BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:

SIERRA CLUB,

Complainant,

v.

MIDWEST GENERATION, LLC,

Respondent.

PCB No. 13-27
(Citizens Enforcement - Air)

COMPLAINANT SIERRA CLUB'S NOTICE OF SUPPLEMENTAL AUTHORITY IN RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS

Complainant, Sierra Club, submits the enclosed four supplemental authorities which support Sierra Club's opposition to Respondent, Midwest Generation's Motion to Dismiss.

(1) Denial of Certiorari, *Genon Power Midwest v. Bell*, U.S. S.Ct. Case No. 13-1013.

Sierra Club cited *Bell v. Cheswick*, 734 F.3d 188, 193 (3rd Cir. 2013) in response to Midwest Generation's arguments that the Environmental Protection Act and the Board's regulations are preempted by the Clean Air Act. (Sierra Club Resp. Br. at 11-12.) The Third Circuit in *Bell* rejected very similar arguments. The defendants in *Bell* sought review by the Supreme Court and on June 2, 2014, the Supreme Court denied review. *GenOn Power Midwest L.P. v. Bell*, 134 S.Ct. 2696; 2014 U.S.LEXIS 3926; 82 U.S.L.W. 3695 (June 2, 2014).

(2) *Little v. Louisville Gas & Elec. Co.*, W.D.Ky.

The District Court for the Western District of Kentucky issued a Memorandum Opinion and Order on July 17. *Little v. Louisville Gas and Elec. Co.*, 2014 U.S.Dist.LEXIS 96947 (W.D.Ky., July 17, 2014). The court in *Little* held that the Clean Air Act does not preempt claims—like those providing the basis for Sierra Club's claims against Midwest

Generation in this case—that are based on state law. *See Little*, Slip Op. at 33-37, 2014 U.S.Dist.LEXIS 96947, *58-*67. The defendants in *Little* argued, as Midwest Generation has argued in this case, that the federal Clean Air Act's procedures for addressing air pollution leave no room for supplemental pollution protections pursuant to state law. (*See e.g.*, MWG Br. Supp. Mot. to Dismiss at 19-20.) Citing *Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989) and *Bell v. Cheswick*, 734 F.3d 188, 193 (3rd Cir. 2013), which Sierra Club also cited in response to MWG's Motion to Dismiss (Sierra Club Resp. Br. at 11-12), the court in *Little* held that the Clean Air Act does not preempt state law claims.

(3) *Merrick v. Diageo Americas Supply, Inc.* (W.D.Ky.)

As the court in *Little*, the court in *Merrick v. Diageo Americas Supply, Inc.*, held that the federal Clean Air Act does not preempt state law claims. Memorandum Opinion at 7-17, Case No. 3:12-CV-334-CRS (W.D.Ky., March 19, 2014).

(4) *Freeman v. Grain Processing Corp.*, (Iowa)

The Iowa Supreme Court recently reversed a lower court's dismissal of plaintiffs' state law claims based on preemption. *Freeman v. Grain Processing Corporation*, 2014 Iowa Sup. LEXIS 72 (June 13, 2014). Specifically, like the courts in *Little*, *Merrick*, *Ontario*, and *Bell*, the Iowa Supreme Court in *Freeman* noted that there is no express preemption of state law by the Clean Air Act and found that neither field preemption nor conflict preemption of state law exists from the Clean Air Act and that "the states were given the authority to impose stricter standards on air pollution than might be imposed by the CAA." *Id.* at *51-*60. The court also rejected arguments that the state's specific air pollution permitting and regulation statutes precluded an action under a separate statutory provision providing a claim against nuisances. *Id.* at *64-*69.

Respectfully submitted, October 17, 2014

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

BRUCE MERRICK, et al. PLAINTIFFS

v. NO. 3:12-CV-334-CRS

DIAGEO AMERICAS SUPPLY, INC. DEFENDANT

MEMORANDUM OPINION

This matter is before the court on the following motions of the defendant, Diageo Americas Supply, Inc. ("Diageo"):

(1) Motion to dismiss Plaintiffs' First Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim (DN 18); and

(2) Motion for leave to file supplemental authority (DN 28).

Also before the court is Plaintiffs' motion to strike Diageo's notice of supplemental authority. (DN 38). For the reasons set forth herein, Diageo's motion for leave to file supplemental authority (DN 28) will be granted, and Plaintiffs' motion to strike (DN 38) will be denied. The court will also grant in part and deny in part Diageo's motion to dismiss the First Amended Class Action Complaint (DN 18).

I. BACKGROUND

Diageo is a New York corporation that operates a whiskey distillery in Louisville, Kentucky. Diageo has aged whiskey in Louisville since 2000, and it contends that whiskey has been aged continuously in its Louisville facilities since at least 1935. In 2008, Diageo leased and

converted additional warehouses to be used for aging whiskey. Plaintiffs[1] are a class of individuals who allegedly own, lease, or rent real and/or personal property located in the vicinity.

As a natural result of the whiskey aging processes that occur in Diageo's warehouses, ethanol escapes and is emitted into the atmosphere. These ethanol emissions are regulated under the provisions of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, as well as state and local regulations.[2] As an ethanol-emitting entity, Diageo is required to comply with the regulations adopted by the Environmental Protection Agency ("EPA"), the Kentucky Department for Environmental Protection, and the Louisville Metro Air Pollution Control District ("LMAPCD"). Diageo contends—and Plaintiffs do not appear to dispute—that its ethanol emissions are within the limits established by these federal, state, and local regulations. Diageo has also obtained a Title V Operating Permit, in addition to permits from the LMAPCD, which authorize its ethanol emissions within the limits prescribed by these federal, state, and local regulations.

Plaintiffs claim that once this ethanol is emitted from Diageo's facilities, it combines with condensation on Plaintiffs' real and personal property to "cause an invisible, naturally occurring fungal spore to 'germinate' (start growing) and become a living organism, visible to the naked human eye." According to Plaintiffs, this fungus is *Baudoinia compniacensis*, colloquially referred to as "whiskey fungus."[3] Plaintiffs argue that whiskey fungus "creates an unsightly condition requiring abnormal and costly cleaning and maintenance, early weathering of surfaces," and "causes unreasonable and substantial annoyance and unreasonable interference

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[1] Plaintiffs filed this lawsuit as a putative class action, alleging that there are potentially hundreds of residents living near Diageo's facilities that could bring similar claims against Diageo.

[2] Ethanol is categorized as an air pollutant, or "volatile organic compound," under both state and federal regulations. *See* 40 C.F.R. § 51.100; 401 KAR 50:010(135).

[3] Plaintiffs allege that they were not aware that the black material forming on their property was a fungus—or that it was caused by Diageo's ethanol emissions—until the *Courier-Journal* newspaper published an article describing the fungus in May 2012.

with the use and enjoyment of the property, and, as a result of which, the value . . . of [their] property is reduced." Plaintiffs contend that whiskey fungus can only be removed through extreme cleaning measures, such as high-pressure washing or application of chlorine bleach, and that this cleaning must be frequently repeated to counteract Diageo's continuous discharge of ethanol.[4] Plaintiffs have complained to local and state agencies about the proliferation of whiskey fungus on their properties. In response to these complaints, the LMAPCD issued a Notice of Violation letter to Diageo on September 7, 2012. In the letter, the LMAPCD stated that between June 2011 and May 2012, it received 27 complaints from residents living near Diageo's warehouses of a "black, sooty substance covering . . . . everything exposed to the outdoors."

On June 15, 2012, Plaintiffs filed a Class Action Complaint on the basis of diversity jurisdiction. (Compl., DN 1). Plaintiffs subsequently amended the complaint to include additional factual allegations to support their claims. (First Am. Compl., DN 15). In the First Amended Complaint, Plaintiffs seek to recover compensatory and punitive damages from Diageo under the following common law theories: (1) negligence and gross negligence; (2) temporary nuisance and permanent nuisance; and (3) trespass. Plaintiffs also seek injunctive relief on the theory that Diageo can correct or abate its ethanol emissions by implementing ethanol control technology in its warehouses. Plaintiffs allege that this technology has been successfully installed and used by brandy makers in California and, because brandy and whiskey aging allegedly involve "substantially similar" processes, the technology could be implemented by Diageo. For its part, Diageo controverts the feasibility of implementing such emission control

[4] The First Amended Complaint alleges that Diageo's warehouses emit thousands of tons of ethanol per year. According to Plaintiffs, between six and ten pounds of ethanol evaporate from a 50-gallon oak barrel during the aging process. Plaintiffs contend that Diageo had a monthly inventory of 426,141 barrels of aging bourbon in its Louisville facilities in 2009, as compared to the 176,000 barrel per month inventory it maintained in 2006.

technologies. It argues that Plaintiffs have not presented proof that these technologies have been successfully implemented in whiskey distilleries and its effect on Diageo's processes remains unknown.

Diageo has moved to dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Mot. to Dismiss, DN 18). Plaintiffs have asked the court to deny Diageo's motion to dismiss or, in the alternative, convert the motion to one for summary judgment. Nearly a year after filing this motion, Diageo asked the court for leave to file supplemental authority consisting of two recent cases from the Jefferson and Franklin Circuit Courts. These state trial court decisions also involved claims brought by property owners against whiskey distilleries for property damage that was allegedly caused by whiskey fungus. (DNs 28, 31). In both cases, the Kentucky lower courts addressed the issue of whether the plaintiff property owners' state common law tort claims were preempted by the Clean Air Act. Plaintiffs subsequently filed a motion to strike Diageo's notice of supplemental authority. (DN 38). These motions are now before the court.

II. STANDARD

Pursuant to Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claims showing that the pleader is entitled to relief. The pleading standard in Rule 8(a)(2) does not require detailed factual allegations, but "demands more than an unadorned, the defendant-unlawfully-harmed me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

To withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim, it is not enough that the complaint contains "facts that are merely consistent with a defendant's liability;" rather, a plaintiff must allege "facts—not legal conclusions or bald assertions—supporting a

'plausible' claim for relief." *Id.* at 687 (quoting *Twombly*, 550 U.S. at 557)). A complaint that offers legal conclusions or a recitation of the elements of a cause of action will not meet this pleading standard. *See id.* "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005). The court must take all of the factual allegations in the complaint as true, but is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). If the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has not shown the pleader is entitled to relief. *Id.* at 677–78.

As a general rule, a district court may not consider matters outside the pleadings when ruling on a Rule 12(b)(6) motion to dismiss without converting the motion into one for summary judgment. *J.P. Silverton Indus. L.P. v. Sohm*, 243 F. App'x 82, 86–87 (6th Cir. 2007) (unpublished); *see* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). However, "when a document is referred to in the complaint and is central to the plaintiff's claim . . . [,] the defendant may submit an authentic copy [of the document] to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (quotation omitted). If a motion to dismiss is converted to a motion for summary judgment, "all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

III. DISCUSSION

A. Diageo's Motion for Leave to File Supplemental Authority

The court will first address Diageo's motion for leave to file supplemental authority. (DN 28). In that motion Diageo argues—for the first time in this action—that Plaintiffs' state law claims are preempted by the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, a federal statute that contains various provisions aimed at reducing and limiting emissions, including ethanol emissions. Diageo asks that the court consider two cases recently decided by the Kentucky trial courts which are centered on facts and claims similar to the claims currently pending before this court. In these cases, the Jefferson and Franklin Circuit Courts reached differing conclusions regarding whether the CAA preempts state common law tort claims brought by property owners against whiskey distilleries.

Diageo also filed a notice of supplemental authority on December 2, 2013, in which it seeks to introduce an additional order from the Jefferson Circuit Court. (DN 37). In response, Plaintiffs filed a motion to strike Diageo's notice of supplemental authority. (DN 38). Plaintiffs argue that the court should refuse to consider Diageo's supplemental authority because: (1) Diageo's request for leave is untimely; (2) Kentucky state trial court opinions are not binding on this court; and (3) the Jefferson Circuit Court's order is flawed because it only provides a minimal analysis of preemption. (DN 38-1, p. 2).

Plaintiffs ask the court to deny Diageo's motion, but a district court generally has the discretion to grant a request to supplement the pleadings. *See* Fed. R. Civ. P. 15(d); *Schuckman v. Rubenstein*, 164 F.2d 952, 958–59 (6th Cir. 1947). Although we recognize that Diageo attempts to raise the defense of preemption for the first time in the supplemental pleadings, the court nonetheless finds that Diageo is not time barred because this supplemental argument is, in

fact, a threshold issue in the case. Moreover, the resolution of this issue will not cause unjust delay. *See Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 701 (6th Cir. 1978). Because the issue of preemption is determinative, the court will grant Diageo's motion for leave to file supplemental authority and deny Plaintiffs' motion to strike.[5] Accordingly, the court will now address the initial question of whether state common law tort claims are preempted by the CAA.

B. Preemption Analysis

"Federal preemption is an affirmative defense upon which the defendants bear the burden of proof." *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007) (quoting *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005)). The Supreme Court has held that federal common law claims are displaced by the CAA. *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011).[6] Yet neither the Supreme Court nor the Sixth Circuit have specifically addressed whether the CAA would preempt a plaintiff's state common law tort claims.

The Supreme Court has, however, addressed preemption of state common law tort claims under the provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq. Internat'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (hereinafter, "*Ouellette*"). In *Ouellette*, Vermont landowners sued a New York paper mill for common law nuisance under Vermont law.[7] The issue before the Court was whether the Vermont property owners' Vermont common law claims against a source of pollution located in New York were preempted under the provisions of the

[5] Plaintiffs request additional time to brief the issue of preemption. However, the court finds that this issue has been fully vetted in the parties' briefs on the motions to file supplemental authority.

[6] In its opinion, the Supreme Court intentionally refrained from deciding whether state nuisance claims were preempted because the parties had not briefed the issue. *Am. Elec. Power Co.*, 131 S. Ct. at 2540. The Court did, however, state that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act," and it warned that "[l]egislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law." *Id.* (citing *Internat'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987)) (emphasis in original).

[7] The paper mill was located in New York, but discharged effluents into a lake that was bordered by both New York and Vermont.

CWA. *Id.* The Court found it necessary to distinguish the law of the state of the source of the pollution (the "source state") from the law of the state affected by the pollution (the "affected state"). *Id.* at 490–91. The court held that suits arising under the common law of the affected state were preempted by the CWA, but suits arising under the common law of the source state were not preempted because

> [t]he CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.

Id. at 497.

Although it recognized that a source state's "nuisance law may impose separate standards and thus create some tension with the permit system," the Court ultimately determined that the application of the source state's law would "not disturb the balance among federal, source-state, and affected-state interests." *Id.* at 499. The Court further found that "the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations," thus ensuring that an emitting entity need only be concerned with complying with its own state's nuisance laws. *Id.*

The Sixth Circuit has addressed the issue of preemption with regard to state statutory claims. *See Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989) (hereinafter, "*Her Majesty*"). *Her Majesty* foreshadows how the Sixth Circuit would approach the issue of preemption, but the decision only goes so far with regard to the facts of the case before this court. *Her Majesty* involved claims brought by several environmental groups against the City of Detroit, relating to the proposed construction of a municipal trash incinerator. The plaintiffs originally brought the suit in Michigan state court,

alleging that the construction of the incinerator would violate the Michigan Environmental Protection Act ("MEPA"). *Id.* at 334. By bringing these claims under the MEPA, the plaintiffs sought to retroactively challenge the validity of permits that the EPA and the Michigan Department of Natural Resources had previously issued to the incinerator. *Id.* The action was removed to the United States District Court for the Eastern District of Michigan. Following removal, the district dourt denied the plaintiffs' motion to remand on the basis that their state law claims were preempted by the CAA. *Id.* at 333–34. The court also granted the city's motion for summary judgment and dismissed all claims against it.

On appeal, the Sixth Circuit first addressed the plaintiffs' motion to remand. The court noted that the CAA establishes minimum air quality standards and gives states the discretion to adopt more stringent standards. *Id.* at 336 (citing the savings clauses contained within the CAA, 42 U.S.C. §§ 7416, 7604). In reviewing the district court's finding of preemption, the Sixth Circuit noted that "the plain language of the CAA's savings clause compels the conclusion" that the CAA did not preclude the plaintiffs' statutory claims. *Id.* at 343. The Sixth Circuit supported this assertion with language from the CAA, which it found to "clearly indicate[ ] that Congress did not wish to abolish state control." *Id.* The court also considered the Supreme Court's holding in *Ouellette*. *Id.* ("[T]hat Congress did not seek to preempt actions such as involved in this appeal is clearly indicated by the Court's holding in [*Ouellette*.]"). Ultimately, the Sixth Circuit ordered that the action be remanded to the district court. *Id.* at 344.

Judge Boggs issued a strong dissent in *Her Majesty*, in which he voiced his disapproval with the effect of the court's holding, primarily as it related to the particular facts of the case. *Id.* at 344 (Boggs, J., dissenting). In particular, Judge Boggs believed it improvident to allow the plaintiffs to retroactively question the propriety of permits that had been granted to the

incinerator by federal and state agencies several years prior to the initiation of the lawsuit. *Id.* Judge Boggs did, however, cite approvingly to the panel's conclusion that the language of the CAA and the Supreme Court's decision in *Ouellette* weigh against a finding of complete preemption. *Id.* at 344–45 ("Congress's decision to give states a role in the regulation of air pollution requires that federal courts allow state environmental actions against alleged polluters, even if those parties who are accused of polluting are in compliance with federal standards.").

Keeping in mind these principles developed in *Ouellette* and *Her Majesty*, the court will also consider the conflicting rulings of other courts that have addressed the specific issue that is before this court. Some courts have held that the CAA does not preempt state common law tort claims. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013) ("We see nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims.") (hereinafter, "*Bell*"); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013); *Cerny v. Marathon Oil Corp.*, 2013 WL 5560483, *8 (W.D. Tex. Oct. 7, 2013) (applying the Third Circuit's analysis in *Bell*). Other courts have reached the opposite conclusion and found that state common law tort claims are preempted by the CAA. *See North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010); *Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013); *United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274, 296–97 (W.D. Penn. Oct. 12, 2011).

The Third Circuit has rendered the most recent opinion on this topic. In *Bell*, a group of property owners brought a putative class action against a power company in Pennsylvania state court. The property owners sought to recover compensatory and punitive damages under the following common law theories: (1) nuisance; (2) negligence and recklessness; (3) trespass; and

(4) strict liability. 734 F.3d at 192. The property owners alleged that the power company's "operation, maintenance, control, and use of [its plant] releases malodorous substances and particulates into the surrounding neighborhood, causing fly ash and unburned coal combustion byproducts to settle onto the Class members' property as a 'black dust/film . . . or white powder' which requires constant cleaning." *Id.* (footnote and citation omitted). The power company removed the case to the United States District Court for the Western District of Pennsylvania on the basis of diversity jurisdiction, and then moved to dismiss the case on the grounds of preemption. *Id.* The district court granted the power company's motion to dismiss after determining that the property owners' state law tort claims were preempted by the CAA. *Id.* at 189. In coming to this conclusion, the court reasoned "that because [the plant] was subject to comprehensive regulation under the Clean Air Act, it owed no extra duty to the members of the Class under state tort law." *Id.*

The Third Circuit overturned the district court's decision on appeal and held that the property owners' state law tort claims were not preempted by the CAA. *Id.* at 190. The Third Circuit reached this holding after tracing the line of authority that addressed preemption under the CAA. The Third Circuit found that the Supreme Court's decision in *Ouellette* was controlling, and it used that Court's analysis in reaching its holding. Though *Ouellette* addressed the issue of preemption in the context of the CWA, the Third Circuit concluded that any variation between the CAA and the CWA was negligible and, thus, it could apply the *Ouellette* Court's analysis in determining the CAA's preemptive effect. *Id.* at 196–97. The Third Circuit reasoned that both the CAA and the CWA contain "savings clauses" which provide states and private citizens with the right to sue entities or individuals who are alleged to have violated the provisions of the CAA or CWA. *See* 33 U.S.C. §§ 1365(e), 1370; 42 U.S.C. §§ 7604(e), 7416.

Similarly, the Sixth Circuit has found that the CAA's savings clauses are virtually identical to the CWA's savings clauses. *See Her Majesty*, 874 F.2d at 343.

After adopting the *Ouellette* Court's method of differentiating between source state and affected state law, the Third Circuit concluded that the CAA did not preempt the plaintiff property owners' source state common law claims. *Bell*, 734 F.3d at 197 ("[The CAA] does not preempt state common law claims based on the law of the state where the source of the pollution is located. Accordingly, the suit here, brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania, is not preempted.") (footnote omitted). The Third Circuit recognized that its holding could "undermine the comprehensive regulatory structure established by the Clean Air Act by allowing the jury and the court to set emissions standards" and "open the proverbial floodgates to nuisance claims against sources in full compliance with federal and state environmental standards, creating a patchwork of inconsistent standards across the country that would compromise Congress's carefully constructed cooperative federalism framework." *Id.* However, the court concluded that the Supreme Court previously addressed and rejected these same concerns in *Ouellette*. *Id.* The court further interpreted *Ouellette* to mean "that the requirements placed on sources of pollution through the 'cooperative federalism' structure of the Clean Water Act serve[ ] as a regulatory floor, not a ceiling." *Id.* at 197–98 (citing *Ouellette*, 479 U.S. at 497–98).

The Third Circuit concluded its opinion by finding that there is "nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims. If Congress intended to eliminate such private causes of action, 'its failure even to hint at' this result would be 'spectacularly odd.'" *Id.* at 198 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996)).

The Fourth Circuit, in contrast, has interpreted *Ouellette* in a different light. *See North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 303 (4th Cir. 2010) (hereinafter, "*Cooper*"). In the Fourth Circuit's view, *Ouellette* supports the conclusion that state law nuisance claims that "have the potential to undermine [the CAA's] regulatory structure" must be preempted. *Id.* (citing *Ouellette*, 479 U.S. at 497) (alterations in original). However, *Cooper* pre-dates the Third Circuit's decision in *Bell*, as well as the recent Supreme Court case, *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011). Moreover, *Cooper* is factually and procedurally distinguishable from the case at bar. In *Cooper*, the state of North Carolina sued the Tennessee Valley Authority ("TVA") in federal court for public nuisance. 615 F.3d at 297. In its complaint, North Carolina alleged that eleven TVA power plants located in Tennessee, Alabama, and Kentucky generated emissions which traversed the borders of those states and were deposited in North Carolina, thereby violating North Carolina's emission regulations and constituting a public nuisance. *Id.* at 296–97. The United States District Court for the Western District of North Carolina agreed with North Carolina and held that the TVA's emissions caused a public nuisance. *Id.* at 296. The district court also granted an injunction which required the TVA to install emissions controls at four of its plants in Alabama and Tennessee. *Id.*

The Fourth Circuit reversed the district court's decision and remanded the case with directions to dismiss the action against the TVA. *Id.* at 312. Regarding the issue of preemption, the Fourth Circuit recognized that the *Ouellette* Court "explicitly refrained from categorically preempting every nuisance action brought under source state law." *Id.* at 303. Yet the Fourth Circuit held that it could state "with assurance that *Ouellette* recognized the considerable potential mischief in those nuisance actions seeking to establish emissions standards different

from federal and state regulatory law and created the strongest cautionary presumption against them." *Id.* The Fourth Circuit opted to exercise this cautionary presumption, and it held that North Carolina's nuisance claim was preempted by the CAA. In reaching its decision, the court expressed concern that "[t]o replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country." *Id.* at 301.

The Fourth Circuit's opinion expressly enumerates the problems that may arise if the CAA is not deemed to preempt state common law tort claims. This court is responsive to those concerns. However, after considering Supreme Court and Sixth Circuit precedent, as well as the decisions of other circuits, we find that the Third Circuit's analysis in *Bell* is the most persuasive. Not only is that case factually similar to the case at bar,[8] but the Third Circuit opinion also interprets and incorporates Supreme Court and Sixth Circuit precedent. Conversely, the Fourth Circuit case addressed a claim brought by a governmental entity, and the court only briefly considered *Ouellette* in reaching its holding. Moreover, *Cooper* involved the application of non-source state laws, whereas the litigation before this court involves Kentucky plaintiffs complaining of alleged pollution in Kentucky, which is allegedly caused by a company located in Kentucky.

Our local courts have also discussed the possibility of CAA preemption in cases involving the same facts as are pending before this court. *See Mills v. Buffalo Trace Distillery, Inc.*, No. 12-CI-00743 (Franklin Cir. Ct., Div. 2, Aug. 27, 2013) (hereinafter "*Buffalo Trace*");

[8] Both claims were brought as putative class action suits by private property owners who alleged that neighboring companies emitted substances into the atmosphere. *Bell*, 734 F.3d at 192. The plaintiffs in both actions complained of a black, soot-like substance which settled on their property and required constant cleaning. *Id.* Finally, the courts in both cases were addressing motions to dismiss in which the defendants sought to dismiss the plaintiffs' state law tort claims on preemption grounds.

Merrick. v. Brown-Forman Corp., No. 12-CI-3382 (Jefferson Cir. Ct., Div. 9, July 30, 2013) (hereinafter "*Brown-Forman*"). Though these state court decisions are merely useful for persuasive purposes, the court will engage in a brief discussion of their holdings.

Brown-Forman involves the same plaintiffs as are named in the action before the court, who brought similar common law tort claims against Brown-Forman Corp. and Heaven Hill Distillers, Inc. *Brown-Forman*, No. 12-CI-3382, at 2. As in the present case, the plaintiffs in *Brown-Forman* alleged that the defendant distilleries "have a duty to minimize and prevent the ethanol emissions through the use of ethanol-capture technology . . . ." *Id.* The defendants sought to dismiss the action on the grounds of preemption. *Id.* at 1.

The Jefferson Circuit Court found that the plaintiff property owners' state law claims were preempted by the CAA, and it granted the defendants' motion to dismiss. *Id.* at 4. In reaching this decision, the court only considered authority issued prior to the Third Circuit's decision in *Bell*. The plaintiffs subsequently filed a motion to reconsider in which they asked the court to reexamine the issue of preemption in light of the Third Circuit's holding in *Bell*. *See Merrick v. Brown-Forman Corp.*, No. 12-CI-3382 (Jefferson Cir. Ct., Div. 9, Nov. 26, 2013). Although it acknowledged the Third Circuit's analysis and holding, the Jefferson Circuit Court declined to reconsider its prior order and elected to follow the Fourth Circuit's reasoning in *Cooper*. *Id.* As did the Fourth Circuit, the Jefferson Circuit Court similarly expressed the concern that if it did not find that the plaintiffs' claims were preempted, its ruling would have "the 'potential to undermine [the] regulatory structure'" established by the CAA, as well as state and local laws. *Id.* at 2 (citing *Ouellette*, 479 U.S. 481, 497–99 (1987)) (arguing that "states can be expected to take into account their own nuisance laws in setting permit requirements").

In contrast, the Franklin Circuit Court rejected a defendant whiskey distillery's motion to dismiss on preemption grounds.[9] *Buffalo Trace*, No. 12-CI-00743, at 3. In reaching its holding, the Franklin Circuit Court considered the language of the CAA itself, as well as the most recent case law regarding preemption. *See id.* at 4–5 (citing *Am. Elec. Power Co., Inc.*, 131 S. Ct. at 2527; *Bell*, 734 F.3d at 188; *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d at 65; *Cooper*, 615 F.3d at 291; *Comer*, 839 F. Supp. 2d at 849). After considering the language of the CAA, in addition to Sixth Circuit authority and cases from other circuits, the Franklin Circuit Court held that the plaintiffs' state law tort claims were not preempted by the CAA. *Id.* at 6. The court noted that "[q]uoting *Ouellette*, the Sixth Circuit in *Her Majesty the Queen* held that the CAA intended to and does preserve 'state causes of action . . . and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the laws of the *source* State.'" *Id.* (quoting *Her Majesty*, 874 F.2d at 343) (emphasis in original).

As the Franklin Circuit Court noted in *Buffalo Trace*, the federal circuits—and, indeed, the Kentucky lower courts—have reached differing conclusions regarding the issue of CAA preemption of state common law tort claims. The Sixth Circuit has only peripherally addressed this issue. *See Her Majesty*, 874 F.2d at 342 (holding that "*the CAA displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute*") (emphasis in original). However, the Sixth Circuit has suggested that the plain language of the CAA's savings clause "clearly indicates that Congress did not wish to abolish state control" over emissions regulations. *Id.* at 343. The Sixth Circuit has further determined that the Supreme Court's holding in *Ouellette* indicates that Congress did not seek to preempt statutory claims brought against a polluting entity. *Id.* Thus, the Sixth Circuit recognized both that *Ouellette*

[9] The complaint was filed by a putative class of property owners who brought claims against a whiskey distillery for negligence, temporary nuisance, permanent nuisance, and trespass. *Buffalo Trace*, No. 12-CI-00743, at 2.

applies to claims that implicate the provisions of the CAA, and that the CAA's plain language suggests that Congress did not intend for certain private causes of actions to be preempted.

We find that the analysis as set forth by the Third Circuit, coupled with the Sixth Circuit's analysis in *Her Majesty*, captures the prevailing law for CAA preemption. In the years since the Supreme Court's ruling in *American Electric Power* that the CAA displaces federal common law claims, courts have increasingly interpreted the CAA's savings clauses to permit individuals to bring state common law tort claims against polluting entities. This interpretation has been cited with approval by a Kentucky trial court, and it corresponds with longstanding Sixth Circuit precedent. Moreover, even the dissent in *Her Majesty* recognized that a cause of action for pollution might be available to private litigants. For these reasons, and the reasons stated above, this court finds that Plaintiffs' state common law tort claims against Diageo are not preempted by the CAA. We will now consider whether Plaintiffs' state common law tort claims can survive Diageo's motion to dismiss.

C. Plaintiffs' State Law Claims

As an initial matter, Diageo has offered materials outside the pleadings concerning its federal and state permits, as well as materials which discuss the feasibility of implementing technologies to control its ethanol emissions. (Mot. To Dismiss, DN 18, Ex. 3–21). Plaintiffs argue that the court must, therefore, convert Diageo's motion to a motion for summary judgment. (DN 24, p. 1–2). *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

Here, however, the above-referenced items are not necessary for the resolution of the issues argued in Diageo's motion to dismiss, and the court will exclude them from its

consideration. Therefore, the court will not treat Diageo's motion to dismiss as one for summary judgment under Rule 56, and Plaintiffs need not be given additional time to respond. *See Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009) (quoting *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984)).

1) Count I: Negligence and Gross Negligence

Plaintiffs attempt to assert claims against Diageo for both negligence and gross negligence. Under Kentucky law, a negligence action requires proof of the following: "(1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992) (citing *Ill. Cent. R.R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967)). In the First Amended Complaint, Plaintiffs allege that Diageo owed them the following duties: (1) "a duty to minimize and prevent the accumulation of whiskey fungus on Plaintiffs' property and the property of others similarly situated caused by Defendant's alcoholic beverage production operations in Kentucky"; and (2) "a duty to minimize and prevent the ethanol emissions from entering on to Plaintiffs' property and the property of others similarly situated." (First Am. Compl., DN 15, ¶¶ 70–71). Plaintiffs further allege that Diageo breached a duty owed to Plaintiffs when it was cited for violating Section 1.09 of the LMAPCD's regulations. (*Id.* at ¶ 79).

Diageo contends that Plaintiffs have failed to plead facts which show that Diageo owed them a duty, or that it breached any such duty. We agree. Plaintiffs have not identified the source of Diageo's purported duty to minimize and prevent its ethanol emissions from entering Plaintiffs' property, nor have they identified the source of Diageo's alleged duty to prevent whiskey fungus from accumulating on Plaintiffs' property. Moreover, Plaintiffs have failed to show how they, as property owners, could maintain a private cause of action based on Diageo's

alleged violation of a city ordinance or regulation. Indeed, "Kentucky courts have held that a property owner has no private cause of action to bring suit against another property owner for a violation of an ordinance . . . . because the property owner owes a duty to follow the ordinance to the municipality, not to another party." *Baker v. Warren Cnty. Fiscal Court*, 2007 WL 486738, *2 (W.D. Ky. Feb. 12, 2007); *Schilling v. Schoenle*, 782 S.W.2d 630, 632–33 (Ky. 1990); *Alderman v. Bradley*, 957 S.W.2d 264 (Ky. Ct. App. 1997). Because Plaintiffs' claim for negligence must fail as a matter of law, so too must their claim for gross negligence.

2) Counts II and III: Temporary and Permanent Nuisance

Diageo also seeks to dismiss Counts II and III of Plaintiffs' First Amended Complaint, which allege nuisance claims. A nuisance can be either private or public. *Brockman v. Barton Brands, Ltd.*, 2009 WL 4252914 (W.D. Ky. Nov. 25, 2009) (citing *W.G. Duncan Coal Co. v. Jones*, 254 S.W.2d 720, 723 (Ky. 1953)). While a private nuisance affects only an individual or limited number of individuals, a public nuisance affects the public at large. *Id.* In this instance, Plaintiffs claim that Diageo's emissions—and the consequent accumulation of whiskey fungus—constitute a private nuisance.

Under Kentucky law, a private nuisance can be either temporary or permanent in nature. *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 755 (Ky. 1965); *see* KRS § 411.520(2) ("A private nuisance shall be either a permanent nuisance or a temporary nuisance, but shall not be both."). A temporary nuisance arises when "a defendant's use of property causes unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the value of use or the rental value of the claimant's property to be reduced." KRS § 411.540(2). A permanent nuisance is similarly defined as arising when "a defendant's use of property causes unreasonable and substantial

annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the fair market value of the claimant's property to be materially reduced." *Id.* at § 411.530(2).

To distinguish between temporary and permanent nuisances, Kentucky courts will consider "whether the cause of the nuisance results from some improper installation or method of operation [of the structure] *which can be remedied at reasonable expense*." *Lynn Mining Co.*, 394 S.W.2d at 759 (emphasis in original). If the nuisance can be remedied at reasonable expense, then it is considered temporary in nature. *Id.* Thus, Kentucky differentiates between temporary and permanent nuisances on the basis of whether the nuisance can be remedied or abated. A nuisance is considered temporary under Kentucky law if it is a continuing nuisance that can be remedied at reasonable expense; if no such remedy is possible, then the nuisance will be classified as permanent. *See, e.g.*, *Huffman v. U.S.*, 82 F.3d 703, 705 (6th Cir. 1996) (citing *Lynn Mining Co.*, 394 S.W.2d at 759).

We will first address Plaintiffs' temporary nuisance claim. Diageo argues that Plaintiffs' allegations of unreasonable conduct must be disregarded as speculative and conclusory. However, we find that the complaint states a claim for temporary nuisance. The complaint alleges that Diageo's operations cause whiskey fungus to accumulate on Plaintiffs' property, and that this fungus unreasonably interferes with Plaintiffs' private use and enjoyment of their property. (DN 15, ¶ 88). The complaint also alleges that the value of use or rental value of Plaintiffs' property has been reduced as a result of Diageo's operations. (*Id.* at ¶ 89). To satisfy the final element of their claim for temporary nuisance, Plaintiffs allege that Diageo's ethanol emissions can be corrected or abated at reasonable expense to Diageo. (*Id.* at ¶¶ 86–87). Although Diageo questions the feasibility of implementing Plaintiffs' proposed ethanol emission

control technologies to abate the nuisance, we find that Plaintiffs have provided adequate factual allegations to state a claim for a temporary nuisance.

Plaintiffs can also proceed with their claim for permanent nuisance, albeit as an alternative theory, although they will eventually have to elect between temporary and permanent nuisance. Diageo argues that this claim should be dismissed because Plaintiffs failed to plead any unreasonableness with regard to Diageo's conduct. In response, Plaintiffs contend that the complaint does, in fact, allege that Diageo's use of its property unreasonably interferes with Plaintiffs' use of their property. The complaint alleges that Diageo's facilities emit ethanol, which combines with condensation on Plaintiffs' property to create a fungus that "appears as a black stain, black dots, and soot" and "is very visible on homes, businesses and vehicles . . . ." (DN 15, ¶ 31). The complaint further alleges that the fungus "can only be removed with extreme cleaning measures," for which Plaintiffs are required to spend "an abnormal amount of time, money, [and] energy . . . ." (*Id.* at ¶¶ 32–34). The extent to which Diageo's conduct in fact intrudes on Plaintiffs' private enjoyment must be evaluated in light of the nature of the intrusion and the means by which Diageo could avoid the intrusion, in whole or in part.

While Plaintiffs have technically complied with the pleading requirements and provided sufficient facts to state a claim for permanent nuisance under *Twombly*, we note that this claim may be time barred under the applicable statute of limitations. The parties have not addressed this issue, so we decline to go further than remark that a claim for permanent nuisance is subject to Kentucky's five-year statute of limitations. *See* KRS § 413.120(7); *Donaway*, 2013 WL 3872228, at *2 (citing *Kentucky West Virginia Gas Co. v. Matney*, 279 S.W.2d 805, 806–07 (Ky. Ct. App. 1955)). The First Amended Complaint itself states that in 2007, whiskey fungus was named and its occurrence was made known in the scientific community. (DN 15, ¶ 26). Further,

emission control technologies were being developed near in time to this scientific discovery. (*Id.* at ¶¶ 126–27). We question whether Plaintiffs can rely on the *Courier–Journal* newspaper's 2012 article for a "new discovery" as to causation when, by their own statement, Plaintiffs concede that whiskey fungus had been identified and emission control technology was made available several years prior.

Further, the court notes that a private nuisance can be classified as either temporary or permanent, but a plaintiff can only recover damages under one theory. *See* KRS § 411.520(2) ("A private nuisance shall be either a permanent nuisance or a temporary nuisance, but shall not be both."). Moreover, whether a nuisance is temporary or permanent is a question of fact. *Huffman*, 82 F.3d at 705. Although Plaintiffs will eventually be limited to one theory, at this stage in the proceedings they have alleged sufficient facts to proceed on claims for both temporary and permanent nuisance.

3) Count IV: Trespass

Plaintiffs appear to bring claims for both intentional and negligent trespass. Kentucky courts distinguish between intentional and negligent trespass by requiring actual harm for negligent trespass. *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 740 (W.D. Ky. 1998). In contrast, "[l]iability is imposed for intentional trespasses when there is an intrusion, even when it is harmless." *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 620 (Ky. Ct. App. 2003) (citation omitted).

"To support an action for trespass, an object or thing must actually enter the person's property and harm it." *Dickens v. Oxy Vinyls, LP*, 631 F. Supp. 2d 859, 864–65 (W.D. Ky. 2009). When bringing a claim for intentional trespass, "[a]ny intended intrusion or encroachment which is not privileged is actionable without regard for the shortness of the period

of the interference, or the absence of pecuniary harm." *Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52, 54 (Ky. 2007) (citation omitted).

Diageo cites to *Rudy v. Ellis*, 236 S.W.2d 466, 468 (Ky. 1951) to support its contention that an intentional trespass claim requires that the plaintiff prove the defendant had actual knowledge of wrongdoing. Diageo argues that Plaintiffs failed to prove that Diageo had actual knowledge of any wrongdoing and, as such, Plaintiffs' allegations must be disregarded as speculative. As we read *Rudy*, the tort of intentional trespass may, but is not required to be, accompanied by actual knowledge of wrongdoing. The trespass may also be innocent, in that the trespasser believes he or she has a right to be on the land of another. The difference is in the damages. Regardless, only an intentional act is required. In this respect, *Rudy* does not support the conclusion that actual knowledge of wrongdoing must be affirmatively pled in order to maintain an action for intentional trespass. *See Hammonds v. Ingram Indus., Inc.*, 716 F.2d 365, 371 (6th Cir. 1983) (interpreting *Rudy* and subsequent Kentucky case law as holding that "a trespass is presumed to be intentional and the defendant bears the burden of proving innocence"). Rather, Kentucky courts distinguish between willful, or knowing, trespass and innocent trespass as a means of determining the amount of damages for which a trespasser may be liable.

Therefore, Plaintiffs can state a claim for intentional trespass if they allege that an object or thing entered on and caused harm to their property. *Dickens*, 631 F. Supp. 2d at 864–65. In their First Amended Complaint, Plaintiffs allege that "[a]s a direct and proximate result" of Defendant's conduct in operating its facilities, Defendant emitted ethanol that subsequently entered upon and physically invaded Plaintiffs' property. (DN 15, ¶ 104). Plaintiffs further allege that "Defendant's actions were, and continue to be, intentional . . . ." (*Id.* at ¶ 112). Accepting these factual allegations as true, *Iqbal*, 556 U.S. at 678, the court finds that Plaintiffs

have sufficiently alleged an intentional wrongdoing on Diageo's part and have stated a claim for intentional trespass.

Diageo next argues that Plaintiffs failed to state a claim for negligent trespass because there is no allegation that Diageo owed a duty to Plaintiffs or that Diageo was in breach of such duty. Under Kentucky law, the tort of negligent trespass requires proof of three basic elements: "(1) the defendant must have breached its duty of due care (negligence); (2) the defendant caused a thing to enter the land of the plaintiff; and (3) the thing's presence causes harm to the land." *Rockwell Int'l Corp.*, 143 S.W.3d at 620.

Plaintiffs, in substance, appear to allege that as a result of its operations, Diageo breached a duty of care to not cause ethanol to physically invade Plaintiffs' property. They further allege that Diageo did not comply with this duty because it allowed ethanol to enter their property. This constitutes an allegation of a duty of care and subsequent breach of that duty. We offer no opinion as to the origin of this duty, or its legal basis, but we note that it is enough to state a claim for negligent trespass. Therefore, Plaintiffs' claims for negligent and intentional trespass will survive Diageo's motion to dismiss.

4) Count V: Injunctive Relief

Finally, Diageo argues that the court should dismiss Plaintiffs' request for injunctive relief because Plaintiffs failed to plead this remedy with sufficient factual matter so as to make their right to relief plausible, rather than speculative. The parties also disagree as to the appropriate standard for stating a right to injunctive relief. Diageo contends that the factors set forth in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)[10] govern Plaintiffs' request

[10] In *eBay Inc.*, the Supreme Court established a four-factor test to determine if a party is entitled to permanent injunctive relief. *eBay Inc.*, 547 U.S. at 391. Pursuant to this test, the plaintiff must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate

for injunctive relief, while Plaintiffs maintain that KRS §§ 77.175 and 77.240[11] provide them with a private right to seek an injunction.

Plaintiffs' First Amended Complaint alleges facts which are sufficient to state a claim under either standard. (*See* DN 15, ¶¶ 73, 114, 116, 137–41). Therefore, we find that the complaint adequately pleads a right to injunctive relief.

IV. CONCLUSION

For the reasons set forth above, the court will grant Diageo's motion to file supplemental authority (DN 28) and deny Plaintiffs' motion to strike (DN 38). Diageo's motion to dismiss (DN 18) is granted as to Count I and denied as to Counts II, III, IV, and V. A separate order will be entered this date in accordance with this Memorandum Opinion.

March 18, 2014

Charles R. Simpson III, Senior Judge
United States District Court

for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*

[11] Pursuant to these statutory provisions, a private citizen is entitled to enjoin a violation of an LMAPCD regulation or a violation of KRS §§ 77.150 through 77.175.

KATHY LITTLE; GREG WALKER and DEBRA L. WALKER, husband and wife; RICHARD EVANS; and PHILLIP WHITAKER and FAYE WHITAKER, husband and wife; on behalf of themselves and all others similarly situated, PLAINTIFFS v. LOUISVILLE GAS AND ELECTRIC COMPANY and PPL CORPORATION, DEFENDANTS

CIVIL ACTION NO. 3:13-CV-01214-JHM

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, LOUISVILLE DIVISION

2014 U.S. Dist. LEXIS 96947

July 16, 2014, Decided
July 17, 2014, Filed

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JUDGES: Joseph H. McKinley, Jr., Chief United States District Judge.

OPINION BY: Joseph H. McKinley

OPINION

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion to Dismiss [DN 29] of Louisville Gas and Electric Company ("LG&E") and PPL Corporation ("PPL"). Fully briefed, this matter is ripe for decision. For the following reasons, the motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

This case involves the operation of the Cane Run power plant in southwestern Louisville. [*3] The Plaintiffs allege that beginning in 2008, they and their neighbors began noticing a persistent film of dust that coated their homes and properties. (See Compl. [DN 1] ¶¶ 2-6.) They allege that the Cane Run power plant emits dust and coal ash into the air and onto their homes and properties several times a month. (Id. ¶¶ 52-57.) The Plaintiffs state that the dust and coal ash have been emitted from: (1) Cane Run's emission stacks, through which solid particulates are released during the coal burning process; and (2) Cane Run's sludge plant, where the ash is mixed with a cementing agent. (Id. ¶¶ 32, 36-39.) Further, the Plaintiffs state that ash, dust, and other coal combustion byproducts blow onto their properties because they are placed in an insufficiently-covered landfill. (Id. ¶¶ 42-43.) The Plaintiffs allege that the ash, dust, and coal combustion byproducts are not only annoying, but also, they are composed of dangerous elements, including arsenic, silica, lead, and chromium. (Id. ¶ 1.)

Louisville's Air Pollution Control District ("APCD") is the agency charged with enforcing environmental regulations in Jefferson County. (Id. ¶ 58.) In 2010, the APCD began investigating complaints [*4] about Cane Run. As a result of the investigation, the APCD issued several Notices of Violation ("NOVs") to LG&E concerning particulate emissions and the odors produced by Cane Run. Specifically, in July of 2011, the APCD issued an NOV, finding that LG&E allowed fly ash particulate emissions to enter the air and be carried beyond its property line. (See id. ¶ 62.) Four months later, in November of 2011, the APCD issued a second NOV, detailing more violations involving the emission of dust and ash from Cane Run. (Id. ¶ 63.) Subsequently, between July of 2012 and August of 2013, the APCD issued four additional NOVs. (Id. ¶¶ 64-69.) These NOVs were resolved by an administrative proceeding before Louisville's Air Pollution Control Board, which resulted in an Agreed Board Order. (See Ag. Bd. Order No. 13-07 [DN 29-2].)

The Agreed Board Order required LG&E to implement, and comply with, a "Plant-Wide Odor, Fugitive Dust, and Maintenance Emissions Control Plan." (Id. at 4.) In the Agreed Board Order, the Air Pollution Control Board specifically found that: (1) the required measures would "fully address" the alleged violations cited in the NOVs; (2) LG&E "demonstrated compliance at the Cane [*5] Run Generating Station" by submitting to the Order's control plan; and (3) the proposed resolution in the Agreed Board Order was "reasonable and adequate under the circumstances." (Id.) After a public hearing on November 20, 2013, the APCD adopted the Agreed Board Order.

On September 6, 2013, the Plaintiffs provided a Notice of Intent to Sue ("NOI") to the Defendants, the APCD's Director, the EPA Administrators, the Director of Kentucky's Division of Waste Management, the Commissioner of Kentucky's Department of Environmental Protection, and the U.S. Attorney General. The Plaintiffs filed this action more than 90 days from when the notices were delivered. (Notice Letter [DN 1-2].) In the action, the Plaintiffs allege violations of the Clean Air Act ("CAA") and Resource Conservation and Recovery Act ("RCRA"). They also bring state-law claims of nuisance, trespass, negligence, negligence per se, and gross negligence. LG&E and PPL argue that the claims must be dismissed under *Fed. R. Civ. P. 12(b)(1)* and *(b)(6)*.

II. STANDARDS OF REVIEW

Fed. R. Civ. P. 12(b)(1) provides that a party may file a motion asserting "lack of subject-matter jurisdiction." Subject matter jurisdiction is "a threshold [*6] determination." *Am. Telecom Co. v. Republic of Lebanon, 501 F.3d 534, 537 (6th Cir. 2007)* (citing *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998)*). "A *Rule 12(b)(1)* motion can either attack the claim of jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists." DLX, Inc. v. *Ky., 381 F.3d 511, 516 (6th Cir. 2004)*. "If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." *Fed. R. Civ. P. 12(h)(3)*. A district court has wide discretion to allow and review affidavits and other

documents to resolve disputed jurisdictional facts. Doing so does not convert the motion to dismiss to a *Rule 56* summary judgment motion where it does not impact the merits of the plaintiff's claim. See *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co., 491 F.3d 320, 330 (6th Cir. 2007)*.

Upon a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court "must construe the complaint in the light **[*7]** most favorable to plaintiff[]," *League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007)* (citation omitted), accepting all of the plaintiff's allegations as true. *Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)*. Under this standard, the plaintiff must provide the grounds for its entitlement to relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)*. A plaintiff satisfies this standard when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. A complaint falls short if it pleads facts that are merely "consistent with a defendant's liability" or if the facts do not \"permit the court to infer more than the mere possibility of misconduct." *Id. at 678-79*. The allegations must "'show[] that the pleader is entitled to relief.'" *Id. at 679* (quoting *Fed. R. Civ. P. 8(a)(2)*).

III. Discussion

At its core, the Plaintiffs' complaint alleges that LG&E and PPL have excessively emitted dust, ash, and other coal combustion byproducts from the Cane **[*8]** Run plant. Generally, excessive emission claims are covered under the Clean Air Act ("CAA"). Thus, the Court will first analyze the Plaintiffs' CAA claims. Thereafter, the Court will turn its attention to the Plaintiffs' Resource Conservation and Recovery Act ("RCRA") claims and their state-law claims.

A. Count III: Clean Air Act ("CAA") Claims

In Count III of their complaint, the Plaintiffs allege four types of CAA claims, including claims for: (1) past violations based on the issued NOVs (Compl. [DN 1] ¶ 189); (2) "substantially similar violations" that are "continuing on at least a weekly basis" (id. ¶ 193); (3) a violation of the 20% opacity standard in Cane Run's Title V operating permit (id. ¶ 195); and (4) operating the Cane Run plant after LG&E's Title V operating permit expired. (Id. ¶ 194.) LG&E and PPL argue that these claims must be dismissed. The Court considers each type of CAA claim in turn.

Past Violations based on Issued NOVs. In part, the Plaintiffs base their CAA claims on issued NOVs which were addressed by the APCD in its Agreed Board Order. LG&E and PPL argue that the Plaintiffs cannot sue for violations based on these issued and addressed NOVs because: (1) the Agreed **[*9]** Board Order renders the claims non-redressable; (2) the claim preclusion doctrine bars the Plaintiffs from re-litigating the claims; (3) this Court lacks jurisdiction to address the ¶ 189(f) and ¶ 189(r) claims, as they are based on an alleged violation of Reg. 1.13 § 2, which is not federally enforceable; and (4) this Court lacks jurisdiction to address the claims in ¶ 189(b)-(c), ¶ 189(g)-(h), and ¶ 189(m)-(o), as the regulations on which they are based do not constitute "emission standards or limitations" enforceable under the CAA's citizen-suit provision.

LG&E and PPL first argue that the Agreed Board Order renders the Plaintiffs' ¶ 189 claims non-redressable. To establish standing, a plaintiff must show that the injury will be redressed by the relief sought. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000)*. LG&E and PPL argue that the Plaintiffs cannot make this showing, as the alleged CAA violations in ¶ 189 of the complaint have already been resolved. According to them, the Plaintiffs base the ¶ 189 claims solely on NOVs that the APCD resolved via its Agreed Board Order. Further, since the Agreed Board Order addresses the issues raised **[*10]** in ¶ 189 of the complaint, and since the APCD has found LG&E in compliance regarding these issues, the Court can take no other action. (Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem.") [DN 29-1] 13-15.) LG&E and PPL argue that "permitting a claim to go forward based upon the same conduct which has already been penalized by an agency in an enforcement action would undermine the goals of ensuring that agencies remain the primary enforcers of [environmental laws]." Benham v. Ozark Materials River Rock, LLC, 2013 WL 5372316, at *7 (N.D. Okla. Sept. 24, 2013).

The Plaintiffs respond by asserting that the Agreed Board Order does not bar their claims. Although the Plaintiffs do not specifically address the ¶ 189 claims in their response, choosing instead to address all their CAA claims generally, they argue that the Agreed Board Order

cannot bar their claims because it is an administrative order entered into without a court action. According to the Plaintiffs, citizen-suit jurisdiction under the CAA is limited by *42 U.S.C. § 7604(b)(1)(B)*, which prohibits the commencement of a citizen suit "if the Administrator or the State has commenced and is diligently prosecuting **a civil action [*11] in a court of the United States or a State** to require compliance with the standard, a limitation, or order . . . ." *42 U.S.C. § 7604(b)(1)(B)* (emphasis added). The Sixth Circuit has held that an administrative order is not a "civil action in a court of the United States or a State" under the meaning of the statute. *Jones v. City of Lakeland, Tenn., 224 F.3d 518, 521 (6th Cir. 2000)*. Thus, the Plaintiffs argue that the Agreed Board Order cannot bar their CAA claims. The Plaintiffs state that LG&E and PPL have ignored this "civil action" requirement, thus rendering their redressability argument without merit. (Pls.' Mem. in Opp. to Defs.' Mot. ("Pls.' Mem.") [DN 41] 16-19.) The Plaintiffs note that federal courts uniformly hold that a "civil action in court" means what it says--and preemption does not arise when a state agency merely undertakes administrative enforcement efforts. When courts bar environmental citizen suits, the suits involve court actions--not administrative proceedings. See *Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 525 (5th Cir. 2008)*.

The Court finds that contrary to the Plaintiffs' argument, LG&E and PPL's position is meritorious. As LG&E and PPL note **[*12]** in their reply, and as they argued during the oral argument on May 5, 2014, the Plaintiffs have essentially confused Article III subject-matter jurisdiction (and the "case or controversy" requirement) with federal question jurisdiction (and the limits of citizen-suit jurisdiction). (Reply in Supp. of Defs.' Mot. to Dismiss ("Defs.' Reply") [DN 42] 1-3.) LG&E and PPL do not argue that the Agreed Board Order constitutes a "civil action" as defined by *42 U.S.C. § 7604(b)(1)(B)*. Rather, they contend that the Agreed Board Order already provides the only relief available for the Plaintiffs' ¶ 189 claims, thereby making those claims not redressable by an Article III court. (Id.) In essence, by focusing on *42 U.S.C. § 7604(b)(1)(B)* instead of LG&E and PPL's redressability argument, the Plaintiffs address an argument that LG&E and PPL did not make. The issue here is not whether the Court has federal question jurisdiction; it is whether the Agreed Board Order bars the Plaintiffs from bringing their ¶ 189 claims due to redressability. For the following reasons, the Court finds that it does.

In Steel Co. v. Citizens for a Better Environment, the Supreme Court held that a plaintiff cannot meet the **[*13]** redressability prong of standing where the alleged violations have been resolved or abated before suit is filed. *523 U.S. 83, 107-09 (1998)*. In other words, the Court held that private plaintiffs may not sue to assess penalties for wholly past violations. Id. In this case, the Plaintiffs' ¶ 189 claims were addressed and resolved by the Agreed Board Order before the Plaintiffs filed suit. As noted above, the APCD found LG&E's control plan to be "reasonable and adequate." The APCD also found that LG&E "demonstrated compliance" at Cane Run by submitting to the control plan. (Ag. Bd. Order No. 13-07 [DN 29-2].) Therefore, the responsible administrative agency found that LG&E was in compliance as to the violations cited in the issued NOVs. The violations cited in the issued NOVs became wholly past violations.

The Court finds that in light of this fact, it can do nothing to redress the Plaintiffs' ¶ 189 claims. See, e.g., *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC, 637 F. Supp. 2d 983, 988 (N.D. Ala. 2009)* (holding that where a regulatory agency grants "meaningful relief of the sort being sought by the citizen," citizen-suit claims are not redressable); see also W. Coast Home Builders, Inc. v. Aventis Cropscience USA Inc., 2009 WL 2612380 (N.D. Cal. Aug. 21, 2009) **[*14]** (holding that no basis for relief exists where the conditions at issue are already being addressed by the administrative agency through a consent order); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)* (noting that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility"). The Plaintiffs' ¶ 189 claims must be **DISMISSED**. LG&E and PPL's motion is **GRANTED** in this respect. In light of this holding, the Court need not address LG&E and PPL's other arguments on the ¶ 189 claims, including their claim preclusion argument, as well as their argument on the Court's jurisdiction over the ¶ 189(f), ¶ 189(r), ¶ 189(b)-(c), ¶ 189(g)-(h), and ¶ 189(m)-(o) claims.

Substantially Similar Violations Continuing on Weekly Basis. In addition to their ¶ 189 claims for past violations based on issued NOVs, the Plaintiffs bring CAA claims based on "substantially similar violations" which are "continuing on at least a weekly basis." (Compl. [DN 1] ¶¶ 193, 197.) LG&E and PPL argue that the Plaintiffs cannot sue for these alleged violations since: (1) the Plaintiffs lack standing; (2) the Plaintiffs

failed to [*15] provide adequate notice of these claims; and (3) the Plaintiffs' vague allegations do not meet the requirements of notice pleading.

Standing. LG&E and PPL first argue that the Plaintiffs lack standing to sue for their "substantially similar" claims, as to both the "injury in fact" prong and the "redressability" prong of the standing inquiry. As for "injury in fact," LG&E and PPL argue that the Plaintiffs have failed to allege facts indicating that the "Plant-Wide Odor, Fugitive Dust, and Maintenance Emissions Control Plan" did not adequately address their "substantially similar" claims. LG&E and PPL argue that the Agreed Board Order specified injunctive relief in the form of the control plan. (Defs.' Mem. [DN 29-1] 21-22.) They cite *Ellis v. Gallatin Steel Co., 390 F.3d 461 (6th Cir. 2004)*, to argue that in light of this control plan, the Plaintiffs have failed to sufficiently plead "injury in fact." In that case, the Sixth Circuit held that the district court committed reversible error in concluding that the plaintiffs had shown a risk of irreparable harm. The Court reasoned that the plaintiffs had failed to establish how the existing consent decrees would not adequately deal with [*16] any post-consent decree violations. *Id. at 476.* As for "redressability," LG&E and PPL argue that the control plan adopted in the Agreed Board Order addresses compliance with the underlying regulations cited in the NOVs; therefore, there is nothing that the Court can award to redress the "substantially similar" claims.

At the oral argument on May 5, 2014, LG&E and PPL noted that here, the Plaintiffs seek declaratory relief. (Compl. [DN 1] 58, ¶ B.) They also seek "a permanent or final injunction enjoining the Cane Run Defendants from allowing coal dust, fly ash, bottom ash, or other coal combustion byproducts from escaping the Cane Run Site." (*Id. at 58*, ¶ F.) In addition, the Plaintiffs request "a permanent or final injunction requiring the Cane Run Defendants to take affirmative measures . . . including but not limited to reducing the size of the Coal Ash Landfill to its pre-1999 size." (*Id. at 58*, ¶ G.) Finally, they request civil penalties and attorneys' fees, as well as compensatory and punitive damages. (*Id. at 58-59*, ¶¶ H-L.) LG&E and PPL argue that in requesting this relief, the Plaintiffs essentially ask the Court to decide issues which were already decided by the APCD--and reach [*17] a different result than it did. LG&E and PPL argue that this is impermissible. See *Ellis, 390 F.3d at 477* (noting that the citizen-suit plaintiffs sought to obtain injunctive relief on "more stringent terms than those worked out by the EPA" and holding that such "second-guessing of the EPA's assessment of an appropriate remedy . . . fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act where the EPA has 'failed' to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view").

The Plaintiffs respond that the Agreed Board Order cannot deprive them of standing, as their claims go beyond the specific incidents itemized in the NOVs. The Plaintiffs argue that the complaint is based on LG&E and PPL's repeated and ongoing conduct--and that this conduct is actionable under controlling authority. In support of their position, the Plaintiffs cite *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987)*. There, the Supreme Court found that a provision of the Clean Water Act authorizing citizens to commence civil actions for [*18] injunctive relief, and/or the imposition of civil penalties, conferred citizen-suit jurisdiction over complaints that make a "good-faith allegation of continuous or intermittent violation." *Id. at 64-66.* The Court remanded the case for consideration of whether the plaintiff's complaint contained such a "good-faith allegation." However, it noted the plaintiff's allegation that the defendant was "continuing to violate its . . . permit when plaintiffs filed suit . . . ." *Id. at 64.*

According to the Plaintiffs, this is not simply a case involving wholly past violations, and courts have routinely recognized that the CAA permits recovery for wholly past violations that have been repeated, as well as for ongoing violations. See, e.g., *Atl. States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 477 (6th Cir. 1995)* (noting that "after *Gwaltney*, Congress amended the Clean Air Act . . . explicitly to allow citizen suits for purely historical violations"); *Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029, 1037-38 (E.D. Tex. 1995)* (finding that plaintiffs may maintain CAA suits based on allegations that past violations were repeated). The Plaintiffs state [*19] that to the extent LG&E and PPL argue that their claims have been redressed by the Agreed Board Order, or to the extent LG&E and PPL dispute that violations are continuing, these arguments must be addressed on summary judgment or at trial--not on a motion to dismiss. See *Gwaltney, 484 U.S. at 66* (noting that as a general rule, a citizen suit "will not be dismissed

for lack of standing if there are sufficient 'allegations of fact'--not proof--in the complaint" and also noting that such allegations may still be challenged if defendants move for summary judgment on the standing issue, where they may demonstrate to a court "that the allegations were sham and raised no genuine issue of fact").

In addition, the Plaintiffs argue that contrary to LG&E and PPL's position, the terms of the Agreed Board Order do not bar this suit. The Plaintiffs distinguish the Ellis case by showing that the language in the Ellis consent decrees is contrary to the Agreed Board Order's language. Specifically, the Plaintiffs note that the Ellis decrees were explicitly drafted to cover all the claims alleged in the citizen-suit complaint. *390 F.3d at 468.* Further, the decrees were forward looking and applied to "continuing [***20**] [CAA] violations." *Id. at 476.* Also, in the Ellis decrees, the government covenanted not to sue on the claims addressed therein. *Id. at 473.* According to the Plaintiffs, these facts are distinct from the present case--and thus, it is not reversible error for the Court to find that the plaintiffs have alleged a risk of irreparable harm. The Plaintiffs note that the Agreed Board Order does not purport to address all the Plaintiffs' claims. Also, it has no reservation of rights, and it does not contain a covenant not to sue. The Plaintiffs argue that it is thus improper for the Court to reach a conclusion similar to the one reached by the Ellis court.

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)* (citing *Los Angeles v. Lyons, 461 U.S. 95, 109 (1983)* (notwithstanding the fact that a plaintiff had standing to pursue damages, he lacked standing to sue for injunctive relief)). Here, as to the Plaintiffs' "substantially similar" claims, the Plaintiffs seek declaratory relief, civil penalties, and injunctive relief. (Compl. [DN 1] 58-59, ¶¶ B, F-G, K.) The Court will [***21**] consider each type of relief in turn.

a. Declaratory Relief. The Court may easily dispose of the Plaintiffs' request for declaratory relief on standing grounds, as declaratory relief is not an appropriate basis to support citizen-suit standing, except in special circumstances not present here. Federal courts have explicitly held that declaratory relief does not support a CAA citizen-suit plaintiff's claim of standing. See, e.g., *WildEarth Guardians v. Pub. Serv. Co. of Colo., 690 F.3d 1174, 1191 (10th Cir. 2012)* (citation omitted). The Plaintiffs do not dispute this authority or respond to this argument. LG&E and PPL's motion to dismiss is thus **GRANTED** to the extent they seek dismissal of the "substantially similar" claims which request declaratory relief. These claims are **DISMISSED**.

b. Civil Penalties. The analysis concerning the Plaintiffs' request for civil penalties is not as straight-forward. LG&E and PPL argue, in a footnote, that civil penalties cannot support citizen-suit standing. Their argument seems to be that civil penalties offer no redress to private plaintiffs because such penalties are paid to the Government. In support, LG&E and PPL cite Steel Co., in which the Supreme [***22**] Court considered the Emergency Planning and Community Right-To-Know Act and held that in requesting civil penalties, "[a citizen-suit plaintiff] seeks not remediation of its own injury . . . but vindication of the rule of law--the 'undifferentiated public interest' in faithful execution of [the law]." *523 U.S. at 106.* Again, the Plaintiffs did not dispute the Defendants' cited authority; they also did not specifically respond to this argument.

In Laidlaw, however, the Supreme Court considered such an argument in a Clean Water Act case and held that "it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties." *528 U.S. at 185.* The Court noted that "for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description." *Id. at 185-86.* Thus, the Court finds that in this case, the Plaintiffs have standing to the extent they seek civil penalties; such relief would afford redress to the Plaintiffs for the alleged "substantially similar" violations. [***23**] As was noted in Laidlaw, "[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct." *Id. at 186.*

In a similar vein, the Court also finds that the Plaintiffs have made sufficient factual allegations of injury to confer standing for their "substantially similar" violations. In Laidlaw, the Supreme Court discussed Steel Co. and recognized that it "established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit." *528 U.S. 167, 188*

(2000). The Court went on, however, to note that in Steel Co., "there was no allegation in the complaint of any continuing or imminent violation, and that no basis for such an allegation appeared to exist." Id. Here, there is such an allegation. The Plaintiffs have alleged that despite the Agreed Board Order, "substantially similar violations to those that are the subject of the APCD NOV's are continuing on at least a weekly basis at the Cane Run Site because the Cane Run Defendants have failed to **[*24]** implement measures to control the emission of coal dust, fly ash, bottom ash, and other particulates . . . ." (Compl. [DN 1] ¶ 193.) The Court agrees with the Plaintiffs that this is a sufficient allegation of a redressable "injury in fact" as to their claims for "substantially similar violations" of the CAA.

c. Injunctive Relief. The Court's finding that the Plaintiffs have adequately alleged injury in fact as to their "substantially similar" claims, however, does not mandate a finding that this injury is redressable as to the Plaintiffs' request for injunctive relief. The Agreed Board Order states that LG&E has "demonstrated compliance" by submitting to the control plan. Also, it states that the plan provides "reasonable precautions . . . to prevent particulate matter from becoming airborne beyond the worksite in the future" and that "nothing shall prevent the District from initiating enforcement action to remedy any alleged violations of District regulations despite [LG&E's] compliance with the Plan." (Ag. Bd. Order [DN 29-2] 4.) The Court finds that in light of these provisions, it cannot redress the Plaintiffs' claims by entering the requested injunctions.

As LG&E and PPL note, **[*25]** the Plaintiffs ask the Court to impose a zero-tolerance policy on emissions by implementing "a permanent or final injunction enjoining the Cane Run Defendants from allowing coal dust, fly ash, bottom ash, or other coal combustion byproducts from escaping the Cane Run Site." (Compl. [DN 1] 58, ¶ F.) They also seek "a permanent or final injunction requiring the Cane Run Defendants to take affirmative measures . . . including but not limited to reducing the size of the Coal Ash Landfill to its pre-1999 size." (*Id. 58*, ¶ G.) The Court agrees with LG&E and PPL that in making these requests, the Plaintiffs ask the Court to decide issues which were already decided by the APCD--and reach a different result than it did. This is impermissible. As the Sixth Circuit noted in Ellis, by seeking injunctive relief on "more stringent terms than those worked out by the EPA," the Plaintiffs have improperly asked the Court to second-guess the regulatory agency's assessment of an appropriate remedy. The Court cannot engage in such second-guessing, as doing so would "fail[] to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of **[*26]** which permit citizens to act where the EPA has 'failed' to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view." *390 F.3d at 477*. LG&E and PPL's motion to dismiss is **GRANTED** to the extent they seek dismissal of the Plaintiffs' "substantially similar" claims which seek injunctions. These claims are **DISMISSED**.

Adequate Notice. Because the Court has held that the Plaintiffs have alleged a redressable injury in fact as to their claims for "substantially similar violations" of the CAA and their request for civil penalties, the Court must address LG&E and PPL's argument that the Plaintiffs failed to provide adequate notice of these claims. The CAA requires plaintiffs to give defendants (and others) a Notice of Intent to Sue ("NOI"). The regulations require the NOI to include "sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the location of the alleged violation, [and] the date or dates of such violation . . . ." *40 C.F.R. § 54.3(b)*. LG&E and PPL argue that the regulations thus require all NOIs to identify violations with **[*27]** specificity. They also argue that the Plaintiffs' NOI failed to identify their "continuing" violations with such specificity. LG&E and PPL argue that the Plaintiffs' NOI left them guessing as to when, how, and where the alleged "substantially similar" violations occurred. (Defs.' Mem. [DN 29-1] 22-25.)

District courts within the Sixth Circuit have held that notice letters that simply identify a lengthy period rather than stating the dates of alleged violations are insufficient. See, e.g., *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth., 175 F. Supp. 2d 1071, 1077 (E.D. Tenn. 2001)* (holding insufficient a notice that a defendant "regularly violated" the opacity limit, where the notice failed to specify the dates of the alleged violations or identify at which sites the violations occurred, but rather only stated that the defendant "regularly violated" the standard "for at least five years"). LG&E and PPL argue that the Plaintiffs' NOI is thus insufficient, as it does not detail with specificity any dates for the "substantially similar" violations. Further, they

argue that the Plaintiffs' NOI fails to even identify any emission standard or limitation regarding the alleged "continuing" **[*28]** violations, leaving them to guess as to which violations continued.

The Plaintiffs counter that their NOI was sufficiently specific to satisfy the requirements. They highlight that the NOI incorporated six NOVs, an APCD study regarding Cane Run, and LG&E's Title V permit. The NOVs detail several incidents when LG&E allegedly emitted coal ash beyond their property. The Plaintiffs state this was sufficient to satisfy the requirements. The Plaintiffs also argue that the notice only needed to provide enough information for the **recipients**-- here, LG&E and PPL, the alleged polluters--to identify the standard or limit being violated. See *Pub. Interest Research Grp. of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3d Cir. 1995)* (reversing a district court's dismissal based on lack of specificity in a notice under the Clean Water Act and holding that the notice must only contain enough information to let the recipient [i.e. polluter] understand what is being alleged and what it would take to correct the problem).

At the outset of this analysis, the Court notes that the Sixth Circuit has not adopted Hercules. In fact, district courts within the Sixth Circuit have largely rejected Hercules to the extent **[*29]** plaintiffs have argued that they should be permitted to prove related violations after providing a single notice of violation to a defendant. See, e.g., Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n, 2009 WL 8520576, at *12 (E.D. Ky. Feb. 27, 2009) (rejecting Hercules, "which held that once a violation is noticed, any subsequently discovered violations that are directly related to the noticed violation may be included in the citizen suit"); *Stephens v. Koch Foods, LLC, 667 F. Supp. 2d 768, 787 (E.D. Tenn. 2009)* (rejecting the argument that the plaintiffs were "entitled to prove additional violations of the same type on summary judgment or at trial without having to include them in additional 60-day notice letters as the violations recur or are discovered" and noting that Hercules is "not the law of the Sixth"). This Court likewise rejects the Hercules decision. Instead, the Court will follow the rule in the Sixth Circuit, which requires plaintiffs to strictly comply with all notice requirements. See *Sierra Club Ohio Ch. v. City of Columbus, 282 F. Supp. 2d 756, 775-76 (S.D. Ohio 2003)* (noting the Sixth Circuit's view); *Atl. States Legal Found. v. United Musical Instruments, 61 F.3d 473, 478 (6th Cir. 1995)*.

In **[*30]** this case, the Plaintiffs correctly note that they incorporated six NOVs into their NOI. These NOVs detailed regulations allegedly violated and the dates on which such violations allegedly occurred. The NOVs also identified the sources on Cane Run that allegedly emitted the ash, and stated that such emissions were regular and continuing occurrences. However, all of the detailed incidents occurred prior to November 20, 2013, the date of the Agreed Board Order. The Court finds that because of this fact, the Plaintiffs have not strictly complied with the notice requirements as to their "substantially similar" claims. A new notice was required. Due to the Plaintiffs' failure to detail with specificity their "substantially similar" violations, LG&E and PPL have been rendered unable to identify emission standards or limitations that they allegedly violated. Their motion is thus **GRANTED**. The Plaintiffs' "substantially similar" claims seeking civil penalties are **DISMISSED**. In light of this holding, the Court need not address LG&E and PPL's remaining argument that the Plaintiffs failed to satisfy the notice pleading requirements.

Opacity Claim. In addition to their claims for "substantially **[*31]** similar" CAA violations, the Plaintiffs allege that LG&E and PPL "regularly exceed the 20% opacity limit" in Cane Run's Title V permit. (Compl. [DN 1] ¶ 195.) "Opacity" is "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." Reg. 1.02 § 1.49. LG&E and PPL argue that the Plaintiffs cannot sue for an opacity violation because: (1) the NOI does not give adequate notice of an opacity claim; and (2) the Plaintiffs have failed to show that they have standing to sue for any alleged opacity violation. (See Defs.' Mem. [DN 29-1] 26-27.)

Adequate Notice. LG&E and PPL argue that the Court lacks jurisdiction over the opacity claims because the Plaintiffs' NOI does not identify a specific emission point at which an opacity violation allegedly occurred on any specific date. LG&E and PPL argue that the NOI thus gave no basis for them to determine whether, where, or when an opacity exceedance occurred. LG&E and PPL argue that when emissions exceed 20% opacity, that does not necessarily mean that a violation has occurred. As a result, notice of the specific emission point, as well as the date, time, and duration of any alleged exceedance, **[*32]** is required. LG&E and PPL state that without such information, they cannot be expected to determine whether a violation occurred and whether it can be

corrected. See *Nat'l Parks Conservation Ass'n, 175 F. Supp. 2d at 1077* (holding that where a notice letter "does not specify the dates of the alleged [opacity] violations or identify at which sites the violations occurred" and only states that a defendant has "regularly violated" the opacity standards "for at least the last five years," the opacity claims must be dismissed).

The Plaintiffs argue that their NOI was detailed, timely, and sent to all required parties. However, the Court finds that the NOI was not detailed as to the alleged opacity violations. The NOI states: "[i]n further violation of the CAA, the Cane Run Defendants' activities regularly exceed the 20% opacity limit set by the Cane Run site's Operating Permit, with respect to the Stacks, the SPP, and the Ash Silo." (Notice of Intent Letter [DN 1-2] 16.) This allegation of "regular" opacity violations is not enough. Although the Plaintiffs' NOI indicates their belief that LG&E and PPL have violated the opacity limit, it does not specify the dates of alleged violations or **[*33]** identify any emission point at which an opacity violation allegedly occurred. LG&E and PPL's motion to dismiss is accordingly **GRANTED**, and the Plaintiffs' opacity claims are **DISMISSED**. In light of this holding, the Court need not consider LG&E and PPL's remaining argument that the Plaintiffs have failed to allege "injury in fact" to support their opacity claims.

Expiration of Permit. As a final matter, the Plaintiffs allege that the Defendants have violated the CAA by continuing to operate Cane Run even though LG&E's Title V operating permit expired in 2007. (Compl. [DN 1] ¶ 194.) LG&E and PPL argue that this claim fails since LG&E submitted a timely application for renewal, as confirmed by the public record. (Excerpts of Title V Permit Renewal App. [DN 29-4]; Receipt for Title V Renewal App. [DN 29-5].) The CAA states that "if an applicant has submitted a timely and complete application for a permit required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information **[*34]** required or requested to process the application." *42 U.S.C. § 7661b(d).* LG&E and PPL argue that the Court should thus dismiss the Plaintiffs' claims as deficient. They argue that the Plaintiffs failed to allege that LG&E and PPL filed no renewal application; likewise, they did not allege that LG&E and PPL failed to timely submit the information required to process that application.

The Plaintiffs argue that they have sufficiently alleged that the Defendants have continued to operate Cane Run without a valid Title V permit. (Compl. [DN 1] ¶ 194.) The Plaintiffs state that by only attaching excerpts of LG&E's renewal application and a document purporting to be a receipt, LG&E and PPL have left several questions open, including: (1) whether the renewal application was complete, (2) whether additional information was requested by the permitting authority, and (3) whether LG&E timely submitted the application. (Pls.' Mem. [DN 41] 38.) The Plaintiffs question what has happened over the past six years that has caused the application to not be renewed as of yet. Further, the Plaintiffs state that the Court cannot take judicial notice over the documents proffered by the Defendants, as they **[*35]** are subject to reasonable dispute. See *Passa v. City of Columbus, 123 Fed. App'x 694, 697 (6th Cir. 2005)* (noting that a court, "on a motion to dismiss, must only take judicial notice of facts which are not subject to reasonable dispute"). The Plaintiffs highlight that the submitted documents do not purport to be the complete record regarding the application. (See Pls.' Mem. [DN 41] 38-39.)

The Court finds that the Plaintiffs' argument is more persuasive. The Plaintiffs allege that LG&E's Title V permit expired in 2007 and that the Defendants nonetheless continue to operate Cane Run. (Compl. [DN 1] ¶ 194.) The Court finds that when it accepts this statement as true, and draws all reasonable inferences in favor of the Plaintiffs, the Plaintiffs have sufficiently alleged a CAA claim based on LG&E's alleged operation of Cane Run without a valid permit. The documents submitted by LG&E and PPL do not purport to be the complete record regarding the application, and on a motion to dismiss, the Court may not take judicial notice of facts which are subject to reasonable dispute. Further, even if the Court could properly take judicial notice of the existence of LG&E's application, that does not **[*36]** automatically compel the conclusion that such application was "timely" or "complete." While LG&E and PPL may properly argue in a summary judgment motion that no genuine issues of fact exist as to whether they have submitted a timely and complete application for a permit--and that any delay in final action was not due to their failure to submit any required or requested information, this issue cannot be properly decided on a motion to dismiss. LG&E and PPL's motion is **DENIED**

as to the Plaintiffs' CAA claim involving the alleged operation of Cane Run without a valid permit.

B. COUNTS I AND II: RCRA CLAIMS

In Counts I and II of the complaint, the Plaintiffs bring RCRA claims against LG&E and PPL. These claims are based on the same activities and events which form the basis for the Plaintiffs' CAA claims. (Compl. [DN 1] ¶¶ 155-83.) In Count I, the Plaintiffs allege that the Defendants' handling of coal combustion residuals at Cane Run violates: (1) Kentucky's special waste landfill requirements at 401 KAR Ch. 45 (and the environmental performance standards incorporated at 401 KAR 30:031); (2) federal municipal solid waste landfill cover and air criteria standards at *40 C.F.R. § 258.21* and **[*37]** *40 C.F.R. § 258.24*; and (3) Kentucky's cover standard which is applicable to "contained" landfills at 401 KAR 48:090 *§ 3*. (Id. ¶¶ 163-64.) In Count II, the Plaintiffs allege that the Defendants' handling of coal combustion residuals "may present an imminent and substantial endangerment to health or the environment," in violation of *42 U.S.C. 6972(a)(1)(B)*. (Id. ¶ 182.) LG&E and PPL argue that these claims must be dismissed.

Pre-Suit Notice. LG&E and PPL first argue that the Plaintiffs have not given sufficient notice of the alleged RCRA violations. As with the CAA, RCRA contains notice requirements, which require plaintiffs to include "sufficient information to permit the recipient to identify" the specific standard or regulation allegedly violated, the activity alleged to constitute a violation, and the date or dates of the violation. *40 C.F.R. § 254.3(a)*. LG&E and PPL argue that "[a]s with their generic CAA claims in ¶¶ 193, 197 and 195, Plaintiffs have failed to provide notice of the specific nature, circumstances, date or duration of the alleged RCRA violations." (Defs.' Mem. [DN 29-1] 30.)

In their NOI, the Plaintiffs state that the "specific dates of violations of RCRA . . . are, **[*38]** on information and belief, daily or near daily since at least 2008 . . . ." (NOI Letter [DN 1-2] 9 n.2.) LG&E and PPL argue that this is insufficient to give them adequate notice of the alleged RCRA violations. LG&E and PPL argue that the Plaintiffs have similarly failed to give adequate notice of their storm water claims, as the NOI fails to provide the date of a violation, the location of an outfall, or a description of the nature of a violation--stating only that "emissions are regularly in the form of dust traveling in the air, as well as in the form of storm water runoff from the Cane Run site," which emissions take place "on at least a weekly basis since at least 2008." (Id. at 9.) In response to this argument, the Plaintiffs again rely on Hercules. They also argue that their NOI contained enough detail, as it incorporated the NOVs, which list examples of dates and times on which LG&E allegedly violated regulations. (Pls.' Mem. [DN 41] 30-31.)

The Court finds that the NOI contained sufficient detail with respect to the RCRA claims which are based on alleged emissions documented, by date and time, in the NOVs. However, as for the RCRA claims involving "ongoing" violations, LG&E **[*39]** and PPL's position is more persuasive. For the reasons outlined above with respect to the Plaintiffs' CAA "substantially similar" claims, the Court finds that the Plaintiffs have failed to provide sufficient notice of the specific nature, circumstances, date, or duration of any alleged "ongoing" RCRA violations. A broad statement that such violations occur "daily or near daily since at least 2008" is insufficient. The Court also finds that the Plaintiffs' NOI similarly failed to give adequate notice of their storm water claims. Therefore, as to the Plaintiffs' RCRA claims for "ongoing" violations and the Plaintiffs' storm water claims, LG&E and PPL's motion is **GRANTED**. Such claims are **DISMISSED**. The Court notes that as for the Plaintiffs' other RCRA claims, they are nonetheless subject to dismissal, as a matter of law, for the reasons outlined below.

Count I Claims under *42 U.S.C. § 6972(a)(1)(A)*. LG&E and PPL argue that even if the Plaintiffs have sufficiently provided notice, the Count I claims fail because: (1) the claims alleging violations of 401 KAR Ch. 45 and 401 KAR 30:031 §§ 9 and 11 are not "effective pursuant to" RCRA and are not enforceable in a citizen suit; (2) even if **[*40]** such claims were "effective pursuant to" RCRA, the claims regarding fugitive air emissions are not redressable; and (3) the claims alleging violations of *40 C.F.R. § 258* and 401 KAR Ch. 48 are inapplicable to Cane Run and were not properly noticed. (See Defs.' Mem. [DN 29-1] 31-36.)

Claims Alleging Violations of 401 KAR Ch. 45 and 401 KAR 30:031 are Not "Effective Pursuant to" RCRA. Count I is based on *42 U.S.C. § 6972(a)(1)(A)*, which provides that "any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order

which has become effective pursuant to [RCRA]." *42 U.S.C. § 6972(a)(1)(A)* (emphasis added). The bulk of Count I alleges violations of requirements under Kentucky's special waste program and the environmental performance standards referenced therein. (See Compl. [DN 1] ¶¶ 164(a)-(h) (alleging violations of 401 KAR Ch. 45 and 401 KAR 30:031).) LG&E and PPL argue that while these standards and requirements are applicable to Cane Run, they are not enforceable in a RCRA citizen suit since they are not "effective pursuant to RCRA." Rather, 401 **[*41]** KAR Ch. 45 and the cited performance standards are a state-law program that is enforceable only under state law. (See Defs.' Mem. [DN 29-1] 31.)

In support of their position, LG&E and PPL cite *Ashoff v. City of Ukiah, 130 F.3d 409, 411 (9th Cir. 1997)*, in which the Ninth Circuit found certain state municipal solid waste program regulations effective pursuant to RCRA after the "EPA approved" them, to the extent that those regulations were not more stringent than the federal criteria. *Id. at 412*. LG&E and PPL suggest that this case shows that at a minimum, to be effective pursuant to RCRA, a state regulation, program, or other requirement must be approved or authorized by the EPA. They also note that other district court cases have drawn similar conclusions. See, e.g., *Frontier Recovery, LLC v. Lane Cnty., 727 F. Supp. 2d 968, 972 (D. Or. 2010)* ("a state program must be authorized by the EPA to 'become effective pursuant to' RCRA"); Cameron v. Peach Cnty., Ga., 2004 WL 5520003, at *18-19 (M.D. Ga. June 28, 2004) (noting that citizen suits are not confined to the provisions contained in RCRA if the state standards are approved by the EPA).

Coal combustion residual waste is currently regulated **[*42]** under *Subtitle D of RCRA. 75 Fed. Reg. 35,144 (June 21, 2010)*. Subtitle D establishes a framework for federal, state, and local government cooperation in controlling and managing this non-hazardous solid waste. Id. at 35,136. Under this framework, the "actual planning and direct implementation of solid waste programs under RCRA subtitle D . . . remains a state and local function . . . ." Id. Indeed, the "EPA has no role in the planning and direct implementation of solid waste programs under RCRA subtitle D." Id.; see also *id. at 35,159* ("Subtitle D provides no federal oversight of state programs as it relates to coal combustion residuals."). LG&E and PPL argue that because the EPA has not reviewed or adopted Kentucky's special waste permit program or the environmental performance standards set out under 401 KAR 30:031, it is clear that 401 KAR Ch. 45 and 401 KAR 30:031 are not "effective pursuant to" RCRA and are not federally enforceable through a RCRA citizen suit. The Defendants state that there is simply no special waste permit program currently applicable to coal combustion residual wastes at the federal level.

The Plaintiffs' response is somewhat difficult to discern. First, the **[*43]** Plaintiffs contend that they can sue under RCRA, as well as under any of Kentucky's environmental regulations listed in the complaint. (Pls.' Resp. [DN 41] 32-34.) In support of this position, the Plaintiffs state that the fact that the EPA has not promulgated regulations specifically regulating coal combustion byproducts only means that such wastes are governed by the existing Subtitle D regulations of RCRA. (Id. at 32-33.) Second, the Plaintiffs argue that unlike hazardous waste programs under Subtitle C of RCRA, approved state solid waste programs under Subtitle D do not operate "in lieu of" RCRA. See *61 Fed. Reg. 2,584*; 2,587 (Jan. 26, 1996) ("Subtitle D does not provide for State/Tribal requirements to operate 'in lieu of' the Subtitle D Federal revised criteria.") According to the Plaintiffs, LG&E and PPL wrongly contend that Kentucky's municipal solid waste landfill regulatory program must be EPA-approved to operate in lieu of federal regulations.

Third, the Plaintiffs argue that because state solid waste programs do not operate in lieu of RCRA's statutory and regulatory provisions, RCRA citizen suits may be brought to enforce RCRA's provisions in states with approved solid waste **[*44]** management programs. See *Ashoff, 130 F.3d at 411-12* ("The Subtitle D Federal revised criteria are applicable to all Subtitle D regulated entities, regardless of whether EPA has approved the State/Tribal permit program. Violation of these criteria may subject the violator to a citizen suit in Federal court."). Thus, the Plaintiffs state that regardless of whether they can sue under Kentucky's regulations, they are permitted to bring suit under RCRA. Finally, the Plaintiffs note that the Defendants have conceded that Kentucky's solid waste landfill regulatory program was approved by the EPA. (See Defs.' Mem. [DN 29-1] 35 n.23 (citing *58 Fed. Reg. 35,454 (July 1, 1993)* and noting that Kentucky's municipal solid waste landfill regulatory program has been EPA-approved).) Thus, the Plaintiffs argue that they can sue under RCRA or any of

Kentucky's environmental regulations.

After making these general arguments, the Plaintiffs turn to specific arguments regarding 401 KAR 30:031 and 401 KAR Ch. 45. As for 401 KAR 30:031, the Plaintiffs argue that §§ 9 and 11 are, in fact, "effective pursuant to" RCRA. The Plaintiffs note that 401 KAR 30:005 sets forth definitions for Kentucky's waste management [*45] program and lists 401 KAR Ch. 30 as among chapters having a federal RCRA counterpart. See 401 KAR 30:005. The Plaintiffs argue that this listing shows that 401 KAR Ch. 30 was adopted pursuant to RCRA. (See Pls.' Mem. [DN 41] 34-35.) Also, the Plaintiffs note that 401 KAR 30:005 delineates where Kentucky regulations differ from their federal counterparts--and none of Kentucky's revisions to RCRA include changes to 401 KAR 30:031 §§ 9 or 11. Therefore, the Plaintiffs argue that they can bring a RCRA claim for violations of those regulations. (See id.)

As for 401 KAR Ch. 45, the Plaintiffs begin by noting that the chapter addresses "special wastes," which include coal combustion waste. See *KRS § 224.50-760*. The term "special waste" is drawn from EPA proceedings which led to the exemption of "fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste from regulation under Subtitle C" of RCRA. See Appalachian Voices v. McCarthy, F. Supp. 2d , 2013 WL 5797633, at *3 (D.D.C. Oct. 29, 2013). Thus, the Plaintiffs argue that Kentucky has drawn its designation of fly ash, bottom ash, and other coal combustion byproducts directly from the EPA's interpretation of RCRA. [*46] According to the Plaintiffs, because Kentucky's solid waste regulations do not operate in lieu of RCRA, whether Kentucky calls these wastes "special" or not, they remain "solid wastes" regulated under RCRA Subtitle D. *40 C.F.R. § 261.4(b)(4)*; *61 Fed. Reg. 2584, 2587 (Jan. 26, 1996)*. Thus, Kentucky's regulations governing special wastes, codified at 401 KAR Ch. 45, are "solid waste" regulations. The Plaintiffs argue that any doubt that Kentucky's "special waste" regulations are effective pursuant to RCRA is dispelled by KRS § 244.50-760, which provides for the classification of "fly ash, bottom ash, scrubber sludge," and other materials as "special wastes" to be regulated consistent with RCRA. *KRS § 224.50-760(1)(b)*.

The Court agrees with LG&E and PPL that 401 KAR Ch. 45 and 401 KAR 30:031 are not "effective pursuant to" RCRA. As LG&E and PPL point out in their reply, the Plaintiffs incorrectly argue that because coal combustion residuals are "solid wastes" under RCRA Subtitle D, Kentucky's special waste regulations in 401 KAR Ch. 45 and the environmental performance standards in 401 KAR 30:031 §§ 9 and 11 are "effective pursuant to" RCRA and enforceable under that statute. The fact [*47] that coal combustion residuals are "solid wastes" under Subtitle D of RCRA does not mean that state standards for coal combustion residual landfills are approved by the EPA. As the Defendants highlight, there is simply no federal counterpart to Kentucky's special waste permit program. See *75 Fed. Reg. 35,159 (June 21, 2010)* ("Subtitle D [of RCRA] provides no federal oversight of state programs as it relates to coal combustion residuals."). While the waste permit program's standards are applicable to Cane Run, they simply are not "effective pursuant to" RCRA and cannot form the basis of the Plaintiffs' Count I claims.

Further, the Court finds that the Plaintiffs wrongly rely on Kentucky's EPA-approved Subtitle D program, which relates to municipal solid wastes and not coal combustion residual landfills. Moreover, the Plaintiffs point to no EPA authorization or approval of 401 KAR Ch. 45 or 401 KAR 30:031, the state Subtitle D standard. In fact, as LG&E and PPL note, the Plaintiffs do not even respond to the cited cases requiring EPA approval of a state program for that program to be deemed "effective pursuant to" RCRA. Merely because a Kentucky regulation refers to RCRA does not make [*48] it "effective pursuant to" RCRA. LG&E and PPL's motion is **GRANTED** in this respect. To the extent the Plaintiffs' claims in Count I are based on 401 KAR Ch. 45 and 401 KAR 30:031, they are **DISMISSED**. In light of this holding, the Court need not consider LG&E and PPL's related argument that even if such claims were "effective pursuant to" RCRA, the Count I claims concerning fugitive air emissions are not redressable.

Applicability of 40 C.F.R. § 258 and 401 KAR Ch. 48. The only other claims in Count I allege violations of *40 C.F.R. § 258* and 401 KAR Ch. 48. (Compl. [DN 1] ¶¶ 163-64.) LG&E and PPL argue that these claims fail because the cited regulations do not apply to Cane Run. Further, they argue that the claims fail because they have not been properly noticed.

Paragraph 163 of the complaint alleges that the Defendants' activities violate "RCRA's requirement that a solid waste landfill . . . be properly covered in accordance

with *40 CFR 258.21* and that a solid waste landfill comply with the air criteria set forth at *40 CFR 258.24*." (Compl. [DN 1] ¶ 163.) Importantly, *40 C.F.R. § 258* establishes criteria and standards applicable to "municipal solid waste landfills." A "municipal solid **[*49]** waste landfill" is defined as a landfill "that receives household solid waste," *i.e.* "any solid waste (including garbage, trash, and sanitary waste in septic tanks) derived from households." *40 C.F.R. § 258.2*. LG&E and PPL argue that the landfill here does not meet this definition, as it does not receive household waste.

Paragraph 164(i) of the complaint further alleges that the Defendants are in violation of 401 KAR 48:090 § 3 "for failing to properly place covering materials on all solid wastes contained in the Coal Ash Landfill, Ash Treatment Basin and ash ponds." (Compl. [DN ¶ 164.) LG&E and PPL state that 401 KAR 48:090 is inapplicable here because it sets forth requirements applicable to "contained landfills." A "contained landfill" is defined as a "solid waste site or facility that accepts solid waste for disposal." 401 KAR 48:005. The term "solid waste" expressly excludes "special wastes," as defined in *KRS § 224.50-760. KRS § 224.1-010(31)(A)*. LG&E and PPL argue that here, because only "special wastes" are disposed of in the landfill, the requirements for "contained landfills" do not apply. (Defs.' Mem. [DN 29-1] 34-36.)

Further, LG&E and PPL argue that these claims fail for **[*50]** the independent reason that they have not been adequately noticed. They state that the Plaintiffs' NOI does not mention, discuss, or cite *40 C.F.R. § 258* or 401 KAR 48:090 in support of their claims. See *United States v. Louisiana-Pacific Corp., 682 F. Supp. 2d 1141, 1155 (D. Colo. 1988)* (noting that a plaintiff cannot "expand [a suit] beyond the specific violations alleged in th[e] letter").

The Plaintiffs respond that the coal ash landfill at Cane Run meets RCRA's definition of a "municipal waste solid landfill" and is thus subject to *40 C.F.R. § 258*. The Plaintiffs cite the second sentence in RCRA's definition of "municipal solid waste landfill," which states that such a landfill "also may receive other types of RCRA Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small quantity generator waste, and industrial solid waste." *40 C.F.R. § 258.2*. "Industrial solid waste" includes coal combustion byproducts. Id. (noting that "industrial solid waste" is "solid waste generated by manufacturing or industrial processes that is not a hazardous waste regulated under subtitle C of RCRA" and noting that such waste may include waste from electric power **[*51]** generation). The Plaintiffs thus argue that the regulation is applicable. The Plaintiffs argue that coal combustion byproducts are "solid wastes" under RCRA and, in this case, were produced by electric power generation. Therefore, Cane Run is properly subject to the RCRA regulations on which the Plaintiffs sue in Count I. (See Pls.' Mem. [DN 41] 36-37.)

The Court disagrees with the Plaintiffs' argument. In their response brief, the Plaintiffs overlook the first sentence of the definition for "municipal solid waste landfill," which states that such a landfill must receive "household waste." *40 C.F.R. § 258.2*. The plain language of the "municipal solid waste landfill" definition indicates that if a landfill receives household waste, it is a municipal solid waste landfill--and the fact that it might also receive other types of solid waste is irrelevant. If a landfill does not receive household waste, however, it is not a municipal solid waste landfill. LG&E and PPL's argument is the correct interpretation of the definition. Further, the Court finds that LG&E and PPL's argument is correct to the extent they argue that 401 KAR 48:090 is inapplicable here because it sets forth requirements **[*52]** applicable to "contained landfills." A "contained landfill" is defined as a "solid waste site or facility that accepts solid waste for disposal," 401 KAR 48:005, and the term "solid waste" expressly excludes "special wastes," as defined in *KRS § 224.50-760. KRS § 224.1-010(31)(A)*. LG&E and PPL also correctly note that the Plaintiffs' NOI was insufficient regarding the alleged violations of these standards, as the Plaintiffs did not cite 401 KAR 48:090 or *40 C.F.R. § 258.24* in their NOI. LG&E and PPL's motion to dismiss is accordingly **GRANTED**. The claims are **DISMISSED** to the extent they are based on *40 C.F.R. § 258* and 401 KAR Ch. 48.

Count II Claims under *42 U.S.C. § 6972(a)(1)(B)*. LG&E and PPL next turn their attention to the Plaintiffs' claims in Count II. As noted above, in Count II, the Plaintiffs allege that LG&E and PPL's handling of coal combustion residuals "may present an imminent and substantial endangerment to health or the environment." (Compl. [DN 1] ¶ 182.) LG&E and PPL argue that the Count II claims fail as a matter of law because: (1) the claims reflect an improper collateral attack on the facility's Title V Air Emission Permit, Storm Water

Discharge Permit, Special [*53] Waste Landfill Permit, and the Agreed Board Order, and are otherwise moot and not redressable; and (2) the claims cover materials which are more properly regulated under the CAA--not under RCRA, which deals with the handling, storage, treatment, transportation, or disposal of solid or hazardous waste. (See Defs.' Mem. [DN 29-1] 36-40.)

Improper Collateral Attack--and Otherwise Moot and Non-redressable. As noted above, the Plaintiffs' prayer for relief seeks to enjoin the Defendants "from allowing coal dust, fly ash, bottom ash, or other coal combustion by-products from escaping the Cane Run Site." It also seeks to require the Defendants "to take affirmative measures that will ensure that coal dust, fly ash, bottom ash, or other coal combustion by-products will not escape the Cane Run Site . . . ." LG&E and PPL argue that this requested injunctive relief is, in essence, a collateral attack on the Title V Air Emission Permit for Cane Run (which authorizes fly ash and other emissions under the terms and conditions of Cane Run's permit), the Special Waste Landfill Permit, the KPDES Permit (which authorizes suspended solids, including fly ash and storm water discharges), and the control plan [*54] implemented pursuant to the Agreed Board Order. They state that an "imminent and substantial endangerment" citizen suit is not available, regardless of context, to enjoin emissions of solid waste that are authorized by a permit for such a facility. (See id. at 36-38.)

In support of their position, LG&E and PPL cite *Greenpeace, Inc. v. Waste Technologies Indus., 9 F.3d 1174 (6th Cir. 1993)*. In that case, the Sixth Circuit held that a waste operator's compliance with the terms of its RCRA permit precluded a district court's jurisdiction under *42 U.S.C. § 6972(a)(1)(B)* to challenge properly permitted activity. The Court reasoned:

> [W]hen Greenpeace alleged in its complaint that the test burn and post-test burn would present an imminent and substantial endangerment, it was asking the district court to review and enjoin the EPA administrator's permit decision . . . . If Greenpeace was prepared to demonstrate that the U.S. EPA disregarded an imminent hazard at the time it issued the permit for the test burn and post-test burn period, *42 U.S.C. § 6976(b)* required Greenpeace to bring its appeal directly to this court within ninety days. Because that was not done, Greenpeace forfeited any opportunity [*55] for judicial review of the claims that could have been raised by appealing the RCRA permit amendments in 1992.

Id. at 1182. LG&E and PPL argue that a similar rationale applies here, as the Plaintiffs had an opportunity to challenge the terms and conditions of the Special Waste Landfill Permit, the Title V Air Emission Permit, the KPDES Permit, and most recently, the Agreed Board Order.

Under *KRS § 77.310(2)*, anyone aggrieved by a district's order or permitting decision may challenge the permit or order by "fil[ing] with the district a petition for a hearing." *KRS § 77.310(2)*. LG&E and PPL argue that the Plaintiffs should have gone this route, if they desired to challenge the APCD's decision regarding LG&E's compliance at Cane Run. LG&E and PPL argue that under the Greenpeace decision, RCRA's citizen-suit provisions do not permit a collateral attack on permit requirements or the Agreed Board Order via a demand injunctive relief. See *Chemical Weapons Working Grp., Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1492 (10th Cir. 1997)* ("Because Plaintiffs' imminent hazard claim essentially attacks Utah's decision to issue the Army a [RCRA] permit, we conclude that the district court properly [*56] refused to recognize jurisdiction under *§ 6972(b)*."); *Palumbo v. Waste Techs. Indus., 989 F.2d 156, 159 (4th Cir. 1993)* ("At bottom, plaintiffs' complaint is nothing more than a collateral attack on the prior permitting decisions of [the EPA]. The RCRA judicial review provision plainly forbids such an attack . . .").

The Plaintiffs respond that the facts of Greenpeace are inapposite to the facts of this case. In Greenpeace, after an eighteen-month permitting process, the state regulator issued a permit to a waste treatment facility, allowing the facility to conduct limited burn operations. The plaintiffs brought a court action to enjoin the same operations the regulators permitted. *9 F.3d at 1177*. The court found this to be an improper collateral attack on the issued permit. The Plaintiffs state that this case is different, as the Plaintiffs do not ask the Court to overrule a permit. Instead, they ask the Court to enforce the limits and conditions in LG&E's permits. (Pls.' Mem. [DN 41] 34.)

Even though the Plaintiffs do not ask the Court to overrule an issued permit, as in Greenpeace, the Court agrees with LG&E and PPL that the rationale underlying Greenpeace is applicable to this case [*57] and requires this Court to refuse to recognize jurisdiction under *42 U.S.C. § 6972(a)(1)(B)*. In Greenpeace, the Sixth Circuit recognized that the plaintiff's complaint amounted "to nothing more than an improper collateral attack on the prior permitting decisions of the U.S. EPA . . . ." *9 F.3d at 1178*. Here, the Plaintiffs' complaint similarly amounts to nothing more than an improper collateral attack on LG&E's permits, which authorize emissions, and on the APCD's decision concerning the limits and conditions in those permits. *KRS § 77.310(2)* provides an avenue by which the Plaintiffs could have properly challenged LG&E's permits, or the APCD's order and its determinations. The Court finds that the Plaintiffs should have taken that approach prior to filing a "substantial endangerment" suit under *42 U.S.C. § 6972(a)(1)(B)*. Further, the Court finds that because the Plaintiffs' claims for injunctive relief under RCRA must be dismissed, their claims for civil penalties must also be dismissed. A citizen suit under RCRA cannot be maintained for civil penalties absent injunctive relief. See *Gwaltney, 484 U.S. at 58* (noting that under the Clean Water Act's citizen-suit provision, which is [*58] substantively similar to *42 U.S.C. § 6972*, civil penalties may not be awarded separately from injunctive relief); Sánchez v. Esso Std. Oil de Puerto Rico, Inc., 2010 WL 3087485, at *2 (D.P.R. Aug. 5, 2010) (applying Gwaltney to a RCRA citizen suit). LG&E and PPL's motion to dismiss is **GRANTED** in this respect; the Plaintiffs' claims in Count II must be **DISMISSED**. In light of this holding, the Court need not address LG&E and PPL's remaining argument, which is whether the Plaintiffs' claims in Count II improperly cover materials regulated under the CAA.

C. Count IV-IX: State-Law Claims

LG&E and PPL next argue that the Plaintiffs' state-law claims must be dismissed because through the guise of these claims, the Plaintiffs ask the Court to regulate Cane Run's emissions. According to LG&E and PPL, all of the Plaintiffs' state-law claims are preempted by the CAA. (See Defs.' Mem. [DN 29-1] 40.) "Field preemption" occurs where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *N.C., ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 303 (4th Cir. 2010)* (quoting *Pac. Gas & Elec. Co. v. St. Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983))*. [*59] "Conflict preemption" includes claims where state law "interferes with the methods by which the federal statute was designed to reach [its] goal." Id. (quoting *Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987))*. LG&E and PPL argue that both of these doctrines apply to bar the Plaintiffs' claims. In Am. Electric Power Co. v. Connecticut, the Supreme Court held that federal common-law claims are displaced by the *CAA. 131 S. Ct. 2527, 2540 (2011)* ("AEP"). However, neither the Supreme Court nor the Sixth Circuit have specifically addressed whether the CAA preempts a plaintiff's state common-law tort claims.

LG&E and PPL argue that with the CAA, Congress enacted a comprehensive, pervasive regime for joint federal and state regulation of air emissions. *United States v. DTE Energy Corp., 711 F.3d 643, 649 (6th Cir. 2013)* ("Over several decades of regulation and litigation, EPA has created a system intended to protect air quality, conserve environmental agencies' scarce resources, and minimize costs for regulated industries."); *N.C., ex rel. Cooper, 615 F.3d at 298* ("To say this regulatory and permitting regime is comprehensive would be an understatement."). They argue that this framework [*60] leaves "no room for a parallel track" where private plaintiffs can side-step the expert federal and state agencies through lawsuits seeking to establish common-law restrictions on emissions inconsistent with those established under the CAA. (Defs.' Mem. [DN 29-1] 40-47.) In this respect, LG&E and PPL begin by addressing Ouellette and AEP.

In Ouellette, Vermont landowners sued a New York paper mill for common-law nuisance under Vermont law. The parties disputed whether the Vermont landowners' state common-law claims against the New York paper mill were preempted under provisions of the Clean Water Act. The Supreme Court held that the Clean Water Act preempted suits arising under the law of Vermont (the affected state), as the "inevitable result" of allowing such suits "would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *479 U.S. at 493*. The Court noted, however, that the plaintiffs could proceed under the law of New York (the source state). *Id. at 494-98*. In this respect, the Court reasoned:

> [t]he CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures **[*61]** set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.

Id. at 497. While the Court recognized that a source state's "nuisance law may impose separate standards and thus create some tension with the permit system," it ultimately determined that the application of that law would "not disturb the balance among federal, source-state, and affected-state interests." *Id. at 499*.

In AEP, the Supreme Court analyzed the CAA's preemptive scope with regard to federal common-law claims, holding that nuisance claims under federal law "cannot be reconciled with the decision-making scheme Congress enacted" in the *CAA. 131 S. Ct. at 2540*. In so holding, the Court reasoned that Congress' "prescribed order of decision-making"--in which "the first decider under the Act is the expert administrative agency" and courts participate through "review [of] agency action"--provides a compelling reason to "resist setting emissions standards by judicial decree" via federal common-law. *Id. at 2539*. The Court intentionally refrained, however, from deciding whether **[*62]** state-law nuisance claims were preempted, as the parties had not briefed the issue. *Id. at 2540*. The Court only stated that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act," and that "[l]egislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law." Id.

LG&E and PPL argue that these cases compel the conclusion that the Plaintiffs' state-law claims are preempted. They argue that the functional concerns that led the Supreme Court in both Ouellette and AEP to find that the applicable statute preempted the asserted common-law claims apply with full force here. (See Defs.' Mem. [DN 29-1] 46.) LG&E and PPL highlight that other courts have relied on these cases to hold that the CAA preempts state common-law claims. In specific, they cite the Fourth Circuit's decision in N.C., *ex rel.* Cooper v. Tenn. Valley Authority. There, the Court found state common-law claims to be preempted by the CAA, 615 F.3d at 298, reasoning that Ouellette was "emphatic that a state law is preempted if it interferes with the methods by which the **[*63]** federal statute was designed to reach its goal, admonished against the toleration of common-law suits that have the potential to undermine the regulatory structure, and singled out nuisance standards in particular as vague and indeterminate." *Id. at 303* (internal alterations and quotations omitted). LG&E and PPL urge this Court to follow the Fourth Circuit and recognize the "considerable potential mischief" in permitting state common-law actions. Id.; see *Nature Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012)* (CAA displaced a federal common-law claim for public nuisance); *Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012)* (CAA preempted state-law nuisance, trespass, and negligence claims); *United States v. EME Homer City Generation L.P., 823 F. Supp. 2d 274, 296-97 (W.D. Penn. Oct. 12, 2011)* (CAA preempted state common-law public nuisance claims).[1]

1 LG&E and PPL also argue that contrary to the CWA's saving clause, which the Supreme Court found to preserve other state actions, *Ouellette, 479 U.S. at 497*, the CAA's saving clauses do not have that effect.

42 U.S.C. § 7604(e) states: "Nothing in this section shall restrict any right which any **[*64]** person . . . may have . . . to seek enforcement of any emission standard or limitation or to seek any other relief . . . ." *42 U.S.C. § 7604(e)*. LG&E and PPL argue that this clause only provides that the creation of a citizen-suit cause of action does not **itself** preempt other causes of action that might exist; it says nothing about the preemptive effect of other sections of the CAA. (Defs.' Reply [DN 42] 11.)

42 U.S.C. § 7416 states: "nothing in this [Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation . . . or (2) any requirement respecting control or abatement of air pollution." *42 U.S.C. § 7416*. LG&E and PPL argue that this clause only allows states and political subdivisions to establish affirmative standards; it does not authorize judges or juries to

use common law to impose retroactively their own, different emission limits. (Defs.' Reply [DN 42] 11.)

The Plaintiffs argue that the CAA does not preempt their state-law claims. They begin by citing *Her Majesty the Queen in Rte. of Prov. of Ontario v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989)* ("Her Majesty"). In that case, several environmental **[*65]** groups brought claims against the City of Detroit related to the proposed construction of a municipal trash incinerator. The case was removed from a Michigan state court, and the district court denied the plaintiffs' motion to remand on the basis that their state-law statutory claims were preempted by the CAA. *Id. at 333-34.* On appeal, the Sixth Circuit addressed the issue of preemption with regard to the state-law claims. It held that the "plain language of the CAA's savings clause compels the conclusion" that the CAA did not preclude the plaintiffs' statutory claims. *Id. at 343.* The Sixth Circuit found that language from the CAA "clearly indicates that Congress did not wish to abolish state control." Id. The Court also considered the Ouellette case, stating: "[T]hat Congress did not seek to preempt actions such as involved in this appeal is clearly indicated by the Court's holding in [Ouellette]." *Id. at 344.* However, this decision only goes so far with regard to the facts of this case; the Sixth Circuit has not considered state common-law claims. The Plaintiffs argue that the decision is still important because it foreshadows how the Sixth Circuit will approach the issue. (See Pls.' **[*66]** Mem. [DN 41] 8-11, 14-16.)

The Plaintiffs urge the Court to accept the Third Circuit's position on the issue. In Bell v. Cheswick, the defendant moved to dismiss the plaintiff's state-law tort claims on the grounds of preemption, arguing that allowing such claims would "undermine the [CAA]'s comprehensive scheme, and make it impossible for regulators to strike their desired balance in implementing emissions standards." *734 F.3d 188, 193 (3d Cir. 2013).* Based on Ouellette and Her Majesty, the Third Circuit 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." *Id. at 197.* The Plaintiffs note that other courts, including the Western District of Kentucky, have similarly held that the CAA does not preempt state common-law claims. See, e.g., Tech. Rubber Co. v. Buckeye Egg Farm, L.P., 2000 WL 782131 (S.D. Ohio June 16, 2000); *Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1285 (W.D. Tex. 1992);* Merrick v. Diageo Americas Supply, Inc., No. 3:12-CV-334-CRS, F. Supp. 2d , 2014 WL 1056568 (W.D. Ky. Mar. 18, 2014).[2]

2 The Court recognizes that LG&E and PPL have filed a Notice of Supplemental Authority [DN **[*67]** 47] concerning the Merrick decision. In it, they note that Judge Simpson has granted the defendant's motion to certify for appeal the portion of its ruling holding that the plaintiffs' state common-law claims were not preempted by the Clean Air Act. The Court also recognizes that the Plaintiffs have filed a response to this notice [DN 48].

The Court agrees with Judge Simpson's recent decision in Merrick that "the analysis as set forth by the Third Circuit, coupled with the Sixth Circuit's analysis in *Her Majesty*, captures the prevailing law for CAA preemption. In the years since the Supreme Court's ruling in [*AEP*] that the CAA displaces federal common-law claims, courts have increasingly interpreted the CAA's savings clause to permit individuals to bring state common-law tort claims against polluting entities. This interpretation has been cited with approval by a Kentucky trial court, and it corresponds with longstanding Sixth Circuit precedent." 2014 WL 1056568, at *9. Therefore, the Court finds that the Plaintiffs' state common-law tort claims are not preempted by the CAA. LG&E and PPL's motion to dismiss is **DENIED** in this respect.

D. PLAINTIFFS' CLAIMS AGAINST PPL

As a final matter, **[*68]** the Defendants urge the Court to dismiss the Plaintiffs' CAA and RCRA claims against PPL. They argue that the Plaintiffs' CAA claims must be dismissed since the complaint contains no allegation that PPL itself violated any emission standard or limitation. They argue that the Plaintiffs' RCRA claims must be dismissed since the complaint contains no allegations that could support the conclusion that PPL itself violated any permit or regulation at Cane Run--or otherwise was involved in the management or disposal of wastes at the facility. The Defendants state that the complaint's allegations make clear that LG&E--not PPL--owns and operates Cane Run. (Compl. [DN 1] ¶¶ 25-27.) Further, the APCD issued Cane Run's Title V operating permit to LG&E--not PPL. (Id.) The NOVs relied on by the Plaintiffs to support their claims also name only LG&E. The Defendants argue that in light of these facts, the Plaintiffs have failed to state a claim

against PPL. (See Defs.' Mem. [DN 29-1] 48-49.)

Also, the Defendants argue that the Plaintiffs' NOI allegations are insufficient under the CAA and RCRA notice provisions as to PPL, as the NOI fails to provide information as to any conduct by PPL that caused or contributed **[*69]** to the alleged violations. The NOI only states that PPL "acquired, and is therefore the successor-in-interest to, E.On U.S. LLC, and E.On U.S. Services Inc." The Defendants argue that this is not enough. See Stark-Tusc-Wayne Joint Solid Waste Mgmt. Dist. v. Am. Landfill, Inc., 2012 WL 4475444, at *5 (N.D. Ohio Sept. 26, 2012) (holding that "claiming that 'other WMI subsidiaries' are also responsible for alleged violations without providing any description of unlawful conduct attributable to that entity is insufficient").

The Plaintiffs respond that corporate parents have been held liable under CAA or RCRA where they were "decision-makers" or "directly responsible" for the activities at issue. See, e.g., *Duquesne Light Co. v. E.P.A., 698 F.2d 456, 472-73 (D.C. Cir. 1983)* (finding that the CAA allows suits against "one who runs a facility as a lessee and one who supervises its operation"); *United States v. Ne. Pharm. & Chem. Co., Inc., 810 F.2d 726, 744-45 (8th Cir. 1986)* (finding that a plant supervisor could be liable under RCRA, as he was "directly responsible" for arranging for the transportation and disposal of hazardous substances--and further finding that RCRA may impose liability **[*70]** upon non-negligent off-site generators). The Plaintiffs state that their allegations are sufficient at this stage in the litigation because the complaint alleges that: (1) PPL is LG&E's corporate parent; (2) PPL holds out LG&E as part of the "PPL family of companies"; and (3) together, LG&E and PPL "operate" Cane Run. (Compl. [DN 1] ¶¶ 2, 25-26.) The Plaintiffs argue that "[s]ubsumed in the allegation that PPL 'operates' Cane Run is the allegation that PPL 'controls or supervises' operation of the plant. No more is required." (Pls.' Mem. [DN 41] 40.)

The Court agrees with the Plaintiffs. When the Court views the complaint's allegations in the light most favorable to the Plaintiffs and construes all reasonable inferences in their favor, it finds that the Plaintiffs have implicitly alleged that PPL controlled and/or supervised the plant-- and thus, that PPL was involved in the alleged wrongful conduct. At this stage of the litigation, this is sufficient. LG&E and PPL's motion is **DENIED**. PPL remains a defendant in this action.

IV. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that the Defendants' Motion to Dismiss [DN 29] is **GRANTED** in part and **DENIED** in part, consistent **[*71]** with this Memorandum Opinion and Order. Remaining in this action are the Plaintiffs' state-law claims, as well as their CAA claims related to the alleged operation of Cane Run without a valid permit.

/s/ Joseph H. McKinley, Jr.

Joseph H. McKinley, Jr., Chief Judge

United States District Court

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GenOn Power Midwest, L.P., Petitioner v. Kristie Bell, et al.

No. 13-1013.

SUPREME COURT OF THE UNITED STATES

134 S. Ct. 2696; *2014 U.S. LEXIS 3926*; *82 U.S.L.W. 3695*

June 2, 2014, Decided

PRIOR HISTORY: *Bell v. Cheswick Generating Station, 734 F.3d 188, 2013 U.S. App. LEXIS 17283 (3d Cir. Pa., 2013)*

JUDGES: [**1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

[*2697] Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

LAURIE FREEMAN, SHARON MOCKMORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT, and BOBBIE LYNN WEATHERMAN, Appellants, vs. GRAIN PROCESSING CORPORATION, Appellee.

No. 13-0723

SUPREME COURT OF IOWA

2014 Iowa Sup. LEXIS 72

June 13, 2014, Filed

PRIOR HISTORY: [*1] Appeal from the Iowa District Court for Muscatine County, Mark J. Smith, Judge. Appellants assert the district court improperly granted summary judgment.

DISPOSITION: DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.

COUNSEL: Sarah E. Siskind, Barry J. Blonien and David Baltmanis of Miner, Barnhill & Galland, P.C., Madison, Wisconsin, Andrew L. Hope of Hope Law Firm, P.L.C., West Des Moines, James C. Larew and Claire M. Diallo of Larew Law Office, Iowa City, for appellants.

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Sarah E. Crane of Davis Brown Law Firm, Des [*2] Moines, and Richard O. Faulk of Hollingsworth LLP, Washington, D.C., for amici curiae National Association of Manufacturers, Council of Industrial Boiler Owners, National Shooting Sports Foundation, Inc., National Mining Association, Nuclear Energy Institute, Inc., and Textile Rental Services Association of America.

JUDGES: APPEL, Justice. All justices concur, expect Mansfield, J., who takes no part.

OPINION BY: APPEL

OPINION

APPEL, Justice.

Eight residents of Muscatine filed a lawsuit [1] on behalf of themselves and other similarly situated Muscatine residents against Grain Processing Corporation (GPC), which operates a local corn wet milling facility. The residents claim the operations at GPC's facility cause harmful pollutants and noxious odors to invade their land, thereby diminishing the full

use and enjoyment of their properties. They base their claims on common law and statutory nuisance as well as the common law torts of trespass and negligence. The residents seek certification of the lawsuit as a class action, damages for the lost use and enjoyment of their properties, punitive damages, and injunctive relief.

> 1 Plaintiffs filed an "Amended Class Action Petition" on March 19, 2013, which will hereinafter be referred [*3] to as the petition.

Prior to class certification, GPC moved for summary judgment. GPC asserted the residents' common law and statutory claims were preempted by the Federal Clean Air Act (CAA), *42 U.S.C. §§ 7401-7671q (2012)*. In the alternative, GPC claimed the common law claims were preempted by Iowa Code chapter 455B (2013), which is the state statutory companion to the CAA. Finally, GPC argued the issues raised by the residents amounted to political questions involving complex policy and economic issues that cannot and should not be resolved by the judicial process.

The district court granted summary judgment in favor of GPC on all three theories and dismissed the lawsuit. The residents appeal. For the reasons expressed below, we reverse the judgment of the district court and remand the case for further proceedings.

I. Factual and Procedural Background.

The eight individually named plaintiffs all reside within one and one-half miles of GPC's facility in Muscatine. They seek to represent a class described as follows: "All Muscatine residents (other than Defendant and its affiliates, parents, or subsidiaries) who have resided during the damages period within 1.5 [miles] of the perimeter of Defendant's facility located at 1600 Oregon St., Muscatine, [*4] Muscatine County, Iowa."

According to the petition, GPC conducts corn wet milling operations at its Muscatine facility. The plaintiffs assert wet milling is a production method and process that transforms corn kernels into products for commercial and industrial use. The plaintiffs allege the corn wet milling operation at GPC's facility creates hazardous byproducts and harmful chemicals, many of which are released directly into the atmosphere. The plaintiffs allege these by-products include: particulate matter, volatile organic compounds including acetaldehyde and other aldehydes, sulfur dioxide, starch, and hydrochloric acid. They assert the polluting chemicals and particles are blown from the facility onto nearby properties. They note particulate matter is visible on properties, yards, and grounds and various chemical pollutants are also present. Compounding these adverse effects, according to the plaintiffs, GPC has used, continues to use, and has failed to replace its worn and outdated technology with available technology that would eliminate or drastically reduce the pollution. The plaintiffs assert these emissions have caused them to suffer persistent irritations, discomforts, [*5] annoyances, inconveniences, and put them at risk for serious health effects.

The plaintiffs generally allege three claims against GPC: nuisance, negligence, and trespass. With regard to the nuisance claim, the plaintiffs contend GPC's use of its facility constitutes a nuisance under the common law and Iowa Code chapter 657, which provides a statutory framework for nuisance claims. They assert that GPC has operated its facility in a manner that unreasonably interferes with the reasonable use and enjoyment of their properties.

The plaintiffs also assert they have been harmed by GPC's negligence. They claim GPC failed to exercise reasonable care in its operations by causing or permitting hazardous substances to be released at the facility; failing to follow accepted industry standards with respect to maintaining its operation; failing to exercise reasonable and prudent care in their operations; and failing to implement, follow, and enforce proper operations and safety procedures. The plaintiffs further rely on res ipsa loquitor, arguing the release of the toxic substances would not ordinarily occur in the absence of GPC's negligence, and, the acts or omissions of the equipment and personnel that led to the [*6] toxic releases were under GPC's control at all relevant times.

Finally, the plaintiffs claim GPC's operations constitute a past and continuing trespass. They allege GPC, intentionally, purposefully, or with substantial knowledge that harm would result, contacted the properties of the plaintiffs and the class without their consent, resulting in the lost use and enjoyment of their properties. The plaintiffs assert GPC's contact with their properties constitutes a tortious physical intrusion on their properties.

GPC sought to bring an end to the litigation by filing a motion for summary judgment. First, GPC claimed the CAA's comprehensive regulatory framework preempted

the plaintiffs' causes of action. Second, GPC claimed Iowa Code chapter 455B, which regulates emissions, preempted the plaintiffs' claims. Finally, GPC asserted the case presented a nonjusticiable political question because a lawsuit impacting facility emissions lacks judicially discoverable and manageable standards for resolving the issues.

Resisting the motion for summary judgment, the plaintiffs emphasized that under the CAA, states are allowed to impose stricter standards than those imposed by federal law. The plaintiffs noted nothing in the **[*7]** language of Iowa Code chapter 455B repealed chapter 657 related to nuisance claims and, in any event, their common law claims were not inconsistent or irreconcilable with chapter 455B. Finally, the plaintiffs asserted courts routinely hear complex nuisance, negligence, and trespass cases and, as a result, there was no basis in the federal political question doctrine to decline to hear the case.

The district court first considered whether the CAA preempted the plaintiffs' claims and concluded the CAA established a comprehensive regulatory scheme that displaced state law. In reaching this result, the district court noted that in *American Electric Power Co. v. Connecticut* (*AEP*), the United States Supreme Court held the CAA displaced "any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *564 U.S. , , 131 S. Ct. 2527, 2537, 180 L. Ed. 2d 435, 447 (2011)*. While the district court recognized the *AEP* Court did not consider the question of whether the CAA preempted state law claims, the district court cited lower federal court authority concluding the CAA also preempted state law claims. *See Bell v. Cheswick Generating Station (Bell I), 903 F. Supp. 2d 314, 315-16, 322 (W.D. Pa. 2012)* (concluding the CAA preempted state common law nuisance, negligence, trespass, and strict liability claims), *rev'd 734 F.3d 188, 190 (3d Cir. 2013)*;[2] *Comer v. Murphy Oil USA, Inc. (Comer I), 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012)* (extending **[*8]** the reasoning of *AEP* to state law claims after characterizing them as turning on the reasonableness of emissions, a determination entrusted to Congress); *United States v. EME Homer City Generation L.P., 823 F. Supp. 2d 274, 297 (W.D. Pa. 2011)* (holding the CAA is a comprehensive regulatory scheme that preempted a common law public nuisance claim).

2 The Third Circuit heard the appeal after the district court ruled on the motion for summary judgment in this case.

Adopting the reasoning of these authorities, the district court noted Congress had entrusted to the EPA and parallel state agencies the authority to regulate air emissions, and the CAA had established a method of citizen input in its rulemaking process. The district court held that to have a jury make a judgment about the reasonableness of GPC's emissions would invade the authority Congress vested in the EPA and state environmental authorities. The district court further noted GPC was already the subject of an enforcement action by state regulators under the CAA and that the plaintiffs' actions in this case would conflict with these enforcement procedures.

For largely the same reasons, the district court concluded state environmental statutes and regulations under Iowa Code chapter 455B preempted the plaintiffs' common law claims. The district **[*9]** court reasoned that controversies related to air emissions were to be determined by state regulators, not by judges and juries in common law actions.

Finally, the district court also agreed with GPC's position that the questions raised in the litigation amounted to political questions not amenable to resolution by the judiciary in a lawsuit. Citing *Comer I*, the district court noted a court or jury lacks judicially discoverable and manageable standards for resolving the complex environmental issues and would be forced to make policy determinations weighing the costs and benefits of GPC's facility to the surrounding community. *See 839 F. Supp. 2d at 864* ("It is unclear how this Court or any jury, regardless of its level of sophistication, could determine whether the defendants' emissions unreasonably endanger the environment or the public without making policy determinations that weigh the harm caused by the defendants' actions against the benefits of the products they produce.").

This court retained the plaintiffs' appeal.

II. Standard of Review.

The standard of review for rulings on motions for summary judgment is for correction of legal errors. *Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 827 (Iowa 2007)*. The standard applies when the material

facts are not disputed **[*10]** or the appeal turns on questions of statutory interpretation. *See State v. Spencer, 737 N.W.2d 124, 128 (Iowa 2007)*; *Krause v. Krause, 589 N.W.2d 721, 724 (Iowa 1999)*.

III. Discussion of Preemption Under the CAA.

A. Overview of Common Law and Statutory Approaches to Environmental Protection.

1. *Introduction.* In the law, as in life, in order to know where you are, you need to know where you have been. We therefore begin our discussion of the issues posed in this case with an overview of the law of environmental protection. This background will give us a better understanding of the historical and legal context in which the issues in this case arise. In particular, the historical and legal context will shed light on the degree to which the passage of the CAA impacts the traditional role of state law in environmental regulation .

2. *Traditional remedies for environmental harm: the common law.* The common law provided the first means of attempting to control environmental pollution. Tort claims challenging environmental pollution can be traced back to at least the seventeenth century to *William Aldred's Case*, (1611) 77 Eng. Rep. 816, 9 Co. Rep. 57a (K.B.), where the court held odor from the defendant's hog lot was a nuisance. *See* 1 John H. Wigmore, *Select Cases on the Law of Torts* 569-71 (1912); Jason J. Czarnezki & Mark L. Thomsen, *Advancing* **[*11]** *the Rebirth of Environmental Common Law, 34 B.C. Envtl. Aff. L. Rev. 1, 3* & n.14 (2007) [hereinafter Czarnezki]. Despite its ancient origin, most American environmental caselaw dates to the late nineteenth and twentieth centuries after the Industrial Revolution. *See* Czarnezki, *34 B.C. Envtl. Aff. L. Rev. at 3*.

The primary common law theories seeking redress for environmental harms were nuisance,[3] negligence, trespass, and strict liability. *See* 1 Linda A. Malone, *Environmental Regulation of Land Use* § 10:2, at 10-7, 10-8.1 (2013) [hereinafter Malone]. In the United States, many pollution cases invoking these common law theories have been brought over the years, with mixed results. *See, e.g., id.* § 10:2, at 10-9 n.8, 10-12 n.19 (collecting cases involving trespasses committed in the air space above land and nuisance cases involving odors in the air and smoke, dust, or gas emissions). *See generally* Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution, 27 Envtl. L. 403, 406-08* & n.7 (1997) (providing a brief history of nuisance actions from as early as the twelfth century to the early twentieth century); Julian Conrad Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 Duke L.J. 1126, 1130-48 (1967) (summarizing cases involving trespass, **[*12]** negligence, and nuisance claims in the air pollution context); Harold W. Kennedy and Andrew G. Porter, *Air Pollution: Its Control and Abatement*, 8 Vand. L. Rev. 854, 854-64 (1954-1955) (citing numerous common law cases seeking remedies in the context of air pollution); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy, 7 Geo. Mason L. Rev. 923, 926-46 (1999)* (giving overview of common law tradition and identifying nuisance as the "backbone" of common law environmental litigation). The availability of nuisance theory to address environmental harms was endorsed by the Restatement (Second) of Torts, which includes sections on both public nuisance and private nuisance. *See Restatement (Second) of Torts §§ 821B-821E*, at 87-104. According to one commentator, nuisance theory "has hung on from its horse-and-buggy origins" and "continues to be the fulcrum of what is called today environmental law." 1 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 1.1, at 3 (1986); *id.* § 2.1, at 29.

> 3 The common law distinguishes between private and public nuisances. *See* Czarnezki, *34 B.C. Envtl. Aff. L. Rev. at 4*. A private nuisance is a tort arising from the unreasonable "invasion of another's interest in the private use and enjoyment of land." *Restatement (Second) of Torts § 821D*, at 100 (1979). A public nuisance arises from "an unreasonable interference" **[*13]** with a public right. *Id. § 821B(1)*, at 87. A public nuisance does not necessarily involve interference with the use and enjoyment of land. *Id. § 821B cmt. h*, at 93.

Nuisance theory has been recognized in Iowa for decades and has been utilized to address environmental problems. *See, e.g., Kriener v. Turkey Valley Cmty. Sch. Dist., 212 N.W.2d 526, 535-36 (Iowa 1973)* (noxious odor from sewage facility amounts to private nuisance); *Ryan v. City of Emmetsburg, 232 Iowa 600, 601-03, 4 N.W.2d 435, 437-38 (1942)* (private nuisance arising from sewer system). *See generally* Ronald Sorenson, *The Law of Nuisance in Iowa*, 12 Drake L. Rev. 107 (1962-1963). For instance, in *Bowman v. Humphrey*, the

plaintiff landowner successfully sued a creamery on a nuisance theory for depositing refuse in a running stream that injured the lower riparian owner. *132 Iowa 234, 235-36, 243, 109 N.W. 714, 714-15, 717 (1906).* Similarly, in *Higgins v. Decorah Produce Co.*, plaintiffs successfully claimed that a poultry and produce plant was a nuisance and obtained a court order that certain sanitary measures be taken to reduce the odor. *214 Iowa 276, 283-84, 242 N.W. 109, 112-13 (1932).*

In addition to common law nuisance, the Iowa legislature has enacted a statutory nuisance claim in Iowa Code chapter 657. *See Iowa Code § 657.1.* We have long held that the statutory nuisance provisions of Iowa Code chapter 657 do not modify the common law of nuisance but supplement it. *See, e.g., Miller v. Rohling, 720 N.W.2d 562, 567 (Iowa 2006); Perkins v. Madison Cnty. Livestock & Fair Ass'n, 613 N.W.2d 264, 271 (Iowa 2000); Bates v. Quality Ready-Mix Co., 261 Iowa 696, 703, 154 N.W.2d 852, 857 (1967).*

In addition to nuisance claims, parties seeking redress for environmental harms have also pleaded common law **[*14]** claims of negligence and trespass. *See* Malone § 10:2, at 10-7, 10-8.1. Negligence claims ordinarily require conduct that falls below a standard of care established for others against unreasonable risk of harm. *Id.* § 10:2, at 10-8.1; *see also Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 316-17 (W.D. Tenn. 1986)* (involving common law negligence claim in connection with closure of chemical waste burial site), *aff'd in part, rev'd in part, 855 F.2d 1188 (6th Cir. 1988); Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1261, 1269 (N.D. W. Va. 1982)* (holding negligence claim arising from air pollution raises question of fact for jury); *Conrad v. Bd. of Supervisors, 199 N.W.2d 139, 140 (Iowa 1972)* (involving negligence claim arising from pollution of a farm pond); *Bloodgood v. Organic Techs. Corp., No. 99-0755, 2001 Iowa App. LEXIS 81, 2001 WL 98656, at *1 (Iowa Ct. App. Feb. 7, 2001)* (involving negligence claim, inter alia, arising from operation of a compost facility); *Schlichtkrull v. Mellon-Pollock Oil Co., 301 Pa. 560, 152 A. 832, 832 (Pa. 1930)* (involving negligence claim arising from injuries resulting from pollution of house well).

Trespass ordinarily requires a showing of actual interference with a party's exclusive possession of land including some observable or physical invasion. *See Ryan, 232 Iowa at 603, 4 N.W.2d at 438* (noting distinction between trespass and nuisance); *see also Borland v. Sanders Lead Co., 369 So. 2d 523, 525 (Ala. 1979)* (trespass involving lead particulates and sulfoxide deposits); *Lunda v. Matthews, 46 Ore. App. 701, 613 P.2d 63, 65-66 (Or. Ct. App. 1980)* (trespass caused by dust); *Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 709 P.2d 782, 784, 792 (Wash. 1985)* (holding intentional deposit of microscopic particulates from copper smelter could give rise to trespass claim). Perhaps the most cited, relatively recent, trespass cases in the air pollution **[*15]** context arise from fluoride emissions in Washington and Oregon. *See generally Lampert v. Reynolds Metals Co., 372 F.2d 245 (9th Cir. 1967); Reynolds Metals Co. v. Lampert, 316 F.2d 272, rev'd in part 324 F.2d 465 (9th Cir. 1963); Arvidson v. Reynolds Metals Co., 236 F.2d 224 (9th Cir. 1956); Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178 (D. Or. 1959); Martin v. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790, 791 (Or. 1959).*

As with nuisance claims, these common law causes of action have a deep legal tradition that find their roots well into the past and extend to the present day. *See* Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law, 54 Vand. L. Rev. 1039, 1056-63 (2001);* George E. Woodbine, *The Origins of the Action of Trespass*, 34 Yale L.J. 343, 343-44 (1925); George E. Woodbine, *The Origins of the Action of Trespass*, 33 Yale L.J. 799, 799-800 (1924).

3. *Advent of the "age of statutes."*[4] While state common law actions to address environmental problems may be well-established, reliance solely on common law to control pollution proved inadequate. Because the common law only settled disputes on a case-by-case basis, coverage was hit and miss. Further, bringing common law actions was expensive, and many potential plaintiffs simply could not afford to bring actions against well-heeled defendants. In addition, requirements of standing, causation, and proof of damages often made success in common law actions difficult. *See* Malone § 10:2, at 10-19. Finally, the 1960s and 1970s saw dramatic increases in the amount and extent of pollution. Through **[*16]** broadcast television, viewers watched as the Cuyahoga River caught fire, acid rain poured on the Northeast region, and many American cities experienced severe smog. *See* Lowell E. Baier, *Reforming the Equal Access to Justice Act, 38 J. Legis. 1, 12-13 (2012)* (describing "[e]nvironmental disasters in the 1960's and

1970's . . . [that] gave rise to . . . environmentalism").

4 *See generally* Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

As a result, the 1960s and 1970s saw the development of significant statutory approaches to pollution. *See* Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control, 36 Hous. L. Rev. 679, 696-711 (1999)* [hereinafter Reitze]. The CAA was originally enacted in 1963. *Id. at 698*. It has since been substantially amended numerous times. *See* Arnold W. Reitze Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work, 21 Envtl. L. 1549, 1588-1612 (1991)*; Reitze, *36 Hous. L. Rev. at 699, 702-29*.

Each subsequent amendment increased the scope and complexity of the effort to control air pollution. *See* Reitze, *36 Hous. L. Rev. at 699-729*. In particular, in 1990 Congress enacted major amendments to the CAA. *See* Craig N. Oren, *The Clean Air Act Amendments of 1990: A Bridge to the Future?, 21 Envtl. L. 1817, 1817, 1828, 1832 (1991)*. As noted by one commentator, since 1970, "the EPA has created a vast regulatory structure to control the emission of air pollutants, including **[*17]** technological standards, health standards, risk levels, and enforcement provisions, completely transforming what was once the province of state law." Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts, 41 Loy. L.A. L. Rev. 1653, 1686 (2008)*.

The CAA is undoubtedly complex. By way of general overview, the CAA embraces what has been called a "cooperative federalism" model. *See Bell v. Cheswick Generating Station (Bell II), 734 F.3d 188, 190 (3d Cir. 2013)* ("[The CAA] employs a 'cooperative federalism' structure under which the federal government develops baseline standards that the states individually implement and enforce."). With respect to ambient air quality, the CAA directs the EPA to set national ambient air quality standards (NAAQS) for pollutants in ambient air considered harmful to the public health and welfare. *See 42 U.S.C. § 7409(a)-(b)*. The NAAQS are further divided into primary NAAQS and secondary NAAQS. *Id. § 7409(b)*. The primary NAAQS are intended to protect public health, while the secondary NAAQS are intended to protect the surrounding environment. *Id.* They are often, though not always, the same. *See, e.g., 40 C.F.R. pt. 50 (2013)*; U.S. Envt'l Prot. Agency, *National Ambient Air Quality Standards (NAAQS)*, http://www.epa.gov/air/criteria.html (last updated Dec. 14, 2012) (chart detailing primary and secondary NAAQS levels). States are required **[*18]** to develop state implementation plan(s) (SIP) that employ pollution reduction methods to meet the NAAQS. *Id. § 7410(a)(1)*. The states, however, are free to adopt more stringent requirements if they choose to do so. *Id. § 7416*. Each state's SIP must include a mandatory permitting program for all stationary sources limiting the amounts and types of emissions each source is allowed to discharge. *Id. § 7661a(d)(1)*. Before new construction or modifications may be made to a source of emissions, the SIP must provide for "written notice to all nearby States the air pollutions levels of which may be affected by such source at least sixty days prior to the date on which commencement of construction is to be permitted." *Id. § 7426(a)(1)(B)*. *See generally North Carolina ex rel. Cooper v. Tenn. Valley Auth. (TVA), 615 F.3d 291, 299-300 (4th Cir. 2010)* (providing overview of the CAA's management of emissions through NAAQS, SIP, permit programs, and *42 U.S.C. § 7426(a)(1)*); *Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989)* (describing basic requirements for SIP, including permit programs).

4. *Differences between common law and regulatory regimes.* The CAA and Iowa Code chapter 455B address the overall quality of air that we all breathe and provide a regulatory framework focused on prevention of pollution through emissions standards designed to protect the general public. While civil money penalties may be imposed for violations of the CAA, **[*19]** the CAA does not provide damage remedies to harmed individuals. *See 42 U.S.C. § 7604*. In contrast, the common law focuses on special harms to property owners caused by pollution at a specific location. *See* Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?, 42 U.S.F. L. Rev. 39, 102-03 (2007)*. As a result, through common law actions, victims may obtain compensatory damages, punitive damages, and injunctive relief. *See id.* In sum, statutes deal with general emissions standards to prospectively protect the public, while common law actions retrospectively focus on individual tort remedies for owners of real property in particular locations for actual harms. As noted by commentators:

> [C]ommon law controls are based on property rights, are location specific, and

> provide remedies to rightholders for real harms. Federal regulation, on the other hand, is all encompassing, provides no specific protection to rightholders, and offers no remedies for damages that rightholders may sustain . . . [t]he two approaches are truly different and therefore, cannot be compared as though they were quite similar.

Roger E. Meiners, Stacie Thomas, & Bruce Yandle, *Burning Rivers, Common Law, and Institutional* **[*20]** *Choice for Water Quality, in The Common Law and the Environment: Rethinking the Statutory Basis for Modern Environmental Law* 54, 78 (Roger E. Meiners & Andrew P. Morriss eds., 2000); *see also* 6 Frank P. *Grad, Treatise on Environmental Law § 18.02*, at 18-5 (2001) [hereinafter Grad] ("A rather clear division of labor has developed between litigation to protect the public interest under federal and state statutory law, and the protection of individual, private interests through common law, frequently tort actions."); Daniel P. Selmi & Kenneth A. Manaster, *State Environmental Law* § 2:2, at 2-12 to 2-13 (2012) [hereinafter Selmi] (noting that even citizen suits under environmental statutes do not ordinarily provide a damage remedy and that injunctive relief in common law actions can take into account specific facts of the case).

The differences in the statutory and common law regimes are demonstrated by what must be shown to establish a violation. A party seeking to establish a violation of the statutory regime does not need to demonstrate the presence of a nuisance. *See, e.g., Pottawattamie County v. Iowa Dep't of Envtl. Quality, 272 N.W.2d 448, 454 (Iowa 1978)* (holding violation of fugitive-dust rule does not require showing of public nuisance). Conversely, many cases have held that a party seeking to show a nuisance **[*21]** is not required to show a violation of some other law. *See, e.g., Galaxy Carpet Mills, Inc. v. Massengill, 255 Ga. 360, 338 S.E.2d 428, 429 (Ga. 1986)* (permitting nuisance action related to pollution caused by coal-fired boilers even though owner had obtained environmental permits); *Urie v. Franconia Paper Corp., 107 N.H. 131, 218 A.2d 360, 362-63 (N.H. 1966)* (permitting private nuisance action for pollution even though defendant complied with state environmental laws); *Tiegs v. Watts, 135 Wn.2d 1, 954 P.2d 877, 883-84 (Wash. 1998)* (finding defendant could be held liable for nuisance even though defendant had permit from department of ecology). *See generally 58 Am. Jur. 2d Nuisances § 395*, 873-74 (2012) ("A governmental license does not carry with it immunity for private injuries that may result directly from the exercise of the powers and privileges conferred."). Similarly, compliance with statewide air pollution regulations does not shield a defendant from trespass liability. *Cf. Borland, 369 So. 2d at 526-27* (holding compliance with Alabama's air pollution control law does not shield a defendant from trespass liability).

Thus, a property owner seeking full compensation for harm related to the use and enjoyment of property at a specific location must resort to common law or state law theories to obtain a full recovery. *Cf. Md. Heights Leasing, Inc. v. Mallinckrodt, Inc., 706 S.W.2d 218, 221-22, 224, 226 (Mo. Ct. App. 1985)* (discussing available damages and relief for claims based on nuisance, negligence, and trespass theories). In addition, the common law offers **[*22]** the prospect of creative remedies, such as paying for clean-up costs or creation of a common law fund for compensation or restoration. *See* Czarnezki, *34 B.C. Envtl. Aff. L. Rev. at 27-35*.

B. Positions of the Parties.

1. *Plaintiffs.* The plaintiffs begin their attack on the district court's ruling by suggesting that we are required to approach the issue of federal preemption of state law with skepticism. They point to the well-established history of common law claims. They further note that several statutory provisions of the CAA demonstrate that Congress did not intend to preempt state common law actions. Turning to the caselaw, the plaintiffs argue that the reasoning in *International Paper Co. v. Ouellette, 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)*, is applicable here and not the reasoning in *AEP*.

The plaintiffs note that there is no express preemption of state law causes of action in the CAA. As a result, any preemption of state law arises by implication only. According to the plaintiffs, such implied preemption is strongly disfavored and ordinarily to be avoided unless absolutely necessary. *Cf. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447, 1459 (1947)* ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

Citing the language of **[*23]** the CAA, the plaintiffs note that the "any measures" clause demonstrates that the

states retain broad authority over air pollution. Specifically, the any measures clause states: "[t]he reduction or elimination, *through any measures*, of the amount of pollutants produced or created . . . and air pollution control [measures] at its source is the primary responsibility of States and local governments." *42 U.S.C. § 7401(a)(3)* (emphasis added). The plaintiffs contend that the plain language of the statute authorizes the states to reduce pollution through any measures, which include nuisance and common law claims.

The plaintiffs next draw our attention to the "citizens' rights" savings clause in the CAA, which in relevant part provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Id. § 7604(e). The plaintiffs argue that the language of the citizens' rights savings clause demonstrates congressional intent not to preempt state statutory or common law claims related to air pollution.

The plaintiffs **[*24]** further cite another savings clause in the CAA entitled "Retention of State authority," which in relevant part provides:

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . .

Id. § 7416. The plaintiffs contend that the retention of state authority savings clause demonstrates congressional intent to allow state statutory or common law causes of action respecting emissions of air pollutants.

The plaintiffs find support for their position in caselaw. The plaintiffs focus our attention on *Ouellette*. In *Ouellette*, a class of property owners on the Vermont side of Lake Champlain alleged the discharge of pollutants into the lake by a paper mill located in New York constituted a continuing nuisance under Vermont common law. *479 U.S. at 483-84, 107 S. Ct. at 807, 93 L. Ed. 2d at 891*. The defendant maintained that the lawsuit was preempted by the Clean Water Act (CWA), *33 U.S.C. §§ 1251-1387 (2010). Id. at 484, 107 S. Ct. at 807, 93 L. Ed. 2d at 892*.

Like the CAA, the CWA contains two savings clauses. The "citizen suit" savings clause of the CWA provides: "Nothing in this section shall **[*25]** restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ." *33 U.S.C. § 1365(e)*.

The CWA also has a "states' rights" savings clause, which provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Id. § 1370.

The Supreme Court in *Ouellette* concluded that while a Vermont common law nuisance claim could not be brought against a New York paper mill, the plaintiffs could bring a nuisance claim under New York common law. *479 U.S. at 497-500, 107 S. Ct. at 814-16, 93 L. Ed. 2d at 900-02*. While the plaintiffs recognize that *Ouellette* was a case brought under the CWA, *see id. at 483, 107 S. Ct. at 807, 93 L. Ed. 2d at 891*, they claim that the reasoning of the case is fully applicable to cases brought under the CAA in light of the similarity of structure **[*26]** and language of the two statutes. *See Bell II, 734 F.3d at 195* ("[A] textual comparison of the two savings clauses [in the CAA and CWA] at issue demonstrates there is no meaningful difference between them.").

The plaintiffs further argue that Congress knew how

to preempt state laws when it so desired. The CAA expressly preempts state law in some areas, for example, with respect to new motor vehicle emissions, fuel additives, and aircraft emissions. *See 42 U.S.C. § 7543(a)* (motor vehicles); *id. § 7545(c)(4)(A)* (fuel or fuel additives); *id. § 7573* (aircraft emissions).

The plaintiffs argue the district court erred in relying on *AEP* instead of *Ouellette*. In *AEP*, the Supreme Court held that the CAA preempted potential claims under federal common law. *564 U.S. at , 131 S. Ct. at 2537, 180 L. Ed. 2d at 447*. The plaintiffs argue that the separation of powers question presented in determining whether a federal statute preempts federal common law is fundamentally different from the federalism question raised in determining whether a federal statute preempts state common law. They note that *AEP* itself recognizes the distinction. *See 564 U.S. at , 131 S. Ct. at 2535-37, 2540, 180 L. Ed. 2d at 445-47, 450-51*. The plaintiffs claim that *AEP* does not alter the basic teaching of *Ouellette* and does not represent a shift in the Supreme Court's approach to federal preemption issues.

In support **[*27]** of their position, the plaintiffs cite two circuit court cases decided after *AEP*. First, the plaintiffs cite *Bell II*, where the Court of Appeals for the Third Circuit reversed a case on appeal that was cited by GPC and relied upon extensively by the district court, *Bell I. See Bell II, 734 F.3d at 190*. In *Bell II*, the Third Circuit followed *Ouellette* and held that the CAA did not preempt state common law claims in the source state. *734 F.3d at 196-97*. Second, the plaintiffs note that a similar result with similar reasoning was obtained in the Court of Appeals for the Second Circuit in *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 96-103 (2d Cir. 2013), cert. denied, 82 U.S.L.W. 3459, 134 S. Ct. 1877, 188 L. Ed. 2d 948 (U.S. 2014)* (No.13-0842).

2. *GPC*. In response, GPC notes that the CAA preempts nonsource-state statutory law and federal common law. *AEP, 564 U.S. at , 131 S. Ct. at 2540, 180 L. Ed. 2d at 447; TVA, 615 F.3d at 296*. It invites us to take the next step and hold that the CAA also preempts source-state common law and statutory private actions.

GPC recognizes that in *Ouellette*, dictum indicates that the CWA did not preempt source-state common law. *See 479 U.S. at 497, 107 S. Ct. at 814, 93 L. Ed. 2d at 900*. But GPC suggests that events since *Ouellette* was decided have driven the law in a different direction. Specifically, GPC points to amendments enacted to the CAA in 1990 and the recent decision of the United States Supreme Court in *AEP*.

GPC's narrative emphasizes that in 1990, **[*28]** three years after *Ouellette* was decided, Congress enacted the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). Characterizing the amendments as "extensive," GPC notes that, among other things, the amendments required the EPA Administrator to conduct "a comprehensive analysis of the impact of this chapter on the public health, economy, and environment of the United States." *42 U.S.C. § 7612(a)*. Further, in conducting the analysis, Congress required the Administrator to consider the effects of the CAA on "employment, productivity, cost of living, economic growth, and the overall economy of the United States." *Id. § 7612(c)*. GPC asserts that the Clean Air Act Amendments of 1990 triggered a "regulatory tsunami" in environmental regulations, including the requirement that the EPA regulate carbon dioxide and other "greenhouse" gases. *See Massachusetts v. EPA, 549 U.S. 497, 528, 127 S. Ct. 1438, 1459, 167 L. Ed. 2d 248, 274 (2007)* (holding that "the [CAA] authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change"). GPC seeks to escape the power of the 1987 language in *Ouellette* by urging this court to examine the CAA as it exists today.

Looking at the CAA today, GPC argues that *AEP*, and not *Ouellette*, is the most authoritative case from **[*29]** the Supreme Court. In reaching the conclusion that the CAA preempted federal common law, the *AEP* Court emphasized the first decider under the CAA is an expert administrative agency involved in the balancing of complex factors. *564 U.S. at , 131 S. Ct. at 2539, 180 L. Ed. 2d at 449*. According to the *AEP* Court, such complex judgments are better left to an expert agency rather than individual district court judges who "lack the scientific, economic, and technological resources an agency can utilize" in deciding such issues. *564 U.S. at , 131 S. Ct. at 2539-40, 180 L. Ed. 2d at 450*. While GPC recognizes that the narrow issue in *AEP* was whether federal common law was preempted by the CAA, *see id.* at , *131 S. Ct. at 2532, 180 L. Ed. 2d at 442*, GPC argues that the reasoning in *AEP* on the federal common law preemption issue applies fully to the question of whether the CAA preempts state law, *see id.* at , *131 S. Ct. at 2537-38, 180 L. Ed. 2d at 447-48*.

Casting a somewhat broader argument, GPC argues that common law and statutory actions such as those brought by the plaintiffs interfere with both the goals and method embraced by the CAA in regulating air pollution. According to GPC, interference with either is grounds for preemption. *Geier v. Am. Honda Motor Co., 529 U.S. 861, 881, 120 S. Ct. 1913, 1925, 146 L. Ed. 2d 914, 932 (2000)* (holding claims are preempted when they are " 'an obstacle to the accomplishment and execution of . . . important means-related federal objectives" **[*30]** (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941))*; *Ouellette, 479 U.S. at 494, 107 S. Ct. at 813, 93 L. Ed. 2d at 898* ("A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach [the] goal [of eliminating water pollution].").

With respect to goals, GPC argues that allowing the plaintiffs' causes of action to proceed would upset the balance between environmental protection and economic disruption that Congress authorized the EPA to determine. *See AEP, 564 U.S. at , 131 S. Ct. at 2539, 180 L. Ed. 2d at 449* (noting "[t]he [CAA] entrusts such complex balancing to EPA"). GPC maintains that the EPA has established a balanced approach to require transition to lower emitting equipment only when modification, replacement, or construction occurs. In this case, GPC claims that plaintiffs, among other things, are seeking to require GPC to install new equipment and take other equipment offline even though the EPA has not imposed a similar requirement. Such a requirement is contrary to *Goodell v. Humboldt County, 575 N.W.2d 486, 500-01 (Iowa 1998)*, where we observed that a local law that would in effect prohibit what state law permitted could give rise to conflict preemption.

GPC also asserts that the goal of certainty is undermined by allowing the plaintiffs' claims to proceed. GPC relies on *TVA*, in which the Court of Appeals for the Fourth Circuit considered whether **[*31]** public nuisance claims related to air pollution could go forward. *615 F.3d at 296.* The *TVA* court noted the complex balancing entrusted to the EPA, the comprehensive nature of the regulation, the scientific complexity of many of the issues, and the reliance interests and expectations of enterprises that have complied with the CAA regulatory requirements, and reasoned that "individual states [should not] be allowed to supplant the cooperative federal-state framework that Congress through the EPA has refined over many years." *Id. at 298-301.* The *TVA* court noted that if nuisance suits were brought across the country, they would threaten to "overturn the carefully enacted rules governing airborne emissions" and "it would be increasingly difficult for anyone to determine what standards govern." *Id. at 298.*

GPC also asserts that private common law and state statutory actions would interfere with the law's method of achieving its goal and should therefore be preempted. *See Ouellette, 479 U.S. at 494, 107 S. Ct. at 813, 93 L. Ed. 2d at 898.* GPC argues the CAA provides a method for individuals to participate in decision making through the rulemaking process. According to GPC, a citizen cannot sidestep that process by bringing common law claims.

GPC further claims that the CAA amounts to a comprehensive **[*32]** scheme that occupies the entire regulatory field. It notes that Congress and the EPA have pervasively regulated the area of clean air and, relying on *TVA*, GPC argues that field preemption is an alternative route to affirm the district court. *See 615 F.3d at 303.*

Last, GPC attacks the plaintiffs' statutory analysis of the CAA. With respect to the retention of state authority savings clause, GPC notes that it allows a "[s]tate or political subdivision thereof to adopt or enforce" more stringent regulations. *See 42 U.S.C. § 7416.* GPC asserts that by its plain language, the retention of state authority savings clause does not authorize private common law or statutory causes of action, but only the imposition of more stringent standards by state or subdivision regulators. *See 42 U.S.C. § 7602(d)* (defining state); *United States v. Amawi, 552 F. Supp. 2d 679, 680 (N.D. Ohio 2008)* (holding the judiciary is not a state or political subdivision); *Haudrich v. Howmedica, Inc., 267 Ill. App. 3d 630, 642 N.E.2d 206, 209-10, 204 Ill. Dec. 744 (Ill. App. Ct. 1994)* (same). GPC also argues that the CWA has stronger language than the retention of state authority savings clause of the CAA. In the CWA, Congress provided that nothing in the chapter shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." *33 U.S.C. § 1370.* GPC notes that Congress did not include **[*33]** similar language in the CAA.

In any event, GPC argues that while a savings clause might prevent field preemption, it does not prevent conflict preemption. *See Geier, 529 U.S. at 869, 120 S. Ct. at 1919, 146 L. Ed. 2d at 924*; *Pokorny v. Ford Motor Co., 902 F.2d 1116, 1125 (3d Cir. 1990).* Moreover, GPC

asserts that the express language of the citizens' rights savings clause is limited to "this section," *see 42 U.S.C. § 7604(e)*; *Iowa Code § 455B.101*, and, as a result, other sections of the CAA are not impacted by the savings clause and may preempt state common law and statutory claims.

C. Analysis of CAA Preemption.

1. *Introduction to federal preemption concepts.* GPC claims that the CAA preempts state common law actions. The concept of federal preemption is based upon the *Supremacy Clause of the United States Constitution.* Under the *Supremacy Clause*,

> [the] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The question of whether a federal statute preempts state common law is one of federal law and we are bound by the decisions of the United States Supreme Court in the area.

Under the *Supremacy Clause*, whether Congress sought to override or preempt any inconsistent state law turns on congressional intent. *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700, 715-16 (1996).* "Congress may indicate pre-emptive intent through **[*34]** a statute's express language or through its structure and purpose." *Altria Grp., Inc. v. Good, 555 U.S. 70, 76, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398, 405 (2008)*; *accord* Scott Gallisdorfer, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After* AEP v. Connecticut, *99 Va. L. Rev. 131, 140 (2013)* [hereinafter Gallisdorfer].

Implied preemption falls into two categories: conflict preemption and field preemption. Conflict preemption occurs when a state law "actually conflicts" with a federal law, especially where it is impossible for a party to comply with both state and federal requirements. *See English v. Gen. Elec. Co., 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65, 74 (1990).* A variant of conflict preemption, obstacle preemption, may be found where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See* Caleb Nelson, *Preemption, 86 Va. L. Rev. 225, 228-29, 265 (2000)* (internal quotation marks omitted). Field preemption occurs where the federal law so thoroughly occupies the field that Congress left no room for state law. *Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407, 423 (1992)*; Gallisdorfer, *99 Va. L. Rev. at 141.*

The Supreme Court, however, has been particularly reluctant to find federal preemption of state law in areas where states have traditionally exercised their police power. In *Rice*, the Supreme Court noted that preemption analysis begins "with the assumption that the historic police powers of the States **[*35]** [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *331 U.S. at 230, 67 S. Ct. at 1152, 91 L. Ed. at 1459.* Further, the Supreme Court has emphasized that "when the text of an express preemption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.' " *Altria Grp., 555 U.S. at 77, 129 S. Ct. at 543, 172 L. Ed. 2d at 406* (quoting *Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449, 125 S. Ct. 1788, 1801, 161 L. Ed. 2d 687, 706 (2005)).*

2. *Traditional application of federal common law or state law causes of action to environmental claims.* When dealing with interstate pollution, federal common law provided the rule of decision in a number of early cases. Prior to the recent *AEP* ruling in the Supreme Court, federal common law was utilized in numerous water pollution cases. As noted above, state claims of nuisance, negligence, and trespass are traditional causes of action that have been utilized in a wide variety of environmental contexts. Plainly, the existence of common law causes of action to address pollution has been part of the "historic police powers" of the states. *See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442, 80 S. Ct. 813, 815, 4 L. Ed. 2d 852, 855 (1960)* (noting the authority of states "to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power").

3. **[*36]** *Clean water precedents related to preemption of federal and state common law claims.* We begin our discussion of CAA preemption with an overview of clean water cases both prior to and after the passage of the CWA. These cases are instructive because of their discussion of the intergovernmental complexities

surrounding pollution cases and because of the similarities in language and structure between the CWA and the CAA. In particular, the cases demonstrate the important distinction between whether a federal statute extinguishes federal common law, and whether a federal statute preempts state common law.

We begin our survey by noting the state of the law prior to the enactment of the CWA. Prior to the 1970s, the Supreme Court held that federal common law governed the use and misuse of interstate water. *See, e.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110, 58 S. Ct. 803, 811, 82 L. Ed. 1202, 1212 (1938)*; *Missouri v. Illinois, 200 U.S. 496, 518-20, 26 S. Ct. 268, 268-69, 50 L. Ed. 572, 577-78 (1906)*.

In 1971, the Supreme Court suggested in dicta, however, that an interstate dispute between a state and a private company should be resolved by reference to state nuisance law. *See Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 n.3, 91 S. Ct. 1005, 1009 n.3, 28 L. Ed. 2d 256, 263 n.3 (1971)* ("[A]n action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law."). Thus, in the early 1970s, it was uncertain whether plaintiffs seeking to **[*37]** attack pollution in the waterways could bring their claims under federal common law or state common law.

In 1972, the United States Supreme Court decided *Illinois v. City of Milwaukee (Milwaukee I), 406 U.S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)*. The case arose when Illinois moved for leave to file an original action in the Supreme Court to enjoin Milwaukee from discharging sewage into Lake Michigan. *Id. at 93, 92 S. Ct. at 1387-88, 31 L. Ed. 2d at 717*. The Supreme Court concluded that Illinois could bring a claim under *federal* common law to abate a public nuisance in interstate or navigable waters. *Id. at 106-07, 92 S. Ct. at 1394-95, 31 L. Ed. 2d at 725-26*. The Supreme Court, however, foreshadowed the future and noted that "[i]t may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id. at 107, 92 S. Ct. at 1395, 31 L. Ed. 2d at 725*.

With respect to *state* common law, the *Milwaukee I* Court suggested that it was displaced by federal legislation and federal common law at least with respect to sources located in another state. The *Milwaukee I* Court noted that:

> [f]ederal common law and not the varying common law of the individual States is . . . entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources *outside* its domain.

Id. at 107 n.9, 92 S. Ct. at 1395 n.9, 31 L. Ed. 2d at 726 n.9 (emphasis added) (quoting *Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971))*.

In 1972, Congress adopted **[*38]** the CWA.[5] *33 U.S.C. §§ 1251-1387 (2012)*. The CWA contains a "citizen suit" savings clause in its remedies section, which provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Id. § 1365(e). The Senate Public Works Committee report in 1971 suggested that the citizen suit savings clause would specifically preserve any rights or remedies under any other law. *See* S. Rep. No. 92-414, at 81 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746.

> 5 The Federal Water Pollution Control Act of 1948 was significantly reorganized and expanded, and as amended became commonly known as the CWA.

The CWA also contains a "states' rights" savings clause, which states: "[e]xcept as expressly provided . . . nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *33 U.S.C. § 1370*.

Finally, the CWA contains a "primary responsibilities and rights" provision. The primary responsibilities and rights provision **[*39]** declares that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id. § 1251(b)*.

After the enactment of the CWA, the Supreme Court decided *City of Milwaukee v. Illinois (Milwaukee II), 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981)*. This case arose out of the ongoing efforts of Illinois, and later Michigan, to abate sewage discharges from the city of Milwaukee allegedly in violation of federal common law. *Id. at 308-10, 101 S. Ct. at 1788-89, 68 L. Ed. 2d at 120-22*. The Supreme Court granted certiorari to consider the effect of the CWA on the federal common law cause of action recognized by *Milwaukee I. Milwaukee II, 451 U.S. at 307-08, 101 S. Ct. at 1787, 68 L. Ed. 2d at 120.*

In *Milwaukee II*, the Supreme Court, consistent with its prediction in *Milwaukee I*, held in light of the passage of the CWA, federal common law related to pollution of the waterways was preempted. *Milwaukee II, 451 U.S. at 317-19, 101 S. Ct. at 1792-93, 68 L. Ed. 2d at 126-28*. Speaking for a six-member majority, Justice Rehnquist observed in a footnote that:

> the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law.

Id. at 315 n.8, 332, 101 S. Ct. at 1792 n.8, 1800, 68 L. Ed. 2d at 125 n.8, 136. The *Milwaukee II* Court concluded that:

> Congress has not left the formulation of appropriate **[*40]** federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.

Id. at 317, 101 S. Ct. at 1792, 68 L. Ed. 2d at 126. The Court noted:

> Not only are the technical problems difficult--doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise--but the general area is particularly unsuited to the approach inevitable under a regime of federal common law [that would generate] 'sporadic' [and] 'ad hoc' [approaches to pollution control].

Id. at 325, 101 S. Ct. at 1796-97, 68 L. Ed. 2d at 131 (quoting S. Rep. No. 92-414, at 95).

The *Milwaukee II* Court, however, was careful to distinguish between federal common law and state common law. *See id. at 310 n.4, 329, 101 S. Ct. at 1789 n.4, 1798, 68 L. Ed. 2d at 122 n.4, 134*. While the Supreme Court declared that federal common law was displaced by the CWA, it expressly declined to consider whether plaintiffs could bring a claim under state common law. *Id. at 310 n.4, 101 S. Ct. at 1789 n.4, 68 L. Ed. 2d at 122 n.4*. In this regard, the Court noted:

> It is one thing . . . to say that States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations **[*41]** through state nuisance law, and apply them to in-state discharges. It is quite another to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers.

Id. at 327-28, 101 S. Ct. at 1798, 68 L. Ed. 2d at 133.

Upon remand, the Court of Appeals for the Seventh Circuit in *Illinois v. City of Milwaukee* (*Milwaukee III*), considered whether the CWA precluded application of one state's common law against a pollution source located in a different state. *731 F.2d 403, 406 (7th Cir. 1984)*. The Seventh Circuit in *Milwaukee III* concluded that such state common law was preempted. *Id. at 410-11*. The Seventh Circuit was careful, however, to distinguish an effort to apply a state's common law against a polluter located outside the state and a common law claim against an instate polluter. *See id. at 414*. The Seventh Circuit noted that an approach that allowed the application of state common law against an out-of-state polluter could lead to confusion, as a single source might be subject to different and conflicting state common law in a number of surrounding states, thereby leading to a "chaotic confrontation between sovereign states." *Id.* Yet, the Seventh Circuit recognized that the citizen suit savings

clause preserved **[*42]** a right under state common law to obtain enforcement or prescribed standards or limitations against an in-state polluter. *Id. at 413-14.* The Supreme Court denied certiorari. *469 U.S. 1196, 105 S. Ct. 980, 105 S. Ct. 979, 83 L. Ed. 2d 981 (1985).*

In 1987, the Supreme Court returned to the subject area in *Ouellette.* In *Ouellette*, a class of property owners on the Vermont side of Lake Champlain alleged that a paper mill located in New York discharged pollutants into the lake and constituted a nuisance under Vermont law. *479 U.S. at 483-84, 107 S. Ct. at 807, 93 L. Ed. 2d at 891.* International Paper Co. moved for summary judgment, claiming that the CWA preempted state common law claims under *Milwaukee III. Ouellette, 479 U.S. at 484-85, 107 S. Ct. at 808-09, 93 L. Ed. 2d at 892-93.* The federal district court denied summary judgment, citing the citizen suit savings clause and the states' rights savings clause of the CWA. *Id. at 485, 107 S. Ct. at 808, 93 L. Ed. 2d at 892-93.* The district court reasoned that state common law actions to redress interstate water pollution could be maintained under the law of the state where the injury occurred. *Id. at 486, 107 S. Ct. at 808-09, 93 L. Ed. 2d at 893.*

In *Ouellette*, the Supreme Court reversed the district court. *See id. at 487, 101 S. Ct. at 809, 93 L. Ed. 2d at 893.* The Supreme Court held that the CWA preempted state nuisance actions to the extent that state law applied to an alleged out-of-state polluter. *Id. at 493-94, 107 S. Ct. at 812-13, 93 L. Ed. 2d at 897-98.* The *Ouellette* Court recognized that states play a significant role in the protection of their own natural resources, **[*43]** that the CWA permits the EPA to delegate to a state the authority to administer permit programs with respect to certain sources of pollution within the state, and that a state may require discharge limitations more stringent than those required by the EPA. *Id. at 489-90, 107 S. Ct. at 810, 93 L. Ed. 2d at 895.*

Nonetheless, the *Ouellette* Court noted that with respect to out-of-state sources, the affected state's role is limited to the opportunity to object to the proposed standards of a federal permit in a public hearing. *Id. at 490, 107 S. Ct. at 810-11, 93 L. Ed. 2d at 895.* A state, however, does not have the authority to block the issuance of a permit with which it may be dissatisfied. *Id. at 490, 107 S. Ct. at 811, 93 L. Ed. 2d at 896.* In short, the state "may not establish a separate permit system to regulate an out-of-state source." *Id. at 491, 107 S. Ct. at 811, 93 L. Ed. 2d at 896.* The *Ouellette* Court noted that allowing affected states to impose separate discharge standards on a single "point source" would interfere with the carefully devised regulatory system established by the CWA. *Id. at 493, 107 S. Ct. at 812, 93 L. Ed. 2d at 898.*

While the *Ouellette* Court held that the plaintiffs could not impose Vermont law on the out-of-state polluter, it emphasized that the Vermont residents were not without a remedy. *Id. at 497, 107 S. Ct. at 814, 93 L. Ed. 2d at 900.* According to the *Ouellette* Court, the citizen suit and states' rights savings clauses, jointly referred to by the Court **[*44]** as the "saving clause," preserves actions not incompatible with the CWA and "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Id.*

The *Ouellette* Court offered three reasons why an action brought against International Paper Co. under New York nuisance law would not frustrate the goals of the CWA. First, the *Ouellette* Court noted that imposing a source state's law does not affect the balance among federal, source-state, and affected-state interests, particularly in light of the specific authorization that allows source states to impose stricter standards. *Id. at 498-99, 107 S. Ct. at 815, 93 L. Ed. 2d at 901.* Second, the *Ouellette* Court noted that restricting common law actions to those of the source state "prevents a source from being subject to an indeterminate number of potential regulations." *Id. at 499, 107 S. Ct. at 815, 93 L. Ed. 2d at 901.* Finally, the *Ouellette* Court noted that states may be expected to take into account their own nuisance laws in setting permit requirements. *Id.*

Thus, under the CWA cases, a clear pattern emerges. Federal common law over pollution of interstate waterways is now preempted in light of the comprehensive nature of the CWA and the expertise vested in the EPA and state agencies to solve **[*45]** complex problems involved in environmental issues. State law claims against out-of-state sources are preempted because they would be inconsistent with the regulatory framework created by the CWA and would create chaos by imposing multiple regulatory schemes on a single source. State law claims against in-state sources of pollution, however, are saved by the citizen suit savings clause, the states' rights savings clause, and other provisions of the CWA and are consistent with the principle that states may impose limitations on pollution

more stringent than required by federal law. As a result, state common law claims against an in-state source are not preempted by the CWA.

4. *CAA precedent.* The Supreme Court has not recently considered the scope of preemption of state common law under the CAA. We begin our discussion, however, with an important Supreme Court case that teed up the issue. In *Massachusetts*, the Supreme Court considered a claim brought by a group of private organizations that filed a rulemaking petition asking the EPA to regulate greenhouse gas (GHG) emissions from new motor vehicles under the CAA. *549 U.S. at 505, 127 S. Ct. at 1446, 167 L. Ed. 2d at 260.* After an extensive notice and comment period, the EPA entered an order denying **[*46]** the rulemaking. *Id. at 511, 127 S. Ct. at 1449-50, 167 L. Ed. 2d at 263-64.* The EPA's stated reasons for denial were that the CAA did not authorize the EPA to issue mandatory regulations to address global climate change and that even if it did, it would be unwise to issue such regulations at this time. *Id. at 511, 127 S. Ct. at 1450, 167 L. Ed. 2d at 264.* The Court of Appeals for the D.C. Circuit denied a petition to review the denial of rulemaking. *Id. at 511, 127 S. Ct. at 1451, 167 L. Ed. 2d at 265.*

The Supreme Court reversed. *Id. at 535, 127 S. Ct. at 1463, 167 L. Ed. 2d at 278.* It held that the EPA did have authority to set emissions standards and had offered no reasonable explanation for its failure to promulgate rules. *549 U.S. at 528, 534, 127 S. Ct. at 1459, 1463, 167 L. Ed. 2d at 274, 278.*

After *Massachusetts*, the EPA began to incrementally regulate aspects of GHG emissions. *See* Gallisdorfer, *99 Va. L. Rev. at 131.* Environmental groups were unsatisfied with the pace of EPA regulation, however, and began to file actions seeking injunctive caps on GHG emissions under a public nuisance theory. *See id.* Often, plaintiffs seeking to increase environmental protection from GHG emissions proceeded on a federal common law theory. *Id.*

In 2011, however, the Supreme Court decided *AEP*, in which eight states, New York City, and three nonprofit land trusts, brought an action seeking to enjoin GHG emissions from four private companies and the Tennessee Valley Authority. *See 564 U.S. at , 131 S. Ct. at 2532, 180 L. Ed. 2d at 442.* Because the EPA began **[*47]** regulating GHG emissions as a result of the *Massachusetts* case during the pendency of the lawsuit, the question arose as to whether the action of the EPA "displaced" the federal common law that was traditionally regarded as a source of law for interstate nuisance actions. *See id.* at *, 131 S. Ct. at 2533-35, 180 L. Ed. 2d at 442-45.*

In language similar to that used in *Milwaukee II*, the Supreme Court held that the CAA displaced federal common law with respect to GHG emissions. *AEP, 564 U.S. at , 131 S. Ct. at 2537, 180 L. Ed. 2d at 447.* The Supreme Court concluded that the CAA directly addressed the question because "air pollutants" were subject to regulation under the CAA and "air pollutants" clearly included GHG emissions. *Id. at , 131 S. Ct. at 2532-33, 180 L. Ed. 2d at 442-43.*

The Supreme Court in *AEP*, however, only held that *federal* common law regarding "air pollutants" was displaced by the CAA. *Id. at , 131 S. Ct. at 2537, 180 L. Ed. 2d at 447.* The Court declined to reach the state law nuisance claims because they had not addressed the issue on appeal. *Id. at , 131 S. Ct. at 2540, 180 L. Ed. 2d at 450-51.* The *AEP* Court noted, however, that "[l]egislative displacement of federal common law does not require the same sort of evidence . . . demanded for preemption of state law." *Id. at , 131 S. Ct. at 2537, 180 L. Ed. 2d at 447* (quoting *Milwaukee II, 451 U.S. at 317, 101 S. Ct. at 1792, 68 L. Ed. 2d at 126*) (internal quotation marks omitted).

As previously noted, after *AEP*, two federal appellate courts considered whether the CAA preempted state law in the source state. **[*48]** *See Bell II, 734 F.3d at 190, cert. denied, 82 U.S.L.W. 3531, 2014 U.S. LEXIS 3926 (U.S. June 2, 2014) (No. 13-1013)* (concluding that state law claims are not preempted); *MTBE Prods. Liab. Litig., 725 F.3d at 96-103* (finding that source-state common law claims are not preempted under the CAA).

One federal district court, however, came to a different conclusion. In *Comer I*, a federal district court found that state common law claims brought by property owners against several oil companies, coal companies, electric companies, and chemical companies, whose emissions allegedly contributed to global warming were preempted by the CAA. *839 F. Supp. 2d at 865.*[6]

6 On appeal, the case was reversed by a panel of the Court of Appeals for the Fifth Circuit. *Comer v. Murphy Oil USA, Inc. (Comer II), 585 F.3d 855, 859, 878-80 (5th Cir. 2009).* However, in an

unusual result, a petition for rehearing en banc was granted and then dismissed for a lack of quorum, with the result that the district court opinion stood. *See Comer v. Murphy Oil USA, Inc., 598 F.3d 208, 210 (5th Cir.), dismissed on reh'g, 607 F.3d 1049, 1055 (5th Cir. 2010).*

Prior to *AEP*, federal caselaw on the question of CAA preemption of source-state common law was mixed. In *Her Majesty the Queen*, the Court of Appeals for the Sixth Circuit held that Canadian officials could seek to enjoin construction of a Michigan trash incinerator under Michigan law because of the alleged lack of air pollution control equipment, even though the facility had already received a CAA permit. **[*49]** *874 F.2d at 342-44.* Similarly, in *Gutierrez v. Mobil Oil Corp.*, a federal district court held that plaintiffs could proceed on source-state common law claims alleging defendant negligently maintained storage facilities for various fuels. *798 F. Supp. 1280, 1281 (W.D. Tex. 1992).*

However, in *TVA*, the Fourth Circuit reviewed a district court order granting an injunction at the behest of the State of North Carolina requiring the immediate installation of emissions controls at four Tennessee Valley Authority generating plants located in Alabama and Tennessee. *615 F.3cd at 296.* The injunction was based upon the district court's determination that the plants were a public nuisance under the law of the affected state, North Carolina. *Id.* The estimated cost of compliance with the order was uncertain, but North Carolina admitted that the cost would be in excess of one billion dollars. *Id. at 298.*

The Fourth Circuit reversed. *Id. at 312.* The Fourth Circuit found that the litigation amounted to a collateral attack on the process chosen by Congress to establish appropriate standards and grant permits for the operation of power plants. *See id. at 302.* The Fourth Circuit stressed that an "injunction-driven demand" for artificial changes was likely to be inferior to a system-based analysis of what changes would do the most **[*50]** good. *Id.* Yet, the Fourth Circuit did not hold that Congress had entirely preempted the field of emissions regulation. *Id.* Instead, each case had to be considered on a case-by-case basis to determine " 'if it interferes with the methods by which the federal statute was designed to reach [its] goal.' " *Id. at 303* (alteration in original) (quoting *Ouellette, 479 U.S. at 494, 107 S. Ct. at 813, 93 L. Ed. 2d at 898*). While the *TVA* court expressly disapproved of the application of the law of the affected state as contrary to Ouellette, *TVA, 615 F. 3d at 308-09*, the court further found "it would be difficult to uphold the injunctions because [the Tennessee Valley Authority's] electricity-generating operations are expressly permitted by the states in which they are located," *id. at 309.*

5. *Discussion.* All parties agree that nothing in the CAA expressly preempted the nuisance and common law actions presented in this case. Therefore, the question of whether the CAA preempted the claims in this case must rely on an implied preemption theory based upon either field preemption or conflict preemption.

a. Field preemption. We begin our discussion by noting that a party seeking to use implied field preemption to oust state law causes of action that have been traditionally part of the police power of the states faces **[*51]** an uphill battle. *See Huron, 362 U.S. at 442, 80 S. Ct. at 815, 4 L. Ed. 2d at 855* (noting the authority of states "to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power"). Congress unquestionably has the power to preempt local law when it acts on federal concerns and may expressly do so. To imply the ousting of traditional state law remedies such as nuisance by implication in a federal statute, though not impossible, seems at least improbable in most cases. In the case of the CAA, state regulation of pollution sources through source-state-law actions had to have been something of an obvious, yet unaddressed, issue when the statute was drafted. To suggest that Congress indirectly removed the state's ability to address these environmental concerns with state law actions seems, on the surface at least, rather unlikely. At a minimum, to find implied field preemption, we think there should be powerful textual authority or structural issues that drive us in this counterintuitive direction.

When we look at the text of the CAA, we find language that tends to support the conclusion that Congress did not impliedly oust the state **[*52]** law actions of the source state. The any measures clause, the retention of state authority savings clause, and the citizens' rights savings clause strongly suggest that Congress did not seek to preempt, but to preserve, state law claims. *See 42 U.S.C. §§ 7401(a)(3), 7416, 7604(e).* The citizens' rights savings clause expressly states that the ability to bring actions under the CAA does not

preempt common law rights. *See 42 U.S.C. § 7604(e).* While the term "requirements" in the retention of state authority savings clause is perhaps indefinite, most courts that have considered the question have concluded that the term includes common law duties. *See, e.g., Riegel v. Medtronic, Inc., 552 U.S. 312, 323-24, 128 S. Ct. 999, 1007-08, 169 L. Ed. 2d 892, 902-03 (2008); Cipollone, 505 U.S. at 521-22, 112 S. Ct. at 2620, 120 L. Ed. 2d at 426.*

GPC suggests that allowing state law actions based on source-state law will undercut the structure of the CAA. We think not. The CAA statute was structured to promote cooperative federalism. Under the cooperative federalism approach, the states were given the authority to impose stricter standards on air pollution than might be imposed by the CAA. *See Bell II, 734 F.3d at 197-98.* In short, Congress expressly wanted the CAA to be a floor, but not a ceiling, on air pollution control. A similar conclusion has been reached by the Second, Third, and Sixth Circuits. *Id. at 194-98; MTBE Prods. Liab. Litig., 725 F.3d at 96-103; Her Majesty the Queen, 874 F.2d at 342-44.*

GPC further suggests that because air pollution **[*53]** matters involve complex questions requiring the balancing of economic and social benefits and harms, controversies over source-state pollution are best left to administrative agencies and the rulemaking process. Further, GPC makes an appeal that there should be a uniform approach to these questions. This argument may have some policy appeal, but it runs against the grain of bilateral cooperative federalism manifest in the any measures clause, the retention of state authority savings clause, and the citizens' rights savings clause of the CAA. *See 42 U.S.C. §§ 7401(a)(3), 7416, 7604(e).*

GPC supports its argument with citation to language in *AEP* and *Comer I.* But GPC and some of the authority upon which it relies conflate the issue of displacement of federal common law with the somewhat related but distinct issue of preemption of state common law. We think two takeaway points from the Supreme Court's caselaw are (1) the question of displacement of federal common law is different than the question of preemption of state law actions, and (2) the standard for displacement of federal common law is different than the standard for preemption of state law. Further, in considering the issues of displacement of federal common law **[*54]** under the CWA and the CAA, the Supreme Court has not had to consider the statutory language in the CAA suggesting a congressional intent to not preempt state law.

GPC's argument that it will be subject to multiple regulators is also insufficient for us to find that all state law actions based upon source-state law are preempted because Congress occupied the field. With respect to this argument, it is important to remember the distinction in *Ouellette* and *Milwaukee II* between preemption of the law of a *source* state from the preemption of the law of the pollution-*affected* state. *Ouellette, 479 U.S. at 491-94, 107 S. Ct. at 811-13, 93 L. Ed. 2d at 896-98; Milwaukee II, 451 U.S. at 327-28, 101 S. Ct. at 1798, 68 L. Ed. 2d at 132-33.* Allowing claims to go forward based on the law of the state merely affected by pollution could cause real structural problems as a multistate polluter could be subject to the laws of many states, which could impose contradictory and confusing legal requirements. The thrust of the *Ouellette* and *Milwaukee II* decisions is that allowing common law claims from all affected states would create chaos and cannot be allowed.

It is critical, however, to distinguish between efforts to apply the law of the source state and efforts to apply the law of the pollution-affected state. In this case we deal with a claim that **[*55]** seeks to regulate pollution based on the law of the source state. This is precisely the kind of cooperative federalism anticipated by the statute. GPC is not subject to a dozen or more regulatory regimes, but only two. The notion that a person must comply with parallel state and federal law requirements that may not be uniform is not new to the law. As recognized in *Ouellette*, on the one hand, state "nuisance law may impose separate standards and thus create some tension with the permit system," but, on the other hand, "the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations." *Id. at 499, 107 S. Ct. at 815, 93 L. Ed. 2d at 901.*

The conclusion that source-state common law claims are not preempted by the CAA is endorsed by treatise writers. *See Grad § 18.02*, at 18-4 to 18-5 ("Despite the overriding emphasis on federal and state statutes in the field of environmental law, common law remedies, even those old fashioned causes of trespass and nuisance, remain viable causes of action."); Malone § 10:2, at 10-7 n.1 ("[S]tate common law theories of liability were not preempted by the [CAA]."); 1 William H. Rodgers,

Environmental Law § 3:1(A)(1) (2013), *available at* **[*56]** www.westlaw.com ("[T]here is no question that nuisance law that was preserved has remained vibrant and serviceable.").

GPC seeks to avoid the teaching of *Milwaukee II* and *Ouellette* by suggesting that while state common law actions might not have been originally preempted by the CAA when *Milwaukee II* and *Ouellette* were decided, the Clean Air Act Amendments of 1990 and the dramatic growth in the complexity of clean air regulation now give rise to conflict preemption. According to GPC, this increasingly complex web of regulation was recognized in *AEP*, where the Supreme Court emphasized the complexity of environmental regulation and the difficulties of balancing competing interests in the formulation of environmental policy. *See 564 U.S. at , 131 S. Ct. at 2539, 180 L. Ed. 2d at 449-50.*

This argument has been zealously advanced by GPC and has some appeal. There is no question that the federal regulatory framework under the CAA is increasingly complicated. It is important in our view, however, not to conflate increased complexity with the issue of conflict preemption. Notwithstanding the increased complexity, the cooperative federalism framework and the notion that states may more stringently regulate remains a hallmark of the CAA.

Further, state common law and nuisance actions have a different purpose than **[*57]** the regulatory regime established by the CAA. The purpose of state nuisance and common law actions is to protect the use and enjoyment of specific property, not to achieve a general regulatory purpose. It has long been understood that an activity may be entirely lawful and yet constitute a nuisance because of its impairment of the use and enjoyment of specific property. *See Galaxy Carpet Mills, 338 S.E.2d at 429-30*; *Urie, 218 A.2d at 362*; *Tiegs, 954 P.2d at 883-84*. We therefore decline to conclude that the increased complexity of the CAA has categorically elbowed out a role for the state nuisance and common law claims presented here.

b. Conflict preemption. GPC presents yet another refinement of its argument. While it may be that Congress has not impliedly occupied the field, case-by-case conflict preemption may arise in light of the dense federal regulations. In other words, while it may not be possible to declare that Congress has preempted source-state law in all cases involving emissions regulation, it has in cases that amount to a collateral attack on the NAAQS, SIP, and permitting method established by Congress under the CAA.

In support of this argument, GPC cites *TVA*. As noted above, in *TVA* the Fourth Circuit reversed an order granting injunctive relief to the State **[*58]** of North Carolina in a public nuisance action challenging the pollution from power plants located in Alabama and Tennessee. *615 F.3d at 296*. The Fourth Circuit noted that it was estimated that the equipment modification ordered by the district court could cost in excess of one billion dollars. *Id. at 298*. The Fourth Circuit held that the injunction requiring extensive changes to equipment based on a public nuisance theory conflicted with the CAA where the existing equipment had been approved under the CAA regulatory framework. *See id. at 302-03.*

The approach of *TVA* has not been uniformly embraced in the federal courts. The conflict preemption analysis in *TVA* seems contrary to the approach of the Third Circuit in *Bell II, 734 F.3d at 193-98* (finding "nothing in the [CAA] to indicate that Congress intended to preempt source state common law tort claims."), and the Second Circuit in *MTBE Products Liability Litigation, 725 F.3d at 95-104* (finding "[s]tate law [in the case] neither 'penalizes what federal law requires' nor 'directly conflicts' with federal law" and therefore the impossibility preemption defense did not overcome the presumption against preemption). *Cf. Merrick v. Diageo Americas Supply, Inc., No. 3:12-CV-334-CRS, 2014 U.S. Dist. LEXIS 36087, 2014 WL 1056568, at *5-8 (W.D. Ky. Mar. 19, 2014)* (disagreeing with *TVA* and following *Bell II* and *MTBE Products Liability Litigation*).

While we understand the reasoning **[*59]** in *TVA*, we do not think it provides a basis for summary judgment in this case. The plaintiffs seek damages related to specific properties at specific locations allegedly caused by a specific source. Of course, the plaintiffs must prevail on issues of substantive liability that the district court has not had occasion to address and are not before us now. If the plaintiffs do prevail on the merits, however, any remedy involving damages or remediation would simply not pose the kind of conflict with the permitting process that the sweeping injunction in *TVA* presented. *See id. at 301-06*. Any impact on the regulatory regime would be indirect and incidental. As a result, we conclude that conflict preemption with the CAA does not apply to a private lawsuit seeking damages anchored in ownership

of real property. *See Bell II, 734 F.3d at 189-90* (allowing private property owners' claims for nuisance, negligence, and trespass based on facility's flying ash and unburned by-products to go forward); *Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 862 (Mo. Ct. App. 1985)* ("States may be preempted from setting their own emissions standards, but they are not preempted from compensating injured citizens.").

With respect to the question of whether injunctive relief would conflict with the CAA, we do not find this **[*60]** issue ripe at this time. Even *TVA* indicates that conflict preemption analysis is not subject to sweeping generalities and must be done on a case-by-case basis. *See 615 F.3d at 302-03*. We simply cannot evaluate the lawfulness of injunctive relief that has not yet been entered. Such an evaluation must await the development of a full record and the shaping of any injunctive relief by the district court.

IV. Discussion of Preemption by Iowa Code Chapter 455B.

A. Positions of the Parties.

1. *Plaintiffs.* The plaintiffs attack the district court's ruling on preemption under Iowa Code chapter 455B in several ways. The plaintiffs note that Iowa Code chapter 455B, like the CAA, has a citizens' rights savings clause, which provides: "[t]his section does not restrict any right under statutory or common law of a person or class of person to . . . seek other relief permitted under the law." *Iowa Code § 455B.111(5)*. The plaintiffs contend the language simply means what it says and allows the statutory and common law claims they have brought in this case, which should be considered "other relief permitted under the law."

With respect to common law claims, the plaintiffs assert because there is no express preemption in Iowa Code chapter 455B, the defendants must rely on implied preemption. Implied preemption, however, is found only where **[*61]** " 'imperatively required,' " *Fabricius v. Montgomery Elevator Co., 254 Iowa 1319, 1322, 121 N.W.2d 361, 362 (1963)* (quoting *Bradshaw v. Iowa Methodist Hosp., 251 Iowa 375, 388, 101 N.W.2d 167, 174 (1960))*. The plaintiffs maintain that preemption here is not "imperatively required," as the common law claims specifically address harms to property, while the regulatory framework in Iowa Code chapter 455B addresses more general harms caused by pollution. The plaintiffs assert that Iowa caselaw supports this proposition. *See Simpson v. Kollasch, 749 N.W.2d 671, 674 (Iowa 2008)* (indicating compliance with environmental regulation is not a defense to a nuisance claim, though it may be evidence of whether defendant's conduct is a nuisance); *Gerst v. Marshall, 549 N.W.2d 810, 813-15 (Iowa 1996)* (involving common law claims brought along with claims under chapter 455B).

The plaintiffs further note that their nuisance claim is based in part on Iowa Code chapter 657, which provides a general framework for bringing statutory nuisance claims in Iowa. In order to find that Iowa Code chapter 455B preempts the statutory provisions of Iowa Code chapter 657, the plaintiffs maintain that the two statutes must be "irreconcilably repugnant." *State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978)*. The plaintiffs argue that far from being irreconcilable, the statutes may be harmonized by interpreting Iowa Code chapter 455B's citizens' rights savings clause as allowing statutory nuisance actions that may result in stricter control of pollution. Further, plaintiffs emphasize that claims under the nuisance statute protect against harms **[*62]** to specific property, while chapter 455B more generally protects the public from air pollution. Because the statutes address different types of harms and interests, the plaintiffs contend there can be no preemption of nuisance claims arising from Iowa Code chapter 455B.

Further, the plaintiffs note that the legislature has expressly provided that certain types of statutes do preempt statutory nuisance actions. Specifically, *Iowa Code sections 657.1(2)* and *657.11(1)* provide that nuisance claims related to electrical utilities and animal feeding operations are preempted from further regulation through statutory nuisance claims. The plaintiffs press the point that the legislature knew how to preempt certain types of environmental claims from nuisance actions but did not extend preemption to the plaintiffs' claims in this case.

Finally, the plaintiffs claim that if Iowa Code chapter 455B preempted state common law claims, a serious constitutional issue would be present. They note, for instance, we have held that giving farms immunity from nuisance suits may deprive one of the use and enjoyment of property and amount to an unconstitutional "taking" of property without due compensation. *Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 172-74 (Iowa 2004)*; *Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 320-21 (Iowa*

1998). To the extent there is any doubt regarding the proper interpretation of Iowa Code chapter 455B, it should **[*63]** be interpreted in a fashion to avoid the constitutional problem. *Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656, 663-64 (Iowa 2010)*.

2. *GPC.* Because state law preemption is substantively identical to federal conflict and field preemption, GPC incorporates its arguments regarding federal preemption on the question of whether Iowa Code chapter 455 preempted the common law claims in this case. GPC, however, presents some refinements based upon its analysis of the Iowa caselaw.

First, GPC points out that in order for state law to preempt common law claims based on field preemption, it is not necessary that it be impossible to reconcile the statute with the common law claims. GPC argues that in *Northrup v. Farmland Industries, Inc.*, we found that the Iowa Civil Rights Act was the exclusive remedy for wrongful discharge based on disability without a finding of impossibility. *See 372 N.W.2d 193, 197 (Iowa 1985)*. Further, GPC argues that an action becomes irreconcilable with state law by imposing requirements beyond what the state law proscribes. For instance, in *Baker v. City of Iowa City*, we held that an ordinance allowing claims against employers with fewer than four employees was irreconcilable with the Iowa Civil Rights Act, which provided claims could only be brought against employers with four or more **[*64]** employees. *750 N.W.2d 93, 101-02 (Iowa 2008)*.

Second, building on *Northrup* and *Baker*, GPC asserts that the common law claims in this case go beyond the state law framework in chapter 455 by circumventing the state's emissions regulation and permitting process and by potentially imposing new standards without the scientific expertise and extensive rulemaking process employed by the state environmental regulators. GPC argues that the court could order GPC to use certain processes or install new pollution control equipment, which could conflict with environmental regulatory requirements imposed on it by the Iowa Department of Natural Resources (DNR) or the EPA and further upset the delicate balance achieved through the regulatory process.

Therefore, GPC argues that if the plaintiffs prevail in their common law claims, GPC could end up in an intolerable catch-22 situation. For instance, GPC suggests that the state court in the common law actions might order a remedy that the DNR refuses to approve. In this setting, GPC would be forced to either comply with the district court order and defy the DNR, or vice versa. Or, the DNR could, after careful study, ultimately approve court-ordered changes to its operations as a result **[*65]** of the common law claims, but the necessary approvals might not be obtained quickly enough for timely compliance with the court's mandate. GPC argues this kind of trouble was addressed in *Goodell*, where the court noted that imposition of local requirements in excess of state law requirements could lead to preemption. *575 N.W.2d at 501* ("Any attempt by a local government to add to those requirements would conflict with the state law, because the local law would in effect prohibit what the state law permits.").

B. Analysis of Iowa Code Chapter 455B Preemption.

The precise question here is whether Iowa Code chapter 455B impliedly conflicts with and thus preempts a statutory claim for nuisance under Iowa Code chapter 657 and common law claims of nuisance, trespass, and negligence. With respect to one statute impliedly preempting another, we have understandingly been quite demanding. The legislature is presumed to know the existing state of the law when the new statute is enacted. *Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780, 787 (Iowa 1971)*. In the absence of any express repeal, the new provision is presumed to accord with the legislative policy embodied in prior statutes. *See Ruth Fisher Elementary Sch. Dist. v. Buckeye Union High Sch. Dist., 202 Ariz. 107, 41 P.3d 645, 648 (Ariz. Ct. App. 2002)*. When prior and later statutes deal with the same subject matter, although in apparent conflict, they should as far as reasonably possible be construed **[*66]** in harmony with each other to allow both to stand and be given force and effect. *See Polk Cnty. Drainage Dist. Four v. Iowa Natural Res. Council, 377 N.W.2d 236, 241 (Iowa 1985)*. While we recognize the possibility of an implied repeal, such action is permitted only where the statutes "cover the same subject matter," are "irreconcilably repugnant," and implied repeal is "absolutely necessary." *Rauhauser, 272 N.W.2d at 434*. While the issue in this case does not require a complete repeal of Iowa Code chapter 657, we think the *Rauhauser* test remains applicable where a party seeks to nullify application of a preexisting statute to a specific circumstance.

With respect to whether a statute abrogates common

law, the test is somewhat similar. We have declared that absent express statutory language, a party seeking to demonstrate that a statute impliedly overrides common law must show that this result is "imperatively required." *See, e.g., Rieff v. Evans, 630 N.W.2d 278, 286 (Iowa 2001)*; *Collins v. King, 545 N.W.2d 310, 312 (Iowa 1996)*. While the question of whether the CAA preempts state common law is a question of federal law, whether chapter 455B impliedly repeals or overrides common law is a question of state law.

There is no definitive Iowa case dealing with the question of whether nuisance or common law claims may go forward in light of the provisions of Iowa Code chapter 455B. In *Gerst*, a plaintiff raised parallel common law claims along **[*67]** with a citizen-action claim under Iowa Code chapter 455B. *549 N.W.2d at 813*. We were not asked, however, to decide whether the nuisance and common law claims were extinguished by Iowa Code chapter 455B.

Nonetheless, we do have instructive caselaw. We have made clear that a lawful business, properly conducted, may still be a nuisance. For instance, in *Simpson* we noted in the context of the proposed construction of a hog-confinement facility that compliance with DNR regulations was not a defense to a nuisance action. *749 N.W.2d at 672, 674*. We noted that " 'a lawful business, properly conducted, may still constitute a nuisance if the business interferes with another's use of his own property.' " *Id. at 674* (quoting *Weinhold v. Wolff, 555 N.W.2d 454, 461 (Iowa 1996))*. Our approach is consistent with the law in other jurisdictions. *See, e.g., Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029, 1036 (Fla. 2001)* (holding "something may legally constitute a public nuisance . . . although it may technically comply with existing pollution laws"); *Biddix v. Henredon Furniture Indus., Inc., 76 N.C. App. 30, 331 S.E. 2d 717, 724 (N.C. Ct. App. 1985)* (noting that the North Carolina Clean Water Act does not preempt common law claims); *Gonzalez v. Whitaker, 1982-NMCA 050, 97 N.M. 710, 643 P.2d 274, 278 (N.M. Ct. App. 1982)* (holding state environmental statutes do not preempt common law claims). *See generally*, Selmi § 10:26, at 10-56, 57.

We do not see enforcement of nuisance and other common law torts in this case as inconsistent with the regulatory framework established by chapter 455B. As indicated **[*68]** above, the nuisance and common law actions in this case are based on specific harms to the use and enjoyment of real property that are different from the public interest generally in controlling air pollution. We thus think the principles articulated in *Van Baale v. City of Des Moines, 550 N.W.2d 153, 156 (Iowa 1996)* ("Where the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive." (quoting IA C.J.S. *Actions* § 14 n.55 (1985))), and *Northrup, 372 N.W.2d at 197* (holding remedy provided under Iowa Civil Rights Act "is exclusive"), are inapplicable. In short, we think Iowa Code chapter 455B did not impliedly repeal application of Iowa Code chapter 657 to air pollution claims or preempt Iowa common law.

With respect to remedies, GPC speculates that the district court could enter a remedy that conflicts with Iowa Code chapter 455B. As a result, GPC argues that the nuisance and common law claims should not be allowed to go forward. Any consideration of this possibility at this stage of the litigation, however, is premature. GPC has not demonstrated that the district court sitting in equity cannot fashion equitable relief that is consistent with Iowa Code chapter 445B. Specifically, to the extent the district court orders equitable relief, any such relief may be conditioned upon **[*69]** obtaining regulatory approvals required under Iowa Code chapter 455B. Or, equitable relief may require development of a common fund to promote clean up that does not impact the requirements of Iowa Code chapter 455B at all. In any event, we decline to speculate at this stage about the possible legal issues that may be raised by the granting of any injunctive relief in this case.

V. Discussion of Political Question Doctrine.

A. Positions of the Parties.

1. *Plaintiffs.* The plaintiffs argue that the political question doctrine does not serve as an impediment to their statutory and common law claims. The plaintiffs note that political questions ordinarily involve questions for which there is a demonstrable constitutional commitment to other branches of government. The plaintiffs note that in *Des Moines Register & Tribune Co. v. Dwyer*, this court held the Iowa Constitution had "a textually demonstrable constitutional commitment" to the Iowa Senate of the power to establish its rules of proceedings. *542 N.W.2d 491, 496 (Iowa 1996)*. Unlike *Dwyer*, the plaintiffs argue, there is no demonstrable constitutional commitment involved in this case. Indeed,

Congress has expressly authorized statutory and common law actions under state law. A state court deciding directly authorized **[*70]** litigation would not be expressing a lack of respect for Congress or any other coordinate branch of government.

The plaintiffs recognize that one of the criteria identified in *Baker v. Carr* and other political question doctrine cases is "a lack of judicially discoverable and manageable standards for resolving [the issue]." *369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 686 (1962)*. The plaintiffs agree that this case may involve social and economic issues to some extent, but that is in the nature of environmental litigation. According to the plaintiffs, courts have been deciding nuisance cases for years without invoking the political question doctrine. *See, e.g., Comer v. Murphy Oil USA, Inc. (Comer II), 585 F.3d 855, 869-76 (5th Cir. 2009), reh'g granted, 598 F.3d 208, 210 (5th Cir.), dismissed on reh'g for lack of quorum, 607 F.3d 1049, 1055 (5th Cir. 2010)*; *Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 321-32 (2d Cir. 2009)* (lower court decision preceding *AEP*), *rev'd on other grounds, 564 U.S. , 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)*. This case is no more complex than thousands of other cases involving medical malpractice, copyright infringement, or patent protection. The plaintiffs argue that the political question doctrine does not permit a court to avoid a dispute merely because it presents complex or technical factual issues that the court "would gladly avoid." *Zivotofsky ex rel. Zivotofsky v. Clinton, U.S. , , 132 S. Ct. 1421, 1427, 182 L. Ed. 2d 423, 429 (2012)* (quoting *Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257, 291 (1821)*).

Finally, on the question of whether the case is impossible to decide "without an initial policy determination of a **[*71]** kind clearly for nonjudicial discretion," *Baker, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686*, the plaintiffs contend the fact that the court or jury may have to determine what conduct is reasonable does not amount to a nonjusticiable question. They cite *McMahon v. Presidential Airways, Inc.*, where the court noted that in "an ordinary tort suit, there is no 'impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.' " *502 F.3d 1331, 1365 (11th Cir. 2007)* (quoting *Baker, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686*).

2. *GPC.* GPC claims that this case presents textbook political questions. No judge or jury could decide the claims, according to GPC, without balancing economic benefits against the harms caused by air pollution. It notes, for instance, that the balance between environmental goals and economic growth involves a conflict between pollution control and new jobs. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 852 n.25, 104 S. Ct. 2778, 2786 n.25, 81 L. Ed. 2d 694, 708 n.25 (1984)*. GPC asserts that this balancing of interests is best left to the political branches of government. Allowing the statutory and common law claims to go forward, according to GPC, would amount to a collateral attack on the elaborate system created by Congress that will risk results that undermine the system's clarity and legitimacy. *TVA, 615 F.3d at 301, 304*.

B. Analysis of Political Question Doctrine.

1. *Overview of political* **[*72]** *question doctrine.* The federal political question doctrine arises largely from the United States Supreme Court case of *Baker*. In that case, the United States Supreme Court laid out six considerations for determining whether a political question was present:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. at 686.

The high-water mark of the federal political question doctrine appears to be matters involving foreign affairs, determinations of the propriety of congressional enactments, and matters related to the legislative process. *See, e.g., Nixon v. United States, 506 U.S. 224, 226,*

236-38, 113 S. Ct. 732, 734, 739-40, 122 L. Ed. 2d 1, 7, 13-14 (1993); *Goldwater v. Carter, 444 U.S. 996, 1002-06, 100 S. Ct. 533, 536-38, 62 L. Ed. 2d 428, 430-32 (1979)* (Rehnquist, J., concurring in **[*73]** judgment).

The federal political question doctrine has been the subject of extensive commentary. Some question whether there is any legitimate basis for it. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 600 (1976) ("[T]here may be no doctrine requiring abstention from judicial review of 'political questions.' "); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031, 1031 (1984) (noting commentators have "disagreed about [the federal political question doctrine's] wisdom and validity");. Other commentators have defended the federal political question doctrine. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine, 137 U. Pa. L. Rev. 97 (1988).*

It has also been observed that since *Baker*, the doctrine has fallen into disuse in the United States Supreme Court. *See* Rachel E. Barkow, *More Supreme than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 263 (2007).* Since *Baker*, the federal political question doctrine has been invoked successfully in only three cases. *See Vieth v. Jubelirer, 541 U.S. 267, 281, 124 S. Ct. 1769, 1778, 158 L. Ed. 2d 546, 560 (2004)* (holding gerrymanding claim nonjusticiable); *Nixon, 506 U.S. at 226, 113 S. Ct. at 734, 122 L. Ed. 2d at 7* (concluding question whether the Senate rule regarding impeachment is constitutional is nonjusticiable); *Gilligan v. Morgan, 413 U.S. 1, 5-6, 10, 93 S. Ct. 2440, 2443, 2446, 37 L. Ed. 2d 407, 413, 415 (1973)* (holding determination of adequacy of national guardsmen training **[*74]** exclusively vested in Congress). Even if one is inclined to adopt a political question doctrine of some kind, there is a question of scope. The six considerations listed by Justice Brennan in *Baker, see 369 U.S. at 217, 825 S. Ct. at 710, 7 L. Ed. 2d at 686*, are both opaque and elastic. Some commentators advocate consideration of all of them, usually in descending order of importance as recognized by the plurality opinion in *Vieth, see 541 U.S. at 278, 124 S. Ct. at 1776, 158 L. Ed. 2d at 558*. Others urge a narrower approach through what has been termed the "classical" model, which emphasizes, if not requires, a constitutionally based commitment of power to another branch of government. *See* Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine, 24 J. Land Use & Envtl. L. 79, 80 (2008).* It is important to note, however, that the United States Supreme Court has made clear that the federal political question doctrine does not apply to state courts. *See Goldwater, 444 U.S. at 1005 n.2, 100 S. Ct. at 538 n.2, 62 L. Ed. 2d at 430 n.2* (Rehnquist, J., concurring) ("This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot, so long as they do not trench upon exclusively federal questions of foreign policy." (Citation omitted.)).

Whether and to what extent state courts should adopt the **[*75]** federal political question doctrine is a question of some controversy. Several decades ago, Oregon Supreme Court Justice Hans Linde remarked that "there are hardly any state analogues to the self-imposed constraints on justiciability, 'political questions,' and the like." Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L. J. 227, 248 (1972). While Linde's observation may be overstated, Helen Hershkoff has noted that state courts do tend to hear an array of questions that would be considered nonjusticiable in federal court. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1863 (2001).* Two former state supreme court justices have observed the significant differences between separation of powers under state constitutions as compared to under the Federal Constitution. *See* Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power, 76 N.Y.U. L. Rev. 1601, 1603 (2001)* ("State constitutions have a tradition independent of federal law in the allocation of power among the branches of state government and in their development and understanding of republican principles."); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts* **[*76]** , *81 Minn. L. Rev. 1543, 1558 (1997)* ("State courts are regularly called upon to enforce state constitutional obligations that, for sound reasons of federalism, federal courts have declined to enforce." (Footnote omitted.)). If so, the federal political question doctrine might have limited value for state courts.

In some state courts, the doctrine seems to be met with some skepticism. *See Backman v. Secretary, 387 Mass. 549, 441 N.E.2d 523, 527 (Mass. 1982)* ("[W]e have never explicitly incorporated the [political question] doctrine into our State jurisprudence . . . . [T]his court has

an obligation to adjudicate claims that particular actions conflict with constitutional requirements."). Other state courts, however, have cited federal precedent solely as if the doctrine were binding on state courts, mixed federal and state cases without any clear delineation, and even simply used the label "political question" without meaningful case citation or analysis. *See* Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims, 42 Colum. J.L. & Soc. Probs. 545, 560-76 (2009)* (categorizing cases according to citation methodology).

The political question doctrine has rarely provided the basis for a holding in our cases. One exception is *Dwyer*, a case in which **[*77]** we considered whether the Iowa Senate's policy on release of certain longdistance phone records fell within the constitutionally granted power to the Senate to determine its own rules of proceedings. *542 N.W.2d at 493*. We held that because of the demonstrable constitutional commitment to the Senate of the power to make its own rules in *article III, section 9 of the Iowa Constitution*, the lawsuit filed by the newspaper to obtain the records raised a nonjusticiable political question. *Id. at 494, 501*.

Similarly, in *State ex rel. Turner v. Scott*, we considered an action brought by the attorney general to remove Scott from his Senate seat. *269 N.W.2d 828, 828 (Iowa 1978)*. Relying upon *article III, section I of the Iowa Constitution* (which vests authority upon each house to judge the qualifications of its own members) we held that the case presented a political question that should be resolved by the Senate. *Id. at 830-31*. The holdings in *Dwyer* and *Scott* are consistent with the narrower classical model of the political question doctrine, which focuses on the textually demonstrable constitutional commitment of decision-making power to another branch of government, the first *Baker* factor, *369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686*.

As is often the case, however, the plaintiffs do not question whether the political question doctrine applies in state court and whether we should adopt a political question **[*78]** doctrine for Iowa that departs from the federal approach. In somewhat similar circumstances, where a party does not suggest a different standard under Iowa law, we adopt for the purposes of the case the federal standard, reserving the right to apply the standard differently than under the federal cases. *See, e.g., State v. Becker, 818 N.W.2d 135, 150 (Iowa 2012)* ("Even where a party has not provided a substantive standard independent of federal law, we reserve the right to apply the standard presented by the party in a fashion different than the federal cases."); *NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W.2d 30, 45 (Iowa 2012)* ("Even in cases where a party has not suggested that our approach under the Iowa Constitution should be different from that under the Federal Constitution, we reserve the right to apply the standard in a fashion at variance with federal cases under the Iowa Constitution."); *State v. Oliver, 812 N.W.2d 636, 650 (Iowa 2012)*; *State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009)*; *In re Det. of Hennings, 744 N.W.2d 333, 338-39 (Iowa 2008)*. We reserve the right to apply the federal standards differently because the six factors in *Baker* are not clearly defined and are open-ended. As a result, within the *Baker* framework, there is a wide range of permissible analysis on each of the factors. We therefore proceed to utilize the federal *Baker* approach, reserving the right to apply these standards in a fashion different from federal precedent. **[*79]**

2. *Discussion.* From any perspective, it is clear that there is no textual constitutional commitment of the issues raised in this case to another branch of government. The first and most important factor of the *Baker* formula is thus plainly not present and cuts markedly against any application of the political question doctrine here. *See Klinghoffer v. S.N.C. Anchille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 49 (2d Cir. 1991)* ("Although no one factor is dispositive, Justice Brennan, the author of *Baker*, has suggested that the first [factor] . . . is of particular importance . . . [and the absence of this factor] strongly suggests that the political question doctrine does not apply." (Citation omitted.)).

We now move to the second factor, namely, a lack of judicially discoverable and manageable standards to resolve the issues. Tort law, however, including the law of nuisance, has evolved over the centuries. The law has devised a number of doctrinal approaches to accommodate difficulties in proof associated with complex environmental and toxic tort cases. *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm, 121 Yale L.J. 350, 370 (2011)*. As a result, the United States Supreme Court has never found a lack of judicially manageable standards in a tort suit **[*80]** involving

private parties. *Id. at 412*. The caselaw generally stands for the proposition that actions for damages are relatively immune to efforts to dismiss based upon the political question doctrine. *See, e.g., Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998)* ("Monetary damages might but typically do not require courts to dictate policy . . . nor do they constitute a form of relief that is not judicially manageable."); *Koohi v. United States, 976 F.2d 1328, 1332 (9th Cir. 1992)* ("Damage actions are particularly judicially manageable."); *Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 679-80, 683 (E.D. La. 2006)* (holding demand for damages justiciable); *Mallinckrodt, Inc., 706 S.W.2d at 221* ("[I]ndividual tort recoveries . . . are not precluded by the political question doctrine. Appellants are not trying to establish standards that conflict with legislative determinations; they are seeking compensation for injuries." (Citation omitted.)).

To the extent the science is obscure and complex, the burden of proof of all elements of causation remains on the plaintiffs. The mere fact that a case is complex does not satisfy this factor. As noted by the Second Circuit in *AEP,* courts have successfully adjudicated complex common law public nuisance claims for more than a century. *Am. Elec. Power Co., 582 F.3d at 326*; *Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005)* (noting the political question doctrine does not arise because the case "is unmanageable in the sense of being large, complicated, or otherwise difficult **[*81]** to tackle from a logistical standpoint").

Turning to the third factor, there is no need for an initial policy determination by another branch of government. Indeed, the tort law itself represents an initial policy determination, namely, that certain plaintiffs who demonstrate necessary harm to the use and enjoyment of their real property may be entitled to damages and injunctive relief. *See Am. Elec. Power Co., 582 F.3d at 331*; *McMahon, 502 F.3d at 1364-65*; *Klinghoffer, 937 F.2d at 49* ("The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.").

With these major factors removed, the remaining factors generally fall out of the equation. None of the remaining *Baker* factors are very strong in any approach to the political question doctrine and they certainly do not provide a basis for nonjusticiability in this case.

As is apparent from the above analysis, none of the *Baker* factors apply in this case with much force. We therefore conclude that this case is not subject to dismissal under the political question doctrine.

VI. Conclusion.

For all of the above reasons, we conclude that the plaintiffs' claims in this case are not preempted by the CAA, are not preempted **[*82]** by Iowa Code chapter 455B, and are not subject to dismissal by operation of the political question doctrine. Our rulings on these issues, of course, express no view on the appropriateness of class certification or on the underlying merits of the plaintiffs' claims. We do conclude, however, that GPC was not entitled to summary judgment. As a result, the judgment of the district court is reversed and the case is remanded for further proceedings.

DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.

All justices concur, expect Mansfield, J., who takes no part.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:

SIERRA CLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB No. 13-27**
	)	**(Citizens Enforcement – Air)**
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I did on October 17, 2014, send by U.S. Mail, with postage thereon fully prepaid, a true and correct copy of the instrument entitled:

COMPLAINANT SIERRA CLUB'S NOTICE OF SUPPLEMENTAL AUTHORITY IN RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS and accompanying exhibits,

TO:

Stephen J. Bonebrake
Bina Joshi
Schiff Hardin LLP
6600 Willis Tower
233 S. Wacker Drive
Chicago, IL 60606-6473

Andrew N. Sawula
Schiff Hardin LLP
One Westminster Place
Lake Forest, IL 60045

and filed the original and nine copies of the same by common carrier (FedEx) to the Clerk of the Illinois Pollution Control Board at the following address:

Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

Dated: October 17, 2014

David C. Bender

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