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## Uncooperative Environmental Federalism 2.0

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**UNCOOPERATIVE ENVIRONMENTAL FEDERALISM 2.0**

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Abstract

Has the Trump Administration made good on its pledges to reinvigorate cooperative federalism and constrain environmental regulatory overreach by the federal government? Perhaps less than one would think. This paper, prepared for the *Hastings Law Journal* symposium, “Revolution of Evolution? Administrative Law in the Age of Trump,” provides a critical assessment of the Trump Administration’s approach to environmental federalism. Despite the Administration’s embrace of “cooperative federalism” rhetoric, environmental policy reforms have not consistently embodied a principled approach to environmental federalism in which the state and federal governments are each encouraged to focus resources on areas of comparative advantage.

## UNCOOPERATIVE ENVIRONMENTAL FEDERALISM 2.0

Jonathan H. Adler\*

### INTRODUCTION

As a presidential candidate, Donald Trump promised to curtail federal environmental regulation. On the campaign trail he inveighed against what he characterized as intrusive and unduly expansive federal rules inhibiting the use of fossil fuels.<sup>1</sup> He further promised to “eliminate the unconstitutional Waters of the U.S. rule” and constrain federal regulation of private land use.<sup>2</sup> The federal government “waste[s] all this money” on environmental protection, candidate Trump explained, “we’re going to bring that back to the states.”<sup>3</sup>

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<sup>1</sup> See, e.g., Steven Mufson & Brady Dennis, *Trump victory reverses U.S. energy and environmental priorities*, WASH POST, Nov. 9, 2016, <https://www.washingtonpost.com/news/energy-environment/wp/2016/11/09/trump-victory-reverses-u-s-energy-and-environmental-priorities/>.

<sup>2</sup> See *Clinton, Trump Split Over WOTUS*, CAPITAL PRESS, Sept. 29, 2016, [https://www.capitalpress.com/clinton-trump-split-over-wotus/article\\_6e64d61d-b8c6-575b-ba95-33502c9a0dcb.html](https://www.capitalpress.com/clinton-trump-split-over-wotus/article_6e64d61d-b8c6-575b-ba95-33502c9a0dcb.html); *Presidential Candidates Answer Farmers’ and Ranchers’ Questions*, FBNEWS, Oct. 14, 2016, <https://www.fb.org/news/presidential-candidates-answer-farmers-and-ranchers-questions>.

<sup>3</sup> Quoted in Ben Adler, “Trump’s budget plan is completely insane — and of course it would screw over the environment,” GRIST, Feb. 27, 2016, <https://grist.org/politics/trumps-budget-plan-is-completely-insane-and-of-course-it-would-screw-over-the-environment/>.

As President, Trump moved quickly to advance his agenda of environmental deregulation.<sup>4</sup> To helm the EPA, Trump selected one of the agency’s most ardent and aggressive critics, Oklahoma Attorney General Scott Pruitt.<sup>5</sup> As a state attorney general, Pruitt filed numerous lawsuits against federal environmental regulations, particularly those promulgated by the EPA.<sup>6</sup> In Pruitt’s view, such regulations burdened economic growth and development and unduly interfered with the rightful prerogatives of state governments.

Some state policymakers were guardedly optimistic that the Trump Administration would reinvigorate cooperative federalism. In June 2017, the Environmental Council of the States released a blueprint for “Cooperative Federalism 2.0,” that sought to outline how state agencies could work with federal officials to achieve environmental goals.<sup>7</sup> Among other things, this document called upon the federal government to reconsider and realign aspects of the state-federal relationship.<sup>8</sup> Some were optimistic that having a former state official lead EPA would help initiate such reforms.

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<sup>4</sup> See Daniel A. Farber, *Trump, EPA, and the Anti-Regulatory State*, THE REG. REV. Jan 24, 2018, <https://www.theregreview.org/2018/01/24/farber-trump-epa-anti-regulatory-state/>; Cary Coglianese, *Let’s Be Real About Trump’s First Year in Regulation*, THE REG. REV., Jan. 29, 2018, <https://www.theregreview.org/2018/01/29/lets-be-real-trumps-first-year-regulation/>. These various deregulatory initiatives have not all fared particularly well in federal court. See Jonathan H. Adler, *Hostile Environment*, NAT. REV. Sept. 27, 2018 (detailing some of the early legal troubles of the Trump Administration’s environmental deregulatory efforts).

<sup>5</sup> See Coral Davenport and Eric Lipton, *Trump Picks Scott Pruitt, Climate Change Denialist, to Lead E.P.A.*, N.Y. TIMES, Dec. 7, 2016.

<sup>6</sup> See Brady Dennis, *Scott Pruitt, longtime adversary of EPA, confirmed to lead the agency*, WASH. POST, Feb. 17, 2017 (noting “Pruitt sued the EPA more than a dozen times during the Obama administration”); Dominique Mosbergen, *Scott Pruitt Has Sued The Environmental Protection Agency 13 Times. Now He Wants To Lead It*, HUFF. POST, Jan. 17, 2017, [https://www.huffpost.com/entry/scott-pruitt-environmental-protection-agency\\_n\\_5878ad15e4b0b3c7a7b0c29c](https://www.huffpost.com/entry/scott-pruitt-environmental-protection-agency_n_5878ad15e4b0b3c7a7b0c29c).

<sup>7</sup> See Cooperative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health,” Environmental Council of the States, June 2017, <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf>.

<sup>8</sup> *Id.* at 5.

Testifying before Congress at his confirmation hearing, Pruitt explained the importance of state participation and leadership in environmental protection:

cooperative federalism must be respected and applied by the EPA with regard to our environmental laws. Congress has wisely and appropriately directed the EPA through our environmental statutes to utilize the expertise and resources of the States to better protect the environment, and for the States to remain our nation's frontline environmental implementers and enforcers. If we truly want to advance and achieve cleaner air and water the States must be partners and not mere passive instruments of federal will.<sup>9</sup>

Once ensconced as head of the agency, Pruitt continued to call for curtailment of the agency's authority and greater respect for the prerogatives of state governments.<sup>10</sup> Under Pruitt's leadership, the EPA announced a "back to basics" agenda that emphasized cooperative federalism and "engaging" with state and local leaders.<sup>11</sup>

Pruitt did not last long as EPA Administrator. He resigned in July 2018, less than eighteen months after his confirmation.<sup>12</sup> Pruitt's deputy, Andrew Wheeler, was then confirmed as his replacement.<sup>13</sup> Despite the change in leadership, the agency's stated commitment to cooperative federalism has persisted. The Administration's 2020 budget overview for the EPA identified "cooperative federalism" as a core part of the EPA's mission, stressing the need to

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<sup>9</sup> Statement of E. Scott Pruitt, Nominee, Administrator, Environmental Protection Agency, Committee on Senate Environment and Public Works, 2017 WL 193530, Jan. 18, 2017.

<sup>10</sup> See Kimberly A. Strassel, *Scott Pruitt's Back-to-Basics Agenda for the EPA*, WALL ST. J., Feb. 17, 2017 (noting Administrator Pruitt's renewed focus on "federalism" in environmental policy); see also David M. Konisky and Neal D> Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 PUBLIUS 345, 349-50 (2018) (discussing Scott Pruitt's environmental agenda at EPA).

<sup>11</sup> See Konisky and Woods, *supra* note \_\_\_, at 355.

<sup>12</sup> See Coral Davenport, Lisa Friedman and Maggie Haberman, *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES, July 5, 2018.

<sup>13</sup> See Lisa Friedman, *Andrew Wheeler, Who Continued Environmental Rollbacks, Is Confirmed to Lead E.P.A.*, N.Y. TIMES, Feb. 28, 2019.

“rebalance the power between Washington and the states to create tangible environmental results for the American people.”<sup>14</sup>

While the Trump Administration emphasized the need to reorient or rebalance federal environmental policy and restore a greater role for state governments in environmental policymaking, the actual environmental policies pursued by the Trump Administration have not represented a principled approach to environmental federalism, let alone a restoration of federal-state relationships that could properly be called “cooperative.”<sup>15</sup>

The Trump Administration’s commitment to supporting and enhancing state policymaking has been inconsistent and somewhat ad hoc. While there have been fairly consistent efforts to limit federal environmental regulation, there has been no real coordinate effort to enhance state flexibility or autonomy. To the contrary, the Trump Administration has pressured states to alter their internal environmental priorities and pursued multiple opportunities to inhibit state efforts to pursue environmental priorities that differ from those of the Trump Administration, particularly in the context of climate change. On the whole, and despite any rhetoric to the contrary, the Trump Administration has emphasized deregulation and support for the continued use of fossil fuels over federalist principles.

However inconsistent the Trump Administration’s approach to environmental federalism, there *is* a case to be made for reorienting the federal-state balance in environmental law. Part I of the article explains how current federal environmental laws and regulations enshrine a jurisdictional mismatch in environmental policy that undermines more effective environmental

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<sup>14</sup> U.S. ENVTL PROT. AGY, EPA BUDGET IN BRIEF: FY 2020.

<sup>15</sup> According to news reports, the relationship between the Trump EPA and state environmental officials has been particularly contentious. See Stephen Lee, *States Demand Wheeler Explain EPA’s Stance on Federalism*, BLOOMBERG ENVIRONMENT, Sept. 27, 2019; *EPA Spurns ECOS After State Group’s Cooperative Federalism Rebuke*, INSIDEEPA, Dec. 12, 2019.

protection efforts. In this regard, an effort to recalibrate the federal government’s environmental efforts is long overdue.

Part II of this article critically assess the Trump Administration’s environmental policies to date in order to assess the extent to which they are consistent with a genuine commitment to cooperative federalism and a meaningful state role in the development and implementation of environmental policy. As this part explains, the Trump Administration’s record is decidedly mixed from a federalism perspective. It evinces a greater commitment to reducing regulatory burdens than to any principled conception of federalism or the proper role of the federal government in environmental policy.

Reinvigorating federalism in environmental policy is admittedly difficult. Much of the jurisdictional mismatch in federal environmental law is baked into the underlying statutory architecture, much of which was enacted nearly half-century ago. Nonetheless, there are steps that could be taken, both by a committed administration as well as by Congress and the states themselves, to help restore a meaningful cooperative federalism. Part III briefly sketches out some of these options before the article concludes.

## I. JURISDICTIONAL MISMATCH IN FEDERAL ENVIRONMENTAL LAW

The core architecture of federal environmental law was erected nearly a half-century ago. Much has been learned about environmental protection and much has changed in the interim. While substantial progress has been made addressing many important environmental matters, serious environmental challenges remain, particularly in areas not targeted by existing environmental laws. Consequently, there are good reasons to question whether existing federal

programs represent the best approach to contemporary environmental problems, particularly those administered by the EPA.<sup>16</sup>

One area ripe for reconsideration is the federal-state balance in environmental law. Concerns about federalism in environmental law have persisted since the 1970s, when Congress began enacting broad environmental regulatory statutes.<sup>17</sup> In the mid-1970s, state governments resisted the EPA’s efforts to force more aggressive air pollution regulation.<sup>18</sup> In the 1980s, the Reagan Administration sought to lessen the burdens of federal environmental regulation, albeit with limited success.<sup>19</sup> In the 1990s, private landowners and local governments sought relief from what they perceived as overweening and excessive federal environmental regulation.<sup>20</sup> During the Obama Administration state attorneys general and resource groups assailed ambitious environmental regulatory initiatives, such as the Clean Power Plan and a broadened definition of “waters of the United States” under the Clean Water Act.

Given the history of opposition to federal environmental regulation, particularly among Republican constituencies, it is unsurprising that candidate Trump campaigned on a platform of

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<sup>16</sup> This is not a new problem. *See generally*, MARC K. LANDY, MARC J. ROBERTS & STEPHEN R. THOMAS, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS, FROM NIXON TO CLINTON 3. (1994) (positing that “the existing organizational and statutory framework inhibits EPA’s ability to ask the right questions”).

<sup>17</sup> *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 253 (2004) (noting persistence of federalism concerns in environmental policy debates); Robert V. Percival, *Symposium – Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995) (noting “federal environmental standards have been a chronic source of friction for federal-state relations”).

<sup>18</sup> *See* Arnold W. Reitze, Jr. *Air Quality Protection Using State Implementation Plans – Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 345–48 (2004) (discussing state lawsuits resisting Clean Air Act implementation and resulting uncertainty as to whether the EPA could force states to implement air pollution control measures); .

<sup>19</sup> *See* LAZARUS, *supra* note \_\_\_, at 99-106 (discussing Regan Administration environmental policies); *see also* James P. Lester, *New Federalism and Environmental Policy*, 16 PUBLIUS 149 (1986) (discussing the Regan Administration’s effort to transfer some authority to state governments).

<sup>20</sup> *See* JONATHAN H. ADLER, ENVIRONMENTALISM AT THE CROSSROADS: GREEN ACTIVISM IN AMERICA xiv-xv (1995).



limiting federal regulation and, upon his election, sought to appoint critics of such regulation to key administration posts.<sup>21</sup>

A common conservative critique of federal environmental law is that it is overly centralized. Under this view, the federal government does too much, and crowds out the opportunity for state governments and local communities to pursue their own environmental priorities. Distinctly local priorities, such as the management of local resources or land-use, get subsumed by federal regulatory edicts.

There is much truth to this critique, but it captures only part of the picture. Federal environmental statutes and implementing regulations centralize much environmental policy decision-making, including concerning distinctly local matters. Yet the fuller story is that centralization of many policy decisions that are more appropriately dealt with at the state or local level has occurred simultaneously with a failure to address those sorts of environmental problems where the federal government needs to take a more active role. The result is a pervasive jurisdictional mismatch in federal environmental law which undermines the more effective achievement of environmental policy goals.<sup>22</sup>

Federal environmental statutes and regulations govern many matters for which the costs and consequences of environmental policy decisions are localized. The argument for federal primacy in such matters is quite weak. Where the costs and benefits of environmental policy choices are known and confined to a given political jurisdiction, there is little reason to believe that transferring responsibility for making such choices to Washington, D.C. will produce

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<sup>21</sup> See generally JAMES MORTON TURNER & ANDREW C. ISENBERG, *THE REPUBLICAN REVERSAL: CONSERVATIVES AND THE ENVIRONMENT FROM NIXON TO TRUMP* (2018) (discussing the history and development of opposition to federal environmental regulation within the Republican Party); see also Jonathan H. Adler, *The Conservative Record on Environmental Policy*, *THE NEW ATLANTIS*, Summer 2013 (same).

<sup>22</sup> See generally Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Protection*, 14 *NYU ENVTL. L.J.* 130 (2005).

systematically better results. Indeed, given the wide geographic, environmental, economic, and political variations across of the country, there are many reasons to suspect that federal policy decisions concerning localized problems will actually be worse than those made by state and local officials. Localized knowledge is difficult to accumulate and deploy from a centralized administrative agency. Regional differences mean that federal policies will often fail to account for local particulars. As a consequence, uniform policies are likely to be over-protective in some areas, and under-protective in others. A policy that effectively reduces air pollution in one part of the country, such as New York City or Atlanta, may not work as well in parts of the country with different mixes of pollution sources, different topography and a different climate. Further, the likelihood that “one size fits all” federal policies operate as “one size fits nobody” will only increase over time, as environmental measures experience diminishing marginal returns and regional variation becomes more important on the margin.

Prioritization is necessary. Federal regulatory resources are necessarily limited. As a consequence, regulatory agencies can maximize the benefits of their regulatory efforts insofar as they concentrate or target their efforts where federal intervention is likely to be the most good, and the least harm. Accordingly, federal regulatory resources are best utilized if they are targeted at those areas where there is an identifiable *federal* interest or where the federal government is in a particularly good position to advance environmental protection, particularly given available alternatives.

Federal regulatory agencies will often have greater scientific and technical expertise than their state and local counterparts, but this does not necessarily translate into superior policymaking. The technical expertise necessary for identifying various trade-offs at the margin does not translate into a superior ability to determine which trade-offs should be made,

particularly insofar as such choices implicate subjective value preferences about how to prioritize competing goods when resources are scarce. Should marginal resources be devoted to controlling emissions of ozone precursors, limiting nutrient runoff into local streams, ensuring proper remediation of an abandoned waste site, or expanding access to health care or nutritional programs? Such choices necessarily implicate normative concerns that are beyond any scientific or technical analysis. Superior expertise certainly supports an argument that federal agencies should assist state and local policymakers and help ensure that environmental policy decisions are more informed, but not that state and local policy choices should be made in Washington, D.C.

One prominent justification for federal environmental regulation of localized pollution concerns is that the lack of a federal “floor” could lead to a destructive “race to the bottom,” in which states adopt suboptimally lax environmental protections in a futile effort to attract off-setting levels of economic investment.<sup>23</sup> As President Richard Nixon warned in 1970, without stringent federal environmental standards “states and communities that require such controls find themselves at a . . . disadvantage in attracting industry, against more permissive rivals.”<sup>24</sup>

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<sup>23</sup> See, e.g., Clifford Rechtschaffen & David L. Markell, *Reinventing Environmental Enforcement & the State/Federal Relationship* 22–25 (2003) (the race-to-the-bottom theory is the “Central underpinning” of federal environmental regulation); WILLIAM A. FISCHER, *THE HOME VOTER HYPOTHESIS* 162 (2001) (noting “a widespread belief that competition among jurisdictions poses a danger of a mutually destructive ‘race to the bottom.’”); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 628 (1996) (“Fears of a welfare-reducing race to the bottom represent one of the central underpinnings of federal environmental regulation in the United States”); Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) (detailing theory); see also Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271 (1996-97).

<sup>24</sup> President Richard Nixon, Special Message to the Congress on Environmental Quality, February 10, 1970, available at <http://www.presidency.ucsb.edu/ws/?pid=2757>; see also See U.S. House of Representatives, Committee on Interstate and Foreign Commerce, H.R. REP. No. 91-1146, 91st Cong., 2d Sess. (1970) (claiming federal environmental standards would “preclude efforts on the part of States to compete with each other in trying to attract new plants and facilities without assuring adequate control of large scale emissions therefrom.”).

The race-to-the-bottom theory presumes that interjurisdictional competition creates a prisoner's dilemma for states. Each state wants to attract industry for the economic benefits that it provides. Each state also wishes to maintain an optimal level of environmental protection. However, in order to attract industry, the theory holds, states will lower environmental safeguards so as to reduce the regulatory burden they impose upon firms. This competition exerts downward pressure on environmental safeguards as firms seek to locate in states where regulatory burdens are the lowest, and states seek to attract industry by lessening the economic burden of environmental safeguards. Because the potential benefits of lax regulation are concentrated among relatively few firms, these firms can effectively oppose the general public's preference for environmental protection regulation. This will lead to social welfare losses even if environmental harm does not spill over from one state to another. The result, according to the theory, is the systematic under-regulation of environmental harms, and a need for federal intervention.<sup>25</sup>

The race-to-the-bottom theory may have had some basis in the 1960s and 1970s, but there is little reason to believe that this dynamic inhibits state regulatory efforts today, particularly given how aggressive many states are in environmental policy. Empirical evidence that states race to relax their environmental regulations in pursuit of outside investment is decidedly lacking. If the prospect of interstate competition discourages state-level environmental regulation, it is hard to explain why state environmental regulation often preceded federal

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<sup>25</sup> Although theoretically plausible, the race-to-the-bottom hypothesis has come under serious attack. *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). Among other works, Revesz draws upon Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333 (1988). For this author's view, see Adler, *Jurisdictional Mismatch*, *supra* note \_\_, at 151-54; *see also* Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation* 31 HARV. ENVTL. L. REV. 67, 79-80 (2007).

intervention and why many states adopt more stringent measures than federal regulations require. Numerous studies have been conducted attempting to determine whether a race-to-the-bottom can be observed in the context of environmental regulation, and they have generally failed to find any evidence that environmental quality worsens when states are given more flexibility to set their own priorities.<sup>26</sup> Indeed, some studies have found precisely the opposite: that when states have more flexibility to set their own environmental priorities they increase their efforts.<sup>27</sup>

None of the above should be taken as an argument against all federal environmental regulation. For just as the federal government is overly interventionist in localized environmental concerns, the federal government is unduly absent in areas where a federal presence is most necessary. That is, the undue centralization of some environmental concerns co-exists with substantial federal abdication from concerns the federal government should be addressing. The federal government devotes relatively little of its regulatory resources on those matters for which the federal government possesses a comparative advantage and abdicates its responsibility to provide the data and knowledge base necessary for successful environmental regulation at all levels of government.

It is often remarked that environmental problems do not respect state borders. This is unquestionably true, and the observation provides ample justification for federal measures to

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<sup>26</sup> For a review of the available empirical literature, see Daniel L. Millimet, *Environmental Federalism: A Survey of the Empirical Literature*, 64 CASE WEST RES. L. REV. 1669 (2014); See also Bruce G. Carruthers and Naomi R. Lamoreaux, *Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards*, 54 J. ECON. LIT. (2016); Wallace E. Oates, *A Reconsideration of Environmental Federalism*, in RECENT ADVANCES IN ENVIRONMENTAL ECONOMICS 1, 11-17 (John A. List & Aart de Zeeuw eds., 2002) (summarizing empirical literature).

<sup>27</sup> See, e.g., Daniel L. Millimet, *Assessing the Empirical Impact of Environmental Federalism*, 43 J. OF REGIONAL SCI. 711 (2003); PAUL TESKE, REGULATION IN THE STATES (180-81 (2004) (finding states are more likely to increase, rather than decrease, air quality regulation in response to actions taken in neighboring states, and concluding that “the race to the bottom is not a factor here”); *id.* at 191-92 (finding same pattern in groundwater regulation).

address transboundary pollution problems.<sup>28</sup> Where pollution or other environmental problems span jurisdictional borders there is less reason to believe state and local jurisdictions will respond adequately.

Consider a simple transboundary pollution problem involving two states, A and B. State A is unlikely to adopt sufficient controls to prevent environmental harm within the State B because it would bear the primary costs of any such regulatory measures, whereas the primary beneficiaries of such controls would be elsewhere. Indeed, absent some external controls or dispute resolution system, the presence of interstate spillovers can actually encourage policies that externalize environmental harms, such as subsidizing development near jurisdictional borders so as to ensure that environmental harms fall disproportionately “downstream.” Policymakers in State B may wish to take action, but they will be unable to control pollution created in State A without State A’s cooperation. Even where polluting activity imposes substantial environmental harm within State A, the externalization of a portion of the harm is likely to result in the adoption of less optimal environmental controls.

Despite the need for federal involvement to help protect downwind and downstream jurisdictions from their polluting neighbors, interstate spillovers have been largely an afterthought in federal environmental law. Of all the pages of the U.S. Code devoted to environmental protection, only a small portion focuses on the control of interstate pollution.<sup>29</sup> Worse, what provisions there are have (until recently) rarely been invoked, and even more rarely

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<sup>28</sup> See, e.g., Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931 932 (1997) (“Given the inherent difficulties in regulation by any single state, transboundary pollution would seem to present a clear case for shifting regulatory authority from local to more centralized levels of governance.”).

<sup>29</sup> See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1998).

invoked due to federal initiative. Downwind states have been more aggressive at seeking to control interstate spillovers than has the federal government.<sup>30</sup>

Global climate change is perhaps the most pressing environmental concern of the twenty-first century. As a global phenomenon, climate change does not respect national boundaries, let alone those of the individual states. At the same time, there is little that any individual state can do to influence greenhouse gas concentrations in the atmosphere.<sup>31</sup> This is a policy area in which the federal government is clearly better positioned than state governments to have an influence, and yet no portion of federal environmental law enacted by Congress squarely and expressly authorizes regulation of greenhouse gas emissions. Insofar as the federal government has legal authority to regulate here, it is only because it was dragged to court by, among other litigants, individual states.<sup>32</sup>

The problem is not that the federal government does too much, or that it does too little. Rather the problem is that the federal government does too much of the wrong things, and too little of the right things, to maximize the effectiveness of the federal government’s environmental protection efforts.

## II. COOPERATIVE FEDERALISM IN THE TRUMP ADMINISTRATION

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<sup>30</sup> As even those who support a fairly aggressive federal environmental presence acknowledge, “EPA has not done a very good job of addressing transboundary pollution.” Rena I. Steinzor, *EPA and Its Sisters at 30: Devolution, Revolution, or Reform?*, 31 ENVTL. L. REP. 11086, 11092 (2001).

<sup>31</sup> See Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PENN. L. REV. 101, 103 (2007) (noting it is “well understood that these state-level efforts, even those of large states such as California, will have little impact on global emissions and hence little impact on global climate.”).

<sup>32</sup> See *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding, among other things, that the EPA possess statutory authority to regulate greenhouse gases as air pollutants under the Clean Air Act).

While Trump Administration officials have expressed an interest in restoring a more proper federal-state balance in environmental regulation, the Administration’s actions have evinced a greater desire to curtail federal environmental regulation than to focus federal efforts on interstate concerns or to empower states to adopt their own regulatory policies. While the Trump Administration has sought to scale back some of the Obama Administration’s more ambitious regulatory initiatives, it has not established a new set of regulatory priorities in which federalism appears to play a major role. To the contrary, while scaling back climate change initiatives, the EPA has resisted efforts to curtail cross-boundary air pollution while simultaneously threatening sanctions against state governments that have not been sufficiently aggressive at controlling local air and water pollution.<sup>33</sup>

The EPA’s approach to Clean Air Act enforcement highlights the failure to make cooperative federalism a core component of Administration policy in a serious way. Since 2017, the EPA has taken action against states that have failed to comply with federal requirements for local air pollution control while resisting efforts to control transboundary air pollution that makes it more difficult for downwind states to meet federal air quality standards. Although California has a reputation as a particularly aggressive environmental regulator, it has not kept pace with the CAA’s requirements to submit adequate State Implementation Plans for criteria air pollutants throughout the state. In September 2019 the EPA threatened to invoke the CAA’s sanction provisions, and potentially suspend federal highway funding in the state, if California did not clear the backlog.<sup>34</sup> Yet when northeastern states sought the Administration’s help in controlling

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<sup>33</sup> See, e.g., Alexa Diaz & Anna M. Phillips, *EPA to California: You’re Also “Failing” to Meet Water Pollution Standards*, L.A. TIMES, Sept. 26, 2019; Juliet Eilperin, Brady Dennis, & Josh Dawsey, *EPA Tells California It Is “Failing to Meet Its Obligations” to Protect the Environment*, WASH. POST, Sept. 26, 2019.

<sup>34</sup> See Juliet Eilperin & Dino Grandoni, *Trump Officials Threaten to Withhold Highway Funding from California for Its “Chronic Air Quality Problems*, WASH. POST, Sept. 24, 2019; see also Marianne Lavelle, *How Trump Is Using*



upwind air pollution that makes it more difficult for downwind states to develop and implement their own compliant SIPs, the Administration dragged its heels, forcing downwind states to seek relief in federal court.<sup>35</sup>

Among the Administration’s greatest environmental accomplishments to date are successful efforts to accelerate the cleanup of hazardous waste sites under the federal Superfund program,<sup>36</sup> yet it is not clear why such cleanups would be a particularly high priority for an administration that touts cooperative federalism as a core policy principle. Barring extreme circumstances, the cleanup and restoration of hazardous waste sites is the sort of environmental concern state and local governments are well able to handle.<sup>37</sup> A “National Priorities List” of waste sites that are truly “national priorities” should be rather short.<sup>38</sup> It is one thing for the EPA to provide technical assistance and aid emergency cleanup, as was done when the Superfund program began. It is quite another for the federal government to take the lead in cleaning up individual sites, and continuing to add sites to the federal program decades after any emergency

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*Environment Law to Attack California. It’s Not Just About Auto Standards Anymore*, INSIDE CLIMATE NEWS, Nov. 5, 2019.

From a federalism perspective, it might have been interesting for California to call the Administration’s bluff, as there is a serious argument that the CAA’s highway fund sanctions are unconstitutional under *South Dakota v. Dole* and *NFIB v. Sebelius*. See Adler & Stewart, *supra* note \_\_, at \_\_. Subsequent news reports, however, indicate that California and the EPA worked cooperatively to address the apparent SIP backlog. See Michael Wilner, *EPA Sees California Progress on Clean Air Backlog After Threats to Highway Funding*, MCCLATCHY NEWS BUREAU, Jan. 7, 2020.

<sup>35</sup> See *New York v. EPA*, 781 Fed.Appx. 4 (D.C. Cir. 2019) (rejecting EPA “close out rule” for failing to require upwind states to control emissions of ozone precursors affecting ozone levels in downwind states prior to 2021); see also *New York v. EPA*, 921 F.3d 257 (D.C. Cir. 2019) (challenge to EPA decision not to expand Ozone Transport Region to include more upwind states).

<sup>36</sup> See U.S. EPA, “Superfund Task Force Issues Final Report and Announces Plans to Continue Program Improvements Moving Forward,” Sept. 9, 2019, <https://www.epa.gov/superfund/superfund-news#stff>.

<sup>37</sup> See generally Jonathan H. Adler, *Reforming Our Wasteful Hazardous Waste Policy*, 17 NYU ENVTL L.J. 724 (2008).

<sup>38</sup> In remarks at Case Western Reserve University School of Law on October 18, 2019, EPA Administrator Andrew Wheeler remarked that “site on the National Priorities List should be just that – a *national priority*.” (Copy of remarks on file with author.)

justification has passed.<sup>39</sup> As with air pollution, the EPA is showing more interest in the local than in those concerns that are more properly national.

Looking at some specific policy areas can shed light on the extent to which a concern for federalism has informed the Trump Administration’s environmental policies. This article will examine two: The Revision of the Regulatory Definition of “Waters of the United States” under the Clean Water Act and the Revocation of California’s Waiver from Federal Preemption of Vehicle Emission Standards.

#### A. *Waters of the United States*

Revising the regulatory definition of “waters of the United States” (aka “WOTUS”) was a top deregulatory priority of the Trump Administration. Candidate Trump had inveighed against the Obama Administration’s expansive reinterpretation of WOTUS,<sup>40</sup> and preliminary court rulings suggested the prior rule was legally vulnerable.<sup>41</sup> Therefore it was no surprise that the Trump Administration took action to both rescind the WOTUS rule adopted by the Obama Administration in 2015 and promulgate a narrower WOTUS definition of its own.<sup>42</sup>

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<sup>39</sup> See U.S. EPA, “EPA Updates Superfund National Priorities List, Advancing the Agency’s Commitment to Protect Human Health and Expedite Cleanups Across the Country,” Oct. 30, 2019, <https://www.epa.gov/newsreleases/epa-updates-superfund-national-priorities-list-advancing-agencys-commitment-protect>.

<sup>40</sup> See *infra* notes \_\_ and accompanying text.

<sup>41</sup> See *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F.Supp.3d 1356 (S.D. Ga. 2018); *Georgia v. Wheeler*, \_\_ F.Supp.3d \_\_ (S.D. Ga. 2019); *Texas v. USEPA*, 389 F.Supp.3d 497 (S.D. Tex. 2019).

<sup>42</sup> This process was initiated by Executive Order. See Exec. Order No. 13778, 82 Fed. Reg 12497, Feb. 28, 2017 (Presidential Executive Order Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule).

The federal WOTUS definition is important because it delineates the scope of federal regulatory authority under the Clean Water Act (CWA). The Act prohibits “the discharge of any pollutant by any person” without an applicable permit.<sup>43</sup> “Discharge of any pollutant” is defined as “any addition of any pollutant to navigable waters from any point source,”<sup>44</sup> and the term “pollutant” is defined broadly to include dredged material, rock, sand, solid and industrial waste, and chemical waste, among other things.<sup>45</sup> Of particularly importance for the scope of federal regulatory jurisdiction, the CWA defines “navigable waters” as “waters of the United States.”<sup>46</sup> Although the CWA identifies the congressional purposes that motivated the statute’s passage, the law itself does not otherwise define the scope this term, so how it is interpreted by the agencies charged with enforcing the CWA – the EPA and U.S. Army Corps of Engineers – is key.

In 1975, a federal district court held that the CWA’s prohibition applied beyond traditionally navigable waters and included wetlands.<sup>47</sup> In the 1980s, the Army Corps and EPA promulgated regulations defining “waters of the United States” to include 1) all waters used for interstate commerce;<sup>48</sup> 2) all interstate waters and wetlands;<sup>49</sup> 3) all tributaries or impoundments of such waters;<sup>50</sup> and, most significantly:

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<sup>43</sup> 33 U.S.C. §1311(a).

<sup>44</sup> 33 U.S.C. §1362(12). The full definition reads:

The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

<sup>45</sup> 33 U.S.C. §1362(6).

<sup>46</sup> 33 U.S.C. §1262(7).

<sup>47</sup> *Natural Resources Defense Council v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975).

<sup>48</sup> 33 C.F.R. § 328.3(a)(1).

<sup>49</sup> *Id.* at § 328.3(a)(2).

<sup>50</sup> *Id.* at § 328.3(a)(4), (5).

[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds) the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.<sup>51</sup>

This definition explicitly included “wetlands adjacent to waters (other than waters that are themselves wetlands).”<sup>52</sup> This WOTUS definition asserted federal regulatory authority over a substantial portion of the country.<sup>53</sup>

This WOTUS definition was predictably controversial and became a legal and political flashpoint. The Bush Administration’s issuance of a revised wetlands delineation manual in 1989 helped spark the property right movement in the early 1990s.<sup>54</sup> This, in turn, led to substantial amounts of litigation, as landowners challenge the authority of the Army Corps and EPA to regulate their land.<sup>55</sup> Although the CWA’s definition of “navigable waters” as “waters” indicates

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<sup>51</sup> *Id.* at § 328.3(a)(3).

<sup>52</sup> *Id.* at § 328.3(a)(7).

<sup>53</sup> See *Rapanos*, 547 U.S. 715, \_\_ (2006) (plurality opinion of Scalia, J.) (noting agencies asserted jurisdiction over “270 to 300 million acres of swampy lands in the United States.”).

<sup>54</sup> See Warren Brookes, *The Strange Case of the Glancing Geese*, FORBES, Sept. 2, 1991, at 104 (reporting that the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands “extended the reach of the 1972 Clean Water Act,” prompting “angry protest from traditional Republican constituencies, farmers, businesses, real estate developers, landowners, and local governments.”); see also Richard Miniter, *Muddy Waters: The Quagmire of Wetlands Regulation*, POL’Y REV., Spring 1991, at 70; Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, in LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION 17 (Bruce Yandle ed. 1995).

<sup>55</sup> See Revised Definition of “Waters of the United States,” Proposed Rule, 84 Fed. Reg. 4159 (Feb. 14, 2019) (“From the earliest rulemaking efforts following adoption of the 1972 CWA amendments, to the agencies most recent attempt to define ‘waters of the United States’ in 2015, the sparse statutory definition has spurred substantial

that federal regulatory authority extends beyond navigable-in-fact waters, many landowners and industry groups objected to the regulation of lands and remote waterbodies as “waters of the United States.”

Opponents of an expansive definition argued that a broad WOTUS definition exceeded the scope of statutory authorization and stretched the boundaries of federal regulatory authority under the Constitution. The Supreme Court ultimately agreed. In 2001 and 2006, the Court concluded that the EPA and Army Corps had gone overboard in their assertion of regulatory authority. First in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”), the Court rejected the agencies’ assertion of CWA jurisdiction over waters that lacked a “significant nexus” to navigable waters.<sup>56</sup> Specifically, the Court concluded that an isolated intrastate pond is not included within the “waters of the United States” even though it constitutes a “water” and is *within* the United States.<sup>57</sup>

Five years later, in *Rapanos v. United States*, the Court reaffirmed the central holding of SWANCC.<sup>58</sup> Here a majority of the Court (albeit in two separate opinions) agreed that “waters of the United States” only extend to those waters and wetlands that have a “significant nexus” to truly navigable waters and are “inseparably bound up with the ‘waters’ of the United States.”<sup>59</sup> Although the two opinions comprising the *Rapanos* majority differed in some respects, they

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litigation testing the meaning of the phrase.”). For an overview of some of the early litigation challenging the scope of federal regulatory authority under the CWA, see Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*, 29 ENVTL L. 1 (1999).

<sup>56</sup> *Id.*

<sup>57</sup> See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs* (SWANCC), 531 U.S. 159 (2001) (holding that “waters of the United States” does not extend to isolated waters and wetlands).

<sup>58</sup> 547 U.S. 715 (2006).

<sup>59</sup> SWANCC, 531 U.S. at 168 (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985)).

both acknowledged meaningful limits on federal regulatory jurisdiction and the constitutional concerns lurking in the background.<sup>60</sup>

*SWANCC* and *Rapanos* generated a great deal of uncertainty about the scope of CWA jurisdiction. The George W. Bush Administration considered adopting a new regulation to define WOTUS in light of the Court’s guidance, but demurred when it became clear any such effort would be controversial. While regulated waters subject to the CWA’s permitting requirements extend beyond traditionally navigable waters to some degree, there are also meaningful limits that fall well short of every hydrologically significant part of the United States

In order to reduce uncertainty, and reassert broad federal regulatory jurisdiction, the Obama Administration promulgated a new WOTUS definition in 2015.<sup>61</sup> This definition sought to identify those hydrological connections that, alone or in combination, sufficiently effect navigable waters so as to provide a sufficient basis for federal regulatory jurisdiction. Among other things, the 2015 regulation adopted an expansive interpretation of those waters and wetlands that could be deemed “neighboring” to other jurisdictional waters so to come within federal regulatory control.<sup>62</sup>

As soon as the 2015 WOTUS rule was promulgated, litigation ensued, much of it filed by state attorneys general who objected to the Army Corps and EPA’s aggressive assertion of federal regulatory authority. In August 2015, before the rule could even take effect, the first of those suits bore fruit, as a federal district court in North Dakota entered a preliminary injunction

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<sup>60</sup> For a fuller examination of each decision, see Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205 (2001) (*SWANCC*); Jonathan H. Adler, *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL L. & POL’Y REV. 1 (2006).

<sup>61</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (Jun. 29, 2015).

<sup>62</sup> *See id.* at 37,104-05.

against the rule, concluding the thirteen plaintiff states in that case were likely to prevail in their claim that the agencies “violated [their] Congressional grant of authority” in the rule.<sup>63</sup> Among other things, the court concluded that the new WOTUS definition likely encompassed “vast numbers of waters that are unlikely to have a nexus to navigable waters,” and therefore stretched beyond the agencies’ statutory authority.<sup>64</sup>

Additional suits were filed. In the end, over half of the fifty states were plaintiffs challenging the 2015 WOTUS. After significant legal wrangling over where challenges to the WOTUS rule should be filed,<sup>65</sup> courts in three jurisdictions concluded the Army Corps and EPA had exceeded the scope of their lawful authority in promulgating the rule.<sup>66</sup>

In February 2017, President Trump issued an Executive Order on “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule,” directing the EPA and Army Corps to revise the WOTUS definition.<sup>67</sup> This order specifically called upon the agencies to give “due regard” for the constitutional role of the States and encouraged adoption of a final rule that hewed closely to the narrow opinion of federal regulatory jurisdiction outlined by Justice Scalia’s plurality opinion in *Rapanos*.

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<sup>63</sup> See *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

<sup>64</sup> *Id.* at 1051. The court also found portions of the rule were likely not a “logical outgrowth” of the proposed rule, as is generally required under the Administrative Procedure Act. *Id.* at 1058.

<sup>65</sup> See *Nat’l Assn of Mfrs v. Dep’t of Def.*, 138 S.Ct. 617 (2018) (holding challenges to the WOTUS definition must be filed in federal district courts, as opposed to directly in the circuit courts of appeal).

<sup>66</sup> See *Georgia v. Pruitt*, 326 F.Supp.3d 1356 (S.D. Ga. 2018); *Georgia v. Wheeler*, \_\_\_ F.Supp.3d \_\_\_ (S.D. Ga. 2019); *Texas v. USEPA*, 389 F.Supp.3d 497 (S.D. Tex. 2019).

<sup>67</sup> See Exec. Order No. 13778, 82 Fed. Reg 12497, Feb. 28, 2017.

The agencies responded by first rescinding the 2015 WOTUS definition.<sup>68</sup> Then, in January 2020, the agencies promulgated new, narrower definition.<sup>69</sup> This new definition, as explained by the agencies, was intended to pursue the CWA’s water pollution control objectives while also following Congress’s direction to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.”<sup>70</sup> Asserting that CWA jurisdiction is tied to Congress’s “traditional jurisdiction over navigable waters,” the new definition sought to ensure that assertions of jurisdiction are related to a significant nexus with such waters.<sup>71</sup> It further sought, as much as possible, to “establish bright categorical lines” so as to provide “clarity and predictability” for regulatory and regulated alike.<sup>72</sup>

These emphases ensured that the new definition would be less expansive than that adopted in 2015, thereby leaving greater room for state governments to exercise primary authority over land and water within their boundaries. The new WOTUS definition includes all those waters traditionally considered to be “navigable waters,” tributaries to such waters, and some lakes, ponds, and ditches, and wetlands adjacent to all such waters. The proposed definition is both more clearly defined and more circumscribed than that promulgated by the Army Corps and EPA in 1986 and 2015. As such, this definition is more consistent with the text of the CWA

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<sup>68</sup> Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019). The agencies also sought, unsuccessfully, to delay the effective date of the 2015 WOTUS rule, but this effort was unsuccessful. *See* South Car. Coastal Conserv. League, 318 F. Supp. 3d 959 (D.S.C. 2018) (rejecting WOTUS suspension rule).

<sup>69</sup> *See* The Navigable Waters Protection Rule: Definition of “Waters of the United States,” Final Rule, [https://www.epa.gov/sites/production/files/2020-01/documents/navigable\\_waters\\_protection\\_rule\\_prepublication.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepublication.pdf) [Publication in Federal Register pending.]

<sup>70</sup> 84 Fed. Reg. 4163 (quoting 33 U.S.C. §1251 (b)).

<sup>71</sup> 84 Fed. Reg. 4164.

<sup>72</sup> *Id.*



and applicable Supreme Court precedent than prior definitions. In this regard, the new WOTUS definition also embodies federalism principles in that it does not presume that the federal government must bear primary responsibility for the protection of water quality, and recognizes that not all waters (or wetlands) *within* the United States are “waters of the United States.”

At the same time, some of the rules details suggest the final contours of the rule were motivated as much with reducing federal regulatory jurisdiction for its own sake as they were with trying to strike a principled balance between federal and state authority. The rule shows little concern for the need to focus federal regulatory resources on those waters and wetlands in which there is a distinct federal interest, such as the existence of transboundary resources or interstate spillovers. For example, there is an undeniable federal interest in regulating the filling or dredging of wetlands where such activities would cause or contribute to interstate pollution problems or compromise water quality in interstate waterways. Where the effects of wetland modification are more localized, the federal interest is less clear. Not coincidentally, in the latter case, the legal basis for federal jurisdiction is also more attenuated.

Perhaps the most conspicuous example of this is the final rule’s exclusion of interstate waters as a distinct category of waters included within the definition of “Waters of the United States.” This omission is concerning on both statutory and policy grounds. As a statutory matter, the category of waters considered to be “waters of the United States” would seem to include interstate waters almost by definition. After all, what are “waters of the United States” if not those waters that concern, or are contained in, more than one of the United States. Indeed, it would seem that of all non-navigable waters, those that touch and concern more than one state fit more securely within the definition of “waters of the United States” than those contained wholly within a single state. The latter may simply be “waters of the state.” The former cannot.

The exclusion is perhaps more inexplicable on federalism grounds, as interstate waters are precisely those waters that are least likely to be adequately protected by state and local governments acting on their own. There is ample evidence that state and other efforts to address water pollution began to produce benefits prior to the enactment of the CWA.<sup>73</sup> The history of state-level wetland regulation further suggests a great willingness on the part of states to act in defense of wetland resources within their boundaries.<sup>74</sup> Yet there is little reason to expect states to be as aggressive where the benefits of any conservation actions they may take will accrue to other jurisdictions.

Because of the particular problems that result from interstate spillovers, and the incentives faced by states that share transboundary or interstate water resources, the EPA and Army Corps should pay particular attention to whether the proposed rule provides adequate protection for interstate waters. It may be true, as the agencies maintained in the rulemaking, that most interstate waters will be otherwise included within the definition of the “waters of the United States,” yet the agencies provided little support for this assertion. Indeed, the agencies acknowledged they “lacked the ability” to determine the effect of this exclusion.

Given that interstate waters are readily included within the statutory phrase and that the nature of transboundary resources makes federal action particularly appropriate, the agencies would have demonstrated a principled commitment to federalism by including interstate waters in the revised WOTUS definition, at least presumptively.

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<sup>73</sup> See, e.g., David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, NBER Working Paper No. 23070 (June 2018); see also A. Myrick Freeman, *Water Pollution Policy*, in *Public Policies for Environmental Protection* 114 (Paul Portney ed., 1990)(noting pre-CWA improvements in water quality).

<sup>74</sup> This history is summarized in Adler, *Wetlands, Waterfowl and Mr. Wilson*, at 41-54.

Adopting a clearer and more focused definition of “waters of the United States” that provides regulatory certainty is certainly beneficial for the regulated community and will give state governments more leeway to set their own environmental policy priorities on the margin. There are reasons to believe that state policymakers will be more likely to act when they are more certain of the potential benefits of their interventions. A clearer and more circumscribed definition may also help facilitate environmental conservation efforts by other non-federal actors. Yet the revised definition, as promulgated, is disappointing in its adherence to principles of federalism.

### B. California Vehicle Emission Standard Waiver

The Trump Administration has also shown little regard for federalist principles and state prerogatives in its decision to revoke California’s waiver from preemption of vehicle emission standards under the Clean Air Act (CAA).

Under the Clean Air Act, states are generally precluded from adopting their own vehicle-emission standards.<sup>75</sup> In Congress’s judgment, allowing different states to adopt different rules would create a costly and confusing regulatory patchwork for automakers and increase prices.<sup>76</sup> Complying with a uniform national standard is easier for automakers to meet, as it ensures any car produced for the U.S. market can be sold anywhere in the country. Indeed, the automakers’ desire to avoid the possibility of variable state standards is the reason Congress adopted preemptive federal vehicle emission standards in the first place.<sup>77</sup>

California, however, is a special case. Because California adopted its first vehicle emission controls before the CAA was adopted, its authority to enact its own vehicle emission

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<sup>75</sup> See 42 U.S.C. § 7543(a) (“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.”).

<sup>76</sup> See *Motor & Equipment Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (noting Congress “expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states all, that is, except California” due to “the spectre of an anarchic patchwork of federal and state regulatory programs.”).

<sup>77</sup> See E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330 (1985) (discussing the role of the autotmakers in the enactment of the first federal vehicle emission standards). The major U.S. automakers desire to avoid multiple vehicle emission standards also served as leverage when the Obama Administration sought to set the first federal greenhouse gas emission standards for motor vehicles. See Adam J. White, *Obama’s Cynical Energy Agenda*, NAT’L AFF., Summer 2012, at 24-26.

standards is grandfathered, subject to certain conditions.<sup>78</sup> Specifically, the CAA allows California to obtain a waiver of preemption from the EPA for standards that are “at least as protective” as the applicable federal standards.<sup>79</sup> If, however, the EPA determines that California does not “need such State standards to meet compelling and extraordinary conditions,” the waiver application must be denied.<sup>80</sup>

Once a waiver is obtained, and only then, other states have the option of adopting California’s standards as their own as part of a CAA State Implementation Plan.<sup>81</sup> In effect, once California obtains a waiver, other states are given the choice of adopting California’s standards or defaulting to whatever federal standards are in place. For the automakers, this means complying with either one uniform federal standard, or two standards – the EPA’s and California’s – that are applicable on a state-by-state basis.

Up until 2008, when California sought a vehicle emission standard waiver, the EPA typically obliged, largely due to California’s distinct – and distinctly severe – urban air pollution problems.<sup>82</sup> Although the major U.S. automakers have often opposed such waivers, allowing California to adopt specialized rules to address smog and soot is in line with the relevant CAA provisions, and preserves California as something of a laboratory for emission control policies. Prior to 2008, however, California always sought waivers for vehicle emission controls concerning traditional air pollutants.

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<sup>78</sup> The language in the U.S. Code does not specifically mention California. Rather, one condition for a state having the ability to set its own vehicle emission standards is that it had adopted its first standards prior to March 30, 1966, and California is the only state that complies with this condition. *See* 42 U.S.C. § 7543(b)(1).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at § 7543(b)(1)(B).

<sup>81</sup> *See* 42 U.S.C. § 7507(2).

<sup>82</sup> *See* Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 293 (2003) (discussing the history of EPA approvals of California waiver requests).

Greenhouse gas emission regulations present quite different considerations from traditional air pollutants because their effects, unlike those of particulates or smog-forming emissions, are not localized.<sup>83</sup> Global climate change is a global phenomenon. The relevant airshed is not the Los Angeles basin or South Coast Air Quality Management District, but earth's entire atmosphere. The degree of warming experienced by California is a consequence of atmospheric concentrations of carbon dioxide and other greenhouse gases, not local conditions or controls. Thus even were the adoption of statewide GHG controls likely to reduce greenhouse warming, they would not address any distinctly California-based concern. California may face specific threats from the effects of global warming, but the climate-forcing of carbon dioxide and other greenhouse gases is dispersed throughout the world. California was granted the ability to seek waivers to enact measures addressing pollution problems in California, not a roving authority to drive environmental policy for the nation as a whole.

In 2008 the Bush Administration denied California's request for a GHG emission standard waiver.<sup>84</sup> Specifically, the Bush EPA concluded that California did not need to limit GHG emissions in order "to meet compelling and extraordinary conditions" within the state. Rather, any benefits from such emission controls would be felt globally. Under the Bush Administration's interpretation of the CAA, this required rejecting the waiver.

This position was based upon a plausible interpretation of the CAA's statutory language, as applied to GHGs. Yet it was not the last word on California's waiver request. After the 2008 election, the Obama Administration reversed course. Almost immediately after taking office, the

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<sup>83</sup> For a broader and more extended discussion of how federalism principles are implicated by climate policies, see Jonathan H. Adler, *Hothouse Flowers: The Vices and Virtues of Climate Federalism*, 17 TEMP. POL & CIV. RTS. L. REV. 443 (2008).

<sup>84</sup> See California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

Obama Administration initiated a review of the waiver denial.<sup>85</sup> The EPA reconsidered and granted the waiver request in July 2009,<sup>86</sup> before using the prospect of two separate vehicle emission standards as leverage to induce the automakers acquiescence to federal GHG standards.<sup>87</sup> Although industry groups filed suit against the waiver grant, the challenge ultimately failed.<sup>88</sup> A subsequent waiver was also granted in 2013.<sup>89</sup>

Like the Obama Administration before it, the Trump Administration has also sought to revisit its predecessor's interpretation of the CAA's waiver provisions. As part of the Trump Administration's revision and reevaluation of federal automobile fuel economy standards, it concluded that California's GHG emission standards are preempted and the waiver must be withdrawn.<sup>90</sup> According to the EPA, and the National Highway Transportation Safety Administration (NHTSA), allowing California to maintain separate standards would prevent the adoption of a nationally uniform fuel economy standard for new vehicles. Under this interpretation, any state-level GHG emission standards are preempted by the Energy Policy and Conservation Act (EPCA), without regard for the existence of or eligibility for a CAA waiver.<sup>91</sup>

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<sup>85</sup> See Remarks by the President on Jobs, Energy Independence, and Climate Change East Room of the White House, January 26, 2009, *available at* <https://obamawhitehouse.archives.gov/blog/2009/01/26/peril-progress-environment>.

<sup>86</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009).

<sup>87</sup> See White, *supra* note \_\_

<sup>88</sup> See Chamber of Commerce of the United States v. EPA, 642 F.3d 192 (D.C. Cir. 2011). Of note, this suit was filed by the U.S. Chamber of Commerce and auto dealers, not the automakers, as the major automakers had agreed to drop their legal challenges as part of their negotiations with the White House.

<sup>89</sup> See California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2111 (Jan. 9, 2013).

<sup>90</sup> See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019).

<sup>91</sup> For a more extensive discussion of the EPCA preemption question, see Alice Kaswan, [THIS VOLUME]

The EPCA precludes any state rules “relating to” to automotive fuel economy,<sup>92</sup> and controlling a vehicle’s GHG emissions necessarily influences that vehicles fuel economy.<sup>93</sup>

There is a reasonable argument that nationally uniform vehicle emission standards are preferable to regionally variable standards, particularly for globally dispersed pollutant like GHGs. Unlike with traditional pollutants, the accumulation of which in the ambient air directly cause localized air pollution problems, the costs of variable standards are not offset by local environmental benefits. For this reason, a presumptive preference for allowing states to set separate standards might yield to concerns for the costs of variability. Yet the Trump Administration was not content with preempting California’s GHG emission standards. In revoking California’s latest waiver, it acted to limit California’s ability to address California-specific air pollution problems as well.

In addition to revoking California’s waiver to set GHG emission standards, the EPA also revoked California’s waiver to set a separate standard requiring the sale of “Zero Emission Vehicles” (ZEVs).<sup>94</sup> Even though such standards do not prescribe any particular GHG emission level per mile or gallon of fuel consumed (or a particular fuel economy standard), the EPA and NHTSA have concluded that a ZEV standard is also preempted by EPCA and not eligible for a CAA waiver. This conclusion is analytically weak, and appears to be quite a break from the Administration’s stated federalism principles.

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<sup>92</sup> 49 U.S.C. § 32919(a) (“When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.”).

<sup>93</sup> See 84 Fed. Reg. 51314-15 (discussing relationship between automotive fuel economy and greenhouse gas emissions).

<sup>94</sup> See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019).



The California ZEV requirement forces automakers to sell a minimum amount of ZEVs as a percentage of their overall vehicle sales within the state.<sup>95</sup> In practice, this forces automakers to cross-subsidize ZEVs by lowering their prices and making up any losses by increasing prices on other vehicles. Understandably, these rules are not popular with the major automakers. The ZEV requirement does not, however, force automakers to design and market a separate set of vehicles meeting a separate set of fuel economy requirements.

However unpopular the ZEV mandates may be among automakers, they fit more comfortably with the CAA’s waiver provisions that GHG emission controls. This is because ZEVs do far more than reduce GHG emissions. They reduce emissions traditional pollutants as well, facilitating California’s compliance with other CAA requirements.<sup>96</sup> Thus California has a strong argument that these standards are needed to control pollution within the state and the claim such rules are “related to” fuel economy rules is more of a stretch. If this part of the Trump proposal remains in the final rule, it will be more vulnerable in court.

Whatever the legal merits of the new EPA and NHTSA positions, from a federalism standpoint it seems incongruous to stretch legal authorities so as to preclude California from exercising the autonomy to set vehicle emission standards it had exercised for over forty years.

The strongest federalist argument for preempting California’s standards is that allowing one state to set its own vehicle emission standards risks Balkanizing the national market for automobiles and will impose costs on consumers in other jurisdictions. Because California represents a particularly large proportion of the national market, California’s standards could

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<sup>95</sup> See *id.* at 51330 (noting for the 2018-2025 model years, ZEVs would have to account for up to 15 percent of each automakers fleet).

<sup>96</sup> See *id.* at 51329 (discussing the California Air Resources Board’s reliance on ZEV requirements as one part of a strategy to ensure CAA compliance, in addition to reducing GHG emissions).

become *de facto* national rules. Rather than make different cars from different markets, automakers may choose to sell California-compliant vehicles nationwide. This is plausible, but the threat to federalism values may be overstated. Insofar as the relevant standards impose requirements on the fleet average of vehicles sold, automakers retain flexibility. If it is less expensive to offer different vehicle mixes in different states, that's what the automakers will do. If not, they won't. Either way, no other state will be forced to adopt California's rules.

Allowing different jurisdictions to adopt different rules can well impose costs on nationwide firms, but that's a cost of doing business in a diverse compound public. The reality is that California has different environmental problems and different environmental preferences than the rest of the nation. Just as California should not be able to impose its preferences on the rest of the nation, it should not be prevented from adopting those rules California voters are willing to accept – and were automakers willing to let California consumers bear the costs of their state's own policies, that might temper their environmental appetites.

If there is a problem in federal environmental law it is not that California is given too much autonomy to adopt its own environmental rules, but that other states are given too little. If anything, the CAA waiver provisions are too narrow, insofar as they only apply to one specific regulatory program within the broader federal regulatory monolith. A broader waiver provision that gave states more leeway to experiment with alternative approaches to environmental protection across-the-board would do more to encourage regulatory innovation and defuse political conflicts over regulation than funneling every major environmental policy question through Washington, D.C.

### III. TOWARDS REAL ENVIRONMENTAL FEDERALISM

The Trump Administration's cooperative federalism rhetoric has not been matched by a demonstrated commitment to federalism in practice. The current EPA departs from federalist principles where doing so facilitates desired deregulation, but also to enforce federal standards on local communities. It is not a principled environmental federalism.

To be fair, the Trump Administration is hardly the first administration to fail to incorporate federalism principles into environmental policy. Much of the jurisdictional mismatch in environmental policy is hard-wired into the various federal environmental statutes. Anything more than marginal readjustments would require revisiting and revising large aspects of federal environmental statutes, and Congress has shown relatively little interest in recent years in such a weighty task.

It may be possible to induce greater Congressional attention to reforming federal environmental laws by incentivizing more regular reauthorization.<sup>97</sup> An alternative approach might be to enact a broad reform measure to provide states with waivers from federal regulatory requirements.<sup>98</sup> Either move would make it easier for future administrations to incorporate federalism concerns into environmental policy.

Barring legislative reform, it should still be possible to encourage greater concern for federalism in the implementation of environmental law, at least on the margin. Federal environmental statutes impose far more responsibilities and authorities to the EPA than Congress appropriates the funds to fulfill. This inevitably means that administration officials have some

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<sup>97</sup> For a discussion of how and why to incentivize more frequent Congressional reauthorization of statutes, see Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. \_\_ (2020) (forthcoming).

<sup>98</sup> One possibility is outlined in Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, in *THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW* (J. Chen ed., 2004).

latitude to set priorities to bring agency actions more (or less) in line with federalism values, at least on the margin. Such flexibility is undoubtedly constrained by the precise authorities contained in statutes, and the inevitability of litigation seeking to force agency action in one direction or another, but what flexibility there is can be used to support or undermine more cooperative environmental federalism.

Specifically, an administration committed to federalism in environmental policy would focus on addressing those environmental concerns that individual states are unwilling or unable to address themselves, such as those involving interstate spillovers, and finding ways to assist state-level implementation of state-level environmental priorities. There is much an administration could do to facilitate greater information sharing and dissemination of technical knowledge about environmental problems and potential solutions, while generally leaving states to make the front-line decisions about which particular environmental concerns to prioritize. Barring extenuating circumstances, if state policymakers and local communities do not believe a localized environmental concern is its highest environmental priority, it is not clear why federal policymakers should attempt to overrule that judgment. A truly cooperative federalism involves working with states to help them achieve their policy goals, not coercing or cajoling them to conform to federal priorities.

Efforts to reinvigorate environmental federalism could be aided if states were more aggressive in pushing a principled cooperative federalism agenda. State attorneys general sue the EPA all the time, but usually in defense of either narrow parochial interests, or to score partisan political points. Red states sue Democratic administrations and blue states sue Republican ones.

Litigation focused instead on expanding state prerogatives might do more to give all states – Red and Blue – greater leeway to pursue their environmental priorities. One such

possibility might be a suit challenging the EPA's ability to threaten to withhold highway funds from states that fail to implement the CAA according to federal dictates.<sup>99</sup> Undoubtedly there could be others. Yet perhaps such cases do not get filed for the same reasons the Trump Administration is fair-weather in its federalist commitments. Perhaps there is no sustained constituency for a principled environmental federalism. Or perhaps no administration has yet tried to appeal to one.

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<sup>99</sup> See Adler and Stewart, *supra* note \_\_\_\_.