

Understanding NC V. Tennessee Valley Authority

Law360, New York (August 19, 2010) -- In a highly anticipated decision, the U.S. Court of Appeals for the Fourth Circuit recently rendered its opinion in *North Carolina v. Tennessee Valley Authority*, ___ F.3d ___, 2010 WL 2891572 (4th Cir. July 26, 2010), a high-profile public nuisance case brought by the State of North Carolina to limit air emissions from several electricity-generating plants in three neighboring states.

Following a bench trial, the federal district court in North Carolina had issued an injunction requiring the immediate installation of additional air emissions controls at four Tennessee Valley Authority power plants. By even North Carolina's estimate, installation of these controls would have cost in excess of \$1 billion.

In a decision with significant ramifications to the evolution of modern public nuisance law, the Fourth Circuit reversed. This article considers the nature of Fourth Circuit's decision and what it might mean for future environmental toxic tort cases more generally.

North Carolina's Claims

TVA owns and operates 11 coal-fired power plants in Tennessee, Alabama and Kentucky. These plants release a number of pollutants into the atmosphere, including sulfur dioxide ("SO₂"), nitrous oxides ("NO_x"), fine particulate matter ("PM_{2.5}") and ozone.

The Clean Air Act ("CAA") and its accompanying regulations extensively regulate the emission of these substances through a variety of controls. Even with these controls, however, air emissions from TVA's power plants inevitably move eastward into North Carolina and other states.

In January 2006, North Carolina sued TVA claiming that the emission of these pollutants had created a public nuisance in the state. In particular, North Carolina asserted that these contaminants had adversely affected the health and welfare of its citizens, damaged the state's natural resources and economy, and harmed the state's finances. To abate the alleged nuisance, North Carolina sought an injunction limiting emissions from TVA's power plants.

After a 12-week hearing, the district court issued an injunction against four TVA power plants located within 100 miles of the North Carolina border. The court ordered TVA to install scrubbers and other emissions-reducing equipment at these facilities by December 2013, and further established a schedule for SO₂ and NO_x emission reductions. (Because the seven other TVA plants were located farther away from the state, the district court found that there was insufficient evidence that they were causing a public nuisance in North Carolina.)

Fourth Circuit Reversal

On appeal, the Fourth Circuit reversed the finding of a public nuisance as to the four neighboring TVA plants.

Summarizing its ruling, the Fourth Circuit explained that “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,” resulting in “a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.”[1]

The court further noted that “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.”[2] For these and other reasons,[3] the court remanded the case with instructions to dismiss the action in its entirety.

Implications Going Forward

While the facts of *North Carolina v. Tennessee Valley Authority* are distinguishable in certain respects from those typically found in a garden-variety environmental nuisance case, the language and reasoning used in the Fourth Circuit’s decision applies just as well to most environmental tort claims and thus is significant for that reason.

In its decision, the Fourth Circuit characterized North Carolina’s nuisance claim as an attempt to impose a different set of air quality standards on TVA than those authorized by Congress and established by EPA.

Noting the obvious pitfalls of such an approach, the court found 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.”[4]

Replacing the air quality standards established under this regulatory scheme, the Fourth Circuit explained, with the uncertainty of common law nuisance litigation will leave states and industries “at sea and potentially expose them to a welter of conflicting court orders across the country.”[5]

This reasoning, of course, can be and has been applied to any number of other environmental regulations, such as groundwater standards under the Clean Water Act (“CWA”),[6] drinking water standards under the Safe Drinking Water Act (“SDWA”),[7] soil remediation standards under the Comprehensive Environmental Response, Compensation and Liability Act,[8] and regulatory safe levels under the Occupational Safety and Health Act.[9]

In fact, in recent years an increasing number of courts from across the country have explicitly relied upon the standards provided by these and other statutes in dismissing a wide variety of common law tort claims.[10]

What is unique about the decision in *North Carolina v. Tennessee Valley Authority*, however, is the Fourth Circuit’s depth of treatment of this issue and the explicit rejection of counter-arguments often raised in response. The court spends considerable time discussing the problems with relying on the vague and indeterminate standards of nuisance law.

As noted by the court, for instance: “[W]hile 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 bull-fights, we will be hard-pressed to derive any manageable criteria.”[11]

Further, reciting Justice Harry Blackmun’s refrain that “one searches in vain ... for anything resembling a principle in the common law of nuisance,” the court notes that “[w]e are hardly at liberty to ignore the Supreme Court’s concerns and the practical effects of having multiple and conflicting standards to guide emissions.”[12]

These problems, the court explains, become even more complicated to the extent that multiple judges from neighboring jurisdictions reach competing conclusions. Indeed, according to the court, such a patchwork of varied decisions could create perverse incentives for defendants and even worsen overall levels of pollution.

Moreover, beyond “the prospect of multiplicitous decrees or vague and uncertain nuisance standards,” the Fourth Circuit argues that the nature of North Carolina’s public nuisance claim “would reorder the respective functions of courts and agencies.”[13]

In the context of the CAA, Congress “opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with judicially managed nuisance decrees.”[14]

The court, in turn, placed great reliance on the specialized knowledge of environmental agencies: “[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information regulatory bodies can consider.”[15]

And further, “[i]t is crucial therefore that courts in this highly technical arena respect the strengths of the agency processes on which Congress has placed its imprimatur.”[16]

These arguments are certain to be repeated by defendants in future environmental toxic tort cases. In every common law nuisance action involving allegations of harm to persons or property from substances in the environment, the court must determine whether the levels of substances released to the environment and present on plaintiff’s property are actionable. This is true irrespective of whether the plaintiff seeks damages or injunctive relief, because in either case the court is setting a standard by which conduct is to be governed.

The Fourth Circuit here joins the numerous other courts that have held that unless substances exceed regulatory levels, there can be no action for nuisance. In so holding, the Fourth Circuit has gone further than any other court to date in articulating the strong legal and public policy basis for such a rule. The decision in *North Carolina v. Tennessee Valley Authority* may therefore well be a harbinger of rulings to come from other courts confronted with this issue.

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[1] *North Carolina v. Tennessee Valley Authority*, ___ F.3d ___, 2010 WL 2891572, at *1 (4th Cir. July 26, 2010).

[2] *Id.*

[3] Though beyond the scope of this article, the Fourth Circuit also found that the district court had improperly applied home state law extra-territorially in violation of the Supreme Court’s decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

[4] *North Carolina v. Tennessee Valley Authority*, 2010 WL 2891572, at *6.

[5] *Id.*

[6] See *Brooks v. E.I. DuPont de Nemours & Co.*, 944 F. Supp. 448, 449 (E.D.N.C. 1996) (dismissing plaintiffs' nuisance, trespass, negligence, and strict liability claims because the level of contaminants at issue did not exceed groundwater quality standards).

[7] See *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc.*, 45 F. Supp. 2d 934, 943 (S.D. Ala. 1999) (dismissing plaintiff's trespass and nuisance claims for lack of standing because the chemical levels found were below regulatory levels and hence did not constitute an injury-in-fact), *aff'd*, 204 F.3d 1122 (11th Cir. 1999).

[8] See *Allgood v. General Motors Corp.*, No. 1:02-cv-1077-DFH-TAB, 2006 WL 2669337, at *37 (S.D. Ind. Sept. 18, 2006), (granting partial summary judgment as to plaintiffs' allegations of property damage where the levels of PCBs were below the remediation standard approved by EPA and the State of Indiana).

[9] See *Adams-Arapahoe School Dist. No. 28-J v. United State Gypsum Co.*, 958 F.2d 381 (Table), 1992 WL 58963, at *1-2 (10th Cir. Mar. 23, 1992) (asbestos within the range considered safe by OSHA does not give building owner a tort action against manufacturer).

[10] See *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1184-85 (E.D. Wash. 2006) (dismissing plaintiff's property injury claims for lack of injury where no groundwater wells exceeded the maximum contaminant level within the limitations period); *Player v. Motiva Enterprises LLC*, No. 02-3216 (RBK), 2006 WL 166452, at *9 (D.N.J. Jan. 20, 2006) (contamination below the "minimum level" set by the state environmental agency "typically is insufficient to establish injurious toxic exposure"); *Rose v. Union Oil Co. of California*, No. C 97-3808 FMS, 1999 WL 51819, at *6-7 (N.D. Cal. Feb. 1, 1999) (trace petroleum constituents in soil and groundwater below regulatory levels insufficient to establish injury); *Lamb v. Martin Marietta Energy Systems Inc.*, 835 F. Supp. 959, 970 (W.D. Ky. 1993) (claim for diminution in property value dismissed because levels were below federal standards); *Adams v. A.J. Ballard, Jr. Tire & Oil Co.*, Nos. 01 CVS 1271, 03 CVS 912 & 03 CVS 1124, 2006 WL 1875965, at *31 (N.C. Super. Ct. June 30, 2006) (holding that "the maximum allowable concentration levels set by the General Assembly established the standard for liability in water contamination cases"); *Ronald Holland's A-Plus Transmission & Automotive Inc. v. E-Z Mart Stores, Inc.*, 184 S.W. 3d 749, 756 (Tex. Ct. App. 2005) (holding that "to bring a cause of action when proper clean-up measures have taken place in compliance with TNRCC requirements, a plaintiff must show that there are 'unreasonable levels' of contaminants, meaning levels in excess of actionable levels of contamination"); *Kansas v. Marion Co. Landfill Inc.*, 76 P.3d 1000, 1010-1011 (Kan. 2003) (reversing judgment for plaintiff on nuisance claim because plaintiff failed to offer expert testimony establishing contamination levels in excess of state standards); *D & J Co. v. Stuart*, 765 N.E.2d 368, 375-76 (Ohio Ct. App. 2001) (property cannot be said to have been used in unlawful manner where levels of contaminants are below state residential cleanup standards); *Muralo Co. Inc. v. Employers Ins. of Wausau*, 759 A.D.2d 348, 352-53 (N.J. Super. Ct. App. Div. 2000) ("[S]ince it is clear that no untreated groundwater is ever entirely pure, we are satisfied that DEP standards are the most reliable guide for determining whether contamination causing damage ... has occurred."). But see *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 458 F. Supp. 2d 149, 156-57 (S.D.N.Y. 2006); *Mercer v. Rockwell International Corporation*, 24 F. Supp. 2d 735, 752 n.12 (W.D. Ky. 1998).

[11] *North Carolina v. Tennessee Valley Authority*, 2010 WL 2891572, at *7.

[12] *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)).

[13] *Id.* at *9.

[14] *Id.*

[15] *Id.* at *10.

[16] Id.