No. 09-1623

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATE OF NORTH CAROLINA
ex rel. ROY COOPER, ATTORNEY GENERAL,
Plaintiff-Appellee,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellant,

STATE OF ALABAMA,
Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

AMICI CURIAE BRIEF OF ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF STATE OF NORTH CAROLINA

William H. Rodgers, Jr., Robert Abrams, William L.Andreen, Robin Kundis Craig, Victor Flatt, John Greabe, Jennifer S. Hendricks, Donald Hornstein, Oliver A. Houck, Ryke Longest, James R. May, Robert V. Percival, Zygmunt J.B. Plater

Patrick Parenteau, Counsel of Record
Environmental and Natural Resources Law Clinic
Vermont Law School
164 Chelsea Street
PO Box 96
South Royalton, VT 05068
(802) 831-1627
Attorney for Amici Curiae Environmental Law Professors

November 6, 2009

TABLE OF CONTENTS:

Page

TABLE OF AUTHORITIES:

Page(s)

Cases:

Statutes:

Regulations:

Other Authorities:

INTEREST OF *AMICI*

Amici are professors and scholars who teach, research, and publish articles and treatises on environmental law, constitutional law, and related topics. *Amici* wish to provide the court with an independent assessment of the issues presented and offer some insights on the legal doctrines that apply to this controversy. In particular, *amici* hope to shed light on the purpose and function of savings clauses in environmental statues such as the Clean Air Act, and the complementary role that common law remedies were intended to play in the overall scheme of federal environmental regulation.

The views expressed here are solely those of the individual *amici* and not necessarily those of their institutions. This brief is properly before the Court pursuant to Federal Rule of Appellate Procedure 29(a) because all parties have consented to its filing.

SUMMARY

The core issue here is whether North Carolina, acting in its quasi-sovereign, *parens patriae* capacity, has the same right to abate a public nuisance based on the harmful effects of air pollution as would any other party, including the governments of the states where that air pollution originates. The *amici* believe that Congress and the U.S. Supreme Court have never required, nor would they allow, federal courts to apply any state

procedural rule that discriminates against affected downwind states and denies them access to the same common law remedies as source states.

The record clearly shows that emissions from TVA's power plants in Alabama and Tennessee are causing serious damage to public health and natural resources in Western North Carolina.[1] There is no question that these effects constitute a classic public nuisance, namely an unreasonable interference with rights common to the public. Nor is there any question that these effects meet the definition of a public nuisance under the common law of Alabama and Tennessee which, as the District Court found, do not differ significantly from those of their sister states across the country.

Nevertheless, TVA argues that North Carolina is foreclosed from bringing an action to abate this nuisance because the laws of Alabama and Tennessee do not explicitly recognize the right of "foreign quasi-sovereigns" to bring public nuisance actions in those states. This argument is multiply flawed.

First, the CAA savings clause expressly preserves common law remedies such as this. Congress has consistently recognized the primary

[1] These effects include increased risk of premature mortality; exacerbation of asthma, chronic bronchitis, and other adverse cardio-pulmonary effects; damage to forests and watersheds from acid deposition; and visibility impairment in the Great Smoky Mountain National Park and several Wilderness Areas in Western North Carolina. *North Carolina v. TVA*, 593 F. Supp. 2d 812, 822-25 (W. D. N. C. 2009).

responsibility of the states to protect public health and welfare, and has carefully balanced the sovereign interests of source states and affected states in the regulation of air and water pollution, while at the same time taking care to preserve common law remedies where regulatory compliance alone is not sufficient to safeguard public health and conserve natural resources. The plain text of the statute reveals Congress' manifest intent to preserve common law remedies to fill regulatory gaps and complement statutory enforcement mechanisms.

Second, on their face the source state laws do not purport to deny sister states the right to bring public nuisance actions against facilities within the source states. Indeed, no state has ever sought to bar suits by foreign states. Thus, it is anomalous for TVA to argue that explicit recognition is necessary for a state to assert a never-before questioned right. Nor is this Court under any obligation to give the source state laws that effect. Basic concepts of federalism and comity require that North Carolina be accorded the same right as the source states would have to exercise their authority as *parens patriae* to protect their citizens from public nuisances caused by sources located within or outside their borders. As the U.S. Supreme Court said over a century ago in *Georgia v. Tennessee Copper*, a state "has the last word as to whether its mountains shall be stripped of their forests and its

inhabitants shall breathe pure air."[2] Although *Tennessee Copper* was based on a federal common law of nuisance that predates the modern era of pollution control statutes such as the Clean Air Act, it remains good law and was recently cited by the Supreme Court in *Massachusetts v. EPA* for the principle that states retain *parens patriae* authority to protect the health of their citizens and integrity of their natural resources from environmental degradation; and, where transboundary pollution is involved federal courts, exercising their equitable authority, must provide a forum for the peaceful resolution of interstate disputes.

Finally, this case fits squarely within the holding of the U.S. Supreme Court's decision in *International Paper Company v. Ouellette*.[3] The Court held that the CAA does not preempt public nuisance actions. In connection with this ruling, the Court adopted a choice-of-law rule that looks to the substance of source state nuisance laws for questions involving interstate air pollution. By no means, however, did the Court authorize source states to engage in unlawful protectionism of their home industries and economic interests by closing their courthouse doors to neighboring states.

[2] 206 U.S. 230, 237 (1907).
[3] 479 U.S. 481 (1987).

ARGUMENT

II. THE PURPOSE OF THE CAA SAVINGS CLAUSE IS TO PRESERVE THE RIGHTS OF STATES TO USE ALL MEANS NECESSARY, INCLUDING COMMON LAW REMEDIES, TO ELIMINATE AIR POLLUTION AND PROTECT PUBLIC HEALTH AND NATURAL RESOURCES.

A. A Central Theme of the CAA Is Its Dedication to Federalism and the Preservation of State Remedies.

The principle of federalism is at the heart of the CAA's purpose and structure. The stated purpose of the CAA is 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 the population." 42 U.S.C. § 7401(b)(1). The legislative findings reflect Congress' recognition that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) …is the primary responsibility of the states and local governments." 42 U.S.C. §7401(a)(3) (emphasis supplied).

The CAA's commitment to federalism is also illustrated by the well-established rule that, for stationary sources, the CAA establishes a baseline level of protection and allows states to set more stringent standards and regulatory requirements as conditions warrant. *See generally* MARTINEAU, ROBERT J. AND DAVID P. NOVELLO, EDS., THE CLEAN AIR ACT HANDBOOK 165 (2d ed. 2009). The only state laws that would be inconsistent with, and

therefore preempted by, the CAA are those state laws that purport to impose less stringent limitations on air pollution. As the Supreme Court has explained:

> Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." To be sure, Congress has largely pre-empted the field with regard to "emissions from new motor vehicles," and motor vehicle fuels and fuel additives. It has also pre-empted the field so far as emissions from airplanes are concerned. So far as factories, incinerators, and other stationary devices are implicated, the States have broad control....

Washington v. General Motors Corp., 406 U.S. 109, 114 (1972). *See also Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975) (explaining that the CAA accords states "broad control" over air pollution).

In furtherance of this bedrock federalism principle, Congress has explicitly preserved the traditional authority of the states to prevent stationary source pollution by any means necessary, including common law remedies. Toward that end, Section 304(e) provides that:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from-(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local

> court, or (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution.

42 U.S.C. § 7604(e). Thus, Congress spoke directly to the precise issue presented in this case, and it has unmistakably expressed its intent that the CAA shall not restrict "any right" or preempt "any relief" available under "any statute or common law." The plain meaning of this statutory language ends the inquiry because Congress "has directly spoken to the precise question at issue… [and where] the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842 (1987).[4]

In addition, Section 116 provides that:

> Nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce ... any requirement respecting control or abatement of air pollution....

[4] The legislative history confirms this reading. The Senate Report accompanying the bill that became the 1970 amendments, in describing the purpose of §304 (the citizen suit provision), states: "It should noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with [CAA] standards would not be a defense to a common law action for pollution damages." Senate Report No. 91-1196 (91st Cong. 2d Sess.) "National Air Quality Standards Act of 1970" Report of the Committee on Public Works, U.S. Senate, at 38 (September 17, 1970).

42 U.S.C. § 7416. This Court has previously concluded in this litigation "that a common-law nuisance action is . . . a 'requirement' within the meaning of the CAA." *North Carolina ex rel. Cooper v. TVA ("TVA I")*, 515 F.3d 344, 351 (4th Cir. 2008). Similarly, in *Guttierrez v. Mobil Oil*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992), the district court explained that:

> To hold that the Clean Air Act preempts purely private state law causes of actions for damages would preclude relief for any person who can prove the elements of the common law claims. Such a result is clearly not intended under, and would not further the goals of, the Clean Air Act.

See also Her Majesty The Queen v. City of Detroit, 874 F.2d 332, 344 (6th Cir.1989) (explaining that state law claims asserted by the plaintiffs were "supplemental of the other applicable legal and administrative requirements of the CAA").

Finally, Congress has been particularly careful to ensure that federal agencies, such as TVA, remain subject to state enforcement actions, including common law remedies. Section 318 provides that "*every agency of the federal government is subject to and must comply with all* Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and *to the same extent as any nongovernmental entity*."

42 U.S.C. 7418(a) (emphasis added). With respect to the obligations of federal agencies:

> Section 304 would provide that a citizen enforcement action might be brought against an individual or a government agency. As recognized under section 118 of the bill [§318 of the statute], Federal facilities generate considerable air pollution. Since Federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to develop control measures, it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under section 118."

Senate Report No. 95-127 (95th Cong. 1st Sess.) "Clean Air Amendments of 1977" Report of the Committee on Environment and Public Works, United States Senate, to accompany S. 252, at 37 (May 10, 1977).

As this Court previously found, this provision "foreclose[s] the TVA's argument that the CAA does not mandate compliance with state 'requirements' enforced through a common-law tort suit." *TVA I*, 515 F.3d at 352-53. As this Court further noted, "[t]he Supreme Court has held that state "requirements" include common-law standards." *Id*. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," [citation omitted] there is no need to infer congressional

intent to pre-empt state laws from the substantive provisions" of the legislation.).

B. The History of the CAA and North Carolina's Thwarted Attempts to Use Its Interstate Pollution Provisions Underscore the Importance of Preserving State Remedies.

Congress was not legislating in a vacuum when it adopted the CAA. As Professor Rodgers states in his seminal treatise:

> In the first place, the experience of hundreds of years of attempting to combat air pollution by nuisance and other common law doctrines was not summarily swept aside. The retention of the common law as part of the deep background of the legislation is probably best expressed by the preservation state authority in Section 116 of the Act.

RODGERS, WILLIAM, ENVIRONMENTAL LAW § 3:1 (2009). Moreover, Congress was fully aware that it was legislating against a background of judicial precedent recognizing the inherent authority of states to seek equitable relief against sources of air pollution regardless of where they are located. *Cf. Ohio v. Wyandotte Chemicals Corp*., 401 U.S. 493, 496 (1971) (acknowledging that "[t]his Court has often adjudicated controversies between States and between a State and citizens of another State seeking to abate a nuisance that exists in one State yet produces noxious consequences in another."); *North Dakota v. Minnesota*, 263 U.S. 365 (1923)(interstate water diversion); *Georgia v. Tennessee Copper; New York v. New Jersey*,

256 U.S. 296 (1921)(discharge of sewage into boundary waters); *Missouri v. Illinois*, 200 U.S. 496 (1906)(sewage discharges to Mississippi River). The legislative history of the 1970 Act confirms that Congress did not intend the CAA to displace the common law. For instance, Congress acknowledged that common-law rights are "not affected" by the enactment of the CAA. H.R. Rep. No. 1783, 91st Cong., 2d Sess. 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5388 (1970). *See* S. Rep. No. 451, 92d Cong., 1st Sess. 23-24 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4234, 4248 (1971). In addition, Congress emphasized that ("[c]ompliance with requirements under [the CAA] would not be a defense to a common law action for pollution damages." S. Rep. No. 414, 92d Cong., 1st Sess. 81, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746-47 (1972)).[5]

Further, in the 1990 amendments to the CAA, Congress again emphasized the importance of preserving both statutory and common law remedies:

---

[5] The "permit shield" provision underscores the fact that permit compliance does not provide a defense to common law claims. Section 504 (c) provides that "[c]ompliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title." 42 U.S.C. § 7661c. Furthermore, this Court has interpreted the identical permit shield provision of the Clean Water Act as limited to violations of the statute and not providing a defense to common law actions. *See Piney Run Preservation Ass'n v. County Com'rs of Carroll County*, 268 F.3d 255, 269 (4th Cir 2001).

> To assure that such preemption of State or local law, whether statutory or common, does not occur, environmental legislation enacted by the Congress has consistently evidenced great care to preserve State and local authority and the consequent remedies available to the citizens injured by the release of harmful substances to the environment.

S. Rep. 101-228, 101st Cong., 2d Sess. 197 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3582 (1990).

The wisdom of Congress' retention of common law remedies to buttress regulatory mechanisms is demonstrated by the unsuccessful efforts of North Carolina to resolve the problems presented here. Indeed, the Act's mechanisms for dealing with interstate pollution have proven singularly ineffective in this case and others. First, North Carolina's efforts to address these issues through the Section 126 petition process were rebuffed by EPA. *See* EPA, "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). In fact, although the Act forbids any pollution that will "contribute significantly" to an affected state's nonattainment of air quality standards, 42 U.S.C. § 7426, states have, with one exception,[6] been unsuccessful in obtaining relief under section 126 for

[6] In 2004, EPA did grant a petition by the Northeast states to address the long range transport of NOx pollution following years of litigation. See 69 Fed. Reg. 21604, (April 21, 2004).

pollution emanating from another state. *See New York v. EPA*, 852 F.2d 574, 578 (D.C. Cir. 1988); *Connecticut v. EPA*, 656 F.2d 902, 907 (2d Cir. 1981).

Moreover, attempts to compel EPA to take action to abate interstate air pollution have routinely failed. In some cases, courts have affirmed EPA's discretion to adopt narrow interpretations of its statutory obligations, while in others, courts have deferred to EPA's technical expertise in finding inadequate proof of an interstate effect. *See Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1093 (6th Cir. 1984); *New York v. EPA*, 716 F.2d 440, 444 (7th Cir. 1983); *New York v. EPA*, 710 F.2d 1200, 1204 (6th Cir. 1983).

The Clean Air Act Interstate Rule (CAIR), which TVA touts as an example of an alternative regulatory mechanism, actually demonstrates yet another failure of administrative approaches. CAIR was struck down by the D.C. Circuit in large part because it did not adequately protect downwind states like North Carolina. *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008). In a scathing opinion, the D.C. Circuit declared that "[n]o amount of tinkering . . . will transform CAIR into an acceptable rule," and "very little [of CAIR] will survive remand in anything approaching recognizable form." *Id*. at 929. EPA has not yet proposed any revised CAIR rule, and it is unclear when or if it will ever do so.

In sum, the text, structure, purpose, and history of the CAA clearly manifest Congress' intent to preserve, not preempt, common law remedies because it recognized that these remedies complement and reinforce the Act's regulatory and enforcement mechanisms. A statute need "not address every issue of [an area of law]... but when it does speak directly to a question, the courts are not free to 'supplement' Congress'[s] answer so thoroughly that the [statute] becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)

II. WHEN ACTING AS *PARENS PATRIAE*, STATES ARE ENTITLED TO SPECIAL CONSIDERATION BECAUSE THEY ARE SEEKING TO PROTECT THE INTERESTS OF ALL OF THEIR CITIZENS.

A. States Have a Unique and Essential Role in Preventing and Abating Public Nuisances.

In its most recent landmark global warming decision in 2007, the Supreme Court relied heavily on *Georgia v. Tennessee Copper* for its rationale, noting the long history of cases allowing states to "litigate as *parens patriae* to protect quasi-sovereign interests—i.e., public or government interests that concern the state as a whole." 127 S. Ct. at 1455 n. 17. The Court held that states were entitled to "special solicitude" when bringing suit in their quasi-sovereign capacity. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455 (2007).

Under the common law of public nuisance in Tennessee and Alabama, public nuisance is defined as "an unreasonable interference with a right *common* to the general public." Rest. (2d) Torts (1979) § 821(B) (emphasis added). Significantly, the District Court found that Tennessee has adopted the Restatement (2d). *North Carolina ex rel. Cooper v. TVA*, 549 F. Supp. 2d 725, 735. Further, the District Court found that:

> In Alabama, a nuisance "is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance."(citing *Russell Corp. v. Sullivan*, 790 So. 2d 940, 951 (Ala. 2001)). '"A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals.'" (quoting Ala. Code § 6-5-121). *Id*.

Air pollution is a classic public nuisance because it injures a wide array of citizens, and it interferes with their use and enjoyment of state resources. *See* Abrams, Robert & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after Boomer,* 54 Alb. L.Rev. 359, 362 (1990).

The Second Circuit has recently reinforced this principle. *See Connecticut v. American Elec. Power Co.*, __F.3d__, 2009 WL 2996729, at *22 (2d Cir. Sept. 21, 2009). Noting that "it is doubtful that individual plaintiffs filing a private suit could achieve complete relief," the Second Circuit concluded that:

> [The states'] interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities. Their quasi-sovereign interests involving their concern for the "health and well-being-both physical and economic-of [their] residents in general" [citation omitted] are classic examples of a state's quasi-sovereign interest.

Id. at 22. Accordingly, the Second Circuit held that a group of states had Article III standing to bring a federal common law public nuisance suit against power plants for damages resulting from carbon dioxide emissions linked to climate change. *See id.*

B. When Acting as *Parens Patriae*, States Are Not Required to Show "Special Damages" in Order to Establish Standing.

The Supreme Court has recognized that states do not stand in the same shoes as private parties when it comes to vindicating the rights of the public to be free from air pollution nuisances. For instance, in *Georgia v. Tennessee Copper*, the Court explained that:

> This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.

206 U.S. at 237. The Court also noted that: "The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law." *Id*. Although *Tennessee Copper* was based on a federal common law of nuisance that predates the modern era of pollution control

statutes, such as the CAA, the principles it teaches are equally applicable here.

TVA's argument that the laws of Alabama and Tennessee require North Carolina to prove "special damages" in order to establish standing is without merit. It would be highly inappropriate to impose a "special damages" requirement on a state suing in its *parens patriae* capacity on behalf of its citizens. As Judge Thornburg correctly observed:

> Here, the State of North Carolina, as *parens patriae,* is effectively bringing suit on behalf of the North Carolina public at large. As such, it makes no sense to interpret the laws of the source states as requiring North Carolina to prove that its damages are *different* from those of the public at large.

549 F. Supp. 2d at 731.

Moreover, it is federal law that controls whether or not a case or controversy exists and, consequently, whether a court has Article III jurisdiction. In *Massachusetts v. EPA*, the Supreme Court held that, to establish standing, a state need only show that it suffers harm from the actions of the defendant. North Carolina has established that in this case.

In short, states retain *parens patriae* authority to protect the health of their citizens and the integrity of their natural resources from environmental degradation. Because states play a special role in responding to public nuisances, they are not subject to any elevated standing requirements. On

the contrary, standing requirements must be applied with special solicitude in light of states' responsibility to protect the health of their citizens and the integrity of state resources.

III. THE DISTRICT COURT FOLLOWED THE SUPREME COURT'S DIRECTIVES IN *OUELLETTE* BY APPLYING THE SUBSTANTIVE COMMON LAW OF THE SOURCE STATES, BUT NOT ANY DISCRIMINATORY PROCEDURAL RULES.

The *amici* urge this Court to apply the substantive principles of public nuisance under source state law, just as the district court did below. While *amici* do not believe the procedural rules of the source states were intended to exclude quasi-foreign sovereigns, even if they did, *amici* would urge this Court not to apply such rules because of their discriminatory nature and doubtful constitutional validity.

In *International Paper v. Oullette*, the Supreme Court acknowledged the potential tension between state nuisance law and federal permitting systems in the context of the Clean Water Act. 479 U.S. at 497. Ultimately, the Court held that the Clean Water Act does not preempt public nuisance actions, and that public nuisance actions relating to interstate water pollution are governed by the substantive law of the source state. *See id.* ("[N]othing in the [CWA] bars aggrieved individuals form bringing a nuisance claim pursuant to the law of the *source* state."). Judge Thornburg accurately summarized the outcome in *Ouellette* as follows:

> Ultimately, the Court chose to balance these competing interests, observing 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." [*479 U.S. at 499*] This way, the Court noted, "a source only is required to look to a single additional authority [beyond the federal permitting system], whose rules should be relatively predictable."

549 F. Supp.2d at 732. The savings clauses in Section 505(e) of the CWA and Section 304(e) of the CAA are identical, *see* 42 U.S.C. 1365(e), and subsequent cases have extended the *Ouellette* holding to the CAA. *See Ouellette v. International Paper Inc.*, 666 F. Supp. 58 60-61 (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."). *See also Guttierrez*, 798 F. Supp. at 1285 ("This Court holds that the Clean Air Act does not preempt the plaintiffs' various common law claims.").

TVA and its *amici* argue that *Ouellette* authorizes suits by private parties but not suits by "foreign quasi-sovereigns" like North Carolina. The short answer is that the *Ouellette* Court did not even consider that issue. *Ouellette* involved a public nuisance action brought by a resident of Vermont against a New York company as a diversity case in the federal district court for the District of Vermont. Hence, the Court was not called

upon to address the question of whether an affected state could maintain a public nuisance case in its quasi-sovereign capacity. However, there is no reason to suppose that the outcome would have been any different had the plaintiff been the State of Vermont. The savings clauses of the CWA and CAA do not distinguish between public and private nuisance claims; nor do they differentiate between claims brought by states as opposed to individuals. Both statutes explicitly include states within the definition of those "person or persons" entitled to bring enforcement actions as well as common law claims.[7]

To accept TVA's argument would be to place North Carolina in a subordinate position to a private individual in North Carolina affected by air pollution, an anachronistic distinction not supported by any evident reason. Similarly, TVA's argument subordinates affected states to source states in the exercise of *parens patriae* authority. TVA's position that a state may discriminate against sister states in this fashion runs afoul of the fundamental constitutional principles of comity, equality of states, and non-discrimination. *Cf. Hughes v. Fetter***,** 341 U.S. 609, 614 (1951) ("We conclude that Wisconsin's statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the Full Faith and Credit

[7] The CWA defines "person" to mean, *inter alia*, a "State." 33 U.S.C.§ 1362 (5); likewise the CAA, 42 U.S.C. § 7602 (e).

Clause."); *Wells v. Simonds Abrasive Co*., 345 U.S. 514, 518-519 (1953) (holding that the forum state may not apply an "uneven hand" to causes of action arising "within and without the forum state").

In light of these venerated constitutional principles, there is no merit to TVA's argument that the *Ouellette* Court authorized source states to deprive downwind states of a remedy. It is simply unreasonable to conclude that the Supreme Court intended to overturn a century of common law remedies for interstate air pollution, especially where, as here, the normal regulatory procedures have failed to prevent ongoing harm to public health and the environment. When choosing between the substantive public nuisance law of the source state and the affected state, the Court clearly presumed that, whichever body of law applied, downwind states would have the same rights as source states to bring a public nuisance action to protect their citizens from the harmful effects of air pollution.

Indeed, the Supreme Court stated in *Ouellette* that "[n]othing in the [CWA] prevents a court sitting in an affected state from hearing a common law nuisance suit, provided that jurisdiction otherwise is proper." *Ouellette*, 479 U.S. at 500 (emphasis supplied). Since this Court has previously ruled that the district court has jurisdiction over this suit under the "sue or be sued" clause of TVA's enabling legislation. *TVA I*, 515 F.3d at 348-50,

North Carolina is properly pursuing this litigation in federal district court within North Carolina.

In sum, *Ouellette* simply held that federal courts must apply the substantive law of the source state in public nuisance cases. That is exactly what the district court did here, finding that "[t]he public nuisance laws of these states do not differ significantly from those of their sister states across the country." 549 F. Supp. 2d at 730. The *Ouellette* decision said nothing even remotely suggesting that source states may close their courthouse doors to downwind states asserting the very same types of claims that the source states themselves would be authorized to bring, and this Court should not read anything of the kind into the *Ouellete* ruling.

In sum, there is no merit to TVA's argument that *Ouellette* carved out an exception for private plaintiffs and left affected states without a remedy.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to uphold the judgment of the district court.

SIGNATURE OF COUNSEL

Respectfully submitted,

*/s/ Patrick Parenteau
Patrick Parenteau
Environmental and Natural Resources Law Clinic
Vermont Law School
164 Chelsea Street, PO Box 96
South Royalton, VT 05068
(802) 831-1305
Attorneys for Amicus Curiae Environmental Law Professors

*I would like to express appreciation to Vermont Law School Student Clinicians Gregory Berck and Matthew Greenberg who contributed substantially to the development of this brief.

RESET FORM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1623 **Caption:** State of North Carolina v. Tennessee Valley Authority

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]

☑ this brief contains 4,790 [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]

☑ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 [*state name and version of word processing program*] in 14-point Times New Roman [*state font size and name of the type style*]; *or*

☐ this brief has been prepared in a monospaced typeface using _____ [*state name and version of word processing program*] with _____ [*state number of characters per inch and name of type style*].

(s) Patrick Parenteau

Attorney for amici Environmental Law Professors

Dated: Nov. 6, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 6, 2009, I electronically filed the foregoing Brief of *Amici Curiae* Environmental Law Professors in support of Plaintiff-Appellee with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following registered CM/ECF users:

Frank H. Lancaster
Harriet A. Cooper
Maria V. Gillen
Maureen H. Dunn
Tennessee Valley Authority
Office of the General Counsel
400 West Summit Hill Drive
Knoxville, TN 37902-1401

David J. DePippo
F. William Brownell
Makram B. Jaber
Hunton & Williams
1900 K Street, N.W.
Suite 1200
Washington, D.C. 20006-1109

Christopher G. Browning, Jr.
James C. Gulick
Marc Bernstein
North Carolina Dept. of Justice
114 West Edenton Street
P.O. Box 629
Raleigh, NC 27602

Sueanna Peeler Sumpter
North Carolina Department of Justice
42 North French Broad Avenue
Asheville, NC 28801

Michael D. Goodstein
Stacey H. Myers
Hunsucker Goodstein & Nelson, P.C.
5335 Wisconsin Avenue, N.W.
Washington, D.C. 20015

Richard E. Ayres
Jessica L. Olson
Ayres Law Group
1615 L Street, N.W.
Suite 1350
Washington, D.C. 20036-0000

Troy King
Attorney General
Corey Maze
Solicitor General
State of Alabama
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130

Kevin C. Newsom
Brian M. Vines
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203

s/s Patrick Parenteau
Patrick Parenteau

United States Court of Appeals for the Fourth Circuit
Court of Appeals Docket #: 09-1623
State of North Carolina v. Tennessee Valley Authority
APPENDIX
Biographies of Amici

William H. Rodgers

William H. Rodgers, Jr. is the Stimson Bullitt Professor of Law at the University of Washington School of Law and is the first Douglas Costle Chair Visiting Professor at Vermont Law School. He is recognized as a founder of environmental law and has taught at the University of Washington School of Law since 1967, except for seven years at Georgetown University Law School. Professor Rodgers is an expert in environmental law, Native American law, natural resource law and ocean law. His authorship, teaching, lectures, professional appointments and visiting professorships are extensive. Professor Rodgers is the author of eleven books on the subject of environmental law inclusive of his four-volume *Environmental Law Treatise.* He was appointed to the National Academy of Sciences, National Research Council and Ocean Studies Board, Committee on Defining Best Available Science for Fisheries Management, 2003-2004 and the National Academy of Sciences, Board on Environmental Studies and Toxicology, 1984-1990 and was selected for the Bloedel Professorship of Law, Washington School of Law, 1987-1992. Professor

Rodgers earned his B.A., 1961, from Harvard University, and J.D., 1965, from Columbia University.

Robert Abrams

Robert Abrams is a Professor at Florida A&M College of Law. He is an expert in Water and Environmental Law. Professor Abrams has authored textbooks in both fields and he is the past Chair of the ABA Water Resources Committee and is currently serving as a Vice Chair of that committee. He is a contributing editor of the *Preview of United States Supreme Court Cases* and a Life Member of the American Law Institute. He earned his J.D., 1973, from the University of Michigan Law School.

William L. Andreen

William Andreen is the Edgar L. Clarkson Professor of Law at the University of Alabama School of Law, the Director of that school's Joint Summer Program with the Australian National University (ANU), and an Adjunct Professor at the ANU's College of Law. Professor Andreen has served as a litigator with the Atlanta law firm of Haas, Holland, Levison & Gibert, and as Assistant Regional Counsel of the U. S. Environmental Protection Agency, Region 4. He has also served as a Visiting Professor at Lewis & Clark Law School, a Fulbright Senior Scholar and Visiting Fellow

at the ANU's National Europe Centre, a Visiting Professor at Washington and Lee University School of Law, and a Visiting Fellow in the Law Faculty at the ANU. He is a member of the IUCN Commission on Environmental Law and received the 2007 River Hero Award from the Alabama Rivers Alliance. Professor Andreen teaches environmental law and administrative law at Alabama and is currently teaching a number of graduate law courses at Addis Ababa University (Ethiopia). He holds a B.A., 1975, from the College of Wooster and a J.D., 1977, from Columbia University School of Law.

Robin Kundis Craig

Robin Kundis Craig is a Professor and Associate Dean for Environmental Programs at Florida State University College of Law. She was Distinguished Environmental Summer Scholar at Vermont Law School, during summer 2009. She is a national expert in the Clean Water Act, the connection of fresh water regulation to ocean water quality, marine biodiversity and marine protected areas, property rights in fresh water, and science and water resource protection. As a result of her Clean Water Act work, the National Research Council of the National Academy of Sciences appointed Professor Craig in 2005 to a two-year committee to assess the effects of that Act's regulation of the Mississippi River. She earned a B.A.,

1985, from Pomona College, a M.A., 1986, from The John Hopkins University, a Ph.D., 1993, from University of California, and a J.D., 1996, from Lewis and Clark School of Law.

Victor Flatt

Victor Flatt is a Professor at the University of North Carolina School of Law and holds an appointment as a Distinguished Scholar in Carbon Markets and Carbon Trading at the Global Energy Management Institute at the University of Houston's Bauer College of Business. He is the Tom & Elizabeth Taft Distinguished Professor in Environmental Law, and the Director of the Center for Law, Environment, Adaptation, and Resources (CLEAR). Professor Flatt is also a member scholar of the Center for Progressive Reform. He earned his B.A., 1985, from Vanderbilt University, and a J.D., 1988, from Northwestern University School of Law.

John Greabe

John Greabe is a Professor at Vermont Law School and Visiting Professor of Constitutional Law at Franklin Pierce Law School. He is an expert in the areas of constitutional law, civil procedure, federal courts and jurisdiction and the federal judiciary. Professor Greabe currently serves as Chair on the Board of Trustees of Capital Region Food Program in Concord,

NH. He holds a B.A., 1985, from Dartmouth College, and a J.D., 1988, from Harvard Law School.

Jennifer Hendricks

Jennifer Hendricks is an Associate Professor at the University of Tennessee College of Law. After receiving her J.D. *magna cum laude* from Harvard Law School, she clerked for the Hon. Karen Nelson Moore on the U.S. Court of Appeals for the Sixth Circuit. She then practiced plaintiffs' trial and appellate litigation in Helena, Montana, for several years before coming to the University of Tennessee in 2005. At UT, she teaches Constitutional Law, Civil Procedure, and Law and Gender. Professor Hendricks researches and writes in the areas of federalism and feminist theory. Her work on federalism focuses on the study of the proper role and scope of authority for state and local institutions in a wide range of fields, ranging from the enforcement of common law rights (*Preemption of Common Law Claims and the Prospects for FIFRA: Justice Stevens Puts the Genie Back in the Bottle*, 15 DUKE ENVTL. L. & POL'Y FORUM 65 (2005)), to national politics (*Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218 (2008)), to educational policy (*Teaching Values, Teaching Stereotypes*, in progress). Professor Hendricks' scholarship has received national recognition, winning the Notre Dame

Feminist Jurisprudence Prize in 1999 and honorable mention in the American Association of Law Schools Scholarly Papers Competition in 2007.

Donald Hornstein

Donald Hornstein is the Aubrey L. Brooks Distinguished Professor of Law at the University of North Carolina School of Law, where he teaches environmental law, insurance law, and administrative law. Professor Hornstein was the first law professor at the University of North Carolina to be awarded the University's overall teaching prize for Post-Baccalaureate Instruction and is the 7-time recipient of the Law School's Frederick B. McCall Award for Teaching Excellence. Professor Hornstein also is a faculty advisor to the University's Institute for the Environment, teaches as a member of the University's Curriculum in Environment and Ecology, and was recently appointed to the Board of Directors of North Carolina's Coastal Wind Pool Insurance Consortium. A former Associate Dean at the Law School, he holds a B.A., 1972, from University of California at Los Angeles, and J.D., 1981, from University of Oregon where he served as Editor-in-Chief of the Oregon Law Review.

Oliver A. Houck

Oliver A. Houck is a Professor at Tulane University Law School. His academic interests are in environmental, natural resources, and criminal law. He has authored more than fifty law review articles and two books on environmental and public law issues. Professor Houck has recently served on the Boards of Directors of the Defenders of Wildlife and the Environmental Law Institute, the Litigation Review Board of the Environmental Defense Fund and two committees of the National Science Foundation. He has received awards as Louisiana's Conservationist of the Year, Gambit magazine's New Orleanian of the Year, and the New Orleans Young Leadership Council's Role Model of the Year; as well as Tulane University Law School's Felix Frankfurter Distinguished Teacher. He earned a B.A., 1960, from Harvard University, and a J.D., 1967, from Georgetown University.

Ryke Longest

Ryke Longest is a Professor at Duke University School of Law where he serves as the Director of the Environmental Law and Policy Clinic. For fourteen years, he worked for the North Carolina Department of Justice in the Environmental Division where he served as lead counsel to state level environmental agencies, boards and commissions. Professor Longest

teaches the seminar at the Environmental Law and Policy Clinic and teaches advanced environmental law and policy. He received his B.A., 1987, from University of North Carolina Chapel Hill and a J.D., 1991, from University of North Carolina Chapel Hill.

James R. May

James R. May is a Professor of Law and Adjunct Professor of Graduate Engineering at Widener University, and serves as Associate Director of the Widener Environmental Law Center. In 2009 he was awarded the H. Albert Young Fellowship in Constitutional Law. Professor May teaches and publishes in Constitutional, Environmental, Natural Resources, Hazardous Substances, Administrative, Civil Procedure, International Environmental, Environmental Justice, Hazardous Wastes and Substances, and Engineering Law. He has published extensively and has a forthcoming book, *Contemporary Principles In Constitutional Environmental La*w.

Professor May directed the law school's Environmental and Natural Resources Law Clinic from 1992-2004, during which time the clinic successfully litigated more than 200 cases for 50 non-profit environmental groups in a dozen federal and state courts across the country, including the United States Supreme Court. Professor May is also the founder and co-

director of the law school's Master's of Marine Policy (MMP) program, a joint program with the University of Delaware. Prior to law he served as a Q clearance engineer on nuclear weapons national defense projects.

Professor May is the founder, and immediate past executive director and president of the Mid-Atlantic Environmental Law Center, and co-founder and past co-director of the Eastern Environmental Law Center. He has served as the director of Widener Institute at the MacQuarie University Environmental Law Centre in Sydney, Australia, Visiting Associate Director of the Institute for Public Representation at Georgetown Law Center, Visiting Professor at Georgetown University Law Center, summer faculty at Vermont Law School, and Visiting Fellow at the Environmental Law Institute. He has taught International Environmental Law in Sydney (four times) and Nairobi, Kenya.

Professor May was Chair of the ABA Section on Environment and Energy Resources' (SEER) 38th Annual Conference on Environmental Law in 2009, and co-Chair in 2007 and 2008. He is a past SEER Council Member and was founder and inaugural Chair to its Task Force on Constitutional Law. In 2009 he was inducted into the American College of Environmental Lawyers. He is a past member of the Committee on Environmental Law to the International Union for the Conservation of

Nature, and Master to the Delaware Valley Environmental American Inn of Court. He is a past recipient of awards from the Sierra Club and the Delaware Nature Society.

He earned his B.S. in Mechanical Engineering, where he won the Bowman Award, his J.D. from the University of Kansas, where he was a national champion in the National Environmental Moot Court Competition, and his LL.M. from Pace University School of Law, where he was the Feldshuh Environmental Fellow and graduated first in his class.

Robert V. Percival

Robert V. Percival is the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland School of Law. He is internationally recognized as a leading scholar in environmental law. Professor Percival is principal author of the country's most widely used casebook in environmental law, *Environmental Regulation: Law, Science & Policy*. He has served as a visiting professor of law at Harvard Law School in 2000 and 2009 and at Georgetown University Law Center in 2005. Professor Percival is a member of the IUCN Commission on Environmental Law and he has served on the Board of Directors of the Environmental Law Institute and as co-chair of the steering committee of the D.C. Bar's Section on Environmental, Energy and Natural

Resources Law. He earned a B.A., 1972, from Macalester College, and M.A. and J.D., 1978, from Stanford University. While in law school, Percival served as managing editor of the Stanford Law Review and he was named the Nathan Abbott Scholar for graduating first in his law school class. Percival served as a law clerk for Judge Shirley M. Hufstedler of the U.S. Court of Appeals for the Ninth Circuit and for U.S. Supreme Court Justice Byron R. White. He joined the Maryland law faculty in 1987 after serving as a senior attorney with the Environmental Defense Fund.

Zygmunt J. B. Plater

Zygmunt Plater is Professor of Law at Boston College Law School. He teaches and researches in the areas of environmental, property, land use, and administrative agency law. Professor Plater has published numerous articles in various environmentally related fields, several cited in Supreme Court decisions, is lead author of a national environmental law casebook published by WoltersKluwer/Aspen Law Publishing, litigated the case of TVA v. Hill, and has consulted on a number of significant cases including work for the State of Alaska after the Exxon Valdez oil spill. He was awarded the 2005 David Brower Lifetime Achievement Award presented by the Land Air Water group at the Twenty-third International Public Interest Environmental Law Conference. He earned an A.B. from Princeton

University, a J.D., from Yale University, and LL.M. and S.J.D. degrees from the University of Michigan.