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American College of Environmental Lawyers

## Preempted, Preempted Not

Posted on July 27, 2017 by [Karen Crawford](#)

### First Circuit Rules that Puerto Rico Municipal Ordinances on Coal Ash Preempted

In mid-May, the First Circuit addressed whether a municipality may prohibit the beneficial use and disposal of coal ash at landfills within their borders when the state agency has authorized such activities. In *AES Puerto Rico, L.P. v. Trujillo-Panisse*, No. 16-2052 (1<sup>st</sup> Cir. May 15, 2017), a coal fired power plant owner, AES-PR, challenged two municipal ordinances attempting such a prohibition as preempted by federal and Commonwealth law and were in violation of the United States and Puerto Rico constitutions. Utility Solid Waste Activities Group and American Coal Ash Association participated on brief as amici curiae brief. The district court granted summary judgment for the municipalities on AES's federal claims and declined to exercise jurisdiction over the Commonwealth claims.

The First Circuit determined the ordinances could not be enforced to the extent they directly conflicted with Commonwealth law as promulgated by the Puerto Rico Environmental Quality Board, but reversed summary judgment in favor of the municipalities and remanded for the district court to enter judgment for AES-PR based on its claim of Commonwealth preemption. The court reviewed the RCRA program and its intent to precipitate cooperation between the federal, state, and local governments. After a serious discussion of the delegation of authority to states and the fact that Puerto Rico's Environmental Quality Board was given authority to manage solid waste (including coal ash) by the Commonwealth, unlike the district court, the court determined the EQB resolutions (and permits) carry the force of law and its permits allowing disposal in a sanitary landfill supersede a local ordinance prohibiting that disposal. Succinctly, the court pointed out that the Commonwealth's public policy to give municipalities as much autonomy as possible is limited by a higher power and that "a municipality cannot 'promote and further its own public policy' if that policy conflicts with Commonwealth law."

### NJ Appeals Court Finds Consumer Fraud Cases Against VW Not Preempted by CAA

This week, however, a three-judge panel of Superior Court of New Jersey, Appellate Division affirmed trial court rulings in two cases denying Volkswagen Group of America Inc.'s (VW) motions to dismiss the complaints, finding the CAA does not preempt such state court actions. *David. L. Felix, et al. v. Volkswagen Group of America Inc. and Eduardo Deang v. Volkswagen Group of America In. et al.*, No. A-0585-16T3 and A-086-16T3, July 17, 2017, Sup. Ct. NJ – App. Div. The motions argued the complaints were expressly or impliedly preempted by provisions of the CAA, citing language in 42 U.S.C.A. 7543(a), "... No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new

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motor vehicles or new motor vehicle engines subject to this part.” Both plaintiffs alleged misrepresentation and violations of New Jersey’s Consumer Fraud Act, among other claims. The decision included interesting arguments on interpretation and attempted distinguishing of prior tobacco, product defect and airline deregulation cases.

With respect to express preemption, the court disagreed with VW’s argument that plaintiffs’ complaints are in reality attempts to enforce EPA’s emissions standards because plaintiffs would have to prove those standards were exceeded to prevail. Instead, the court determined that the plaintiffs were not seeking to enforce an EPA emission standard or force the manufacturer to adopt a different emissions standard, but rather the claims were centered “on VW’s alleged deceitful, fraudulent practices and its alleged breach of a duty not to mislead consumers.”

The court also determined that the CAA did not impliedly preempt plaintiffs’ claims because the savings clause explicitly contemplates continued state involvement in regulation of motor vehicles, and that because plaintiffs’ claims do not hinge on compliance with EPA standards, there is no direct conflict with the federal regulatory scheme.

Tags: RCRA, preemption, municipal ordinances, Puerto Rico Environmental Quality Board, PREQB, Environmental Quality Board, EQB, Puerto Rico

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2007

November (8)

December (1)

2008

January (5)

February (3)

March (1)

April (1)

May (2)

June (1)

July (2)

August (1)

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