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STATE NUISANCE CLAIMS (CLEAN AIR ACT)

Amici say state common-law claims are preempted in air pollution case

The U.S. Supreme Court should overturn a federal appellate decision reviving a lawsuit over property damage allegedly caused by power plant emissions, the National Association of Manufacturers argues in a friend-of-the-court brief.

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REUTERS/Aly Song

NATURAL GAS DRILLING (CASE MANAGEMENT)

Colorado Supreme Court to review fracking contamination suit

The Colorado Supreme Court has agreed to decide whether state law permits the imposition of a *Lone Pine* order in a case brought by homeowners who allege natural gas drillers contaminated their drinking water, causing personal injury and property damage.

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GenOn Power Midwest et al. v. Bell et al., No. 13-1013, amici curiae brief filed (U.S. Mar. 26, 2014).

In a filing in support of GenOn Power Midwest, the manufacturers association and its co-*amici* ask the high court to hold that the Clean Air Act, 42 U.S.C. § 7401, preempts state common-law claims over alleged air pollution. Allowing private plaintiffs to sue over conduct that should instead be subject to federal enforcement would make a mess of environmental regulation, the groups say.

“Unless state common-law nuisance claims are preempted, they will undermine the reliability [of] permits issued under the Clean Air Act,” *amici curiae* lawyer **Richard Faulk**, of **Hollingsworth LLP** said. “Allowing state nuisance claims to regulate emissions will create a dangerous and confusing dual-track system where regulatory agencies and courts apply different standards to address the same concerns.”

The *amici* urge the Supreme Court to side with GenOn Power, which argues in its *certiorari* petition that the high court’s 2011 decision in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), left open the question of whether the Clean Air Act preempts all state common-law claims. *AEP* held that the CAA preempts nuisance suits under federal common law.

PLAINTIFFS ALLEGE COMMON-LAW NUISANCE

The suit against GenOn Power concerns the Cheswick Generating Station in Springdale, Pa. Two Allegheny County residents filed the complaint in Pennsylvania state court on behalf of a proposed class of about 1,500 people who live within a 1-mile radius of the plant, claiming that discharged coal dust, fly ash and other particles left a coating of black dust or white powder on their properties.

The suit alleged nuisance, negligence and trespass.

GenOn removed the case to the U.S. District Court for the Western District of Pennsylvania and moved to dismiss it, arguing that the

(or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation.”

The CAA does not preempt state common-law tort claims, the court said, citing the 1987 Supreme Court decision *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). *Bell et al. v. Cheswick Generating Station et al.*, No. 12-4216, 2013 WL 4418637 (3d Cir. Aug. 20, 2013).

GenOn argues in its *certiorari* petition that the 3rd Circuit ruling could have serious unintended consequences.

If the decision stands, “it will encourage litigants across the country to use the nearly limitless range of liability theories available

Allowing private plaintiffs to sue over conduct that should instead be subject to federal enforcement would make a mess of environmental regulation, the *amici* say.

Clean Air Act preempted the plaintiffs’ suit. Allowing the plaintiffs to bring common-law claims would undermine the CAA’s regulatory scheme, the company said.

The District Court agreed, finding that the federal statute preempted the claims. The court rejected the plaintiffs’ argument that a “savings clause” in the CAA preserved their right to sue for property damage.

On appeal, the 3rd U.S. Circuit Court of Appeals reversed, pointing to the savings clause, which provides that “[n]othing in [the CAA] shall restrict any right which any person

under state common law to try to impose their own preferred emissions standards on enterprises and businesses,” the company says. **WJ**

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Related Court Document:

Amici curiae Brief: 2014 WL 1260137

See Document Section A (P. 19) for the brief.