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## There's Still a Chance: Why the Clean Air Act Does Not Preempt State Common Law Despite the Fourth Circuit's Ruling in North Carolina v. TVA.

Thomas J. Alves

Many legal hurdles confront plaintiffs who assert common law public nuisance claims against energy companies in an effort to curtail their production of greenhouse gases (GHG's). These include standing, political question, the dormant commerce clause, and federal preemption. This paper explores federal preemption of common law public nuisance claims by the Clean Air Act (CAA) and concludes that such common law claims remain viable. The Supreme Court's ruling in International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (Ouellette), combined with the textual, structural, and schematic similarities between the Clean Water Act (CWA) and the CAA, form the basis for a convincing argument that the CAA does not preempt source-state common law public nuisance claims against source-state emitters of GHG's.

The standard for federal preemption of state common law is addressed in U.S. v. Texas, 507 U.S. 529, 534 (1993) (Texas). In that case, the Supreme Court ruled that when a court interprets a federal statute, it must do so with an assumption preferring the "retention of long-established and familiar principles," except when it is clear that the congressional purpose of the statute was to override the established common law principles. Texas, 507 U.S. at 534 (citing Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Astoria Federal Savings and Loan Assn. v. Solimino, 501 U.S. 104, 108 (1991)). When Congress legislates in an area that is typically governed by common law, the resulting statute does not totally supersede the common law, but only does so with regard to the specific area or issue presented in the statute. Id. Courts, when interpreting a federal statute, can rightly assume that Congress intended to preserve common law principles, unless it is evident that the statutory purpose was to abrogate the common law principles. Id. (referencing Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978); City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 315 (1981) (Milwaukee II)).

The Supreme Court's decision in Ouellette also established preemption standards for state common law. In that case, the Court ruled that Vermont public nuisance law as applied against New York sources of water pollution was preempted by the CWA. Ouellette, 479 U.S. at 494. However, in Ouellette, the Court did not hold that the CWA preempts all state common law public nuisance claims—rather the Court stated that there are circumstances when the CWA does not preempt common law nuisance claims: "The [CWA] savings clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." Id. at 497. Furthermore, the Court ruled that holding a point source of effluent accountable to the common law of the state within which it operates does not frustrate the purpose of the CWA: "[A]pplication of the source State's [nuisance] law does not disturb the balance among federal, source-state, and affected-state interests." Id. at 498-99.

The structure and purpose of the CAA and the CWA are extremely similar. *See Id.* at 487-97 (discusses the structure of the CWA); Milwaukee II, 451 U.S. 310-32 (discusses the

structure of the CWA); Coalition for Responsible Regulation, Inc. v. E.P.A., 684 F.3d 102, 113-19 (D.C. Cir. 2012) (per curiam) (discusses the structure of the CAA); American Elec. Power Co., Inc. v. Connecticut, 131 S.Ct. 2527, 2532-40 (2011) (discusses the structure of the CAA); North Carolina, ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291, 304 (4th Cir. 2010) (discusses how the CWA and CAA are similar with regard to their respective savings clauses). The CWA delegates authority to EPA to administer its comprehensive permitting program. Ouellette, 479 U.S. at 490-92. The CAA does as well. Coalition v. E.P.A., 684 F.3d 102, 113-19 (D.C. Cir. 2012). The CAA explicitly preserves common law rights of action, except those regarding motor vehicles and airplanes, and allows for states to establish more stringent standards than the national ambient air quality standards (NAAQS). 42 U.S.C.A. § 7416 (West 2013). The text and scheme of the CWA and CAA are so similar that the ruling in Ouellette can be persuasively applied in interpreting the CAA. When the savings clause of the CAA is interpreted in light of the Supreme Court's preemption doctrine as articulated in Texas and Ouellette, it appears clear that the CAA does not preempt source-state common law public nuisance claims against source-state emitters of GHG's.

However, two cases—North Carolina, ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291 (4th Cir. 2010) (North Carolina v. TVA) and Bell v. Cheswick Generating Station, No. 2:12 cv 929, 2012 WL 4857796 (W.D.P.A. Oct. 12, 2012) (Bell)—which appear to have been wrongly decided, held that if an emitter is operating in compliance with the NAAQS and the authorized state implementation plan (SIP), then it cannot be a nuisance at common law. North Carolina v. TVA, 615 F.3d at 309; Bell, at \*8. It appears that these two cases were wrongly decided because they failed to properly follow the reasoning of Ouellette and misapplied specific sentences from the Ouellette decision. (Bell is wrongly decided because its preemption holding was based upon the Fourth Circuit's ruling in North Carolina v. TVA. Bell, 2012 WL 4857796 at \*9.)

In North Carolina v. TVA, the appeals court found that even if the district court had applied source-state law as opposed to affected-state law, TVA's operation of emitting units within the source-state would not have constituted a public nuisance because its plants were in compliance with source-state issued permits:

It would be odd, to say the least, for specific 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 made clear, '[s]tates can be expected to take into account their own nuisance laws in setting permit requirements.' (North Carolina v. TVA, 615 F.3d at 309 (citing Ouellette, 479 U.S. at 499))

Here, the Fourth Circuit is establishing a complete defense to public nuisance law as long as the emitter is operating in compliance with a properly issued state permit.

In Ouellette, the Supreme Court expressly rejected that position:

An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law... 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. Second, the restriction of suits to those

brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance law in setting permit requirements. Ouellette, 479 U.S. at 498-99.

Here the Court is explaining that the reason source-state nuisance law can be applied to source-state emitters is because doing so does not frustrate the permitting system of the CWA. In North Carolina v. TVA, the Fourth Circuit did not hold that the ruling in Ouellette was not applicable to the case before it because Ouellette dealt with the CWA whereas North Carolina v. TVA dealt with the CAA. Rather in North Carolina v. TVA, the Fourth Circuit stipulated that “[w]hile Ouellette involved a nuisance suit against a source state regulated under the [CWA], all parties agree its holding is equally applicable to the [CAA].” North Carolina v. TVA, 615 F.3d at 306.

Ouellette explained that a source-state emitter would only have to account for one more area of law besides the CWA—its own state’s nuisance law—and *for that reason* the application of source-state nuisance law *does not frustrate* the permitting scheme of the CWA. The Fourth Circuit, in North Carolina v. TVA, misconstrued the language of Ouellette to reach a contradictory position. The Fourth Circuit held that because a source-state emitter was granted a permit by the state, it was exempted from public nuisance claims within that state. This is based on the assumption that the state, in issuing the permit, contemplated its own nuisance law prior to the issuance of the permit. The Fourth Circuit justified this position using the language of Ouellette, yet Ouellette expressly rejected the Fourth Circuit’s conclusion. Therefore, the Fourth Circuit’s holding in North Carolina v. TVA is not persuasive. Based on a fair reading of Ouellette, a source-state emitter should be subject to source-state common law public nuisance causes of action, even if it has a properly issued state permit.

In North Carolina v. TVA, the Fourth Circuit asserted that North Carolina was making a veiled attempt to apply North Carolina common law to emitting units in Alabama. North Carolina v. TVA, 615 F.3d at 309. If this were the case, the Court’s ruling in Ouellette would bar North Carolina’s claim. However, this was not the case. The district court decision, which North Carolina v. TVA overturned, made no mention of applying North Carolina law to the TVA emitting units in Alabama—rather it discussed applying Alabama common law to Alabama emitters. North Carolina ex rel. Cooper v. Tennessee Valley Authority, 593 F.Supp.2d 812, 829-30 (W.D.N.C. 2009). The Fourth Circuit dismissed the analysis of the district court without addressing it on its stated terms. For this reason also, the ruling in North Carolina v. TVA, is not persuasive.

Moreover, North Carolina v. TVA is unpersuasive because its preemption analysis of state common law nuisance claims did not follow the reasoning established by the Supreme Court in Texas. There is a long-established and familiar common law principle that allows for activities that otherwise comply with all applicable regulations to be considered a public nuisance, if those activities cause significant harm that is unreasonable under the circumstances. Bamford v. Turnley, 122 Eng. Rep. 27, 32-34 (Exch. Ch. 1862). As mentioned earlier, one of the source-states involved in the North Carolina v. TVA case was Alabama. According to

Alabama law, a nuisance is “anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance.” Tipler v. McKenzie Tank Lines, 547 So.2d 438, 440 (Ala. 1989) (quoting Ala. Code § 6-5-120). This means that, in order for the CAA to preempt the source-state common law, it has to specifically address this well-established principle of Alabama law.

The CAA specifically preserves common law causes of action, which necessarily include public nuisance claims, except when they are being used to regulate motor vehicles and airplanes—moving sources. 42 U.S.C.A. § 7416 (West 2013). Accordingly, the CAA only supersedes the common law with regard to the specific area or issue presented in the statute—moving sources. Id. The source-state emitting units in North Carolina v. TVA were stationary sources, not moving sources. Courts, when interpreting a federal statute, should assume that Congress intended to preserve the common law principle, unless it is evident that the statutory purpose was to abrogate the common law principle. Texas, 507 U.S. at 534 (referencing Mobil Oil, 436 U.S. at 625; Milwaukee II, 451 U.S. at 315). Since Congress only explicitly preempted state and common law with regard to the regulation of moving sources, it is clear that the statutory intent was to preserve common law causes of action against source-state stationary sources. 42 U.S.C.A. § 7604(e) (West 2013); 42 U.S.C.A. § 7416 (West 2013); Quellette, 479 U.S. at 498-99 (analyzing the savings clause of the CWA, which is extremely similar to the savings clause of the CAA). Therefore, the Fourth Circuit in North Carolina v. TVA should have construed the CAA with the assumption that the long-standing and familiar principle—namely that even activities that are in compliance with the law can constitute a public nuisance in certain circumstances where the activities cause foreseeable, significant harm that is unreasonable—remained intact, except with regard to moving sources. The Fourth Circuit’s preemption analysis is therefore flawed and unpersuasive.

A fair reading of Quellette leads to the conclusion that the CAA does not preempt the source-state common law of public nuisance. The Fourth Circuit’s decision in North Carolina v. TVA is unpersuasive due to its misinterpretation of common law preemption, the Quellette decision, and the CAA. The text and scheme of the CAA and CWA are so similar, that the reasoning in Quellette can fairly be applied to the CAA. Quellette holds that source-state common law nuisance actions against source-state dischargers of effluent do not frustrate the purpose of, nor are they preempted by, the CWA. For the same reasons, the CAA does not preempt source-state common law public nuisance claims against source-state emitters of GHGs. Because the Fourth Circuit’s ruling in North Carolina v. TVA was misguided, large-scale emitters of GHGs should not feel protected by its ruling, since the decision has questionable precedential value.

Thomas Alves is entering his third year at Hofstra Law School. During the summers of 2012 and 2013, he worked as a legal intern at the firm Blish & Cavanagh, LLP in Providence, R.I.