IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

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MUSCATINE CO. IOWA

LAURIE FREEMAN, JOSEPH PRESTON SHARON MOCKMORE, EUGENE W. MOCKMORE, BECCY BOYSEL, GARY D. BOYSEL, DARYLE SNYDER, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT and BOBBIE LYNN WEATHERMAN, Plaintiffs, vs. GRAIN PROCESSING CORPORATION, Defendant.	Case No. LACV 021232 RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COURSE OF PROCEEDINGS

Plaintiffs commenced this lawsuit on April 23, 2012 in Muscatine County, Iowa alleging nuisance, negligence, and trespass by Defendant Grain Processing Corporation ("GPC"). Plaintiffs aver that their real and personal properties within a three-mile radius of Defendant's facility have been directly impacted by the continuous and increasing pollution by industrial methods and processes used by Defendant. The proposed class of Plaintiffs consists of approximately 17,000 individuals within a three-mile radius.

GPC is a corn-processing facility located in Muscatine, Iowa that engages in "corn wet milling." Through this process it transforms corn kernels into products for various commercial and industrial uses. This process involves the use of various acids

and chemicals, which results in the creation of by-products and chemicals that are subsequently released into the air.

Plaintiffs' Petition alleges that Defendant's operations release particulate matters and other harmful substances into the air and that it "has failed and refused to follow accepted industry standards of care, including appropriate maintenance, housekeeping and safety measures, pollution controls, and the utilization of available technology to eliminate or drastically reduce the adverse effects of its production activities on the neighboring community." (Pls.' Amended Class Action Pet. Para. 2.) It claims that Defendant uses outdated technologies that are ineffective in reducing levels of air pollution. (*Id.*) Plaintiffs also claim that the polluting particles and chemicals settle onto nearby homes, schools, and churches, noxious odors waft through the community causing them "to suffer persistent irritations, discomforts, annoyances and inconveniences" and putting them "at risk for a (sic) serious health effects" and diminishing their use and enjoyment of their property. (*Id.*) Plaintiffs assert claims pursuant to statutory and common law nuisance, trespass, and negligence. Plaintiffs deny that they are bringing their claims under the federal or state Clean Air Acts. Plaintiffs seek damages to remediate their properties, compensation for the loss of use and enjoyment of their properties, punitive damages, and possible injunctive relief.

Multiple motions have been filed in this case since its inception less than a year ago. On June 20, 2012, Defendant filed a Motion for a *Lone Pine*[1] case management

[1] In *Lone Pine*, the court required plaintiffs to provide reports from physicians and medical experts in order to support their claim of injury and causation from the Lone Pine landfill before discovery commenced. *Lore v. Lone Pine Corp.*, L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

order, which was denied by ruling of this Court. Defendant also filed a Motion to Disqualify Plaintiffs' Attorney James C. Larew based on a purported conflict of interest between Larew's former employment as general counsel for Governor Chet Culver and the present action. This motion was denied on September 26, 2012. On October 9, 2012, Defendant filed a Motion for a Case Management Order. As a result, a hearing for class certification was scheduled for October 23, 2013, as well as other deadlines to facilitate management of the case.

On December 21, 2012, Defendant filed a Motion for Summary Judgment centered on preemption of Plaintiffs' claims by existing federal and state regulations. Plaintiffs filed their resistance to the Defendants' motion on February 4, 2013. Defendants replied to this resistance on February 20, 2013. Oral argument was heard on March 18, 2013. The Plaintiffs requested the Court allow them to file an amended petition which the Court granted since Defendant did not resist.

ANALYSIS

I. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3) (2013). In reaching summary judgment, the court must review the record in the light most favorable to the non-moving party. *Wright v. American Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999). The moving party must meet its burden to show the absence of a genuine issue of material

fact. *Id.* If the federal preemption doctrine applies, summary judgment is appropriate because it would deprive the court of subject matter jurisdiction. *Id.* at 671. But, summary judgment is not appropriate if reasonable minds could differ on how an issue should be resolved. *Id.* at 670.

II. Environmental Regulation under the Clean Air Act

The Clean Air Act ("CAA") was enacted in 1970 and is a comprehensive federal law that regulates air emissions under the Environmental Protection Agency ("EPA"). Congress enacted the law in response to evidence of the increasing amount of air pollution created by the industrialization and urbanization of the United States and its threat to the public health and welfare--including agriculture, property, and air and ground transportation. 42 U.S.C. § 7401(a)(1) (2012). The CAA states that air pollution prevention and control is the primary responsibility of individual states and local government, but that federal financial assistance and leadership is essential to accomplish these goals. § 7401(a)(3)-(4).

The EPA Administrator ("Administrator") maintains a list of air pollutants, which include "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." § 7408(a)(1)(A). He or she then issues "air quality criteria," which reflects the latest scientific knowledge on the adverse effects of the pollutant and the variables that can interact with the pollutant to make it better or worse. § 7408(2). The Clean Air Act also authorizes the Administrator to establish national primary and secondary ambient air quality standards ("NAAQS"). "Ambient" air is defined as "that portion of the

atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1. "Primary NAAQS are intended to protect individuals, while Secondary NAAQS are set to protect the surrounding environment." *N. Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 299 (4th Cir. 2010). The NAAQS currently regulate sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen oxides, and lead. 40 C.F.R. §§ 50.4-50.13.

A. State Implementation Plans

Each state is then responsible for adopting and submitting to the EPA for approval a plan for implementation, maintenance, and enforcement of the NAAQs within the state. § 7410(a)(1). These plans are referred to as State Implementation Plans or "SIPs." *Id.* The SIPs cannot be adopted by the state until after reasonable notice and public hearing. *Id.* The SIPS are required to have several general elements set forth in 42 U.S.C. § 7410(a)(2). After the SIP is approved by the EPA, it is identified in 40 C.F.R. Part 52—Approval and Promulgation of Implementation Plans. The EPA is then authorized to take action against alleged violators. § 7413. Iowa's State Implementation Plan is set forth in the Iowa Administrative Code §§ 567-20.1-567-34.229.

The governors of each state must also submit to the Administrator a list of all areas in their state classified as either "attainment" or "nonattainment," or "unclassifiable," based on whether they have complied with NAAQS. § 7407(d). "Nonattainment" refers to an area that does not meet the primary or secondary NAAQs (or contributes to poor air quality in a nearby area). *Id.* "Attainment" is used to classify areas that meet the NAAQs. *Id.* "Unclassifiable" refers to areas that the governor does

not have sufficient evidence about to make a classification. *Id.* SIPs must include specific requirements for nonattainment areas, which are set forth in Part D of Title 1 of the CAA. 42 U.S.C. Ch. 85, Subch. I, Pt. D, Subpt. 1.

B. Department of Natural Resources Regulatory Process

The Iowa Department of Natural Resources ("DNR") is vested with the primary responsibility of protecting the environment in Iowa. Iowa Code § 455A.2 (2013). The governor appoints a Director who is in charge of running the DNR. § 455A.3. The Director is required to be knowledgeable in the general field of natural resource management and environmental protection. *Id.* An environmental protection commission ("commission") of nine members is also appointed by the governor. § 455A.6. Generally, the commission's duties include setting policy for programs under the DNR, advising other agencies of the state, engaging in rulemaking, and issuing orders and directives to ensure the administration of the DNR's programs. § 455B.105.

Section 455B, Division II specifically governs the DNR's regulation of air quality in Iowa. The commission has the responsibility to abate, control, and prevent air pollution. § 455B.133. The commission has extensive duties set out in § 455B.133, including developing comprehensive plans and programs, setting ambient air quality standards and emission limitations, and adopting rules consistent with the CAA's requirement that owners or operators of an air containment source obtain an operating permit. *Id.* The standards adopted under section 455B for air contaminant sources may not exceed the standards promulgated by the EPA administrator or the requirements of the Clear Air Act. § 455B.133(4).

The Director of the DNR has statutory duties in regards to air quality as well. § 455B.134. The Director publishes and administers the rules and standards established by the commission. *Id.* He or she also provides technical or scientific support to the commission and other agencies and administers permits for air contaminant sources. *Id.* Furthermore, the Director conducts studies, considers complaints, disseminates information, and holds public hearings in order to facilitate the protection of Iowa's air quality. *Id.*

Additionally, a citizen may commence a civil action in district court against an alleged violator of Chapter 455B. § 455B.111. The person must give at least sixty (60) days notice to the alleged violator and the Director prior to commencing the action. *Id.* However, a civil action may not be commenced if the DNR is already prosecuting a civil action or otherwise negotiating with the alleged violator to abate the violation. *Id.*

III. Preemption of Common Law Claims by the CAA

Defendant argues in its Motion for Summary Judgment that Plaintiffs' common law claims should be dismissed because they are preempted by the Clean Air Act and accompanying state laws. Defendant does not argue that the CAA expressly preempts these claims, but that they are impliedly precluded by field and conflict preemption principles. "Although courts should not lightly infer pre-emption, it may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (citations and quotation marks omitted). A state law is also invalid if it conflicts with federal law and "stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 491-92.

In 2010, the Fourth Circuit Court of Appeals rejected a state law public nuisance claim against power plants based on federal preemption. *Tennessee Valley Authority*, 615 F.3d at 296. In pertinent part, the court stated that:

> A field of state law, here public nuisance law, would be preempted if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Here, of course, the role envisioned for the states has been made clear. Where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted.

Id. at 303 (citations and quotation marks omitted). The court also noted that allowing district courts to hear these cases would result in a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id.* at 296.

In June 2011, the United States Supreme Court ruled in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), that the Clean Air Act displaces any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants. *Id.* at 2530. The Court's holding rested on the test for federal preemption of federal common law, which requires only that congressional legislation "speaks directly to the question at issue." *Id.* at 2537 (citations omitted). It found that the CAA "speaks directly" to emissions from the defendant's plant and therefore the plaintiffs could not bring federal common law claims to address these same issues. *Id.*

The Court remarked that the EPA "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions" because federal judges lack the expertise and means to make such decisions. *Id.* at 2539-40. However, it refrained from ruling on state common law claims because the parties did not brief state preemption issues, but stated that the availability of state lawsuits depends "on the preemptive effect of the federal Act." *Id.* at 2540.

With that question left unanswered by *American Electric Power*, federal courts have used the opinion's reasoning to determine whether state common law claims are preempted by the CAA. In *Bell v. Cheswick Generating Station*, No. 2:12-cv-929, 2012 WL 4857796 (W.D. Pa. Oct. 12, 2012), the plaintiffs brought a class action lawsuit against a coal-fired power plant, which they claimed deposited air emissions on their nearby property. *Id.* at *1. Plaintiffs sought compensatory and punitive damages under the common law theories of nuisance, negligence and recklessness, trespass, and strict liability, as well as injunctive relief. *Id.* at *2.

After the defendants brought a motion to dismiss based on preemption by the Clean Air Act and the Political Question Doctrine, the plaintiffs argued that (1) the savings clause in the citizen suit provision of the CAA preserved their right to bring suit, (2) that their complaint did not attack emissions standards, (3) that their claim was justiciable because "protection can be 'judicially molded' in this case just as it is molded in any other action to protect property rights", and (4) that they were not attempting to challenge the regulations of Cheswick's emissions in any way. *Id.* at *3.

In response, the defendant argued that the plaintiffs' complaint explicitly required the court to regulate Cheswick Generating Station's air emissions. *Id.* at *4. They cited the complaint's references to alleged permit violations as support that the plaintiffs were asking the court to regulate Cheswick's activities when they were already regulated by state and federal law. *Id.* The defendants also argued that the savings clause did not save the plaintiffs' claims because state environmental agencies "must now be afforded deference and that 'duality' with regard to federal and state common law claims has been ended." *Id.*

In *Bell*, the court found that the Cheswick Generating Station was extensively regulated by the EPA, Penn Department of Environmental Protection, and the Allegheny County Health Department to ensure compliance with the Clean Air Act. *Id.* at *5. The court also highlighted certain excerpts from the plaintiffs' complaint in support of its finding that the plaintiffs were asking the court to review emissions standards that were already regulated by administrative bodies. *Id.* These highlights included assertions that the Defendant's operation of the facility "has been the subject of numerous and constant complaints," Defendant "knew…or allowed the improper constructions, or maintenance and operation of the facility" and "knowingly continues to operate the…plant without proper or best available technology," and as a result, "Plaintiffs' person and[/]or property has been invaded by particulates and contaminants." *Id.*

The *Bell* court relied on *American Electric Power* and *Tennessee Valley Authority* in support of its finding that the plaintiffs' claims were preempted by the Clean Air Act.

Id. at *8. It noted that although *American Electric Power* did not address state common law nuisance claims, the Supreme Court had held that the Clear Air Act preempted federal common law nuisance claims because the EPA was better suited than a district judge to deal with air emission issues. *Id.* at *8. The *Bell* court also relied on *Tennessee Valley Authority's* caution against allowing state nuisance law to "contradict joint federal-state rules so meticulously drafted." *Id.* Thus, the *Bell* court dismissed the plaintiffs' claims because "[t]o conclude otherwise would require an impermissible determination regarding the reasonableness of an otherwise government regulated activity." *Id.*

Other district court cases decided since *American Electric Power* have followed the same reasoning as *Bell v. Cheswick Generating Station* and dismissed state common law claims based on preemption. *Comer v. Murphy Oil U.S.A., Inc.*, 839 F.Supp.2d 849 (S.D. Miss. 2012) held that the Clean Air Act preempted property owners' common law nuisance, trespass, and negligence claims against an oil company because the determination of whether the companies' emissions were "reasonable," as well as "what level of reduction is practical, feasible, and economically viable" had been entrusted by Congress to the EPA. *Id.* at 864. It did not matter to the court that the plaintiffs were not asking for injunctive relief and only compensatory and punitive damages, because it would have to make "reasonableness" determinations either way. *Id.* Another case from the Western District of Pennsylvania dismissed a public nuisance claim against a coal-fired power plant because "both the federal Clean Air Act and the Pennsylvania Air Pollution Control Act represent comprehensive statutory and

regulatory schemes that establish the standards by which...power plants must reduce their emissions of air pollutants." *United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274, 297 (W.D. Pa. 2011).

In their amended petition, Plaintiffs have pleaded claims in nuisance, negligence and trespass against the Defendant. The grounds for these actions arise from the Plaintiffs' allegations that:

> Defendant ... has used, and continues to use outworn machineries, outdated manufacturing technologies and outworn pollution-abating technologies. The result is that polluting chemicals and particles are released and blown from the facility onto nearby homes, schools, businesses and churches. Particulate matter, in the form of soot, is visibly deposited on and around these structures and upon plaintiffs' properties, yards and grounds. Chemical emissions carry noxious odors throughout the community. These emissions have caused Plaintiffs and their neighbors to suffer persistent irritations, discomforts, annoyances and inconveniences, put them at risk for a serious health effects (sic), and generally diminished Plaintiffs' ability to use and enjoy their properties.

(Pls.' Amended Pet. Para. 2.) They further allege that Defendant's practice of the corn wet milling process "generates hazardous by-products and harmful chemicals, including but ... not limited to particulate matter, volatile organic compounds including acetaldehyde and other aldehydes, sulfur dioxide, starch, and hydrochloric acid, which are released into the atmosphere." (*Id.* at Para. 5.) The Plaintiffs amended petition dispensed with the much more specific allegations of their original petition, such as the allegation that "Defendant has violated the Federal Clean Air Act in all twelve of the last twelve quarters. In the past five quarters, the EPA has designated Defendant as a 'High Priority Violator' under the Federal Clean Air Act." (Pls.' Original Class Action Pet. Para. 16, April 23, 2012.)

Like the plaintiffs in *Bell*, Plaintiffs contend that Defendant knowingly refuses to limit its air emissions and as a result has invaded their persons and property with particulate matter and other pollutants. (Pls.' Amended Pet. Para. 2.) Essentially Plaintiffs are asking the jury to make a judgment about the reasonableness of Defendant's air emissions. As the *Comer* court found, that is a judgment that has been entrusted by Congress to the EPA. Even as to Plaintiffs' claims for compensatory and punitive damages, the jury will have to make determinations as to whether Defendant's air emissions are reasonable. As the Supreme Court recognized in *American Electric Power*, the EPA is better equipped to make these decisions than district court judges or juries.

Similarly, the regulation of air emissions is not within the proper province of this Court when Congress has already prescribed a method for dealing with GPC's air emissions through the Clean Air Act and the DNR's role in carrying out the CAA. Although GPC may be in "nonattainment" with the NAAQs, the DNR has already taken action[2] and continues to take action to bring it within attainment of these standards. Furthermore, citizens can be involved in the rulemaking process and are entitled to notice, comment, and even public hearing before a conditional or construction permit can be issued to a major stationary source. Iowa Admin. Code r. 11-6.5(17A); Iowa Admin. Code r. 567-22.2(455B). They can also sue under the citizen suit provision of the CAA for a violation of an emission standard. 42 U.S.C. § 7604. To

[2] The State of Iowa filed a petition seeking civil penalties and injunctive relief more than a year ago. State of Iowa, ex rel., Iowa Department of Natural Resources v. Grain Processing Corp., No. CVCV 020979 (Dist. Ct. of Muscatine Cty filed December 1, 2011).

permit citizens to sue under the common law as well would conflict with these already established statutory procedures. Accordingly, this Court finds that Plaintiffs' claims are preempted because they conflict with the comprehensive regulatory scheme of the Clean Air Act.

IV. Savings Clause of the CAA

Plaintiffs argue that their common law claims are preserved under the CAA's general savings clause. When determining whether a savings clause preserves certain actions, the court must look to the goals and policies of the Act in determining whether the Act preempts any such action. *Ouellette*, 479 U.S. at 493. As mentioned previously, a state law action is pre-empted if it interferes with the methods by which the federal statute was designed to reach its goal. *Id.* at 494. It can also be preempted if Congress "left no room" for state action. *Tennessee Valley Authority*, 615 F.3d at 303.

In *Ouellette*, the Supreme Court held that Vermont landowners could not sue the operator of a New York paper mill under the Vermont common law of nuisance. 479 U.S. at 481. In *Ouellette*, the applicable savings clause appeared in the Clean Water Act. It stated:

> [N]othing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if [a standard] is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any [standard]which is less stringent than the [standards] under this chapter.

33 U.S.C. § 1370. The Act also included a citizen suit provision that stated: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." 33 U.S.C. § 1365. The Court found that Congress "left room" for state causes of action through the savings clause, but that regulation via Vermont law over a New York pollutant would disrupt the balance of public and private interests and undermine Congress's intent in crafting the EPA regulatory structure. *Ouellette*, 479 U.S. at 495-96. The Fourth Circuit applied this same reasoning to the Clean Air Act in *Tennessee Valley Authority* when it held that a North Carolina district court could not apply North Carolina law to Alabama and Tennessee generating plants. 615 F.3d at 296. "We... cannot allow non-source states to ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never intended." *Id.* at 304.

Nevertheless, in *Ouellette* the Court held that the Clean Water Act did not preclude common law nuisance claims pursuant to the law of the "source state" or state where the polluter was located. 479 U.S. at 485. The Court found that a nuisance action brought under New York law against the New York paper mill would not frustrate the goals of the CWA. *Id.* at 498. It stated that the Act "specifically allows source States to impose stricter standards" and although state nuisance law may set standards different from the EPA's permit program for the discharge of pollutants into navigable waters, "a source only is required to look to a single additional authority, whose rules should be relatively predictable." *Id.* at 499.

But in *Bell v. Cheswick Generating Station*, the district court declined to allow common law claims under the savings clause of the Clean Air Act. 2012 WL 4857796 at *9. The savings clause used by the plaintiffs in *Bell* was part of the CAA's citizen suit provision, which states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 7604(e). The court relied on *Tennessee Valley Authority's* conclusion that allowing states to rely on the savings clause to bring common law claims would "be a serious interference with the achievement of the full purposes and objectives of Congress." *Bell*, 2012 WL 4857796 at *9 (*citing Tennessee Valley Authority*, 615 F.3d at 304). The *Bell* court also pointed to the U.S. Supreme Court's previous statement that "a federal statute's saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id., citing AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (citations, alterations, and quotation marks omitted). Thus, the plaintiffs' claims in *Bell* for monetary damages and injunctive relief were dismissed as inconsistent with the CAA's existing remedies to limit air emissions. *Id.* This ruling is consistent with the Supreme Court precedent on savings clauses. A savings clause "does not bar the ordinary working of conflict pre-emption principles." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000). In fact, the Supreme Court regularly refuses to "give broad effect to saving clauses where doing so would upset the

careful regulatory scheme established by federal law." *Id.* (further citations omitted). Thus, where conflict preemption principles warrant dismissal, a savings clause cannot rescue. *See id.* In this case, Plaintiffs cite to a section entitled "Retention of State Authority" under Part A: Air Quality and Emissions Limitations, which states that:

> [N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirements respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7416. They argue that with this clause, as well as with the other savings clauses included in the CAA, "Congress clearly and expressly provided that States are free to adopt stricter laws and apply them to pollution sources within the State." This clause is similar to the savings clause in the Clean Water Act, which the Court held preserved state common law nuisance claims pursuant to state law of the pollutant's source in *Ouellette*. Although the Court in *Ouellette* found that state common law claims would not frustrate the purposes of the Clean Water Act, the same cannot be said in this case. As the court acknowledged in *Bell*, common law suits interfere with the achievement and full purposes of the Clean Air Act. Congress has enacted a comprehensive scheme to regulate air emissions and has afforded states a large part in its enforcement. Thus, a savings clause preserving the State's prerogative to regulate its in-state emissions more stringently than the CAA cannot be construed to also preserve a common law right of action. To do so would contravene conflict preemption principles

and undermine the carefully crafted statutory and regulatory scheme they were meant to protect. To allow Plaintiffs to bring a common law action here would be inconsistent with the CAA's existing remedies to limit Defendant's air emissions.

V. Political Question Doctrine

Defendant also asserts that the claims Plaintiffs present to the Court are barred by the political question doctrine. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986). The U.S. Supreme Court has set forth a list of elements that make a claim non-justiciable.:

> (1) a textually demonstrable constitutional commitment to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving [the issue]; or (3) the impossibility of deciding without initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect to coordinate branches of the government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality for embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). *Comer* also dealt with the issue of the political question doctrine and the Clean Air Act. "It is unclear how this Court or any jury, regardless of its level of sophistication, could determine whether the defendants' emissions unreasonably endanger the environment or the public without making policy determinations that weigh the harm caused by the defendants' actions against the

benefits of the products they produce." *Comer*, 839 F. Supp. 2d at 864. Therefore, the court found the claims nonjusticiable because there were no judicially feasible standards for resolving issues that had already been entrusted to the EPA to resolve. *Id.* at 865.

Similarly, in this case, the court or a jury lacks judicially discoverable and manageable standards for resolving the complex environmental issues involved in this case. It would also be required to make policy determinations concerning GPC's costs and benefits to the surrounding community of Muscatine. The Court finds that these decisions have been entrusted by Congress to the EPA and that they are not properly reviewed in district court.

VI. State Preemption under § 455B

Defendant argues that Plaintiffs' claims are further precluded via preemption by state law, but the Plaintiff disputes the characterization and thus the applicability of the Defendant's cited authorities. Plaintiffs have styled their claims as common law actions, but include a statutory nuisance action under Iowa Code § 657.1. Iowa's statutory provisions regarding nuisance are merely "skeletal in form" and do not modify the existing common law. *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 660 (Iowa 2002). Thus, the question is whether statutory and common law claims conflict with the state's air quality regulations embodied in Iowa Code § 455B. Whether this conflict is analyzed under the preemption doctrine or via rules of statutory construction, the result is the same.

Even if nuisance is statutory, whenever there is conflict or ambiguity between specific and general statutes, the specific statutes govern. *Oyens Feed & Supply, Inc. v.*

Primebank, 808 N.W.2d 186, 194 (Iowa 2011). But as to common law claims, "[w]here the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996), *quoting* 1A C.J.S. *Actions* § 14 n. 55 (1985). Thus, the far more specific air quality provisions of § 455B, which via rulemaking govern the types of emissions released by GPC, must supplant the "skeletal" nuisance statute if it is used to regulate the same conduct. Furthermore, the comprehensive scheme created by § 455B creates statutory remedies regarding a specific kind of dispute: namely the discharge of deleterious emissions into the neighboring community. The bottom line is, deciding whether a lawful industry's operation constitutes a nuisance requires judging "the reasonableness of conducting it in the manner, at the place and under the circumstances in question." *Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 852, 857 (Iowa 1967). The determination of "reasonableness" of emissions has been entrusted to government agencies because of their superior information-gathering resources. *American Electric Power*, 131 S. Ct. at 2539-40. While the Supreme Court refrained from ruling on state common law claims,[3] this court is left with the inescapable conclusion that its reasoning applied here precludes state common law claims as well. And just like the analysis above, the savings clause at § 455B.111 cannot rescue a common-law claim that would subvert the overall goals of the statute. *See Geier*, 529 at 869. For all the same reasons listed in the federal preemption analysis

[3] The Court declined to analyze state common law claims because none of the parties briefed the issue and thus, it was left for consideration upon remand. *American Electric Power Co., Inc.*, 131 S. Ct. at 2540.

above, the state's environmental regulations must necessarily govern in place of common law rights.

RULING

Plaintiffs claim they are damaged by air pollution emanating from the Defendant's facilities. Indeed, their expert's report of his observations inside the plant reveals troubling signs of such pollution:

> Over the past decade, GPC's compliance record has been poor. It has operated without careful monitoring of its discharges to air, without controlling its point source discharges for long periods of time, without investing in modern pollution controls, without conducting stack testing which is mandatory to demonstrating that pollution controls are effective, without controlling many fugitive emissions, without controlling spills and leaks in parts of its operations, without performing maintenance on pollution controls, bypassing pollution controls and discharging toxic chemicals uncontrolled into the atmosphere, not meeting reporting deadlines, at times not reporting emissions and major discharges to air, and by ignoring many other best practices that are required to be followed under its Title V permit.

(Pls.' Ex. A Pg. 6, attached to Motion for Leave to Submit Full Report.) The expert observed leaking valves, pumps and unions that "are sources of volatile, odorous and corrosive fugitive emissions which expose both workers and the community." (*Id.* at 11.) He reported "horrible neglect" of dryer units, "antiquated" control rooms and "a complete breakdown of environmental awareness and safety" in management operations. (*Id.*) If half the expert's findings are true, there has been blatant disregard for the environment and the community of Muscatine. The report also indicates that the above deficiencies have gotten worse in 2012, which is after the civil action was filed by the DNR.

However, the Clean Air Act, as implemented by the Iowa SIP and enforced by the Iowa DNR is the congressionally and legislatively determined method for balancing the harm done to the Plaintiffs and the community with the economic impact placed on the Defendant and its secondary effect on the community. If Plaintiffs' common law action was successful in obtaining an injunction specifying what GPC must do to remedy these problems and obtain substantial monetary compensation, this outcome may, and probably would, interfere with or contravene the DNR remedies for these very issues which are being litigated in Muscatine County. Congress, through the EPA, and the State of Iowa, through the DNR regulations, have comprehensively addressed these issues in a uniform manner. These regulations and statutes are designed to protect not only the citizens of this State, but also protect the alleged polluter from multiple court decisions which may conflict with each other as well as the agency enforcement protocols.

Of course, as pointed out by Plaintiffs, the downside of this agency approach is that it may not remedy the harm each individual plaintiff or class member may incur as a result of the polluter's actions or inactions. An individual's right to remedy wrongs through the courts via common law or statutes is the basis of our legal system. But when an individual's rights to seek damages for economic or physical harm conflict with the economic well-being of a large local employer, those rights must be carefully weighed and reconciled through political compromises achieved by the legislative and rule-making processes. The federal cases addressing these issues after *American Electric Power Co. v. Connecticut* have uniformly ruled that the statutes and regulations which

have been developed over decades through the legislative and regulatory process represent a much more thorough, comprehensive and uniform approach to the pollution problem than myriad court decisions could ever do.

The Supreme Court's reasoning regarding federal common law in *American Electric Power Co.* must be applied to lawsuits filed under state common or statutory law when they conflict with the purpose of the Clean Air Act and the State SIP. To do otherwise would allow the same regulatory patchwork proscribed by the U.S. Supreme Court.

IT IS THEREFORE THE RULING OF THIS COURT that Defendant's Motion for Summary Judgment is granted and this case is dismissed.

Dated this 27th day of March, 2013.

Mark J. Smith, District Court Judge
Seventh Judicial District, State of Iowa