IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TAMIA BANKS, on behalf of herself and all others similarly situated, Plaintiff, v. COTTER CORPORATION, *ET AL.*, Defendants.	**No. 4:18-CV-00624-JAR**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR REMAND

I. INTRODUCTION

Defendants removed this case, which seeks class-wide relief for damages caused by toxic, carcinogenic, hazardous radioactive wastes released by Defendants' abandonment of these wastes throughout the Coldwater Creek floodplain, absent a "nuclear incident", solely based on Defendants' argument that the federal Price-Anderson Act ("PAA") pre-empts Plaintiff's state law claims, thereby conferring subject matter jurisdiction in federal Court.

But the PAA was enacted in order to limit liability of private enterprises engaged in licensed nuclear power plant related activity at the dawn of the nuclear age, by extending indemnity, creating strict liability and capping liability to ease the significant risks associated with such work—it has no application here, where there was no nuclear incident, and defendants acted without a federal license, without an indemnity agreement, and in contravention of their duties to safely dispose of hazardous radioactive waste material with an appropriate specific license allowing the abandonment and therefore disposal of these wastes.

This Court has already addressed and rejected Defendants' argument, with respect to the ***same facts*** and waste streams that are involved herein. In *Strong v. Republic Services, Inc.*, Judge

Jean C. Hamilton concluded that (1) the PAA is not applicable without a license or indemnity agreement and (2) no license or indemnity agreement covers the activity alleged by Plaintiff. *See* 283 F. Supp. 3d 759, 772 (E.D. Mo. 2017). Judge Hamilton noted the existence of contrary authority outside this jurisdiction, but, citing an opinion authored by then-Judge Neil Gorsuch for the 10th Circuit Court of Appeals, held that "to the extent Congress's statutory direction is susceptible to more than one reading, we have the duty to accept the reading that disfavors pre-emption." *Id*. at 771, *citing Cook v. Rockwell Int'l Corp*., 790 F.3d 1088, 1094 (10th Cir. 2015)(holding plaintiffs' claims not preempted under PAA).

Here, Plaintiff's First Amended Petition invokes no federal law. No license or indemnity agreement covers the activities alleged, and Plaintiff has therefore not a pleaded a "nuclear incident" within the meaning of PAA. While one Defendant, Cotter Corporation, at one time held a license to possess "source material," i.e., uranium, no Defendant herein had any indemnity agreement nor any license to handle, store or transport hazardous byproducts, such as mill tailings and raffinates (uranium ore mining wastes), which Plaintiff alleges were the source of the contamination at issue. The PAA has a preemptive effect only with respect to "nuclear incidents."

Judge Hamilton's opinion in *Strong v. Republic Services Inc., supra,* is directly on point: Plaintiff's allegations do not amount to a "nuclear incident" as statutorily defined, thus PAA does not apply, and Defendants' removal was improper. This case should be remanded to state court.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff, on behalf of herself and all other similarly situated, filed this property damage claim against Defendants on February 18, 2018 alleging violations of Missouri state law and the Missouri Constitution; Plaintiff filed a substantially similar Amended Petition on April 2, 2018.[1]

[1] Original Petition and First Amended Petition.

Four Defendants, Cotter Corporation, Commonwealth Edison Company, Exelon Corporation and Exelon Generation Company, LLC (collectively "Cotter Defendants"), relate in some way to the Cotter Corporation, the owner, processor and disposer of hazardous, toxic, carcinogenic and radioactive wastes.[2]

Two Defendants, DJR Holdings (formerly known as Futura Coatings, Inc.) and the St. Louis Airport Authority, are the current owners of the properties which are the source of the radioactive contamination found on Plaintiff's property. DJR Holdings is the owner of the property located at 9200 Latty Avenue, Hazelwood, Missouri ("Latty Avenue Site") and the St. Louis Airport Authority is the owner of the site formerly known as the St. Louis Airport Site ("SLAPS").[3] Despite knowing that significant activities involving radioactive material were conducted on their property in the past, DJR and St. Louis Airport Authority did nothing to prevent continued dispersal and runoff of hazardous, toxic, carcinogenic, radioactive wastes into Coldwater Creek.[4]

Tamia Banks owns property located at 4501 Ashby Rd., St. Ann, Missouri ("Banks Property") which is adjacent to Coldwater Creek.[5] The Banks Property, along with the property of other members of the Class, is located within the flood plain of Coldwater Creek.[6] Testing on the Banks Property confirmed radioactivity above normal background levels and the source of this radioactivity is small, microscopic particles, which among other things contain the carcinogenic, toxic, radioactive substance known as thorium.[7] Defendants caused contamination of Banks Property through their negligent storage, handling and disposal of radioactive waste.[8]

A full description of the factual history can be found in Plaintiff's well pleaded First

[2] Amended Petition ¶¶ 20-24
[3] Amended Petition ¶¶ 73, 76.
[4] Amended Petition ¶¶ 74, 77.
[5] Amended Petition ¶ 18.
[6] Amended Petition ¶ 8.
[7] Amended Petition ¶ 9.
[8] Amended Petition, *passim*.

Amended Petition, at ¶¶ 56-85. Based on the facts pleaded, it is clear that the radiation areas complained of were nothing more than dumping grounds. Defendants never alerted the authorities of a "nuclear occurrence" or "nuclear incident" at any of these locations because no such incident occurred. This was a dumping ground and no activities which would fall under the scope of the Act at the time occurred here. It is quite amazing that after years of downplaying the gravity of the situation, Defendants are now prepared to admit that a nuclear incident occurred to support their baseless removal of this action and to therefore admit strict liability under the Act.

III. LEGAL ARGUMENT

A. Legal Standard

Federal courts are courts of limited jurisdiction; "they possess only that power authorized by Constitution and statute."[9] To determine whether removal was proper, the Court must look to the Plaintiff's pleadings at the time of removal.[10] The basis for federal jurisdiction must be apparent from the face of Plaintiff's properly pleaded complaint, rather than from any defenses asserted by Defendants.[11] The party seeking removal and opposing remand has the burden of establishing jurisdiction.[12] Since "plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables [plaintiff] to, by eschewing claims based on federal law, to have the cause heard in state court."[13] The law of removal should not be construed to "defeat[] a plaintiff's choice of forum…"[14]

Removal statutes are strictly construed, and any doubts about the correctness of removal are resolved in favor of state court jurisdiction and remand.[15] "[T]he better practice is for the

[9] *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994).
[10] *Pullman, Co., v. Jenkins,* 305 U.S. 534, 537-38 (1939).
[11] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).
[12] *Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.,* 561 F. 3d 904, 912 (8th Cir. 2009); *University City, MO v. AT & T Wireless Servs., Inc.,* 229 F. Supp. 2d 927, 929 (E.D. Mo. 2002).
[13] *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002)(internal citations omitted).
[14] *See id.*
[15] *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *In re Bus. Men's Assurance Co. of Am.,* 992 F.2d 181,183 (8th Cir. 1993); *Manning v. Wal-Mart Stores East,* 304 F. Supp 2d 1146, 1148 (E.D. Mo. 2004).

federal court not to decide the doubtful question in connection with a motion to remand but simply to remand the case and leave the question for the state courts to decide."[16] "A heavy burden of proof is on the party contesting a remand motion."[17]

Federal question jurisdiction is limited only to "civil actions arising under the Constitution, laws, or treaties of the United States."[18] When no federal question appears on the face of the complaint, federal courts do not have jurisdiction.[19] "The plaintiff is master of his claim and may avoid federal removal jurisdiction by exclusive reliance on state law."[20] "When plaintiff's action is properly brought under state law the defendant is not entitled to remove simply because federal law or principles of federal preemption will provide a defense, even a complete defense, to plaintiff's state law claims."[21]

In the present case, Defendants must, at minimum, prove all of the following in order to sustain their burden in opposing this Motion to Remand: (1) that there was a "nuclear incident" as defined in the PAA, (2) they had a disposal license for the wastes in question, (3) they had an indemnity agreement as provided under PAA, and (4) the waste materials at issue were subject to PAA at the relevant times.[22] Defendants have not even attempted to demonstrate any of the above—indeed, they cannot, because, as noted above, in adjudicating remand and removal, the basis for federal jurisdiction must be apparent from the plaintiff's complaint.

B. <u>The Price-Anderson Act Does Not Apply to Plaintiff's Claims</u>

The PAA provides for exclusive federal court jurisdiction over "public liability" claims

[16] *Iowa Pub. Serv. Co. v. Med. Bow Coal Co*., 556 F.2d 400, 406 (8th Cir. 1977).
[17] *Bowers v. City of Helena-W. Helena*, 2007 WL 2827676, at *1 (E.D. Ark. Sept. 27, 2007), *citing* 14A Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 2d § 3739 (1994).
[18] 28 U.S.C. § 1331.
[19] *M. Nahas & Co. v. First National Bank of Hot Springs*, 930 F.2d 608, 611 (8th Cir. 1991).
[20] *Id*. (*citing Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)).
[21] M. Nahas, 930 F.2d at 612.
[22] *See infra,* Section B.1.

arising out of a "nuclear incident," which includes "extraordinary nuclear occurrences."[23] The issue in this case is whether chronic and small releases of radioactivity from the mill tailings disposed of at the headwaters of Coldwater Creek are materials subject to the Act and represent such an "incident" or "occurrence." This question of statutory construction must be answered on the basis not only of the statutory language, but the role of PAA public liability claims within the overall structure and purpose of PAA. Furthermore, we deal here with the question of whether a federal statute displaces and preempts state jurisdiction over liability claims based on state tort law. Based on federalism considerations, the Supreme Court has held a federal statute should not be interpreted as preemptive of state common law remedies unless the intent of Congress to preempt is clear.[24] Applying these considerations and principles to the circumstances here, it is manifest that Plaintiff's claims are not subject to the exclusive federal jurisdiction of PAA and are not preempted by PAA; accordingly, such claims may be maintained in Missouri state courts.

The legislative history of the PAA clearly indicates congressional intent to preserve state law remedies in the event of anything other than a meltdown i.e. nuclear occurrence.[25] The PAA's enactment had dual purposes: "(1) making funds available to protect the public in the event of a nuclear incident, and (2) limiting liability of nuclear developers to provide incentives for development."[26] Subsequent amendments to the PAA did not change this overarching framework: the "1966 Amendments expressed Congress' intent to interfere with state law as little as possible, while the 1988 Amendments demonstrated the need for a consolidated forum in the event of a nuclear incident . . . [the] legislative history suggests that Congress did not intend to preempt all

[23] 42 U.S.C.A. § 2210(n)(2); 42 U.S.C.A. § 2014(q).
[24] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).
[25] S. REP. 85-296 (1957)(The PAA is designed to have "no interference with the state law until there is a likelihood that the damages exceed the amount of financial responsibility required together the amount of the indemnity").
[26] Daniel Kolomitz, *A Nuclear Threat: Why the Price-Anderson Act Must Be Amended Following Cook v. Rockwell*, 48 Ariz. St. L.J. 853, 860 (2016).

state law actions involving nuclear energy—just those rising to the level of a nuclear incident." [27]

1. The Price-Anderson Act Does Not Apply Without an Applicable Indemnity Agreement or License

The PAA does not apply without an appropriate license or indemnity agreement covering the activities complained of. In this case, Defendants do not possess an indemnity agreement with government. Accordingly, the PAA and its exclusive federal jurisdiction are not applicable.

In 1954, Congress enacted the Atomic Energy Act ("AEA") to encourage private sector involvement in atomic energy. The AEA provided for federal regulation and licensing of private construction, ownership, and operation of commercial nuclear power reactors.[28] In 1957, Congress amended the AEA with the PAA "which provided certain federal licensees with a system of private insurance, government indemnification, and limited liability for claims of 'public liability.'"[29]

The basic purpose of PAA was to redress disincentives posed by the threat of far-reaching liability to private firms' participation in the development of nuclear power and other nuclear-related activities involving certain nuclear materials, specifically special nuclear material, source material, and byproduct material.[30] As set forth in 42 U.S. C. § 2210, the means by which Congress implemented this objective was to provide a federally administered liability and insurance scheme to pay "public liability" claims, in order to ensure compensation for injuries suffered by third parties caused by participating nuclear licensees or contractors, while also providing those licensees or contractors with protection against the risk of massive, uninsurable liabilities.

Authority to administer the system was originally given to the Atomic Energy Commission ("AEC"); its regulatory authorities were transferred in 1975 to the Nuclear Regulatory

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[27] *Id*. at 862.
[28] *Pac. Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983).
[29] *El Paso Nat. Gas Co. v. Neztsosie,* 526 U.S. 473 (1999).
[30] S. REP. 85-296 (1957); Dan M. Berkovitz, *Price-Anderson Act: Model Compensation Legislation?-the Sixty-Three Million Dollar Question*, 13 HARV. ENVTL. L. REV. 1 (1989).

Commission ("NRC") and its operational authorities to the Department of Energy. These government authorities are authorized to require nuclear licensees or contractors to establish a basic level of insurance or other financial responsibility to cover their nuclear-related liabilities; in turn, such licensees or contractors receive indemnity agreements under which the government will cover any excess liabilities. The liability of participating licensees or contractors is capped. Liabilities in excess of the cap are covered by an insurance pool established and overseen by AEC/NRC and financed by premiums assessed against nuclear facility operators. All licensees receiving indemnity agreements are required to pay a fee to the government. This liability cap and insurance umbrella system, including government indemnity agreements, was designed to cushion liability risks for participating licensees and contractors conducting nuclear related activities in accordance with federal licensing and regulatory requirements.[31] There is no allegation in the removal papers that any of the Defendants have such coverage for the incidents complained herein.

The PAA "mandated that an assured 'pool' of available funds be established to cover certain liabilities which might arise out of activities related to licenses."[32] A licensee "was required as a condition of its license to maintain 'financial protection,' consisting of either 'private insurance, private contractual indemnities, self insurance, [or] other proof of financial responsibility.'"[33] The AEC itself "was required to enter into an indemnification agreement with any licensee who was required by license to maintain financial protection."[34]

The PAA's jurisdictional provision, 42 U.S.C.A. § 2210(n)(2), vests federal district courts with original jurisdiction over "any public liability action arising out of or resulting from a nuclear

[31] *See* George T. Mazuzan and J. Samuel Walker, THE BEGINNINGS OF NUCLEAR REGULATION 1946-62 103 (1984).
[32] *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325, 333 (D. N.J. 1998), *disagreed with on other grounds*, *Estate of Ware v. Hosp. of the Univ. of Penn.*, 871 F.3d 273 (3rd Cir. 2017).
[33] *Gilberg*, 24 F.Supp.2d at 333. (*quoting* 42 U.S.C. §§ 2210(a) & (b)).
[34] *Id.* (citing 42 U.S.C. § 2210(c)).

incident."[35] A "nuclear incident" is defined, in pertinent part, as an "occurrence, including an extraordinary nuclear occurrence."[36] "Occurrence" is not separately defined in the statute—but "extraordinary nuclear occurrence" is. An "extraordinary nuclear occurrence" is defined in the statute as any event causing a substantial amount (and resulting in substantial damages) of nuclear material or radiation to be dispersed "offsite."[37] The term "offsite" is defined based on the language of the indemnity agreement: "As used in this subsection, 'offsite' means away from 'the location' or 'the contract location' as defined in the applicable . . . indemnity agreement, entered into pursuant to section 2210 of this title."[38]

In order for there to be an "extraordinary nuclear occurrence," there must be a "location" set forth in an existing indemnity agreement. If there is no indemnity agreement, there is no occurrence: "An occurrence which underlies the definition of 'extraordinary nuclear occurrence' cannot be just 'any event,' but can only be an event at 'the location' or 'the contract location' as those terms are defined 'in the applicable . . . indemnity agreement."[39]

Because Congress chose to use the same word, "occurrence," in the same sentence and separated by only three other words, statutory interpretation requires that it not be given two separate and inconsistent definitions:

> The proximity to and interrelationship between the word "occurrence" and the phrase "extraordinary nuclear occurrence," in turn, presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. As a matter of statutory construction, therefore, the occurrence which underlies a "nuclear incident," can only be an event at "the location" or "the contract location" as that term is defined in an indemnity agreement entered into under § 2210."[40]

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[35] 42 U.S.C.A. § 2014(w).
[36] 42 U.S.C.A. § 2014(q).
[37] 42 U.S.C. § 2014(j).
[38] 42 U.S.C. § 2014(j). *See Gilberg v. Stepan Co.*, 24 F.Supp.2d, 325, 332 (D.N.J. 1998).
[39] 24 F.Supp.2d at 332.
[40] 24 F.Supp.2d at 332 (internal citations omitted).

This issue was recently considered by Judge Jean Hamilton in *Strong v. Republic Servs., Inc.,* 2017 WL 4758958 (E.D. Mo. 2017). Plaintiffs in that case sued owners and operators of the landfill into which the ***same waste at issue in the present case*** was ultimately dumped. *Id*. at 761. Defendants removed and plaintiffs moved for remand arguing that because defendants were not licensed to dispose of radioactive materials and have not entered an indemnification agreement regarding acceptance of radioactive materials, PAA does not apply to their claims. *Id*. The Court agreed, holding "***there cannot be a nuclear incident without an applicable license or indemnity agreement***." *Id.* at 773 (emphasis added). In fact, Judge Hamilton specifically rejected the argument that Cotter's license applied to disposal of the same waste materials complained of here.

Similarly, in *Samples v. Conoco, Inc.,* 165 F. Supp. 2d 1303 (N.D. Fla. 2001), the Court considered whether a license is necessary for federal subject matter under the PAA. The defendant claimed that the "clear language of the PAA covers any claim of injury to property allegedly caused by certain nuclear material" and that "Congress did not limit the scope of the PAA's 'public liability' provisions to Nuclear Regulatory Commission (NRC) licensees and Department of Energy (DOE) contractors."[41] Referring to the defendant's argument as "Hogwash," the Court held that "the word 'occurrence' as used in the definition of 'nuclear incident' means 'that event at the site of the ***licensed activity, or activity for which the Commission has entered into a contract,*** which may cause damage."[42] Finding that there had not been a nuclear incident under the PAA's definition, the court concluded that because the defendant failed to demonstrate that it was a DOE contractor or a NRC licensee, the case did not state a claim under the PAA.[43]

[41] *Samples*, 165 F. Supp. 2d at 1320–21
[42] *Id*. at 1321 (quoting S. REP. NO. 296, at 16 (1957) (quoted in 10 C.F.R. § 8.2at 202 (2001))(emphasis added)
[43] *Id.* at 1321–22. *See also Gilberg*, 24 F. Supp. 2d at 343 (holding that "whether as a matter of statutory construction or the structure and history of the Act, no claim for public liability can lie [under the PAA] in the absence of an applicable indemnity agreement."); *Joseph v. Sweet*, 125 F. Supp. 2d 573, 576 (D. Mass. 2000)("[T]he prerequisite for a claim to fall within the scope of the [PAA] [is] the existence of an indemnification agreement between the government and the defendant with respect to the complained activity.")

Judge Hamilton acknowledged in the *Strong* decision that there are "varied and conflicting opinions" regarding the issue of PAA applicability in the absence of a license or indemnity agreement.[44] To resolve these conflicts, she turned to the legislative history, concluding that "[i]t is implicit in the language of the . . . legislative history that the terms 'nuclear incident' and 'occurrence' are inextricably intertwined with 'licenses' and 'indemnification agreements,' thus suggesting licenses and indemnification agreements are an integral part of the PAA's statutory scheme and that there cannot be a nuclear incident without an applicable license or indemnity agreement." 283 F. Supp. 3d at 771. Further, she noted that that "conflicts should be resolved by finding no federal preemption" and thus "there cannot be federal jurisdiction under the PAA without a license or an indemnity agreement." *Id*.

The present case is not a PAA case because PAA does not apply unless a "nuclear incident" has occurred. No nuclear plant melted down here. There was no explosion or incident alleged in the removal papers. Defendants simply left radioactive waste on and in the ground on their properties, with no governmental permission, allowing it to slowly be dispersed into Coldwater Creek, consequently contaminating Plaintiff's property. Compare the facts here with the facts in *Cook,* where an operating plutonium plant called Rocky Flats released over time small amounts of plutonium thorough its air discharge stacks which contaminated the plaintiff's property.[45] Despite the fact the plant was an ongoing and licensed operation, now-Justice Neil Gorsuch and a unanimous panel of the Court of Appeals held that this was not a nuclear incident under the PAA.[46]

2. <u>Plaintiff has Alleged that Defendants Do Not Have an Appropriate License or Indemnity Agreement for the Complained Activity</u>

[44] 283 F. Supp. 3d at 767. *Cf. Estate of Ware*, 871 F.3d 273 ("we do not decide whether the possession of a license…might affect the Act's applicability to a particular case. We note only that these *implicit limitations* on the Price-Anderson Act's scope would not preclude its application here."); *Acuna v. Brown & Root Inc.,* 200 F.3d 335, 339 (5th Cir. 2000); *O'Conner v. Commonwealth Edison Co.,* 807 F. Supp. 1376 (C.D. Ill. 1992), *aff'd,* 13 F.3d 1090 (7th Cir. 1994); *Carey v. Kerr-McGee Chem. Corp.,* 60 F. Supp. 2d 800 (N.D. Ill. 1999).
[45] *See generally, Cook v. Rockwell Int'l Corp*., 790 F.3d 1088 (10th Cir. 2015).
[46] *Id*. at 1104.

Plaintiff has affirmatively alleged that Defendants do not possess an appropriate license or indemnity agreement for the complained activity in this matter, and Defendants have despite their high burden of proof, supplied no evidence to the contrary in support of removal. Defendant cannot create federal subject matter jurisdiction by introducing facts and evidence not pled by Plaintiff.[47]

Nonetheless, the only possible license Defendants could argue confers jurisdiction under the PAA is Cotter's 1969 "source material" license which the *Strong* Court specifically found not applicable to disposal of the wastes at issue.[48]

3. Principles of Statutory Construction Dictate that the Price-Anderson Act Does Not Preempt Plaintiffs' State Law Claims

In enacting the PAA, Congress did not preclude maintenance of any and all state law claims for nuclear-related harms. In fact, the legislative history shows Congress recognized that State courts would have a role to play in regards to providing remedies for damages caused by radioactive materials.[49] The Act provides jurisdiction only over those claims involving a nuclear occurrence involving special nuclear, source, or byproduct material arising out of conduct by a defendant operating in accordance with an appropriate government license or indemnity agreement.[50] It does not preempt state law claims that fall outside of its jurisdiction. The Act does not reflect congressional intent to occupy the entire field of all nuclear-related claims; prosecuting nuclear-related state-law claims in state court does not conflict with the PAA's scheme.

The well-reasoned opinion by Judge (now Justice) Gorsuch for the court in *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1099 (10th Cir. 2015), *cert. dismissed sub nom. Dow Chem.*

[47] *Caterpillar Inc. v. Williams*, 482 U.S. 386, 397 (1987) ("[Defendant] attempts to justify removal on the basis of facts not alleged in the complaint. The 'artful pleading' doctrine cannot be invoked in such circumstances.").
[48] *Strong*, 283 F. Supp. 3d at 773.
[49] S. REP. 85-296, S. REP. 85-296 (1957).
[50] *See* 42 U.S.C.§ 2014(q).

Co. v. Cook, 136 S. Ct. 2055 (2016), provides an exceedingly sound analysis of the issues and justification for these conclusions. As Judge Gorsuch shows, the PAA does not extend to all nuclear-related activities and resulting injuries. Nor does it preempt the field, so as to preclude state law recovery for such injuries when they are not subject to compensation under the Act. Further, the congressional scheme in the Act can function perfectly well in tandem with state court decision of state law actions involving claims not covered by the PAA system. Indeed, the availability of state law claims, which could include punitive damage awards, would strengthen the PAA system by giving operators incentives to subject their activities to federal regulatory and financial responsibility/indemnity requirements.

As *Cook* points out, courts that have stated in unqualified terms that PAA and its exclusive federal jurisdiction encompasses all nuclear-related injury claims have failed to address the limitations in the Act's coverage.[51] The Act covers only claims arising out of a "nuclear incident" "including an extraordinary nuclear occurrence," involving specified nuclear-related materials in activities subject to federal regulation or indemnity agreements.[52] Precluding state law claims that do not meet these limitations would leave injured parties in limbo, without any remedy. As *Cook* emphasized, PAA should not be interpreted to preempt state law claims that do not fall within its "public liability" scheme. Court must not interpret federal statutes to preempt traditional state tort law remedies unless congressional intent to do so is clear.[53] No such intent can be found in PAA.

Furthermore, interpreting PAA to preempt state law claims that do not qualify as "public liability" claims under the Act would leave injured parties without any redress. Depriving such parties of any remedy at all would likely violate due process. Under the canon of constitutional

[51] *Cook*, 790 F.3d at 1098.
[52] 42 U.S.C.A. § 2210(n)(2); 42 U.S.C. § 2014(w); 42 U.S.C.§ 2014(q); 42 U.S.C.A. § 2014(j).
[53] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008).

avoidance enunciated by the Supreme Court, courts should construe federal statutes so as to avoid presenting such serious constitutional issues.[54] Accordingly, courts should not interpret PAA to preempt state law claims for injuries for which PAA does not itself provide a remedy.

4. Applying the PAA to Every Case Involving Nuclear Material or Radiation Leads to Absurd Results

Defendants propose that PAA grants immunity from state tort liability to anyone who intentionally or unintentionally uses nuclear materials to cause harm. This approach ignores the history, structure, language and purpose of the act and would lead to absurd results. Based on Defendants' approach, the PAA covers all nuclear tortfeasors under any conceivable circumstance. It would cover the properly licensed and indemnified owner of a nuclear plant, as well as any corporate opportunist who foregoes licensing and regulations to conduct operations at a discount.

Such an extreme change to the PAA was not Congress' intent and it is not supported by the language of the 1988 amendment. If Congress intended to extend the benefits of the PAA to all nuclear wrongdoers, it would have used a word other than "occurrence" to define "nuclear incident." At the very least, Congress would have provided an alternative definition of "occurrence" to include events that do not take place at a "location" as set forth in an applicable indemnity agreement or license. Congress chose to do neither, thus, "occurrence" continues to have the same meaning after the amendment that it did before the amendment: an event taking place at a location identified in a license or indemnity agreement held by a defendant. This Court should resist Defendants' invitation to depart from the purpose and language of the PAA by assigning an interpretation that would have absurd consequences.

5. Applying PAA Preemption to Encompass all State Law Claims Involving Radiation Violates the Due Process Clause

[54] *United States v. Witkovich*, 353 U.S. 194 (1957); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

The Due Process Clause of the United States Constitution prevents the government from taking away long-held common law rights, especially property rights such as recourse for nuisance, without providing a reasonable alternative remedy. The Supreme Court considered a due process challenge to PAA's preemption provisions in *Duke Power Co. v. Carolina Envtl. Study Group, Inc*. 438 U.S. 59, 88 (U.S. 1978). The Court held the requirements of the Due Process Clause were satisfied, in part because PAA provided "a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id*. It reached this decision in part because the indemnity provisions of PAA provided "assurance" of available funds to satisfy potential radiation claims. *Id*. at 90-91.

Defendants' position is that all state-law claims for lost property that in any way involve damage from radiation are preempted by the PAA—including those not covered by indemnification. Adopting this position would mean that the PAA deprives injured claimants of their common law property rights without any substitute. Per the Supreme Court's analysis in *Duke Power*, this would be an unconstitutional due process violation.

IV. CONCLUSION

Contrary to Defendants' argument, Plaintiff's claims do not arise under the PAA. Plaintiff has alleged that no "nuclear incident" giving rise to PAA liability has occurred. PAA does not apply without an applicable license or indemnity agreement and the Defendants in this matter have neither. Cotter's 1969 Source Material License does not apply to the radioactive wastes at issue. Entities that operate outside the bounds of PAA's licensing and indemnification provisions do not and cannot enjoy the limitations on liability and other benefits of PAA. The uranium ore processing byproducts at issue, including mill tailings, were not covered by PAA at the relevant times. Any doubts about the correctness of removal are resolved in favor of state court jurisdiction and remand. Accordingly, this matter must be remanded to Missouri state court.

Dated: May 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 29, 2018, a true and accurate copy of the foregoing was served by filing it in the court's electronic filing system, which will provide electronic notice to all parties and attorneys of record.

/s/ *Ryan Keane*