Interpreting the Relevance of Economic Harm in the Clean Air Act: *Tennessee Valley Authority v. Environmental Protection Agency*

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The Eleventh Circuit case *Tennessee Valley Authority v. Environmental Protection Agency* offers prudential standing to third-party power companies who claim that an economic interest of theirs has been affected by an EPA action in connection with enforcement of the Clean Air Act. This economic interest is not listed in the statute as an interest to be considered in the course of Clean Air Act enforcement decisions; however, because economic interests are mentioned as a viable consideration at some point in the Act, the threat of injury to those interests is sufficient to confer standing to sue over an action taken in the course of enforcement of a different part of the Act.

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INTRODUCTION

The federal court system is open only to those parties who can demonstrate the constitutional minimum requirements for standing. A claim of standing typically requires, at the very least, a direct redressable injury in fact to the party claiming standing. Yet some courts have held that parties without cognizable direct injuries can obtain standing. Although these “downstream” parties may lack direct injuries, their standing, and their theoretical injury, stems from the possibility that they might suffer a future injury through the application of a law. The case Tennessee Valley Authority v. United States Environmental Protection Agency (TVA v. EPA\(^1\)) provides a recent example. In 1999, the Environmental Protection Agency (“EPA”) imposed restrictions on the ability of Tennessee Valley Authority (“TVA”) power companies to emit pollution. These companies were supplying electricity to third-party power companies, who feared that prices would subsequently rise as a result of the new pollution restrictions and therefore injure their economic interests. These companies attempted to file suit against the restrictions but their standing to do so remained in doubt.

This Note reviews the background, holding and implications of TVA v. EPA\(^2\). In that case, the Eleventh Circuit granted standing to third-party power companies who claimed economic injury as a result of an EPA order requiring TVA power plants to comply with the Clean Air Act’s New Source Review requirements.\(^3\) These companies challenged EPA’s decision to apply Clean Air Act standards to their power plants. This challenge raised several questions of justiciability and standing, including a debate over what kind of injury may be sufficient to justify a grant of standing to a third party. In the most significant holding of the case, the court found that third parties in these particular circumstances did indeed have standing to sue, because the Clean Air Act specifically requires that the EPA consider economic interests during the standard-setting process. The court therefore implies that even economic interests that are

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1. 278 F.3d 1184 (11th Cir. 2002).
2. Id.
3. Id. at 1188.
incidental to the central purposes of a statute may nonetheless serve to invalidate an action performed in the course of enforcing that statute.

Although such a grant of standing is not entirely unusual in light of prior caselaw, its impact on the outcome of the suit may signal grave consequences for the future of the New Source Review ("NSR") enforcement program. Several pending cases hinge on interpretations of the NSR requirements. These cases have been essentially stalled during an overhaul of the NSR program. Most of these cases would, if adjudicated and enforced, result in significant fines to polluters and significant reductions in pollution. A result in TVA v. EPA that acknowledges and favors industry claims on NSR issues could set a precedent that could derail other pending claims in NSR cases.

This Note begins by outlining the history and purpose of the Clean Air Act and NSR legislation, with a brief foray into the history of third-party standing jurisprudence. Section III then reviews the background of TVA v. EPA, examining the Eleventh Circuit’s holdings on the minor and major issues. Finally, Section IV delves into the implications of the case for non-industry parties pursuing litigation related to the Clean Air Act and other environmental statutes.

4. See infra Part II(C).
5. Of the eight pending power plant cases, five are currently in active discovery on liability issues. The first of the five (U.S. v. Southern Indiana Gas & Electric Co. (SIGECO)) is scheduled to go to trial later this year in October. In the other three pending power plant cases, the parties are either engaged in settlement negotiations (U.S. v. Cinergy Corp. in Indiana) or discovery has been stayed because the district courts are awaiting the Eleventh Circuit’s decision in TVA v. EPA (U.S. v. Georgia Power Co. and Savannah Power Co. in Georgia and U.S. v. Alabama Power Co. in Alabama). TVA v. EPA is a challenge by TVA to EPA’s 1999 administrative order directing TVA to install pollution controls at coal-fired power plants in Kentucky, Tennessee and Alabama that have undergone modifications.

7. Id. “Two of the largest utility cases that had been settled ‘in principle’ in early 2000 under the Clinton Administration – Cinergy and VEPCO—remain stalled to this day. Those cases would have required $2.6 billion dollars in fines and the reduction of more than 800,000 tons of pollution.” Id.
I. BACKGROUND

A. The Clean Air Act

As industrialization spread across America during the first half of the twentieth century, significant and hazardous air pollution followed closely, causing intense adverse health effects in urban and industrialized areas. For example, in 1948, a temperature inversion caused dangerous smog to blanket the town of Donora, Pennsylvania, killing twenty people. Such deadly incidents combined with a decline in air quality across the country led Congress to the pass the Air Pollution Control Act of 1955. This limited law called only for information-gathering and research.

In the 1960s, new studies linked acid rain to air pollution and smog. Reduction of acid rain and its associated environmental degradations became another goal of air pollution legislation. As air pollution still posed substantial environmental problems by 1963, Congress passed the first version of the Clean Air Act (CAA). The 1963 Act provided monetary grants to state and local programs for air quality remediation programs, and explicitly recognized the transboundary nature of air pollution.

Power plants have always been one of the largest contributors to air pollution. They emit most of the nation’s sulfates, sulfur dioxide, and nitrogen oxides, as well as 300,000 tons of particulate matter, into the atmosphere every year. Numerous studies have linked these pollutants

15. Henry C. Kenski & Helen M. Ingram, The Reagan Administration and Environmental Regulation, in CONTROVERSIES IN ENVIRONMENTAL POLICY 275, 280 (Sheldon Kamieniecki et al. eds., 1986). See 42 U.S.C. § 7405 (2003) ("Before approving any grant under this subsection to any air pollution control agency the Administrator shall receive assurances that such agency provides for adequate representation of appropriate State, interstate, local, and (when appropriate) international interests in the air quality control region.").
to serious health problems, including asthma and bronchitis in children and adults living in the vicinity of coal-burning power plants.\textsuperscript{17}

In 1970, Congress created the EPA and charged the agency with the protection of national natural resources.\textsuperscript{18} Because the EPA was also therefore responsible for preventing most types of pollution, it carried out the mandates of the 1955 and 1963 air quality laws. The same session of Congress then substantively amended earlier air quality laws to create the current version of the Clean Air Act. The 1970 CAA, along with its 1977 Amendments split responsibility for air quality between the states and the federal government,\textsuperscript{19} such that the federal government became responsible for setting air quality standards and the states became responsible for creating and enforcing policies to help meet those standards. The CAA requires each state to submit to the EPA state implementation plans (SIPs) that indicate how the state will achieve and maintain national ambient air quality standards (NAAQSs) set by the EPA.\textsuperscript{20} If a state submits a SIP that the EPA deems inadequate, EPA may set emission limitations or take other action to bring the state’s pollution sources into compliance.\textsuperscript{21}

At the time of its enactment in 1970, the CAA was one of the largest steps ever taken toward curbing pollution through legislative means. The Act supports the principle that economic growth and environmental protection are not incompatible, but that environmental protection should take priority over economic concerns.\textsuperscript{22} Although the primary thrust of the CAA was to protect the environment and human health, legislative compromises produced a law with limited application. Relationships between the coal industry and Congress, combined with the high cost and poor efficacy of the available pollution control technologies, resulted in a compromise whereby only new factories and

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\textsuperscript{17} \textit{John D. Spengler, Death, Disease, and Dirty Power: Mortality and Health Damage Due To Air Pollution From Power Plants}, 3 (Oct. 2000), available at http://www.pirg.org/reports/enviro/dirty_power/DIRTPOWER.pdf.


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power plants were required to use modern forms of air pollution control in a process called New Source Review.\textsuperscript{23}

\textbf{B. New Source Review}\textsuperscript{24}

New Source Review is a provision incorporated into the CAA in 1977 that requires new sources of air pollution in statutorily defined non-attainment\textsuperscript{25} areas to comply with the stringent emissions requirements.\textsuperscript{26} Existing sources of air pollution are exempt from the emissions requirements.\textsuperscript{27} Specifically, the NSR provision requires newly constructed electric utilities to conform to CAA standards for pollution generation, on an individual basis.\textsuperscript{28} Utilities constructed prior to 1970 are not required to obtain NSR permits unless they make changes that constitute "major modifications," or changes that result in significant pollution increases.\textsuperscript{29} Not only are polluters required to conform to federal technology requirements, but they must also obtain a permit detailing what they are allowed to emit. Both the technology requirements and the permit conditions are legally enforceable.

The meaning of "modification" has been the subject of much interpretation and debate.\textsuperscript{30} EPA has established both policies that exempt "routine maintenance activities" from compliance, and other policies that require an assessment of the impact of a modification before requiring modified facilities to submit to NSR requirements.\textsuperscript{31}

In essence, conforming to NSR requirements necessitates the installation of modern pollution-reducing technologies whenever a new


\textsuperscript{24} For a quick introduction to the basics of the New Source Review program, refer to the article: Rolf R. von Oppenfeld et. al., A Primer on New Source Review and Strategies for Success, 32 ENVTL. L. REP. 11,091 (2002).

\textsuperscript{25} Non-attainment areas are those areas where National Ambient Air Quality Standards are not met for any pollutant listed under the CAA. 42 U.S.C. § 7501 (2003).

\textsuperscript{26} Leahy, supra note 6; Darren Samuelsohn, Upcoming Court Cases Highlight Details of 30-year Debate, in NEW SOURCE REVIEW: AN E&E PUBLISHING SPECIAL REPORT, Apr. 29, 2002, at http://www.eenews.net/sr_nsr2.htm.

\textsuperscript{27} Leahy, supra note 6; Darren Samuelsohn, Upcoming Court Cases Highlight Details of 30-year Debate, in NEW SOURCE REVIEW: AN E&E PUBLISHING SPECIAL REPORT, Apr. 29, 2002, at http://www.eenews.net/sr_nsr2.htm.


\textsuperscript{31} Samuelsohn, supra note 27.
utility is built or whenever an existing utility increases its output. However, retrofitting an older utility to comply with NSR requirements can have very high costs. These high costs and other disincentives have led to significant noncompliance with the Act. However, noncompliance often goes unpunished. For example, EPA estimates that at least eighty percent of existing oil refineries do not comply with NSR requirements. This non-compliance leads to an increase in pollution, which then corresponds to an increase in the health complaints (and associated adverse economic effects) that the CAA and other air pollution regulations were originally designed to reduce.

C. Constitutional Third-Party Standing Requirements

Standing to sue under the Clean Air Act is not granted lightly. In 1992, the Supreme Court case Lujan v. Defenders of Wildlife established the principle that third-party suits by citizens face a very high threshold of justiciability due to the lower likelihood that third parties have suffered an injury creating a case or controversy, and in many cases are also prohibited by principles of constitutional standing. Although Congress has used citizen suit provisions in many statutes, particularly in environmental ones (in some cases, to shore up a relatively low level of governmental enforcement), this decision appeared to be a move toward invalidating citizen suit provisions in many of them. The later decision Friends of the Earth v. Laidlaw subsequently seemed to liberalize third-party standing requirements, allowing concerned citizen groups to sue Clean Water Act violators, so long as the members of those citizen groups are directly affected by the environmental violations in question.

Standing jurisprudence is framed in terms of the parties' relationship to both the suit and the court. It draws a distinction between parties with a valid concern in the legal matters at hand and parties with peripheral or
no real concern in the dispute. The law of standing finds its constitutional roots in Article III of the Constitution, which grants the judiciary power over "cases and controversies." This construction of Article III is relatively recent, and the relationship of standing to Article III only began to develop in 1944 with the case Stark v. Wickard. University of Chicago Law School Professor Cass Sunstein identifies five main eras of standing jurisprudence. The first four span the time period from the founding of the United States to approximately 1975, and trace the development of standing from a readily available source of jurisdiction to, over time, a much more limited doctrine applicable only in specific cases. Standing started to liberalize again, according to Sunstein, in the 1970s and 80s. Recent cases established the principle that injury does not confer standing unless it is both traceable to the defendant's conduct and redressable by judicial action. Perhaps most importantly, courts have begun to draw a distinction between parties who were objects of a regulation and those who were merely incidental beneficiaries of that regulation; the former were granted standing more often than the latter.

To have standing, the Eleventh Circuit requires that a potential plaintiff be able to demonstrate: 1) injury in fact, 2) injury traceable to the defendant's acts, and 3) redressability in a court of law. Injury in fact is defined as a harm that is concrete and particularized, as opposed to merely conjectural. In addition, most courts consider "prudential standing requirements." Prudential standing requirements, in contrast to Constitutional standing requirements derived from Article III, are devised by courts to determine whether a statute can be justifiably construed to offer the claimant a right to relief.

In TVA v. EPA, the Eleventh Circuit looked to the "zone of interests" regulated by the CAA. To determine whether prudential standing has been satisfied in a particular case, the zone of interests test asks whether the interest at stake in the case is specifically addressed by the statute under which the case is being brought. Thus, in TVA v. EPA, prudential standing requires that the putative injury suffered by the third-

40. US CONST., art. III.
42. Sunstein, supra note 37 at 168.
43. Id. at 170-93.
44. Id.
45. Id. at 198-99 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).
46. Id. at 184.
47. Id. at 199-200 (citing Lujan, 504 U.S. 555).
48. Id.
party claimants be an injury to some interest within the scope of the Clean Air Act.

II. TVA v. EPA: THE CASE ITSELF

A. Background

Over the past twenty years, TVA has modified nine of its power plants in a manner that, according to the EPA, triggers permit requirements under the CAA's NSR programs. TVA argued that the modifications were exempt from regulation under the CAA because they did not in fact result in increased pollution overall, and that the EPA's methodology for determining which modifications required permits was unfair and unlawful.

The EPA subsequently issued an Administrative Compliance Order (ACO), which found TVA to be in violation of the CAA and not exempt. Several private parties joined TVA's suit, petitioning for review of the ACO. Alabama Power Company (APC) and Duke Energy Corporation (Duke) are power utilities with energy networks integrated with TVA's. Any instability or unpredictability in TVA's network would, they contended, force them to increase their own production to preserve the regional power supply. In addition, they felt that they had a right to participate in the process by which the EPA's enforcement actions with regard to TVA were scheduled, since those actions would affect their own ability to generate power. They further argued that as consumers of TVA power themselves, any interference with TVA's power generation capabilities might increase their own power costs.

In addition to the private companies, the Tennessee Valley Public Power Association (TVPPA) also sought standing. TVPPA is a corporation representing the interests of 160 electrical power distributors. TVPPA claimed that its members, as TVA power customers like APC and Duke, would bear the brunt of the costs of compliance with the EPA's ACO, placing them at an unfair economic disadvantage.

In response, the EPA Administrator granted reconsideration of the ACO. However, the ACO remained in effect during the reconsideration period while it was being reviewed by the Environmental Appeals Board.

52. 278 F.3d. at 1189.
53. Id. at 1188.
54. Id. at 1188, n.1.
55. Id.
56. Id. at 1205-06
57. Id. at 1206.
58. Id. at 1206-07.
59. Id. at 1208.
TVA and the other third party petitioners then petitioned for review of EPA’s decision to allow the ACO to remain in effect during the reconsideration period. Meanwhile, the EAB requested supervision by an Administrative Law Judge over matters of discovery and the evidentiary hearing. The EAB then issued a decision, finding that EPA had proved some of the allegations and either abandoned or failed to prove the rest. It rejected all of TVA’s arguments and sustained most of the remedies that EPA sought. TVA then petitioned for review of the EAB decision in the Eleventh Circuit, which consolidated all of the related petitions.

**B. Eleventh Circuit Opinion**

In reviewing the EAB’s decision, the Eleventh Circuit only considered EPA’s motions to dismiss the primary case concerning the legality of the EPA’s orders. The first five issues of this case concerned whether the court possessed subject matter jurisdiction to hear the case, potential mootness issues, and other concerns of justiciability other than standing. On all five issues, the Eleventh Circuit ruled that the case was justiciable. The most remarkable aspect of the court’s decision is the sixth issue, which concerned the standing of the third parties to sue.

1. **Claims for Standing**

As ordinary private petitioners, APC and Duke had to meet the requirements for standing established in the case *Lujan v. Defenders of Wildlife*. A plaintiff wishing to establish standing to sue must establish three elements: injury in fact, a causal connection between the conduct at issue and the harm complained of, and judicial redressability of the injury claimed.

APC and Duke claim four different injuries in fact as justifications for standing. They believe that they will suffer economic injury. First, since their utility networks are closely intertwined with TVA’s, disruptions to TVA’s power system would affect theirs. Second, excluding APC and Duke from the drafting of TVA’s shut-down schedule excluded them from a regulatory process in which they had a

60. *Id.* at 1188, n.1.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1191-1205.
65. *See supra* note 47 and accompanying text.
67. *Id.* at 1205-06.
68. *Id.*
stake.\textsuperscript{69} Third, APC and one of Duke’s subsidiaries had contractual rights to TVA power, and therefore any disruption in TVA’s power would lead to increased costs for APC and the Duke subsidiary.\textsuperscript{70} APC and Duke also expressed concerns over potential due process injuries. APC and Duke had been sued by the EPA in an enforcement action similar to the present one against TVA, and the TVA orders in this case will probably be used against them; therefore, including them in this case serves the goal of judicial economy.\textsuperscript{71}

The EPA argued that the private petitioners (APC, Duke, and TVPPA) failed to show a legally cognizable injury redressable by the court. They asserted that the possibility of injury was dependent not on the EPA’s actions, but on TVA’s; and that the interests of the private parties were not within the zone of interests addressed by the CAA.\textsuperscript{72} The EPA argued primarily that the injury, based as it was on some actions that had not yet occurred and might never occur (the cost of TVA’s compliance with the order) was too speculative to be recognized.\textsuperscript{73} Secondly, the EPA argued that the injury, if it happened at all, would only occur because of the way in which TVA chose to comply with the EPA’s order, and not directly because of the order itself.\textsuperscript{74} And finally, the EPA argued that the injury was not redressable, because even if the order were reversed, a similar rate increase might result for any number of unforeseeable reasons.\textsuperscript{75}

TVPPA also challenged the order as a private petitioner and thus had to meet additional standing requirements. Since it claimed standing to sue on behalf of its members, TVPPA was also required to show (in addition to the \textit{Lujan} elements) that at least one of its members would have standing to sue on his or her own, that the interests at issue are related to the association’s purpose, and that the participation of individual members in the litigation is unnecessary.\textsuperscript{76} The court divides the private petitioners into two groups, with APC and Duke in one group and TVPPA in the other, because the claims of APC and Duke are very similar and as mentioned above, TVPPA, as an industry association, must

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\textsuperscript{69} Id. at 1206
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 1205-06.
\textsuperscript{72} Id. at 1205.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 1207.
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meet additional standards in order to have standing. However, TVPPA also makes the same basic claims for standing as APC and Duke.

2. The Eleventh Circuit's Ruling

The Eleventh Circuit held that the speculative nature of the injury was not a sufficient reason to dismiss petitioners' claims at this early stage of the litigation. Because this case arose at the pleading stage, parties only needed to make general allegations of injury that were potentially supportable, rather than alleging specific facts about injuries actually suffered. The court did not address APC's and Duke's claim that, in the future, they might be injured through the increase in electricity costs that they might face as a result of the EPA's order. Instead, the court reasoned, standing may be established on other grounds. APC and Duke were only required to assert that TVA's compliance with the EPA's orders would result in uncertainties in the power supply that could affect them due to the interconnected state of their transmission networks. Although many factors unrelated to the EPA's order might have contributed to the alleged injury, the court again held that at early stages of litigation, a direct connection need not be shown. It is enough that as a result of the order, the petitioners might suffer an injury, regardless of whether such injury could be averted as a result of TVA's behavior. Finally, with regard to the zone of interests question, the court held that the mention of "economic... effects" in the Clean Air Act sufficed to indicate that Congress intended to include the interests of the petitioners while drafting the Act.

In addressing TVPPA's standing claim, the court reasoned that since those TVPPA members who had contracts with TVA would probably face rate increases as a result of the EPA's action, there was a potential for economic harm sufficient to confer standing upon them. In addition,

77. Id. at 1205. "TVPPA must also show that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to TVPPA's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the law suit." Id. at 1208.
78. Id. at 1206-07.
79. Id.
80. Id. at 1207.
81. Id.
82. Id.
83. Id. at 1208.
84. Id. at 1209

([W]e think that business realities make it likely that TVPPA's members can expect some rate increases as a result of EPA's order, a point that EPA apparently concedes. As the court stated in Central Arizona, the EPA order "will likely cause Petitioners some amount of pecuniary harm," and that is sufficient to confer standing.)
III. IMPLICATIONS AND ANALYSIS

A. The Outcome of TVA v. EPA and the Future of New Source Review

New Source Review is a hotly disputed program that may not survive many more rounds of legislation and litigation. The modern environmental protection technologies required by the NSR program are expensive, so noncompliance, inadvertent or otherwise, occurs with some frequency.

Industry groups argue that the program creates economic disincentives to enlarging power plants, which eventually translates into higher consumer prices when utilities cannot satisfy the power demands of an increasing population. In addition, NSR may slow the upgrading of older, grandfathered power plants, since many types of upgrades trigger EPA review, and compliance with EPA requirements may be expensive.

These industry groups instead endorse the current Bush administration’s Clear Skies Initiative, a market-based approach that utilizes emissions trading to keep total emissions low while streamlining power plant expansion and modernization.

NSR was originally established via amendments to the CAA to mitigate pollution problems caused by older, dirtier power plants, and to supplement other pollution-mitigating measures that proved to be less effective. The chief problem with the emissions-trading approach proposed in the Bush Clear Skies Initiative lies in its disparate effects.

(citations omitted).

85. Id. at 1193-1204 (holding that APC and Duke had standing because the ACO and the May 4th letter are moot and therefore are no longer avenues for agency action; that a justiciable case or controversy exists; that the EAB decision is final and reviewable; and that this matter is ripe for review).

86. Id.

87. The NSR reforms, collectively called the Clear Skies Initiative, aim to simplify the current NSR policies regarding modifications to existing plants. Under these reforms, individual plants would not have to conform to NSR standards every time modifications were made, as long as “the industry” meets total emissions limits. EPA, New Source Review Questions and Answers, at http://www.epa.gov/nsr/bkgrnd/questions.html (last updated Mar. 11, 2003).


90. Id.

Emissions-trading approaches can create "hot spots" of pollution, and residents in areas where older, dirtier power plants use emissions credits to continue polluting at high levels may suffer disproportionate or unequal health effects. These areas are typically in socioeconomically depressed areas where residents have fewer resources available to either protect themselves from this form of pollution or to organize and demand greater consideration of public health, of their own health. Power plants that generate disproportionate amounts of pollution would generally be permitted to continue generating these abnormally high, localized levels of pollution if NSR requirements were relaxed under the Clear Skies Initiative, since polluters could, through purchasing emissions trading permits, pay for the right to continue polluting. The Clear Skies initiative does not appear to recognize that what may work on a national emission level can spell disaster on a local level.

Allowing power companies to have standing based on potential economic harm seems to be inconsistent with the purposes of the CAA. The grant of standing to APC, Duke, and TVPPA may have given the utility industry a disproportionately powerful voice in the debate over the current NSR system. An Eleventh Circuit decision on the merits in favor of TVA and the third-party petitioners could solidify the validity or even the primacy of economic interests in Clean Air Act cases throughout the Circuit, and could be relied upon by petitioners nationally. The Eleventh Circuit is also considering similar cases filed by the EPA against several power companies that are subsidiaries of the Southern Company (another large supplier of power); these cases were stayed pending the outcome of TVA v. EPA.

A decision in favor of the EPA, however, would probably be used as support for NSR enforcement actions against the power industry elsewhere – but as NSR is weakened by the administration’s Clear Skies Initiative, such enforcement actions may lose their teeth.

B. The Grant of Standing as a Violation of the CAA’s Spirit

A superficial analysis of the decision in this case may seem to indicate that it is not particularly out of line with the current understanding of third-party standing questions. The power companies generated evidence of an injury in fact that suffices in the eyes of the

94. Id.
95. Samuelsohn, supra note 8.
96. See supra note 93.
court for the purposes of this action. Those injuries follow from the EPA’s NSR enforcement action, and the injuries are redressable by a court. Furthermore, since the CAA mentions economic interests as a factor for the EPA to consider when making decisions (at least about how NSR should be developed), and since the industry’s economic interests are affected by the EPA’s order, the zone of interests test is also met, according to the court.

However, petitioners’ fulfillment of each of the standing elements remains debatable. First, no injury has yet occurred; petitioners are simply alleging that they will probably suffer some form of injury in the future as a result of the EPA’s activities. For the court, there appeared to be no impediment to standing: “at the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” According to the court, the existence of some form of economic harm, or at least the possibility that evidence thereof could be presented at trial, is easy to fulfill; the court notes that APC and Duke will face “uncertainties and diminished reserves” if TVA complies with the EPA’s orders.

Second, TVA’s intervening actions serve to disconnect the third-party plaintiffs from the enforcement action itself. Perhaps some unknown circumstance may cause the same harm, increased power costs, even if the court does intervene. The court found the second argument easy to dismantle. As the Eleventh Circuit noted, the Supreme Court rejected a similar claim in Bennett v. Spear, warning against unfairly equating “injury ‘fairly traceable’ to the defendant with injury as to which the defendant’s actions are the very last step in the chain of causation.” In TVA v. EPA, the court indicated an opinion that any doubts about redressability were not particularly significant. It noted that redressability need only be likely, not certain.

More fundamentally, the relevance of these economic harms to the purposes of the CAA is in doubt. The traditional notion of what

98. Id. at 1208.
99. Id. at 1207-08, (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).
100. Id. at 1206 (“We find less speculative APC’s and Duke’s claim that, due to the interconnectedness of their electric transmission networks with TVA’s, they will be required to increase production to compensate for uncertainties and diminished reserves created by TVA’s compliance with EPA’s orders.”).
101. Id. at 1207, (quoting Bennett v. Spear, 520 U.S. 154, 168-169 (1997)).
102. Id. at 1207.
constitutes a "zone of interests" that does not include every interest mentioned in the statute, but rather those interests that are germane to the purposes for which the statute was established. The Eleventh Circuit uses the test outlined in Clarke v. Securities Industry Association, which indicates that the relevant interests are all those that are not "so marginally related to or inconsistent with the purposes of the statute that it cannot be reasonably assumed that Congress intended to permit the suit. The test is not especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." The economic interests of an industry actor are merely interests that should be duly considered by the EPA as it considers the most effective and efficient implementation of its enforcement protocols - and the court has noted neither evidence nor arguments suggesting that the EPA failed to consider the petitioners' interests before implementing its ACO. Standing does not necessarily accrue to parties potentially affected by an EPA decision merely because the EPA did not fully protect their interests at every step.

Further, the court did not consider the argument that the private petitioners' interests are in fact inconsistent with the purposes implicit in the statute. Congress may not have intended to permit the suit. Why would Congress allow a statute like the CAA, designed to force polluting industries to install cleaner technologies in its plants via the economic threat of fines and suits, to become potentially unenforceable upon the possibility of economic harm to an industry member? The economic effects cited in the statute are to be considered well before compliance orders are issued, and not in the course of issuing such orders, at this point, petitioners' economic interests are no longer relevant to the

103. In order to have standing, a party must claim an injury that falls within the zone of interests contemplated by the statute. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

104. Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258, 287 (1992) (Scalia, J., concurring) ("Yet another element of statutory standing is compliance with what I shall call the "zone of interests" test, which seeks to determine whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefited by the provision at issue"). But see Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987) (stating that the zone of interests test "is a guide for deciding whether, in view of Congress's intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision").


107. 42 U.S.C. § 7409(d)(2)(C)(iv) (2003). (indicating that the scientific review committee should advise the EPA Administrator of "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards").

108. Id.
purposes of the statute and are indeed likely to be inconsistent, if not directly in conflict, with those purposes.

In fact, the provisions cited as evidence that the EPA must consider the economic effects upon industry members are not the provisions relied upon to issue the orders challenged in this case. The petitioners are not challenging the national ambient air quality standards that the EPA established long before the enforcement orders in question were issued; those standards are the ones for which the EPA was required to consider economic effects before taking action. The Act commands the EPA to consider economic interests when promulgating air quality standards, not when enforcing its strategies for attainment and maintenance of those standards.109

Essentially, the plaintiffs' economic interests in this case are inconsistent with the stated purpose of the CAA, which is "to protect and enhance the quality of the Nation's air resources."110 The considerations that the EPA was instructed to take into account when establishing air quality standards include economic effects on third parties.111 Even so, it is likely that EPA took economic considerations into account indirectly when determining that TVA's plants were not in compliance with the Clean Air Act. The original determination of the standards of compliance considered economic effects, and EPA determined that those effects were not more important than the preservation of clean air. Protection of the plaintiffs' economic interests could mean that EPA must allow TVA's plants to remain in noncompliance whenever economic injury to a downstream consumer might occur. This result would be inconsistent with the enhancement of the Nation's air quality. For EPA's enforcement action to be effective, they must not be confined only to circumstances where no economic pain will be inflicted. If EPA did allow itself to be constrained in that matter, it would become ineffectual as an enforcement agency. Since EPA orders often lead to compliance costs, almost all plaintiffs can claim some form of economic injury.112 If this kind of injury became a controlling interest, the EPA might find it somewhat more difficult to enforce orders that involve any economic cost. Surely this was not the intent of Congress in passing the CAA.

If any consideration mentioned in passing by a statute becomes part of that statute's "zone of interests," then a host of inconsistent interpretations may result. Congress intended the Clean Air Act primarily to protect the quality of the air and the health of those who

110. Id. § 7401(b)(1).
111. See supra note 107.
breathe it. Of course, economic interests are important to the feasibility of such a statute, and Congress provided for their protection by requiring that the EPA consider those interests in establishing air protection strategies. But continuing to consider those economic interests not only when developing these strategies, but also at every step of putting them into practice, heightens the risk that environmental protection will be weakened for the sake of protecting an economic interest that is no longer relevant to the purposes of the statute. In order for APC, Duke, and TVPPA to establish standing to sue in this case, they should have been required to show instead that the EPA failed to consider those interests when establishing its overall strategy, and not merely when implementing that strategy against them.

In _Bennett v. Spear_, a seminal case on zone-of-interest standing, the Supreme Court stated that the "overall purposes of the Act in question" were not determinative of the zone of interests, but rather that the relevant parts of the statute for determining the zone of interests were the particular provisions relied upon by the plaintiffs in that case. Similarly, the particular provisions relied upon in _TVA v. EPA_ are Congress' directions to the EPA to, when promulgating air quality standards, take into consideration "any adverse public health, welfare, social, economic or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." However, _Bennett v. Spear_ is distinguishable because the statute examined in that case required the Fish and Wildlife Service to take into account the petitioners' economic interests at the point where it was performing the action that caused the petitioners' injury. In contrast, the petitioners' injury in _TVA v. EPA_ was caused by an action in compliance with a section of the CAA that did not explicitly require the EPA to take the petitioners' economic interests into account at that point. Those economic interests should have been accounted for earlier, during the standard-setting process, as the CAA demands.

_TVA v. EPA_ supports the principle that third parties may have standing to become involved in litigation if the type of injury they claim is mentioned anywhere in the relevant statute, whether or not that interest is relevant to the provisions on which the claim relies (as long as they

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113. See _supra_ note 107.
115. _Id._ at 175-76 (stating that the statutory protection of a plaintiff's interest "within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . , but by reference to the particular provision of law upon which the plaintiff relies").
fulfill the other elements of standing, of course). The implications of such a principle are wide-ranging. Primarily, it may undermine the efficacy of the Clean Air Act and similar statutes by permitting parties with interests contrary to the stated purpose of those statutes to bring suit. Consideration of an interest mentioned in the statute should not go so far as to subvert the overarching purpose of the statute; there must be some hierarchy of interests.

C. Future Utility of the Eleventh Circuit Decision

Through its interpretation of the Clean Air Act in this case, the court has indicated a willingness to explicitly recognize economic interests even in the context of post-standard-setting enforcement.118 Citizens with public health concerns may be able to use this case to their advantage in situations where the EPA (or another agency) has failed to regulate an industry practice that is harmful to health, thus causing economic loss through illness or death. Some statutes have a greater protective connection to particular economic activities than the CAA does, such as the Clean Water Act119 or the Endangered Species Act.120 By preserving the quality of the nation's waters, the Clean Water Act also serves to preserve water-dependent economic activities such as fishing. The statute mandates that the EPA consider economic costs when setting New Source Performance Standards (a CWA program similar to the NSR program included in the CAA).121 The Endangered Species Act, which preserves certain valuable tourist attractions, considers the economic impact of designating certain areas as habitat for endangered animals.122

CONCLUSION

Given the Eleventh Circuit's minimalist interpretation of injury sufficient to confer standing in the face of minor, uncertain economic disadvantages, environmental groups that want to sue for enforcement of environmental laws should demand standing based on their economic injuries. Parties who have suffered economic harm through the pollution of local waters on which they depend, or through the endangerment of animals whose presence feeds a local tourist economy, may find that they

120. 16 USC § 1531 (2003).
have standing to sue since their economic interests are often taken into account by these statutes. If industry economic interests are protected when they are mentioned in passing by a statute, the economic interests of a private citizen may also carry significant weight in the courts. When these two sets of economic interests are pitted against each other, then the question of which interests are truly relevant to the purposes of the statute may arise again, and a more reasoned balance once again achieved.