

ALERT

NOVEMBER 6, 2012

Energy, Environmental and Utilities Group

News Concerning

Recent Developments in Energy and Environmental Law



U.S. District Court Holds that Federal Clean Air Act Preempts Pennsylvania State Law Common Law Tort Claims

On October 12, 2012, the U.S. District Court for the Western District of Pennsylvania issued an opinion and order in *Kristie Bell v. Cheswick Generating Station, GenOn Power Midwest, L.P.*, No. 2:12-cv-929, holding that state law nuisance claims are preempted by the federal Clean Air Act (CAA). While numerous courts have held that the CAA preempts federal common law public nuisance claims with respect to power plant emissions, a principle recently confirmed by the U.S. Supreme Court,¹ the district court's ruling further applies that reasoning to Pennsylvania common law claims and with important implications for standard toxic tort actions as well as climate-related litigation.

The Complaint

In *Bell*, plaintiffs had filed suit on April 19, 2012, alleging emissions from GenOn's Cheswick power plant, a 570-MW coal-fired facility, caused damage both to the plaintiffs' property and to a putative class of at least 1,500 individuals within a one-mile radius of the facility, located in the borough of Springdale, Allegheny County, Pennsylvania. Specifically, the complaint alleged damage in the form of odors and the deposition of coal dust and combustion residuals on private property. The plaintiffs sought compensatory and punitive damages under the common law tort theories of nuisance,

negligence and recklessness, trespass and strict liability, as well as injunctive relief in connection with the alleged nuisance and trespass. The suit originally was filed in the Allegheny County Court of Common Pleas, but was removed to federal court on diversity of citizenship.

GenOn responded to the complaint by filing a motion to dismiss for failure to state a claim. In support of its motion, GenOn advanced a number of arguments, including that the pleadings were not legally sufficient, that the CAA preempts the state common law claims, that the action is barred under the political question doctrine as non-justiciable, and that power generation is not considered an ultra-hazardous activity.

The Court's Decision

Ruling that the plaintiffs' complaint did not sufficiently state a plausible claim for relief, the court granted GenOn's motion in its entirety and dismissed the action. Construing the complaint as "necessarily speaking to and attacking emission standards," the court cited the "extensive" regulation and "comprehensive" oversight by the U.S. Environmental Protection Agency, the Pennsylvania Department of Environmental Protection and the Allegheny County Health Department when ruling that the plaintiffs' claims "impermissibly encroach on and interfere with [the CAA's federal] regulatory scheme." Rejecting plaintiffs' contention that the case was solely about property damage, the court explained that the complaint would necessarily require the court to alter agency-established emission standards, and that such "judicial interference ... is neither warranted nor permitted."

¹ In *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), the Court held that federal common law claims seeking to curtail greenhouse gas emissions as a public nuisance were displaced by the mere delegation of regulatory authority to U.S. Environmental Protection Agency. By contrast, the Court went on to explain that the extent to which EPA has exercised that authority (i.e., the extensive and comprehensive nature of its regulation) was relevant to whether the CAA displaced state law.

The court also held that the CAA savings clause found at 42 U.S.C. § 7604(e) did not preserve the present state actions. The court reasoned, consistent with U.S. Supreme Court precedent, to allow a state common law action to proceed in a way that conflicts with the provisions of the CAA ultimately would undermine the objectives of Congress. Again citing the extensive and comprehensive nature of the CAA's regulatory scheme, the court determined that the plaintiffs' chosen remedies — monetary damages and injunctive relief — were “simply inconsistent” with the CAA.

Going Forward

Although the court is not the first to rule that state common law tort theories can be preempted by a comprehensive federal regulatory scheme, it is the most recent example of a court's willingness to find state common law preempted by regulations implemented under the CAA and may indicate a future trend. This is particularly relevant in light of the current state of climate change-related litigation, in which federal common law theories

have been roundly rejected by the U.S. Supreme Court as displaced by the CAA. However, consistent with the Supreme Court's holding in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), as plaintiffs seeking to impose stricter controls on emissions of greenhouse gases and other pollutants turn instead to common law tort theories arising under state law, it will be critical for plaintiffs and defendants alike to be in a position to educate the courts on the “comprehensive” nature of any potentially applicable federal regulatory scheme and whether such regulatory oversight is so “extensive” as to preempt state law.

To discuss any questions you may have regarding this Alert, or how it may apply to your particular circumstances, please contact a member of Cozen O'Connor's Energy, Environmental & Public Utilities Practice.

Atlanta • Charlotte • Cherry Hill • Chicago • Dallas • Denver • Harrisburg • Houston • London • Los Angeles • Miami
New York • Philadelphia • San Diego • Seattle • Toronto • Washington, D.C. • West Conshohocken • Wilkes-Barre • Wilmington