

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12-4216

KRISTIE BELL & JOAN LUPPE,
Plaintiffs-Appellants,

– v. –

GENON POWER MIDWEST, L.P.,
Defendant-Appellee

On Appeal from the United States District Court
for the Western District of Pennsylvania

APPELLEE’S PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
COUNSEL’S STATEMENT OF PURPOSE AND CERTIFICATION FOR REHEARING EN BANC.....	1
ARGUMENT	2
I. The Panel’s Decision is Contrary to Third Circuit Precedent Regarding Conflict Preemption	4
A. The Panel Did Not Analyze Conflict Preemption	5
B. Under <i>Farina’s</i> Roadmap for Conflict Preemption, There Is a Conflict Here and This Lawsuit is Preempted.....	6
II. THE PANEL’S DECISION MISCONSTRUES SUPREME COURT PRECEDENT AND THE CLEAN AIR ACT’S SAVINGS PROVISION	9
A. The CAA and CWA Have Different Savings Provisions Which Serve Different Purposes	9
B. <i>Ouellette</i> Does Not Support the Panel’s Holding.....	13
CONCLUSION	14
CERTIFICATION OF SERVICE.....	16
CERTIFICATION OF VIRUS CHECK.....	17

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Am. Electric Power Co. v. Connecticut</i> , 131 S. Ct. 2527 (“AEP”).....	6, 7, 8, 14
<i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981).....	10
<i>Comer v. Murphy Oil</i> , 607 F.3d 1049 (5th Cir. 2010)	8
<i>Comer v. Murphy Oil, Inc.</i> , 839 F. Supp. 2d 849 (S.D. Miss. 2012)	1, 8
<i>Farina v. Nokia</i> , 625 F.3d 97 (3d Cir. 2010)	passim
<i>Her Majesty the Queen v. Detroit</i> , 874 F. 2d 332 (6th Cir. 1989)	14
<i>International Paper v. Ouellette</i> , 479 U.S. 481 (1987).....	passim
<i>North Carolina v. Tenn. Valley Authority</i> , 615 F.3d 291 (4th Cir. 2010) (“TVA”).....	1, 7, 8
<i>U.S. v. EME Homer City</i> , 2013 U.S. App. LEXIS 17477 (3d Cir. Aug 21, 2013)	3, 7
STATUTES	
33 U.S.C. § 1365(e)	10
33 U.S.C. § 1370	12
42 U.S.C. 7416.....	10
42 U.S.C. § 7604(e)	10

OTHER AUTHORITIES

S. Rep. No. 1196, 91st Cong., 2d Sess., (1970).....11

**COUNSEL’S STATEMENT OF PURPOSE AND
CERTIFICATION FOR REHEARING *EN BANC***

Appellee GenOn Power Midwest, L.P., pursuant to Federal Rules of Appellate Procedure 35 and 40, petitions for rehearing *en banc* because (1) this case presents a question of exceptional importance, (2) the Panel’s precedential opinion conflicts with a prior decision of this Circuit, on principles of conflict preemption, and conflicts with decisions of the United States Courts of Appeals for the Fourth and Fifth Circuits, *North Carolina v. Tennessee Valley Authority*, 615 F.3d 291, 305-05 (4th Cir. 2010) (“*TVA*”); *Comer v. Murphy Oil, Inc.*, 839 F. Supp. 2d 849, 864-65 (S.D. Miss. 2012), and (3) the Panel incorrectly reads federal statutes and cases.

I believe, based on a reasoned and studied professional judgment, that the Panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, i.e., the Panel’s decision is also contrary to the decision of this Court in *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010), and that this appeal involves a question of exceptional importance, i.e., as the Panel noted, a “[m]atter of first impression...” Slip Op. at 13. Given the substantial number of power plants within this Court’s jurisdiction, this decision

will either invite or bar numerous lawsuits brought pursuant to state common law, not under the authority of the Clean Air Act (“CAA”).¹

ARGUMENT

A panel of the Court has permitted a putative class action tort suit to proceed even though the suit directly attacks permissible power plant emission levels, construction requirements and fugitive particulate controls that are expressly regulated by state and federal air permits. The Panel did so without analyzing “conflict preemption,” even though it is expressly required by Third Circuit precedent. The Panel chose instead to allow common law claims on the authority of *International Paper v. Ouellette*, 479 U.S. 481 (1987), a case involving the Clean Water Act’s (“CWA”) fundamentally-different “savings” provision. The Panel failed to recognize this distinction, and did not consider whether a jury’s possible nuisance verdict and a federal court’s injunctive order could unbalance the limits, caps and numerical requirements already specified for Cheswick Generating Station in Pennsylvania’s state and federally-mandated comprehensive air permit.

More broadly, the Panel failed to acknowledge that the Supreme Court and Third Circuit since *Ouellette* have rejected repeatedly the notion that tort juries and

¹ One lawsuit essentially identical to the case at bar has already been filed following the Panel’s decision. *See* Complaint, *Jesso v. Hatfields Ferry Power Station*, No. 2:13-cv-01232-DSC (W.D. Pa. Aug. 27, 2013). This suit attacks plant operations, construction and the emission of specific, regulated chemicals and seeks injunctive relief.

judges sitting in equity can substitute their judgments for regulators enforcing nationally-coordinated and balanced public health and welfare programs. The Panel, without a conflict analysis, concluded that “more is better” in the realm of pollution enforcement, and because “states are free to impose higher standards on their own sources of pollution,” Slip Op. at 22, class action counsel and juries can do the same.

The Panel’s decision thus swims upstream against an unmistakable trend toward professionalizing environmental regulation and requiring clear, prescriptive requirements set out in advance by trained professionals with more learning, expertise, resources and perspective than a jury trial or evidentiary hearing could provide. In effect, the Panel decision invites jurors or judges to decide proper emission levels (for example, of “polycyclic aromatic compounds,” Slip Op. at 10 n.3), or to set stack height, or to discern the proper “operation of the Plant.” *Id.* at 10. This inevitably conflicts with the methods and mandates that Congress delegated to expert state and federal regulators, a point a different Panel of this Circuit made a day later when affirming another of Judge McVerry’s decisions. *See U.S. v. EME Homer City*. 2013 U.S. App. LEXIS 17477 at *4-9 (3d Cir. Aug 21, 2013) (Recognizing the “‘case-by-case’ permitting process that ‘tak[es] into account energy, environmental, and economic impacts and other costs.’”).

Third Circuit precedent requires a conflict preemption analysis, and the Panel erred in failing to undertake one.

I. The Panel’s Decision is Contrary to Third Circuit Precedent Regarding Conflict Preemption

The Panel correctly observed that:

“Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption.” *Farina v. Nokia*, 625 F.3d 97, 115 (3d Cir. 2010) “Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.*

Slip Op. at 13 (emphasis added.) Such a conflict preemption analysis is imperative:

When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives. Allowing state law to impose a different standard permits a re-balancing of those considerations. A state-law standard that is more protective of one objective may result in a standard that is less protective of others.

Farina, 625 F. 3d at 123.

In *Farina*, this Court applied conflict preemption analysis, even in the face of a savings provision, to preempt common law claims because jury verdicts and other common law remedies would upset the careful balancing of competing objectives that Congress charged the Federal Communications Commission to

undertake in the first instance. The Panel here, however, declined to conduct any kind of conflict preemption analysis at all, deferring instead to a conclusion by the U.S. Supreme Court from a 1987 case, *Ouellette*, involving the competing application of the laws of a paper mill's home state and those of a neighboring state. Neither the Panel, nor *Ouellette*, ever considered whether a lawsuit against a power plant regarding airborne emissions would unbalance complex regulatory structures put in place by Congress and delegated to the States through the CAA, or whether the litigation would interfere with Pennsylvania's enforcement methods. The Panel thus conducted an express preemption analysis only, and therefore issued an opinion that conflicts with *Farina*.

A. The Panel Did Not Analyze Conflict Preemption

The Panel's decision hinges on statutory interpretation, and the Supreme Court's decision in *Ouellette*, to find no express preemption.² However, *Farina* noted that different types of preemption require different types of analysis. GenOn specifically argued that the Appellants' suit necessarily *conflicts* with the careful balancing by the various agencies required under CAA. *See* GenOn Br. at 7-26. Despite this argument, the Panel focused only on the statutory savings clauses in

² "We see nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims. If Congress intended to eliminate such private causes of action, 'its failure even to hint at' this result would be 'spectacularly odd.' The Supreme Court's decision in *Ouellette* confirms this reading of the statute." Slip Op. at 23 (internal citation omitted).

the CAA, not whether the common law remedies sought in this lawsuit would conflict with, and thereby be an obstacle to, the regulatory scheme effected by Congress. By neglecting to perform *Farina's* conflict preemption analysis, the Panel ultimately issued an opinion which conflicts with Third Circuit precedent.

B. Under *Farina's* Roadmap for Conflict Preemption, There Is a Conflict Here and This Lawsuit is Preempted

In *Farina*, Judge Scirica, joined by Judge Ambro and by Judge Alarcon, sitting by designation, prescribed a two-step conflict preemption analysis. The court must first determine whether a Congressionally-authorized agency has implemented regulations that carefully balance competing objectives and then must consider whether state law would complement the agency's regulations or re-balance them. 625 F.3d at 123, 131. If state law would re-balance the regulatory objectives, conflict preemption applies. These steps must be taken *even if there is a savings provision*. *Id.* at 130-32 (“a savings provision does not bar the ordinary working of conflict pre-emption principles”). “[W]here a federal regulatory scheme reflects a careful balancing, savings provisions should not be given broad effect, lest they ‘permit [a] law to defeat its own objectives, or potentially . . . to ‘destroy itself’”” *Id.* (internal quotation and citation omitted).

Here, all agree that power plants such as Cheswick Generating Station are subject to comprehensive regulation under the CAA. *See generally Am. Electric*

Power Co. v. Connecticut, 131 S. Ct. 2527, 2538 (“*AEP*”); *EME Homer City*, 2013 U.S. App. LEXIS 17477 at *4-5, 8; Slip Op. at 4. Thus, this lawsuit may proceed only if it would complement, and not upset, this careful balance. Contrary to *Farina*, however, the Panel neither considers whether Appellants’ common law suit would upset the CAA’s comprehensive balancing, nor performs the analysis.

In *AEP*, the Supreme Court highlighted the importance of balancing competing interests, and the inadequacy of a courtroom as a venue for such decisions. 131 S. Ct. at 2539-40. In this vein, the Panel opinion conflicts with recent CAA decisions of the Fourth and Fifth Circuits. In 2010, the Fourth Circuit, after an in-depth conflict preemption analysis, held that nuisance lawsuits were an affront to the comprehensive regulation of the CAA. *TVA*, 615 F.3d at 305-06 (noting that courts must respect agency processes in “this highly technical arena [of power plant regulation].” “Regulations and permits, while hardly perfect, provide an opportunity for predictable standards that are scientifically grounded and thus give rise to broad reliance interest.”). Likewise, in 2012, the Fifth Circuit refused to overturn a district court holding which preempted a suit alleging emissions-based state law injuries because the claim would commit the jury to

question the Congressionally-mandated agency decision making process of the CAA. *Comer*, 839 F. Supp. 2d at 864-65.³

The GenOn Panel thus *created* a circuit split by failing to perform a conflict preemption analysis, and thereby declining to evaluate the impact of a putative class action nuisance suit on the state, federal, industry and community interests balanced by agencies effecting the mandates of the CAA.

As stated in GenOn's brief, the CAA's comprehensive regulatory scheme will be upset if a jury is permitted to impose its competing views to supersede CAA regulations. GenOn Br. at 7-26. In short, the Supreme Court's analysis of CAA conflict preemption in *AEP*, and the Fourth Circuit's analysis of *Ouellette* in the *TVA* case, should control here. As *Farina* held, "allowing juries to perform their own risk utility analysis and second guess the [expert agency's] conclusion would disrupt the expert balancing underlying the federal scheme." 625 F.3d at 126.⁴

³ The Fifth Circuit reversed the district court but withdrew that decision and reinstated the district court's ruling that preempted common law claims. *See Comer v. Murphy Oil*, 607 F.3d 1049 (5th Cir. 2010).

⁴ The Panel's consideration of potential conflicts between its holding and the CAA, dubbed "Public Policy Considerations," merely asserts that *Ouellette* addressed these issues. Slip Op. at 21-22. But *Ouellette's* assessment of those issue is facially too limited to reflect modern conflict preemption analysis as articulated in *Farina* and *AEP*. Nor were those issues crucial to the decision, because the Court found source state claims saved under the CWA.

II. The Panel’s Decision Misconstrues Supreme Court Precedent and the Clean Air Act’s Savings Provision

The Panel’s decision also errs by extending *Ouellette*, holding that the CWA savings provision preserves source state common law claims, into the CAA, and in finding that Congress expressly declined to preempt source state common law in CAA disputes. In fact, the savings clauses in the CWA and CAA are relevantly different. The Panel’s error is clear both from the differences in the two Acts’ savings clauses, and from a careful reading of *Ouellette*, which declined to hold that the savings clauses common to both Acts preserved common law claims.

A. The CAA and CWA Have Different Savings Provisions Which Serve Different Purposes

The CWA and CAA each contain two savings clauses. The first pair, found in each Act’s citizen suit provisions, are substantially identical, but the second pair, the so-called “state authority” clauses, significantly differ. In *Ouellette*, the Supreme Court, consistent with the statutory text, (1) dismissed as irrelevant the savings clause in the CWA citizen suit provision (identical to the CAA), (2) ignored the common language in the “state authority” savings clauses, a decision critical to the holding that source state common law rights are preserved, and (3) based its conclusion exclusively on language in the “state authority” savings provision that is unique to the CWA. We address each savings clause in turn.

The CAA citizen suit savings clause simply provides that nothing “in this section” shall restrict “common law” rights. 42 U.S.C. § 7604(e). The CWA citizen suit provision, added two years later, essentially adopts this language. *See* 33 U.S.C. § 1365(e). The Supreme Court has twice held that the citizen suit savings clause does not save anything due to its limited scope. *Ouellette*, 479 U.S. at 493; *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981). The result must be the same under the identical CAA citizen suit savings clause.

Consequently, only the CAA “state authority” savings clause can support the Panel’s conclusion that Congress expressly preserved common law claims in the CAA. However, the CWA adds a second clause, a difference that is decisive here. The CAA state authority savings clause, enacted first in 1970, provides:

nothing 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 requirement respecting control or abatement of air pollution

42 U.S.C. § 7416. This clause is facially limited to preserving more stringent standards adopted by “a State or political subdivision,” and thus preserves enactments by state and municipal legislatures and state or local administrative agency rules, but would not facially include common law judgments, as courts are not a “State or political subdivision” and do not “adopt” requirements.

The legislative history clarifies that Congress only intended to preserve state and local legislative and administrative enactments:

[42 U.S.C. § 7416] would reinstate the intent of Section 109 of the Air Quality Act of 1967 which provided assurance that States, localities, intermunicipal and interstate agencies may adopt standards and plans to achieve a higher level of ambient air quality than approved by the Secretary. The section would be revised to provide that such States, localities, intermunicipal and interstate agencies may adopt such more restrictive standards and plans and may establish timetables which achieve standards in a shorter period of time

S. Rep. No. 1196, 91st Cong., 2d Sess., 14-15 (1970).

This legislative history makes clear that when Congress authorized “any State or political subdivision thereof to adopt” more stringent requirements in section 116, it thus plainly meant to grant this authority only to governmental, not judicial, bodies. The Supreme Court adopts this interpretation of the clause in *Ouellette*. 479 U.S. at 492-93.

The companion CWA savings clause, enacted two years later, reiterates the CAA savings clause essentially verbatim, but adds a second clause:

nothing 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 or (2) *be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.*

33 U.S.C. § 1370 (emphasis added). This second part of the CWA’s “state authority” savings clause was retained from a prior version of the CWA, and placed in a new section entitled “State authority,” along with the new language borrowed from the CAA. This language, by its terms, preserves *some* common law claims. The phrase “any right . . . of the States” is broad, and would be read in *Ouellette* to cover state law common law claims. However, the clause is limited to claims “with respect to the waters . . . of such States,” a phrase which *Ouellette* construed to include only common law claims based on the laws of the state where the source is located. To conclude that the first part of the CWA savings clause, borrowed from the CAA, preserves common law claims would render the second “source state” clause redundant and without independent meaning. If that first clause cannot reasonably be read to cover common law claims in the CWA, there is no basis to find, as did the Panel, that such claims are preserved under the CAA’s identical language.

The Panel attempts to explain away Congress’ later addition of the second CWA “source state law” clause by supposing that “Congress intended to preserve more rights for the states, rather than less.” Slip Op. at 17. But if the first clause is read to preserve common law claims, as the Panel does, the second clause cannot possibly preserve “more” rights, and indeed it preserves less since it is limited to source state law. It is more reasonable to conclude that Congress, as the

legislative history indicates, only meant to cover judicial and administrative enactments in the CAA savings clause. Congress was well aware of this reading when it drafted the CWA amendments two years later, no doubt, and therefore *decided* to preserve some common law claims under the CWA by including the second clause.

B. *Ouellette* Does Not Support the Panel’s Holding.

The Panel further errs by contending that *Ouellette* controls, when in fact *Ouellette* never considered the first part of the “state authority” savings provision (common to the CAA and CWA). Rather, *Ouellette* rested its holding *only* upon the language unique to the CWA.

At the outset, *Ouellette* carefully defined the term “the savings clause,” to include only the citizen suit savings provision and the second clause of the CWA state authority savings provision (not found in the CAA). 479 U.S. 485. Hence, *Ouellette* does not review the “state authority” clause found in the CAA. Consequently, *Ouellette* demonstrates that the Panel erred in concluding that there is “no meaningful difference between the [CWA] and the [CAA].” Slip Op. at 20.

Moreover, the *Ouellette* Court’s decision not to consider the first part of the CWA savings clause had to have been deliberate, because the Court was confronted with not only source state claims, but also claims based on the law of the state affected by the discharge (Vermont), which the Court held were not

saved. 479 U.S. at 493. Since the Court held that common law claims based on the law of the affected state (Vermont) were not saved under the CWA, it necessarily read the first clause of the CWA as not saving *any* common law claims at all, confirming the reading that only legislative and administrative enactments are preserved. Consequently, the Panel's holding directly contradicts the Supreme Court's decision to dismiss the Vermont law claims in *Ouellette*.⁵

CONCLUSION

Because the Panel's opinion neglects to perform the conflict preemption analysis mandated in *Farina* and supported by the Supreme Court's holding in *AEP*, and because it misconstrues Supreme Court precedent and misinterprets the Clean Air Act, GenOn respectfully petitions for rehearing *en banc*.

Respectfully Submitted,

/s/ Scott C. Oostdyk

⁵ The Panel also erred in adopting a student note's conclusion that "there is little basis for distinguishing" the CAA and CWA savings clauses. The note adds nothing since (like the Panel decision) it fails to explain why, if the CAA clause were to cover common law claims, Congress would add additional language to the CWA, and why *Ouellette* dismissed Vermont's common law claims.

The Panel also misconstrued *Her Majesty the Queen v. Detroit*, 874 F. 2d 332 (6th Cir. 1989). There, the "saved" cause of action was based on a Michigan *statute* that specifically authorized the judicial redress of air pollution. *Id.* at 336. This is fully consistent with the CAA state authority savings clause, which allows states to adopt *laws and regulations* that are more stringent than any federal EPA requirements, a choice Pennsylvania was able to, but did not, make.

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CERTIFICATION OF SERVICE

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CERTIFICATION OF VIRUS CHECK

I certify that a virus check was performed on the electronic version of this motion using Symantec Anti-Virus software.

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