savings clause”). Furthermore, England characterizes this CAA shortcoming as “a significant hole currently left unaddressed by Congress.” *Id.* (attributing CAA’s lack of remedial measure to Congressional silence).

7. See England, *supra* note 6, at 703 (recognizing that CAA does not provide for injured property owner to seek compensatory damages from polluter, except through savings clause). See generally Kathleen Roth, Note, *A Landowners’ Remedy Laid to Waste: State Preemption of Private Nuisance Claims Against Regulated Pollution Sources*, 20 WM. & MARY ENVTL. L. & POL’Y REV. 401, 402–03 (1996) (discussing historical significance of private nuisance claim in cases of pollution damage).

8. See Roth, *supra* note 7, at 401–03 (discussing importance of preserving common law claims to ensure plaintiffs are afforded mode of redress).

9. See *id.* at 401, 420–22 (explaining that common law has traditionally been used to protect property owners and illustrating inadequacy of alternative remedies); see also England, *supra* note 6, at 703–04 (describing common law and its ability to provide relief: “it is foundational that courts have the ability to prevent harm from occurring through exercise of equitable powers and further ability to provide relief to aggrieved parties through their powers at law.”); Scott Gallisdorfer, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 VA. L. REV. 131, 163–65 (2013) (stating one argument in favor of preserving common law nuisance actions: such remedies act as “flexible

This Casebrief asserts that the Third Circuit, in a case of first impression, correctly preserved common law remedies to protect private property interests by holding that the CAA does not preempt state common law.¹⁰ Part II of this Casebrief provides an overview of the CAA and its structure, including the model of cooperative federalism it employs and the two savings clauses it features.¹¹ Part III explains and evaluates the Third Circuit's decision in *Bell v. Cheswick Generating Station*¹² and discusses other related circuit cases in light of Supreme Court precedent.¹³ Part IV analyzes the implications of the *Cheswick* holding for Third Circuit practitioners.¹⁴ Finally, Part V argues that the Third Circuit's preemption ruling properly preserves landowners' rights to recover damages caused by air pollution.¹⁵

II. BACKGROUND

This section provides a general overview of the CAA and the preemption issues associated with its implementation.¹⁶ First, this section discusses the mechanics of the CAA.¹⁷ Second, it explains the preemption doctrine and the inconsistent applications various circuit courts have adopted.¹⁸ Finally, this section examines the preemption jurisprudence arising in the context of the CAA.¹⁹

tool for filling in the 'gaps' not covered by more general legislative or administrative regulation," but ultimately concluding that it has little application to context of climate change and that substantial costs from "gap-filling" litigation may actually be counterproductive).

10. For a further discussion of the Third Circuit's adoption of the proper approach to preemption in a CAA case, see *infra* notes 95–106, 151–54 and accompanying text.

11. For a further discussion of the CAA and the preemption doctrine, see *infra* notes 16–84 and accompanying text.

12. 734 F.3d 188 (3d Cir. 2013).

13. For a further discussion of the Third Circuit's analysis and holding in *Cheswick*, see *infra* notes 85–138 and accompanying text.

14. For a further discussion of the practical ramifications for practitioners, including an explanation of the ramifications of the Third Circuit's holding, see *infra* notes 139–57 and accompanying text.

15. For the argument that the Third Circuit applies a proper approach to protect property owners' rights to seek redress from air pollution, see *infra* notes 158–61 and accompanying text.

16. For a general overview of the CAA and associated issues, see *infra* notes 17–84 and accompanying text.

17. For a brief overview of the CAA's structure, see *infra* notes 20–43 and accompanying text.

18. For an overview of the preemption doctrine generally and its inconsistent application, see *infra* notes 44–67 and accompanying text.

19. For an overview of preemption jurisprudence in the context of the CAA, see *infra* notes 68–84 and accompanying text.

A. *Pollution Solution: The Clean Air Act*

Air pollution recognizes neither geographical nor political boundaries; thus, a joint effort by state and federal governments is necessary to regulate its adverse effects.²⁰ Although the CAA is a federal law, its cooperative federalism structure and savings clauses safeguard states' rights.²¹ Moreover, these distinct structural mechanisms reflect Congress's intent to preserve state law remedies.

1. *Two Halves of a Whole: The CAA's Cooperative Federalism Structure*

The twentieth century was marked by the rise of industry and urbanization of American cities.²² Industrialization generated unprecedented levels of air pollution and eventually spurred congressional action to protect public health.²³ By 1963, Congress enacted the CAA, a comprehensive federal law that regulates air emissions and delegates its implementation to the Environmental Protection Agency (EPA).²⁴ The CAA's goal is "to protect . . . air resources . . . to promote the public health and welfare"²⁵

20. For a further discussion of the CAA's cooperative federalism structure, see *infra* notes 21–32 and accompanying text.

21. For a further discussion of the CAA's savings clauses, see *infra* notes 33–43 and accompanying text.

22. See Caroline Wick, Note, *Bell v. Cheswick Generating Station: Preserving the Cooperative Federalism Structure of the Clean Air Act*, 27 TUL. ENVTL. L.J. 107, 109 (2013) (explaining that scientists, public, and government officials began to worry about air pollution in 1950s and 1960s); see also FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW, ch. 2, § 2.03 (Matthew Bender) (explaining increasing air pollution following World War II); England, *supra* note 6, at 703 (describing air pollution and climate change as causes for concern and using native village of Kivalina for illustration).

23. See 42 U.S.C. § 7401(a)(2) (2012) (explaining Congress's finding "that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development . . . has resulted in mounting dangers to the public health and welfare, including . . . the deterioration of property, and hazards to air and ground transportation"); see also Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 90 (2001) (recounting history of environmental movement).

24. See 42 U.S.C. § 7409(b)(1)–(2) (declaring that EPA retains ultimate authority over NAAQS to determine acceptable levels of emissions). Congress enacted the CAA in 1963 and amended it significantly in 1970, 1977, and 1990, providing the EPA with even broader authority to implement and enforce regulations reducing air pollutant emissions. See Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392; Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (illustrating expansion of EPA's authority).

25. 42 U.S.C. § 7401(b)(1) (declaring purposes of CAA). The stated purposes of the CAA include:

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

Under the CAA, state and local governments are responsible for pollution prevention and control, but the Act recognizes federal financial assistance and leadership as essential components to accomplishing these objectives.²⁶ Through this cooperative federalism structure, the federal government develops baseline standards for states to individually implement and enforce.²⁷ The EPA, on the other hand, is tasked with creating National Ambient Air Quality Standards (NAAQS) to create a uniform level of air quality across the country.²⁸ After establishing such standards, the EPA delegates responsibility and authority for achieving NAAQS “attainment” to the states.²⁹

Specifically, states are required to create and submit to the EPA a State Implementation Plan (SIP), which details a plan for attainment, maintenance, and enforcement of NAAQS within the state.³⁰ As such,

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

Id. § 7401(b) (listing CAA’s objectives).

26. *See id.* § 7401(a)(3)–(4) (recognizing federal financial support as “essential” to success of CAA).

27. *See id.* § 7410 (describing CAA’s implementation system); *see also* Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013) (discussing CAA’s “cooperative federalism” structure); Michigan v. EPA, 268 F.3d 1075, 1083 (D.C. Cir. 2001) (describing CAA as “experiment in cooperative federalism”); England, *supra* note 6, at 713–14 (explaining that “[b]ecause pollutants do not respect political boundaries,” CAA “contains several additional authorities that allow for cooperative interstate, regional, and international regulatory programs”).

28. *See* 42 U.S.C. § 7409(b)(1) (describing purpose of NAAQS). The CAA splits the country into various “air quality control regions” to facilitate compliance with the NAAQS. *See id.* § 7407(b) (describing air control regions). An air quality control region is considered to be in “attainment” if it satisfies the NAAQS for a given pollutant. *See id.* § 7409(b) (explaining when region satisfies NAAQS); *see also* Am. Lung Ass’n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998) (“NAAQS must protect not only average healthy individuals, but also ‘sensitive citizens’—children, . . . people with asthma, emphysema, or other conditions rendering them particularly vulnerable to air pollution.” (quoting S. REP. NO. 91-1196, at 10 (1970))); England, *supra* note 6, at 707 (“[T]he EPA Administrator [must] add pollutants to this list and promulgate [NAAQS] upon a finding that such pollutants ‘endanger [the] public health or welfare.’” (third alteration in original) (quoting 42 U.S.C. § 7408(a))).

29. *See* 42 U.S.C. § 7409 (explaining that air quality control region is considered to be in “attainment” if it satisfies the NAAQS for a given pollutant); *see also id.* § 7410 (detailing states’ responsibilities); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Md. L. Rev. 1183, 1193 (1995) (discussing authority delegated to states).

30. *See* 42 U.S.C. § 7410(a)(1) (explaining that decisions regarding how to meet NAAQS are left to individual states). All SIPs must be submitted to the EPA for approval, and once a SIP is approved, “its requirements become federal law and are fully enforceable in federal court.” Her Majesty The Queen in Right of the Province of Ont. v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989) (citing 42

states are given the freedom to set standards more stringent than those specified by federal requirements.³¹ To enforce their standards, states require sources—facilities that emit pollution—to obtain a state-issued permit that limits the types and amounts of emissions that each permit holder is allowed to discharge.³²

2. *The Savings Clauses*

The CAA features two savings clauses that preserve the rights of citizens to bring civil actions and states to set their own emissions standards.³³ First, the “citizen suit” provision permits the filing of civil suits “against any person . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation” or “an order issued by the Administrator or a State with respect to such a standard or limitation”³⁴ In short, this savings clause enables property owners to bring suit if their property is adversely affected by air pollution.³⁵

While the citizen suit provision authorizes private enforcement of the CAA, its remedies are limited to injunctive relief and recovery of litigation costs and attorney’s fees.³⁶ Notably, the citizen suit provision does not

U.S.C. § 7604(a)) (explaining requisite steps to make SIP legally enforceable). Additionally, the states must implement a mandatory permit program that limits the amounts and types of emissions that each stationary source is allowed to discharge. *See id.* at 336 (citing 42 U.S.C. § 7410(a)(2)(B), (D)) (describing mandatory permit system states are required to implement). If a state declines this delegated authority, then the CAA requires the EPA to develop a federal implementation plan. *See id.* at 346 (citing 42 U.S.C. § 7410(c)) (discussing circumstances that lead to federal implementation plan).

31. *See* 42 U.S.C. § 7416 (detailing how states retain authority); *see also* Int’l Paper Co. v. Ouellette, 479 U.S. 481, 494–97 (1987) (emphasizing source state law could impose more stringent emissions rates than those required by federal regulations of Clean Water Act (CWA)); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 328 (1981) (“Section 510 [of the CWA] clearly contemplates state authority to establish more stringent pollution limitations . . .”).

32. *See* 42 U.S.C. §§ 7661a(a), (d)(1), 7661c(a) (detailing state implemented permit program).

33. *See id.* §§ 7604(a)(1), 7416 (establishing savings clauses); *see also* Roth, *supra* note 7, at 401 (asserting that Congress resolved preemption issues “by expressing its intent to save these causes of action or to preclude them in each environmental protection statute”).

34. 42 U.S.C. § 7604(a)(1) (describing citizens savings clause). The statute allows suits against any entity that constructs a source of emissions without securing the requisite permits. *Id.* § 7604(a)(3). Furthermore, the EPA can “inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court.” *See* *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011) (describing EPA’s authority).

35. *See* Wick, *supra* note 22, at 111 (arguing that legislative history of citizen suit provision illustrates Congressional intent to preserve citizens’ right to bring actions for pollution damages under common law).

36. *See* 42 U.S.C. § 7604(e) (lacking provision allowing for recovery of damages).

provide for recovery of damages.³⁷ In fact, there is no provision within the CAA that allows an individual to seek compensation for actual harm caused by air pollution.³⁸ Unfortunately, property owners who suffer extensive damage from air pollution find little relief by recovering litigation costs and attorney's fees.³⁹

The other savings clause, entitled "Retention of State authority" (states' rights savings clause), focuses on the rights of states.⁴⁰ The provision specifies that "nothing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . ." ⁴¹ As a result, this savings clause preserves a state's right to impose its own standards and illustrates the CAA's cooperative federalism structure.⁴² In light of this provision, it is clear that Congress intended the CAA to impose minimum standards for emissions—a "regulatory floor, not a ceiling" on state emissions standards.⁴³

B. *Preemption: A Constitutional Doctrine Obscured by Hazy Application*

1. *Preemption Generally*

Preemption, a doctrine based on the Supremacy Clause of the Constitution, holds that certain matters are of such national character that federal laws governing those matters take precedent over conflicting state laws.⁴⁴ Thus, if a state passes a law that is inconsistent with federal law, the doctrine of preemption is triggered: federal law trumps and invalidates the conflicting state law.⁴⁵ Congressional intent, however, is the threshold inquiry for every preemption issue.⁴⁶ Preemption analyses begin with the

37. See *id.* § 7604. For a brief overview of the CAA's silence on damages, see *infra* notes 38–39 and accompanying text.

38. See 42 U.S.C. § 7604(e) (lacking provision to allow for recovery of damages).

39. See Roth, *supra* note 7, at 420 (explaining denial of common law nuisance claims "will also leave individual landowners without adequate remedies for harm caused by the polluter").

40. See 42 U.S.C. § 7416 (preserving state authority).

41. *Id.* (preserving states' authority to set emissions standards).

42. See England, *supra* note 6, at 715 (stating legislative history of savings clause illustrates "it was intended to preserve traditional common law claims for pollution damages").

43. See *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013) (concluding that federal regulations set minimum standards and states are free to impose stricter standards).

44. See U.S. CONST. art. VI, § 1, cl. 2 ("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 . . .").

45. See generally Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1258–61 (2010) (providing overview of preemption doctrine); see also England, *supra* note 6, at 724 (illustrating supremacy clauses and explaining in detail two types of preemption: express and implied).

46. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (asserting Congressional purpose is "'ultimate touchstone' in every pre-emption case" (quoting Retail

assumption that the states' historic police powers are not to be preempted by federal law absent a "clear and manifest" congressional intent.⁴⁷

While the preemption doctrine appears straightforward, it has been described as "notoriously fuzzy" in its application.⁴⁸ Indeed, "if there is any fixed principle in preemption doctrine, it is that courts will only grudgingly read preemptive intent into a federal statute."⁴⁹ Accordingly, Supreme Court tests for determining if state law is preempted are inconsistent and "open-ended" and therefore susceptible to varied interpretations by district court judges.⁵⁰

In 1987, the Supreme Court addressed whether the Clean Water Act (CWA) preempted state law in *International Paper Co. v. Ouellette*.⁵¹ In *Ouellette*, a Vermont resident sued the owner of a paper mill located across Lake Champlain in New York, alleging that the plant's discharges were a nuisance.⁵² The plaintiff brought a state common law claim under the laws of Vermont, the affected state, despite the fact that the polluting plant was in New York.⁵³ The Court explained that "[a]lthough Congress intended to dominate the field of pollution regulation, the [CWA's] saving clause negates the inference that Congress 'left no room' for state causes of action."⁵⁴ Underscoring the importance of the savings clause, the Court reasoned, "nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State."⁵⁵ The *Ouellette* Court definitively held that the CWA did not preempt a state common law nuisance suit, positioning its decision on the existence of the

Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (explaining evidence of congressional intent may be explicit or implicit).

47. See Gallisdorfer, *supra* note 9, at 140–41 ("[T]he presumption against congressional intent to preempt state law has 'particular force when Congress has legislated in a field traditionally occupied by the States.' . . . [A] court will read a statute that is ambiguous as to preemptive intent not to invoke preemption, particularly where any preemptive effect would disrupt the traditional balance between state and federal power." (footnote omitted) (quoting *Altria Grp. v. Good*, 555 U.S. 70, 77 (2008))).

48. See England, *supra* note 6, at 723 (describing preemption doctrine).

49. Gallisdorfer, *supra* note 9, at 140 (describing standard of review for preemption).

50. See England, *supra* note 6, at 729 ("[T]he foundation of the Court's preemption jurisprudence is on uncertain footing."). England attributes the uncertainty of preemption jurisprudence to the Court's case-by-case analysis. See *id.* at 730–33 (providing in-depth discussion of Supreme Court's uncertain stance on preemption).

51. 479 U.S. 481, 483 (1987) (providing issue of case).

52. See *id.* at 484 (stating facts); see also RESTATEMENT (SECOND) OF TORTS § 822 (1979) (listing elements of nuisance claim).

53. See *Ouellette*, 479 U.S. at 483 (stating plaintiff's claim).

54. *Id.* at 492.

55. *Id.* at 497 (concluding that CWA does not prevent plaintiffs from bringing action under source state's law).

CWA's two savings clauses that preserve a citizen's right to bring claims under common law or any other statute.⁵⁶

Since 2000, the Supreme Court's stance on preemption issues has been inconsistent.⁵⁷ For example, in *Williamson v. Mazda Motor of America, Inc.*,⁵⁸ the Court held that the Federal Motor Vehicle Safety Standard, which limits auto manufacturers' choice of seatbelts to two options, does not preempt state tort suits.⁵⁹ On the other hand, in *PLIVA, Inc. v. Mensing*,⁶⁰ the Court held that federal statutes and regulations promulgated under the Food and Drug Act do preempt state laws imposing the duty to change a drug's label upon generic drug manufacturers.⁶¹ In *Bruesewitz v. Wyeth LLC*,⁶² the Court held that the National Childhood Vaccine Injury Act preempts all state-law design-defect claims against vaccine manufacturers brought by plaintiffs seeking compensation for injury or death caused by a vaccine's side effects.⁶³ The Court, in *AT&T Mobility LLC v. Concepcion*,⁶⁴ issued a holding that that the Federal Arbitration Act preempts a California Supreme Court decision because it impeded "the accomplishment and execution of the full purposes and objectives of Congress."⁶⁵ Finally, in *Chamber of Commerce of the United States v. Whiting*,⁶⁶ the Supreme Court established that that the Federal Immigration Reform and Control Act of 1986 (IRCA) does not preempt Arizona's unauthorized alien employment law because it "fits within the confines of IRCA's savings clause and does not conflict with federal immigration law"⁶⁷

2. Preemption and the CAA

The Supreme Court first considered preemption in the context of the CAA in *American Electric Power Co. v. Connecticut*.⁶⁸ In *American Electric Power*

56. *Id.* at 500 (holding CWA does not preempt state law).

57. See Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 305 (2012) (noting that most Justices "remain uncommitted" to clear positions on many issues central to preemption doctrine, with clear exception of Justice Thomas).

58. 131 S. Ct. 1131 (2011).

59. See *id.* at 1136 ("Under ordinary conflict pre-emption principles a state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law is pre-empted." (internal quotation marks omitted)).

60. 131 S. Ct. 2567 (2011).

61. See *id.* at 2579 ("The Supremacy Clause, on its face, makes federal law 'the supreme Law of the Land' even absent an express statement by Congress." (quoting U.S. CONST. art. VI, cl. 2)).

62. 131 S. Ct. 1068 (2011).

63. *Id.* at 1070–71 (providing holding).

64. 131 S. Ct. 1740 (2011).

65. *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted) (stating holding).

66. 131 S. Ct. 1968 (2011).

67. *Id.* at 1987 (stating holding).

68. 131 S. Ct. 2527, 2532 (2011) (stating issue of case).

Co., the Court held that federal common law is fully displaced by the CAA.⁶⁹ The Court expressly reserved the question of whether the CAA similarly preempts state common law claims.⁷⁰ Yet, despite having issued six preemption opinions, the Court's stance on preemption remains uncertain.⁷¹

Inconsistent treatment of CAA preemption has not been limited to the Supreme Court.⁷² Not surprisingly, courts have struggled to rule consistently on preemption cases.⁷³ In 1989, the Sixth Circuit held that the CAA did not preempt plaintiffs from suing the City of Detroit under the Michigan Environmental Protection Act (MEPA).⁷⁴ In *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*,⁷⁵ the plaintiffs initiated a suit against the City of Detroit under the MEPA over the proposed construction of a city-owned incinerator.⁷⁶ In holding that the CAA did not preempt the state law, the court emphasized that the CAA's savings clause, like those of the CWA, expressly preserves an ongoing role for the states in regulating air pollution.⁷⁷

More recently, in 2010, the Fourth Circuit held in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*⁷⁸ that the CAA preempts state-law tort claims.⁷⁹ The state of North Carolina brought a state-law public nuisance suit against the Tennessee Valley Authority (TVA), a federal agency that owned and operated coal-fired power plants in Tennessee, Alabama, and Kentucky.⁸⁰ The district court issued an injunction against four TVA plants, which imposed emissions standards that were stricter than those required by the CAA.⁸¹

69. *Id.* at 2531 (holding that CAA preempts federal common law).

70. *See id.* at 2540; *see also* England, *supra* note 6, at 723 (stating that district courts faced with CAA preemption issues have arrived at different results, "spanning the entire range from full preemption to non-preemption").

71. *See* England, *supra* note 6, at 729–30 (describing lack of Supreme Court consistency in its 2011 preemption opinions).

72. *Compare* *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013) (holding CAA does not preempt state law), *and* *Her Majesty the Queen in Right of the Province of Ont. v. City of Detroit*, 874 F.2d 332, 334 (6th Cir. 1989) (holding CAA did not preempt state law), *with* *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010) (holding CAA preempts state law).

73. For cases illustrating inconsistent circuit court preemption opinions, *see infra* notes 120–30 and accompanying text.

74. *See Her Majesty the Queen*, 874 F.2d at 342 (finding that CAA "displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute").

75. 874 F.2d 332 (6th Cir. 1989).

76. *See id.* at 333–34 (providing facts of case).

77. *See id.* at 342–43 (noting that plain language of CAA's savings clause "clearly indicates that Congress did not wish to abolish state control").

78. 615 F.3d 291 (4th Cir. 2010).

79. *See id.* at 311–12 (holding CAA preempts state tort claims).

80. *See id.* at 296 (providing facts of case).

81. *See id.* (providing facts of case).

On appeal, the Fourth Circuit reversed, noting that the district court misapplied *Ouellette*, and held that the CAA preempts state law.⁸² Moreover, the court concluded that *Ouellette*'s holding regarding the CWA is applicable in a CAA action, particularly because of the striking similarities between the two acts.⁸³ Subsequently, in 2013, the Third Circuit was given the opportunity to formulate its own approach to state preemption, "a matter of first impression" for the court.⁸⁴

III. *BELL V. CHESWICK GENERATING STATION: THE THIRD CIRCUIT PROTECTS PROPERTY OWNERS' RIGHTS TO SEEK REDRESS FROM AIR POLLUTION*

The Third Circuit took a decisive stance in the preemption debate by holding that the CAA did not preempt state law.⁸⁵ The unanimous ruling had the effect of preserving state-law tort claims and with it the rights of citizens to seek compensation for property damage caused by a facility's pollution.⁸⁶

A. *Narrative Analysis*

In a matter of first impression for the Third Circuit, the *Cheswick* court correctly relied on Supreme Court precedent to give full effect to the CAA's states rights' savings clause.⁸⁷

1. *Background: Facts and Procedure*

In 2012, two women led a 1,500-member class action lawsuit against Cheswick Generating Station, GenOn Power Midwest, L.P. (GenOn), the owner of a 570-megawatt coal-fired power plant (Plant).⁸⁸ The plaintiffs claimed that the Plant's operation caused ash and other contaminants to settle on their property and sought to recover compensatory and punitive damages under three common law tort actions: nuisance, negligence and

82. *See id.* (rejecting lower court's holding and stating it misapplied Supreme Court's *Ouellette* decision).

83. *See id.* at 306 (justifying applicability of *Ouellette*, despite it being CWA case).

84. *See* *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189–90 (3d Cir. 2013) ("[W]e are faced with a matter of first impression: whether the [CAA] preempts state law tort claims brought by private property owners against a source of pollution located within the state."); *see also* Gallisdorfer, *supra* note 9, at 151 (emphasizing that "[r]elatively few lower courts have specifically addressed whether the Clean Air Act preempts nuisance claims arising from state common law").

85. *See Cheswick*, 734 F.3d at 198 (holding plaintiffs' claims are not preempted by CAA).

86. *See id.* (explaining plaintiffs' claims are not preempted by CAA).

87. For a further discussion of the facts, procedure, and analysis of *Cheswick*, *see infra* notes 88–106 and accompanying text.

88. *See Cheswick*, 734 F.3d at 189 (identifying named plaintiffs in class action complaint against defendant).

recklessness, and trespass.⁸⁹ They argued that despite GenOn's claims of operating within the law, the Plant was violating its permit, which prohibits it from emitting visible, or otherwise perceptible, contaminants outside of its own boundaries.⁹⁰ In response, "GenOn argued that because the Plant was subject to comprehensive regulation under the [CAA], it owed no extra duty to the [property owners] under state tort law."⁹¹

Agreeing with GenOn, the district court granted its motion to dismiss on the grounds that the plaintiffs' tort claims "impermissibly encroach[ed] on and interfere[d] with [the federal] regulatory scheme" and were thus preempted by the CAA.⁹² On appeal, the Third Circuit's main issue was whether the CAA preempts state-law tort claims brought by private property owners against a source of pollution located in the same state as the property.⁹³ Based on the plain language of the CAA's savings clauses and U.S. Supreme Court precedent, the Third Circuit Court of Appeals reversed the district court's judgment, holding that the CAA does not preempt state-law tort claims.⁹⁴

2. CAA Preemption Analysis

The Third Circuit acknowledged that the Plant was extensively regulated and comprehensively overseen by both state and federal authorities under the CAA and that the facility's permit specifically addresses odor and combustion residuals emissions.⁹⁵ Consequently, the Third Circuit did not determine that the permit was controlling on the issue.⁹⁶ Rather, the court looked to the states' rights savings clause within the permit itself

89. See *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012) (detailing plaintiffs' complaint: "property damage, the invasion by and inhalation of . . . odors, and the deposit of . . . particulate coal dust, including fly ash and particulates formed by gases and chemicals emitted by [the Plant]"); see also *Cheswick*, 734 F.3d at 192 (listing common law tort theories under which plaintiffs sought damages). The plaintiffs also sought injunctive relief on the nuisance and trespass counts but admitted that such relief would only force GenOn to remove the debris and particulate that continuously falls upon the plaintiffs' properties. *Id.* at 192–93.

90. See *Cheswick*, 734 F.3d at 191–92 (detailing specifics of GenOn's Subchapter V permit for its Cheswick plant).

91. *Id.* at 189 (describing defendant's argument).

92. *Cheswick*, 903 F. Supp. 2d at 322 (ruling CAA preempted state law claims).

93. See *Cheswick*, 734 F.3d at 189–90 (identifying case as matter of first impression); cf. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490–91 (1987) (discussing different laws of affected and source states involved).

94. See *Cheswick*, 734 F.3d at 198 ("We see nothing in the [CAA] to indicate that Congress intended to preempt source state common law tort claims. . . . We will reverse the decision . . ."). *Contra Cheswick*, 903 F. Supp. 2d at 322 ("[T]o permit the common law claims would be inconsistent with the dictates of the [CAA].").

95. See *Cheswick*, 734 F.3d at 191–92 (discussing regulation at Cheswick plant).

96. See *id.*

that preserved all rights and remedies under equity, common law, and statutory law.⁹⁷

The Third Circuit, acknowledging that it was addressing preemption in the context of the CAA for the first time, based its reasoning on the Supreme Court's holding in *Ouellette*.⁹⁸ The court explained that the CAA includes savings clauses similar to the CWA that provide the statutory basis to preserve the plaintiffs' state common law claims.⁹⁹ Further, the court emphasized the consistency with which other circuits have examined this issue and failed to find any meaningful distinction between the CWA and the CAA.¹⁰⁰

In terms of policy considerations, the court refrained from addressing whether its ruling would open the floodgates to nuisance claims against facilities that may otherwise be in compliance with established state and federal emissions standards.¹⁰¹ The court also did not discuss whether its decision could result in a patchwork of inconsistent requirements.¹⁰² Instead, the Third Circuit emphasized that states have the ability to apply more stringent standards to pollution emitting facilities located within their jurisdiction.¹⁰³ The court also approved state tort law as an acceptable means for imposing higher standards on an in-state facility.¹⁰⁴

Lastly, the court rejected GenOn's contention that the CAA's comprehensive regulatory structure would be undermined if juries and courts set

97. *See id.* (focusing on savings clause in permit).

98. *See id.* at 195 (citing *Ouellette*, 479 U.S. at 481).

99. *See id.* (comparing CWA and CAA and finding no material difference between their savings clauses and preemptive reach and thus holding that *Ouellette* controlled outcome); *see also* *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 328–29 (1981) (holding that CWA savings clauses are essentially identical to CAA counterparts).

100. *See Cheswick*, 734 F.3d at 195–96 (discussing other circuit courts' failure to meaningfully distinguish between two acts and rejecting defendant's attempt to distinguish CWA and CAA). The Third Circuit concluded that "GenOn's argument hinges on its expansive reading of the [CWA]'s states' rights savings clause. . . ." *Id.* at 195 (analyzing defendant's argument).

101. *See id.* at 197 (lacking discussion concerning effects of holding on increased litigation).

102. *See id.* (acknowledging possible tension between state nuisance laws and permit system but countering with argument that state nuisance laws are "relatively predicable" (quoting *Ouellette*, 479 U.S. at 498–99)); *see also* Roth, *supra* note 7, at 423 (recognizing "need to balance the interests of private citizens with industry's need for predictable liability"); Mark Delaquil & Richard Raile, *Third Circuit Decision Finding No CAA Preemption of State Law Nuisance Creates Apparent Split with Fourth Circuit*, BAKERHOSTETLER (Sept. 27, 2013), <http://www.environmentallawstrategy.com/2013/09/third-circuit-decision-finding-no-caa-preemption-of-state-law-nuisance-creates-apparent-split-with-fourth-circuit/> ("[T]he balancing of societal interests inherent in deciding nuisance claims may well preclude the certainty necessary for regulated entities to make business investments.").

103. *See Cheswick*, 734 F.3d at 197–98 (emphasizing that CAA's savings clause allows states to impose standards higher than those required by federal law).

104. *See id.* (concluding that state tort law is legitimate means to impose state standards).

emissions standards.¹⁰⁵ The Third Circuit went on to note that the requirements of the CAA “served as a regulatory floor, not a ceiling,” and that states remain free to impose higher standards, enforceable under state tort law, on their own sources of pollution.¹⁰⁶

B. Critical Analysis

The Third Circuit’s reliance on *Ouellette*, a case that analyzed the CWA, shows the court’s willingness to use the Supreme Court’s analysis of the CWA to inform its analysis of the CAA.¹⁰⁷ On the other hand, courts like the Fourth Circuit have failed to recognize and apply *Ouellette* to cases involving the CAA.¹⁰⁸ Ultimately, in *Cheswick*, the Third Circuit reserved its judicial discretion to determine CAA preemption issues on a case-by-case basis.¹⁰⁹

1. Sister Acts: The CWA/CAA Analogy and Supreme Court Precedent

The *Cheswick* court properly relied on the Supreme Court’s analysis of preemption under the CWA in *Ouellette* to analyze preemption under the CAA.¹¹⁰ Indeed, the similarities between the CAA and CWA have led to the acts being called “sibling acts.”¹¹¹ Both acts were passed in the 1970s, are “command-and-control” statutes, and are seminal environmental laws in the United States.¹¹² Most importantly, both acts feature a cooperative

105. See *id.* at 197 (rejecting defendant’s argument by way of analogy: “[the] Supreme Court addressed this precise problem” in *Ouellette* . . . and rejected the very same concerns that [defendants] now raise.” (first alteration in original) (citation omitted) (quoting *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301 (2010))).

106. See *id.* at 197–98 (rejecting GenOn’s argument that court’s holding may undermine regulatory scheme of CAA and explaining that CAA standards and requirements serve as baseline for emissions standards).

107. For a further discussion of the CWA/CAA analogy, see *infra* notes 110–19 and accompanying text.

108. For a further discussion of the Fourth Circuit’s approach, see *infra* notes 120–30 and accompanying text.

109. For a further discussion of the impact of the *Cheswick* decision, see *infra* notes 131–38 and accompanying text.

110. See Jonathan Martel, *How to Defend Air Pollution Torts After Bell v. Cheswick*, LAW360 (Sept. 27, 2013, 12:04 PM), <http://www.law360.com/articles/475613/how-to-defend-air-pollution-torts-after-bell-v-cheswick> (arguing *Cheswick* upholds Supreme Court precedent); see also *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987) (holding CWA does not preempt state law); *Cheswick*, 734 F.3d at 198 (holding CAA does not preempt state law).

111. See Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 206 (1999) (noting that both acts were “largely written by the same pivotal members of Congress”); England, *supra* note 6, at 725 (describing CWA and CAA as “sibling acts”).

112. See England, *supra* note 6, at 726 (describing similarities between CWA and CAA); see also Adler, *supra* note 111, at 206 (examining similarities and differences between CWA and CAA). Adler asserts the statutes have differed significantly in their implementation. See *id.* at 207 (detailing differences in implementation methods). Command and control regulations directly regulate an

federalism structure and delegate significant authority and discretion to states to implement the statutes.¹¹³ Moreover, when Congress amended the CAA in 1990, it borrowed significant ideas from the CWA.¹¹⁴ Therefore, the *Ouellette* Court's conclusion that "nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the laws of the source State" bears heavily in determining whether the CAA preempts state laws.¹¹⁵

A textual comparison of the two savings clauses in the CAA and CWA reveals that the CWA's states' rights savings clause includes additional language: that nothing in the CWA shall "be construed as impairing or in any

industry or activity by legislation that defines what is permitted and what is illegal, e.g. harmful pollution. See Adam Babich, *A New Era in Environmental Law*, 20 COLO. LAW. 435, 435 (1991) (describing command and control regulations). The term "command and control" describes a regulatory structure that "impos[es] rigid standards of conduct . . . backed up by sanctions designed to assure full compliance with such standards . . ." Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 659 (2012) (alterations in original) (quoting James E. Krier & Richard B. Stewart, *Using Economic Analysis in Teaching Environmental Law: The Example of Common Law Rules*, 1 UCLA J. ENVTL. L. & POL'Y 13, 15 n.3 (1980)) (internal quotation marks omitted) (providing early definition of term). In the context of air pollution, command and control regulations "focus[] on preventing environmental problems by specifying how a company will manage a pollution-generating process." Sophia Hamilton, *When Scientific Palmers Make Policy: The Impact and Future of Cap-and-Trade in the United States*, 4 J. BUS. ENTREPRENEURSHIP & L. 269, 313 (2011) (internal quotation marks omitted) (describing how command and control regulations function in context of air pollution control); see also Gallisdorfer, *supra* note 9, at 152 (stating that both acts "feature nearly identical savings clauses contemplating preservation of independent forms of state regulation," but also providing basis on which to distinguish two acts). The CWA's primary savings clause contains additional language stating that nothing in the Act should "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370 (2012). As Gallisdorfer points out, some commentators have suggested that the phrase "of such States" acts as a qualifier and limits the coverage of the savings clause to a state's regulation of its own waters, thus driving the source and affected state law distinction articulated by the Supreme Court in *Ouellette*. See Gallisdorfer, *supra* note 9, at 152–53. "The [CAA], by contrast, lacks any such qualifier, perhaps indicating that this same distinction should not apply there." *Id.* at 153.

113. See generally Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1160–62 (1995) (providing background on federalism models employed in CWA and CAA).

114. See Adler, *supra* note 111, at 207–08 (illustrating close nexus between two acts).

115. *Cheswick*, 734 F.3d at 194–95 (quoting *Ouellette*, 479 U.S. at 497) (internal quotation marks omitted) (relying heavily on *Ouellette*'s CWA preemption analysis to inform its analysis); see also England, *supra* note 6, at 715 n.106 (arguing that legislative history of CWA supports inference that Congress intended to preserve traditional common law claims for pollution damages). The Senate Report for the CWA demonstrates Congress intended for the savings clauses to "specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." See *id.* (quoting S. REP. NO. 92-414 (1972)) (internal quotation marks omitted), reprinted in 1972 U.S.C.C.A.N. 3668, 3746–47.

manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”¹¹⁶ The Third Circuit explained that the CAA lacked analogous language because “*there are no such jurisdictional boundaries or rights which apply to the air.*”¹¹⁷ The court reasoned that, “[i]f anything, the absence of any language regarding state boundaries” in the CAA’s states’ rights savings clause is indicative of Congress’s intent to afford more rights to the states.¹¹⁸ Moreover, Congress’s “failure even to hint at” its intention to eliminate private causes of action under state law belies any argument for preemption of state law.¹¹⁹

2. *Parting Ways with the Fourth Circuit*

The Third Circuit’s vision of preemption under the CAA, however, differs dramatically from the Fourth Circuit’s understanding of preemption.¹²⁰ In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the Fourth Circuit held that a facility’s CAA permit preempts a state nuisance claim under North Carolina law.¹²¹ The Fourth Circuit suggested that subjecting permittees to a state-by-state “patchwork” of ambiguous nuisance laws is incompatible with the comprehensive regulatory framework of the CAA.¹²²

The Fourth Circuit strategically characterized the CAA as a delicate regulatory system carefully crafted by “decades of thought by legislative bodies and agencies.”¹²³ With this in mind, the court appointed itself as the defender of the CAA against “the vagaries of public nuisance doctrine” that threaten to “scuttle the extensive system of anti-pollution mandates that promote clean air in this country.”¹²⁴

116. 33 U.S.C. § 1370 (preserving states’ rights and jurisdiction with respect to waters of states); *see also Cheswick*, 734 F.3d at 195 (noting additional language in CWA’s states’ rights savings clause).

117. *Cheswick*, 734 F.3d at 195 (providing explanation for CWA’s additional language).

118. *Id.* (interpreting omitted language as indication that Congress intended to reserve state authority).

119. *Id.* at 198 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted).

120. *Compare id.* (holding CAA does not preempt state law), *with North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 306 (4th Cir. 2010) (holding CAA preempts state law).

121. *See Cooper*, 615 F.3d at 310–12 (holding CAA preempts North Carolina state law).

122. *See id.* at 302 (asserting state specific nuisance laws are incompatible with CAA).

123. *Id.* at 298 (describing efforts that created CAA).

124. *Id.* (explaining policy consideration in holding that CAA preempted state law). Moreover, the court characterizes North Carolina’s suit in one short, but poignant statement: “Litigation that amounts to ‘nothing more than a collateral attack’ on the system, however, risks results that lack both clarity and legitimacy.” *Id.* at 301 (quoting *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir. 1993)) (characterizing plaintiff’s argument as attack on CAA). The court noted that “[i]t ill behooves the judiciary to set aside a congressionally sanctioned

The Third Circuit, on the other hand, adopted a “fundamentally different” approach.¹²⁵ Two practitioners have noted that the Fourth Circuit adopted “a broader view of *Ouellette*’s holding, finding that nuisance law was an ‘ill-defined omnibus tort of last resort,’ and North Carolina’s lawsuit was an attempt ‘to replace’ the carefully crafted CAA regime with nuisance law’s ‘vague and indeterminate’ standards.”¹²⁶ However, the Fourth Circuit’s shortcoming is more conspicuous: it ignores the Supreme Court’s assertion that nothing in the CWA—the CAA’s sister act—bars injured individuals from bringing a nuisance claim under state law.¹²⁷

Ultimately, the court’s holding in *Cheswick* is limited to the Third Circuit, and the issue is far from settled.¹²⁸ Other federal courts of appeals have not had the occasion to address whether the CAA preempts private state-law tort claims.¹²⁹ Moreover, “the Third Circuit’s opinion is subject to discretionary appeal to the U.S. Supreme Court.”¹³⁰

3. *Impact of Cheswick on the Third Circuit*

The Third Circuit looked to the states’ rights savings clause contained in GenOn’s permit to preserve all rights and remedies under equity, common law, and statutory law.¹³¹ As such, the decision reserves judicial discretion to determine, on a case-by-case basis, whether a facility’s permit preempts state tort claims.¹³² Additionally, just one month before the Third Circuit issued its *Cheswick* decision, the court issued another anti-

scheme of many years’ duration . . . that reflects the extensive application of scientific expertise” *Id.* (explaining policy concerns).

125. See Delaquil & Raile, *supra* note 102 (explaining import of Third Circuit decision in context of liability).

126. *Id.* (quoting *Cooper*, 615 F.3d at 302) (asserting Fourth Circuit took broader approach to *Ouellette* than Third Circuit).

127. See *Cooper*, 615 F.3d at 301–04 (discussing *Ouellette* but lacking any mention of its recognition that CWA does not bar state-law nuisance claims).

128. See Arthur J. Harrington, Matthew T. Kemp & Douglas M. Poland, “*Federal Court Rules that Compliance with Clean Air Act Permit Does Not Preempt Private Tort Suits over Air Emissions*”, GODFREY & KAHN, S.C. (Sept. 12, 2013), http://www.gklaw.com/news.cfm?action=pub_detail&publication_id=1321 (emphasizing *Cheswick* decision is limited to Third Circuit).

129. See *id.* (noting Seventh Circuit, for example, has never addressed this state preemption issue).

130. *Id.* (emphasizing possibility of appeal).

131. See *Bell v. Cheswick Generating Station*, 734 F.3d 188, 192 (3d Cir. 2013) (focusing on savings clause in permit).

132. See Joshua L. Belcher, *Third Circuit Holds “Source State” Common Law Tort Claims Not Preempted by Federal Clean Air Act*, COZEN O’CONNOR, ENERGY, ENVTL. & UTILS. ALERT (Sept. 3, 2013), <http://www.cozen.com/news-resources/publications/2013/third-circuit-holds-source-state-common-law-tort-claims-not-preempted-by-federal-clean-air-act> (emphasizing importance of specific language in permits).

polluter decision.¹³³ In *GenOn REMA, LLC v. EPA*,¹³⁴ GenOn's Pennsylvania facility was generating high levels of sulfur dioxide emissions that traveled just across the Delaware River, a mere 500 feet away, to New Jersey.¹³⁵ New Jersey filed a claim with the EPA, which issued a ruling requiring GenOn to decrease its emissions.¹³⁶ GenOn argued that the EPA's ruling was invalid because the ruling was arbitrary and capricious and the EPA lacked the authority to issue the ruling; however, the Third Circuit rejected both these claims.¹³⁷ Given the Third Circuit's pattern of issuing pro-plaintiff decisions, it appears "polluters will have a hard time arguing their way out of their dirty business"¹³⁸

IV. PRACTICAL IMPLICATIONS FOR THIRD CIRCUIT PRACTITIONERS AFTER *CHESWICK*

This section explores several key points and practical implications for practitioners as a result of *Cheswick*.¹³⁹ First, this section explains that CAA compliance alone will not shield polluters from liability, because *Cheswick* preserves state-law tort claims.¹⁴⁰ Second, it recommends valuable litigation tips for regulated entities.¹⁴¹

A. CAA Compliance Alone Will Not Shield Against Liability

The Third Circuit's decision is significant for regulated entities because it questions the degree to which CAA compliance will shield them against liability for state common law violations.¹⁴² In light of *Cheswick*,

133. See Gabriella Khorasanee, *State Tort Claims Not Preempted by the Clean Air Act, Says 3rd Cir.*, FINDLAW.COM (Aug. 23, 2013, 2:55 PM), http://blogs.findlaw.com/third_circuit/2013/08/state-tort-claims-not-preempted-by-the-clean-air-act-says-3rd-cir.html (illustrating that Third Circuit's recent rulings are not favorable for polluters).

134. 722 F.3d 513 (3d Cir. 2013).

135. See *id.* at 515–16 (providing facts of case).

136. See *id.* at 516 (stating details of EPA's ruling). The CAA "allows downwind states to petition the EPA for a finding that a source in an upwind state affects the petitioning state's attainment or maintenance of NAAQS due to air pollution emanating from the source in the upwind state." *Id.* (citing 42 U.S.C. § 7426(b) (2012)) (describing circumstances that allow states to petition EPA).

137. *Id.* at 526 ("[W]e hold that the EPA's action of promulgating the Portland Rule was neither an abuse of discretion nor arbitrary or capricious.").

138. Khorasanee, *supra* note 133 (predicting Third Circuit's recent EPA decisions do not bode well for future polluters).

139. For a further discussion of practical implications of the *Cheswick* decision, see *infra* notes 140–57 and accompanying text.

140. For a further discussion of what *Cheswick* means for companies that own and operate pollution emitting sources, see *infra* notes 142–47 and accompanying text.

141. For suggestions and litigation tips, see *infra* notes 148–57 and accompanying text.

142. See Delaquil & Raile, *supra* note 102 (explaining importance of Third Circuit decision in context of liability).

facilities with pollution-emitting sources may not shield themselves from civil liability by simply complying with federal law.¹⁴³

The Third Circuit's assurance that its decision is unlikely to trigger increased litigation is questionable; *Cheswick* allows landowners to pursue state claims against power plants despite their compliance with state and federal regulations.¹⁴⁴ Commentators note that because the Third Circuit is the first circuit to explicitly extend *Ouellette* to private nuisance claims for air pollution, it may cause facilities to "become targets of a new wave of state tort actions from newly-emboldened neighbors."¹⁴⁵ Of particular note, just days after the *Cheswick* decision, the "prevailing plaintiffs' attorney filed a similar suit involving a different public utility in the same federal district."¹⁴⁶ Moreover, increased litigation is a palpable concern given America's reputation as the most litigious country in the world.¹⁴⁷

B. *Litigation Tips for Regulated Entities*

Owners and operators of facilities within the Third Circuit—particularly electric, oil, and gas companies—should be cognizant of the potential increase in tort actions brought under local state law.¹⁴⁸ Regulated entities should emphasize the significance of their "[CAA] compliance to a favorable merits determination."¹⁴⁹ At the very minimum, facilities

143. See Sudhir Lay Burgaard, *Third Circuit Finds the Clean Air Act Does Not Preempt State Common Law Claims*, MORRIS POLICH & PURDY LLP (Oct. 7, 2013), http://www.mpplaw.com/files/Publication/987a9ef1-88b7-4361-8cb5-f2c0f1f42045/Presentation/PublicationAttachment/8e542b00-d59e-46ba-9700-f692f09b86ba/8_Vol5_Third-Circuit-Finds%20CAA-Does-Not-Preempt%E2%80%9393SLB.pdf; see also Belcher, *supra* note 132 (explaining that facilities may be complying with their permit but that it will not "insulate them against environmental challenge"). But see *Brown v. Scioto Cnty. Bd. of Comm'rs*, 622 N.E.2d 1153, 1159 (Ohio Ct. App. 1993) (holding that compliance with pollution permit issued under comprehensive regulatory scheme barred common law nuisance actions).

144. See Rob Green, *Third Circuit Holds Clean Air Act Does Not Preempt State Tort Claims*, ABNORMAL USE (Aug. 22, 2013), <http://abnormaluse.com/2013/08/third-circuit-holds-clean-air-act-does-not-preempt-state-tort-claims.html> (explaining rationale for anticipated increase in litigation).

145. *Clean Air Act Does Not Preempt Property Owners' State Law Tort Claims, Says Third Circuit in Case of First Impression*, CROWELL & MORING LLP (Sept. 23, 2013) [hereinafter *Case of First Impression*], <http://www.crowell.com/NewsEvents/All/Clean-Air-Act-Does-Not-Preempt-Property-Owners-State-Law-Tort-Claims-Says-Third-Circuit-in-Case-of-First-Impression>; see also Green, *supra* note 144 (discussing possibility of increased litigation resulting from *Cheswick*).

146. *Case of First Impression*, *supra* note 145.

147. See Paul H. Rubin, *More Money into Bad Suits*, N.Y. TIMES (Nov. 16, 2010, 4:44 PM), <http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits> ("The United States is already the most litigious society in the world. . . . [It] spend[s] about 2.2 percent of gross domestic product, roughly \$310 billion a year . . . on tort litigation, much higher than any other country.").

148. See Belcher, *supra* note 132 (warning owners of pollution-emitting facilities to be aware of possible increase in litigation).

149. Martel, *supra* note 110 (noting importance of CAA compliance).

should negotiate their permits to include language that acknowledges the CAA permit shield provision, in order to protect from additional requirements where the facility is in compliance with permitted limits.¹⁵⁰

The *Cheswick* ruling abolished the defense that CAA regulation and compliance shield facilities from incurring liability under state law.¹⁵¹ Despite the decision, however, other preemption-related defenses are available.¹⁵² For example, facilities could argue that state laws that regulate air emissions preempt common law tort claims, such as nuisance.¹⁵³ Additionally, defendants may assert “fact-specific administrative law arguments, such as the plaintiffs’ failure to exhaust available administrative review remedies for seeking more stringent emission limitations in the underlying permit.”¹⁵⁴

Public relations efforts are also critical to proactively preventing an onslaught of litigation.¹⁵⁵ Specifically, permit holders should consider strategies for reaching out to landowners in the vicinity of emissions-releasing facilities, because those owners are most likely to be impacted by emissions and therefore most likely to bring future tort claims.¹⁵⁶ Reaching out to potential plaintiffs and resolving issues out of court may prevent costly litigation, for both parties.¹⁵⁷

V. CONCLUSION: THE THIRD CIRCUIT’S APPROACH APPROPRIATELY PROTECTS PROPERTY OWNERS’ RIGHTS TO SEEK REDRESS

Considering that common law claims have traditionally been the means to address legislative shortcomings, the Third Circuit’s approach in *Cheswick* appropriately takes steps to preserve property owners’ rights to recover damages caused by air pollution.¹⁵⁸ If the Third Circuit had upheld the district court’s preemption finding, then it would have effectively barred attempts by property owners to assert their common law rights.¹⁵⁹ One commentator notes that allowing defendants in CAA actions to in-

150. Belcher, *supra* note 132 (explaining what companies should negotiate in permit).

151. See *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013) (remanding case for further proceedings).

152. See *Harrington, Kemp & Poland, supra* note 128 (discussing importance of public relations as well).

153. See *id.* (suggesting alternative defense).

154. *Id.* (suggesting administrative law arguments for defense).

155. See *id.* (describing importance of public relations efforts).

156. See *id.* (discussing target audience for public relations efforts).

157. See *id.* (suggesting reaching out to potential plaintiffs).

158. See *England, supra* note 6, at 746 (explaining negative effect of allowing federal laws to preempt state laws).

159. See *CAA Does Not Preempt Toxic Tort, supra* note 4 (explaining significance of Third Circuit’s holding); see also *Roth, supra* note 7, at 404–07 (discussing permit shield provisions). *Roth* asserts that permit-shield provisions restrict individuals’ rights to protect their property interests and “create a gap in the scheme for environmental protection and unnecessarily harm private landowners.” *Id.* at 415 (discussing impact of permit-shield provisions).

voke a preemption defense “may deprive plaintiffs of a remedy needed to right a wrong, and it may further erode centuries-old precedent allowing common law air pollution claims involving traditional air pollutants to move forward—claims expressly preserved by CAA.”¹⁶⁰ In sum, the Third Circuit correctly held that the CAA does not preempt state common law actions, because its decision preserves the historic federal-state partnership that addresses “one of the most notorious types of public nuisance in modern experience.”¹⁶¹

160. England, *supra* note 6, at 746 (explaining potential effect of upholding defendant’s preemption defense).

161. *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114 (1972) (describing air pollution). For the argument that the Third Circuit applies the proper approach to protect property owners’ rights to seek redress from air pollution, see *supra* notes 110–19 and accompanying text.

