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The Gap-Filling Role of Nuisance in Interstate Air Pollution

Emily Sangi

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The Gap-Filling Role of Nuisance in Interstate Air Pollution

Emily Sangi

Air pollutants from coal-fired power plants frequently cross state borders, which can impact a receiving state’s ability to meet and maintain the National Ambient Air Quality Standards (NAAQS) mandated by the Clean Air Act (CAA). North Carolina asserted that such interstate air pollution was responsible for its nonattainment of certain NAAQS. After engaging in a protracted and circuitous petitioning process under the CAA, which failed to compel large electric utilities in thirteen states to reduce emissions of certain pollutants, North Carolina then looked to the common law of public nuisance for relief. Under public nuisance law, a defendant is liable for unreasonably interfering with a right common to the general public. In North Carolina ex rel. Cooper v. Tennessee Valley Authority (TVA), North Carolina sued the TVA, contending that the air pollution from the agency’s eleven coal plants in three surrounding states crossed North Carolina’s borders in unreasonable amounts, creating a public nuisance under the nuisance laws of each source state. This Note argues that, in overturning the lower court’s finding that four of the plants created a public nuisance, the Fourth Circuit missed an important opportunity to use source state nuisance law as a gap-filler and provide relief where the CAA provided none. It explains how, in reaching its decision, the Fourth Circuit muddled the application of nuisance law, in contravention of the goals of public nuisance and the CAA, and misconstrued and misapplied Supreme Court precedent. This Note advances the popular contention that the common law of nuisance rightfully co-exists with, complements, and fills the gaps in, statutory regimes. Specifically, it defines the proper edges of the gap public nuisance actions may fill in the interstate air pollution context and advises the courts to adopt such a conception.
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"'Nuisance,' unhappily, has been a sort of legal garbage can . . . used to designate anything from an alarming advertisement to a cockroach baked in a pie."

INTRODUCTION

Nuisance law has a bad reputation. It has colorfully been characterized as a "legal garbage can"; a "legal grab-bag [used] as a substitute for analysis whenever [courts wish] to redress an injury"; a "chameleon word, with meaning technical or general, depending on who is using it when and where"; and perhaps the most "impenetrable jungle in the entire law." Decades ago, William L. Prosser, the acclaimed "Master of Torts," counseled that in order to move beyond the "deplorable tendency [of] us[ing] the word as a substitute for any thought about a problem" and give "nuisance" real meaning, "it is necessary to disregard much of [its history] as mere aberration."

4. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people . . . .").
Public nuisance claims brought under the nuisance law of the state in which the pollution source is located provide an important means for nuisance to shed some of its legal "garbage can" status and, more importantly, curb certain interstate air pollution problems that have been inadequately addressed by the federal environmental law regime. Although the federal government has tried to address interstate air pollution through the Clean Air Act (CAA), the existing statutory and regulatory provisions have proven incomplete. Through the lens of a recent cross-border state common law nuisance action, North Carolina ex rel. Cooper v. Tennessee Valley Authority (TVA I–IV), this Note argues that the Fourth Circuit missed an important opportunity to use source state nuisance law as a gap-filler and provide relief where the CAA provided none. This Note is not intended to be a comprehensive examination of nuisance law or federal environmental law. Rather, by examining the relationship between source state nuisance law and the CAA in the context of one case study, it presents a role for source state nuisance law in addressing certain interstate air pollution problems.

Part I defines public nuisance as compared to private nuisance actions. It also provides background on the focal case, coal plant contributions to our nation’s air pollution problems, and the ways in which the CAA has tried to address interstate air pollution. Part II outlines the scope of the CAA’s preemption of nuisance claims and describes how the CAA does not affect the nuisance laws of source states. It then discusses how the district court in TVA III properly applied source state nuisance laws to find that the Tennessee Valley Authority’s (TVA) emissions created a public nuisance, and how the Fourth Circuit in TVA IV erred, as a matter of law, in striking down the lower court’s abatement order. Part III compares state common law and federal statutes in terms of their advantages and disadvantages to demonstrate, as a matter of policy, why both are needed to best address interstate air pollution—each fills the gaps the other leaves behind. Part IV then defines the proper edges of the gap public nuisance actions may fill in the interstate air pollution context and advises the courts to adopt such a conception.

7. A public nuisance is "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979); see also North Carolina ex rel. Cooper v. Tenn. Valley Auth. (TVA II), 549 F. Supp. 2d 725, 735 (W.D.N.C. 2008).


9. The source state is the state in which the pollution source is located.
I. BACKGROUND

A. Private and Public Nuisance: Two Distinct Causes of Action

Nuisance law is "an important intersection between property and torts" and includes two separate common law causes of action—private nuisance and public nuisance. Even though the two are distinct causes of action, courts and scholars have frequently mingled their rules, which is a major source of the confusion surrounding nuisance law. Private and public nuisance have little in common besides their focus on unreasonable interference with a protected interest and, of course, their names.

Private nuisance is an ordinary tort arising from the unreasonable "invasion of another's interest in the private use and enjoyment of land," without involving trespass. Public nuisance, however, arises from "an unreasonable interference" with a public right, and "does not necessarily involve interference with use and enjoyment of land." The origins of public nuisance lie in criminal law; a public nuisance was an offense against the Crown prosecuted as a crime. But the Restatement (Second) of Torts ultimately dropped the criminality concept from its definition, and "[p]ublic

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10. Gideon Parchomovsky & Peter Siegelman, Selling Mayberry: Communities and Individuals in Law and Economics, 92 CAL. L. REV. 75, 99 (2004); see also JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 639 (3d ed. 1993) ("As a subject of study, the law of nuisance is part torts and part property—torts because nuisance liability arises from negligent or otherwise wrongful activity, and property because the liability is for interference with the use and enjoyment of land.").

11. See Abrams, supra note 3, at 359.

12. See id. at 367–68; see also Louise A. Halper, Untangling the Nuisance Knot, 26 B.C. ENVTL. AFF. L. REV. 89, 130 (1998) (providing a detailed survey of the forces that have contributed to making the law of nuisance "a mess, a muddle, a knot").

13. See Prosser, supra note 1, at 411 (citation omitted) ("The two have nothing in common, except that each causes annoyance or inconvenience to some one, and it is in the highest degree unfortunate that they are called by the same name.").

14. RESTATEMENT (SECOND) OF TORTS § 821D (1979) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."). "In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability." Id. § 821D cmt. d (1979).

15. Id. § 821B(1) (1979). "It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large." Id. § 821B(1) cmt. g (1979).

16. Id. § 821B(1) cmt. h (1979).

17. See Schwartz, supra note 6, at 543 ("Public nuisance theory has its foundation in twelfth-century English common law as a tort-based crime for infringing on the rights of the Crown."); Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. CIN. L. REV. 741, 745–46 (2003) ("Historically, public nuisance most often was not regarded as a tort, but instead as a basis for public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct.").

18. See Abrams, supra note 3, at 366. "To the extent that public nuisance is still a crime, it is codified by statute and does not exist in the common law." Id. at 365 (citing RESTATEMENT (SECOND) OF TORTS § 821B cmts. c, d (1979)).
nuisance eventually became a source of common law civil liability." Modern day public nuisance actions are brought as civil actions pursuant to federal or state common law or to a state statute that has codified state nuisance principles. Public nuisance actions are still brought by a government official representing the public at large, with one exception: under the special injury rule, which is a "standing test," a private citizen may bring an action against a public nuisance if she shows that she "suffered harm of a kind different from" that experienced by the larger community. Finally, it is important to keep in mind that, whether public or private, nuisance is recognized as "a field of tort liability, a kind of damage done, rather than any particular type of conduct." 

B. Background on the Focal Case: North Carolina v. TVA

In 2006, North Carolina sued the TVA, contending that the air pollution from TVA's eleven coal-fired power plants in Alabama, Tennessee, and Kentucky crossed North Carolina's borders in unreasonable amounts, creating a common law public nuisance in violation of these states' respective nuisance laws. Common law nuisance actions to abate interstate pollution are brought under the state law where the pollution source is located rather than the law of the state that is affected by the pollution. Alleging that the emissions harm

20. See Abrams, supra note 3, at 365.
21. See Schwartz, supra note 6, at 541 (noting that the "essence" of public nuisance "is to allow governments to use the tort system to stop quasi-criminal conduct that, while not illegal, is unreasonable given the circumstances and could cause injury to someone exercising a common, societal right.").
22. See RESTATEMENT (SECOND) OF TORTS § 821C; see also Antolini, supra note 5, at 765 ("Because public nuisance is a uniquely powerful tort, embodying a private attorney general concept, courts adhere to the special injury rule as a way to limit access to this unusual remedy."). This hybrid action has been called a "public nuisance tort" to distinguish it from an action brought by a sovereign. See Abrams, supra note 3, at 363; see also Antolini, supra note 5, at 776 (explaining why the public nuisance action brought by a private plaintiff is "a bizarre hybrid tort").
23. Prosser, supra note 1, at 416.
25. See TVA II, 549 F. Supp. 2d 725, 727 (W.D.N.C 2008); see also Brief of Appellee at 2, North Carolina ex rel. Cooper v. Tenn. Valley Auth. (TVA IV), 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) ("TVA's emissions travel to North Carolina where they harm health, acidify soil and water in sensitive ecosystems, degrade the beauty of scenic mountain areas, and the state's economy."). Alabama has codified its nuisance law and Kentucky and Tennessee follow the Restatement (Second) of Torts. See infra Part II.A.2.
26. See Int'l Paper Co. v. Ouellette, 479 U.S. 481, 487 (1987) (holding that the Clean Water Act's (CWA) saving clause preserves the right to bring a public nuisance action to abate interstate water pollution so long as the nuisance law of the source state is applied). While the Court has not specifically addressed the scope of the CAA's saving clause, the logic of Ouellette applies to the CAA's virtually identical saving clause. No court has ruled otherwise. Rather, within the appellate courts, the Sixth Circuit found that the CAA did not preempt a state nuisance action brought under the law of the source state, see Her Majesty the Queen in Right of the Province of Ont. v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989), and the Third Circuit found that the CAA's saving clause should be interpreted similarly
North Carolina's public health and welfare\textsuperscript{27} and damage its natural resources and economy,\textsuperscript{28} North Carolina sought an injunction requiring TVA to upgrade or install air pollution control equipment.\textsuperscript{29}

After denying TVA's motion to dismiss\textsuperscript{30} and ruling on cross-motions for summary judgment,\textsuperscript{31} the U.S. District Court of the Western District of North Carolina analyzed the state public nuisance laws of Alabama, Tennessee, and Kentucky, and concluded that emissions from four TVA plants in Alabama and Tennessee located within 100 miles of North Carolina (the 100-Mile Plants) created a public nuisance in North Carolina and ordered the nuisance abated.\textsuperscript{32} The court denied the request pertaining to the seven other plants, finding that there was "insufficient evidence that their emissions are having an unreasonable health, safety, or welfare impact."\textsuperscript{33} The district court ordered TVA to upgrade or install pollution control systems at the four plants\textsuperscript{34} at an estimated cost of one billion dollars.\textsuperscript{35} The court also imposed sulfur dioxide (SO\textsubscript{2}) and nitrogen oxide (NO\textsubscript{x}) emissions caps on all generating units at each of the four plants.\textsuperscript{36}
TVA appealed the decision and, on July 26, 2010, a unanimous, three-judge panel for the Fourth Circuit overturned the district court’s order, holding that the interstate air pollution emissions originating from the four 100-Mile Plants in Alabama and Tennessee did not, under the nuisance laws of these source states, constitute a public nuisance downwind in North Carolina.

C. Old King Coal’s Merry Old Roll

Air pollution respects no political boundaries. Coal-fired power plants are the United States’ main electric power source, producing nearly half of the nation’s electricity. Coal plants are also the country’s single leading source of air pollution. Emissions “can travel hundreds of miles and contribute to smog, haze, and air pollution in downwind states.” This Note focuses on the regional

37. Amici lined up on both sides of the appeal, filing nine amicus briefs. Industry groups and seven states (Alabama, Kentucky, Louisiana, North Dakota, South Dakota, Utah, and Wyoming) sided with TVA. Public interest groups and sixteen states (California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, and Vermont) sided with North Carolina. The pro-North Carolina states were arguably interested in bringing public nuisance suits of their own to improve their states’ air quality by targeting out-of-state pollution sources. Eight of these states are also involved in a suit against TVA and five other electric utilities alleging public nuisance claims caused by the power companies’ greenhouse gas emissions under federal common law. See Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), cert. granted, 178 L. Ed. 2d 530 (2010) (No. 10-174).

38. See TVA IV, 615 F.3d 291, 296 (4th Cir. 2010).


42. The Plain English Guide to the Clean Air Act: Interstate and International Air Pollution, ENVTL. PROT. AGENCY, http://www.epa.gov/air/peg/interstate.html (last visited Feb. 7, 2011). Coal plants are also huge emitters of carbon dioxide, a main contributor to climate change. See U.S. ENERGY INFO. ADMIN., Energy in Brief: What is the Role of Coal in the United States?, http://www.eia.doe.gov/energy_in_brief/role_coal_us.cfm (last visited Apr. 24, 2011) (“Coal accounted for 37% of the total U.S. emissions of carbon dioxide released into the Earth’s atmosphere in 2008.”) However, this issue is beyond the scope of this Note. For a discussion of this problem, see, for example, A Report of Working Group II of the Intergovernmental Panel on Climate Change, Summary for Policymakers, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://www.grida.no/climate/ipcc_tar/wg2/005.htm (last visited Feb. 7, 2011), which documents the adverse health and environmental effects of global warming including detrimental impacts in many areas of the United States.
air quality impacts of coal plant emissions through the lens of North Carolina’s nuisance action against TVA’s eleven plants.

1. Air Pollution

A coal-fired power plant comprises a firebox, boiler, turbine, generators, and transformer.\(^{43}\) Electricity is generated when pulverized coal is blown from the firebox into the boiler where it is burned to heat water and create the steam that spins the plant’s generator.\(^{44}\) To provide a sense of the massive scale of coal plant operations, a large plant “going full blast burns a thousand tons of coal an hour, or 30,000 pounds of coal a minute . . . generating a billion watts of electricity—in round numbers, enough for a million households.”\(^{45}\)

Coal combustion “creates a veritable devil’s brew of dangerous and environmentally damaging air pollutants,”\(^{46}\) which cause “smog, acid rain, global warming, and air toxics.”\(^{47}\) Air pollutants are classified as either primary or secondary: primary pollutants are directly emitted and secondary pollutants form through chemical reactions in the atmosphere.\(^{48}\) The major primary air pollutants emitted by coal plants include mercury,\(^{49}\) sulfur dioxide (SO\(_2\)),\(^{50}\) and nitrogen oxide (NO\(_X\)).\(^{51}\) SO\(_2\) and NO\(_X\) undergo chemical changes in the


\(^{44}\) See id.

\(^{45}\) Id. at 186.


\(^{47}\) Environmental Impacts of Coal Power: Air Pollution, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/clean_energy/coalvswind/c02c.html (last visited Feb. 7, 2011); see also Jillian S. Hishaw, Gone with the Wind: Coal, Fire & Brimstone—A Legal Analysis of the New Reality Facing the Coal Industry, 5 ENVTL. & ENERGY L. & POL’Y J. 95, 97 (2010) (“At a more local and regional level, chemical elements such as sulfur, mercury, and chromium are deadly by-products of coal plants.”).

\(^{48}\) See Michelle S. Bergin et al., Regional Air Quality: Local and Interstate Impacts of NO\(_X\) and SO\(_2\) Emissions on Ozone and Fine Particulate Matter in the Eastern United States, 41 ENVTL. SCI. & TECH. 4677, 4677 (2007).

\(^{49}\) Coal-fired power plants constitute the nation’s largest source of mercury, annually emitting around 96,000 pounds. JEFF GOODELL, BIG COAL: THE DIRTY SECRET BEHIND AMERICA’S ENERGY FUTURE 134 (2007). Mercury is a potent neurotoxin that bioaccumulates through the food chain and has been linked to elevated blood levels in millions of women of childbearing age and neurological harm in children. Id. at 134–35.


\(^{51}\) Coal plants are the second largest source of NO\(_X\) in the nation. See Mckean, supra note 50, at 10 (citing ENVTL. PROT. AGENCY, NO\(_X\): HOW NITROGEN OXIDES AFFECT THE WAY WE LIVE AND BREATHE (1998)); see also HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES AND READINGS 616 (5th ed. 2008) (“Nitrogen oxides (NO\(_X\)), which include NO, NO\(_2\) and other oxides of nitrogen, play a major role in the formation of ozone, particulate matter, and acid rain.”).
atmosphere to create atmospheric sulfates and nitrates, which form a secondary pollutant called particulate matter (PM). And when NOx emissions react with sunlight, they create a secondary pollutant called ground-level ozone or smog.

Despite the existence of pollution control technologies, concentrations of PM and ozone “are often above regulated levels and can be dependent on emissions from upwind states.” While primary pollutants “can be managed directly” through emission reductions (assuming emissions can be identified and mitigated), secondary pollutants are more difficult to control “because their relationships to emission sources may not be readily apparent and response to emission reductions may not be proportional.” A pollutant’s impact on regional air quality depends on several factors including “its rate and method of emission and/or formation, [its] method of transport, and [its] removal and/or destruction processes.”

52. In the eastern United States, fine particulate matter (PM2.5) is chiefly comprised of sulfate, the majority of which is formed from coal plant SO2 emissions. See TVA III, 593 F. Supp. 2d 812, 820 (W.D.N.C. 2009).

53. See id. at 819–20.

54. See id. at 820; see also Kati Kiefer, A Missing Market: The Future of Interstate Emissions Trading Programs after North Carolina v. EPA, 54 ST. LOUIS U. L.J. 635, 640 (2010) (defining particulate matter as “a chemically and physically diverse mixture of discrete particles and droplets, existing in a range of particle sizes”); Particulate Matter: Basic Information, ENVTL. PROT. AGENCY, http://www.epa.gov/air/particlepollution/basic.html (last visited Feb. 7, 2011) (defining PM2.5 alternatively as “fine particles”); DOREMUS ET AL., supra note 51, at 617 (“Particulate matter (PM) refers to the mixture of solid particles and liquid droplets found in the air. Some particles are large or dark enough to be seen as soot or smoke. Others are so small they can be detected only with an electron microscope.”).


56. The most effective SO2 control technology is the scrubber or flue gas desulfurizer, which uses chemical processes to remove SO2 from the plant’s exhaust or “flue gas”; dry scrubbers can remove more than 90 percent of SO2, while wet scrubbers can remove 98 percent or more. TVA III, 593 F. Supp. 2d at 821. The two primary NOx control technologies include the selective catalytic reduction and selective non-catalytic reduction, which convert NOx in the flue gas into nitrogen and water; the former remove about 90 percent of NOx and the latter remove between 20 and 40 percent. See TVA IV, 615 F.3d 291, 297 (4th Cir. 2010). Both scrubbers and selective catalytic reduction are building-sized chemical plants, which can be larger than the power plants themselves and cost hundreds of millions of dollars to build. TVA III, 593 F. Supp. 2d at 821; TVA IV, 615 F.3d at 297.

57. Bergin et al., supra note 48, at 4677.

58. Michelle S. Bergin et al., Regional Atmospheric Pollution and Transboundary Air Quality Management, 30 ANN. REV. ENV’T & RESOURCES 1, 3 (2005).

59. Id.
2. Health and Environmental Impacts

Air pollution harms human health and ecosystems.60 In their gaseous forms, SO₂ and NOₓ cause respiratory problems61 and, after being converted to fine particulate matter and ground-level ozone, they cause premature mortality, asthma, chronic bronchitis, and other cardiopulmonary illnesses.62 Particulate matter (PM), also known as particle pollution, is “solid or liquid particles suspended in the air which carry poison into the lungs.”63 PM₂.₅, which is approximately twenty to thirty times smaller than the width of a human hair64, annually causes tens of thousands of premature deaths from respiratory disease.65 Exposure to ground-level ozone, also called smog,66 has been likened to “getting a sunburn in the lungs,”67 and results in a variety of health problems, especially in sensitive populations like children.68 Coal plant emissions create acid rain that degrades water quality and soils;69 damages vegetation and

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60. See generally What Are the Six Common Air Pollutants? Envtl. Prot. Agency, http://www.epa.gov/air/urbanair/ (last visited Apr. 24, 2011) (linking to “Health and Environment” information for each of the six criteria pollutants); see also GOODELL, supra note 49, at xxiv (providing the sobering statistic that in the three years it took the author to research and write his book, “the American Lung Association calculated[d], about 72,000 people in the United States died prematurely from the effects of coal-fired power plant pollution—more than from AIDS, murder, or drug overdose”).


64. See TVA III, 593 F. Supp. 2d 812, 820 (W.D.N.C. 2009) (“By way of comparison, a human hair has a diameter of 50–70 [micrometers]. Dust, pollen, and mold are typically about 10 [micrometers] in diameter.”); see also Particulate Matter: Basic Information, ENVTL. PROT. AGENCY, http://www.epa.gov/air/particlepollution/basic.html (last visited Apr. 24, 2011) (“The average human hair is about 70 micrometers in diameter—making it 30 times larger than the largest fine particle.”)

65. See GOODELL, supra note 49, at xxiv (explaining that PM “can trigger heart attacks and strokes, worsen asthma, cause irregular heartbeat, and lead to premature death.”); TVA III, 593 F. Supp. 2d at 821 n.5 (“NC Exh. 242 is a 2006 expert report commissioned by the EPA for reasons entirely unrelated to this lawsuit. In light of the resulting objectivity, the Court finds the report to be uniquely compelling in the area of premature mortality resulting from PM₂.₅ exposure.”).


67. McKeown, supra note 50, at 10 (citing ENVTL. PROT. AGENCY, OZONE AND YOUR HEALTH (1999)).


commercial crops;\textsuperscript{70} and produces haze that obscures scenic views, which harms tourism.\textsuperscript{71}

\section*{D. The Clean Air Act: A Cooperative Federalism Model}

Enacted in 1970 as the nation’s “first major, modern federal pollution control statute,”\textsuperscript{72} the CAA\textsuperscript{73} provides a cooperative federalism model\textsuperscript{74} in which the federal government sets national uniform standards\textsuperscript{75} and the states create regulatory schemes to meet this federal floor.\textsuperscript{76} The CAA directs the Environmental Protection Agency (EPA) to list criteria pollutants that are

\begin{itemize}
\item See, e.g., \textit{TVA III}, 593 F. Supp. 2d at 823–24 (“PM\textsubscript{2.5}, in particular sulfate, also has significant effects on visibility due to its efficient scattering of light,” which creates haze and obscures North Carolina’s scenic vistas at “cherished, pristine wilderness areas” and “world-famous attractions.”); see also Brief of Appellee at 44, \textit{TVA IV}, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) (citing \textit{TVA III}, 593 F. Supp. 2d 812, 823 (W.D.N.C. 2009)) (“PM\textsubscript{2.5} haze and other air pollution impacting visibility at [state-owned recreation and scenic area] vistas creates a difficult problem from both a social and economic perspective,” and diminishes “an extremely valuable resource to this state.”).
\item See generally Glicksman, supra note 72, at 721 (noting that cooperative federalism in environmental law “reflect[s] the understanding that, despite the creation of an extensive body of federal environmental restrictions, the states would continue to play an important role in the adoption and implementation of environmental policy, and that, in particular, they would remain free to supplement or exceed federally established goals or standards”); see also Holly Doremus & W. Michael Hanemann, \textit{Of Babies and Bathwater: Why the Clean Air Act’s Cooperative Federalism Framework Is Useful for Addressing Global Warming}, 50 ARIZ. L. REV. 799, 817 (2008) (noting that the CAA “was the first modern federal environmental statute to employ a ‘cooperative federalism framework,’ assigning responsibilities for air pollution control to both federal and state authorities”); Connecticut v. EPA, 696 F.2d 147, 151 (2d Cir. 1982) (characterizing the CAA as a “bold experiment in cooperative federalism”).
\item See John P. Dwyer, \textit{The Practice of Federalism under the Clean Air Act}, 54 MD. L. REV. 1183, 1195 (1995) (“Congress’s widely repeated justification for preempting less stringent state ambient air quality standards and certain stationary source emission standards . . . was the states’ natural tendency to compete in a ‘race-to-the-bottom’ for business. Because of their willingness to relax environmental standards to attract or keep economic development, states could not be trusted to adopt adequate standards.”).
\item See Robert L. Fischman, \textit{Cooperative Federalism and Natural Resources Law}, 14 N.Y.U. ENVTL. L.J. 179, 189 (2005). To achieve the NAAQS, states may tailor federal standards to local conditions, establish compliance strategies, implement permit programs, and enforce rules. \textit{See id.; see also} Talkington, supra note 50, at 961. (“In many ways the Clean Air Act embodies federalist ideals because it is a national program that delegates a great deal of management power to the states,”); Emma Hutchinson & Peter W. Kennedy, \textit{State Enforcement of Federal Standards: Implications for Interstate Pollution}, 30 RESOURCE & ENERGY ECON. 316, 336 (2008) (presenting a mathematical model which shows that “the EPA is able to monitor the adoption of technology-based standards more closely than it can monitor state-level enforcement, and that this causes an effective division of control between [federal and state agencies]”).
\end{itemize}
present in the ambient air as a result of emissions from many sources that "may reasonably be anticipated to endanger public health or welfare." The EPA then promulgates National Ambient Air Quality Standards (NAAQS) for these criteria pollutants, which currently include SO\(_2\), NO\(_x\), PM, ozone, carbon monoxide, and lead. EPA must establish for each criteria pollutant both a primary NAAQS that is sufficient to "protect the public health" within "an adequate margin of safety" and a secondary NAAQS in order "to protect the public welfare." EPA lists these standards as a maximum permissible amount of the pollutant in a quantity of air, with measurements averaged over a specific time interval. These ambient standards set forth the minimum levels of environmental quality that the EPA will tolerate, but states are free to enact more stringent standards. The NAAQS are considered the "heart" of the CAA because they require objective improvement in air quality throughout the nation.

States consist of one or more "air quality control regions," each of which EPA designates as being in either "attainment" or "nonattainment" for each of the criteria pollutants on a pollutant-by-pollutant basis. Nonattainment areas come under stricter federal control, which varies with respect to different

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78. See also National Ambient Air Quality Standards (NAAQS), ENVTL. PROT. AGENCY, http://www.epa.gov/air/criteria.html (last visited Feb. 8, 2011). EPA defines the pollution standards for the Act’s other air pollution programs, which are outside the scope of this Note. See, e.g., 42 U.S.C. § 7411 (new source performance standards); id. § 7412 (hazardous air pollutants); id. §§ 7470–7479 (standards for prevention of significant deterioration in attainment areas).
80. 42 U.S.C. § 7409(b) (2006). Both the criteria and the NAAQS are supposed to be reviewed every five years and revised when appropriate. Id. § 7409(d)(1).
81. See Harry Moren, Note, The Difficulty of Fencing in Interstate Emissions: EPA’s Clean Air Interstate Rule Fails to Make Good Neighbors, 36 ECOLOGY L.Q. 526, 528 (2009) (citing 40 C.F.R. § 50.3). For example, the PM2.5 NAAQS consists of an annual primary standard of 15 micrograms per cubic meter and a 24-hour primary standard of 65 micrograms per cubic meter. The secondary standard is the same. 40 C.F.R. § 50.7 (2010); National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 38,652 (July 18, 1997).
82. See Clean Air Act § 116, 42 U.S.C. § 7416 (2006). For example, North Carolina’s Clean Smokestacks Act requires in-state coal plants to reduce their SO\(_2\) and NO\(_x\) emissions to lower levels than the NAAQS. See N.C. GEN. STAT. § 143-215.107D(b)-(e) (2010).
83. See Train v. Natural Res. Def. Council, 421 U.S. 60, 66 (1975); see also Robert W. Adler, Integrated Approaches to Water Pollution: Lessons from the Clean Air Act, 23 HARV. ENVTL. L. REV. 203, 207 (1999) (noting NAAQS “are set at levels deemed necessary to protect human health and environmental quality, without regard to technological feasibility or economic impacts. These ambient standards are designed to address aggregate releases from multiple, usually diverse, pollution sources.”).
84. 42 U.S.C. § 7407(c) (2006). An air quality control region may span multiple states when appropriate. See id.
85. See id. § 7407(d)(1)(A). An area may remain "unclassified" if there is insufficient information about the area’s pollution. See id. § 7407(d)(1)(A)(iii).
pollutants. States are responsible for adopting state implementation plans (SIPs) that employ air pollution-reduction methods to provide for the "implementation, maintenance, and enforcement" of the NAAQS for each of the criteria pollutants. "A SIP both extensively analyzes the current air quality within the state, including individual source emissions, and models possible scenarios for NAAQS attainment based on the analysis." Thus the CAA gives states the freedom to balance their air pollution budgets according to their own economic policies. While NAAQS establish the minimum acceptable levels of environmental quality, they do not directly restrain the activities of any polluter. Instead, states primarily use a permitting process to implement SIP requirements, with each permit intended as a source-specific guidebook for CAA compliance for that polluting source. Once the EPA approves a SIP, the permits issued under the SIP are enforceable by the EPA and the state as federal law. Even after the EPA has approved a state's SIP, the agency has statutory authority under section 110(k)(5) to "call the SIP," that is, request its revision, if it fails to comply with a provision of the CAA. If after two years a state fails to submit an approved SIP or its approved SIP fails to meet the

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87. 42 U.S.C. § 7410(a)(1) (2006). If EPA rejects a SIP as inadequate, or a state fails to submit one, EPA may promulgate a federal implementation plan (FIP) for the area. See id. § 7410(c)(1)(A). A SIP must be revised when NAAQS change or new technology becomes available. See id. § 7410(a)(2)(H)(i) (stating that each SIP "shall" be revised "from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard"). If a state is untimely in revising its SIP, EPA may make the revision. See id. § 7410(c)(1). A SIP also must contain provisions for the compilation of data on ambient air quality. See id. § 7410(a)(2)(B)(i); David Woolley & Elizabeth Morris, Clean Air Act Handbook § 1.20 (West 2010) (setting out the general requirements for SIPs from Clean Air Act § 110(a)(2), 42 U.S.C. § 7410(a)(2)). See generally Arnold W. Reitze, Stationary Source Air Pollution Law 55–126 (2005) (describing the SIP process).

88. Moren, supra note 81, at 528 (citing 42 U.S.C. § 7410(a)(2)(B), (F), (K) (2006)).

89. See Union Elec. Co. v. EPA, 427 U.S. 246, 269 (1976) (noting states have "the power to determine which sources would be burdened and to what extent"); see also 42 U.S.C. § 7407(a) (2006) (noting states have "primary responsibility for assuring [their own] air quality"); Philip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. REV. 1692, 1697–98 (2001) ("Congress and the federal agency bear responsibility for setting forth the basic framework within which state agencies can act, defining relevant federal statutory terms, and instituting uniform minimum standards. State agencies then can supplement that framework and experiment with regulatory approaches that are consistent with it.").

90. See Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996) (noting that the permit is a "source-specific bible for Clean Air Act compliance" that "contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source").


minimum "completeness" criteria, EPA must promulgate a federal implementation plan (FIP) under the CAA, and the state is subject to EPA imposed sanctions.94

E. Overview and Critique of Interstate Air Pollution Controls under the CAA

States have largely failed to achieve the NAAQS.95 A critical reason for this failure is interstate air pollution, which is "generally accepted as a situation in which federal intervention is required," but which the CAA "has failed to fully address."96 Interstate air pollution problems and possible solutions have been widely considered and debated.97 Scientific research and modeling studies demonstrate that air pollutants travel long distances, with geographic transport patterns being influenced by the type of pollutant, location of the emissions, weather, and topography.98 Consequently, air pollution in one state is partly caused by emissions from another state, with the severity of the interstate impact primarily dependent on the quantity and character of the emissions themselves, the locations of the sources, and the height of the source stacks.99 A National Research Council report identified pollutant transport across multistate regions as one of the seven major air quality challenges facing the United States in the coming decade.100 While addressing interstate pollution externalities is a common justification for developing federal environmental

94. See William V. Luneburg, Drawing Boundaries for Air Quality Control Under the Clean Air Act: The Importance of Not Being Nonattainment, 1 PITT. J. ENVTL PUB. HEALTH L. 61, 65 (2006) ("[S]erious legal and economic sanctions may attend missing [the NAAQS] if the failure is due to inadequate implementation efforts (e.g., increased restrictions on new source growth and cut-offs of federal highway funds to a state.").
95. See, e.g., Bergin et al., supra note 48, at 4677 (noting that in 2002, more than 50 percent of the U.S. population lived in counties where air pollution exceeded the NAAQS, particularly for ozone and particulate matter); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 3.10, at 258 (1986) (noting that SIPs "have failed conspicuously to achieve ambient goals").
96. Kiefer, supra note 54, at 673; see also Craig N. Oren, Clean Air and Interstate Transport: Seeing the Big Picture, 10 N.Y.U. ENVTL. L.J. 196, 204 (2002) ("Clean Air Act's interstate pollution provisions have not worked well.").
97. See, e.g., Hutchinson & Kennedy, supra note 76, at 316-44; Kiefer, supra note 54; Oren, supra note 96; Geoffrey L. Wilcox, New England and the Challenge of Interstate Ozone Pollution under the Clean Air Act of 1990, 24 B.C. ENVTL. AFF. L. REV. 1 (1996); Bergin et al., supra note 58.
98. See, e.g., Bergin et al., supra note 48.
99. See Kenneth L. Hirsch & Steven Abramovitz, Clearing the Air: Some Legal Aspects of Interstate Air Pollution Problems, 18 DUQ. L. REV. 53, 54 (1979); see also Richard L. Revesz, Federalism and Interstate Environmental Externalities, 144 U. PA. L. REV. 2341, 2376 (1996). For a given stack height and location, a source's impact on a downwind state's air quality increases as emission levels increase and distance between the source and downwind state's border decreases. For a given location and emission level, as stack height increases, the source will have a smaller air quality impact closer to downwind states and larger impact on states farther away. Id.
100. See NAT'L RES. COUNCIL, AIR QUALITY MANAGEMENT IN THE UNITED STATES 5 (2004), available at http://www.nap.edu/openbook.php?record_id=10728&page=5 (identifying as a "key challenge[]" the ability to understand and address "multistate and international transport of pollutants").
arguably "little of the regulatory regime actually advances this goal." 102

By policing only intrastate rather than interstate pollution, it has been suggested that the CAA represents a "bizarre twist on the federal role" that has "actually caused much of today's interstate pollution." 103 Indeed, in the early years of the CAA, some states satisfied NAAQS by allowing power plants within their borders to build very tall smoke stacks to disperse air pollution to downwind states. 104 While the CAA principally "focuses a state's attention on its own air quality, and does little to encourage states to minimize air pollution that drifts across state boundaries," 105 the Act does contain provisions that deal with interstate air pollution, and the EPA has also taken steps to address the problem. The details of these complex regional pollution control efforts are beyond the scope of this Note, and have been widely discussed and analyzed elsewhere. 106 This Note summarizes the main statutory provisions and federal regulatory actions taken to address interstate air pollution, and offers some reasons why they have not wholly solved the problem.

1. CAA Statutory Provisions

As part of the 1990 CAA amendments, Congress enacted Title IV, known as the Acid Rain Program (ARP), to control the emission of acid rain precursors $SO_2$ and $NO_X$ from coal plants. 107 The ARP set an innovative cap-

101. See, e.g., Dwyer, supra note 75, at 1219 ("The usual justifications for a dominant federal role in environmental regulation are to take advantage of economies of scale with regard to research and data collection, to regulate interstate pollution, and to replace unduly weak state regulation.").

102. Revesz, supra note 99, at 2414; see also id. at 2341 (noting that the "interstate externalities justification is theoretically compelling but little of the regulatory regime actually advances this goal"); Thomas W. Merrill, Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy, 21 ECOLOGY L.Q. 485 (1994) (arguing that of the three customary explanations for centralized control—interstate externalities, a universal right to an unpolluted environment, and the race-to-the-bottom or "protectionism" rationale—only the third is generally apparent in the resultant federal legislation).


104. See Revesz, supra note 99, at 2349 (explaining that "the distance that pollution travels increases with the height of the stack"). While Congress largely curtailed this practice with the addition of section 123 in the 1977 amendments, Clean Air Act § 123, 42 U.S.C. § 7423 (2006), which placed restrictions on stack height, "[t]all stacks remain a means by which excessive pollution can be externalized." Revesz, supra note 99, at 2354.

105. Kiefer, supra note 54, at 635.

106. See, e.g., Kiefer, supra note 54; Robert A. Wyman, Jr. & Janda D.R. Kuhmert, Regional SIP Issues, in THE CLEAN AIR ACT HANDBOOK 109, 109-30 (Robert J. Martineau & David P. Novello eds., 2 ed. 2004); Moren, supra note 81; Caplan, supra note 55; McCubbin, supra note 92.

and-trade system for SO₂ emissions\textsuperscript{108} and "a more traditional regulatory approach" for NOₓ emissions that set facility-specific limits.\textsuperscript{109} The ARP has been widely heralded as a success, particularly the SO₂ cap-and-trade program, which has resulted in lower regulatory costs for both regulators and the regulated community.\textsuperscript{110}

Other statutory provisions include section 176(A), which authorizes EPA to designate "transport regions" impacted by a shared interstate air pollution problem and establish a "transport commission" comprised of state representatives to recommend mitigation measures.\textsuperscript{111} In section 184, Congress itself established the first such transport region: the Northeast Ozone Transport Region for twelve northeastern and mid-Atlantic states\textsuperscript{112} and the District of Columbia.\textsuperscript{113} The Region’s Ozone Transport Commission established the NOₓ Budget Program—a NOₓ cap-and-trade program designed to reduce NOₓ emissions from stationary sources within the region in order to promote attainment of the ozone NAAQS. Implemented from 1999 to 2002, it was largely based on the ARP, except that a group of collaborating states set the emission caps, rather than Congress.\textsuperscript{114} In 2003, EPA replaced the commission’s program with the NOₓ Budget Trading Program under the NOₓ SIP Call.\textsuperscript{115}

Two other CAA provisions specifically address interstate air pollution. First, section 110(a)(2)(D), or the "good neighbor provision," requires SIPs to, among other things, prohibit emissions that "contribute significantly to nonattainment in, or interfere with maintenance" of the NAAQS in another state.\textsuperscript{116} Second, section 126(b) gives any state or political subdivision the right to petition EPA to find that "any major source or group of stationary sources [in

\textsuperscript{108} See Moren, supra note 81, at 530 ("Title IV of the Act mandates a maximum tonnage limit of annual SO₂ emissions for the plants (a 'cap') and directs EPA to allocate allowances, equivalent to one ton of emissions per year, among the plants. The Act then allows the plants to transfer (or 'trade') the allowances.").

\textsuperscript{109} See id. at 531.

\textsuperscript{110} See Schoenbrod, Schwartz, & Sandler, supra note 103, at 289 (noting that under the ARP, the costs of reducing SO₂ from power plants dropped by more than half, saving the public billions); Moren, supra note 81, at 530–31 (noting that the ARP reduced the economic costs of regulatory compliance for the power industry).

\textsuperscript{111} See 42 U.S.C. § 7506(a)–(b) (2006).


upwind states] emits or would emit air pollution [into downwind states] in violation of the prohibition in section 110(a)(2)(D)(ii).” In turn, section 110(a)(2)(D)(ii) requires a SIP to “contain adequate provisions” that will insure compliance with the “provisions relating to interstate and international pollution abatement”—sections 126 and 115, respectively. If EPA grants such a petition, the sources must comply with EPA emissions limitations or shut down within at most three years. Such direct regulation under section 126 of sources that violate the good neighbor provision “depart[s] from the general precept that the states regulate their own emission sources.” As will be demonstrated, however, these statutory provisions have not solved interstate air pollution problems.

2. EPA Rulemaking under the CAA

i. NOX SIP Call and Section 126 Rule

Following successful implementation of the ARP, EPA created a NOX cap-and-trade program in the controversial NOX SIP Call Rule. Lacking Title IV’s express congressional authorization and instruction to implement such programs, EPA adopted the NOX SIP Call program pursuant to its authority to “call,” that is to request revisions to, SIPs for violations of the good neighbor provision. The rule regulates NOX emissions, primarily from power plants, in

117. Id. § 7426(b). The CAA also permits transport commissions to ask EPA to find that the SIP of any state in the transport region is inadequate to comply with the section 110(a)(2)(D) good neighbor provision. See id. § 7506a(c).

118. Id. § 7426. While section 126(b) grants states EPA petitioning power, section 126(a) operates as a notice provision, requiring states to provide written notice to other affected states about new or existing major sources that may significantly contribute to air pollution levels in excess of NAAQS. See id. § 7426(a).

119. Id. § 7415.

120. See id. § 7426(c); see also Wyman, supra note 106, at 119.

121. Moren, supra note 88, at 534.

122. See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,359 (Oct. 27, 1998). The rule required emission reduction measures to be in place by May 1, 2003. See id. at 57,366; see also Finding of Significant Contribution and Rulemakings for Certain States in the Ozone Transport Assessment Group Region, ENVTL. PROT. AGENCY, http://www.epa.gov/ttn/naaqs/ozone/rto/sip/index.html (last visited Feb. 20, 2011) (“The NOX SIP call builds upon analyses conducted by the Ozone Transport Assessment Group ... a partnership between the EPA, the Environmental Council of the States and various industry and environmental groups which assessed the long-range transport of ozone and ozone precursors.”).

123. See McCubbin, supra note 92, at 51 (“To issue the NOX SIP Call pursuant to section 110(a)(2)(D), EPA faced enormous challenges. EPA had to determine not only which states' emissions were contributing to ozone levels in distant downwind states (and to what degree), but also had to define which emissions would be considered 'significant,' for nowhere does the Clean Air Act define the phrase 'contribute significantly' or provide any guidance for its interpretation. In addition, EPA had to develop a regulatory mechanism that would force the states to reduce their emissions while, at the same time, leaving each state the flexibility to choose which pollution control measures to adopt in order to obtain the necessary reductions.”).
twenty-two states and the District of Columbia to address NO\textsubscript{X} transport that has prevented states along the eastern seaboard from meeting NAAQS requirements for ozone\textsuperscript{124} EPA required each jurisdiction to revise its SIP to meet the maximum NO\textsubscript{X} emission budget that EPA had set for it.\textsuperscript{125} While EPA was developing the NO\textsubscript{X} SIP Call, eight northeastern states petitioned the agency under CAA section 126 to find that NO\textsubscript{X} emissions from certain upwind states were interfering with their ability to meet the NAAQS for ozone.\textsuperscript{126} EPA determined that sources in twelve states\textsuperscript{127} and the District of Columbia were in violation of the good neighbor provision\textsuperscript{128} and imposed federal reduction requirements on these sources by mandating that they participate in the cap-and-trade program EPA had developed for the NO\textsubscript{X} SIP Call.\textsuperscript{129} While both the NO\textsubscript{X} SIP Call and section 126 petition were ultimately upheld in court\textsuperscript{130} and have produced beneficial results,\textsuperscript{131} protracted legal battles delayed their implementation.\textsuperscript{132}

\textit{ii. Clean Air Interstate Rule}

In light of persistent ozone nonattainment problems in the northeast, as well as increasing state difficulty attaining the PM\textsubscript{2.5} NAAQS, EPA issued the Clean Air Interstate Rule (CAIR) in 2005.\textsuperscript{133} CAIR imposed a market-based program on SO\textsubscript{2} and NO\textsubscript{X}—the two main ozone and PM precursors from

\textsuperscript{124} For an analysis of the unsuccessful legal challenge to the NO\textsubscript{X} SIP Call brought in federal court by industries and eight of the twenty-three upwind states, see McCubbin, \textit{supra} note 92. The district court held that the "resulting [NO\textsubscript{X}] emissions budgets, while appearing to restrict the states' choices, in fact allowed each state sufficient flexibility to implement a variety of pollution control measures, thereby preserving the careful balance of authority mandated by the cooperative federalism of the Clean Air Act." \textit{Id.} at 66.

\textsuperscript{125} \textit{See id.}


\textsuperscript{127} Including Delaware, Indiana, Kentucky, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia.

\textsuperscript{128} \textit{See Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 64 Fed. Reg. 28,250} (May 25, 1999).


\textsuperscript{130} \textit{See Michigan v. EPA, 213 F.3d 663, 669–70} (D.C. Cir. 2000) (upholding the NO\textsubscript{X} SIP Call); Appalachian Power Co. v. EPA, 249 F.3d 1032, 1047–52 (D.C. Cir. 2001) (holding that EPA has the authority to impose direct federal controls on individual sources found to contribute significantly to nonattainment in downwind states, irrespective of the requirements of the NO\textsubscript{X} SIP Call).

\textsuperscript{131} \textit{See, e.g., Moren, \textit{supra} note 88, at 533–35} (describing the NO\textsubscript{X} SIP Call and its successes, including leading to EPA's re-designation of 83 of the region's 126 nonattainment areas to attainment areas for the eight-hour ozone NAAQS and a reduction in biomass loss from ozone exposure).

\textsuperscript{132} \textit{See Caplan, \textit{supra} note 55, at 181–85.}

\textsuperscript{133} \textit{See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162 (May 12, 2005)} (codified at 40 C.F.R. pts. 96–97).
electric power plants in the eastern and central United States.\textsuperscript{134} CAIR established three separate cap and trade programs: an annual \( \text{SO}_2 \) program, an annual \( \text{NO}_X \) program, and a seasonal \( \text{NO}_X \) program.\textsuperscript{135} EPA modeled the CAIR’s \( \text{SO}_2 \) rule after the ARP’s \( \text{SO}_2 \) trading program and “intended for CAIR to subsume the \( \text{NO}_X \) SIP Call program." \textsuperscript{136} The CAIR capped regional \( \text{SO}_2 \) and \( \text{NO}_X \) emissions and allocated emission reductions among the regulated twenty-eight states and the District of Columbia. Pursuant to the good neighbor provision, states subject to the CAIR were required to revise their SIPs to achieve reductions.\textsuperscript{137} While permitted to use other measures, all states chose to adopt EPA’s model cap-and-trade program.\textsuperscript{138} EPA also used this model emissions trading program for the CAIR’s FIP, which served as the default until the states submitted, and EPA approved, their revised SIPs.\textsuperscript{139}

Numerous petitioners, including North Carolina, challenged the CAIR, arguing that, among other things, it lacked reasonable measures to assure that upwind states would abate their unlawful emissions as required by the CAA’s good neighbor provision.\textsuperscript{140} CAIR’s regionwide emission trading system permitted states contributing to downwind nonattainment in another state to buy emission allowances to comply with the cap, rather than actually reduce their emissions. The court held that such a scheme violates the CAA, which requires that programs eliminate emissions from the specific sources contributing to downwind nonattainment areas.\textsuperscript{141} The court also concluded that

\begin{itemize}
  \item 134. See id.; see also Clean Air Interstate Rule: Basic Information, ENVTL. PROT. AGENCY, http://www.epa.gov/interstateairquality/basic.html (last visited Feb. 8, 2011). For a description of the changes finalized by CAIR and critique of their validity, see Jamie Gibbs Pleune, Do We CAIR About Cooperative Federalism in the Clean Air Act?, 2006 UTAH L. REV. 537 (2006).
  \item 135. See Kiefer, supra note 54, at 652 (“Continuing a strategy of interstate air pollution control through market-based emissions trading programs, EPA replaced the \( \text{NO}_X \) SIP Call Trading Program with the CAIR ozone-season \( \text{NO}_X \) Trading Program to reduce ozone. . . . [And for] \( \text{PM}_2.5 \) regulation, EPA added an annual \( \text{NO}_X \) Trading Program, and streamlined the Acid Rain \( \text{SO}_2 \) Trading Program with CAIR’s \( \text{SO}_2 \) Trading Program.”); Matthew D. Tait, A Remedy Even the Plaintiffs Don’t Like. The D.C. Circuit’s Vacatur of the Clean Air Interstate Rule North Carolina v. E.P.A., 16 MO. ENVTL. L. & POL’Y REV. 552, 563 (2009) (noting that EPA designed CAIR’s three separate cap and trade programs “to mirror the structure of the \( \text{NO}_X \) SIP Call and to coordinate with the Acid Rain Program”); see also WOOLEY & MORSS, supra note 87 (“As the \( \text{NO}_X \) SIP Call was only a seasonal (summer) regulation, and CAIR was an annual one, the EPA decided to implement two separate \( \text{NO}_X \) trading programs in CAIR to avoid complications.”).
  \item 136. See Moren, supra note 88, at 536.
  \item 137. See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162, 25,162 (May 12, 2005) (codified at 40 C.F.R. pts. 96–97) (“Based on State obligations to address interstate transport of pollutants under section 110(a)(2)(D) of the Clean Air Act (CAA), EPA is specifying statewide emissions reduction requirements for \( \text{SO}_2 \) and \( \text{NO}_X \).”).
  \item 138. WOOLY AND MORSS, supra note 87 (“All states subject to the CAIR chose to participate in regional trading.”).
  \item 141. But see Kiefer, supra note 54, at 671–72 (arguing that “[c]onceptually, CAIR did address the goal of section 110(A)(2)(D)(i), which sought to prevent out-of-state emissions from hindering the efforts of a state in attaining NAAQS for a particular pollutant, although as a region-wide effort”).
\end{itemize}
EPA ignored statutory language requiring SIPs to contain adequate provisions to preclude sources from interfering with NAAQS maintenance in downwind states.\textsuperscript{142} According to the court, EPA failed to consider upwind sources that interfere with downwind maintenance when it established the CAIR, effectively ignoring those states that barely meet attainment due in part to upwind sources.\textsuperscript{143} In sum, the court determined that CAIR was fatally flawed in five of the nine issues raised by challengers.\textsuperscript{144} The D.C. Circuit originally vacated the rule,\textsuperscript{145} but, in order to "at least temporarily preserve the environmental values covered by CAIR," it eliminated the vacatur on rehearing and left the CAIR in place during remand rulemaking.\textsuperscript{146}

3. \textit{Critique of Interstate Air Pollution Approaches under the CAA}

A first critique of the CAA is that its emission standards for stationary sources are not a "well-targeted means for controlling interstate externalities"\textsuperscript{147} since the standards only restrict the pollution emitted from each source, and fail to regulate the quantities or locations of the sources within a state.\textsuperscript{148} Although the 1977 and 1990 CAA amendments attempted to address regional air quality challenges by placing constraints on stack height and creating the ARP and regional transport commissions, as discussed above,\textsuperscript{149} these strategies have not solved the pollution transport problem. The stack height and acid rain provisions offer "at best a partial response to the problem"\textsuperscript{150} since they pertain only to two criteria pollutants (SO\textsubscript{2} and NO\textsubscript{x}), and only to electric utilities.\textsuperscript{151} A criticism of interstate transport commissions is that they have only the power to study transport problems and make recommendations to the EPA, and lack independent decision-making authority.\textsuperscript{152}


\textsuperscript{143} See id.

\textsuperscript{144} See Tait, supra note 135, at 565 (2009) ("Of the five fatal flaws the court found in the CAIR rule, three were unique issues of the rule itself; while two of the flaws found were very close to similar measures in the Acid Rain Program and the NO\textsubscript{x} SIP Call that were previously found to be acceptable by the court."); id. at 553 (summarizing the range of objections to the CAIR).

\textsuperscript{145} See id. at 552–53 ("Ultimately the court held that because the EPA adopted CAIR as one integral action, the only proper remedy was to vacate CAIR completely, and its associated federal implementation plan (FIP), and remand to the EPA.")

\textsuperscript{146} North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008) ("[N]otwithstanding the relative flaws of CAIR, allowing CAIR to remain in effect until it is replaced by a rule consistent with [the] opinion would at least temporarily preserve the environmental values covered by CAIR."). Consequently, the CAIR took effect in January 2009 for the annual NO\textsubscript{x} program and in May 2009 for the ozone season NO\textsubscript{x} program. WOOLEY & MORSS, supra note 87, § 3:8.

\textsuperscript{147} Revesz, supra note 99, at 2350.

\textsuperscript{148} See id.

\textsuperscript{149} See supra Part I.E.1.

\textsuperscript{150} Revesz, supra note 99, at 2350.

\textsuperscript{151} See id. at 2359 (citing Clean Air Act § 401(b), 42 U.S.C. § 7651(b) (2006)).

\textsuperscript{152} See Caplan, supra note 55, at 195.
While this leaves CAA sections 110(a)(2)(D) and 126(b) as the remaining available avenues to comprehensively address the interstate pollution problem, these provisions, too, have received criticism. For example, Professor Richard L. Revesz considers them "wholly ineffective," 153 faulting the EPA's and the federal courts' failure "to define a coherent and logical body of law"154 and offering three improvements to address the CAA's shortcomings. First, he argues for a determination of whether the stack height and location of a proposed source "are motivated by an effort to externalize the effects of pollution;" he maintains that the current, limited inquiry of "whether the emissions of a proposed source in an upwind state are excessive" does not adequately address interstate spillover.155 Second, he calls for an assessment of the permissibility of upwind pollution even when there is no NAAQS violation in a downwind state; this would promote a proper allocation of "the downwind state's margin for growth" and safeguard the downwind state's "legitimate interests" in requiring stricter air quality standards.156 Finally, Revesz favors undertaking "a dynamic analysis, which examines desirable allocations of the pollution-control burden between upwind and downwind sources in light of economic growth," over the current analysis that considers the problem "statically, at one point in time."157

Moreover, while EPA has increasingly acted under CAA sections 110(a)(2)(D) and 126, reliance on EPA's delegated regulatory authority to tackle interstate pollution has been criticized because parties strategically use judicial review of EPA rulemakings "to delay and disable" well-intentioned agency action "at the expense of the interests of other states and the environment."158 For example, EPA's lengthy and costly rulemakings to address the ozone transport problem through implementing the NOx SIP Call and granting section 126 petitions were met by litigation at every step of the way.159 Moreover, the section 126 process is subject to immense agency discretion, which has proven problematic in the past.160 In light of the federal

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153. See Revesz, supra note 99, at 2344.
154. Id.
155. Id.
156. Id. at 2345.
157. Id.
158. Caplan, supra note 55, at 189.
159. See supra Part I.E.2.i.
160. For example, during the first several decades of the Act, EPA rejected every state petition it received. See id.; see also Nigel Barrella, North Carolina v. Tennessee Valley Authority, 35 HARV. ENVTL. L. REV. 247, 250 (2011) ("From 1977 to 1998 EPA never granted [a section 126(b)] petition, and since 1998 EPA has still generally avoided or denied such petitions, often by claiming that they are mooted by contemporaneous rulemaking."); Vickie L. Patton, The New Air Quality Standards, Regional Haze and Interstate Air Pollution Transport, 28 ENVTL. L. REP. 10155, 10156 (1998) ("Since the adoption of the 1970 Clean Air Act, . . . EPA has resisted restrictions on downwind pollution transport or allocating emissions reduction responsibilities among states to address transboundary pollution."). The weaker versions of sections 110(a)(2)(D) and 126 that existed in earlier versions of the Act may partly explain EPA's failure to utilize its section 126 authority. See Caplan, supra note 55, at
legal and regulatory regime’s shortcomings, it is important to determine the nature and scope of common law nuisance’s role in addressing regional air pollution problems.

II. PUBLIC NUISANCE: FILLING IN THE REGULATORY GAPS TO ADDRESS INTERSTATE AIR POLLUTION

A. Types of Common Law Nuisance Actions

Three common law nuisance theories can arise in the interstate air pollution context: (1) the federal common law of nuisance; (2) the nuisance law of the affected state; and (3) the nuisance law of the source state. This Part explains why the CAA preempts the first two options, and then demonstrates why North Carolina appropriately brought suit under source state nuisance. I argue that, as a matter of law, the Fourth Circuit erred in holding that public nuisance doctrine does not provide remedies to states for interstate air pollution.

1. Federal Common Law Nuisance Actions

Prior to the passage of the Clean Water Act (CWA) and CAA, the U.S. Supreme Court developed a body of federal common law nuisance to adjudicate parens patriae pollution disputes between states. Following the enactment of these comprehensive pollution control statutes, the question arose whether they preempted federal common law nuisance claims. In City of Milwaukee v. Illinois, the Supreme Court answered in the affirmative by holding that the comprehensive nature of the 1972 CWA amendments precluded use of the federal common law. The Court reaffirmed this position in Middlesex County Sewerage Authority v. National Sea Clammers Association, stating that “the federal common law of nuisance is entirely preempted by the more comprehensive scope” of the CWA. Although the Supreme Court has not directly addressed whether the CAA bars federal common law nuisance actions concerning regulated criteria pollutants, the same
reasoning suggests that it would. If federal common law is not available, the question then becomes whether state public nuisance laws can provide a remedy.

2. Affected State versus Source State Common Law Nuisance Actions

The nuisance law of a particular state may be “defined in statute,” a “creature of the courts,” or both. For example, Alabama has codified its common law nuisance principles, defining a nuisance as “anything that works hurt, inconvenience, or damage to another” and a public nuisance as “one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals.” Tennessee does not have a nuisance statute; its courts follow the Restatement (Second) of Torts section 821B, which defines a public nuisance as “an act or omission that unreasonably interferes with or obstructs rights common to the public.”

The CWA and CAA contain materially identical saving clauses, which preserve state common law remedies, with one important exception concerning interstate pollution. The CWA’s saving clause is contained in sections 505(e) (2006) (providing that the CWA does not “restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief”).

166. See Crider, supra note 39, at 643 (explaining why “it is highly unlikely that the Supreme Court would uphold a federal common law nuisance action in an interstate air pollution suit”). Note, however, that the public nuisance claims in Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), cert. granted, 178 L. Ed. 2d 530 (2010) (No. 10-174), and Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), vacated, 607 F.3d 1049 (5th Cir. 2010), were brought under the federal common law of nuisance since carbon dioxide is not regulated under the CAA as a criteria air pollutant requiring NAAQS. These cases have not been decided on the merits, but there is a strong likelihood that the public nuisance claim under federal common law will be upheld. For further discussion, see generally Thomas W. Merrill, Global Warming as a Public Nuisance, 30 COLUM. J. ENVTL. L. 293 (2005); David A. Grossman, Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation, 28 COLUM. J. ENVTL. L. 1 (2003); Sarah Olinger, Filling the Void in an Otherwise Occupied Field: Using Federal Common Law to Regulate Carbon Dioxide in the Absence of a Preemptive Statute, 24 PACE ENVTL. L. REV. 237 (2007); James R. Drabick, “Private” Public Nuisance and Climate Change: Working Within, and Around, the Special Injury Rule, 16 FORDHAM ENVTL. L. REV. 503 (2005).

167. G. Nelson Ill Smith, Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion, 36 SANTA CLARA L. REV. 39, 49 (1995) (citations omitted) (“In some instances, what may be considered a nuisance is poorly defined in statute, while in some states nuisance appears to be a creature of the courts.”); see also Antolini, supra note 5, at 768 (noting that “American states incorporated the notion of public nuisance both through common law and by statute”); Abrams, supra note 3, at 365; Reitz, supra note 87, at 27 (“Today, [statutory] nuisance laws primarily are used to regulate air pollutants not covered by the comprehensive Clean Air Act,” such as odors.).

168. ALA. CODE § 6-5-120 (2010).

169. Id. § 6-5-121.


171. See, e.g., Roberie v. VonBokern, 2006 WL 2454647 at *3 (Ky. 2006) (citing RESTATEMENT (SECOND) OF TORTS § 821B (1977). This Note will not further explore Kentucky nuisance law since the district court found that none of the Kentucky-based plants created a public nuisance in North Carolina.

172. 33 U.S.C. § 1365(e) (2006) (providing that the CWA does not “restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief”).
The CAA's saving clause also consists of two provisions: section 304(e), which is identical to CWA section 505(e), and section 116.175

In International Paper Co. v. Ouellette, the Supreme Court interpreted the CWA's saving clause to preserve interstate nuisance claims brought "pursuant to the law of the source State" only.176 The law of the affected state is, however, preempted by the CWA.177 Lower courts have subsequently extended the Ouellette holding to the CAA.178 Thus, because the CWA and, by inference, the CAA preempt both federal common law nuisance and the nuisance law of the affected state, the nuisance law of the source state governs public nuisance actions against interstate pollution.179

B. A Tale of Two Courts in North Carolina v. TVA

1. The District Court Properly Applied Source State Nuisance Law

Both Alabama and Tennessee have long recognized public nuisance common law claims.180 The issue in North Carolina v. TVA was whether, under

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173. Id. at § 1370 (providing that the CWA does not "preclude or deny the right of any State or political subdivision . . . or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution").


175. 42 U.S.C. § 7416 (2006) (saving from pre-emption "any requirement respecting control or abatement of air pollution").

176. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (emphasis in original). The issue in the case was whether the CWA "pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York." Id. at 483. The Court held that the plaintiff was barred from bringing an action under Vermont's law, but that it could bring suit in Vermont court against the New York-based polluter under New York's (the source state's) nuisance law. See id. at 497.


178. See, e.g., Ouellette v. Int'l Paper Co., 666 F. Supp. 58, 62 (D. Vt. 1987) ("We feel the same concerns that led the Ouellette Court to require application of the source state's law in the interstate water disputes are equally applicable to plaintiffs' air claims."); Her Majesty the Queen in Right of the Province of Ont. v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989) (applying Ouellette to the CAA); Gutierrez v. Mobile Oil Corp., 798 F. Supp. 1280, 1285 (W.D. Tex. 1992) (stating that a decision that the CAA preempts state common law actions would "entirely preclude any compensatory relief that . . . plaintiffs may show is justified," which "would not further the goals of the CAA or the intent of Congress").

179. See Ouellette, 479 U.S. at 497 ("[N]othing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State."). For a critique of the Ouellette holding and argument for allowing the nuisance laws of the affected state, see generally Ann M. Lininger, Narrowing the Preemptive Scope of the Clean Water Act as a Means of Enhancing Environmental Protection, 20 HARV. ENVTL. L. REV. 165 (1996); Heimert, supra note 86, at 481.

180. See, e.g., Penn-Dixie Cement Corp. v. City of Kingsport, 225 S.W.2d 270, 273 (Tenn. 1949) ("It is generally recognized that whatever is injurious to human life or detrimental to health, or whatever deprives the inhabitants of pure, uncontaminated and inoffensive air, constitutes a public nuisance.")
the laws of Alabama and Tennessee, TVA's plants cause a public nuisance in North Carolina. The district court applied Alabama law to find that TVA's emissions from its Widows Creek plant constitute such a public nuisance. The court based its finding on the plant's proximity to North Carolina, the air quality impacts of its emissions, the substantial health and environmental harms caused by the resulting PM$_{2.5}$ and ozone, and the feasibility and affordability of available pollution control technology. The district court then exercised its equitable authority under Alabama law to abate the public nuisance. Under Alabama law, injunctive relief is appropriate if the "nuisance and harmful damage to complainant may be abated at reasonable cost and effort on respondent's part." Based on undisputed expert testimony, the court found that "it is financially feasible for TVA to bear the costs of the installation, maintenance, and year-round operation of the pollution control technology" that it ordered for the Alabama-based plant. In a similar analysis, the district court held that TVA's emissions from three of its Tennessee plants constitute a public nuisance in North Carolina under Tennessee common law. Again the court specified emissions limits and completion deadlines, and ordered TVA to pay for the installation, maintenance, and continuous operation of pollution control technology at these plants.

After determining that the "greatest negative impacts from pollution emitted by TVA power plants accrue close to those plants, with lesser impacts at greater distances," the district court held that emissions from TVA's seven other power plants in Alabama, Tennessee, and Kentucky did not cause a public nuisance in North Carolina under the laws of those three source states.

(citation omitted) (internal quotation marks omitted)); Hundley v. Harrison, 26 So. 294, 294 (Ala. 1898) ("[E]very man has a right, by the common law, to . . . pure air.").


182.  See id. at 821–25, 830.

183.  See id. at 830 ("TVA's conduct in failing to install readily available pollution controls on Widows Creek constitutes a course of conduct . . . that, in its natural and foreseeable consequences, is proximately caus[ing] the hurt, inconvenience, [and] damage.").


185.  Martin Bldg. Co., 124 So. at 85; see also Smith, supra note 159, at 50 ("[T]his attempt to balance rights [between that of the property owner and public and neighboring land owners], as opposed to establishing a comprehensive statutory scheme, causes a great deal of confusion for litigants.").


187.  See id. at 831.

188.  See id. at 827–28, 831–34; see also Brief of Appellee at 11, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) ("TVA sets its own electricity rates, which are currently among the lowest in the country. North Carolina's utility economics expert demonstrated that TVA could easily absorb between $3–$5 billion in additional pollution controls, which at most would impact average customers by $3 to $4 a month." (internal citations omitted)).

189.  TVA III, 593 F. Supp. 2d at 825.
The court explained that these other plants “do not have nearly the same impact on North Carolina’s air as the easternmost four.”

This case presents a classic example of the type of supplemental state common law action to abate air pollution expressly preserved by the CAA. Not only did the district court’s partial injunctive relief abate an unreasonable interference with a public interest, but it also promoted the CAA’s pollution reduction goals. However, the Fourth Circuit disagreed and reversed the district court’s decision.

2. The Fourth Circuit Muddled the Application of Nuisance Law in Contravention of the Goals of Public Nuisance and the CAA

The Fourth Circuit panel unanimously held that the district court’s ruling was flawed for three main reasons: (1) the injunction undermined principles of federalism by applying North Carolina law extraterritorially to TVA’s plants in Alabama and Tennessee, (2) TVA’s emissions cannot constitute a public nuisance under Alabama’s and Tennessee’s state nuisance laws because the emissions are expressly permitted and the plants are not operated negligently, and (3) the CAA preempts common law nuisance actions where the criteria pollutants at issue are comprehensively regulated. Finally, the court noted that North Carolina had several alternative remedies available to it in lieu of a public nuisance action. This Part explains why, as a matter of law, the Fourth Circuit’s conclusions were in error.

i. The District Court Did Not Apply North Carolina Law Extraterritorially

The Fourth Circuit held that the district court’s injunction “compromised principles of federalism” by improperly applying North Carolina’s state law, the Clean Smokestacks Act, extraterritorially, in direct contradiction with the

190. Id. at 826.
191. See 42 U.S.C. §§ 7416, 7604(e) (comprising the CAA analogs of the CWA’s saving clause). The Ouellette Court held that the CWA saving clause “specifically preserves” common law nuisance actions under source state law. Int’l Paper Co. v. Ouellette, 479 U.S. 481, 479 (1987).
192. See TVA IV, 615 F.3d 291, 311–12 (4th Cir. 2010).
193. See id. at 306–07.
194. See id. at 309–11.
195. See id. at 302–07.
196. See id. at 310–11.
197. Id. at 306.
198. In 2002, North Carolina passed the North Carolina Clean Smokestacks Act, which requires the state’s fourteen large coal-fired power plants “to reduce their emissions of NOx and SO2 to levels even lower than those specified in EPA regulations promulgated pursuant to the Clean Air Act.” Id. at 297 (quoting N.C. GEN. STAT. § 143-215.107D(b)–(e) (2010)); see also Petition at 1, Rulemaking on Section 126 Petition from North Carolina to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed. Reg. 25,328 (Apr. 28, 2006) (to be codified at 40 C.F.R. pts. 51, 52, 72, 73, 74, 78, 96, 97) (No. EPA-HQ-OAR-2004-0076), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2004-0076-0002 (“The State has gone beyond federal requirements in order to reduce the
Supreme Court's decision in *Ouellette*, which emphasized that a "court must apply the law of the State in which the point source is located." While the Fourth Circuit conceded that the district court had recognized the appropriate standard, it declared that "for all practical purposes" the lower court did "little more than mention the black letter nuisance law of Alabama and Tennessee on its way to crafting a remedy derived entirely from the North Carolina Act."

This conclusion is surprising given the lower court's careful analysis of each of the three source state nuisance laws and its ultimate conclusion that, in light of the "strict requirements as to both causation and unreasonableness of the harm," only four of the eleven plants constituted a nuisance. Consistent with source state nuisance law, North Carolina sought to prove that TVA's emissions were "at an unreasonable rate" and that "the responsible thing to do would be to take some action to reduce those emissions at a faster rate than [TVA] currently plan[ned] to."

Moreover, the district court's remedy of unit-by-unit pollution control technologies and emission limits on only four of the eleven plants does not resemble North Carolina's Clean Smokestacks Act, which establishes system-wide SO₂ and NOₓ caps for the state's fourteen coal plants and prescribes no pollution control technologies. Finally, the district court's remedy resembles TVA's own air pollution reduction plan, albeit at an accelerated rate, yet one that the court found was technologically and financially reasonable.

**ii. The Source State Nuisance Laws Do Not Require a Showing of Negligence**

The Fourth Circuit found that even if it assumed that the district court applied the appropriate source state nuisance laws, TVA's power plants could not logically constitute a public nuisance because they complied with their
emissions permits. The court explained that Alabama’s and Tennessee’s state
nuisance laws prohibit a nuisance finding for activities that, in the absence of
negligence, are “expressly permitted and extensively regulated by both
federal and state government.”

Absent from the Fourth Circuit’s analysis is a discussion of the Supreme
Court’s holding in Ouellette, which the district court had found spoke
“conclusively” to the dispute. The Ouellette Court balanced the competing
interests of a federal permitting system and state nuisance law by recognizing
“that, on one hand, ‘[state] nuisance law may impose separate standards and
thus create some tension with the permit system,’ but on the other hand, ‘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.”

Rather than accept some tension between the CAA permit requirements
and those imposed by the abatement remedy, the Fourth Circuit instead read
a negligence requirement into Alabama’s and Tennessee’s nuisance laws to
preclude a nuisance finding. The court cited to Alabama Supreme Court
decisions that stated that “there can be no abatable nuisance for doing in a
proper manner what is authorized by law.” But these “few Alabama cases
that apply a negligence requirement” are the exception, not the rule. They are
distinguishable in that they “involve either municipal defendants with express
legislative authorization to conduct governmental activities, or circumstances
where the plaintiff ‘comes to the nuisance.’” TVA is not a municipality, nor was a “municipality’s right to engage in activities that would otherwise be
a nuisance” even at issue in the case. Consequently, the negligence standards
established in these discrete Alabama cases should not apply to TVA—a

207. TVA IV, 615 F.3d 291, 309 (4th Cir. 2010) (“It would be odd, to say the least, for specific state
laws and regulations to expressly permit a power plant to operate and then have a generic statute
countermand those permissions on public nuisance grounds.”).
208. See id. at 309–10.
209. Id. at 296.
211. Id.; accord Int’l Paper Co. v. Ouellette, 479 U.S. 481, 507 (1987) (Brennan, J., concurring in
part and dissenting in part) (“But Congress set out to establish ‘clear and identifiable’ discharge
standards, . . . it did not intend to reform the ‘impenetrable jungle’ of state nuisance law . . . As both
legislative history and EPA regulations indicate, compliance with effluent standards is not a defense to
state tort suits . . . .” (emphasis added) (internal citations omitted)).
212. Indeed, the Fourth Circuit directly rejected this possible tension, noting that “[a]s TVA’s
facilities operate under permits, required by Congress and EPA regulations, we cannot say that the plant
emissions of which North Carolina complains are a public nuisance.” TVA IV, 615 F.3d at 310
(emphasis added).
213. Id. at 309 (emphasis added) (internal citations omitted).
215. Id. (citing six case examples).
216. See id. at 51–52 (noting that TVA is “the functional equivalent of a private corporation”).
217. Id. at 51.
218. See id. at 52.
critical point the Fourth Circuit ignored. Additionally, Alabama’s nuisance statute does not mention a negligence requirement; rather, it expressly recognizes that “[t]he fact that the act done may otherwise be lawful does not keep it from being a nuisance.” \(^{219}\) Under the statute, the proper causation analysis is “whether the [defendant] . . . has engaged in a course of conduct, or has permitted to exist a set of circumstances, that, in its natural and foreseeable consequences, proximately caused the hurt, inconvenience, or damage complained about.” \(^{220}\)

The Fourth Circuit also cited two Tennessee cases to support its conclusion that “[a]n activity that is explicitly licensed and allowed by Tennessee law cannot be a public nuisance.” \(^{221}\) The very different facts of these cases as compared to the present dispute demonstrate the depths to which the court went to mold the law to its holding. In one, a nuisance suit against a liquor store was dismissed because the store had a license to operate, and the opinion included no discussion of negligence. \(^{222}\) In the other, an injured plaintiff sued a company whose employees, while cutting a pipe, caused a shard of iron to enter the plaintiff’s eye. \(^{223}\) The court found that the question of negligence should have been submitted to the jury. \(^{224}\) This holding demonstrates that the court treated nuisance and negligence as two different causes of action; \(^{225}\) it did not, however, hold that negligence is required for a finding of nuisance, which is the proposition for which the Fourth Circuit cited it. Tennessee common law is clear “that a nuisance that interferes with persons’ enjoyment of their own property, particularly by pollution, is actionable regardless of whether it is a lawful activity or undertaken pursuant to a license.” \(^{226}\) The cases cited by the Fourth Circuit fail to address, let alone preclude, public nuisance actions.

The Fourth Circuit relied on two additional contentions, which are equally unconvincing. First, the Fourth Circuit provided no support for its broad assertion that the law distinguishes “between activities which are merely not

\(^{219}\) ALA. CODE § 6-5-120 (2010); see also Russell Corp. v. Sullivan, 790 So. 2d 940, 951 (Ala. 2001) (“This Court has recognized that even a lawful and careful activity, when combined with culpable acts, constitutes a nuisance if the activity hurts, inconveniences, or damages the complaining party.”).


\(^{221}\) TVA IV, 615 F.3d 291, 310 (4th Cir. 2010) (citing O’Neil v. State ex rel. Baker, 206 S.W.2d 780, 781 (Tenn. 1947); Fey v. Nashville Gas & Heating Co., 64 S.W.2d 61, 62 (Tenn. Ct. App. 1933)).


\(^{223}\) See Fey, 64 S.W.2d at 62.

\(^{224}\) See id.

\(^{225}\) See id. at 62 (“The fact that one has a license to interfere with a highway or a street only relieves him from the imputation of creating a public nuisance, but no license will relieve him from the consequences of carelessness or negligence. It is an implied condition of every such license that the licensee will use ordinary care in prosecuting his work, and diligence in completing it.” (emphasis added)).

\(^{226}\) Brief of Appellee at 54, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) (citations omitted).
illegal... and those which are expressly permitted." Rather, aided by circular reasoning, it continued to speak in a conclusory fashion, stating that the fact that "an act that is not illegal can still be a nuisance" is irrelevant to the present dispute "because TVA's Tennessee plants are expressly permitted to operate as they do."  

Second, the court stated that the NAAQS (which are designed to protect people particularly sensitive to emissions) are more stringent than source state nuisance laws (which prohibit activities that significantly interfere with the average person). The Fourth Circuit then reasoned that "[i]f TVA is in compliance with the more demanding federal EPA requirements and state law SIPs, it cannot be in violation of less-stringent state law nuisance standards." But comparing national uniform regulatory standards to case-specific application of source state nuisance laws makes little sense. Here, Alabama's and Tennessee's nuisance laws, under which the district court found a public nuisance, are more stringent than the federal standards.  

### iii. The CAA Does Not Preempt Source State Nuisance Law  

The primary question before the Fourth Circuit was "whether individual states will be allowed to supplant the cooperative federal-state framework that Congress, through the EPA, has refined over many years." Framed in a way that telegraphs the result, the court found such state action impermissible. Pointing to the CAA's comprehensive treatment of emissions control, it concluded that, through its nuisance action, North Carolina was effectively asking the federal courts to impose a more stringent set of standards than those "authorized by Congress, established by the EPA, and implemented through Alabama and Tennessee permits." The court held that allowing such nuisance
lawsuits to drive emission standards would "supplant,"234 "scuttle,"235 "overturn,"236 and "replace"237 the CAA's carefully crafted state and federal regulatory schemes and would result in confusion "to the detriment of industry and the environment alike."238 The Fourth Circuit further explained that it would be unfair to replace the CAA's regulatory framework with the "uncertain twists and turns" of public nuisance litigation since individual states, government entities, and private industries reasonably expect that they are complying with the law if they follow the CAA's prescribed regulatory standards.239

Moreover, the court cautioned that a "patchwork of nuisance injunctions" might lead to increased air pollution because different standards set forth by the CAA and public nuisance laws "could create perverse incentives for power companies to increase utilization of plants in regions subject to less stringent judicial decrees."240 Stating that "the purpose of Congress is the ultimate touchstone in every preemption case,"241 the court contended that emission standards should be established by agencies rather than courts because Congress, in enacting the CAA, "opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls."242 Finally, the court pointed out that the judicial system is ill equipped to emulate EPA's expertise in determining proper emissions standards,243 and that "North Carolina's approach would [improperly] reorder the respective functions of courts and agencies."244

234. Id. at 306 ("It is not open to this court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states and permit holders in favor of the nebulous rules of public nuisance." (emphasis added)).

235. Id. at 298 ("The district court's well-meaning attempt to reduce air pollution cannot alter the fact that its decision threatens to scuttle the extensive system of anti-pollution mandates that promote clean air in this country." (emphasis added)).

236. Id. ("If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot be set, and the environment cannot prosper, in this way." (emphasis added)).

237. Id. at 304 ("[T]he case... involves an attempt to replace comprehensive federal emissions regulations with a contrasting state perspective about the emission levels necessary to achieve those same public ends." (emphasis added)); see also id. at 301 ("To replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country." (emphasis added)).

238. Id. at 296.

239. See id. at 301.

240. Id. at 302.

241. Id. at 303 (internal citation omitted).

242. Id. at 304.

243. See id. at 305 ("[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 that regulatory bodies can consider.").

244. Id. at 304.
Recognizing that it “cannot anticipate every circumstance that may arise in every future nuisance action,” the Fourth Circuit stopped short of holding that the CAA has completely preempted the field of emissions regulation. But indeed, the court left little room for such suits, and it emphasized that the Supreme Court “created the strongest cautionary presumption” against common law nuisance suits “that have the potential to undermine” federal and state regulatory laws.

iv. Summary of International Paper Co. v. Ouellette

In Ouellette, Vermont property owners sued a New York paper mill under Vermont common law for creating a public nuisance in Vermont by discharging pollutants into Lake Champlain. The Supreme Court rejected the paper mill’s contention that the CWA preempted any action brought under state law, explaining that the CWA’s saving clause “negates the inference that Congress ‘left no room’ for state causes of action.” But the Court held that the CWA only preserved “a nuisance claim pursuant to the law of the source State.” It determined that application of the affected state’s law to a source in another state was impermissible for three main reasons: (1) such an action “could effectively override both the permit requirements and the policy choices made by the source State,” (2) it would allow the affected state to “regulate the conduct of out-of-state sources,” and (3) it would subject the source “to a variety of common-law rules established by the different States along the interstate waterways.”

v. Critique of the Fourth Circuit’s Opinion

The Fourth Circuit failed to recognize that the CAA’s text, structure, and legislative history demonstrate clear congressional intent to preserve traditional state authority to use common law public nuisance actions to address interstate air pollution from stationary sources. Moreover, the court repeatedly misconstrued and misapplied the Ouellette Court’s holding to reach its conclusion.

The Fourth Circuit explained that the Ouellette Court established that “state law is preempted ‘if it interferes with the methods by which the federal statute was designed to reach [its] goal,’” and warned against “common-law

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245. Id. at 302.
246. Id. at 303–04 ("[A] state law is preempted ‘if it interferes with the methods by which the federal statute was designed to reach [its] goal.’" (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987))).
247. Ouellette, 479 U.S. at 492.
248. Id. at 497.
249. Id. at 495.
250. Id.
251. Id. at 496.
suits that have the potential to undermine [the] regulatory structure."" 252 Under the preemption doctrine, 253 there are two traditional types of preemption: express and implied. Express preemption occurs where a federal law explicitly preempts state or local law. 254 Implied preemption, which is based on clear congressional intent, consists of two basic varieties: field preemption and conflict preemption. Field preemption exists where the pervasiveness of the federal regulatory scheme suggests that "Congress [has] left no room for the States to supplement it." 255 Conflict preemption exists when there is an actual conflict between state and federal law. 256 The CAA's saving clause 257 and citizen suit provisions 258 plainly rule out express and field preemption, leaving us to consider only whether conflict preemption bars a nuisance action in this case. The Supreme Court has summarized the test for conflict preemption as "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 259 Applying this test, it is clear that there is also no conflict preemption since North Carolina's common law nuisance action does not contradict federal law. Not only is it possible for TVA to comply with both state and federal requirements, it is certain; that is, by complying with the district court's abatement order pursuant to the source state nuisance laws, TVA would also be in compliance with the less stringent federal requirements set forth in the plant permits.

Additionally, the nuisance action does not undermine the CAA and its cooperative intent because "public nuisance law is the policy of the [source] State, not an impingement on it." 260 The application of source state nuisance law also does not interfere with the operation of the air pollution reduction programs established under the Act. 261 While the district court's order obliged the 100-Mile Plants sources to reduce emissions ahead of federal schedules and mandated actual controls, rather than allow the plants to purchase pollution

252. TVA IV, 615 F.3d at 303 (citing Ouellette, 479 U.S. at 494, 497).
253. The preemption doctrine derives from the U.S. Constitution's Supremacy Clause, which makes federal laws "the supreme Law of the Land." U.S. CONST., art. VI, cl. 2.
256. See CHEMERINSKY, supra note 254, at 393.
258. ld. § 7604(a) (2006).
260. Brief of Appellee at 77, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) ("The CAA, like 'the CWA allows States ... to impose higher standards on their own point sources, and ... this authority may include the right to impose higher common-law as well as higher statutory restrictions.'" (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987))).
261. See supra Part I.E.2 (discussing the ARP, NOx SIP Call, section 110(a)(2)(D) good neighbor provision, and section 126(b) petition process).
credits through existing emissions trading programs, these requirements would have promoted the purpose of the CAA by reducing major emissions of criteria pollutants. Moreover, by complying with the injunction, TVA’s emission reductions would have created “cap and trade pollution allowances,” which TVA still could have sold or banked for later use. Source state nuisance law actions frustrate the CAA’s purpose only if they “discourage conduct that federal legislation specifically seeks to encourage.” Here, this is clearly not the case. The plain goal of the CAA is to combat air pollution; North Carolina’s nuisance suit and the lower court’s abatement remedy would have accomplished just that.

A straightforward application of the implied preemption doctrine does not support the Fourth Circuit’s conclusion that “field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted.” Nor does the Fourth Circuit’s assertion that the Ouellette decision created “the strongest cautionary presumption against” nuisance actions hold water. Tennessee and Alabama retained the job of achieving the NAAQS through their SIPs; the nuisance action brought under their own state nuisance laws complements the CAA by promoting pollution reduction values. The Fourth Circuit improperly recast North Carolina’s suit as “an attempt to replace comprehensive federal emissions regulations with a contrasting state perspective about the emission levels necessary to achieve those same public ends.” It ignored both the district court’s strict application

262. See Brief for Appellant at 59–60, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623); Page Proof Brief of Amici Curiae for Kentucky et al. at 24–26, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623); Brief of Amici Curiae Chamber of Commerce of the United States et al. in Support of Defendant-Appellant at 6–13, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623).


264. Brief of Appellee at 78, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) (quoting Morgan City v. S. Louisiana Elec. Coop. Ass’n., 31 F.3d 319, 322 (5th Cir. 1994)).

265. See 42 U.S.C. § 7401(b)(1) (2006) (“The purposes of this subchapter are . . . to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population . . . .”).

266. TVA IV, 615 F.3d 291, 303 (4th Cir. 2010).

267. Id.


269. TVA IV, 615 F.3d at 304.
of the source state nuisance laws to the facts alleged at trial and the district court's narrowly tailored remedy of partial injunctive relief.\textsuperscript{270}

The \textit{Ouellette} Court said it best: bringing an action under source state nuisance law would "not frustrate the goals of the CWA,"\textsuperscript{271} would "not disturb the balance among federal, source-state, and affected-state interests,"\textsuperscript{272} and would "not disrupt the regulatory partnership established by the permit system."\textsuperscript{273} The Court recognized that the CWA (and thus, by extension, the CAA in light of the statutes' materially identical saving clauses)\textsuperscript{274} "allows States . . . to impose higher standards on their own point sources, and . . . this authority may include the right to impose higher common-law as well as higher statutory restrictions."\textsuperscript{275} Moreover, while the Supreme Court has acknowledged that there is "no one crystal clear distinctly marked formula" for federal preemption of state standards,\textsuperscript{276} courts are inclined to recognize a "presumption against preemption in areas traditionally regulated by the states."\textsuperscript{277} Indeed, such a "presumption against preemption where the relevant state regulatory activity falls within a field of traditional state authority" is one of the widely recognized "black letter rules" of Supreme Court preemption jurisprudence.\textsuperscript{278} Air quality protection "is a classic exercise of the state's police power to protect the health, safety, and welfare of their citizens."\textsuperscript{279}

The Fourth Circuit rejected North Carolina's nuisance claim by improperly invoking the \textit{Ouellette} Court's language out of context. One

\textsuperscript{270} The district court found that fewer than half of the challenged plants met the common law's strict causation requirements. \textit{Id.} at 830–31 (finding that four of eleven challenged TVA coal plants created a public nuisance in North Carolina).

\textsuperscript{271} \textit{Ouellette}, 479 U.S. at 498.

\textsuperscript{272} \textit{Id.} at 499.

\textsuperscript{273} \textit{Id.}

\textsuperscript{274} See supra II.A.2.

\textsuperscript{275} \textit{Ouellette}, 479 U.S. at 497.


\textsuperscript{278} Robert R. Gasaway, \textit{The Problem of Federal Preemption: Reformulating the Black Letter Rules}, 33 \textit{PEPP. L. REV.} 25, 25–26 (2005); see also City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) ("The Court is less likely . . . to find federal preemption of state common law because it begins 'with the assumption that the historic police powers of the states were not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress.'"); James R. May, \textit{Of Happy Incidents, Climate, Federalism, and Preemption}, 17 \textit{TEMP. POL. \\& CIV. RTS. L. REV.} 465, 481 (2008) (noting that "[t]he Court generally upholds state action concerning matters traditionally under state control, such as energy and pollution control," which "includes . . . common law causes of action for environmental nuisance or negligence"); Sandra Zellmer, \textit{Preemption by Stealth}, 45 \textit{HOUS. L. REV.} 1659, 1675 (2009) ("State and local governments historically grappled with air pollution problems through smoke abatement ordinances and the like, and air pollution prevention falls squarely within states' traditional police powers of protecting their citizens' health.")

\textsuperscript{279} PHILIP WEINBERG \\& KEVIN A. REILLY, \textit{UNDERSTANDING ENVIRONMENTAL LAW} 78 (2d ed. 2008); see also Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 442 (1960) (recognizing that the authority of states "to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power").
example is the Ouellette Court’s determination that “[i]t is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.”\textsuperscript{280} But the Court was not referring to the use of source state nuisance law. Rather, it was explaining why the nuisance law of the affected state should not apply extraterritorially.\textsuperscript{281} The Court explicitly ruled that source state common law is applicable.\textsuperscript{282} Similarly, the Fourth Circuit pointed to the Ouellette Court’s statement that the CWA’s saving clause did not allow states to “undermine this carefully drawn statute through a general savings clause.”\textsuperscript{283} Again, the Court’s focus was on the CWA’s preemptive effect on nuisance actions based on the law of an affected state.\textsuperscript{284}

\textbf{vi. There Are No Adequate Alternative Remedies}

Finally, the Fourth Circuit found that “North Carolina has a number of possible paths to pursue [outside of public nuisance injunctions] in its entirely laudable quest to guarantee pure air to its citizens.”\textsuperscript{285} The court’s “non-exclusive” list included: (1) North Carolina’s previous opportunity to comment on and object to Alabama’s and Tennessee’s SIPs before they were approved by the EPA and implemented by the states;\textsuperscript{286} (2) the CAA citizen suit provision authorizing a private suit against an entity that fails to comply with emissions standards or implementing state permit programs;\textsuperscript{287} (3) the CAA provision authorizing a cause of action against EPA for failure to perform any nondiscretionary responsibility;\textsuperscript{288} and (4) the petition process under CAA section 126.\textsuperscript{289}

\begin{footnotes}
\item[281] See supra Part II.B.2.iv.
\item[282] Ouellette, 479 U.S. at 496–97 (“For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless... It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.” (emphasis added)).
\item[283] \textit{TVA IV}, 615 F.3d 291, 304 (4th Cir. 2010).
\item[284] Ouellette, 479 U.S. at 494 (“Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.” (emphasis added); see also id. at 497 (“The saving 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.”) (emphasis added)).
\item[285] \textit{TVA IV}, 615 F.3d at 311.
\item[286] See id. (noting that North Carolina “apparently chose not to do so, and cannot complain now that it desires a different resolution”).
\item[287] See id.
\item[288] See id.
\item[289] See id. (“North Carolina’s section 126 claims... remain pending, and there is no suggestion that the process will fail to provide North Carolina with a full and fair venue for airing its concerns.”).
\end{footnotes}
The first three alternatives are patently empty. First, North Carolina cannot go back in time to alter its participation in the source state SIP proceedings, and, given the complexity of the problem, it is unclear whether the state could have known or shown that TVA’s emissions would impact its ability to meet the NAAQS. Second, since TVA appears to be in compliance with its permits, the referenced CAA citizen suit provision for emission violations is of no use to North Carolina. Third, the court fails to explain how a suit against EPA for failure to perform a nondiscretionary duty would work to alleviate TVA’s unreasonable emissions. Moreover, it is unclear what that failed nondiscretionary duty could even be, and the court provides no suggestion, since a plaintiff is barred from challenging how EPA performs its duties.

The court’s fourth proffered solution, the CAA section 126 petition process, also fails to pass muster since the Ouellette Court expressly recognized that federal law and source state common law may provide for overlapping remedies without conflict. This proposal warrants additional analysis given that North Carolina pursued this avenue prior to bringing its nuisance action. In its section 126(b) petition, filed in 2004, North Carolina sought a specific determination from EPA that emissions from large electric utilities in thirteen upwind states were significantly contributing to PM$_{2.5}$ and/or ozone nonattainment and maintenance problems in North Carolina. Two years later, EPA denied the petition, electing to rely on the CAIR FIP to address interstate transport affecting North Carolina. After the D.C. Circuit remanded rulemaking of CAIR, it also ordered EPA to reconsider North Carolina’s

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290. But see Brief of Appellee at 55–57, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) (challenging TVA’s proof of permit compliance and noting that the district court “never made such a finding”).


292. For example, a permissible challenge to a nondiscretionary duty would be EPA’s failure to timely review proposed SIP revisions. But a challenge to the EPA’s approval of a SIP, which is “inherently discretionary,” would be impermissible. See WEINBERG, supra note 279, at 101.

293. See id. at 100–01 (citing Wisconsin’s Envtl. Decade, Inc. v. Wis. Power & Elec. Co., 395 F. Supp. 313 (W.D. Wis. 1975)).

294. See Int’l Paper Co. v. Ouellette, 479 U.S. 481, 498 n.18 (1987) (“Nothing in our decision, of course, affects respondents’ right to pursue remedies that may be provided by the Act.”).

295. See Petition at 21, Rulemaking on Section 126 Petition from North Carolina to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed. Reg. 25,328 (Apr. 28, 2006) (to be codified at 40 C.F.R. pts. 51, 52, 72, 73, 74, 78, 96, 97) (No. EPA-HQ-OAR-2004-0076), available at http://www.regulations.gov/pdf/d/5525338 (Based on the technical information presented in this petition, North Carolina has concluded that SO$_2$ and NO$_x$ emissions from the [large electric generating units] are the most prevalent contributors to the State’s nonattainment issues. In its discretion under section 126, the State elects to petition against such sources at this time.)


Almost two years later, the Fourth Circuit accurately noted that "North Carolina's section 126 claims...remain pending."299

Even if the Fourth Circuit is correct that the process still offers North Carolina "a full and fair venue for airing its concerns,"300 the court overlooks that the state’s section 126 petition and its common law public nuisance suit are two different actions, based on different justifications, with different remedies; accordingly, the two may proceed simultaneously. Indeed, the district court specifically found that North Carolina’s nuisance action was not impermissibly duplicative of its pending petition because the petition sought emissions reductions from sources in thirteen states, while the suit named TVA sources in only three of those states and restricted its arguments to their respective nuisance laws. A successful abatement of the nuisance would remedy the specific health and environmental harms alleged in the complaint. The Fourth Circuit also overlooked the extremely slow pace of the section 126 petition process, finding it acceptable that North Carolina continue to wait for relief, seven years after filing its petition. This waiting game comes at a high price to the state’s public health, welfare, environment, and economy. While the section 126 petition process has thus far failed North Carolina, the district court order in its nuisance action offered tangible relief from TVA’s unreasonable emission levels.301

III. SOURCE STATE NUISANCE LAW: NEITHER REPLACEMENT NOR PANACEA

This Note, like many before it, acknowledges that modern environmental statutes grew up to fill in the gaps left by common law nuisance doctrines.302

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298. See Sierra Club v. EPA, 313 F. App’x 331, 331 (D.C. Cir. 2009) (“EPA concedes this Court’s holding in North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008), and its order in that case of December 23, 2008, have eliminated the legal basis for EPA’s denial of North Carolina’s Section 126 petition with regards to PM2.5.”).

299. TVA IV, 615 F.3d 291, 311 (4th Cir. 2010); Cf. Barrella, supra note 16082, at 253 (predicting that “[w]hen EPA does eventually respond to North Carolina’s petition, its response will likely be (if history is any guide) that the petition’s concerns will be addressed by EPA’s latest rulemaking involving interstate emissions”).

300. Id.

301. Accord Petition for Writ of Certiorari at 18, North Carolina ex rel. Cooper v. Tenn. Valley Auth., No. 10-997 (U.S. Feb. 2, 2011) (noting that the “net effect of the Fourth Circuit’s decision...is to deny injured plaintiffs even the right to pursue a remedy,” which “is hardly the result counseled by Ouellette”).

302. See, e.g., Alice Kaswan, The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?, 42 U.S.F. L. REv. 39, 102 n. 331 (2007) (explaining that the increased promulgation of new federal environmental laws beginning in 1970 was “partly a response to the failure of state regulatory measures,” as well as representing “an implicit rejection of the common law as an environmental policy tool.” (citations omitted)); see also Roger Meiners & Bruce Yandle, Common Law and the Conceit of Modern Environmental Policy, 7 GEO. MASON L. REv. 923, 956–58 (1999) (“Critics of common law argue that common law protection is unreliable in that bad consequences still happen despite the law, that evidence of cause and effect is difficult to provide, and that enforcement is subject to unpredictable whims of common law judges and juries.”).
but it rejects the contention that such statutes offer a complete solution. Rather, the common law of nuisance co-exists with, complements, and fills the gaps in, statutory regimes. A comparison of common law and federal statutory law demonstrates why both are needed to reduce pollution to environmentally safe levels.

This Part weighs the comparative merits of common law nuisance and then concludes that, as a matter of policy, courts should apply source state public nuisance doctrine to cases of interstate air pollution.

A. Common Law versus Public Law

The relative advantages and disadvantages of common law and public law have been widely considered. Professor Alice Kaswan summarizes the strengths and weaknesses of each through the lens of four evaluative parameters: "(1) democratic principles; (2) effectiveness as a tool for addressing environmental problems (considering such factors as comprehensiveness, consistency, flexibility, and advance notice); (3) institutional competence; and (4) the availability of a remedy for pollution victims." This Part summarizes and builds upon Professor Kaswan's analytical framework.

1. Democratic Values

Public law receives the highest marks for democratic principles because Congress enacts laws through a democratic process, and agencies, with delegated authority, generally use a notice and comment rulemaking procedure that allows public participation. Common law cases, on the other hand, are limited to the parties, intervenors, and court-authorized amici participants, and are decided by judges who may not be politically accountable. Moreover, given "the delicate political balance between environmental and economic concerns" common to environmental debates, politically responsive institutions may be more suitable actors.

304. Kaswan, supra note 302, at 98.
306. Federal judges generally are not politically accountable. See U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" federal judges); U.S. CONST. art. III, § 1 (explaining that federal judges enjoy life tenure and cannot be removed from office except through impeachment). However, state judges are generally elected. See Judicial Selection in the States, THE AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/ (last visited Apr. 25, 2011) (containing comprehensive information on judicial selection processes in each of the fifty states and the District of Columbia).
But "[t]he [federal] judiciary’s lack of political accountability," by insulating the courts from lobbyists, "can also be seen as one of its virtues." 307 Common law thus function to "protect rights, not ... interest groups" 308 and "correct[] for a regulatory system that is too easily controlled by the very interests it is supposed to be controlling." 309 Moreover, the legislative branch, which can pass laws that courts must follow, has the "ultimate democratic check" on the court's ability to use its common law authority. Additionally, common law doctrines are flexible and can provide unique responses to societal changes, 310 "often ... without changing the doctrines themselves." 311 For example, in nuisance law, "the concept of what types of actions are 'unreasonable' is capable of evolving as society evolves, without requiring a fundamental doctrinal shift, and without requiring all of the necessary political stars to align." 312 Thus "the common law process is continuous; it draws together information on controversies as they occur; and evolves as the world changes." 313

2. Effectiveness

In terms of comprehensiveness, consistency, and advance notice to the regulated, which Kaswan uses as helpful proxies for effectiveness, 314 public law, again, has the upper hand. Where public law establishes "objective, consistent standards," the common law relies on a piecemeal approach dependent on individual plaintiffs suing individual polluters. 315 The high cost of litigation, 316 free rider problems, 317 and proof difficulties 318 serve as roadblocks

308. Meiners & Yandle, supra note 302, at 956.
309. Kaswan, supra note 302, at 99 (citation omitted).
311. Kaswan, supra note 302, at 100.
312. Id.
313. Meiners & Yandle, supra note 302, at 959; see also Butler, supra note 310, at 705–06 ("Command-and-control bureaucrats and legislators are often oblivious to changes inherent in a dynamic world, but common law environmentalism and jurisdictional competition provide a dynamic process through which policy options are discovered and discarded in response to the reality of perpetual changes in technology and political preferences.").
314. See Kaswan, supra note 302, at 100–02.
315. See id. at 101.
316. The expense of litigation leads some harmed plaintiffs to abstain from bringing suit because these costs would exceed the benefits received from an injunction or damages award. Heimert, supra note 86, at 415.
317. Since an injunction benefits everyone in the surrounding area of the pollution, people have an incentive to "free ride" and wait for someone else to bear the cost of litigation. See Kaswan, supra note 302, at 100–01 ("Many instances of environmental harm might not be addressed because the victims
to successful common law actions, likely leading some polluters to escape liability. Moreover, even when similarly situated actors are subject to common law action, results may differ “due to the lack of precise standards and the notorious subjectivity of nuisance law.” Finally, public law gives the regulated community notice of legal principles, which is lacking from the common law’s retroactive application of variable nuisance standards.

However, the effectiveness of uniform federal legal standards is diminished when enforced non-uniformly. Moreover, the SIP process is not a model of clarity. For example, due to “the inherent complexity of developing and setting standards for a multiplicity of pollutants and types of sources all at the same time,” EPA inevitably revises the NAAQS for the six criteria pollutants at different times, which tends to cause states to revise their SIPs pollutant-by-pollutant. Such piecemeal announcement of obligations can be problematic for the regulated industry “because sources typically emit many kinds of pollutants and many pollutants are controlled by the same methods.”

Moreover, nuisance principles are not as “vague” and “indeterminate” as the Fourth Circuit would have us believe. “Tort law still applies community or collective norms, often under a rubric of ‘unreasonableness’; the difference is that these norms are ‘spelled out through an iterative process of individualized litigation, [rather than] through an intentional decision of some public entity.” And as North Carolina’s CAA section 126 petition process experience demonstrates, administrative remedies may be cumbersome and slow, with public nuisance suits potentially offering faster relief. North Carolina’s nuisance action embodies the forecast made decades ago that lack the resources to bring suit, or because of the ‘free rider’ problem: each resident’s hope that someone else will bring suit.”

318. See, e.g., Jason J. Czarnezki & Mark L. Thomsen, Advancing the Rebirth of Environmental Common Law, 34 B.C. ENVTL. AFF. L. REV. 1, 5 (2007) (“[T]ort law plaintiffs face the burden of having to show causation, which can be especially difficult if there are multiple polluters, and often plaintiffs must expend substantial financial resources to bring common law tort actions against entities having potentially far greater resources.”); Daniel A. Farber, Toxic Causation, 71 MINN. L. REV. 1219, 1220 (1987) (describing how proving causation is difficult in the context of toxic pollution); Reitze, supra note 87, at 3 (“The interaction of many chemicals, before and during exposure, and the limits of scientific knowledge make proving causation difficult.”).

320. See id.
321. See Meiners & Yandle, supra note 302, at 957 (explaining that federal laws “lead to uniform rules with variable enforcement”).
322. Schoenbrod, Schwartz & Sandler, supra note 103, at 294.
323. See id. at 294–95.
324. Id.
325. See TVA IV, 615 F.3d 291, 303 (4th Cir. 2010).
327. Id.
328. Antolini, supra note 5, at 759 n.6 (noting that “public nuisance fills statutory gaps when administrative remedies are ‘slow,’ restricted, or too weak”) (citation omitted).
[a]part from its usefulness as a gap-filler, public nuisance has the flexibility to provide a remedy when an administrative agency, charged with providing the necessary environmental and health protection pursuant to a comprehensive regulatory scheme, nevertheless allows a serious pollution problem to go unabated.329

3. Institutional Competency and Remedy Availability

Administrative agencies with delegated authority to enforce public laws have scientific and policy expertise, which legal generalist judges admittedly lack.330 But concern about “deep judicial involvement in highly technical matters” is not unique to common law actions. Such concern has existed “throughout the modern history of environmental law” since agency regulations challenged in court are subject to judicial review.331 Nor are concerns about the court’s role in “adjudicating transboundary pollution disputes implicating the interests of two ‘quasi-sovereign’ states”332 unique to common law actions. Moreover, judges “have the benefit of sworn experts” to help them understand complex scientific and technological matters.333

Lastly, the common law can offer pollution victims “compensatory damages, punitive damages, and injunctive relief tailored to the circumstances,”334 which federal environmental laws cannot. For example, under the CAA, penalties are paid into a U.S. Treasury fund that finances nationwide compliance and enforcement efforts; consequently, such payments may not translate into compensation to those actually harmed by the violation.335

329. Abrams, supra note 3, at 397; see also Antolini, supra note 5, at 775 (“Given that federal and state environmental statutes are never likely to form a seamless web of environmental protection and that national political shifts can poke huge holes in the web, there will always be an important practical role for public nuisance.”)

330. See Kaswan, supra note 302, at 102.

331. DOREMUS ET AL., supra note 51, at 95 (“Judicial review of agencies may involve determinations of whether an agency has acted beyond its delegated authority or beyond constitutional limits, whether an agency’s findings of fact are adequately supported, whether an agency’s interpretation of the law is proper, and whether an agency has made reasonable judgments.”). See Administrative Procedure Act, 5 U.S.C. § 706 (2006).


333. Kaswan, supra note 302, at 102.

334. Id. at 103.

335. See WEINBERG, supra note 279, at 101. Although in some cases, funds may instead be used for beneficial mitigation projects related to the Act, called supplemental environmental projects. See DOREMUS ET AL., supra note 51 at 829 (noting the variety of supplemental environmental projects, including, for example, “an air toxics reduction demonstration study”).
4. Implication: Common Law and Public Law Offer Complementary, Overlapping Remedies

In sum, common law and public law “are not mutually exclusive”; indeed, "they often coexist," particularly “with respect to state common law."336 Where statutes provide a “comprehensive, preventative, regulatory regime,”337 the common law is reactive, offering pollution victims a remedy for past harm.338 A commonly advanced reason for why nuisance law endures “amid apparently comprehensive federal and state environmental regulations” is because of its “nearly infinite flexibility and adaptability and . . . inherent capacity to fill gaps in statutory controls.”339 Through injunctive relief, common law actions can “promote timely restoration of damaged natural resources and polluted lands,” which are goals of the federal environmental statutes themselves.340

IV. DEFINING THE EDGES OF THE GAP: THE PROPER BOUNDARIES OF PUBLIC NUISANCE

While allowing common law to play an overlapping, gap-filling role in the modern administrative state is not a novel idea in American governance,341 it is not altogether welcome, as the Fourth Circuit’s decision demonstrates. The court noted that industry would face debilitating uncertainty if it remained susceptible to common law nuisance actions despite permit compliance.342 “[P]redictability and consistency,” however, “are not the only values served by the law”; certainly, “the common law’s ability to respond to unique circumstances is intrinsically valuable.”343 Moreover, given the comprehensive nature of federal air pollution regulations and the common law’s strict

337. Kaswan, supra note 302, at 103.
338. See id.
340. See Czarnecki & Thomsen, supra note 318, at 2–3; see also Alexandra B. Klass, Common Law and Federalism in the Age of the Regulatory State, 92 IOWA L. REV. 545, 599 (2007) (“The building blocks for state common law are there for those who wish to use them as a progressive force.”).
341. See, e.g., Klass, supra note 340, at 599; see also THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW (Roger E. Meiners & Andrew P. Morriss eds., 2000); Butler, supra note 310; Czarnecki & Thomsen, supra note 318; Meiners & Yandle, supra note 302; Olinger, supra note 166; Merrill, supra note 166; Heimert, supra note 86; William H. Wilson, Nuisance as a Modern Mode of Land Use Control, 46 WASH. L. REV. 47 (1970).
342. See TVA IV, 615 F.3d 291, 306 (4th Cir. 2010) (“A company, no matter how well-meaning, would be simply unable to determine its obligations ex ante under such a system, for any judge in any nuisance suit could modify them dramatically. Rather than take this risk in the future, ‘otherwise worthy permit applicants will weigh the formidable costs in delay and litigation, and simply will not apply.’”) (citation omitted).
343. Kaswan, supra note 302, at 104.
causation requirements, it is unlikely that there will be a flood of public nuisance suits with debilitating impacts on industry.344

A. Guiding Principles

For public nuisance actions brought to address interstate air pollution problems, the following principles should guide courts’ decisions: (1) such actions should only be brought by the attorney general in the name of the state; (2) the court should base its decision on a strict application of the source state nuisance law to the factual record to ensure injuries meet robust causation requirements; (3) the court should not apply fault principles because public nuisance liability is predicated upon unreasonable injury, not unreasonable conduct; (4) the court should only provide injunctive relief, narrowly tailored to the record, to abate the public nuisance.

1. States May Sue in their Parens Patriae Capacity

A state has standing as parens patriae ("parent of the country") to sue for an injury to its "quasi-sovereign interest," which includes its interest in its citizens’ health, safety, and welfare, and interest in a healthy environment.345 Parens patriae suits to protect the public health and welfare from public nuisance are "well-established."346 While it is generally possible for a private plaintiff to bring a private action against a public nuisance under the special injury rule,347 courts should recognize that the special injury rule should play no role in public nuisance suits brought to abate interstate air pollution. A public nuisance action to address an interstate air pollution problem should only be brought by the state attorney general. Requiring an attorney general to assess public complaints and conduct independent investigations to determine whether there is adequate factual basis to support a public nuisance challenge is far more efficient than a piecemeal approach of individual private actions for public nuisance grounded in a special injury rule. This is particularly true in

344. See Caplan, supra note 55, at 202 (noting that nuisance litigation "is time-consuming, expensive, and likely to fail on issues of causation"); see also Brief of Amici Curiae Nat’l Parks Conservation Ass’n et al. at 21, TVA IV, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) (arguing that the district court’s decision would not “open the floodgates to a surge in nuisance litigation or establish near-universal liability”).

345. See Abrams, supra note 3, at 384 n.149 (citation omitted); see also Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 334 (2d Cir. 2009), cert. granted, 178 L. Ed. 2d 530 (2010) (No. 10-174). ("Parens patriae is an ancient common law prerogative which ‘is inherent in the supreme power of every state . . . [and is] often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.’" (citation omitted)); Allan Kanner, The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources, 16 DUKE ENVT'L. L. & POL’Y F. 57, 101 (2005).

346. Abrams, supra note 3, at 384 n.149 (citations omitted).

347. The private plaintiff must show that he suffered harm different from that experienced by the larger community, in addition to establishing the other elements of public nuisance. See supra Part I.A.
light of the high costs of litigation and technical experts needed to meet nuisance law's strict causation and proof requirements.

2. **Strict Application of Nuisance Law to Facts**

In tort law, as in all law, each case stands on its own facts.\(^{348}\) A court must limit its review to the facts in the record and resist the temptation to make policy judgments.\(^{349}\) For example, the district court held that certain coal plants created a public nuisance based on the harms they caused to North Carolina's environment, economy, and the health and welfare of its citizens. These harms were well established in the factual record and were the type of injuries commonly recognized by the nuisance laws of the two source states. The court granted only partial relief because there was insufficient proof that emissions from TVA's other seven plants were having an unreasonable health, safety, or welfare impact in North Carolina.\(^{350}\)

3. **No Consideration of Fault**

A fault analysis of whether the offending party acted negligently, like that engaged in by the Fourth Circuit, is illogical in a public nuisance suit.\(^{351}\) The public should not have to endure an unreasonable interference with its rights simply because the responsible entity has acted non-negligently or even, as in TVA's case, has acted in compliance with pollution permits. While negligence liability is predicated upon unreasonable conduct, nuisance liability is predicated upon unreasonable injury.\(^{352}\)

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348. *See* Tipler v. McKenzie Tank Lines, 547 So. 2d 438, 440 (Ala. 1989) (explaining that under Alabama law, in order to find a nuisance, a court must "look to the particular facts of each case" (emphasis added)); Memphis Light, Gas & Water Div. v. Goss, 494 S.W.2d 766, 769 (Tenn. 1973) (explaining that under Tennessee law, what constitutes a nuisance "must . . . be determined upon the facts shown in any particular case" (emphasis added) (internal citation omitted)).

349. *See* MELVIN EISENBERG, THE NATURE OF THE COMMON LAW 3 (1991) ("Although the judge is not limited to doctrines found in past official texts, neither is he free, as would be a legislator, to employ those social propositions he thinks best, or to establish those rules he thinks best, on the basis of his own moral and political convictions. Rather, the judge is under an obligation to employ only those social propositions that satisfy certain criteria, and to establish only those rules that are generated by the application of the institutional principles of adjudication.").


351. *See* Abrams, supra note 3, at 370 ("[T]he notion of fault is the least functional . . . when balancing the interests of the property holder against the interests of the state in the exercise of its police power, because the beneficiary is not an individual but the community."); James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, NAT. RESOURCES & ENV'T, Summer 1990, at 29, 29 ("Fault is simply not a basis for public nuisance liability to a state, and fault-based care and causation defenses are not appropriate elements of the basic claim . . . .")

352. *See id.* at 369.
4. Narrowly Tailored Injunctive Relief

A finding of public nuisance in the interstate air pollution context should solely establish a right to injunctive relief, which must be narrowly tailored to address the established injuries. It would be impractical to employ a so-called “balancing of the equities” process because a public nuisance does not always, nor should it, lend itself to quantifiable injury. For example, the “right to breathe clean air” is “not readily amenable to comparative assessment,” nor would it be proper for a court to view this right as an “amenity which can be sacrificed for the benefits associated with a worthy private enterprise.”

Through public nuisance actions, states, acting in their parens patriae capacities, have historically exercised authority to seek abatement of interstate air pollution.

The district court’s remedy specifying plant-specific emissions caps and control technologies demonstrates a proper, narrowly tailored abatement remedy. Moreover, while the court recognized the efficiency of reducing TVA’s total emissions (based on a system-wide cap for all TVA plants developed by North Carolina’s expert) it chose not to use this limit because “the restrictive nature of public nuisance doctrines does not allow such a remedy, at least on the facts presented.”

CONCLUSION

Much scholarship has explored how the common law tort system served as the wellspring of modern environmental law. Indeed, “[t]he legal roots of air
pollution control are found in common-law tort remedies," including public nuisance.359 But the fact that federal legislation developed to deal with the failings of the common law has also created skepticism about relying on the common law to address contemporary pollution problems.360 This Note has explored and embraced the validity of the counter-notion that when the federal regulatory regime fails to mitigate interstate air pollution problems,361 state common law public nuisance doctrines may play a crucial, gap-filling role as an "alternative litigation response."

There is no doubt that the CAA has generated programs to address interstate air pollution problems that the courts would have been unable to develop through the common law. However, the CAA's express preservation of state common law actions,363 such as North Carolina's public nuisance suit, demonstrates that Congress saw fit to allow the courts to provide injunctive relief when the requisite levels of causation and proof are shown.364 While neither common law nor statutory law is sufficient to manage complex interstate air pollution problems, both are necessary. In North Carolina v. TVA (TVA IV), the Fourth Circuit missed an important opportunity to use source state public nuisance law as a gap-filler to provide relief to North Carolina, which would have furthered the purpose of the CAA. In so doing, it would have brought a new coherence to the field of nuisance, allowing nuisance to move a little farther away from its legal "garbage can" status, and into its rightful, complementary role.

359. Reitze, supra note 87, at 3.
360. See, e.g., Butler, supra note 310, at 707 ("Many commentators do not take [the] proposal [for increased reliance on the common law] seriously because of their belief that it was the failure of state common law that necessitated federal legislation."); Drabick, supra note 166, at 503 ("Law students learn early on in their environmental law curriculum that common law remedies have taken a backseat over the past thirty years to the complex statutory environmental law framework.").
361. See, e.g., Hubbard Brook Research Found., Acid Rain Revisited: Advances in Scientific Understanding Since the Passage of the 1970 and 1990 Clean Air Act Amendments 4 (2001) ("[W]hile the Clean Air Acts of 1970 and 1990 have improved air quality somewhat, the emissions reductions mandated in 1990 are not likely to bring about full ecosystem recovery in sensitive areas of the Northeast.").
362. Czarnecki & Thomsen, supra note 318, at 2; see also Klass, supra note 340, at 552 ("[T]he common law remain[s] necessary 'to fill the gaps in legislation, to develop the principles introduced by legislation, and to interpret them.'" (citation omitted)).
364. See Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (interpreting an identical saving clause in the CWA to preserve a public nuisance claim brought under the common law of the state where a pollution source is located).

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