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## Dust in the Wind: Is TVA's Permit Shield a Death Knell for Interstate Public Nuisance Claims?

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# DUST IN THE WIND: IS TVA'S PERMIT SHIELD A DEATH KNELL FOR INTERSTATE PUBLIC NUISANCE CLAIMS?

**Abstract:** On July 26, 2010, the U.S. Court of Appeals for the Fourth Circuit, in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, held not only that the Clean Air Act (CAA) preempts state nuisance law, but also that the issuance of a CAA permit makes a public nuisance legally and theoretically impossible. In doing so, the Fourth Circuit established a considerable barrier to public nuisance suits. This Comment analyzes the legal viability of this decision and the implications of barring public nuisance in light of its growing popularity to address interstate air pollution and climate change.

## INTRODUCTION

Airborne particles, unfortunately, refuse to respect state boundaries.<sup>1</sup> Sulfur dioxide and nitrogen oxides from the Tennessee Valley Authority's (TVA) coal-fired plants in Tennessee and Alabama transform into fine particulate matter and ozone, which travel to North Carolina where they cause serious health impairments and environmental damage.<sup>2</sup> In search of relief, North Carolina sued the TVA under its own public nuisance law.<sup>3</sup> In July 2010, the U.S. Court of Appeals for the Fourth Circuit heard *North Carolina ex rel. Cooper v. Tennessee Valley Authority (TVA)*.<sup>4</sup> The court had to decide whether enjoining these unwieldy, interstate polluting particles under a public nuisance action was consistent with the structured program of the federal Clean Air Act (CAA), or if "vague public nuisance standards scuttle the

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<sup>1</sup> See *North Carolina ex rel. Cooper v. Tenn. Valley Auth. (TVA I)*, 593 F. Supp. 2d 812, 815, 825 (W.D.N.C. 2009), *vacated*, 615 F.3d 291 (4th Cir. 2010) (*TVA II*).

<sup>2</sup> See *TVA I*, 593 F. Supp. 2d at 819–24. Particulate matter can cause system-wide inflammation of the human body, changes in blood flow to the heart, brain and other vital organs, cardiac arrhythmia, infant mortality, increased incidence of asthma, chronic bronchitis and other cardiopulmonary illnesses. *Id.* at 821–22. Sulfites and nitrates lead to acid deposition in the soil and destruction of fine roots and plant matter. *Id.* at 823. Ozone exposure, similarly, damages vegetation and commercial crops. *Id.* at 824. Particulate matter, especially sulfate, impacts visibility by causing light to scatter, creating a haze over scenic vistas. *Id.* at 824.

<sup>3</sup> See *id.* at 815.

<sup>4</sup> See 615 F.3d at 291.

nation's carefully created system for accommodating the need for energy production and the need for clean air."<sup>5</sup>

This Comment evaluates the *TVA* opinion with a specific emphasis on the Fourth Circuit's impediments to public nuisance suits.<sup>6</sup> Part I introduces the parties to the case and the legal doctrines at issue and provides a procedural summary of the district and appellate court decisions.<sup>7</sup> Part II then highlights the implications of *TVA* for future public nuisance litigation.<sup>8</sup> Finally, Part III establishes the importance of public nuisance jurisprudence to the Clean Air Act's framework and evaluates the Fourth Circuit's most detrimental doctrinal weapon against public nuisance: the permit shield.<sup>9</sup>

### I. NORTH CAROLINA'S ATTEMPT TO ABATE TVA POLLUTANTS

In 1933, Congress established the Tennessee Valley Authority (TVA), a corporation owned by the U.S. government to promote economic development in the Tennessee Valley region.<sup>10</sup> To achieve this end, the TVA produces, distributes, and sells electric power.<sup>11</sup> Today, the TVA operates eleven coal-fired generating plants averaging fifty years old.<sup>12</sup> All are located in Tennessee, Alabama, and Kentucky.<sup>13</sup> These plants emit nitrogen oxides and sulfur dioxide, which create ozone and particulate matter downwind.<sup>14</sup> All of these pollutants are regulated by the Clean Air Act (CAA).<sup>15</sup>

The CAA requires both federal and state action to abate air pollution.<sup>16</sup> The federal Environmental Protection Agency (EPA) develops National Ambient Air Quality Standards ("NAAQS") for air pollutants,

<sup>5</sup> See *id.* at 296, 298.

<sup>6</sup> See *infra* notes 10–104 and accompanying text.

<sup>7</sup> See *infra* notes 10–40 and accompanying text.

<sup>8</sup> See *infra* notes 41–73 and accompanying text.

<sup>9</sup> See *infra* notes 74–104 and accompanying text.

<sup>10</sup> Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58 (codified as amended at 16 U.S.C. §§ 831-831ee (2006)).

<sup>11</sup> 16 U.S.C. § 831d(1).

<sup>12</sup> John-Laurent Tronche, *TVA Examining Aging Coal Plant Closure*, PLATTS ENERGY WEEK, <http://plattsenergyweektv.com/story.aspx?storyid=107686&catid=293> (last visited Feb. 10, 2011).

<sup>13</sup> Final Brief for Tennessee Valley Authority at 19, *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) [hereinafter *TVA Brief*].

<sup>14</sup> See *North Carolina ex rel. Cooper v. Tenn. Valley Auth. (TVA I)*, 593 F. Supp. 2d 812, 819–20 (W.D.N.C. 2009).

<sup>15</sup> National Ambient Air Quality Standards, 40 C.F.R. §§ 50.4–7, 50.9, 50.11, 50.13, 50.15 (2010).

<sup>16</sup> See Clean Air Act, 42 U.S.C §§ 7402, 7407 (2006).

and state agencies implement permitting programs calculated to achieve the NAAQS.<sup>17</sup> These federal standards are a floor, not a ceiling, as the CAA permits states to impose stricter standards.<sup>18</sup>

North Carolina legislators exercised this right in 2002 by passing the North Carolina Clean Smokestacks Act (CSA), which imposes stricter oxide emissions caps on state coal-fired plants.<sup>19</sup> In order to fully address air pollution's deleterious effects, however, the CSA also requires the state to use all available resources to induce its neighboring states and other entities to achieve similar reductions in oxide emissions.<sup>20</sup> As such, Attorney General Roy Cooper, on behalf of North Carolina, sued the TVA in 2006 in the U.S. District Court for the Western District of North Carolina, claiming that unreasonable amounts of airborne particles from the TVA's coal-fired plants pose a public nuisance by threatening the health of North Carolinians, the financial viability of the state, and the strength of its ecosystems.<sup>21</sup>

On interlocutory appeal, the U.S. Court of Appeals for the Fourth Circuit determined that a public nuisance cause of action is not barred by the U.S. Constitution's Supremacy Clause, held that the TVA had no sovereign immunity, and permitted the case to proceed in district court.<sup>22</sup> In January 2009, after extensive findings regarding the emissions of the plants and their health and environmental impacts, the district court applied the source state nuisance laws of Alabama and Tennessee to conclude that the emissions caused unreasonable damages to North Carolina.<sup>23</sup> It then granted injunctions against the TVA, requiring the four closest coal-fired plants to upgrade or install certain

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<sup>17</sup> *Id.* § 7407.

<sup>18</sup> *Id.* § 7416 (“[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . .”).

<sup>19</sup> Clean Smokestacks Act, N.C. GEN. STAT. § 143-215.107D (2009).

<sup>20</sup> 2002 N.C. Sess. Laws 79.

<sup>21</sup> See *TVA I*, 593 F. Supp. 2d at 815. North Carolina claimed that the damages cost the state billions of dollars in health care expenses, missed school and work days, plant damage, and lost tourism. *Id.*

<sup>22</sup> See *North Carolina ex rel. Cooper v. Tenn. Valley Auth. (TVA II)*, 615 F.3d 344, 350, 352–53 (4th Cir. 2008). The Fourth Circuit reasoned that the “sue-and-be-sued” clause of the TVA Act waived sovereign immunity. See *id.* at 348. Furthermore, the Fourth Circuit waived any Supremacy Clause protections by holding that public nuisance falls into the meaning of “requirement” in the CAA saving clause. See *id.* at 352–53.

<sup>23</sup> See *TVA I*, 593 F. Supp. 2d at 818–28, 829–30. The decision to apply source state nuisance law, rather than North Carolina's nuisance law, derived from the Supreme Court case *International Paper Co. v. Ouellette*. See 479 U.S. 481, 487 (1987).

pollution-reduction devices.<sup>24</sup> Appealing again to the Fourth Circuit, the TVA did not contest the conclusion that North Carolina's damages outweighed the costs of treating emissions.<sup>25</sup> Instead, the TVA appealed the application of state law.<sup>26</sup>

The Fourth Circuit reversed the injunctions for three major reasons: (1) the CAA preempted state public nuisance law, (2) the decision amounted to an impermissible extraterritorial application of North Carolina's CSA, and (3) public nuisance was "legally impossible" because the TVA's emissions were legislatively authorized and, theoretically, the EPA's NAAQS imposed a stricter standard than state nuisance law.<sup>27</sup>

The Fourth Circuit began by holding that public nuisance, being unpredictable and overly general, undermines the "carefully designed" CAA scheme, and, as such, the CAA preempts the application of state nuisance law in this instance.<sup>28</sup>

Next, the Fourth Circuit held that the district court improperly extended North Carolina's CSA, which contradicted the U.S. Supreme Court's 1987 holding in *International Paper Co. v. Ouellette* that source state law must apply to interstate nuisance claims.<sup>29</sup> Expert testimony at

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<sup>24</sup> See *TVA I*, 593 F. Supp. 2d at 832. These injunctions would cost TVA approximately one billion dollars. *TVA II*, 615 F.3d at 298.

<sup>25</sup> See TVA Brief, *supra* note 13, at 15–16.

<sup>26</sup> See *id.*

<sup>27</sup> See *TVA II*, 615 F.3d at 296.

<sup>28</sup> See *id.* at 302–03. According to the Fourth Circuit, judicial regulation of air pollution through nuisance law would lead to forum shopping, consideration of legal over technological demands, and injunction-driven improvements, all of which would undermine the uniform regulatory framework of the CAA. See *id.* at 302.

<sup>29</sup> *Id.* at 307, 309; see *Ouellette*, 479 U.S. at 497. In *Ouellette*, Vermont citizens invoked Vermont state nuisance law in suing a New York paper mill for discharging pollutants into a shared water body. *Id.* at 483–84. The discharge was in fact authorized by the CWA permitting scheme. *Id.* at 490 n.10. The Supreme Court held that the CWA's saving clause preserves the right to a remedy only under the law of the source state, notwithstanding a comprehensive federal permitting scheme. *Id.* at 497–99. The Court thus rejected the defendant's claim that the CWA preempted all common law actions. *Id.* at 497–99. In addition, the Court held that the saving clause, by its terms, preserves common law actions under source state law. *Id.* at 497. As such, the Court remanded the case to district court to apply New York nuisance law. *Id.* at 500. Note that the saving clauses of the CWA and the CAA are nearly identical. Compare Clean Water Act, 33 U.S.C. § 1365(e) (2006) ("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 effluent standard . . .") (emphasis added), with Clean Air Act, 42 U.S.C. § 7604(e) (2006) ("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 . . .") (emphasis added).

trial relied on CSA emissions standards, rather than Tennessee and Alabama nuisance law.<sup>30</sup>

Notwithstanding the CAA's preemption over state nuisance actions and the extraterritorial extension of North Carolina law, the Fourth Circuit deemed that the express legislative authorization of the power plants' emissions precluded the possibility of a public nuisance.<sup>31</sup> According to both Tennessee and Alabama common law, a legislatively authorized permit shields entities from nuisance liability.<sup>32</sup> Furthermore, NAAQS protect "sensitive citizens," for instance, children and other people particularly sensitive to air pollution due to disease; whereas nuisance law protects the "reasonable man," or one with "ordinary health and sensibilities, and ordinary modes of living."<sup>33</sup> Therefore, theoretically it would be impossible for emissions permitted by the more stringent NAAQS system to pose a public nuisance.<sup>34</sup>

Finally, the court assured North Carolina that other remedies besides public nuisance claims exist.<sup>35</sup> First, the Fourth Circuit suggested a section 126 petition.<sup>36</sup> The CAA permits states to file such petitions to the EPA in the event that any source contributes significantly to the nonattainment of another state's air quality standards.<sup>37</sup> In fact, North Carolina initiated a section 126 petition in 2004, which was denied and, as of the date of the *TVA* opinion, awaited an appellate review.<sup>38</sup> Second, the court suggested participation in the comments period for the development of Tennessee's and Alabama's State Implementation Plans under the CAA.<sup>39</sup> Finally, in the event of non-compliance of TVA's permits, private action suits are available under the CAA.<sup>40</sup>

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<sup>30</sup> See *TVA II*, 615 F.3d at 308. Although North Carolina, in its final brief, refuted the claim that expert testimony at trial relied on CSA standards, suggesting that the CSA demands a system-wide cap, the district court applied a plant-by-plant analysis. Final Brief of Appellee State of North Carolina at 41–42, North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010) (No. 09–1623). Furthermore, the trial court's injunctions resembled TVA's own plan for emissions reductions, rather than that of the CSA. See *id.*

<sup>31</sup> See *TVA II*, 615 F.3d at 309.

<sup>32</sup> See *id.* at 309–10.

<sup>33</sup> See *id.* at 310.

<sup>34</sup> See *id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Clean Air Act, 42 U.S.C. §§ 7426(b), 7410 (a)(2)(D) (2006).

<sup>38</sup> See North Carolina v. EPA, 531 F.3d 896, 930 (D.C. Cir. 2008) (per curiam).

<sup>39</sup> See *TVA I*, 615 F.3d at 311.

<sup>40</sup> *Id.*

## II. IMPLICATIONS OF THE FOURTH CIRCUIT DECISION

The Fourth Circuit's decision in *TVA* could significantly change future environmental litigation on a number of fronts: (1) the feasibility of the nuisance doctrine, (2) the CAA's preemption of public nuisance, (3) the judiciary's participation in air pollution regulation, and (4) the viability of the permit shield defense.<sup>41</sup>

First, the decision represents a setback to public nuisance law, which increasingly has been invoked in high profile environmental cases.<sup>42</sup> Current and future defendants subject to a public nuisance suit may use the Fourth Circuit's disparaging language.<sup>43</sup> In particular, the court stated that public nuisance doctrine "provide[s] almost no standard of application" and that it is "an ill-defined omnibus tort of last resort."<sup>44</sup>

Second, the *TVA* court's holding that the CAA preempts source state law represents a major shift in interstate pollution jurisprudence and a serious disadvantage for plaintiffs seeking relief outside the CAA regulatory framework.<sup>45</sup> This holding created a circuit split and was arguably inconsistent with the U.S. Supreme Court's holding in *International Paper Co. v. Ouellette* that the CAA's saving clause preserves com-

<sup>41</sup> See *infra* notes 42–73 and accompanying text.

<sup>42</sup> See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 855, 855 (5th Cir. 2009) (permitting coastal land owners to bring a putative class action against oil and energy companies, claiming that their greenhouse gas emissions led to climate change and posed a public nuisance), *vacated*, 607 F.3d 1049 (5th Cir. 2010) (en banc) (lacking quorum); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 310 (2nd Cir. 2009) (holding that plaintiffs stated a claim of public nuisance and that such a claim against electric power companies was justiciable). See generally Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing at the Right Time*, 85 WASH. L. REV. 197 (2010) (establishing that public nuisance litigation could provide environmental justice with regard to climate change); Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155 (2007) (noting a shift in nuisance law towards a more offensive tool used to institute changes in environmental legislation).

<sup>43</sup> Telephone Interview with Matthew M. Pawa, Principal, Law Offices of Matthew M. Pawa, P.C., (Sept. 7, 2010) (lead counsel in *Am. Elec. Power Co.*, 582 F.3d 309). Product manufacturers, particularly of lead paint, have similarly succeeded over the years at building a body of case law that disparages the tort of nuisance as a tool for plaintiffs. See Peter Tipps, Note, *Controlling the Lead Paint Debate: Why Control Is Not an Element of Public Nuisance*, 50 B.C. L. REV. 605, 605–06 (2009).

<sup>44</sup> See North Carolina *ex rel. Cooper v. Tenn. Valley Auth. (TVA II)*, 615 F.3d 291, 302 (4th Cir. 2010).

<sup>45</sup> See R. Trent Taylor, *Fourth Circuit Reverses \$1 Billion Injunction Related to Air Emissions in State of North Carolina v. TVA*, MCGUIREWOODS LLP (Aug. 2, 2010), <http://www.mcguirewoods.com/news-resources/item.asp?item=4997>; see also *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) ("The saving clause specifically preserves other state actions . . .").

mon law actions under source state law.<sup>46</sup> As such, this holding may create the most controversy; indeed, it is upon this basis that North Carolina sought a rehearing en banc.<sup>47</sup>

The Fourth Circuit in *TVA* was cautious not to hold “flatly” that the CAA preempts the entire field of emissions regulation.<sup>48</sup> It still held, however, that a “strong cautionary presumption” against nuisance actions exists, as such suits “interfere[] with the methods by which the federal statute was designed to reach its goal.”<sup>49</sup> The CAA preempted state public nuisance law by virtue of conflict preemption because additional state regulation through public nuisance law would conflict with the CAA’s explicit role for states of implementing NAAQS.<sup>50</sup>

The holding in *Ouellette*, however, was that source state law may coexist with federal legislation without disrupting the CAA’s regulatory framework.<sup>51</sup> Furthermore, the CAA’s saving clause expressly preserves the state’s role to institute common law relief, by stating, “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or *common law* to seek . . . any other relief . . . .”<sup>52</sup>

The Fourth Circuit did not simply ignore the CAA’s saving clause.<sup>53</sup> It compared it to a saving clause analyzed by the U.S. Supreme Court in 1983 in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, which held that states could continue to regulate nuclear power plants in their capacity as utilities, but that

<sup>46</sup> See *Ouellette*, 479 U.S. at 497; *Am. Elec. Power Co.*, 582 F.3d at 310, 375 n.42, 378 (permitting plaintiffs to bring a public nuisance claim within the purview of the CAA and eschewing the conclusion that the CAA is so comprehensive as to displace other actions); *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 342–43 (6th Cir. 1989) (holding that the plain language of the saving clause, congressional intent, and Supreme Court precedent indicates that the CAA does not preempt state action).

<sup>47</sup> See State of North Carolina’s Petition for Rehearing and Suggestion for Rehearing en banc at 5, *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) (No. 09-1623).

<sup>48</sup> *TVA II*, 615 F.3d at 302–03.

<sup>49</sup> See *id.*

<sup>50</sup> *Id.* at 303.

<sup>51</sup> See 479 U.S. at 498–500 (holding that “the application of the source State’s law does not disturb the balance among federal, source-state, and affected-state interests” and that “[n]othing in the Act prevents a court sitting in an affected State from hearing a common-law nuisance suit . . .”).

<sup>52</sup> Clean Air Act, 42 U.S.C. § 7604(e) (2006) (emphasis added). The Court in *Ouellette* also held that the “saving clause negates the inference that Congress ‘left no room’ for state causes of action.” 479 U.S. at 492.

<sup>53</sup> See *TVA II*, 615 F.3d at 303–04.

the federal government maintained domain over safety regulations.<sup>54</sup> From this, the Fourth Circuit in *TVA* reasoned that state law cannot regulate that which federal law regulates.<sup>55</sup> Thus, the CAA's saving clause could not apply in this instance because state law regulated within the purview of the CAA.<sup>56</sup>

Third, the Fourth Circuit in *TVA* disparaged the judiciary's role in air pollution regulation.<sup>57</sup> Unlike courts, the court reasoned, agency experts are able to promulgate regulations based on the latest scientific data.<sup>58</sup> Furthermore, input through the required notice and comments period allows many perspectives to be considered, resulting in a proactive regulatory process.<sup>59</sup> The CAA framework also promotes uniform application of air quality standards and the reliance interests of industry.<sup>60</sup> Litigation may breed distortions and inconsistencies and is far more costly than agency decision-making.<sup>61</sup> Finally, the Fourth Circuit in *TVA* held that a public nuisance is legally and theoretically impossible because the power generating operations of the plants were expressly permitted by law.<sup>62</sup> First, Alabama and Tennessee "permit shield" case law precluded public nuisance claims regarding legislatively authorized activities.<sup>63</sup> Second, the Fourth Circuit constructed a theoretical argument suggesting a physical impossibility of a CAA permitted emission source posing a public nuisance.<sup>64</sup>

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<sup>54</sup> See *id.* (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–13 (1983)).

<sup>55</sup> See *id.* (reasoning that applying state nuisance law and imposing injunctions on the TVA amounts to replacing "comprehensive federal emissions regulations with a contrasting state perspective about the emissions levels necessary to achieve those same public ends").

<sup>56</sup> See *id.* The Fourth Circuit also relied on additional language from *Ouellette*—stating that "if affected states were 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 purpose and objectives of Congress'"—to hold that the Supreme Court did not intend affected states to impose separate discharge standards. *Id.* (quoting *Ouellette*, 479 U.S. at 493–94). The context of this statement in *Ouellette* is the construction of the Supreme Court's argument that *source state law* must be applied in public nuisance cases, rather than *affected state law*, and not that state law is preempted entirely. See 479 U.S. at 494 ("Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause, we conclude that the CWA precludes a court from applying the law of an *affected* state against an *out-of-state* source.") (emphasis added).

<sup>57</sup> See *TVA II*, 615 F.3d at 304.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 305.

<sup>60</sup> See *id.* at 306.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 309–10.

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

<sup>64</sup> See *id.* at 310.

There may be gaps, however, in the Fourth Circuit's permit shield holding.<sup>65</sup> The permit shield cases cited apply only to activities authorized by local zoning laws.<sup>66</sup> Furthermore, Alabama has a more recent case on point that holds that compliance with the Alabama Air Pollution Control Act does not shield against liability.<sup>67</sup> Tennessee also has a more recent and applicable case.<sup>68</sup> In 1987, the U.S. Supreme Court, in *Tennessee v. Champion International Corp.*, vacated a decision by the Tennessee Supreme Court due to its failure to recognize public nuisance where the discharge was legislatively authorized.<sup>69</sup> As such, *Champion International's* permit shield is no longer good law in Tennessee.<sup>70</sup>

The Fourth Circuit further held that nuisance suits are not only legally barred by virtue of state permit shield law, but also "logically" impossible because NAAQS imposes a more stringent "sensitive citizen" standard than the "reasonable" standard required by public nuisance doctrine.<sup>71</sup> Therefore, the court reasoned, compliance with NAAQS precludes the possibility of a public nuisance.<sup>72</sup> If federal circuits or the Supreme Court adopted this doctrine, public nuisance cases could be disposed of regardless of the source state permit shield law.<sup>73</sup>

### III. THE NECESSITY OF PUBLIC NUISANCE NOTWITHSTANDING THE CAA

This Part addresses two issues.<sup>74</sup> First, it argues that state public nuisance law should survive within the purview of the CAA framework.<sup>75</sup> Second, it suggests that the Fourth Circuit's boost for the per-

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<sup>65</sup> See *infra* notes 66–70 and accompanying text.

<sup>66</sup> See *Birmingham v. Fairfield*, 375 So.2d 438, 438 (Ala. 1979) (placement of drainage pipes); *Johnson v. Bryant*, 350 So.2d 433, 433 (Ala. 1977) (extension of pier); *Birmingham v. Scogin*, 115 So.2d 505, 512 (Ala. 1959) (operation of a garbage dump); *Fricke v. Guntersville*, 36 So.2d 321, 322 (Ala. 1948) (placement of drainage ditches); *Branyon v. Kirk*, 191 So. 345, 349 (Ala. 1939) (placement of sidewalks); *O'Neil v. State ex rel. Baker*, 206 S.W.2d 780, 780–81 (Tenn. 1947) (construction of a liquor store); *Fey v. Nashville Gas & Heating Co.*, 64 S.W.2d 61, 62 (Tenn. Ct. App. 1933) (gas pipes).

<sup>67</sup> *Borland v. Sanders Lead Co.*, 369 So.2d 523, 526 (Ala. 1979).

<sup>68</sup> See *State v. Champion Int'l Corp.*, 709 S.W.2d 569, 574, 576 (Tenn. 1986), *vacated*, 479 U.S. 1061 (1987) (holding that a permit to discharge under the CWA foreclosed the possibility of public nuisance).

<sup>69</sup> See 479 U.S. 1061, 1061 (1987).

<sup>70</sup> See *id.*

<sup>71</sup> See *TVA II*, 615 F.3d at 309–10; RESTATEMENT (SECOND) OF TORTS § 821B (2010).

<sup>72</sup> See *TVA II*, 615 F.3d at 310.

<sup>73</sup> See *id.*

<sup>74</sup> See *infra* notes 75–104 and accompanying text.

<sup>75</sup> See *infra* notes 80–84 and accompanying text.

mit shield defense is misguided and poses a major threat to the future of public nuisance suits.<sup>76</sup>

The Fourth Circuit presented laudable reasons for eliminating public nuisance claims within the CAA framework.<sup>77</sup> Certainly, exposing industry to the uncertain and general public nuisance standard would breed litigiousness and unreliability.<sup>78</sup> Public nuisance suits could threaten the framework created by Congress to achieve a balance between clean air and energy production.<sup>79</sup>

Nonetheless, public nuisance may coexist within the CAA framework.<sup>80</sup> Public nuisance can be a check on administrative agencies in the face of uncertain atmospheric science and wind patterns.<sup>81</sup> More importantly, it ensures relief for underrepresented or disenfranchised parties who are unable to aptly participate in the permitting process.<sup>82</sup> In short, public nuisance claims are a necessary component of air pollution regulation.<sup>83</sup> Congress even envisioned this opportunity by virtue of the express language of the saving clause.<sup>84</sup>

<sup>76</sup> See *infra* notes 88–104 and accompanying text (cautioning against the permit shield doctrine).

<sup>77</sup> See *North Carolina ex rel. Cooper v. Tenn. Valley Auth. (TVA II)*, 615 F.3d 291, 301 (4th Cir. 2010).

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 296.

<sup>80</sup> See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 498–99 (1987) (“[A]pplication of the source State’s law does not disturb the balance among federal, source-state, and affected-state interests.”).

<sup>81</sup> See Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 579 (2007) (establishing that the federal government’s failure to address modern environmental concerns has introduced a new role for state and local governments, as well as for state common law, to ameliorate environmental issues); Susannah Landes Weaver, *Setting Air Quality Standards: Science and the Crisis of Accountability*, 22 TUL. ENVTL. L.J. 379, 386 (2009) (noting “the tremendous complexity of ecosystems, and, consequently, the great scientific uncertainty associated with our understanding of the relationship of environmental factors to human health”). Some scholars have expressed serious concern over the federal regulatory framework’s ability to address modern environmental issues. See, e.g., Klass, *supra*, at 579–80 (emphasizing the failure of the federal regulatory system and the importance of state common law in addressing environmental issues); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1321, 1409 (2010) (demonstrating shortcomings of the public hearing process); Weaver, *supra*, at 389–90 (establishing imperfection of regulations based on scientific data alone).

<sup>82</sup> See Wagner, *supra* note 81, at 1321, 1374–84 (establishing that information capture by administrative agencies faces three major challenges: imbalances in resources of the parties, information “symbiosis” between the agency and the industry, and imbalance in participation in the public hearing process due to cost).

<sup>83</sup> See *supra* notes 81–82 and accompanying text.

<sup>84</sup> See Clean Air Act, 42 U.S.C. § 7604(e) (2006) (“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

The U.S. Court of Appeals for the Fourth Circuit in *TVA* certainly helped provide future defendants with many arguments to evade nuisance suits: (1) strong language against public nuisance doctrine and judicial involvement in air pollution disputes, (2) preemption of state public nuisance law by the CAA framework, and (3) use of the permit shield defense.<sup>85</sup> The first is dicta, and the second will likely be overturned by virtue of *International Paper Co. v. Ouellette* and the express language of the CAA's saving clause.<sup>86</sup> The third argument, however, could pose a serious obstacle in future environmental litigation, as many states have similar permit shield cases.<sup>87</sup>

In invoking the permit shield defense, the Fourth Circuit relied on testimony from Tennessee's Deputy Air Director indicating that permit officials address the same factors considered in a nuisance case.<sup>88</sup> As such, the Fourth Circuit held that, barring negligence, it is impossible for such an activity to actually pose a public nuisance.<sup>89</sup> The basis of this reasoning is the assumption that the permitting process is sufficient in its ability to predict public nuisances.<sup>90</sup> It is a difficult task, however, to predict all public nuisances, due to the complexity of the interaction of environmental factors and human health.<sup>91</sup> Therefore, the *TVA* court's reasoning may leave many without a remedy.<sup>92</sup>

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..."); S. REP. NO. 101-228, at 249 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3582 ("To assure that such a preemption of State or local law, whether statutory or common, does not occur, environmental legislation enacted by the Congress has consistently evidenced great care to preserve state and local authority and the consequent remedies available to citizens injured by the release of harmful substances into the environment.").

<sup>85</sup> See *TVA II*, 615 F.3d at 296.

<sup>86</sup> See 42 U.S.C. § 7604(e) (expressly permitting state action); *Ouellette*, 479 U.S. at 500 (contradicting *TVA*'s holding); *TVA II*, 615 F.3d at 296 (indicating criticism of nuisance doctrine not necessary to holding).

<sup>87</sup> See, e.g., *Murphy v. EAPWJP, LLC*, 1 A.3d 1171, 1180 (Conn. App. 2010); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1084 (Ill. 2004); *Neuse River Found. v. Smithfield Foods, Inc.*, 574 S.E.2d 48, 53 (N.C. App. 2002); *Brading v. Cnty. of Georgetown*, 490 S.E.2d 4, 8 (S.C. 1997); *Atkinson v. City of Pierre*, 706 N.W.2d 791, 797 (S.D. 2005).

<sup>88</sup> See *TVA II*, 615 F.3d at 310.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *supra* notes 81–82 and accompanying text (establishing potential and actual gaps in the federal environmental regulatory system).

<sup>92</sup> See *supra* notes 81–82 and accompanying text. Some scholars have argued that precluding public nuisance violates due process. See Robert L. Glickman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 179, 182 (1985) (demonstrating due process issues with preemption of state common law relief); W. David Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 667, 674–75 (1986) (arguing that protection from air pollution is a right and that separation of powers demands judicial involvement). See generally Jan Erik Hasselman, Comment, *Alaska's Nuisance Statute Revisited*:

The Fourth Circuit's reliance on Alabama and Tennessee permit shield cases was unsuitable, as all of them applied to legislative authorization on the local level.<sup>93</sup> The permitting process on the local level is not analogous to federal and state-wide permitting; therefore, applying local permit shields to the CAA framework is improper.<sup>94</sup> The noxious uses on which *TVA* relied (for example, placement of discharge pipes, liquor stores, and waste treatment facilities) have more predictable and localized effects than the complicated activities of primary pollutants in the atmosphere amidst capricious weather patterns.<sup>95</sup> Furthermore, the permitting process at the local level is more accessible to potentially aggrieved parties.<sup>96</sup>

The construction of a national permit shield was equally misguided.<sup>97</sup> The EPA's "sensitive citizen" standard is a commendable goal, but the extent to which the NAAQS consider or protect sensitive populations is unclear.<sup>98</sup> As such, precluding public nuisance on the assumption that this goal has been achieved is imprudent and may foreclose remedies for people negatively affected by air pollution.<sup>99</sup>

Without a public nuisance claim, the only form of relief is through the CAA's administrative proceedings.<sup>100</sup> As such, the Fourth Circuit excludes the opportunity to "end run" this regulatory process, which often provides only stagnant relief.<sup>101</sup> Moreover, affected states are technically those within fifty miles of the source.<sup>102</sup> In addition, partici-

*Federal Substantive Due Process Limits to Common Law Abrogation*, 24 B.C. ENVTL. AFF. L. REV. 347 (1997) (criticizing a statutory permit shield as a violation of due process).

<sup>93</sup> See, e.g., cases cited *supra* note 66.

<sup>94</sup> See *infra* notes 95–97.

<sup>95</sup> See *Weaver*, *supra* note 81, at 386. The "great scientific uncertainty" that concerned *Weaver* is not as severe at the local level and in some cases, is nonexistent. Compare, e.g., *O'Neil v. State ex rel. Baker*, 206 S.W.2d 780, 780–81 (Tenn. 1957) (dealing with the construction of a liquor store), and *Branyon v. Kirk*, 191 So. 345, 349 (Ala. 1939) (dealing with placement of sidewalks), with *Weaver*, *supra* note 81, at 386.

<sup>96</sup> See *Wagner*, *supra* note 81, at 1321, 1374–84. The information capture challenges at the federal agency level would also be less severe at the local level, where the subject matter is not as complex and participation is less costly. See *id.*

<sup>97</sup> See *infra* notes 98–99 and accompanying text.

<sup>98</sup> *Jamie Grodsky, Genetics and Environmental Law: Redefining Public Health*, 93 CALIF. L. REV. 171, 198–99 (2005) (noting the difficulty of identifying and protecting the "sensitive citizen" subgroup).

<sup>99</sup> See *id.*

<sup>100</sup> See *TVA II*, 615 F.3d at 310.

<sup>101</sup> See *id.* North Carolina began this process in March 2004 by petitioning the EPA to establish control requirements for power plants in thirteen other states; as of the date of the *TVA* opinion, the outcome was still pending. *Id.* at 311.

<sup>102</sup> 40 C.F.R. § 70.2 (2010). Oxides, however, can travel hundreds of miles from their source. *Interstate and International Air Pollution*, EPA, <http://www.epa.gov/air/peg/inter->

pating in the public hearing process could only occur every five years for permit renewal.<sup>103</sup> In fact, in *TVA*, sixteen states filed amicus briefs in support of preserving states' rights to bring common law nuisance suits to protect citizens against interstate pollution.<sup>104</sup>

### CONCLUSION

*TVA* introduces many questions regarding the sufficiency of the CAA. The difficulty of understanding the interactions between primary pollutants, atmospheric chemistry, weather patterns, human health, and ecosystems present a weighty task for the agency experts. As such, in the tradition of American government, the judiciary and common law doctrines must act as a check on this regulatory framework to ameliorate gaps or missteps in the permitting process. Knowing that such gaps and missteps are inevitable, the Fourth Circuit was misguided to conclude that a permit to emit under the CAA precludes a finding of public nuisance *ab initio*. Such a conclusion would leave many without relief from the deleterious health and environmental impacts of air pollution.

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<sup>103</sup> 40 C.F.R. § 70.6(a)(2) (2010) (establishing five-year permit renewal period); 40 C.F.R. § 70.6(d) (establishing that public participation is necessary for the issuance of a permit).

<sup>104</sup> Brief of Amici Curiae in Support of the State of North Carolina at 10–11, *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (No. 09-1623) (claiming they will be “restricted in their ability to redress interstate air pollution”).

