

## NORTH CAROLINA V. TENNESSEE VALLEY AUTHORITY

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In *North Carolina v. Tennessee Valley Authority*,<sup>1</sup> (“TVA II”) the Court of Appeals for the Fourth Circuit held that the federal Clean Air Act (“CAA”) preempted certain, if not all, applications of state nuisance law. The court also ruled on the meaning of state nuisance laws and the scope of North Carolina’s air quality laws. This Comment analyzes the court’s ruling, with particular attention to the aspects of the ruling that are likely to prove controversial.

### I. INTRODUCTION

The federal CAA is a textbook example of a federal regulatory solution to a national problem. Because air pollution does not respect state boundaries, state decisions on air pollution control can affect air quality nationally and globally, particularly in neighboring states. Further, due to weather patterns and geography, air pollution is likely to impact certain “downwind” or “downstream” states more than their “upstream” neighbors, in the same way that localities further downstream on a river are likely to experience a greater degree of water pollution. Largely because of the national scale of the problem, air quality is widely seen as an appropriate, and perhaps necessary, subject for federal regulation.

But a drawback of federal regulation is that it may limit a state’s freedom to decide its own environmental policy. Such a limitation, in the case of air pollution, extends not just to states where citizens may wish to accept dirtier air as the price of cheaper electricity or economic opportunities, but also to states where citizens wish to make the opposite trade-off, opting for cleaner air and better visibility of natural scenery. Under current federal law, a state may establish higher air quality standards for itself, but a state has limited influence over other states’ emissions. If the state is a downwind state, emissions from other states may make it impossible to attain higher air quality.

In such a case, the downwind state may wish to sue the upwind state or the individual polluters located upwind. A suit for damages could force the upwind polluters to pay the loss of value (in human health, natural beauty, etc.) imposed on the downwind state; monetizing these externalities could then lead the state or individual polluters to alter their pollution control decisions. The state could also seek equitable relief, such as an injunction requiring better pollution controls. However, under a regime of federal regulation, the polluter or the state may argue in its defense that it is simply

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<sup>1</sup> 615 F.3d 291 (4th Cir. 2010), *reh’g & reh’g en banc denied*, 09–1623 (4th Cir. Sept. 29, 2010).

complying with the federal standards, and that it should not be held to a higher standard.

Just such a scenario played out in *TVA II*. Since passing its Clean Smokestacks Act in 2002, North Carolina has lowered its emissions of certain harmful pollutants to a standard more stringent than that required by federal law. Still, due to the emissions of upwind states, it has faced difficulties in attaining its goal of superior air quality. As part of its effort to improve its air quality, the state brought suit against the Tennessee Valley Authority (“TVA”), which operates electric facilities in upwind states,<sup>2</sup> arguing that its facilities’ pollution constituted a public nuisance to North Carolina under state laws. After a twelve-day bench trial, the district court agreed with North Carolina that certain facilities contributed significantly to air pollution in North Carolina,<sup>3</sup> and found that this constituted a public nuisance under each respective state’s laws, issuing an injunction requiring the facilities to install costly equipment to reduce emissions.<sup>4</sup>

A panel of the Fourth Circuit reversed and ordered the case dismissed entirely.<sup>5</sup> In reaching this disposition, the court held: (1) that the district court had applied the wrong standard of law, using North Carolina law rather than the laws of the states in which the plants were located;<sup>6</sup> (2) that the laws of the states in which the facilities were located precluded nuisance actions of this sort;<sup>7</sup> and (3) that the nuisance action was preempted by federal law.<sup>8</sup> This last holding is likely to be the most controversial, both because it is arguably at odds with Supreme Court precedent and with the Fourth Circuit’s own prior holding on an interlocutory appeal,<sup>9</sup> and because the Fourth Circuit was extremely vague in its description of what actions it found to be preempted by the CAA. Furthermore, this holding was not necessary to the disposition, which was independently compelled by the court’s interpretation of state law. The broad and uncertain federal preemption declared by the court could cause future difficulties for states that independently attempt to improve the quality of the environment, and such preemption would place future air quality improvement efforts exclusively in the realms of the federal Environmental Protection Agency (“EPA”) or the federal Congress.

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<sup>2</sup> Along the East Coast, prevailing weather patterns move air from west to east. Here, the upwind facilities were in Kentucky, Tennessee, and Alabama; only certain facilities in Tennessee and Alabama were found to contribute significantly to air pollution in North Carolina, and the district court sought to apply the nuisance laws of these two states to the facilities within their respective borders. *TVA II*, 615 F.3d at 306–07.

<sup>3</sup> *North Carolina v. Tenn. Valley Auth.* (“*TVA*”), 593 F. Supp. 2d 812, 825–26 (W.D.N.C. 2009).

<sup>4</sup> *Id.* at 831–34.

<sup>5</sup> *TVA II*, 615 F.3d at 312.

<sup>6</sup> *Id.* at 306–09.

<sup>7</sup> *Id.* at 309–10.

<sup>8</sup> *Id.* at 301–04.

<sup>9</sup> *North Carolina v. Tenn. Valley Auth.* (“*TVA I*”), 515 F.3d 344 (4th Cir. 2008).

## II. BACKGROUND

### A. *Regulatory Framework*

The CAA<sup>10</sup> requires that the EPA establish National Ambient Air Quality Standards (“NAAQS”).<sup>11</sup> As the name implies, NAAQS establish a uniform baseline for air quality nationwide.<sup>12</sup> However, in establishing these standards, EPA was careful to note that the establishment of such standards “shall not prohibit any State . . . from establishing ambient air quality standards for that State . . . or any portion thereof which are more stringent than the national standards.”<sup>13</sup>

Congress gave the states some discretion regarding the details of complying with the federal standards, allowing each state to formulate an individual plan for attaining compliance with the NAAQS.<sup>14</sup> The State Implementation Plans (“SIPs”) prepared by the states are subject to public notice-and-comment and review by EPA,<sup>15</sup> and EPA has the power to approve, deny, or require modifications of SIPs.<sup>16</sup> For a state’s SIP to be valid, it not only must provide for the attainment of NAAQS within the state, but it also must “contain adequate provisions prohibiting . . . any source or other type of emissions activity . . . which will contribute significantly to nonattainment” in any other state.<sup>17</sup>

If a downwind state wishes to complain that an upwind state’s SIP impermissibly “contribute[s] significantly to nonattainment” in the downwind state, the downwind state has two potential opportunities to air its concerns. First, the downwind state may raise its concern about interstate pollution during the public hearing when the upwind state first proposes its SIP.<sup>18</sup> However, it may be difficult for the downwind state to anticipate how the upwind state’s current plan for pollution control will contribute to future pollution in the downwind state (unless the plan blatantly states, for example, that the state will attain internal compliance by placing its polluting facilities exclusively along the state’s borders). A state’s policies are often already in place before the consequences of those policies (here, contributing to pollution in another state) become apparent.

Second, for relief from a currently existing policy, the CAA provides that the downwind state may file a petition with EPA, known as a section 126 petition, asking that the upwind state’s SIP be reviewed and modified.<sup>19</sup>

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<sup>10</sup> Clean Air Act, 42 U.S.C. §§ 7401–7671 (2010).

<sup>11</sup> 42 U.S.C. § 7409 (2010). These standards, which are set and occasionally revised on a pollutant-specific basis, are codified in 40 C.F.R. pt. 50 (2010).

<sup>12</sup> See 42 U.S.C. § 7409 (2010), 40 C.F.R. § 50.2(b) (2010).

<sup>13</sup> 40 C.F.R. § 50.2(d) (2010).

<sup>14</sup> 42 U.S.C. § 7410 (2010).

<sup>15</sup> *Id.* § 7410 (a).

<sup>16</sup> *Id.* § 7410 (k).

<sup>17</sup> *Id.* § 7410 (a)(2)(D) (internal section breaks omitted).

<sup>18</sup> *Id.* § 7410 (a)(1).

<sup>19</sup> 42 U.S.C. § 7426 (b) (2010).

EPA, however, has historically been extremely reluctant to grant such petitions. From 1977 to 1998 EPA never granted such a petition,<sup>20</sup> and since 1998 EPA has still generally avoided or denied such petitions, often by claiming that they are mooted by contemporaneous rulemaking.<sup>21</sup> Indeed, North Carolina had filed such a petition prior to its suit against TVA, but its complaints were rebuffed repeatedly by EPA, with reference to ongoing rulemakings.<sup>22</sup>

In all of this, however, one must realize that the only valid complaint that a downwind state may make to EPA is that another state's SIP contributes to the downwind state's nonattainment of NAAQS — that is, the *national* standard. Despite early indications that EPA would also consider nonattainment of more stringent *state* standards,<sup>23</sup> and despite an early circuit court ruling indicating that EPA had the discretion to do so,<sup>24</sup> EPA does not currently provide any method by which a state can complain of another state's contribution to nonattainment of more stringent state standards. In other words, if a state wishes to attain a higher air quality standard than provided by NAAQS, and if controlling pollution from out of state is a necessary step in attaining that standard, the state has no available means to receive assistance from EPA regarding the out-of-state pollution.

Under this formulation of the problem, the importance of the preemption issue becomes clear.<sup>25</sup> If a state wishes to attain more stringent air quality standards than the federal NAAQS, it must go outside the prescribed regulatory process administered by EPA. But if federal law is found to preempt any state-level action regarding interstate pollution, the downwind state *cannot* go outside of this prescribed regulatory process. The downwind state then has no recourse under either federal or state law to decrease the amount of pollution from out of state.<sup>26</sup>

If a downwind state, operating under the preemption regime just described, wishes to alter another state's emissions, the state must lobby EPA or the Congress to adopt, for the entire nation, the more stringent standard.

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<sup>20</sup> Arnold Reitze, Jr., *Air Quality Protection Using State Implementation Plans*, 15 VILL. ENVTL. L.J. 209, 332 (2004).

<sup>21</sup> See *id.* at 335–44 (describing history of rulemaking for the NO<sub>x</sub> SIP call in relation to states' section 126 petitions).

<sup>22</sup> See 71 Fed. Reg. 25,328 (Apr. 28, 2006) (denying initial petition); 72 Fed. Reg. 35,354 (Jun. 28, 2007) (denying reconsideration). As described in greater detail in Part II.B, *infra*, North Carolina's section 126 petition has been reopened by order of the D.C. Circuit. *Sierra Club v. EPA*, 313 Fed. Appx. 331 (D.C. Cir. 2009).

<sup>23</sup> See Richard Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2367 (1996).

<sup>24</sup> *Id.* at 2367–68 (citing *Connecticut v. EPA*, 656 F.2d 902, 910 (2d Cir. 1981)).

<sup>25</sup> This note only addresses one feature of the CAA under the lens of federalism. For a more detailed federalist analysis of the CAA's adoption and implementation, see John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

<sup>26</sup> Worse yet, an upwind state could conceivably *increase* its emissions into the downwind state in response to the downwind state's lowering of its own emissions, without consequence. As long as these actions in tandem would not raise the downwind state's pollutant levels above NAAQS, the downwind state would appear to have no valid federal complaint against the upwind state.

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This presents obvious difficulties for a state that seeks a standard higher than most other states are willing to adopt. The only obvious alternative would involve negotiation with other states or the polluters in other states, but without the threat of state-level litigation, the state seeking stricter standards has no leverage in such negotiations.

Whether the CAA preempts state law nuisance claims is thus an important question for states that wish to attain higher air quality. In early judicial rulings on the matter, it seemed likely that the CAA preempted some, if not all, nuisance claims under *federal* common law.<sup>27</sup> State common law nuisance claims, however, seemed to have potential, particularly after the Supreme Court's ruling in *International Paper Co. v. Ouellette*.<sup>28</sup> In that case, the Court dealt with interstate water pollution, and the Court held that state nuisance law was not preempted and could be applied to interstate pollution, but that courts must apply the law of the state in which the *source* was located.<sup>29</sup> In finding such suits not preempted, the Court relied on the Clean Water Act's savings clause.<sup>30</sup> Almost identical language is found in the CAA's savings clause:

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 . . . . Nothing in this section or *in any other law* of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from —

- (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
- (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

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<sup>27</sup> See *New England Legal Found. v. Costle*, 666 F.2d 30, 32 (2nd Cir. 1981); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982). Both of these cases noted the similarity to the Clean Water Act and applied the Supreme Court's preemption analysis from *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 21–22 (1981). *But see* *Cal. Tahoe Reg'l Planning Agency v. Jennings*, 594 F.2d 181, 192–93 (9th Cir. 1979) (holding that federal common law nuisance claims were not preempted by CAA), *cert. denied*, 444 U.S. 864 (1979). The Supreme Court could directly rule on this issue in *American Electric Power v. Connecticut*. No. 10-174 (*cert. granted* Dec. 6, 2010) (Sotomayor, J. recused). The United States has argued that, by issuing an endangerment finding for greenhouse gas pollutants and bringing them under the purview of the CAA, EPA has displaced federal common law claims of nuisance relating to those pollutants. See Brief for Petitioner TVA at 22-32, 2010 WL 3337661. For an overview of the federal common law of nuisance, and for an analysis of the case now on appeal before the Supreme Court, see Nikhil V. Gore & Jennifer E. Tarr, Case Comment, *Connecticut v. American Electric Power*, 34 HARV. ENVTL. L. REV. 577 (2010).

<sup>28</sup> 479 U.S. 481 (1987).

<sup>29</sup> *Id.* at 497–98.

<sup>30</sup> *Id.* at 497, 485 (referencing the Clean Water Act's savings clause, 33 U.S.C. § 1370).

against the United States, any department, agency, or instrumentality thereof . . . under State or local law respecting control and abatement of air pollution.<sup>31</sup>

By the plain language of the savings clause, and under the Supreme Court's reasoning in *Ouellette*, state common law nuisance actions regarding air pollution do not appear to be preempted by the CAA.<sup>32</sup> In fact, the savings clause explicitly contemplates air pollution suits against U.S. "agenc[ies]" or "instrumentalit[ies]" (as which TVA qualifies<sup>33</sup>), if not against private parties. However, as described below, in the present case the Fourth Circuit did not adopt this analysis.

### B. North Carolina's Pollution Control Efforts

In 2002, North Carolina enacted its Clean Smokestacks Act,<sup>34</sup> which required the installation of scrubbers on the coal-fired power plants of the state's largest utilities. As a result, emissions of sulfur dioxide ("SO<sub>2</sub>") and nitrogen oxides ("NO<sub>x</sub>")<sup>35</sup> from these utilities have dropped by more than 75% each, and the state has also observed associated decreases in ambient ozone and fine particles.<sup>36</sup> All of these air pollutants have environmental and human health consequences.

In its effort to improve its air quality further, the state petitioned EPA in 2004 for relief from the higher degree of pollution emitted by electric utilities in upwind states, using the section 126 petition method described in Part I.A, above. More than two years later, EPA denied the petition in full, arguing that some of North Carolina's claimed interstate pollution was not significant, and that the significant pollution would be addressed by a contemporaneous rulemaking, namely the Clean Air Interstate Rule ("CAIR"),<sup>37</sup> which was a proposed emissions-trading program that EPA claimed would address the issue of interstate pollution.<sup>38</sup>

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<sup>31</sup> 42 U.S.C. § 7604 (e) (emphasis added) (2010). The first sentence alone is identical to the entire savings clause of the Clean Water Act, except for the substitution of "emission" for "effluent."

<sup>32</sup> At least one federal appellate court has followed this logic. *See Her Majesty the Queen v. Detroit*, 874 F.2d 332, 342–43 (6th Cir. 1989).

<sup>33</sup> *TVA II*, 615 F.3d at 296 (TVA "is a federal executive branch agency") (citing provisions of the TVA Act, 16 U.S.C. §§ 831–831dd).

<sup>34</sup> An Act to Improve Air Quality in the State by Imposing Limits on the Emission of Certain Pollutants from Certain Facilities that Burn Coal to Generate Electricity and to Provide for Recovery by Electric Utilities of the Costs of Achieving Compliance with Those Limits, 2002 N.C. Sess. Laws 4.

<sup>35</sup> Sulfur dioxide and nitrogen oxides are two pollutants that result from the burning of coal. These compounds cause acid rain, among other effects (SO<sub>2</sub> contributes to formation of particulate pollution; NO<sub>x</sub> contributes to formation of ozone).

<sup>36</sup> NORTH CAROLINA DIVISIONS OF AIR QUALITY, CLEAN SMOKESTACKS ACT BENEFITS UPDATE, (2010), [http://daq.state.nc.us/news/leg/Clean\\_Smokestacks\\_Act\\_Benefits.ppt](http://daq.state.nc.us/news/leg/Clean_Smokestacks_Act_Benefits.ppt) (on file with the Harvard Law School Library).

<sup>37</sup> 71 Fed. Reg. 25,328, 25,330 (Apr. 28, 2006).

<sup>38</sup> 70 Fed. Reg. 25,162 (May 12, 2005).

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EPA's linkage of North Carolina's petition to CAIR would prove to keep the issue alive for far longer than either North Carolina or EPA probably desired. North Carolina petitioned for reconsideration of EPA's determination, and, when this petition was denied,<sup>39</sup> appealed to the Court of Appeals for the District of Columbia Circuit, challenging not only the denial of its petition but also the validity of CAIR itself. Ultimately, the challenge was successful on the latter ground. CAIR was invalidated on the grounds that the emissions trading program violated the text of the CAA, which requires consideration of the effects of emissions of *specific* states on *specific* other states.<sup>40</sup> Because an emissions trading scheme allows trading away of this burden, the D.C. Circuit reasoned, such a scheme violates the requirements of the CAA.

Whatever the merits of the court's reasoning in invalidating CAIR,<sup>41</sup> the fact that it did so reopened the issue of North Carolina's petition, because EPA's basis for denial was that CAIR would address North Carolina's concerns. As a result, the D.C. Circuit ordered EPA to reconsider the section 126 petition.<sup>42</sup> Accordingly, as of this writing nearly seven years after North Carolina first filed its petition on interstate emissions, that same petition remains pending. When EPA does eventually respond to North Carolina's petition, its response will likely be (if history is any guide) that the petition's concerns will be addressed by EPA's latest rulemaking involving interstate emissions.<sup>43</sup>

In the midst of all of this, North Carolina, presumably impatient with EPA's untimely and indirect responses to its petition, decided to force TVA to account for its externalities the old-fashioned way: by filing suit in federal court under state common law of nuisance.<sup>44</sup> We now examine this suit in more detail, before turning to the appeal that is the main subject of this Comment.

### C. *The District Court Decision*<sup>45</sup>

North Carolina brought suit in the District Court for the Western District of North Carolina against TVA regarding emissions from its coal-fired power plants in three upwind states: Kentucky, Tennessee, and Alabama. Early in North Carolina's case against TVA, TVA appealed the district court's denial of TVA's motion to dismiss. One of TVA's argued grounds for

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<sup>39</sup> 72 Fed. Reg. 35,354 (June 28, 2007).

<sup>40</sup> North Carolina v. EPA, 531 F.3d 896, 907 (D.C. Cir. 2008).

<sup>41</sup> For an analysis criticizing the court's reasoning, see Elizabeth Kruse, Case Comment, North Carolina v. Environmental Protection Agency, 33 HARV. ENVTL. L. REV. 283 (2009).

<sup>42</sup> Sierra Club v. EPA, 313 Fed. Appx. 331 (D.C. Cir. 2009).

<sup>43</sup> 75 Fed. Reg. 45,210 (Aug. 2, 2010).

<sup>44</sup> In the words of the district court, "North Carolina now turns to the federal courts as the final source of relief . . ." North Carolina v. Tenn. Valley Auth. ("*TVA*"), 593 F. Supp. 2d 812, 816 (W.D.N.C. 2009).

<sup>45</sup> *Id.*

dismissal was federal preemption by the CAA. A panel<sup>46</sup> of the Fourth Circuit rejected the federal preemption argument,<sup>47</sup> allowing the suit to proceed under the common law of nuisance.

The case proceeded to a bench trial in July 2008,<sup>48</sup> and the district court awarded injunctive relief against four of TVA's plants in January 2009.<sup>49</sup> Relying on expert testimony,<sup>50</sup> the court determined that TVA's plants within 100 miles of North Carolina's border contributed significantly to harmful levels of air pollution in North Carolina.<sup>51</sup> The court did not find sufficient evidence to establish that the plants farther than 100 miles from North Carolina's border contributed significantly.<sup>52</sup>

Under the court's analysis of the laws of Alabama<sup>53</sup> and Tennessee,<sup>54</sup> TVA's contributions from these plants constituted a public nuisance. The court also held that injunctive relief was proper, and the court ordered TVA to install controls that would lower the four facilities' emissions to levels similar to those required of North Carolina's facilities.<sup>55</sup> TVA appealed the court's judgment.

### III. THE CIRCUIT COURT'S OPINION

The *TVA II* court reversed the district court's judgment with directions to dismiss.<sup>56</sup> The court<sup>57</sup> relied on two independent grounds for its decision: that state law, when properly applied, did not permit the nuisance action; and that federal law would have preempted any such state law action in this case. Of these two grounds, the one involving state law is analytically clearer, more narrowly tailored to the case at hand, and less controversial. However, the *TVA II* court devoted a greater portion of its opinion to the federal law preemption issue than to the state law issues, and seemed to rely on preemption as its primary basis for deciding the case. This Part will describe the court's rulings on the state law and federal law issues in turn; the subsequent Part will analyze and critique the court's treatment of these issues in greater detail.

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<sup>46</sup> Notably, this was a different panel from the one that decided the ultimate appeal.

<sup>47</sup> *TVA I*, 515 F.3d 344, 350–53 (4th Cir. 2008).

<sup>48</sup> *TVA*, 593 F. Supp. 2d at 818.

<sup>49</sup> *Id.* at 831–34.

<sup>50</sup> *Id.* at 828–29.

<sup>51</sup> *Id.* at 825.

<sup>52</sup> *Id.* at 825–26.

<sup>53</sup> *Id.* at 829–30.

<sup>54</sup> *Id.* at 830–31.

<sup>55</sup> *Id.* at 831–34.

<sup>56</sup> *TVA II*, 615 F.3d 291, 312 (4th Cir. 2010).

<sup>57</sup> Judge Wilkinson, writing for the court, was joined by Judge Niemeyer and Judge Shedd.

### A. *State Law Issues*

The court reached two important holdings on issues implicating state law: (1) that the wrong state's law had been applied, and (2) that the correct states' laws would have precluded the action. This section will review the court's reasoning on these points.

#### 1. *Application of North Carolina Law*

The court held that the district court had improperly applied North Carolina law extraterritorially. To support this finding, the court primarily relied on two pieces of evidence: (1) statements contained in North Carolina law and statements made by North Carolina officials regarding the litigation, and (2) the nature of the remedies that the district court actually ordered.

First, the Clean Smokestacks Act itself contained language requiring the state to use any means necessary, including litigation, to gain similar emissions reductions from sources outside of North Carolina.<sup>58</sup> The court also relied on statements made in the course of litigation, and statements made contemporaneously (e.g. a press release), referencing the state's goal of lowering TVA's emissions to a level "similar to" or "equivalent to" Clean Smokestacks Act standards.<sup>59</sup>

The relief ordered by the district court was the second major piece of evidence in support of the court's contention that North Carolina law was applied extraterritorially. The state requested emissions levels equivalent to Clean Smokestacks Act levels, and the district court ordered exactly such relief for those facilities that it found to be significantly contributing to air pollution in North Carolina.<sup>60</sup>

Recall that in *Ouellette*, the Supreme Court held that the only applicable law in a state nuisance action was the law of the state in which the polluting facility was located;<sup>61</sup> it is thus impermissible to apply the law of a downwind state to the polluters in an upwind state.<sup>62</sup> Therefore, based on its finding that North Carolina law was applied to out-of-state polluters, the court held that the ruling must be reversed.

In short, the court reasoned that, because the state had expressed a desire for out-of-state emissions reductions similar to the Clean Smokestacks Act's in-state reductions, and because this was the relief actually awarded by the district court, the judgment and remedy were an invalid extraterritorial application of state law, and thus could not stand.

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<sup>58</sup> *TVA II*, 615 F.3d at 307 (quoting 2002 N.C. Sess. Laws 4 § 10).

<sup>59</sup> *Id.* at 307.

<sup>60</sup> *Id.* at 307–09.

<sup>61</sup> *International Paper Co. v. Ouellette*, 479 U.S. 481, 498–500 (1987).

<sup>62</sup> *Id.* at 494–97.

## 2. Application of Alabama and Tennessee Law

In addition to holding that the district court applied the incorrect state's law, the court took the extra step of explaining that, if the correct states' laws had been applied, the nuisance action could not have been maintained. This extra legal step allowed the court to order the case dismissed.

The court based this extra step on two legal grounds: (1) that both Alabama and Tennessee law bar nuisance claims against activities that are the subjects of state permits, unless the activities are done negligently;<sup>63</sup> and (2) that the state law nuisance standards in Alabama and Tennessee are necessarily less stringent, in the realm of air pollution, than the federally-issued permits that account for NAAQS.<sup>64</sup>

The court cited various Alabama and Tennessee cases for the proposition that negligence is a necessary element of a nuisance claim "if the defendant's activities are specifically authorized by law[.]"<sup>65</sup> and that in general, "there can be no abatable nuisance for doing in a proper manner what is authorized by law."<sup>66</sup> As the court also pointed out, this position has some basis in the common law of torts.<sup>67</sup>

The court also made use of another line of doctrine in the common law of nuisance: that some state nuisance laws are tied to the standard of the "ordinary reasonable man" or the person of "ordinary health and sensibilities[.]"<sup>68</sup> Because the NAAQS standard is supposedly a higher standard that also protects *sensitive* citizens,<sup>69</sup> the court reasoned, the fact that TVA's facilities are required to account for NAAQS means that they must necessarily satisfy the standards of Alabama and Tennessee nuisance law.

As will be discussed in Part IV.A, below, these state law issues are not as clear as the court suggests, and there are several grounds for questioning the court's legal analysis on these points. But having reached such a ruling on the state law issues, it was unnecessary for the court to address the more complicated issues of federalism and preemption, which could have major implications for other cases. The court nonetheless chose to make the federal issues the larger part of its opinion, and we will now examine the court's holding on these issues.

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<sup>63</sup> *TVA II*, 615 F.3d at 309–10.

<sup>64</sup> *Id.* at 310.

<sup>65</sup> *Id.* at 309–10 (internal quotations and citations omitted).

<sup>66</sup> *Id.* (internal quotations and citations omitted).

<sup>67</sup> *Id.* at 309 (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. f. (1979) ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability."))

<sup>68</sup> *Id.* at 310 (internal quotations and citations omitted).

<sup>69</sup> *Id.* (citing *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998)).

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B. *Federalism and Preemption*

The *TVA II* court held that the CAA preempted North Carolina's nuisance suit, and repeatedly cited *International Paper Co. v. Ouellette*<sup>70</sup> as the primary authority requiring this result.<sup>71</sup> Yet *Ouellette* held that state common law suits regarding emissions *could* go forward as long as they were limited to the *source* state's law, thus dealing with the problem of having multiple state laws governing a single emission (the "multiplicity" problem).<sup>72</sup> The court used language from the *Ouellette* Court supposedly condemning common law suits generally, even though this language was actually addressing the ills of the multiplicity of standards that would result if states could sue extraterritorially under their own laws.

The fact that the court arrived at this holding may have been partly due to the court's conclusion, described in Part III.A, above, that the district court *did* apply North Carolina's laws against a foreign state, which (if true) would clearly violate *Ouellette*. But the court did not explicitly link its preemption holding to its choice of law analysis. Although the court refused to hold that Congress "entirely preempted the field of emissions regulation[,]"<sup>73</sup> it did imply that most (if not all) nuisance actions that would condemn air emissions allowed by federal law would be preempted,<sup>74</sup> *even if* source state law were used to bring the action. In the court's language, utilizing state law (even correctly) would "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air,"<sup>75</sup> "[result in] a balkanization of clean air regulations and a confused patchwork of standards,"<sup>76</sup> "chaotically upend an entire body of clean air law,"<sup>77</sup> and amount to "'nothing more than a collateral attack' on the system . . . ."<sup>78</sup> The concern that state law nuisance suits had disruptive potential was apparently crucial to the court's finding of preemption.

The court also gave an institutional competence argument, namely that Congress intended to vest decisionmaking authority on emissions in EPA, removing such questions from common law adjudications in state courts.<sup>79</sup> Finally, the court expressed concern that litigation outcomes would be un-

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<sup>70</sup> 479 U.S. 481 (1987).

<sup>71</sup> *TVA II*, 615 F.3d at 301–04 (citing and quoting *Ouellette* repeatedly).

<sup>72</sup> 479 U.S. at 497–98.

<sup>73</sup> *TVA II*, 615 F.3d at 302.

<sup>74</sup> *Id.* at 303 ("We can state, however, with assurance that *Ouellette* recognized the considerable potential mischief in those nuisance actions seeking to establish emissions standards different from federal and state regulatory law and created the strongest cautionary presumption against them.").

<sup>75</sup> *Id.* at 296.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 312.

<sup>78</sup> *Id.* at 301 (quoting *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir. 1993)) (internal quotations omitted).

<sup>79</sup> *Id.* at 304–06.

predictable, because nuisance in particular is a “vague and indeterminate” standard.<sup>80</sup>

However, for all the reasons the court gave to support its decision on preemption, the court did not provide a clear guide regarding what common law actions on emissions would be preserved under its preemption framework. The court, again, did not hold the field entirely preempted, admitting its inability to “anticipate every circumstance that may arise in every future nuisance action.”<sup>81</sup> The court’s opinion ultimately leaves the reader with little more guidance than “the strongest cautionary presumption against” such suits.<sup>82</sup>

#### IV. ANALYSIS

##### A. State Law Issues

###### 1. Alleged Application of North Carolina Law

The court held that the district court had applied North Carolina law extraterritorially, but the court’s given reasons for this holding have troubling implications. First, the court relied on statements made in North Carolina records and by public officials expressing the state’s intentions to lower out-of-state emissions to levels similar to those permitted in-state. If the mere expression of intent to lower out-of-state emissions is sufficient evidence of an attempted extension of state law beyond its borders, this reasoning would almost always bar a state with more stringent emissions standards from seeking to lower out-of-state emissions; it seems reasonable and natural for a state to compare publicly its own standards to those of another state when complaining of interstate emissions.

The court also relied on the fact that the relief actually awarded at certain plants was to have those plants comply with something very close to North Carolina emissions standards.<sup>83</sup> However, it is unclear what other remedy would be appropriate. North Carolina could certainly not equitably ask for a more stringent standard than it itself followed. However, asking for something less stringent than the state standard would be compromising the state’s own chosen policies,<sup>84</sup> and would violate the state’s duty to advocate zealously for its citizens. As for the district court’s decision on the remedy, it is unclear whether it would be more appropriate for a court to choose (perhaps arbitrarily) a standard somewhere between the federal and the North Carolina emissions requirements. The only reasonable and equita-

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<sup>80</sup> *Id.* at 303 (quoting *Ouellette* 479 U.S. at 496).

<sup>81</sup> *Id.* at 302.

<sup>82</sup> *Id.* at 303.

<sup>83</sup> In fact, no such standard exists; North Carolina’s law uses system-wide, not plant-specific, caps on emissions. The district court relied on an expert’s estimation of what plant-specific standard would be an equivalent to North Carolina’s law. *Id.* at 308.

<sup>84</sup> Further, it would seem difficult for a state to come up with a justifiable less-stringent standard; attempts to do so would seem arbitrary.

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ble request North Carolina could make would be the equivalent of its own emission standards, but to the *TVA II* court, this request itself constituted an attempt to apply state law extraterritorially. In practice, the court's stated legal test likely forbids states from asking for, or courts from granting, relief from emissions from facilities located in states where less stringent standards prevail.

## 2. *Alabama and Tennessee Law*

As described in Part III.A.(2), above, the *TVA II* court relied on the general rule that permitted activities do not give rise to nuisance claims in Alabama or Tennessee, and based on this rule held that the nuisance action could not be maintained. What the court did not address, however, was whether there were any exceptions to this general rule, statutory or otherwise.

North Carolina's brief addressed this very issue,<sup>85</sup> and its arguments went entirely unmentioned by the court.<sup>86</sup> As North Carolina argued, the state permits<sup>87</sup> and regulations<sup>88</sup> at issue explicitly leave the permit subjects open to suits at common law. Further, North Carolina quoted extensive Alabama and Tennessee case law describing applicable exceptions to the general rule.<sup>89</sup> A detailed analysis of Alabama and Tennessee common law of nuisance is beyond the scope of this comment. At the very least, however, the *TVA II* court should have attempted to respond to the arguments North Carolina raised in its brief; as written, the court's treatment of Alabama and Tennessee law appears rather one-sided.

### B. *Federalism and Preemption*

As described earlier, the court's treatment of the issue of preemption was perhaps unnecessary in light of its other rulings. The court more prudently could have avoided the issue, instead resolving this case on the more concrete grounds of state law. However, the preemption analysis was the first one given by the court, and the court also gave this analysis a greater amount of text (though arguably a lesser degree of clarity). Because of the court's emphasis of this issue, the court's analysis and the consequences thereof must be taken seriously.

The court's frequent use of *Ouellette* as a basis for preemption, as described above, is somewhat disingenuous, as that case itself did not find

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<sup>85</sup> Final Brief of Appellee State of North Carolina at 45–57, *TVA II* (No. 09–1623), 2009 WL 4249024 [hereinafter “NC Brief”].

<sup>86</sup> The only argument attributed to North Carolina (and dismissed) was that “an activity need not be illegal in order to be a nuisance . . . .” *TVA II*, 615 F.3d at 309.

<sup>87</sup> NC Brief at 53 (quoting text of TVA's Tennessee permits).

<sup>88</sup> NC Brief at 50–51 (Alabama law does not provide “permit shield”); NC Brief at 53 (Tennessee clean air law does not abridge common law rights).

<sup>89</sup> NC Brief at 48–49 (exceptions generally in several states); *Id.* at 49–50 (case law in Alabama); *Id.* at 54–55 (case law in Tennessee).

preemption of state law. Every concern that the court quoted from *Ouellette* was addressed to the dangerous multiplicity of regulations. The *Ouellette* Court feared a regime in which *any* state's law could be applied to a polluting source in *any other state*. Meanwhile, *Ouellette* expressly sanctioned the use of source state law against the polluter in that state. While the *TVA II* court had a colorable analysis that this application of state law did not, in fact, occur in this case, that finding cannot transform the *Ouellette* opinion into an argument for federal preemption.

In support of preemption, the court further expressed a repeated fear that any other ruling would undermine or destroy the current regulatory structure.<sup>90</sup> It seems unclear, however, how court orders imposing stricter emissions standards on certain facilities on the border between two states would "chaotically upend an entire body of clean air law . . . ."<sup>91</sup> The court made no effort to explain why, exactly, these two layers of regulation could not coexist. Perhaps the court feared the possibility of opening the floodgates to hundreds of potential similar suits. Perhaps the court feared the possibility that EPA would stop enforcing the CAA and leave it to the states to fight among themselves. However, with a very small number of states actually pushing for higher air quality standards for themselves, these fears would seem exaggerated. If anything, such suits could have the potential to fill a regulatory *gap*,<sup>92</sup> rather than upsetting existing regulatory structure.

The court also might have been concerned that future suits, larger and more complicated than this one, could be far more disruptive. Although this one case involved enjoining just four facilities, all within 100 miles of North Carolina, a less reasonable court could find causation of air pollution from facilities several states away. Perhaps the court was worried about the potential of climate change litigation (against, for example, every coal-fired plant in the United States) through this route. But the court never stated that it was concerned about these possibilities, and these suggested motivations are mere speculation.

What the court *did* provide was an ample set of concerns that was divorced from any clear rule that would tell future potential plaintiffs whether their actions would, in the court's view, be preempted. Though dealing with a relatively unusual case in which a state was suing a federal utility operating in other states, the court's preemption ruling is not so limited to this case. The broadest (and indeed, most natural) reading of the opinion is that, anywhere in the United States, if some facility has a permit to emit air pollution under the CAA, common law claims against the facility for its emissions are preempted as long as the facility complies with its permit.<sup>93</sup> Though the

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<sup>90</sup> See *supra* notes 75–78 and accompanying quotations.

<sup>91</sup> *TVA II*, 615 F.3d at 312.

<sup>92</sup> See Reitze, *supra* note 20 at 332–344. See also Parts II.A & II.B *supra* (describing regulatory gap regarding interstate emissions in relation to North Carolina).

<sup>93</sup> *TVA II*, 615 F.3d at 303 (declaring "the strongest cautionary presumption against" . . . "nuisance actions seeking to establish emissions standards different from federal . . . regulatory law . . . .").

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court, fortunately, did not condemn “every future nuisance action,”<sup>94</sup> the strength of its condemnation of this particular nuisance action, and the lack of guidance on what future nuisance actions would *not* be condemned, now serve as a strong caution against bringing any nuisance suit on the basis of air pollution in federal courts in the Fourth Circuit.

Thus, in ruling on the preemption issue, the court created legal implications not just for states suing out-of-state polluters, but for any nuisance action involving permitted emissions. While one can debate whether this is desirable, it is doubtless not a prudential ruling to reach in this uncommon case where a narrow, state law-based ruling would have been sufficient.

Furthermore, this ruling seems to be another nail in the coffin of any state’s hopes of improving its air quality to a level greater than federal NAAQS, save for the possibility of major legislative or regulatory change. Any internal efforts made by an individual state can always be frustrated by increased pollution from out-of-state polluters. Not only does this make a state less likely to invest in cleaner air, for fear that its efforts will be unavoidably destroyed by out-of-state forces, but it also has taken away yet another degree of freedom from the state’s right to self-determination, tying a state with higher standards to the standards of the rest of the country.<sup>95</sup> Under the goals of our federal system, neither of these results is desirable.

## V. CONCLUSION

As a result of the Fourth Circuit’s decision, the fate of North Carolina’s efforts to improve its air quality now rests wholly with the federal EPA. Whether EPA’s new rulemaking on interstate emissions will address North Carolina’s problems adequately, and whether the rule can survive another round of challenges, remains to be seen. But if the problem of interstate pollution is going to be solved, this appears to be the only remaining option.

Further, the decision does more than just take away North Carolina’s power to help itself attain cleaner air. The broadest reading implicates *any* nuisance action based on air pollution from a permitted source, not just those complaints that cross state boundaries. The decision further diminishes the incentives any state has to attempt to surpass the federal standard, as out-of-state sources can frustrate in-state standards, and the state is without legal recourse or the bargaining power that comes from potential litigation. This, in turn, exacerbates the problem of the federal air quality standards describing a truly ambient air quality, rather than describing an upper limit which, one would hope, is often met by a comfortable margin.

While there are reasonable arguments on both sides of the state law questions, the implications of the federal preemption question decided in this

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<sup>94</sup> *Id.* at 302.

<sup>95</sup> Much has been written on potential fixation and regulatory stagnation in response to national standards, particularly the theory that they create bad incentives against surpassing minimal standards. *See, e.g.,* Revesz, *supra* note 23, at 2392–94.

case are potentially severe, and the Fourth Circuit was wrong to use this case to decide such a broad question. If taken seriously and literally, this case's reasoning would remove from state discretion a large swath of environmental policy decisions, in a way that Congress almost certainly did not intend.