

ClientAlert

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Fourth Circuit Declines To Permit State Suit Alleging TVA's Power Plants' Interstate Air Emissions Constitute A Public Nuisance

On July 26, 2010, a unanimous three-judge panel of the U.S. Court of Appeals for the Fourth Circuit reversed a ruling that would have forced the Tennessee Valley Authority ("TVA") to spend \$1 billion on pollution control devices at its power plants in Tennessee and Alabama. *North Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010) ("*North Carolina v. TVA*").

The State of North Carolina had brought suit arguing that eleven of TVA's coal-fired power plants located in Tennessee, Alabama, and Kentucky posed a public nuisance because air emissions from those plants crossed state lines and contributed to North Carolina's air pollution. *See North Carolina v. TVA*, 2010 WL 2891572, at *2. TVA moved to dismiss. The U.S. District Court for the Western District of North Carolina denied TVA's motion and entered judgment in favor of the state, granting a comprehensive injunction ordering TVA to upgrade or install pollution controls for sulfur dioxide and nitrogen oxides at four of TVA's power plants in Tennessee and Alabama. *Id.* at *2-*3; *see also* 593 F. Supp. 2d 812 (W.D.N.C. 2009).

Reversing the district court, the Fourth Circuit rejected North Carolina's claim that the Clean Air Act (the "Act") permitted the state to seek enforcement of any emission standard or limitation as against TVA. *See North Carolina v. TVA*, 2010 WL 2891572, at *8. The court observed that there was a "strong[] cautionary presumption against" "nuisance actions seeking to establish emissions standards different from federal and state regulatory law," and that North Carolina's action was preempted by the comprehensive air pollution scheme under the Act. *Id.* at *7 (citation omitted). The court reasoned that "[t]he system of statutes and regulations addressing the problem represents decades of thought by legislative bodies and agencies and the vast array of interests seeking to press upon them a variety of air pollution policies. To say this regulatory and permitting regime is comprehensive would be an understatement. To say it embodies carefully wrought compromises states the obvious. But the framework is the work of many, many people, and it is in place." *Id.* at *3. The Fourth Circuit stopped short, however, of holding that Congress had entirely preempted the field of emissions regulation, noting that it "cannot anticipate every circumstance that may arise in every future nuisance action." *Id.* at *7.

The court also noted there was a separate provision in the Act that would permit a state affected by air pollution generated in other states to file a section 126 petition, which would "provid[e] an important method for downwind states like North Carolina to address any concerns they have regarding the adequacy of an upwind state's regulation of airborne emissions." *Id.* at *5.

The Fourth Circuit found that the district court's ruling was "flawed for several reasons. If allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for

clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.” *Id.* at *1. The Fourth Circuit further held that the district court’s decision compromised federalism principles by applying the law of North Carolina extraterritorially to TVA plants located in Alabama and Tennessee. *Id.* at *11.

In addition, the Fourth Circuit’s opinion focused on the roles and functions of the branches of government, noting that agencies, which have rulemaking processes allowing for notice and comment, could more appropriately handle the implementation of regulations. *Id.* at *9-*10.

The Potential Impact Of The Fourth Circuit’s Decision

The ruling in *North Carolina v. TVA* could dampen plaintiffs’ enthusiasm for this type of litigation. As we have previously reported, several climate-change lawsuits are now pending in federal courts. As noted in [Client Alert, “Climate Change: Litigation- and Regulatory Update,” \(Mar. 31, 2010\)](#), in *Connecticut v. American Elec. Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009) (“*AEP*”), the Second Circuit held that states have standing to sue sources of greenhouse gas emissions for their contribution to global warming.¹

Unlike *AEP*, of course, *North Carolina v. TVA* is not a global warming case; but a public nuisance action. And while in *AEP*, the Second Circuit held that state governments and advocacy groups could seek injunctive relief against greenhouse gas-emitters, there has not yet been a ruling on whether the plaintiffs in that case could actually prevail under a public nuisance theory. Also, in *AEP*, plaintiffs’ cause of action was a federal nuisance claim, rather than one that focused on the state law of nuisance at issue in *North Carolina v. TVA*. Thus, some of the issues that concerned the Fourth Circuit about the extraterritoriality of state nuisance claims are not at issue in *AEP*.

In another nuisance action, *Native Village of Kivalina v. Exxon Mobil Corp.*, No. 09-17490 (9th Cir.), a federal district court dismissed the lawsuit of a village against oil, energy and utility companies claiming that their greenhouse gas emissions threatened the habitability of the village. See [Client Alert, “Recent Decisions Permit Claims That Private Companies are Contributing to ‘Climate Change’” \(Nov. 5, 2009\)](#). Plaintiff village’s appeal is currently pending before the Ninth Circuit. In a third nuisance action, *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010), the district court’s opinion -- dismissing plaintiffs’ lawsuit on the basis that it presented a non-justiciable “political question”-- remains good law. See [Client Alert, “Climate Change’ Litigation Update -- Fifth Circuit Dismisses En Banc Appeal On Procedural Grounds, So District Court Decision Dismissing Claims Related To Climate Change Stands As Good Law” \(June 11, 2010\)](#).²

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¹ Certain defendants in *AEP* filed a *certiorari* petition to the U.S. Supreme Court on August 2, 2010.

² The current deadline to file *certiorari* petitions to the U.S. Supreme Court in *Comer* is August 26, 2010.

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For Additional Information

Mary T. Yelenick
+1 (212) 408-5493
myelenick@chadbourne.com

Thomas J. McCormack
+1 (212) 408-5182
tmccormack@chadbourne.com

Andrew A. Giaccia
+1 (202) 974-5652
agiaccia@chadbourne.com

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