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How the EPA Is Undermining Cooperative Federalism under the Clean Air Act

And What Congress Can Do About It

By William Yeatman*

*The Congress finds ... that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is **the primary responsibility of States and local governments** – Clean Air Act findings¹*

When it crafted legislation to fight air pollution, Congress relied on America's unique system of federalism. The 1970 Clean Air Act establishes a "division of responsibilities" between the state and federal governments commonly known as "cooperative federalism."² In practice, this means that the federal agency sets minimum standards, which states are left to meet however they best see fit, subject to U.S. Environmental Protection Agency (EPA) approval. Pursuant to this partnership, "[t]he state proposes" and "the EPA disposes."³ Typically, states shoulder 80 percent of the costs of implementing regulations under the Clean Air Act.⁴

For most of the Clean Air Act's history, states and the EPA have worked well together. However, during the Obama administration, there has been a marked shift away from harmonious relations between these co-sovereigns. This transition from cooperative to *combative* federalism has led to some serious problems for the nation's air quality policy:

- EPA takeovers of state air quality programs, known as Federal Implementation Plans (FIPs), have increased precipitously since President Obama took office. The Obama administration has imposed more FIPs than the sum of the previous three administrations—multiplied by 10.
- Ninety-eight percent (50 of 51) of Obama-era Clean Air Act FIPs are of dubious legitimacy.
- Environmental special interests have "captured" the EPA. In return for investing in electoral politics, green groups have been given the reins to environmental policy making at the EPA.

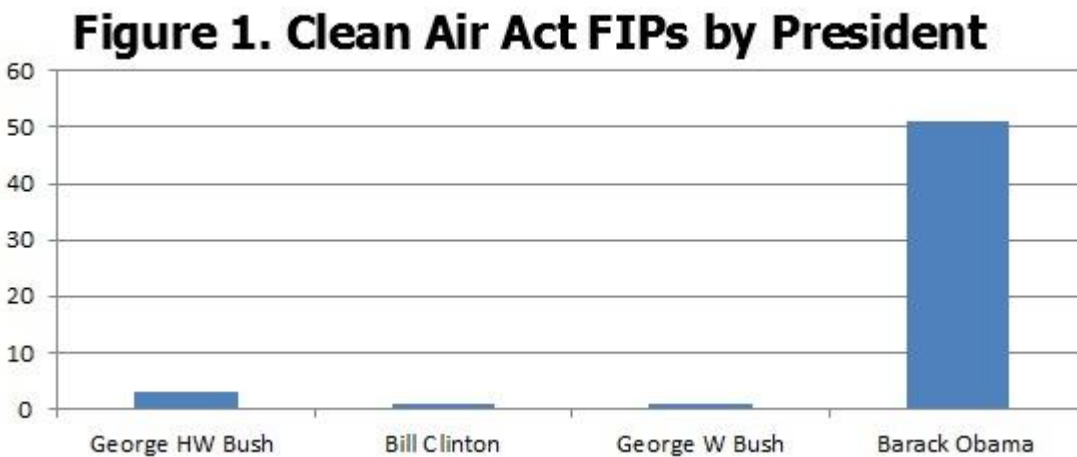
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- By using a legal strategy known as “sue and settle,” the EPA has effectively undermined states’ authority in favor of environmental special interests in the implementation of the Clean Air Act. This involves the agency implementing policy changes in response to lawsuits by environmental pressure groups, rather than pursuant to any explicit delegation by Congress. Sue and settle litigation has tripled during the Obama administration.

Two legislative solutions would restore the proper balance of power between the state and federal governments pursuant to the Clean Air Act. The first would level the balance of justice when state and federal governments disagree on how to implement the Clean Air Act. The second would ameliorate the impacts of collusive “sue and settle” policymaking between EPA and special interests, to the exclusion of the states.

The Obama Administration Ushers in Unprecedented Expansion of Federal Power at the Expense of States. During the Obama administration, the EPA has demonstrated an unprecedented usurpation of the states’ role under the Clean Air Act’s system of cooperative federalism.

If the EPA disapproves a state Clean Air Act compliance plan, then the agency is empowered to impose a Federal Implementation Plan that would achieve the statute’s purpose.⁵ Under the Clean Air Act’s cooperative federalism structure, a FIP is the most drastic and aggressive action the EPA can take against a state government, as it represents a seizure of the state’s authority.



Accordingly, past administrations have proved reluctant to impose a FIP. For example, the administrations of George H.W. Bush,⁶ Bill Clinton,⁷ and George W. Bush⁸ accounted for a total of five FIPs. By comparison, President Obama’s EPA has perpetrated 51 FIPs⁹—and he still has two years left in office!

The dramatic increase in FIPs might make sense if states, for whatever reason, had decided to stop implementing the Clean Air Act upon President Obama taking

office. But that has not been the case. Rather, virtually all EPA regulatory takeovers of state programs are of dubious legitimacy.

For example, 13 Obama administration FIPs¹⁰ pertaining to the Clean Air Act's visibility improvement regulations, known as Regional Haze,¹¹ would cost states billions of dollars in retrofits in order to achieve an "improvement" in visibility that is literally invisible.¹² Another nine FIPs¹³ would seize state permitting programs to regulate greenhouse gases,¹⁴ even though the agency concedes that the rules would in no way impact climate change.¹⁵

Finally, 28 of the FIPs¹⁶ were imposed pursuant to the Clean Air Act's "Good Neighbor" provision,¹⁷ before states were informed what their individual targets were. This stands in stark contrast to "Good Neighbor" rules promulgated by the Clinton and Bush administrations, which afforded states the opportunity to comply with EPA targets before the agency imposed a FIP.¹⁸

EPA's New "Partners": How Green Special Interests Captured the EPA. Four decades ago, environmental advocacy groups ran public service announcements. Today, they run political attack ads.¹⁹ Environmental special interests have become major political players and now comprise a major component of the Democratic Party's base. Thanks to their investment in electoral politics, they have gained access and influence that rightly belongs to the states under the Clean Air Act's system of cooperative federalism.

In effect, environmental organizations have "captured" the agency. Regulatory capture is founded on a *quid pro quo* relationship.²⁰ Environmental groups commit resources to help getting a president elected. In return, these special interests garner access and influence. States are left out of the mix as EPA and green groups plot policy.

Forty years ago, environmental groups like the Sierra Club and Natural Resources Defense Council (NRDC) rightly could be perceived as scrappy underdogs. Today, however, they are sophisticated, connected, and—most importantly—extremely well-funded advocacy organizations.²¹ Increasingly, they are throwing their considerable resources into politics.

For example, on the Sierra Club's Politics and Elections Web page, the organization boasts:

Working closely with Obama for America, we recruited more than 12,000 members to join Environmentalists for Obama, to participate in "Get Out the Vote" (GOTV) shifts on Election Day, and to plug into the Obama campaign dashboard to make over 30,000 phone calls...It worked.

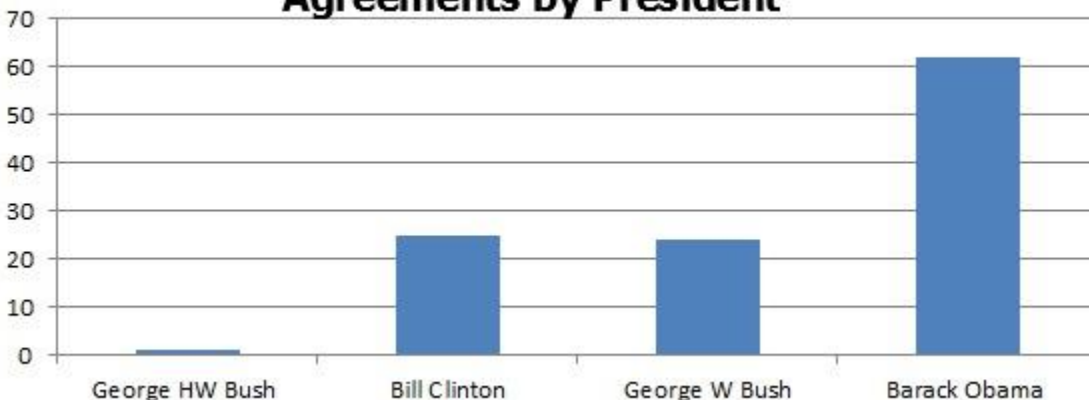
The president subsequently conceded that the Sierra Club was "an integral part of (the) win."²²

In 2003, NRDC started a 501c(4) advocacy organization, NRDC Action Fund, to “work to educate and mobilize voters.”²³ During the last election cycle, “NRDC Action Fund primarily operated by encouraging its donors to donate directly to candidates or environmental advocacy groups,” reports *The Washington Post*.²⁴ NRDC is also involved in LeadingGreen, a new collaboration of environmental groups that will steer donations to federal candidates and enlist the help of major donors in lobbying elected officials.²⁵

Of course, political investments like these engender access to the highest levels of power. As a result, a “revolving door” exists between employment at environmental special interests and at the EPA. NRDC and Sierra Club are well represented in the ranks of political appointees at the agency.²⁶

More broadly, EPA has surrendered its regulatory initiative to environmental groups by way of a legal strategy known as “sue and settle.”²⁷ This consists of sweetheart lawsuits brought by green special interests and immediately settled by the agency, whereupon the parties negotiate how to deploy the EPA’s limited resources—with no input from states, the entities tasked by statute to implement the regulations—in implementing the green groups’ agenda.

Figure 2. Clean Air Act 'Sue and Settle' Agreements by President



The opportunity for such sue and settle shenanigans is created by the Congress’ overreliance on deadlines in environmental statutes. The Clean Air Act, in particular, contains far many more date-certain duties than the agency has proven capable of performing. Since 1993, of 200 date-certain duties pursuant to three core Clean Air Act programs, only 2 percent were completed on time, and the agency was late in implementation by almost six years on average.²⁸

Missed deadlines per se would not be problematic. But they have become a problem because the Clean Air Act empowers environmental special interests to sue in order to compel the agency to perform any nondiscretionary duty.²⁹ In a “sue and settle” case, an environmental group sues over a missed deadline. Then, instead of litigating—and thereby defending its prerogative to set its own priorities—the agency immediately agrees to settle.

If the EPA is out of compliance with virtually all its Clean Air Act deadlines, as demonstrated by the above data, then establishing *any* deadline determines how the agency deploys its limited resources, which is no different than rendering policy. Of course, if the EPA wants to give priority to its many outstanding responsibilities, it should do so in cooperation with the states, which must actually implement these regulations.

However, with “sue and settle,” the EPA and green groups have developed a way to collude to formulate policy to the exclusion of the states, who suffer the consequences of the resulting policies. During the Obama administration, “sue and settle” agreements pursuant to the Clean Air Act have tripled relative to prior administrations.³⁰

Legislative Solutions. Two simple amendments to the Clean Air Act could restore the balance of power between state and federal governments to what Congress intended.

Stipulate That States Warrant Deference during Judicial Review of EPA’s Oversight Authority. To a great extent, the EPA’s power grab has been facilitated by Article III courts, which have given the agency undue deference. This is not to imply that these co-branches of the federal government are in cahoots. Rather, federal courts’ obsequiousness to the EPA results from the fundamental incompatibility between the federal courts’ deference doctrine and the Clean Air Act’s system of cooperative federalism.³¹ By fixing this incongruity, Congress would level the balance of justice when state and federal governments disagree how to implement the Clean Air Act.

Deference to reasoned agency decision making is an essential principle of judicial review. From a constitutional perspective, Article III Courts have little choice but to defer to agency determinations pursuant to federal statutes, because Congress delegates its policy making authority to federal agencies (or states), not to the judiciary. There are also practical reasons for this doctrine. For example, agencies possess expertise and political accountability; the courts do not. Due to these factors, courts very rarely upset agency determinations.³²

However, the principle of judicial deference comports poorly with cooperative federalism. As noted above, congressional delegation is the constitutional foundation of judicial deference to agency decisions. Yet the Clean Air Act’s system of cooperative federalism splits the congressional grant of authority between the EPA and the states. And while a congressional delegation may be divisible, deference by its very nature is a zero-sum game.³³ So when the EPA and a state disagree on how to implement the Clean Air Act, federal courts must choose which sovereign merits deference and thus carries the day in court.

In a recent series of rulings upholding several Clean Air Act federal implementation plans, federal courts have affirmed that the EPA is the sole recipient of judicial

deference when sovereigns dispute how to implement the Clean Air Act.³⁴ In so doing, federal judges have reasoned that the agency is supreme in this area by virtue of its authority to review state air quality strategies. However, nothing in the statute compels this prevailing interpretation. In fact, the states have as good—if not better—a claim to deference than does the EPA.

For starters, the Clean Air Act states that “air pollution control at its source is the primary responsibility of States and local government.”³⁵ This is borne out in practice by the fact that states generally pay for 80 percent of environmental improvement.³⁶ States, in exercising their share of congressionally delegated authority pursuant to the Clean Air Act, enact their own version of the Clean Air Act, which enables a state-level implementing agency. This state agency, in turn, establishes its own administrative code and is responsible for actually achieving the statute’s air quality goals. Thus, the states meet all the criteria for judicial deference—they possess congressional delegation, political accountability, and expertise. Alas, these attributes have been ignored by federal courts.

In fact, the courts’ obsequiousness to the EPA is the primary reason why the preponderance of Obama-era regulatory takeovers of state programs has survived judicial review. These regulations have been controversial, to say the least. Had the states been accorded deference in these inter-sovereign conflicts, they almost certainly would have won in court. And if neither party were accorded deference, then the courts would have had to weigh the evidence, rather than merely side with the federal agency by rote.

Congress should level the deference playing field by stipulating that states are the proper recipient of deference or ideally, that neither sovereign merits deference when the two are in conflict. The latter amendment is a concession to the reality that judicial deference to agency decision-making is incompatible with cooperative federalism as established by the Clean Air Act.

It is worth noting that such a leveling of Article III courts’ deference would leave intact the Clean Air Act’s system of cooperative federalism. States would still be responsible for achieving national targets established by the EPA. The only change would be that the agency could no longer run roughshod over state decision making due to it being the sole recipient of deference from federal courts. The EPA would have to justify better its decision to reject state plans and impose FIPs in their stead. This would weed out regulations that owe their genesis more to politics than to public health concerns.

Target Sue and Settle by Culling Statutory Deadlines, Guaranteeing States Intervention of Right. The Clean Air Act suffers from a significant flaw: It contains far more deadlines than the EPA has the resources to meet. This unfortunate reality facilitates collusive “sue and settle” policy making by the agency and environmental special interests, to the exclusion of the states.

The most direct way for Congress to correct this is to cull deadlines from the Act, in order to make EPA's responsibilities more reasonable.

Alternatively, Congress should establish a statutory process whereby the EPA periodically establishes its own non-binding priorities with enhanced congressional oversight. Although such deadlines would not carry the force of law, this plan has the decided advantage of subjecting the EPA's performance in meeting deadlines to greater political accountability, in addition to relieving the agency of an impossible burden.³⁷

Finally, Congress should guarantee states' ability to join pending "sue and settle" litigation. A troubling pattern has emerged during the Obama administration, whereby the EPA actually litigates to prevent state intervention in deadline lawsuits brought by environmental special interests.³⁸ The EPA's opposition to having states at the table—when the agency is negotiating the states' responsibilities with green groups—stands in stark contravention to the principles of cooperative federalism. By granting states an automatic right of intervention, Congress would help states have a voice.

Conclusion. When it comes to the expansion of federal power, the Obama administration stands in a class all its own. President Obama's EPA has taken over more Clean Air Act regulatory programs away from states than the previous three administrations combined—by a multiple of 10. The agency has given access and influence once reserved for the states—who are supposed to function as the EPA's co-sovereigns—to environmental special interests.

Thus, the Obama administration has undermined the Clean Air Act's system of cooperative federalism, as designed by Congress. To reestablish a true partnership between state and federal governments in the cause of air pollution mitigation, two legislative solutions are needed. The first would level the balance of justice when state and federal governments disagree on how to implement the Clean Air Act. The second would ameliorate the impacts of collusive "sue and settle" policy making between the EPA and special interests, to the exclusion of the states.

Notes

¹ 42 U.S.C. §7401(a)(3).

² *Train v. Natural Resources Defense Council, Inc.*, 421 US 60 (Supreme Court 1975), 79

³ *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984) 1036.

⁴ Environmental Council of States, "State Environmental Spending, 2005-2008," March 12 2008, <http://www.ecos.org/section/states/spending>.

⁵ 42 U.S.C. §7410(c).

⁶ Clean Air Act FIPs promulgated by EPA during the George H.W. Bush administration: 55 FR 26814, 56 FR 5458, 56 FR 50172.

⁷ Clean Air Act FIPs promulgated by EPA during the William Clinton administration: 63 FR 41326.

⁸ Clean Air Act FIPs promulgated by EPA during the George W. Bush administration 73 FR 21418.

⁹ Clean Air Act FIPs promulgated during the Barack Obama administration: 75 FR 82849, 75 FR. 82246, 76 FR 2581, 76 FR 48006, 76 FR 52387, 76 FR 81727, 77 FR 20893, 77 FR 40149, 77 FR.

50936, 77 FR 51915, 77 FR 61477, 77 FR 71533, 77 FR 72511, 79 FR 5032, 79 FR 33438, 76 FR 48208.

¹⁰ 76 FR 52387, 77 FR 20893, 76 FR 81727, 77 FR 51915, 77 FR 61477, 77 FR 71533, 78 FR 8705, 77 FR 50936, 77 FR 72511, 77 FR 40149, 79 FR 5032, 79 FR 33438.

¹¹ 42 U.S.C. §7491 169A/B; 40 C.F.R. §51.308.

¹² William Yeatman, "EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs," U.S. Chamber of Commerce, July 14 2012, <http://cei.org/studies/epas-new-regulatory-front>.

¹³ 75 FR 82429, 75 FR 82246 (seven states).

¹⁴ The FIPs pertained to the Prevention of Significant Deterioration program, 42 U.S.C. §7470-§7479, 40 C.F.R. §51.166.

¹⁵ In a September exchange with Rep. Mike Pompeo (R-Kan.), EPA Administrator Gina McCarthy conceded that the agency's climate change regulatory regime would in no way affect the climate, due to the fact that the preponderance of present and future greenhouse gas emissions originate in Asia. See Marlo Lewis, "Rep. Pompeo Questions EPA Administrator McCarthy on Obama Climate Plan," GlobalWarming.org, September 18, 2013, <http://www.globalwarming.org/2013/09/18/rep-pompeo-questions-epa-administrator-mccarthy-on-obama-climate-plan/>.

¹⁶ 76 FR 48208.

¹⁷ 42 U.S.C. §7410(a)(2)(D)(i).

¹⁸ The Clinton- and W. Bush-era regulations pursuant to the Clean Air Act "Good Neighbor" provision were known as the 1998 NO_x SIP Call (See 63 FR 57368, 57450-1) and the 2005 Clean Air Interstate Rule(ss 71 FR 25328,25330), respectively. Both rules gave states 12 months to comply with their individual targets before the EPA imposed a FIP.

¹⁹ William Yeatman, "Attack of the Scare Ads!" *Green Watch*, Capital Research Center, July 2, 2012, https://capitalresearch-zippykid.netdna-ssl.com/wp-content/uploads/2012/06/GW0712.indd_2.pdf.

²⁰ For regulatory capture, see William Yeatman, "Deadline Citizen Suits: An Idea Whose Time Has Expired", *Appalachian Natural Resources Law Journal*, Vol. 8, pp. 54-60, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470127.

²¹ In 2012, NRDC had revenues in excess of \$103 million. See Consolidated Statement of Activities for the Year Ending June 30, 2012, <http://www.nrdc.org/about/finances2012.pdf>. In 2012, the Sierra Club had assets greater than \$82 million. See The Sierra Club Foundation: Annual Report 2012, p. 36, http://www.sierraclubfoundation.org/sites/sierraclubfoundation.org/files/TSCF_AR_2012_FINAL-web.pdf.

²² Sierra Club "Politics & Elections: Impact of the 2012 Elections," <http://content.sierraclub.org/politics-elections/impact-2012>.

²³ NRDC Action Fund "about" Web page, <http://www.nrdcactionfund.org/about/>.

²⁴ Juliet Eilperin, "Two Environmental Groups to Create Political Alliance," *Washington Post*, April 14, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/14/two-environmental-groups-to-create-political-alliance/>.

²⁵ Ibid.

²⁶ William Yeatman, "Regulatory Capture Comes Full Circle at the EPA," GlobalWarming.org, May 15, 2014, <http://www.globalwarming.org/2014/05/15/regulatory-capture-comes-full-circle-at-the-epa/>. William Yeatman, "Regulatory Capture Comes Full Circle at the EPA," GlobalWarming.org, May 15, 2014, <http://www.globalwarming.org/2014/05/15/regulatory-capture-comes-full-circle-at-the-epa/>.

²⁷ See, generally, U.S. Chamber of Commerce, "Sue and Settle: Regulating behind Closed Doors," May 2013, <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

²⁸ William Yeatman, "EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, 'Sue and Settle,'" *WebMemo* No. 23, Competitive Enterprise Institute, July 10, 2013, <http://cei.org/web-memo/epas-woeful-deadline-performance-raises-questions-about-agency-competence-climate-change-re>.

²⁹ 42 U.S.C. §7604(a)(2).

³⁰ An Excel file that lists sue and settle agreements by the administration was created by author and uploaded at <http://www.globalwarming.org/wp-content/uploads/2014/08/Sue-and-settle-agreements-by-administration.pdf>.

³¹ See, generally, William Yeatman, “Which Sovereign Merits Deference When State & Federal Governments Conflict under the Clean Air Act’s Cooperative Federalism Arrangement?” *GlobalWarming.org*, March 18, 2014, <http://www.globalwarming.org/2014/03/18/which-sovereign-merits-judicial-deference-when-sovereigns-conflict-under-the-clean-air-acts-cooperative-federalism-arrangement/>.

³² Tellingly, the default standard for judicial review of agency action is “arbitrary and capricious” (see, e.g., 42 U.S.C. §7607(d)(9)). This is a very narrow standard pursuant to which courts rarely upset agency action. Deference and its underpinnings are aptly described by Professor William Fo, Jr., in *Understanding Administrative Law*, 4th Ed., Lexis Publishing, New York (2000), Chapter 12.

³³ Unlike a Congressional delegation of authority, deference cannot be split. The Supreme Court repeatedly has recognized that there are often two or more possible reasonable determinations given the facts at hand, and that reviewing courts should never substitute their own reasonable conclusions for that of the agency. See, *Marsh v. Oregon Natural Resources Council*, 490 US 360 (1989), pp. 376-3777; *Arkansas v. Oklahoma*, 503 US 91 (1992), p. 113; *Chevron v. NRDC*, 467 US 837, 844. Accordingly, both state and federal agencies could render reasonable yet different decisions on the same matter. In the case of such a federalism dispute, a reviewing court is in no position to split the difference. It must choose which sovereign merits respect, and which does not.

³⁴ William Yeatman, “Breaking News: SCOTUS Just Killed Cooperative Federalism,” *GlobalWarming.org*, May 27, 2014, <http://www.globalwarming.org/2014/05/27/major-breaking-news-scotus-just-killed-cooperative-federalism/>.

³⁵ 42 U.S.C. §7401(a)(3).

³⁶ Environmental Council of States, “State Environmental Spending, 2005-2008,” March 12 2008, <http://www.ecos.org/section/states/spending>.

³⁷ This policy is discussed in Alden F. Abbot, “The Case against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal,” *Administrative Law Review*, Vol. 39, No. 171 (1987), pp. 200-201.

³⁸ For example, on September 22, 2011, North Dakota Attorney General Wayne Stenehjem sought intervention in an agency-forcing citizen suit brought by WildEarth Guardians over the EPA’s inaction regarding a number of SIP revisions resulting from a 2007 revision of the ozone National Ambient Air Quality Standards. Rather than welcome the state’s participation, in accordance with the tenets of cooperative federalism, the EPA successfully opposed North Dakota’s involvement. See *WildEarth Guardians v. Jackson*, No. 4:09-04095 (N.D. Cal. 2009). More recently, the EPA opposed intervention by North Dakota, Arizona, Louisiana, South Dakota, Nevada, and Texas in an ongoing suit brought by the Sierra Club over the agency’s non-performance of area designation pursuant to a 2008 revision of the sulfur dioxide NAAQS (*Sierra Club et al. v. McCarthy*, Civil Action 3:13-cv-3953). See William Yeatman, “Anatomy of an Ongoing Sue and Settle Scandal,” *GLobalWarming.org*, June 13, 2014, <http://www.globalwarming.org/2014/06/13/primary-document-dump-fridays-anatomy-of-an-ongoing-sue-settle-scandal/>.