IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah Elstrom, and Alan and Kathy Jackson, Plaintiffs, v. Lee County Landfill SC, LLC, Defendant.	)	C.A. No.: 3:10-01724-JFA

BRIEF OF AMICI CURIAE NATIONAL WASTE & RECYCLING ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Congress enacted the Clean Air Act ("CAA") to address the Nation's air pollution problems. To achieve the core mandate of the CAA, Congress created a comprehensive, scientific, and deliberative process through which the federal Environmental Protection Agency ("EPA") and the states implement Congress's intent by regulating major stationary sources of pollutants, including the Lee County Landfill at issue in this case, and facilities owned and operated by members of the National Waste & Recycling Association ("NW&RA") and the National Association of Manufacturers ("NAM"). Congress expressly determined that federal and state regulators are the entities best suited to set emission requirements under the CAA.

Regulated industries such as solid waste management facilities rely on established, detailed scientific and engineering-based statutory and regulatory requirements to lawfully run their businesses. Court-ordered injunctions setting different requirements not only would contravene established Supreme Court and Fourth Circuit precedent, but also would dramatically alter the cooperative federal-state framework established by Congress to address air quality in the United States. This is especially evident from two points discussed more fully in the remainder of this brief:

(a) The issuance of injunctions by various courts across the states based on each court's determination of what amount of air pollution is a nuisance under that state's common law would result in a patchwork of different, case-by-case emission standards around the country.

(b) If individuals are allowed to seek injunctive relief regulating air emissions and control technology pursuant to a state common law nuisance cause of action, regulated sources will be faced with the daunting challenge of predicting the standards for lawful emissions.

INTEREST OF THE AMICI CURIAE

As set forth in the accompanying Motion for Leave to File, solid waste management facilities and manufacturers throughout South Carolina would be adversely affected by allowing plaintiffs in private nuisance cases to seek injunctions that impose operating requirements different from, or conflicting with, operating requirements of their Title V permits. Facilities owned and operated by members of NW&RA and the NAM would be subject to a vague nuisance standard and the uncertainties of litigation, despite being in compliance with their operating permits. Judicial decrees dramatically altering the meticulously drafted, comprehensive regime Congress and EPA established to regulate industrial sources would threaten the ability of private sector waste and recycling companies and their public sector brethren in municipal county solid waste departments to provide cost-effective solid waste processing and disposal services to residents and businesses in South Carolina. Courts in different states, applying the common law of nuisance in those states, would craft different permit requirements for similar facilities, thus subjecting lawfully operated manufacturing businesses to unforeseeable mandates to halt their operations, even if the operations are in compliance with federal and state law and with duly and lawfully issued permits.

Amici urge the Court to rule that injunctive relief claims against Title V facilities are preempted by the CAA for the reasons set forth below.

ARGUMENT

I. THE PREEMPTIVE EFFECT OF THE CLEAN AIR ACT SHOULD BE ANALYZED UNDER THE DOCTRINE OF CONFLICT PREEMPTION.

All discussions of preemption necessarily begin with the Supremacy Clause of the U.S. Constitution, which establishes our government's federalist hierarchy and vertical separation of powers. *See* U.S. CONST. art. VI, 1, ¶ 2. This Clause has resulted in two types of preemption, express and implied. It is the latter type that is applicable here, specifically a type of implied preemption known as "conflict" preemption. Conflict preemption occurs "where 'compliance with both federal and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona v. U.S.*, 132 S. Ct. 2492, 2501 (2012) (citations and internal quotation marks omitted). Thus, the question becomes whether a state common law nuisance claim seeking injunctive relief would render it "impossible" for a source to comply with federal law, present an "obstacle" to achieving the goals and purpose of the CAA, or otherwise present a conflict with the CAA. The answer to this question is decidedly "yes."

EPA regulation of air emissions from solid waste landfills is extensive. In 1996, EPA promulgated New Source Performance Standards for municipal solid waste landfills. 60 Fed. Reg. 9918 (Mar. 12, 1996), codified at 40 C.F.R. Part 60, Subparts Cc and WWW. Thereafter, EPA promulgated National Emission Standards for Hazardous Air Pollutants from municipal solid waste landfills. 66 Fed. Reg. 2227 (Jan. 16, 2003), codified at 40 C.F.R. Part 63, Subpart AAAA. Since promulgation of the regulations, EPA has published numerous fact sheets, technical memoranda, and guidance documents instructing facilities on how to comply with the

regulations.[1] In addition, the Clean Air Act requires EPA to review New Source Performance Standards every eight years and revise the Standards as necessary. EPA is performing such a review now, and is under a court-ordered deadline to complete the review and make any revisions to the Standards by the end of 2014.[2] EPA's press release seeking public input on the new standards is available at http://tinyurl.com/20130620pressrelease.

EPA regulation of air emissions from manufacturing facilities is also extensive. Besides National Ambient Air Quality Standards (40 C.F.R. Part 50), which are imposed on all facilities through State Implementation Plans, NAM members are subject to New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants applicable to their industries. EPA has promulgated dozens of New Source Performance Standards for facilities as diverse as fossil fuel-fired steam generators (40 C.F.R. Part 60 Subpart D); Portland cement plants (40 C.F.R. Part 60 Subpart F); Kraft pulp mills (40 C.F.R. Part 60 Subpart BB); glass manufacturers (40 C.F.R. Part 60 Subpart CC); synthetic organic chemicals manufacturers (40 C.F.R. Part 60 Subpart VV); rubber tire manufacturers (40 C.F.R. Part 60 Subpart CCC); and synthetic fiber production facilities (40 C.F.R. Part 60 Subpart HHH). EPA has issued National Emission Standards for Hazardous Air Pollutants covering over 80 categories of major industrial sources, such as chemical plants (40 C.F.R. Part 63 Subparts F, G, H, I, and FFFF); petroleum refineries (40 C.F.R. Part 63 Subpart CC); aerospace manufacturers (40 C.F.R. Part 63 Subpart GG); boat manufacturers (40 C.F.R. Part 63 Subpart VVVV); users of boilers and process heaters (40 C.F.R. Part 63 Subpart DDDD); and steel mills (40 C.F.R. Part 63 Subpart EEEEE). Additionally, EPA has issued standards for categories of smaller "area" sources, such as dry

[1] The New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants under the Clean Air Act are in addition to other permitting requirements under the Resource Conservation and Recovery Act and the Clean Water Act.

[2] *Envtl. Def. Fund v. Jackson*, No. 1:11-cv-04492-KBF (filed Oct. 1, 2012).

cleaners (40 C.F.R. Part 63 Subpart M); commercial sterilizers (40 C.F.R. Part 63 Subpart O); secondary lead smelters (40 C.F.R. Part 63 Subpart X); and chromium electroplating facilities (40 C.F.R. Part 63 Subpart N). Like the regulations for municipal solid waste facilities, these regulations are subjected to an extensive technical, scientific, and public review process before promulgation, and they are regularly reviewed and revised.

Judicially ordered operating and emissions requirements created the very real prospect of conflicting requirements, and even of conflicting judicial requirements, imposed on an operating facility. Such a result would present an obstacle to achieving the goals and purpose of the CAA. Determinations regarding appropriately protective levels of air emissions, entrusted by Congress to the EPA in combination with state agencies, would be rendered meaningless and the predictable, scientifically grounded standards upon which sources currently rely would be replaced by a patchwork of different case-by-case standards. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (noting that "nuisance standards often are vague and indeterminate").

The Fourth Circuit commented on the pitfalls of this approach: "It ill behooves the judiciary to set aside a congressionally sanctioned scheme of many years' duration — a scheme, moreover, that reflects the extensive application of scientific expertise and that has set in motion reliance interests and expectations on the part of those [facilities] that have complied with its requirements." *North Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010) ("*TVA*"). With the sound reasoning of the Fourth Circuit in mind, this Court should conclude that claims for injunctive relief against Title V facilities are preempted by the CAA under the doctrine of conflict preemption.

II. EMISSIONS AUTHORIZED BY A TITLE V PERMIT CANNOT BE SUBJECT TO A COURT-ORDERED INJUNCTION IMPOSING STANDARDS DIFFERENT FROM THE TITLE V PERMIT.

The South Carolina Department of Health and Environmental Control ("DHEC") is the agency charged with protecting the public health and welfare and the environment of the State of South Carolina. S.C. Code Ann. §§ 44-1-140; 48-1-40; 48-1-50 (1976). EPA has delegated to DHEC the authority to implement the CAA, and in particular the Title V permitting process, in South Carolina. 60 Fed. Reg. 9918 (Mar. 12, 1996). A delegated state permit program must require that all emissions limitations, controls, and other requirements imposed by the permit be at least as stringent as any other applicable limitations and requirements in federal regulations. 54 Fed. Reg. 22274 (June 28, 1989).

Federal (and state) emissions limits and standards are developed with full scientific consideration of the potential primary and secondary public health and welfare effects of the facility's emissions, including air emissions that may have odor. Such limits and standards are promulgated only after technical support documents are made publicly available, and draft regulations are subject to notice and public comment before they become final. A plaintiff requesting injunctive relief asks the Court to impose different standards based on a limited scientific and engineering record. Further, an injunction is likely to create a direct conflict with a facility's air permit issued in accordance with the CAA. *See Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2539-40 (2011) ("AEP") ("The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources . . . [to] cop[e] with [these] issues . . . .").

TVA supports this conclusion.[3] In that case, the Fourth Circuit properly determined that TVA's plants cannot logically be public nuisances under state law because TVA's facilities are "expressly permitted to operate as they do . . . under permits, required by Congress and EPA regulations." *TVA*, 615 F.3d at 310. TVA's permits, like the Title V Permit at issue in this case, were issued pursuant to EPA regulations and the State Implementation Plan ("SIP") implementing them, and are "understandably designed to protect even those individuals particularly sensitive to emissions." *Id.* This is in stark contrast, the Fourth Circuit noted, to state nuisance law, which relies on a reasonable person standard — those with "*ordinary* health and sensibilities, and *ordinary* modes of living." *Id.* (internal quotation marks and citations omitted). The Fourth Circuit concluded that because the permit conditions are designed to exceed common law nuisance standards, a finding of public nuisance for permitted emissions under the CAA was legally impossible. *Id.* at 296. As the Court noted, "[i]t would be odd, to say the least, for specific state laws and regulations to expressly permit [a landfill] to operate and then have a generic statute countermand those permissions on public nuisance grounds." *Id.* at 309. *See also* Restatement 821B cmt. F ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.").

An injunction setting standards different from the standards of a Title V permit would interfere with the means and methods Congress selected to address air pollution and would upset the carefully constructed federal-state framework that the EPA and the state agencies have implemented over decades. 42 U.S.C. § 7401(a)(3) ("[A]ir pollution prevention . . . [and] control

[3] Amici recognize that *TVA* involved a public nuisance claim, and Plaintiffs have asserted a private nuisance claim in the instant action. However, no language in *TVA* suggests that the Fourth Circuit's rationale would have been any different if the case had been brought in a private nuisance context.

at its source is the primary responsibility of States and local governments."). The Court should be reluctant to enjoin activities that are specifically authorized by the government and implicate the technically complex area of environmental law. *New England Legal Foundation v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981). Moreover, granting injunctive relief would be an impermissible collateral attack on a state-issued permit and would constitute an unwarranted intrusion into a process that has been regulated in such detail to ensure inclusiveness and predictability. *TVA*, 615 F.3d at 301; *see also Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159-61 (4th Cir. 1993) (refusing to hear complaints about Ohio's permitting decisions dressed up as a state nuisance claim).

As stated by the Fourth Circuit: "We can state . . . with assurance that *Ouellette* recognized the considerable potential mischief in those nuisance actions seeking to establish emissions standards different from federal and state regulatory law and created the strongest cautionary presumption against them." *TVA*, 615 F.3d at 303. Thus, this Court should find that emissions allowed by Title V permits cannot be subject to a court-ordered injunction imposing standards different from the permit. Such a ruling is particularly sound when considering the public policy concerns raised by superimposing state nuisance law on a carefully developed federal-state regulatory structure.

III. PUBLIC POLICY CONCERNS DICTATE A RULING THAT INJUNCTIVE RELIEF IS PREEMPTED.

A. Federalism and separation of powers principles dictate that courts adhere to the role Congress envisioned for them when it enacted the Clean Air Act.

Congress has enacted a wide range of social legislation providing for new rights, responsibilities, and remedies to protect the environment and public health. Legislation, like the CAA, centralized policy-making authority over the environment and created new agencies, such

as the EPA, to carry out the congressional mandate. Congress also intended for the states to play a role in implementing and enforcing federal standards, as evidenced by the provision for delegating the CAA regulatory program to the states. The CAA contains a wide span of detail, however, substantially limiting states' regulatory flexibility. This relationship between the Federal Government and the states, frequently called "cooperative federalism," allows state agencies to tailor environmental policies to local conditions, although states may not write regulations that are less stringent than federal regulations. *See e.g.*, Jonathan H. Adler, *The Green Aspects of Printz*: *The Revival of Federalism and its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573 (1998).

It is established that courts must "respect the system that Congress, the EPA, and the states have collectively established." *TVA*, 615 F.3d at 303. In *AEP*, the Supreme Court, in the context of greenhouse gas emissions, discussed how the CAA entrusts the complex balancing between "our Nation's energy needs and the possibility of economic disruption" to the EPA, in combination with state regulators. *AEP*, 131 S. Ct. at 2539. Further noting that "[i]t is altogether fitting that Congress designated an expert agency, here, [the] EPA" to set emissions standards, as "[j]udges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of [state] regulators . . . ." *Id.* at 2539-40. With separation of powers principles in mind, the Supreme Court concluded that "[t]he judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted." *Id.* at 2540. Although *AEP* involved the federal common law right to seek abatement of emissions from regulated sources, and the Supreme Court expressly declined to address state law claims, it provides, among other things, insight on

the cooperative federalism envisioned by the CAA and helpful guidance on the ability, or *inability*, of the courts to adequately decide the contours of a source's allowable emissions.[4]

Similarly, in *TVA*, the Fourth Circuit discussed and defined the role of the courts in this context. It acknowledged Congress granted the states "an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process," and concluded that "the role envisioned for the states has been made clear." *TVA*, 615 F.3d at 303. Under the direction of *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Committee*, 461 U.S. 190, 204 (1983), which provides that a field of state law is preempted if "a scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," it follows then that courts should not accord states a "wholly different role" by "allowing state nuisance law to contradict joint federal-state rules so meticulously drafted." *TVA*, 615 F.3d at 303.

Both the CAA and its implementing regulations are "meticulously" drafted, based on years of data and technical supporting documents. If judges were to set emission standards, courts would be tasked with determining the allowable emissions of sources "in a vacuum." *AEP*, 131 S. Ct. at 2539. Congress clearly sought to avoid this result when it enacted the CAA and delegated this highly complex and scientific task to the EPA in combination with state regulators. *See TVA*, 615 F.3d at 305 ("[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that

[4] At least one other district court relied on *AEP*'s discussion of how ill-equipped the federal courts are to make determinations in this context to conclude that the CAA preempts state common law nuisance claims. *See Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd solely on res judicata grounds*, 718 F.3d 460 (5th Cir. 2013) (noting the Supreme Court's expressed concern that plaintiffs were calling upon the federal courts to determine what amount of emissions is unreasonable and relying on *AEP* to find plaintiffs' nuisance claims, filed pursuant to both federal and state common law, preempted by the CAA).

regulatory bodies can consider."). The Amici members urge the Court to recognize the separation of powers principles at work in this carefully crafted regime Congress established and to respect the courts' role within this framework as set forth by the Supreme Court and Fourth Circuit.

B. Predictable regulatory standards will be replaced by a patchwork of nuisance standards if the Court grants the requested injunction.

To effectively address air quality concerns in our Nation, Congress was mindful that sources across the country would need to be governed consistently. Although admittedly not perfect, Congress determined that "[r]egulations and permits . . . provide an opportunity for predictable standards . . . and thus give rise to broad reliance interests." *TVA*, 615 F.3d at 306. Permits allow sources to run efficient, profitable, and most importantly, safe businesses, because the regulations under which they must operate are not only clearly defined, but foreseeable, being derived from a single system of permitting. Title V permits are issued only after public notice, and a member of the public who thinks permit-specific requirements are set incorrectly has the opportunity to raise that concern with the regulator before the permit is issued, and to request administrative and judicial review of the permit if he is dissatisfied with the regulator's response.[5]

Nuisance-based litigation threatens the very fabric of the CAA, by inserting an element of the unknown — the determination by a judge regarding the validity of a source's permit — into an otherwise predictable system. *See id.* ("Without a single system of permitting, 'it would be virtually impossible to predict the standard' for lawful emissions, and 'any permit issued would be rendered meaningless.'" (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987))). It

[5] The CAA provides a separate mechanism for a citizen suit against a Title V permittee for alleged noncompliance with the Title V permit. 42 U.S.C. § 7604.

is not difficult to imagine the patchwork of standards that would result under such a system, as the standard of what constitutes a nuisance could be different for each judge or jury that decides the issue. "To replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave . . . [regulated] industries at sea . . . and potentially expose them to a welter of conflicting court orders across the country." *TVA*, 615 F.3d at 301.

Congress did not intend for the clearly-defined standards promulgated by the CAA to be rendered meaningless by courts overriding and replacing federal environmental standards pursuant to state nuisance law. Rather, Congress "opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, *especially* in comparison with . . . judicially managed nuisance decrees . . . ." *Id.* at 304 (emphasis added). This is not surprising, as "[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark." *Id.* at 302.

C. Judicial injunctions in these circumstances will adversely affect source operations, the quality of our Nation's air, and the lives of the public.

A patchwork of emissions standards would have adverse consequences for a source's operations, and, in turn, the public. To run efficient operations, a regulated source must be able to rely on the assumption that if it operates in accordance with its permit, its legal requirements are met under state and federal law. Every business must determine and understand its legal requirements in advance of making investments to comply with those requirements. *Id.* at 306 ("A company, no matter how well-meaning, would be simply unable to determine its obligations ex ante . . . for any judge in any nuisance suit could modify them dramatically."). Otherwise, a source would be unable to make rational business decisions. An ever-present threat of costly litigation, including a possible judicial order to halt operations even if a facility is in full

compliance with the requirements of its permit, makes it impossible for a business to reasonably plan for the future.

Solid waste management facilities provide a valuable and necessary service to businesses and citizens. Access to safe, cost-effective waste disposal allows communities to thrive and avoids uncontrolled, unpermitted discharges that threaten public health and the environment. Additionally, although this case is about a solid waste landfill, the principle at stake will affect industries of all kinds. Allowing the requirements of Title V permits to be supplanted by judicial injunction creates uncertainty and potential litigation against permit holders of all types — manufacturers, pulp and paper mills, electric utilities, and more. *See TVA*, 615 F.3d at 306. ('"[W]orthy permit applicants will weigh the formidable costs in delay and litigation and simply will not apply.'" (quoting *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 162 (4th Cir. 1993))). Companies, like the Amici members, will be de-incentivized to apply for permits because compliance costs are simply too high and uncertain. *See id.* (noting that "the costs and dislocations would be heavy" if operating permits were supplanted with "mandates derived from public nuisance law").

Both the nation's air quality and the public interest are better protected if companies that have complied in good faith with the CAA's system of statutes and regulations can reasonably rely on that compliance. If operating permits can be modified by courts across the nation, "[e]nergy policy cannot be set, and the environment cannot prosper . . . ." *Id.* at 298.

IV. *INTERNATIONAL PAPER CO. V. OUELLETTE* DOES NOT SUPPORT THE GRANTING OF AN INJUNCTION.

In the one circuit court case to consider the preemptive effect of the Clean Air Act, *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), the Third Circuit relied on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), to reject, in cursory fashion, public

policy considerations favoring preemption. However, the Third Circuit's analysis of *Ouellette* ignores the distinction between the citizen suit "savings clause" and the state action savings clause.

Ouellette involved a suit brought by Vermont citizens under Vermont state nuisance law against a paper mill located in New York. *Id.* at 483-84. At issue was whether the Clean Water Act ("CWA") and its comprehensive regulatory regime preempted the action. *Id.* at 483. The Supreme Court held that certain common law actions based upon the affected state's law (Vermont) would be barred by the CWA, but stated that no such preemptive effect applied to laws of the source state (New York). *Id.* at 495-500. In arriving at its conclusion, the Court examined the CWA's two savings clauses. *See* CWA § 510, 33 U.S.C. § 1370 (2006) ("Except as expressly provided . . . nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right of jurisdiction of the States with respect to the waters (including boundary waters) of such States.") ("state authority provision"), *and id.* at § 505(e), 33 U.S.C. § 1365(e) ("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 effluent standard or limitation or to seek any other relief . . . .") ("citizen suit provision").

The CAA contains a citizen suit provision similar as that of the CWA. *See* 42 U.S.C. § 7604(e) (CAA's citizen suit provision). However, the Supreme Court ultimately based its conclusion in *Ouellette* on the second clause of the CWA's state authority provision, which is not included in the CAA's state authority provision.[6]

[6] Plaintiffs in *Ouellette* argued the language of the citizen suit provision preserves an injured party's right to seek relief under "any statute of *common law*." *Ouellette*, 479 U.S. at 493 (emphasis in original). The Court disagreed and concluded that this provision does "not purport to preclude preemption of state law by other provisions of the Act."

The state authority provision of the CAA provides:

> nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . .

42 U.S.C. at § 7416. A plain reading of this clause preserves the right for more stringent standards adopted by "a State or political subdivision," thereby preserving enactments by state and municipal legislatures and state or local administrative agency rules. Notably, courts are not a "State or Political subdivision." The legislative history further supports that Congress intended to grant this authority only to legislatures and administrative agencies, not judicial bodies:

> [42 U.S.C. § 7416] would reinstate the intent of Section 109 of the Air Quality Act of 1967 which provided assurance that States, localities, intermunicipal and interstate agencies may adopt standards and plans to achieve a higher level of ambient air quality than approved by the Secretary. The section would be revised to provide that such States, localities, intermunicipal and interstate agencies may adopt such more restrictive standards and plans and may establish timetables which achieve standards in a shorter period of time . . . .

S. Rep. No. 1196, 91st Cong., 2d Sess., 14-15 (1970).

In contrast, the state authority provision of the CWA, enacted two years later, adds a section to the language of the CAA:

> nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution . . . **or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.**

33 U.S.C. § 1370 (emphasis added). It was a plain reading of this second clause that the *Ouellette* Court found evidenced Congress's intent to preserve source-state common law nuisance claims "with respect to the waters . . . of such Stat[e]." *Ouellette*, 479 U.S. at 493. It is

reasonable to conclude that Congress was aware of the plain meaning of the state authority provision of the CAA, and therefore, chose to preserve some common law claims under the CWA by including this second clause, unique to the CWA. For this reason, *Ouellette* does not weigh against a finding of preemption, and the Court should not extend its holding to the CAA.

CONCLUSION

Amici Curiae respectfully request that this Court determine the CAA preempts claims for injunctive relief based on state nuisance law against Title V facilities.

Respectfully submitted,

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DATED: January 31, 2014

CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on this 31st day of January 2014, she electronically filed a true and correct copy of the foregoing "BRIEF OF AMICI CURIAE NATIONAL WASTE & RECYCLING ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS" with the Clerk of Court using the CM/ECF system, and thereby served a copy on the following counsel:

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