IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

VIRGINIA URANIUM, INC., *et al*. Plaintiffs, v. MCAULIFFE, *et al*., Defendants.	)	Case No. 4:15-cv-00031-JLK

BRIEF AS AMICUS CURIAE OF
THE ROANOKE RIVER BASIN ASSOCIATION AND
THE DAN RIVER BASIN ASSOCIATION

Pursuant to this Court's order on October 19, 2015 (Dkt. No. 65), Roanoke River Basin Association and Dan River Basin Association (the "Basin Associations"), by and through undersigned counsel, hereby file this brief as amicus curiae in support of Defendants' Motion to Dismiss (Dkt. No. 32) and in opposition to Plaintiffs' Cross-Motion for Summary Judgment (Dkt. No. 46).

I. BACKGROUND

A. Factual Summary.

In 1982, the Virginia General Assembly enacted a law that imposes a moratorium on uranium mining in the Commonwealth. (Complaint ("Compl."), Dkt. No. 1, at ¶ 2). In 1983, the General Assembly extended the ban until the legislature established a specific uranium mining regulatory program "by statute." Va. Code § 45.1-283; (Compl. at ¶ 64). At roughly the same time, the market for uranium 'yellowcake' was collapsing, and efforts to develop a potential state mining program for uranium fell off the General Assembly's radar. (John C. Watkins, *Uranium Can Be Mined Safely in Virginia*, Richmond Times-Dispatch, Jan. 21, 2013, (Exh. 40 to Decl. of

John D. Ohlendorf, Dkt. No. 48-22) ("[A] downturn in the uranium market in the mid-1980s shelved the idea, and a moratorium originally conceived as a temporary measure has remained in place *by default* for the past 30 years.") (emphasis added).

In 2007, a quarter-century after Virginia adopted its uranium mining statute, Plaintiff Virginia Uranium, Inc. was formed and began lobbying the Virginia General Assembly to repeal the law. (Compl. at ¶¶ 9, 75). At that time, Plaintiffs recognized Virginia's rightful authority to regulate uranium mining. In a March 2011 opinion-editorial published in the *Danville Register & Bee* and elsewhere, Mr. Walter Coles, Sr., CEO of both Plaintiff Virginia Uranium, Inc. and Plaintiff Virginia Energy Resources, pledged that Virginia Uranium was "prepared to work with the members of the General Assembly in 2012" on the issue, adding that Virginia Uranium has "unequivocally supported the efforts" of a state-commissioned study ever since "the Virginia Coal and Energy Commission tasked the National Academy of Sciences to conduct such a study in 2009." *See* Walter Coles, Sr., "No End-Run Around The Study," *Danville Register & Bee* (Mar. 28, 2011) (A copy of Mr. Coles' opinion piece is no longer available on the website of the *Register & Bee* and is included with this brief as Attachment A) (hereinafter Coles Op-Ed).[1] Virginia Uranium stated it was "fully committed to heeding [the NAS's] findings - regardless of the outcome. . . . [I]f the NAS finds that uranium mining would entail unacceptable risks, we will not pursue lifting the moratorium in 2012. Period." *Id.*

[1] *See also* Opinion Letter by Walter Coles, *South Hill Enterprise* (Mar. 29, 2011), *available at* http://www.southhillenterprise.com/opinion/article_3df9d621-27e4-50de-8f69-07ffeea412e2.html, (*last visited* Sept. 1, 2015) (containing language virtually identical to what was published in the *Register & Bee*).

In 2013, Senator Watkins introduced a bill to end the ban. (Compl. at ¶ 87).[2] Before either house of the General Assembly considered his bill, however, Senator Watkins withdrew it. (Compl. at ¶ 89). All told, since 1983, the Virginia General Assembly has not made any amendments or changes to the uranium mining ban.

B. Procedural History.

Plaintiffs challenge the mining ban, seeking a declaratory judgment that the Atomic Energy Act, 42 U.S.C. § 2011 *et seq*. (the "AEA") preempts Virginia's uranium mining law entirely. (Compl. at ¶ 111). Because there are no federal laws or regulations covering conventional uranium mining on private lands, Plaintiffs also seek an injunction directing Virginia's Department of Mines, Minerals and Energy to process Plaintiffs' state permit applications for mining and mine safety. (Compl. at ¶ 111). On August 25, 2015, Defendants moved to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Motion to Dismiss, Dkt. No. 32). Plaintiffs filed a cross-motion for summary judgment. (Cross-Motion for Summary Judgment, Dkt. No. 46).

On September 4, 2015, the Basin Associations moved to intervene in this proceeding (Motion to Intervene, Dkt. No. 40). On October 19, 2015, the Court issued an order denying the motion to intervene but granting the Basin Associations leave to file an amicus brief and leave to renew their motion to intervene should circumstances warrant it. (Memorandum Opinion, Dkt. No. 64, at 7). Pursuant to the Court's directive, the Basin Associations now file this brief as amicus curiae.

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[2] Jackson H. Miller, a member of the Virginia House of Delegates, introduced House Bill 2330, which was identical to Senator Watkins' bill. A copy of House Bill 2330 is available online at http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+HB2330. That legislation was left in the House Commerce and Labor Committee without ever coming up for a vote.

C. Summary of Plaintiffs' Flawed Preemption Argument.

Uranium extraction and development involves two phases: (1) the *mining* of the ore, regulated under state mining laws; and (2) the *milling* of the ore into uranium 'yellowcake' and the management of mill tailings, regulated under federal law. (Compl. at ¶¶ 29-32). Plaintiffs' claim is that federal law on the milling of yellowcake preempts state legislation on mining. Related to this regulatory structure, Plaintiffs include in the record several portions of a National Academy of Sciences ("NAS") report on uranium mining in Virginia. (Exh. 3 to Decl. of John D. Ohlendorf, Dkt. No 48-3). Plaintiffs omit, however, the final two chapters of the study, ending their submittal at page 222 of the NAS report. *Id.* This is a telling omission, as page 223 highlights one of the "key points" of the report: "There is no federal law that specifically applies to uranium mining on non-federally owned lands; state laws and regulations have jurisdiction over these mining activities."[3] (These two chapters are included as Attachment B to this amicus brief.)

Simply stated, Plaintiffs' Complaint boils down to an argument that "Virginia's ban frustrates the objectives of federal law" to promote nuclear energy development. (Plaintiffs' Cross-Motion for Summary Judgment, at 51, Dkt. No. 46). This theory, however, requires a gross over-reading of the AEA that would prohibit *any* of the 50 states from enacting legislation to ban uranium mining on private lands. Plaintiffs' own articulation of their claim is illuminating on this point. As Plaintiffs would have it:

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[3] National Research Council, URANIUM MINING IN VIRGINIA: SCIENTIFIC, TECHNICAL, ENVIRONMENTAL, HUMAN HEALTH AND SAFETY, AND REGULATORY ASPECTS OF URANIUM MINING AND PROCESSING IN VIRGINIA (National Academies Press 2012) at 223, *available at* http://www.nap.edu/catalog/13266/uranium-mining-in-virginia-scientific-technical-environmental-human-health-and-safety-and-regulatory-aspects-of-uranium-mining-and-processing-in-virginia (hereinafter "NAS Report") (*last visited* Oct. 30, 2015).

> "To appreciate the degree to which Virginia's ban frustrates the objectives of federal law, one need only imagine what would become of Congress's desire to encourage the development and use of uranium if all 50 states enacted similar legislation. … By entirely eliminating the upstream activities of mining, [Virginia] has choked off the very existence of the federally-regulated downstream activities that Congress sought to encourage."

(Plaintiffs' Cross-Motion for Summary Judgment, at 51-52, Dkt. No. 46). Because there is no federal program to regulate conventional uranium mining on private lands, Plaintiffs' argument necessarily presumes that the AEA *requires* states like Virginia to develop and maintain state programs for uranium mining as a means of providing ore to feed "federally-regulated downstream activities." But this cannot possibly be an accurate reading of the AEA, since it would render the AEA itself unconstitutional. *New York v. U.S.*, 505 U.S. 144, 161 (1992) (The Supreme Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.").

D. Summary of Federal Law on Preemption.

Federal law can only preempt a state enactment in one of three ways: (1) *express preemption*,[4] when Congress expressly states in a federal statute its intention to preempt state law, (2) *field preemption*, when federal law completely occupies a field as to leave no room for state involvement and (3) *conflict preemption*, when a conflict between parallel state and federal laws makes compliance with both impossible. *See Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S.Ct. 1591, 1595 (2015) (holding that the federal Natural Gas Act did not preempt state-law antitrust claims); *Pacific Gas and Elec. Co. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190, 204 (1983). As a preliminary matter, the Supreme Court of the United States has *never*

[4] Plaintiffs have not plead express preemption.

found a state law preempted under the Atomic Energy Act. *English v. General Elec. Co*., 496 U.S. 72 (1990) (AEA did not preempt state law claims for intentional infliction of emotional distress); *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238 (1984) (AEA did not preempt state law tort claims for punitive damages caused by escape of plutonium from federally-licensed nuclear facility); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (state law regarding operation of nuclear reactor not preempted).

Moreover, as the Commonwealth has observed (Reply in Support of Motion to Dismiss ("MTD Reply"), Dkt. No. 56, at 4-5), the lower court cases finding AEA preemption all concern state laws that *facially* intrude on activities that the Nuclear Regulatory Commission ("NRC") regulates. In contrast, the NRC has no regulatory oversight of uranium mining on private lands, a point which Plaintiffs concede. (Compl. at ¶¶ 37, 51; Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment ("SJ Brief"), Dkt. No. 47, at 53). This is a critical distinction that highlights the radical degree to which Plaintiffs' seek to expand the doctrine of federal preemption under the AEA. *See Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1242 (10th Cir. 2004) (Utah laws facially targeted storage of spent nuclear fuel, an activity for which the NRC has promulgated "detailed regulations."); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 414 (2d Cir. 2013) (challenged statutes facially targeted "issues related to dry cask storage of nuclear waste and decommissioning options"); *United States v. Manning*, 527 F.3d 828, 837 (9th Cir. 2008) ("It is abundantly clear *from the text* of the [challenged state law] that it is intended to regulate both nonradioactive hazardous substances and radioactive substances in order to protect health and environmental safety.") (emphasis added); *United States v. Kentucky*, 252 F.3d 816, 823 (6th Cir. 2001) (challenged permits "*specifically* limit[ed] the amount of 'radioactivity' and 'radionuclides' that DOE [could] place

in its landfill") (emphasis added); *Long Island Lighting Co. v. Suffolk Cnty., N.Y.*, 628 F. Supp. 654, 666 (E.D.N.Y. 1986) (local law facially prohibited utility from conducting emergency response test preempted because a local government may not "obstruct the information gathering process *of the NRC* for a reason that lies with the NRC's congressionally-mandated sphere of authority"); *Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234, 1241-42 (7th Cir. 1985) (Plaintiffs' request for injunctive relief to have wastes removed was preempted because the "radioactive and nonradioactive materials [were] 'inextricably intermixed'," and because the "NRC has exclusive authority to regulate the radiation hazards of the byproduct material.").

In short, Plaintiffs dramatically overstate the AEA's preemptive scope. They cite to no case where a court found preemption of a state statute that did not, on its face, concern issues over which the NRC has jurisdiction and is actively regulating. Because the NRC's jurisdiction under the AEA does *not* extend to conventional uranium mining on private lands, this Court should be especially skeptical of Plaintiffs' claims that the AEA nevertheless preempts Virginia's restrictions on this activity.

II. ARGUMENT

A. Plaintiffs' Field Preemption Theory Fails Because the Virginia Statute is Limited to Restrictions in an Area of Exclusive State Control and Does Not Impair the AEA's Objectives on Nuclear Energy.

Federal law may preempt state law absent an express Congressional declaration if the federal law is "so pervasive as to make reasonable the inference that Congress has left no room to supplement it." *Pacific Gas*, 461 U.S. at 204. Field preemption, however, faces a high hurdle when it interacts with areas of traditional state regulation. *English*, 496 U.S. at 79 (where "the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest")

(citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Since regulation of mining on private lands is indisputably an area of traditional state control, this high hurdle applies to Plaintiffs' claim of federal preemption here.

The field preemption analysis requires a three-step approach. *Entergy*, 733 F.3d at 415-18. First, the court looks to the statute's actual text to determine whether it intrudes upon federal law. *Entergy*,733 F.3d at 414 ("proper place to begin the analysis of a statute is its text") (citing *U.S. v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Second, a court looks to the law's actual effect; in other words, whether the law actually achieves the statute's textual purpose or achieves an altogether different (and potentially preempted) result. *English*, 496 U.S. at 84 ("part of the preempted field is defined by reference to the purpose of the state statute . . . [and] another part of the field is defined by the state law's actual effect on nuclear safety."). Finally, a court may look to legislative history, although "inquiry into legislative motive is often an unsatisfactory venture." *Pacific Gas*, 461 U.S. at 216. Plaintiffs' theory of preemption fails at all three stages of the analysis.

1. The Mining Ban's Text, Focused Exclusively on Legitimate State Restrictions on Mining, Does Not Warrant Preemption.

As the Supreme Court has noted, there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *U.S. v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Here, the challenged statute contains only two sentences. Va. Code. § 45.1-283 ("Notwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium mining is established by statute. For the purpose of construing § 45.1-180 (a), uranium mining shall be deemed to have a significant

effect on the surface."). The ban's actual words make clear that its purpose is to prohibit uranium mining on private lands unless and until a specific regulatory program for such mining exists, nothing more.

In fact, Plaintiffs have previously made this exact point. In 2011, Mr. Walter Coles., Jr., Executive Vice President both for Plaintiff Virginia Uranium, Inc. and Plaintiff Virginia Energy Resources, Inc., stated that "there's a misconception — sometimes — amongst investors that Virginia banned uranium mining in 1982. And that's not what Virginia did. What Virginia said is, 'We need to slow down and develop regulations to oversee this new industry if it's going to come to the state of Virginia' . . . . " (Walter Coles, Jr., Feb. 2, 2011, "Building North America's Uranium Supply," Presentation to the Investment Congress on America's Resources, Ironmongers' Hall, London, UK, (hereinafter "Coles London Presentation") at 6, transcript attached hereto as Attachment C).[5] As Plaintiffs concede, Virginia retains its authority to regulate uranium mining on private lands (Compl. at ¶¶ 37, 51; SJ Brief at 53), which is the *only* thing this statute does.

2. The Mining Ban's Actual Effects Have Not Impaired the AEA's Objectives on Nuclear Energy Development, as Evidenced by Plaintiffs' Own Allegations.

The second prong of field preemption looks to the challenged statute's effects. *English*, 496 U.S. at 85. In other words, the court asks whether the law intrudes onto a preempted field despite the legislature's avowed purpose. *Entergy*, 733 F.3d at 416 ("[W]e have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.")

[5] The attached transcript was taken by the Southern Environmental Law Center from a video of Mr. Coles's presentation that was posted online. A screenshot from the video of Mr. Coles is still available online (*available at* http://objectivecapitalconferences.com/ocic/london_1feb11.html, *last visited* October 29, 2015), although the video itself has now been disabled as "private."

(citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992)). For preemption to apply under this prong, however, the effect must be sizeable. *English*, 496 U.S. at 85 ("[N]ot every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the preempted zone."). Here, the ban's primary effect is that it suspends permitting for uranium mining on private lands unless or until the legislature decides to establish a program for such mining. That is, the appropriate scope of the statute's text matches the narrow scope of its impact.

In an attempt to try to survive the motion to dismiss, Plaintiffs allege that the mining ban has effects far beyond uranium mining. (SJ Brief at 52) (the ban has "choked off the very *existence* of the federally-regulated "downstream" activities that Congress sought to encourage."); (Compl. at ¶ 110) ("the ban "flat-out prohibits the safe management of uranium tailings, by prohibiting the mining of uranium in the first place."). Plaintiffs, however, grossly overstate the ban's effects in a way that contradicts their own statements elsewhere in their filings.

As the Commonwealth notes, Plaintiffs could begin milling and tailings management operations today without violating Virginia's uranium mining statute. (MTD Reply at 6) ("If the Plaintiffs completed the necessary application with the NRC, that application was approved, and no other traditional land use concerns existed to preclude the operation, the Plaintiffs could operate a uranium milling facility in Virginia today."). Plaintiffs actually concede this point but attempt to discredit it by claiming that milling uranium from out-of-state is economically futile. (Reply in Support of Cross-Motion for Summary Judgment ("SJ Reply Brief"), Dkt. No. 58, at 11) ("[T]here is no basis for believing that anyone would *want* to undertake the *pointless expense*

of constructing a mill and tailing-management complex in Virginia and transporting out-of-state uranium into the Commonwealth.") (emphasis added).

Avoiding an activity as a "pointless expense," however, is vastly different from a legal impediment to that activity. In reality, were Plaintiffs so inclined, they could mill uranium and manage the mill tailings without violating Virginia's law on uranium mining. Several Plaintiffs reside in Chatham, Virginia, roughly 25 miles from the North Carolina border. Compl. at ¶¶ 9-11. Nothing in the challenged statute prevents these Plaintiffs from importing uranium ore from North Carolina (or any other state) for milling and storing the subsequent tailings. Other mining operations haul ore farther than that; the Cameco mining company, for example, hauls ore from its McArthur River mine nearly fifty miles for milling at its Key Lake operation.[6] Plaintiffs might determine that milling uranium sourced from out of state is a "pointless expense" or economically impractical, but their financial position does not factor into the Court's preemption analysis in any way. If it did, the constitutionality of the statute could fluctuate year-to-year with the spot price of uranium.

The mining ban does not impose any legal obstacle to uranium milling or mill tailings management. In fact, the uranium mining ban has imposed no impediment to nuclear power development in the state. Plaintiffs themselves allege that Virginia has a robust nuclear energy industry. (Compl. at ¶ 36) ("Virginia is currently home to a wide variety of nuclear activities that potentially pose a far higher radiological safety risk than uranium development at Coles Hill ever could."). Plaintiffs further allege that the General Assembly has "long embraced the presence of

[6]Cameco Corp., "Businesses: McArthur River / Key Lake," http://www.cameconorth.com/about/businesses (last visited Nov. 2, 2015) (explaining that "ore slurry from McArthur River is trucked in special containers 80 kms southwest to Key Lake where it's milled and blended for processing with low-grade ore stockpiled at the mill.").

nuclear facilities and activities within [Virginia's] borders, making the judgment that the marginal radiological safety risk they pose is far outweighed by their many benefits," (SJ Brief at 12). In sum, Plaintiffs' own pleadings concede that Virginia's uranium mining ban has not adversely impacted the development of nuclear power in Virginia or frustrated the AEA's objectives on the development of atomic energy. (Compl. at ¶¶ 33-36.) To the contrary, Plaintiffs allege that the nuclear energy industry has prospered in Virginia while the Commonwealth has exercised its jurisdiction over an area of exclusive state control: the imposition of a moratorium on uranium mining.

3. To The Extent Legislative History is Relevant, Plaintiffs' Own Statements on the Ban Contradict Their Claims on Legislative Intent.

Plaintiffs ask this Court to upend the field preemption analysis by skipping over the statutory text and the statute's real-world impacts and focus exclusively on Plaintiffs' imaginative version of Virginia legislative history. (SJ Brief at 28). Legislative history, at best, plays only a secondary role in a preemption analysis. As the Supreme Court in *Pacific Gas* cautioned:

> First, inquiry into legislative motive is often an unsatisfactory venture. What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it. Second, it would be particularly pointless for us to engage in such inquiry here when it is clear that the states have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a state so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings. In these circumstances, it should be up to Congress to determine whether a state has misused the authority left in its hands.

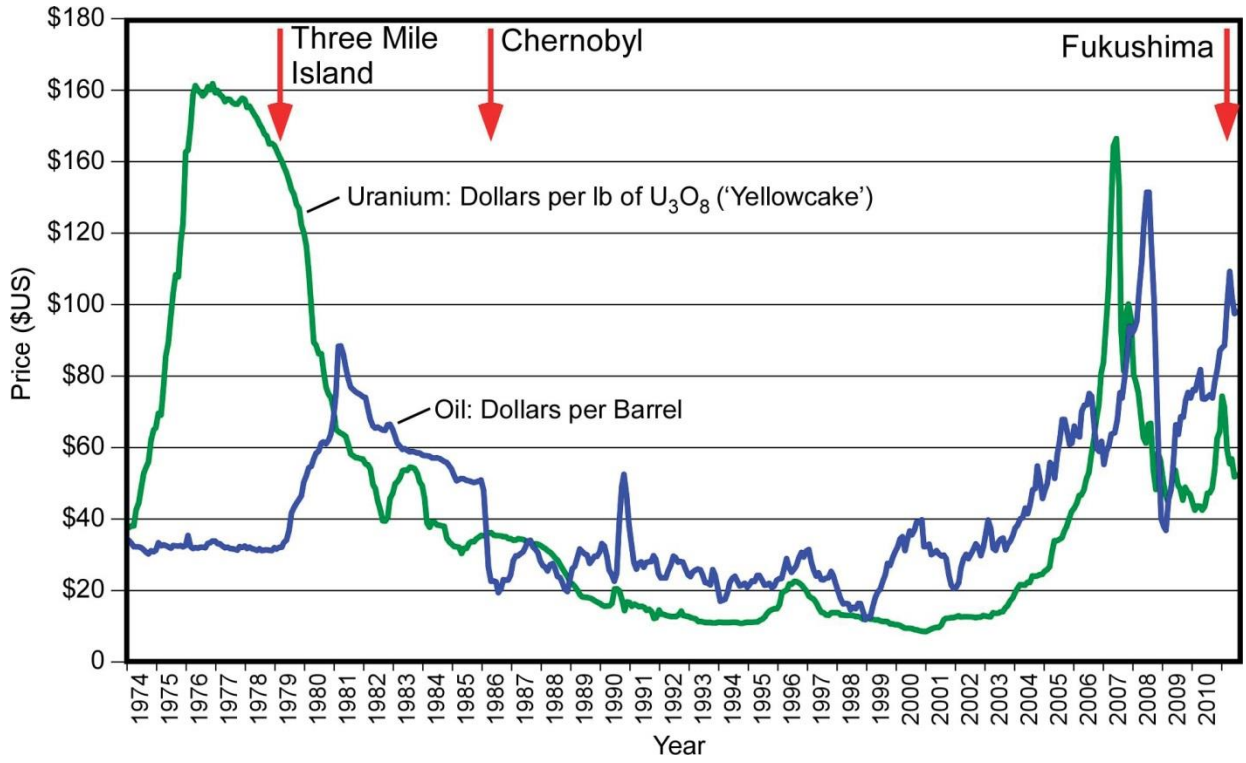
Pacific Gas, 461 U.S. at 216 (internal citations omitted).

Moreover, not even the mining ban's legislative history, to the extent it exists, supports Plaintiffs' preemption theory. Since Virginia does not publish official legislative histories,

Plaintiffs have invented their own "legislative history" that fundamentally misrepresents the facts surrounding the uranium ban discussion in the mid-1980s. At that time, the legislature created a Uranium Administrative Group ("UAG") to "conduct a more in-depth 'evaluation of the costs and benefits' of 'uranium mining and milling activity in the Commonwealth.'" (Compl. at ¶ 64). According to Plaintiffs, the UAG recommended lifting the ban in 1985. (Compl. at ¶ 66). The UAG was not unanimous, however; Ms. Elizabeth H. Haskell and Mr. Frank E. Wallwork, dissented from the recommendation. (Compl. at ¶ 66-67); (Exh. 16 to Decl. of John D. Ohlendorf, Dkt. No 48-17). After detailing Ms. Haskell's alleged statements on radiological safety, Plaintiffs blindly claim with absolutely no evidentiary support that the General Assembly overruled the UAG's recommendation based on Ms. Haskell's dissent. (Compl. at ¶ 72) ("The Assembly adopted Ms. Haskell's recommendation rather than the majority's *for the reasons she expressed*.") (emphasis added); (SJ Brief at 39) ("[T]he General Assembly chose to follow the recommendations of Ms. Haskell and Mr. Wallwork.").

These wholly unsupported conclusions are contradicted by the documents that Plaintiffs themselves have entered into the record. Plaintiffs cite to an article by State Senator John C. Watkins, who sponsored Plaintiffs' legislation to repeal the ban. (Exh. 40 to Decl. of John D. Ohlendorf, Dkt. No 48-41.) Senator Watkins states that he was "a freshman member of the General Assembly in the early 1980s," and claims that he "was closely involved in the decision-making process over whether to allow uranium mining in Virginia." *Id.* He explains that "a downturn in the uranium market in the mid-1980s shelved the idea, and a moratorium originally conceived as a temporary measure has remained in place *by default* for the past 30 years." *Id.* (emphasis added).

Plaintiffs' citation to the National Academy of Sciences report on uranium mining further supports Senator Watkins' statement that economic realities led the General Assembly to abandon efforts in 1985 to reconsider the moratorium. At that time, the spot price for uranium 'yellowcake,' had fallen from a high of $160 per pound in the late 1970s down to less than $40 per pound by 1984. (Exh. 3 to Decl. of John D. Ohlendorf, Dkt. No 48-3, at 93, Figure 3.22).



In fact, Mr. Walter Coles, Jr. has repeatedly stated that the ban exists today, by default, because of economics, not radiological safety concerns. In February 2011, Mr. Coles stated that "unfortunately for us, [in 1984] the price of uranium had declined to the point that Union Carbide had already dropped the project. And so there was no initiative to get the legislation passed in the 1985 legislative session, and that's the way the situation stayed *for 25 years* until we started our company in 2007." (Coles London Presentation, *supra*, at 6 (emphasis added)).

Likewise, in March 2011, Mr. Coles repeated that economics, not radiological safety concerns, drove Union Carbide and Marline to drop their legislative efforts, which in turn caused the issue to drop off the legislature's radar. (Walter Coles, Jr., March 1, 2011, Presentation at the 22nd Annual Investor Conference, University Club, New York City, at 14, transcript attached hereto as Attachment D)[7] ("Basically, [Union Carbide and Marline] thought the price is so low they didn't see any reason to keep spending the money to push their legislative agenda and *they were correct* because the price stayed low *for the next 25 years*. It isn't until now that the price is back up to a level where it makes sense to get back in here and start mining.") (emphasis added).

Nothing in Plaintiffs' exhibits support the fictional conclusion that the General Assembly acted to "adopt[]" Ms. Haskell's dissent. Plaintiffs' record and Plaintiffs' own prior statements contradict this theory of the case. This fact may explain why Plaintiffs initially acknowledged the General Assembly's authority to impose a moratorium on uranium mining. As highlighted above, Mr. Walter Coles, Sr. affirmed that Plaintiffs were "prepared to work with the members of the General Assembly in 2012" and "unequivocally supported the efforts" of a state-commissioned study ever since "the Virginia Coal and Energy Commission tasked the National Academy of Sciences to conduct such a study in 2009." *See* Coles Op-Ed, *supra*.[8] Plaintiffs further confirmed that they were "fully committed to heeding [the NAS's] findings - regardless

[7] The attached transcript was prepared for the Southern Environmental Law Center from a webcast by Wall Street Webcasting. Although the webcast itself is no longer available, reference to it may be found on the UraniumFree Virginia blog, *available at* http://uraniumfreevirginia.blogspot.com/2011/03/virginia-uranium-inc-claims-it-has-va.html, *last visited* October 29, 2015).

[8] *See also* Opinion Letter by Walter Coles, *South Hill Enterprise* (Mar. 29, 2011), *available at* http://www.southhillenterprise.com/opinion/article_3df9d621-27e4-50de-8f69-07ffeea412e2.html, (*last visited* Sept. 1, 2015) (containing language virtually identical to what was published in the *Register & Bee*).

of the outcome. . . . [I]f the NAS finds that uranium mining would entail unacceptable risks, we will not pursue lifting the moratorium in 2012. Period." *Id.*

4. Plaintiffs' Citation to a Series of Equal Protection Clause Cases Addressing Racial and Gender Discrimination Are Wholly Irrelevant to the Preemption Analysis.

Implicitly acknowledging the fundamental weakness of their case on 1980s legislative history, Plaintiffs cite a string of Equal Protection clause cases, claiming a valid statute can nonetheless become unconstitutional if it is "maintained" for "insidious purposes." (SJ Brief at 31). To state the obvious, these cases concern the deprivation of core constitutional rights due to alleged racial or gender discrimination—a unique area of the law where heightened scrutiny and a more intrusive role for federal courts has been required. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose, and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.") (internal citations omitted).

Moreover, in each of those cases, the governing body had actually taken *affirmative action* to "maintain" those challenged laws, something that is notably absent here. For example, in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2626 (2013), elements of the 1965 Voting Rights Act were stricken down after "extraordinary features [of the Act] were *reauthorized*" in 2006. Similarly, in *Brown v. Board of School Commissioners of Mobile County*, the Eleventh Circuit ruled: "When the Alabama legislature *reinstated* a law which suited the

purpose of discrimination, the law may be said to have been a product of discriminatory intent, notwithstanding the fact that in its *earlier* enactment, discrimination was not a factor." 706 F.2d 1103, 1106 (11th Cir. 1983) (emphasis added). Unlike the cases Plaintiffs cite, the General Assembly has taken no affirmative action to "maintain" the ban. The General Assembly passed the ban in 1982/1983, and has not adopted any amendments to it since.

B. Conflict Preemption Does Not Apply Here and Plaintiffs' Theory of Conflict Preemption Would Actually Render the Atomic Energy Act Unconstitutional On Commandeering Grounds.

Finally, the Supreme Court's jurisprudence on conflict preemption holds that a federal law may preempt a state law when it would be "impossible to comply with both the federal and state requirements." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). *See also Williamson v. Mazda Motor of America, Inc.* 562 U.S. 323, 336 (2011) (holding that federal motor vehicle safety standards for seatbelts did not preempt a state-law tort action "even though the state tort suit may restrict the manufacturer's choice" of seatbelt to install); *Silkwood*, 496 U.S. at 79 ("the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (internal citations omitted). Plaintiffs do not argue that it is legally impossible to comply with both the state mining ban and federal law, nor could they. Plaintiffs do, however, argue that the uranium mining ban "frustrates the Atomic Energy Act's full purposes and objectives." (SJ Brief at 49.) Plaintiffs are not only wrong, but their theory of preemption would actually render the Atomic Energy Act unconstitutional on commandeering grounds.

A basic tenet of cooperative federalism is that the "Federal Government may not compel states to enact or administer a federal regulatory program." *Printz v. U.S.*, 521 U.S. 898, 933

(1997); *see also New York v. U.S.*, 505 U.S. 144, 161 (1992) (The Supreme Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.") (citing *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982)). Here, Plaintiffs' argument runs directly against *Printz* and *New York* by claiming that the Atomic Energy Act *requires* states to allow uranium mining. (*See* SJ Brief at 51) ("Virginia's ban on uranium mining upsets the balance established by federal law in the most jarring way possible – by flat-out *prohibiting* the achievement of one of Congress's "primary purpose[s]": "the promotion of nuclear power.") (emphasis in original). Plaintiffs' conflict preemption theory suggests that the uranium mining ban would always be invalid, *regardless* of the legislative intent. (*See* SJ Brief at 51-52). Such an argument cannot survive commandeering scrutiny.

Congressional power to meddle in state affairs has limits. When regulating private activity under the Commerce Clause, Congress may "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. U.S.*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)). As Plaintiffs ask this Court to read it, the AEA offers Virginia no such choice regarding uranium mining on private lands. The AEA does not provide any federal standards by which the Nuclear Regulatory Commission could approve state regulations, nor does the NRC possess federal regulations it could apply directly to uranium mining in Virginia. Thus, Plaintiffs' conflict preemption claim amounts to an argument that the AEA compels the Virginia Department of Mines, Minerals and Energy to regulate uranium mining because the federal government has refused to do so.

If Congress had wanted to compel conventional uranium mining in Virginia, it could have done so through a federal permitting program for conventional uranium *mining* on non-

federal lands. *See, e.g.*, *Virginia v. Browner*, 80 F.3d 869, 882 (4th Cir. 1996) (upholding portions of the federal Clean Air Act because "Virginia [was] not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia."). No such federal uranium mining program exists, which is precisely why Plaintiffs argue that they "need[] to obtain several permits from the Commonwealth's agencies" to "Mine Their Uranium." (Compl. at ¶¶ 51-52.) Plaintiffs' conflict preemption claim, however, must fail because of this total absence of a federal regulatory framework for conventional uranium mining.

Plaintiffs incorrectly describe how far the AEA seeks to promote nuclear power. As the Supreme Court has stated, "the promotion of nuclear power is not to be accomplished 'at all costs.'" *Pacific Gas*, 461 U.S. at 222. In *Pacific Gas*, the Supreme Court further noted that while the AEA promotes nuclear power, "Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed *or even stopped* for economic reasons." *Pacific Gas*, 461 U.S. at 223 (emphasis added). Plaintiffs, however, take the exact opposite view. According to them, Virginia may not stop development of uranium mining for any reason, including economic ones. The Supreme Court has not read the AEA's preemptive scope so broadly, and this Court should decline to do so here. If Virginia wishes to impose a moratorium on uranium mining—an area of exclusive state control—it may. As the National Academy of Sciences report cited by Plaintiffs confirms: "There is no federal law that specifically applies to uranium mining on non-federally owned lands; state laws and regulations have jurisdiction over these mining activities." NAS Report, *supra* note 3. Nothing in the AEA holds otherwise.

Contrary to Plaintiffs' claims, there is no conflict preemption at issue here. In fact, Plaintiffs' version of conflict preemption — that Virginia *must* allow uranium mining because a

ban on uranium mining for any reason would frustrate the Atomic Energy Act — directly violates the anti-commandeering principles of cooperative federalism.

III. CONCLUSION

The Atomic Energy Act does not preempt Virginia's uranium mining ban. The statute's text demonstrates the General Assembly's clear intention to suspend all uranium mining on private lands unless and until a specific regulatory program for such mining exists. Plaintiffs' field preemption claim must fail because enforcement of the mining statute has not adversely affected the development of nuclear power in Virginia or frustrated the AEA's objectives on the development of atomic energy, a fact that Plaintiffs' critically concede when they allege that "Virginia has thus long embraced the presence of nuclear facilities and activities within its borders..." (Compl. at ¶ 36.) Plaintiffs' conflict preemption claim also fails as Plaintiffs' preemption theory, taken to its logical extreme, would render the AEA itself unconstitutional by requiring states like Virginia to regulate uranium mining to provide ore for "federally-regulated downstream activities." (Plaintiffs' Cross-Motion for Summary Judgment, at 52.) This reading of the AEA fails to comport with cooperative federalism's anti-commandeering principles. Accordingly, the Basin Associations respectfully request that this Court deny Plaintiffs' motion for summary judgment and grant Defendants' motion to dismiss with prejudice.

SIGNATURES ON FOLLOWING PAGE

November 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filling to the following:

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