Entrenching the Status Quo: The Ninth Circuit Uses Preemption Doctrines to Interpret CERCLA as Setting a Ceiling for Local Regulation of Environmental Problems

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The inadequacies of the federal and state hazardous waste cleanup statutes are almost as renowned as the high-profile incidents of pollution that spurred those laws' creation. Fireman's Fund v. City of Lodi gave the Ninth Circuit the chance to review a community's attempt to address those deficiencies. In that case, when its sole source of drinking water was contaminated, the City of Lodi supplemented federal and state law with a town ordinance that allowed more stringent cleanup. The plaintiff insurance companies, who were the target of the ordinance, challenged the ordinance on preemption grounds. Although the Ninth Circuit acknowledged municipalities' police powers to protect their community by holding that federal and state laws do not preempt the field, it limited that holding by determining that local enactments that enforce a more stringent cleanup standard are invalid because they conflict with the existing regulations' goals.

This Note asserts three arguments suggesting that the Ninth Circuit's conflict preemption holding was erroneous: first, the ruling is inconsistent with CERCLA; second, it violates Supreme Court precedent; and third, it is contrary to the court's own rationale. The Note concludes that the Fireman's Fund ruling contravenes Congress's intent to allow lower levels of government to improve upon existing regulations. Instead, the decision
entrenches the status quo by restricting municipalities' ability to protect their residents' health and safety; under Fireman's Fund, local legislation can only require polluters to clean up contamination to levels at or below those required by federal and state law, which are publicly recognized as inadequate.

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INTRODUCTION

In a remote area of northern California, lies the municipality of Lodi, a community of 57,000 people. Lodi is noted for having "an environmental public nuisance amounting to... a tremendous and serious groundwater contamination problem within [the] city limits..." according to California's Supreme Court. Unfortunately, that distinction does not make Lodi unique. In towns and cities of all sizes across the nation, properties contaminated with hazardous waste threaten residents' health and safety. The number of such sites, often referred to as "brownfields," is estimated to range "from tens of thousands to nearly 450,000, with some urban areas hosting more than 2,000 sites." The brownfields' size can fluctuate from a quarter acre to 1,300 acres. The sources of the waste polluting those areas are as varied as the sites are numerous. Some brownfields are remnants of 1950s weapons development plants and industrial runoff while others, including the site within the city of Lodi, resulted from local dry cleaners dumping chemicals down the drain. It is in the public's interest to clean up the contaminated soil and groundwater, not only to protect the residents' health and safety, but also for environmental reasons. Achieving cleanup...
under the existing federal and state hazardous waste laws, however, could take decades, if it happens at all. The inadequacies of the current cleanup regime have left communities with brownfields searching for alternatives.

*Fireman’s Fund Insurance Co. v. City of Lodi* presents the question of whether a municipality can constitutionally design and implement its own hazardous waste remediation ordinance without triggering preemption by federal and/or state laws. Addressing this issue, the Ninth Circuit concluded that municipalities are not preempted from enacting innovative ordinances that clean up polluted sites to the same or lower degree than federal and state government statutes require. *Fireman’s Fund* therefore represents an important judicial acknowledgement of local governments’ abilities to proactively address contamination that is too small to garner state or federal attention and is not being addressed voluntarily. However, the Ninth Circuit circumscribed municipal power by concluding that localities are preempted from enacting *more* stringent standards than those mandated by federal or state remediation laws. This Note maintains that the Ninth Circuit should have ruled, as other circuits have, that CERCLA sets a floor, not a ceiling, for hazardous waste cleanup standards.

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8. See *infra* notes 34-37 and accompanying text.


10. *Fireman’s Fund*, 302 F.3d at 952 (stating that Lodi’s cleanup provisions are only preempted to the extent they permit the city to order use of procedures more stringent than federal standards).

11. Under the existing hazardous waste cleanup regime a city may enforce state and federal laws where applicable. However, these methods have proved inadequate, causing municipalities like Lodi to develop their own enforcement mechanisms. See *infra* notes 30 and 35 and accompanying text.

12. *Fireman’s Fund*, 302 F.3d at 934, 949, 951-52 (holding that to the extent that the City of Lodi’s municipal Superfund law, the Comprehensive Municipal Environment Response and Liability Ordinance (MERLO) section 8.24.030(A)(5), permits the City to order abatement that is more stringent than National Contingency Plan, the court finds that the City is preempted by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.).

13. *See, e.g.*, United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1454 (6th Cir. 1991) (“CERCLA sets only a floor, not a ceiling, for environmental protection.”); *see also* Illinois ex rel. Ryan v. Northbrook Sports Club, 1999 U.S. Dist. LEXIS 18632, at *8 (E.D. Ill. Nov. 24, 1999) (upholding the Illinois state legislature’s expressed intent not to venture beneath the CERCLA floor. The Illinois legislature declared that “it would be inappropriate for the State of Illinois to adopt a hazardous waste management program that is less stringent than or conflicts with federal law.”).
Section I will describe the historical role municipalities have had in regulating environmental nuisances, particularly in the area of hazardous waste cleanup, and the continuing need for a local response. This section details the manner in which lower levels of government have gradually lost much of this authority under the doctrine of preemption, as state and federal governments increasingly developed their own environmental laws. Section II will detail the history of the Fireman’s Fund case, in which potentially responsible parties challenged Lodi’s unique environmental ordinance. Section III maintains that the Ninth Circuit failed to follow CERCLA’s text, legislative history, and congressional intent; deviated from United States Supreme Court precedent (in Mortier); and contradicted its own field preemption rationale (which correctly acknowledged lower-level governments’ rights to supplement CERCLA) by invalidating under preemption doctrines a law that did not treat CERCLA as setting a ceiling for cleanup standards. Section IV concludes that court’s paradoxical result - which acknowledged municipalities’ right to adopt supplemental standards in the field, yet invalidated an ordinance that exercised that right by requiring more cleanup - sets a bad precedent for proactive localities. Rather than holding open the window of opportunity Congress created, Fireman’s Fund simply entrenches the status quo.

I. THE STATUS QUO OF HAZARDOUS WASTE CLEANUP LAWS

A. The Response to Contaminated Property: Federal, State, and Local Hazardous Waste Cleanup Laws

Laws regulating the cleanup of property have historically developed on a local level. Municipalities and states exercised their police powers to prevent public nuisances and protect public health and safety, which formed the grounds for the first environmental laws. Some of those early local regulations included sanitation codes, drinking water provisions, and solid waste disposal enactments. Municipal environmental regulation expanded as the concept of environment grew, and these local regulations were tailored to the community’s specific needs. However, this ground-up approach declined in the 1950s and 1960s when national environmental laws emerged as the dominant source

of environmental protection and regulation. The displacement of local regulation with national laws naturally resulted in the trading of flexible, uniquely tailored policies for blanket rules designed to resolve national problems by addressing the lowest common denominator. The regulation of properties contaminated by hazardous waste illustrates this trend.

1. Federal Response: CERCLA

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a federal law designed to regulate the remediation of hazardous waste sites that threatened human health and the environment. CERCLA is commonly referred to as the "Superfund" law because one of its provisions imposes a tax on petroleum and chemical companies, establishing a trust fund to finance the cleanup of abandoned or uncontrolled hazardous waste sites. CERCLA and its interpretive guidance document, the National Contingency Plan (NCP), establish removal and remedial response procedures to eliminate or significantly reduce materials harmful to human and environmental health in a timely manner. Each year, sites are prioritized according to their designation on the National Priorities List (NPL), an inventory of the most threatening sites identified by the EPA. Under CERCLA, liability can attach to four categories of potentially responsible parties (PRPs). PRPs include current owners of contaminated property, former owners if they owned the property at the time of disposal, parties who arrange for hazardous waste treatment or disposal, and parties who transport such substances.

17. Weiland, supra note 14, at 468.
19. CERCLA Overview, supra note 18.
20. Id. The NCP informs the EPA and other agencies charged with CERCLA administration of the appropriate procedures for cleanup. Id.; see also Weiland, supra note 14, at 478, Stanton Road Assoc. v. Lohrey Enter., 984 F.2d 1015, 1020 (9th Cir. 1993) (stating that timely cleanup is a fundamental purpose and objective of CERCLA). See also Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp, 948 F.2d 1507, 1517 (9th Cir. 1991) ("[a] fundamental goal of CERCLA is to encourage and facilitate voluntary settlements.").
21. CERCLA Overview, supra note 18; Weiland, supra note 14, at 478 (NPL sites "pose the greatest risk to human health and the environment.").
23. Id.
The "compensation" aspect of CERCLA requires that responsible parties reimburse the government's costs of responding to a release or a threatened release of a hazardous substance. To effectuate the Act's goal of making the polluter pay, CERCLA liability is retroactive, meaning that parties may be held liable for releases that occurred prior to the enactment of the statute in 1980. CERCLA also invokes a strict liability scheme, whereby a person or corporation that fits within the statutory definition of a PRP is liable regardless of fault. Furthermore, PRPs are jointly and severally liable for the entire cost of cleanup.

CERCLA allows multiple levels of governmental and private entities to initiate the cleanup of hazardous waste. Where a state, city, or private party wishes to enforce CERCLA, the act provides two alternative legal avenues. A party can recoup environmental cleanup costs under either a section 107(a) cost recovery action or a section 113(f)(1) contribution action, but not both. CERCLA section 107(a) allows a party to recover costs incurred from PRPs as long as the enforcer is not deemed to be a PRP itself. If the enforcer is a PRP, it may still compel CERCLA under section 113(f)(1), a provision that gives a PRP the right to seek contribution from other responsible parties.

CERCLA section 121 details the level of clean-up required in a given situation, which generally is determined by all "applicable or relevant and appropriate requirements" (ARARs) of federal and state environmental laws. For example, residual contamination on the regulated property must meet "(i) any standard, requirement, criteria, or limitation under any Federal environmental law...or (ii) any promulgated standard, requirement, criteria, or limitation under a State law."
environmental or facility siting law that is *more stringent* than any Federal standard, requirement, criteria, or limitation."\(^{33}\)

Despite its broad sweeping liability measures and flexibility in allowing multiple parties to initiate hazardous waste cleanup, CERCLA is no panacea. The efficacy of CERCLA has been heavily scrutinized in the two and a half decades following its implementation.\(^{34}\) Given the pervasiveness of hazardous waste contamination, federal and state authorities typically only address the largest, most serious waste sites.\(^{35}\) New sites are added to the NPL significantly more rapidly than they are cleaned up and removed from it.\(^{36}\) Furthermore, the combination of diminishing enforcement resources (due to federal reluctance to extend the tax which replenishes the Superfund) and the under-enforcement of federal and state laws results in many smaller contamination sites going unaddressed.\(^{37}\) Attempts by higher-level laws to develop programs which encourage cleanup of smaller or lightly polluted sites have been

\(^{33}\) 42 U.S.C. § 9621(d)(2)(A) (emphasis added). Weiland, *supra* note 14; at 479 (determining which standards are ARARs is at times ambiguous despite the attempts to clarify this distinction by the NCP).

\(^{34}\) *See* Superfund Needs Reform to Speed Toxic Cleanup, *U.S.A. Today*, Feb. 2, 1994, at 10A (finding CERCLA is "absurdly expensive, hideously complex, and sometimes patently unfair. As a result it invites litigation the way dung attracts flies; not by seeking, but just by being."). *See also* Robert W. McGee, *CERCLA: It's Time for Repeal After a Decade of Failure*, 12 UCLA J. ENVTL. L. & POL'Y, 165 (1993).

\(^{35}\) Federal authorities are only involved in a small percentage of the nation's hazardous waste sites. *Brownfields Revitalization and Environmental Restoration Act*, S. REP. NO. 107-2 at 2 (2001) ("CERCLA was intended to clean up the nation's worst sites and identify responsible parties to bear the cost of cleanups...The need [for brownfield revitalization] is clear. While less than 1,500 sites have been listed on the National Priorities List (NPL), there are estimated to be more than 450,000 brownfield sites nationwide."). *Id.* at 2-3.

\(^{36}\) *Id.* The vast majority of contaminated sites will go unaddressed by the federal government. Because "the vast number of contaminated sites do not meet the criteria for inclusion on the NPL," the federal government will likely play no role in its cleanup or terminate its role after preliminary site assessment and emergency response. EPA, *AN ANALYSIS OF STATE SUPERFUND PROGRAMS: A 50 STATE STUDY, 2001 UPDATE*, 11 (Nov. 2002) [hereinafter 50 STATE STUDY]. Therefore, "if any government-supervised activity is to take place at non-NPL sites, states will have to oversee, enforce, or fund cleanup." *Id.* States, in turn, use various forms of risk assessment to prioritize the eligible sites for cleanup using state funds. *Id.* at 14. The majority of those non-priority state sites will go unaddressed unless a private party gets involved. According to the latest data only 31 states have voluntary cleanup incentive programs directed at brownfields remediation. *Id.* at 41. Among those programs, most are limited to sites that have redevelopment potential, so a contaminated site in a low income community would likely slip through the cracks of regulation and pose unchecked health risks on its neighbors. *Id.* at 41-42.

\(^{37}\) S. REP. NO. 107-2 at 5 (pinpointing lack of funding as an obstacle to brownfields redevelopment). "Many of the estimated 450,000 brownfields sites may be ripe for redevelopment, and merely lack a site assessment that confirms that a site is not contaminated. Often, funding is unavailable to conduct these site assessments or site characterizations. If the site assessment does confirm contamination at a brownfield site, private funding is often unavailable, but a small amount of Federal seed money can leverage other moneys that can be used for remediation." *Id.*
underutilized and often ignore local problems. Fortunately, CERCLA anticipated that problem and created an opportunity for lower levels of government to bridge the Act's gaps.

The authors of CERCLA recognized that cleaning up contaminated property would require a multifaceted approach—a joint effort among the various levels of government. In accordance with that goal, CERCLA contains three savings clause provisions that preserve lower-level governments’ rights to continue regulating hazardous waste cleanup where such local regulations do not conflict with the federal statute.

First, section 114(a) establishes that “nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.” Second, section 302(d) provides that “nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other federal or state law, including common law, with respect to release of hazardous substances or other pollutants or contaminants....” Third, section 310(h) declares that “this chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h),” a CERCLA provision that is not at issue in the present case.

These sections indicate that CERCLA does not override or invalidate the existing frameworks established by local, state, or common law but instead establishes a complimentary federal regulatory structure. Because Congress did not envision the federal government as the exclusive regulatory body in this area, lower levels of government may establish unique regulatory systems or borrow from this framework and build upon it, tailoring their hazardous waste regulations laws to meet local needs and individualized concerns. The savings clauses not only further Congress's goal of multi-level regulation, but also acknowledge the

38. The epidemic of under-enforcement is especially detrimental for brownfields, because CERCLA is devoid of a specific provision that encourages brownfield cleanup and redevelopment. ld. at 3. The EPA has a brownfields grant program which provides money to State and local governments to fund site cleanup. However, because this program was administratively created under CERCLA, it must follow the National Contingency Plan (NCP), an application designed for only the “nations worst hazardous waste sites” using a process that is “cumbersome and has become a significant barrier to greater participation in the program.” ld.

39. ld. at 15 (noting that “[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program.”)

40. Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 941 (9th Cir. 2002).

41. 42 U.S.C. § 9614(a) (2000). More stringent cleanup standards by lower-level governments is supported in other parts of the act as well. See CERCLA § 121, quoted supra at note 33.

42. 42 U.S.C. § 9652(d).

43. 42 U.S.C. § 9659(h).
traditional role state and local governments have played in regulating environmental nuisances.

2. State Response: California’s Superfund Act

In accordance with the congressional intent, forty-nine states have implemented their own version of CERCLA. The state’s action demonstrates that the need for cleanup far outreaches the federal government’s ability to redress contamination. Those polluted lands which are not designated as NPL sites are remediated and rehabilitated in accordance with the state laws, often using state funds. Unlike many federal pollution control laws, which set minimum national standards to be administered by federally-approved state programs, CERCLA requires no federal review of state Superfund laws. As a result, states enacting hazardous waste cleanup laws have been able to “experiment widely and to develop some highly innovative and effective cleanup programs.”

While flexibility is possible, the majority of state cleanup programs model the federal program. One such program, California’s state Superfund law, the Carpenter-Presley-Tanner Hazardous Substances Account Act (HSAA or California’s Superfund), is modeled after its federal analogue and contains many similar provisions. For example, California’s Superfund authorizes an administrative agency, in this case the California Environmental Protection Agency’s Department of Toxic Substances and Control (DTSC), to identify and prioritize the most seriously contaminated sites in the state and publish this list annually as California’s Superfund list. DTSC ranks sites and addresses them according to health and environmental risks, subject to available staff resources and funding. Under HSAA, California—like the federal

44. By the year 2000, every state but one had implemented some form of a hazardous waste cleanup policy. However, at that time, Nebraska, Idaho, and the District of Columbia lacked a “superfund” to pay for cleanups if no responsible parties could be found to pay for, or conduct the cleanup. Furthermore, six other states had superfund balances below one million dollars, a value EPA finds insufficient to remedy even a single site with moderate contamination permanently. EPA, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 2001 UPDATE, at 14. See also Harry F. Klodowski Jr., Redevelopment Under State Superfund Laws, available at http://library.law.findlaw.com/articles/file/00385/002302/title/topic/environmental%20law_cleanup%20%20superfund/filename/environmentallaw_1_410 (last visited Sept. 8, 2004).
45. See generally 50 STATE STUDY, supra note 36.
46. Id. at 13.
47. Id.
48. Id.
49. CAL. HEALTH & SAFETY CODE §§ 25300-25395.15 (Deering 2004).
50. See CAL. HEALTH & SAFETY CODE § 25356.
government—can order PRPs to perform cleanups and can undertake cleanup procedures itself if the PRPs fail to comply.\textsuperscript{52} To compensate for the DTSC’s inability to enforce cleanup at smaller sites, HSAA has authorized a voluntary cleanup program for low-priority contaminated sites within California.\textsuperscript{53} Rather than waiting for DTSC to issue a cleanup order, the voluntary program allows designated property owners to undertake cleanup and remediation measures themselves after obtaining DTSC oversight and approval.\textsuperscript{54}

The degree of cleanup required under HSAA is determined by the uniform national standard.\textsuperscript{55} Therefore, hazardous waste site remediation in California can be no less stringent than the federal cleanup standard set by the NCP,\textsuperscript{56} but California’s Superfund may impose higher cleanup standards than the federal government does.\textsuperscript{57}

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\item \textsuperscript{52} CAL. HEALTH & SAFETY CODE §§ 25355, 25358.3.
\item \textsuperscript{53} See Procedure for Managing Voluntary Site Mitigation Projects, supra note 51, at 2. Currently, 49 states have adopted some form of voluntary cleanup program encouraging private parties to undertake remediation measures in exchange for mitigated penalties. 50 STATE STUDY, supra note 36, at 8, 19, 109.
\item \textsuperscript{54} Procedure for Managing Voluntary Site Mitigation Projects, supra note 51, at 2; CAL. HEALTH & SAFETY CODE § 25355. Undertaking voluntary compliance with HSAA can result in mitigation of fines or reduced penalties, though the state reserves the right to bring enforcement actions under other statutory provisions if violations or deficiencies are discovered. See generally 50 STATE STUDY, supra note 36, at 39-40.
\item \textsuperscript{55} Fireman’s Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 952 (9th Cir. 2002) (citing CAL. HEALTH & SAFETY CODE § 25356(c)). Compare Kloodowski, supra note 45 (stating that other states’ cleanup standards vary significantly from NCP standards; “some follow Superfund or RCRA, some use risk assessment alone or in some combination, some use drinking water limits or water quality criteria, and others require cleanup to background levels[,]... usually the most strict cleanup standard.”). See also 50 STATE STUDY, supra note 36, at 14.
\item \textsuperscript{56} Fireman’s Fund, 302 F.3d at 952 (citing § 25356(c), which requires listed sites comply with the NCP).
\item \textsuperscript{57} The DTSC treats every site uniquely, forgoing generic soil clean-up levels for contaminated sites. Instead, cleanup levels are calculated through a risk assessment, which evaluates the types of toxic materials, the potential receptors, the pathways of potential exposure and the fate of the toxics in the environment. DTSC, Frequently Asked Questions, What is the Standard of Cleanup?, available at http://www.dtsc.ca.gov/ToxicQuestions/dofaqs.html#What%20are%20the%20standards%20for (last updated Apr. 28, 2004). Depending on the risk factors, the DTSC can and does order cleanup that is more stringent than the federal levels. As one DTSC administrator put it, “The federal laws [CERCLA] set a baseline level and the state can supplement it where appropriate.” Telephone Interview with Robert Krug, Project Manager, DTSC (Feb. 20, 2004). For example, California’s Education Code authorizes DTSC to cleanup school grounds to a degree that ensures no hazardous wastes exist on the property. Cal EPA, DTSC Site Mitigation and Brownfields Reuse Program Management Memo #EO-02-002-MM, Response Actions for Sites Where Future Use May Include Sensitive Uses, 1, available at http://www.dtsc.ca.gov/PolicyAndProcedures/SiteCleanup/SMBR_POL_SENSITIVEUSES-MM_E-02-002.pdf (last visited Sept. 8, 2004).
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As it is not unusual for state hazardous waste cleanup laws to be modeled after CERCLA, only the worst non-NPL sites in these states are addressed through enforcement actions in a timely fashion. Although it is unfortunate that smaller sites are ignored, addressing the most highly-polluted sites first and delaying the cleanup of smaller, less-severe sites makes administrative, economic, and political sense. Economic considerations would normally drive the private sector to clean up marginally contaminated sites. However, many state hazardous waste laws, following CERCLA, impose liability that is retroactive, strict, and joint and several. This liability system fails to create incentives for private actors to resolve the problems of the smaller sites. Developers prefer to sprawl outward to build on open land rather risk the liability associated with developing a contaminated site. Marginally contaminated sites within cities would therefore remain unaddressed if not for the desire of neighbors of the contaminated property to improve their environment.

3. Local Response: Municipal Ordinances and By-Laws

Local governments are usually the most familiar with the effects of local environmental problems, thus municipalities are often in the best position to determine the appropriate course of action in remediating contaminated property. Modern local hazardous waste regulation

58. 50 STATE STUDY, supra note 36, at 13.
59. See supra note 35.
60. U.S. CONFERENCE OF MAYORS, supra note 3, at 7. Under the current federal brownfield liability scheme, whether the or not the current owner polluted the water or land, they can generally be held liable for its cleanup. As a result, "many potential developers and businesses are driven away from these brownfields as potential sites for investment. Instead, private and public parties have looked to 'greenfields', pristine or undeveloped land, as the first choice for locating new businesses, new homes, and other types of development. As a result, our nation is consuming millions of acres of farmland and other open spaces at an ever increasing rate, while leaving hundreds of thousands of acres of brownfields abandoned or underutilized." See also, Robertson, supra note 4, at 1079.
61. See, e.g., Elena Rutrick, Local Pesticide Regulation Since Wisconsin Public Intervenor v. Mortier, 20 B.C. ENVTL. AFF. L. REV. 65, 67 (1993) (private citizens are in the best position to regulate pesticides because they are familiar with the local climate, water and population conditions); Id. at 89-90 (Federal policy cannot encompass all local "conditions such as climate, wind, population, and geographic differences and varying needs to protect their groundwater supplies," which local governments could better address because these areas "are individualized, and require little technical or scientific expertise."); Randall E. Kromm, Town Initiative and State Preemption in the Environmental Arena: A Massachusetts Case Study, 22 HARV. ENVTL. L. REV. 241, 249-50 (1998) (noting the distinct advantages localities have over centralized regulators and asserting that local enforcement can offer much needed respite to those citizens seeking to protect the environment during a politically environmental resistant administration, and can provide more flexibility to tailor the solution to the problem). However, academics also argue that allowing local control may be inappropriate to solve our national environmental problems. Id. at 250-51 (suggesting that national oversight is necessary to effectively solve environmental problems because, "State and federal regulators may fear that the efficiency,
typically takes the form of municipal ordinances, resolutions, or by-laws which regulate nuisances. Municipalities have successfully passed local laws that regulate hazardous waste and effectively and innovatively implement brownfield programs that are responsive to their specific needs. Until recently, however, no California municipality had attempted to follow the example of the state and implement a local hazardous waste regulation modeled after CERCLA or HSAA. The following section describes the source of local authorities' rights to regulate environmental nuisances as well as restrictions on that authority.

B. The Hierarchy of Environmental Regulation and Preemption Analysis

1. Home Rule

Most municipalities can enact legislation through a principle known as "home rule." The concept of home rule is derived from the Tenth Amendment, which reserves powers to the states that are not exclusively delegated to the federal government. States around the country, in turn, have included provisions in their constitutions or developed statutes that allow municipal governments to retain authority not exclusively assigned to the state. While the framework and scope of municipal authority varies, home rule typically allows for local regulation of either municipal affairs, or more broadly, any activity not prohibited by state law.

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effectiveness, and political acceptability of carefully crafted programs will be undermined if local governments are allowed to place further restrictions on activities inside their borders.

62. See Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 952 (9th Cir. 2002); Kromm, supra note 61, at 249.


64. Historically, towns derived their self-governing powers from a treatise on municipal authority referred to as "Dillon's Rule." The home rule's predecessor defined municipalities as subsets of State government "created for convenient administration" and granted only those powers necessary to run a municipal corporation. Kromm, supra note 61, at 255. See also GERALD E. FRUG, LOCAL GOVERNMENT LAW 141 (2d ed. 1994).


66. Weiland, supra note 15, at 263-65; Kromm, supra note 61 at 255. Note that because a locality's rights are derivative of the state's rights, their powers cannot exceed the state's powers.

67. Kromm, supra note 61, at 255.

68. Weiland, supra note 15, at 263-64; see also FRUG, supra note 64, at 70 (suggesting that the more broadly construed the home rule, the more effective it seems to be in limiting the scope of state power over local regulation.).
California follows the narrower formulation, allowing any locality with a charter to regulate its own affairs.  

Home rule also affirms the traditional concept of local police powers. Municipal police power includes the ability to regulate nuisances and to do "everything expedient for the preservation of safety, health, or comfort of the city's inhabitants." The Supreme Court has consistently asserted that "the regulation of health and safety matters is primarily, and historically, an area of local concern." Supporting that principle, in California the state constitution and legislature have provided cities with broad authority to address local environmental nuisances. Despite the empowering doctrine of home rule, higher-level governments can limit the rights of lower-level governments to develop conflicting regulations.

2. *Preemption*

a. *Hierarchy of Preemption*

When local, state, and/or federal laws overlap, the doctrine of preemption establishes which rules will govern. The concept of preemption is derived from the Supreme Court's interpretation of the Supremacy Clause of the Constitution. The Court has ruled that subordinate government entities' laws that "interfere with, or are contrary to the laws of Congress" are invalidated under the preemption doctrine. Thus under this hierarchical doctrine, when two levels of government have conflicting regulations, the higher level's law will be applied.


72. Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 942 (9th Cir. 2002).

73. *Id.*

74. U.S. CONST. art. VI, cl. 2.

75. Weiland, *supra* note 14, at 469; Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 479-514 (1988); Gibbons v. Ogden, 22 U.S. 1, 211 (1824) (declaring that acts of state legislatures that "interfere with, or are contrary to the laws of Congress" must yield to the supremacy of the federal laws).

76. Gibbons v. Ogden, 22 U.S. 1, 221 (1824).

77. Kromm, *supra* note 61, at 252 (stating that preemption analysis is "the framework by which courts evaluate statutory directives to determine what powers otherwise possessed by a lower level of government have been restrained or denied by a higher level.").

78. Weiland, *supra* note 15, at 260. At the state level, preemption of local laws varies according to state constitutions and the state laws themselves. Localities are often considered political subdivisions of the state and have the least autonomy in relation to state and federal
Federal preemption of local environmental laws became an issue during the 1960's and 1970's when federal and state regulatory agencies developed their own environmental laws and created increasing areas of overlap and conflict between the various levels of government. Courts increasingly relied on the preemption doctrine to sort out which laws could co-exist and which laws invalidated conflicting lower-level laws. When deciding whether a state or local law is preempted by a federal rule such as CERCLA, courts begin with a presumption against preemption in areas historically regulated by the states. Because environmental nuisance regulation is part of the commonly acknowledged police powers of states and localities, courts give weight to this fact in any preemption analysis. Nevertheless, determining Congressional intent concerning environmental regulation is a complex task.

b. Types of Preemption

i. Express Preemption

The preemption doctrine is divided into two main categories: "express" and "implied" preemption. Express preemption is an overt prohibition of regulation by a lower-level of government through explicit language in the statute itself. A textualist examination of the statutory language of the law in question makes plain the congressional command to expressly preempt a state or local regulation. For example, an express preemption clause within the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") invalidates non-federal regulation by providing that states and localities "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required in this subchapter." Since Congress's intent to
preempt lower laws is explicitly stated in the statute, the courts do not examine the legislative history and other supporting documents.

ii. Implied Preemption: Invalidating Lower Level Regulation of the Field

Implied preemption relies not on explicit statutory statements, but rather on statutory elements as a whole, legislative history, and supporting documents which reveal the lawmaker's intention to displace lower laws. Implied preemption relies not on explicit statutory statements, but rather on statutory elements as a whole, legislative history, and supporting documents which reveal the lawmaker's intention to displace lower laws. Two types of implied preemption exist—"field" and "conflict." Field preemption exists when Congress intended to exclusively occupy the field being regulated and prevent lower level regulation in that area. Courts will find field preemption when the field "is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Without an unambiguous statement in the legislative history to that effect, courts will find that multiple levels of government may regulate that area of law, and the federal laws will not exclusively govern.

Courts typically undertake a two-part test to evaluate field preemption. First, the courts ask whether the field is traditionally governed by local, state, or federal law. If the field is traditionally a federal area of law, a finding of federal preemption is given more weight. If regulation is traditionally a state or local issue, such a finding weighs against implied preemption and requires a stronger showing on the test's other prong.

Under the second prong, courts evaluate the congressional intent. If this review reveals a desire to allow or leave room for supplementation of

86. Weiland, supra note 15, at 253-54; Weiland, supra note 14, at 470.
87. Weiland, supra note 15, at 253-55 (field preemption is evidenced by either Congressional intent or the pervasiveness of the federal regulation); Weiland, supra note 14, at 470; Barnett Bank, 517 U.S. at 31.
89. See Weiland, supra note 15, at 253 (describing the "plain statement rule" requiring some sort of clear indication by government—whether or not it is express in the statute—indicating its intent to invalidate lower-level laws).
90. Weiland, supra note 15, at 255 (citing Hines v. Davidowitz, 312 U.S. 52, 74 (1941) and other Supreme Court cases in which the Court used a two step test to evaluate field preemption).
92. See Weiland, supra note 15, at 255.
93. Id. (suggesting that because courts "may come to widely divergent conclusions regarding congressional intent to preempt [lower] laws," the doctrine of preemption may be difficult to apply, lending weight to the conclusion that judges evaluate preemption more easily using a more objective analysis such as which government body typically controls the disputed area of law).
the regulated area by lower levels of government, the field is not preempted. For example, the Supreme Court ruled that, given the historic federal interest in regulating immigration and the pervasive nature of federal laws in that field, Congress intended to vest the federal government with broad national authority and therefore preempted the field by implication. In contrast, many environmental laws provide local, state, and federal governments with a shared regulatory role. Therefore, in arenas traditionally governed by state and local law, congressional intent to occupy the field through federal preemption must be "clear and manifest." Even if Congress did not intend to regulate the field, a lower level law may still be invalidated under the other type of implied preemption.

iii. Implied Preemption: Invalidating Conflicting Lower Laws

Conflict preemption prevents lower levels of government from creating regulations that either "conflict with or frustrate the purpose of federal law or the Constitution." Scholars suggest that this either/or language creates two varieties of conflict preemption. The first is "actual conflict," in which two statutes are incompatible. A classic example of an actual conflict occurred in the CERCLA context in United States v. City and County of Denver. In that case, pursuant to CERCLA, the federal Environmental Protection Agency (EPA) issued an order requiring a party to perform on-site remediation. At the same time, in accordance with a local zoning law, the city and county of Denver issued a conflicting cease and desist order prohibiting the party from performing on-site remediation. Given that it was impossible to comply with both orders simultaneously, the court invalidated the local zoning ordinance due to CERCLA preemption.

Even when two laws are not mutually exclusive, a court may still find a second type of conflict preemption, commonly referred to as "obstacle"

94. Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 942 (9th Cir. 2002).
96. Rutrick, supra note 61, at 71 (examples include FIFRA, the Resource Conservation and Recovery Act, the Oil Pollution Act, the Toxic Substances Control Act, the Safe Drinking Water Act and the Federal Water Pollution Control Act.)
100. Nelson, supra note 91, at 228; Weiland, supra note 15, at 253-54.
101. 100 F.3d 1509 (10th Cir. 1996).
102. Id. at 1512.
103. Id.
104. Id.
preemption. Obstacle preemption may be implied where complying with one statute would discourage achieving the goals of the other. In undertaking obstacle preemption analysis, a court must "consider both the degree to which the state or local law may interfere with the ends Congress intended to achieve and the means by which Congress decided to achieve those ends." Accordingly, under this doctrine, overlapping laws with the same goal are not enough to trigger conflict preemption. The state or local law must actively interfere with the legislature's objectives and means in order to be invalidated through obstacle preemption.

c. Effect of Preemption

When a higher-level enactment preempts a lower-level law, the conflicting law is struck down as void. As a result of the preemption doctrine, "federal preemption has been applied to strike down state and/or local regulations addressing: air pollution, hazardous waste management ... nuclear power, pesticide use, solid waste management, surface mining, toxic substance control, and water pollution control." However, some courts strike only the offending parts of the law and leave behind those aspects that do not interfere with the superior law. This distinction can be important because preemption significantly limits state and local governments' ability to develop alternative solutions to their environmental problems. The next section brings together the previously described elements, details how they play out in a courtroom battle, and comments on the outcome.

106. Weiland, supra note 14, at 471.
108. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); Weiland, supra note 14, at 471. See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 99 (1992) (invalidating a state law because the goals of the federal law were to protect workers health by regulating hazardous waste exposure uniformly and allowing the State to supplement that law would have abandoned the explicitly stated federal goal of uniformity).
110. Weiland, supra note 14, at 471.
111. See, e.g., Fireman's Fund, 302 F.3d 928.
112. See generally, Weiland, supra note 14, at 467.
II. STORY OF FIREMAN'S FUND: A CITY'S EFFORT TO CLEAN UP HAZARDOUS WASTE

A. Facts of the Case

In 1989, the City of Lodi ("City" or "Lodi"), a small town in California's central valley, discovered tetrachloroethylene ("PCE"), a carcinogenic chemical in their groundwater, the City's sole source of drinking water and primary source of agricultural water. To address this threat to the environment and the public's health and safety, the City sought to discover and hold accountable the responsible parties. Working jointly with the California Environmental Protection Agency's Department of Toxic Substances Control (DTSC), the City performed an investigation to identify PRPs and their insurers, who would be responsible for the remediation and rehabilitation of Lodi's groundwater. The City maintained that small, local businesses, including several drycleaners, caused the release of the toxic industrial chemicals. The polluted water source (the Lodi Groundwater Site) was listed by DTSC as a state hazardous waste site in fiscal year 1993-94, making it subject to HSAA requirements.

The City of Lodi wanted to quickly clean up the contaminated property and make the polluters pay for the remediation. In accordance with a "Comprehensive Joint Cooperation Agreement" (Cooperative Agreement or Agreement) between the City and DTSC, the City assumed the lead enforcement position and agreed to use and enforce applicable federal, state, and municipal hazardous waste laws through remedial, regulatory, injunctive, and cost recovery actions. The agreement required:

...the prompt enactment and enforcement of a comprehensive municipal environmental response ordinance [MERLO] which shall enact into municipal law additional legal authorities to appropriately
supplement the City of Lodi’s already extensive environmental response authority under federal, state and local law.\textsuperscript{119}

**B. Local Hazardous Waste Cleanup Ordinance: MERLO**

In accordance with the Cooperative Agreement, the City Council enacted a local ordinance entitled Comprehensive Municipal Environmental Response and Liability Ordinance (MERLO or the Ordinance).\textsuperscript{120} Generally, MERLO granted the City the authority to investigate and remediate hazardous waste contamination affecting the City and to bring direct actions against PRPs and their insurers to recover cleanup costs.\textsuperscript{121} MERLO was intended to supplement its federal and state analogues, CERCLA and HSAA, and it accordingly incorporates many of the federal and state standards.\textsuperscript{122} However, the Ordinance does not necessarily require that the contaminated sites be cleaned up to a standard equivalent to the federal and state standards.

Under MERLO, sites listed by California or the federal government must meet NCP cleanup standards.\textsuperscript{123} Because the DTSC listed the Lodi Groundwater Site, the level of abatement could be no less stringent than

\textsuperscript{119} Id. The Cooperative Agreement also detailed Lodi’s agreement to reimburse DTSC for response costs not reimbursed by PRPs in exchange for DTSC’s covenant not to sue the City for claims arising from Lodi’s design, construction, operation or maintenance of any storm or sanitary sewer systems. Fireman’s Fund, 302 F.3d at 936. The City was also given contribution protection in the Agreement. Appellee City of Lodi’s Response to Opening Brief of Appellant Fireman’s Fund Insurance Company, 1999 WL 33623794, at 8. The City sought such an arrangement because it repeatedly denied any liability relating to the City’s operation of sewer and storm water systems, despite claims that the city’s failure to maintain those systems resulted in leaking or leaching of the toxic chemicals into the water systems. Fireman’s Fund, 302 F.3d at 936; Brief in Opposition to Petition for Writ of Certiorari, 2003 WL 21698673, at 1–2; Appellee City of Lodi’s Response to Opening Brief of Appellant Fireman’s Fund Insurance Company, 1999 WL 33623794, at 8 (noting that the City was never formally accused of liability by the California EPA and the City denies liability).

\textsuperscript{120} City of Lodi Ordinance 1650 “Comprehensive Municipal Environment Response and Liability Ordinance” MERLO §§ 8.24.010 et. seq.; Appellee City of Lodi’s Response to Opening Brief of Appellant Fireman’s Fund Insurance Co., 1999 WL 33623794, at 9. While the original MERLO was repealed and an amended version reenacted, the courts have found this action did not moot the Insurers’ appellate claims because the two were substantially similar, and given provisions in both versions as well as the municipal code, the remedial enforcement action remained viable. See Fireman’s Fund, 302 F.3d at 936, n. 8. The PRPs and their insurance companies characterized MERLO, the City’s local hazardous waste ordinance, as a cost shifting law enacted to help the City skirt its own liability and “go after insurance money.” See Brief in Opposition to Petition for Writ of Certiorari 2003 WL 21698673, at 2.

\textsuperscript{121} Fireman’s Fund, 302 F.3d at 934, 936; Petition for Writ of Certiorari, 2003 WL 21698672, at 6. MERLO defined certain conditions, releases, and processes to be public nuisances properly regulated by the City. Fireman’s Fund Ins. Co. v. City of Lodi, 41 F. Supp.2d 1100, 1105 (E.D. Cal. 1999).

\textsuperscript{122} Fireman’s Fund, 302 F.3d at 937.

\textsuperscript{123} MERLO § 8.24.030(A)(7) requires actions at listed sites shall comply with Cal. H&S §25356, which in turn requires adherence to the NCP.
However, MERLO section 8.24.030(A)(5) states that Lodi may order additional or more stringent requirements than those applicable under the federal NCP standard. At the same time, beyond the Lodi Groundwater Site, MERLO also provided that the City “may order less stringent requirements” than those that would apply under the NCP. The ordinance also included a severability provision, establishing that any portion of MERLO held unconstitutional would not affect the remainder of the Ordinance.

Using the national and state government’s hazardous waste liability statutes as baseline models, the City of Lodi sought to develop a swift and effective environmental law. MERLO’s authors therefore distinguished the ordinance from its higher governmental equivalents in other substantive areas, in addition to altering the required cleanup standard. Building a broader and more comprehensive law allowed Lodi to regulate anything put into the ground as a nuisance. The enactment also recognized that in such a small community, businesses that caused releases might not be able to afford the full cleanup costs, and MERLO therefore enabled the City to move against PRPs’ insurance companies. Under the terms of MERLO, a judgment against the PRPs could occur in administrative courts as well as federal and state courts, a provision that the City expected would expedite rulings against PRPs. The remedies MERLO provides exceed those allowed by state and federal law, garnering the City certain response costs unavailable under existing laws and injunctions in a more timely manner. This way, the City would not have to wait for the site to be recognized nationally or by California before the contamination could be addressed. However, the same federal and state hazardous waste cleanup acts on which Lodi based its supplemental Ordinance—CERCLA and HSAA—became the basis for

124. MERLO § 8.24.030(A)(7); Fireman’s Fund, 302 F.3d at 951.
125. MERLO § 8.24.030(A)(5); Fireman’s Fund, 302 F.3d at 951.
128. Interview with Cecilia Fusich, Envision Law Group, Counsel for the City of Lodi (Nov. 4, 2003).
129. Interview with Cecilia Fusich, Envision Law Group, Counsel for the City of Lodi (Nov. 4, 2003).
130. Id.
131. Id.
constitutional preemption claims brought by the PRPs' insurance companies.

C. Judicial Interpretation of Preemption Claim against MERLO

In May 1998, the City brought an abatement action under MERLO against local drycleaners that used PCE in their businesses. In response, those businesses' insurance companies, Fireman's Fund and Unigard (collectively, "the Insurers"), filed separate actions against the City, alleging that MERLO was unconstitutional. The claims centered around allegations that MERLO violated: (1) the U.S. Constitution's Supremacy Clause due to CERCLA preemption; and (2) the California State Constitution's Article 11 due to HSAA preemption. In bringing these actions, the Insurers sought a declaration invalidating the MERLO and an injunction prohibiting Lodi from enforcing it. The Insurers theorized that the combination of CERCLA and HSAA preempted the field of hazardous waste cleanup regulation and argued that MERLO's provision enabling Lodi to impose higher cleanup standards conflicted with CERCLA's goals.

1. District Court Ruling

In separate actions, Unigard and Fireman's Fund moved for partial summary judgment and a permanent injunction and the City moved to dismiss for lack of jurisdiction and failure to state a claim. At the close

132. Fireman's Fund v. City of Lodi, 302 F.3d 928, 934-35, 937 (9th Cir. 2002).
133. Id.
134. Id. at 938. Unigard raised other claims, such as preemption by California Insurance Code § 11580 and violations of the Contracts Clause of the United States Constitution. However, the court dismissed the majority of these claims prior to the transfer of the action from the Northern to the Eastern District of California.
135. Fireman's Fund, 302 F.3d. at 937-38.
136. In both instances, the district court applied the Pullman abstention doctrine and abstained from deciding if state law preempted MERLO. Id. at 938-939. The Pullman abstention doctrine "... allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." San Remo Hotel v. City of San Francisco, 145 F.3d 1095, 1104 (9th Cir. 1998) (the doctrine's name comes from Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)); Fireman's Fund, 302 F.3d at 938, n.11. The Pullman abstention doctrine requires that:

(1) the complaint must involve a 'sensitive area of social policy' that is best left to the states to address; (2) 'a definitive ruling on the state issues by a state court could obviate the need for [federal] constitutional adjudication by the federal court'; and (3) 'the proper resolution of the potentially determinative state law issue is uncertain.'

Id. at 939-940 (quoting from Cedar Shake and Shingle Bureau v. City of Los Angeles, 997 F.2d 620, 622 (9th Cir. 1993)) (internal footnote omitted). The Ninth Circuit found the district court's Pullman abstention erroneous particularly on the first and third elements. Id. at 940. The Ninth Circuit held that HSAA neither alone nor in combination with CERCLA preempted the hazardous waste remediation field. Id. at 956.
137. Id. at 938.
of 1998, the district court held a joint hearing on all motions in both cases and then issued two written opinions. The district court ruled for Lodi in both cases, finding that MERLO was not preempted by CERCLA. On the Insurers' field preemption claim, the district court ruled that Congress did not intend that CERCLA should preempt all state environmental laws. To the contrary, the court held that regardless of the statute's comprehensiveness, CERCLA's savings clauses evince clear congressional intent that states and their political subdivisions could supplement the regulation with more stringent environmental regulations. On the conflict preemption claim, the district court ruled that while the ordinance and CERCLA differ, there is no obstacle preemption because both statutes' goals were to clean up hazardous waste. Nor could the court find actual conflict preemption because "it is not physically impossible for [the Insurer] to comply with [both CERCLA and MERLO]," particularly in this case, where CERCLA was not being enforced. Fireman's Fund and Unigard separately appealed the lower court decisions.

2. Ninth Circuit Opinion

a. Court Finds No Field Preemption

The Ninth Circuit reviewed de novo whether CERCLA and HSAA together preempted the field of hazardous waste remediation.

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138. Id.
139. Id. at 938-39. While the court issued two written opinions, the holding for both plaintiffs was essentially identical.
141. Id. (citing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) to determine that CERCLA's silence on municipal supplementation did not establish a clear and manifest purpose to preempt local authority).
142. Id. at 1112.
143. Id. at 1111. Lodi was never listed nationally by the EPA because, like many brownfields sites, it did not meet the criteria that would make it significant enough to be singled out as one of the gravest and riskiest instances of hazardous waste contamination.
144. Upon consolidation, the Insurers obtained a ruling partially affirming and partially reversing the district court. Brief in Opposition to Writ of Certiorari, 2003 WL 21698672, at 7. The Insurers filed petition for rehearing and the Ninth Circuit withdrew its opinion and issued a new published opinion. Id. A subsequent petition for rehearing was denied but resulted in a final, modified published opinion from that court. Id. The Supreme Court denied certiorari to review the Ninth Circuit, therefore the next section evaluates the Ninth Circuits ruling in that case.
145. The Ninth Circuit applied a de novo standard of review because it was reviewing the district court's decision to grant or deny a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 939 (9th Cir. 2002).
Following its own precedent, the court rejected the Insurers’ field preemption claim. In accordance with the lower court, the reviewing court concluded that neither CERCLA alone nor the combination of CERCLA and HSAA completely preempt the field. The court based this determination, as the district court did, on the existence of CERCLA’s three savings clauses that preserve states’ regulatory rights.

The Insurers claimed that the savings clauses’ grant of power to “States” to supplement CERCLA intentionally excluded municipalities such as Lodi from its purview because CERCLA explicitly refers to municipalities elsewhere. If Congress intended to preserve local regulation, the Insurers argued, the savings clauses would have designated that authority for both “States and municipalities.” The court swiftly and summarily rejected this argument, finding such a narrow interpretation contrary to Supreme Court precedent, CERCLA itself, and general reason.

The cornerstone of the Ninth Circuit’s field preemption analysis rested on the precedent established in the Supreme Court case, Wisconsin Public Intervener v. Mortier, which raised a similar claim that a local ordinance was preempted by FIFRA, a federal statute whose savings clause referred only to “States” but not to localities. In Mortier, a small Wisconsin community adopted a local ordinance fashioned after state and federal pesticide laws and enacted it under the town’s police powers as granted by the state constitution. The ordinance required those seeking to apply pesticides to obtain a permit first. When Mortier, a resident, was granted a permit with conditions that limited his pesticide use, he sought a declaratory statement that the ordinance was preempted by state and federal law. The Supreme Court found that neither the language nor the legislative history of FIFRA expressed any intent to pre-empt local regulation. Rather, the Court held that FIFRA “implies a regulatory partnership between federal, state, and local governments” in its savings clauses. The Court determined that although FIFRA’s savings clauses made no reference to municipalities, the term “State” was broad enough to encompass a state’s political

146. Id. at 941, 943 (citing ARCO Envtl. Remediation, LLC v. Dep’t of Health & Envtl. Quality, 213 F.3d 1108, 1114 (9th Cir. 2000)).
147. Id.
148. Id. at 942.
149. Id. at 942-43.
151. Id. at 602.
152. Id. at 602-03.
153. Id. at 603.
154. Id. at 606.
155. Id. at 615.
subdivisions.\footnote{156} This broad reading was based on the presumption that, to find field preemption in the absence of explicit preemptive language, the Court required a showing that Congress left no room for supplementation.\footnote{157} The Supreme Court held that the statute's silence regarding localities was insufficient \textquote{to establish a clear and manifest purpose to preempt local authority.}\footnote{158}

Drawing an analogy between FIFRA and CERCLA, the \textit{Fireman's Fund} court held that CERCLA's savings clauses are broad enough to permit states \textit{and} their subdivisions the right to supplement federal hazardous waste laws.\footnote{159} The court found that CERCLA's text provides explicit support for that interpretation in section 9606(a) which begins, \textquote{In addition to any other action taken by a State or local government...}\footnote{160} The court suggested that the quoted provision and others indicated congressional intent that local governments could undertake independent remedial actions beyond those provided for by CERCLA.\footnote{161} The court further noted that HSAA contained similar provisions to CERCLA which authorized cities to adopt parallel municipal environmental ordinances.\footnote{162}

The court found additional support for its conclusion in the historic grant of local police power to regulate nuisances. Under the Ninth Circuit's analysis, reading CERCLA to allow local enforcement as a part of the explicitly granted state rights comported with the traditional right of local governments to preserve and protect public health.\footnote{163} In so ruling, the court recognized the importance of preserving the City's historic police powers in order to protect public health and safety.\footnote{164} Given California's constitutional grant of broad municipal authority to address local environmental nuisances, the court determined that rejecting field preemption was appropriate because the regulation in question fell into a historically local area and, under such circumstances, \textquote{preemption may
not be lightly found." Thus, the Ninth Circuit concluded that Congress did not intend CERCLA to preempt the field of hazardous waste regulation. This finding was only the beginning of the court’s preemption analysis, however.

b. Ninth Circuit Finds Conflict Preemption

The court found merit in the Insurers’ claim that MERLO is preempted where it allows the City to require more stringent remediation than federal or state standards.166 The Ninth Circuit established that it would find federal conflict preemption where complying with two regulations would be impossible or where a lower law acts as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”167 The court determined that MERLO’s provision granting Lodi authority to order more stringent abatement was preempted because it interfered with the goals of CERCLA.168 Fearing that Lodi’s actions in creating MERLO would cause a slippery slope, the Ninth Circuit concluded that allowing “thousands of different local governments to impose their own liability schemes . . . would foster uncertainty and discourage site cleanup.”169

Specifically, the court held that MERLO conflicted with CERCLA’s purpose of encouraging timely cleanup of hazardous waste sites and therefore stood as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”170 The court pointed to several government sources suggesting that the primary obstacle to brownfield cleanup is uncertain or overly strict regulatory demands.171 Though the court did not explain its reasoning, it claimed that predictability is the key to swift rehabilitation and allowing each locality to impose its own liability scheme would be “inefficient and inequitable.”172 Presumably, the court believed that allowing cleanup more stringent than the NCP would either be overly restrictive or be

165. Id. at 943 (quoting Western Oil & Gas Assoc. v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408 (1989)).
166. Id. at 951. The Ninth Circuit also held that: (1) MERLO was not preempted by the California doctrine of preemption by duplication; (2) the burden of proof set by MERLO for PRPs for establishing a defense to liability was preempted; (3) MERLO was invalidated where the ordinance expanded the city’s ability to sue insurers beyond what is permitted by California insurance law; (4) sections of MERLO allowing Lodi to impose joint and several liability on other PRPs and to recover attorneys’ fees may be preempted if Lodi is judicially declared a PRP; and (4) that the balance of MERLO remained viable. Id. at 956-57.
167. Id. at 954-55.
168. Id. at 952.
169. Id. at 949.
171. Id. at 948-49.
172. Id.
uniquely debilitating because it departed from the uniform national norm. The court suggested that fear of liability due to lack of predictability impedes investigation and discourages remediation by both PRP's and prospective purchasers of contaminated property.\textsuperscript{173}

Despite its emphasis on uniformity as the linchpin to avoiding obstacle preemption, the court—seemingly incongruously—found that where MERLO allows the City to impose less onerous cleanup standards than state and federal laws, it was not preempted.\textsuperscript{174} The court concluded that it saw "no reason" for localities to adhere to state and federal standards, since neither preempt the field. The court, in fact, encouraged localities to enact non-conflicting standards for smaller sites that "do not attract state or federal involvement" because they are in a unique position to implement innovative and effective remediation programs.\textsuperscript{175}

To this end, the court found that the lower cleanup standard which can occur under MERLO at sites beyond the Lodi Groundwater Site is "particularly useful" because less onerous standards could "make rehabilitation of contaminated property more feasible, thus furthering the objective of Congress."\textsuperscript{176} The court also concluded that cities may enact municipal environmental ordinances that are less or more stringent than the NCP where they do not conflict with CERCLA or HSAA.\textsuperscript{177}

The court provides no explanation for its blatantly contradictory conclusion that less onerous regulations are not preempted but more onerous regulations are.\textsuperscript{178}

\section*{III. ACCOLADES FOR FIELD PREEMPTION AND CRITICISM FOR THE COURT'S CONFLICT PREEMPTION RULING}

The Ninth Circuit correctly decided the field preemption claim in Lodi, but erroneously decided the conflict preemption claim by holding that CERCLA preempts MERLO where MERLO allows Lodi to impose higher cleanup standards. The Ninth Circuit's field preemption analysis followed CERCLA's text and intent, as well as judicial precedent, in finding that federal hazardous waste regulation anticipates lower-level

\begin{itemize}
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.} at 952.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} \textit{Id.} at 949, 952.
\item \textsuperscript{177} \textit{Id.} at 952. In this case, the Lodi Groundwater Site had been listed by the California DTSC in 1993-94. \textit{Id.} at 951-52. MERLO required that listed sites comply with HSAA which requires standards no less stringent than the NCP. \textit{Id.} at 952. Accordingly MERLO only allowed cleanup to be equal to or higher than NCP standards at the Lodi Groundwater Site. \textit{Id.} At unlisted sites, it seems the Ninth Circuit would allow cleanup to be either equal to or less than NCP standards.
\item \textsuperscript{178} Presumably, the court's rationale is that raising the cleanup standard makes remediation less likely which conflicts with CERCLA's goals and is therefore preempted, while maintaining or reducing the standard makes cleanup equally or more likely and is therefore not preempted.
\end{itemize}
supplementation in its savings clauses. Unfortunately, this acknowledgment of state and local supplementation authority was erroneously ignored in the court's evaluation of conflict preemption. As a result, the Ninth Circuit's ruling creates a paradox, acknowledging that municipalities can impose supplemental standards in the field of hazardous waste regulation, yet finding that when they do so by requiring a more stringent standard of cleanup than federal regulations do, such standards are preempted. The Ninth Circuit should have held that CERCLA sets a floor and not a ceiling of environmental protection (as it did in its initial ruling on this case).\textsuperscript{79} Such an outcome is compelled by CERCLA itself, judicial precedent, and the Ninth Circuit's own analysis.

A. Field Preemption: Getting it Right

The Ninth Circuit avoided one pitfall of preemption analysis (implying field preemption where it does not exist) when it ruled that CERCLA does not preempt the field of hazardous waste remediation. Despite the existence of a seemingly straightforward two-step field preemption test, courts have often interpreted those requirements in a way that makes the test meaningless.\textsuperscript{8} Many findings of field preemption have been based on little more than the assertion that, because a federal law applies nationwide, it has the pervasive, uniform impact required for a field preemption finding.\textsuperscript{180} The simple fact that a congressional

\textsuperscript{79} See Fireman's Fund Ins. Co. v. City of Lodi, 271 F.3d 911 (9th Cir. 2001), an earlier Fireman's Fund unpublished opinion where the court followed United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1454 (6th Cir. 1991) ("CERCLA sets only a floor, not a ceiling, for environmental protection.") and concluded MERLO's provisions allowing the city to impose stricter remediation standards was not preempted. See also Appellee City of Lodi's Response to Opening Brief of Appellant Fireman's Fund Insurance Company, 1999 WL 33623794.

\textsuperscript{8} The Court has endorsed undertaking a two step field preemption test to make that determination, by asking: 1) if the field is traditionally a federal or state issue and 2) what was the Congressional intent. Wisconsin Public Intervenor v. Mortier, 501 US 597, 605 (1991); Hines v. Davidowitz, 312 U.S. 52 (1941) (applying the two part test to hold that a Pennsylvania law regulating immigration was preempted by federal law because immigration law must have broad national authority applied through a single, all-embracing system). However, this seemingly clear and simple rule has been manipulated by the courts. Kromm, supra note 61 at 279 (finding that courts undertaking a field preemption analysis can often abandon the frustration-of-purpose inquiry and erroneously rely on the comprehensiveness of a law to determine a law was meant to control the field, when this is not necessarily the legislative intent). This is particularly a grave outcome for localities because it prevents towns from addressing issues that are consistent with the higher regulation. This result in turn creates uncertainty for cities in terms of what will be preempted, possibly creating a chilling effect for municipalities considering developing their own solution. Compare Town of Wendell v. Attorney General, 476 N.E. 2d 585, 590-592 (Mass. 1985) (concluding that although the court found obstacle preemption, the comprehensiveness of a federal or state act cannot foreclose local regulation through field preemption, and therefore localities could develop non-conflicting pesticide regulations).

\textsuperscript{180} See Weiland, supra note 15, at 259. See, e.g., Jersey Central Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985) (finding local ordinance regulating nuclear waste was preempted, in part, because of the perversiveness of the federal regulatory scheme);
regulatory scheme is uniform and applies an identical standard throughout the nation should have no bearing on the interpretation of field preemption. Otherwise, every federal enactment would preempt its field. This spurious rationale acts as a smokescreen, allowing courts to invalidate lower-level environmental regulations simply because a higher law on the same subject already exists.\textsuperscript{182} The Insurers' brief attempted to lure the Ninth Circuit into this faulty reasoning by arguing field preemption existed merely because a higher law on the same subject already exists.\textsuperscript{182} Viewed against this jurisprudential background, the Fireman's Fund court's decision to uphold the field preemption standard set out by the Supreme Court is refreshing change. In the narrower context of CERCLA field preemption decisions, however, this case is not unique. The Ninth Circuit's ruling falls in line with substantial judicial precedent. The Supreme Court and many circuit courts, including the Ninth, have held that in enacting CERCLA, Congress neither explicitly preempted all state environmental laws, nor enacted a regulatory scheme so comprehensive as to provide no room for state supplementation.\textsuperscript{183} The

Water Quality Ass'n v. County of Santa Barbara, 44 Cal. App. 4th 732 (1996) (holding State regulation of water softeners preempted a local regulation attempting to implement heightened standards, despite state water agency published finding of no preemption, because the legislators impliedly intended uniform standards to apply); Water Quality Ass'n v. City of Escondido, 53 Cal. App. 4th 755 (1997) (same—city's water quality requirements held preempted because judge sought a uniform, centralized approach). In the area of hazardous waste regulation, local laws in other states have repeatedly been found to be preempted by state and federal hazardous waste laws. See, e.g., Envirosafe Servs. of Idaho, Inc. v. County of Owyhee, 112 Idaho 687 (1987) (concluding that where a municipality modeled local regulations after federal and state laws, the state law amounted to a comprehensive regulation in the field, preempting lower level regulation); Stablex Corp. v. Town of Hooksett, 122 N.H. 1091 (1982); Township of Cascade v. Cascade Resources Recovery, Inc., 118 Mich. App. 580 (1982); Rollins Envtl. Servs., Inc. v. Township of Logan, 209 N.J. Super. 556 (1986). But compare Town of Wendell v. Attorney General, 476 N.E. 2d 585, 590-592 (Mass. 1985) (determining that the law's comprehensiveness could not be used to imply field preemption). \textsuperscript{182} See generally Weiland, supra note 15. \textsuperscript{183} Reply Brief of Appellant Fireman's Fund Insurance Company, 1999 WL 33623792, at 15-17. "CERCLA unlike FIFRA, 'is a comprehensive statute that occupie[s] the field'" in what Fireman's Fund claims is a narrow field of "investigation and remediation of hazardous substance releases and the allocation of liability for costs of response."

\textsuperscript{184} See, e.g., Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); Manor Care, Inc. v. Yaskin, 950 F.2d 122 (3d Cir. 1991); ARCO Envtl. Remediation, LLC v. Dep't of Health and Envtl. Quality, 213 F.3d 1108 (9th Cir. 2000); Bedford Affiliates v. Sills, 156 F.3d 416, 426 (2d Cir. 1998) (finding that in enacting CERCLA, Congress did not explicitly or impliedly occupy the field by preempting all state environmental laws); Witco Corp. v. Beehuis, 38 F.3d 682, 687 (3d Cir. 1994)(same); United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1455 (6th Cir. 1991) (same); Illinois ex rel. Ryan v. Northbrook Sports Club, 1999 U.S. Dist. LEXIS 18632, at *9 (E.D. Ill 1999) ("CERCLA sections 114(a), 302(d) and 106(a) support the proposition that CERCLA does not presumptively preempt state or local law"). Fireman's Fund Ins. Co. v. City of Lodi, 41 F. Supp. 2d 1100 (D. Cal. 1999) (holding CERCLA did not entirely preempt the field of environmental regulation but reflected a congressional intention to allow state and local authorities to impose
reason courts repeatedly have come to this conclusion is simple. Congress clearly and expressly declared in its savings clauses that it had no intent to allow CERCLA to override the field.\textsuperscript{185}

The three savings clauses expressly provide that nothing in CERCLA should be interpreted to prevent states from imposing additional liability, modifying personal obligations, or altering the timing of review under other state law regarding release of hazardous substances, and these factors clearly guide the court's field preemption analysis.\textsuperscript{186} Even a rudimentary application of statutory construction reveals that CERCLA anticipates supplementation by the states. A textual reading of the savings clauses demonstrates congressional intent to preserve the power of states and localities to "impose[e] any additional liability or requirements with respect to the release of hazardous substances."\textsuperscript{187} If Congress intended to occupy the entire field, this language would be surplusage and would violate the canon of statutory interpretation requiring that effect be given to each word of the law's text.\textsuperscript{188} The appeals court in \textit{Fireman's Fund} therefore correctly acknowledged that CERCLA's savings clauses reveal Congress's intent to preserve states' rights to regulate hazardous waste cleanup.\textsuperscript{189}

The noteworthy aspect of \textit{Fireman's Fund} field preemption ruling was the Ninth Circuit's extension of \textit{Mortier} beyond its FIFRA context. Responding to the Insurers' claim that the omission of the term "municipalities" in CERCLA's savings clauses was intentional, the \textit{Fireman's Fund} court cross-applied the Supreme Court's analysis of savings clause provisions empowering political subdivisions of states to apply under CERCLA as well.\textsuperscript{190} As discussed in above, in \textit{Mortier}, when the Court heard an argument that FIFRA's savings clause applied only to the governing bodies mentioned (states, and not localities), it reasoned that the Acts "mere silence...cannot suffice to establish a 'clear and

\textsuperscript{185} See 42 U.S.C. § 9614(a) (2000) ("Nothing in this chapter shall be construed or interpreted as preemption any State from imposing any additional liability or requirements with respect to the release of hazardous substances ... "); § 9672(a) ("Nothing in this subchapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State."); \textit{Fireman's Fund}, 302 F.3d at 942.

\textsuperscript{186} §§ 9614(a), 9652(d), 9659(h). This interpretation was also upheld by the Supreme Court in its ruling on the similarly drawn FIFRA in \textit{Wis. Pub. Intervenor v. Mortier}, 501 U.S. 597 (1991).

\textsuperscript{187} 42 U.S.C. §9614(a).

\textsuperscript{188} \textit{Fireman's Fund}, 41 F. Supp. 2d at 1110.

\textsuperscript{189} 302 F.3d at 941 (citing ARCO Envtl. Remediation, LLC v. Dep't of Health and Envtl. Quality, 213 F.3d 1108 (9th Cir. 2000)).

manifest purpose' to preempt local authority.\textsuperscript{191} Accordingly, the Court concluded localities were empowered through the savings clauses because "political subdivisions are components of the very entity the statute empowers."\textsuperscript{192}

The \textit{Mortier} Court came to this conclusion despite FIFRA's legislative history which revealed that congressional committees rejected proposals to explicitly empower municipalities.\textsuperscript{193} The Supreme Court reasoned that those historical statements merely reflected congressional debates on the local role local regulating pesticides, and that in the end the Act was left deliberately vague.\textsuperscript{194} Since legislative history was not persuasive, the Court followed a textual reading. Interpreting the term "State" to include its political subdivisions was a common and plausible reading; therefore, the Act's scattered references to "localities" did not persuasively indicate that its omission in the savings clause meant that localities were excluded.\textsuperscript{195} Interpreting the savings clause reference to "States" to exclude localities would have made many other FIFRA provisions superfluous, and therefore, the Court concluded that such a reading must be incorrect.\textsuperscript{196} The Court's field preemption analysis also concluded that FIFRA was devoid of any indication that Congress was concerned enough about regulating the field to "require pre-emption of local use ordinances simply because they were enacted locally."\textsuperscript{197}

The Ninth Circuit's similar determination that CERCLA's silence as to localities in the savings clause language was insufficient to establish a clear and manifest purpose to preempt local authority, was an important

\textsuperscript{191} \textit{Mortier}, 501 U.S. at 607. The court went on to reason that

Even if FIFRA's express grant of regulatory authority to the States could not be read as applying to municipalities, it would not follow that municipalities were left with no regulatory authority. Rather, it would mean that localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been pre-empted through actual conflicts with federal law. At a minimum, localities would still be free to regulate subject to the usual principles of pre-emption.

\textit{Id.}

\textsuperscript{192} \textit{Id.} at 607-08 (basing its interpretation on the well settled principle that local "governmental units are created as convenient agencies for exercising such governmental powers of the State as may be entrusted to them") (internal quotation marks omitted).

\textsuperscript{193} \textit{Mortier} cited legislative records that rejected FIFRA provisions that "would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." \textit{Id.} at 609 (quoting from H. R. Rep. No. 92-511, at 16 (1971)). But, FIFRA's legislative history also revealed that the law "deprive[d] political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides . . . ." \textit{Id.} at 609 (quoting from S. REP. NO. 92-838, at 16 (1972)).

\textsuperscript{194} \textit{Id.} at 612.

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} \textit{Id.} at 612-13.

\textsuperscript{197} \textit{Id.} at 615.
and appropriate step towards protecting municipal rights. The court rightly acknowledged the parallels between the Supreme Court ruling in Mortier on a similar clause in a similarly drawn federal environmental statute, in concluding that the term "State" in the savings clause naturally encompassed the political subdivisions that make up the state. Support for the Ninth Circuit's conclusion that CERCLA doesn't preempt the field is found in the statute's text, legislative history, and guidance documents in addition to the Supreme Court precedent set in Mortier. Like FIFRA, CERCLA contains provisions that support the conclusion that Congress intended to allow local governments to supplement the law. In this context, reading the term "States" to include its political subdivisions is a common and plausible reading. Furthermore, rather than evincing Congressional concern over local regulation of local pollution, CERCLA's legislative history indicates the legislature's intent to empower localities. Given the extent and variety of sources that consistently suggest CERCLA does not preempt the field, the court's conclusion is not remarkable. However, the court's abandonment of this precedent and departure from this reasoning just a few pages later, when it evaluated conflict preemption, is surprising.

B. Conflict Preemption Decision is Clearly Erroneous

1. The Ninth Circuit's Obstacle Preemption Ruling Is Inconsistent with CERCLA

A textual reading of CERCLA suggests that the Ninth Circuit's conflict preemption ruling is erroneous. In particular, the CERCLA savings clause at section 114(a), along with CERCLA's other savings clauses, make it plain that states have the right to modify and impose additional liability for hazardous waste cleanup. Merriam-Webster's Dictionary defines the term "additional" as "existing or coming by way of..."

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198. Prior to Lodi, the Ninth Circuit had not made a ruling as to whether CERCLA permits both states and their political subdivisions to enact non-conflicting hazardous waste regulations. Fireman's Fund Ins. Co. v. City of Lodi, 41 F. Supp. 2d 1100, 1110 (E.D. Cal. 1999).
199. CERCLA's savings clauses, 42 U.S.C. § 9614(a), § 9652(d), § 9659(h), indicate that Congress anticipated that local governments would require site remediation beyond the levels mandated under CERCLA. Other parts of the statutory text point to Congress' expectation that states and local governments would impose their own rules regarding hazardous waste abatement. See 42 U.S.C. §9606(a) (2000) ("In addition to any other action taken by a State or local government...").
200. 132 CONG. REC. 17, 212 (Oct. 17, 1986).
201. 42 U.S.C. §9614(a) ("nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.").
202. See 42 U.S.C. §§ 9614(a), 9652(d), 9659(h).
addition," where addition means "to join, annex, or unite so as to bring about an increase." Therefore, the plain meaning of the section 114(a) savings clause is that Congress intended that states and/or their political subdivisions could impose elevated or improved cleanup standards. This interpretation is consistent with the canon of statutory interpretation that holds Congress intended to give effect to each part of a statute and to create a coherent body of law.

Congress anticipated that lower levels of government would impose additional liability on polluters and provided for such supplementation not only in the savings clauses but also within other sections of CERCLA. CERCLA section 121(d)(2) allows a state's "more stringent" cleanup standards to govern the appropriate level of abatement. Furthermore, CERCLA's interpretive guidance documents acknowledge that lower levels of government will use more stringent cleanup requirements. For example, in determining the applicable level of cleanup, the NCP establishes that "only those state standards that are...more stringent than federal requirements may be applicable." All of these supporting documents bolster the conclusion that CERCLA sets a floor, not a ceiling, of environmental protection.

Contextually, the court's ruling on this question conflicts with the language and purpose of the Act as a whole. It is contrary to reason to conclude, as the Ninth Circuit did, that a more stringent law presents an obstacle to CERCLA's purpose of hazardous waste cleanup when that Act contains a provision expressly allowing states and localities to write more stringent regulations. The plain text of the statute should be interpreted as being consistent with the broader purpose and goals of CERCLA. Instead, the Ninth Circuit held that Lodi's ability to impose higher standards conflicted with CERCLA's cleanup goals by disturbing the uniformity and predictability of the statute. This assertion is simply

204. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).
207. Id.
208. The National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300, provides that a State or municipality's "applicable or relevant and appropriate" cleanup requirements may be required under CERCLA if they are more stringent than the federal requirements. See 40 C.F.R. §§300.5, 300.400(g).
209. NCP, 40 C.F.R. 300.5, 300.400(g).
210. These authorities reiterate that states and localities are allowed to use "more stringent" cleanup requirements than the federal baseline standard would allow. United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1454 (6th Cir. 1991) (providing that "CERCLA sets only a floor, not a ceiling, for environmental protection."). See also Appellee City of Lodi's Response to Opening Brief of Appellant Fireman's Fund Insurance Company, Fireman's Fund, 1999 WL 33623794.
211. Fireman's Fund v. City of Lodi, 302 F.3d 928, 948-49 (9th Cir. 2002).
incorrect; CERCLA has no uniformity or predictability goal.212 Congress intended CERCLA to be one set of standards to be supplemented by both state and local enactments, and only controlling, by setting a floor, when invoked by proper governmental authority.213

The Ninth Circuit tried to overcome the absence of a predictability and uniformity goal within CERCLA by suggesting that PRPs will be less willing to clean up when their liability is uncertain.214 This is an unavailing argument. First, the sources that the Ninth Circuit used to assert that uncertain or strict regulatory demands inhibit cleanup in fact state that PRPs' CERCLA liability is inherently unpredictable: "CERCLA provides no real guidance to parties who become embroiled in allocation disputes."215 According to the court's referenced studies, the cost of cleanup is usually a "difficult to predict," fact-intensive process which can only be determined on a case-by-case basis.216 Thus, even if allowing localities to impose higher standards makes predicting liability difficult, this would neither be a change from the status quo nor contrary to CERCLA's goals. Applying a higher standard would simply create one more factor to consider in the complex liability equation. Second, even if a higher abatement standard made liability uniquely uncertain, predictability alone does not determine the speed and willingness of PRPs to clean up. The major factors contributing to delay in cleanup include property values,217 availability of cleanup funds, liability issues, the need for environmental assessments of properties, and the

212. Indeed, the Supreme Court has explicitly rejected the concept of generalized pleas for uniformity. See Atherton v. FDIC, 519 U.S. 213 at 220 (1997) (suggesting that "to invoke the concept of 'uniformity' is not to prove its need."). Even the Ninth circuit's own sources prove that predictability is not a major factor in cleanup. See BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001, S. REP. NO. 107-2, at 2 (2001); U.S. CONFERENCE OF MAYORS, supra note 3, at 7.

213. City of Lodi's Petition for Writ of Certiorari, 2003 WL 21698672, at 26; see also City of Lodi's Response Brief, 1999 WL 33625794. Although as stated supra, CERCLA was not invoked because CERCLA's NCP standard did set the floor at the Lodi Groundwater Site because that site was listed by the DTSC, triggering MERLO's requirement that the abatement meet—at least—NCP standards.

214. Fireman's Fund, 302 F.3d at 948.

215. Robert P. Dalquist, Making Sense of Superfund Negotiated and Litigated Allocations, 31 ENVTL. L. REP. 11098 (2001). Instead of CERCLA providing certainty, "a body of case law and practical experience" has resulted in a rough approximation of justice and an ability of PRPs to predict their liability depending on the individual's fact intensive circumstances.

216. Id.

217. S. REP. No. 107-2 at 2 (noting that "at abandoned sites, even those with little or no contamination, the fear that cleanup costs could exceed the property value can reduce incentives for redevelopment."). Congress also pointed out the need for states (and localities) to implement their own hazardous waste cleanup policies, because "[w]hile less than 1,500 sites have been listed on the National Priorities List (NPL), there are estimated to be more than 450,000 brownfield sites nationwide." Id. at 3.
effectiveness of the enforcement agency. Third, the court ignored the unique enforcement techniques MERLO puts in place to ensure a quick determination of PRP status, streamlining the liability allocation process and enabling swift cleanup. Fourth, and most importantly, the level of cleanup is not a negotiable element of hazardous waste statutes. Whether or not the PRPs desire that level of abatement is irrelevant. Compliance with the law enforced against the PRP is mandatory, regardless of where the standard is set. Though the Ninth Circuit may have wanted to create a rule that would please the regulated community, that is not its job. The court’s proper role is to strike down only those lower laws with that seek incompatible goals from CERCLA. Where CERCLA’s framers explicitly empowered lower levels of government to impose higher standards to achieve its remediation goals, the PRPs’ willingness to clean up to that degree is irrelevant in a preemption analysis.

The Ninth Circuit should have recognized that MERLO’s policies are consistent with the overall objectives of CERCLA. Both laws are designed to protect public health and the environment by making the polluter pay and timely remediate contaminated property. Furthermore, MERLO fulfills the congressional vision of supplementation. Instead, the Fireman’s Fund court invented a goal for CERCLA that does not exist in order to justify its conflict preemption ruling.

2. Fireman’s Fund Decision Violates Supreme Court Precedent in Mortier

The Fireman’s Fund court’s application of Mortier should not have stopped with field preemption analysis. The facts in Mortier are strikingly similar to those in Fireman’s Fund. In both cases, the party subject to a local ordinance sought a judicial declaration that the local law was preempted because it conflicted with the federal law’s goals by destroying predictability and uniformity. In both cases, the courts acknowledged that a savings clause empowered both states and localities to supplement the field, despite the fact that the text of that clause granted the authority to “States.” The Ninth Circuit’s departure from Mortier—by upholding

218. U.S. CONFERENCE OF MAYORS, supra note 3, at 11. “The perceived risk of Superfund liability is one of many factors that may influence a developer’s willingness to acquire a brownfield site. Access to resources is another issue.” Most of the sources Ninth Circuit uses refer more to the fear of liability generally, and the fear of excessive liability in particular, than the problem of exposure to uncertain liability. There is no evidence that MERLO imposes excessive liability. For example, only 38 percent, or 88 cities of the 231 surveyed, indicated standard of cleanup was a relevant factor in the redevelopment of brownfields. Id. at 11-12.

219. Interview with Cecilia Fusich, of Envision Law Group, Counsel for the City of Lodi (Nov. 4, 2003).

an obstacle preemption claim where the Supreme Court rejected such a claim—is both illogical and inappropriate.

The Supreme Court noted the importance of evaluating preemption based on the applicability of the federal or state act when it rejected Mortier's obstacle preemption claims.\(^\text{221}\) In Mortier's case, as in the Insurers', the federal act was not invoked.\(^\text{222}\) Given that compliance was not at issue, the Supreme Court found that FIFRA contained no indication that "an independently enacted ordinance that falls outside the statute's reach frustrates its purpose."\(^\text{223}\) The Ninth Circuit should have followed suit and concluded that there is often no conflict between a local ordinance and a federal statute governing the same field, when the federal act is not invoked.\(^\text{224}\) This is especially the case where the Act envisions state and local supplementation.

The district court in Fireman's Fund recognized, as the Ninth Circuit should have, that complying with both CERCLA and MERLO was neither impossible nor an obstacle to achieving federal goals.\(^\text{225}\) As the Supreme Court implied in Mortier, there are both practical and procedural reasons that a local ordinance and federal law may not be mutually exclusive. First, in many instances CERCLA and a city ordinance will never come into conflict, because the municipality is likely to develop a hazardous waste cleanup law only if CERCLA or state law will not be used to address the problem. If the municipal ordinance imposes a higher cleanup standard than the NCP, the responsible parties face no conflict; the PRP must meet the municipal standard. Second, even when CERCLA or a state law is being invoked, compliance is always possible. The responsible party must simply meet the higher standard to comply with all applicable laws. Interpreting CERCLA's requirements as a floor and not a ceiling\(^\text{226}\) for cleanup standards would resolve the Ninth

\(^{221}\) Mortier, 501 U.S. at 615 ("There is no indication that any coordination which the statute seeks to promote extends beyond the matters with which it deals ... ").

\(^{222}\) Fireman's Fund, 41 F. Supp. 2d at 1111-12 (finding "no agency, federal or state, is enforcing CERCLA's provisions in this hazardous waste cleanup effort, nor has Fireman's Fund identified any provision of CERCLA with which it must comply pursuant to any order or request of any federal or state agency").

\(^{223}\) Mortier, 501 U.S. at 615.

\(^{224}\) Id.

\(^{225}\) Fireman's Fund, 41 F. Supp. 2d at 1111.

\(^{226}\) See United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1454 (6th Cir. 1991) (establishing that "CERCLA sets only a floor, not a ceiling, for environmental protection."). Although the court attempts to deflect the relevance of this precedence by regarding it as dicta, this case was been repeatedly relied upon in earlier Fireman's Fund rulings. "To the extent that MERLO [permits Lodi to order abatement that is more stringent than the NCP, we find that MERLO is not preempted by either state or federal law. 'CERCLA sets only a floor, not a ceiling, for environmental protection."") Id. Accordingly, "state laws which establish 'more stringent' environmental standards are not preempted by CERCLA." Id. (quoting 42 U.S.C. § 9621(d)(2)(A)). It therefore stands to reason that a municipal ordinance which similarly
Circuit’s internal inconsistencies. This interpretation is in keeping with congressional intent; Congress made clear that lower levels of government could create “additional liability or requirements” for cleanup.\textsuperscript{227} The co-existence of CERCLA and MERLO reinforces the two laws’ similar goals of imposing liability upon responsible parties and achieving efficient, effective cleanup. The Ninth Circuit, therefore, should have openly acknowledged that municipal ordinances pose no conflict when cities set higher cleanup standards than the federal law requires.\textsuperscript{228}

The Ninth Circuit also should have followed the Supreme Court’s ruling and acknowledged the link between field preemption analysis and obstacle preemption. The \textit{Mortier} court ruled that there could be no obstacle preemption because the Act did not anticipate the creation of a regulation to the exclusion of local law.\textsuperscript{229} Because FIFRA explicitly left room for supplementation by state and local governments, the Supreme Court reasoned that those lower enactments fulfill rather than frustrate the goals of the higher act.\textsuperscript{230} Having concluded that CERCLA explicitly provides for supplementation in its savings clauses, the Ninth Circuit should have taken its analysis to the logical conclusion—that local enactments like MERLO help fulfill Congress’s intent. Instead, the

\begin{quote}
provides for more stringent environmental standards is also not preempted. \textit{See Fireman’s Fund Ins. Co. v. City of Lodi, 271 F.3d 911 (9th Cir. 2001).}

\textsuperscript{227} 42 U.S.C. § 9614(a) (2000). This interpretation is consistent with Congressional intent because CERCLA clearly acknowledged that States—and according to the Ninth Circuit—their political subdivisions may impose additional standards.

\textsuperscript{228} In other circuits, the fate of creative and more stringent state and local laws has not been so fortunate. In \textit{United States v. City and County of Denver,} the city of Denver’s zoning ordinance was found to be void due to conflict preemption with CERCLA. 100 F.3d 1509, 1511 (10th Cir. 1996). In that case, the issue arose when the federal government, through the EPA, tagged one area of the Denver Radium Superfund site for on-site soil contamination treatment while the city and county of Denver prohibited maintenance of hazardous waste on industrially zoned lands. \textit{Id.} at 1511-12. Instead of viewing the differing state provision as an applicable or relevant and appropriate requirements or “ARAR,” both the lower court and the appellate court held it was not. \textit{Id.} The Tenth Circuit ruled that under the Supremacy Clause, this direct conflict with federal law invalidated the state law under the doctrine of conflict preemption. \textit{Id.} at 1512-13. This case shows that ambiguities in CERCLA itself allow for judicial interpretation that handicaps state and local governments from enforcing the laws they have developed to protect themselves and their environment, despite the fact that CERCLA expressly intended lower levels of government to supplement the laws.

\textsuperscript{229} \textit{Mortier,} 501 U.S. at 614-15. Nor did the Court find any indication in FIFRA that Congress felt that local ordinances necessarily rest on insufficient expertise or burden commerce. \textit{Id.} at 615-16.

\textsuperscript{230} \textit{Id.} at 615. It stands to reason, therefore, that even in those cases where the federal law is invoked, due to the savings clause language that empowers states and municipalities to use the federal standards as a floor, not a ceiling, a local law would not be preempted so long as the regulated party can achieve the goals of both laws by complying with the higher local standard.
\end{quote}
Fireman’s Fund court asserted that allowing lower regulation would disrupt uniformity.\textsuperscript{231}

In Mortier, the Court has already addressed and rejected the argument that supplementation of an environmental law disturbs uniformity or predictability and therefore frustrates the purpose of the act.\textsuperscript{232} In that case, Mortier asserted that allowing localities to impose their own standards created an uneven playing field which would discourage compliance.\textsuperscript{233} The Supreme Court dismissed this claim, because the federal Act did not prohibit local regulation of pesticides.\textsuperscript{234} If Congress had feared the specter of navigating through multiple contradictory municipal regulations, the Court reasoned, the legislators would have made it plain in the act.\textsuperscript{235} Thus, the Court stated that “Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it.”\textsuperscript{236} The Supreme Court recognized that Congress had not done so with FIFRA, and the Ninth Circuit should have recognized that it has not done so with CERCLA either.

If the Ninth Circuit had followed Mortier, it would not have been able to anchor its conflict preemption claim in a uniformity and predictability analysis. Instead, the court would have been forced to acknowledge that because CERCLA encourages additional lower-level regulation of hazardous wastes, uniformity was not one of CERCLA’s goals. Conforming to Mortier’s precedence, the Ninth Circuit should have acknowledged that Congress must not have believed multiple regulations would thwart compliance, or it would have prohibited such a result from occurring. Further, the Ninth Circuit should have recognized that where a savings clause explicitly preserves authority to states and municipalities, the resulting local ordinances that supplement the federal standards pose no obstacle to the higher statute’s goals.

Had the Ninth Circuit followed Mortier’s conflict preemption analysis as suggested above, this reading of CERCLA would be

\textsuperscript{231} See Fireman’s Fund Ins. Co. v. City of Lodi, 271 F.3d 911 (2001), withdrawn, 287 F.3d 810 (9th Cir. 2002) (an earlier unpublished opinion on this area in which the court describes its rationale).

\textsuperscript{232} Mortier, 501 U.S. at 615 (dismissing the claim that FIFRA’s authors’ comprehensiveness indicated intent to avoid conflicts with “thousands of contradictory and ineffective municipal regulations.” Rather, the court found the Act contemplated a partnership between the various levels of government and concluded that if Congress is concerned about local enactments it can explicitly address the issue, but it had not done so at the time.).

\textsuperscript{233} Mortier argued (much the same way that the Insurers have) that “the town’s ordinance stands as an obstacle to the statute’s goals of promoting pesticide regulation that is coordinated solely on the federal and state levels, that rests upon some degree of technical expertise, and that does not unduly burden interstate commerce.” Id. at 614-15.

\textsuperscript{234} Id. at 615.

\textsuperscript{235} Id.

\textsuperscript{236} Id. at 616.
consistent with the legislative history and intent of CERCLA. CERCLA's legislative history, unlike FIFRA's, makes clear that lower levels of government would be permitted to implement more stringent procedures. One of the bill's principal drafters stated, "we have stated repeatedly in this bill that there is no preemption. Any other conclusion is wholly without foundation." There is no evidence in CERCLA's legislative history indicating that Congress intended to preempt local regulation. If the Supreme Court refused to find preemption in FIFRA even though that Act's legislative history was "at best ambiguous," then positive statements in CERCLA's legislative history should certainly weigh toward a finding of no preemption.

Given the factual similarity of Fireman's Fund to Mortier, the precedential value of the case, and the persuasive reasoning of the high court, the Ninth Circuit should have followed Mortier's example. By failing to do so, the Ninth Circuit established a precedent that allows interpretations of CERCLA that contravene Congress's explicit intent for lower level supplementation.

3. Fireman's Fund is Inconsistent with the Court's Own Rationale Under Field Preemption

The Fireman's Fund court's conflict preemption ruling that MERLO cannot allow Lodi to impose higher cleanup standards relies on a uniformity and predictability rationale that is fundamentally inconsistent with its field preemption analysis. The court's entire conflict analysis hinges on the contention that allowing localities to impose higher cleanup standards would interfere with the accomplishment of CERCLA's cleanup and rehabilitation goals. This hypothesis assumes that uniform standards and predictable liability are required to encourage parties to undertake cleanup and reuse of contaminated property.

Yet, when the Ninth Circuit acknowledged the importance of CERCLA's savings clause, which allows states and municipalities to "impos[e] any additional liability or requirements" in its field preemption analysis, the court necessarily established that the field will inherently lack uniform cleanup standards. If the court believed that only one standard was necessary, then it would have ruled that municipalities cannot supplement CERCLA, or at least that localities may only enforce standards identical to the NCP. However, the court came to the opposite conclusion: that CERCLA provides just one tier of multi-level

237. 132 CONG. REC. 17, 212 (Oct. 17, 1986).
238. See Mortier, 51 U.S. at 610.
regulation.\textsuperscript{240} For example, by ruling that CERCLA does not preclude states from delegating their authority to their political subdivisions to regulate hazardous waste,\textsuperscript{241} the court necessarily established that multiple levels of government will establish cleanup standards. Without a single administrative agency carrying out CERCLA, hazardous waste regulation will inherently lack uniform standards of cleanup. Although ruling that CERCLA preempts the field would have supported its conflict preemption ruling, the court appropriately recognized that denying local hazardous waste regulation would have unlawfully encroached on local police powers.\textsuperscript{242} Furthermore, when the Ninth Circuit endorsed the Supreme Court ruling that locally enacted ordinances effectuate rather than conflict with congressional intent,\textsuperscript{243} it could no longer found its argument on uniformity. Given the clear contradiction with congressional intent, it is not surprising that the Ninth Circuit's conflict preemption analysis is conspicuously devoid of any reference to CERCLA's savings clauses.

But the Ninth Circuit was not content to simply omit CERCLA references that would have illuminated the fallacy of the court's reasoning. Instead, the court found that municipalities can impose less-stringent cleanup standards.\textsuperscript{244} This statement solidified the court's contradictory rulings. The court recognized that because CERCLA and state law did not preempt the field, a city could "borrow or adapt the NCP as it sees fit—or use some other procedure for making cleanup decisions"\textsuperscript{245} where the municipal law did not conflict. The court found that this flexibility could be "particularly useful for cities dealing with smaller...sites."\textsuperscript{246} While these statements lead to the conclusion that lower governments may impose higher standards and there can be no expectation of uniformity, the court spins it differently. Even as the Ninth Circuit claims that the flexibility of municipalities to apply different cleanup standards is beneficial, the court also suggests that flexibility would create so much uncertainty as to pose an obstacle to CERCLA's

\textsuperscript{240} Fireman's Fund v. City of Lodi, 302 F.3d 928, 942-43 (9th Cir. 2002) (holding that "CERCLA anticipates that states will enact supplemental remedial environmental legislation" and "the text of CERCLA indicates that Congress anticipated remedial actions undertaken by local governments independent of CERCLA's own provisions"). The court also followed Mortier, which holds that, given the savings clauses, "FIFRA implies a regulatory partnership between federal, state and local governments." Mortier, 501 U.S. at 615.

\textsuperscript{241} Fireman's Fund, 302 F.3d at 938, 942.

\textsuperscript{242} Id. at 943.

\textsuperscript{243} See id. at 942 (endorsing Mortier, a case that provides that given the savings clause's text, "the statutory language tilts in favor of local regulation").

\textsuperscript{244} Id. at 949 (finding that MERLO was not preempted where it imposed lower cleanup standards).

\textsuperscript{245} Id. at 952.

\textsuperscript{246} Id. at 952.
goals.** If the court's uniformity rationale were true, then as the court said itself, this would "allow literally thousands of different local governments to impose their own liability schemes ... which would foster uncertainty." Yet, when it came to allowing lower standards, the court came to the opposite conclusion—that this non-uniformity would further CERCLA's goals and make rehabilitation more feasible.

Uniformity clearly is not one of CERCLA's goals. Not only does the existence of savings clauses which explicitly delegate regulatory authority to lower levels of government undermine the Ninth Circuit's hypothesis, but Supreme Court precedent, legislative history, and Congressional intent also debunk the proposition. The Ninth Circuit failed to point to any section of CERCLA supporting its contention that uniformity was required for cleanup to take place. Nor did the court identify anything in the Act's legislative history that upheld its uniformity hypothesis. In fact, the court's sole judicial source for this contention lies in a Ninth Circuit case that has been disapproved by the Supreme Court. As previously discussed, the courts' other sources suggesting risk of uncertain regulatory demands are also flawed. The Fireman's Fund court's field preemption determination and reasoning provide a foundation upon which the court's conflict preemption analysis cannot stand.

The court offers no explanation for the contradictory assertion that higher standards would deter the cleanup and reuse of contaminated properties, but lower standards, though equally uncertain, somehow produce the opposite results—swifter cleanup and reuse. A legally sound determination of this issue would have followed the letter of the law, congressional intent, Supreme Court precedent, and municipal police powers. Instead the court abandoned all of these. Those sources would have guided the Ninth Circuit to conclude that CERCLA sets a floor, not a ceiling, for the appropriate cleanup standard, a position consistent with the court's determination that CERCLA does not preempt the field.

247. Compare id. at 948-49 with 952.
248. Id. at 949.
249. Id.
250. Id. at 948 (citing Stanton Road Assoc. v. Lohrey Enter., 984 F.2d 1015 (9th Cir. 1993)). Stanton Road was disapproved by the U.S. Supreme Court in Key Tronic Corp. v. United States, 511 U.S. 809 at 813-14, 819 n. 13 (1994) (reversing the Ninth Circuit's holding that private parties could obtain attorneys fees by bringing an action under 42 U.S.C. § 9607, and disagreeing with the lower courts assertion that CERCLA's goal of timely accepting the responsibility of cleanup was so explicit that it warranted a departure from the American rule of litigation financing).
251. See supra note 215 and accompanying text.
252. Fireman's Fund, 302 F.3d at 948-49.
253. MERLO § 8.24.030(A)(5-7) provide that Lodi can order more or less stringent remediation except at State or Federally listed sites where the NCP applies. In a previous opinion issued by the Ninth Circuit, the court held that "To the extent that MERLO § 8.24.030(A)(5) permits Lodi to order abatement that is more stringent than the NCP, we find
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CONCLUSION

Because the city of Lodi was the first locality to base its environmental hazardous waste ordinance upon CERCLA, the Fireman's Fund ruling could have a widespread impact on local governments that wish to clean up their towns. The Ninth Circuit's field preemption analysis in this case advances the right of local governments to protect the health and safety of their inhabitants, hopefully reversing the trend of using malleable field preemption standards to invalidate state and local environmental laws. Unfortunately, Fireman's Fund also stands for the rule that lower governments may only require equal or lesser cleanup than the national standard, despite the fact that this ruling is contradicted by CERCLA's text and goals, legislative history, Supreme Court precedent, and even the court's own field preemption analysis.

The Ninth Circuit has created a logical conundrum. The court simultaneously acknowledged that municipalities can impose supplemental standards in the field of hazardous waste regulation, yet found that when they do so by raising the cleanup standard, those standards are preempted. This result will only discourage local efforts to develop unique, area-specific solutions to environmental problems. This is particularly problematic because local governments may offer respite for those citizens who seek to protect the environment when the federal government is resistant to expanding environmental laws and opposed to strict enforcement of existing laws. Localities are well-situated to develop and enforce their own laws dealing with small scale brownfields that do not attract federal attention, especially in light of their familiarity with the regulated industry and their awareness of state and federal environmental laws' inadequacies. The Ninth Circuit's ruling could chill brownfield remediation efforts by municipalities—last viable level of government to address the problem, because local laws may be invalidated when they attempt to alter the status quo. As a result, communities will be forced to choose between restricting cleanup to the lowest common denominator or allowing cleanup that falls below already ineffective existing standards. This result defies Congress's intent made

that MERLO is not preempted by either state or federal law. 'CERCLA sets only a floor, not a ceiling, for environmental protection.' Akzo Coatings, 949 F.2d at 1454. Accordingly 'state laws which establish more stringent environmental standards are not preempted by CERCLA.' Id. (quoting 42 U.S.C. § 9621(d)(2)(A)). It therefore stands to reason that a municipal ordinance which similarly provides for more stringent environmental standards is also not preempted." The court went on to find that "CERCLA permits both states and their political subdivisions to enact hazardous waste regulations and 'pursue additional remedies at [their] own expense, as long as those remedies do not conflict or interfere with,' Akzo Coatings, 949 F.2d at 1454, 'the accomplishment and execution of [CERCLA's] full purpose and objective.' Industrial Truck Ass'n, 125 F.3d at 1309." See also Fireman's Fund Ins. Co. v. City of Lodi, 271 F.3d 911.

255. Id. at 249.
plain in CERCLA that the Act did not preclude local regulatory activity, but instead empowered lower levels of government to impose additional requirements.

These negative consequences are the result of the Ninth Circuit's adherence to a nonexistent goal of CERCLA: uniformity. Although the concept of uniformity can generate the stability and predictability that helps polluters and owners of contaminated land anticipate liability and rehabilitate the land accordingly, the concept alone will have little effect if the federal law is not being enforced. The statistics speak for themselves. Only a fraction of the 450,000 current brownfield sites are being addressed. Some of those will take decades to be decontaminated. At this level of enforcement, the regulated community is aware that existing regulatory frameworks are extremely unlikely to be reliably applied to small-scale sites.

Given the epidemic of hazardous waste contamination and the lack of enforcement at the federal level, municipalities must step in with their own rules. Although uniformity is not a goal of CERCLA, broad remediation is. CERCLA's drafters anticipated other methods of addressing the hazardous waste problem in their savings clauses. The provisions of CERCLA that share authority across levels of government should provide strength for this administratively weakened law. Courts should not impede localities that are trying to fulfill the congressional intent of CERCLA by encouraging cleanup. Nor should the courts prevent states and localities from exerting their police powers to protect residents from nuisances. This result is particularly counterproductive where local laws did not interfere with state and federal regulation in the first place.

The Fireman's Fund ruling undermines the democratic principle of local police power and represents a loss of localities' ability to self-regulate and protect residents from environmental nuisances. Had the Ninth Circuit followed other courts (and its own earlier rationale) and

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256. There is a tension between uniformity and centralized approach as opposed to a decentralized effort with unique solutions that push beyond conservative state and federal rules. While centralization can afford the benefits of allowing companies to normalize their expectations and establish a base level of protection, the unique aspects of environment make uniformity an undesirable goal in the face of a rulemaking forum that can tailor environmental laws to the local needs. See Weiland, supra note 14, at 504-06.

257. Due to the presumption that courts hold that states' historic police powers are not to be superseded unless Congress has a clear and manifest purpose for doing so, courts are typically very deferential to local legislation in environmental regulation, a traditionally state determined area of law. Petition for Writ of Certiorari, 2003 WL 21698672; see, e.g., Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991); Exxon Mobil Corp. v. EPA, 217 F.3d 1246, 1255 (9th Cir. 2000).
concluded CERCLA sets a floor, not a ceiling,258 the residents of Lodi could be enjoying a clean community and using their municipal government the way Congress intended, as a means of protecting their health and safety. Instead, even though the express language of CERCLA indicates that localities’ rights are to be preserved, the Fireman’s Fund court has invalidated creative local efforts to redress environmental problems. This aspect of the court’s ruling is both insensitive to town interests and ignores the judicial restraint previously employed when preemption tests were properly applied.259 Because of this, “where the court perceived a value in uniformity, local regulation could be invalidated without a further investigation of whether specific statutory purposes had been frustrated.”260 Thus, the Fireman’s Fund decision is a departure from a restrained application of preemption doctrine and is instead over-protective and unclear. The legislature can explicitly write into statutes the preemption of state and local authority and it should do so when it wishes to invalidate local laws.261 Until that time, the courts should support the ability of local governments to clean up brownfields, an issue of “vital national importance.”262

258. United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1454 (6th Cir. 1991) (“CERCLA sets only a floor, not a ceiling for environmental protection.”). See also 1999 WL 33623794.

259. See Kromm, supra note 61, at 263-64.

260. Kromm, supra note 61, at 266; see also Weiland, supra note 14, at 493-94.

261. Rutrick, supra note 61, at 95.

262. Case, supra note 69, at 774.