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THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S
ASSAULT ON STATE SOVEREIGNTY

By William Yeatman



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The U.S. Environmental Protection Agency's Assault on State Sovereignty

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INTRODUCTION

Congress had a vision for national environmental policymaking when it created the U.S. Environmental Protection Agency (EPA). It is known as cooperative federalism. In practice, cooperative federalism meant that the EPA and states worked together in order to effectively balance economic progress with environmental protection.

Congress intended for states to be first among equals in this federalist arrangement. In the preamble of the Clean Air Act, Congress explained that “air pollution prevention...**at its source is the primary responsibility of States and local governments.**”¹ And, according to the opening of the Clean Water Act, “It is the policy of the Congress to recognize, preserve, and protect the **primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.**”²

“Since 2009, however, the EPA has radically altered this balance of power. To be precise, the agency has expanded its own prerogatives, at the expense of the states’ rightful authority.”

Of course, this makes sense. The preponderance of pollution is local, and it is an axiom of American political history that local officials are best suited to solving local problems. Accordingly, Congress wanted for the EPA to set environmental standards, which the states would then implement, taking into account local circumstances and conditions. The EPA’s role in implementation primarily served to provide technical assistance and financial support.

Since 2009, however, the EPA has radically altered this balance of power. To be precise, the agency has expanded its own prerogatives, at the expense of the states’ rightful authority. Congress wanted states to quarterback environmental policymaking, but the EPA has pushed them to the bench.

The purpose of this report is to explain how the EPA is replacing cooperative federalism with command and control. In the first section, the report addresses the empirics. Since 2009, EPA regulatory disapprovals are up 190 percent relative to the average during the previous three presidential terms. EPA takeovers of state programs are up 2,750 percent.

In the second section, this report addresses an increasing phenomenon—known as Sue and Settle—by which the EPA has effectively replaced state participation with that of green groups like the Sierra Club. The practice involves friendly lawsuits that go straight to settlement discussions, during which the EPA and the environmentalist litigants negotiate policy.

The next section brings attention to the EPA’s pending rule to expand its own jurisdiction under the Clean Water Act. By reinterpreting the phrase “navigable waters,” the agency would seize jurisdiction over virtually every drop of water in America. The rule is a significant threat to states’ traditional land and resource management role.

The fourth section warns of the EPA’s expected decision to revise the National Ambient Air Quality Standard (NAAQS) for ozone. This unwarranted rule would plunge up to 96 percent of the country into a classification known as “NAAQS-nonattainment,” one of the harshest possible regulatory programs. NAAQS-nonattainment is a serious impediment to a state’s ability to attract industry.

In the fifth section, the report explains how the EPA has limited states’ ability to choose which fuels they are allowed to use for electricity generation. The EPA has proposed a regulation, known as the Carbon Pollution Standard, which would effectively ban the construction of new coal-fired power plants. In addition, the EPA has issued a suite of pending or final regulations that are likely to lead



EPA BOARDROOM, WASHINGTON D.C.

to the retirement of 81,000 megawatts of coal-fired electricity generation.

The sixth section looks at the EPA's efforts to regulate hydraulic fracturing, or "fracking," the technological revolution in drilling that has led to a precipitous increase in American oil and gas production over only the last five years. The EPA has reviewed environmental statutes looking for "loopholes" with which it could regulate the

process. The agency has, moreover, made unwelcome intrusions into the fracking oversight process in a number of states.

Lastly, the final section describes ALEC model legislation and resolutions that can be used to push back against an overreaching EPA and reform state-based regulatory schemes, as well.

EPA'S POWER GRAB: BY THE NUMBERS

Under both the Clean Air Act and Clean Water Act, the EPA has the authority to “disapprove” a state’s strategy to meet national environmental goals.³ A regulatory disapproval is no small matter. State officials spend countless hours and taxpayer resources crafting implementation plans to comply with the Clean Water Act and the Clean Air Act. The EPA effectively throws this work out the window when the agency issues a regulatory disapproval.

Figure 1 shows the number of instances whereby the EPA has disapproved state proposals during the last four presidential terms.⁴ The number of regulatory disapprovals

clearly skyrockets with the election of President Barack Obama. The numbers don’t lie: The current EPA is second-guessing states to an unprecedented degree.

Even more alarming is the precipitous increase in the number of EPA takeovers of state regulatory programs. Known as “federal implementation plans,” or FIPs, this is the EPA’s most provocative action in its relationship with states. A FIP entails the complete usurpation of a state’s regulatory authority.⁵

Figure 1 also shows the number of federal implementation plans imposed by the EPA during the last four presidential terms. From 1997–2009, there were only two total FIPs imposed by the EPA. Since 2009, there have been 19.⁶

Whenever the EPA imposes a FIP, the agency effectively determines that a state’s government cares less about the environment than do federal bureaucrats inside the

FIGURE 1.

EPA Regulatory Disapprovals and Takeovers Previous Four Presidential Terms

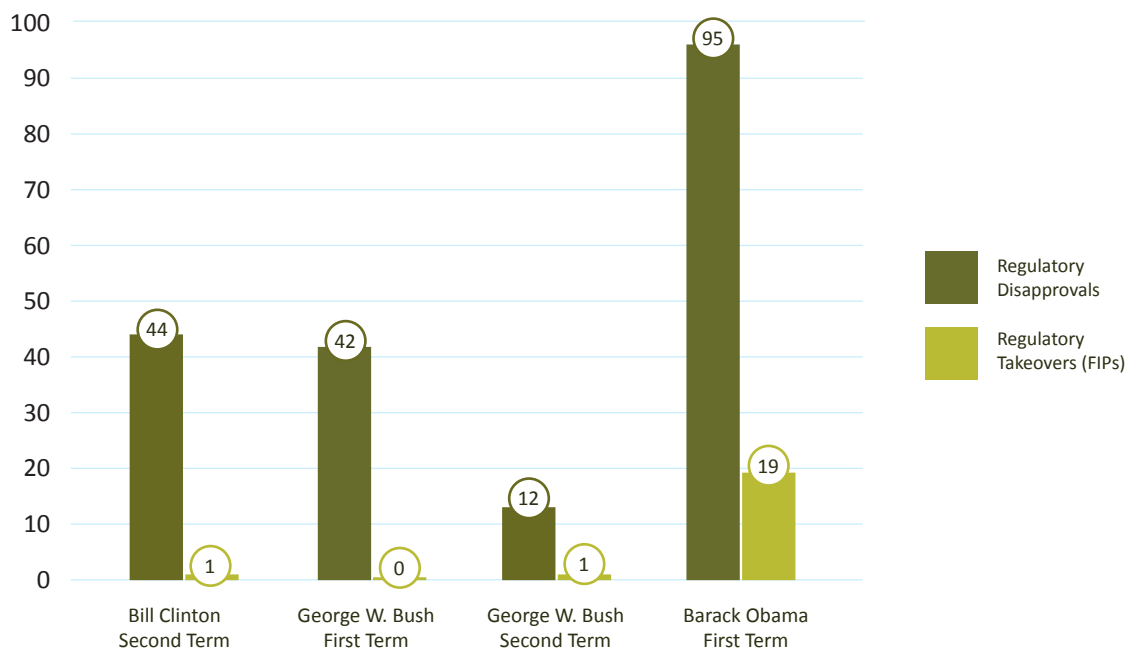
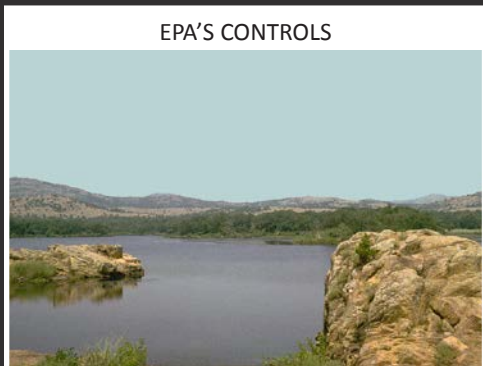
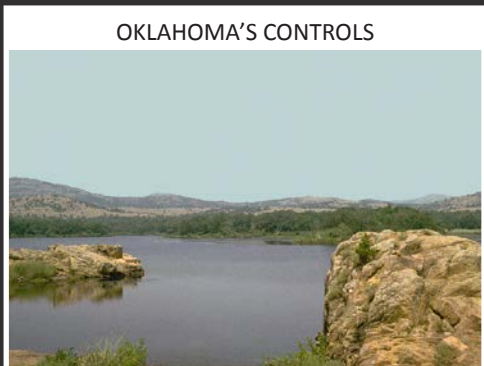


FIGURE 2. EPA'S REGIONAL HAZE TAKEOVER: BILLIONS IN COSTS FOR INVISIBLE BENEFITS



EPA's implementation plan costs \$670 million more than Arizona's plan.



EPA's plan costs \$1.8 billion more than Oklahoma's plan.



EPA's plan costs \$770 million more than New Mexico's plan.

Capital Beltway. Given the gravity of this accusation, the rationale for each FIP should be especially strong. Unfortunately, this has not been the case.

Consider, for example, the outrageous basis for the EPA's takeover of seven states' programs to implement a Clean Air Act regulation known as Regional Haze, the purpose of which is to improve visibility in national parks.⁷ The EPA imposed these FIPs despite the fact that they failed to result in a perceptible improvement in visibility over the states' plans.

See for yourself. Computer software developed by researchers at Colorado State University⁸ allows us to model the differences in visibility improvement between the EPA's Regional Haze FIPs and plans submitted by Arizona, Oklahoma, and New Mexico. The EPA's FIPs cost these States \$640 million, \$1.8 billion, and \$770 million, respectively (see Figure 2). As is readily evident, the vistas portrayed by the images are indistinguishable from one another. Simply put, the EPA's federal takeovers cost billions of dollars, yet achieved results that are literally invisible.⁹

The EPA's takeover of Texas' permitting program for new stationary sources of air pollution was similarly baseless. In a December 2010 determination, the EPA claimed that it had erred when it approved Texas' permitting program in 1992, because the state did not grant itself the authority to regulate greenhouse gases *at that time*. Based on this putative error, the EPA imposed a FIP.¹⁰

In 1990, Congress explicitly declined to regulate greenhouse gases as part of major amendments to the Clean Air Act that were enacted that year.¹¹ The EPA is stretching the truth well past the breaking point when it asserts that it was wrong to approve Texas' permitting program for new stationary sources almost 20 years ago, because the agency was unable to predict that a future administration would seize the authority to regulate greenhouse gases. The EPA imposed a FIP because Texas couldn't foresee the future.

The extent of the EPA's power grab is demonstrated by the data. During President Obama's first term, EPA disapprovals of state implementation plans were up 300 percent over the average during the previous three pres-

idential terms. EPA takeovers of state programs are up an astonishing 1,900 percent. This trend has shown no sign of abatement since the start of President Obama's second term. In February 2013, for example, the EPA proposed FIPs for 33 states.¹²

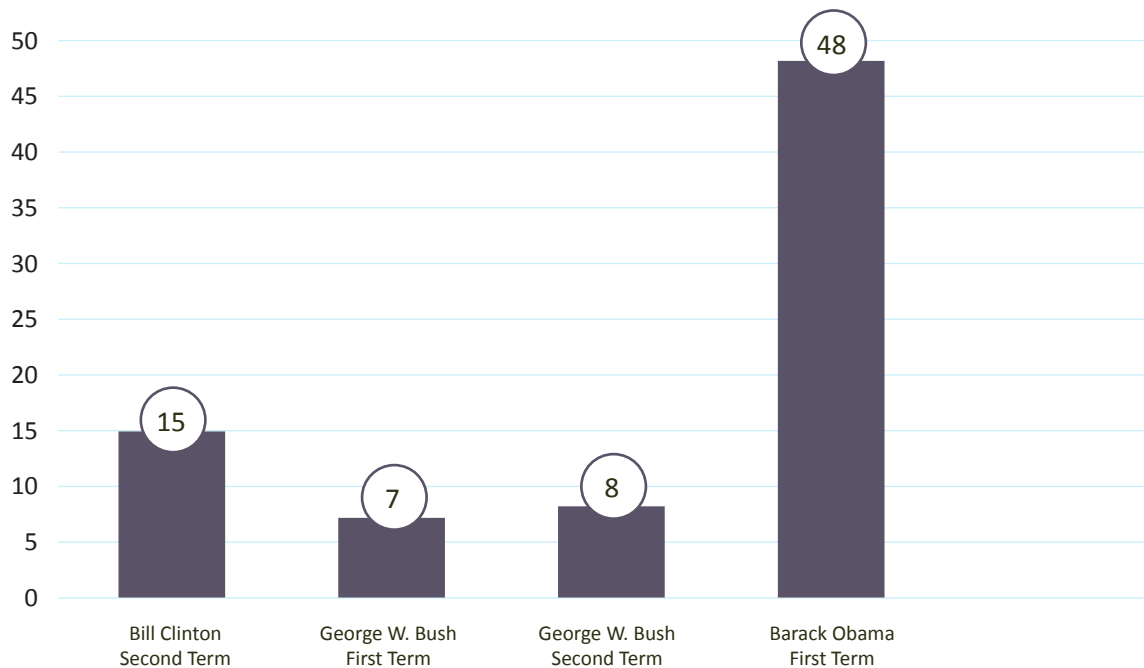
SUE AND SETTLE: HOW THE EPA REPLACES STATES WITH ENVIRONMENTAL GROUPS

Forty percent of the EPA's regulatory takeovers, in addition to the aforementioned FIPs proposed for 33 states last February, were derivative of "sue and settle," a legal strategy by which the agency effectively replaces state participation with that of environmentalist groups like the Sierra Club. Since 2009, the EPA has imposed at least \$13 billion in annual regulatory costs that resulted from sue-and-settle litigation.¹³

Sue and settle is made possible primarily by the fact that the EPA has more mandates than it can handle. The agency is, for example, still implementing the 1997 National Ambient Air Quality Standard for ozone, much more than a decade after it was legally required to do so. Because the EPA's responsibilities far exceed its resources, establishing regulatory priorities is essential, and it is a decision that should be made with the states. With sue and settle, the EPA has found a way to cut states out of the process, instead negotiating the agency's priorities with environmental special interests.

Here's how it works: An environmentalist litigation outfit like the Sierra Club sues the EPA for failing to meet a deadline for regulatory action pursuant to the Clean Air Act or Clean Water Act. Instead of challenging the suit, both the EPA and the environmentalist groups immediately engage in friendly negotiations, which lead to a settlement that determines a deadline. By dictating how the EPA should use its limited resources, these sweetheart settlements effectively render official policy.

FIGURE 3. EPA SUE AND SETTLE AGREEMENTS ACROSS PREVIOUS FOUR PRESIDENTIAL TERMS



Sue and settle allows the EPA to replace input from the states with that from professional environmentalists. As is demonstrated in Figure 3, which depicts sue-and-settle activity during the last four presidential terms, settlement agreements and consent decrees with special interests are up significantly since 2009.¹⁴

States are frequently caught off guard by these sue-and-settle agreements, because the EPA doesn't inform them about the ongoing settlement negotiations. For example, the Florida Department of Environmental Protection's Brian Accardo told a U.S. House of Representatives Committee that he only found out about a citizen suit settlement affecting his state's regional haze planning when a notice appeared in the Federal Register—despite years of haze-related planning efforts. He said, "I was drinking my coffee and reading the Register and I became aware."¹⁵

In other instances, the EPA has actually fought in court to preclude state participation in settlement discussions.

When North Dakota Attorney General Wayne Stenehjem learned that his state was subject to FIP pursuant to an EPA settlement with WildEarth Guardians in an Oakland federal court, he tried to gain intervention into the lawsuit,¹⁶ so that North Dakota could have a voice. The EPA opposed Stenehjem's motion to intervene, and won a court order that kept North Dakota out of negotiations.¹⁷

"Since 2009, the EPA has imposed at least \$13 billion in annual regulatory costs that resulted from sue-and-settle litigation."

The EPA has, unfortunately, made a practice of opposing participation by states—the regulated entities—in settlement discussions with environmentalist organizations.

Officials from Virginia and Maryland¹⁸ have also tried to intervene in sue-and-settle negotiations that affected their states, only to be opposed in court by the EPA.

The EPA can't perform all of its mandated duties on time, because there are too many. Instead, the agency must choose among its responsibilities, to which it directs manpower and money. The EPA should choose priorities in collaboration with states, the regulated entities. Since 2009, however, the EPA has been using sue and settle to establish its regulatory goals in cahoots with environmentalist litigation groups, to the exclusion of states.

PENDING OZONE RULE WOULD SMOTHER STATE DECISION-MAKING ON INDUSTRY

The EPA's most onerous air quality regulations are for areas that are in "nonattainment" of a Clean Air Act regulation known as "National Ambient Air Quality Standards," or "NAAQS." It should, therefore, be alarming to all 50 governors that the EPA is working on an ozone standard that would plunge 76 to 96 percent of the country into NAAQS-nonattainment. As a result, virtually all states' ability to develop industry would be seriously compromised. Troublingly, the justification for the EPA's ozone rule is largely based on a statistical sleight of hand, such that it is unlikely to actually improve public health, despite its profound costs.

Simply put, NAAQS-nonattainment is a nightmare. It is much more difficult to build new industry in areas that are in NAAQS-nonattainment. Emissions from each new stationary source (like a factory) built in a non-attainment area must be "offset" with emissions reductions elsewhere in the nonattainment area.¹⁹ In practice, this means that industrial development becomes a zero-sum game, whereby every new business requires the closure of an existing business.

NAAQS nonattainment is also a nightmare for drivers. Typically, when an area is in NAAQS-nonattainment, state regulators implement a number of new rules on motorists to reduce vehicular emissions, including:

- Vehicle inspection/maintenance programs
- Vehicle idling restrictions
- Clean fuel programs
- Speed limit reductions

In NAAQS-nonattainment areas, industry pays more to control emissions, and motorists pay more in vehicle registration fees. For these reasons, NAAQS-nonattainment is a serious impediment to a state's attractiveness as a destination for capital investment. Finally, NAAQS-nonattainment imposes a significantly greater administrative burden on states' air quality programs.

The current standard for ozone is 75 parts per billion (ppb) and was established in 2008.²⁰ In 2010, the EPA proposed to lower the ozone standard to between 60 ppb and 70 ppb.²¹ The agency has indicated that it will again propose the ozone rule by October 2013, and that it will finalize the rule by July 2014.

There are 675 counties across America that have air quality monitors used by states and the EPA for Clean Air Act compliance (see Figure 4). Currently, there are:

- 322 counties (47 percent) are in NAAQS nonattainment for the current ozone standard (75 ppb)
- 515 counties (76 percent) are in NAAQS nonattainment for a 70 ppb ozone standard
- 608 counties (90 percent) are in NAAQS nonattainment for a 65 ppb standard
- 650 counties (96 percent) are in NAAQS nonattainment for a 60 ppb standard²²

The compliance costs would be staggering. According to a National Association of Manufacturers study, the proposed 60 ppb ozone standard would lead to a total of \$1 trillion in annual compliance costs and 7.3 million jobs lost.²³

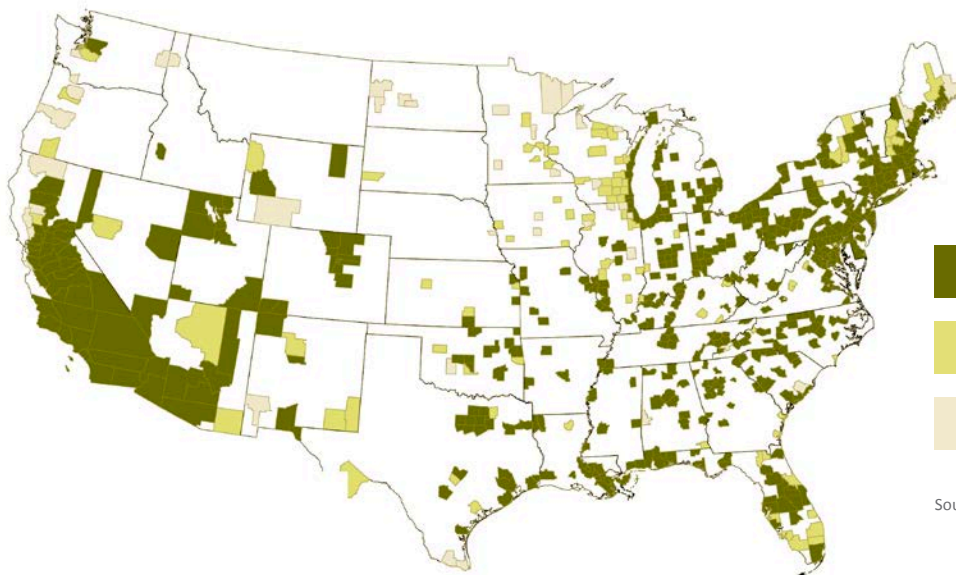
The biggest losers are California, Pennsylvania, and Texas, although nearly all states face multi-billion dollar energy



“The compliance costs would be staggering. According to a National Association of Manufacturers study, the proposed 60 ppb ozone standard would lead to **a total of \$1 trillion in annual compliance costs and 7.3 million jobs lost.**”

FIGURE 4.

**EPA'S EXPECTED OZONE RULE TO
PLUNGE 76% TO 96% OF U.S. IN
“NAAQS-NONATTAINMENT”**



Of the 675 counties
with air monitors:

- 515 counties out of 675 violate 0.070 ppm
- 93 additional counties violate 0.065 ppm for a total of 608 out of 675
- 42 additional counties violate 0.060 ppm for a total of 650 out of 675

Source: <http://www.fas.org/sgp/crs/misc/R41062.pdf>

taxes and thousands to tens of thousands of lost jobs:

- California would incur a total state energy tax of \$210 billion and lose 846,000 jobs during 2020–2030.
- Texas would pay a \$452 billion energy tax and lose 1.6 million jobs.
- Pennsylvania would pay an \$85 billion energy tax and lose 351,000 new jobs.²⁴

And for what? Despite the huge costs of the rule, its benefits are almost exclusively an artifice constructed from the EPA's statistical assumptions. Anne Smith of Charles River Associates, an economic consulting firm, calculates that virtually all of the quantitative risks to public health attributed to ozone by the EPA result from the agency's decision to dramatically lower its estimate of background ozone—i.e., ozone that is naturally occurring or drifts into U.S. airspace from other countries. In establishing the current ozone standard in 2008, the EPA assumed that the background ozone concentrations were 40 ppb. When the EPA proposed a revision of the ozone standard in 2010, the agency controversially used a lower background ozone concentration of 14 ppb to 34 ppb. According to Smith, 92 percent to 100 percent of the EPA's ozone risk estimate depends on this altered assumption.²⁵

CLEAN WATER ACT EXPANSION THREATENS STATES RESOURCE MANAGEMENT ROLE

The principles of cooperative federalism dictate that control of land use decisions properly rests with state and local governments. As the Supreme Court recognized, “regulation of land use is perhaps the quintessential state activity.”²⁶ As such, lawmakers in all 50 states should be concerned about a pending rule that would significantly expand the EPA's federal jurisdiction under the Clean Water Act, at the expense of the states' traditional land and resource management role.

Under the Clean Water Act, the EPA has authority to regulate “navigable waters” of the United States.²⁷ Although it would seem simple to define “navigable waters”—and thereby define the limits of the EPA's power—in practice it has proven contentious. Indeed, the Supreme Court has twice checked the federal government's interpretation as being too broad, in *SWANCC v. U.S. Army Corps of Engineers* (2001)²⁸ and *Rapanos v. United States* (2006).²⁹

“The agency's interpretation is so expansive that it expressly refuses to categorically exclude swimming pools and ornamental ponds, saying that these water features are only “generally exempt” from federal regulations.”

In 2011, the EPA and the U.S. Army Corps of Engineers, which co-administers a section of the Clean Water Act with the agency, sought comment on a new interpretation of navigable waters (“2011 interpretation”)³⁰ that would reflect the Supreme Court's decision in *Rapanos v. United States*. In the *Rapanos* case, as noted above, the Supreme Court *limited* the federal government's definition of its own powers. It is, therefore, remarkable that the EPA's 2011 interpretation would significantly *expand* the agency's authority. Seemingly, the EPA is refusing to acknowledge that its authority had been narrowed.

The agencies admit what they are doing, stating, “[EPA & the Army Corps of Engineers] believe that under this proposed guidance the number of waters identified as protected by the Clean Water Act will increase compared to current practice.”³¹ In an earlier draft of the interpretation, the agencies were more candid. In that version, the federal government conceded that its jurisdiction would “increase significantly.”³² Even this is an understatement: In practice, the 2011 interpretation would extend federal jurisdiction to virtually every drop of moisture in America.



“...lawmakers in all 50 states should be concerned about a pending rule that would significantly expand the EPA’s federal jurisdiction under the Clean Water Act, at the expense of the states’ traditional land and resource management role.”

The key to the EPA’s expanded reach is an aggregate “watershed” analysis to determine whether isolated waters have a “significant nexus” to navigable waters, and which are therefore subject to federal jurisdiction. The test is so amorphous that every ditch, vernal pond, playa lake, mudflat, sandflat, and slough could easily fall under the EPA’s jurisdiction. The agency’s interpretation is so expansive that it expressly refuses to categorically exclude swimming pools and ornamental ponds, saying that these water features are only “generally exempt” from federal regulations.³³

EPA and the Army Corps of Engineers have estimated that the annual costs of implementing the 2011 interpretation of the term “navigable waters” will be upwards of \$242 million,³⁴ and they arrived at that number without taking into consideration permitting costs, the increased delays associated with expanded federal jurisdiction, and the costs of new land use restrictions. When you consider that the average applicant for an individual permit spends 788 days and \$271,596 in completing the process,³⁵ these costs will mount quickly.

Given that states are entitled to significant deference in land and water resource management, it is outrageous that the federal government crafted the 2011 interpretation without consulting any state officials or their repre-

sentatives. This is particularly striking in light of the fact that the proposal would interfere with a number of the states’ rightful prerogatives.

For example, transportation officials from Maine,³⁶ New York,³⁷ and Massachusetts³⁸ warned the EPA that its proposed interpretation of “navigable” waters would include roadside ditches. As a result, they cautioned, routine roadside maintenance activities—like trash collection and grass-cutting—could be forced to apply for Clean Water Act permits.

In separate comments to the EPA, Oklahoma officials noted that the agency’s 2011 jurisdictional interpretation of “navigable” waters easily incorporates groundwater, which is not subject to the Clean Water Act. States, moreover, are solely responsible for protecting, allocating, and administering groundwater.³⁹

After the Supreme Court determined that the EPA’s definition of its own Clean Water Act authority was too broad, the agency proposed to reinterpret its prerogatives. Despite the court’s ruling, the EPA has proposed to significantly expand its own prerogatives under the Clean Water Act, at the expense of states’ traditional authorities. The EPA has not yet given a timetable for when it would finalize the 2011 interpretation.



COAL POWER PLANT

EPA HAS SEVERELY LIMITED STATES' FUEL CHOICE

In April 2012, the EPA proposed a regulation, known as the Carbon Pollution Standard,⁴⁰ that would ban the construction of new coal-fired power plants. If finalized, the rule would severely limit the states' ability to craft air quality programs tailored to local circumstances. Currently, coal generates about 40 percent of the nation's electricity, and the percentage is much higher in states with significant coal resources.

The EPA's Carbon Pollution Standard effectively bans new coal-fired power plants by requiring them to capture their greenhouse gas emissions. Because this technology has never proven commercially viable, the Carbon Pollution Standard, in practice, renders it impossible to build a new coal-fired power plant.

Remarkably, the EPA never even tried to tether the regulation to a specific benefit accruable to the American people. This makes sense, because there are no such benefits. U.S. policy on new electricity generation (like the Carbon Pollution Standard) is an insignificant driver of global greenhouse gas emissions relative to coal-fueled Asian economic growth. In fact, the Carbon Pollution Standard rested on a discretionary authority: The EPA only agreed

FIGURE 5. TOP TEN COAL STATES

STATE	% OF ELECTRICITY FROM COAL
West Virginia	96%
Kentucky	93%
Wyoming	86%
Indiana	86%
Missouri	82%
Utah	82%
Ohio	78%
North Dakota	78%
New Mexico	71%
Nebraska	71%

The EPA's proposed Carbon Pollution Standard would take coal off the table as a fuel resource.

to exercise this authority pursuant to a sue-and-settle agreement.⁴¹

Coal is abundant in America, which is often referred to as the "Saudi Arabia of coal." Many states rely on coal for electricity generation, because of the simple fact that these states enjoy plentiful reserves of the fuel. Other states incorporate coal into their fuel mix because its cost historically has been cheaper and less volatile than that of other fuels. The EPA's Carbon Pollution Standard would radically alter electricity generation in these states by lim-

iting their choice of fuel mix (see Figure 5).

Unfortunately, that's not the only adverse impact that the EPA has had on the electricity market. In 2008, then-Sen. Barack Obama told the San Francisco Chronicle editorial board that he would "bankrupt" the coal industry if elected president.⁴² Since 2009, the EPA has been fulfilling this promise, by subjecting coal-fired electricity generation to unprecedented regulatory assault.

In February 2012, for example, the EPA promulgated a rule known as the Utility MACT. It will cost the power industry—and, ultimately, ratepayers—almost \$10 billion annually. The regulation's purpose is to protect a supposed population of pregnant, subsistence fisherwomen, who consume at least 225 pounds of self-caught fish from exclusively the 90th percentile most polluted fresh, inland water bodies. Notably, the EPA has never identified a single member of this putative population. Rather, they are modeled to exist.⁴³

Earlier, this report discussed the EPA's similarly baseless Regional Haze regulations, whereby the agency is imposing billions of dollars in compliance costs in order to achieve an invisible "improvement" in visibility (see Figure 2). These regulations focused almost exclusively on coal-fired power plants.

Unfortunately, there are more anti-coal regulations in the pipeline. One, known as the Cooling Water Intake rule under the Clean Water Act, would cost up to \$4.8 billion every year,⁴⁴ in order to protect fish larvae from being sucked into the cooling systems of coal- and nuclear-fired power plants. Pursuant to a sue-and-settle agreement, the EPA is under a court-ordered deadline to finalize the Cooling Water Intake rule by July 2013.

Another pending regulation, known as the Coal Combustion Residual rule, could result in the classification of coal ash as a toxic substance, at a total cost of \$55 billion to \$76 billion.⁴⁵ Finally, the EPA has indicated that it intends to issue greenhouse gas standards for existing coal-fired power plants. In previous regulatory filings, the EPA has suggested that it has the authority to impose a cap-and-trade under this regulation.⁴⁶

As the costs mount, many utilities will find it economical to retire coal-fired power plants rather than comply with the EPA's regulatory assault. According to the Federal Energy Regulatory Commission, almost 81,000 megawatts of electricity generation are "likely" to retire because of regulatory costs (see Figure 6).⁴⁷

FIGURE 6.

PROJECTED GENERATION LOSS DUE TO EPA REGULATIONS: 81,000 MW

Equivalent to an energy blackout through Nevada, Utah, Wyoming, Arizona, New Mexico, Colorado, and Idaho



Based on net summer capacity of states: Nevada (11,421), Arizona (26,392), Idaho (3,990), Wyoming (7,986), Colorado (13,777), New Mexico (8,130) and Utah (7,497).

EPA'S OVERBEARING OVERSIGHT OF "FRACKING" IN THE STATES

By now, virtually all Americans are aware that there has been a technological revolution in the oil and gas industry over the last decade. Drilling innovations collectively known as hydraulic fracturing, or "fracking," have made huge oil and gas reserves accessible for the first time.

For now, fracking is regulated primarily by the states. The EPA, however, is actively trying to expand its own authority to regulate fracking. In 2012, Fred Hauchman, director of the EPA's Office of Science Policy within the Office of Research & Development, said that the agency is doing "a pretty comprehensive look at all the statutes" to determine where "holes" may allow for additional federal oversight.⁴⁸

In 2010, Congress requested that the EPA study fracking in order to determine whether the practice poses any threat to drinking water.⁴⁹ This has been a point of contention between industry and environmentalists. The former claims that the process is safe, citing the fact that there has never been a proven instance of aquifer contamination. Green groups claim that the process threatens utility-scale water supplies, but they've yet to produce any evidence. The EPA study is meant to clarify the matter.

The EPA's study will likely determine whether the agency is afforded more authority to regulate the process, so a great deal hinges on its results. The effort is ongoing, and the results are expected to be released in 2014.⁵⁰ In the meantime, however, there are troubling indications that the EPA's fracking science is needlessly alarmist and often wrong.

In December 2010, for example, the EPA ordered Fort Worth, Texas-based Range Resources Corporation, a natural gas company, to provide drinking water to residents in Parker County. EPA tests had concluded that fracking



A WELL DRILLING RIG IN COLORADO

operations by the company “caused or contributed to the contamination of at least two residential drinking water wells.”⁵¹ The EPA rendered this decision over the staunch objection of Texas officials, who argued that water in the Parker County wells had been contaminated by naturally occurring methane. Subsequent lab tests by the state’s Railroad Commission, which regulates oil and gas extraction in Texas, exonerated Range Resources.⁵² The EPA dropped the order a year and a half later, in an apparent concession that state officials had gotten it right.⁵³

In December 2011, the EPA issued a bombshell press release, alleging that an aquifer in Pavillion, Wyoming, “likely” had been contaminated by fracking.⁵⁴ Despite the gravity of the announcement, the EPA issued the press release after having reviewed only preliminary data, and before the peer-review process. Problems soon surfaced with the EPA’s science, as Wyoming state regulators balked at the federal government’s methodology. Specifically, state officials maintained that the EPA’s inexpert drilling to collect

water samples had led to the contamination.⁵⁵ These concerns led the U.S. Geological Survey to agree to perform an independent retest of the Pavillion water samples. On the basis of those results, the oil and gas industry called on the EPA to withdraw its preliminary conclusions.⁵⁶ The EPA has since delayed the peer review process of its Pavilion results, to the chagrin of Wyoming Gov. Matt Mead.⁵⁷

In January 2012, the EPA issued a press release announcing that the agency would test water samples from Dimock, Pennsylvania,⁵⁸ where residents alleged that fracking had contaminated well water. The EPA did so over the objection of Pennsylvania Department of Environmental Protection Secretary Michael Krancer, who had asked the EPA not to second-guess the state’s handling of the matter. In a critical response to the letter, EPA Administrator Lisa Jackson insinuated that Pennsylvania was failing to ensure the protection of its own citizens.⁵⁹ Three months later, the agency quietly informed Dimock residents that their well water had not been contaminated.⁶⁰

These three unwelcome intrusions into state oversight of fracking suggest that the EPA doesn't trust the states to properly regulate fracking on their own. This is a worrisome indicator. The experiences in Fort Worth, Pavillion, and Dimock demonstrate that EPA oversight of fracking has proven redundant when not entirely mistaken. By seizing the reins of regulation from the states, the EPA needlessly threatens to smother an industry that is a major driver of American job growth in the wake of the recession.

CONCLUSION

In the spirit of cooperative federalism, Congress intended for states and the EPA to work together to ensure environmental protection of the nation. Instead of collaboration, however, the EPA since 2009 has adopted a confrontational relationship with the states. With increasing frequency, the agency is disapproving state initiatives to comply with the Clean Water Act and the Clean Air Act. Outright takeovers of state regulatory programs have skyrocketed, too. Perhaps worst of all, the EPA is using a technique known as "sue and settle" to eliminate states from the environmental policymaking process, replacing them with environmental organizations.

"The risks of the EPA's power grab are severe for the states. To be sure, there are billions, even trillions, of dollars of direct costs. However, there is also a more insidious price: the loss of states' rightful authority."

The risks of the EPA's power grab are severe for the states. To be sure, there are billions, even trillions, of dollars of direct costs. However, there is also a more insidious price: the loss of states' rightful authority. The EPA's expected ozone rule would seriously impede any state's ability to attract industrial development, and the EPA's pending interpretation of its own Clean Water Act jurisdiction is a threat to the states' land and resource management prerogatives.

This element of the EPA's actions (i.e., intruding on states' rightful decision-making) is the most insidious. That's because it limits the extent to which local officials take local conditions into account in determining how to improve the environment. By undercutting cooperative federalism, the EPA also undermines good policymaking.

EPA HEARING ROOM, WASHINGTON, D.C.



TOOLS FOR STATE LEGISLATORS

State legislators have a number of tools at their disposal to ensure that their state's voice is heard in 2013 and beyond. This section provides ALEC model legislation relevant to the EPA and regulatory overreach. It often seems fruitless for state legislators to push back against federal government overreach, but it is imperative that one uses all of the tools possible in order to maintain the balance of power between federal and state governments.

ALEC RESOLUTIONS

RESOLUTION OPPOSING THE EPA'S REGULATORY TRAIN WRECK

This resolution calls on Congress to slow and stop the EPA's regulatory train wreck. This resolution highlights the impact and scope of the EPA's recent regulatory offensive. It also calls on Congress to adopt legislation prohibiting the EPA by any means necessary from regulating greenhouse gases, impose a moratorium on any new air quality regulation for at least two years, and require the Administration to undertake a multi-agency study identifying all EPA regulatory activity and the cumulative effect on the economy, jobs, and American competitiveness.

REASON TO INTRODUCE:

This is the most comprehensive ALEC resolution addressing EPA overreach. It is important to get the state on record as calling on Congress to stop the regulatory train wreck. It is needed to bolster allies in Congress and to show the EPA and the Administration that consequences will follow across the country if they refuse to pull back.

RESOLUTION ON BEST AVAILABLE CONTROL TECHNOLOGY FOR COAL-BASED ELECTRIC GENERATION

This resolution offers guidance to state regulatory agencies on how to interpret "Best Available Control Technology" (BACT) when issuing Prevention of Significant Deterioration permits for the BACT requirements for greenhouse gases from coal-based electric generation. The language expresses the need for new electric generation that is efficient and economically practicable. It also encourages accommodation of highly efficient power technologies, like super-critical and ultra-super-critical coal-fired electric generating units, to serve the dual purpose of reducing the overall emissions profile of the electricity generation unit while providing efficient, affordable, and available power today and into the future.

REASON TO INTRODUCE:

Considering the extremely vague guidance offered by the EPA as to what constitutes "Best Available Control Technology," legislatures should consider weighing in to prevent overly restrictive interpretations that could devastate investment and certainty. Also, this resolution is needed to be able to incorporate highly efficient and reliable technologies into the definition of BACT.

RESOLUTION IN OPPOSITION TO THE EPA'S PLAN TO REGULATE GREENHOUSE GASES UNDER THE CLEAN AIR ACT

This resolution opposes the EPA's endangerment finding and any regulation of greenhouse gases, citing the massive economic burden that would result and the global nature of climate emissions.

REASON TO INTRODUCE:

This resolution expresses opposition to the endangerment finding and all regulation of greenhouse gases. This year and next will be critical years, in

which the EPA will roll out regulations of greenhouse gases. In addition, 2013 and 2014 will be filled with litigation surrounding every aspect of the endangerment finding and greenhouse gas regulation. It is imperative that states voice opposition to regulations that would significantly damage state economies, grow federal influence within state borders, and lead to little or no environmental benefit.

RESOLUTION TO RETAIN STATE AUTHORITY OVER HYDRAULIC FRACTURING

This resolution anticipates the EPA's planned regulation of hydraulic fracturing. It explains that reservoirs producing oil and gas are highly variable geologically, and separated geographically across the oil- and gas-producing states such that state regulatory agencies are best suited, through local expertise and experience, to effectively regulate hydraulic fracturing.

■ REASON TO INTRODUCE:

The EPA is currently working on a federal regulatory framework for hydraulic fracturing. To push back against federal overreach, introduction of this resolution would influence the regulatory process and send a strong message that the state regulatory framework is adequate, and that the state should have sovereignty over state-specific energy development issues.

RESOLUTION ON RESPONSIBLE RESOURCE DEVELOPMENT

This resolution also focuses on the jurisdiction of regulating hydraulic fracturing. It describes in detail the benefits of resource development in the states, and encourages responsible resource development practices, balanced efforts to ensure reliable U.S. energy resources, and continued jurisdiction of the states to appropriately regulate oil and gas production in their unique geological and geographical circumstances.

■ REASON TO INTRODUCE:

This resolution asserts that states can effectively and safely extract and use resources within their borders. In order to preemptively push back against potential federal regulation of hydraulic fracturing, this resolution confirms that the state is the best entity to deal with the unique characteristics within their state.

RESOLUTION IN SUPPORT OF ENERGY SECURITY, PRODUCTION, DISTRIBUTION, ENVIRONMENTAL PROTECTION, AND ECONOMIC GROWTH IN THE U.S.

This resolution requests that Congress quickly pass legislation and take other actions as necessary so that the benefits of coal-fire-generated electricity to Americans and state economies are increased, not decreased; fuel diversity and grid reliability is improved, not restricted; and continuing emission reduction progress is made while minimizing capital costs, rate increases, and other economic impacts, simultaneously meeting public health and environmental goals.

■ REASON TO INTRODUCE:

This resolution pushes back against the implications of the Cross-State Air Pollution Rule, the regulation of coal combustion residuals, and the Utility MACT Rule that threaten the reliability and security of the nation's energy supply. It sends a message to Congress and the Administration that the state does not approve of recent regulatory actions that threaten the ability of the state to have affordable and reliable electricity generation.

RESOLUTION REQUESTING THAT THE FEDERAL GOVERNMENT CONFER AND CONSULT WITH THE STATES ON MANAGEMENT OF PUBLIC LANDS AND ENERGY RESOURCES

This resolution requests Congress and the Administration

to acknowledge and respect the role of states in a federal constitutional republic. It calls on Congress and the Administration to commit to greater consultation with the states, and to recognize cost-benefit and job-impact analyses must be addressed in order to understand how federal regulations impact states and their respective citizens.

■ **REASON TO INTRODUCE:**

Every year, the federal government further erodes state sovereignty by handing down decisions on the use of energy on public land. This resolution demands a seat at the table when decisions are made at the federal level that affect public land and energy development.

RESOLUTION IN SUPPORT OF THE REGULATIONS FROM THE EXECUTIVE IN NEED OF SCRUTINY

This resolution calls on Congress to support the passage of an Act that would require that Congress must pass a joint resolution of approval to be signed by the President for each new major regulation proposed by the executive branch before it may be enforced against the American people.

■ **REASON TO INTRODUCE:**

This resolution supports the concept of limiting the scope of regulation-making and requires accountability that would improve the quality of federal regulations by engaging elected representatives into the regulation making process. Introduction of this resolution would send a strong message to Congress regarding regulatory processes.

ALEC LEGISLATION

REGIONAL AIR QUALITY INTERSTATE COMPACT

The Regional Air Quality Interstate Compact asserts the right of states to retain authority over their own implementation plans to enforce the Clean Air Act. The inter-

state compact has throughout constitutional history been a tool for states to exercise joint authority over a common issue, and the Supreme Court has held in recent decades that it can be an effective means for states to preserve their sovereignty and push back against federal overreach.

Under the cooperative federalism model established by the Clean Air Act, the federal government traditionally defers enforcement of many air quality standards to states, which develop and submit for approval their own State Implementation Plans. However, as this report has shown, the EPA routinely violates the cooperative federalism concept. The compact represents a direct attempt to combat the EPA on this particular legal issue — the violation of state sovereignty to implement CAA requirements through SIPs. It establishes a commission comprising representatives of joining states to develop non-binding common guidance for SIP enforcement of the CAA. Per Supreme Court precedent, a compact that receives congressional consent assumes the force of federal law, and it would displace the authority of the EPA to implement the portions of the Clean Air Act covered by the compact. This would restore state sovereignty allowing state officials to develop their own plans to meet air quality requirements, as explicitly outlined in the CAA.

■ **REASON TO INTRODUCE:**

Full implementation of the compact, which requires congressional consent, is admittedly an uphill battle. Nonetheless, the compact is still more than just stated opposition to the EPA's assault on state sovereignty. It makes a compelling constitutional case for a viable solution, demonstrating that state legislatures are serious about restoring state sovereignty and reason to air quality regulation. A broad coalition of states joined together would allow constituents to offer a proposal directly to Congress, to which it would have to respond. By taking this actionable step, state legislatures can publicly address the federalism concerns raised by the actions of the EPA.

CLIMATE ACCOUNTABILITY ACT

This model bill requires that, before implementation of any government expenditure to reduce greenhouse gas emissions, the respective agency must provide the overall cost per ton of carbon dioxide–equivalent to be achieved by the policy. This bill is designed to ensure that states receive the greatest return possible on environmental expenditures.

■ REASON TO INTRODUCE:

Many states are passing and implementing laws to reduce greenhouse gas emissions. If these efforts cannot be stopped, holding the programs designed to reduce these emissions accountable and assessing their relative cost would shine a light on the expense of these activities and guide the process toward less expensive alternatives.

CONDITIONING REGULATION OF NON-POLLUTANT EMISSIONS ON SCIENCE ACT

This legislation requires a state environmental administrator to perform an assessment prior to implementing regulation of an emission not explicitly listed as a “pollutant” under the Clean Air Act. This includes a “regulatory right to know” disclosure, to include: reasonable demonstration that authority is necessary to protect public health or welfare; whether there is a significant impact on energy availability or price; and if the regulation is feasible and superior to alternatives.

■ REASON TO INTRODUCE:

This legislation provides full disclosure and a proper procedure for regulating any pollutants not explicitly listed under the Clean Air Act. States should be concerned with the impact of such regulation on energy availability and price. This will provide proper consideration before moving forward with a regulation that has potentially damaging unintended consequences.

ECONOMIC IMPACT STATEMENTS ACT

This bill is designed to provide environmental protection without compromising economic growth, by requiring an economic analysis of new environmental regulations. Key components of the bill include: detailed short-term and long-term projections of the economic effects of regulation, and legislative review of regulators.

■ REASON TO INTRODUCE:

This bill is essential for states that want proper evaluation of the economic costs of a proposed regulation. It will also allow for better decision making in deciding to implement a regulation that could have a major impact on the state’s economy.

STATE REGULATORY RESPONSIBILITY ACT

This Act clearly establishes the role of a state environmental agency when confronted with attempted intrusive and unauthorized actions by the federal government. The purpose of the Act is to ensure the division of governmental responsibilities between the federal government and the states under the principles of federalism, so those state agencies are free to implement their powers without unauthorized federal interference.

Toward that end, the legislation establishes three policies. First, the Act prevents a state agency from complying with a federal requirement that is inconsistent with state law unless the requirement is clearly expressed in a federal statute or rule, and is adopted pursuant to the Federal Administrative Procedures Act. Second, the Act precludes a state agency from allowing federal law to preempt state law unless the state attorney general finds that such preemption is required. Lastly, the Act prohibits state agencies from complying with any federal regulatory mandate or requirement unless adequate funds are provided, the state agency has express state statutory authority to implement the program, and the action does not conflict with state law. These provisions ensure that the state does not accept unfunded mandates, and has the authority to implement a delegated program consistent with state law.

■ **REASON TO INTRODUCE:**

This Act effectively pushes back against unfunded and unwarranted federal intervention in the states. The State Regulatory Responsibility Act is one way to address the federal government overstepping its bounds.

INTRASTATE COAL AND USE ACT

This Act establishes that the environmental regulation of coal and certain coal products mined and used within the state are exclusively regulated by the state's Department of Environmental Protection.

■ **REASON TO INTRODUCE:**

As the EPA becomes increasingly active in state regulatory affairs regarding the use of coal, this Act would essentially test the boundaries of the Tenth amendment of the U.S. Constitution by asserting state sovereignty over the extraction and use of coal within a state's borders.

THE ENERGY AFFORDABILITY AND RELIABILITY ACT

This Act requires the Public Service Commission or Public Utility Commission within a state to evaluate the economic impact, reliability, and other objectives in decisions affecting electricity supplies for a state.

■ **REASON TO INTRODUCE:**

With pending and proposed EPA regulations, some states are attempting to make early actions to comply with pending or proposed EPA regulations without evaluating the short-term and long-term consequences to fuel supply and deliverability, economic impacts, and electricity reliability. This Act would ensure that all factors important to state citizens and a state's economy are considered.

REGULATORY REVIEW AND RESCISSION ACT

Section 1 of this Act institutes a system allowing state lawmakers to examine the efficacy of regulations before implementation, reviewing costs, benefits, and potential impacts on employment. Section 2 provides a system of retrospective review of regulations three years after they take effect. Section 2 grants the governor the power to rescind regulations after the retrospective review.

■ **REASON TO INTRODUCE:**

Regulations are often imposed without consideration of unintended consequences. This Act would allow for a preliminary cost-benefit analysis of a proposed regulation and an after-implementation review in order to properly analyze the efficacy of regulations in a state.

RESTRICTIONS ON PARTICIPATION IN A LOW-CARBON FUEL STANDARDS PROGRAMS

This legislation prohibits the state from participating in any low-carbon fuel standard or similar program requiring quotas, caps, or mandates on fuels used for transportation, industrial purposes, or home heating without prior legislative approval.

■ **REASON TO INTRODUCE:**

States have already begun participating in regional greenhouse gas programs which include low-carbon fuel standard programs. In some cases, states have been forced into these programs without legislative approval. This legislation simply puts the decision process back into the hands of state legislators. In addition, as discussions of a federal low-carbon fuel standard heat up, introduction of this legislation would be a powerful tool to push back against federal programs that would conflict with this state law.



ABOUT THE AUTHOR

William Yeatman is the Assistant Director of the Center for Energy and Environment at the Competitive Enterprise Institute (CEI), a free-market think tank based in Washington, D.C. His writing has appeared in newspapers and other periodicals across the country, and he is a frequent commentator on energy policy for both television and radio. Prior to joining CEI, William was a Peace Corps volunteer in the Kyrgyz Republic, where he taught entrepreneurship and small business management to rural women. Before that, he helped run a homeless shelter in Denver, Colo. William holds a master's degree in international administration from the Denver Graduate School of International Studies, and a bachelor's degree in environmental sciences from the University of Virginia.

ENDNOTES

- 1 Clean Air Act §101(a)(3).
- 2 Clean Water Act §101(b).
- 3 Clean Air Act §110(k)(3), Clean Water Act §303(C)(3).
- 4 Data for EPA disapprovals was collected using a search of the federal register. The search terms were: Agency ("Environmental Protection Agency"); Summary ("disapproval" or "disapprove"). The search terms were input across four durations, each representing a presidential term: Bill Clinton term 2 (1/20/1997–1/20/2001); George W. Bush term 1 (1/20/2001–1/20/2005); George Bush term 2 (1/20/2005–1/20/2009); Barack Obama term 1 (1/20/2009–1/20/2013). The results were narrowed to final rules.
- 5 Clean Air Act §110(c)(1), Clean Water Act §303(b)(1).
- 6 Data for EPA FIPs was collected using a search of the federal register. The search terms were: Agency ("Environmental Protection Agency"); Summary ("federal implementation plan" or "federal implementation plans"). The search terms were input across four durations, each representing a Presidential term: Bill Clinton term 2 (1/20/1997–1/20/2001); George W. Bush term 1 (1/20/2001–1/20/2005); George Bush term 2 (1/20/2005–1/20/2009); Barack Obama term 1 (1/20/2009–1/20/2013). The results were narrowed to final rules.
- 7 See Clean Air Act §169 A/B.
- 8 WinHaze 2.9.9.1 is available for free: <http://www.air-resource.com/resources/downloads.html>
- 9 Data and images for Oklahoma and New Mexico are taken from case studies in William Yeatman, "EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs," U.S Chamber of Commerce, June 2012; For Arizona, visibility improvement of EPA controls over state controls (0.97 deciviews) was obtained from Tables 9, 12, and 13 of the EPA's Proposed Regional Haze federal implementation plan for Arizona, 77 FR 42834. Visibility improvement was then modeled using WinHaze software. Cost data for the Arizona Regional Haze FIP was derived from Tables 10.10 and 10.11 (for Apache units 2 and 3) and Table 14.4 (for Coronado Units 1 and 2) of Appendix D of Arizona's Regional Haze State Implementation Plan (page 64 and 109, respectively). Cost data for the Cholla units 2, 3, and 4 were obtained from Table 3-3 on page 3-10 of Arizona Public Service's Best Available Control Technology submissions for Regional Haze.
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- 14 Data for the chart was obtained from a database search of the Federal Register. Pursuant to §113(g) of the Clean Air Act, the EPA must announce all consent decrees or settlements pursuant to the law in the Federal Register. The search terms were: Agency ("Environmental Protection Agency"); Title ("settlement agreement" or "consent decree"). The search terms were input across four durations, each representing a Presidential term: Bill Clinton term 2 (1/20/1997–1/20/2001); George W. Bush term 1 (1/20/2001–1/20/2005); George Bush term 2 (1/20/2005–1/20/2009); Barack Obama term 1 (1/20/2009–1/20/2013) Consent decrees were limited to citizen deadline suits, and Title V challenges and enforcement actions were removed, in order to ensure that the settlement agreement/consent decree has general applicability.
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- 17 *Ibid.*, docket document 69.
- 18 *Fowler et al. v United States EPA et al.*, Case no. 1:09-cv-00005-CKK (D.C. District Court), docket document 33, in which the EPA opposed participation in settlement discussions by Maryland Association of Municipal Wastewater Agencies, Inc., Virginia Association of Municipal Wastewater Agencies, Inc., Virginia Municipal Stormwater Association, Inc., Storm Water Association of Maryland.
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- 25 Anne Smith, "Comments to CASAC on Reconsideration of the Ozone National Ambient Air Quality Standard," p 9, 7 February 2011.
- 26 *Federal Energy Regulatory Comm. v. Miss*, 456 U.S.C 742, 767 n. 30 (1980).
- 27 Two federal agencies implement the Clean Water Act: EPA and the U.S. Army Corps of Engineers. The latter is the co-administrator of the Clean Water Act's dredge-and-fill permitting program. Between the two, the EPA's responsibilities are greater.
- 28 In 1986, the Army Corps of Engineers published a "Migratory Bird Rule," by which it asserted federal Clean Water Act jurisdiction over all waters that could serve as a habitat for migratory birds. Of course, this essentially incorporates every body of water in the United States. In *SWANCC v US Army Corps of Engineers*, the Supreme Court invalidated the rule.
- 29 The Rapanos case pertained to four Michigan wetlands lying near ditches that drained into a traditional navigable water. The Army Corps of Engineers asserted jurisdiction over the wetlands, and sanctioned the owner for filling them in. In a 4-4-1 decision, five Supreme Court justices vacated earlier judgments by district and appeals courts that the federal government had jurisdiction. In a May 20, 2009, letter to Sen. Barbara Boxer (D-CA), the heads of both the EPA and the U.S. Army Corps of Engineers wrote that, "Supreme Court decisions in 2001 and 2006 narrowed the prior interpretation of the scope of waters protected by the Clean Water Act." Cited from Federal Water Quality Coalition, Comments of the Federal Water Quality Coalition on the 2011 Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act," 30 July 2011.
- 30 76 FR 24479.
- 31 EPA, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," p. 3.
- 32 EPA, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," version of Draft Guidance leaked in February 2011, as referenced in footnote 5 of, "State of Alaska Comments on Proposed Future Federal Rulemaking to Delineate a New Jurisdictional Process for identifying "Waters of the U.S." under the Clean Water Act," 15 December 2011.
- 33 EPA, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," p. 21.

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