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

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, PUBLIC NUISANCE FAIRNESS COALITION, UTILITY AIR REGULATORY GROUP AND AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT

CHARLES H. KNAUSS
MICHAEL B. WIGMORE
ROBERT V. ZENER
SANDRA P. FRANCO
BINGHAM & MCCUTCHEN LLP
2020 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 373-6000

(Please see inside cover for Of Counsel)

August 18, 2009

OF COUNSEL:

WILLLIAM L. WEHRUM
HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
SUITE 1200
WASHINGTON, D.C. 20006-1109
(202) 955-1500

Counsel for the Utility Air Regulatory Group

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 PENNSYLVANIA AVENUE, N.W.
6TH FLOOR
WASHINGTON, D.C. 20004-1790
(202) 637-3000

HARRY M. NG
STACY R. LINDEN
OFFICE OF THE GENERAL COUNSEL
AMERICAN PETROLEUM INSTITUTE
1220 L STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-8000

GEORGE S. KOPP
COUNSEL
PUBLIC NUISANCE FAIRNESS COALITION
1990 M STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 741-4663

JAN POLING
VICE PRESIDENT, GENERAL COUNSEL & CORPORATE SECRETARY
AMERICAN FOREST & PAPER ASSOCIATION
1111 19TH STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20036
(202) 463-2590

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1623 Caption: STATE OF NORTH CAROLINA v. TENNESSEE VALLEY AUTHORITY

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

See attached.	

/s/ Charles H. Knauss
(signature)

08/18/09
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1623 Caption: STATE OF NORTH CAROLINA v. TENNESSEE VALLEY AUTHORITY

Pursuant to FRAP 26.1 and Local Rule 26.1,
National Association of Manufacturers (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

See attached.	

/s/ Charles H. Knauss (signature)

08/18/09 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1623 Caption: STATE OF NORTH CAROLINA v. TENNESSEE VALLEY AUTHORITY

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Petroleum Institute (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

See attached.	

/s/ Charles H. Knauss (signature) 08/18/09 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1623 Caption: STATE OF NORTH CAROLINA v. TENNESSEE VALLEY AUTHORITY

Pursuant to FRAP 26.1 and Local Rule 26.1,
Public Nuisance Fairness Coalition (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

See attached.	

/s/ Charles H. Knauss (signature)

08/18/09 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1623 Caption: STATE OF NORTH CAROLINA v. TENNESSEE VALLEY AUTHORITY

Pursuant to FRAP 26.1 and Local Rule 26.1,

Utility Air Regulatory Group (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

See attached.	

/s/ Charles H. Knauss (signature)

08/18/09 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1623 Caption: STATE OF NORTH CAROLINA v. TENNESSEE VALLEY AUTHORITY

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Forest & Paper Assn. who is Amicus, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

See attached.	

/s/ Charles H. Knauss
(signature)

08/18/09
(date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL ADMINISTRATIVE MATERIALS

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

BART	Best Available Retrofit Technology
CAA or the Act	Clean Air Act
CAIR	Clean Air Interstate Rule
CWA	Clean Water Act
FOF	Finding of Fact
NAAQS	national ambient air quality standards
NOx	nitrogen oxide
NOx SIP Call	Nitrogen Oxide Budget Trading Program
ppb	parts per billion
PM	particulate matter
$PM_{2.5}$	fine particulate matter
SIP	state implementation plan
SO_2	sulfur dioxide
TVA	Tennessee Valley Authority
$\mu g/m^3$	micrograms per cubic meter

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY

The Chamber of Commerce of the United States of America represents an underlying membership of 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The National Association of Manufacturers represents small and large manufacturers in every industrial sector and in all 50 states.

The American Petroleum Institute represents nearly 400 companies that are involved in all aspects of the oil and natural gas industry. The Public Nuisance Fairness Coalition is composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits. The Utility Air Regulatory Group is a not-for-profit association of electric generating companies and national trade associations. The American Forest & Paper Association represents the forest, paper, and wood products industry.

Amici represent manufacturers in their respective industries on matters affecting their businesses. Members of *amici* operate facilities that emit air pollutants under permits issued pursuant to the Clean Air Act ("CAA" or "the Act"). These facilities may become subject to additional controls imposed outside the normal regulatory process, and by entities outside of their home state, if the

district court's opinion stands. As such, the associations have a substantial interest in this case.

All parties consented to filing this *amici* brief.

INTRODUCTION AND SUMMARY

The district court's decision raises profound legal and practical issues that go to the heart of how air pollution is regulated in this country. As a legal matter, plaintiff's state public nuisance claims are preempted by the comprehensive interstate air pollution control scheme of the CAA, and in many respects constitute impermissible collateral attacks for which the district court lacks jurisdiction. As a practical matter, the district court's decision could expose virtually any source of emissions above an arbitrary case-by-case threshold anywhere in the country to liability for causing or contributing to a public nuisance.

Federal preemption "may be presumed when the federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *Int'l Paper Co. v. Ouellette ("Ouellette"),* 479 U.S. 481, 491 (1987) (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In addition, state laws conflicting with federal requirements are preempted, and a conflict will be found when the state law "'stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress.'" *Id.* at 492 (quoting *Hillsborough*, 471 U.S. at 713, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The CAA, which requires EPA to comprehensively regulate interstate air pollution, preempts interstate public nuisance suits under both these tests. Pursuant to Congress' authorization, EPA has established several programs specifically addressing interstate pollution, including the very pollutants and potential adverse health effects at issue in this case. These programs include: the Clean Air Interstate Rule ("CAIR") and the Nitrogen Oxide Budget Trading Program ("NOx SIP Call") under CAA §110(a)(2)(D), 42 U.S.C. §7410(a)(2)(D); regulations under CAA Title IV regulating acid deposition, *id.* §§7651-7651*o*; and "regional haze" regulations under CAA §169A(b) aimed at protecting visibility in "mandatory class I Federal areas" (which include the Great Smoky Mountains National Park and four other areas in North Carolina), *id.* §7491. These programs give downwind states the right to present their positions administratively and on judicial review. This federal system of regulation is comprehensive, and leaves no room for further controls through interstate public nuisance suits.

The CAA also requires major sources of air pollution to obtain federal operating permits, which mandate compliance with all "applicable requirements" of the Act, including state requirements. 42 U.S.C. §7661c(a). This provision is designed to facilitate compliance with the Act by ensuring that major sources have

a single document setting forth all the air pollution requirements they must meet. Judicial imposition of additional requirements outside of this permit stemming from interstate public nuisance suits directly conflicts with this goal. Moreover, major capital expenditures a source makes to comply with CAA requirements might be nullified or superseded by additional or alternative controls imposed by a public nuisance suit.

The CAA generally preserves a state's ability to impose pollution control requirements stricter than federal standards. 42 U.S.C. §§7416, 7604(e). The district court allowed North Carolina's suit in reliance on *Ouellette*, which held similar provisions in the Clean Water Act ("CWA") preserved the right of individuals to bring interstate *private* nuisance actions under the law of the source state. The Supreme Court recognized, however, that the CWA would not allow source state nuisance law to be applied in a manner that conflicts with federal law. *Ouellette*, 479 U.S. at 499 n.20. Public nuisance suits based on interstate air pollution conflict with federal law because they run counter to the same requirements established by the CAA -- acceptable levels of ambient pollutant concentrations based on EPA's scientific and policy judgments regarding the overall level of risk posed.

In addition, the CAA requires EPA to comprehensively regulate interstate pollution -- which authority EPA utilized to establish programs specifically

directed at the interstate pollution targeted by North Carolina in this suit. North Carolina's public nuisance suit conflicts with this comprehensive regulatory system. By contrast, private nuisance suits, like the suit in *Ouellette*, require a showing that individual plaintiffs suffered special damage caused by the defendant, and are akin to typical tort liability.

Interstate public nuisance suits pose a particularly acute conflict with federal law when they are brought by a neighboring state based on its political judgment that an out-of-state source's permit requirements are not sufficient. That is not a judgment the source's state is likely to make, because that state will have issued (or already agreed to) the source's operating permit, which must incorporate the source state's requirements even if stricter than federal requirements. Allowing a neighboring state to bring a public nuisance suit in these circumstances, in lieu of the administrative and judicial remedies provided by the CAA, directly conflicts with the comprehensive federal scheme, and frustrates Congress' purpose in enacting the CAA and delegating its implementation to EPA and state regulators.

Finally, the district court lawsuit brought by North Carolina amounted to a collateral attack on the national ambient air quality standards ("NAAQS") for particulate matter ("PM") and ozone, EPA's CAIR decisions, and EPA's decision to deny North Carolina's CAA §126 petition. The district court lacks jurisdiction

over such challenges, which is exclusive to the U.S. Courts of Appeals. 42 U.S.C. §7607(b).

ARGUMENT

I. The Clean Air Act Establishes a Comprehensive System of Federal Regulation of Interstate Air Pollution, Leaving No Room for Additional Regulation Through Interstate Public Nuisance Suits.

The CAA establishes a comprehensive regulatory scheme to address the interstate air pollution at issue in this case. The pollutants at issue before the district court were nitrogen oxide ("NOx") and sulfur oxide ("SO_2"). *North Carolina, ex rel. Cooper v. Tenn. Valley Auth. ("TVA-FJ")*, 593 F. Supp. 2d 812, 819 (W.D.N.C. 2009). NOx and SO_2 are precursors for ozone and PM, referred to as "secondary pollutants."[1] *Id.* Pursuant to the CAA, EPA has established comprehensive regional programs to regulate these pollutants, as well as a regional program to control acid deposition, and a nationwide program to control regional haze. *All* of these programs are implicated in the present case.

CAA §110(a)(2)(D) requires state implementation plans ("SIPs") to contain provisions prohibiting sources within the state from contributing significantly to violations of air quality standards in any other state, interfering with maintenance of air quality in any other state, or interfering with measures in any other state's SIP to prevent significant deterioration of air quality. 42 U.S.C. §7410(a)(2)(D).

[1] Although mercury is also listed as a primary pollutant in the suit, the district court addressed it only in the context of PM.

EPA issued comprehensive regulations prescribing what states must do to fulfill these statutory requirements. 70 Fed. Reg. 25,162, 25,165 (May 12, 2005), described in *North Carolina v. EPA*, 531 F.3d 896, 903-05 (D.C. Cir. 2008). These regulations, known as CAIR, established a regional program covering 28 states and the District of Columbia, which EPA determined may contribute significantly to out-of-state nonattainment of one or more NAAQS. CAIR established a schedule for emission reductions in the upwind states. *North Carolina*, 531 F.3d at 903. It also established threshold levels for each pollutant to determine whether a state is subject to CAIR; for each state exceeding that threshold, EPA provided criteria for determining whether the state contributes significantly to a violation in a downwind state. *Id.* at 903-04. CAIR also established state-specific NOx and SO_2 emissions budgets designed to alleviate significant contribution to downwind nonattainment, *id.* at 904-05, and an optional regionwide emissions trading system under which the sources in participating states may sell or purchase emissions credits from sources in other states, with the result that the overall regional budget is preserved, *id.* at 903, 906-08.[2]

Prior to CAIR, EPA used its authorities under CAA §110(a)(2)(D), 42 U.S.C. §7410(a)(2)(D), and §126, *Id.* §7426, in two rules directed at interstate

[2] The D.C. Circuit, on North Carolina's petition, held portions of CAIR invalid, but subsequently decided to leave CAIR in effect while EPA responds to the Court's decision. *North Carolina v. EPA*, 531 F.3d 896, *pet. for reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

transport of NOx. One of these rules, the NOx SIP Call, established NOx emission budgets for 23 states. *See West Virginia v. EPA*, 362 F.3d 861, 865 (D.C. Cir. 2004). EPA also adopted a rule under §126 ("Section 126 Rule"), establishing NOx emission budgets for sources in 12 states contributing to non-attainment in downwind states. *Id.* at 865-66. The NOx SIP Call and the Section 126 Rule also established regional cap-and-trade programs, under which sources could purchase emission credits from, and sell emissions credits to, sources located in other states within the region. *Id.* at 866, 868.

This case involves interstate pollution among Alabama, Kentucky, Tennessee and North Carolina, each of which is part of the NOx SIP Call and CAIR programs. The district court's order regulates the very same pollutants for the very same reasons as federal interstate pollution programs.

In addition, Title IV of the CAA established a nationwide cap-and-trade program for SO_2 emissions from electric generating units, designed to curb "acid rain." 42 U.S.C. §§7651-7651*o*. Under this program, Congress imposed a nationwide cap on power plant SO_2 emissions, and allocated allowances based on a plant's share of total heat input during a baseline period. *See North Carolina*, 531 F.3d at 902-03. This program also imposed technology-based NOx control requirements. The district court's decision was grounded in part on concerns related to acid deposition resulting from interstate pollution of SO_2 and NOx. Yet

these pollutants and potential adverse environmental effects are the very focus of the federal acid rain program.

Also, CAA §169A(b) requires SIPs to contain emission limits designed to eliminate man-made impairment of visibility in any "mandatory class I Federal area." 42 U.S.C. §7491(b). This requirement applies to any state in which a class I Federal area is located and any state "the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area." *Id.* §7491(b)(2). There are five mandatory class I Federal areas in North Carolina, including Great Smoky Mountains National Park. 40 C.F.R. §81.422. EPA's Regional Haze regulations implementing this program require Best Available Retrofit Technology ("BART") on specific sources, "unless the State demonstrates that an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions." *Id.* §51.308(e). The determination of BART for large fossil-fueled power plants must be made pursuant to EPA guidelines. *Id.* §51.308(e)(1)(ii)(B). *See also* 40 C.F.R. Part 51, App. Y. Each source subject to BART must achieve compliance within 5 years. *Id.* §51.308(e)(1)(iv). The district court's liability finding was based in part on the potential effects of NOx and SO_2 emissions on visibility in National Parks in North Carolina, including the Great Smoky Mountains and Shining Rock. Yet, such visibility impairment is the entire focus of EPA's Regional Haze Rule.

In short, pursuant to the CAA EPA has established numerous programs to comprehensively regulate the interstate pollution and potential adverse effects found actionable in this suit. In this situation, the "comprehensive federal role 'leave[s] no room or need for conflicting state controls.'" *California v. FERC*, 495 U.S. 490, 502 (1990) (quoting *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181 (1946)).

That this case involves *interstate* public nuisance is crucially important. If there is a presumption against preemption in areas "the States have traditionally occupied," *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), there is no such presumption "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). There is such a history in the area of interstate air pollution where, in the absence of a comprehensive federal regulatory statute, *federal* common law has been applied. *See Illinois v. Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

II. Interstate Public Nuisance Suits Stand as Obstacles to Full Implementation of the Purposes and Objectives of Congress.

Interstate public nuisance suits, such as North Carolina's, "'stand[] as . . . obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ouellette*, 479 U.S. at 492 (quoting *Hillsborough*, 471 U.S. at 713, quoting *Hines*, 312 U.S. at 67). The district court's opinion

undermines not only the CAA programs addressing interstate air pollution discussed above, but also a key method for achieving the CAA's goals -- the Title V operating permit program.

The CAA provides that major sources of air pollution[3] must obtain operating permits that, among other things, reflect compliance with "all applicable requirements" under the Act. 42 U.S.C. §§7661b, 7661c(a). The permit is a "source-specific bible for Clean Air Act compliance" that "contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source." *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). The purpose of consolidating all requirements in a single permit is to "facilitate compliance" with CAA and source-state requirements. *Sierra Club v. Leavitt*, 368 F.3d 1300, 1302-03 (11th Cir. 2004). *See also Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 453 (5th Cir. 2003); *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 320 (2d Cir. 2003). "'The program will . . . clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements of the Act.'" *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 742 (9th Cir. 2008) (quoting 57 Fed. Reg. 32,250, 32,251 (July 21, 1992)) (omission in original). The district court's decision essentially creates a

[3] Each of the facilities targeted in the district court had been issued a Title V operating permit. *See* Park Decl. at ¶6 (Docket No. 60, Ex. 1, filed July 19, 2007).

free-standing regulatory regime that would not be reflected in a source's CAA operating permit, thereby frustrating a key CAA objective.

As the Supreme Court recognized, by imposing requirements in addition to those specified in the permits, interstate public nuisance suits "would undermine the important goals of efficiency and predictability in the permit system." *Ouellette*, 479 U.S. at 496. Such suits could effectively override the permit, which incorporates not only federal requirements but also the "policy choices made by the source State" as they are incorporated in the permit, including requirements of the SIP. *Id.* at 495. Given the inherent vagueness of state nuisance law, allowing interstate public nuisance suits would make it "virtually impossible to predict the standard" for lawful emissions into the atmosphere (which by its nature is interstate) and render federal permit limits for these emissions meaningless. *Id.* at 497 (quoting *Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)).

The district court's decision also frustrates the operation of the regional and nationwide programs for the reduction of air emissions described in Section I. For example, the district court's decision imposes additional restrictions on states' abilities to develop their own compliance plans for meeting the emission reductions under the NOx SIP Call and CAIR programs necessary to achieve the NAAQS, a key goal of EPA and the CAA. The district court's opinion also bypasses EPA's comprehensive visibility protection program, which provides a

measured and deliberate scheme for meeting the goal of eliminating man-made visibility impairment in national parks. Further, the acid rain program requires an orderly and competitive allowance system, which may be undermined if another state is allowed to impose its own standards in addition to EPA and the source state, as was done in this case. 42 U.S.C. §7651b(d). EPA, in fact, has prohibited states from imposing restrictions in Title V permits that would frustrate allowance trading. 40 C.F.R. §72.72(a).

In each instance, the purposes of the CAA are frustrated by allowing another state to dictate the controls that should be imposed on sources, thereby circumventing the methods prescribed by Congress to achieve the emissions reductions required under the Act. *See Clean Air Mkts. Group v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003) ("Even where federal and state statutes have a common goal, a state law will be preempted 'if it interferes with the *methods* by which the federal statute was designed to reach this goal.'").

III. *Ouellette*'s Allowance of Private Interstate Water Pollution Suits Under the Nuisance Law of the Source State Does Not Govern Here.

Ouellette held that the CWA, while barring interstate nuisance suits under the law of the affected states, would not bar "aggrieved individuals" from bringing private nuisance suits under the law of the source state. 479 U.S. at 497. The district court relied on *Ouellette* to conclude that North Carolina could bring this suit under the laws of Tennessee, Alabama and Kentucky (the source states). *North*

Carolina, ex rel. Cooper v. Tenn. Valley Auth. ("TVA-SJ"), 549 F. Supp. 2d 725, 728-29 (W.D.N.C. 2008). *Ouellette* does not change the conclusions in Sections I and II. The reasoning of that case is not applicable here because this case involves the CAA, not the CWA, and this case involves public, not private, nuisance claims.

A. EPA has broad authority to regulate interstate air pollution under the CAA, which was not addressed in *Ouellette*.

Ouellette differs from the instant case because it involved the CWA, not the CAA. The CAA requires EPA to regulate interstate air pollution to a much greater extent than EPA regulates interstate water pollution under the CWA. While both Acts contain procedures for resolving disputes over particular permits,[4] interstate emissions of NOx have long been regulated by EPA through Title IV, the NOx SIP Call, the Section 126 Rule, CAIR, and the Regional Haze Rule. Similarly, interstate emissions of SO_2 have been addressed through Title IV, CAIR and the Regional Haze Rule. Each of these programs is implicated in the present case. By contrast, the CWA's interstate programs are limited to certain interstate bodies of water, and were not implicated in *Ouellette.*[5]

---

[4] *See* 33 U.S.C. §1342(b)(5); 42 U.S.C. §7661d.

[5] Under the CWA, EPA does not issue "national" water quality standards similar to NAAQS, and "regional" programs are limited to specific bodies of water. For example, CWA §118(c)(2) requires EPA to issue guidance on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System. 33 U.S.C. §1268(c)(2). Section 120 requires state pollution prevention, control and restoration plans for the Lake Champlain Basin, which must be approved by EPA. *Id.* §1270. In these cases, Congress expressly

Moreover, Congress established in the CWA a policy "to recognize, preserve, and protect *the primary responsibilities and rights of States*" to address water pollution under the CWA. 33 U.S.C. §1251(b) (emphasis added). *See also id.* §1251(g). Under the CAA, on the other hand, EPA adopts national standards sufficient to promote public health and welfare *and* the productive capacity of the entire nation, although it grants states the primary responsibility for identifying and imposing controls on sources necessary to meet these national goals. 42 U.S.C. §§7401(a)(3), (b)(1), 7408-7410.

B. Statutory savings clauses do not restrict the scope of federal preemption.

In holding that the CWA does not preempt private nuisance suits based on interstate water pollution if brought under the source state's law, *Ouellette* relied in large part on the CWA's savings clauses (33 U.S.C. §§1365(e), 1370). 479 U.S. at 492-93. *Ouellette* also recognized, however, that despite the savings clauses, application of the source state's law would be pre-empted if it would "frustrate the carefully prescribed CWA regulatory system." *Id.* at 499 n.20. The Court explained that, while the source state's law "generally controls," "the preemptive scope of the CWA necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress.'" *Id.* (quoting *Hillsborough*, 471 U.S. at 713). *See also*

---

provided that CWA §118 and §120 do not affect a state's authority over these waters. *Id.* §§1268(g), 1270(h).

Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) ("[T]he savings clause . . . does *not* bar the ordinary working of conflict pre-emption principles.").

Likewise, the preemptive scope of the CAA necessarily includes, despite its savings clauses,[6] *all* laws inconsistent with the full purposes and objectives of Congress, such as interstate public nuisance suits at issue here. As discussed above in Section II, such suits are inconsistent with the CAA's comprehensive federal programs to control interstate air pollution. In addition, they frustrate the certainty Congress intended to provide by requiring major source CAA permits to address all applicable requirements. The savings clauses do not save the conflicting state law from preemption.[7]

C. Unlike this case, *Ouellette* involved a private nuisance suit involving special damages.

Ouellette was a private nuisance suit, brought by persons seeking to recover property damage resulting from an interstate discharge. *Ouellette* emphasized this point, stating that it was preserving nuisance suits brought by "aggrieved individuals." 479 U.S. at 497. This case, by contrast, is a public nuisance suit, in

---

[6] The CAA contains savings clauses similar to the CWA. 42 U.S.C. §§7604(e), 7416.

[7] In addition to *Ouellette*, the district court relied on *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332 (6th Cir. 1989), and *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992). Neither case is relevant here because neither involved interstate pollution.

which North Carolina seeks a remedy for alleged damages to the public at large -- the same kind of damages addressed by federal regulation under the CAA.

The special damages required for private nuisance suits must be "different, not merely in degree, but in kind, from that suffered by the public at large." *TVA-SJ*, 549 F. Supp. 2d at 731 (citations omitted). *See*, *e.g.*, *Fox v. Corbitt*, 194 S.W. 88, 88-89 (Tenn. 1917). *Ouellette* is a good example. The plaintiffs there owned property on the lake into which the defendant's plant discharged; they alleged that the discharge made the water "'foul, unhealthy, smelly, and . . . unfit for recreational use,'" thereby diminishing the value of their property. *Ouellette*, 479 U.S. at 484 (omission in original) (citation omitted). In such a case, a court may examine direct evidence of causation and damage typical in tort cases.

By contrast, North Carolina's public nuisance claim does not involve special damages. Absent special damages, public nuisance suits must be brought by the state.[8] Here, a political decision was made by a *downwind state* that the controls imposed by the out-of-state source's permits are not sufficient to protect the downwind state's citizens or environment. The North Carolina legislature directed the Attorney General to bring this action, and the district court acknowledged that the impetus of the suit is the North Carolina General Assembly's direction that the State use "all available resources and means, including . . . litigation to induce

[8] As the district court noted, that is the law of all three source states involved here. *TVA-SJ*, 549 F. Supp. 2d at 730.

other states and entities, including [TVA], to achieve reductions in emissions of [NOx] and [SO_2] comparable to those required [in a North Carolina Act]" -- reductions that North Carolina has imposed on its own sources and is now attempting to impose on out-of-state sources as well. *TVA-FJ*, 593 F. Supp. 2d at 816 n.2 (quoting N.C. Clean Smokestacks Act §10). The reality is that North Carolina, with the district court's cooperation, is using the nuisance laws of the source states to enforce the political judgment of North Carolina as to the appropriate pollution controls on sources located in *other* states.

The source states have already made these political judgments, in their SIPs and the sources' permits. As a practical matter, sources with CAA permits need not worry about nuisance suits by their own state attorney general.[9] By contrast, if downwind states can bring nuisance suits to vindicate their differing views of appropriate pollution control levels, "'[a]ny permit issued under the Act would be meaningless.'" *Ouellette*, 479 U.S. at 497 (quoting *Milwaukee*, 731 F.3d at 414).

The evidence relied on by the district court reflects that this suit seeks to vindicate North Carolina's policy disagreement with EPA concerning the levels of emission control needed to protect public health and the environment. Rather than

[9] As observed in *Ouellette*, "States can be expected to take into account their own nuisance laws in setting permit requirements." 479 U.S. at 499. *See also Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008) (finding general interests of people of a state are represented by state environmental agency issuing a permit, thereby precluding suit by state attorney general).

identifying specific individuals or specific properties that have suffered special damage, the district court relied on statistical estimates as to public health effects of pollutants associated with a source's emissions -- estimates it acknowledged are "fraught with uncertainty, due to disagreement among leading experts." *TVA-FJ*, 593 F. Supp. 2d at 822 (discussing effects of fine particulate matter ($PM_{2.5}$)). In addition, the district court entered findings with respect to acid deposition, visibility effects, and the health and environmental effects of ozone and $PM_{2.5}$.

The judge's findings examine the same issues, with the same type of evidence, that EPA has already considered in establishing the ozone and $PM_{2.5}$ NAAQS, as well as regulations to control acid deposition and visibility. For example, the court's Finding of Fact ("FOF") 27 relating to premature mortality allegedly caused by exposure to PM covers the same ground discussed by EPA in its preamble to the 2006 proposed rule revising the PM NAAQS.[10] 71 Fed. Reg. 2620, 2627, 2636 (Jan. 17, 2006).[11] In assessing this evidence, the district court

---

[10] EPA must review its NAAQS every five years. 42 U.S.C. §7409(d). The 2006 PM NAAQS was challenged by various petitioners, including a number of states, and subsequently remanded to EPA. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009).

[11] The district court's other findings regarding the effects of PM and ozone on human health and the environment have likewise been evaluated by EPA under the CAA, including the relationship between PM and asthma, chronic bronchitis, and other cardiopulmonary illness and the social and economic harms associated with those impacts (FOF 30-33, 71 Fed. Reg. at 2632, 2642, 71 Fed. Reg. 61,144, 61,154-55, 61,157 (Oct. 17, 2006)); effects of PM on the environment (FOF 34-39, 71 Fed. Reg. at 2682-2684); ozone effects on premature death, asthma, and

concluded that exposures to various pollutants have negative health effects even at levels at or below the NAAQS (although the CAA requires these standards to protect public health with an adequate margin of safety). *TVA-FJ,* 593 F. Supp. 2d at 821, FOF 25 ("$PM_{2.5}$ exposure has significant negative impacts on human health, *even when the exposure occurs at levels at or below the NAAQS."*) (emphasis added); *id.* at 824, FOF 48 ("It is well-established in the scientific literature that ozone contributes significantly to these bad health effects, *even at or below NAAQS levels."*) (emphasis added); 42 U.S.C. §7409(b)(1).

In essence, North Carolina persuaded the district court to utilize the state nuisance laws of Tennessee, Kentucky and Alabama as a platform for deciding what levels of pollution control are necessary to protect public health and the environment in North Carolina -- and in that connection to disagree with EPA on that precise issue. EPA has already denied North Carolina's petition for relief under CAA §126, under which North Carolina demanded stricter limits on power plants in several states (including the plants targeted here), and targeting the same pollutants ($PM_{2.5}$ and ozone) that it targets here. 71 Fed. Reg. 25,328, 25,334, 25,337-38 (Apr. 28, 2006). With respect to ozone, EPA denied North Carolina's petition on the basis of projected attainment of the ozone standard, and with

---

responses to allergens (FOF 44-47, 73 Fed. Reg. 16,436, 16,440 (Mar. 27, 2008)); and ozone effects on vegetation (FOF 50, 73 Fed. Reg. at 16,488). PM's effects on visibility, at issue in FOF 40-43, was the focus of the Regional Haze Rule. 64 Fed. Reg. 35,714, 35,715 (July 1, 1999).

respect to $PM_{2.5}$, EPA denied the petition on the basis that the problem would be addressed in the implementation plans. *Id.* at 25,337-38.

In contrast to an effort to obtain relief for individual special damage, as was the case in *Ouellette*, North Carolina is using a public nuisance suit as a collateral means for judicial review of EPA's refusal to grant it relief under the CAA.[12] Nothing in *Ouellette* sanctions this result.

IV. North Carolina's Suit is an Impermissible Collateral Attack on EPA's Interstate Pollution Regulations and Decisions.

Judicial review of final EPA action under the CAA rests exclusively in the U.S. Courts of Appeals. 42 U.S.C. §7607(b). Collateral attacks on EPA actions subject to CAA §307(b)'s preclusive review provision are impermissible. *Virginia v. United States*, 74 F.3d 517, 522-24 (4th Cir. 1996); *Palumbo v. Waste Tech. Indus.*, 989 F.2d 156, 159-61 (4th Cir. 1993). In determining whether a district court has jurisdiction over a matter, courts look to the substance of the complaint, "regardless of how the grounds for review are framed," to determine if the "practical objective . . . is to nullify final actions of EPA." *Virginia*, 74 F.3d at 523 (citations omitted).

---

[12] North Carolina is also sought judicial review of EPA's denial of its §126 petition in the D.C. Circuit under the CAA. On March 5, 2009, the D.C. Circuit remanded EPA's decision denying the petition for reconsideration due to the holding in *North Carolina v. EPA*, *supra* note 2. *Sierra Club v. EPA*, 313 Fed. Appx. 331 (D.C. Cir. Mar. 5, 2009).

In this suit, North Carolina seeks the same relief it seeks in the CAA §126 and CAIR proceedings on remand from the D.C. Circuit and currently pending before EPA: additional source-specific reductions of NOx and SO_2. The district court gave North Carolina what the D.C. Circuit and EPA have not. *TVA-FJ*, 593 F. Supp. 2d at 831-34. Likewise, the district court's decision essentially reviews the adequacy of the ozone and $PM_{2.5}$ NAAQS, as well as EPA's regulations to control acid deposition and visibility. But under CAA §307(b), these challenges may only be brought in the U.S. Courts of Appeals. 42 U.S.C. §7607(b).

If North Carolina is unsatisfied with EPA's decisions relating to NAAQS, CAIR, §126, Regional Haze, or any other interstate pollution program, it may seek relief by filing a timely petition for review in the appropriate Court of Appeals. The district courts have no jurisdiction to entertain collateral attacks on EPA's CAA regulatory decisions.

V. The District Court's Sweeping Logic Could Establish a Rule of Near-Universal Liability.

Justice Blackmun once said, "[O]ne searches in vain . . . for anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). This case bears out that observation.

Here, the district court concluded that emissions from the "100 Mile Plants"[13] should be aggregated for purposes of determining their collective downwind impact, and that emissions from other TVA plants should be assessed separately. Yet, the court expresses no clear principle for deciding why 100 miles was the appropriate distance for grouping plants and collectively assessing potential liability for creating a public nuisance. Why not 50 miles, or 500 miles? There is no way of knowing by reading the district court decision.

Similarly, the district court concludes that certain air quality impacts are large enough to constitute a public nuisance, while other impacts are not. These conclusions are nominally based on a finding that the pollutants at issue can cause a range of health and environmental harms. The court's findings of fact, however, do not provide any numeric thresholds or benchmarks for deciding what level of contribution to ambient pollution is too much. Likewise, the court provided no rationale for deciding why certain levels are actionable, while others are not.

The court's "know it when you see it" rationale could similarly be applied to any of the thousands of large air emissions sources throughout the country to find that they too constitute a public nuisance. The district court's decision utilized criteria that easily could be similarly applied to any source of air emissions, in whatever industry, located virtually anywhere in the United States. While a "know

[13] These include four plants in the TVA system within 100 miles of North Carolina. *TVA-FJ*, 593 F. Supp. 2d at 825.

it when [you] see it" approach may work for obscenity,[14] it is directly at odds with the comprehensive CAA regulatory scheme.

A. The district court's decision stakes out a vast expanse of potential public nuisance liability.

The true scope of the district court's decision is revealed only when broken down into its component parts. The court's finding of liability was based on three key elements, none of which is bounded by ascertainable, objective criteria. The result is a malleable decision-making scheme that could be applied to reveal a public nuisance virtually anywhere one might look.

The district court concluded that emissions from groups of sources could be considered together in deciding whether those sources caused a public nuisance. In this case, the plaintiff selected a group of sources that all happen to be power plants that are owned by TVA, and the district court concluded that a subset of those plants should be aggregated in determining liability. There is nothing in the district court's decision that would prevent the next plaintiff (and court) from targeting a larger group of relatively small sources of air emissions for liability based on the argument that the sources exceed some apparently random threshold for liability established by the court in this case, or another court in the next case.

On this basis, the district court decided that even a small contribution to downwind air pollution can constitute a public nuisance. With regard to $PM_{2.5}$, for

[14] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

example, the Court found that the 100-Mile Plants contribute between 0.3 and 0.5 micrograms per cubic meter ($\mu g/m^3$) to downwind ambient levels in North Carolina. *TVA-FJ*, 593 F. Supp. 2d at 825. The Court observed that "North Carolina's annual average $PM_{2.5}$ concentrations from 1999 and 2005 ranged between 12.6 and 15.2 [$\mu g/m^3$]." *Id*. This means that a *de minimis* contribution (here 2%) to downwind $PM_{2.5}$ levels is actionable under the district court's reasoning. Moreover, any contribution greater than 0.1 $\mu g/m^3$ (representing less than 1% of the total ambient $PM_{2.5}$ concentration in North Carolina) could be actionable under the court's opinion, because only those TVA plants determined to contribute less than 0.1 $\mu g/m^3$ to downwind ambient $PM_{2.5}$ levels were exonerated. *Id*. at 826.

Similarly, with regard to ozone, the district court determined that the 100-Mile Plants "contribute 4-8 parts per billion (ppb) to peak 8-hour ozone concentrations in much of western North Carolina" and that "North Carolina's average 8-hour ozone concentrations from 1999 and 2005 ranged between 73 to 94 ppb." *Id*. at 825. Based on these data, a 4% contribution to downwind ozone levels was sufficient to constitute a public nuisance.

Under this logic, a finding of liability need not be based on a showing that certain emissions are creating a downwind air quality problem or even that the

emissions create most of the problem. All that must be shown is that the emissions contribute above some randomly selected threshold to ambient pollution levels.

Finally, in finding that a public nuisance exists due to upwind, out-of-state emissions, the district court completely ignored for purposes of liability in-state sources of air pollution above its random threshold. Air pollution does not recognize state borders and, thus, in many cases a local air quality problem can be caused by a combination of emissions from local and upwind-state sources. The CAA establishes as federal policy that the responsibility of upwind states to protect and improve downwind air quality should be decided in the context of the relative contribution of in-state sources and the extent to which the downwind state has controlled these sources. In this case, the district court put on blinders and looked only at the upwind sources for determining potential liability. As a result, context is irrelevant and a balanced, equitable apportionment of responsibility is impossible under the methodology employed by the district court.

B. Recent EPA analyses regarding interstate air pollution illustrate the far-reaching extent of potential liability under the district court's rubric.

EPA's CAIR analysis illustrates the vast extent of potential liability that exists under the district court's reasoning. In promulgating CAIR, EPA conducted sophisticated computer air quality modeling that shows the level of contribution to ambient $PM_{2.5}$ and ozone levels in downwind states (including North Carolina)

attributable to the entire inventory of man-made emissions from each upwind state (including Alabama, Kentucky and Tennessee). EPA's state-wide analyses illustrate how a sufficiently large group of sources -- without regard to size, type, or function -- can be shown to exceed the ambient impact thresholds applied by the district court in determining the existence of a public nuisance.

1. EPA's method for determining downwind impacts.

In CAIR, EPA identified upwind states making a significant contribution to nonattainment in a downwind state using a "zero out" approach:

> Our zero-out approach consisted of air quality model runs for each State, both with and without each State's man-made SO_2 and NOx emissions. We then compared the predicted downwind concentrations in the 2010 base case, which included the State's SO_2 and NOx emissions, to the "zero-out" case which excluded all of the State's man-made SO_2 and NOx emissions. From these results, we were able to evaluate the impact of, for example, Ohio's total man-made SO_2 and NOx emissions on each projected downwind nonattainment county in 2010. Using the results of this modeling, we identified States as significantly contributing … to downwind nonattainment based on the predicted change in the $PM_{2.5}$ concentration in the downwind nonattainment area which receives the largest impact.

69 Fed. Reg. 4566, 4583 (Jan. 30, 2004). *See also id.* at 4600 (explaining how EPA used same method in significant contribution analysis for ozone). In short, this method allowed EPA to quantify the air quality impact of man-made emissions from an upwind state on potentially affected downwind states.

2. Applying the district court's contribution analysis to EPA's CAIR air quality modeling results.

The district court determined that a contribution of as little as 0.3 μg/m^3 to downwind ambient concentrations of $PM_{2.5}$ can constitute a public nuisance. *TVA-FJ*, 593 F. Supp. 2d at 825. EPA's CAIR modeling shows that, if this threshold were applied to state-wide emissions of SO_2 and NOx, aggregate emissions from each of the following 21 states would be above the threshold for a public nuisance: Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland/DC, Michigan, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. EPA, Technical Support Document for the Final Clean Air Interstate Rule, Air Quality Modeling, at 42 (Mar. 2005).[15] If a threshold of 0.1 μg/m^3 is applied (consistent with the fact that the district court exonerated only the TVA plants contributing less than 0.1 μg/m^3), EPA's CAIR modeling shows that aggregate emissions from each of the following ten additional states (for a total of 31 states) would be above the threshold: Arkansas, Delaware, Kansas, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, North Dakota, and Oklahoma. *Id.*

The results are similar for ozone. The district court suggests that a contribution of as little as 2 ppb to downwind ozone concentrations constitutes a

[15] Available at http://www.epa.gov/cleanairinterstaterule/pdfs/finaltech02.pdf.

public nuisance. EPA's CAIR modeling shows that aggregate man-made emissions from each of the following 25 states would exceed this threshold: Alabama, Arkansas, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. *Id*. at App. G.

The total number of potentially affected states for $PM_{2.5}$ and ozone could be even greater, because EPA conducted air quality modeling only for the 41 states east of the continental divide. 69 Fed. Reg. at 4583. Moreover, EPA's analysis focused only on the downwind impact in "nonattainment areas" -- *i.e.*, those areas in downwind states that do not meet either the ozone or $PM_{2.5}$ NAAQS. Surely, the number of potentially affected states would be greater if EPA's analysis extended (as did the district court's analysis) to all areas in the downwind states.

In sum, the practical ramifications of the district court's decision are staggering in that EPA's own modeling reveals that sources located in vast swaths of the country are contributing to downwind concentrations in excess of the levels found actionable in this case. This raises the specter of judge-made law broadly displacing the comprehensive federal regulatory scheme that governs air emissions.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated: August 18, 2009

Respectfully submitted,

/s/ Charles H. Knauss

CHARLES H. KNAUSS
MICHAEL B. WIGMORE
ROBERT V. ZENER
SANDRA P. FRANCO
BINGHAM & MCCUTCHEN LLP
2020 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 373-6000

Attorneys for Industry Amici Curiae

OF COUNSEL:

WILLLIAM L. WEHRUM
HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
SUITE 1200
WASHINGTON, D.C. 20006-1109
(202) 955-1500

Counsel for the Utility Air Regulatory Group

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 PENNSYLVANIA AVENUE, N.W.
6TH FLOOR
WASHINGTON, D.C. 20004-1790
(202) 637-3000

HARRY M. NG
STACY R. LINDEN
OFFICE OF THE GENERAL COUNSEL
AMERICAN PETROLEUM INSTITUTE
1220 L STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-8000

George S. Kopp
Counsel
Public Nuisance Fairness Coalition
1990 M Street, N.W.
Suite 200
Washington, D.C. 20036

(202) 741-4663

Jan Poling
Vice President, General Counsel &
Corporate Secretary
American Forest & Paper Association
1111 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 463-2590

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 6,997 [*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 _____ [*state name and version of word processing program*] in Times New Roman 14pt [*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) Charles H. Knauss

Attorney for Industry Amici Curiae

Dated: 08/18/09

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2009, I electronically filed the foregoing Brief of *Amici Curiae* Chamber of Commerce of the United States of America, National Association of Manufacturers, American Petroleum Institute, Public Nuisance Fairness Coalition, Utility Air Regulatory Group and American Forest & Paper Association in Support of Defendant-Appellant with the Clerk of the Court *via* 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 Department 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
William G. Parker, Jr.
Assistant Attorney 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/ Charles H. Knauss
Charles H. Knauss

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

No. 09-1623

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, PUBLIC NUISANCE FAIRNESS COALITION, UTILITY AIR REGULATORY GROUP AND AMERICAN FOREST & PAPER ASSOCIATION as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

/s/ Charles H. Knauss
(signature)

If you have not been admitted to practice before the Fourth Circuit, you must complete and return an application for admission with this form. If you were admitted to practice under a different name than you are using now, you must include your former name when completing this form so that we can locate you on the attorney roll.

Charles H. Knauss
Name (printed or typed)

(202) 373-6644
Voice Phone

BINGHAM MCCUTCHEN LLP
Firm Name (if applicable)

(202) 373-6435
Fax Number

2020 K Street, N.W.
Washington, D.C. 20006
Address

chuck.knauss@bingham.com
E-mail address (print or type)

☐ I am not participating in this case. Appellate counsel is:

(Name) (Phone)

REGISTRATION AS AN APPELLATE ECF FILER

Electronic filing of documents by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at www.ca4.uscourts.gov/cmecftop.htm.

CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

See attached.

/s/ Charles H. Knauss
Signature

08/18/09
Date

Reset Form