No. 09-1623

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

STATE OF NORTH CAROLINA'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Plaintiff-Appellee State of North Carolina, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Local Rule 40, respectfully petitions this Court to rehear this appeal and further suggests rehearing *en banc*.

INTRODUCTION AND STATEMENT OF PURPOSE

This case presents the issue of when a public nuisance action may be brought, consistent with the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, with respect to air pollution that crosses state lines. Following a bench trial, the district court concluded that emissions from four of Defendant-Appellant Tennessee Valley Authority's ("TVA") coal-fired electric plants – three in eastern Tennessee and one in northeastern Alabama – resulted in substantial damage within North Carolina and that this harm far outweighed the cost to TVA of treating these emissions by installing and using modern pollution controls. The court concluded that North Carolina had proven the elements of a cause of action for public nuisance under Tennessee law as to three TVA plants in Tennessee and under Alabama law as to one TVA plant in Alabama. The district court, consistent with this Court's prior opinion in the earlier interlocutory appeal in this case, held that North Carolina's public nuisance action was not preempted by the Clean Air Act. *See North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344 (4th Cir. 2008) ("*TVA I*"); *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812 (W.D.N.C. 2009). Accordingly, the district court entered an injunction requiring TVA to install and operate appropriate pollution control equipment at the four plants. A panel of this Court reversed and directed the district court to dismiss the action.

In counsel's judgment, the matter involves an issue of exceptional importance: the role of state law nuisance causes of action to enjoin major interstate air pollution sources within the structured program of the federal Clean Air Act. The panel's decision also conflicts with a decision of the United States Supreme Court, and this conflict is not addressed in the opinion.

Additionally, the panel's opinion conflicts with the previous opinion of this Court in *TVA I*, and *en banc* consideration is necessary to maintain uniformity of this Court's decisions. Finally, the panel's decision conflicts with decisions of two other circuits.

STATEMENT OF THE FACTS

TVA operates four of its eleven coal-fired electric generating facilities within 100 miles of the North Carolina border: Bull Run, Kingston and John Sevier in eastern Tennessee and Widows Creek in northeastern Alabama. J.A. 982, 1003. These plants emit sulfur dioxide ("SO_2") and nitrogen oxides ("NO_X"), which form fine particulate matter ("$PM_{2.5}$") and ozone downwind of the smokestacks. J.A. 984-89. $PM_{2.5}$ and ozone cause numerous severe health effects, including death, and have significant negative impacts on the environment in North Carolina. J.A. 992-1004. The district court found, and TVA does not contest on appeal, that the cost to TVA of treating these emissions is outweighed by the vast harm that these emissions have caused in North Carolina. J.A. 1010, 1020. Accordingly, the district court, following a bench trial, held that these emissions constituted a public nuisance under Tennessee and Alabama law. J.A. 1014-16, 1018-20. After hearing extensive evidence of the effectiveness and cost of controls and the impact of those costs on TVA's rates, the district court entered an injunction requiring TVA to install pollution control equipment at its Kingston, Bull Run, John Sevier and Widows Creek plants. J.A. 1023.

Noting its concern that the cost of treating these pollutants would be "passed on in the form of rate increases to citizens who purchase power from TVA," a panel of this Court reversed the district court's judgment. (Slip op., p. 10) The panel concluded that federal courts should not "use vague public nuisance standards to scuttle the nation's carefully created system for

accommodating the need for energy production and the need for clean air" (Slip op., p. 6), and directed that the district court dismiss the action.

ARGUMENT

The present appeal is of exceptional importance to the health and well-being of the citizens of North Carolina, to the State's natural resources, including its public and private parks and historic sites, and to our Nation's jurisprudence. For over two decades, the United States Supreme Court has recognized that when pollution crosses state lines, an action may be brought for common law nuisance provided it is based on the law of the State from which the harmful emissions originate – notwithstanding a comprehensive federal permitting scheme addressing such emissions. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The panel's decision robs impacted parties of this important tool to enjoin life-threatening, environmentally devastating pollution. As a result, the protections that Congress and the United States Supreme Court recognized as essential to supplement the Clean Air Act have been lost within this Circuit. The panel's decision has profound consequences on the ability of States to protect the public health and the environment from deadly emissions emanating from plants such as TVA's.

I. THE PANEL'S OPINION SHOULD BE RECONSIDERED GIVEN THE EXCEPTIONAL IMPORTANCE OF THE QUESTION RAISED BY THIS APPEAL.

It is difficult to overstate the importance of this case. In factual findings that were uncontested by TVA on appeal, the district court found that exposure to $PM_{2.5}$ and ozone formed from emissions from TVA's four plants closest to North Carolina have resulted in significant health effects in North Carolina. These include increased risk of premature death from adverse pulmonary inflammation, which increases the risk of blood clots and thus heart attacks and strokes; from cardiac arrhythmia – "the immediate cause of death in most fatal heart attacks"; and

from sudden infant death syndrome. Non-fatal effects include scarring of the lungs, which reduces lung function up to sixty percent; acute respiratory pain; and increased incidence of asthma and chronic bronchitis. J.A. 994-96, 1000. Government and private businesses in western North Carolina have been forced to reduce operations on high-ozone days to avoid these health effects. J.A. 1001. $PM_{2.5}$ deposition also causes the release of toxins in soils and lowers the nutrient content of soils, stunting the growth of vegetation and rendering plants more susceptible to drought. J.A. 996-97. Finally, the court found that $PM_{2.5}$ diminishes visibility in the "cherished, pristine wilderness areas" of western North Carolina, including private, State and federal parks. J.A. 998-99. The economic effect on the State has been substantial. J.A. 996. Although the district court concluded that "TVA's generation of power at low cost to the consuming public has a high social utility," it "[n]onetheless [concluded that] the vast extent of the harms caused in North Carolina by the secondary pollutants emitted by these plants outweighs any utility that may exist from leaving their pollution untreated." J.A. 1020.

The importance of the issue raised by this appeal has not been lost on members of Congress, Attorneys General throughout the country, the numerous environmental organizations who have fought to protect our Nation's natural resources and public health, and the business community. As a result, a staggering number of amicus briefs have been filed in this appeal. Sixty-two amici appeared in this appeal, filing nine separate briefs totaling 341 pages.

Members of Congress have exhibited a keen interest in this appeal. In congressional hearings earlier this year, Senator Barbara Boxer chastised TVA's Board of Directors for appealing from the district court's decision. Testimony before Senate Comm. on Envt. & Public Works (Feb. 9, 2010) (available at www.epw.senate.gov) (go to "Archived Flash Video" and forward to 93:20 mark). Senator Boxer also wrote to TVA to urge it not to appeal the decision in

light of the overwhelming evidence of harm that TVA's emissions have caused. *Id.* Ten members of the United States House of Representatives also joined an amicus brief before this Court. Amicus Br. of Rep. Jim Cooper, *et al*.

North Carolina's sister States, like members of Congress, have urged this Court to carefully consider the important issues raised by this appeal. Twenty-four state Attorneys General have filed briefs with this Court, either as a party, intervenor, amicus supporting North Carolina or amicus supporting TVA. Noting their "strong interest in ensuring that they can bring public-nuisance actions to redress air pollution emanating from sources in other States," sixteen of these States emphasized that any restriction on the ability of States to redress interstate air pollution through such actions will substantially impact "the health of their citizens and the quality of their environments." Amicus Br. of Cal., *et al*., p. 1, 3; *see also* Amicus Br. of American Lung Ass'n, p. 1 (noting that the "district court's conclusions regarding the health effects of pollutants emitted by TVA's power plants are virtually uncontroverted in the scientific community"). Alabama even took the extraordinary step of intervening on appeal although it had not sought to participate at the trial level. In moving to intervene, Alabama emphasized to this Court the "important sovereign interests at stake in this appeal." Ala. Motion to Intervene, p. 1.

TVA and the regulated community have also recognized the substantial impact that this appeal has on electric utilities and other industries. *See, e.g.*, TVA's Opening Br., p. 3 ("This is a case of first impression that presents issues critical to the preservation of this country's federal structure."). As the United States Chamber of Commerce notes in its amicus brief, this appeal "raises profound legal and practical issues that go to the heart of how air pollution is regulated in this country." Amicus Br. of Chamber of Commerce, *et al.*, p. 2. More importantly, TVA and other electric utilities have cited to this Court's opinion on no less than nine occasions in arguing

that the United States Supreme Court should grant certiorari to review the Second Circuit's opinion in *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009). Petition for Writ of Certiorari, *Am. Elec. Power Co. v. Connecticut*, No. 10-174, pp. 3, 23-24, 27, 29, 32 (filed Aug. 2, 2010); Br. of TVA in Support of Pet'rs, *Am. Elec. Power Co. v. Connecticut*, No. 10-174, p. 17 (filed Aug. 24, 2010). In that case (in which TVA stands as a defendant), the petitioning utilities argue that the Second Circuit's opinion allowing a public nuisance action to proceed against electric utilities based on excess carbon dioxide emissions is in "demonstrable conflict[]" with this Court's opinion. Petition for Writ of Certiorari, *Am. Elec. Power Co.*, No. 10-174, p.12.

In addition to briefs from the several States, members of Congress, and an industry coalition, the Court also received amici briefs from the American Lung Association and the American Thoracic Society, several environmental groups, and two separate coalitions of legal academicians, demonstrating the importance of and wide-ranging interest in this matter. *See, e.g.*, Amici Br. of Gerald V. Bradley, *et al.*, p. 1 ("[T]he questions raised by this case are of the highest importance").

The outcome of the present appeal will shape the legal landscape regarding interstate pollution and affect the environment and public health of our Nation for generations to come. Accordingly, this proceeding involves questions of exceptional importance.

II. THE PANEL'S OPINION IS IN CONFLICT WITH A DECISION OF THE UNITED STATES SUPREME COURT, AS WELL AS DECISIONS OF OTHER CIRCUIT COURTS.

The panel's decision directly conflicts with the Supreme Court's decision in *International Paper Co. v. Ouellette*. In *Ouellette,* residents of Vermont brought a public nuisance action seeking injunctive and other relief in connection with International Paper's discharge of pollutants into an interstate body of water, Lake Champlain. The discharge, which originated in New York,

was authorized by a National Pollution Discharge and Elimination System ("NPDES") permit issued by the Environmental Protection Agency (and later reissued by the State of New York). 479 U.S. at 490 n.10; *see* 33 U.S.C. § 1342. The Supreme Court expressly held that the plaintiffs' public nuisance action could go forward, provided it was based on the law of the State in which the pollution source was located (New York) rather the affected State (Vermont). 479 U.S. at 497. The Supreme Court rejected the defendant's claim that the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, preempted all common law actions. 479 U.S. at 497-99. To the contrary, the Supreme Court held – unanimously – that although claims based on the nuisance law of the downstream State were preempted, "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Id.* at 497, 500; *id*. at 500, 508-09 (Brennan, J., concurring). On remand, the Supreme Court's holding was also expressly applied to common law claims for interstate air pollution. *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 60 (D. Vt. 1987). Under the Supreme Court's *Ouellette* decision, the State of North Carolina may proceed with a public nuisance action, provided the action is based on the law of the source State. The *Ouellette* decision cuts short any argument that North Carolina's public nuisance action is preempted by federal law or is precluded by the issuance of a permit to TVA.

The only arguable distinction between the facts of the present case and those in *Ouellette* is that the present case involves air pollution crossing state lines while the *Ouellette* decision involved water pollution. This is a distinction without a difference. As the panel recognized, the *Ouellette* decision "is equally applicable to the Clean Air Act." (Slip op., p. 25)

In *Ouellette,* the Supreme Court stated, "[b]y its terms," the Clean Water Act's "saving clause specifically preserves" common law actions under source-state law. 479 U.S. at 497. That "saving clause" – found in Sections 505(e) and 510 of the Clean Water Act – cannot be

distinguished from the Clean Air Act's "saving clause." Section 304(e) of the Clean Air Act is *identical* to Section 505(e) of the Clean Water Act. *Compare* 33 U.S.C. 1365(e) *with* 42 U.S.C. §7604(e); *see also Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989). Section 116 of the Clean Air Act further provides:

> [N]othing in this Act 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. § 7416. Although Section 116 is not identical to Section 510 of the Clean Water Act, this Court has already concluded in this case "that a common-law nuisance action is . . . a 'requirement' within the meaning of the CAA." *TVA I*, 515 F.3d at 351; *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("reference to a State's 'requirements' includes its common-law duties"). Additionally, this Court has already found that Clean Air Act Section 118(a), 42 U.S.C. § 7418(a), "foreclose[s] the TVA's argument that the CAA does not mandate compliance with state 'requirements' enforced through a common-law tort suit." *TVA I*, 515 F.3d at 352-53. Nothing in *Ouellette* justifies the panel's decision to ignore the saving clause of the Clean Air Act, through which Congress specifically preserved the action that North Carolina brought in this case. Indeed, contrary to the result reached by the panel in this case, the Supreme Court expressly held "the saving clause negates the inference that Congress 'left no room' for state causes of action." *Ouellette*, 479 U.S. at 492.

The panel attempted to distinguished *Ouellette* based on the Supreme Court's admonition that "affected States" should not be "allowed to impose separate . . . standards" on sources. (Slip op., p. 21 (quoting *Ouellette*, 479 U.S. at 493-94)). From this, the panel concluded that North Carolina – an "affected State" – should not be "allowed to impose separate . . . standards" on TVA.

But the Supreme Court, in making its observation, was not referring, as was the panel, to the nature of the plaintiff but instead to whether the "affected State" could impose its own law on sources in another State. Indeed, in the very next sentence the Supreme Court "conclude[d] that the CWA precludes a court from applying *the law of an affected State* against an out-of-state source." *Ouellette*, 479 U.S. at 494 (emphasis added). In this case, the district court did not apply the law of the affected State. To the contrary, the court repeatedly stated that it would apply the law of the source States in evaluating North Carolina's nuisance claims. *E.g.*, J.A. 210-13, 1014-21. The remedy granted was consistent with the common law of those jurisdictions. J.A. 1014-16, 1018-1020.[1]

The panel's focus on the "structure of the Clean Air Act in order to emphasize the comprehensiveness of its coverage" also conflicts with *Ouellette*. (Slip op., p. 15) As detailed by the Supreme Court, the Clean Water Act was "the most comprehensive and far reaching provisions that Congress ever had passed" regarding water pollution control. 479 U.S. at 489 (internal quotations and citation omitted). But, "merely because the federal provisions [a]re

[1] Even if the panel were correct that the district court exported the North Carolina Clean Smokestacks Act ("CSA") (Slip op., pp. 25-29), remand would be in order to allow the district court to fashion a more appropriate remedy. However, the panel's conclusion that the district court applied the CSA is not correct. The CSA establishes system-wide tonnage caps in North Carolina for SO_2 and NO_X emissions and expressly leaves to the utility the discretion to determine the specific controls to be installed on the specific units needed to meet those broad caps. N.C. Gen. Stat. § 143-215.107D(b)-(f). The district court rejected a proposed system-wide cap for TVA because "the restrictive nature of public nuisance doctrines does not allow such a remedy [*i.e.*, a system-wide cap]." J.A. 979-80. Instead, the district court ordered specific pollution controls to be installed and operated at the four plants whose emissions were harming North Carolina. J.A. 1024-25. The court simply ordered the same scrubbers and SCRs that TVA said it was planning to install, but on a faster schedule, as TVA's "failure to speedily install readily available pollution control technology is not, and has not been, reasonable conduct under the circumstances." J.A. 1020. To ensure "[c]ontinual, year-round operation of scrubbers and SCRs on these four plants" to abate the nuisance, the court ordered unit-by-unit emission limits based on what the scrubbers and SCRs would "enable the plants to achieve" at each unit according to the evidence. J.A. 1008; NC Ex. 97, 461 at 17-20 [J.A. 1111, 1189-92]; Tr. 410.

sufficiently comprehensive to meet the need identified by Congress d[oes] not mean that States and localities [a]re barred from . . . imposing further requirements." *Hillsborough County Florida v. Automated Med. Labs. Inc.*, 471 U.S. 707, 717 (1985). Rather, the Supreme Court requires deference to causes of action preserved by Congress despite the comprehensiveness of federal regulations, holding that "the only state suits that remain available are those specifically preserved by the Act." *Ouellette*, 479 U.S. at 492 (internal citation omitted). Given the similarity between the Clean Water Act and the Clean Air Act, and especially their indistinguishable saving clauses, *Ouellette* instructs that the Clean Air Act, like the Clean Water Act, is not so comprehensive as to preclude nuisance-law claims brought under the laws of the source State.

The panel's concern that state law nuisance actions would undermine the "single system of permitting" embodied in the federal Clean Air Act was likewise considered and rejected by the Supreme Court. (Slip op., p. 24) In *Ouellette*, the Supreme Court recognized that while source-state nuisance law "may impose separate standards and thus create some tension with the permit system," application of such standards "does not disrupt the regulatory partnership established by the permit system." 479 U.S. at 499. Indeed, in *Ouellette*, the defendant had been issued an NPDES permit by the State of New York pursuant to authority New York had been granted under the Clean Water Act. Despite the fact that the discharges at issue had been authorized by this NPDES permit, the Supreme Court concluded that the plaintiffs in that case could still proceed with a public nuisance action.[2] The panel's conclusion that the air quality

[2] Even if Tennessee and Alabama law generally prohibit nuisance claims regarding activities that are specifically authorized by law (*see* Slip op., pp. 30-31), that is not the case regarding air pollution in either State. *See, e.g., Borland v. Sanders Lead Co.*, 369 So. 2d 523, 526 (Ala. 1979) (holding that "compliance with the Alabama Air Pollution Control Act" is not a defense to a

permits issued to TVA immunize TVA from a public nuisance action (Slip op., pp. 7, 29-32) directly conflicts with the Supreme Court's treatment of this issue.

The *Ouellette* decision also specifically approved of parties pursuing relief under the federal statute in addition to common law nuisance claims. Rather than finding that federal regulatory programs provided the exclusive avenue of redress (as the panel held in this case), the Supreme Court specifically stated "[n]othing in our decision, of course, affects respondents' right to pursue remedies that may be provided by the Act" in addition to the common law nuisance claims that were expressly preserved by Congress. 479 U.S. at 498 n.18. Thus, the panel's observation that "North Carolina is by no means without a remedy" under the federal act is immaterial and cannot justify the panel's deviation from the Supreme Court's controlling decision in *Ouellette*. (Slip op., p. 32)

The Supreme Court's decision likewise forecloses the panel's conclusion that it cannot "allow multiple courts in different states to determine whether a single source constitutes a nuisance." (Slip op., p. 18) The Supreme Court expressly rejected this argument, finding that nothing "prevents a court sitting in an affected State from hearing a common-law nuisance suit" under these circumstances. *Ouellette,* 479 U.S. at 500.

The panel's decision that "[s]eeking public nuisance injunctions against TVA . . . is not an appropriate course" also directly conflicts with the *Ouellette* decision, which specifically rejected any distinction between claims for damages and injunctive relief. (Slip op., p. 34) The Supreme

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nuisance action); *accord Poffenbarger v. Merit Energy Co.*, 972 So. 2d 792, 798 (Ala. 2007); Ala. Code § 22-28-16; Tenn. Code Ann. § 68-201-114 (Tennessee Air Quality Act shall not "be construed to abridge or alter any rights of action, civil or criminal, arising from statute, common law or equity"); *see also* TVA Ex. 185, p. 2990 (J.A. 1303) (example of TVA permit from Tennessee stating that "No Authority is Granted by this Permit to Operate, Construct or Maintain any Installation in Violation of any Law, Statute, Code, Ordinance, Rule, or Regulation of the State of Tennessee or any of its Political Subdivisions.").

Court declined to "draw a line between the types of relief sought," noting that "unless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available." *Ouellette*, 479 U.S. at 499 n.19.

In addition to the conflict with the *Ouellette* decision, the panel's opinion conflicts with decisions of the Second and Sixth Circuits. As previously noted, the Second Circuit has held that a public nuisance action regarding greenhouse gas emissions based on federal common law may proceed against electric utilities. *Am. Elec. Power Co.*, 582 F.3d 309. Given the Clean Air Act's state-law saving clause, this Court's prohibition on state-law nuisance actions cannot be reconciled with the Second Circuit's opinion.

The panel's decision also is in direct conflict with the Sixth Circuit's decision in *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989). In that case, the Sixth Circuit reversed the district court's conclusion that the issuance of a Clean Air Act permit to Detroit preempted plaintiffs' cause of action under the Michigan Environmental Protection Act. The Michigan Act codified a nuisance-like cause of action and left to the judiciary the task of "developing a state common law of environmental quality." *Id.* at 338. The Sixth Circuit concluded that the district court erred in holding that the Clean Air Act preempted this nuisance-like cause of action. *Id.* at 342. Instead, the Sixth Circuit held that the Clean Air Act "displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute." *Id.* As reflected by the Clean Air Act's saving clause, "Congress did not wish to abolish state control." *Id.* at 343. The Sixth Circuit correctly concluded that the issuance of a permit under the Clean Air Act does not preclude a plaintiff from seeking injunctive relief based upon a state law cause of action – even if that cause of action requires the courts to balance the harm of specific air emissions against the feasibility of pollution

controls that could minimize the harm. For purposes of this analysis, the cause of action before the Sixth Circuit in *Her Majesty the Queen* is indistinguishable from the nuisance causes of action under Tennessee and Alabama law at issue in the present case.

En banc review is warranted in light of the conflict between the panel opinion and the Supreme Court's decision in *Ouellette* and in light of the circuit split that the opinion creates.

III. *EN BANC* CONSIDERATION IS NECESSARY TO MAINTAIN UNIFORMITY AS BETWEEN CONFLICTING OPINIONS OF THIS COURT.

The panel's decision likewise conflicts with the prior opinion of this Court in *TVA I,* 515 F.3d at 350-53. *En banc* consideration is necessary to maintain uniformity among the Court's opinions.

In the interlocutory appeal in this case, TVA asserted that because it is a federal agency, it was not subject to a common law cause of action for nuisance arising from its air emissions. This Court rejected TVA's argument, concluding that Congress included the federal facilities clause, 42 U.S.C. § 7418(a) ("Section 118"), in the Clean Air Act to ensure that federal entities would not be immune from nuisance claims and other state common law causes of action. *TVA I,* 515 F.3d at 350-53. The federal facilities clause provides that federal agencies, departments and instrumentalities "shall be subject to, and comply with, all Federal, State, interstate and local requirements." 42 U.S.C. § 7418(a). The previous panel rejected TVA's argument that common law nuisance actions do not fall within the scope of the word "requirement" as used in the federal facilities clause. Relying on the Supreme Court's decisions in *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996), and *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992), that panel held that the word "requirement" as used in the Clean Air Act included state common-law tort actions, such as common law nuisance claims. *TVA I,* 515 F.3d at 351-52. The prior panel concluded:

> [T]he plain meaning of "requirement" and the Supreme Court's broad interpretation of the term foreclose the TVA's argument that the CAA does not mandate compliance with state "requirements" enforced through a common-law tort suit. This being the case, we conclude that this lawsuit falls within Congress' waiver of the TVA's Supremacy Clause protections.

Id. at 352-53. The panel's opinion in the present appeal is at odds with the opinion of the prior panel. The prior panel recognized that Congress expressed its intent in the federal facilities clause to allow common law nuisance actions to proceed against federal facilities and instrumentalities, such as TVA, even though state-law nuisance actions do not "embody[] an objective, quantifiable standard." *Id.* at 351. The prior panel also held that "[t]he fact that North Carolina seeks to hold the TVA liable in tort by seeking injunctive relief, rather than damages" did not foreclose North Carolina's claims. *Id*. at 352 n.5.

Section 116 of the Clean Air Act expressly provides that "nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce . . . any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. Under the prior panel's interpretation of the word "requirement," this provision allows for the enforcement of a source State's existing nuisance law to abate air pollution. Alabama and Tennessee law both allow nuisance actions to abate air pollution. *See Hundley v. Harrison*, 26 So. 294, 294 (Ala. 1898); *Penn-Dixie Cement Corp. v. Kingsport*, 225 S.W.2d 270, 273 (Tenn. 1949). Nothing in the Clean Air Act's language or history remotely suggests that Congress intended for the word "requirement" – when used in similar phrases in similar contexts – to mean anything different in Section 116 than it does in Section 118. Thus, under the prior panel's opinion, Section 116 must be read as allowing Alabama's and Tennessee's nuisance requirements to be applied to air pollution sources in Alabama and Tennessee, respectively. *See* 515 F.3d at 351-53 ("requirement" includes nuisance causes of action). This Court's more recent opinion, however,

precludes North Carolina from bringing a nuisance action under the law of Alabama with respect to the Alabama plant and under the law of Tennessee with respect to the Tennessee plants. Indeed, the Court's present opinion concludes that Congress intended to preempt such actions because "vague public nuisance standards [would] scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." (Slip op., p. 6)

The conflict between the Court's most recent opinion and the opinion of the prior panel is substantial. *En banc* review is necessary so as to ensure consistency in this circuit's precedents with respect to identical wording in two related sections of the Clean Air Act – Section 116, 42 U.S.C. § 7416, and Section 118, 42 U.S.C. § 7418.

CONCLUSION

The State of North Carolina respectfully requests this Court to grant rehearing and respectfully requests rehearing *en banc.*

Respectfully submitted, this 8th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2009, I electronically filed the foregoing **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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