

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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Compliance With the Clean Air Act May Not Be Enough

A recent Third Circuit decision indicates that compliance with the requirements of the Clean Air Act (CAA) may not be sufficient to protect an owner or operator from state common law tort claims. In *Bell v. Cheswick Generating Station* (Aug. 20, 2013), the Court of Appeals for the Third Circuit held that the CAA does not preempt state common law claims that are based on the law of the state where the source of the pollution is located. Therefore, the Court allowed the *Bell* plaintiffs to proceed with state tort claims against the Cheswick Generating Station, despite comprehensive regulation of the power plant's emissions under the CAA.

Bell involves a class action complaint, with a putative class consisting of at least 1,500 individuals living within one mile of the Cheswick Generating Station, a coal-fired electrical generation facility in Springdale, Pennsylvania (the Plant). The *Bell* plaintiffs allege that the Plant's emissions led to the deposition of ash and other contaminants on their properties, and they seek damages under common law tort theories, including nuisance, negligence and trespass. The Plant argued that it is extensively regulated by federal, state and local authorities under the CAA, and that state tort law is preempted because its use would undermine the comprehensive design of CAA regulation and disrupt the work of regulators. The *Bell* plaintiffs argued that the plain text of two savings clauses in the CAA authorizes state law tort claims related to air emissions.

The Court applied the Supreme Court's opinion in *International Paper Co. v. Ouellette* (1987), which interpreted the savings clauses of the Clean Water Act. Because the Clean Water Act and CAA savings clauses use almost identical language, the Court restated the *Ouellette* holding in the context of the CAA, and held that the CAA "does not preempt state common law claims based on the law of the state where the source of the pollution is located." Therefore, the *Bell* claims, brought under Pennsylvania law against a source located in Pennsylvania, are not preempted. The Court dismissed the Plant's concerns about inconsistent and difficult-to-ascertain emissions standards created through tort litigation, quoting the Supreme Court's declaration that such "separate standards" would only come from a "single additional authority" and "should be relatively predictable." By requiring claims to be based on the law of the state in which the source is located (rather than, say, neighboring states where affected individuals might live), the Court believed that the existing partnership between Federal and state law would not be disrupted.

Nothing in the *Bell* opinion limits its application to situations where a source is violating CAA emission limits. Under the Third Circuit's reasoning in *Bell*, plaintiffs could bring common law tort claims against entities entirely in compliance with their permits and the CAA.

For more information on tort claims related to air emissions, please contact Michael H. Winek at (412) 394-6538 or mwinek@babstcalland.com, or Abigail F. Jones at (412) 773-8758 or ajones@babstcalland.com.