



## Air Permits Don't Stop Neighbors' Nuisance Claims

On November 2, 2015, the United States Court of Appeals for the Sixth Circuit issued opinions in two cases presenting the issue of whether the federal Clean Air Act (“CAA”) preempts state common law claims against sources. In both cases, the Sixth Circuit ruled that the state law claims were not preempted. These recent opinions, in combination with efforts by environmental regulators to make reporting and compliance information more widely available, could lead to more state law claims seeking damages or injunctive relief related to air emissions from sources across the country.

### Background—Previous Case Law

The Sixth Circuit opinions followed a series of similar cases also analyzing the preemption of state law claims by the CAA. In *American Electric Power Co., Inc. v. Connecticut*, the U.S. Supreme Court held that federal common law claims were preempted by the CAA, but it expressly left open the question of whether state common law claims were preempted.<sup>1</sup> More recently, the U.S. Court of Appeals for the Third Circuit held in *Bell v. Cheswick Generating Station* that a class action against a coal-fired electrical generation facility, alleging nuisance, negligence, and trespass stemming from ash and other contaminants allegedly settling

on nearby properties, was not preempted by the CAA because it was “brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania.”<sup>2</sup> Last year, in *Freeman v. Grain Processing Corp.*,<sup>3</sup> the Iowa Supreme Court reasoned that “a claim that seeks to regulate pollution based on the law of the source state ... is precisely the kind of cooperative federalism anticipated by” the CAA.<sup>4</sup> The Iowa Supreme Court went on to hold that “a private lawsuit seeking damages anchored in ownership of real property” is not preempted by the CAA.<sup>5</sup> The U.S. Supreme Court denied certiorari in appeals of both *Bell* and *Freeman*.<sup>6</sup>

### The Sixth Circuit Cases

In *Little v. Louisville Gas & Electric Co.*,<sup>7</sup> the plaintiffs alleged that a power plant in Kentucky was the cause of a dust that was periodically coating their nearby homes and properties. In addition to arguing that the power plant had violated various statutory requirements under federal law, the plaintiffs brought state law claims of nuisance, trespass, negligence, negligence per se, and gross negligence. The district court dismissed most of the plaintiffs’ federal law claims but rejected defendants’ argument that the CAA preempted plaintiffs’ state common law claims.

*Merrick v. Diageo Americas Supply, Inc.*<sup>8</sup> involved the release of ethanol emissions from a Kentucky distillery that allegedly caused “whiskey fungus” to grow on neighboring properties. The plaintiffs in *Merrick* filed a class action seeking damages for negligence, nuisance, and trespass. The defendants moved to dismiss, arguing that the plant’s ethanol emissions levels were in compliance with applicable permits and that the tort claims were preempted by the CAA. The district court denied the motion to dismiss.

The Sixth Circuit, in related opinions, affirmed both district court opinions with regard to preemption under the CAA. The court primarily relied on what it refers to as the “states’ rights savings clause,” a provision of the CAA that reads, in relevant part:

... nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution....<sup>9</sup>

The Sixth Circuit reasoned that state law tort standards function as requirements respecting the control or abatement of air pollution. Therefore, the court held that the CAA expressly reserved to states the right to adopt and enforce such standards.<sup>10</sup> Citing *Bell* and *Freeman*, the Sixth Circuit opinion distinguished claims based on the common law of the source state (not preempted) and claims based on the common law of a non-source state (preempted).<sup>11</sup>

The Sixth Circuit subsequently declined to rehear the *Merrick* case.<sup>12</sup>

## Implications for Sources

It is important highlight that although this line of cases represents a significant development for air pollution enforcement, the holdings are limited. All of the opinions stressed that plaintiffs may not bring state common law claims against sources located in other jurisdictions. In addition, these cases simply held that the tort claims could proceed—and did not rule on the question of whether the plaintiffs would succeed on the merits. The requirements for successfully alleging and proving tort claims will vary from state to state, and they could

be difficult to satisfy. For example, some jurisdictions may not allow recovery under tort for alleged harms resulting from activity authorized pursuant to a permit or other statutory authority.<sup>13</sup> Furthermore, establishing causation (i.e., that pollution originated at a particular source) or damages (showing actual harm caused by the alleged pollution) may be complicated, depending on the circumstances.

However, potential plaintiffs increasingly have access to resources for information about facilities in their communities. The U.S. Environmental Protection Agency, for example, recently launched its “[Next Generation Compliance](#)” initiative. One of the primary goals of Next Generation is to publish information (such as release and compliance data for individual sources) in a manner that is more accessible to the public. Armed with more readily available emissions information and the rulings in cases like *Little* and *Merrick*, plaintiffs may strengthen their scrutiny of, and challenges against, local facilities. Pending a possible U.S. Supreme Court decision about whether to review *Little* or *Merrick*, sources may wish to consider pursuing statutory amendments (either at the state level for tort law or at the federal level for the CAA itself) that could curtail the potential effects of these holdings. Sources also might consider engaging local stakeholders to understand any issues of concern to the community around a facility.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

### Charles T. Wehland

Chicago  
+1.312.269.4388  
[ctwehland@jonesday.com](mailto:ctwehland@jonesday.com)

### Mary Beth Deemer

Pittsburgh  
+1.412.394.7920  
[mbdeemer@jonesday.com](mailto:mbdeemer@jonesday.com)

### Thomas M. Donnelly

San Francisco  
+1.415.875.5880  
[tmdonnelly@jonesday.com](mailto:tmdonnelly@jonesday.com)

### Kevin P. Holewinski

Washington  
+1.202.879.3797  
[kpholewinski@jonesday.com](mailto:kpholewinski@jonesday.com)

### John A. Rego

Cleveland  
+1.216.586.7542  
[jreg@jonesday.com](mailto:jreg@jonesday.com)

### Casey F. Bradford

Atlanta  
+1.404.581.8119  
[cbradford@jonesday.com](mailto:cbradford@jonesday.com)

### Alina Fortson

Chicago  
+1.312.269.1542  
[afortson@jonesday.com](mailto:afortson@jonesday.com)

## Endnotes

- 1 131 S. Ct. 2527, 2540 (2011).
- 2 734 F.3d 188, 197 (3rd Cir. 2013).
- 3 848 N.W.2d 58 (Iowa 2014).
- 4 *Id.* at 84.
- 5 *Id.* at 85.
- 6 134 S. Ct. 2696 (2014) (*Bell*); 135 S. Ct. 712 (2014) (*Freeman*).
- 7 [Case No. 14-6499](#) (Nov. 2, 2015).
- 8 [Case No. 14-6198](#) (Nov. 2, 2015) (*Merrick*).
- 9 *Merrick* at 3–4; 42 U.S.C. § 7416.
- 10 *Merrick* at 6.
- 11 *Merrick* at 10.
- 12 Order denying petition for rehearing en banc, No. 14-6198 (Dec. 7, 2015).
- 13 See, e.g., Cal. Civ. Code § 3482 (“Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”).

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our “Contact Us” form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.