

# New Jersey Law Journal

VOL. CLXXXVII—NO.7—INDEX 498

FEBRUARY 12, 2007

ESTABLISHED 1878

## Environmental Law

### The Future of State NRD Claims

What conflict pre-emption might mean for New Jersey

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In January 2003, then-New Jersey Governor James McGreevey proudly proclaimed that environmental protection would be one of his administration's top priorities. A key aspect of this new environmental focus was the pursuit of natural resource damages (NRD) claims against potential polluters. Since that time, New Jersey's Department of Environmental Protection has pursued an innovative program that involved self-reporting on the part of potential parties, numerous lawsuits and many multimillion dollar settlements. Gov. McGreevey felt that states such as New Jersey owed their residents a duty to protect the environment in the face of lax federal leadership in the field. Unfortunately, the power of states to provide this leadership took a hard blow recently in the case of *State of New Mexico v. General Electric*, 467 F.3d 1223 (10th Cir. 2006).

*General Electric* involved a claim by the New Mexico attorney general for recovery of natural resource damages at a former nuclear weapons production facility on the southern edge of Albuquerque, New Mexico. As first pled, the attorney

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general sought \$4 billion in money damages under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as well as a range of state common law violations, for contamination of the state's groundwater resources.

Originally filed as separate cases before state and federal courts in 1999, *General Electric* was consolidated in Federal District Court for the State of New Mexico, where it underwent a number of significant alterations. Ultimately, the attorney general abandoned all CERCLA-based claims, focused only on state law claims, and significantly reduced the amount of damages she was seeking. The District Court, clearly displeased by the state's failure to conduct independent testing for contamination, found that evidence to support even these reduced claims was wholly lacking. A summary judgment for the defendants was granted in June 2004.

On appeal, the 10th Circuit brushed over highly compelling issues of evidence, causation and damages. Instead, the court chose to build the core of its decision around a principle that is enjoying increasing popularity in the federal courts: conflict pre-emption.

Federal pre-emption is rooted in the Supremacy Clause of the United States Constitution, and it holds simply that, under the proper circumstances, federal law supercedes and supplants state law.

Three types of pre-emption are generally recognized: express pre-emption, field pre-emption and conflict pre-emption.

Based on explicit reservations of state law authority contained within the statute itself, courts have repeatedly acknowledged that CERCLA does not expressly pre-empt all state law, nor does the statute create such a comprehensive scheme of action so as to completely occupy the field. The *General Electric* decision also rejects these two types of pre-emption, stating that Congress has "clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve the country's hazardous waste cleanup problem." The court, however, then proceeded to examine whether CERCLA pre-empted New Mexico's state law claims under the principle of conflict pre-emption.

In its most simplified form, conflict pre-emption is nothing more than the recognition that where compliance with both federal and state regulations is a physical impossibility, the federal law has precedence. Courts have expanded this basic form of conflict pre-emption to include cases where a state statute attempts to authorize the exact conduct that Congress sought to prohibit. More generally, pre-emption can be found where a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In *General Electric*, the 10th Circuit focused on the most general form of conflict pre-emption. The court clearly stated that it would find pre-emption where "a claim, or any portion thereof, stands as an

obstacle to the accomplishment of congressional objectives." By focusing on purported Congressional objectives and portions of state law claims, the court gave itself the freedom to claim that while federal law might not have pre-empted the field of hazardous waste cleanup, federal policy in the field has effectively done so.

Intent on explaining federal environmental damages policy, the court expended a great deal of effort articulating the types of damages allowable under CERCLA, and discussing how those damages are to be used. Where natural resource damages are recoverable, CERCLA requires that these funds be used only to restore or replace injured natural resources, or to acquire some reasonable equivalent. Focusing on this statutory language, the court held that CERCLA thereby pre-empts any state law remedy designed to achieve something other than one of these three goals. Pre-emption is proper because the restrictions on the use of funds recovered for damages to natural resources "represent Congress's considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste."

The *General Electric* decision did not find that CERCLA pre-empts any of the state law claims typically seen in hazardous waste cases, such as trespass or nuisance. However, CERCLA does pre-empt the remedy that can be sought in those suits by limiting the manner in which recovered damages can be used by the state. Reduced to its most blunt form, *General Electric* merely holds that an unrestricted award of money damages based on state law claims is pre-empted by CERCLA.

The court argued that while CERCLA does not prohibit states from independently regulating hazardous waste sites, the policies behind CERCLA clearly indicate that the considered opinion of Congress is that remediation is the best manner of

addressing contaminated sites. Unrestricted monetary awards violate this policy in at least three ways. First, the court said that if states are allowed to recover money damages, then contaminated sites would never be cleaned up. Alternatively, the court said that potentially responsible parties could be liable for double damages if sued by a state first, and then later forced to comply with a CERCLA remediation plan.

There is something hollow about each of these two purported concerns. First, even under the court's ruling there is nothing to require that a contaminated site be cleaned up. A damaged resource can be replaced, or a reasonable alternative can be acquired. Second, the possibility of double liability is inherent in any field where two sovereigns share overlapping authority. Double liability does not demonstrate any conflict between the state and federal laws. It merely means that potentially responsible parties could end up paying more than simply the cost of the federal cleanup.

The court's third justification of pre-emption appears to be the one which carries the most real weight. Throughout its decision, the court displayed a clear hostility towards the attorney general's use of outside "special counsel" to conduct the state's case. Because it is undisputed that funds recovered under CERCLA could not be used to pay such outside counsel, attorney's fees in environmental damages cases are often paid out of the recovery for state law claims. The court's decision found that this practice is pre-empted by the same CERCLA prohibitions. States with small litigation budgets will find this aspect of the ruling particularly restrictive.

Despite its harsh rhetoric, there are indications within the *General Electric* decision that even the 10th Circuit will continue the federal courts' general deference to local legislation in the fields of environmental regulation. However, states

will have to carefully craft future suits to avoid the two principle objects of the court's ire.

First, the court was clearly outraged that money recovered for damage to the environment would go into a state's general treasury. Rather than seeing NRD recoveries as funds that a reasonable state/trustee could put to good use, such as in health care or education, the court felt that such recoveries are merely windfalls to the public treasury.

Second, still focusing on the use of recovered funds, the court was clearly displeased with the use of outside counsel by the state to pursue NRD claims. The court did not directly prohibit the use of special counsel, but the restrictions the court placed on the use of funds makes paying these outside attorneys highly difficult.

Fortunately, New Jersey's current NRD initiative avoids both these contentious issues. Rather than being earmarked for the state's general treasury, all money collected for natural resource damages are maintained in a separate Hazardous Discharge Site Remediation Fund (HDSRF), and are targeted towards environmental recovery projects. Furthermore, while New Jersey initially retained special counsel as part of its NRD initiative, the state has moved away from the use of outside counsel. The New Jersey Department of Environmental Protection Web site no longer even discusses the issue.

These factors indicate that the pre-emption policies outlined in *General Electric* might not be enough to bring down New Jersey's ongoing NRD initiative. However, increased federal presence in the field, along with troubling language in the decision, indicating that the court believes more challenges to state authority might be appropriate, will undoubtedly encourage further challenges to NRD programs and initiatives around the country. ■