

Secondhand Smoke: North Carolina's Clean Smokestacks Act and the Quest for Air Quality

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Introduction

In June 2002, North Carolina enacted the Clean Smokestacks Act (CSA), a legislative attempt to reduce coal-fired power plant emissions and improve air quality throughout the state.¹ For NC utility companies, the act set new emissions requirements that were considerably more stringent than the federal requirements set in place by the Clean Air Act (CAA).² Due to concerns over increasing electricity prices as a result of the legislation, the act froze the price of electricity and gave the two major NC utility companies, Duke Power Co. and Progress Energy Corp., several economic advantages to help reach the new emissions standards.³ These concessions were estimated to cost the state roughly \$2.3 billion over the span of a decade.⁴

Because the CSA-imposed elevated standards on NC emissions reduced NC utility companies' emissions levels, the relative contribution of foreign utility companies to pollution levels in North Carolina was amplified.⁵ The most notable culprit of this interstate pollution was the Tennessee Valley Authority (TVA).⁶ In a several-year struggle to reduce the impact of TVA's emissions on its air quality and reap the benefit of the CSA, North Carolina has attempted to utilize two separate areas of law: the regulatory laws of the Environmental Protection Agency (EPA) on interstate pollution; and the common law doctrine of nuisance.

¹ *Key Facts about the Clean Smokestacks Act*, N.C. DIV. OF AIR QUALITY, <http://daq.state.nc.us/news/leg/cleanstacks.shtml> (last modified May 13, 2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *See id.*

⁶ *Id.*

Clean Smokestacks Act

The Air Quality/Electric Utilities Act, or Clean Smokestacks Act, was enacted by the North Carolina legislature in 2002 and set decade-long goals for North Carolina coal-fired power plant emissions.⁷ The act set requirements that were more stringent than those imposed by the EPA, mandating the plants reduce emissions of nitrogen oxide (NO_x) by 77% before 2009 and emissions of sulfur dioxide (SO₂) by 73% before 2013.⁸ Furthermore, the two largest utility companies in North Carolina, Duke Power Co. and Progress Energy Corp., were barred from engaging in the buying and selling of emissions credits with the hopes of accomplishing two goals: (1) ensuring all emissions reductions in North Carolina were actual emissions reductions, not the result of purchasing credits; and (2) preventing utility companies in neighboring states from purchasing credits from North Carolina emissions companies and increasing their own emissions, thus negating the purpose of the act.⁹

Due to concern in the North Carolina House of Representatives over the CSA's effects on utility rates for industries, the CSA also locked electricity rates for five years and allowed utility companies "to accelerate the write off of their costs for installing new pollution controls," costing roughly \$2.3 billion.¹⁰ Additionally, the act required plants to reduce NO_x emissions year-round, not just in the warmer months as per EPA regulations.¹¹ Because of the high standards set by the CSA, the relative impact of interstate air pollution entering North Carolina became a more significant factor in air quality. This, paired with the high cost of the CSA, gave North Carolina a strong incentive to minimize the negative influence of pollution from other

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

states, and this is emphasized in the language of the CSA: “It is the intent of the General Assembly that the State use all available resources and means[] including . . . litigation to induce other states and entities, including the Tennessee Valley Authority, achieve reductions in emissions . . . comparable to those required by . . . this act, on a comparable schedule.”¹²

EPA Regulation: Introduction

Since 1970, the Environmental Protection Agency has been charged with handling much of the United States Federal Government’s regulation of environmental issues.¹³ The EPA has authority to regulate air pollution under the CAA.¹⁴ The EPA implemented the National Ambient Air Quality Standard (NAAQS), which sets acceptable air quality levels for six “criteria” pollutants.¹⁵ Regions of each state that meet these standards are known as “attainment” areas and those that fail, “non-attainment” areas.¹⁶ Each state is allowed to create a State Implementation Plan (SIP) to submit to the EPA that details how it plans to meet NAAQS requirements.¹⁷ One EPA requirement for an SIP is that it must contain provisions preventing the state from emissions that will contribute significantly to the non-attainment of any other state.¹⁸ The EPA also provides states suffering from interstate pollution the opportunity to file a section 126 petition requesting the SIP of the polluting state be reviewed and modified.¹⁹

¹² *Id.*

¹³ *History of the Clean Air Act*, ENVTL. PROT. AGENCY, <http://www.epa.gov/air/caa/amendments.html> (last updated Aug. 15, 2013).

¹⁴ *Id.*

¹⁵ Elizabeth Kruse, *North Carolina v. Env'tl. Prot. Agency*, 33 HARV. ENVTL. L. REV. 283, 284 (2009).

¹⁶ *Id.* at 284.

¹⁷ *Id.*

¹⁸ Nigel Barella, *North Carolina v. Tennessee Valley Authority*, 35 HARV. ENVTL. L. REV. 247, 249 (2011).

¹⁹ *Id.* at 250.

EPA Regulation: Past Attempts

North Carolina submitted a section 126 petition on March 19, 2004, claiming 13 other states were significantly contributing to non-attainment of the NAAQS in NC.²⁰ Two years later, the request was denied, in part, because the EPA believed the problem would be solved by finalizing the Clean Air Interstate Rule (CAIR).²¹ The CAIR implemented a cap-and-trade program that allowed for the buying and selling of credits between power plants across the United States.²² This program allowed for a utility company that failed to meet an emissions standard to purchase credits from another utility company that had more than satisfied the requirements of the same standard.²³ Because the CAIR requirements did not consider the effect one state's pollution might have on another, North Carolina filed suit against the EPA claiming that the CAIR violated parts of the CAA, which required each SIP to contain adequate provisions prohibiting pollution emitted within a state from "contribut[ing] significantly to nonattainment in, or interfer[ing] with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard."²⁴

The D.C. Circuit ruled that the CAIR was in violation of the CAA and ordered the EPA to develop a new system, consistent with the CAA, to regulate the effects of interstate pollution.²⁵ In response, the EPA created the Cross-State Air Pollution Rule (CSAPR), which was soon the subject of another lawsuit.²⁶ In *EME Homer City Generation, L.P. v. EPA*²⁷ the

²⁰ Rulemaking on Section 126 Petition from N.C. To Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed. Reg. 25,328 (Apr. 28, 2006).

²¹ *Id.* at 25328.

²² Elizabeth Kruse, *North Carolina v. Environmental Protection Agency*, 33 HARV. ENVTL. L. REV. 283, 283 (2009).

²³ *Id.* at 286–87.

²⁴ *North Carolina v. EPA*, 531 F.3d 896, 902 (D.C. Cir. 2008).

²⁵ *Id.* at 930.

²⁶ *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

²⁷ *Id.*

circuit court ruled that the CSAPR overstepped the authority given to the EPA under the CAA.²⁸ The case was granted certiorari by the Supreme Court on June 24, 2013.²⁹

EPA Regulations: Future Possibilities

Effective interstate pollution regulation by the EPA could undoubtedly provide satisfactory means for addressing the grievances of states affected by interstate pollution.³⁰ It is, however, difficult to predict when such an effective, lawful rule limiting such pollution will be promulgated.³¹

Regardless, even the implementation of an enforceable rule might fail to help North Carolina in achieving the desired results of the CSA. Many previous attempts by the EPA to regulate interstate emissions greatly limited a downwind state's ability to request modification of an upwind state's SIP.³² Only in the event that an upwind state's emissions contributed significantly to a downwind states non-attainment of the NAAQS—not the downwind states non-attainment of its own heightened standards—could the downwind state request a modification.³³

Common Law: Introduction

With the difficulties of preventing interstate pollution under the EPA's regulatory framework, some states have attempted to resolve their grievances through common law.³⁴ Before the creation of the EPA, interstate pollution issues were traditionally handled by lawsuits filed under the common law doctrine of nuisance.³⁵ Any such modern lawsuit invariably runs into the same issue: are common law nuisance claims regarding pollution between states

²⁸ *Id.* at 58.

²⁹ *U.S. Supreme Court to Review Cross-State Air Pollution Rule*, ENV'T. NEWS SERV. (June 24, 2013), available at <http://ens-newswire.com/2013/06/24/u-s-supreme-court-to-review-cross-state-air-pollution-rule/>.

³⁰ Nigel Barella, *North Carolina v. Tennessee Valley Authority*, 35 HARV. ENVTL. L. REV. 247, 247 (2011).

³¹ *See id.* at 253.

³² *Id.* at 250.

³³ *Id.* at 250.

³⁴ *Id.* at 249.

³⁵ *Id.* at 247.

preempted by EPA regulation under the CAA?³⁶ With no clear answer to this question, North Carolina brought suit against TVA.³⁷

Common Law: Past Attempts

On January 30, 2006, North Carolina filed a complaint against TVA seeking injunctive relief to prevent the damages caused by pollution from eleven of TVA's coal-fired power plants in the states bordering North Carolina.³⁸ The Western District of North Carolina conducted a bench trial.³⁹ In its decision, the court ruled that the controlling nuisance law in this case was the law of the states in which TVA's power plants were located: Alabama, Kentucky, and Tennessee.⁴⁰ Despite a myriad of defenses asserted by TVA, the court held that TVA was bound by the laws of the source states, regardless of its compliance with EPA restrictions.⁴¹ In its opinion the court quoted 42 U.S.C. § 7418(a)⁴² which says that emitters of air pollution, like TVA's power plants, "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution. . . ."⁴³

After evaluating each plant under the proper state laws, the court ruled that, of the eleven power plants included in the complaint, four emitted pollution that constituted a nuisance in North Carolina: three in Tennessee and one in Alabama.⁴⁴ The court issued an injunction that

³⁶ *See id.* at 248.

³⁷ North Carolina *ex rel.* Cooper v. TVA, 439 F. Supp. 2d 486 (W.D.N.C. 2006).

³⁸ *Id.* at 486.

³⁹ *See id.*

⁴⁰ North Carolina, *ex rel.* Cooper v. TVA, 549 F. Supp. 2d 725, 729 (W.D.N.C. 2008).

⁴¹ *Id.* at 729.

⁴² 42 U.S.C. § 7418(a) (2012).

⁴³ TVA, *supra* note 37, at 496.

⁴⁴ N.C. *ex rel.* Cooper v. TVA, 593 F. Supp. 2d 812, 829–30 (W.D.N.C. 2009).

outlined specific measures to be taken by each plant to reduce its emissions.⁴⁵ TVA appealed the decision.⁴⁶

The Fourth Circuit found that the lower court had erred in their assessment of the controlling law, holding, in part, that TVA was not subject to common law claims under the facts of the case.⁴⁷ In its reasoning, the court pointed out that North Carolina had other effective avenues for attaining its goal of reduced air pollution and allowing this kind of nuisance suit would result in “a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.”⁴⁸ Thus, the court held that any right North Carolina might have had against another state for interstate air pollution under common law was preempted by the CAA, even without obvious conflict between the two sets of laws.⁴⁹ Accordingly, the court reversed and remanded the decision with directions to dismiss.⁵⁰ North Carolina petitioned for a writ of certiorari, but withdrew the request when TVA settled an older dispute with the EPA that included concessions for North Carolina’s damages.⁵¹ In the settlement, TVA committed to spending up to \$5 billion on penalties and emissions reduction efforts.⁵²

Common Law: Future Possibilities

While the settlement ultimately resolved the contest between North Carolina and TVA, the length and difficulty of the dispute elucidates the problems faced by any state suffering from interstate pollution issues. While the decision in *TVA* might signal the end of common law

⁴⁵ *Id.* at 831–32.

⁴⁶ N.C. *ex rel.* Cooper v. TVA, 615 F.3d 291 (4th Cir. 2010).

⁴⁷ *Id.* at 311.

⁴⁸ *Id.* at 296.

⁴⁹ *Id.* at 311.

⁵⁰ *Id.* at 312.

⁵¹ Bruce Henderson, *TVA Settles N.C. Pollution Claims*, THE NEWS & OBSERVER (Apr. 15, 2011), available at <http://www.newsobserver.com/2011/04/15/1130747/tva-settles-nc-pollution-claims.html>.

⁵² *Id.*

litigation as a solution, the result of a recent lawsuit has cast doubt on the finality of the court's ruling.

Recently, a common law nuisance case similar to *TVA* was brought before Third Circuit⁵³. In *Bell v Cheswick Generating Station*,⁵⁴ the trial court held that common law nuisance lawsuits over interstate pollution were preempted by the CAA.⁵⁵ However, the appellate court reversed the decision on appeal holding that “the Clean Air Act does not preempt state common law claims based on the law of the state where the source of pollution is located.”⁵⁶ Similar to the majority opinion in *TVA*, the defendants argued that the decision would “creat[e] a patchwork of inconsistent standards across the country that would compromise Congress’s carefully constructed cooperative federalism framework.”⁵⁷ The court replied by quoting the Supreme Court’s opinion in *Int’l Paper Co. v Ouellette*:⁵⁸ “[f]irst, application of the source State’s law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system.”⁵⁹

Because this Third Circuit ruling is contradictory to the Fourth Circuit’s decision in *TVA*, it is possible that the Supreme Court will grant certiorari to resolve the differences between the two circuits’ precedents.

Conclusion

The future of interstate pollution regulation and the effectiveness of the CSA is an uncertain one, but two upcoming Supreme Court decisions will play a defining role. If the Court

⁵³ *Bell v. Cheswick Generating Station*, 2013 U.S. App. LEXIS 17283 (3d Cir. 2013).

⁵⁴ *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314 (W.D. Pa. 2012).

⁵⁵ *Bell*, *supra* note 53, at *12–13.

⁵⁶ *Id.* at *23.

⁵⁷ *Id.*

⁵⁸ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 498–99 (1987).

⁵⁹ *Bell*, *supra* note 53, at *25.

overrules the circuit court's decision in *EME Homer City*, the CSAPR would better allow states to seek relief from pollution within the EPA's framework.⁶⁰ Moreover, should the Supreme Court decide to grant certiorari in *Bell*, its decision could finalize the argument of common law preemption under the CAA.⁶¹

⁶⁰ *U.S. Supreme Court to Review Cross-State Air Pollution Rule*, *supra* note 29.

⁶¹ *Bell*, *supra* note 52.