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In Closing the Door to Environmental Public Nuisance Claims, Did the Fourth Circuit Leave a Window Cracked?

*North Carolina ex rel. Cooper v. Tennessee Valley Authority*¹

I. INTRODUCTION

Global warming. Climate change. Regardless of the vernacular used, it is a scientific fact that the Earth is experiencing unpredicted temperature changes, and it seems logically implausible that humans have had nothing to do with it.² In the face of this knowledge, environmentalists scream for a change in how the world conducts itself. To effect this change, many believe the United States must set the example for the rest of the world with self-regulation. However, the tug-of-war between changing political administrations and the need for proactive measures to deal with climate change has not yet produced desired results. Frustrated with the legislative process and its many loopholes, activists have turned to the judicial branch to force the issue. This note will analyze how the common law tort of public nuisance is faring as a tool for environmental litigation. Furthermore, in discussing the recent decision of *North Carolina ex rel. Cooper v. Tennessee Valley Authority*,³ it is important to determine whether the court closed the door for public nuisance claims, yet possibly opened a window.

II. FACTS AND HOLDING

The Tennessee Valley Authority (“TVA”) is a federal agency established in 1933 with a primary objective of producing, distributing and selling electric power.⁴ TVA provides electricity to parts of seven states,⁵

¹ 615 F.3d 291 (4th Cir. 2010).

² DAVID WOOLEY & ELIZABETH MORSS, CLEAN AIR ACT HANDBOOK § 10:1 (20th ed. 2010) (emphasizing how climate scientists have overwhelmingly concluded that manmade emissions are contributing to global warming).

³ *North Carolina ex rel. Cooper v. Tenn. Valley Auth. (Cooper II)*, 615 F.3d 291 (4th Cir. 2010).

⁴ *Cooper II*, 615 F.3d at 296 (quoting 16 U.S.C. §§ 831d(l), 831i, 831n-4(f) (2006)).

and much of this power is generated by coal-fired power plants located in Tennessee, Alabama and Kentucky.⁶ Coal-fired power plants emit sulfur dioxide ("SO₂") and nitrous oxides ("NO_x"), which can transform into "fine particulate matter" ("PM_{2.5}")—all of which are extensively regulated through the federal Clean Air Act.⁷

In order to control these emissions, TVA power plants have numerous pollution controls; including the use of SO₂ scrubbers,⁸ selective catalytic reduction plants ("SCR"),⁹ selective non-catalytic reduction controls ("SNCR"),¹⁰ and low-output NO_x coal.¹¹ TVA has promulgated these controls in accordance with the Environmental Protection Agency ("EPA") regulations, the Clean Air Act and the individual state standards that control each plant.¹²

While the Clean Air Act and the EPA are the primary means of managing emissions and developing standards, specific decisions regarding how to meet these standards are left up to the individual states.¹³ Some states choose to view the EPA's standards as a minimum requirement and enact statutes subjecting emitters to a stricter standard. North Carolina is one such state, implementing the North Carolina Clean Smokestacks Act¹⁴ to provide more stringent controls for in-state coal-fired plants than the Clean Air Act requires.¹⁵

⁵ TVA's power service area covers approximately 80,000 square miles including most of Tennessee and parts of Mississippi, Kentucky, Alabama, Georgia, Virginia, and North Carolina. *Frequently Asked Questions about TVA*, TENNESSEE VALLEY AUTHORITY, <http://www.tva.gov/abouttva/keyfacts.htm> (last visited Aug. 31, 2011).

⁶ *Cooper II*, 615 F.3d at 296.

⁷ *Id.* The Clean Air Act is codified at 42 U.S.C. §§ 7401–7681q (2006).

⁸ *Cooper II*, 615 F.3d at 296–97. Scrubbers are large chemical plants that can remove SO₂ from exhaust emitted from a power plant. *Id.* at 297. This "flue gas desulfurization system" can cost hundreds of millions of dollars. *Id.* at 296–97.

⁹ *Id.* at 297. SCRs are also large buildings costing hundreds of millions of dollars to construct but can remove approximately 90% of the NO_x emissions from a coal power plant. *Id.*

¹⁰ *Id.* Costing less than an SCR but not nearly as effective, a SNCR can remove 20–40% of NO_x from power plant emissions. *Id.*

¹¹ *Id.*

¹² *Id.* at 296.

¹³ *Id.* at 299 (citing 42 U.S.C. § 7410(a)(1) (2008)).

¹⁴ N.C. GEN. STAT. §§ 143-215.105 to .114C (2010).

¹⁵ *Cooper II*, 615 F.3d at 297 (citing N.C. GEN. STAT. § 143-215.107D(b)–(e)).

CLOSING THE DOOR TO ENVIRONMENTAL PUBLIC NUISANCE CLAIMS

Based on this stricter standard, Plaintiff–Appellant, the state of North Carolina, filed the initial action against TVA on behalf of its citizens, alleging TVA’s eleven coal-fired power plants¹⁶ constitute a public nuisance and subsequently sought an injunction against the TVA plants.¹⁷ Due to the weather systems in states where TVA plants operate, some emissions from these plants move eastward into North Carolina and other neighboring states.¹⁸ North Carolina contended these emissions from TVA plants enter the state in “unreasonable amounts, thereby threatening the health of millions of people, the financial viability of an entire region and the beauty and purity of a vast natural ecosystem.”¹⁹

TVA initially moved to dismiss this suit, arguing that the discretionary function doctrine²⁰ and the Supremacy Clause²¹ of the U.S. Constitution barred the litigation.²² While Congress has waived TVA’s sovereign immunity to some degree by providing that TVA may “sue and be sued in its corporate name,”²³ TVA and North Carolina disagreed over the scope of this waiver.²⁴ Furthermore, the Supremacy Clause provides that the activities of the federal government be free from regulation by any state.²⁵ Although Congress waived some of this protection in the Clean Air Act, TVA argued that this suit did not fall within that waiver because of its basis in a state-law nuisance action.²⁶ In an interlocutory appeal of a

¹⁶ TVA operates seven plants in Tennessee, two in Kentucky, and two in Alabama. North Carolina *ex rel. Cooper v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 818 (W.D.N.C. 2009), *overruled by Cooper II*, 615 F.3d 291 (4th Cir. 2010).

¹⁷ *Id.* at 815.

¹⁸ *Id.* at 825.

¹⁹ *Id.* at 815.

²⁰ The discretionary function doctrine prevents a tort suit against the United States, its agencies, or its officers where “the challenged conduct involves an element of judgment or choice,” and “that judgment is the kind that the discretionary function exception was designed to shield, *i.e.*, . . . the challenged action is based on considerations of public policy.” *Suter v. United States*, 441 F.3d 306, 310–11 (4th Cir. 2006) (internal citations omitted) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988)).

²¹ U.S. CONST., art. VI, § 1, cl. 2.

²² North Carolina *ex rel. Cooper v. Tenn. Valley Auth. (Cooper I)*, 515 F.3d 344, 347 (4th Cir. 2008).

²³ 16 U.S.C. § 831c(b) (2006).

²⁴ *Cooper I*, 515 F.3d at 347.

²⁵ *Mayo v. United States*, 319 U.S. 441, 445 (1943).

²⁶ *Cooper I*, 515 F.3d at 351.

denial of this motion, the Fourth Circuit found that none of the arguments brought by TVA could prevent the suit from proceeding.²⁷ Thus, the Fourth Circuit affirmed the denial of the motion to dismiss and the case was remanded to the District Court for a trial on the merits.²⁸

In a bench trial in the United States District Court for the Western District of North Carolina, Judge Lacy Thornburg agreed with North Carolina and issued an injunction that required the immediate installation of emissions controls at four plants located in Tennessee and Alabama.²⁹ TVA appealed and the state of Alabama was granted leave to intervene.³⁰ The United States Court of Appeals, Fourth Circuit, found the district court's ruling to be "flawed for several reasons."³¹ First, the district court applied the incorrect public nuisance law, using North Carolina's law instead of the laws of Tennessee and Alabama.³² Second, if the correct law had been applied, the alleged injury would not have constituted a public nuisance.³³ Finally, public nuisance law did not provide proper standards for determining emissions violations when there was a "carefully created system for accommodating the need for energy

²⁷ The court found that this suit did not implicate any "separation-of-powers concern" so the "broad waiver of sovereign immunity effected by the TVA's 'sue-and-be-sued' clause is not restricted by a discretionary function exception." *Id.* at 350. Regarding the Supremacy Clause argument, the court determined the broad application of the term "requirement" in the Clean Air Act does not exclude common-law nuisance actions, and thus the waiver of the Supremacy Clause found in the Clean Air Act applies to TVA in this public nuisance suit. *Id.* at 352–53.

²⁸ *Id.* at 353.

²⁹ North Carolina *ex rel.* Cooper v. Tenn. Valley Auth. (*Cooper II*), 615 F.3d 291, 298 (4th Cir. 2010). The court found the other seven plants too far away from North Carolina to have any impact and only those plants within a 100-mile radius contributed significantly to North Carolina ozone levels. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 593 F. Supp. 2d 812, 825 (W.D.N.C. 2009), *overruled by Cooper II*, 615 F.3d 291 (4th Cir. 2010).

³⁰ *Cooper II*, 615 F.3d at 298.

³¹ *Id.* at 296.

³² *Id.*

³³ *Id.*

production and the need for clean air.”³⁴ The appellate court subsequently reversed and remanded with directions to dismiss the action.³⁵

III. LEGAL BACKGROUND

A. Environmental Protection Agency Regulation through the Clean Air Act

Congress enacted the federal Clean Air Act³⁶ in order to “protect and enhance the quality of the Nation’s air resources,” and to provide oversight and assistance to state and local governments in regulating and managing emissions.³⁷ The Clean Air Act gives the EPA the power to develop acceptable levels of airborne emissions, known as National Ambient Air Quality Standards (“NAAQS”).³⁸ These standards are created to set a uniform level of air quality across the country, furthering a healthy population and environment.³⁹ Not only are there primary standards to protect individuals, but the Clean Air Act also creates secondary standards designed to protect the surrounding environment.⁴⁰

As a result of this statute, the EPA has promulgated air quality standards for a number of emissions, including SO₂ and NO_x.⁴¹ These standards are not arbitrarily set, but instead become adopted after significant scientific research and a “reasonable time for interested persons to submit written comments” has passed.⁴²

It is important to understand that while the EPA establishes these nationwide standards for emissions levels, “[it] does not directly regulate actual sources of emissions.”⁴³ Congress understood that control and

³⁴ *Id.*

³⁵ *Id.* at 312.

³⁶ 42 U.S.C. §§ 7401–7671q (2006).

³⁷ *Id.* § 7401(b)(1).

³⁸ *Id.* § 7409(a)(1)(A), (b)(1).

³⁹ *Cooper II*, 615 F.3d at 299; see also *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989) (“The Act directs the EPA to prescribe national air quality standards at a level sufficient to protect the public health and welfare.”).

⁴⁰ 42 U.S.C. § 7409(a)(1)(A), (b)(1)–(2) (2006).

⁴¹ These are the same emissions at issue in this case. *Cooper II*, 615 F.3d at 296.

⁴² *Id.* at 299 (quoting 42 U.S.C. § 7409(a)(1)(B), (b)(1)–(2)).

⁴³ *Id.* at 299.

prevention of air pollution at its source should lie with states and local governments.⁴⁴ The EPA sets the air quality standards and the individual states determine how to meet those requirements using individualized plans.⁴⁵ "Each state is required to submit to the EPA a State Implementation Plan ("SIP") 'which provides for implementation, maintenance, and enforcement of [air quality standards] . . . within such State.'"⁴⁶ These plans must be consistent with EPA regulations and must include enforceable emission limitations. Each state's plan must also consider the impact of its own emissions on other states' abilities to meet the required air quality standards.⁴⁷ Practically, this ensures that a state cannot export its emissions to another state without consequence. Thus, a cohesive regulatory infrastructure exists while still allowing state sovereignty to control.

If a state believes it is being subjected to unlawful interstate emissions, it may file a "Section 126 petition."⁴⁸ This petition provides an avenue for a neighboring state subject to "downwind" emissions to address any concerns they may have "regarding the adequacy of an upwind state's regulation of airborne emissions."⁴⁹ In this way, there is a method for a state to address concerns that current EPA regulations are not preventing enough pollution to satisfy that state's standards.

B. *Public Nuisance Environmental Claims*

Over the past twenty years, plaintiffs dissatisfied with government regulation of clean water and air have sought to bring their claims using

⁴⁴ 42 U.S.C. § 7401(a)(3) (2006).

⁴⁵ *Cooper II*, 615 F.3d at 299.

⁴⁶ *Id.* (quoting 42 U.S.C. § 7401(a)(1)).

⁴⁷ Each state must ensure that its State Implementation Plan "contain adequate provisions prohibiting . . . any source . . . within the State from emitting any air pollutant in amounts which will contribute significantly to non-attainment 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) (2006).

⁴⁸ *Cooper II*, 615 F.3d at 300 (citing 42 U.S.C. § 7426(b) (2006)). "Any State or political subdivision may petition the Administrator 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)." *Id.* (citing 42 U.S.C. § 7426(b)).

⁴⁹ *Cooper II*, 615 F.3d at 300–01.

common law public nuisance doctrines.⁵⁰ While some commentators thought this trend had died by the early 1980s,⁵¹ recent litigation has created a renewed fervor for asserting challenges to environmental regulation through tort law.

In *Milwaukee v. Illinois and Michigan*,⁵² the U.S. Supreme Court found that statutory law⁵³ had “eradicated any federal common law remedies” regarding pollution of Lake Michigan from a nearby municipality.⁵⁴ The main issue in *Milwaukee* was whether there existed a federal regulatory scheme that “spoke directly to the question” at issue in the case.⁵⁵ Due to the statutory enactments regarding regulations of water pollution, the statute essentially displaced the *federal* common law.⁵⁶ The Court noted that, “[t]he invocation of federal common law by the District Court and the Court of Appeals in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control.”⁵⁷

This ruling was further extended in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.⁵⁸ Here, the Supreme Court found the “federal common law of nuisance . . . fully pre-empted in the area of ocean pollution.”⁵⁹ Using the *Milwaukee* “preemption test,”⁶⁰ the court first determined whether the claim asserted was within a regulatory scheme already established by Congress; and second, whether

⁵⁰ John Gray & Richard Faulk, Commentary, *Circuit Courts Help Define The Boundaries Of Public Nuisance*, 31 NO. 4 WESTLAW J. ENVTL. 1 (2006).

⁵¹ WILLIAM H. RODGERS JR., RODGERS’ ENVIRONMENTAL LAW § 2:14 (2d ed. 2010) (“In 1981, the Supreme Court delivered two setbacks to those who perceived the federal common law of nuisance as the means for repairing inadequate federal environmental statutes.”).

⁵² 451 U.S. 304 (1981). Illinois brought suit against the city of Milwaukee because some of Milwaukee’s sewage plants discharged sewage into Lake Michigan (and therefore its tributaries), endangering the health and safety of Illinois citizens. Illinois contended that this action constituted a public nuisance under federal common law. *Id.*

⁵³ Clean Water Act, 33 U.S.C. §§ 1251–1274 (2006).

⁵⁴ RODGERS, *supra* note 51, § 2:14.

⁵⁵ *Milwaukee*, 451 U.S. at 315.

⁵⁶ *Id.* at 317–319.

⁵⁷ *Id.* at 325.

⁵⁸ 453 U.S. 1 (1981).

⁵⁹ *Id.* at 11.

⁶⁰ RODGERS, *supra* note 51.

said regulatory scheme has at least attempted to address the substance of the claim.⁶¹ Thus, a rubric for evaluating public nuisance claims began to take hold.

Yet another early public nuisance case was *International Paper Co. v. Ouellette*,⁶² which arose out of a suit by property owners on the Vermont side of Lake Champlain against pulp mill operators whose mill was on the New York side of the lake.⁶³ Here, the Supreme Court first determined that the proper law applicable in interstate nuisance disputes would be the law of the "source" state.⁶⁴ Thus, the Clean Water Act preempted Vermont nuisance law to the extent the law sought to impose liability on a New York "point source."⁶⁵ Yet an important side note from this case was that the Court specifically found that the Clean Water Act did not bar an individual from asserting a nuisance claim pursuant to the state law of the source state.⁶⁶

Moving from water pollution to air pollution, the EPA was forced to regulate carbon dioxide and other "green house gases" after the state of Massachusetts successfully sued the EPA for underperforming in its regulatory capacity to protect the health and safety of Americans.⁶⁷ For the purposes of this article, the importance of this case is that the Supreme Court granted Massachusetts standing to bring the suit⁶⁸ and subsequently

⁶¹ See *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21–22 (1981).

⁶² 479 U.S. 481 (1987).

⁶³ *Id.* at 483–84.

⁶⁴ See *id.* at 497. "Source state" refers to whichever state contains the "source" of the problem within its boundaries. *Id.* at 485.

⁶⁵ *Id.* at 494–95.

⁶⁶ *Id.* at 497; see also *Cooper II*, 615 F.3d 291, 303 (4th Cir. 2010) ("The *Ouellette* Court itself explicitly refrained from categorically preempting every nuisance action brought under source state law.").

⁶⁷ See *Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007).

⁶⁸ *Id.* at 520–21. "[I]t is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.' There is, moreover, a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk." *Id.* at 521.

allowed for the current litigation landscape.⁶⁹ The main issue in many of the following cases revolves around the correct application of this new precedent regarding standing.

Subsequently, the first “common-law climate change” lawsuit appeared in the form of *Connecticut v. American Electric Power*.⁷⁰ Eight states and three land trusts sued five major utility companies (who were also the largest emitters of carbon dioxide in the U.S.), claiming the companies were a public nuisance as they contributed to the increase in global warming.⁷¹ While the district court initially dismissed this case for lack of standing because “resolution of the plaintiff’s claims would require the court to engage in the balancing of economic, environmental, and national security interest, and . . . present[ed] a nonjusticiable political question,”⁷² the Second Circuit disagreed.⁷³ Relying on *Massachusetts v. EPA*, the Court of Appeals ruled that the plaintiffs had standing to seek compensation for damages from climate change.⁷⁴

Another climate-change case, *California v. General Motors*,⁷⁵ proposed a now-familiar question of whether the state of California had standing to seek damages from major automakers under a theory of common-law public nuisance.⁷⁶ Essentially, California argued that the automakers’ products contributed to greenhouse gas emissions and thus were a cause of global warming.⁷⁷ Referring to the *Massachusetts* decision, the Northern District of California found that if it chose to

⁶⁹ For a more in-depth analysis of this case and its far-reaching implications, see Brett Maland, *A New Era of Green Regulation: EPA Must Regulate Climate Altering Gases Emitted From Motor Vehicles*, 15 MO. ENVTL. L. & POL’Y REV. 369 (2008).

⁷⁰ 582 F.3d 309 (2d Cir. 2009). The suit was filed in 2004, decided by the district court in 2006, decided by the Second Circuit in 2009, and the Supreme Court granted certiorari in December 2010 to settle these claims. So while it was the first filed, it is arguably the most important case with regards to public nuisance and federal preemption issues. *Id.* at 314–15.

⁷¹ *Id.* at 314.

⁷² *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

⁷³ *Connecticut v. Am. Elec. Power*, 582 F.3d 309 (2d Cir. 2009).

⁷⁴ *Id.* at 336–38 (finding also that the plaintiff had standing under the factors provided by *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

⁷⁵ No. C06-05755 MJJ, 2007 WL 2726871, at 1 (N.D. Cal. Sept. 17, 2007).

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 1–2.

proceed to the merits of the case, it would risk infringing upon federal policymaking due to the EPA's forthcoming regulation of carbon dioxide and other greenhouse gases.⁷⁸ Thus, the court dismissed the case because it presented a nonjusticiable political question.⁷⁹

The Northern District of California had yet another chance to hear a climate change case in *Native Village of Kivalina v. ExxonMobil*.⁸⁰ The plaintiffs represented an Inupiat Eskimo village on the Alaskan coast and alleged that twenty-four oil, energy and utility companies were responsible for the erosion and destruction of the Arctic ice shield protecting their village.⁸¹ Specifically, Kivalina charged the defendants with contributing to greenhouse gases and thereby causing global warming.⁸² The district court again found that ruling on the merits of this claim would require an initial policy decision, and therefore presented a nonjusticiable political question.⁸³ Kivalina has filed an appeal currently pending in the Ninth Circuit.⁸⁴

The case of *Comer v. Murphy Oil USA*⁸⁵ created a roadblock in the Fifth Circuit for "climate change cases." This case concerned private landowners—with damage from Hurricane Katrina—bringing a class action suit including private and public nuisance claims against energy, utility and mining companies.⁸⁶ They sought damages based on the assertion that climate change aggravated Hurricane Katrina, which damaged their land.⁸⁷ While the district court initially dismissed the case

⁷⁸ See *id.* at 10–12 ("The underpinnings of the Supreme Court's rationale in *Massachusetts* only reinforce this Court's conclusion that Plaintiff's current tort claim would require this Court to make the precise initial carbon dioxide policy determinations that should be made by the political branches."). *Id.* at 12.

⁷⁹ *Id.* at 16. After this decision, the state of California filed an appeal to the Ninth Circuit, but it voluntarily dismissed its appeal after General Motors filed for bankruptcy. Kevin A. Gaynor et al., *Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10845, 10848 (Sept. 2010).

⁸⁰ 663 F. Supp. 2d 863 (N.D. Cal. 2009).

⁸¹ *Id.* at 868.

⁸² *Id.*

⁸³ *Id.* at 876, 883.

⁸⁴ Gaynor et al., *supra* note 79, at 10849.

⁸⁵ 585 F.3d 855 (5th Cir. 2009).

⁸⁶ *Id.* at 859.

⁸⁷ *Id.*

as a non-justiciable political question, the Fifth Circuit reversed, finding the plaintiffs had standing to bring public and private nuisance, trespass and negligence claims.⁸⁸ Subsequently, in a strange twist, a petition for rehearing en banc was granted, and on May 28, 2010, the Fifth Circuit was forced to dismiss the entire appeal due to a lack of quorum, allowing the district court's dismissal of the case to be reinstated.⁸⁹

Though the initial hurdle of standing to bring a federal public nuisance claim remains unclear,⁹⁰ a remaining issue is whether the regulations promulgated through the EPA preempt common law tort claims. Viewing the court's decision in *North Carolina v. TVA*,⁹¹ it seems unlikely that these claims can survive such a facial challenge.

IV. INSTANT DECISION

Judge Wilkinson, for the Fourth Circuit Court of Appeals, found the underlying district court's opinion flawed for multiple reasons.⁹² At issue was whether public nuisance is an appropriate way to address this claim, whether the correct state law was applied and whether TVA's actions constituted a public nuisance when they were within federal and state regulations.⁹³

Believing the real question at issue in the case to be "whether individual states will be allowed to supplant the co-operative federal-state

⁸⁸ *Id.* at 860.

⁸⁹ *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). At the time of the en banc review, eight judges out of sixteen had to recuse themselves from the case. Under the Fifth Circuit's own rules, this lack of quorum prevented it from conducting judicial business. Furthermore, under its own precedent, the earlier appellate panel decision had been vacated by the grant of a rehearing en banc, so the remaining precedent left standing was the district court's decision to dismiss the case as a non-justiciable political question. However, the plaintiffs still retain the right to petition to the U.S. Supreme Court. Gaynor et al., *supra* note 79, at 10850.

⁹⁰ Currently the Second Circuit is the only federal court of appeals to grant standing to the plaintiffs in a "climate change case." See *Connecticut v. Am. Elec. Power*, 582 F.2d 309 (2d Cir. 2009).

⁹¹ *Cooper II*, 615 F.3d 291 (4th Cir. 2010).

⁹² *Id.* at 296.

⁹³ *Id.*

framework” created and refined by Congress, the court first discussed the extensive history of the EPA’s regulations regarding emissions and how they interact with state regulations.⁹⁴ Specifically, it focused on the requirements preventing a state from “exporting” their emissions to other regions.⁹⁵ The court said that due to the many checks in the system, a state dissatisfied with the adequacy of another state’s regulation of its own emissions has a method built into the statute to address this grievance.⁹⁶ The court provided this explanation to show that the Clean Air Act is a highly comprehensive piece of legislation.⁹⁷ While the Fourth Circuit found it understandable that not everybody would agree with the process put forth by the EPA, “[l]itigation that amounts to ‘nothing more than a collateral attack’ on the system . . . risks results that lack both clarity and legitimacy.”⁹⁸ In pursuing a public nuisance cause of action, the court determined that North Carolina sought to impose a different set of standards.⁹⁹ The court gave many policy reasons against using public nuisance law to regulate emissions, yet it stopped short of holding that “Congress has entirely preempted the field of emissions regulation.”¹⁰⁰

In addition to the problem of “multiplicitous decrees” and uncertain standards, the court found a bigger problem in allowing this judgment to stand: North Carolina’s approach questions the status quo between the judiciary branch and federal agencies.¹⁰¹ The court argued that Congress had entrusted emission regulation not to the courts, but to a federal agency that can allocate the right resources.¹⁰² Further, it found that Congress could have designated the judiciary with the primary authority to set emissions standards, but instead it chose to utilize the EPA.¹⁰³ “While expressing the utmost respect for the obvious efforts the

⁹⁴ *Id.* at 298.

⁹⁵ *Id.* at 300 (citing 42 U.S.C. § 7410(a)(2)(D), (D)(i), (D)(l) (2006)).

⁹⁶ *Id.* at 300–01.

⁹⁷ *Id.* at 301.

⁹⁸ *Id.* at 301 (quoting *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir. 1993)).

⁹⁹ *Cooper II*, 615 F.3d at 301.

¹⁰⁰ *Id.* at 302.

¹⁰¹ *Id.* at 304.

¹⁰² *Id.*

¹⁰³ *Id.*

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.”¹⁰⁴ The Fourth Circuit felt that courts should respect the authority of the agency process, by which predictable standards grounded in science, and thus easily relied on, have been provided.¹⁰⁵ Because the breadth of public nuisance law has very little standards, the court determined public nuisance does not avail itself to predictability¹⁰⁶.

Looking to the Supreme Court’s decision in *Ouellette*,¹⁰⁷ the Fourth Circuit determined without question that in an interstate nuisance dispute, the law of the states where the emissions source is located should apply.¹⁰⁸ While the district court acknowledged and claimed to be following this standard, it essentially applied the North Carolina’s Clean Smokestacks Act¹⁰⁹ extraterritorially in Alabama and Tennessee.¹¹⁰ From the expert witness testimony at trial to the language of the Clean Smokestacks Act, the Fourth Circuit determined that all the evidence proved that North Carolina desired to apply its standards to the TVA plants, even though they were not located within the state of North Carolina.¹¹¹ The court concluded that, in issuing its injunction, the district court practically followed line by line the emissions caps suggested by North Carolina’s key expert witness.¹¹² The Fourth Circuit reasoned that these suggestions followed the Clean Smokestacks Act requirements almost exactly.¹¹³ Thus, in following the advice of the expert witness, the district court applied requirements found in the North Carolina statute extraterritorially to Tennessee and Alabama.¹¹⁴ “The Supreme Court emphasized that only source state law, here that of Alabama and

¹⁰⁴ *Id.* at 305.

¹⁰⁵ *Id.* at 305–06.

¹⁰⁶ *See id.* at 306.

¹⁰⁷ *Int’l Paper Co. v. Ouellette*, 429 U.S. 481, 487 (1987).

¹⁰⁸ *Cooper II*, 615 F.3d at 306 (citing *Ouellette*, 429 U.S. at 497).

¹⁰⁹ N.C. GEN. STAT. § 143-215.107D (2010).

¹¹⁰ *Cooper II*, 615 F.3d at 306–07.

¹¹¹ *Id.* at 307–08.

¹¹² *Id.* at 308–09.

¹¹³ *Id.* at 307.

¹¹⁴ *Id.* at 308.

Tennessee, could impose more stringent emission rates than those required by federal law on plants located in those two jurisdictions."¹¹⁵

In its final reason for overturning the district court's ruling, the Fourth Circuit found that even if the district court had properly applied Alabama and Tennessee's own public nuisance law to the issue at hand, it would be quite hard to uphold the injunctions because TVA's plants were "expressly permitted by the states where they are located."¹¹⁶ Citing to previous precedent and treatises on torts, the court found that, traditionally, courts have been reluctant to deem an activity "specifically authorized by the government" as a public nuisance.¹¹⁷ Since both Alabama and Tennessee state laws subscribe to this principle, the court found that "TVA's plants cannot logically be public nuisances . . . where TVA is in compliance with [the federal and state regulations]."¹¹⁸

Near the end of its opinion, the Fourth Circuit emphasized that its decision was not leaving North Carolina without a remedy.¹¹⁹ It detailed the multiple processes provided by the EPA through which North Carolina could bring its grievance.¹²⁰ Ultimately, the court was unwilling to upend an entire body of law when legislation provided a superior way to handle this issue.¹²¹

The court stated that the trial court's ruling, if allowed to stand, would have encouraged vague public nuisance standards by replacing a "carefully created system" with a "confused patchwork of standards, to the detriment of industry and the environment alike."¹²² The Fourth Circuit found that even if public nuisance law had been appropriate to apply in this case, the district court incorrectly applied North Carolina law rather than Tennessee or Alabama law as required by Supreme Court precedent.¹²³ Finally, even if the district court had correctly applied source state law, is the court found it "difficult to understand how an

¹¹⁵ *Id.* (citing *Int'l Paper Co. v. Ouellette*, 429 U.S. 481, 494-497 (1987)).

¹¹⁶ *Id.* at 309.

¹¹⁷ *Id.* (citing *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981)).

¹¹⁸ *Id.* at 310.

¹¹⁹ *Id.* at 310-11.

¹²⁰ *Id.*

¹²¹ *Id.* at 312.

¹²² *Id.* at 296.

¹²³ *Id.* (citing *Int'l Paper Co. v. Ouellette*, 429 U.S. 481, 497 (1987)).

activity expressly permitted and extensively regulated” could constitute a public nuisance.¹²⁴ Thus, the Fourth Circuit reversed the judgment of the district court and remanded with directions to dismiss this case.¹²⁵

V. COMMENT

Many environmentalists have become impatient with the federal government’s lack of action regarding climate change. Due to the perceived “inadequacy” of federal regulation, environmental advocates have turned to the judicial branch. Currently, the EPA and the Clean Air Act do not actively regulate “greenhouse gases,” which has led to the recent spike in “climate change litigation” utilizing the common law tort of public nuisance.¹²⁶ With the latest political shift in Washington,¹²⁷ it seems unlikely that the government will manage to effectively bring about the regulation and change many environmentalists seek.¹²⁸ As a result, this trend in environmental litigation seems unlikely to disappear on its own.

¹²⁴ *Id.*

¹²⁵ *Id.* at 312.

¹²⁶ The EPA has announced a proposed rule focusing on regulation of large facilities that emit “greenhouse gases.” This rule was announced on September 30, 2009, but has yet to be implemented. This rule is in keeping with the Supreme Court’s holding in *Massachusetts v. EPA*, requiring the EPA to regulate greenhouse gases. See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535 (Oct. 7, 2009) (to be codified at 40 C.F.R. pt. 52).

¹²⁷ Starting in 2008, the Democratic Party enjoyed control of both houses of Congress and the Presidency. However, after the congressional election of 2010, Republicans regained a majority in the House of Representatives and closed the gap in the Senate. See also Letter from 18 Republican Governors to President Obama (Mar. 18, 2011), available at: <http://republicans.energycommerce.house.gov/Media/file/Letters/112th/032111Obama.pdf> (referring to the EPA’s policy as an “unreasonably aggressive regulatory agenda”).

¹²⁸ While EPA’s new regulations aimed at greenhouse gases were scheduled to roll out on January 2, 2011, there is a coalition of House Representatives, including emboldened Republicans, seeking to delay these EPA rules for two years. Additionally, the EPA is facing lawsuits from states concerning the agency’s power to limit greenhouse gas emissions. Texas is leading this charge, as it has so far refused to issue permits or allow the EPA to issue permits for greenhouse gas emissions. Posting of Darren Goode to E2 Wire, <http://thehill.com/blogs/e2-wire/677-e2-wire/128601> (Nov. 10, 2010, 11:58 EST).

A. *Predicting the Future: Potential Effects of U.S. Supreme Court Review of American Electric Power v. Connecticut*

Initially, the biggest hurdle involves overcoming the “standing” requirement, as many of these cases are dismissed at the circuit level for being nonjusticiable political questions. At the moment, all eyes look toward the U.S. Supreme Court, as it has recently granted certiorari to review *American Electric Power v. Connecticut*.¹²⁹ This is the only current case where a federal court of appeals has given the plaintiffs standing to pursue a claim of public nuisance due to global warming.¹³⁰ At least twelve states have signed an amicus brief urging the Court to overturn the Second Circuit due to its “impermissible intrusion into the political realms to let federal judges set source-by-source limits on greenhouse gases.”¹³¹ While no one seems to think *American Electric Power* will be won on the merits, many are concerned over the precedent set in allowing standing for this type of claim.¹³² Even the Obama administration, which has vowed to address climate change, filed a brief advocating reversal of the Second Circuit.¹³³ Claiming the EPA’s new greenhouse gas regulations have “displaced common law,” the brief was seen as a betrayal by some environmental activists.¹³⁴

In choosing to hear this case, the Supreme Court could decide once and for all whether “[s]tates and private plaintiffs have standing to seek, and whether federal common law provides authority for courts to impose,

¹²⁹ 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

¹³⁰ See *supra* notes 67–86 and accompanying text.

¹³¹ Gabriel Nelson, *CLIMATE: 12 states ask Supreme Court to Review ‘Nuisance’ Case*, GREENWIRE, Sept. 8, 2010; see also Brief of the States of Indiana et al. as Amici Curiae Supporting Petitioner, *Am. Elec. Power v. Connecticut*, 582 F.3d 309 (2d Cir. Sept. 3, 2010) (No. 10-174), 2010 WL 3501263.

¹³² “The justiciability of climate change lawsuits under federal common law is an issue of extraordinary national importance. To permit federal adjudication of claims seeking damages for past emissions and injunctions curtailing future emissions would heighten the risks and uncertainties for businesses and countless other entities, including state agencies, which may suddenly find themselves as defendants in a federal suit.” Brief of the States of Indiana et al. as Amici Curiae Supporting Petitioner, *supra* note 131, at 1.

¹³³ Nelson, *supra* note 131.

¹³⁴ *Id.*

a *non-statutory*, judicially-created regime for setting caps on greenhouse gas emissions based on ‘vague and indeterminate nuisance concepts.’”¹³⁵ If the Supreme Court upholds the federal appellate court and decide to grant standing, the door may be flung open for plaintiffs to bring common law nuisance suits to circumvent the regulatory infrastructure that have failed to bring desired results. Alternatively, if the Court finds that this is in fact a nonjusticiable political question, environmentalists will have to return to their lobbying efforts to get actual climate change legislation passed through Congress.

B. *Impact of North Carolina v. TVA (Cooper II)*

While *North Carolina v. TVA* is not technically a “climate change” case, it does involve an attempt to regulate emissions through the public nuisance doctrine.¹³⁶ Where similar cases have faltered, this case represents a unique outcome—the court actually proceeded past the standing hurdle and ruled on the merits of the argument.¹³⁷ In analyzing how the Fourth Circuit reached its conclusion, clues to the outcome of future “climate change” cases may be found.

The plaintiffs in *North Carolina v. TVA* lost on the merits because the court found that TVA could not possibly constitute a public nuisance when they were within the emissions requirements promulgated by the EPA in the Clean Air Act.¹³⁸ Because there exists a statutory regime directly on point regarding these emissions, the court found the vagueness of public nuisance inadequate to redress any perceived injury.¹³⁹

For the time being, greenhouse gases remain unregulated by the Clean Air Act.¹⁴⁰ Furthermore, the U.S. has not enacted any federal legislation regarding these emissions.¹⁴¹ If a “climate change case” were to proceed beyond the standing requirement, a court may well find a

¹³⁵ Petition for Writ of Certiorari at 2, *Am. Elec. Power v. Connecticut*, 582 F.3d 309 (2d Cir. Aug. 2, 2010) (No. 10-174), 2010 WL 3054374.

¹³⁶ *Cooper II*, 615 F.3d 291, 297 (4th Cir. 2010).

¹³⁷ *Id.* at 301–306.

¹³⁸ *Id.* at 310.

¹³⁹ *Id.* at 311.

¹⁴⁰ See *supra* notes 126–128 and accompanying text.

¹⁴¹ *Id.*

defendant liable under a public nuisance theory for its pollution and emission of greenhouse gases. With no federal law on point to preempt or give guidance, an active judiciary may choose to hold an entire industry or business liable and subject it to public nuisance liability.

C. Fourth Circuit's Roadmap for Climate Change Public Nuisance Analysis

The Fourth Circuit went through three main steps in evaluating this public nuisance claim. These requirements could very well become the benchmark for future environmental public nuisance claims since this case is one of the few to proceed to the merits. First, a court should determine if regulations exist (either federal or state) relating to the greenhouse gas emissions (or other environmental issue) at hand. Second, if there are regulations on point, a court must determine whether the defendant has properly adhered to these standards. If the defendant is found not to be in compliance with the statute, they are probably liable, at a minimum, for violating the statute and possibly for a public nuisance claim as well. However, if there are regulations on point and the defendant is acting within those regulations, it will be very hard for the plaintiff to succeed in showing the alleged actions constitute a public nuisance. Third, in deciding whether nuisance law is appropriate, a court should determine whether the legislation provides an avenue to redress the alleged "wrong." If the issue has gone unregulated (as with greenhouse gas emissions), the court may find itself engaged in the balancing act of tort analysis where it must weigh the burden of precaution versus the probability and gravity of harm.

If one of these "climate change cases" manages to proceed to the merits, it will not be a clear win for environmentalists yet. The issues of causation and compensation loom large, especially when trying to deduce whether one particular defendant is truly responsible for *all* of the alleged harm to the environment.

VI. CONCLUSION

The Fourth Circuit's decision made it clear that a common law public nuisance claim is not a desired way to regulate emissions on a

national level. Many of the issues Judge Wilkinson discussed would be a problem with a climate change case as well. Federal common law entails a wide range of interpretation, and without a standard set of rules governing the country, many members of the business and industry community would be hard-pressed to comply. While the threat of litigation may force big companies to rethink their energy policies, public nuisance claims would provide minimal guidance for a company looking to prevent a suit. This tangled web of common law regulations could end up doing more harm than good. Forcing change through judicial activism may help kick-start the government into action, but it would probably hurt the businesses and the economy in the long run. While it is clear that the Fourth Circuit desired to close the door on this notion of emissions regulation through public nuisance law, they have left ajar a window into this realm of litigation. Because the court stopped short of holding the entire field of emissions regulation preempted by federal law, there may yet exist a claim for a tenacious lawyer to bring, possibly allowing a future court to answer environmentalists' hopes.

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