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North Carolina ex rel. Cooper, Attorney General v. Tennessee Valley Authority
United States Circuit Court for the Fourth Circuit
--- F.3d ----, 2010 WL 2891572

The Tennessee Valley Authority (TVA) appeals an injunction requiring immediate installation of emissions controls at four TVA electricity generating plants in Alabama and Tennessee. The injunction was based on the district court's determination that the TVA plants' emissions constitute a public nuisance in North Carolina. As a result, the court imposed specific emissions caps and emissions control technologies that must be completed by 2013.

This 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. Moreover, the injunction improperly applied home state law extraterritorially, in direct contradiction to the Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Finally, even if it could be assumed that the North Carolina district court did apply Alabama and Tennessee law, it is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance. For these reasons, the judgment must be reversed. I.

The Tennessee Valley Authority (TVA) is a federal executive branch agency, established in 1933 and tasked with promoting economic development in the Tennessee Valley region. One of TVA's "primary objectives" is to "produce, distribute, and sell electric power." As a result of this mandate, TVA provides electricity to citizens in parts of seven states. Much of this power is generated by eleven TVA owned and operated coal-fired power plants located in Tennessee, Alabama, and Kentucky.

As a natural byproduct of the power generation process, coal-fired power plants emit sulfur dioxide (SO_2) and nitrous oxides (NO_x). In the atmosphere, both compounds can transform into microscopic particles known as "fine particulate matter" or "$PM_{2.5}$" (particulate matter less than 2.5 micrometers in diameter) that cause health problems if inhaled. When exposed to sunlight, NO_x also assists in the creation of ozone, which is known to cause respiratory ailments.

SO_2, NO_x, $PM_{2.5}$, and ozone are among the air pollutants extensively regulated through the Clean Air Act. Pursuant to the Act, the Environmental Protection Agency (EPA) has issued numerous regulations, and states have enacted further rules implementing the Act and the EPA requirements. Together, these laws and regulations form a system that seeks to keep air pollutants at or below safe levels.

In order to comply with requirements under the Clean Air Act, a number of controls can be fitted to coal-fired power plants to reduce the amounts of SO_2 and NO_x they emit and, by extension, the amounts of $PM_{2.5}$ and ozone created. One of the ways SO can be reduced, for example, is by installing a flue gas desulfurization system, or "scrubber." Scrubbers are large chemical plants-

often larger than the power plants themselves-that remove SO_2-from plant exhaust and cost hundreds of millions of dollars.

To control NO_x emissions, plants may use selective catalytic reduction (SCR). Like scrubbers, SCRs are building-sized plants that can cost hundreds of millions of dollars to construct. However, they can remove approximately 90% of the NO_x from the flue gasses a coal power plant produces. NO_x emissions can also be reduced in alternative ways, such as retrofitting plants with burners that result in lower NO_x emissions, burning types of coal that have low NO_x output, and installing selective non-catalytic reduction (SNGR) controls. Although SNCRs are not as effective as SCRs, removing some 20 to 40% of NO_x, they have the benefit of costing about one-tenth as much as SCRs.

TVA has already installed numerous pollution controls at its coal-fired plants. SO_2 scrubbers already operating cover 43% of TVA's coal-fired electricity generation capacity, while scrubbers under construction and anticipated to be completed this year will bring that number above 50%. Nationwide, only one-third to one-half of the country's coal plants are equipped with scrubbers. Similarly, while one-third to one-half of the country's coal plants have SCRs to control NO_x, TVA has installed SCRs on 60% of its coal-fired electricity generation capacity. At several plants that do not currently have SCRs, TVA is installing SNCRs and is also burning low NO_x coal.

Unlike TVA, power plants in North Carolina historically had not put sufficient controls on their emissions, choosing instead to purchase emissions allowances under an EPA cap and trade program implemented by Congress in 1990 to address acid rain. *See* 42 U.S.C. § 7651-7651o (Clean Air Act Title IV, Acid Deposition Control); 42 U.S.C. § 7651b(b) (emissions allowance transfer system under acid rain program). As a result, North Carolina decided to implement more stringent controls on in-state coal-fired plants as a matter of state law, as it is allowed to do under the Clean Air Act. *See* 42 U.S.C. § 7416. It passed the North Carolina Clean Smokestacks Act, N.C. Gen.Stat. § 143-215.107D, which requires investor-owned public utilities that operate coal-fired generating units to reduce their emissions of NO_x and SO_2 to levels even lower than those specified in EPA regulations promulgated pursuant to the Clean Air Act. N.C. Gen.Stat. § 143-215.107D(b)-(e).

Not all emissions are generated by in-state sources, however. Prevailing high pressure weather systems in the states where TVA operates tend to cause emissions to move eastward into North Carolina and other states. Although there are lengthy Clean Air Act provisions and regulations controlling such interstate emissions, North Carolina chose to bring a public nuisance suit against TVA in the Western District of North Carolina, seeking an injunction against all eleven of TVA's coal-fired power plants. [A previous appeal by TVA upheld denial of simmunity.]

… the district court held a bench trial at the end of which it issued an injunction against four of the power plants. All of these plants were within 100 miles of the North Carolina border. The injunction required TVA to install and continuously operate scrubbers and SCRs at each of the plants by December 31, 2013. In addition to these requirements, the district court also established a schedule of SO and NO emissions limits for each electric generation unit at the four plants, capping the emissions that each unit was allowed to release. Primarily because TVA's

seven other plants are located farther from North Carolina, the district court concluded there was insufficient evidence that they contributed significantly to pollution in North Carolina. As a result, it did not rule that they were a public nuisance.

The cost of compliance with the district court's injunction against the four TVA plants is uncertain, but even North Carolina admits it will be over a billion dollars, while TVA estimates that the actual cost will be even higher. Regardless of the actual amount, there is no question that costs will be passed on in the form of rate increases to citizens who purchase power from TVA. TVA appealed the injunctions against its four plants, and we granted leave to the state of Alabama to intervene on appeal on TVA's behalf.

The desirability of reducing air pollution is widely acknowledged, but the most effective means of doing so remains, not surprisingly, a matter of dispute. The 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.

The district court's well-meaning attempt to reduce air pollution cannot alter the fact that its decision threatens to scuttle the extensive system of anti-pollution mandates that promote clean air in this country. If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot be set, and the environment cannot prosper, in this way.

North Carolina attempts to frame this case in terms of protecting public health and saving the environment from dirty air. But the problem is not a neglected one. In fact, emissions have been extensively regulated nationwide by the Clean Air Act for four decades. The real question in this case is whether individual states will be allowed to supplant the cooperative federal-state framework that Congress through the EPA has refined over many years.

[The opinion’s descriptions of the CAA NAAQS and the basics of the SIP process are omitted.] Critically for this case, each SIP must consider the impact of emissions within the state on the ability of other states to meet NAAQS. The Clean Air Act requires each state to ensure that its SIP “contain[s] adequate provisions prohibiting ... any source ... within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.” 42 U.S.C. § 7410(a)(2)(D), (D)(i), & (D)(i)(I) (internal section breaks omitted). This rule prevents states from essentially exporting most of their emissions to other regions by strategically positioning sources along an arbitrary border line.

In addition, before new construction or modifications of a source of emissions may begin, a SIP must provide for “written notice to all nearby States the air pollution levels of which may be affected by such source at least sixty days prior to the date on which commencement of construction is to be permitted.” 42 U.S.C. § 7426(a)(1).

Both Alabama and Tennessee have promulgated SIPs, and as part of its compliance with these regulations TVA has sought and obtained state permits to operate each of its power plants. As far as the record before us indicates, TVA currently operates each of the four plants at issue in this case in conformity with the permits, including limitations on SO_2 and NO_x emissions. Indeed, this suit does not present a challenge to Alabama and Tennessee's SIPs, the permits issued to TVA pursuant to them, or TVA's operation pursuant to the permits.

In addition to this framework, there are a number of checks built into the system to prevent abuses and to address concerns about emissions. As already noted, the EPA retains ultimate authority over NAAQS to determine what levels of emissions are acceptable and has the responsibility to modify those levels as necessary. The EPA also has the authority, through a procedure known as a SIP Call, to demand that states modify their SIPs if it believes they are inadequate to meet NAAQS. Finally, any state that believes that it is being subjected to interstate emissions may file what is known as a section 126 petition. Named after the original section of the Clean Air Act and codified at 42 U.S.C. § 7426(b), the section states that "[a]ny State or political subdivision may petition the Administrator [of the EPA] for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)([i]) of this title or this section." [FN1] 42 U.S.C. § 7426(b). As noted earlier, section 7410(a)(2)(D)(i)(I) prohibits states from allowing emissions that will interfere with other states' attainment or maintenance of NAAQS air emission levels. Thus, section 126 provides 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.

We have explained at some length the structure of the Clean Air Act in order to emphasize the comprehensiveness of its coverage. The fact that the process has been regulated in such detail has contributed to its inclusiveness and predictability. It was hardly unforeseeable that the aforementioned process and the plans and permits related to it would not meet with universal approbation. Litigation that amounts to "nothing more than a collateral attack" on the system, however, risks results that lack both clarity and legitimacy. *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir.1993).

Dissatisfied with the air quality standards authorized by Congress, established by the EPA, and implemented through Alabama and Tennessee permits, North Carolina has requested the federal courts to impose a different set of standards. The pitfalls of such an approach are all too evident. It ill behooves the judiciary to set aside a congressionally sanctioned scheme of many years' duration-a scheme, moreover, that reflects the extensive application of scientific expertise and that has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements. To replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country.

The Supreme Court addressed this precise problem of multiplicity in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). It emphasized that allowing "a number of different states to have

independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states." *Id.* at 496-97 (quoting *Illinois v. City of Milwaukee*, 731 F .2d 403, 414 (7th Cir.1984)). This problem is only exacerbated if state nuisance law is the mechanism used, because "nuisance standards often are vague and indeterminate." *Id.* at 496 (citation omitted).

Indeed, the district court properly recognized that "[t]he ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance." *North Carolina v. Tenn. Valley Auth.*, 593 F.Supp.2d at 815. This is at least in part because public nuisance is an all-purpose tort that encompasses a truly eclectic range of activities. It includes such broad-ranging offenses as:

interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the public peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 643-45 (5th ed.1984) …

Thus, while public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, *see* Keeton, *supra*, at 643-45, we will be hard pressed to derive any manageable criteria. As Justice Blackmun commented, "one searches in vain ... for anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

The contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark. We are hardly at liberty to ignore the Supreme Court's concerns and the practical effects of having multiple and conflicting standards to guide emissions. These difficulties are heightened if we allow multiple courts in different states to determine whether a single source constitutes a nuisance. "Adding another layer of collateral review for agency decisions threatens to put at naught the ... process established by Congress." *Palumbo*, 989 F.2d at 161. An EPA-sanctioned state permit may set one standard, a judge in a nearby state another, and a judge in another state a third. Which standard is the hapless source to follow? *See Ouellette*, 479 U.S. at 496 n. 17.

Indeed, a patchwork of nuisance injunctions could well lead to increased air pollution. Differing standards could create perverse incentives for power companies to increase utilization of plants

in regions subject to less stringent judicial decrees. Alabama Br. at 62. Similarly, rushed plant alterations triggered by injunctions are likely inferior to system-wide analysis of where changes will do the most good. Injunction-driven demand for such artificial changes could channel a limited pool of specialized construction expertise away from the plants most in need of pollution controls to those with the most pressing legal demands. Tennessee Br. at 8-9, 12. Even these scenarios probably fail to exhaust the full scope of unpredictable consequences and potential confusion. "It is unlikely-to say the least-that Congress intended to establish such a chaotic regulatory structure." *Ouellette*, 479 U.S. at 497.

We need not hold flatly that Congress has entirely preempted the field of emissions regulation. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm.*, 461 U.S. 190, 203-04 (1983). We cannot anticipate every circumstance that may arise in every future nuisance action. In *TVA I*, for example, we held that the savings clause of the Clean Air Act may allow for some common law nuisance suits, although we did not address whether a nuisance action brought under these circumstances is barred by preemption under the Supremacy Clause. The *Ouellette* Court itself explicitly refrained from categorically preempting every nuisance action brought under source state law. 479 U.S. at 497-99. At the same time, however, the *Ouellette* Court was emphatic that a state law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal," *id.* at 494, admonished against the "tolerat[ion]" of "common-law suits that have the potential to undermine [the] regulatory structure," *id.* at 497, and singled out nuisance standards in particular as "vague" and "indeterminate," *id.* at 496 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)) (internal quotation marks omitted). The upshot of all this is that we cannot state categorically that the *Ouellette* Court intended a flat-out preemption of each and every conceivable suit under nuisance law. 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.

In particular, it is essential that we respect the system that Congress, the EPA, and the states have collectively established. This is especially so in light of the fact that " 'the purpose of Congress is the ultimate touchstone in every preemption case.' " *Wyeth v. Levine*, 555 U.S. ----, 129 S.Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). A field of state law, here public nuisance law, would be preempted if "a scheme of federal regulation ... [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Pac. Gas & Elec. Co.*, 461 U.S. at 204 (ellipsis in original, citation omitted). Here, of course, the role envisioned for the states has been made clear. Where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted.

It is true, as North Carolina argues, that the Clean Air Act's savings clause states that "[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 enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). We must weigh that admonition, however, in light of the Supreme Court's direction in *Pacific Gas & Electric*, 461 U.S. at 203-13. There the Court

explained that when Congress chose to give the Nuclear Regulatory Commission (at the time of the legislation the Atomic Energy Commission) control over issues relating to nuclear safety, it completely occupied the field of nuclear safety regulations, notwithstanding a general savings clause indicating that states retained their traditional power to regulate electrical utilities. *Id.* at 210. As a result, the State of California's claim that "a State may completely prohibit new construction until its safety concerns are satisfied by the Federal Government" was rejected. *Id.* at 212. The Court explained that "[w]hen the Federal Government completely occupies a given field or an identifiable portion of it, ... the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.' " *Id.* at 212-13 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)). While the Court recognized that California retained the right to regulate for traditional utilities purposes, the case at bar mirrors *Pacific Gas & Electric* insofar as it involves an attempt to replace comprehensive federal emissions regulations with a contrasting state perspective about the emission levels necessary to achieve those same public ends.

Similarly, *Ouellette* held that the Clean Water Act's savings clause, which is similar to the one found in the Clean Air Act, *compare* 33 U.S.C. § 1365(e) *with* 42 U.S.C. § 7604(e), did not preserve a broad right for states to "undermine this carefully drawn statute through a general savings clause." *Ouellette*, 479 U.S. at 494. The Court indicated that the clause was ambiguous as to which state actions were preserved and noted 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 purposes and objectives of Congress.' " *Id.* at 493-94 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). We thus cannot allow non-source states to ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never intended.

The difficulties with North Carolina's approach in this litigation do not end with the prospect of multiplicitous decrees or vague and uncertain nuisance standards. In addition to envisioning a role for the states that the Clean Air Act did not contemplate, North Carolina's approach would reorder the respective functions of courts and agencies. [Portions of the opinion describing what the panel perceived as the procedural advantages of agency rulemaking are omitted.]

Injunctive decrees, of course, are rulemakings of a sort. While expressing the utmost respect for the obvious efforts the district court expended in this case, we doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. "Courts are expert at statutory construction, while agencies are expert at statutory implementation." *Negusie v. Holder*, 555 U.S. ----, 129 S.Ct. 1159, 1171 (2009) (Stevens, J., concurring in part and dissenting in part). In fact, the district court properly acknowledged that "public nuisance principles ... are less well-adapted than administrative relief to the task of implementing the sweeping reforms that North Carolina desires." *North Carolina v. Tenn. Valley Auth.*, 593 F.Supp.2d at 817. As the District of Columbia Circuit has emphasized, courts "would be less than candid if [they] failed to acknowledge that [they] approach the task of examining some of the complex scientific issues presented in cases of this sort with some diffidence." *Lead Indus. Ass'n*, 647 F.2d at 1146.

It is crucial therefore that courts in this highly technical arena respect the strengths of the agency

processes on which Congress has placed its imprimatur. Regulations and permits, while hardly perfect, provide an opportunity for predictable standards that are scientifically grounded and thus give rise to broad reliance interests. TVA, for example, spent billions of dollars on power generation units that supply electricity to seven different states in the belief that its permits allowed it to do so. There is no way to predict the effect on TVA or utilities generally of supplanting operating permits with mandates derived from public nuisance law, but one suspects the costs and dislocations would be heavy indeed. Without a single system of permitting, "[i]t would be virtually impossible to predict the standard" for lawful emissions, and "[a]ny permit issued ... would be rendered meaningless." *Ouellette*, 479 U.S. at 497 (quoting *Illinois v.. City of Milwaukee*, 731 F.2d at 414). This is because "for an uncertain length of time after the agency issues the permit, the permit-holder would face the very real threat that the inquiry into the validity of its permit might be reopened in an altogether different forum." *Palumbo*, 989 F.2d at 162. A company, no matter how well-meaning, would be simply unable to determine its obligations ex ante under such a system, for any judge in any nuisance suit could modify them dramatically. Rather than take this risk in the future, "otherwise worthy permit applicants will weigh the formidable costs in delay and litigation, and simply will not apply." *Id.*

There are, therefore, a host of reasons why Congress preferred that emissions standards be set through agencies in the first instance rather than through courts. The prospects of forum shopping and races to the courthouse, the chances of reversals on appeal, the need to revisit and modify equitable decrees in light of changing technologies or subsequent enactments, would most assuredly keep matters unsettled. Congress opted instead for an expert regulatory body, guided by and subject to congressional oversight, to implement, maintain, and modify emissions standards and to do so with the aid of the rulemaking process and a cooperative partnership with states. In the words of *Ouellette* addressing the similarly comprehensive Clean Water Act, the statute "carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA." 479 U.S. at 497. It is not open to this court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states and permit holders in favor of the nebulous rules of public nuisance.

In addition to the problems noted above, the district court's decision compromised principles of federalism by applying North Carolina law extraterritorially to TVA plants located in Alabama and Tennessee. There is no question that the law of the states where emissions sources are located, in this case Alabama and Tennessee, applies in an interstate nuisance dispute. The Supreme Court's decision in *Ouellette* is explicit: a "court must apply the law of the State in which the point source is located." 479 U.S. at 487. While *Ouellette* involved a nuisance suit against a source regulated under the Clean Water Act, all parties agree its holding is equally applicable to the Clean Air Act.

Unfortunately, while the district court acknowledged the proper standard, it for all practical purposes applied North Carolina's Clean Smokestacks Act extraterritorially in Alabama and Tennessee. The decision below does little more than mention the black letter nuisance law of Alabama and Tennessee on its way to crafting a remedy derived entirely from the North Carolina Act. [A portion of the opinion describing the extent to which North Carolina's litigation strategy

revealed its intent to obtain the equivalent of extraterritorial application of the clean Smokestacks Law is omitted.]

Even were we to accept North Carolina's claim that the district court actually applied source state law from Alabama and Tennessee, it would be difficult to uphold the injunctions because TVA's electricity-generating operations are expressly permitted by the states in which they are located. It would be odd, to say the least, for specific state laws and regulations to expressly permit a power plant to operate and then have a generic statute countermand those permissions on public nuisance grounds. As the Supreme Court has made clear, "[s]tates can be expected to take into account their own nuisance laws in setting permit requirements." *Ouellette*, 479 U.S. at 499.

While North Carolina points out that an activity need not be illegal in order to be a nuisance, that is not the situation before us. There is a distinction between an activity that is merely not illegal versus one that is explicitly granted a permit to operate in a particular fashion. "Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government." *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir.1981). This is especially true "where the conduct sought to be enjoined implicates the technically complex area of environmental law." *Id.; see also* Restatement (Second) of Torts § 821B cmt. f. ("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."). [A portion of the opinion reciting Alabama and Tennessee cases saying authorized activities carried on in a proper manner are not abatable is omitted as is . Similarly, the concluding portion of the opinion recounting the other "remedies" open to North Carolina is omitted.]

For the foregoing reasons, we reverse the judgment of the district court and remand with directions to dismiss the action.

Commentary and Questions

1. Should out-of-state nuisance injunctions replace source state direct regulation of major stationary sources under the Clean Air Act? If that, in fact, is the proper description of the question presented for decision in NC v. TVA, the answer would seem to be, "No, for a series of reasons, most of which were well stated by Judge Wilkinson." Is that what the case is actually about, or is it a bit more subtle? What might be the case is that NC believes it has proven facts that place the case into a category of situations in which the common law of nuisance can complement CAA regulation of stationary sources. For example, what if North Carolina had sought *damages* on behalf of its injured citizens and damaged natural resources? Such a suit was allowed by the Supreme Court in Georgia v. Tennessee Copper 206 U.S. 230, 237 (1907). That, of course, pre-dated the Clean Air Act, so the question now becomes whether the Clean Air Act totally preempts or ousts those sorts of state remedies.

2. What the Supreme Court said in *Milwaukee II, Ouellette, PG&E,* and *Silkwood*. In those cases, none found total preemption. The *Milwaukee II* related to interstate water pollution after passage of the Clean Water Act and the *Ouellette* subsequently expressly permitted an interstate nuisance action to lie, requiring only that it be conducted using the nuisance law of the source state. *PG&E*, which involved preemption of radiological safety in relation to a nuclear power plant found that traditional state regulatory authority over the fiscal soundness of nuclear power

was permissible and *Silkwood* allowed a state law tort remedy including punitive damages for an injury sustained as a result of radiological contamination in a plant without proof of causative violations of the federal radiological safety standards. If anything, the tenor is consistent with the cannon of judicial interpretations that statutes in derogation of common law are to be read narrowly. Moreover, with both the Clean Water Act and the Clean air Act, there is the explicit savings clause, which must be given content, even if what content it should be given is not readily apparent to the 4th circuit panel in this case.

3. The other remedies open to North Carolina: source state permitting and EPA oversight. As the Union Electric v. EPA, 427 U.S. 246 (1976) made clear, the choice of how a source state regulates its stationary sources is, in the first instance a matter for determination by the state agency, subject to review by EPA, primarily to ensure that the source state SIP will achieve compliance with the NAAQS. As the opinion in NC v. TVA explains, another factor EPA is to consider under CAA §§110 and 126 is whether an upwind state SIP will prevent a downwind state from being able to attain tNAAQS compliance in its SIP, or that the downwind state feels it is unduly adversely affected by the upwind state SIP. In some cases, upwind SIPs regulate power plants stringently, either out of necessity in writing a SIP that will be adequate, or because of a desire to do more than the CAA requires, or because electric generating utilities can bear and spread the cost of such controls better than other emitters subject to regulation. Once the upwind state decides to regulate less stringently, but still stringently enough that the overall SIP satisfies the NAAQS, the downwind state's only recourse internal to the CAA is to EPA. How likely is it that EPA will intervene on behalf of the downwind state if EPA believes the downwind state can still write its own SIP in a way that also meets the NAAQS? The CAA does not require best technology, only an acceptable ambient result that does not prevent a neighboring state from also achieving an acceptable ambient result. Is there any consistent principle that EPA could enunciate regarding when it will impose over a billion dollars in costs on source states emitters whose actions violate none of the mandates EPA is obligated to enforce? Does EPA have the available resources to consider all interstate effects to which a downwind state might object? Taken together, it seems unlikely that EPA will often side with the downwind states if the upwind state will not do so on its own.

4. Back to basics: balancing the equities. Think back to *Boomer*, for example. Isn't it abundantly clear that a downwind neighbor of a cement plant, even on operating in compliance with its permit, can nevertheless have a valid claim for intentional nuisance? Surely the granting of a state permit to operate in some particular fashion would not take away Boomer's property rights and grant the cement company a free easement to dump dust on its neighbors regardless of the impact on them. As was the case in *Boomer*, a lawfully operated business, even one complying with the minimum terms the state requires for its operation (or operating at a "state of the art" level in regard to pollution control) as spelled out in its permit, can still be a tortfeasor. The question ought to be one of remedy. What the court's opinion has done is make out a strong case that the balance of equities here, when the public interest factors are conceived broadly enough to include the congressional balancing of the interests in public health and economic stability for major industrial enterprises, weighs in favor of not enjoining the activity. If North Carolina proved substantial economic damage, is there any reason TVA should be allowed to externalize those costs any more than Atlantic Cement and not respond in damages? If North Carolina could show direct causation of hundreds of deaths, shouldn't a judge be free to at least consider an injunction? In that latter case, hopefully, the EPA would have stepped in (or been ordered to do so), but if EPA did nothing and Tennessee and Alabama refused to modify the

permits, are judges debarred from considering an order halting the slaughter? At a practical level, the damage scenario seems realistic and the death scenario does not, but doesn't allowing the suit and applying the balancing of the equities protect all of the relevant private and governmental interests?