REVERSE PREEMPTION

WHEN LOCAL BY-LAWS BANNING THE LAND APPLICATION OF SEWAGE SLUDGE SUPERCEDE STATE LAWS TO THE CONTRARY

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33 U.S.C. §1345(e)
THE LOCAL DETERMINATION STATUTE ("LDS")
OF THE CLEAN WATER ACT [1]

Manner of sludge disposal
The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations. [Bold added]

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40 C.F.R. PART 503.6(b)
THE LOCAL DETERMINATION REGULATION ("LDR")
OF PART 503 [2]

Selection of a use or disposal practice
This part does not require the selection of a sewage sludge use or disposal practice. **The determination of the manner in which sewage sludge is used or disposed is a local determination.** [Bold added]

[1] http://www.law.cornell.edu/uscode/33/usc_sec_33_00001345----000-.html

[2] http://www.cee.vt.edu/ewr/environmental/teach/gwprimer/group09/503reg.htm

The thesis of this paper is that in order for rural counties across the country to stop the importation and land-application of sewage sludge within their jurisdiction, all they have to do is pass an ordinance that bans land-application. In fact, one Virginia county has done this successfully merely by amending its zoning ordinance, and this has held up in federal court. It's as simple as that.

In this paper I review the case law related to land-application of sludge in Virginia. On the basis of this case law I develop what I refer to as a "Reverse Preemption Theory" (RPT) whereby a county ordinance banning land-application of sludge would, in effect, preempt state laws and regulations allowing land-application. I review this reverse preemption theory with respect to three federal Virginia sludge cases and one state Virginia sludge case. I conclude that the Clean Water Act ("CWA") gives localities a limited right of self-determination of how sludge is disposed of within the locality's boundaries, but this right does not include the right to regulate any practices for disposing of sludge. Understanding this distinction between the right to ban land application of sludge and attempting regulating it is absolutely essential for a locality who wishes to assert its rights under the CWA. I also review a USDC Virginia telecommunications case and a U.S. Supreme Court telecommunications case that support the reverse preemption theory explicitly and suggest a plan for challenging the state's hegemony over sludge disposal.

This work is directed to the sludge situation in Virginia, and more specifically to the common situation where sludge is exported from a large urban center outside of Virginia to a rural Virginia county for land-application over the county's objections. I refer to counties involuntarily targeted by sludgers as *coerced counties*, as opposed to *fecalophile counties* that, apparently, have no objection to the importation of human feces mixed with industrial waste. This paper represents my best efforts to dissect and understand a rather complex legal relationship between Virginia counties, the Commonwealth of Virginia, and the U.S. Congress with respect to the sludge issue. The relevance of the points made here to communities and counties in states other than Virginia should not be presumed without further legal research. This paper is not intended to be legal advice, and should not be considered legal advice. Rather, it represents a personal legal opinion and theory based upon my studied understanding of the US Constitution, the Clean Water Act, and relevant Virginia case law. This legal landscape is rife with booby traps and is populated by a well funded sludge industry that is highly motivated to use whatever funds are required – including bribing public officials – to

maintain the legal status quo. No individual, group of individuals, or local government should attempt to implement any course of action without first consulting their own lawyers. And no lawyer should attempt to advise any clients in this matter without completely understanding the legal issues discussed herein.

A few definitions at the outset will be helpful.

Sewage sludge is defined by 40 CFR Part 503.9(w) as solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works. This official EPA definition ignores, perhaps intentionally, a primary concern that most sewage sludge contains industrial pollutants admixed with the residues of domestic sewage treatment. In other words, from a public health point of view sewage sludge is a lot worse than the government's definition would suggest. With the understanding that sewage sludge is more than mere residue from domestic sewage treatment, I use the noun *sludge*, to refer to sewage sludge regardless of its content or source. When I use "sludge" as a verb or participle, I am referring to the act of spreading sludge on land. The term *sludgers* means those, including farmers, who promote or participate in sludging, normally for pecuniary gain.

I refer to §1345(e) of the CWA as the *federal local determination statute* (LDS). It is quoted *verbatim* above. Please see FN 1.

Likewise, I refer to 40 C.F.R. Part 503.6(b) as the *federal local determination regulation* (LDR), which is also quoted *vertatim* above.

Part 503 refers to the federal regulations for disposal of sewage sludge – Part 503 of Title 40 of the US Code of Federal Regulations. See FN 2.

The principle of supremacy of state law over local law is often referred to as *Dillon's Rule* or the *Dillon Rule*. Virginia's Dillon Rule is codified as Va. Code §1-13.17.

CHILLING THE RESOLVE OF COERCED COUNTIES TO ASSERT THEIR RIGHTS

"In our opinion, Amherst County should take its place with Amelia, Rappahannock, Louisa, and

Appomattox as a county willing to do everything reasonable and justified to assert its right to determine how sludge will be disposed of within its borders. But we emphasize that Amherst's case would be distinguished from the others in that it would be the first time that a county has sued a state in federal court for a determination of whether The Dillon rule is preempted by the Clean Water Act. Win or lose, that decision is worth far more than $2 per resident."

The above quote is the closing shot in a letter fellow lawyer, Steve Martin, and I sent the Board of Supervisors of Amherst County, Virginia in 2005. We were encouraging the County to assert its right to ban land application of sludge, a right explicitly given by both the federal LDS and LDR. Before we sent our anti-sludge letter to the BoS, Amherst had already had two very fiery public meetings and it was clear to the supervisors that their constituents were not happy about the thought of Amherst County becoming another pay-potty for New Jersey, New York, and Northern Virginia. Earlier in 2005 the county had received notice that a state application for a permit to sludge farmland owned by Mr. Wesley Wright had been filed. The land is adjacent to a public rails-to-trails project that had recently opened. Mr. Wright's was the first application for a permit to sludge Amherst County even though for years hundreds of thousands of tons of sludge from New York, New Jersey, and other east coast cities have been off-loaded at the Gladsone, Va. rail yards just five miles beyond the Amherst County line.

Our letter argued that the Amherst County BoS should file a federal declaratory judgment action in US district court, naming the Virginia Attorney General and the Virginia Department of Health as defendants in order to clarify the county's right, *vel non,* under the CWA to determine how sludge is disposed of in the county.

Given the clear language of the CWA, above, one would think that any county that wanted to ban sludging within its borders would have not just the right but a federally mandated obligation to do so. However, Amherst declined our invitation and has not taken any worthwhile steps to prohibit the spreading of sludge in the county in order to protect its citizens and people who go to Amherst County from around the state and country to use and enjoy a multi-million dollar, publically-funded rails-to-trails project adjacent the property to be sludged.

The county's reason for not taking any action was, and apparently still is, the mistaken perception that

Appomattox County, Virginia had been sanctioned $800,000 by a federal court as a result of Appomattox trying to prevent the land-application of sludge in that county. Although that story is false, as discussed below, it has, understandably, had a chilling effect on the activities of Virginia counties trying to deal with the flood of sewage into their communities.

In order to understand the Appomattox case, and the other sludge cases in Virginia, and in order to develop a legal theory to support a county's right to ban the land-application of sludge within its borders, it is absolutely essential to understand the legal principle of preemption. Upon reviewing the Virginia case law, it is beyond dispute that some Virginia counties have waded into, and lost, unnecessary legal fights against sludgers without fully understanding the relationships between federal, state, and local powers to ban or regulate land-application of sludge.

PREEMPTION – FORWARD AND REVERSE

Political power abhors a vacuum, and whenever there is the opportunity to exert power over people, you can bet your left shoe-lace that some governmental body is going to rush in and seize control of that power. If that body is not the US government, it is almost always the state. Any morsels of power left over after the federal government and state have their fill go to the localities – municipalities and counties. And so there is basically a three-tiered hierarchy of laws. By "preemption" one means, essentially, the pecking-order between these three different levels of government in exercising their powers. The term "preemption" implies the top-down flow of power from federal to state to local.

The term "reverse preemption" is not a recognized legal term; it is a term I have coined to describe the unusual situation in which local law appears to supercede state law. I say "appears" because reverse preemption is an illusion – it looks like a local ordinance or a local action is preempting a state law but it is in reality the state law being preempted by some federal law that delegates powers to the locality. In other words, the traditional concepts of preemption apply but in a special way; the term "reverse preemption" is merely offered as a convenient way to express this rather complex concept in a nutshell.

The Supremacy Clause of the US Constitution (Art VI, Cl 2) says, in effect, that federal law and federal treaties trump everything except the U.S. Constitution. This is an assertion of federal sovereignty, and

sovereignty is what preemption is really all about. All judges and justices – state and federal – are duty-bound to apply the laws of the United States if there is a dispute between state and federal law, at least whenever the federal law in dispute occupies a given legal area. Since the enactment of a number of federal environmental laws beginning in the early 1970's, including what has become known as the Clean Water Act, environmental law is one of those areas that is clearly dominated by federal law. Consequently, federal environmental laws preempt all state and local environmental laws or actions. The CWA is one very important federal law that preempts all state and local laws, ordinances, and by-laws.

Within the traditional or "forward" preemption scheme, state law preempts any ordinances passed by cities, counties, municipalities. The term "municipalities" usually includes cities, towns, villages, and other organizations "below" the level of the county that are incorporated into a legal entity. Municipalities and counties are referred to herein collectively as "localities." With respect to its localities, the state is sovereign. In most (but not all) states that sovereignty is complete and is summarized in the legal principle called the Dillon Rule. One refers to such states as "Dillon Rule states" or "Dillon states."

Virginia is a Dillon state and Virginia's anti-sludge activists know the term "Dillon Rule" well because the Dillon Rule is generally given by state authorities as the reason that counties have no say in whether they will be sludged. But the Dillon Rule is not about sludge, *per se*, and it is not about counties, *per se*. The Dillon Rule comes from a 1872 treatise called "Municipal Corporations" by John Forrest Dillon, an otherwise obscure Iowa judge, even as Iowa judges go. Technically, the Dillon Rule is about the relationship between municipalities and their state. The best statement of the Dillon Rule is in the words of the good judge himself, as he put it in the 1868 case *Clinton v Cedar Rapids and Missouri River RR:* [3]

> "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."

Although, technically, the Dillion Rule subordinates municipal corporation law to state law, it has been widely applied to all types of localities. In some respects the Dillon Rule is to localities what the Supremacy Clause is to states. But note that the legal basis of the state-federal relationship is drastically different than that of the state-locality relationship. The Supremacy Clause works because a group of people that existed in

[3] 24 Iowa 455, 1868

a pre-state condition – a colony or U.S. territory – agreed that the federal government would be their sovereign. Even those states that joined the Union after it was formed were cognizable as independent legal entities prior to admission. In other words, states are not creations of the US government – and one certainly would not want to suggest such a heresy in any state that was previously a part of the Confederacy, including Virginia. In spite of the outcome of the Civil War and the dramatic and tragic manner of establishing the point that states may not unilaterally secede from the whole, it is implied by the 10th Amendment and explicitly set forth by countless federal court opinions upholding the sovereignty of states that all states have an existence independent of the United States.

But, according to Judge Dillon's 19th century analysis, local governments, at least municipalities, do not have an independent existence beyond that of their state. Localities are created by state legislatures as corporations. The term "municipal corporation" or "incorporated" refers to a legislative act that brings the locality into existence, legally. And this was the basis for Judge Dillon's conclusion that state law always and without exception preempts local law: if the state creates it, the state controls it.

But as any parent of teenagers knows, this creates-equals-controls equation goes only so far, and the Dillon Rule has not been without it's critics. The primary criticism is that in a democratic society communities have an inherent right to govern themselves – after all, that's what democracy is about, people governing themselves. And nowhere does this democratic view have greater force than the right of one community, like Amherst County, to decide whether or not it will allow the feces and industrial pollution of another community, like Washington, D.C., to be spread on the county's lands, foul its air, create a health hazard for its citizens, and potentially pollute its waters.

In spite of such pesky democratic arguments, the Dillon Rule has been used in hundreds of court decisions to uphold the assertion of virtually unlimited state power over cities. It got a huge boost in 1891 (*Merrill v The Town of Monticello*, 138 US 673)[4] and 1907 (*Hunter v Pittsburgh*, 207 US 161)[5] when the US Supreme Court used the Dillon Rule to reaffirm the point that a state has so much power over municipalities that it has the right to abolish a city if it wants to – much like the Galactic Empire did to the planet Alderan in

[4] http://supreme.justia.com/us/138/673/

[5] http://supreme.justia.com/us/207/161/

one of those Jedi flicks. The Dillon Rule is essentially a Galactic Empire flex-muscle law that codifies the top-down preemption scheme from state to local level.

In some states the Dillon Rule still remains a judge-made law; in Virginia, it is embedded in the state's statutes as Va. Code §1-13.17, which says that local laws ". . . must not be inconsistent with the [US] Constitution and laws of the United States or of this Commonwealth." Please note the "or" – it possibly renders this statute unconstitutional in view of the Supremacy Clause. Consider a situation in which a local ordinance (such as one banning sludge) is consistent with or mandated by a federal law (such as the CWA) and yet that local law is contradictory to a Virginia law. According to §1-13.17, if the local law is inconsistent with federal law (which it isn't) *OR* state law (which it is), then the state could use the "or" to cancel that local law and thereby, in effect, preempt the federal law. In other words, a local law that is inconsistent with the laws of the Commonwealth violates §1-13.17 even if that local law is mandated by a federal law. That is exactly what Virginia is doing to the CWA – effectively overriding it by applying the Dillon statute to prohibit local communities from determining how sludge will be disposed of within their borders. This is a violation of the Supremacy Clause.

It is hard for many people living in Virginia's rural communities to accept that as a result of Virginia's Dillon statute, a sludge-hauler like the company Synagro Mid-Atlantic, Inc, can haul hundreds of thousands of tons of New York city sewage into their communities and spread it next to schools, parks, and community walking trails, and the people affected have no say in the matter, but that is the way Dillon's Rule is being applied. However, in my estimation it is futile for coerced counties or anti-sludge activists to attack the Dillon principle itself, as some have tried to do. Even though the constitutionality of the specific Virginia Dillon statute might be fertile ground for a federal lawsuit, there is no point in trying to argue to a federal judge that Virginia has no right, generally, to control its local governments. The Dillon concept is just too solidly entrenched in American jurisprudence to attack it head on. However, one doesn't have to attack the Dillon principle head on, one can argue that a local law banning the land-application of sludge preempts the Dillon Rule by virtue of the CWA. This is the reverse preemption concept.

THE DETERMINATION – REGULATION DICHOTOMY

The federal LDS – 33 U.S.C. §1345(e) – of the CWA has two distinct parts. Part A gives to localities the

power to make the determination of how sludge is disposed of. Part B requires that whatever disposal decision the locality makes, that disposal must be performed according to federal law and regulations. So the statute itself sets up a clear dichotomy between determination and regulation: the locality determines and the feds regulate. Because this is important, let me break the statute down *verbatim* into these two parts:

Part A: The determination of the manner of disposal or use of sludge is a local determination, except that . . .

Part B: . . . it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

Subsection (d) of §1345, referred to above, is too long to reproduce here, but essentially it gives the EPA the power and deadlines for promulgating regulations for disposing of sludge.[6] Subsection (c) of §1345 allows the states to play a role in this regulation by enacting sludge disposal permit systems. So, while Part A, above, gives the localities the power to make the decision as to what method is going to be used to dispose of sludge, Part B, in conjunction with subsections (c) and (d), give the feds and the states the power to regulate how the disposal is carried out.

This distinction is vital: **the power to determine the method of disposing of sludge is not the same as the power to regulate whatever methods are chosen.** Only the locality has the power to determine; only the feds and the state have the power to regulate. Understanding this determination-regulation dichotomy is essential for understanding why some counties in Virginia have gotten themselves into deep trouble trying to regulate land application of sludge, while at least one other county has prevailed in federal court by outright banning land application of sludge. Presumably, county attorneys have been confused on this issue because logic would seem to suggest that if you cannot regulate sludging then you cannot outright ban it. But to ban sludging a county doesn't need regulatory powers; it just needs need to say "Don't do it." See the *Rappahannock* case, below.

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[6] The entire statute is found at: http://www.law.cornell.edu/uscode/33/usc_sec_33_00001345----000-.html

If the determination-regulation dichotomy seems contradictory, think about it. It makes perfect sense to allow counties to decide on a county-by-county basis which ones will permit land-application and which ones will not. But it does not make sense to allow counties to each construct a different regulation-scheme. The sale of alcohol is an excellent analogy. Counties all across the country make their own decisions as to whether liquor can be sold within the county – some counties are wet and some are dry. The thumbs-up/thumbs-down on allowing alcohol does not require state-wide uniformity. Furthermore, it is the type of decision that is best left to the residents of each county because it's a decision that directly effects their quality of life. But once a county decides to allow the sale of alcohol, the state imposes a statewide regulatory and taxation scheme that is consistent for every county that allows alcohol sales. The counties decide yea or nea to alcohol, and the state sets the operating rules for those who choose yea. Imagine the mess if each county could regulate alcohol – set it's own drinking age, DUI limits, and liquor license laws. It is precisely the same with sludge – there must be one set of regulations for all counties that choose to allow land-application of sludge, but the existence of those regulations cannot be used as a rationale to cut off the right of other counties that wish to ban it.

The CWA approach to sludge disposal is essentially the same. It is up to the localities to determine what method of sludge disposal is best suited for that locality. If a locality bans a given method of disposal such as land application, then that's the end of the story; the state has no say. But with respect to any methods of disposal not banned by the locality, a statewide regulatory scheme controls that type of disposal. Surely no one would want each county setting their own sludge regulations, for no one would benefit from a patchwork of counties with differing regulations scattered all across the state. If a sludge-farmer in Buckingham County, Virginia isn't allowed to throw sludge down on frozen land, then a sludge-farmer in Nelson County, Virginia shouldn't be allowed to either. If a potential sludge-farmer in one county has to jump through 10-foot high hoops to get his sludging permit approved, then a potential sludge-farmer in the next county over should have to jump through the same hoops. This regulating land disposal of sludge is where the Dillon Rule makes sense. The same goes for regulating incineration and land-filling sludge.

But the Dillon Rule goes out the window when it comes to the county's right to make the initial determination. The state, whether it be a Dillon state or not, does not preempt local powers in this regard because Congress gave that power – the power to make the determination – to the localities. Thus, the

preemption flows backwards in the sense that local ordinances that prohibit sludging would preempt the Dillon statute and any other state laws and judicial opinions that conflict with the federal local determination statute. This is reverse preemption.

With this interpretation of the CWA and the reverse preemption theory in mind, I now turn to the Virginia case law to see whether there is any support there for the theory. I have concluded that while no court has expressly held that there is such a thing as reverse preemption, this theory is the only way one can make sense of federal and state court decisions on land-application of sludge in Virginia.

THE VIRGINIA SLUDGE CASES

It is easiest to present the case law chronologically rather than discussing the federal cases and state cases separately even though the state and federal issues are significantly different. There are not that many cases to review and they seem less contradictory when examined on the timeline. There are three federal sludge cases and one state case in Virginia. In addition, there are a couple of federal non-sludge cases that illustrate the reverse preemption theory more explicitly than the sludge cases do.

1994 – *Welch v. Rappahannock County,* Part I – U.S. District Court, Charlottesville, Va – Magistrate Judge Waugh Crigler. [7]

It's a bad sign when the first case in a body of law is the high-water point. In this case a cabal of sludge farmers, "Welch," sued Rappahannock County, Virginia over an amendment to the County's zoning ordinances that banned land-application of sludge on private land within the county. After the initial documents were filed by both sides and there was enough meat for the court to chew on, Rappahannock moved for summary judgment, which means they argued that there was no real dispute over the facts and, consequently, no need for a trial. This appears to be the only sludge case in Virginia in which a county moved for summary judgment, and that may be significant

As long as both parties agree, in federal cases a magistrate judge can be assigned to decide pretrial motions, hopefully to speed things up some. In *Welch v. Rappahannock* the magistrate was Magistrate Judge

[7] 860 F. Supp 326 (W.D. Va., 1994)

Waugh Crigler. Crigler agreed with the county that summary judgment was appropriate and he entered judgment for the county, dismissing the sludge-farmers suit without a trial. In doing so he let rip with a very strong opinion that for the first time established the right of Virginia counties to ban sludging. Crigler read the federal local determination statute and regulation to say that sludge disposal is a local determination, which was a pretty good call because that's exactly what they do say.

One subtle point from Crigler's opinion is particularly instructive: Rappahanock was not banning sludge *per se*. For instance, it was not banning land-filling or incineration of sludge. It was not banning the importation of sludge. It was only making a determination that sludge in the county would not be disposed of by land-application.

Another important but subtle point is that Rappahannock's by-law did not specify what method had to be used; it merely said that land application *could not* be used. In other words, in order to assert it's rights under the LDS of the CWA, it was not necessary for the county to say what method must be used to dispose of sludge; it was sufficient for the county to say that one of the potential methods could not be used. I do not address in this paper the question of whether a county can ban all known means of disposing of sludge, nor do I address whether a county may ban the importation of sludge. But with respect to the latter point, it is worth noting that a federal district court judge in California ruled that Kern County, California, cannot stop Los Angeles from shipping its sludge to Kern County because it would unconstitutionally restrict interstate commerce; however, that judge has been reversed by the 9th Circuit Court of Appeals, which upheld the Kern County importation ban. However, please note that California is not a Dillon State, and so the California case does not speak to the state vs. locality issues that plague Virginia and most other states. The issue of whether a rural Virginia county or a county in some other Dillon state can use the CWA to keep NYC from pumping its sludge into the county has not been answered – it hasn't even been asked as far as I am aware. But that issue goes beyond the legal issues presented here, which are restricted to whether a county can ban sludging of land within its jurisdiction in opposition to state law.

1995 – *Welch v. Rappahannock County*, Part II – U.S. District Court, Charlottesville, Va – Judge Harry Michael.[8]

[8] 888 F. Supp 753 (W.D. Va., 1995)

Returning to *Rappahannock*, when a magistrate judge decides a summary judgment motion in federal court, the loser can ask the "real" judge to reverse what the magistrate judge did – this is sort of an in-house appeal. Judge Harry Michael was the "real" judge in this case. Judge Michael not only backed-up his magistrate judge 100%, he went further and made it clear in no uncertain terms that 1) under the CWA, how sludge is disposed of is a local determination, and 2) federal sludge regulations do not preempt a county's right to ban sludge, which was the sludgers' argument.

Let me explain the sludger's preemption argument because it is often raised by sludgers and it is easy to confuse these competing preemption principles. The sludgers' preemption theory is not related in any discernable way to reverse preemption. In most of these sludge cases the sludgers argue, as they did in *Rappahannock*, that EPA regulations promote the spreading of human feces on farmland and therefore those regulations preempt any county laws – like Rappahannock's – preventing the spreading of human feces on farmland. The regulations they are talking about are found in Part 503 of Title 40 of the Code of Federal Regulations. This argument is about the normal "forward" or "top-down" preemption scheme, as in federal law trumps state law and local law, state law trumps local law, local law doesn't trump anything.

The sludgers are correct that federal regulations can preempt state and local law. But the fine (and fatal) point raised by Judge Michael is that federal regulations cannot preempt federal law, and federal law – the CWA specifically – is what controlled the Rappahannock case. When the sludgers in *Rappahannock* argued that Part 503 encourages sludging farmland and therefore preempts Rappahannock's ordinance banning sludging, they were really arguing (without saying it) that federal regulations preempt federal law, but Judge Michael wasn't buying it.

Judge Michael's response to the sludgers' preemption theory was, essentially, that the EPA is just an agency and its opinions and regulations do not preempt the county's right to ban sludge because federal law – the CWA – gives the county that right. Michael turned the sludgers preemption argument against them. He found that the CWA clearly states that localities determine how sludge is disposed of and the CWA preempts anything Part 503 may say or suggest to the contrary. End of story. And this pretty well meant the end of the Synagro's sludge operations in Rappahannock County – at least for the last 15 years. I don't know what the Rappahannock lawyers were paid to fight that fight, but the outcome in terms of keeping sludge out of Rappahannock for 15 years, while hundreds of thousands of tons have been spread in nearby counties, was

worth many times more than what they were paid.

There are a couple of particularly interesting points about the *Rappahannock* case in light of the decade of litigation that followed it. First, the sludgers didn't appeal Judge Michael's decision. This was not for lack of funding, you can be sure. They had a strategic reason, and that was most likely that losing in the Fourth Circuit Court of Appeals would have had huge regional repercussions that would go well beyond Rappahannock County or even Virginia. Besides, Michael's opinion was likely viewed as bullet-proof and would have stood up to appeal. The last thing the sludge-haulers and the sludge-farmers wanted was a US circuit court of appeals opinion agreeing that counties have a right under the CWA to ban sludging.

The second fascinating point about *Rappahannock* is that there was that Crigler's and Michael's opinions totally ignored the Dillon Rule and state sovereignty issues, and just focused on the relationship between the federal law and local law, suggesting that the sludge-farmers did not raise Dillon Rule arguments. The absence of any mention in these opinions of a single state law or court ruling is weird because the state plays a huge role in this whole mess. The Virginia Dept. of Health (VDH), which at that time was the state agency in charge of regulating sludging, had been in bed with the sludgers for years and had been promoting sludge land-application as enthusiastically as the commercial sludge-slingers, like Synagro. One would think that the sludge-consortium, which included the VDH, would have hammered the Dillon Rule pretty hard. But there was no mention of Dillon in the opinions.[9]

But there has been, in retrospect, a certain symmetry in the judicial citations because not only did the *Rappahannock* opinions not cite the Dillon Rule or any state cases, none of the state court or federal opinions that followed *Rappahannock* – all based on Dillon – referred to the *Rappahannock* case. This mutual exclusion type-symmetry suggests a path that coerced counties should follow if they wish to assert their federal right to ban sludging – emphasize the CWA and federal mandates to localities and avoid Dillon. And state clearly in ordinances banning sludging that the county is availing itself of its rights mandated by the CWA.

As a result of Crigler and Michael not bringing state law into their opinions, technically *Rappahannock* cannot be considered a reverse preemption case. Although the opinions clearly say that the CWA gives the

[9] There is a footnote in Magistrate Judge Crigler's opinion indicating that he was avoiding state law issues because those issues were before the state court.

counties the power to ban sludging, because the Dillon Rule and state law were ignored, these opinions don't explicitly hold that the CWA empowers counties to preempt state law. Nevertheless, for those who feel strongly that the people of a county have the right through their boards of supervisors to ban sludging, the *Rappahannock* case is a very valuable case. It has not been over-ruled.

But six years later Dillon raised its ugly head and confused the issues.

2001 – *Blanton v. Amelia County* -- Va. Supreme Court, Richmond, Va – Justice Leroy Rountree Hassell [10]

Having been shut down in Rappahannock County, the corporate sludgers started looking around Virginia for other counties they could use as an outhouse for New York and New Jersey. They found a two-holer in Amelia County and Louisa County, and they immediately began sludging those folks big-time.

In Amelia County, after a number of public hearings in which the public made it very clear how they felt about Synagro bringing New Jersey sewage to their county, Amelia's board of supervisors took the same route as Rappahannock and passed ordinances banning sludging outright.

Now, one would think in view of *Welch v. Rappahannock* that Amelia would have a very strong case. After all, two federal judges both read the LDS and concluded that counties can ban sludging. Surely Amelia's case would be an instant-replay of Rappahannock's. It wasn't.

I don't have a record of what transpired in *Blanton v. Amelia*. One has to review the trial court record in the Amelia County courthouse and I presently live on the west coast of Canada and don't have access to those records. But I know from the Virginia Supreme Court's published opinion that Judge Thomas V. Warren presided over the case in the trial court. I can also see that the Blanton sludge-farmers sued Amelia on the grounds that Amelia's ban of land-application was inconsistent with the state sludge laws and regulations and was, therefore, illegal under Va. Code §1-13.17; e.g., the Dillon Rule. So the two major differences between *Blanton* and *Rappahannock* is that (1) *Blanton* was tried in the state court and (2) Dillon was argued in *Blanton*.

[10] 261 Va 55; 540 S.E. 2nd 869; 540 S.E.2d 869 (2001)

The logical response for the county would have been to remove the case straight to federal court, but unless a federal issue is raised by the plaintiff, that can be difficult to do.

The second logical response for the county would be to say: "Yeah, all that Dillon yada-yada might be right, your Honor, but the federal CWA trumps the state sludge laws and it also trumps Dillon. As two federal opinions have already held, §1345(e) of the CWA gives Amelia the right to ban sludging. Now let's pack up all these brief cases and go home." Which is probably about what Amelia's lawyers did say because Judge Warren found for Amelia County, shut the case down, and they all packed up their brief cases and went home. In other words, Judge Warren was the third Virginia judge to rule that a county can ban sludging. Three in a row, in fact. Three strikes is an out where I grew up, but fortunately I didn't grow up in Virginia. The sludgers appealed Judge Warren's decision to the Virginia Supreme Court.

It is precisely on January 12, 2001, the publication date of the Va. Supreme Court opinion in the *Blanton v. Amelia,* that the whole sludge issue, and the sludge itself, started going south in Virginia, both figuratively and geographically. From a legal perspective, this point is a lot like when the house dropped on Dorothy's head or when Alice stepped through the mirror – everything begins to get a little surreal, legally speaking.

In a nutshell, the Virginia Supreme Court reversed Judge Warren and found the Amelia ban on the land-application of sludge to be contrary to the state sludge laws and contrary to Dillon. Leroy Rountree Hassell (eventually to become a much admired Chief Justice of the Virginia Supreme Court) was the Supreme Court justice who wrote the opinion on the Amelia case – it was a 100% Dillon Rule argument. Technically, if you apply just state law and the Dillon Rule and ignore all the federal law (after all, it's *only* federal law), then the Amelia opinion makes sense. Because there was a strong federal issue here, Amelia had strong grounds to appeal to the U.S. Supreme Court, which was their only option for appealing Hassell's decision. However, such appeals are always very expensive long shots and this is not one of the wealthier counties in the state, which is likely why Synago chose it.

What is worrying in Justice Hassell's opinion is that in writing appeals opinions, or any opinions, judges and justices try to present each side's arguments in a balanced way and then explain why one side's arguments are the most persuasive. Justices are duty bound to do this so that the world can see that they worked through the legal and factual issues in a way that was fair to both sides. But Hassell gives Amelia's arguments

extremely short shrift. Nowhere does he once mention federal law in general, or the CWA specifically, or the Supremacy Clause, or Crigler's opinion in *Rappahannock* Part I, or Michael's opinion in *Rappahannock* Part II, or the county's federally protected right to determine how sludge is disposed of. Hassell hardly mentions Amelia's position at all, and he absolutely ignores the federal law issues.

A legal commentator reviewing Hassell's *Amelia* opinion would say, "Well, obviously Amelia's lawyers never raised those points." I do not have access to the briefs in this appeal, but I know that all of these CWA and federal law arguments must have been presented to the Supreme Court because Rappahannock County and the Local Government Attorneys of Virginia, Inc. both filed amcus briefs with the Supreme Court, and there is no way they – particularly the Rappahannock attorneys – would omit the one killer argument for banning sludging. Surely the federal law arguments were presented. Why did Hassell ignore those arguments? This is not the last time such perplexing questions will surface.

2001 – *Synagro v Louisa County* -- US District Court, Charlottesville, Va. – Judge Harry Michael [11]

Remember I said Synagro found itself a 2-holer in Virginia? Lousia County was the next hole over from Amelia. The *Blanton v. Amelia* opinion came out in January of 2001 and by June of that year Synagro was in Judge Michael's federal court in Charlottesville trying to block Louisa County's new sludge regulations.

Synagro had been particularly brutal in sludging Louisa county. Not only were people getting sick, the sludge trucks were spilling the stuff all over the roadways. And so the Louisa board of supervisors passed an ordinance in an attempt to control the mess and calm the citizens down – it was obvious by then that the VDH wasn't doing anything helpful and wasn't likely to, never mind that people were getting sick and the VDH is, . . . well, the *health* department. This lack of assistance from the state generated an enormous amount of enmity from the people of Louisa toward the state health officials and the state in general. Enmity that was well deserved.

Synagro v. Louisa County allows us to fully appreciate the dangers in neglecting the reality of the determination-regulation dichotomy discussed above, because Louisa County's ordinance didn't outright ban

[11] Unpublished

sludge land-application like Rappahannock's did. Louisa tried to regulate sludging. *Synagro v Louisa* is a sludge-regulation case, and that is a huge distinction. Recall that the sludgers, backed by Synagro no doubt, had lost big time in the Rappahannock County, which was heard by Judge Michael. And recall that the sludgers won big time in *Blanton*, a case they brought in state court. So it is a bit curious as to why the sludgers would choose to go back into the same federal court and before the same federal judge that had just shut them down after winning in state court. The answer is probably that the sludgers, unlike the county attorneys, fully understood the distinction between trying to regulate land application of sludge and banning it. The sludgers knew that Louisa didn't have a chance.

Unlike Appomattox's ordinances, which we will come to next, Louisa's ordinances were not overly onerous – they required the sludgers to file a nutrient management plan, post warning signs 30 days in advance, obey setbacks and buffers, take a break when the 4th of July parade was in progress, and post a bond to insure the sludge that was being spilled on the roadways would be cleaned up. All of these are requirements that anyone with a brain and a healthy distrust of truck drivers hauling toxic materials would consider entirely reasonable. Unfortunately, the VDH had no such requirements, which was the sludgers' whole point. If the State doesn't give a whop about cleaning the sludge off the roads, then the county just has to eat it. That, according to Synagro, is the legal effect of the Dillon Rule, and Synagro is mostly right.

Synagro immediately sought a preliminary injunction, meaning they wanted to keep slinging their sludge – in spite of Louisa's ordinance and in spite of growing health complaints – until the case could be decided. Preliminary injunctions like this are not easy to get, particularly in federal court. The plaintiff has to meet four criteria, one of which is to convince the judge that the plaintiff is likely to win at trial. This means the preliminary injunction is sort of the whole case tried in miniature. Judge Michael, after hearing both sides, gave Synagro their injunction, saying that Synagro would probably win the case.

We don't know what points Louisa argued to Judge Michael. Unlike Crigler's and Michael's opinions in *Rappahannock*, this case is not published in the case reports. However, one can obtain Michael's injunction opinion on the website for the U.S. District Court for the Western District of Virginia.[12] But even then, you can't tell whether the lawyers for Louisa raised *Rappahannock* and CWA issues or not. Michael gave Synagro

[12] http://www.vawd.uscourts.gov/opinions/michael/301cv060preliminjunc.pdf – good as of May, 2011.

their preliminary injunction against Louisa's ordinance, and that is apparently where the case ended. I don't see any record of summary judgment motions or the main case ever being argued, or any appeals being taken.

In the absence of any explanation from Judge Michael, we are left to speculate as to how the same judge came to such radically different positions in *Rappahannock* and *Louisa*. It's really not that hard to see within the context of the determination-regulation dichotomy. When placed next to each other these two cases say that if a county's ordinance bans sludging (as Rappahannock's did) then that ordinance is protected by the CWA. But if the county ordinance attempts to regulate sludging (as Louisa's did) then the CWA doesn't apply and the Dillon Rule kicks in, which means the ordinance kicks out. In other words, a local ordinance banning land-application essentially preempts the Dillon Rule and state sludge laws because that ordinance is protected by the federal law. But a local law that tries to regulate sludging gets no support from the CWA and runs afoul of state law and Dillon. This is, I believe, the logic Michael was using to rule for Rappahannock on one hand and then rule against Louisa on the other. It is the only logic I can see that allows Michael's *Rappahannock* and *Louisa* decisions to make any sense when laid next to each other. The *Rappahannock-Louisa* dichotomy is a judicial application of the determination-regulation dichotomy.

While one can make sense of this *Louisa-Rappahannock* dichotomy in terms of the determination-regulation dichotomy, what is still utterly baffling, and what has absolutely no discernable support in the statutes or case law, is Justice Hassell's opinion that Amelia County's ordinance banning sludging was *ultra vires* under the Dillon Rule. This point is even more mysterious because in Michael's injunction opinion in *Lousia*, he referred to the *Amelia* decision with favor to make the point that state law trumps local law, but Michael completely ignored the CWA, his own opinion in *Rappahannock* applying the CWA, and the Supremacy Clause. A judicial opinion that raises more questions than it answers is not helpful to anyone except the prevailing litigant, and *Amelia* and *Louisa* both raise more questions than they answer.

2002 – *O'Brien, et al. v Appomattox County* – US District Court, Lynchburg, Judge Norman K. Moon[13]

Unlike Louisa County, Appomattox County, Virginia saw the sludge coming well before it reached the

[13] Judge Moon's preliminary injunction opinion is at 213 F. Supp 2d 627 (W.D. Va 2002). HIs summary judgment opinion is at 293 F. Supp 2d 660 (W.D. Va. 2003). The unpublished *per curiam* opinion of the US 4th Circuit Court of appeals can be found at http://pacer.ca4.uscourts.gov/opinion.pdf/022019.U.pdf

county line. Before it could hit the red Appomattox dirt the Board of Supervisors passed a suite of very onerous anti-sludge regulations – regulations so strict that it would be virtually impossible for any sludge-farmer to comply with them, which is apparently what the county intended.

For instance, the sludging set back distances from property boundaries were so extreme they ate up most good sized fields, and the maximum slope that could be sludged was only 7%, which in that part of Virginia would be considered basically flat. Nor did the county leave anyone guessing about what it thought of being a pay-potty for big cities: Appomattox's ordinance explicitly announced the county's intention to ban sludge if the Virginia legislature ever modifies the law to allow that. This was brilliant in its temerity and Appomattox is the only Virginia county I am aware of that has made a public record of its objections to being sludged. However, this ordinance clearly indicates that Appomattox's legal people did not understand the CWA and the right of the county under that Act to self-determine how sludge is disposed of – they didn't need to wait for the state legislature to do anything, the CWA gave them all the power they needed to ban sludging.

It's too bad, in view of Appomattox's willingness to fight Synagro, that the county didn't just ban sludging outright under the CWA. Apparently, in light of *Amelia,* somebody thought it would be better to try and do an end-run around *Amelia* and effectively ban sludge by regulating it into oblivion. U.S. District Court Judge Norman K. Moon was not amused and Appomattox learned the hard way that the idea of trying to regulate sludge into oblivion was a real bad one.

The sludge companies backed a cabal of sludge-farmers led by Tommy O'Brien (no known relation to me) to challenge Appomattox's stiff sludge regulations. They hired uber sludge-lawyer J. B. Slaughter of the Washington, D.C. firm Beveridge & Diamond, who filed suit against Appomattox in the US District Court in Lynchburg, Virginia.

Slaughter wanted this thing tried in federal court for a couple of reasons. First of all, he had a slam dunk and he knew it. At the time he filed this case, the ink hadn't dried on *Louisa*, and the Appomattox case was almost identical – a county trying to regulate sludge instead of banning it. Second, if the sludgers won (which was almost certain) and Appomattox appealed to the US 4th Circuit Court of Appeals, a win there would effectively spread the sludge happy-news, if not the sludge itself, throughout the entire 4th Circuit – all the way from S. Carolina to Maryland.

As in *Louisa*, as soon as the curtain went up, the sludgers filed for a preliminary injunction. They wanted to spread their sludge while the litigation was going on. Like Michael in *Louisa*, Judge Moon gave the sludgers their preliminary injunction, and in so doing indicated that Appomattox had less chance of winning than a three-legged donkey on the outside rail at the Kentucky Derby. In fact, Moon's preliminary injunction reads like a PR brochure for Synagro, for example:

> "Thus, many in the scientific community, insist that there are no cognizable dangers to the public, so long as sludge is properly treated before application . . . [t]hus, the long term benefits from the use of biosolids include more productive fields and less reliance on chemical fertilizers."

Unlike Louisa, Appomattox had the resources and the poor judgment to appeal the preliminary injunction to the 4th Circuit Court of Appeals, but the appeal court stamped the injunction "Approved," stating explicitly that the preliminary injunction was justified because Appomattox was not likely to win. In spite of some bad legal decisions made in their behalf, the Appomattox Board of Supervisors must be admired for doing everything they could to protect their citizens. While Louisa folded their cards after losing the preliminary injunction motion, Appomattox fought on.

After winning the preliminary injunction fight, Slaughter immediately filed a motion for summary judgment. There was no sense going to a jury on this one, he argued, it's a done deal. Judge Moon agreed and published another Synagro PR brochure. He held that the Appomattox ordinances were contrary to the VDH regulations and that the Dillon Rule prohibits counties from implementing and enforcing regulations outside the regulatory scheme of the state. The case was over. . . almost. As soon as he had his summary judgment in hand, Slaughter moved the court for attorney fees. I don't know how much he asked for, but Appomattox settled for $225,000, which is about $17 per head of population.

This settlement has had more of an impact on the future of sludging in Virginia than the ruling itself – or any other sludge ruling – because the Appomattox pay-out generated a myth that Judge Moon sanctioned Appomattox $800,000, and that myth has other rural counties running around like ants on a hot grill. For instance, I noted above that in 2005 a colleague of mine and I tried to convince Amherst County to pass an ordinance banning sludging in Amherst County. The county attorney advised against taking any action at all on the mistaken belief that Appomattox County had just been sanctioned $800,000.

But this sanctions myth is just that – a myth. It is clear from the record that Slaughter asked for $820,000

in damages when he filed the suit, but I can find no evidence in the record that Judge Moon gave the sludgers a dime. It is not even clear that Moon would have given the sludgers anything. In his preliminary injunction opinion Moon explicitly noted that the county was protected from damages by sovereign immunity – that was one of his reasons for granting the injunction. Consequently, it is not clear from the record why the county agreed to pay Slaughter anything. Nevertheless, the $800,000 sanctions myth has had a major effect in dampening the resolve of other counties, like Amherst and Campbell, to take on the Synagro-funded sludge-farmers.

How does *O'Brien v Appomattox* square with the Reverse Preemption Theory? Like *Synagro v. Louisa* it is neutral on the issue because the RPT is based on the scenario where a county *bans* sludging pursuant to the CWA and these cases are about counties *regulating* the practice. In fact, Moon, like Michael in *Louisa*, ignored the CWA and the federal issues altogether. Nevertheless, *Appomattox* is consistent with, and extends, the premise that localities cannot regulate sludge. That much is more than beyond doubt.

Even though the Appomattox case is outside the boundaries of the federal CWA because it is a regulation case, it is odd that Judge Moon didn't at least make that point. I was able to get my hands on the briefs filed by the Appomattox lawyers, and I know that they put the CWA before Moon and said, to paraphrase: "Look at this, judge, §1345(e) of the CWA says the county determines how sludge is handled." Of course, the Appomattox lawyers had it mostly wrong – the CWA doesn't give counties the power to determine how sludge is "handled" if "handled" means set-backs, and slopes, and nutrient plans. While I agree that the sludge-farmers, and J.B Slaughter, and Synagro, and Judge Moon, and the Fourth Circuit Court of Appeals were right to say Appomattox had no right to regulate sludging, it's a bit troubling that the county's federal law argument was ignored in both of Moon's opinions and the opinion of the 4th Circuit Court of Appeals. You've got a federal law giving the county the power to determine how sludge is to be disposed of; you've got the county lawyers putting the federal law in the federal judge's face; presumably, you've got the judge reading the federal law and arguments; and, you've got the judge's opinion completely ignoring the federal law.

It seems to me that at the very least a federal judge has an obligation to explain why he chooses to ignore federal law and apply state law. As I said above, I believe Judge Moon's decision was correct, but his ignoring the CWA is puzzling. Judge Michael's ignoring the CWA in the *Louisa* case was also puzzling. And Justice Hassel's failure to do so in the *Amelia* case was down right baffling. This judicial trend of ignoring essential

legal counter-arguments in opinions that benefit the sludgers may be one of the things that worries Virginia counties and undermines their expectation that their case will be dealt with fairly, particularly in view of the fact that some of these sludge companies have tens of millions of dollars at stake and at least one has acquired a reputation for bribing public officials.

In summarizing these four Virginia sludge cases – *Rappahannock*, *Amelia*, *Louisa*, and *Appomattox* – in spite of a record that is less than clear in explaining the reasons behind the decisions, none of them precisely address the RPT. *Rappahannock* comes the closest and establishes that 33 U.S.C. §1345(e) of the CWA gives localities the power to ban sludging. That, of course, is the most important point. But because the court did not explicitly decide that Rappahannock's ordinance preempted the Dillon Rule or Virginia's sludge laws, *Rapphannock* falls short of clearly establishing reverse preemption *per se*. We have to go beyond the sludge cases to find cases explicitly supporting the legal theory of reverse preemption.

FEDERAL CASES SUPPORTING REVERSE PREEMPTION

2001 – *Bristol v. Earley* – U.S. District Court, Abingdon, Va. Judge James Jones.[14]

Just to be clear on where I'm going here, my reason for wandering away from sludge cases is that I am looking for an example of reverse preemption: a locality relying on federal law to do something the state says the locality can't do. *Bristol* is such a case. It was heard by US District Court Judge James Jones in Abdingdon, Va. This case has nothing to do with sludging county farmlands or misinformed sludge-farmers; it's about telecommunications. But it's a huge case for RPT because this is an example of how a federal law can empower a locality to preempt state laws and regulations – this is clearly and explicitly an anti-Dillon case. The first we've examined.

This case has its origins in a congressional amendment to the Telecommunications Act of 1996 that added a provision that prevents states from prohibiting "any entity" from providing interstate or intrastate phone service.

> "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications

[14] 145 F. Supp 2nd, 741. As of Jul01.2010, this case can be found at http://www.baller.com/pdfs/bristol-dct.pdf.

service." 47 USC §253(a)

The city of Bristol, Virginia figuring that it was obviously an "entity," decided it was time to get into the fiber optic telecommunications business. The city set up a board and started making plans to provide local families with fiber optic services. However, in 1999 Virginia's legislature passed a law (§15.1-1500(B)) that prohibits local governments from competing in the telecommunications business. Clearly, if localities such as Bristol are "entities" under then federal law, then Virginia's law would be preempted by the federal law. Bristol justifiably felt its rights under the federal law preempted Virginia's law and the Dillon Rule, but Bristol didn't want to invest in tens of millions of dollars for fiber optic gear and take the chance of getting busted by the Virginia Attorney General.

In addition to having a legal dilemma, Bristol also had some smart lawyers. Instead of pushing ahead with their telecommunications plans and waiting for the state or potential deep-pocket competitors to sue them under the state law, Bristol filed for a declaratory judgment in Judge Jones' federal court. Bristol sued Virginia Attorney General Mark Earley and the Commonwealth itself, asking Judge Jones for a declaratory judgment that Bristol has the right to enter the telecommunications market. The situation is completely analogous to counties that want to ban sludging under the CWA but knowing that by doing so they may get into hot water the way Appomattox County did for intruding on state powers to regulate sludge.

A declaratory action is a very attractive alternative to an outright judicial slug-fest, particularly if your opponent has far more resources than you do. In a declaratory action you – the plaintiff – are asking the court to decide a question of law in order to avoid some threatened harm to your interests. Here Bristol was asking Judge Jones to resolve the conflict between Bristol's rights under the federal law and Bristol's obligations under the Dillon Rule. Because Bristol never actually provided telecommunications services it was not exposed to damages or sanctions or other monetary threats – not even if the competing communications companies were allowed to participate in the lawsuit, which they eventually were.

Bristol, of course, did not want to wade into an expensive legal brouhaha, and neither did Virginia. And that's the beauty of declaratory actions: they can usually be resolved relatively cheaply with a summary judgment, for the plaintiff does not seek damages and the issues very frequently come down to a matter of interpreting laws, so there is no need to develop a lot of evidence. After Bristol filed the suit, Virginia filed a

motion to dismiss and Bristol filed a motion for summary judgment. Judge Jones had everything he needed to decide this conflict between the federal and state statutes.

Bristol argued that the federal Telecommunications Act preempts the state law that bans local governments from competing in telecommunications. Bristol framed it's case as strictly federal law v. state law. Bristol did not argue that any local ordinance preempted the state law, so they did not argue reverse preemption precisely. I don't really think any lawyer would have the chutzpah to argue that a city or county law preempts the state law, and I don't advocate such an argument because no judge wants to be the first to reverse 200 years of preemption tradition in which preemption always goes top down. But as I noted above, reverse preemption is actually federal law preempting state law in a way that gives localities power over the state. If Bristol won the case on the "straight" preemption argument – and Bristol did win – Bristol's resolution to enter the telecommunications market would be upheld over Virginia's no-compete law, which would be, in practice, a bottom up preemption.

Here is Judge Jones' opening volley:

> "In this suit by a municipality seeking a declaratory judgment that a Virginia statute is preempted by the federal Telecommunications Act of 1996, I grant summary judgment in favor of the plaintiff [Bristol] and declare the Virginia statute unenforceable under the Supremacy Clause of the Constitution." *Bristol v. Earley* 145 F. Supp. 2d 741 (2001).

This is a fairly complex opinion, but a brilliant one. Judge Jones slices right through all of the state's arguments, leaving little doubt that the state cannot prevent a locality from doing that which the federal government says the locality can do. The analogy to the sludge situation could hardly be tighter and Jones' decision is in complete accord with Magistrate Judge Crigler's, and Judge Michael's opinions in *Rappahannock*, except that Judge Jones directly addressed how the federal law overcomes the Dillon relationship.

But Bristol and Judge Jones had a complicating factor with the Telecommunications Act – a complicating factor that would not plague counties seeking a declaratory judgment to assert their federal right to ban sludging. The Telecommunications Act prohibits states from interfering with "any entity" and Virginia argued that "any entity" does not mean "any entity" but rather it means "any entity except municipalities." Virginia had the Federal Communications Commission for back-up, for the FCC had concluded in a nearly identical

case out of Missouri that "any entity" does not include sub-divisions of a state. After a long analysis of what Congress meant by "any entity" Judge Jones rejected Virginia's and the FCC's interpretation of "any entity" and came to this common-sense conclusion:

> "Simply put, it strains logic to interpret the term 'any entity' in §253(a) to mean 'any entity except for municipalities and other political subdivisions of states.' While it is true that such an interpretation is possible, the Supreme Court has cautioned that '[a] statute can be unambiguous without addressing every interpretive theory offered by a party.'"

Judge Jones found for Bristol. He held that because the federal law prohibited the states from interfering with "any entity" entering the telecommunications market, the states cannot prohibit their own sub-divisions from entering the market. So the federal statute, in effect, places itself between the state and the locality and protects the locality from the state's prohibitions. The federal statute nullifies the Dillon Rule, in other words.

2004 – Nixon v. Missouri Municipal League – U.S. Supreme Court, Washington, D.C.[15]

Over in Missouri a consortium of municipalities wanted to get into the telecommunications business, too, but, as in Virginia, there was a state law standing in their way. Instead of suing the state for declaratory judgment in federal court, the Missouri municipalities went to the FCC to get an opinion. The FCC came to the opposite conclusion of Judge Jones' opinion with respect to what "any entity" means and ruled that a municipality is not an "entity" under the Telecommunications Act.

Before we look at *Nixon* closely it is important to keep in mind that two separate questions must be answered in order to resolve both of these cases. First, did Congress intended the term "any entity" to include municipalities? If the answer is "no," the municipalities lose. If the answer is "yes", then the second question is: Can localities use the federal law to avoid state law and the Dillon relationships? Only the second question relates to our sludge issue or reverse preemption. Jones answered both questions affirmatively. Yes, Congress meant for "any entity" to include municipalities, and, yes, Bristol can use the federal law to avoid the state statute. But in the Missouri case, the FCC answered the first question in the negative: Congress did not mean for "any entity" to include a municipality. Consequently, the FCC found against the municipalities without reaching the preemption question.

[15] 541 U.S. 125 (2004)

The Missouri municipalities appealed the FCC decision to the 8th Circuit Court of Appeals, [16] which reversed the FCC, and held, as Judge Jones had held, that a municipality is an entity under the law and that the federal law protects the municipalities from the state law preemption. By the time the Missouri case reached the 8th Circuit, *Bristol* was already over and the 8th Circuit noted Judge Jones' opinion with favor. So you have both a Virginia federal trial court and a federal appeals court interpreting the Supremacy Clause to say that a federal law can be used as a shield by a locality against it's own state – a blatantly anti-Dillon position. A reverse preemption position.

Missouri then appealed the 8th Circuit decision to the U.S. Supreme Court, which agreed to hear the case, now titled *Nixon v. Missouri Municipal League*. The majority opinion (8-1) was written by Justice Souter. Justice Stevens filed a dissenting opinion.

Souter's opinion focused almost entirely on the meaning of the term "any entity." Souter emphasized that when Congress writes a law that could be interpreted to preempt a state law, in order for that preemption to happen, the federal law must be absolutely clear that Congress intended it to happen. Souter reasoned that because § 253(a) of the Telecommunications Act didn't specifically refer to a municipality or state subdivision, and because it was possible to read "any entity" to mean "any commercial entity" that Congress did not clearly express its intent to preempt state laws. The 8th Circuit was over-ruled, and, in effect, so was Judge Jones and *Bristol v. Earley*.

While *Nixon* was clearly a defeat for Virginia towns and cities that were hoping to get into the communications business, it is not a defeat for Virginia counties that want to use the CWA to ban sludging. It is, in fact, an important step in the right direction. Having answered the first question no, "any entity" does not include municipalities, Justice Souter could have stopped without addressing the second question, the preemption issue. But in closing, Souter reflects briefly but explicitly on the question of whether Congress can pass a law that puts a state sub-division beyond the reach of Dillon, although he never uses the name Dillon. In answering this question Souter concurs with the both the 8th Circuit Court of Appeals and Judge Jones that Congress has such power. Souter's only concern is that *if* Congress intends to step between a state and its subdivisions, then Congress must do so with absolutely clear and unmistakable language. The term

[16] Missouri Municipal League v. FCC, (8CA, 299F3d949)

"any entity" in the telecommunications statute doesn't pass this clarity test because Congress could have meant "any commercial entity;" after all, the Telecommunications Act is about regulating commercial activity.

But the CWA is not about regulating a commercial activity, it is about determining how sludge is disposed of, and it is about the health, safety, and aesthetics of a community – issues that have historically been left to the communities themselves. And in contrast to the Telecommunications Act, there can be no ambiguity as to whom Congress was referring in §1345(e) of the CWA when it says the manner of disposing of sludge "is a local determination." This is not an ambiguity like "any entity" – it is language that unmistakably and clearly points to localities, as Justice Souter's opinion requires.

Therefore, applying the principals set down by the United States Supreme Court in *Nixon,* one would have to conclude that because in the CWA Congress *did* make clear that it was referring to localities, Congress plainly intended that localities have a federally mandated right to determine how sludge is disposed of, and, consequently, that the federal statute can be used by localities to preempt any state statutes that may be in conflict with their federal right.

What remains now is for some county or consortium of counties to stand up to Virginia and assert their federal right to ban sludging within their borders. That has rarely been attempted in America. As noted above Rappahannock County, Virginia successfully banned sludging in 1994, Kern County, California passed an ordinance banning importation of sludge from LA, which ordinance has been upheld by the federal circuit court of appeals, and in May, 2011 Wahkiakum County, Washington has passed an ordinance banning land-application of sludge. [17] The Wahkiakum County ordinance has not been challenged in court as of the date of this paper.

SUMMARY

Over 60% of the human fecal matter produced by the cities of this country is mixed with toxic industrial waste, shipped to rural communities, and spread on the land there. In thousands of these rural communities

[17] http://www.co.wahkiakum.wa.us/depts/bocc/documents/151-11BanningBiosolids.pdf

the people, many of them too poor to assert their rights, have grown weary of being the collective pay-potty for the large cities, of being made ill by the practice of human fecal material being used as free fertilizer, of smelling it, of having their eyes burned by it, of having it spilled on their roadways, and of worrying about the lingering and very real threat to their rivers and ground water from the organic and inorganic contaminants found in sludge.

Fortunately, the federal Clean Water Act provides a way for these victims of the sludge industry to assert their right to determine whether or not sludge will be spread in their communities. Now, if only the county politicians and lawyers would step up to the plate and assert their counties' right to ban land application of sludge, rather than trying to argue that the counties have the right regulate land application of sludge.