



Roy Cooper North Carolina Attorney General

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Contact: Noelle Talley
Phone: 919/716-6413

AG Cooper seeks to stop TVA from unlawfully polluting NC air

Cooper asks court to order TVA to cut emissions that threaten the health of North Carolinians

Charlotte: Attorney General Roy Cooper today filed suit against the Tennessee Valley Authority seeking to significantly reduce pollution from TVA's coal-fired power plants that damages the health of North Carolina's people, its economy and natural resources.

"TVA's pollution is making North Carolinians sick, damaging our economy and harming our environment," said Cooper, speaking at a news conference at the Charlotte-Mecklenburg Health Department. "It must stop."

In a legal action filed today in federal district court in Asheville, Cooper says that TVA's pollution is a public nuisance that threatens the health of North Carolina residents. He is asking the court to require TVA to reduce pollution from its coal-fired power plants.

As explained in the complaint, TVA's coal-fired power plants in Tennessee, Kentucky, and Alabama emit large amounts of sulfur dioxide (SO₂), nitrogen oxides (NO_x), and mercury into the air. These emissions are carried from TVA's smokestacks into North Carolina where they pollute the air and water. Cooper's office estimates that out-of-state power plant emissions are responsible each year for more than 15,000 illnesses and hundreds of emergency room visits and deaths in North Carolina alone. This air pollution also harms the economy and degrades the environment, damaging forests, lakes and streams and ruining air quality and scenic vistas in our mountains.

Cooper previously notified TVA that he planned to take legal action if TVA would not agree to significantly reduce pollution that harms North Carolinians. Cooper is now asking the court to require TVA to control its emissions to levels similar to those required for North Carolina plants by the state's Clean Smokestacks Act on a similar timetable.

Cooper has also filed a petition under section 126 of the Clean Air Act asking the federal government to force coal-fired power plants in thirteen other states, including Tennessee, Kentucky and Alabama where TVA operates plants, to cut down on pollution they are contributing to North Carolina.

North Carolina's Clean Smokestacks Act directs the Attorney General to use all resources, including litigation, to seek emission reductions from polluters in other states that affect North Carolina's air quality, specifically TVA. Approved by the General Assembly and Governor Easley in June 2002, Clean Smokestacks requires real reductions in emissions by the state's 14 largest coal-fired power plants and is expected to lead to fewer cases of lung disease and asthma, less smog and acid rain, and lower mercury levels in the state's waterways.

"My goal is to clear the air we breathe here in North Carolina," said Cooper. "Legal action is the last resort, but it's necessary to force TVA to do what's right."

Joining Cooper at today's news conference were NC Department of Environment and Natural Resources Secretary Bill Ross, State Health Director Leah Devlin and businessman and NC Progress Board member Mack Pearsall.###

II. PARTIES

2. North Carolina is a sovereign State of the United States of America. It brings this cause of action on its own behalf to protect State property, resources, and revenue, as *parens patriae* on behalf of its citizens and residents to protect their health and well-being, and to protect those natural resources held in trust by the State. North Carolina's Attorney General is authorized under North Carolina law to bring an action in the name of the State to address wrongs done to its citizens that constitute a public nuisance.

3. A public nuisance under North Carolina law, as well as the laws of Tennessee, Alabama, and Kentucky, is generally a condition that injuriously affects the community at large, including that which tends to endanger life, or generate disease, and affect the health of the community.

4. North Carolina has responsibility for abating air pollution within its geographic area. The State's responsibilities include implementation of the federal Clean Air Act ("CAA") generally, and the CAA explicitly preserves to the states the right to enforce any state common law remedy. 42 U.S.C. §§ 7401, 7604(e).

5. In 2002 North Carolina enacted the Clean Smokestacks Act, officially titled the Air Quality/Electric Utilities Act (2002 N.C. Sess. Law 4), which requires substantial reductions in emissions from EGUs in North Carolina, and directs the State government to pursue similar emission reductions from upwind emission sources in other states that affect the air quality in North Carolina, explicitly including TVA.

6. Defendant TVA is a corporation created by federal law and wholly-owned by the United States, with its principal place of business located in Knoxville, Tennessee. At all times

relevant to this action, including the present, TVA has owned and commercially operated the following power plants:

- A. Allen: Tennessee
- B. Bull Run: Tennessee
- C. Colbert: Alabama
- D. Cumberland: Tennessee
- E. Gallatin: Tennessee
- F. John Sevier: Tennessee
- G. Johnsonville: Tennessee
- H. Kingston: Tennessee
- I. Paradise: Kentucky
- J. Shawnee: Kentucky
- K. Widows Creek: Alabama

III. JURISDICTION AND VENUE

7. The Court has jurisdiction of this matter under 28 U.S.C. § 1331 which grants federal subject matter jurisdiction over all suits against TVA. Subject matter jurisdiction is also found under 28 U.S.C. § 1337, in that TVA is a corporation created by a federal statute regulating commerce.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b). TVA has significant contacts in the Western District of North Carolina. TVA sells electricity it generates directly to power companies serving customers in five counties in the Western District of North Carolina –

Avery, Burke, Cherokee, Clay, and Watauga. TVA owns and operates four hydroelectric dams and maintains four reservoirs in the Western District of North Carolina. TVA also sells its electricity directly to industries in North Carolina. More than 50 TVA employees are based in North Carolina. TVA also conducts other business in North Carolina including, purchasing fuel, material, and services within the state. A substantial part of the damage sustained by North Carolina and its citizens as a result of TVA's excessive emissions has occurred and is occurring in this District.

IV. CLAIMS FOR RELIEF

(Public Nuisance)

9. Paragraphs 1 through 8 are incorporated by reference.

10. Sulfur dioxide ("SO₂"), nitrogen oxides ("NO_x"), mercury ("Hg"), and primary coarse and fine particulate matter ("PM₁₀" and "PM_{2.5}", collectively "PM"), are emitted from TVA's EGUs, and secondary PM_{2.5} is formed from TVA's SO₂ and NO_x emissions downwind of TVA's EGUs. Collectively, these pollutants ("TVA's pollutants") have traveled and continue to travel into and adversely affect human health and the quality of the environment in North Carolina, as well as elsewhere in the region.

11. TVA's pollutants harm human health, safety, comfort, the environment, and the economy, including but not limited to natural resources, in North Carolina. TVA's pollutants also contribute to loss of revenue for the State and a substantial increase in expenditures for the State to combat and remedy the effects of the nuisance, as well as increased costs to the citizens of the State from increased hospital visits and other medical costs and from absence from work.

12. PM_{2.5} from TVA's EGUs (both primary and secondary) contributes to disease and premature death of citizens of North Carolina. Health effects include premature death, cardiovascular disease (including heart attacks and cardiac arrhythmia), aggravation of respiratory disease (including asthma), decreased lung function, changes to lung tissue and structure, and other respiratory effects.

13. NO_x generated from TVA's EGUs contributes to the formation of ground-level ozone, which causes North Carolina citizens to experience adverse health effects, including chest pains, aggravated asthma, shortness of breath, reduced lung function, coughing, and throat irritation.

14. The SO₂ and NO_x emissions from TVA's EGUs contribute to the deposition of acid compounds in North Carolina. Acid deposition causes the acidification of surface waters, including lakes, streams and ponds, and damages forests in North Carolina.

15. SO₂, NO_x, and primary and secondary PM emanating from or caused by TVA's EGUs contribute to haze that markedly decreases visibility in North Carolina, including in the State's treasured State parks. This haze degrades the quality of the environment for the citizens of North Carolina and visitors to the State.

16. Hg is a toxic, persistent pollutant that accumulates in the food chain. Hg emitted from TVA's EGUs moves from the atmosphere to the earth and enters lakes, rivers, and estuaries in North Carolina. Once there, it can chemically transform into methylmercury, which becomes increasingly concentrated as it travels up the food chain, reaching concentrations in fish tissue that can be toxic to those who consume affected fish. Human exposure to elevated levels of mercury has been associated with a variety of developmental neurological abnormalities. The risk of these effects is substantially increased for developing fetuses and young children.

17. Reasonable measures to abate the emissions of SO₂, NO_x, Hg, and PM would have eliminated most of TVA's pollutants and prevented much of the damage that has occurred and is still occurring to the public health of the citizens of North Carolina, and to its environment and economy as a result of those pollutants.

18. TVA's excessive pollutants also cause similar health, environmental and economic impacts in other states in the region including Tennessee, Alabama, and Kentucky.

19. TVA is aware that North Carolina has repeatedly objected to, and sought abatement of, TVA's excessive emissions, in particular of SO₂ and NO_x, from its EGUs. TVA has nonetheless failed to take appropriate and sufficient action to control the excessive emissions from these EGUs.

20. Unless enjoined by this Court, TVA will continue to operate its EGUs in a manner that creates a common law public nuisance.

21. TVA's continuing failure to utilize appropriate pollution control technology or otherwise reasonably abate emissions from its EGUs results in significant harms to the State of North Carolina and constitutes a public nuisance under the applicable law of the three States where TVA's EGUs are located – Tennessee, Alabama and Kentucky.

22. EGUs Located in Tennessee. TVA has engaged, and continues to engage, in conduct – whether otherwise lawful or not – that unreasonably interferes with or obstructs rights common to the citizens of North Carolina. TVA's conduct is prejudicial to the health, comfort, safety, and property of North Carolina's citizens at large and to the economy, finances, and natural resources of the State of North Carolina. Based upon this conduct at its EGUs in Tennessee, TVA is liable to North Carolina for the creation of a public nuisance under Tennessee's common law doctrine

of public nuisance.

23. EGUs Located in Alabama. TVA has engaged, and continues to engage, in conduct – whether intentional, unintentional, and/or negligent and whether otherwise lawful or not – that causes hurt, inconvenience, and/or damage to an indefinite number of persons in North Carolina. TVA has improperly or negligently operated its EGUs. The conditions creating the nuisance have not been caused by changed conditions in the locality surrounding the EGUs. TVA's conduct has caused a substantial and unreasonable interference with North Carolina's citizens' use and enjoyment of their property and natural resources, and/or has imperiled the comfort or health of the citizens at large of North Carolina and has damaged the economy, finances, and natural resources of the State of North Carolina. Based upon this conduct at its EGUs in Alabama, TVA is liable to North Carolina for the creation of a public nuisance under Alabama's statutory and common law.

24. EGUs Located in Kentucky. TVA has engaged, and continues to engage, in conduct – whether lawful or not – unreasonably creating a condition prejudicial to the health, safety, comfort, and property of the citizens at large in North Carolina and to the finances and natural resources of the State of North Carolina. TVA's conduct affects the rights enjoyed by North Carolina's citizens as part of the public, and causes their material annoyance, discomfort, and/or hurt, and/or harms their enjoyment of their property. Additionally, TVA's conduct causes damage to the economy, finances, and natural resources of North Carolina. Based upon this conduct at its EGUs in Kentucky, TVA is liable to North Carolina for the creation of a public nuisance under Kentucky's common law.

25. By failing to abate the public nuisance to human health and the environment

attributable to its emissions, TVA has caused and contributed to, and continues to cause and contribute to, the maintenance of a public nuisance in North Carolina and in other states in the region, including Tennessee, Alabama and Kentucky.

26. TVA's excessive emissions from its EGUs have caused and continue to cause harm to human health and the environment in North Carolina, and increased financial burdens to the State.

27. At all times relevant hereto, TVA has and continues to have a duty and obligation to North Carolina and its citizens to abate the harm and threatened harm resulting from its excessive emissions. Such duties and obligations include, inter alia, determining the nature and extent of the harm and threat to human, animal, and plant life, and to other natural resources, caused by the excessive emission of air pollutants, and implementing reasonable and appropriate measures needed to abate such harm and threat of harm.

28. TVA has failed and refused to perform its duties and obligations as set forth in the preceding paragraph.

29. Because of TVA's failure to perform some or all of those duties and obligations, North Carolina has incurred, and continues to incur, costs to pay for services needed to protect the public health and the environment. North Carolina has expended large sums of money to pay for the treatment of the harm caused by TVA's unlawful acts, including but not limited to incremental health care cost increases for treatment of additional cases of cardiovascular disease and respiratory problems and costs to address the impact of the environmental pollution.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered against Defendant to:

1. Permanently enjoin Defendant from operating its EGUs in a manner that causes or contributes to a public nuisance;
2. Require Defendant to implement reasonable and appropriate air pollution control equipment and measures at each of its power plants, as necessary to abate the public nuisance it has created;
3. Order Defendant to take all other appropriate actions to remedy the harm to public health and the environment caused by the public nuisance alleged above;
4. Award costs and attorneys' fees to Plaintiff;
5. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

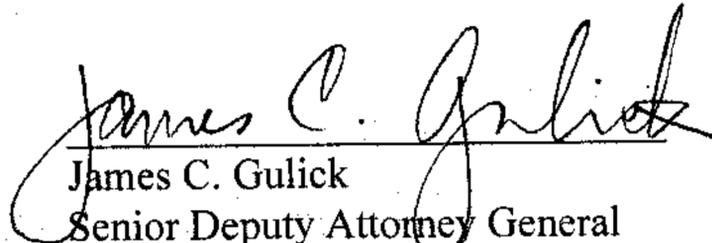
ROY COOPER
Attorney General

Of Counsel:



Michael D. Goodstein
DC Bar No. 469156
Attorney for Plaintiff
Resolution Law Group, P.C.
5335 Wisconsin Avenue NW
Suite 305
Washington DC 20015
Phone: (202) 686-4844
Fax: (202) 686-4843
e-mail: Michael.Goodstein@reslawgrp.com

By :



James C. Gulick
Senior Deputy Attorney General
N.C. State Bar No. 6179
North Carolina Department of Justice
P.O. Box 629
114 West Edenton Street
Raleigh, NC 27602
Phone: (919) 716-6940
Fax: (919) 716-6767
E-Mail: jgulick@ncdoj.com

Richard E. Ayres (APG)

Richard E. Ayres
DC Bar No. 212621
Attorney for Plaintiff
Ayres Law Group
1615 L Street, N.W., Suite 1350
Washington, D.C. 20036
Phone: 202-452-9200
Fax: 202-452-9222
E-mail: AyresR@AyresLawGroup.com

Marc Bernstein

Marc Bernstein
Special Deputy Attorney General
N.C. State Bar No. 21642
North Carolina Department of Justice
P.O. Box 629
114 West Edenton Street
Raleigh, NC 27602
Phone: (919) 716-6956
Fax: (919) 716-6767
E-Mail: mbernstein@ncdoj.com

Sueanna P. Sumpter

Sueanna Sumpter
Assistant Attorney General
N.C. Bar No. 9404
North Carolina Department of Justice
42 North French Broad Street
Asheville, NC 28801
Phone: (828) 251-6083
Fax: (828) 251-6338
E-mail: WOssumpt@ncdoj.com

TVA Should Clear the Air: Q&A

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Q: What action did North Carolina Attorney General Roy Cooper take?

North Carolina Attorney General Roy Cooper continued his efforts to make sure that North Carolinians receive the full benefit of cleaner and clearer air as promised in North Carolina's Clean Smokestacks laws. On behalf of the people of North Carolina, Cooper filed suit against the Tennessee Valley Authority (TVA). Cooper seeks to significantly reduce the amount of pollution emitted from TVA's coal-fired power plants.

Too much air pollution from coal-fired plants makes people sick with asthma and other lung diseases, damages plants and trees with acid rain and contaminates the fish we catch with toxic mercury. North Carolina claims that TVA's pollution is a public nuisance that threatens the health of North Carolina residents and harms North Carolina's natural resources, tourism and economy.

Q: Who are the parties to the case?

The plaintiff is the State of North Carolina. The defendant is the TVA. The TVA was established by the federal government as part of President Franklin Roosevelt's "New Deal." It was originally designed to improve the economic and social circumstances of people living in the Tennessee Valley, a region that includes portions of seven states including North Carolina. Today the TVA calls itself "the Nation's largest public power system."

The TVA operates 59 coal-fired electric generating units in three states, Tennessee, Alabama and Kentucky.

Q: Where and when will the case be heard?

The action was filed in the Asheville Division of the United States District Court for the Western District of North Carolina. North Carolina will seek a prompt resolution to the case because of the importance of obtaining pollution reductions quickly. A federal judge will set the schedule for the case.

Q: What is North Carolina saying in its complaint?

North Carolina is saying and will prove that air pollutants from TVA's coal-fired power plants in Tennessee, Kentucky, and Alabama are causing unreasonable harm to the public in North Carolina and the surrounding region.

TVA's coal-fired power plants emit large amounts of sulfur dioxide (SO₂), nitrogen oxides (NO_x), and mercury into the air. These pollutants are carried from TVA's smokestacks into North Carolina. Along the way, SO₂ and NO_x form fine particulate matter, and NO_x is converted to ozone. Fine particulate matter, ozone and mercury are pollutants that make people in North Carolina sick with lung disease, and contaminate the fish they catch with dangerous neurotoxins.

North Carolina estimates that out-of-state power plant emissions are responsible each year for more than 15,000 illnesses and hundreds of emergency room visits and deaths in North Carolina alone. This air pollution also degrades the environment, ruining visibility in the scenic mountains, and harms North Carolina's economy.

TVA's emissions create an unlawful common law public nuisance in North Carolina under the laws of the states in which TVA's plants are located.

Q: What is common law public nuisance?

Specific definitions of common law public nuisance vary from state to state. Generally, an activity can be found to be a public nuisance when the activity interferes with a right common to the general public and the interference of that right is unreasonable.

The United States Supreme Court has noted "[a]ir pollution is, of course, one of the most notorious types of public nuisance in modern experience." Washington v. General Motors Corp., 406 U.S. 109, 114 (1972).

Q: What is North Carolina asking the Court to do?

North Carolina is seeking a Court order requiring TVA to control its emissions to levels similar to those required for coal-fired power plants in North Carolina by the North Carolina Clean Smokestacks Act on a similar timetable.

Q: What are coal-fired power plants required to do in North Carolina?

In 2002, the legislature adopted the North Carolina Clean Smokestacks Act. This law requires coal-fired power plants to reduce their emissions by more than two-thirds. Clean Smokestacks establishes a cap on emissions from coal-fired power plants in North Carolina that is far below current emission levels. As a result, North Carolina plants cannot annually emit more than 56,000 tons of NOx by 2009 and 130,000 tons of SO2 by 2013. In 2004 it is estimated that TVA plants emitted 199,000 tons of NOx and 492,000 tons of SO2.

North Carolina utilities are meeting the timetables for reductions. These reductions are real emission reductions and cannot be met through alternative means. As North Carolina utilities make their plants cleaner, the harmful impact TVA's plants have on North Carolinians increases.

Q: Why is North Carolina concerned about out-of-State power plants?

North Carolina has passed a law which greatly reduces emissions from North Carolina plants. Because air pollution doesn't respect state lines, it's reasonable for out-of-state plants to make similar reductions. North Carolina estimates that out-of-state power plants have a combined effect on public health and the environment in North Carolina equal to or greater than that of power plants in the state.

Q: Why is North Carolina focusing on TVA?

Analysis shows that TVA is one of the largest contributors to air pollution in North Carolina. North Carolina estimates that out-of-state power plant emissions are responsible each year for more than 15,000 illnesses and hundreds of emergency room visits and deaths in North Carolina alone.

The North Carolina Senate established a Select Committee on Mountain Air Quality in 2000. According to a letter signed by all 50 members of our State Senate, the Committee found that “the substantial problems impacting our western areas of the state are caused in large part by TVA.”

In a May 9, 2001 letter to members of the North Carolina Senate, U.S Senator Jesse Helms wrote: “I generally appreciate your sharing the findings of your Senate Select Committee on Mountain Air Quality (which are very distressing). We have done our own research up here and have come up with much the same conclusion regarding the culprit - - the TVA.”

Also, North Carolina’s Clean Smokestacks Act directs the Attorney General to use all resources, including litigation, to seek emission reductions from polluters in other States that affect North Carolina’s air quality, specifically TVA. (2002 Sess. L. 4, § 10)

Q: Will there be any benefits in other States if TVA reduces its emissions?

Across the eastern United States, TVA emissions contribute to at least 900 deaths annually. The people of Tennessee, Alabama, and Kentucky, where TVA’s coal-fired electric plants are located, as well as residents in other downwind states, will benefit if TVA is required to make the emission reductions North Carolina is seeking.

Q: Why doesn’t North Carolina just sit down with TVA and work it out?

North Carolina officials have tried and will keep on trying. The State has asked the TVA for binding assurances that TVA will clean up its power plants. TVA’s Chairman has said that entering into agreements with individual states is counterproductive, even though he admits that “we [TVA] are part of the problem.” It has also recited a list of past pollution control actions, many required under federal court consent decrees from 1979 and 1980, and vague but unenforceable plans for future actions.

Q: Why is North Carolina taking the route of litigation?

Litigation is a last resort. North Carolina has attempted to engage TVA in discussions, but with no results so far. The State also has filed a petition under section 126 of the Clean Air Act asking the federal government to require TVA, as well as other power companies, to reduce their pollution to protect citizens of North Carolina. TVA is actively opposing North Carolina’s petition.

In addition, TVA has fought the U.S. Environmental Protection Agency’s (EPA) own efforts to force TVA to install pollution controls on its power plants. A federal appeals court has ruled that the EPA cannot administratively force TVA to comply with federal rules requiring the installation of pollution controls. The court’s ruling was on procedural grounds, despite the fact that an administrative law judge found that TVA violated pollution control requirements under the federal Clean Air Act.

Q: Why isn't the EPA's CAIR rule good enough to solve North Carolina's problem?

EPA's recent Clean Air Interstate Rule (CAIR) requires states in the eastern half of the country to meet certain emission "budgets." CAIR requirements are not expected to be met fully until after 2020. North Carolinians don't want to and shouldn't have to wait another generation for healthy air quality, or for the chance to see the Smokies clearly again. As North Carolina's Clean Smokestacks program shows, emissions can be reduced far more rapidly than federal rules require.

In addition, CAIR does not cap emissions from any power plant or power system. TVA can comply with CAIR by buying pollution "allowances" rather than actually cleaning up, leaving North Carolinians and those in Alabama, Tennessee, Kentucky and other states, suffering from TVA's continuing excessive pollution.

Unlike CAIR, Clean Smokestacks requires actual reductions from North Carolina power plants that cannot be avoided by buying paper credits on the market. North Carolina deserves an equivalent assurance that TVA's harmful emissions are also actually reduced.