ESSAY

RESISTING DEREGULATION: HOW PROGRESSIVE STATES CAN LIMIT THE IMPACT OF EPA'S DEREGULATORY EFFORTS

BY

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I. INTRODUCTION

These are dark times for those who care about our environment. In the pollution-control context, we have long been accustomed to the idea that, in general, our environmental laws get stricter over time; or at the very worst, that they would at least stay the same. In the Clean Water Act[1] (CWA) context, for example, since 1972, the statute's first-stated goal has been "that the discharge of pollutants into the navigable waters be eliminated by 1985."[2] In that vein, it is hardly surprising that the United States Court of Appeals for the D.C. Circuit intoned, in 1988, that "non-experts such as ourselves may picture water pollution controls becoming steadily more stringent over

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1 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

2 33 U.S.C. § 1251(a)(1).

time."[3] But alas, as the court noted in concluding that sentence—and as will be seen below—"this is apparently not the case."[4]

It goes without saying, of course, that Congress could relax, or perhaps even eliminate, our federal environmental standards if it so chose. But this Essay deals with a different and more imminent threat: that of a United States Environmental Protection Agency (EPA) that, in the current Administration, seems hell-bent on implementing an aggressive deregulatory agenda. At the 2018 Ronald Reagan Dinner, the Conservative Political Action Conference's annual showcase, then-Administrator Scott Pruitt referred to EPA as an agency that has been "weaponized against certain sectors of the economy."[5] In response to that perception, in his relatively short time in office, Administrator Pruitt demonstrated his inclination to disarm the agency in significant ways. In July of 2018, the New York Times documented seventy-six environmental regulations that the Trump Administration had overturned or was in the process of rolling back.[6] EPA was either solely or jointly responsible for at least twenty-three of them.[7] In the following month, EPA issued a "Notice of Proposed Rulemaking," heralding its intent to water down fuel economy standards for new cars and light duty trucks.[8] By all accounts, Acting Administrator Wheeler will pursue a similar agenda.[9]

Thus far, the Trump-era EPA seems to have concentrated its efforts on withdrawing or narrowing initiatives that EPA advanced during the last two years of the Obama Administration. These include, for example, the "Clean Power Plan," addressing climate change under the Clean Air Act[10] (CAA),[11]

3 Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency (*NRDC Backsliding I*), 859 F.2d 156, 195 (D.C. Cir. 1988).

4 *Id.*

5 Coral Davenport, *Scott Pruit, Trump's Rule-Cutting E.P.A. Chief, Plots His Political Future*, N.Y. TIMES (Mar. 17, 2018), https://perma.cc/D7NY-AZPR.

6 Nadja Popovich et al., *76 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (July 6, 2018), https://perma.cc/3CU4-6P5T.

7 *Regulatory Rollback Tracker*, ENVTL. L. HARV., https://perma.cc/H7QU-LV7L (last visited Nov. 25, 2018).

8 *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018).

9 *See, e.g.*, Coral Davenport, *How Andrew Wheeler, The New Acting E.P.A. Chief, Differs From Scott Pruitt*, N.Y. TIMES (July 5, 2018), https://perma.cc/WWS9-GWVR (reporting that many in Washington D.C. believe Wheeler will be even more effective at pursuing the Trump Administration's deregulatory agenda); H. Sterling Burnett, *EPA Policy: Meet The New Boss, Same As The Old Boss*, HEARTLAND INST. (July 13, 2018), https://perma.cc/AZ85-PEWZ ("[C]ritics and supporters of President Donald Trump's energy and environment agenda alike agree substantively nothing much will change with Wheeler's ascension to head the agency.").

10 42 U.S.C. §§ 7401–7671q (2012).

11 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015) (implementing 42 U.S.C. § 7411(d) with Clean Power Plan final rule); Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Generating Units, 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018) (replacing the Clean Power Plan with the Affordable Clean Energy rule); *see also Clean Power Plan/Carbon Pollution Emission Guidelines*, ENVTL. L. HARV., https://perma.cc/T6H6-8X4A (last visited Nov. 25, 2018) (tracking developments in replacing Clean Power Plan).

EPA and the United States Army Corps of Engineers' joint "Clean Water Rule" (sometimes known as the "WOTUS Rule," for "waters of the United States"), which redefined the scope of the "navigable waters" protected under the CWA,[12] and EPA's recent effluent limitation guidelines for toxic discharges from steam electric power plants.[13] This focus on recently-promulgated regulations makes sense, of course, given that in these contexts regulated entities faced significant capital costs, as opposed to just ongoing implementation measures.[14]

More recently, however, EPA has begun to take action on initiatives designed to reduce compliance costs, even in situations in which regulated entities have already invested in the necessary equipment to meet the pre-existing standards. In January of 2018, for example, EPA withdrew the "once in, always in" policy under the CAA's National Emission Standards for Hazardous Air Pollutants (NESHAPs) program.[15] Under EPA's new interpretation, major emitters of toxic pollutants[16] will now be able to use the very equipment they were required to install under that program—referred to as the "maximum achievable control technology" (MACT)[17]—to avoid the very standards the equipment was designed to achieve and—if a given source has been complying—has been achieving. In effect, they will be

12 *See* Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,053 (June 29, 2015) (final rule revising existing definition of "waters of the United States" used in 33 U.S.C. § 1362(7)); Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice of proposed rulemaking stating intent to repeal 2015 rule defining waters of the United States); *see also Defining Waters of the United States/Clean Water Rule*, ENVTL. L. HARV., https://perma.cc/H6DX-Z2BA (last visited Nov. 25, 2018) (tracking developments in repealing 2015 Clean Water Rule and litigation surrounding repeal).

13 *See* Effluent Limitations Guidelines and Standards for the Steam Electronic Power Generating Point Source Category, 80 Fed. Reg. 67,838 (Nov. 3, 2015) (final rule implementing 33 U.S.C. § 1317(a)); Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines, 82 Fed. Reg. 43494 (Sept. 18, 2017) (final rule postponing compliance dates for 2015 rule for two years and noting intent to revise effluent limitations); *see also Powerplant Effluent Limits*, ENVTL. L. HARV., https://perma.cc/7RNY-YNJZ (last visited Nov. 25, 2018) (tracking changes to the 2015 rule and legal challenges to the delay).

14 *See, e.g.*, Effluent Limitations Guidelines and Standards for the Steam Electronic Power Generating Point Source Category, 80 Fed. Reg. 67,838 at 67,842. Of course, these entities may still face these costs if courts rebuff these efforts. *See, e.g.*, S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 967–68 (D.S.C. 2018) (issuing a nationwide injunction against EPA's suspension of the 2015 WOTUS rule).

15 *See* Memorandum from William L. Wehrum, Assistant Adm'r, Office of Air & Radiation, U.S. Envtl. Prot. Agency, to Regional Air Division Directors (Jan. 25, 2018), https://perma.cc/7PRS-AKMS (withdrawing Seitz Memorandum and reinterpreting 42 U.S.C. § 7412(a)(1) to not authorize the "once in, always in" policy); *see also* Memorandum from John S. Seitz, Director, Office of Air Quality Planning & Standards, U.S. Envtl. Prot. Agency, to Linda Murphy et al. (May 16, 1995), https://perma.cc/YX2B-3LC8 (establishing the "once in, always in" policy that is now withdrawn).

16 Under this program, a "major source" is defined as one that emits or has the potential to emit ten tons of any individual hazardous pollutant, or twenty-five tons in the aggregate. Clean Air Act, 42 U.S.C. § 7412(a)(1) (2012).

17 42 U.S.C. § 7412(g)(2).

able to use this equipment at less than full capacity, so long as their emissions stay below the threshold levels that required them to install that equipment in the first place.

It remains to be seen exactly how aggressive the Trump EPA will be in trying to undermine longstanding pollution-control requirements. Sadly, as we will be see below, the major pollution-control regulatory statutes—by which I mean the CAA, the CWA, and the Resource Conservation and Recovery Act (RCRA)[18]—do not have strict and comprehensive prohibitions on what is referred to as "backsliding"—that is, the relaxation of existing regulatory requirements—even in situations in which regulated entities are having no trouble meeting the preexisting standards.[19] Instead, the relevant "antibacksliding" provisions are limited in either context or scope.[20] Given this limited applicability and the deference to which EPA is due on both legal and scientific matters,[21] there is probably much that EPA can do, if it proceeds carefully, to provide what the current Administration may perceive to be "regulatory reform."[22]

This Essay will begin with a brief discussion of how antibacksliding requirements may limit EPA's ability to relax regulatory requirements under both the CWA and the CAA.[23] Next, I will provide a very basic overview of the most pertinent principles of "cooperative federalism," as they apply in the pollution-control context. And that accomplished, I will then move to the major point of this piece: how states can blunt the force of any impending deregulatory efforts by maintaining their existing programs, if they so choose. In this regard, I will argue that in most contexts the states not only will be able to preserve their favored regulatory requirements, but that—if they do so—the relevant requirements will remain enforceable as a matter of federal law. As a practical matter, this would typically be through citizen suits, as, at least during the Trump Administration, EPA is probably quite unlikely to enforce state standards that are stricter than required as a matter of federal law.

18 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

19 *See generally NRDC Backsliding I*, 859 F.2d 156, 195–204 (D.C. Cir. 1988) (interpreting an antibacksliding provision in the CWA).

20 *See id.* at 203 (upholding antibacksliding in the best professional judgment context).

21 *See* Administrative Procedure Act, 5 U.S.C. § 706 (2012); Baltimore Gas & Electric Co. v. Nat. Res. Def. Council, 462 U.S. 87, 103 (1983) (deferring to agencies' scientific determinations); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984) (deferring to agency interpretations regarding ambiguous statutory provisions); Auer v. Robbins, 519 U.S. 452, 459 (1997) (deferring to agency interpretations regarding ambiguities in their administrative regulations).

22 *See generally* Evaluation of Existing Regulations, 82 Fed. Reg. 17,793 (Apr. 13, 2017) (seeking input "on regulations that may be appropriate for repeal, replacement, or modification" from entities significantly affected).

23 The EPA's third major pollution-control program, RCRA, does not contain any antibacksliding provisions. *See* Application of Chapter and Integration with Other Acts, 42 U.S.C. § 6905 (2012); Modification or Revocation and Reissuance of Permits, 40 C.F.R. § 270.41 (2006).

Of course, some states no doubt will be eager to relax their standards accordingly.[24] Other states, however, may resist any impending deregulatory thrust. It is noteworthy, for example, that New York has been leading a coalition of ten states in challenging the Trump Administration's new rule seeking to put the Obama Administration's 2015 WOTUS rule on ice until 2020.[25] Similarly, Massachusetts led a coalition of twelve states in successfully challenging EPA's refusal to even make a finding whether greenhouse gases posed an "endangerment" within the meaning of § 202 of the CAA.[26]

The key operative principle of this Essay is that, as will be discussed further below, under the "cooperative federalism" framework embodied in most of our pollution control laws, the states are free in most contexts to establish or maintain standards that are either stricter or broader in scope than the relevant federal requirements. As such, those states that do not embrace the Trump Administration's deregulatory agenda can effectively stymie that agenda within their borders. If the ten states that challenged the stay of the WOTUS rule were to band together to even passively resist any deregulatory efforts—by simply refusing to make any corresponding changes—they will be able to limit the damage in states that bear a disproportionate number of both our citizenry and our economic activity.[27] Moreover, this form of resistance may serve to discourage EPA from pursuing these relaxations, if—as some theorize—regulated entities may sometimes value uniformity more than laxity.[28] This latter prospect may especially be so, of course, if regulated entities perceive that the relevant relaxations may be short-lived.

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24 By way of example, twenty-seven states challenged the Clean Water Rule in 2015, arguing that it was too broad in its scope of coverage. *See* Timothy Cama, *States Challenge Obama Water Rule in Court*, HILL (June 30, 2015), https://perma.cc/QQF5-WZL9. In some states, existing state law may even compel the relevant state agency to relax their standards in accordance with federal changes. In Arizona, for example, a state statute requires the Arizona Department of Environmental Quality, absent specific statutory authorization, to "ensure that state laws, rules, standards, permits, variances and orders are adopted and construed to be consistent with and no more stringent than the corresponding federal law that addresses the same subject matter." Ariz. Rev. Stat. § 49-104(A)(16).

25 *See* New York v. Pruitt, Nos. 18-CV-1030 (JPO), 18-CV-1048 (JPO) (S.D.N.Y. May 29, 2018). The other states include California, Connecticut, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, and Washington. *States Seek Summary Judgment in Lawsuit Challenging Change to Clean Water Rule*, LEXIS LEGAL NEWS (May 3, 2018), https://perma.cc/PG43-XD3Y. The District of Columbia is also a plaintiff. *Id.*

26 *See* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007). This coalition included all of the states mentioned in *supra* note 25, except Maryland. *See id.* at 502. It also included Illinois, Maine, and New Mexico. *Id.*

27 The ten states referenced in *supra* note 25 are responsible for more than 35% of our gross domestic product. *See* Press Release, Bureau of Econ. Analysis, Gross Domestic Product by State: Second Quarter 2018 (Nov. 14, 2018), https://perma.cc/3V2G-JXGU.

28 *See, e.g.*, J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1505 n.14 (2007).

II. ANTIBACKSLIDING

As mentioned above, many states likely will be inclined to relax their pollution standards to track whatever deregulatory measures EPA may implement. Sadly, for the most part they will be able to do so. Contrary to the D.C. Circuit's preliminary expectation,[29] there is no flat ban in any of our major pollution control statutes precluding either EPA from relaxing any of its regulatory requirements or the states from following suit.[30]

EPA first introduced the concept of antibacksliding in its regulations in 1979, when—in the CWA context—it precluded those issuing permits under the National Pollutant Discharge Elimination System (NPDES) program from relaxing prior technology-based permit limits when renewing or reissuing permits, except in limited circumstances.[31] While these circumstances varied depending on whether the relevant conditions had been established through national rulemaking or through the permit issuer's exercise of its "best professional judgment,"[32] for our purposes the most salient point is that, in the former context, one of the exceptions encompassed situations in which EPA had "revised, withdrawn, or modified that portion of the effluent limitations guidelines on which the permit term or condition was based."[33] This basic dynamic carries through to this day. While the current (re-numbered) iteration of that regulation generally precludes backsliding from permit conditions that were established through the application of national effluent limitation guidelines,[34] it still includes an exception incorporating the grounds for modification in what is now 40 C.F.R. § 122.62.[35] In turn, this provision encompasses situations in which "[t]he standards or regulations on which the permit was based have been changed by promulgation of amended standard or regulations."[36]

Thus, if EPA were now to weaken any of its nationally-applicable effluent limitation guidelines, the states would be free to follow suit. This would involve a two-step process. First, the given state would have to submit its proposed program revision to EPA, incorporating the new,

29 *See supra* notes 3–4 and accompanying text.

30 *See supra* note 19 and accompanying text.

31 40 C.F.R. § 122.15 (1979); *see also* National Pollutant Discharge Elimination System; Revision of Regulations, 44 Fed. Reg. 32,854, 32,907–08 (June 7, 1979) (codified at 40 C.F.R. pts. 6, 115, 121–25, and 402–03).

32 For a good discussion of "best professional judgment" determinations and their intersection with the antibacksliding policy, see *NRDC Backsliding I*, 859 F.2d 156, 195–204 (D.C. Cir. 1988).

33 40 C.F.R. §§ 122.15(i), 122.31(e)(3)(ii)(A) (1979); *see also* National Pollutant Discharge Elimination System; Revision of Regulations, 44 Fed. Reg. at 32,907–08, 32,912.

34 40 C.F.R. § 122.44(l)(1) (2017).

35 40 C.F.R § 122.62 (2017).

36 § 122.62(a)(3); *see also NRDC Backsliding I*, 859 F.2d at 196 (noting that EPA and both the industrial and environmental challengers all assumed that if EPA were to revise—and weaken—a set of new source performance standards, the relevant industrial entities would be able to backslide in accordance with the new standards); U.S. ENVTL. PROT. AGENCY, NPDES PERMIT WRITERS' MANUAL 7-4 (2010), https://perma.cc/CPE5-U9G7.

relaxed requirement as a matter of state law.[37] And second, it would then need to revise the relevant permits for individual dischargers, incorporating the new treatment standards.[38] The limit on any permissible backsliding would be that, on a case-by-case basis, the relevant discharges could not cause or contribute to the violation of any water quality standard.[39]

The CAA's overarching permit program, in Title V, does not itself contain any explicit antibacksliding dynamics paralleling those in 40 C.F.R. § 122.44(l).[40] In the air quality context, however, § 172(e) requires EPA, if it relaxes a "primary" (that is, health-based) national ambient air quality standard (NAAQS),[41] to "promulgate requirements" ensuring that "controls" are maintained for sources in any areas that were in nonattainment with the relevant standard prior to the relaxation at issue.[42] Interestingly, in 2004, EPA interpreted this antibacksliding dynamic as also applying when EPA strengthens a primary standard:

> In section 172(e), Congress specified that if EPA revises a NAAQS and makes it less stringent, EPA must promulgate regulations applicable to areas that have not yet attained the original NAAQS to require controls that are no less stringent than the controls that applied to areas designated nonattainment prior to such relaxation. We believe that, if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent.[43]

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37 *See* 40 C.F.R. § 123.62(b)(1) (2017). There is an argument that any relaxation of the federal requirements may become effective immediately—without requiring any revision of the state program—if a state's current statutes or regulations simply incorporate the federal regulations by reference. *See Ex parte* Elliott, 973 S.W.2d 737, 740 (Tex. App. 1998). The theory would be that the state provisions automatically morph in response to any corresponding changes in the incorporated federal requirements. *See id.* Given EPA's requirements for approval of State-program revisions, however, the better view is to the contrary. *See id.* at 742–43 (determining that, due to non-delegation concerns, the reference to "solid waste identified or listed as hazardous waste [by EPA]" in the relevant Texas hazardous waste statute should be read only to incorporate EPA's regulatory definition of "hazardous waste" in effect on the date the Texas legislature passed the relevant law); *see also* 40 C.F.R. § 271.21(h)(3)–(5) (2017) (addressing State-program revisions under RCRA).

38 40 C.F.R. § 122.62(a)(3) (illustrating situations in which permits may be modified). This second step would be necessary because, as discussed in more detail below, it is the permit conditions that are directly enforceable under the CWA. *See* discussion *infra* Part IV; CWA, 33 U.S.C. §§ 1319(a)(3), 1365(a)(1), 1365(f)(6) (2012) (enforcement of permit condition).

39 *See, e.g.*, 33 U.S.C. § 1311(b)(1)(C) (2012); 40 C.F.R. § 122.44(l)(2)(ii). Section 402(o) of the CWA also incorporates antibacksliding dynamics for permit conditions established on the basis of either § 402(a)(1)(B) ("best professional judgment" determinations) or §§ 301(b)(1)(C) or 303(d) (relating to water quality and "total maximum daily loads," respectively). 33 U.S.C. § 1342(o). These conditions are not as likely to be implicated by EPA deregulatory efforts.

40 *See* CAA, 42 U.S.C. § 7661c (2012); 40 C.F.R. § 70.7(c) (2017).

41 42 U.S.C. § 7409(b)(1) (2012).

42 42 U.S.C. § 7502(e) (2012).

43 Final Rule to Implement National Ambient Air Quality Standard—Phase 1, 69 Fed.Reg. 23,951, 23,972 (Apr. 30, 2004).

The D.C. Circuit deferred to this interpretation in *South Coast Air Quality Management District v. EPA*[44] (*South Coast*), noting that "[c]onsidered as a whole, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter."[45] The court further determined the new source review program constitutes a "control" within the meaning of § 172(e).[46]

For our purposes, the most important implication of § 172(e), as understood through the lens of *South Coast*, is that whenever EPA revises an air quality standard, in whatever direction, all sources that were previously subject to new source review in the relevant area must remain subject to the same new source review requirements that applied to them before the relevant revision.[47] This would mean, for example, that if the Trump EPA were to relax a primary standard, the major sources in what are currently nonattainment areas must continue to achieve the same "lowest achievable emission rate"[48] requirements specified in their pre-existing new source review permits, even if an affected area is in attainment with the new standard.

Conceptually, the beauty of an overarching antibacksliding dynamic would be that it would ensure that our pollution-control requirements would move in only one direction, toward continued improvement. Or at worst, that they would at least stand still. In a perfect world these dynamics would hold, at least absent statutory change, regardless of the deregulatory tendencies of an EPA administrator or any of the relevant states. Unfortunately, though, only § 172(e) of the CAA appears to provide any real constraints, and even there it may only come into play if EPA revises an air quality standard.[49] At the very least, though, perhaps these dynamics will dissuade EPA from attempting to relax any existing standards.

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44 472 F.3d 882 (D.C. Cir. 2006).

45 *Id.* at 900. It is also worth noting that in reaching its result, the *South Coast* court relied in part of some other, more qualified, antibacksliding dynamics in the CAA. The court characterized the relevant statutory provisions and their import as follows:

> [Under the CAA, even] areas that attained were not allowed to remove controls. At most, an attaining area was allowed to shift controls from active enforcement to the contingency plan that would be automatically triggerd should air quality again deteriorate. CAA § 175A, 42 U.S.C. § 7505a. And EPA was to enforce a high threshold for removing controls from a [state implementation plan]—no mandatory controls could be removed and nothing could be done that would hinder an area's ability to achieve prescribed annual incremental emissions reductions. CAA § 110(l), 42 U.S.C. 7410(l).

Id.

46 *Id.* at 901–02; *see also* Nat. Res. Def. Council, Inc. v. Envtl. Prot. Agency (*NRDC Backsliding II)*, 571 F.3d 1245, 1267–71 (D.C. Cir. 2009) (rejecting EPA's attempt to eliminate an 18-month limit on certain exemptions to new source review requirements).

47 *NRDC Backsliding II*, 571 F.3d at 1270–71.

48 *See* 42 U.S.C. §§ 7501(3), 7503(a)(2) (2012).

49 Given the breadth of the quoted language from *South Coast*, environmental advocates may argue that § 172(e) applies even in the absence of the revision of a primary standard. *See* Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency, 779 F.3d 1119, 1121 (9th Cir. 2015) (holding that the breadth of § 172(e) is ambiguous, which implies that environmental advocates may

III. COOPERATIVE FEDERALISM: THE BASICS

EPA's major regulatory programs operate based on a framework incorporating what the United States Supreme Court in *U.S. Department of Energy v. Ohio*[50] referred to in the NPDES context as "a distinctive variety of cooperative federalism."[51] As the Court explained,

> The Clean Water Act anticipates a partnership between the States and the Federal Government . . . . To effectuate this partnership, the CWA authorizes [EPA] to issue pollution discharge permits, but provides that a State may administer its own permit system if it complies with detailed statutory and regulatory requirements.[52]

In order to become "authorized" to administer the relevant programs, the states must have the authority as a matter of state law to impose standards that are at least as strict as those which EPA would impose if it were administering the relevant federal program.[53] Additionally, EPA has oversight authorities as necessary to ensure that the states do in fact impose these requirements. Under the CWA, for example, EPA may preclude a state from issuing a given permit if it finds that the conditions contained therein are "outside the guidelines and requirements of this [Act]."[54]

In addition to being able to impose requirements that are at least as strict as the pertinent federal standards, the states must also establish certain enforcement authorities as a precondition to authorization. In this context, however, full equivalence is not required.[55] Again, using the CWA as an example, under that statute states must have the authority to impose civil penalties in the amount of up to $5,000 per day for any and all violations.[56]

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present the aforesaid argument). If neither EPA nor a relevant state can relax a source's new source review requirements when an existing primary standard is either weakened or relaxed, it would seem quite counter-intuitive that either could do so in the absence of a revision.

50 503 U.S. 607 (1992).

51 *Id.* at 633.

52 *Id.* (internal quotations and citations omitted).

53 *E.g.*, CWA, 33 U.S.C. § 1342(b)(1) (2012) (under the National Pollutant Elimination System program, EPA shall approve a State program unless it find that the relevant State does not have the ability to issue permits which "apply, and insure compliance with, any applicable requirements of [the relevant federal provisions]"); RCRA, 42 U.S.C. § 6926(b) (2012) (requiring EPA to approve State hazardous waste programs unless a given program "is not equivalent to the Federal program" governing hazardous waste); CAA, 42 U.S.C. § 7661a (2012) (applying the same dynamics under the CAA's "Title V" permit program).

54 33 U.S.C. § 1342(d)(2).

55 *Compare* 33 U.S.C. § 1319(d) (federal enforcement of CWA has a maximum $25,000 civil fine per day) *and* 42 U.S.C. § 6928(g) (federal enforcement of RCRA has a maximum $25,000 civil fine per day), *with* 40 C.F.R. § 123.27(a)(3)–(b)(1) (2017) (state enforcement of CWA has a maximum $5,000 civil fine per day), *and* 40 C.F.R. § 271.16(a)(3)–(b)(1) (2017) (state enforcement of RCRA has a maximum $10,000 civil fine per day).

56 40 C.F.R. § 123.27(a)(3)–(b)(1) (implementing 33 U.S.C. § 1342(b)(7)). Under both the CAA and RCRA, civil penalties must be assessable in the amount of up to $10,000 per day, for each violation. *See* 42 U.S.C. § 6926(b); 42 U.S.C. § 7661a(b)(5)(E); 40 C.F.R. § 70.11(a)(3)(i) (2017); 40 C.F.R. § 271.16(a)(3)–(b)(1).

The vast majority of states have taken up the invitation to administer the relevant federal programs. Under the CWA, for example, forty-seven of the fifty states are authorized to administer most elements of the NPDES program.[57]

Most importantly, for our purposes, the relevant statutes have express savings clauses, preserving, as a general matter, the states' ability to establish or maintain requirements that go beyond the federal "floors" (minimum requirements) established under the relevant statutes and regulations.[58] Section 510 of the CWA is typical in this regard. It provides that, except as otherwise expressly provided, nothing in the CWA shall "preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution."[59]

Significantly, the Supreme Court has recognized these dynamics on multiple occasions. In the CWA context, for example, the Supreme Court noted in *EPA v. California ex rel. State Water Resources Control Board* (*EPA v. California*)[60] that "[Section 510] provides that the States may set more restrictive standards, limitations, and requirements than those imposed under [the CWA]."[61] Likewise, in *Arkansas v. Oklahoma*,[62] the Court noted that "§ 510 allows States to adopt more demanding pollution-control standards than those established under the Act."[63] Addressing the parallel provision of the CAA, the Court in *Union Electric Co. v. EPA*[64] determined that "Section 116 of the Clean Air Act . . . provides that the States may adopt emission standards stricter than the national standards."[65] Finally, under RCRA, in *City of Philadelphia v. New Jersey*,[66] the Court agreed with the New Jersey Supreme Court that the relevant state restriction, which had no basis under RCRA, was not preempted by RCRA.[67]

Thus, it is well-established that, except where otherwise specifically provided, the states can maintain existing requirements—or even strengthen or expand them—even in the face of any deregulatory measures the Trump

57 *NPDES State Program Information*, U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/7WGS-9EXF (last updated Aug. 20, 2018).

58 *See* 33 U.S.C. § 1370; 42 U.S.C. § 7416; 42 U.S.C. § 6929.

59 33 U.S.C. § 1370; *see also* 42 U.S.C. § 7416; 42 U.S.C. § 6929; 40 C.F.R. § 271.1(i)(1) (2017) (providing that, under RCRA, subject to narrow exceptions, nothing in EPA's regulations precludes states from "[a]dopting or enforcing requirements which are more stringent or more extensive" than the equivalent requirements states must impose in order to become authorized).

60 426 U.S. 200 (1976).

61 *Id.* at 217–18.

62 503 U.S. 91 (1992).

63 *Id.* at 107.

64 427 U.S. 246 (1976).

65 *Id.* at 263–64; *see also* Espinosa v. Roswell Tower, Inc., 32 F.3d 491, 494 (10th Cir. 1994) ("[The CAA] explicitly provides that state regulation of air pollution is preempted only insofar as any state regulation is less stringent than the [relevant federal requirements]. Thus, a state may have other more restrictive air quality regulations that are not based on EPA standards.").

66 437 U.S. 617 (1978).

67 *Id.* at 620 & n.4.

EPA may undertake. Moreover, the states will remain fully capable of enforcing their regulatory programs as a matter of state law.[68] As mentioned, they have long been required, as a precondition to becoming authorized, to have these enforcement powers.[69]

The more interesting question is whether, in situations in which the states retain their existing requirements in the face of EPA's deregulatory efforts, the retained requirements would remain federally enforceable either by EPA or, more significantly, by the public under the relevant citizen-suit provisions.[70]

This is an important question for two reasons. First, it would expand the number of potential enforcers significantly, and thus the likely number of enforcement actions. And second, perhaps even more significantly, it would dramatically increase the potentially applicable sanctions. As previously mentioned, in order to become authorized, states only have to have the ability to impose fines of up to $5,000 per day for each violation under the CWA, or up to $10,000 per day under the CAA and RCRA.[71] In the federal context, by contrast, citizens (or EPA) can seek much larger fines.[72] The relevant citizen suit provisions incorporate the penalty dynamics that are available to EPA when it is authorized to seek civil penalties in court.[73] EPA periodically adjusts these amounts pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.[74] As it currently stands, the potentially applicable daily fines on a per violation basis are $52,414 under the CWA, $95,284 under the CAA, and $71,264 under RCRA.[75]

IV. WILL THE OLD LIMITS REMAIN FEDERALLY ENFORCEABLE?

In general, the citizen-suit provisions in the relevant statutes—like EPA's enforcement provisions—contain a laundry list of the categories of requirements that citizens may enforce.[76] Most pertinently, though, all of the relevant citizen suit authorities allow citizens (like EPA) to enforce permit

68 *Id.*

69 *See supra* note 53 and accompanying text.

70 In my view, the question whether the public could bring citizen suits is more significant because, frankly, it is hard to imagine EPA—especially in this Administration—making use of its potential authority to enforce more stringent state statutes, in situations in which the state standards conflict with its precise deregulatory initiatives.

71 40 C.F.R. § 70.11(a)(3)(i) (2017) (implementing the CAA); 40 C.F.R. § 123.27(3) (2017) (implementing the CWA); 40 C.F.R. § 271.16(a)(3)(i) (2014) (implementing RCRA); *see also* CWA, 33 U.S.C. § 1342(b)(7) (2012); RCRA, 42 U.S.C. § 6926(b) (2012); CAA, 42 U.S.C. § 7661a(b)(5)(E) (2012).

72 *See* 33 U.S.C. § 1319(d) (up to $25,000 per day, per violation under the CWA); 42 U.S.C. § 6928(a)(3) (up to $25,000 per day of noncompliance for each violation under RCRA); 42 U.S.C. § 7413(d)(1) (up to $25,000 per day under the CAA).

73 *See* 33 U.S.C. § 1365(a); 42 U.S.C. § 6972(a); 42 U.S.C. § 7604(a).

74 28 U.S.C. § 2461 (2012).

75 40 C.F.R. § 19.4 tbl.2 (2017).

76 *See, e.g.*, 33 U.S.C. §§ 1319(a)(1), (3), 1365(a), (f) (under the CWA); 42 U.S.C. §§ 7413(a)(1), (b), 7604(a)(1), (f) (under the CAA).

conditions, without qualification, including in situations in which—as is most often the case—the states are the relevant permit-issuers.[77] Also significantly, § 7002 of RCRA allows citizens to enforce all relevant "regulations," and § 304 of the CAA allows them to enforce a whole host of state implementation plan (SIP) requirements even beyond those implemented through permits under the statute's new source review programs.[78]

Taken together, these provisions encompass virtually every requirement that a state may have established to fulfill its obligation as an authorized state under the relevant programs. No one seriously doubts that these permit conditions, regulations, and SIP requirements are enforceable through citizen suits to the extent that they are necessary to meet the requirements of federal law.[79] The question is whether these state-generated requirements suddenly become unenforceable through citizen suits if EPA takes a deregulatory action, making—for example—an extant state-generated NPDES permit condition no longer essential to ensuring that the permit meets the minimum federal requirements.

While this situation has not often arisen, and thus has not given rise to a body of well-established law, my view is that these permit or SIP conditions—or even, under RCRA, the applicable state regulations—would remain fully enforceable as a matter of federal law. This would remain true until and unless the relevant state modifies them to make them consistent with EPA's newly-relaxed regulatory dynamics; if the state does not choose to do so—immediately or otherwise—nothing in either the relevant statutes, regulations, or case law suggests that the requirements at issue would suddenly lose their status as federally-enforceable requirements. As will be discussed below, in the context of permit requirements, it may be that a given regulated entity could petition for a permit modification.[80] Even there, however, it is not clear that the permittee would be entitled to such a modification as a matter of law. But the more important principle is that the relevant permit condition should remain federally-enforceable unless and until it is modified.

This interpretation finds support both in the relevant statutes and the case law. First and foremost, as mentioned, the relevant citizen-suit provisions are unqualified in providing citizens with the right to enforce the relevant permit conditions, SIP requirements, and regulations.[81] There is simply no hint in the text of these provisions that this authorization is

77 *See* 33 U.S.C. § 1365(a)(1), (f)(6) (CWA); 42 U.S.C. § 6972(a)(1)(A) (RCRA); 42 U.S.C. § 7604(a)(1), (f) (CAA).

78 42 U.S.C. §§ 6972(a)(1)(A), 7604(e).

79 *See, e.g.*, Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 234–36 (1999) (discussing state flexibility in choosing controls to meet local economic and environmental conditions so long as standards are attained and maintained, and that SIPs are legally enforceable as a matter of federal law).

80 *See supra* note 35 and accompanying text.

81 The CWA, CAA, and RCRA provide citizen suit provisions that are without qualification. *See* 33 U.S.C. § 1365; 42 U.S.C. § 6972; 42 U.S.C. § 7604.

limited to those conditions, requirements, or regulations that are—or, in our context, *remain*—essential to ensuring consistency with the minimum federal requirements. Reading such a requirement into these provisions would also be in tension with the judicial review provisions in the relevant statutes, which contemplate, for example, that challenges to EPA's approval of any SIP requirements "may be filed only in the United States Court of Appeals for the appropriate Circuit."[82] Allowing the district courts in citizen-enforcement actions to examine the ongoing appropriateness of SIP conditions would appear to contravene this provision.

The case law is generally consistent with this view. Most notably, the Supreme Court in *Union Electric* expressly rejected the notion that when states impose more stringent requirements, the relevant standards "must be adopted *and enforced* independently of the EPA-approved state implementation plan."[83] The Court found that imposing such a requirement

> would not only require the Administrator to expend considerable time and energy determining whether a state plan was precisely tailored to meet the federal standards, but would simultaneously require States desiring stricter controls to enact and enforce two sets of emission standards, one federally improved plan and one stricter state plan.[84]

Thus, the Court held that states may implement more stringent state requirements through a federally-approved SIP.[85] As recognized by the Court, this in turn renders the relevant requirements enforceable as a matter of federal law.[86]

While not as directly on point, the Supreme Court's opinion in *EPA v. California* is also supportive. In that case, the Court dealt with the question whether, as then drafted, the CWA's federal facilities provision, § 313,[87] subjected federal entities to the need to obtain permits under § 402 of the Act.[88] The Court interpreted the term "requirement," as then used in § 313, to refer only to the CWA's substantive standards and schedules, not its permitting requirements.[89]

In reaching this result, however, the Court in *EPA v. California* considered the implications of § 505, the CWA's citizen suit provision.[90] In particular, the Court focused on the language in § 505(f)(6), which indicates

82 42 U.S.C. § 7607(b)(1) (2012).

83 Union Electric Co. v. U.S. Envtl. Prot. Agency, 427 U.S. 246, 264 (1976) (emphasis added).

84 *Id.*

85 *Id.* at 265.

86 *Id.* at 264–67.

87 33 U.S.C. § 1323 (1970 & Supp. IV 1972).

88 *EPA v. California*, 426 U.S. 200, 201–02 (1976).

89 *Id.* at 227. Congress effectively overruled the Supreme Court's interpretation the next year, amending § 313 to command that federal instrumentalities "be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution." 33 U.S.C. § 1323(a) (2012).

90 426 U.S. at 222–24.

that the "effluent standard[s] and limitation[s]" that citizens may enforce include "a permit of condition thereof issued under [§ 402], which is in effect under this Act (including a requirement applicable by reason of [§ 313])."[91] In reading the term "requirement" in the parenthetical as "referring principally to a 'condition,' not to a 'permit,'" the Court noted that this reading was consonant with the CWA's primary reliance on those conditions "as a means to abate and control water pollution."[92] More to the point here, though, the Court grounded its understanding of the reference to § 313 in § 505(f)(6) in light of the overall thrust of § 505(f)(6):

> The reference in [§] 505(f)(6) to requirements applicable by reason of [§] 313 is to be read as making clear that *all* dischargers (including federal dischargers) may be sued to enforce permit conditions, *whether those conditions arise from standards and limitations promulgated by the Administrator or from stricter standards established by the State*.[93]

Thus, the Court clearly contemplated that, in the NPDES context, citizens can enforce even more stringent conditions imposed by the States.

The lower courts are also generally in accord. In *National Parks Conservation Ass'n, Inc. v. Tennessee Valley Authority*,[94] for example, the United States Court of Appeals for the Sixth Circuit determined that citizens could bring action against a facility that had failed to obtain the required permit under the CAA before modifying its facility.[95] As one basis for its holding, the court noted that as a matter of state law the relevant SIP imposed an ongoing obligation to apply for a permit on those who modified their facilities.[96] This was sufficient to allow the case to go forward because, as the court had previously noted, under § 304(f), "the provisions of the particular state's SIP determine what conduct is actionable under the CAA."[97]

In the CWA context, the Ninth Circuit in *Northwest Environmental Advocates v. City of Portland*[98] similarly found that "[t]he plain language of CWA [§] 505 authorizes citizens to enforce *all* permit conditions."[99] And in *Parker v. Scrap Metal Processors, Inc.*,[100] the United States Court of Appeals for the Eleventh Circuit determined that "a plain reading of [the CWA] indicates that state permits and conditions fall within the effluent standards or conditions covered under this chapter."[101]

91 *Id.* at 222–23 (internal quotations omitted).
92 *Id.* at 223.
93 *Id.* at 224 (second emphasis added) (footnote omitted).
94 480 F.3d 410 (6th Cir. 2007).
95 *Id.* at 416.
96 *Id.* at 419.
97 *Id.* at 418.
98 56 F.3d 979 (9th Cir. 1995).
99 *Id.* at 986.
100 386 F.3d 993 (11th Cir. 2004).
101 *Id.* at 1005–06 (internal quotations omitted).

It should be noted that some of EPA's regulations muddy these statutory waters a bit. In particular, EPA's regulations under both the CWA and RCRA draw a distinction between state-generated requirements that are "more stringent" than the relevant federal requirements, versus those with "a greater scope of coverage" than the relevant federal programs.[102] The general thrust of these regulations is that while more stringent requirements are federally enforceable, those that are "broader in scope" are not.[103] The United States Court of Appeals for the Second Circuit relied in part on this dichotomy in holding that if a particular state-issued permit condition meant what the plaintiffs argued it meant, it would be broader in scope than contemplated under the federal program, and therefore unenforceable in a citizen suit.[104] The United States Court of Appeals for the First Circuit, in a criminal case under RCRA, also acknowledged this dichotomy, but—as one basis for its holding—agreed with EPA that the relevant regulation should be viewed as being "more stringent," not "broader in scope," because it merely imposed additional requirements on those who already were subject to regulation under the federal program.[105]

It is debatable whether these regulations should ever be able to undercut the plain text under the relevant statutes indicating what citizens (and EPA) may enforce.[106] In our context, however, this question is likely to be an academic one in the vast majority of circumstances. If EPA is "only" relaxing requirements, rather than eliminating them, the remaining state regulation would likely qualify as "more stringent," rather than broader in scope.

102 *See* 40 C.F.R. § 123.1(i) (2017) (CWA); 40 C.F.R. § 271.1(i) (2017) (RCRA).

103 *See* 40 C.F.R. § 123.1(i) (providing that a state program with a greater scope of coverage than required by federal law is not part of the federally approved program); 40 C.F.R. § 271.1(i) (providing the same).

104 Atl. States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 359–60 (2nd Cir. 1993).

105 United States v. S. Union Co., 630 F.3d 17, 29–30 (1st Cir. 2010), *rev'd on other grounds*, 567 U.S. 343 (2010).

106 Prospectively, there is an easier way to address this concern if EPA wants to allow the states to include permit or SIP conditions, or even regulations that are not federally-enforceable because they are beyond the scope of anything contemplated under the relevant programs. It merely needs to allow the states to include in the relevant documents provisions flagging any portions thereof that are effective only as a matter of state law. In the NPDES context, for example, a state could indicate that a particular provision is not technically part of the NPDES permit. Indeed, EPA has embraced this exact approach in its regulations governing Title V permits under the CAA. 40 C.F.R. § 70.6(b)(1)–(2) (2017); *see also S. Union Co.*, 630 F.3d at 30. While 40 C.F.R. § 70.6(b)(1) notes that "[a]ll terms and conditions in a [Title V] permit . . . are enforceable by the Administrator and citizens under the Act," subsection (b)(2) of that regulation gives states the power to designate certain requirements as "state only" conditions if they are not required under the relevant federal statutes and regulations; in this event, the relevant requirements are *not* federally enforceable. 40 C.F.R. § 70.6(b)(1), (2). It is worth noting, however, that this designation must happen at the time of permit issuance. 40 C.F.R. § 70.6(a)(1).

V. CONCLUSION

The point of this Essay is that, while our pollution control laws do not—outside of the nonattainment new source review context—significantly limit EPA's ability to relax its extant regulatory requirements, their cooperative federalism dynamics are capable of saving the day, at least in the states that are willing take a stand against significant deregulation. It is absolutely clear that any such states can preserve their existing schemes as a matter of state law. Moreover, the better argument is that any of the relevant requirements would remain federally enforceable so long as they are embodied in forms (*e.g.*, permit conditions or SIP provisions) that are referenced in the relevant citizen suit provisions. Further, as previously mentioned, if enough states indicate their intent not to embrace any deregulatory efforts, their collective force may dissuade EPA from going forward with at least some of the relevant changes.