No. 14-6499

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUISVILLE GAS AND ELECTRIC COMPANY and PPL CORPORATION,

Defendants-Appellants,

v.

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-Appellees.

On Appeal from the United States District Court
for the Western District of Kentucky
The Honorable Joseph H. McKinley, Jr.
District Court No. 3:13-cv-01214-JHM

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STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs-Appellees request oral argument, because this Court's rulings on the issues presented on this appeal likely will have a significant effect beyond the particular claims presented in this litigation.

JURISDICTIONAL STATEMENT

Plaintiffs agree with Defendants' jurisdictional statement.

ISSUES PRESENTED

1. Did Congress intend the Clean Air Act, which does not provide a private right of action, to *sub silentio* preempt all State common-law claims for injuries, including claims for violations of the Clean Air Act and State air-pollution statutes and regulations, thereby depriving injured people of any remedy under either federal or State law for injuries caused by air pollution or for injunctive relief to limit emissions in the future?

2. Do Plaintiffs have Article III standing to bring Clean Air Act claims based on Notices of Violation issued by a state agency to LG&E and later addressed in an agreed order between the agency and LG&E, where: (1) the violations described in the Notices were repeated; (2) Plaintiffs allege, and record evidence demonstrates, that the violations described in the Notices continued after the agreed order; and (3) the agreed order was entered into without a court action being brought by the state agency?

3. Do Plaintiffs have Article III standing to seek injunctive relief for violations of the Clean Air Act that were continuing and substantially similar to violations described in the Notices of Violation?

4. Does Plaintiffs' claim under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), constitute a collateral attack on certain

permits and an agreed order between a state agency and LG&E, when: (1) the RCRA claim did not challenge the propriety of the permits but rather LG&E's failure to comply with them; (2) the state agency lacked authority to enforce RCRA, and the agreed order did not address RCRA; (3) the permits did not allow the emissions of which Plaintiffs complain; and (4) the permits and agreed order did not address remediation of LG&E's solid waste pollution, which Plaintiffs allege may present an imminent and substantial endangerment to health or the environment?

5. Was Plaintiffs' pre-filing notice adequate to support their claims under the CAA and RCRA for violations that were continuing and substantially similar to those listed in the Notices of Violation?

STATEMENT OF THE CASE

For years, Plaintiffs have been continually exposed to toxic dust and ash that Louisville Gas & Electric and its parent company PPL Corporation (collectively, "LG&E") emit from the Cane Run facility in Kentucky.[1] It was not always like this. Cane Run burned coal to generate electricity for decades, but LG&E and its predecessors long managed to operate within limits set by regulations and their Clean Air Act ("CAA") permit.

LG&E's most recent permit expired in 2007. Since at least 2008, LG&E has flouted air quality regulations. LG&E admitted to pumping tons of coal ash into the air each year and acknowledged that ash containing arsenic and other toxins regularly settles on neighboring homes. Neighbors have complained for years that Cane Run's ash and dust coats their properties, causing severe lung, eye, and skin irritation, and exposing them to risk of more serious illnesses. LG&E ignored not only the complaints but also repeated Notices of Violation from the Louisville Air Pollution Control District ("APCD"), which is the regulating authority for the CAA. Despite generating more than a billion dollars in annual revenue, LG&E did

[1] Plaintiffs refer to Defendants-Appellants collectively as LG&E, because the distinction between them is irrelevant for this appeal.

not adopt effective measures to avoid dumping toxic ash on its neighbors, even though the cost of doing so is negligible compared to Cane Run's revenues.

After years of futile complaints, Plaintiffs served a Notice of Intent to Sue. This prompted LG&E to enter into an Agreed Board Order[2] with the APCD, which included the payment of outstanding penalties levied by the APCD. LG&E now tries to use the Agreed Board Order as a shield against liability for harm it caused and continues to cause its neighbors. But this agreement with the APCD does not have the preclusive effect LG&E claims.

Plaintiffs bring common-law claims under Kentucky law to remedy injuries caused by LG&E's toxic emissions. Plaintiffs also seek to enjoin continuing violations, compel remediation, and obtain civil penalties under the CAA and RCRA. The CAA claims are based on repeated and continuing violations of emissions standards and limits in LG&E's permits and regulations Kentucky adopted under the CAA. The RCRA claims are based on LG&E's handling of solid waste that presents imminent and substantial dangers to health or the environment, along with violations of RCRA and Kentucky regulations. Contrary to LG&E's assertion, Plaintiffs do not seek "zero tolerance" for emission of pollutants but instead seek relief under Kentucky's longstanding common-law standards for damages and

[2] Def. Mot. Dismiss, Ex. 1, RE 29-2, Page ID #442-46.

injunctive relief based on the emission of excessive pollutants that violate LG&E's permits and the common law.

I. THE CLEAN AIR ACT, KENTUCKY'S AIR-POLLUTION STATUTES AND COMMON LAW, AND RCRA

A. The Clean Air Act.

The CAA requires the EPA to set national air quality standards to protect the public health and welfare.[3] It requires each State to adopt a state implementation plan ("SIP"), which is enforceable under federal law once approved by the EPA.[4] This Court has explained that the CAA "established only minimum air quality levels, however, and states are free to adopt more stringent protections."[5] Section 116 of the CAA provides that States are prohibited from setting *less* stringent standards than federal law:

> [N]othing 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 respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce

[3] 42 U.S.C. § 7409.

[4] *See* 42 U.S.C. §§ 7410(a), 7604(a).

[5] *Her Majesty the Queen in Rt. of Prov. of Ontario v. City of Detroit*, 874 F.2d 332, 336 (6th Cir. 1989).

> any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.[6]

Section 304(a) allows citizen suits to enforce the CAA.[7] Citizens can obtain an injunction and recover costs and attorney's fees but not damages. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*,[8] the Supreme Court stated that in citizen suits, "'a citizen can obtain an injunction but cannot obtain money damages for himself….'" Any penalties awarded under the Act are deposited in the United States Treasury[9] and are not paid to the citizen who brings suit. Injunctive relief is limited to three types of relief: (1) to enforce "an emission standard or limitation under this Act"; (2) to enforce "an order issued by the Administrator or a State with respect to such a standard or limitation"; or (3) to order the "Administrator to perform any act or duty under this Act which is not discretionary with the Administrator."[10]

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[6] 42 U.S.C. § 7416.

[7] 42 U.S.C. § 7604(a).

[8] 484 U.S. 49, 61 (1987) (quoting 118 Cong. Rec. 33717 (1972), 1 Leg. Hist. 221 (Sen. Bayh)). *See Gutierrez v. Mobil Oil Corp*., 798 F. Supp. 1280, 1285 (W.D. Tex. 1992) ("Entirely opposite to the defendants' arguments, the Clean Air Act does not provide similar or comparable remedies to those sought by plaintiffs in common law actions for damages.").

[9] 42 U.S.C. § 7604(g)(1).

[10] 42 U.S.C. § 7604(a).

While citizens cannot collect damages from a citizen suit under the Act, the citizen-suit provision contains a savings clause that expressly saves common-law actions any relief:

> 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)….[11]

B. Kentucky statutes and common law regarding air pollution.

1. Kentucky allows for stricter air-pollution controls than federal law.

LG&E erroneously contends that Kentucky's legislature has declined to impose stricter air-pollution standards than federal requirements. LG&E makes that argument by using the following misleading selective quotation:

> While the Clean Air Act permits a "State or political subdivision thereof" to adopt additional "standard[s] or limitation[s] respecting emissions of air pollutants" so long as they are not less stringent than an applicable SIP requirement or other federal standards, 42 U.S.C. § 7416, Kentucky's legislature, by statute, has affirmatively declined to exercise this authority, *directing that Kentucky regulation of air pollutants "shall be no more stringent than federal requirements…."* KRS § 224.10-100(26).[12]

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[11] *Id.*, § 7604(e).

[12] Appellants' Br. at 11 (emphasis added).

In fact, Kentucky's legislature has *not* directed that Kentucky's regulation be no more stringent than federal requirements. The statute from which LG&E plucks the misleading quotation *solely* concerns powers of Kentucky's Energy and Environment Cabinet. Section 224.10-100 is part of Subchapter 10 of Chapter 224. Subchapter 10 is entitled "Energy and Environment Cabinet Powers and Function." As part of Subchapter 10, Section 224.10-100 concerns the powers of that Cabinet. So section 224.10-100(26) addresses the powers of *the Cabinet* only:

> [T]he cabinet shall have the authority, power, and duty to: … (26) Preserve existing clean air resources while ensuring economic growth by issuing regulations, which shall be no more stringent than federal requirements….

But Kentucky statutes empower other entities to set air-pollution standards stricter than federal requirements. KRS § 224.20-130(2) states that "the air pollution control district shall adopt no regulation or standard less stringent than a regulation or standard adopted by the cabinet, and shall submit prepared regulations and standards to the cabinet for prior concurrence." The Kentucky Attorney General has explained that the State Air Pollution Control Commission (now Energy and Environment Cabinet) does not have veto power over an air pollution control district's program that is more stringent than the Cabinet's standards.[13]

[13] Opinion of Kentucky Attorney General 70-610.

And local ordinances may impose stricter standards than those imposed by the air pollution control district. Section 77.170(1) provides that, apart from mobile sources of pollutants, "the provisions of this chapter do not prohibit the enactment or enforcement of any local ordinance stricter than the provisions of KRS 77.150 to 77.180 and stricter than the rules and regulations adopted pursuant to KRS 77.180 to 77.240, which local ordinance prohibits, regulates, or controls air pollution." Thus, Kentucky's air pollution control districts and local governmental bodies may impose stricter limits than federal requirements.

Thus, Kentucky's legislature has *not* directed that Kentucky's regulation of air pollutants shall be no more stringent than federal requirements.

2. Kentucky explicitly preserves common-law causes of action.

KRS § 224.1-060 preserves Plaintiffs' common-law claims. It is entitled "Pollution control law supplements other laws" and states:

> KRS Chapter 224 and the provisions of 1972 (1st Extra. Sess.) Ky. Acts ch. 3 shall not be construed as repealing any of the laws of the Commonwealth relating to the pollution of the waters thereof or any conservation laws, but shall be held and construed as ancillary and supplementary thereto, except to the extent that the same may be in direct conflict with KRS Chapter 224 and the provisions of 1972 (1st Extra. Sess.) Ky. Acts ch. 3.[14]

[14] Section 224.1-060 is in Chapter 224 ("Environmental Protection") of Title XVIII ("Public Health") of the Kentucky Revised Statutes.

In *Ohio River Sand Co. v. Commonwealth*,[15] the Kentucky Supreme Court held that Kentucky's air-pollution statutes do not preempt common-law nuisance claims. In *Ohio River*, Kentucky indicted the defendant for "maintaining a public nuisance in that the company habitually and continuously did unlawfully cause dust, filth, refuse and waste and other things to be put into the air, atmosphere, streams and waters rendering them offensive and polluted."[16] The "trial court permanently enjoined the company from maintaining the nuisance."[17]

The Kentucky Supreme Court rejected the defendant's argument that "KRS 224.010, etc., abrogates the common-law offense of nuisance where the facts constituting the offense also violate the statute."[18] The Court held that former KRS § 224.100[19] preserved the common-law nuisance claim for *both* air and water pollution: "We believe this section is conclusive that the legislature did not intend

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[15] 467 S.W.2d 347 (Ky. 1971).

[16] *Id*. at 348.

[17] *Id*.

[18] *Id*.

[19] Section 224.100 stated: "KRS 224.010 to 224.060, 224.080 and 224.100 shall not be construed as repealing any of the laws of the Commonwealth relating to the pollution of the waters thereof or any conservation laws, but shall be held and construed as ancillary and supplementary thereto, except to the extent that the same may be in direct conflict with KRS 224.010 to 224.060, 224.080 or 224.100." 467 S.W.2d at 349.

to abrogate the common-law remedies."[20] Former KRS § 224.100 is now KRS § 224.1-060, which is quoted above, but the substance remains the same.

3. Kentucky provides for common-law actions to remedy injuries caused by air pollution.

Damages caused by air pollution are remedied in Kentucky by common-law claims for nuisance. In 1954, in *Searcy v. Kentucky Utils. Co.*,[21] the plaintiffs obtained a judgment for nuisance, where the defendant operated a power plant that spewed ash, soot, and smoke onto the plaintiffs' property. The Court described the harm suffered by the plaintiffs:

> The appellants offered testimony of a number of witnesses to the effect the fly ash, soot and smoke from the power plant had upon their property. The fly ash, soot and smoke were discharged into the air and settled upon the appellants' property with the result that it penetrated the window sills into appellants' residences and settled upon the furniture and clothes therein. Some of the witnesses said the gardens and crops were covered with fly ash, to the extent that they were not fit for consumption. They said also that a person had to wear overshoes when walking on the lawn. The exhibits show that the fly ash, soot and smoke settled upon the outside of the houses and necessitated frequent painting.[22]

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[20] *Id.*

[21] 267 S.W.2d 71 (Ky. 1954).

[22] *Id.* at 72.

The plaintiffs appealed, claiming that the damages were inadequate because of erroneous jury instructions. The Court agreed, explaining that the damages are measured by "the difference in the fair market value of the property prior to the settling of the fly ash, soot and smoke caused by the operation of the power plant and the fair market value of the property resulting from the conditions apparent after the settling."[23]

The Kentucky Supreme Court similarly has held that damages caused by air pollution can be recovered in a nuisance suit. In *Southeast Coal Co. v. Combs*, the defendant operated "a coal tipple, which included utilization of some 120 trucks per day and erection of a stockpile of coal which attained a height of as much as 32 feet and covered up to five acres."[24] The plaintiffs brought a nuisance claim for impurities released into the air. The Supreme Court reversed a verdict for the defendants, holding that a jury instruction improperly informed the jury that the harm had to be caused "solely by reason" of the nuisance. The word "solely" was improper because "[o]ne who *contributes* to a nuisance is responsible in damages and/or diminution of market value *only* to the extent of his contribution, but the

[23] *Id*. at 73.

[24] 760 S.W.2d 83, 83 (Ky. 1988).

fact that others participate in creating the nuisance does not exonerate the contributor completely."[25]

Further, negligence claims can be based on violations of Kentucky's laws and regulations under KRS § 446.070, which states that a "person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." In *Ezell v. Christian County*,[26] this Court held that § 446.070 allowed a plaintiff to pursue an action under KRS § 179.070 based on the failure of a county engineer to remove trees or other obstacles from a right-of-way, because the $100 penalty allowed by § 179.070 did not provide a damage remedy.[27]

Finally, federal statutes can establish a duty for a negligence claim under Kentucky law. In *T&M Jewelry, Inc. v. Hicks*,[28] the Kentucky Supreme Court held that a claim for negligence per se cannot be based on a federal statute but that the federal Gun Control Act of 1968 nonetheless provided the basis for finding a duty of due care. The Court held that "provisions of the Gun Control Act represent a

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[25] *Id*. at 84.

[26] 245 F.3d 853 (6th Cir. 2001).

[27] In *Centre College v. Trzop*, 127 S.W.3d 562, 567 (Ky. 2003), the Supreme Court stated that in the "specific context of public safety regulations … the Court has allowed KRS 446.070 to extend to violations of administrative regulations."

[28] 189 S.W.3d 526 (Ky. 2006).

reasonable and satisfactory duty to impose upon licensed gun dealers in Kentucky. Whether the Castle breached such a duty of care will be for the trier of fact, as will be the other elements of compensable negligence."[29]

C. RCRA.

Plaintiffs seek to enjoin continuing violations, compel remediation, and ask for civil penalties under RCRA.[30] The RCRA claims are based on LG&E's handling of solid waste that may present imminent and substantial dangers to health or the environment, as well as violations of RCRA and Kentucky regulations. Under RCRA, a plaintiff may bring a citizen suit to enforce "any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to [the RCRA]."[31]

II. FACTUAL AND PROCEDURAL BACKGROUND

LG&E's Title V permit was issued in 2002 and expired in 2007.[32] LG&E's former parent applied for a new permit in April 2007, but no renewal had been issued before the Complaint's filing.[33] Beginning in about 2008, Plaintiffs and

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[29] *Id*. at 532-33.

[30] 42 U.S.C. § 6972(a)(1)(A) and (B).

[31] 42 U.S.C. § 6972(a)(1)(A).

[32] Compl., RE 1, Page ID #54, ¶ 191; *id*., Ex. 1-H, RE 1-4, Page ID #174-248.

[33] Mot. to Dismiss, Ex. 3, RE 29-4, Page ID #449-456.

their neighbors noticed a persistent film of dust coating their houses.[34] Removing the film proved futile.[35] Cane Run emitted coal dust and ash onto Plaintiffs' homes several times a month, and some estimate on a near daily basis.[36] The ash and dust coat Plaintiffs' homes, yards, and vehicles, and often prohibit the normal use of their properties.[37] Some Plaintiffs describe regularly feeling a film coating their skin that causes constant itching, like feeling bugs crawling on their skin, often smelling a sulfuring odor, and tasting a metallic taste each time they go outside their home.[38]

The Complaint identifies Cane Run sources that emit coal dust and ash. Chief among them are the emissions stacks, the Sludge Plant, and a Coal Ash Landfill. Solid particulates are released though emission stacks when the techn-ologies designed to capture the particulates malfunction.[39] LG&E uses a "Sludge Plant" (known as an SPP) to mix ash with a cementing agent, and witnesses have

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[34] Compl., RE 1, Page ID #18, ¶¶ 52, 53.

[35] *Id.*, Page ID #18, ¶ 53.

[36] *Id.*, Page ID #31-33, ¶¶ 99, 110; #34 ¶ 120; #36, ¶ 129.

[37] *Id.*, Page ID #18-20, ¶¶ 53-55 (and accompanying photographs); #31, ¶ 102; #33, ¶ 113; #35-36, ¶¶ 122, 131, 132.

[38] *Id.*, Page ID #37, ¶ 133.

[39] *Id.*, Page ID # 11-12, ¶¶ 32, 35, 36 (video link); #23, ¶ 65.

repeatedly documented the Sludge Plant's blasting of ash into the air.[40] LG&E piles ash and other byproducts of coal combustion in a "Coal Ash Landfill." When LG&E got its Title V Permit a decade ago, the Coal Ash Landfill was small and contained. Since then it has grown massive, covering 160 acres and rising more than 100 feet.[41] The Coal Ash Landfill has not been sufficiently covered, and ash blows into surrounding neighborhoods.[42] The ash, dust, and coal combustion byproducts often drive Plaintiffs indoors and forced them to live with windows and doors closed.[43] But the ash migrates inside their homes, sticking to surfaces, requiring chemical solutions to remove, and damaging personal belongings beyond repair.[44]

The byproducts from Cane Run consist of dangerous elements, including arsenic, silica, lead, and chromium, which pose serious health risks.[45] The dangers of exposure to coal dust and particulates have been known for decades and are well known to LG&E, which requires workers to wear hazardous materials suits around

[40] *Id.*, Page ID #12-13, ¶¶ 38, 39; #21-24, ¶¶ 57 (video link), 63, 64, 66.

[41] *Id.*, Page ID #14, ¶ 43.

[42] *Id.*, Page ID #13-14, ¶¶ 42, 44; #17, ¶ 49 (video link); #24, ¶ 67.

[43] *Id.*, Page ID #31, ¶ 102; #33, ¶ 113; #35-36, ¶¶ 122, 131.

[44] *Id.*, Page ID #18-20, ¶ 55 (accompanying photographs); #31-33, ¶¶ 103, 114; #35, ¶ 123; #37, ¶ 135.

[45] *Id.*, Page ID #28-29, ¶¶ 86-87.

the Coal Ash Landfill and Sludge Plant.[46] Coal dust is linked to lung diseases and disorders such as cancer, bronchitis, lung function loss, and emphysema, cardio-pulmonary disease, and serious eye and skin irritation.[47] All Plaintiffs suffer from eye, skin, and lung ailments caused by exposure to Cane Run's emissions.[48]

In 2010, the APCD began investigating complaints by Cane Run's neighbors, who reported that the dust was an "ongoing issue and not a single event."[49] The APCD tested dust samples from the homes and confirmed that the dust was fly ash from the Cane Run facility.[50] In July 2011, based on multiple observations over months, the APCD issued a Notice of Violation ("NOV"), finding that "LG&E allowed fly ash particulate emissions to enter the air and be carried beyond their property line, settling onto surrounding neighborhood properties."[51] These findings showed that LG&E violated APCD regulations, along with limits and conditions in LG&E's Title V Permit.[52] On August 9, 2011,

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[46] *Id.*, Page ID #15-16, ¶ 45.

[47] *Id.*, Page ID #29-30, ¶¶ 88-92.

[48] *Id.*, Page ID #32, ¶ 104; #34-35, ¶¶ 115, 124; #37, ¶ 136.

[49] Compl., Ex. 1-A, RE 1-2, Page ID #85-89.

[50] *Id.*

[51] *Id.*

[52] *Id.*

LG&E submitted a compliance plan for control of fugitive emissions from the plant.[53] The APCD assessed a $4,000 fine for the violations.[54]

LG&E's compliance plan was not effective. In November 2011, the APCD issued an NOV detailing thirteen violations that involved emission of dust and ash from several sources on Cane Run.[55] At least six incidents of escaped ash occurred after LG&E submitted its compliance plan.[56] The APCD assessed $26,000 in fines and again asked LG&E to submit a compliance plan.[57]

Despite repeated compliance plans, LG&E continued to violate APCD regulations and the conditions set out in its expired Title V Permit. Between July 2012 and August 2013, the APCD issued four NOVs that detailed dozens of incidents that violated LG&E's Title V Permit.[58] The NOVs required LG&E to submit multiple compliance plans and levied penalties of more than $104,000.[59]

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[53] *Id.*

[54] *Id.*

[55] Compl., RE 1, Page ID #23, ¶ 64; Compl., Ex. 1-B, RE 1-2, Page ID #90-107.

[56] Compl., Ex. 1-B, RE 1-2, Page ID #90-107.

[57] *Id.*

[58] *See* Compl., RE 1, Page ID #23-25, ¶¶ 64-69; Compl., Ex. 1-C, RE 1-2, Page ID #108-126; Ex. 1-D, RE 1-3, Page ID #128-131; Ex. 1-F, RE 1-4, Page ID #157-169; Ex. 1-G, RE 1-4, Page ID #170-174.

[59] *Id.*

Allegations that the offending dust, ash, and coal combustion byproducts came from Cane Run are based on studies and investigations conducted by the APCD and by LG&E's own studies. These investigations concluded that the dust coating the neighboring homes indeed contains significant amounts of dangerous fly ash and bottom ash, and that the ash originated from Cane Run.[60] LG&E's reports to the APCD and the EPA admit to releasing thousands of tons of coal combustion particulates each year and to being non-compliant with the CAA since at least 2010.[61]

On September 6, 2013, Plaintiffs provided a Notice of Intent to Sue to both defendants in this litigation, to EPA Administrators, the U.S. Attorney General, the Commissioner of the Kentucky Department for Environmental Protection, the Director of the Kentucky Division of Waste Management, and the Director of the APCD.[62] Plaintiffs filed this action more than 90 days from when notice was delivered to each recipient. The notice identifies past and continuing statutory and regulatory violations and of LG&E's Title V operating permit.[63] The notice

[60] Compl., RE 1, Page ID #25-26, ¶¶ 70-75; Compl., Ex. 1-E, RE 1-3, Page ID #132-155; Ex. 2, RE 1-5, Page ID #249-263.

[61] Compl., RE 1, Page ID #26-27, ¶¶ 76-77.

[62] *Id.*, #43 ¶¶ 153-154; Compl., Ex. 1, RE 1-2 – 1-8, Page ID #66-283.

[63] Compl., Ex. 1, RE 1-2 – 1-8, Page ID #66-283.

incorporated six NOVs that identified dozens of dates and times on which LG&E violated regulations by emitting coal dust and ash. Neither the EPA nor any state entity filed a court action based on the incidents and violations in the Notice.

Plaintiffs' Complaint sets forth claims for violations of the CAA and RCRA, as well as state-law claims for nuisance, trespass, negligence, negligence per se, and gross negligence.[64] LG&E moved to dismiss Plaintiffs' complaint in its entirety, pursuant to Federal Rules 12(b)(1) and 12(b)(6).[65] The district court denied LG&E's motion to dismiss as to all of Plaintiffs' state-law claims, finding that the CAA does not preempt state common law causes of action.[66] The district court did, however, grant LG&E's motion to dismiss certain of Plaintiffs' CAA claims, on the following grounds:

1. For lack of Article III standing, as to Plaintiffs' CAA claims grounded on NOVs issued by the APCD and set forth in paragraph 189 of the Complaint;[67]

2. For lack of Article III standing, as to Plaintiffs' CAA claims for declaratory and injunctive relief, grounded on continuing, substantially similar violations to those identified in the NOVs;[68]

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[64] Compl., RE 1 Page ID #43-61, ¶¶ 155-236.

[65] Mot. to Dismiss, RE 29, Page ID #375-556.

[66] Op. & Order, RE 49, Page ID #792.

[67] *Id.* at Page ID #760-63.

[68] *Id.* at Page ID #763-69.

3. For inadequate notice, pursuant to 40 C.F.R. § 54.3(b), as to Plaintiffs' CAA claims for civil penalties, grounded on continuing, substantially similar violations to those identified in the NOVs[69] and for LG&E's violation of opacity limits set by Cane Run's Title V Permit.[70]

The district court also dismissed Plaintiffs' RCRA claims, under 42 U.S.C. §§ 6972(a)(1)(A) and (a)(1)(B). To the extent it found Plaintiffs' RCRA claims to rest on the incidents described in the NOVs, the district court held that Plaintiffs failed to state a claim under 42 U.S.C. § 6972(a)(1)(A)[71] and that the court lacked jurisdiction over Plaintiffs' § 6972(a)(1)(B) claim because the claim constituted a collateral attack on Cane Run's permits and the Agreed Board Order entered into by LG&E with the APCD.[72] To the extent it deemed Plaintiffs' RCRA claims to be based on allegations of continuing, substantially similar conduct to that described in the NOVs and on storm water discharge, the district court dismissed Plaintiffs' RCRA claims for inadequate notice, pursuant to 40 C.F.R. § 254.3(a).[73]

The court made additional rulings that are not the subject of this appeal, denying LG&E's motion to dismiss Plaintiffs' CAA claim that LG&E operated

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[69] *Id.* at Page ID #769-72.

[70] *Id.* at Page ID #772-73.

[71] *Id.* at Page ID #777-84.

[72] *Id.* at Page ID #784-87.

[73] *Id.* at Page ID #776-77.

Cane Run without a Title V permit,[74] and denying the motion to the extent it sought dismissal of all claims against defendant PPL.[75]

SUMMARY OF ARGUMENT

The district court correctly held that Congress did not intend the CAA to preempt common-law claims by plaintiffs who suffer injuries from air pollution. The CAA's citizen-suit provision does not allow citizens to obtain damages and only allows for limited injunctions. Penalties awarded in a citizen suit are paid to the federal government, not to plaintiffs who suffered harm.

Congress preserved common-law claims in the citizen-suit provision of the Act, which provides that "[n]othing 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…."[76] And as this Court has stated, "The Clean Air Act established only minimum air quality levels, however, and states are free to adopt more stringent protections."[77]

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[74] *Id.* at Page ID #773-75.

[75] *Id.* at Page ID #793-94.

[76] 42 U.S.C. § 7604(e).

[77] *Her Majesty the Queen in Rt. of Prov. of Ontario v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989).

The CAA does not preempt Plaintiffs' common-law suits. As the Supreme Court stated in *Exxon Shipping Co. v. Baker*, "we find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals."[78] Similarly here, it is too hard to conclude that the CAA was intended to eliminate *sub silentio* the common-law duties of LG&E to refrain from injuring its neighbors.

In *International Paper Co. v. Ouellette*,[79] the Supreme Court held that the Clean Water Act ("CWA") does not preempt common-law claims under the laws of the source state. Similarly, the CAA does not preempt Plaintiffs' common-law claims. Plaintiffs sue under the laws of Kentucky, the source state.

Under LG&E's misguided theory, Congress intends the CAA to bar people injured by air pollution from recovering *any* damages under *any* circumstances, and from obtaining injunctive relief under longstanding tort principles. The CAA does not provide any means for Plaintiffs to recover damages and provides for only limited injunctive relief in citizen suits under the Act. And yet LG&E contends that Congress intended to prevent Plaintiffs, whose properties have been covered

[78] 544 U.S. 472, 488-89 (2008).

[79] 479 U.S. 481 (1987).

by pollutants for years and who have suffered personal injuries, from bringing common-law action claims to recover damages for their losses and to obtain injunctive relief to bar LG&E from continuing to shower them with pollutants. LG&E's proposed rule of law is not supported by any CAA provision or any legislative history, and is belied by the CAA's savings clause. The district court correctly rejected LG&E's argument in holding that the CAA does not preempt Plaintiffs' common-law claims.

The district court erred in dismissing Plaintiffs' claims to enjoin continuing violations and for civil penalties under the CAA and to obtain injunctive relief under RCRA to force LG&E to remediate the damage it has caused to Plaintiffs' properties. The CAA claims are based on LG&E's repeated and continuing violations of emissions standards and limits in its permit and in regulations Kentucky adopted under the Act. Plaintiffs' RCRA claims are based on LG&E's handling of waste that may present imminent and substantial dangers to health or the environment. As demonstrated below, the district court erred in dismissing the claims under those federal statutes, because Plaintiffs gave proper notice and because the actions of the air pollution control district do not preclude Plaintiffs' claims against LG&E under those statutes.

ARGUMENT

This Court reviews *de novo* the district court's ruling on LG&E's motion under Rule 12(b)(6).[80] To the extent the district court relied on Rule 12(b)(1), if at all, in dismissing Plaintiffs' CAA and RCRA claims, this Court applies a *de novo* standard, but "[w]here the district court does not merely analyze the complaint on its face, but instead inquires into the factual predicates for jurisdiction, the decision on the Rule 12(b)(1) motion resolves a 'factual' challenge rather than a 'facial' challenge, and we review the district court's factual findings for clear error."[81]

I. THE CAA DOES NOT PREEMPT PLAINTIFFS' COMMON-LAW CLAIMS

The Supreme Court has explained that there are "two cornerstones of our pre-emption jurisprudence."[82] First, "the purpose of Congress is the ultimate touchstone in every pre-emption case."[83] Second, "in all pre-emption cases … we 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

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[80] *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 832 (6th Cir. 2015).

[81] *Stew Farm, Ltd. v. Natural Res. Conservation Serv.*, 767 F.3d 554, 558-59 (6th Cir. 2014).

[82] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

[83] *Id*. (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted)).

Congress."[84] LG&E fails to demonstrate that it was the clear and manifest purpose of Congress to preempt Plaintiffs' common-law claims.

A. LG&E fails to establish that Congress intended the Clean Air Act to preempt common-law tort claims.

LG&E first erroneously contends that Plaintiffs' common-law claims are preempted because "Congress committed regulation of air pollutants to EPA, not the courts."[85] Congress did no such thing, as demonstrated by *International Paper Co. v. Ouellette*,[86] in which the Supreme Court held that Congress did not intend for the CWA to preempt common-law claims for water pollution under the laws of the source State. In *Ouellette*, Vermont plaintiffs alleged that a factory discharged pollutants into a lake from New York. The Court considered whether the CWA "pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York."[87]

The Court held that the plaintiffs could not sue under Vermont law (the affected state) but could proceed under the law of the state where the pollution originated (the source state). The Court explained that the CWA's savings clause

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[84] *Id*. (quoting *Lohr*, 518 U.S. at 485 (internal quotation marks omitted)).

[85] Appellants' Br. at 32.

[86] 479 U.S. 481 (1987).

[87] *Id.* at 483.

"negates the inference that Congress 'left no room' for state causes of action."[88] As the Court stated, 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."[89]

The Court stressed that a nuisance claim under the laws of the source state does not frustrate the CWA's goals, even if those laws imposed separate standards:

> An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law. First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, 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. *Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable*. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.[90]

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[88] *Id.* at 492.

[89] *Id.* at 497.

[90] *Id.* at 498-99 (footnotes omitted; emphasis added). The American Chemistry Council erroneously argues that the Court based its holding in *Ouellette* on CWA § 1370A, which states that "'nothing in this [Act] shall … be construed as impair-

And the Court held that the plaintiffs' common-claim for injunctive relief was not preempted. The Solicitor General argued that while damages suits under the common law of the source state are not preempted, "suits seeking *punitive* or *injunctive* relief under affected-state law should be pre-empted because of the interference they cause with the CWA."[91] The Court rejected that argument, because "unless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available…."[92]

Ouellette applies equally to CAA claims. In *Her Majesty*, this Court held that the CAA did not preempt claims under the Michigan Environmental Protection Act ("MEPA"). This Court quoted the Supreme Court's explanation in *Washington v. General Motors Corp*., that States have broad control over air pollution:

> Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress

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ing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'" American Chemistry Council Brief at 24 (quoting 479 U.S. at 485, which quoted 33 U.S.C. § 1370). In fact, the Court cited § 1370 in holding that the CWA did *not* "preserve the right to bring suit under the law of any affected State." 479 U.S. at 492. The Court did not cite § 1370 in holding that the CWA does *not* preempt common-law claims under the laws of the source States.

[91] 479 U.S. at 498 n.19.

[92] *Id*.

> has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." To be sure, Congress has largely pre-empted the field with regard to "emissions from new motor vehicles," and motor vehicle fuels and fuel additives. It has also pre-empted the field so far as emissions from airplanes are concerned. *So far as factories, incinerators, and other stationary devices are implicated, the States have broad control*….[93]

This Court stressed 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*."[94]

This Court then held that "the plain language of the CAA's savings clause compels the conclusion that neither of the groups of plaintiffs are precluded by the CAA from pursuing claims under the MEPA. It clearly indicates that Congress did not wish to abolish state control."[95] According to this Court, "that Congress did not seek to preempt actions such as involved in this appeal is clearly indicated by the Court's holding in *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)."[96]

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[93] 874 F.2d at 342 (emphasis supplied by Sixth Circuit) (quoting *Washington*, 406 U.S. 109, 114 (1972)).

[94] *Id*. (emphasis in original).

[95] *Id*. at 342-43.

[96] *Id*. at 343.

This Court rejected the defendants' argument that *Ouellette* was distinguishable because it involved the CWA rather than the CAA:

> [T]here was no reason to think that the result with regard to air pollution should be different. The opinion indicates that the air pollution claims were simply not before the court. *Id*., 107 S. Ct. at 807 n.2. Moreover, on remand, the *International Paper* district court did hold that the air pollution claims could proceed, concluding that the Supreme Court's holding applied equally to them.[97]

Finally, this Court explained that the claims were not preempted even if they might result in more stringent pollution controls than federal law imposed:

> [T]he plaintiffs' actions in state court, if successful, will not in any way alter or modify the validity of the federal permit previously issued. That permit will still be in existence, and will still be of full legal effect. If the plaintiffs succeed in state court, it will simply be an instance where a state is enacting and enforcing more stringent pollution controls as authorized by the CAA. With MEPA, the State of Michigan has created a mechanism under which more stringent limitations may be imposed than required by federal law. It is, by its terms, supplemental to other legal and administrative procedures and requirements, and in this case principles of comity and federalism require us to hold these MEPA actions are not preempted by federal law.[98]

While the issue in *Her Majesty* was complete preemption, this Court held that the claims were not preempted *at all*, let alone completely preempted.

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[97] *Id*.

[98] *Id*. at 344.

This Court's preemption analysis in *Her Majesty* applies fully to Plaintiffs' common-law claims here. As shown above, Kentucky has long provided remedies under common law to people injured by air pollution. Moreover, Kentucky's air-pollution laws explicitly preserve such common-law remedies, under KRS § 224.1-060. And as the Court stated in *Ouellette*: "Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements."[99] Similarly here, LG&E only needs to look to the common law of Kentucky.

LG&E erroneously relies on *American Elec. Power Co. v. Connecticut* ("*AEP*"),[100] in which the Supreme Court held that the CAA displaced federal common law. In *AEP*, several States, the city of New York, and three private land trusts brought federal common-law nuisance claims against carbon-dioxide emitters. The plaintiffs sought broad relief, asking "for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually."[101]

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[99] 479 U.S. at 499 (footnote omitted).

[100] 131 S. Ct. 2527 (2011).

[101] *Id*. at 2532.

In holding that the CAA displaced federal common law, the Court stated 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 pre-emption of state law."[102] So, as the Third Circuit explained in *Bell v. Cheswick Generating Station*,[103] "the displacement finding in [*AEP*] hardly compels – or even presages – a corresponding finding of preemption."

LG&E erroneously relies on *AEP* when it claims that "like the plaintiffs in *AEP*, [Plaintiffs] now ask a federal court to second-guess the expert judgment of the agencies to which Congress has assigned the task of determining the acceptable level of particulate emissions from Cane Run."[104] In *AEP*, the plaintiffs sought "a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually."[105] Here, in contrast, Plaintiffs seek damages under State common law for injuries caused by LG&E's flouting of federal and state law, and under predictable standards long established under Kentucky's common law. The Supreme Court held in *Ouellette* that the CWA does not preempt such claims, and the CAA also does not preempt them.

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[102] *Id*. at 2537 (citation omitted).

[103] 734 F.3d 188, 197 (3d Cir. 2013).

[104] Appellants' Br. at 5.

[105] 131 S. Ct. at 2532.

Despite *AEP*, the Second and Third Circuits have both rejected claims that the CAA preempts common-law claims. In *Bell*, the Third Circuit held that the CAA does not preempt "state law tort claims brought by private property owners against a source of pollution located within the state."[106] The plaintiffs alleged that ash and other contaminants from a power plant covered their properties with black dust, causing harmful and noxious odors. The district court held that the CAA preempted the plaintiffs' common-law claims.

The Third Circuit reversed, relying on *Ouellette*. As the Court explained, "Given that we find no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis, we conclude that the Supreme Court's decision in *Ouellette* controls this case, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located."[107] The Court explained that the requirements for pollution sources under the CAA are a "regulatory floor,"[108] letting States impose higher standards, including by common-law tort actions.

[106] 734 F.3d at 189-90.

[107] *Id*. at 196-97.

[108] *Id*. at 197-98.

Similarly, the Second Circuit rejected Exxon's argument in *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*,[109] that the CAA preempted a nuisance claim by the City of New York and for contamination of groundwater from the gasoline additive methyl tertiary butyl ether ("MTBE"). Exxon appealed from a judgment for the City. The Second Circuit rejected Exxon's argument that it could not comply with federal law and with the judgment. The Court held that Exxon had not established that Congress had a clear and manifest intent to preempt state-law tort judgments. Similarly, in *Freeman v. Grain Processing Corp.*,[110] the Iowa Supreme Court held that the CAA did not preempt common-law claims by the plaintiffs against a corn wet-milling facility for causing "harmful pollutants and noxious odors to invade their land, thereby diminishing the full use and enjoyment of their properties." The Court held that the claims were not preempted because they sought relief for specific injuries, not broad regulatory changes.[111]

Moreover, the cases relied on by LG&E do not support its argument. LG&E relies principally on a Fourth Circuit case that did not involve a claim by injured people for damages and related injunctive relief. In *North Carolina ex rel. Cooper*

[109] 725 F.3d 65 (2d Cir. 2013).

[110] 848 N.W.2d 58, 63 (Iowa 2014).

[111] *Id.* at 84.

v. TVA,[112] North Carolina brought a nuisance suit against the TVA, which owned and operated eleven coal-fired power plants in Tennessee, Alabama, and Kentucky. The district court entered an injunction under North Carolina law, requiring the immediate installation of emissions controls at four TVA generating plants located in Alabama and Tennessee.

The Fourth Circuit held that the CAA preempted that claim, because the district court applied "North Carolina law extraterritorially to TVA plants located in Alabama and Tennessee."[113] The Court stated that it "cannot allow non-source states to ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never intended," i.e., application of the common law of affected states, rather than the common law of the source state. In addition to improperly applying the laws of an affected state, the district court established multi-state emissions standards, which Plaintiffs do not seek in this case. Instead, Plaintiffs seek damages caused by pollution emitted by a single source under the common law of the source state, along with injunctive relief tailored to the harm.[114]

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[112] 615 F.3d 291 (4th Cir. 2010).

[113] *Id*. at 306.

[114] Other cases cited by LG&E do not support its preemption argument. *See Native Village of Kivalena v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012) (holding that the CAA displaces federal common law but not addressing preemption of state law claims); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849

Such claims are not preempted, under the reasoning of *Ouellette*, *Her Majesty*, *Bell*, *MTBE*, and *Freeman.*

B. Plaintiffs' common-law claims do not upset the roles that Congress gave to State and local governments under the Clean Air Act.

LG&E erroneously contends that "Plaintiffs' state common law claims upset the roles the Congress has given state and local governments under the CAA."[115] Plaintiffs' common-law claims are wholly consistent with the CAA's regulatory framework, because they are the sole means by which they can obtain damages. All of LG&E's arguments are disposed of by *Ouellette* and *Her Majesty*. Neither the CWA nor the CAA precludes common-law claims for damages and injunctive relief under the laws of the source state, even if more stringent standards apply in the common-law action.

C. Plaintiffs' common-law claims do not conflict with the role that Congress provided citizens for direct enforcement of the CAA.

LG&E erroneously argues that Plaintiffs' common-law claims "conflict with the role Congress provided for public participation in forming and enforcing the

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(S.D. Miss. 2012) (ruling that the CAA preempted the plaintiffs' common-law claims, but relying solely on the Supreme Court's ruling in *AEP* that the CAA displaces federal common law), *aff'd, Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (5th Cir. 2013) (affirming ruling solely on res judicata grounds, without even discussing preemption).

[115] Appellants' Br. at 37.

requirements of the Act."[116] LG&E raises a red herring by asserting that "when an agency does exercise its enforcement authority and resolves a claim administratively, the Act's regulatory scheme does not permit citizen suits concerning the same conduct merely because the plaintiffs feel the penalties or other remedies imposed by the agency were inadequate."[117] Plaintiffs seek redress for injuries and do not seek a change in penalties or agency remedies.

The flaw in LG&E's argument is revealed by a Sixth Circuit case it cites, *Ellis v. Gallatin Steel Co.*[118] In *Ellis*, this Court affirmed a judgment for nuisance under Kentucky common law, even though this Court also ruled that the plaintiffs' CAA citizen suit was properly dismissed. Dust particles from the defendant's manufacturing operations migrated to the plaintiffs' family farm and residence. The plaintiffs filed a citizen suit under federal laws, including the CAA, and also sued for common-law nuisance under Kentucky law. After the defendants entered into a consent decree, the district court granted summary judgment for the defendants in the citizen suits, ruling that the consent decrees operated as a res judicata bar. But in a subsequent bench trial, the district court found that the defendants'

[116] Appellants' Br. at 41.

[117] *Id*. at 48.

[118] 390 F.3d 461 (6th Cir. 2004).

"fugitive-dust violations constituted a common-law nuisance under state law."[119] To "remedy the nuisance, the court awarded each plaintiff $24,570 in compensatory damages (for the reduction in the rental value of their property) and a lump sum of $750,000 in punitive damages to the plaintiffs collectively."[120]

On appeal, this Court first rejected the defendants' "challenges to the compensatory and punitive damage awards under state nuisance law."[121] This Court also affirmed the injunction based on the nuisance claim.[122] Despite affirming the nuisance judgment for the plaintiffs, this Court held that the district court properly entered summary judgment against them on the ground that the consent decree barred their citizen suits under the CAA.

Ellis fatally undermines LG&E's erroneous assertion that "[p]ermitting common law suits based on the same conduct that an agency has already addressed through an enforcement action would work [an] impermissible interference with Congress's regulatory scheme."[123] In *Ellis*, the district court correctly entered summary judgment for the defendants on the plaintiffs' citizen suits but then held a

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[119] *Id*. at 469.

[120] *Id*.

[121] *Id*.

[122] *Id*. at 472.

[123] Appellants' Br. at 45.

bench trial and awarded monetary and injunctive relief on the plaintiffs' nuisance claim under Kentucky law. Similarly here, Plaintiffs' common-law claims would be viable even if they lacked direct claims under federal law.[124]

The other two cases cited by LG&E also do not support its argument that Plaintiffs' claims under common law would interfere with the regulatory scheme. In *Gwaltney*, the Court explained that under section 7604 of the CAA, "'a citizen can obtain an injunction but cannot obtain money damages for himself….'"[125] The Court did not discuss whether people who suffer injuries from air pollution can obtain damages in common-law suits. And in *Envtl. Conservation Org. v. City of Dallas*,[126] the Fifth Circuit stated that "ECO assumed the role of private attorney general in the pursuit of its citizen suit. Any penalty that it achieved would have

[124] *Ellis* did not address preemption, but it nonetheless stands for the proposition that a nuisance claim under State law does not interfere with regulatory proceedings under the Clean Air Act.

[125] 484 U.S. at 61 (quoting 118 Cong. Rec. 33717 (1972), 1 Leg. Hist. 221 (Sen. Bayh)). In light of *Gwaltney*, Congress amended the CAA to allow citizens to bring an action under section 7604 for repeated past violations, but the CAA still does not permit an award of damages in a citizen suit. *See Atl. States Legal Found. v. United Musical Instrs.*, 61 F.3d 473, 477 (6th Cir. 1995) ("after *Gwaltney*, Congress amended the Clean Air Act … explicitly to allow citizen suits for purely historical violations").

[126] 529 F.3d 519, 531 (5th Cir. 2008).

been paid into the United States Treasury." The court did not address whether ECO could seek damages in a common-law action.

D. Actions by the District and Board do not resolve or preempt Plaintiffs' common-law claims for damages and particularized injunctive relief.

LG&E incorrectly argues that Plaintiffs' common-law claims are preempted because "the District and the Board took action to resolve the very same allegations regarding emission issues at Cane Run that underlie Plaintiffs' complaint." There are two fundamental flaws with that argument. First, neither the District nor the Board has any power to award damages or other relief to Plaintiffs and the putative class for the severe injuries they have suffered for years, both to their persons and to their property. Nonetheless, in LG&E's view, Plaintiffs have no recourse whatsoever to obtain relief for their injuries, merely because the District and Board took action against them. But they provide no support for that claim.

Second, through their common-law claims, Plaintiffs seek to give effect to Kentucky's SIP and the Permit requirements. The common-law claims arise from LG&E's failure to operate its facility without releasing toxic ash and dust onto the surrounding neighborhood. Plaintiffs allege that this failure violates limits in LG&E's expired permit and Kentucky's SIP, such that LG&E is liable under Kentucky's common law.

LG&E's Permit prohibits emission of particulate matter of greater than 20% opacity. Plaintiffs allege LG&E violated opacity limits and released hundreds of tons of ash from various sources. The permit also prohibits operation "that results in excess emissions of a regulated air pollutant that would endanger the public or the environment." But that is precisely how Plaintiffs allege LG&E operated Cane Run, and these allegations serve as a basis for negligence, nuisance, and trespass claims. Plaintiffs rely on repeated SIP and Permit violations documented by the APCD notices, APCD dust investigation, a study LG&E commissioned, reports of local residents, and photographs and videos.[127] Seeking recovery under the common law for duties created in part by the Title V Permit is not a collateral attack on the Permit. Indeed, Plaintiffs seek to enforce the duties created by the Permit, not to challenge it.

E. Congress did not intend to provide polluters with certainty and predictability at the expense of injured people, who would be left without a remedy.

LG&E incorrectly argues that "Plaintiffs' common law claims would eliminate the uniformity, certainty and predictability afforded by the Clean Air Act's

[127] *See, e.g.*, Compl., RE 1, Page ID #6-8, ¶¶ 9-13; #12-17, ¶¶ 36-49; #18-21, ¶¶ 55-57.

permitting regime."[128] LG&E does not and cannot cite any authority for the proposition that Congress was so intent on providing certainty to companies that emit pollutants that it denied injured people any remedy to obtain damages for their losses. In *Exxon Shipping Co. v. Baker*,[129] the Supreme Court rejected Exxon's argument that the CWA *sub silentio* preempted a common-law claim for punitive damages:

> If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.[130]

Similarly, LG&E does not cite any statutory authority or legislative history for the proposition that the CAA *sub silentio* bars common-law claims by people injured by air pollution.

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[128] Appellants' Br. at 48.

[129] 554 U.S. 471 (2008).

[130] *Id*. at 488-89.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' STATUTORY CLAIMS

Plaintiffs seek injunctive relief and penalties under the CAA and RCRA. The district court dismissed those claims.[131] As discussed below, the dismissal of those claims should be reversed.

A. Plaintiffs state a valid claim under the Clean Air Act.

1. The Agreed Board Order did not deprive Plaintiffs of standing to seek relief under the Clean Air Act.

LG&E seeks to use the Agreed Board Order entered into by LG&E with the Louisville APCD ("Board Order") to insulate itself from CAA liability. The district court correctly found that the Board Order did not constitute an "action" within the meaning of § 7604(b)(1)(B) and, therefore, could not preclude Plaintiffs' CAA citizen suit on statutory jurisdictional grounds.[132] But the district court erred in finding that the Board Order deprived Plaintiffs of Article III standing with respect to their CAA claims based on the Notices of Violations that

[131] In this interlocutory appeal, Plaintiffs are not appealing the RCRA claim in Count I of the Complaint but instead are appealing the dismissals of Count II (RCRA) and Count III (CAA).

[132] Op. & Order, RE 49, Page ID #761 (citing *Jones v. City of Lakeland*, 224 F.3d 518, 521 (6th Cir. 2000) (en banc)).

the APCD issued to LG&E ("NOV claims").[133] This finding was contrary to both United States Supreme Court and Sixth Circuit precedent.

Plaintiffs' NOV claims are set forth in paragraph 189 of the Complaint.[134] According to the district court, the NOV claims cannot be redressed because the Board Order, which purported to settle the NOVs, states that: (1) "the APCD found LG&E's control plan to be 'reasonable and adequate'"; and (2) "LG&E 'demonstrated compliance' at Cane Run by submitting to the control plan."[135] As a result, the district court held that the Board Order rendered Plaintiffs' NOV claims "wholly past violations," for which Plaintiffs lacked Article III standing.[136]

The district court mistakenly relied on the Supreme Court's ruling in *Steel Co. v. Citizens for a Better Env't*.[137] In *Steel Co.*, the defendant complied with the Emergency Planning and Community Right to Know Act ("EPCRA") before the citizen suit was filed. Specifically, the defendant brought all of its EPCRA-required storage and emissions report filings with relevant agencies up to date

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[133] *Id*. at Page ID #761-63.

[134] Compl., RE 1, Page ID #49-54, ¶ 189.

[135] Op. & Order, RE 49, Page ID #762.

[136] *Id.*

[137] 523 U.S. 83 (1998). *See* Op. & Order, RE 49, Page ID #762.

before the lawsuit was filed.[138] So the ruling in *Steel Co.* turned on whether the plaintiff had Article III standing to bring an EPCRA citizen suit for wholly past violations, and the Court held that it did not.[139]

But the district court erroneously equated the facts of *Steel Co.*, in which the violations had ceased, to the Board Order here in which the APCD agreed to settle outstanding violations in return for the payment of fines and LG&E's submission to a control plan. In so doing, the district court used the Board Order to determine, as a matter of fact, that the violations described in the NOVs had ceased. But as the controlling precedent discussed below demonstrates, the district court erred in relying on the Board Order, because Plaintiffs have alleged both repeated past violations and continuing violations of the CAA,[140] which show LG&E's current failure to comply with both the CAA and the control plan, as well as a future likelihood of non-compliance.

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[138] 523 U.S. at 87-88. *See id.* at 106 (explaining that there was "no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation").

[139] *Id.* at 109 ("Because respondent alleges only past infractions of EPCRA, and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury.").

[140] Compl., RE 1, Page ID #49-54, ¶¶ 188-192.

The Supreme Court's holding in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*,[141] confirms that an administrative settlement, such as the Board Order, does not per se deprive citizen suit plaintiffs of Article III standing. In *Laidlaw*, the Supreme Court held that plaintiffs had Article III standing to sue for both civil penalties and injunctive relief under the CWA, despite the facts that the defendant: (1) entered into a settlement with a state agency, before the citizen suit was filed, for $100,000 in civil penalties and an agreement to comply with its permit obligations, facts analogous to those in this case; and (2) had come into compliance with its permit during the pendency of the suit.[142] Nevertheless, the Supreme Court reversed the Fourth Circuit's decision vacating the judgment against the defendant, and held that the plaintiffs had Article III standing to pursue both injunctive relief and civil penalties.

With respect to injunctive relief, *Laidlaw* concluded that the plaintiffs had demonstrated Article III standing, because the challenged emissions were ongoing at the time the complaint was filed and the "affidavits and testimony" submitted by the plaintiffs showed that the defendant's activities directly affected the affiants'

[141] 528 U.S. 167 (2000).

[142] *Id.* at 178.

interests.[143] *Laidlaw* also held that the plaintiffs had Article III standing as to their claim for civil penalties because, where there are allegations of ongoing violations at the time of suit, civil penalties provide redress for a plaintiff "who is injured or faces the threat of future injury."[144]

Here, Plaintiffs have alleged ongoing violations of the CAA.[145] And in support of their Opposition to Defendants' Motion to Stay Discovery,[146] which was filed more than two months after the Complaint, Plaintiffs submitted declarations from plaintiffs Kathy Little and Greg Walker, attesting that the polluting activity described in the Complaint and the NOVs was continuing.[147] Under *Laidlaw*, these allegations and evidence of ongoing violations precluded the district court from relying solely on the Board Order in finding that Plaintiffs lacked Article III standing. Indeed, *Laidlaw* makes clear that whether a plaintiff, in fact, lacks Article III standing is an evidentiary issue not amenable to resolution on a motion to dismiss

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[143] *Id*. at 184-85.

[144] *Id.* at 185.

[145] Compl., RE 1, Page ID #54-55, ¶¶ 193, 197; *see also* Page ID #5-6, ¶¶ 7, 10; #11-12, ¶¶ 30, 32, 36; #16-17, ¶ 46; #28, ¶ 82; #31, ¶¶ 99, 100; #44, ¶ 161; #47, ¶ 173; #49-57, ¶¶ 189, 194-197, 201, 206.

[146] Opp. to Stay Discovery, RE 40, Page ID #584-593.

[147] Feb. 24, 2014, Little Decl., RE 40-1, Page ID #595-96; Feb. 24, 2014, Walker Decl., RE 40-2, Page ID #598-99.

and that a settlement with a state administrative agency cannot be substituted for a factual inquiry into whether the alleged ongoing violations have indeed ceased.

If the district court was correct that *Steel Co.* was applicable to cases like this one, then the *Laidlaw* Court would have affirmed the Fourth Circuit's order directing dismissal of the plaintiffs' case, because the defendant in *Laidlaw* had entered into a settlement with a state agency regarding the polluting activity at issue, prior to the filing of the plaintiffs' suit. A pre-suit settlement with a state agency was not an issue in *Steel Co.* So *Laidlaw*, not *Steel Co.*, is the relevant precedent in this case as to the effect of the Board Order, and *Laidlaw* compels the reversal of the district court's dismissal of Plaintiffs' NOV claims.

Laidlaw is not alone in compelling this result. Unlike the EPCRA, the CAA permits citizen suits to be brought to recover for what the district court incorrectly termed "wholly past" violations of the statute where, as here, such violations are repeated. In *Atl. States Legal Found. v. United Musical Instrs.*,[148] this Court stated that "after *Gwaltney*, Congress amended the Clean Air Act … explicitly to allow citizen suits for purely historical violations."

[148] 61 F.3d 473, 477 (6th Cir. 1995) (citing 42 U.S.C. § 7604(a), which allows citizen suits against any person "alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation" of an emission limit or standard).

Each NOV incorporated in the Complaint details repeated violations. The July 22, 2011, NOV describes ongoing violations that were observed in December 2010, February 2011, and April 2011.[149] The November 3, 2011, NOV describes thirteen separate violations that occurred on June 21, July 15, 18, 29, and 30, and August 4, 11, 12, 19, and 22, 2011.[150] The July 9, 2012, and June 5, 2013, NOVs each include multiple Incident/Violation Reports and describe violations that were repeated between January 2012 through June of 2013.[151] And the August 2, 2013, NOV describes repeated violations over the course of 13 days in June 2013.[152]

Under the CAA, 42 U.S.C. § 7604(a), Plaintiffs have standing to sue on the violations described in the foregoing NOVs whether or not they are past violations, because these violations were repeated. Thus, the district court's reasoning, founded on *Steel Co.*'s reading of EPCRA, cannot be reconciled with the plain language of the CAA.

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[149] Compl. Ex. 1-A, RE 1-2, Page ID #85-89.

[150] Compl. Ex. 1-B, RE 1-2, Page ID #90-107.

[151] Compl. Ex. 1-C, RE 1-2, Page ID #108-126; Compl. Ex. 1-F, RE 1-2, Page ID #157-169.

[152] Compl. Ex. 1-G, RE 1-2, Page ID #170-74.

The district court's dismissal of Plaintiffs' NOV claims is also inconsistent with this Court's *en banc* decision in *Jones v. City of Lakeland*.[153] *Jones* reversed a district court ruling that a citizen suit seeking injunctive relief and civil penalties under the CWA was barred by administrative enforcement activities against the defendant, by the Tennessee Department of Environment and Conservation ("TDEC").[154] *Jones* held that the TDEC's administrative enforcement activity, which included a 10-year history of consent orders and collecting fines from the defendant, did not bar plaintiffs' citizen suit, because this activity did not constitute an "action in a court of the United States, or a State" under the CWA.[155] As this Court explained, "In an effort to satisfy the dictates of the statute, the trial court committed reversible error by according the TDEC, a state *administrative agency*

[153] 224 F.3d 518 (6th Cir. 2000) (en banc).

[154] *Id.* at 522. The citizen-suit provisions in the Clean Water Act and Clean Air Act are interpreted similarly. *See Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997) ("Courts have relied on cases interpreting the citizen suit provisions in each of these statutes [i.e., the CWA, CAA, and RCRA] to interpret the other's citizen suit provision.").

[155] 33 U.S.C. §1365(b). The Clean Air Act contains a nearly identical provision, which states that a citizen suit is precluded only by a previously filed "action in a court of the United States or a State." 42 U.S.C. § 7604(b)(1)(B).

charged by the state legislature with supervising water quality, the status of *a court* of the United States or a State." [156]

The holding in *Jones* is in accord with similar decisions in this and other circuits finding that administrative enforcement of the kind engaged in by the APCD here does not bar citizen suits, because it does not constitute court action.[157] While *Jones* and these other cases did not explicitly address Article III standing, they highlight a fault in the district court's reasoning. Specifically, to affirm the district court would be to accept that this Circuit in *Jones*, as well as numerous other courts, failed to recognize that administrative enforcement could deprive plaintiffs of Article III standing, even if such enforcement did not bar their suits on statutory jurisdictional grounds.

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[156] 224 F.3d at 522-23.

[157] *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 754 (7th Cir. 2004) (Clean Water Act citizen-suit bar does not apply unless government files suit first); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987) (agency's order did not preclude citizen suit because agency proceedings are not a court action); *Coalition for Health Concern v. LWD, Inc.*, 834 F. Supp. 953, 956 (W.D. Ky. 1993) ("enforcement of the agreed order constitutes administrative action, not diligent prosecution of a court action within the meaning of [RCRA]"), *rev'd on other grounds*, 60 F.3d 1188 (6th Cir. 1995); *Lykins v. Westinghouse Elec. Corp.*, 715 F. Supp. 1357 (E.D. Ky. 1989) (administrative action filed before RCRA citizen suit did not bar the suit because it was not an action filed in court); *Sierra Club v. City & Cnty. of Honolulu*, No. 04–00463, 2008 U.S. Dist. LEXIS 37896, at *19 (D. Haw. May 7, 2008) ("the administrative orders were not the functional equivalent of court action, and cannot demonstrate diligent prosecution").

Given the longstanding principle that courts have an independent duty to examine Article III standing,[158] it is not credible to read *Jones* and related cases as overlooking what the district court believed to be the effect of agency enforcement actions on Article III standing. It is better to interpret these decisions consistent with *Laidlaw*, as standing for the principle that agency enforcement actions, including consent orders like the Board Order, do not automatically deprive citizen-suit plaintiffs of Article III standing.

For the foregoing reasons, the district court's dismissal of Plaintiffs' CAA claims, which are grounded on the NOVs described in paragraph 189 of the Complaint, should be reversed.

2. Plaintiffs have standing to seek injunctive relief for ongoing violations of the Clean Air Act.

The district court erred by ruling that Plaintiffs lack Article III standing to seek injunctive relief for continuing CAA violations that are "substantially similar" to those set forth in the NOVs.[159] The Complaint alleges that "substantially similar

[158] *See, e.g., Laidlaw*, 528 U.S. at 180 ("we have an obligation to assure ourselves that [the plaintiff] had Article III standing at the outset of the litigation").

[159] The district court noted that standing must be established for each form of relief requested in the Complaint – here, Plaintiffs seek civil penalties, injunctive relief, and declaratory relief for LG&E's CAA violations. Regarding injunctive relief, the Complaint seeks to "[enjoin] the Cane Run Defendants from allowing coal dust, fly ash, bottom ash, or other coal combustion byproducts from escaping

violations to those that are the subject of the APCD NOVs are continuing on at least a weekly basis."[160] Relying on the Supreme Court's decision in *Laidlaw*, the district court found that Plaintiffs have Article III standing to seek civil penalties for alleged continuing, substantially similar CAA violations. As the court explained, "Plaintiffs' have made sufficient factual allegations of injury to confer standing for their 'substantially similar' violations."[161] The court found that the Complaint contains "a sufficient allegation of a redressable 'injury in fact' as to [Plaintiffs'] claims for 'substantially similar violations' of the CAA."[162] Importantly, the court also found that Plaintiff's injury is redressable by civil penalties: "[S]uch relief would afford redress to the Plaintiffs for the alleged 'substantially similar' violations…. 'To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they

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the Cane Run Site" and to "[require] the Cane Run Defendants to take affirmative measures that will ensure that coal dust, fly ash, bottom ash, or other coal combustion byproducts will not escape the Cane Run Site ….." Compl., Requests for Relief F and G, RE 1, Page ID #61.

[160] Compl., RE 1, Page ID #54, ¶ 193. *See also id*., #5-7, ¶¶ 7, 10; #11-12 ¶¶ 30, 32, 36; #16-17, ¶ 46; #28, ¶ 82; #31, ¶¶ 99, 100; #44, ¶ 161; #47, ¶ 173; #49-57, ¶¶ 189, 194-197, 201, 206 for additional allegations of continuing violations. *See also* Little Decl., RE 40-1, Page ID # 595-96; Walker Decl., RE 40-2, Page ID # 598-99.

[161] Op. & Order, RE 49, Page ID #768.

[162] *Id*.

afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.'"[163]

However, the district court then ruled that Plaintiffs do not have standing to seek injunctive relief for the same continuing, substantially similar violations of the CAA, and dismissed Plaintiffs' claims for injunctive relief.[164] The court found that "Plaintiffs have adequately alleged injury in fact as to their 'substantially similar' claims", but ruled that the injury is not redressable by injunctive relief.[165] According to the district court, "it cannot redress the Plaintiffs' claims by entering the requested injunctions" because the Agreed Board Order states that: a) "LG&E has 'demonstrated compliance' by submitting to the control plan"; b) "the plan provides 'reasonable precautions … to prevent particulate matter from becoming airborne beyond the worksite in the future'"; and c) "'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.'"[166] The court stated that in requesting injunctive relief the Plaintiffs were essentially asking the

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[163] *Id.* at #767-68 (quoting from *Laidlaw*, 528 U.S. at 186).

[164] The court also found that Plaintiffs lack standing to seek declaratory relief under the CAA for continuing, substantially similar violations. *Id.* at #766-67.

[165] *Id.* at #768-69.

[166] *Id.*

Court to "decide issues which were already decided by the APCD – and reach a different result than it did."[167] "[B]y seeking injunctive relief on 'more stringent terms that those worked out by the [Board]', the Plaintiffs have improperly asked the Court to second-guess the regulatory agency's assessment of an appropriate remedy."[168] It is prohibited from doing so, according to the district court, by this Court's holding in *Ellis v. Gallatin Steel Company*.[169]

The district court erred in dismissing, for lack of Article III standing, Plaintiffs' claims for injunctive relief based on continuing, substantially similar violations of the CAA. First, the holding in *Ellis* does not mandate or even support the district court's ruling. *Ellis* examined a district court's award of an injunction under the CAA following a bench trial on the merits. Entry of the injunction was reversed, in part because the plaintiffs did not establish at trial "a risk of continuing irreparable harm."[170] Unlike *Ellis*, no injunction has been entered in this litigation. And unlike the present case, *Ellis* did not involve a challenge to Article III standing and did not address an environmental plaintiff's *standing* to seek injunctive relief for alleged CAA violations. As was true in *Ellis*, whether Plaintiffs' claims for

[167] *Id.*

[168] *Id.*

[169] 390 F.3d 461 (6th Cir. 2004).

[170] *Id.* at 476.

injunctive relief in this case have been fully redressed by the Agreed Board Order is an issue that should be addressed at trial, or perhaps on summary judgment, but not on a motion to dismiss.[171]

Also, and again unlike the present case, the administrative body involved in the *Ellis* case, the EPA, had filed federal-court actions, which were pending at the same time as citizen suits that sought relief for the same violations of the CAA. The citizen-suit plaintiffs intervened in the EPA's enforcement actions, and the district court then entered consent decrees that addressed the federal claims. So this Court in *Ellis* examined the effect of the EPA's consent decrees on the citizen suits. Here, there was no enforcement action by the APCD, and no consent decree, only an administrative order.

And the terms of the consent decrees in *Ellis* bear little resemblance to the Board Order at issue in this case. The consent decrees in *Ellis* were explicitly drafted to cover claims alleged in the citizen suit complaints.[172] Here, the Board Order did not even purport to address all of the claims Plaintiffs allege in this case. Also, the *Ellis* decrees were "forward looking and appl[ied] to 'continuing' [CAA] violations" and "reserve[d] all rights to deal with anything that happens in the

[171] *See also Gwaltney*, 484 U.S. at 66.

[172] *Ellis*, 390 F.3d at 468.

future."[173] Here, the Board Order has no prospective language or reservation of rights. In fact, the Board Order does not make clear that LG&E ceased violations or will not violate regulations going forward, only that LG&E "demonstrated compliance" by "submitting to" yet another remedial plan.[174] But this is only the latest plan to which LG&E submitted. LG&E submitted multiple control plans and compliance plans in response to NOVs, and then violated those plans. Notably, the APCD first "adopted" the Control Plan referred to in the Board Order on April 17, 2013.[175] And yet, additional NOVs were issued to LG&E on June 5, 2013 and August 2, 2013. Despite a history of violations and continuing failure to abide by numerous remedial "plans", the Board Order does not even vest the APCD with power to enforce the Order – the APCD must seek a "court order" for enforcement.[176] Finally, in the *Ellis* consent decrees, the government specifically covenanted not to sue on claims addressed in the decree.[177] The Board Order contains no such covenant.

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[173] *Id.* at 476.

[174] Mot. to Dismiss, Ex. 1: Agreed Board Order, RE 29-2, Page ID #445.

[175] *Id*.

[176] *Id*.

[177] *Ellis*, 390 F.3d at 473.

Ultimately, the district court may decide not to award injunctive relief in this case. As the Supreme Court explained in *Laidlaw*, "the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones."[178] But it does not follow that Plaintiffs have no standing to ask for injunctive relief. Just as civil penalties can provide redress for the injury Plaintiffs have suffered due to LG&E's continuing, substantially similar violations of the CAA, injunctive relief can also provide redress to Plaintiffs. As the *Laidlaw* Court stated, "To the extent that [injunctions] 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."[179]

B. Count II of the Complaint states a valid cause of action under RCRA, 42 U.S.C. § 6972(a)(1)(B).

Count II of the Complaint pleads a claim under § 6972(a)(1)(B) of RCRA.[180] The district court dismissed Count II as a collateral attack on permits governing Cane Run's operations, as well as on the Board Order.[181] For four reasons, the

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[178] *Laidlaw*, 528 U.S. at 192-93 (citation omitted).

[179] *Id.* at 185-86.

[180] Compl., RE 1, Page ID #46-48, ¶¶ 166-83.

[181] Op. & Order, RE 49, Page ID #784-87.

district court should not have dismissed Count II of the Complaint. First, Plaintiffs do not attack any permit provisions but instead seek redress for LG&E's failure to comply with the permits. Second, the APCD is not empowered to enforce RCRA. Third, none of the permits referenced by the district court allow the emissions of which Plaintiffs complain. Fourth, neither the Board Order nor the applicable permits address the present danger posed by LG&E's harmful emissions.

1. Plaintiffs challenge LG&E's compliance with the permits at issue, not the terms of the permits.

Plaintiffs allege that LG&E violated permits but do not challenge the terms of those permits. The district court dismissed Count II as an improper collateral attack on the Board Order and the following permits governing Cane Run's operations: the Title V Air Emission Permit issued by the APCD, the Special Waste Landfill Permit issued by the Kentucky Department of Waste Management, and the Pollutant Discharge Elimination System ("KDEPS") Permit issued by the Kentucky Department of Environmental Protection.[182] But the district court erred by conflating a suit challenging the provisions of a permit with an action seeking redress for violations of these provisions. Nowhere does the Complaint challenge the provisions of any of the aforementioned permits. Instead, Plaintiffs seek to

[182] Op. & Order, RE 49, Page ID #784-85.

compel LG&E to comply with the permits' provisions, as well as to recover for past and continuing violations of these provisions.

The district court's finding rested on this Court's decision in *Greenpeace, Inc. v. Waste Techs. Indus*.[183] In *Greenpeace*, after an 18-month permitting process and a month-long hearing, the state regulator issued a waste treatment facility a permit to conduct limited burn operations. Plaintiffs brought a court action to enjoin the same operations the regulators permitted. This Court held that the action was an improper collateral attack on the permit the regulator issued. In contrast, Plaintiffs here do not seek to challenge any provision of a permit but instead seek to enforce the limits and conditions in LG&E's permits.

The district court recognized this distinction from *Greenpeace*, stating that "Plaintiffs do not ask the Court to overrule an issued permit, as in *Greenpeace*," but nevertheless decided that the rationale in *Greenpeace* was applicable in this case.[184] As a result, the district court's holding effectively prohibits citizen suits against permitted facilities for violations of RCRA. This holding is at odds with

[183] 9 F.3d 1174 (6th Cir. 1993).

[184] Op. & Order, RE 49, Page ID #787.

RCRA, which does not contain any such limitation on citizen suits,[185] as well as with subsequent cases interpreting both RCRA's plain language and *Greenpeace*.

For instance, in *Glazer v. Am. Ecology Envtl. Serv. Corp.*,[186] the district court rejected the very argument advanced by LG&E and accepted by the district court regarding *Greenpeace*:

> *Greenpeace*'s holding does not necessarily compel the conclusion that, because defendant Gibraltar holds a valid permit, plaintiffs' claims against it under section 6972(a)(1)(B) are barred. Rather, *Greenpeace* merely precludes an attack on a previous permitting decision. Plaintiffs' section 6972(a)(1)(B) claim is not a collateral attack on a previous permitting decision; *instead, it is an attack on the operation of a facility in a manner inconsistent with the permits issued*.[187]

For these reasons, the dismissal of Count II of the Complaint should be reversed.[188]

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[185] The RCRA provides that a plaintiff may bring a citizen suit to enforce "any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to [RCRA]." 42 U.S.C. § 6972(a)(1)(A).

[186] 894 F. Supp. 1029 (E.D. Tex. 1995).

[187] *Id*. at 1039 (emphasis added) (citing *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991)). *See also Cameron v. Peach County, Georgia*, 2004 U.S. Dist. LEXIS 30974, at *83-87 (M.D. Ga. June 28, 2004) (denying defendant's summary judgment motion and allowing plaintiff's § 6972(a)(1)(B) claim to proceed against a permitted landfill).

[188] The additional Circuit Court cases cited by the district court do not alter this conclusion. Like *Greenpeace*, those cases involved attacks on permit provisions. *See Chemical Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d

2. The APCD is not empowered to enforce RCRA.

The district court treated the Board Order and the control plan that the Order approved as akin to a permit modification, such that Plaintiffs' Count II RCRA claim could be viewed as a collateral attack on this purported modification.[189] Nothing in *Greenpeace* supports this treatment of the Board Order, and there is a distinct problem with this analysis. The APCD, which issued the Board Order, is not empowered to enforce RCRA. That power rests in the Kentucky Resources and Environmental Cabinet.[190] Indeed, the Board Order reflects the APCD's lack of RCRA authority, as it was solely addressed to CAA violations, was silent on RCRA, and did not address Cane Run's Special Waste Landfill or KDEPS permits. In sum, the APCD cannot engage in administrative action under RCRA, whether by permit or otherwise, so as to bar Plaintiffs' RCRA claim under § 6972(a)(1)(B).

And the APCD's lack of authority under RCRA removes an additional pillar of the district court's holding, *i.e.*, that Plaintiffs' sole recourse with respect to their

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1485, 1492-93 (10th Cir. 1997); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir. 1993).

[189] Op. & Order, RE 49, Page ID #784-87.

[190] *See* KRS § 224.50-760(1)(b). For the same reason, the APCD has no authority to modify Cane Run's Special Waste Landfill Permit or its KDEPS Permit – two of the permits the district court found Plaintiffs' Count II RCRA claim to collaterally attack.

RCRA claim was to seek a hearing before the APCD on the Board Order, under KRS § 77.310.[191] The district court's finding that Plaintiffs should have sought redress for their RCRA claim before an agency with no enforcement power under RCRA was in error.

3. The permits do not allow the emissions that Plaintiffs challenge.

The district court erroneously found that because some degree of emissions are allowed by the applicable permits, Plaintiffs' RCRA § 6972(a)(1)(B) claim is necessarily a collateral attack on these permits.[192] The flaw in this conclusion is that the permits referenced by the district court do not allow the level of emissions which Plaintiffs allege have occurred, *i.e.* repeated and extensive deposition of fly ash, bottom ash, and other particulates produced by the coal combustion process.

With respect to Cane's Title V Air Emission Permit, Plaintiffs' Complaint details the various emissions standards and limits contained in this Permit, as well as LG&E's repeated violations of these standards and limits, including violations described in NOVs issued by the APCD.[193] Cane Run's Special Waste Landfill Permit also prescribes several emissions limits and standards, including:

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[191] Op. & Order, RE 49, Page ID #787.

[192] *Id*.

[193] Compl., RE 1, Page ID #49-55, ¶¶ 184-198.

a. For ownership and operation of a special waste facility, compliance with "KRS Chapter 224 and 401 KAR Chapters 30, 40, and 45 for the construction and operation of special waste facilities. [KRS 224.50-760]."

b. For construction and operation of a special waste landfill, compliance with "KRS Chapter 224.50-760, 401KAR 45:030, 45:110 and the approved permit application(s). [401 KAR 45:110]."[194]

The Complaint details numerous violations of these regulations, including 401 KAR 30:031, 401 KAR 45:110, 401 KAR 45:130, and 401 KAR 45:140.[195]

Finally, Cane Run's KDEPS Permit only allows the discharge of "uncontaminated" storm water runoff onto Cane Run Road, which fronts the properties of Plaintiffs Kathy Little, Debra Walker, and Greg Walker.[196] In support of their Count II RCRA claim, Plaintiffs allege that storm water runoff from Cane Run regularly contains fly ash, bottom ash, and other particulates produced by the coal combustion process, as well as the toxic contaminants contained in these materials.[197]

So the district court was incorrect that Cane Run's permits allow the emissions on which Plaintiffs' Complaint is grounded. Further, to the extent that

[194] Def. Mot. Dismiss, Ex. 6, RE 29-6, Page ID #463, ¶¶ 1-2.

[195] Compl., RE 1, Page ID #45-46, ¶ 164.

[196] Def. Mot. Dismiss, Ex. 7, RE 29-7, Page ID #531, ¶¶ 1-2.

[197] Compl., RE 1, Page ID #47, ¶¶ 172-74.

the district court concluded that the Board Order somehow modified the emissions standards and limits in these permits, the Board Order contains no such language. Moreover, the Board Order does not purport to resolve violations of regulations or other requirements contained in the Special Waste Landfill Permit or the KDEPS Permit, nor could it, as the APCD is not the enforcement agency for these permits.

4. Plaintiffs' Count II RCRA claim does not constitute a collateral attack, because neither the Board Order nor the applicable permits address remediation of LG&E's past activities that may present an imminent and substantial danger.

In addition to the other reasons previously discussed, the district court's deference to the Board Order was error because it failed to account for the well-settled principle that an RCRA § 6972(a)(1)(B) claim allows injunctive relief to force remediation of solid wastes that may present an imminent and substantial danger at the time an RCRA suit is filed, even if the polluting activity itself has ceased.[198] This interpretation of § 6972(a)(1)(B) is entirely in accord with the section's plain language, which permits citizen suits against a "past" generator, transporter, owner or operator of a treatment, storage, or disposal facility, who "has

[198] *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484, 488 (1996); *Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 7 (1st Cir. 2009) ("a suit under [§ 6972(a)(1)(B)] may be predicated on a past violation which presents an 'imminent and substantial endangerment to health or the environment'") (quoting *Meghrig*, 516 U.S. at 484) (additional citations omitted).

contributed" to solid waste pollution.[199] The district court erred in finding that the Board Order reflected the APCD's approval of LG&E's emission activities at Cane Run, such as to render Plaintiffs' § 6972(a)(1)(B) claim a collateral attack on the Order,[200] because the court did not recognize that the Order and the applicable permits are silent on remediation for past activities.

Indeed, Plaintiffs allege that: (1) for years, LG&E emitted harmful coal combustion particulates onto Plaintiffs' and other properties surrounding Cane Run; (2) these particulates remain on and in homes, buildings, and other structures; and (3) these particulates may present an imminent and substantial danger to health or the environment.[201] Count II of the Complaint includes a request for injunctive relief.[202] Because Plaintiffs' § 6972(a)(1)(B) claim properly seeks an injunction that can compel LG&E to remediate affected properties, it is not a collateral attack on a Board Order or on permits that do not address such remediation.

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[199] 42 U.S.C. § 6972(a)(1)(B).

[200] Op. & Order, RE 49, Page ID #787.

[201] *See, e.g.*, Compl., RE 1, Page ID #27-28, ¶¶ 78-84; #47-48, ¶¶ 172-83.

[202] *Id.* at Page ID #48, ¶ 183.

C. Plaintiffs provided adequate pre-filing notice of their claims under RCRA and the Clean Air Act.

The district court erroneously found that Plaintiffs failed to give adequate notice of their claims under RCRA and the CAA. Plaintiffs sent the requisite pre-filing notice to all the proper entities and then waited sufficient time before filing their complaint. Plaintiffs' pre-filing notice identified the specific standards and limitations LG&E violated, detailed the specific facilities and sites that were the sources of the ash emissions that violated the standards and limitations, and identified when the violations occurred. As to several dozen violations, the notice specified the dates of violating ash omissions either by incorporating APCD NOVs, or with links to videos that recorded the violations. After itemizing the limits and standards violated, the notice stated that violations substantially similar to those in the NOVs and the video footage occurred and continue on at least a weekly basis since at least 2008 from the Landfill, Ash Treatment Basin, Ponds, SPP, Ash Silo, roads, and Stacks, as well as from uncovered trucks operated by LG&E.[203]

The district court found that Plaintiffs provided sufficient notice of the violations specifically listed in the APCD NOVs that were attached to the pre-filing notice. The NOVs detailed the specific nature, source, circumstances, dates and

[203] *See* Notice of Intent to Sue, RE 1-2, Page ID #74, 75 n.2, 76-77, 82.

times on which LG&E violated regulations, and the specific standards violated.[204] But the court erroneously found that violations beyond those identified in the NOVs, which the pre-filing notice identified as being substantially similar to violations detailed in the NOVs and occurring on a daily or near daily basis since 2008, were insufficiently identified.[205] This was erroneous as a matter of law in that it imposes a nearly impossible standard for pre-filing notice that precedes discovery – a standard that is inconsistent with the language of the statute and with Sixth Circuit precedent. The district court also erred factually as it overlooked instances in which the pre-filing notice went beyond the APCD NOVs – including those documented with date-stamped video recordings.

1. The district court imposed an incorrect notice standard.

Under the CAA's citizen-suit provision, a citizen must provide "notice of the violation (i) to the [EPA] Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order" at least sixty days before filing suit.[206] RCRA requires sixty days' notice (to the same

[204] *Id.*, Page ID #772, 777.

[205] Op. & Order, RE 49, Page ID #772, 773, 776-77.

[206] 42 U.S.C. § 7604(b)(1)(A).

entities) before filing suit under section 6972(a)(1)(A) and ninety days' notice before filing suit under section 6972(a)(1)(B).[207] The notice letter must contain:

> 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 person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.[208]

The district court noted that the Sixth Circuit has not adopted the lenient notice standard the Third Circuit adopted in *Public Interest Research Group. of New Jersey v. Hercules, Inc.*,[209] and cited a number of district court opinions stating that the Sixth Circuit requires plaintiffs to "strictly comply" with all notice requirements.[210] Though this Court has not adopted *Hercules* and requires strict compliance with pre-filing notice requirements, the standard the District Court applied is inconsistent with controlling Sixth Circuit precedent.

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[207] *See* 42 U.S.C. § 6972(b)(1)(A) & (2)(A).

[208] 40 C.F.R. § 54.3(b).

[209] 50 F.3d 1239 (3rd Cir. 1995).

[210] Op. & Order, RE 49, Page ID #770-71 (citing *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 175 F. Supp. 2d 1071, 1077 (E.D. Tenn. 2001); *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 2009 WL 8520576, at *12 (E.D. Ky. Feb. 27, 2009); *Stephens v. Koch Foods, LLC*, 667 F. Supp. 2d 768, 787 (E.D. Tenn. 2009); *Sierra Club Ohio Ch. v. City of Columbus*, 282 F. Supp. 2d 756, 775-76 (S.D. Ohio 2003); *Atl. States Legal Found. v. United Musical Instruments*, 61 F.3d 473, 478 (6th Cir.1995)).

In *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs*,[211] the Sierra Club brought suit under the CWA citizen-suit provision based on ongoing failures in Cincinnati's sewer system. The failures involved repeated releases of untreated sewage through approximately 100 openings, known as Sanitary Sewer Overflows, throughout the sewer system. The defendants entered into a consent decree that the court approved but filed an appeal after the court awarded Sierra Club its attorney's fees. In part, the defendants claimed that the Sierra Club's pre-filing notice was insufficiently specific. The notice identified the violations as follows:

> On a monthly basis for at least the past 5 years to the present, the sanitary sewer conveyance systems owned and operated by the Metropolitan Sewer District, the City of Cincinnati and/or Hamilton county have and continue to overflow … from specific openings in the sewer systems. These openings are known as Sanitary Sewer Overflows or SSOs.[212]

This Court upheld the district court's finding that that this pre-filing notice "did contain sufficient information to allow Defendants to identify all pertinent aspects of its … violations without extensive investigation."[213] *Hamilton Cnty* makes clear that while the level of compliance with notice provisions the Sixth

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[211] 504 F.3d 634 (6th Cir. 2007).

[212] *Id*. at 637.

[213] *Id*. at 644.

Circuit requires may be strict, it is not draconian. It is, in fact, consistent with the standard recognized by several other circuits, each of which has upheld pre-filing notices that specified certain violations and noted that other similar violations occurred at various times, so long as the notice allows the alleged violator to know what it is doing wrong and what corrective actions can prevent a lawsuit.[214]

The lower court decisions on which the district court relied involved pre-filing notices that were wholly deficient and, in some cases, non-existent. For example, in *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Authority*, the pre-filing notice did not specify any sites that were the sources of the alleged violations, did not identify the SIP limits that allegedly were exceeded, and stated only that limits were "regularly violated for at least the last five years."[215] In *Sierra Club Ohio Ch. v. City of Columbus*, the notice contained only a single paragraph purporting to set out the manner in which permits were violated and

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[214] *See, e.g., Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002) ("the citizen is not required to list every specific aspect or detail of every alleged violation. Nor is the citizen required to describe every ramification of a violation."); *Atl. States Legal Found. Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997) (upholding pre-filing notice that itemized specific violations about which plaintiffs were aware and then generally accused the defendant of a history of continued violations); *Catskill Mnts. Chapter of Trout Unltd. v. City of New York*, 273 F.3d 481, 488-89 (2d Cir. 2001) (finding notice sufficient because defendant could infer basis for violation from facts alleged in the notice).

[215] 175 F. Supp. 2d 1071, 1076 (E.D. Tenn. 2001).

only generally identified the sources of violations as "hundreds of illegal cross connections from the city's sanitary water system."[216] The court also found that the plaintiffs had filed suit before the 60-day notice period had passed,[217] the notice was provided by a non-plaintiff,[218] and the complaint alleged different violations than those listed in the notice.[219]

In the Sixth Circuit Court case on which the district court relied, *Atl. States Legal Found. v. United Musical Instruments*,[220] the plaintiff alleged that the defendant did not file toxic release forms required by the Emergency Planning and Community Right-to-Know Act ("EPCRA"). The pre-filing notice stated an intent to sue based on defendant's failure to file the required forms for the years 1987 – 1990, along with "violations not yet known."[221] The complaint alleged the failure to file from 1988 – 1991. This Court ruled that a notice stating "violations not yet known" was a "vague warning of possible other claims" and thus was inadequate notice only as to the violation for the defendant's failure to file its 1991 form.

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[216] 282 F. Supp. 2d 756, 765 (S.D. Ohio 2003).

[217] *Id*. at 759.

[218] *Id*.

[219] *Id*. at 766-67.

[220] 61 F.3d 473 (6th Cir.1995).

[221] *Id*. at 478.

Atlantic States did not address the sufficiency of notice as to the remaining violations.

Here, in contrast, Plaintiffs provided more detail in their pre-filing notice than the plaintiff in *Sierra Club* provided. Plaintiffs' notice was far more detailed and complete than in any of the lower court decisions on which the district court relied. Plaintiffs' pre-filing notice satisfied the requirements stated in 40 C.F.R. § 54.3(b), because it provided sufficient information to allow LG&E to identify each violation based on records it keeps. The notice identified: (1) specific standards and limits that LG&E's emissions violated; (2) each substance that LG&E emitted; and (3) eight specific sites at Cane Run from which LG&E emitted the fly ash, bottom ash, and other particulates produced by the coal combustion process.[222] The notice stated that the violations had occurred and still were occurring on a daily or near daily basis since 2008, which is far more specific than the "monthly basis" deemed to be sufficient in *Hamilton County*.

2. The district court overlooked portions of Plaintiffs' pre-filing notice that preclude dismissal of the claim.

The district court also erred by overlooking eleven violations that Plaintiffs identified in the pre-filing notice, documented with links to video clips. The court

[222] *See* Compl., Ex. 1 (Notice of Intent to Sue), RE 1-2, Page ID #68-83.

found that only the violations documented in the NOVs incorporated into the pre-filing notice provided the requisite detail. Yet each video is dated and shows the spot on the Cane Run Plant from which the ash and dust leaves the plant. For example, one video is labeled as being filmed on June 28, 2012.[223] It shows black smoke leaving the far right stack, which indicates that safety measures are not working properly and that fine ash particles are being emitted into the air. This is one of eleven video links in the notice that the district court did not address at all. For this reason alone, dismissal was improper.

III. CONCLUSION

Plaintiffs respectfully request that this Court affirm the district court's ruling that the CAA does not preempt Plaintiffs' common-law claims but reverse the dismissal of Plaintiffs' claims under the CAA and RCRA (Count II).

[223] http://www.youtube.com/watch?v=3xGf2Xb31Lw&feature=youtube.

Dated: April 16, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A) AND 28.1

1. This brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(B)(i) inasmuch as it contains 16,337 words of text, excluding portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) inasmuch as it has been prepared in a typeface using Microsoft "Word" processing, with 14-point font and Times New Roman type style.

/s/ Steve W. Berman
Steve W. Berman

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2015, the foregoing was electronically filed with the clerk of Court by using the Cm/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Steve W. Berman
Steve W. Berman

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiffs-Appellees hereby designate the following District Court documents as relevant to this matter.

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EX 1-E: Can Run Residential Area Nuisance Dust Investigation & Analysis 06/04/2013	1-3	132 - 155
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EX 6: KPDES Permit	29-7	526 - 548
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Response to Motion to Certify for Interlocutory Appeal (filed 08/12/2014) EX A: Supp. Mem. Op. & Order, *Merrick v. Diageo Americas Supply, Inc.*,	55 55-1	856 - 870 872 - 875

Description of Entry	Record Entry No.	Page ID
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EX C: Declaration of Kathy Little	55-3	879 - 881
EX D: Notice of Violation Ltr 06/26/2014	55-4	882 - 886
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