

Climate Alert

Significant Climate Change-Related News and Updates from the LLB&L Climate Change Practice Team

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A Blow to Public Nuisance Law

The Winds Change Direction as the Fourth Circuit Reverses the District Court Decision in State of North Carolina v. Tennessee Valley Authority

For years plaintiffs have attempted to expand public nuisance law, seeking to apply it to claims related to everything from pollution, guns, alcohol, and fast food to, as we have previously reported, global warming. (See our *Climate Alerts* of [September 29, 2009](#), [October 28, 2009](#) and [June 7, 2010](#)). The United States Court of Appeals for the Fourth Circuit recently dealt a blow to proponents of the use of public nuisance law to curb air pollution by reversing a district court's ruling and holding that North Carolina could not sue the Tennessee Valley Authority ("TVA") for claims that interstate air emissions of criteria pollutants originating from TVA-owned coal-fired power plants in Alabama and Tennessee constituted a public nuisance downwind in North Carolina.

Background

In 2006, North Carolina Attorney General Roy Cooper filed suit against TVA alleging that 11 of TVA's coal-fired power plants created a public nuisance because airborne emissions generated from these plants traveled eastward over state lines affecting air quality in North Carolina's western mountains.

U.S. District Judge Lacy H. Thornburg agreed with North Carolina and found four of TVA's power plants within 100 miles of the North Carolina border constituted a "public nuisance" and ordered TVA to upgrade or install emissions control devices at the power plants by December 31, 2013. In addition to installing emissions control technologies, the district court also imposed specific emissions caps for each electric generation unit at the four plants. Both North Carolina and TVA estimated that it would cost in excess of \$1 billion dollars to install and operate the pollution controls at the four power plants located in Alabama and Tennessee. TVA appealed the costly injunction imposed by the district court.

Reversal by the Fourth Circuit

In a unanimous three-judge panel decision, the Fourth Circuit overturned the district court's

decision, finding that "the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike."

The Fourth Circuit found the lower court's decision flawed for the following reasons:

1. Clean Air Act Preempts Common Law Nuisance Actions – To Find Otherwise Would Result in Vague Nuisance Standards and Inconsistent and Multiplicitous Judicial Decrees

The Fourth Circuit framed the main issue in this case as "whether individual states will be allowed to supplant the cooperative federal-state framework that Congress through the EPA has refined over many years." In holding that the The Clean Air Act, 42 U.S.C. § 7401 *et seq.* (the "Act") preempts public nuisance law in this instance, the Court emphasized the practical application of the law and favored public policy oriented arguments.

The Act extensively regulates airborne pollutants including substances such as sulfur dioxide and nitrous oxides emitted by the TVA coal-fired power plants at issue in the case. The Act is the primary mechanism under which emissions in the U.S. are managed and the Act makes the Environmental Protection Agency ("EPA") responsible for developing acceptable levels of airborne emissions. In turn, individual states regulate the actual sources of emissions and make decisions regarding how to meet national emissions standards and other requirements promulgated by the Act and EPA through state implementation plans ("SIPs") and permit programs.

Although the Act provides numerous provisions and regulations controlling interstate emissions, North Carolina opted instead to bring a public nuisance action against TVA seeking an injunction against TVA's power plants. By bringing a nuisance claim against TVA, the Fourth Circuit pointed out that North Carolina had essentially requested the federal

courts to impose a different set of standards than those thoroughly contemplated and authorized by Congress through the Act, established by the EPA, and implemented by the individual states through SIPs and permit programs.

The Fourth Circuit relied heavily upon the United States Supreme Court's 1987 decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), in finding that public nuisance law is so ill-defined, vague and general that it "provide[s] almost no standard of application" or "manageable criteria." The Court reasoned that "it would be increasingly difficult for anyone to determine what standards govern" airborne emissions if courts were allowed to use "vague public nuisance standards" to undermine the comprehensive regulatory framework provided by the Act and implemented through corresponding state regulations. The Court further explained that individual states, governmental entities, and private industries have come to rely upon the defined regulatory standards set forth in the Act and possess a reasonable expectation that if they follow those regulations, then it also is reasonable to expect that they are in compliance with the law. The Court recognized it would be unfair and unexpected to replace the regulatory framework set forth in the Act with the "uncertain twists and turns" of public nuisance litigation.

The Court illustrated the practical effects of having multiple and conflicting standards to guide airborne emissions. "An EPA-sanctioned state permit may set one standard, a judge in a nearby state another, and a judge in another state a third. Which standard is the hapless source to follow? . . . A company, no matter how well-meaning, would be simply unable to determine its obligations *ex ante* under such a system, for any judge in any nuisance suit could modify them dramatically." The Court went so far as to say that a "patchwork of nuisance injunctions" could actually lead to increased air pollution. For example, differing standards set forth by the Act and public nuisance law "could create perverse incentives for power companies

to increase utilization of plants in regions subject to less stringent judicial decrees."

The Fourth Circuit stopped short, however, of holding that the Act has entirely preempted the field of emissions regulation acknowledging that it "cannot anticipate every circumstance that may arise in every future nuisance action." With that said, the Court then went on to emphasize that the *Ouellette* Court "created the strongest cautionary presumption" against common law nuisance suits that have the potential to undermine federal and state regulatory law. The Court also found that non-source states cannot utilize the Act's general savings clause as a means of undermining or replacing federal emissions regulations with a contrasting state perspective about the emission levels necessary to achieve those same public ends.

Finally, in holding that the Act trumps common law nuisance actions, the Court debated the respective merits of agency and judicial roles in addressing the problem of air pollution. The Court pointed out that Congress, through enacting the Act, "opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls." The Court found the judicial system ill-equipped to replicate the resources and expertise the EPA possesses in deciding appropriate emissions standards. "[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider." The Court noted that the Act's extensive coverage allows regulators with expertise in the relevant scientific fields to use their knowledge to create empirically based emissions standards.

2. The District Court Erred in Applying North Carolina Law Extraterritorially to TVA's Power Plants Located in Alabama and Tennessee

The Fourth Circuit sharply criticized the district court's decision for "compromis[ing] principles of federalism" by applying North Carolina's Clean Smokestacks Act extraterritorially to the TVA plants located in Alabama and Tennessee. North Carolina's

Clean Smokestacks Act requires investor-owned public utilities that operate coal-fired generating units to reduce their sulfur dioxide and nitrous oxides emissions to levels lower than those specified in EPA regulations promulgated pursuant to the Act. The Court again pointed to the Supreme Court's *Ouellette* decision which emphasized that a "court must apply the law of the State in which the point source is located." The Court found that the district court violated *Ouellette's* explicit directive by improperly applying the more stringent North Carolina state law to the four power plants located outside its jurisdiction in Alabama and Tennessee. The Court reiterated the *Ouellette* ruling that only source state law — in this case the law of Alabama and Tennessee — could impose more stringent emission rates on the power plants than those required by federal law as set forth in the Act.

3. TVA's Power Plants Were Specifically Authorized by the Government As A Permissible Activity

Finally, assuming for the sake of argument that the district court applied the correct source state law, the Court determined that it would be difficult to uphold the district court's injunctions because it seemed counterintuitive that an industrial activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance. "It would be odd, to say the least, for specific state laws and regulations to expressly permit a power plant to operate and then have a generic statute countermand those permissions on public nuisance grounds." The Court found that TVA's power plants cannot logically constitute a public nuisance where TVA is in compliance with the EPA's National Ambient Air Quality Standards, corresponding state SIPs, and permit programs that implement them. Given that the air pollution standards promulgated by the EPA are stricter than amorphous common law nuisance rules, the Court concluded that a power plant that is in compliance with federal requirements cannot logically be a public nuisance.

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A Blow to Public Nuisance Law (cont'd.)**4. Other Remedies Available to North Carolina In Lieu of Filing Nuisance Lawsuit**

Although the Court overturned the district court's public nuisance injunctions, it emphasized that "North Carolina has a number of possible paths to pursue in its entirely laudable quest to guarantee pure air to its citizens." The Court pointed out that the Act provides for a method for downwind states to petition EPA for immediate relief from unlawful interstate pollution. The Court also pointed out that North Carolina had an ample opportunity to comment and object to Alabama's and Tennessee's SIPs before they were implemented by each state. The Court also highlighted that the Act provides for a private right of action against an entity that is not complying with emissions standards or state permit programs implementing those standards. Lastly, the Court noted that the Act provides for a cause of action against the EPA if it fails to perform any non-discretionary responsibility. The Court was especially focused on pointing out that North Carolina had numerous possible remedies to pursue in lieu of filing a public nuisance action against TVA.

Commentary

As evidenced by the numerous amicus briefs filed in this case, the *State of North Carolina v. TVA* case was closely watched by environmental groups, other state attorney generals and government representatives, business groups, public health organizations and other public interest groups to see if the Fourth Circuit would preserve public nuisance actions as an avenue for addressing air pollution complaints. While the Fourth Circuit did not find a blanket preemption of public nuisance claims, it left little (if any) room for such claims where the EPA regulates such emissions under the Act. The opponents of other types of public nuisance claims will be buoyed by the Fourth Circuit's broad language regarding the "vague" and "indeterminate" nature of the standards for public nuisance claims, especially in contrast to federal and state regulatory law. *State of North Carolina v. TVA* could have a significant impact on current attempts to apply public nuisance law to global warming claims. While EPA and Congress are now very publicly grappling with setting emissions standards for greenhouse gases, if such standards are ultimately adopted (either by legislation or EPA regulation), global warming based public nuisance claims are likely to face the

same preemption hurdle that tripped up the plaintiff in this case.

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