NOTES

North Carolina ex rel. Cooper v. Tennessee Valley Authority: The Problem with State Nuisance Law in the Regulation of Out-of-State Emissions Standards

I. OVERVIEW OF THE CASE

The Clean Air Act (CAA) allows states the opportunity to enact legislation placing restrictions on in-state coal-fired plants as a matter of state law.[1] Hence, the United States Supreme Court has defined source state law as "the law of the State in which the point source is located."[2] Pursuant to this authority, the State of North Carolina enacted the Clean Smokestacks Act in 2002 requiring coal-fired plants to "reduce their emissions of NO_x and SO_2 to levels even lower than those specified in EPA regulations promulgated pursuant to the Clean Air Act."[3] Concurrent with the authority to implement and enforce in-state emissions standards, states may also address out-of-state emissions concerns under the CAA by "petition[ing] the Administrator [of the EPA] for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)([i]) of this title or this section."[4] The Tennessee Valley Authority (TVA) operates eleven coal-fired power plants, four of which are located within 100 miles of the North Carolina border.[5] Recognizing the prevalence of out-of-state emissions from the TVA plants due to "[p]revailing high pressure weather systems," North Carolina filed a public nuisance suit against the TVA in the United States District Court for the Western

1. 42 U.S.C. § 7416 (2006).
2. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 487 (1987).
3. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth. (*Tenn. Valley Auth. IV*), 615 F.3d 291, 297 (4th Cir. 2010) (quoting N.C. GEN. STAT. §§ 143-215 (2002)).
4. *Id.* at 300 (quoting 42 U.S.C. § 7426(b)).
5. *Id.* at 297-98.

District of North Carolina requesting an injunction against each of the eleven coal-fired plants operated by the TVA.[6]

Despite defenses raised by the TVA, including preemption by the Supremacy Clause of the United States Constitution[7] and application of the discretionary function doctrine, the district court denied the TVA's motion to dismiss the claims.[8] On interlocutory appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling on the grounds that the TVA's immunity was waived because the CAA required federal compliance with state and local regulations "in the same manner, and to the same extent as any nongovernmental entity."[9] Next, the district court issued an injunction against the four TVA plants operated near the North Carolina border that required the TVA to "install and continuously operate scrubbers and [selective catalyst reductions (SCRs)] at each of the plants by December 31, 2013."[10] The injunction also placed a cap on the allowable amount of emissions to be released from the plants in accordance with a schedule of sulfur dioxide (SO) and nitrous oxides (NO) emissions limits.[11] Finding no significant contribution from the remaining seven plants outside of the 100-mile border area, the district court limited the injunction to the four plants within the North Carolina border area and did not rule on a nuisance theory.[12] The Fourth Circuit reversed the lower court's injunction on the TVA plants and *held* that the law of the source states, rather than the law of North Carolina, applied when determining the existence of a public nuisance;[13] it further *held* that under Alabama and Tennessee law, the TVA emissions were not a public nuisance.[14] *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 310 (4th Cir. 2010).

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6. *Id.* at 297 (citing North Carolina *ex rel.* Cooper v. Tenn. Valley Auth. (*Tenn. Valley Auth. III*) , 593 F. Supp. 2d 812, 825 (W.D.N.C. 2009)).

7. U.S. CONST. art. 6, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

8. *Tenn. Valley Auth. IV*, 615 F.3d at 297 (citing North Carolina *ex rel.* Cooper v. Tenn. Valley Auth. (*Tenn. Valley Auth. I*), 439 F. Supp. 2d 486, 497 (W.D.N.C. 2006)).

9. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth. (*Tenn. Valley Auth. II*), 515 F.3d 344, 350 (4th Cir. 2008) (quoting 42 U.S.C. § 7418(a) (2006)).

10. *Tenn. Valley Auth. III*, 593 F. Supp. 2d 812, 832 (W.D.N.C. 2009)).

11. *Id.* at 832-33.

12. *Id.* at 831-32.

13. *Tenn. Valley Auth. IV*, 615 F.3d at 306.

14. *Id.* at 310.

II. BACKGROUND

Under the CAA, the EPA is charged with developing National Ambient Air Quality Standards (NAAQS), "the attainment and maintenance of which . . . are requisite to protect the public health."[15] Emissions of sulfur dioxide and nitrous oxides by coal-fired power plants are among the many types of compounds known to impact human health and air quality.[16] Recognizing the inherent dangers of such airborne compounds, the EPA's promulgation of NAAQS ensures uniformity in air quality across the country and generates emissions standards "sufficient to protect the public health and welfare."[17]

Although the EPA oversees the development of NAAQS and provides for a subsequent notice and comment period before emissions standards may be changed or adopted,[18] Congress intended, in the CAA, for states to assume the responsibility of "regulat[ing] actual sources of emissions."[19] Thus, the Act requires each state to create and submit a State Implementation Plan (SIP) to the EPA. SIPs provide for the State's "implementation, maintenance, and enforcement of [NAAQS]."[20] Upon compliance with SIP submission requirements, including the adoption of plans in conformity with EPA regulations "governing preparation, adoption by the state, and submission to the EPA,"[21] SIP requirements become federal law and are "enforceable in federal court."[22]

In addition to implementing a permit program containing EPA emissions standards "relevant to the particular polluting source,"[23] states must also oversee the modification and construction of any emissions sources designated under the SIP.[24] Prior to modification and construction, however, a SIP must provide for "written notice to all nearby States the air pollution levels of which may be affected by such source at least sixty days prior to the date on which commencement of construction is to be permitted."[25] The CAA further protects states by

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15. *Id.* at 300 (quoting 42 U.S.C. § 7409(b)(1) (2006)).
16. *See id.* at 296.
17. Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989) (citing 42 U.S.C. § 7409(a)-(b)).
18. 42 U.S.C. § 7409(a)(1)(B).
19. *Id.* § 7410(a)(1).
20. *Id.*
21. 40 C.F.R. § 51 (2008).
22. *Her Majesty the Queen*, 874 F.2d at 335 (citing 42 U.S.C. § 7604(a)).
23. *Tenn. Valley Auth. IV*, 615 F.3d 291, 300 (4th Cir. 2010) (quoting Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996)).
24. *See* 42 U.S.C. § 7410(a)(2)(C).
25. *Id.* § 7426(a)(1).

allowing them to petition the EPA for a finding that any emissions source emits, or may emit, any air pollutant in violation of § 7410(a)(2)(D)(i).[26]

The Supreme Court, recognizing the authority of federal safety regulations over conflicting state laws, has addressed the issue of preemption within the context of nuclear regulation.[27] In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, the Supreme Court held that state regulation would be invalid if "a scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room [for the States] to supplement it."[28] Despite the existence of a general savings clause attached to legislation enacted by the Atomic Energy Commission (AEC) indicating California's right to regulate electrical utilities notwithstanding preemption by the Nuclear Regulatory Commission (NRC), the Supreme Court rejected California's claim that "a State may completely prohibit new construction until its safety concerns are satisfied by the Federal Government."[29] Recognizing the pervasive authority of the NRC over nuclear safety regulations, the Court held that "the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'"[30]

The Supreme Court has also evaluated the interaction between state nuisance law and federal environmental regulations similar to the CAA within the context of preemption.[31] In *International Paper Co. v. Ouellette*, the Supreme Court recognized the existence of preemption where the state law "interferes with the methods by which the federal statute was designed to reach this goal."[32] In considering a nuisance claim brought by Vermont landowners against the operators of a paper mill for discharging effluents into a lake in violation of the Clean Water Act (CWA), the Court recognized the "vague" and "indeterminate"

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26. *See id.* § 7426(b) (under § 7410(a)(2)(D)(i)(1) state implementation plans must "contain adequate provisions . . . prohibiting . . . any source . . . within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard").

27. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-13 (1983).

28. *Id.* at 204.

29. *Id.* at 210, 212.

30. *Id.* at 212-13 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)).

31. *See* Int'l Paper Co. v. Ouellette, 479 U.S. 491-92 (1987) (discussing whether Clean Water Act "pre-empts Vermont common law to the extent that law may impose liability on a New York point source").

32. *Id.* (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).

nature of nuisance suits.[33] It noted that "if affected States [are] allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'"[34]

III. THE COURT'S DECISION

In the noted case, the Fourth Circuit relied primarily on the Supreme Court's holding in *International Paper Co. v. Ouellette* to establish that North Carolina had erroneously applied state law extraterritorially to the TVA plants in Alabama and Tennessee.[35] To justify lifting the injunction on out-of-state TVA plants, the Fourth Circuit considered the potential for conflicting court orders, the general unreliability of nuisance law, and the need to sustain, and exercise, a preexisting system of emissions regulation.[36] The court also recognized the difficulty in upholding the injunction against the source states involved in the nuisance action, because under Alabama and Tennessee law, "TVA's electricity-generating operations are expressly permitted."[37]

One of the court's primary concerns over North Carolina's attempt to extend state nuisance law extraterritorially was the potential for "multiplicitous decrees."[38] The Fourth Circuit warned against replacing the established NAAQS set by the EPA with "standards whose content must await the uncertain twists and turns of litigation."[39] The court thus recognized the ambiguity created by conflicting standards, where the EPA sets one, and another is imposed by a judge in a nearby or distant state.[40] Relying on arguments advanced by the state of Alabama, the Fourth Circuit reasoned that "a patchwork of nuisance standards" would likely give way to increased air pollution because it would allow the opportunity for emissions sources in less regulated regions to be overly used in order to compensate for more restricted sources.[41] The court also noted a concern by the state of Tennessee involving the potential for "a limited pool of specialized construction expertise [to be driven] away

33. *Id.* at 493-94.
34. *Id.*
35. *See id.* at 487.
36. *See Tenn. Valley Auth. IV*, 615 F.3d 291, 296 (4th Cir. 2010).
37. *Id.* at 308.
38. *Id.* at 304.
39. *Id.* at 301.
40. *See id.* at 302.
41. *Id.* (citing Final Brief of Intervenor State of Alabama at 62, North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d at 302 (2010) (No. 09-1623)).

from the plants most in need of pollution controls to those with the most pressing legal demands."[42]

In addition to the number of problems associated with source exposure to conflicting court orders, the Fourth Circuit considered the ambiguous nature of nuisance law as a likely cause of heightened "chaotic confrontation between sovereign states" when used to effectuate emissions regulation.[43] The Fourth Circuit's conclusion that nuisance law was an ineffective means of regulating out-of-state emissions sources found further support in the district court's reference to nuisance law as "not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance."[44] Referencing the prevailing common law nuisance doctrine, which extends to "such broad-ranging offenses as: interferences with the public health . . . with the public safety [and] with public morals,"[45] the court noted that nuisance law addresses environmental and air quality concerns "at such a level of generality as to provide almost no standard of application."[46]

The Fourth Circuit further classified North Carolina's attempt to enjoin out-of-state TVA plants as an augmentation of the respective roles of courts and agencies.[47] Under the CAA, the EPA is charged with the responsibility of ensuring that air quality standards "accurately reflect the latest scientific knowledge."[48] Moreover, the EPA must provide states with emissions control information specifying "cost of installation and operation[,] . . . environmental impact of the emission control technology[,] . . . [and] data on alternative fuels, processes, and operating methods."[49] The court emphasized Congress's intent to rely on the EPA's expertise in regulating emissions standards.[50] Thus, the Fourth Circuit explained that "[c]ourts are expert at statutory construction, while agencies are expert at statutory implementation."[51]

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42. *Id.* (citing Amicus Curiae Brief of the State of Tennessee in Support of the Tennessee Valley Authority and the State of Alabama and Requesting Reversal of the District Court at 8-9, 12, North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d at 302 (2010) (No. 09-1623)).

43. *Id.* at 301 (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496-97 (1987)).

44. *Id.*

45. *Id.* at 301-02 (quoting W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 643-45 (5th ed. 1984)).

46. *Id.* at 302.

47. *Id.* at 304.

48. 42 U.S.C. § 7408(a)(2) (2006).

49. *Id.* § 7408(b)(1).

50. *See Tenn. Valley Auth. IV*, 615 F.3d at 304.

51. *Id.* at 305 (quoting Negusie v. Holder, 129 S. Ct. 1159, 1171 (2009)).

The court also found North Carolina's extraterritorial application of state nuisance law to be problematic.[52] The Fourth Circuit pointed out that under *Ouellette*, a "court must apply the law of the State in which the point source is located."[53] The Fourth Circuit easily recognized North Carolina's intention to apply its own emissions standards to the TVA plants; the lower court had used calculations "provided by North Carolina" to create the injunction against TVA plants.[54] Furthermore, the Fourth Circuit emphasized an erroneous application of state law extraterritorially when the standard introduced by North Carolina's expert witness and relied upon by the district court consisted of "emissions rates . . . equivalent to what would be required in the Clean Smokestacks Act in 2013."[55] Rejecting the claim by North Carolina that the state did not apply its law extraterritorially because the only plants impacted by the injunction were the four closest to the North Carolina border, the Fourth Circuit reasoned that the remedy adopted by the lower court against the four TVA plants was so similar to the North Carolina Act "that it violate[d] *Ouellette's* directive that source state law applies to interstate nuisance suits."[56]

The Fourth Circuit further held that under the state laws of Alabama and Tennessee, the TVA plants did not constitute a nuisance.[57] The court noted that under Alabama law, "there can be no abatable nuisance for doing in a proper manner what is *authorized* by law."[58] Similarly, Tennessee precedent emphasizes the inapplicability of nuisance law to an activity that is "explicitly licensed."[59] While the court considered negligent operation of an emissions source to be grounds for an injunction under both Alabama and Tennessee nuisance theory, it noted that negligence was "a claim not before us in this case."[60] Finally, the court emphasized the TVA's compliance with EPA emissions standards, corresponding state implementation plans, and the "permits that implement them" as justification for Alabama and Tennessee having fulfilled the less-stringent requirements of "source state nuisance law."[61]

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52. *See id.* at 306.
53. *Id.* (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 487 (1987)).
54. *Id.* at 308.
55. *Id.* at 307.
56. *Id.* at 309.
57. *Id.* at 308-09.
58. *Id.* at 309 (quoting Fricke v. City of Guntersville, 36 So. 2d 321, 322 (Ala. 1948)).
59. *Id.* (citing O'Neil v. State *ex rel.* Baker, 206 S.W.2d 780, 781 (Tenn. 1947)).
60. *Id.*
61. *Id.*

The Fourth Circuit also rejected North Carolina's attempt to assert the savings clause of the CAA, which authorizes any person or entity to "seek [under any statute or common law] enforcement of any emission standard or limitation."[62] Reiterating the decision of the Supreme Court in *Pacific Gas*, which acknowledged preemption of state law despite the existence of a savings clause where the federal government "completely occupie[s]" a field of safety regulations,[63] the Fourth Circuit held that "[w]e thus cannot allow non-source states to ascribe to a generic savings clause."[64]

The court found further justification in the preemptive effect of federal regulations under the *Ouellette* court's evaluation of the savings clause provision contained in the CWA.[65] Noting the similarities between the CWA and the CAA, the Fourth Circuit adopted the Supreme Court's reasoning that such clauses do not allow for the upset of "carefully drawn statute[s]" and that the implementation of numerous discharge standards on a single emission source would effectively thwart "the full purposes and objectives of Congress."[66]

Finally, the Fourth Circuit reinforced its decision to overturn the injunction placed on the TVA plants by outlining a number of alternative remedies available to North Carolina.[67] In addition to the remedy provided by § 7426 of the CAA allowing states the opportunity to petition the Administrator of the EPA for relief of emissions in violation of the CAA,[68] the court also emphasized the importance of the notice and comment period, which allows interested parties the opportunity to object to the modification or construction of emission sources under SIPs.[69] Thus, the court reasoned that North Carolina, which had received the opportunity to object to the presence of TVA plants along the border, "cannot complain now that it desires a different resolution."[70]

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62. *Id.* at 303 (quoting 42 U.S.C. § 7604(e) (2006)).

63. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983).

64. *Tenn. Valley Auth. IV*, 615 F.3d at 304.

65. *See id.* (noting that the *Ouellette* court "indicated that the clause was ambiguous as to which state actions were preserved").

66. *Id.* (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987)).

67. *Id.* at 310-11.

68. *See* 42 U.S.C. § 7426(b) (2006).

69. *Tenn. Valley Auth. IV*, 615 F.3d at 297 (citing 42 U.S.C. § 7426(a)(1)).

70. *Id.* at 310.

IV. ANALYSIS

In the noted case, the Fourth Circuit expressed a preference for agency expertise over state nuisance law in the regulation of emissions standards. In reversing the district court's injunction on TVA plants, the Fourth Circuit held that North Carolina erroneously applied state law extraterritorially; furthermore, the TVA plants did not constitute a nuisance under the laws of Alabama and Tennessee.[71] Emphasizing the inherent weaknesses of state nuisance law, the court correctly prohibited North Carolina from upsetting the balanced system of emissions regulation authorized by Congress, established by the EPA, and implemented through state permits.[72]

The Supreme Court's holding in *Ouellette* provided the Fourth Circuit with an authoritative basis to hold that the need for efficiency, organization, and certainty in the enforcement of emissions regulations must override state nuisance law. Thus, the court's emphasis on the "vague" and "indeterminate" nature of nuisance standards bolstered the preference for agency expertise both in creating emissions standards and "provid[ing] states with information about available emissions controls."[73] The court emphasized the established and uniform system of regulation controlling the respective functions of the judiciary and agencies while maintaining "reliance interests and expectations on the part of those states and enterprises that have complied with [the agencies'] requirements."[74]

Furthermore, the Fourth Circuit's emphasis on the application of source state law in interstate nuisance disputes demonstrates the court's intention to adhere to the principles of federalism.[75] Thus, the court's finding that North Carolina's extraterritorial application of state law was erroneous reflected the reasoning articulated by the Supreme Court in *Ouellette*, which provided that "only source state law . . . could impose more stringent emission rates than those required by federal law on plants located in those . . . jurisdictions."[76] The Fourth Circuit's decision to apply source state law, then, serves the dual purpose of promoting uniformity in the regulation of air quality standards and reinforcing the values of federalism, state autonomy, and fairness.

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71. *Id.* at 311.
72. *See id.* at 297-98.
73. *Id.* at 304 (quoting 42 U.S.C. § 7408(b)(1)).
74. *Id.* at 301.
75. *Id.* at 306.
76. *Id.* at 308 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494-97 (1987).

Pacific Gas provides further support for the Fourth Circuit's decision to overturn the injunction and yield to agency expertise by emphasizing the need for preemption of state law when "the matter on which the State asserts the right to act is . . . regulated by the Federal Act."[77] Despite the existence of a savings clause preserving the right for states to seek enforcement of emissions standards, the Fourth Circuit's reliance on the test for preemption articulated by the Supreme Court in *Pacific Gas* reveals the need to disregard reserved rights of states when a federal agency "completely occupie[s] [a] field of . . . safety regulations."[78] Similarly, the Court's concern in *Ouellette* over "which state actions were [in fact] preserved" under the savings clause of the CWA further supports the court's reluctance to allow state actions to upset the full purposes and objectives of Congress.[79] Despite the court's apparent disregard for state action under a savings clause, its reference to alternative remedies, including North Carolina's "right to petition for immediate relief from unlawful interstate pollution under section 126," demonstrates its recognition of the State's need for relief.[80]

The court's decision in the noted case emphasizes the need for emissions regulation to remain the primary concern of the federal government rather than the states. Although nuisance law may be effectively used to combat negligent operation of in-state emissions sources,[81] state autonomy and fairness dictate against asserting in-state nuisance law against out-of-state emissions sources. Furthermore, any benefits that state nuisance law may provide to citizens near state borders who desire greater protection from emission sources are outweighed by the efficiency of maintaining a uniform set of regulatory measures under the CAA. Allowing states to rely on common law tort claims to enforce out-of-state emissions standards not only frustrates an established system of emissions regulation, but also undermines Congress's objective to maintain the public health through the uniform regulation of air pollution.[82]

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77. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, at 212-23 (1983).

78. *Id.* at 210.

79. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987).

80. *Tenn. Valley Auth. IV*, 615 F.3d at 310 (quoting North Carolina v. EPA, 531 F.3d 896, 930 (D.C. Cir. 2008)).

81. *See* Fey v. Nashville Gas & Heating Co., 64 S.W.2d 61, 62 (Tenn. Ct. App. 1933).

82. *See* 42 U.S.C. § 7409(b)(1) (2006).

V. CONCLUSION

The Fourth Circuit's decision in the noted case has promising implications for the EPA's future ability to ensure uniform state compliance with national emissions standards. By ensuring that out-of-state emissions sources remain free from the constraints of abstract state law and conflicting court orders, the Fourth Circuit's decision reinforced the legitimacy of agency expertise, discouraged the potential for courts to assume unnecessary responsibilities, and supported the values of federalism. Thus, the court's decision to invalidate the injunction on the TVA plants recognized the need for clarity in the judicial process and reinforced the preference for an established and detailed regulatory system over mere nuisance claims advanced by self-interested entities.

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