



February 22, 2016

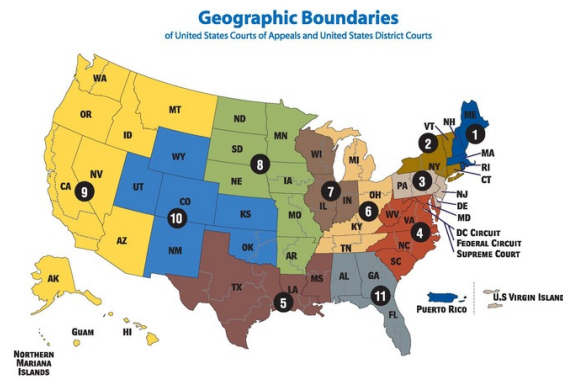
STATE SOLUTION TO AIR POLLUTION

Impact! (/full-blog?category=Impact%21), Natural Resource (/full-blog?category=Natural+Resource)

By: Rafael Rodriguez

Even though you can survive many days without food and several hours without water, without air you would die within a few minutes.^[i] Particularly, air pollution can burn your eyes and nose, which can affect visibility and the ability to breathe.^[ii] In order to combat pollution in the air, Congress passed the Clean Air Act (hereinafter "the Act"), which gave the federal government the power to limit air pollution in the United States.^[iii]

The Act states that air pollution prevention is the primary responsibility of individual states, but acknowledges federal assistance is essential on achieving those goals.^[iv] The Act essentially depends on a cooperative federalism structure under which the federal government develops baseline standards that the states follow.^[v] The Act itself allows states to adopt or enforce standards for air that can be stricter than what the federal guidelines require.^[vi] Or at least, that is what some courts have been ruling.^[vii]



On November 2, 2015, the Sixth Circuit followed the Third Circuit and the Supreme Court of Iowa, and concluded that the Act does not preempt common law claims brought against an emitter of pollution based on the law of the state in which that emitter conducts its activities. [viii] In *Merrick v. Diageo Ams. Supply, Inc.*, owners, lessors, and renters of properties near Diageo's warehouses were affected by whiskey fungus and complained to air pollution control about the amount of whiskey fungus that was growing on their property due to their proximity to Diageo's warehouses.[ix] The plaintiff's alleged that the Act did not preempt the state common laws of nuisance and trespass, while the defendants suggested that those claims would disrupt the Act's cooperative federalism structure because it would allow states to adopt stricter standards than the 'floor' established by federal law.[x] The Sixth Circuit held that the Act expressly allowed the States to impose stricter standards on air pollution than the federal government; therefore, the common-law claims were not preempted.[xi] The Fourth Circuit, however, in *N.C. ex rel. Cooper v. TVA* held to the contrary, and recognized that allowing nuisance claims would provide an unmanageable method with which to implement regular standards of pollution control.[xii] The court reasoned that allowing the state claims would conflict too much with pollution control guidelines set forth in the Act and dismissed the claims.[xiii]

This circuit split raises the question on whether the Act preempts state common law claims or not. A plain reading of the statute suggests that it does not, as Congress specifically carved out a provision for the states to retain authority over the level of strictness of air control.[xiv] Additionally, if the Act were to be read as dismissing all common-law claims, something which even the Fourth Circuit failed to accept, then there would be no remedy for those whose property value was damaged.[xv] Furthermore, the question whether state law is preempted by federal law depends on whether compliance with the state law defeats the purposes and objectives of the federal law.[xvi] Allowing tort claims against polluters does not seem to defeat the purpose of Congress' goal of quality air control. In fact, it seems to further the goal as emitters will have stricter standards to adhere to.

[i] *The Plain English Guide to the Clean Air Act*, U. S. Envtl. Protection Agency (Sept. 10, 2015), http://www3.epa.gov/airquality/peg_cca/concern.html.

[ii] *Id.*

[iii] *Id.*

[iv] *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013).

[v] *See id.*

[vi] *See* 42 U.S.C. § 7416 (1999); *See id.*

[vii] John A. Ferrolli, *Sixth Circuit Holds That Clean Air Act Does Not Preempt State Common-Law Claims*, DYKEMA (Nov. 6, 2015), <http://www.dykema.com/resources-alerts-sixth-circuit-holds-that-clean-air-act-does-not-preempt-state-common-law-claims.html> (explaining that the Sixth Circuit and Third Circuit agree that The Clean Air Act does not preempt state common-law claims, while the Fourth Circuit held that the Act does preempt state common-law claims).

[viii] Justin Jennewine, *Sixth Circuit Sides with Third Circuit on Preemption Issue*, Sixth Circuit App Blog (Nov. 3, 2015), <http://www.sixthcircuitappellateblog.com/recent-cases/sixth-circuit-sides-with-third-circuit-on-preemption-issue/>.

[ix] *Merrick v. Diageo Ams. Supply, Inc.*, No. 14-6198, 2015 U.S. App. LEXIS 19096, at *7 (6th Cir. Nov. 2, 2015).

[x] *Id.* at *25.

[xi] *Id.* at *26.

[xii] *N.C. ex rel. Cooper v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010).

[xiii] *Id.* at 303, 312.

[xiv] 42 U.S.C. § 7416.

[xv] N.C. ex rel. Cooper v. TVA, 615 F.3d at 302-303.

[xvi] Merrick v. Diageo Ams. Supply, Inc., 2015 U.S. App. LEXIS 19096, at *25.

Source: <https://www.challenge.gov/agency/environmental-protection-agenc...>

♥ 0 Likes < Share

COMMENTS (0)

Newest First [Subscribe via e-mail](#)

Preview POST COMMENT...

[Newer Post](#)

[Supreme Court Smackdown: Obama's Overreaching Clean Power Plan Halted \(/full-blog/2016/2/25/johnnylermullinsblog\)](#)

[Older Post](#)

[Controversy Following 2015 Breeders' Cup: Ex-trainer of 'Runhappy' Files Suit \(/full-blog/2016/2/7/markashleyhatfieldblog\)](#)

SEARCHABLE ARCHIVE (/PUBLICATION-ARCHIVE-1)

631 SOUTH LIMESTONE, LEXINGTON, KY

40508 (859) 257-4747 [BLOG.KJEANRL@GMAIL.COM](mailto:blog.kjeanrl@gmail.com) ([MAILTO:BLOG.KJEANRL@GMAIL.COM](mailto:blog.kjeanrl@gmail.com))