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## Bell v. Cheswick Generating Station

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

**Jill Hughes**

**ABSTRACT**

This case addressed the issue of whether the Clean Air Act (CAA) preempts state law tort claims of private landowners brought in the state where emissions are occurring. Additionally, the case determined whether the political question doctrine barred the complaint as a policy-making decision constitutionally allocated to the U.S. Congress. The court decided that the cooperative purpose of the CAA is not frustrated when actions are brought under the law of the pollution's source state, rather than the state law of affected parties. The federal regulations serve as a floor that state law may exceed but not lower. The court also determined that no court has ever held, under the political question doctrine, that the legislative branch carries constitutional authority to redress private property rights regarding air pollution, so the claim was constitutional. It was thus proper for the Bell parties to seek redress for individual tort damages under the CAA.

**I. INTRODUCTION**

As a matter of first impression, in *Bell v. Cheswick Generating Station*,<sup>1</sup> the United States Court of Appeals for the Third Circuit held the Clean Air Act's ("CAA") design of cooperative implementation between state and federal entities<sup>2</sup> allows private property owners to bring state law tort claims for pollution violations filed in the source state.<sup>3</sup> Thus, state law claims are not

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<sup>1</sup> *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013).

<sup>2</sup> *Id.* at 196.

<sup>3</sup> *Id.* at 190.

preempted by the federal statute, because the law employs a “cooperative federalism” structure that establishes a baseline of air quality standards that state law is free to exceed, but not lower.<sup>4</sup> Additionally, the court asked whether personal property rights claims for pollution were excluded from judicial review, and held that such a constitutional grant of authority for personal torts such as these has never been found.<sup>5</sup>

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs Kristie Bell and Joan Luppe represented a putative class of 1,500 people (the “Class”) who lived on or owned property within one mile of the GenOn Cheswick coal-fired electrical generation plant (the “Plant”) in Spring Dale, Pennsylvania.<sup>6</sup> The Class’s complaint alleged contaminants and ash regularly settled on their properties neighboring the plant.<sup>7</sup> For these harms, the Class sought injunctive relief to require GenOn to remove the particulate plus compensatory and punitive damages for trespass, nuisance, negligence and recklessness under state law theories.<sup>8</sup> The complaint alleged that GenOn did not utilize the required Best Available Technology (“BAT”) and that it knowingly implemented improper construction and operation methods, which allowed the particulate byproducts to cross property lines.<sup>9</sup>

Availing itself of diversity jurisdiction, GenOn removed the case to district court in the Western District of Pennsylvania, where it moved to dismiss the action, arguing the CAA preempted the state law tort claims.<sup>10</sup> Further, GenOn argued that federal preemption served to preserve the CAA’s comprehensive scheme and allowance of state law claims would undermine

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 198.

<sup>6</sup> *Id.* at 189.

<sup>7</sup> *Bell*, 734 F.3d at 192.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 193.

the statute's purpose and goals.<sup>11</sup> The district court granted GenOn's motion, holding that to permit the state law actions would be inconsistent with the CAA.<sup>12</sup> The Class timely appealed.<sup>13</sup>

The Class relied on multiple provisions of the CAA for redress. First, the citizen suit provision of the CAA reserves the right of citizens to file civil suits for violations of emissions standards.<sup>14</sup> This right to seek enforcement under statute or common law may not be restricted and is called the "citizen suit savings clause."<sup>15</sup> Second, the "Retention of State Authority" clause guarantees the retention of state authority, prohibiting the preclusion of that authority by the CAA regarding standards and air pollutant controls if the floor of those federal standards is met.<sup>16</sup> Third, the operating permits for the Plant were governed by the Pennsylvania Department of Environmental Protection, the Environmental Protection Agency, and the Allegheny County Health Department.<sup>17</sup> The Plant's permit stated that any matter emitted from the plant may not be perceptible beyond the Cheswick's property line. The permit also upheld the permittees' obligation to comply with all federal, state and local regulations.<sup>18</sup>

### **III. ANALYSIS**

The court determined the purpose of the CAA is not frustrated by actions brought under the law of the pollution's source state and that state law claims are not barred under the CAA from review by the political question doctrine.

#### **A. Preemption under the Supremacy Clause and U.S. Supreme Court Precedent**

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Bell*, 734 F.3d at 193.

<sup>14</sup> 42 U.S.C. § 7604(a)(1) (2012).

<sup>15</sup> *Bell*, 734 F.3d at 191.

<sup>16</sup> 42 U.S.C. § 7416 (2012).

<sup>17</sup> *Bell*, 734 F.3d at 191.

<sup>18</sup> *Id.* at 191-92.

The United States Supreme Court interprets the Supremacy Clause of the United States Constitution to mean that federal law can preempt state law to the extent that it conflicts with federal law (“conflict preemption”).<sup>19</sup> The question of whether the CAA preempts state law tort claims brought against a source of pollution in the state is a matter of first impression for the Third Circuit Court of Appeals.<sup>20</sup> Although the Supreme Court has not decided this precise question, it ruled on a nearly identical question under the Clean Water Act’s (“CWA”) savings clause.<sup>21</sup> The Court held that the CWA did not bar nuisance claims by private parties pursuant to the laws of the pollution’s source state.<sup>22</sup> Additionally, the common and state statutory laws may require higher standards.<sup>23</sup> These different state and federal restrictions, although carrying inherent tensions, do not frustrate the purpose of the CAA because “a source only is required to look to a single additional authority, whose rules should be relatively predictable.”<sup>24</sup> The claims may not be filed in the affected states outside of the polluter’s regulation scheme.<sup>25</sup>

The circuit court held the savings clauses under the CAA and the CWA are “virtually identical,” which undermines GenOn’s argument that the savings clause of the CAA is narrower than the CWA.<sup>26</sup> The Sixth and Fourth Circuit Courts have also found no meaningful distinction between the statutory clauses.<sup>27</sup> With no distinction proven, the Third Circuit held the Supreme

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<sup>19</sup> *Id.* at 193.

<sup>20</sup> *Id.* at 194.

<sup>21</sup> *Id.* at 194. (See *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).)

<sup>22</sup> *Id.*

<sup>23</sup> *Bell*, 734 F.3d at 195.

<sup>24</sup> *Id.* See *Ouellette*.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 196.

Court's analysis applied to the CAA.<sup>28</sup> Thus, the Pennsylvania property owners' suit brought under Pennsylvania law is not preempted by the federal statute.<sup>29</sup>

Public policy concerns also support this court's holding. GenOn argued to allow the suit would instigate a flood of claims.<sup>30</sup> The court disagreed, reasoning the goals of the CAA would not be frustrated if the law of the source state does not disrupt the "regulatory partnership established by the permit system."<sup>31</sup> Secondly, the number of regulatory controls remain defined and limited, protecting parties from an indeterminate number of regulations.<sup>32</sup> The "cooperative federalism" structure of both CWA and CAA regulations allow states to impose higher standards than the federal government.<sup>33</sup> The federal laws are the floor, not the ceiling, of regulatory control.<sup>34</sup>

## **B. Political Question Doctrine**

In the alternative, GenOn argued the political question doctrine bars the Class's claims by excluding them from judicial review because such policy choices are constitutionally allocated to the legislature.<sup>35</sup> But the circuit court rejected this argument because no such constitutional commitment of authority to the U.S. Congress regarding private property claims for pollution violations has ever been held by a U.S. court.<sup>36</sup>

## **IV. CONCLUSION**

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<sup>28</sup> *Id.*

<sup>29</sup> *Bell*, 734 F.3d at 197.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 198.

<sup>34</sup> *Id.*

<sup>35</sup> *Bell*, 734 F.3d at 198.

<sup>36</sup> *Id.*

This case solidifies the standing of individual property owners and class actions utilizing the state laws of the source of pollution to seek redress under the CAA savings clauses. In addition, the circuit court upheld the analogous nature of the savings clauses of the CAA and CWA. Going forward, a clear path is outlined for individual property owners to file suits, what the parameters of those claims are, and with whom they must be filed.