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Western Pa.'s Take On Carbon Dioxide Liability Claims

Law360, New York (December 17, 2012, 12:01 PM ET) -- Left open by the U.S. Supreme Court's decision in American Electric Power Co. v. Connecticut, 131 S. Ct. 2527 (2011), was the question of whether state law nuisance claims for the emission of carbon dioxide were viable in the face of the Clean Air Act. That question continued to be answered in the negative with the decision of the U.S. District Court for the Western District of Pennsylvania last month in Bell v. Cheswick Generating Station, GenOn Power Midwest L.P. (W.D. Penn. Oct. 12, 2012), which was appealed to the Third Circuit the Friday before Thanksgiving.[1]

In Bell, plaintiffs, neighbors to the defendant's coal-fired electricity generating plant, filed suit alleging:

> that the [defendant's] atmospheric emissions fall upon their properties and leave a film of either black dust (i.e., unburned coal particulate/unburned coal combustion byproduct) or white powder (i.e., fly ash). According to the Plaintiffs, those discharges require them to constantly clean their properties, preclude them from full use and enjoyment of their land, and "make [them] prisoners in their own homes." Order at 2.

Plaintiffs further alleged that the defendant did not use best available technology and was damaging the plaintiffs' properties, an outcome not permitted by the defendant's permit to operate. Id. at 3. As to legal theories, plaintiffs alleged nuisance, negligence and recklessness, trespass and strict liability. Id.

The defendant moved to dismiss, asserting, among other things, that the claims were preempted by the Clean Air Act. Id. at 5. The court agreed.

Plaintiffs had attempted to distance themselves from their complaint, which had criticized the defendants for failing to comply with their Clean Air Act permit and sought injunctive relief. They asserted in their papers that "[t]he the defendant is allowed to emit whatever millions of pounds of emissions the [EPA] has decided for the defendant but the defendant is not allowed by those emissions granted [to] it by the [EPA] to damage private property." Id. at 8.

The court was not buying: "A review of the Complaint reveals that the allegations of Plaintiffs, as pleaded, assert various permit violations and seek a judicial examination of matters governed by the regulating administrative bodies … Thus, the Court reads the Plaintiffs' Complaint, including its common law claims, as necessarily speaking to and attacking emission standards." Id. at 10.

The court specifically noted that the Supreme Court, in American Electric Power Co. v. Connecticut, had held that "the Clean Air Act preempted federal common law nuisance claims as a means to curb emissions from power plants." Id. at 12 (citing 131 S. Ct. at 2540). It also noted, however, that the court had not ruled on state law nuisance claims. Those claims would depend "on the preemptive effect of the federal Act." Id. (citing 131 S. Ct. at 2540).

Did the Clean Air Act preempt state law nuisance claims? The court had little doubt and turned for authority to the Fourth Circuit's decision in North Carolina, ex rel. Cooper v. Tennessee Valley Auth., 615 F.3d 291 (4th Cir. 2010), cert. dismissed, 132 S. Ct. 46 (2011)). In finding that "public nuisance claims were preempted because they threaten to scuttle the comprehensive regulatory and permitting regime that has developed over several decades," order at 12-13, the Fourth Circuit held:

> A field of state law, here public nuisance law, would be preempted if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Here, of course, the role envisioned for the states has been made clear. Where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted. Id. at 13, quoting Cooper. 615 F.3d at 303.

Accordingly, because the "specific controls, equipment, and processes to which the Cheswick Generating Station is subject to are implemented and enforced by [state and federal regulators] Plaintiff's Complaint, as pled, would necessarily require this Court [the Western District] to engraft or alter those standards, and judicial interference in this regulatory realm is neither warranted nor permitted. To conclude otherwise would require an impermissible determination regarding the reasonableness of an otherwise government regulated activity." Id. at 14. Thus, plaintiffs' claims were preempted.

Plaintiffs had one slim hope. The Clean Air Act contains a "savings clause," which provides "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 7604(e). This too had been considered in Cooper and rejected. Order at 14, citing 15 F.3d at 303-04.

Further, the Supreme Court had spoken on savings clauses as well: "As we have said, a federal statute's saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." Id. at 14, quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011). Thus, "Based on the extensive and comprehensive regulations promulgated by the administrative bodies which govern air emissions from electrical generation facilities, the Court finds and rules that to permit the common law claims would be inconsistent with the dictates of the Clean Air Act." Id. at 15.

Accordingly, notwithstanding the suggestion by the Supreme Court in American Electric Power that state law nuisance claims for carbon dioxide liability might be viable, if Western District's analysis is correct and applicable to carbon dioxide, such claims will not survive for very long.

--By J. Wylie Donald, McCarter & English LLP

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[1] Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), also relied on American Electric Power and found state law nuisance claims displaced by the Clean Air Act. That court had first found that plaintiffs' claims failed due to res judicata and estoppel, and half a dozen other reasons, and its analysis of the displacement and preemption issue is not extensive. See Dismissed Means Dismissed: Comer v. Murphy Oil, the First Climate Change Liability Damages Suit, Is Tossed Again

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