Chapter 6

Cooperative Federalism and Environmental Laws:
Coping with Two Masters

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Introduction.

The concept of federalism is relatively straightforward. Both the state and federal government are independent sovereigns with power to directly govern the people. According to the Constitution, the powers of the federal government are limited (enumerated) and all powers not expressly delegated
to the federal government “are reserved to the States respectively, or to the people.”¹ As Chief Justice John Marshall once remarked, demarcating the reach the federal government’s power is not an easy task. “This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”²

Much has been written about the inherent constitutional design of federalism. This chapter barely scratches the surface of the volumes of scholarly materials that delve into the purpose, history, evolution, and meaning of federalism. The goal of this chapter is to contribute to that scholarship by addressing how “cooperative federalism” — state government administration and implementation of initially federal law — has evolved in recent years, particularly in the area of environmental regulation. Section 6.02 briefly addresses the basics of federalism — what it is and how it works — and the cooperative federalism model. Section 6.03 traces the evolution of the United States Supreme Court’s federalism jurisprudence from the early years of the republic through the present. Section 6.04 provides an overview of the cooperative federalism approach to environmental regulation that began in the 1970s. Lastly, Section 6.05 describes a series of recent efforts by both the national government and non-governmental organizations to diminish the role and authority of the states in environmental regulation.

§ 6.02. What Is Federalism?

As noted above, federalism is a model of governance that has two separate and independent layers of government: (1) a national government that, at least in theory, has limited authority as spelled out in a Federal constitution; and (2) separate state and local governments for each of the sovereign states, each of which has more general powers as limited by each state’s constitution.

1   U.S. Const. Amend. X.
2   McCulloch v. Maryland, 17 U.S. 316, 405 (1819) (as quoted in Erin Ryan, Federalism and the Tug of War Within 71 (2011)).
But federalism is more than just having national and state governments. Fundamentally, federalism is a question of how power, resources, and responsibility should be divided between the federal and state governments. In other words, which government gets to call the proverbial shots on any given issue? To paraphrase Chief Justice Roberts, federalism essentially boils down to who calls the balls and strikes in the governmental game.

The federalism question, however, is really two questions. First, there is the question of who gets to decide an issue — the federal or state governments. The second question is who gets to decide who decides? Stated another way, which government has the power to bestow or assume the authority to have the final say on a particular issue? The United States Constitution does not squarely address these questions. As addressed in Section 6.03, the United States Supreme Court has been feeling its way through this issue since the birth of the republic.

Cooperative federalism is a relatively new phenomenon when viewed against the entire history of the nation. Several authors have attempted to define what cooperative federalism entails. Under one definition, cooperative federalism amounts to circumstances where “state and federal actors . . . take responsibility for separate but interlocking components of a unified regulatory program”[4] Cooperative federalism has also been described as “shared government responsibilities for regulating private activity”[5] and circumstances where “states take primary responsibility for implementing federal standards, while retaining freedom to apply their own, more stringent standards[6]” Under cooperative federalism programs, federal law remains in place and is separately enforceable by the federal government even though the states have enacted their own version of the applicable federal law. An example of cooperative federalism is the Medicaid program where the

states are the primary administrators according to a framework established by federal law that sets minimum standards that must be followed. Other examples include environmental regulation under the Clean Air Act and Clean Water Act, which are discussed in Section 6.04, below.

§ 6.03. Evolution of Federalism Jurisprudence.

This section attempts to divide the evolution of federalism jurisprudence into six general eras. Each of these time periods is not cleanly delineated by specific cases, but represents periods during which the Supreme Court tended to take a certain view of what was considered to be the proper spheres of power between the state and federal governments.

[1] — Dual Federalism in the Formative Years (18th Century Through the Civil War).

During the early years of the republic, according to one author, the respective roles of the federal and state governments were viewed as having distinctively separate roles and spheres of power that did not generally overlap. However, as noted above, the power of each vis-à-vis the other was not clearly addressed in the United States Constitution, so many of the early federalism decisions by the United States Supreme Court attempted to flesh out that issue. In Chisolm v. Georgia, the Court ruled that it had the power to award relief in a suit against a state government to collect a debt incurred during the Revolutionary War. The notion that a sovereign state could be subjected to suit in the court of the national government was apparently so antithetical to the general understanding of the federalism system that Congress swiftly passed the 11th Amendment in March, 1794, which was quickly ratified by the states in February, 1795, to clarify that states cannot be sued in federal court.

The Court extended its power of judicial review to state court decisions interpreting a federal treaty in Martin v. Hunter's Lessee, 14 U.S. 304

8 Chisolm v. Georgia, 2 U.S. 419 (1793).
(1816). *Martin* also held that the United States Supreme Court had the power to command a state court to adhere to an order issued by the United States Supreme Court. In addition to recognizing extensions of federal power, the Court also limited the power of state governments over the national government. In *McCulloch v. Maryland*, the Court invalidated as unconstitutional a state law tax by Maryland on the National Bank established by the federal government. The Court also acted to preserve the supremacy of federal law in the face of conflicting state laws. *Gibbons v. Ogden* invalidated a state law granting exclusive right to use steam powered boats in New York waters, which was in conflict with Federal Navigation Act. The Court did continue to recognize the sovereignty of the states and the limitation application of the federal Constitution to them. For example, in *Barron v. Balt.*, the Supreme Court ruled that the Fifth Amendment prohibition against taking of private property for public use without just compensation did not apply to state of Maryland. Rather, the Fifth Amendment only restrained the power of the federal government — not the state governments.

Slavery was another issue with strong federalism implications. As the nation crept closer and closer to the Civil War and the tensions between liberty and slavery grew, legislative efforts by abolitionists in both Congress and the northern states faced legal challenges by slave-holding citizens. *Prigg v. Pennsylvania* deemed unconstitutional a Pennsylvania statute that criminalized recovery of slaves who escaped into Pennsylvania from slave-holding states. A few years later, the Court ruled that a state court lacks authority to enforce writs of habeas corpus issued to the federal government by a state court to release a prisoner held for aiding and abetting escape of slave in violation of federal Fugitive Slave Act. The infamous *Dred Scott v. Sandford* decision also had a federalism angle. In addition to ruling that

slaves were not citizens, for which the opinion is largely known, the Court also held that Congress lacked authority to prohibit citizens from owning slaves in territories acquired by the federal government. The Court observed that the right to own slaves was reserved to the people and the states in the Constitution, and therefore Congress lacked authority to interfere with that right.


The result of the Civil War and associated amendments to the Constitution drastically changed the nature of the relationship between the federal and state governments.16 Passage of the 13th Amendment outlawed slavery everywhere in the United States and granted Congress the power to enforce the amendment “by appropriate legislation.” The 14th Amendment expressly prohibits the states from engaging in three categories of conduct: (1) making or enforcing “any law which shall abridge the privileges and immunities of citizens of the United States”; (2) depriving any person of “life, liberty, or property, without due process of law”; and (3) denying any person “equal protection of the laws.” The 15th Amendment states that neither the federal government nor the state governments may deny any citizen the right to vote “on account of race, color, or previous condition of servitude.”

The post-Civil War amendments vested more power in the national government over the states to address racial discrimination and other vestiges of slavery, but the Supreme Court did not interpret these amendments to give Congress plenary power to do so. In an early challenge to federal legislation aimed at prohibiting racial discrimination by private individuals, the Court invalidated the law based on the conclusion that the 14th Amendment applies only to state governments — not individual citizens.17 The Court also upheld state segregation laws that established the purportedly “separate but equal” public schools.18

18 Plessy v. Ferguson, 163 U.S. 537 (1896).
The Civil War amendments did not alter the Court’s view of federalism outside of slavery and discrimination. The Court continued to recognize the distinct governmental spheres occupied by the national and state governments:

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, ‘reserved,’ are as independent of the general government as that government within its sphere is independent of the States.19

As the industrial revolution came into full swing and interstate commerce continued to grow, both the federal and state governments took action to regulate the burgeoning new industries. The Court initially took a rather dim view of these efforts. The Court struck down a state statute banning the importation of liquor because only Congress can regulate interstate commerce.20 However, the Court also narrowly construed the Congressional power to regulate commerce. In United States v. E.C. Knight Co.,21 the Court concluded that federal authority to regulate interstate commerce did not extend to regulation of manufacturing. Similarly, in Hammer v. Dagenhart,22 the Court struck down a federal law prohibiting interstate shipment of goods produced using child labor. “In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved.”23

Also in apparent disfavor were state government attempts to regulate employment conditions. The Court invalidated a state labor law setting

20 Leisy v. Hardin, 135 U.S. 100 (1890).
23 Id.
maximum hours for bakery employees in *Lochner v. New York*. The Court found such a statute to be an “unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract” in violation of the 14th Amendment.

**[3] — The Great Depression and the New Deal.**

When the second man named Roosevelt stepped into the presidency in 1933, the nation was in the throes of the possibly the worst economic conditions the nation had yet experienced. Roosevelt had campaigned on a platform of federal intervention (part of the “New Deal”) to address the problems that President Hoover’s policy of local and private solutions had failed to cure — at least in the short term. Several of Roosevelt’s New Deal laws failed to pass constitutional muster in the early years of his presidency. In *Schechter Poultry v. United States*, the Supreme Court struck down provisions enacted under the National Industrial Recovery Act that authorized the President to establish “codes of fair competition,” as beyond the congressional power to regulate commerce. According to the Court, “[e]xtraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants.”

The following year, two more of Roosevelt’s legislative initiatives fell to the constitutional axe wielded by the Supreme Court. First, the Court rejected federal legislation aimed at taxing agriculture in *United States v. Butler*. Since the Constitution did not expressly grant the national government power to regulate agriculture, the Court concluded that such power was reserved to the states, and Congress may not tax what it cannot regulate. Later the same year, federal legislation aimed at regulating coal mining activities failed to survive a constitutional challenge because, according to the Court’s view at

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25 *Id.*
the time, intrastate mining activities did not constitute interstate commerce that Congress may regulate.  

The Supreme Court’s hostility to Roosevelt’s agenda would not last. From 1937 through 1943, FDR appointed eight new justices to the Supreme Court. As those justices took their seats, the constitutionality of New Deal legislation began to change. The Supreme Court performed a proverbial “about face” in two areas. First, the Court rejected precedent and ruled that the commerce power did give Congress authority to regulate employment conditions. Second, the Court overruled United States v. Butler by holding that not only may Congress regulate agriculture under the commerce power, but Congress may even regulate purely intrastate production of wheat grown for private consumption.

Although federal power was increasing on the civil rights front, the Court also limited the reach of the national government by recognizing circumstances under which the federal courts should abstain from addressing issues arising under state law. Railroad Commission of Texas v. Pullman held that federal courts should abstain from interpreting ambiguous state laws. A few years later, the Court also recognized that federal courts should abstain from hearing cases while state administrative procedures were underway.

[4] — Civil Rights, the Great Society, and Birth of Cooperative Federalism

The civil rights decisions of the 1950s and 1960s greatly expanded the scope of federal power to legislate in the area of racial discrimination. Probably the most famous decision of this era was Brown v. Board of Education, in which a unanimous court overturned the “separate but equal” doctrine recognized in Plessy v. Ferguson. The Court also overruled

34 Plessy v. Ferguson, 163 U.S. 537 (1896).
earlier decisions and upheld federal bans on private discrimination in motels and restaurants as within the Congressional power to regulate commerce.35

This expansive interpretation of the commerce power extended beyond civil rights issues in the 1970s and 1980s. In Perez v. United States, the Court upheld a federal prohibition against “extortionate credit transactions” (i.e. loan sharking) even though the conduct at issue was “purely intrastate.”36 The Court also sanctioned a federal ban on possession of firearms by felons so long as the firearm had traveled in interstate commerce at some time in the past.37 The commerce power arguably reached the pinnacle of its breadth in Garcia v. San Antonio Metropolitan Transi Authority, where the Court affirmed federal legislation regulating minimum wage and overtime for employees of a city government.38

In addition to efforts by the national government to expand its regulatory reach, Congress expanded social programs pushed as a part of President Johnson’s “Great Society” campaign. During this time, Medicare and Medicaid came to be and cooperative federalism was the vehicle through which these programs would be implemented. Environmental regulation on a national scale was also a legislative priority, out of which the Clean Air Act and Clean Water Act were born (more on those in Section 6.04).


The expansion of federal authority began to reach its limits in the 1990s when Justice Rehnquist began to command a majority of the Supreme Court. Federal programs implemented in cooperation with the states had become less of a voluntary partnership and more of a master-servant relationship. In New York v. United States,39 the Court ruled that Congress may not compel

the participation of state legislatures in a federal regulatory program for the disposal of hazardous waste. Similarly, the Court struck down federal legislation that required state governments to enact or enforce a federal regulatory program imposing mandatory background checks for handgun purchases.40

The Rehnquist Court established limits on the ability of Congress to subject the states to suits in federal court. In 1989, the Court ruled that the Congress had the power to abrogate state immunity from suit when legislating pursuant to a power granted by the Constitution, such as the power to regulate interstate commerce, notwithstanding the 11th Amendment.41 The Rehnquist Court rejected that reasoning in *Seminole Tribe v. Florida*,42 and limited the federal power to abrogate state sovereign immunity to the scope of 14th Amendment. Building on that reasoning a few years later, the Court recognized the immunity of states from citizen suits brought under federal law in federal courts.43

The Rehnquist Court also identified some limits to what seemed like a virtually limitless Congressional power to regulate in the name of interstate commerce. *United States v. Lopez*44 ruled that the regulation of guns in school zones was not sufficiently related to interstate commerce. The Court also deemed the regulation of violence against women to be outside the bounds of interstate commerce.45


In recent years, the Roberts Court has issued a mixed bag of decisions involving federalism concerns. In *Bond v. United States*,46 the Court took a more pro-state federalism stance by holding that the a criminal defendant may challenge the constitutionality of a federal criminal statute under the

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10th Amendment, which reserves to the States or the people all powers not delegated to the national government, even without the involvement of a state government in the proceeding. In other words, an individual can challenge a federal law on the grounds that it infringes on the powers reserved to the States by the 10th Amendment.

The controversial decision that initially upheld the Patient Protection and Affordable Care Act (also known as Obamacare) as a valid exercise of Congress’s taxing authority had a lesser known federalism component that protected the States from the federal coercion. The Court struck down the portion of Obamacare that would allow Congress to withhold all Medicaid funds from states who do not participate in the expansion of the Medicaid program. “Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when “pressure turns into compulsion,” . . . the legislation runs contrary to our system of federalism.” (citations omitted).

The Roberts Court curtailed the power of the states to deal with illegal immigrants in Arizona v. United States, in which the Court struck down a state law making it unlawful for unauthorized alien to (1) fail to apply for or carry federally issued registration documents and (2) solicit, apply for, or perform work. Writing for the majority in a 5-3 decision, Justice Kennedy reasoned that most of the Arizona law at issue was preempted by federal law because the Arizona law established a policy that undermines federal immigration policy.

§ 6.04. Cooperative Federalism Approach to Environmental Regulation.

The national and state governments have combined efforts to address the effects of industrial activity on air and water resources. The Clean Air Act and Clean Water Act are probably the best examples of a cooperative federalism approach to environmental regulation. As described in more

49 Justice Kagan did not participate in the decision.
detail below, both programs were designed on the federal level and primarily administered by the state governments (at least initially). The environmental program for regulation of surface coal mining, the Surface Mining Control and Reclamation Act\textsuperscript{50} (SMCRA), was originally created by Congress and is administered by the states, but SMCRA does not perfectly fit the cooperative federalism mold. Rather than being implemented cooperatively by both the national and state governments, SMCRA allows state law to essentially displace federal law once a state receives approval for its regulatory program. At that point, federal oversight is (or should be) minimal.

A detailed review of each of these statutory schemes would require a chapter unto itself — or even an entire book in the case of the air and water programs.\textsuperscript{51} The summary below is intended only to provide a high level overview of these provisions pointing to the cooperative nature of the regulatory framework, and to set the stage for a discussion of efforts to alter that paradigm.


Congress enacted the Clean Air Act in 1970 in recognition of the problem of air pollution (including specifically “the increasing use of motor vehicles”) caused by “rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States.”\textsuperscript{52} Congress recognized that “federal financial assistance and leadership” was essential for the development of “cooperative” air pollution control programs.\textsuperscript{53} While federal involvement was necessary, the Act acknowledges that air pollution prevention “is the primary responsibility of States and local governments . . . .”\textsuperscript{54} Similar to other environmental statutes that followed it, the Clean Air Act establishes a

\begin{itemize}
  \item \textsuperscript{50} 30 U.S.C. §1201, \textit{et seq}.
  \item \textsuperscript{52} 42 U.S.C. § 7401(a)(b).
  \item \textsuperscript{53} 42 U.S.C. § 7401(a)(4).
  \item \textsuperscript{54} 42 U.S.C. § 7401(a)(3).
\end{itemize}
“floor,” or minimum standards, that must be achieved by all States in order to achieve the goal of clean air.

To achieve that goal, EPA promulgates national ambient air quality standards (NAAQS) for all “criteria” or “conventional” air pollutants (lead, ozone, nitrogen dioxide, carbon monoxide, sulfur dioxide, and particulates (now, PM 10 and PM 2.5)).55 Primary NAAQS are set at levels needed to protect public health (including sensitive populations).56 Secondary NAAQS are set at levels needed to protect public welfare (visibility, harm to animals, crops, etc.).57 The Act mandates periodic review of the science upon which NAAQS are based, and of the need for NAAQS for additional pollutants.58 NAAQS are achieved through State implementation plans (SIPs) that implement “new source review” permitting program for all major stationery sources of air pollution (including “Prevention of Significant Deterioration” and Nonattainment Area provisions) with federal oversight and approval.59

In addition to NAAQS, the Act also imposes separate source-directed emissions limits. For stationary sources, new source performance standards (NSPS) apply to specific industrial categories and establish minimum “best available control technology” (BACT) that must be in place for such sources.60 Hazardous (or “toxic”) air pollutants (currently 187) are governed by technology-based emissions limits known as “maximum achievable control technology” (MACT) that must be incorporated into State-issued permits for stationary sources.61 These requirements are imposed through comprehensive operating permits program for all “major (stationary) sources” (a.k.a, “Title V” permits), which incorporate all applicable air pollution control requirements, and stringent monitoring, measuring and reporting protocols.62 Title V permits are issued by state regulatory agencies. If EPA

58 42 U.S.C. § 7409(d).
60 42 U.S.C. § 7411.
objects to a state permit, EPA has the power to ultimately issue a federal permit that would supersede the state permit.63

Mobile sources of air pollution (e.g. vehicles and non-stationary sources) are treated differently. EPA must make a finding that a particular category of mobile sources cause or contribute to air pollution which endangers public health or welfare before EPA may promulgate regulations limiting pollution from those sources.64 For example, in December, 2009, EPA determined that the combined emissions of six greenhouse gases (including carbon monoxide and methane) threaten the public health and welfare.65 Based on this finding, EPA issued a New Source Review regulation for greenhouse gases (discussed further below).

The Clean Air Act was originally designed to afford the states discretion in identifying which sources to regulate and how stringent emission limits should be. The scope of state discretion has been narrowed and eroded over the years through Congressional amendments, EPA policies and regulations, and judicial interpretations. On the enforcement side, a broad citizen suit provision authorizes suits against EPA and operators of sources alleged to be in violation (or to have incurred a pattern of violations) of air emission standards, limits or permits, or anyone who constructs or modifies a major new source without undergoing New Source Review.66


The Clean Water Act67 is legislation established a state option to administer a program for water discharge permits (National Pollution Discharge Elimination System — NPDES) for “point sources,” which has been called the “center piece” of the Clean Water Act.68 Upon approval of

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64 42 U.S.C. § 7521(a)(1).
65 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (December 15, 2009).
67 33 U.S.C. § 1251 et seq.
68 Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1225 (11th Cir. 2009).
regulatory program, states become the primary, but not exclusive, enforcement authority. EPA maintains discretion to take independent enforcement action in the absence of, or (sometimes) even in the presence of, state enforcement action.69

NPDES permits are designed to implement technology-based standards and recommended water-quality based standards promulgated by EPA and used to calculate “end of pipe” effluent limits.70 States have primary responsibility for adoption and enforcement of water quality standards with EPA oversight and approval.71 The Act establishes two basic types of effluent limits. The first type is technology-based limits, meaning that the limit is based on the availability and cost of pollution control technology.72 EPA publishes guidelines that establish these limits for various types of industrial activities. The second type is water-quality based effluent limits, which are designed to achieve compliance with water quality standards without regard to technological or economic feasibility.73 Water-quality based effluent limits are required whenever a permitting authority determines that pollutants “are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any applicable water quality standard, including state narrative criteria for water quality” and technology-based limits are insufficient to ensure compliance.74

Water quality standards (also referred to as “criteria”) establish allowable concentrations of pollutants while still protecting the uses of water bodies (e.g. aquatic life, recreation, drinking water source). Both the states and EPA can promulgate water quality standards, but EPA must approve any standards before they become effective.75 The criteria are normally expressed as numeric value of the concentration of a particular pollutant that may be

69 33 U.S.C. § 1342(i).
70 33 U.S.C. § 1311(b).
75 33 U.S.C § 1313(c).
present in a water body without impairing one or more uses (average/chronic value and acute/maximum value). The criteria can also be expressed in a “narrative form” that express water quality goals, such as keeping water free from debris, scum, other nuisance-type substances, odors, films, and sheen. For example, West Virginia’s narrative water quality standards prohibit (1) materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life; and (2) conditions that cause any “significant adverse impact” to the “chemical, physical, hydrologic, or biological components of aquatic ecosystems.” To ensure that narrative standards are attained, EPA may require development of implementation procedures, including (unless shown to be unnecessary due to other controls) use of whole effluent toxicity (WET) testing to regulate discharges.

To further the overall goal of achieving compliance with water quality standards, the states that administer an approved Clean Water Act program compile a list every three years of waters that that do not meet one or more water quality standards — known as the “§ 303(d) list” or the “impaired waters” list. The state regulatory agency then prepares a “total maximum daily load” (TMDL) plan to reduce the pollutant load by imposing more stringent effluent limits for the relevant pollutants in permits that authorize discharges into impaired streams. One must obtain a “waste load allocation” in order to be permitted to discharge a TMDL-limited pollutant. Like water quality standards, TMDLs must be approved by EPA before a state may implement them.


SMCRA is similar to the Clean Air Act and Clean Water Act in that SMCRA was a Congressional initiative in the 1970s to establish national
environmental standards for certain industrial activities, but SMCRA is very different in several ways. SMCRA is not limited to a particular media (air or water). Rather, SMCRA establishes standards governing air quality, water quality, and to some degree land use associated with coal mining activities. SMCRA focuses on a single industry while the Clean Air Act and Clean Water Act apply across many industries.

Unlike the Clean Air Act and Clean Water Act, the role of the states in enforcing the SMCRA program is primary, and to some extent exclusive of the federal government. Once a state has received approval for a state-law based regulatory program that is “in accord with” and “no less effective than” the federal standards, the state has “primacy” for administering the program.82 State programs are subject to limited federal oversight through the Secretary of Interior Office of Surface Mining Reclamation and Enforcement (OSM). That oversight includes regular and special (complaint driven) inspections of mine sites, an annual evaluation of how the state program is performing, and authority to issue cessation orders to address conditions that present an imminent danger to the health or safety of the public or conditions presenting significant, imminent environmental harm.83 If OSM identifies perceived violations that do not present imminent danger, OSM issues a “10-day notice” to the primacy state to address the condition.84 The state then has 10 days to take “appropriate action” to correct the violation or show “good cause” why action is not warranted (no violation, lack of jurisdiction, etc.).85 Unless harm is imminent, or a state agency fails to take appropriate action to address a mining-related condition, OSM cannot take independent enforcement action.

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§ 6.05. Federal Agency Efforts to Diminish State Authority in Environmental Regulation.


As discussed above, the Clear Air Act was enacted in 1970 with the purpose of establishing federal leadership in controlling air pollution associated with urban areas that crosses state lines. One of the primary means of achieving that goal is through the establishment by EPA of National Ambient Air Quality Standards (NAAQS) for all “criteria” or “conventional” air pollutants. At the time the statute was enacted, such pollutants were deemed to be lead, ozone, nitrogen dioxide, carbon monoxide, sulfur dioxide and particulates. Since then, the form of particulates that is subject to a NAAQS has been refined (to encompass so-called “PM2.5”), but the list of conventional air pollutants has not been otherwise amended.

Nevertheless, as a part of its charge under other provisions in the Clear Air Act, EPA has proceeded aggressively to develop regulatory programs aimed at controlling emissions of all Greenhouse Gases (“GHGs”), and in the case of electric generating units, carbon dioxide in particular. These efforts reflect President Obama’s determination that climate change represents “an urgent and growing threat to our national security.” EPA’s development of these programs and its attempts to force their implementation through state agencies have sorely tested the boundaries of cooperative federalism under the Clean Air Act.

[a] — Regulation of Mix of Greenhouse Gases.

[i] — Massachusetts v. EPA.

EPA’s first such effort to impose regulations on GHG emissions began with a challenge to EPA’s refusal to do so. In particular, Massachusetts v. EPA arose out of EPA’s rejection of a petition filed under Clean Air Act Section 202(a)(1). That provision requires that EPA develop regulations to

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86 See 42 U.S.C. § 7401(a), (b).
set standards on emissions from new motor vehicles as to any air pollutant that EPA determines “causes or contributes to air pollution . . . reasonably . . . anticipated to endanger public health or welfare.” For purposes of this part of the Act addressing new vehicle emissions control, the statute defines “air pollutant” to include “any air pollution agent . . . including any physical [or] chemical . . . substance . . . emitted into . . . the ambient air.”

Various private groups, as well as state and local governments, challenged EPA’s refusal to grant their request that EPA develop regulations to control vehicle emissions of carbon dioxide and three other GHGs, for reasons that they considered to be invalid under the statutory scheme. In denying the petitions, EPA argued that it had no authority to issue mandatory standards intended to address global climate change, and even if it did, because of the uncertainty of the science with respect to the causal link between GHGs and the increase in global surface air temperatures, it would be unwise to do so. EPA also observed that the Clean Air Act was designed to address local air pollutants, rather than a substance “that is fairly consistent in its concentration throughout the world’s atmosphere.”

In reversing the D.C. Circuit Court of Appeals and ordering that EPA make an “endangerment finding” under CAA Section 202(a), the United States Supreme Court (Stevens, J. writing for the majority) determined that the policy issues and other political considerations cited by EPA in refusing the petition could not override the plain statutory language. Addressing the issue of standing, the Court held that even though an increase in GHG emissions inflicts “widespread harm,” the doctrine of standing only requires that one plaintiff demonstrate that the action complained of “injures him in a concrete and personal way.” Further, in making that inquiry in a case involving a state as a plaintiff, the Court observed that it has long recognized that “states are not normal litigants for purposes of invoking federal jurisdiction.”

89 42 U.S. § 7521(a)(1).
90 42 U.S.C. § 7602(g).
91 Massachusetts, 549 U.S. at 512.
92 Id. at 518.
Citing *Georgia v. Tennessee Copper Co.*, the Court found it to be important that this was a suit by a state “for an injury to it in its capacity of quasi-sovereign.” In that capacity any state has an interest “independent of and behind the titles of its citizens, in all of the earth and air within its domain.”

Nevertheless, the Court explained that when a state enters the Union, it surrenders “certain sovereign prerogatives,” including the right to force emissions reductions in neighboring states, the right to negotiate treaties with foreign nations, and “in some circumstances the exercise of its police powers to reduce in-state motor vehicle emissions might well be pre-empted.” Those sovereign prerogatives “are now lodged in the federal government,” and through the Clean Air Act “Congress has ordered EPA to protect Massachusetts (among others) by prescribing [motor vehicle emissions] standards. . . .”

In other words, under this sovereignty exchange, the states have a right to expect effective, federally-driven regulation of air pollutant emissions with interstate implications, and EPA would be failing in that mission if it declined to follow the plain language of the statute by enacting rules limiting emissions of harmful pollutants. Given the unchallenged assertions that global warming causes sea levels to rise, and that these “rising seas have already begun to swallow Massachusetts’ coastal land,” the Court had no difficulty in finding that Massachusetts had established standing to bring the lawsuit.

[ii] EPA Responses to *Massachusetts*.

The Endangerment Finding and the Tailpipe Rule.

In response to *Massachusetts*, in 2009 EPA issued its determination that GHG emissions from new motor vehicles contribute to elevated atmospheric GHG concentrations, endangering public health and welfare by causing

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93 *Georgia v. Tennessee Copper Co.*, 206 US 230 (1907).
95 *Id.* at 519.
96 *Id.*
97 *Id.* at 522-523.
global climate change (the “Endangerment Finding”). The agency noted that GHG emissions from mobile sources in the United States exceed the total GHG emissions of all other nations except China, India and Russia, and comprise 23 percent of total U.S. GHG emissions. This, in turn, led to the issuance of light-duty vehicle GHG emission standards and other regulations designed to improve vehicle fuel efficiency and thereby reduce aggregate GHG emissions from the transportation sector (the so-called “Tailpipe Rule”). Those regulations, which took effect January 2, 2011, are expected to result in approximately 960 million metric tons of reductions in carbon dioxide equivalent emissions over the life of such vehicles produced for model years 2012 through 2016.

The Tailoring Rule.

As a result of the Endangerment Finding, EPA concluded that it was required under the Clean Air Act to apply its stationary source permitting requirements to all major sources with the potential to emit GHGs in excess of specified statutory thresholds. In particular, under the New Source Review program, EPA would be forced to require permitting of sources with the potential to emit 100 tons per year or 250 tons per year of GHGs (depending on the type of source), as such a source is typically subject to the Act’s “Prevention of Significant Deterioration” (or PSD) requirements. Since the amounts of GHGs emitted by various sources are typically orders of magnitude greater than the emissions of other, conventional pollutants, this would result in an “unprecedented expansion of EPA authority that [would] have a profound effect on virtually every sector of the economy and touch every household in the land . . . .”

98 74 Fed. Reg. 66496 (Dec. 15, 2009). Specifically, EPA identified a mix of 6 GHGs that would be regulated as a single air pollutant, with a source’s emissions measured in terms of “carbon dioxide equivalent units” or “CO₂e.” 74 Fed. Reg. at 66499.
99 74 Fed. Reg. at 66499. From a global perspective, GHG emissions from U.S. mobile sources comprise approximately four percent of worldwide GHG emissions. Id.
100 75 Fed. Reg. 25324, 25328 (May 7, 2010).
Likewise, under EPA’s Title V operating permit program, all stationary sources with the potential to emit GHGs in excess of 100 tons per year would be required to obtain operating permits from delegated state agencies (or EPA itself). This too would bring so many sources within coverage of the program that state agencies could not be expected to have the resources to competently administer such a permit program.102

In response, EPA issued the so-called “Tailoring Rule.” The Tailoring Rule set New Source Review and Title V threshold limits for GHG emissions different from those found in the Clean Air Act, on the basis that to do otherwise would lead to “absurd results,” creating a regulatory program that would impose impossible burdens on state agencies.103

In general, the Tailoring Rule created a three-step, phased approach to New Source Review and Title V permitting for GHGs:

(a) Step One: threshold for imposing BACT emissions controls for GHGs, for sources that were already subject to PSD permitting due to emissions of conventional pollutants, set at 75,000 tons per year CO2e.

(b) Step Two: for new sources, threshold for triggering PSD permitting set at 100,000 tons per year CO2e, and for modifications of existing sources, at 75,000 tons per year CO2e, beginning on July 1, 2011.

(c) Step Three: expressed intent to consider further reducing threshold levels for permitting, and/or to consider promulgating exemptions for PSD and Title V permitting for certain sources of GHGs, after July 1, 2013.104

Although these adjustments admittedly found no specific sanction in the Clean Air Act, EPA believed they were appropriate because even if Congress intended the New Source Review program to apply to GHG emission

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102 73 Fed. Reg. at 44512.
104 75 Fed. Reg. at 31516.
sources, it could not have intended to impose statutory requirements that are impossible to administer.\textsuperscript{105}

\textbf{Utility Air Regulatory Group v. EPA.}\textsuperscript{106}

In \textit{Utility Air Regulatory Group v. EPA (UARG)},\textsuperscript{106} the Supreme Court was presented with the somewhat odd circumstance of the regulated industry petitioning the Court for relief from an EPA regulation that was intended to moderate the adverse effects of its own regulations. Arguing that EPA had no authority to simply dismiss the plain statutory language dealing with emissions thresholds for permitting of stationary sources, industry plaintiffs in \textit{UARG} asked that the Court strike down the Tailoring Rule and require that EPA go back to square one in considering whether limits on the emissions of GHGs from stationary sources were truly mandated by the Clean Air Act.\textsuperscript{107}

By its ruling issued on June 23, 2014, the Court agreed in large measure with the plaintiffs. It rejected EPA’s premise that because it was required to regulate GHG emissions from motor vehicles under CAA Section 202, it was required to apply the same definition of “air pollutant” under the New Source Review and Title V permit programs. Though the Court in \textit{Massachusetts} had upheld the application of the CAA’s “Act-wide” definition of “air pollutant” to CAA Section 202, the Court held that its earlier decision in that case did not prohibit EPA from applying a “narrower, context-appropriate” definition of “air pollutant” when administering the Act’s “operative provisions.”\textsuperscript{108}

Indeed, the Court observed that EPA has been applying different definitions of that term under various parts of the CAA for years. In the words of Justice Scalia writing for the majority, “[i]t takes some cheek for EPA to insist that it cannot possibly give ‘air pollutant’ a reasonable, context-

\begin{footnotesize}
\begin{enumerate}
\item[105] 75 Fed. Reg. at 31517.
\item[106]  Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014).
\item[107]  See Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 146 (D.C. Cir. 2012).
\item[108]  State plaintiffs in UARG alternatively sought to have the statutory permitting thresholds for stationary sources take effect immediately as to GHGs, because they believed this would “result in astronomical costs and unleash chaos on permitting authorities,” forcing Congress to act to rectify the situation. \textit{Coal. for Responsible Regulation, Inc.}, 684 F.3d at 146-147. \textit{UARG}, 134 S. Ct. at 2439.
\end{enumerate}
\end{footnotesize}
appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.”

As a result, the Court rejected the rule’s “Step Two,” that was based upon EPA’s decision to “rewrite” the statutory thresholds for PSD and Title V permitting. As the Court explained, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.” Thus, *UARG* established that an agency “has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”

On the other hand, the Court in *UARG* upheld EPA’s “Step One” approach to GHG stationary source permitting, affirming EPA’s authority to impose BACT controls on so-called “anyway” sources (i.e., sources that are independently subject to PSD permitting due to potential emissions of criteria pollutants). This was a legitimate exercise of EPA’s authority because the text of the Act’s definition of “best achievable control technology” or “BACT” makes it clear that it is applicable to “each pollutant subject to regulation under this chapter.”

However, the ruling was a narrow one: in essence, the Court held that nothing in the statute compels EPA to impose BACT limits on GHG emissions at “anyway” sources, but nothing “categorically prohibits” EPA from doing so. In passing on this aspect of EPA’s regulations, the Court was also careful to point out that it was not approving of any particular approach to the BACT determination for such sources, and acknowledged that there were “legitimate concerns” that EPA might try to apply BACT in such a way as to regulate every aspect of a facility’s design and operation, in the name of “energy efficiency.”

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109 *Id.* at 2440.
110 *Id.* at 2444 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).
111 *Id.* at 2445.
112 *Id.* at 2447.
113 *Id.* at 2448-2449. On August 14, 2015, EPA published a final rule amending its GHG regulations to specify that only those sources that were already required to obtain permits
[b] — Regulation of Carbon Dioxide Emissions from Electric Generating Units.

Beyond the light-vehicle GHG emissions regulations and EPA’s continuing efforts to implement a legally authorized strategy for applying GHG emission thresholds to Title I (New Source Review) permitting of stationary sources of all GHGs, EPA has also started the development of standards of performance under CAA Section 111(b) and Section 111(d) aimed at substantially limiting and reducing the emissions of one particular GHG (carbon dioxide) from one particular industrial category: electric generating units (EGUs). The purpose of these rules is to force states to curtail the use of fossil fuels (especially coal) in the generation of electricity, and to require the use of greater amounts of renewable energy. All of these changes are being implemented as a part of President Obama’s “Climate Action Plan,” which the EPA describes as, in part, adopting a “commonsense approach to cut carbon pollution from power plants.”

[i] — New Source Performance Standards — CAA § 111(b).

President Obama’s June 25, 2013 Memorandum on Power Sector Carbon Pollution Standards directed EPA to issue NSPS for the control of carbon dioxide emissions under CAA section 111(b), to be applied to new, modified, and reconstructed EGUs (constructed or modified after publication date of proposal). The proposed NSPS for new EGUs were published on January 8, 2014, and the proposed NSPS for modified and reconstructed EGUs were published on June 18, 2014. The final version of all of these NSPS was issued on August 3, 2015.

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for emissions of conventional pollutants will be required to permit their GHG emissions.


114 EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards (available at www2.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan) (“EPA Clean Power Fact Sheet”).


Under the rules, the emission limit for new fossil fuel-fired EGUs is based on emissions reductions associated with a highly efficient supercritical pulverized coal (SCPC) unit, with partial carbon capture and storage (CCS) — a technology that has seen at best limited commercial application. The limit has been set at 1,400 lb CO$_2$/MWh, which reflects the rate EPA believes is achievable by such a plant that captures “about 20 percent” of its carbon emissions.\(^{(117)}\) For modified plants, EPA decided not to impose a NSPS unless the modification would result in an increase of hourly CO$_2$ emissions at least 10 percent greater than the most recent five-year average emission rate. For those that do trigger NSPS, the emission limit will be set based upon the individual plant’s best historical performance since 2002. For reconstructed plants with a heat input of more than 2,000 MMBtu/h, the emission limit is 1,800 lb CO$_2$/MWh.\(^{(118)}\)


Pursuant to Clean Air Act Section 111(d), whenever EPA has promulgated NSPS for an industrial category, it is generally required to also publish guidelines for individual states to follow, in developing programs to limit emissions from existing sources within that same category. That obligation does not arise, however, whenever sources within that industry have already been subject to emissions limits issued under Clean Air Act Section 112 (authorizing emission limitations on hazardous air pollutants).\(^{(119)}\)

In 2012, EPA published emission standards for EGUs under CAA Section 112, imposing limits on emissions of mercury and other toxic air pollutants (the so-called “Mercury and Air Toxics,” or “MATS” rule).\(^{(120)}\) Disregarding

\(^{(119)}\) 42 U.S.C. 7411(d).
\(^{(120)}\) 77 Fed. Reg. 9363 (Feb. 16, 2012). On June 29, 2015, the United States Supreme Court vacated the MATS rule due to EPA’s admitted failure to consider the costs of compliance. Michigan v. EPA, 129 S. Ct. 2699 (2015). The MATS rule was remanded to the D.C. Circuit Court of Appeals, in order to require that EPA take some action to consider the costs of compliance — be that through formal cost-benefit analysis or otherwise. Michigan, at 2702.
those regulations, on June 18, 2014 EPA published proposed “Carbon Dioxide Emission Guidelines for Existing Plants” under Section 111(d) Section 111(d) (a.k.a., the “Clean Power Plan”). In seeking to justify issuance of the Clean Power Plan, EPA asserted (through a 104-page legal memorandum) that a drafting error during the legislative process created an ambiguity as to how Section 111(d) should be interpreted. Because the courts must defer to EPA on any ambiguity in the statute or corresponding regulations, EPA believes that its reasonable, good faith opinion that the MATS rule does not preclude issuance of Section 111(d) guidelines for carbon dioxide limits at existing plants is entitled to deference. The Clean Power Plan was published in final form on August 3, 2015.

The substance of the Clean Power Plan is unprecedented, both in scope and in the ways that EPA plans to achieve its stated goal of reducing nationwide carbon dioxide emissions from EGUs by 32 percent (compared to 2005 levels) by 2030. To do so, EPA’s proposal include two main elements: (1) state-specific emission rate-based carbon dioxide emission reduction goals (based on the percentage of current coal-fired EGUs in each state), and (2) Guidelines (“Building Blocks”) for the development, submission and implementation of state plans, incorporating a mix of fuel-switching at EGUs, improved power plant efficiency and increased use of renewable and zero-emitting sources — all of which together will be deemed to satisfy the Section 111(d) requirement that such sources meet limits based on the “best system of emission reduction . . . adequately demonstrated” (or “BSER”).

EPA’s Three Building Blocks to achieve BSER emission rates have been summarized as follows:

(1) Reducing the carbon intensity of generation at individual affected EGUs through heat rate improvements (improved coal-fired EGU efficiency).

(2) Reducing emissions from the most carbon-intensive affected EGUs in the amount that results from substituting generation at

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121 79 Fed. Reg. 34830, 34853 (June 18, 2014).
those EGUs with generation from less carbon-intensive affected EGUs (i.e., switch from coal-fired to natural gas-fired EGUs).

(3) Reducing emissions from affected EGUs in the amount that results from substituting generation at those EGUs with expanded low- or zero-carbon dioxide generation (i.e., renewable energy).124

Most significantly, these requirements encompass a number of steps that will require states to fundamentally alter the regulation of their electric supply systems, relying to a great extent on making changes to the types of energy sources used (and as to EGUs, the type of fuel used in those sources), and encouraging (if not effectively requiring) the use of emissions trading on a state-wide or regional basis.125 All of these measures go far beyond the traditional tool of direct emissions limits on EGUs, that until now has been EPA’s only method of reducing power plant emissions of various pollutants.

[iii] — Legal Challenges to the Clean Power Plan.

Although early challenges to the proposed version of the rule were dismissed as premature,126 it is easy to see that there are several grounds upon which EPA’s Clean Power Plan may be subject to legal challenge. Whether any attempts to derail the regulation will have any practical effect in the end is yet to be seen.127


127 For example, it is widely believed that the Supreme Court’s decision in Michigan is unlikely to have a substantial effect on EGU plans to comply with the MATS rule, as most utilities long ago made plans to incorporate necessary equipment to control mercury and other emissions in order to comply with the challenged EPA regulations. As the D.C.
To begin with, the regulation was proposed based upon a debatable interpretation of the legislative history leading to the amendment of Clean Air Act Section 111(d) in 1990 and the effect of certain legislative procedural errors. In particular, EPA’s legal memorandum accompanying the proposal suggested that such lack of clarity regarding the validity of a statutory provision based upon alleged *drafting* errors somehow creates the type of statutory ambiguity that an administrative agency such as EPA has special expertise to resolve. That these types of arguments serve as the key bases upon which such a significant rule was promulgated raises serious questions.

More significant, however, are the considerable questions that have been posed regarding EPA’s authority to promulgate the Clean Power Plan even assuming that Section 111(d) does not preclude it. Those questions arise because Section 111(d) requires that states impose a “standard of performance” on existing sources. A “standard of performance” is defined as “a standard for emissions of air pollutants” that reflects the degree of emissions limitation achievable through application of the “best system of emission reduction . . . .”128 There is nothing in this statutory provisions that authorizes EPA to require that states change the types of sources used for power generation, or the types of EGUs that may be employed, or mandate the use of emissions trading in order to achieve an overall national emissions reductions goal as to one type of energy source.

One commentary on the proposed Clean Power Plan has described it as “forc[ing] the states to carry out federal policy. It is a gun to the head of the states: ‘Your sovereignty or your economy’ is EPA’s ultimate demand.”129 Former EPA General Counsel Roger Martella has written that “. . . the [Clean Power Plan] *would forever redefine the system of cooperative federalism upon which the nation’s environmental laws are built* and challenge Constitutional limits on the federal government’s ability to commandeer states to pursue

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128 42 U.S.C. §§ 7411(d), 7411(a).
129 *Engage*, at 36.
federal policies.”

Harvard Law Professor Laurence H. Tribe, noting that many states “will need to enact new legislation and develop completely new regulatory schemes” to comply with it, described the Clean Power Plan (in its proposed form) as raising “grave constitutional questions” as EPA seeks to “commandeer state agencies in violation of core structural principles of federalism and the Tenth Amendment.” Although various changes were made to make the regulations more palatable to some states and more legally defensible, nothing that EPA did in finalizing the plan was enough to erase these concerns.


[a] — Implementation of West Virginia Narrative Water Quality Standards.

WVDEP regulations include two “narrative” water quality standards (the “Narrative Standards”) that are intended to protect the biological health of streams against harm from unregulated pollutants, and against harms that may not otherwise be prevented through compliance by sources with applicable numeric standards for various parameters. Specifically, the Narrative Standards specify that the following conditions are not allowed in State waters:

130 Testimony of Roger Martella before Subcommittee on Clean Air and Nuclear Safety, Committee on Environment and Public Works, United States Senate (presented on May 5, 2015).
132 On August 13, 2015, after EPA declined to issue an Administrative Stay, a group of 15 states filed an emergency petition with the D.C. Circuit Court of Appeals, seeking a stay of the Clean Power Plan while their (and others’) substantive legal challenges are heard. Those states sought such relief because absent a stay, they will have to immediately “spend significant and irrecoverable sovereign resources to begin preparing their State plans” as required under the new federal regulations. Emergency Petition for Extraordinary Writ, State of West Virginia, by Attorney General Patrick Morrisey, et al., No. 15-277, D.C. Circuit Court of Appeals (August 13, 2015), at 2.

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• Materials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life;
• Any other condition . . . which adversely alters the integrity of the waters of the State . . .; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed . . . \(^{133}\)

Until recently, the WVDEP did not have any written regulations or policies specifically describing how it would determine whether a stream complies with its Narrative Standards. However, for purposes of complying with its obligations under Clean Water Act Section 303(d) (to report to EPA those streams that do not meet water quality standards), the WVDEP has informally used a tool known as the “West Virginia Stream Condition Index” (or WVSCI). The WVSCI is an index of benthic macroinvertebrate metrics that was developed for the purpose of assessing the biological health of West Virginia streams. Based on an evaluation of the types and conditions of macroinvertebrates (small aquatic insects) found within a designated stream segment, the stream is given a WVSCI score which is used to determine compliance with the biologic component of the Narrative Standards.\(^{134}\)

The WVDEP used the WVSCI for purposes of determining compliance with the Narrative Standards for many years. A WVSCI score of 68 or higher indicates that the narrative standard is satisfied; a score of 60.6 or below indicates that the stream is “impaired.” The “gray zone” between 60.6 and 68 represents a precision estimate that takes into account sampling error. To avoid misclassifying streams, any stream that falls within this “gray zone” interval is considered to be in compliance.\(^{135}\)


On April 1, 2010, EPA issued a draft guidance document indicating that henceforth, in Appalachian coal mining states only, it was recommending the use of a single indicator — stream conductivity (or “specific conductance”) — to measure and regulate the adverse affects of coal mining-related discharges on aquatic life. The primary basis for EPA’s draft guidance was a 2008 study by Mr. Gregory Pond and other scientists at EPA that had concluded that the WVSCI was ineffective at detecting harm to macroinvertebrates in Appalachian streams, because the WVSCI only identifies those organisms to the “family” classification rather than the genus level.

As a comprehensive measure of all ionic strength, Pond suggested that Appalachian streams were likely harmed by levels of conductivity at 500 microSiemens or more. EPA’s 2010 draft Guidance therefore suggested that environmental agencies in Appalachian states place conductivity limits of 500 micro Siemens/cm on all coal mining NPDES permits, and to consider placing limits as low as 300 microSiemens/cm.136 As discussed below, based on data compiled by the WVDEP on the levels of conductivity routinely associated with coal mining operations, imposition of such standards would make it virtually impossible to issue future permits, as the treatment that would be necessary to achieve and maintain such levels at every surface mining discharge point would be prohibitively expensive.137

136 EPA, “Improving EPA’s Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order” (April 1, 2010) (on file with authors). This guidance was issued in final form on July 21, 2011. It was upheld against an industry challenge based on EPA’s representations that it had “no legal impact,” and the WVDEP and other state agencies were “free to ignore it.” National Mining Association v. McCarthy, 758 F.3d 243, 253 (D.C. Cir. 2014). The final guidance document was preceded by EPA’s release of “A Field-Based Aquatic Life Benchmark for Conductivity in Appalachian Streams” (March 2011) (based, in part, on the work of 16 members of EPA’s Science Advisory Board) (the “Benchmark”).

137 Through at least 2010, the WVDEP’s “stressor identification protocols” used in its Total Maximum Daily Loads (TMDL) program, as approved by EPA, specified that conductivity would not even be recognized as a “likely stressor” of aquatic life until it reached levels of

Beginning at least with the 2008 Pond study and continuing throughout 2009, EPA routinely cited the need for consideration of conductivity levels in evaluating WVDEP’s application of its Narrative Standards, and in reviewing individual NPDES permits issued by the WVDEP for mining operations. In response, in March 2010 the West Virginia Legislature approved House Concurrent Resolution No. 111 (“HCR 111”). By it, among other things, the Legislature resolved that: (i) any interpretation of the Narrative Standards is the responsibility of the WVDEP, not other agencies; (ii) the requirement of the Narrative Standards are satisfied when a stream “supports a balanced aquatic community that is diverse in species”; and (iii) in interpreting the Narrative Standards, the WVDEP must balance the protection of the environment with the need to maintain and expand opportunities for employment, agriculture and industry (as expressed in the statement of legislative purpose set forth in the WVWPCA, at W. Va. Code § 22-11-2).138

HCR 111 was explicitly a federalism statement — affirming the State’s role in implementing the Clean Water Act, and citing the federal statute itself. In support of this, it explicitly encouraged the EPA to “change [its] current interpretation of [the WVWPCA]” to reflect the sense of the Legislature as expressed in the resolution.139


In August 20, 2010, WVDEP released its “Permitting Guidance for Surface Coal Mining Operations to Protect West Virginian’s Narrative Water Quality Standards” (‘Narrative Guidance”) along with a “Justification and Background” document explaining the purpose, factual basis, and scientific

1075 to 1500 microSiemens/cm. WVDEP, “Permitting Guidance for Surface Coal Mining Operations to Protect West Virginian’s Narrative Water Quality Standards” (August 20, 2010). EPA offered no explanation for this inconsistency.

139 Id.
studies that were considered in developing it. Essentially, WVDEP’s Narrative Guidance measures compliance with the Narrative Standards through a combination of WVSCI scores, WET tests, and “aquatic ecosystem protection plans.”

WVDEP’s Justification Document demonstrated that, based on data obtained by the agency over the years, there is no correlation between conductivity scores and Narrative Standards impairment as measured by the WVSCI. The WVDEP also rejected the assertion set forth in the Pond (2008) study that a finding of a diminished number of certain mayflies, without more, constituted a violation of the Narrative Standards.

[e] — Codification of Biologic Water Quality Standard Implementation:

Building upon House Concurrent Resolution 111 and WVDEP’s Narrative Guidance, in 2012 the West Virginia Legislature amended the West Virginia Water Pollution Control Act by including a specific provision directing the WVDEP to develop new legislative rules for assuring compliance with the biologic component of the Narrative Standards. That provision (W.Va. Code § 22-11-7b(f)) requires that the agency develop a new protocol under which a stream will be deemed to meet the biologic component of the Narrative Standards if it:

(i) supports “a balanced aquatic community that is diverse in species composition;”

(ii) “contains appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations;” and

(iii) has an aquatic community that is composed of “benthic invertebrate assemblages sufficient to perform the biologic functions necessary to support fish communities within the

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140 The referenced “WET” or “Whole Effluent Toxicity” tests measure the toxicity of water to aquatic organisms by exposing test species to stream water and/or samples of discharge water from a particular source.

141 WVDEP Narrative Guidance, at 6.
assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present.”

As the WVDEP Secretary made clear in a letter to EPA, the WVDEP has engaged West Virginia University in a project to “develop a more robust protocol” for determining compliance with the Narrative Standards, in accord with this legislative mandate.

[f] — EPA Usurpation of West Virginia’s Role in Determining Impaired Streams.

In the meantime, in submitting its list of impaired streams for 2012 to the EPA pursuant to Clean Water Act Section 303(d), the WVDEP declined to apply the WVSCI, or any other measure, to evaluate whether there are any new streams that were biologically impaired. In the WVDEP’s view, enactment of the amendments to the WVVPCA prohibited the agency from adding new biologically impaired streams to the 303(d) list, until the agency had developed and obtained legislative approval of new rules for interpreting and applying the Narrative Standards.

In response, EPA rejected that portion of the WVDEP 303(d) list that pertained to biologically impaired streams. According to EPA, “even assuming that [the new legislation] as a matter of state law precludes WVDEP from assessing state waters against West Virginia’s narrative water quality criteria as applied to the aquatic life uses, [the new legislation] is a state law that does not override federal requirements.” Although EPA indicated that it would review any proposed new method of measuring compliance with the Narrative Standards that might be developed, in the meantime EPA

142 Id.
143 April 6, 2012 letter from WVDEP Secretary Randy Huffman to Jon Capacasa, Director, EPA Region III Water Protection Division (on file with authors).
145 March 25, 2013 letter, from Jon Capacasa, Director, EPA Region III Water Protection Division to WVDEP Secretary Randy Huffman (enclosure, at 14) (on file with authors).
added 255 streams to West Virginia’s 303 (d) list for biological impairment, based on EPA’s determination that these streams would have been listed had WVDEP applied WVSCI scores. Further, EPA also stated that it believes the “gray zone” that was recognized when the WVSCI was developed (and was used with EPA’s implicit approval for many years) is “statistically unproven.” Therefore EPA refused to follow the WVDEP’s former policy that established a score of 60.6 as the impairment threshold, and instead classified any stream with a score below 68 as impaired.\footnote{Id., at Enclosure 2 (“EPA’s List Development Process”); 2012 303(d) List Report, EPA List Pages 1-9; EPA Gray List Pages 1-4. Since then, various environmental groups have sued EPA for wrongly approving of TMDLs submitted by WVDEP (dating back to 2009) for several watersheds that did not include TMDLs for “ionic stress” as to streams that were listed as biologically impaired using the WVSCI. \textit{See} Ohio Valley Envtl. Coalition, Inc. v. McCarthy, Civil Action No. 3:15-cv-00271 (S.D. W. Va.; Complaint filed Jan. 7, 2015).}

\textbf{[g] — CWA Citizens Suits Based upon the EPA Benchmark.}

Based in large part on EPA’s actions in disapproving WVDEP’s Narrative Standards implementation in favor of imposing a conductivity measure (as proposed in the Benchmark Report and other EPA publications), and no doubt encouraged by EPA’s refusal to allow WVDEP time to develop a new protocol for assessing compliance with the Narrative Standards (as required by W.Va. Code § 22-11-7b(f)), several Clean Water Act citizen suits have been filed against West Virginia coal companies on the theory that high conductivity values in their discharges constitute violations of the federal Clean Water Act. Given proof that such discharges caused or contributed to stream conductivity values higher than recommended in the Benchmark Report, these civil actions have imposed on the defendants the costs of treating for a condition that was never made an express part of their NPDES permits during the permitting process, in order to reduce the value of a parameter that does not in itself constitute a pollutant. Thus, the federal oversight agency has both displaced the WVDEP in its role as the evaluator of compliance with the Narrative Standards (through EPA’s own interpretation and application of the WVSCI) and provided a basis for third parties to sue companies that...
Cooperative Federalism and environmental laws:

Hold NPDES permits issued by the WVDEP, for failing to comply with EPA’s new proposed compliance test (conductivity).¹⁴⁷


As summarized above, SMCRA is structured differently than other federal environmental statutes that allow for the submission of state regulatory programs intended to achieve minimum federal environmental protection goals. Under SMCRA, once a state agency has been approved as the sole issuer of coal mining permits and primary regulatory authority over mining operations within its borders (known as “primacy”), the federal statute and regulations “drop out” of the picture — meaning they have no direct application to coal mine operators.¹⁴⁸

Moreover, SMCRA encourages states to achieve primacy. According to the Act, it is the states, not the federal government, that are to “develop and implement a program to achieve the purposes of this chapter.”¹⁴⁹ To make this point absolutely clear, SMCRA provides explicitly that when states regulate, they do so exclusively,¹⁵⁰ and when the federal government regulates, it does so exclusively.

Likewise, the federal Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of Interior has only limited oversight authority with respect to the activities of an approved state regulatory authority (SRA) under SMCRA, and limited involvement in direct inspection and enforcement carried out under a state’s SMCRA program. In


¹⁴⁹ Id. citing 30 U.S.C. § 1202(g).

particular, SMCRA allows OSM to conduct oversight inspections at “surface coal mining and reclamation operations” based upon either citizen complaints identifying alleged violations of the state program, or on a random basis, to evaluate state implementation of its program (which inspections should be made jointly with the SRA, upon request).\textsuperscript{151} There is no provision in SMCRA or OSM regulations that describes the review of SRA permit files as a form of authorized oversight, separate and apart from inspections of mine sites.


Consistent with this limited and ordered oversight prescribed by SMCRA, on October 21, 2005, Assistant Interior Secretary Rebecca Watson issued a letter overturning a “Ten Day Notice” that had been issued by OSM’s Charleston Field Office to the West Virginia Department of Environmental Protection (WVDEP) pertaining to the WVDEP’s decision to issue a mining permit to Mettiki Coal Company for its proposed “E Mine.”\textsuperscript{152} As noted in that decision, once a permit has been issued, administrative and judicial appeals of permit decisions “[in a primacy state] are matters of state jurisdiction in which the Secretary plays no role.”\textsuperscript{153} Therefore, OSM had no jurisdiction in its oversight role to entertain a citizen’s complaint based upon a challenge to an administrative appeal board’s affirmance of the state-issued permit (a decision that could have been appealed to a state circuit court). In the words of Assistant Secretary Watson, to find otherwise “would conflict with the federalism established under [SMCRA] by allowing OSM to commandeer the state permit review and appeal process . . . .”\textsuperscript{154}

\textsuperscript{151} 30 U.S.C. § 1267(h)(1); 30 U.S.C. § 1271(a)(1); 30 C.F.R. § 842.11(a).
\textsuperscript{152} Oct. 21, 2005 letter, Interior Dept. Assistant Secretary Rebecca W. Watson to attorney Joseph M. Lovett, Appalachian Center for the Economy and the Environment (on file with author) (“Watson Letter”).
\textsuperscript{153} Id., citing In re: Permanent Surface Mining Regulations Lit., 653 F.2d 514, 519 (D.C. Cir. 1981).
\textsuperscript{154} Watson Letter at 3.
Soon after his appointment early in President Obama’s first term, OSM Director Joseph Pizarchik issued a Memorandum to all OSM Regional Directors, notifying them that henceforth OSM policy would be to “reject the rationale set forth in the Mettiki [E Mine] decision.”\textsuperscript{155} Instead, OSM will apply its oversight authority to “\textit{all} types of violations, including . . . violations of permitting requirements” found in state programs.\textsuperscript{156} No further explanation for this change in policy was provided, other than that “the Solicitor’s Office has . . . determined that this analysis represents a better reading of SMCRA . . . .”\textsuperscript{157}

About two months later, OSM issued a new policy directive, No. INE-35, governing “Ten-Day Notices.” In it, OSM set forth detailed procedures for issuance of Ten-Day Notices ("TDNs") to SRAs, evaluation of responses to TDNs, and actions that should be taken when a SRA does not take appropriate action to address a TDN and fails to show good cause for not doing so.\textsuperscript{158} INE-35 also specifically authorized the issuance of TDNs for “permit defects,” and defined that term broadly, to encompass “any procedural or substantive deficiency in a permit-related action taken by a [SRA] (including permit issuance, permit revision, permit renewal, or transfer, assignment or sale of permit rights).”\textsuperscript{159} At least one primacy state complained that this directive “eviscerate[d] the concept of state primacy in relation to SMCRA . . . .”\textsuperscript{160}

Since the issuance of INE-35, OSM has engaged in a number of permit-related oversight actions. One such effort is an ongoing, detailed review of various aspects of the WVDEP permitting system being conducted by a joint federal-state task force in order to prepare a response to a petition for

\begin{itemize}
\item[155] November 15, 2010 letter, OSM Director Pizarchik to Regional Directors (on file with author).
\item[156] \textit{Id.} at 1 (emphasis in original).
\item[157] \textit{Id.} at 1.
\item[159] \textit{Id.} at 3.
\item[160] April 28, 2011 letter, Kenneth T. Cuccinelli, Attorney General, Commonwealth of Virginia, to OSM Director Pizarchik (on file with author).
\end{itemize}
federal takeover of the WVDEP mine regulatory program that was filed on June 23, 2013.161


[i] — OSM Position on Oversight Authority over Water Discharges.

Consistent with federal law, WVDEP mining regulations specify that discharges from a mine site cannot cause a violation of effluent limits set forth in a NPDES permit or cause a violation of state water quality standards that apply to the receiving streams for such discharges.162 At the same time, SMCRA recognizes that the Clean Water Act and delegated state programs under that statute are the primary means of ensuring against pollution of surface waters. Accordingly, Congress specified that no provision in SMCRA may be interpreted or applied as superseding or modifying any Clean Water Act requirement or any state law enacted thereunder.163 As explained below, it is OSM’s current position that because of the cross-reference to NPDES permits and water quality standards in WVDEP mining regulations, it is forced to interpret the requirements of both those regulations and WVDEP’s water pollution control regulations in order to determine whether the WVDEP is adequately implementing its approved SMCRA program.

[ii] — Citizen Complaints Regarding Selenium Discharges.

In December, 2012, representatives of several non-governmental organizations filed complaints with the WVDEP under its mining program, claiming that five active mines were in violation of WVa. C.S.R. § 38-2-14.5 because those mines were discharging selenium at levels in excess of water quality standards.164 These citizen representatives asked that WVDEP

164 See 733 Petition,” available at www.arcc.osmre.gov. The complainants also raised concerns about a sixth mine, at which mining had been mostly completed but the bond
inspect the mines, and that they be allowed to accompany the WVDEP inspection teams.

After initially indicating that inspections would be allowed, the WVDEP declined to entertain the citizen complaints once it became clear that the corresponding NPDES permits for the five mines in question did not have selenium effluent limits. Since the mines were not subject to selenium limits, and water quality standards are not self-implementing (e.g., they must be translated to permit-specific limits to be enforced), the WVDEP determined that it did not have “reason to believe” that there were ongoing violations of any mining regulation. In response, OSM’s Charleston Field Office found that the actions of the WVDEP under the West Virginia Water Pollution Control Act, requiring the companies to evaluate their discharges and potentially apply to amend their NPDES permits to include selenium limits, constituted “appropriate action” under SMCRA to cause any mining-related violations to be addressed.

At the same time, the OSM July 2, 2013 Letter conditioned its determination of “appropriate action” on “WVDEP following through on its [WV WPCA Orders] in a timely fashion.” In addition, OSM questioned WVDEP’s position on application of the West Virginia permit shield statute, rejected the notion that the complaints could not be recognized because the

was forfeited and the permit had been revoked. OSM found that WVDEP’s response to the citizens’ complaint as to that site was inappropriate for reasons related to the regulations pertaining to reclamation of forfeiture sites. July 23, 2013 letter, OSM Charleston Field Office Director Roger Calhoun to WVDEP Division of Mining and Reclamation Director Thomas L. Clarke, re: Forfeited Keenan Trucking site (“OSM Keenan Trucking Letter”) (on file with author).

April 22, 2013 letter, WVDEP Division of Mining and Reclamation Director Thomas L. Clarke to OSM Charleston Field Office Director Roger Calhoun (“Clarke April 22, 2013 Letter”) (on file with author). Director Clarke also noted that this result was made more certain by the recent passage of W. Va. Code § 22-11-6, which provides a “permit shield” for NPDES permittees against allegations of water quality standard violations when those standards have not been expressed in an NPDES permit.


July 2, 2013 letter, OSM Charleston Field Office Director Roger Calhoun to WVDEP Division of Mining and Reclamation Director Thomas L. Clarke (“OSM July 2, 2013 Letter”) (on file with author).
sampling that had been done was not sufficient to actually determine a water quality standard violation, and rejected the WVDEP’s position that it was entitled to substantial deference because OSM has no authority to interpret the Clean Water Act or the WV WPCA.168

Recognizing this as a serious challenge to its authority under both the WV WPCA and its approved SMCRA program, WVDEP took the unusual step of informally appealing OSM’s “appropriate action” determination on the five citizen complaints, to the Regional Director of OSM’s Appalachian Region.169 In addition to asserting that conditions that do not violate clean water laws cannot constitute violations of the mining laws, the WVDEP reasserted that the citizen complainants should have been required to seek redress through approved state administrative appeal channels rather than using the OSM citizen complaint mechanism. Perhaps in recognition of the difficulty of addressing these issues, OSM has yet to issue a decision on this appeal.

§ 6.06. Conclusion.

In dissenting from the Court’s decision in Sebelius, Supreme Court Justices Scalia, Kennedy, Thomas and Alito commented on the nature of federalism today:

The principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system. That obstacle can be overcome by

168 OSM July 2, 2013 letter at 3-4. Significantly, OSM also noted that the duties of the WVDEP NPDES permit reviewers were so intertwined with the WVDEP staff responsible for preparing “cumulative hydrologic impact” analyses under the mining program that OSM had “fund[ed] some of West Virginia’s NPDES employees under SMCRA.” In OSM’s view, this funding confirmed that OSM “must consider [WV WPCA] compliance as it relates to our SMCRA oversight responsibilities.” Id.
169 July 15, 2013 letter and July 24, 2013 letter, WVDEP Division of Mining and Reclamation Director Thomas L. Clarke to OSM Regional Office Director Thomas Shope (“Shope Letters”) (on file with author).
granting funds to the States, allowing them to administer the program. That is fair and constitutional enough when the States freely agree to have their powers employed and their employees enlisted in the federal scheme. But it is a blatant violation of the constitutional structure when the States have no choice.\footnote{Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. at 2695 (Justices Scalia, Kennedy, Thomas and Alito, dissenting).}

As has become evident in the continuing evolution of the federal government’s implementation policy for environmental statutes, in most cases the states truly “have no choice,” both as to the question of what precisely should be the goal of any particular regulatory program, and as to the manner in which private activity will be regulated. Administrative petitions for relief are rarely granted, and judicial challenges of apparent federal overreach are more often than not effectively decided through delayed resolutions that force the states and regulated community to comply with a regulation they view as illegal, lest they face severe sanctions for failing to toe the line in the meantime. Hence, in small, day-to-day decisions and through large policy announcements, federal bureaucrats impose their will both on the state agencies administering these delegated programs, and on large segments of the business community that are forced to maneuver through the maze of federal and state requirements. It is difficult to imagine a federalism that is less “cooperative.”