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Sixth Circuit Rejects Clean Air Act Preemption of State Common Law Claims: Four Things to Know

By Matthew W. Morrison and Bryan M. Stockton

In two decisions released on November 2, 2015, Merrick, et al. v. Diageo Americas Supply, Inc. *and* Little et al. v. Louisville Gas & Electric Company; PPL Corporation*, the U. S. Court of Appeals for the Sixth Circuit unambiguously held that the Clean Air Act (CAA) does not preempt state common law claims brought against regulated sources of air emissions in the same state.*[1] *As we noted in a previous client alert and subsequent* Environmental Law Reporter *article,*[2] *a facility that is otherwise in compliance with CAA emission requirements can still face lawsuits by neighboring landowners for traditional torts such as nuisance and trespass.* Merrick *and* Little *are not outliers but add to the foundation of precedent across the Second, Third, and Sixth Circuits, and Iowa Supreme Court.*

When these cases first began being litigated, many practitioners and observers had expected courts to treat state common law claims the way the Supreme Court dealt with federal common law claims[3]—as being preempted by the CAA. In light of these decisions, emitting sources may want to reevaluate their compliance strategies, factoring in potential exposure to state common-law claims when reevaluating their compliance strategies.

Here are four things you need to know about the Sixth Circuit's decisions:

[1] *Merrick, et al. v. Diageo Americas Supply, Inc.,* No. 14-6198 (6th Cir. Nov. 2 2015) (opinion); *Little et al. v. Louisville Gas & Elect. Co.; PPL Corp.*, No. 14-6499 (6th Cir. Nov. 2, 2015) (opinion).

[2] Matthew Morrison and Bryan Stockton, 45 ENV'T. L. REP. 10261, 10282 (April 2015).

[3] See *American Elec. Power Corp. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011).

1. **They were clear and unambiguous in authorizing state common law claims against sources within the same state.**

   The Sixth Circuit considered state common law standards to be "requirements" adopted by "States," and as such, protected against preemption by the Clean Air Act states' rights savings clause.[4] No such savings clause exists in the CAA for either *federal* common law claims or state law claims brought against sources in other states; such claims are expressly preempted under the CAA.

2. **They could impact a wide variety of industrial and utility sources.**

   The decisions apply to state common law claims brought against a source within the same state. Cases have dealt with corn wet-mills, whiskey distilleries, coal-fired power plants, and MBTE contamination.[5] The holdings in these cases could be applied to other regulated activities with dust, contamination or fugitive emission impacts transcending property boundaries.

3. **It will still be difficult for class action plaintiffs to certify their class in these types of cases.**

   Because the common law claims at issue in these cases—such as nuisance and trespass—are highly individualized determinations, a court may refuse to certify a putative class if the plaintiffs do not share the requisite commonality of law and fact required under Rule 23 of the Federal Rules of Civil Procedure. Indeed, in one such case, while allowing the state common law tort claims to proceed, the court refused to certify the class.[6]

4. **Supreme Court review is unlikely, so sources should start evaluating their potential exposure.**

   It is unlikely that the Supreme Court would grant cert in *Merrick* or *Little*, as the cases are essentially identical to two cases for which the Court denied cert last term.[7] If the Sixth Circuit had reversed the district court and held the claims were preempted, the resulting split between the Second and Third Circuits and the Sixth Circuit might have increased the chances that the Supreme Court would grant certiorari to an appeal.

With Supreme Court review unlikely, and with the body of precedent growing across circuits, sources may therefore want to factor reevaluate their compliance strategies and take greater account of their potential exposure to state common-law claims in reevaluating their compliance strategies. In this regard, the Sixth Circuit's holding also coincides with EPA's promotion of advanced monitoring, including monitoring of airborne emissions at facility fence lines, as part of the Agency's Next Generation Compliance Initiative.[8] Facilities should confer with counsel, however, before embarking on such advanced monitoring and before finalizing compliance strategies to address state common law claims.

[4] *Merrick*, No. 14-6198 at 6.

[5] See *Bell v. Cheswick Generating Station*, 734 F.3d 188, 196-97 (3d Cir. 2013), *reh'g en banc denied*, No. 12-4216 (3d Cir. Sept. 23, 2013), *cert. denied sub nom. GenOn Power Midwest, L.P. v. Bell*, 134 S. Ct. 2696 (2014); In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 725 F.3d 65, 96-104 (2nd Cir. 2013); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 69 (Iowa 2014), cert. denied, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014); *Merrick*, No. 14-6198; *Little*, No. 14-6499.

[6] See *Bell v. Cheswick Generating Station*, *GenOn Power Midwest, L.P.,* No. 12-929 (Jan. 28, 2015) (Memorandum Order).

[7] *Bell*, 734 F.3d 188 (3d Cir. 2013), *cert. denied sub nom. GenOn Power Midwest, L.P. v. Bell*, 134 S. Ct. 2696 (2014); *Freeman*, 848 N.W.2d 58, cert. denied, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014).

[8] See Final Rule, Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards (Sept. 29, 2015) (not yet published in Federal Register).

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