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Regulation by Litigation: Fourth Circuit Weighs in on Nuisance Suits Involving Air Emissions

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The Fourth Circuit Court of Appeals has become the latest federal appellate court to weigh in on the viability of public nuisance lawsuits to effectively regulate air emissions. In *North Carolina v. Tennessee Valley Authority*, (No. 09-1623, July 26, 2010), a unanimous three-judge panel vacated an injunction granted by a North Carolina district court that required power plants located in Tennessee and Alabama to install additional pollution control devices and reduce their emissions. The State of North Carolina filed suit against electricity provider Tennessee Valley Authority (TVA) in early 2006 alleging that emissions migrating into North Carolina from TVA's eleven coal-fired power plants constitute a public nuisance that contributes to adverse health effects and damage to natural resources. After the Fourth Circuit determined that TVA was not immune from the suit, the district court held a bench trial that culminated in the award of an injunction against TVA requiring the installation of scrubbers and "selective catalytic reduction" (SCR) equipment on four of TVA's plants located in Tennessee and Alabama to reduce emissions of sulfur dioxide (SO_2) and nitrous oxides (NO_X). The injunction also set more stringent emissions caps than were established in the Clean Air Act permits issued to the plants. The estimated price tag for achieving compliance with the injunction order well exceeded $1 billion - a cost that would ultimately be borne by electricity customers in the seven states served by TVA.

The Fourth Circuit vacated the injunction on essentially three grounds. First, the court concluded that nuisance actions targeting air pollution were effectively precluded by the federal Clean Air Act, which establishes air quality standards that are implemented in permits issued to power plants and other sources of air emissions. After detailing the extensive and comprehensive regulatory scheme established by Congress and implemented by both the federal Environmental Protection Agency (EPA) and the individual states, the court observed that "[i]t 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." The court observed that allowing individual courts to set air emissions standards using the "vagaries of public nuisance doctrine" in conflict with those established under the Clean Air Act would "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." Allowing such nuisance actions, noted the court, would subject government and business entities who have obtained regulatory approval for their emissions to unpredictable changes in the applicable standards "for any judge in any nuisance suit could modify them dramatically." According to the court "[e]nergy policy cannot be set, and the environment cannot prosper, in this way."

The second basis for vacating the injunction was the district court's improper application of North Carolina law to TVA's plants located in Tennessee and Alabama. In cases involving interstate nuisance claims, courts should apply the law of the state in which emissions originate. Instead of applying Tennessee and Alabama law to the power plants located in those states, the district court imposed pollution control requirements on those plants according to emissions standards established under North Carolina law.

Lastly, the court observed the power plants subject to the injunction order "are expressly permitted by the states in which they are located" and "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." Under both Alabama and Tennessee law, an activity that is expressly licensed and allowed by law cannot be a public nuisance so long as the activity is carried out in compliance with the law. No evidence was

presented that the Tennessee and Alabama power plants were violating the terms of their air emissions permits.

North Carolina's inability to seek emissions reductions through a nuisance suit does not leave it without a remedy. The Clean Air Act establishes a procedure for an aggrieved state to petition EPA to impose more stringent standards on emissions from other states when those emissions are impairing the ability of the petitioning state to achieve compliance with ambient air quality standards. North Carolina has such a petition pending. States also have the right to comment on and object to plans proposed by other states for regulating air emissions.

The Fourth Circuit now joins the ranks of other courts that have addressed, with differing results, the propriety of public nuisance suits targeting air emissions. In *Connecticut v. American Electric Power Company, Inc.*, 582 F.3d 309 (2d. Cir. 2009), eight states, three private land trusts, and the City of New York filed suit in federal court in New York against six electricity companies alleging that emissions from the companies' coal-fired power plants contribute to the "ongoing nuisance" of global warming. The plaintiffs mostly alleged future injuries if the emissions allegedly contributing to global warming were not reduced, such as increased health problems from heat waves and smog, coastal erosion from rising sea levels, and general disruption of ecosystems. The plaintiffs asked the court to set deadlines for future reductions in emissions of "greenhouse gases" - mostly carbon dioxide. The plaintiffs did not seek any monetary damages.

The district court dismissed the case as a "political question" requiring the "identification and balancing of economic, environmental, foreign policy, and national security interests" that are appropriately addressed by the legislative and executive branches of government. On appeal, the Second Circuit reversed and reinstated the claims. The court concluded that the claims did not present a "political question," but rather each plaintiff had sufficiently alleged legal claims upon which courts may grant relief. The power companies petitioned the United States Supreme Court to review the decision in early August, 2010.

A similar global warming nuisance suit was commenced as a class action by a group of residents along the coast of the Gulf of Mexico alleging that "greenhouse gas" emissions from several energy and chemical companies in the area increased the intensity of Hurricane Katrina by contributing to global warming. *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009). Like the New York district court in *Connecticut*, the Mississippi district court concluded that the claims presented "political questions" and dismissed the case. On appeal, the Fifth Circuit essentially adopted the same reasoning as *Connecticut* and reinstated the claims. However, the Fifth Circuit later vacated its own opinion on procedural grounds, so the district court decision dismissing the claims stands pending any appeal to the United States Supreme Court.

The District Court for the Northern District of California has dismissed two "global warming" nuisance actions. First, in *California v. GMC* (N.D. Cal. No. 06-05755, September 17, 2007), the court dismissed on political question grounds nuisance claims by the State of California seeking damages against six major automakers for their alleged contribution to global warming through auto emissions. California voluntarily dismissed its appeal following revisions to the federal fuel economy standards and the EPA's "endangerment finding" in December, 2009 that carbon emissions threaten public health and the environment.

The court reached the same conclusion two years later in *Native Village of Kivalina v. ExxonMobil Corporation*, 663 F.Supp.2d 863 (N.D. Cal. 2009) despite the Second Circuit's decision in *Connecticut*. The Native Village of Kivalina and the City of Kivalina alleged that carbon emissions from ExxonMobil Corporation and other energy companies contributed to global warming, which is diminishing the sea ice that protects them from artic storms and resulting coastal erosion. The district court specifically disagreed with the Second Circuit's reasoning in *Connecticut* and concluded that the claims presented political questions that should be resolved by the other branches of government. The court also concluded that the village lacked standing to pursue the claims because even assuming the emission of "greenhouse gases" contributes to global warming and the associated harm to the village, "it is not plausible to state which emissions - emitted by whom and at what time in the last several centuries and at what place in the world - 'caused' Plaintiffs' alleged global warming related injuries." An appeal is currently pending before the Ninth Circuit Court of Appeals.

The Fourth Circuit's decision in *TVA* effectively created a circuit split concerning whether public nuisance claims may be asserted to control air emissions. Although *TVA* was not a global warming suit, the rationale that activity expressly authorized by law cannot constitute a public nuisance would seem to preclude such a claim because even though stationary sources of greenhouse gases are not yet required to obtain air pollution control permits that cap such emissions, EPA's proposed regulations (including its "Tailoring Rule")

make it clear that such requirements are on the way. As such, *TVA* appears to have major implications for potential "global warming" litigation against energy producers in the Appalachian region within the Fourth Circuit (WV, VA, MD, NC, and SC). Also, the existence of a circuit split of opinion generally increases the chances that the United States Supreme Court will hear one of the cases to resolve the issue.