

Coal Ash/Preemption: Federal Appellate Court Addresses Challenge to Municipal Regulation



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The United States Court of Appeals for the First Circuit (“Court”) addressed whether two Puerto Rican municipalities could prohibit the beneficial use and disposal of coal ash (also known as Coal Combustion Residuals [“CCR”]) within their borders. See *AES Puerto Rico, L.P. v. Trujillo-Panisse*, 857 F.3d 101 (2017).

AES Puerto Rico, L.P. (“AES-PR”) brought an action in the United States District Court against the two municipalities, Humacao and Peñuelas, challenging the ordinances.

The United States District Court granted summary judgment for the municipalities. AES-PR appealed.

AES-PR’s coal-fired power plant produces CCRs. Some of the material is used in a manufactured aggregate product known as Agremaz.

Agremax is used for various purposes including several waste treatment applications. These include solidification of liquid waste and use as a daily landfill cover.

Peñuelas and Humacao adopted ordinances in 2013 prohibiting the placement of CCRs on the ground within the respective municipalities. This action had the effect of prohibiting AES-PR’s use of Agremax at landfills within those municipal borders.

Despite the ordinances, in September 2014, Puerto Rico’s Environmental Quality Board (“EQB”) issued a resolution authorizing disposal of CCR generated by AES-PR’s coal plant at landfills meeting the design and operation requirements of federal and Commonwealth law. AES-PR contracted with three landfills that met the requisite standards and were issued permits by the EQB to accept disposal of nonhazardous solid waste.

EQB issued in October 2015 a second resolution approving requests to allow those contracted landfills to receive CCR. It specifically approved the use of Agremax to solidify liquid waste. The use of Agremax as a daily cover would require a waiver from the EQB.

AES-PR delivered CCR to the EQB-approved landfills in 2016. Humacao sent a letter to the landfill demanding that it refrain from receiving CCR. Peñuelas used city trucks to prevent tanker trucks with AES-PR’s Agremax from entering the landfill.

The disposal of CCR is governed by federal law, the Resource Conservation and Recovery Act of 1976 (“RCRA”), Commonwealth law, Puerto Rico’s Environmental Public Policy Act of 2004 which bestows

power to the EQB, and local law, the Autonomous Municipalities Act which grants power to municipalities.

Congress enacted RCRA to govern the treatment, storage, and disposal of solid and hazardous waste for the purpose of establishing “a viable Federal-State partnership” to “promote the protection of health and the environment and to conserve valuable material and energy resources.”

Pursuant to RCRA and approved by the EPA, the Commonwealth of Puerto Rico established that the EQB has the “authority and responsibility for implementing and enforcing solid waste management regulations.” This authority to regulate is further delineated in the Environmental Public Policy Act of 2004. Further, EQB adopted State Regulation No. 5717 which consists of rules governing management of non-hazardous solid waste. The issues addressed by these rules include the placement of material in landfills.

Puerto Rico’s Autonomous Municipalities Acts gives local governments broad authority to promote the welfare of the community and specifically allows for the adoption of “standards and measures that are necessary for the improvement and adequate control and disposal of waste,” however their authority is “subject to applicable legislation” and “subordinate[] to the Constitution of the Commonwealth of Puerto Rico and its laws.”

The Court determined that “Puerto Rico law envisions a collaboration between Commonwealth and local authorities in dealing with solid waste. However, in the case of a conflict, the statutory scheme explicitly recognizes the preeminence of Commonwealth law.”

The Court concluded that “[t]he Commonwealth’s law on solid waste management is made by the EQB” and that “EQB decisions carry the full force of law – including resolutions such as the one authorizing use and disposal of CCRs at the Peñuelas and Humacao landfills.” It held that the EQB resolutions preempt the two municipal ordinances. Therefore, it vacated the summary judgment holding “AES-PR had complied with all regulatory prerequisites for the deposit of CCRs at the three landfills and obtained the EQB’s approval to move forward.”

[A copy of the opinion can be downloaded here.](#)