

# RECENT DEVELOPMENT

## THE STATES TAKE ACTION: NORTH CAROLINA'S COMMON-LAW SUIT AGAINST THE TENNESSEE VALLEY AUTHORITY

### I. INTRODUCTION

Congress passed the Tennessee Valley Authority Act (16 U.S.C.A. § 831) in 1933 to develop the Tennessee River System in the interest of generating and selling electricity.<sup>1</sup> Originally, the Tennessee Valley Authority (“TVA”) dealt mainly with hydroelectric power, but today the TVA, an independently controlled government corporation, operates a mix of eleven coal-fired power plants, twenty-nine hydroelectric dams, three nuclear power plants, and six combustion turbine plants.<sup>2</sup> The TVA is one of the nation’s largest public power providers serving 8.8 million people within its seven state service area.<sup>3</sup> The TVA covers almost all of Tennessee, and parts of Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia.<sup>4</sup> It currently operates fifty-nine coal-fired electric generating units

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1. Tennessee: A Guide to the State: Tennessee Valley Authority, <http://newdeal.feri.org/guides/tnguide/ch09.htm> (last visited Nov. 15, 2008); *see also* N. C. *ex rel. Cooper v. Tenn. Valley Auth.*, 515 F.3d 344, 347 (4th Cir. 2008); A Short History of TVA, [http://www.tva.gov/heritage/hert\\_history.htm](http://www.tva.gov/heritage/hert_history.htm).

2. Tennessee Valley Authority Website, Our Bottom Line is the Public Good, <http://www.tva.gov/power/index.htm> (last visited Nov. 15, 2008); TVA at a Glance, [http://www.tva.com/abouttva/pdf/tva\\_glance.pdf](http://www.tva.com/abouttva/pdf/tva_glance.pdf) (last visited Nov. 15, 2008).

3. Tennessee Valley Authority Website, Our Bottom Line is the Public Good, <http://www.tva.gov/power/index.htm> (last visited Nov. 15, 2008); TVA at a Glance, [http://www.tva.com/abouttva/pdf/tva\\_glance.pdf](http://www.tva.com/abouttva/pdf/tva_glance.pdf) (last visited Nov. 15, 2008); Press Release, Roy Cooper, TVA Should Clear the Air: Q&A (Jan. 30, 2006), *available at* <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=clean%20air%20TVA%20suit%20final%20corrected%20version.pdf> (last visited Nov. 15, 2008).

4. TVA at a Glance, [http://www.tva.com/abouttva/pdf/tva\\_glance.pdf](http://www.tva.com/abouttva/pdf/tva_glance.pdf) (last visited Nov. 15, 2008).

in Tennessee, Alabama, and Kentucky.<sup>5</sup>

As early as the 1970s, environmental concerns were raised regarding emissions from TVA's coal-fired power plants.<sup>6</sup> By 1977 the TVA had become the worst polluter of sulfur dioxide<sup>7</sup> in the United States and was found to be in violation of the Clean Air Act ("CAA").<sup>8</sup> The TVA promptly initiated a billion dollar undertaking to clean up the plants, and by the 1980's it had cut sulfur dioxide emissions from the plants by 50%.<sup>9</sup> It is estimated that by 2010 the TVA will have cut sulfur dioxide emissions since 1977 by 80%, and will have spent \$5.6 billion dollars on clean air modifications to its coal-fired plants.<sup>10</sup> Nonetheless, within the past ten years the TVA's coal-fired plants have once again been placed at the forefront of the legal system as several states have become disconcerted with the level of pollutants emitted from the plants.<sup>11</sup> As such, this article will address some of the actions that the states have taken in order to force the TVA to reduce unwanted emissions. The article will focus on the recent lawsuit filed by Attorney General Roy Cooper on behalf of North Carolina against the TVA. The lawsuit seeks to hold the TVA liable for emitting pollutants in a manner that causes a public nuisance.<sup>12</sup> I will first give an introduction to the general facts surrounding

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5. Press Release, Roy Cooper, TVA Should Clear the Air: Q&A (Jan. 30, 2006), *available at*, <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=clean%20air%20TVA%20suit%20final%20corrected%20version.pdf>.

6. Tennessee Valley Authority, <http://www.answers.com/topic/tennessee-valley-authority?cat=bi-fin> (last visited Nov. 15, 2008); Tennessee Valley Authority Website, On the Air Monitoring Networks, [http://www.tva.gov/environment/air/ontheair/mon\\_networks.htm](http://www.tva.gov/environment/air/ontheair/mon_networks.htm) (last visited Nov. 15, 2008).

7. At very high levels sulfur dioxide can be deadly, and long term exposure to persistent levels of sulfur dioxide can affect your health. *See, e.g.*, DEP'T OF HEALTH AND HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY (June 1999), <http://www.atsdr.cdc.gov/tfacts116.html>.

8. Tennessee Valley Authority, <http://www.answers.com/topic/tennessee-valley-authority?cat=bi-fin> (last visited Nov. 15, 2008); Tennessee Valley Authority Website, On the Air Monitoring Networks, [http://www.tva.gov/environment/air/ontheair/mon\\_networks.htm](http://www.tva.gov/environment/air/ontheair/mon_networks.htm) (last visited Nov. 15, 2008).

9. *Id.*

10. Tennessee Valley Authority Website, From the New Deal to the New Century, <http://www.tva.gov/abouttva/history.htm> (last visited Nov. 15, 2008).

11. The Clean Air Act was amended in 1990 to provide stricter standards for pollution regulation. See Pub. L. No. 101-549, 104 Stat. 2399 (amending 42 U.S.C. 7401-7661). For an overview and explanation of the 1990 amendments, see Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. LAW 1721 (1991); Craig N. Oren, *The Clean Air Act Amendments of 1990: A Bridge to the Future?*, 21 ENVTL. LAW 1817 (1991).

12. *See N. C. ex rel Cooper v. Tenn. Valley Auth.* 515 F.3d 344 (4th Cir. 2008); Press Release, Roy Cooper, TVA Should Clear the Air: Q&A, *supra* note 5.

the recent Fourth Circuit Court of Appeals decision allowing North Carolina to sue the TVA under the common-law theory of public nuisance.<sup>13</sup> I will then offer a brief background and analysis as to why North Carolina resorted to a common-law suit in order to prosecute one of the nation's largest public power plants.<sup>14</sup>

## II. SUING THE TVA

In November of 2004 the Attorney General of North Carolina, Roy Cooper, notified the TVA that he intended to file a common-law nuisance suit against the federal corporation.<sup>15</sup> Cooper alleged in his complaint that the plants, although located out of state, emit dangerous pollutants which travel through the atmosphere and adversely affect the environment and human health of those in North Carolina.<sup>16</sup> He contended that the pollutants cause a substantial increase in costs to North Carolina citizens as a result of hospital visits and other medical costs.<sup>17</sup> In addition, environmental health expert reports submitted as part of the lawsuit indicated that decreased emissions from TVA plants would provide for 1,400 fewer premature deaths and 2,300 fewer missed school days from asthma and other ailments.<sup>18</sup>

Cooper sought an injunction requiring the TVA to stop operating the coal-fired plants in a harmful manner and to instead operate them in a fashion similar to that of the coal-fired power plants in North Carolina under the Clean Smokestacks Act ("CSA").<sup>19</sup> The CSA was approved in 2002 by North Carolina's General Assembly and Governor Michael Easley.<sup>20</sup>

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13. See generally Cooper, 515 F.3d at 344.

14. *Id.*

15. Scott Barker, *Tennessee Valley Authority to Face North Carolina Pollution Lawsuit*, KNIGHT-RIDDER TRIB. BUS. NEWS, Nov. 16, 2005, available at [http://goliath.ecnext.com/coms2/summary\\_0198-27782\\_ITM](http://goliath.ecnext.com/coms2/summary_0198-27782_ITM).

16. Press Release, Roy Cooper, AG Cooper Seeks to Stop TVA from unlawfully polluting N.C. Air (Jan. 30, 2006), available at <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=clean%20air%20TVA%20suit%20final%20corrected%20version.pdf> (last visited Nov. 15, 2008); Press Release, Roy Cooper, TVA Should Clear the Air: Q&A *supra* note 5.

17. Press Release, Roy Cooper, TVA Should Clear the Air: Q&A, *supra* note 5.

18. *North Carolina vs. the Tennessee Valley Authority*, ENVIRONMENTAL ECONOMICS, Feb. 7, 2008, <http://www.env-econ.net/2008/02/north-carolina.html>.

19. See N. C. *ex rel.* Cooper v. Tenn. Valley Auth., 515 F.3d 344 (4th Cir. 2008); Press Release, Roy Cooper, TVA Should Clear the Air: Q&A, *supra* note 5.

20. Press Release, Roy Cooper, Statement by Attorney General Roy Cooper on notice of intent to sue pursuant to Clean Air Act, (Nov. 19, 2004), available at <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=AG%20Cooper%20statement%20on%20letter%20to%20EPA.pdf> (last visited Nov. 15, 2008); Press Release, Roy Cooper, TVA Should Clear the Air: Q&A, *supra* note 5.

The CSA is an air pollution bill that aims to significantly reduce nitrogen oxide, sulfur dioxide, mercury, and carbon dioxide from in-state power plants.<sup>21</sup> The CSA is stricter than the federal regulations governing the TVA's plants, and Cooper suggested that such statewide efforts to meet national air quality standards have been thwarted by TVA's continued pollutant emissions.<sup>22</sup> Past reports indicate that in 2003 TVA's plants released 583,000 tons of sulfur dioxide, 235,000 tons of nitrogen oxide and 4,645 pounds of mercury.<sup>23</sup>

Cooper filed the suit against the TVA in the United States District Court of Asheville North Carolina, and the Court denied TVA's motion to dismiss, holding that it had subject matter jurisdiction to hear the case.<sup>24</sup> The Fourth Circuit Court of Appeals affirmed the District Court's ruling on January 31, 2008, concluding that the TVA did not have immunity under a discretionary function exception to the TVA Act's "sue-and-be-sued" clause, and that the action was not barred by the Supremacy Clause.<sup>25</sup>

In its opinion the Court first held that North Carolina's lawsuit was not barred by the discretionary function doctrine.<sup>26</sup> The TVA did not deny that its sovereign immunity was waived to some extent, as the TVA Act specifically provides a "sue-and-be-sued" clause.<sup>27</sup> In determining just how much immunity was waived, the Court of Appeals cited *Loeffler v. Frank*, a Supreme Court case which held that a presumption existed that Congress intended "sue-and-be-sued" clauses to be broad waivers of sovereign immunity absent a contrary showing.<sup>28</sup>

In the case at hand, the Court found that the TVA failed to show there was an exception to this presumptive reading of the clause.<sup>29</sup> The TVA argued that there was an exception, namely

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21. Press Release, Roy Cooper, TVA Should Clear the Air: Q&A, *supra* note 5; see also, Sierra Club Clean Smokestacks Act, <http://www.sierraclub.org/legislativetracker/109Hr1451.asp>.

22. Press Release, Roy Cooper, Statement by Attorney General Roy Cooper on notice of intent to sue pursuant to Clean Air Act, *supra* note 20; Press Release, Roy Cooper, TVA Should Clear the Air: Q&A *supra* note 5.

23. J.R. Pegg, *Seven States Urge Bush Action on Tennessee Valley Pollution*, ENV'T NEWS SERV., June 7, 2004, available at <http://www.ens-newswire.com/ens/jun2004/2004-06-07-10.asp>.

24. See generally *N. C. ex rel. Roy Cooper v. Tennessee Valley Authority*, 439 F.Supp. 2d 486, 497 (W.D.N.C 2006).

25. See Cooper, 515 F.3d at 344.

26. *Id.* at 350.

27. *Id.* at 346-48 (citing 16 U.S.C. § 831(c)).

28. *Id.* at 347 (citing *Loeffler v. Frank*, 486 U.S. 549, 554).

29. Cooper, 515 F.3d at 347-49. An exception to the clause will only be found if the clause is not consistent with the statutory or constitutional scheme, or if it was the

that there was a separation-of-powers concern, which rendered the lawsuit inconsistent with the constitution.<sup>30</sup> The Court disagreed, reasoning that the TVA was an independent government corporation run by an independent board of directors.<sup>31</sup> As such, the TVA was separate from the federal government, and suing the TVA was not equivalent to suing the federal government.<sup>32</sup> Based on these findings, the Court held that a separation-of-powers concern did not apply to this case, and as no other exception was raised by the TVA to rebut the presumptive reading of the TVA Act's "sue-and-be-sued" clause, the clause was found to be unrestricted by the discretionary function doctrine.<sup>33</sup>

The Court of Appeals also held that the Supremacy Clause did not bar the lawsuit as Congress can authorize state regulation of federal entities with a "clear and unambiguous" waiver.<sup>34</sup> In the case at hand the Court found that language in the Clean Air Act (CAA) effectively waived the TVA's Supremacy Clause immunity.<sup>35</sup> The CAA provides that federal facilities such as the TVA "shall be subject to, and comply with, all Federal, State, interstate, and local requirements . . ."<sup>36</sup> The Court of Appeals found that the term "requirements," as written in the CAA, included common-law standards.<sup>37</sup> As such, North Carolina's common-law nuisance action fell within Congress's waiver of the TVA's Supremacy Clause protections.<sup>38</sup>

In his dissent Circuit Judge Neimeyer agreed that both the TVA Act and the CAA have language that supports North Carolina's ability to bring suit against the TVA.<sup>39</sup> However, Judge Neimeyer concluded that the TVA Act "should be read in light of the separation-of-powers doctrine, which precludes a suit challenging a governmental agency's exercise of its discretionary functions."<sup>40</sup> Judge Niemeyer explained that there must be an explicit waiver of sovereign immunity specifically in regard to

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purpose of Congress to use the clause in a narrow sense. *Id.* at 348.

30. *Id.*

31. *Id.*

32. *Id.* at 348-50.

33. *Id.* at 350.

34. *Cooper*, 515 F.3d at 350-53 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180).

35. *Id.* at 350; see Clean Air Act, 42 U.S.C. § 7418 (2008).

36. *Cooper*, 515 F.3d at 350 (quoting 42 U.S.C. § 7418(a)).

37. *Id.* at 351-52.

38. *Id.*

39. *Id.* at 354-55 (Niemeyer, C.J., dissenting in part).

40. *Id.*

discretionary functions.<sup>41</sup> Where statutes are silent on the waiver of discretionary decisions, as in the TVA Act, a discretionary function exception should apply.<sup>42</sup>

Nonetheless, Judge Niemeyer agreed with the majority that the term “requirements” in the CAA encompassed North Carolina’s nuisance suit, and, therefore, North Carolina was authorized to bring suit against the TVA even if the emissions in question are the result of a discretionary function.<sup>43</sup>

### III. THE STATES TAKE MATTERS INTO THEIR OWN HANDS

North Carolina’s common-law suit against the TVA is not the first example of states straying away from the use of federal tools such as the Environmental Protection Agency (“EPA”) and CAA. States have sued manufacturers of fuel additives under state statutory and common-law theories and have sued companies under federal and state common-law for operating power plants in a manner that caused a public nuisance and contributed to global warming.<sup>44</sup>

In the case at hand, the suit was filed after discussions with the TVA were unsuccessful, and after Cooper filed a petition with the EPA under section 126 of the CAA to require the TVA to reduce their pollutants.<sup>45</sup> In March 2006 the EPA denied the petition.<sup>46</sup> The EPA contended that under the Clean Air Interstate Rule (CAIR), issued the previous year, North Carolina’s goals would be met.<sup>47</sup> The CAIR requires that powerplants in twenty-eight states and in the District of Columbia reduce sulfur dioxide and nitrogen oxide emissions by 2015.<sup>48</sup> However, under the CAIR actual emission reductions are not necessary, but rather emission cuts can be achieved by buying or trading emission credits with other plants.<sup>49</sup> The CAIR was

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41. *Cooper*, 515 F.3d 344.

42. *Id.* at 354-55 (citing *McMellon v. U.S.*, 397 F.3d 329, 344 (4<sup>th</sup> Cir. 2004)).

43. *Id.*

44. Redefining Federalism, Top 10 State and Local Environmental Solutions, <http://www.redefiningfederalism.org/SLES/Sol10.asp> (last visited Nov. 15, 2008).

45. Complaint, *ex rel. Cooper v. Tenn. Valley Auth.*, 2008 WL 256631; Press Release, Roy Cooper, TVA Should Clear the Air: Q&A, *supra* note 5; North Carolina Requests Air Aid, <http://enviro.blr.com/display.cfm/id/46121> (last visited Nov. 15, 2008).

46. *Clean Air in the News*, THE CHARLOTTE OBSERVER, June 27, 2006 available at <https://www.environmentnorthcarolina.org/in-the-news/clean-air/clean-air/cooper-appeals-epa-air-decision-groups-join-fight>.

47. *Id.*

48. EPA: Clean Air Interstate Rule, <http://www.epa.gov/interstateairquality/> (last visited Nov. 15, 2008).

49. William G. Ross Jr., North Carolina Division of Air Quality, Key Facts about the Clean Smokestacks Act, <http://daq.state.nc.us/news/leg/cleanstacks.shtml> (last visited

overturned in *North Carolina v. EPA*,<sup>50</sup> but the court has taken the unusual act of revisiting it.<sup>51</sup>

Under the CSA, the buying and trading of emissions credits is not allowed and emissions must actually be reduced.<sup>52</sup> Consequently, the CSA may provide for cleaner air quicker than the CAIR.<sup>53</sup> As such, Cooper, not satisfied with the CAIR, asked the EPA to reconsider the denial of the petition, filed an appeal with the District Court of Appeals for the District Court of Columbia for judicial review of the denial, and filed suit against the EPA contending that parts of the CAIR needed to be stronger.<sup>54</sup>

The filing of this lawsuit against the TVA also followed other actions taken by the states in order to reduce the corporation's emissions. In June of 2004 seven states<sup>55</sup> urged President Bush to require the TVA to install modern pollution controls at its coal-fired power plants.<sup>56</sup> The plea followed an unsuccessful legal attempt, by none other than the EPA, to force TVA to install the modern controls in 1999.<sup>57</sup> The EPA alleged that the TVA violated the Clean Air Act's New Source Review program when it conducted fourteen projects at eight of its coal-fired plants

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Nov. 15, 2008); Press Release, Roy Cooper, TVA Should Clear the Air: Q&A, *supra* note 5.

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

51. *US appeals court seek petitioners' view of CAIR remand*, PLATTS, Oct. 22, 2008, <http://www.platts.com/Electric%20Power/News/6994241.xml?src=rssheadlines0>.

52. *Id.*

53. *Id.*

54. Press Release, N.C. Attorney General's Office, AG Puts EPA on Notice Over Clean Air (Feb. 19, 2007), *available at* <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=EPA%20clean%20air.pdf>; *see also* *Clean Air in the News*, *supra* note 46; Press Release, Roy Cooper, Statement by Attorney General Roy Cooper on notice of intent to sue pursuant to Clean Air Act, *supra* note 20; *see also* Petition for Reconsideration, *available at* [http://www.epa.gov/CAIR/Jun2007/pfr\\_nc.pdf](http://www.epa.gov/CAIR/Jun2007/pfr_nc.pdf); H. WILLIAM SWANSTROM, WHO HAS THE FIRST SAY? ADDITIONAL JURISDICTIONAL CONFLICTS INVOLVING THE FERC 12 (2005), *available at* <http://www.lockelord.com/files/News/d8bc1536-17a5-4591-9335-0fccfd26272f/Presentation/NewsAttachment/1018ecea-030f-4ff7-b732-125937ba9f71/FERC%20Jurisdictional%20Issues.pdf>; Press Release, N.C. Attorney General's Office, AG Cooper Wants Out of State Polluters to Stop Dirtying NC Air (Mar. 18, 2003), *available at* <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=clean%20air%20petition%20final.pdf>; Press Release, Roy Cooper, Statement by Attorney General Roy Cooper on notice of intent to sue pursuant to Clean Air Act, *supra* note 20.

55. J.R. Pegg, *Seven States Urge Bush Action on Tennessee Valley Pollution*, ENV'T NEWS SERV., June 7, 2004, *available at* <http://www.ens-newswire.com/ens/jun2004/2004-06-07-10.asp> (listing the following states: Connecticut, Illinois, New Jersey, Massachusetts, New York, Rhode Island and Vermont).

56. *Id.*

57. *Id.*

between 1982 and 1996.<sup>58</sup> The CAA's New Source Review program requires that a "polluter" install the best available pollutant controls when building a new plant or when making major modifications that increase emission production to an existing plant.<sup>59</sup> An issuance of an Administrative Compliance Order ("ACO"), which ordered the TVA to install the modern pollutant controls, and a review by the EPA's Environmental Appeals Board affirming the ACO, proved to be unsuccessful.<sup>60</sup> The TVA refused to comply with the order and challenged the EPA in federal court. On appeal the Eleventh Circuit Court of Appeals held in 2003 that the ACO was not the proper action the EPA should have taken in dealing with the TVA's alleged violation.<sup>61</sup> The Court of Appeals found the ACO to be flawed, and required the EPA to take action under the CAA in District Court.<sup>62</sup> In May of 2004 the Supreme Court declined the appeal of the Eleventh Circuit ruling.<sup>63</sup>

Ironically, at the same time as EPA's legal battle with the TVA, revisions to the CAA's New Source Review program were being made by the agency.<sup>64</sup> In 2002, revisions exempted many facilities from the New Source Review's permit and pollution control requirements.<sup>65</sup> The revisions reflected the most drastic cutback of the clean air law since enacted.<sup>66</sup> The Bush Administration contended that the revisions clarified the New Source Review Program, and would improve efficiency and decrease emissions.<sup>67</sup> Others contended that the reforms could

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58. *Id.*; Press Release, Sen. Joseph Lieberman, Chairman, Senate Comm. on Homeland Security and Governmental Affairs, Lieberman Questions Administration Commitment to Clean Air Litigation: Wither TVA Case (Oct. 10, 2003), available at <http://hsgac.senate.gov/public/> (follow "Press" hyperlink; then follow "Press Releases (Chairman)" hyperlink; then follow "2003" hyperlink and find the date of Oct. 10, 2003); see generally *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11<sup>th</sup> Cir 2003).

59. J.R. Pegg, *Supreme Court Opts Not to Hear TVA Clean Air Case*, ENV'T NEWS SERV. (2004), available at <http://www.ens-newswire.com/ens/may2004/2004-05-04-10.asp>.

60. J.R. Pegg, *Seven States Urge Bush Action on Tennessee Valley Pollution* *supra* note 55; Lieberman *supra* note 58.

61. J.R. Pegg, *Seven States Urge Bush Action on Tennessee Valley Pollution* *supra* note 55, at 28.

62. *Id.*

63. *Id.*

64. ILAN LEVIN, ET AL., AMERICA'S DIRTIEST POWER PLANTS: PLUGGED INTO THE BUSH ADMINISTRATION, PUBLIC CITIZEN ENVIRONMENTAL INTEGRITY PROJECT (2004), available at [http://www.whitehouseforsale.org/documents/dirtiest\\_plants2.pdf](http://www.whitehouseforsale.org/documents/dirtiest_plants2.pdf); see also Natural Resources Defense Counsel, The EPA's Changes to New Source Review, <http://www.nrdc.org/air/pollution/pnsr.asp>.

65. LEVIN, *supra* note 64; Natural Resources Defense Counsel, *supra* note 64.

66. Natural Resources Defense Counsel, *supra* note 64.

67. J.R. Pegg, *Seven States Urge Bush Action on Tennessee Valley Pollution*, *supra* note 55.

increase air pollution in twelve states by 1.4 million tons and allow power plants to postpone the adoption of updated pollutant controls.<sup>68</sup> In December 2003 the revisions were challenged in federal court, and the judge executed a stay to the revisions until the case was decided.<sup>69</sup> In two separate cases, the D.C. Circuit upheld some of the EPA's changes and overturned others.<sup>70</sup>

The result of the EPA's suit against the TVA, the unsuccessful plea to the executive branch, and the complex litigation over the revised New Source Review program did nothing to aid the states in reducing the TVA's unwanted emissions. Even more so, North Carolina's own discussions with the TVA, the recent denial of the petition filed with the EPA under the CAA, and the adoption of the CAIR, which arguably is not as effective as the CSA, left North Carolina with few options. It seemed as if there was no federal solution that could effectively reduce TVA's emission rate. As such, this lawsuit exemplifies the actions states must take independently of traditional federal options in order to successfully achieve their desired goals. The Federal CAA preserved the use of common law remedies, and the deployment of such remedy in this situation may be the most effective way to deal with North Carolina's concerns.

Despite the fact that North Carolina may have a tough road ahead in prevailing against the TVA, the buzz created by the lawsuit may nonetheless prompt others to file their own grievances. In this case, the Fourth Court of Appeals allowing North Carolina to sue the TVA may be all that is needed to spur an upheaval in common-law suits being filed against the government corporation. According to some experts, common-law suits are an effective way to encourage legislation reform.<sup>71</sup> For example, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), also known as the Superfund Law, was enacted by Congress in 1980 as a result of a

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68. J.R. Pegg, *Supreme Court Opts Not to Hear TVA Clean Air Case*, *supra* note 59; ENVIRONMENTAL INTEGRITY PROJECT AND THE COUNCIL OF STATE GOVERNMENTS/EASTERN REGIONAL CONFERENCE, REFORM OR ROLLBACK? HOW EPA'S CHANGES TO NEW SOURCE REVIEW AFFECT 12 STATES 10-11 (2003).

69. LEVIN, *supra* note 64.

70. Michael Janofsky, *US Backs Bush's Changes on Clean Air Act*, N.Y. TIMES, June 25, 2005, available at <http://www.nytimes.com/2005/06/25/politics/25enviro.html>.

71. See comments by Richard J. Lazarus, Environmental Law Professor at Georgetown University, in Elizabeth Shorgren, *North Carolina Sues TVA to Clean up Pollution*, NATIONAL PUBLIC RADIO, Mar. 18, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=6417740>. For an example of common-law suit prior to the enactment of the Clean Air Act, see *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

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stream of common-law suits dealing with hazardous wastes.<sup>72</sup> The law gave the federal government broad authority to respond to the release of hazardous wastes that could endanger the environment.<sup>73</sup> Similarly, an increase in common-law suits against the TVA could encourage Congress to pass stricter regulations and laws to help the states meet their pollution control objectives.

#### IV. CONCLUSION

Overall, Roy Cooper's lawsuit against the TVA is an interesting development in the quest of many states to reduce pollution emissions beyond what federal statutes such as the CAA and CAIR require. Many hail Roy Cooper as a hero, while others contend that it is the expense of the lawsuit and the neglect of the CAIR provisions that may harm North Carolina in the end. Nevertheless, North Carolina's lawsuit highlights the power of the states to effectively challenge the TVA without using the aid of federal agencies such as the EPA, but by instead using the judicial system and age old common-law.

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72. U.S. Environmental Protection Agency: CERCLA overview, <http://www.epa.gov/superfund/policy/cercla.htm>. See also Comments by Richard J. Lazarus, *supra* note 71.

73. CERCLA overview, *supra* note 72.