

United States Senate
Committee on Environment & Public Works
Minority Report
Cooperative Federalism



*Neglecting a Cornerstone Principle of
the Clean Air Act: President Obama's
EPA Leaves States Behind*

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EXECUTIVE SUMMARY

The Clean Air Act (CAA) was built on the principle of “cooperative federalism” in which the federal government and individual States would work together to control air pollution and improve air quality. When enacting the CAA in 1970, Congress found that “air pollution prevention ... and air pollution control at its source is the primary responsibility of States and local governments” and that “Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution (42 U.S.C. § 7401).” As a federal appeals court recently explained, “Congress chose a balanced scheme of state-federal interaction to implement the goals of the Clean Air Act.” Thus far, this symbiotic approach has served the nation well, with air quality improving substantially since the CAA was established over forty years ago.

This report shows the attempts made by President Barack Obama’s Administration (EPA specifically) to phase out State and local involvement, and also what the Senate Environment and Public Works (EPW) Committee Republicans are doing to maintain and uphold cooperative federalism, one of the cornerstones of the CAA.

In recent years, assertions have increasingly been made that the U.S. Environmental Protection Agency (EPA), instead of cooperating with the States as equal and valued partners under the CAA, is diminishing the role of the States. Since 2009, a majority of States have expressed concerns on a variety of fronts about EPA’s failure to adhere to the CAA’s cooperative federalism design.

For instance, States are troubled by EPA’s practice of entering closed-door, secretive “sue and settle” arrangements, in which environmental organizations particularly friendly to this Administration will sue the federal government, claiming that its regulatory obligations have not been satisfied. In the ensuing negotiations, States are not included in the discussion as new regulations are created. Evidence suggests that EPA entered more “sue and settle” agreements during this Administration’s first term than all three previous presidential terms combined. In addition, States are concerned that EPA is pursuing the unilateral revoking of long-standing, well-accepted provisions of State air quality programs. The data show that the current Administration is rejecting an unprecedented number of State Implementation Plan provisions. It is also apparent that EPA is imposing unreasonable timeframes for the States to review and comment on upcoming, complex EPA regulations; EPA is not providing equal treatment to the States in responding to Freedom of Information Act (FOIA) requests; and EPA has created significant uncertainty among the States by prematurely reconsidering national air quality standards.

The EPW Committee Minority Report discusses this Administration's growing failure to adhere to the cooperative federalism approach in working with States as established in the CAA, and also chronicles many of the recent concerns raised by States about EPA actions contrary to this principle. EPW Republicans also evaluate actions and conclude with possible solutions that should be considered to address these concerns.

This report was prepared by EPW Republican staff and the Republican staff of the EPW Subcommittee on Clean Air and Nuclear Safety.

Table of Contents

INTRODUCTION	5
COOPERATIVE FEDERALISM: A KEY STRATEGY FOR IMPROVING AIR QUALITY	11
COOPERATIVE FEDERALISM IN THE CLEAN AIR ACT	14
“SUE AND SETTLE”: COERCING THE STATES THROUGH SECRETIVE SETTLEMENT AGREEMENTS	18
EPA’S EFFORTS TO UNILATERALLY REVOKE LONG-STANDING PROVISIONS OF STATE IMPLEMENTATION PLANS	24
EPA’S UNREASONABLE DEADLINES FOR STATES TO COMMENT ON COMPLEX RULES	33
EPA’S REFUSAL TO PROVIDE EQUAL TREATMENT TO THE STATES IN RESPONDING TO INFORMATION REQUESTS	34
EPA’S PREMATURE RECONSIDERATION OF AIR STANDARDS.....	36
6 WAYS TO HELP RESTORE A COOPERATIVE RELATIONSHIP BETWEEN EPA AND THE STATES UNDER THE CLEAN AIR ACT	39

INTRODUCTION

Congress has enacted many environmental statutes that preserve the primary role of the States in achieving environmental quality goals.¹ This “cooperative federalism” approach has been described as a partnership between the States and the federal government.² In these statutes, Congress usually gives federal agencies, often the U.S. Environmental Protection Agency (EPA), a prescribed role to set national standards while leaving the administration, implementation, and enforcement of those standards primarily in the hands of the States. Congress also supports the States and local governments in their environmental missions by providing technical assistance and funding. Thus, the concept of cooperative federalism is based on a mutual commitment by the States and federal government to collaborate and develop workable solutions for shared environmental challenges.

Cooperative federalism has both constitutional and pragmatic underpinnings. In environmental policy, the concept reflects a foundational American principle that the federal government has limited, enumerated powers. As stated by one architect of our Constitution: “[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”³ The authority of Congress to regulate for the protection of the environment is based almost exclusively on its power under Article I, Section 8 of the Constitution to regulate interstate commerce.⁴ States, on the other hand, are not constrained in this manner.⁵ By crafting statutes that allow States to maintain the lead role they have traditionally maintained in protecting the environment, Congress recognized the constitutional concerns that might otherwise hinder a purely federal, top-down system.

¹ *New York v. United States*, 505 U.S. 144, 167-168 (1992) (citing various examples of federal regulatory programs premised on “cooperative federalism” approaches).

² *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

³ THE FEDERALIST NO. 45, at 292-93 (James Madison) (1788) (Clinton Rossiter ed., 1961). As the U.S. Court of Appeals for the Fifth Circuit has explained, “No authority need be cited for [this] fundamental and well-known limitation on the power of our Federal Government.” *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 627 (5th Cir. 2003).

⁴ See, e.g., Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 770-80 (2002) (“... federal environmental statutes rely on the Commerce Clause as the basis for Congressional authority...”).

⁵ See U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

Cooperative federalism also has a pragmatic basis. States and localities are best suited to design and implement compliance strategies to protect human health and the environment in a manner that appropriately accounts for local needs and conditions.⁶ Some activities have interstate effects, and Congress has provided enhanced federal roles for those specific contexts; yet, many, if not most, environmental and land use issues are essentially intrastate matters more effectively and efficiently addressed at the State and local level.⁷ As a former chairman of the Texas Commission on Environmental Quality has explained in a recent Heritage Foundation report, “The state and local governments’ direct accountability to real people has catalyzed creative and cost-effective solutions to air quality problems in stark contrast to the heavy-handed control, bureaucratic red tape, and scientifically unjustified regulatory mandates characteristic of the EPA’s approach.”⁸

While cooperative federalism is a foundation of many federal environmental statutes,⁹ this report focuses on the Clean Air Act (CAA) and, more specifically, concerns that the current Administration’s EPA too frequently ignores cooperative federalism principles and breaks faith with the States in the implementation of the

⁶ Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, N.Y.U. ENVTL. L.J. 130, 134-39 (2005-06).

⁷ See *Winnebago Tribe of Nebraska v. Ray Eyeglasses*, 621 F.2d 269, 272-73 (8th Cir. 1980) (where Congress does not directly provide federal jurisdiction, “environmental protection is still a matter primarily of state concern”).

⁸ Kathleen H. White, The Heritage Foundation, *CLEAN AIR THROUGH LIBERTY: REFORMING THE CLEAN AIR ACT* (2012), available at http://thf_media.s3.amazonaws.com/2012/EnvironmentalConservation/Chapter4-Clean-Air-Through-Liberty.pdf.

⁹ For example, the Clean Water Act (CWA) employs a cooperative federalism approach to achieving water quality goals. On its face, the CWA limits the jurisdiction of federal agencies to regulate the discharge of pollutants as well as dredged and fill material into “navigable waters,” defined as the “waters of the United States.” See 33 U.S.C. § 1344; *id.* at § 1362(7); see also EPA *Clean Water Act Definition of “Waters of the United States,”* EPA.GOV, <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm> (last accessed Sept. 23, 2013). The Supreme Court has rejected federal agency interpretations of “waters of the United States” that infringe upon the jurisdiction of the States. See *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (U.S. Army Corps of Eng’rs “expansive interpretation of the ‘waters of the United States,’” which included “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall,” was “not ‘based on a permissible construction of the statute.’”); see also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (overturning Corps determination that a “seasonally ponded, abandoned gravel mining depressions located on [a] project site” qualified as “waters of the United States” under the CWA). It remains to be seen whether the Administration will nonetheless vastly expand federal CWA jurisdiction through rulemaking, although it seems inclined to do so. Such an attempt could subject numerous routine activities to costly federal permitting, displace State and local water regulation, and raise serious Constitutional concerns.

CAA.¹⁰ For example, the Attorneys General of 17 States (and the senior environmental regulator of an additional State) wrote EPA Administrator Gina McCarthy on September 11, 2013, in response to “EPA’s aggressive proposal for GHG performance standards for new [electrical generating units (EGUs)] and indications of a similarly aggressive stance on existing EGUs,” noting “**EPA’s unwillingness to appropriately defer to State authority under the Clean Air Act in recent years.**”¹¹ State officials from every corner of the country are publicly expressing serious concerns with EPA’s recent CAA actions, such as:

- **State of Florida** – “Had EPA reached out to Florida at any point during the federal agency’s year-and-a-half of closed door negotiations with the third party, Florida would have addressed each of EPA’s apparent concerns...”¹²
- **State of Alaska** – “...in responding to the Sierra Club petition, EPA failed to appropriately consult with Alaska on the specific issues and findings related to Alaska’s SIP before proposing this SIP call.”¹³
- **State of Alabama** – “[EPA’s] confidential negotiations [with environmental groups] improperly excluded the primary parties affected by the consequent rulemaking—States—from participating in a process that should be open and transparent to the public...”¹⁴
- **State of Kansas** – “EPA has had years to contemplate, evaluate, and work with the Sierra Club to compromise and resolve issues in the Sierra Club’s petition. During this time, no outreach by EPA to the States or to regulated entities occurred.”¹⁵

¹⁰ The CAA specifically declares that “[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .” 42 USC § 7407(a).

¹¹ Letter from Jon Bruning, Attorney Gen., State of Neb., to Gina McCarthy, Adm’r, U.S. Env’tl. Prot. Agency (Sept. 11, 2013) (accompanying a White Paper entitled, “Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act.” On September 20, 2013, EPA proposed strict carbon dioxide emission limits for new coal and natural gas-fired power plants. See EPA, 2013 Proposed Carbon Pollution Standard for New Power Plants, available at <http://www2.epa.gov/carbon-pollution-standards/2013-proposed-carbon-pollution-standard-new-power-plants> (last visited October 18, 2013).

¹² Comments of Fla. Dep’t of Env’tl. Prot. on EPA’s Proposed SSM Rule, Docket ID No. EPA-HQ-OAR-2012-0322-0878, at 4 (May 13, 2013).

¹³ Comments of Alaska Dep’t of Env’tl. Conservation on EPA’s Proposed SSM Rule, Docket ID No. EPA-HQ-OAR-2012-0322-0629, at 4 (May 13, 2013).

¹⁴ Comments of Ala. Att’y Gen. on EPA’s Proposed SSM Rule, Docket ID No. EPA-HQ-OAR-2012-0322-0443, at 4 (May 10, 2013).

¹⁵ Comments of Kan. Dep’t of Health & Env’t on EPA’s Proposed SSM Rule, Docket ID No. EPA-HQ-OAR-2012-0322-0129, at 3 (April 17, 2013).

- **State of Montana** - “My primary concern is that EPA developed this proposed rulemaking without input from the affected states.”¹⁶
- **State of North Carolina** - “The NCDAQ believes that the federal/state partnership principles envisioned by Congress when the CAA was enacted are being violated by EPA’s actions.”¹⁷
- **State of Ohio** - “Because U.S. EPA did not consult with Ohio EPA prior to the issuance of the proposal, there are many errors in the application and interpretation of the Ohio rules.”¹⁸
- **Commonwealth of Pennsylvania** - “EPA has very likely overstepped its legal boundaries under the cooperative-federalism mandates of [the CAA]... EPA has adopted what has been called the ‘FIP first approach’ which has illegally commandeered the States’ role under the cooperative federalism mandates of the CAA...”¹⁹
- **State of Texas** - “[I]mplementation of [EPA’s] Cross-State Air Pollution Rule (CSAPR) will cause irreparable harm to our businesses and consumers by reducing overall energy production and crippling the operations of our rural electric cooperatives and mining facilities, which are major employers in rural Texas. Implementation of CSAPR will decrease electricity reliability, which could negatively impact businesses and consumers at a time when they desperately need stability for jobs and economic growth.”²⁰

Based on a review of recent EPA regulations and actions, as well as the comments of many States, this report describes several pervasive concerns that relate to the failure of EPA to properly abide by the CAA’s principle of cooperative federalism. This review suggests the following:

- EPA has purposely circumvented the States by entering closed-door, secretive “sue and settle” arrangements.

¹⁶ Comments of Mont. Dep’t of Env’tl. Quality on EPA’s Proposed SSM Rule, Docket ID No. EPA-HQ-OAR-2012-0322-0597, at 1 (May 13, 2013).

¹⁷ Comments of N.C. Dep’t of Env’tl. and Natural Res. on EPA’s Proposed SSM Rule, Docket ID No. EPA-HQ-OAR-2012-0322-0619, at 3 (May 13, 2013).

¹⁸ Comments of Ohio Env’tl. Prot. Agency on EPA’s Proposed SSM Rule, Docket ID No. EPA-HQ-OAR-2012-0322-0532, at 1 (May 13, 2013).

¹⁹ Comments of Pa. Dep’t of Env’tl. Prot. on EPA’s CSAPR.

²⁰ Todd Staples, Comm’r Tex. Dep’t of Agric., commenting about U.S. EPA’s CSAPR, Docket ID No. EPA-HQ-OAR-2009-0491-4819, at 1 (Nov. 28, 2011).

- EPA has unilaterally revoked long-standing, well-accepted provisions of State air quality programs.
- EPA has imposed unreasonable timeframes on the States for reviewing and commenting on complex EPA regulations.
- EPA has refused to provide equal treatment to the States in responding to information requests under the Freedom of Information Act.
- EPA has created significant uncertainty among the States through premature reconsiderations of national air quality standards, well ahead of the timeframes set forth in the CAA.

This is not an exhaustive list of concerns regarding recent EPA actions that disregard the principles of cooperative federalism. For example, under the current Administration, EPA has taken an unprecedented number of regulatory actions that will have the effect of making electricity more expensive in the States than is warranted. Examples include EPA's Cross State Air Pollution Rule (CSAPR),²¹ EPA's Utility MACT Rule,²² and the Administration's Climate Action Plan²³ – all of which seek to impose billions of dollars in new energy costs on the U.S. economy based on highly speculative environmental improvements and questionable cost-benefit analyses.²⁴ As illustrated in the following map, a number of States (shown in red) have expressed concerns since 2009 related to EPA's failure to adhere to the cooperative federalism design of the Clean Air Act.

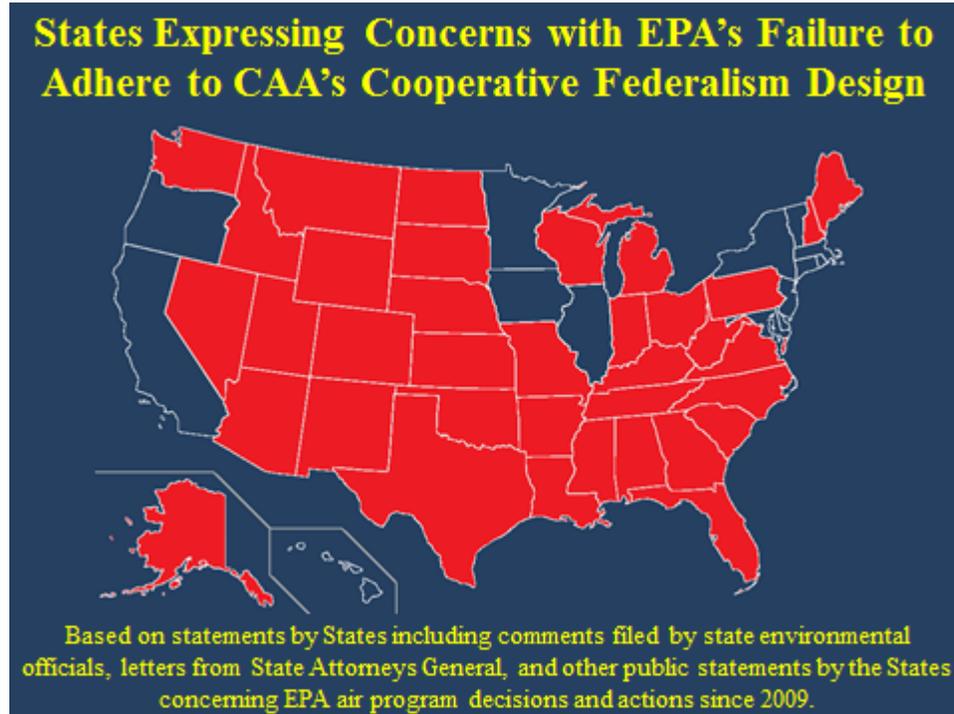
²¹ Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011), Docket ID No. EPA-HQ-OAR-2009-0491-4574 (hereinafter, "CSAPR").

²² See EPA Regulatory Actions: Mercury and Air Toxics Standards, available at <http://www.epa.gov/mats/actions.html> (last visited Oct. 18, 2013).

²³ See The President's Climate Action Plan, available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf> (last visited Oct. 18, 2013).

²⁴ *Obama's War on Coal*, SENATE REPUBLICAN POLICY COMMITTEE (May 15, 2012), <http://www.rpc.senate.gov/policy-papers/obamas-war-on-coal>.

Figure 1.



For its part, EPA seems to believe its actions are necessary because of its view that States are not doing enough to protect air quality. Yet, this assertion is contradicted by the plain fact that air quality in the United States is significantly better than it has been at any time since the enactment of the CAA.²⁵ Perhaps the most overreaching efforts by EPA in recent years center on its efforts to regulate carbon dioxide under the CAA even though carbon dioxide is not a harmful pollutant in the traditional sense. This 1970 Act of Congress focused on air pollution that adversely affected the health of Americans, and it was never envisioned to cover carbon dioxide, which is exhaled by every breathing creature, is not harmful to human health, and is essential to plant life. Nonetheless, based on a dubious interpretation of the CAA allowed by a slim majority of the U.S. Supreme Court, but

²⁵ American Lung Association, *Key Findings for 2009-2011, STATE OF THE AIR*, <http://www.stateoftheair.org/2013/key-findings/> (last visited Sept. 23, 2013) (“Thanks to the Clean Air Act, the United States continues to make progress providing healthier air. The ‘State of the Air 2013’ shows that the nation’s air quality is overall much cleaner, especially compared to just a decade ago. . . . This chart from the EPA shows that since 1970, the air has gotten cleaner while the population, the economy, energy use and miles driven increased greatly.”); see also *Progress Cleaning the Air and Improving People’s Health*, EPA, <http://www.epa.gov/air/caa/progress.html#pollution> (last visited Sept. 23, 2013).

never expressly endorsed by Congress, EPA is systematically imposing federal standards to regulate carbon dioxide on the basis that it is “pollution.”²⁶

Since cooperative federalism is a cornerstone of the Clean Air Act, it is worth considering whether, by running roughshod over the States, EPA’s tactics risk undermining the very program that has led to remarkable improvements in air quality in the United States since the 1970s.

COOPERATIVE FEDERALISM: A KEY STRATEGY FOR IMPROVING AIR QUALITY

Air quality has significantly improved in the United States over the past 40 years, and the Clean Air Act’s cooperative federalism arrangement deserves great credit for these improvements, as do the voluntary efforts of millions of Americans and businesses. The States—not just EPA—desire that all citizens are able to breathe clean air. As the official EPA website explains:²⁷

- *Clean Air Act programs have lowered levels of six common pollutants -- particles, ozone, lead, carbon monoxide, nitrogen dioxide and sulfur dioxide -- as well as numerous toxic pollutants.*
- *From 1970 to 2011, aggregate national emissions of the six common pollutants alone dropped an average of 68 percent while gross domestic product grew by 212 percent. This progress reflects efforts by state, local and tribal governments; EPA; private sector companies; environmental groups and others.*
- *The emissions reductions have led to dramatic improvements in the quality of the air that we breathe. Between 1980 and 2010, national concentrations of air pollutants improved 90 percent for lead, 82 percent for carbon monoxide, 76 percent for sulfur dioxide (24-hour), 52 percent for nitrogen dioxide (annual), and 28 percent for ozone.*

²⁶ EPA’s website for its NSPS proposal for new and existing sources describes EPA’s efforts as necessary to “reduce carbon pollution...” <http://www2.epa.gov/carbon-pollution-standards>.

²⁷ EPA, *Progress Cleaning the Air and Improving People’s Health*, available at <http://www.epa.gov/air/caa/progress.html> (last visited Oct. 18, 2013).

- *State emission control measures to implement the Act, as well as EPA's national emissions standards, have contributed to air quality improvements.*

The Heritage Foundation created a useful chart summarizing this improving air quality data:²⁸

Figure 2.

Air Quality Improvement, 1980-2010

	Ambient, 1980-2008	Ambient, 1980-2010	Emissions, 1980-2008	Emissions, 1980-2010
Carbon Monoxide (CO)	-79%	-82%	-58%	-71%
Ozone (O ₃)	-25%	-28%	-49%	No current data
Lead (Pb)	-92%	-90%	-96%	-97%
Nitrogen Dioxide (NO ₂)	-46%	-52%	-40%	-52%
Particulates (PM ₁₀)*	-31%	-38%	-46%	-83%
Fine Particulates (PM _{2.5})**	-21%	-27%	-36%	-55%
Sulfur Dioxide (SO ₂)	-71%	-76%	-56%	-69%

* 1990-2010 ** 2000-2010

Source: U.S. Environmental Protection Agency, "Air Quality Trends," January 2012, <http://www.epa.gov/airtrends/aqtrends.html> (accessed April 18, 2012).

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Regional and state-by-state analyses also show how emissions are dropping all over the United States.²⁹ These advancements have come with a significant price tag: in the United States, over \$1 trillion is reported to have been spent on emissions controls and other air quality improvements.³⁰

The success of reduced emissions domestically contrasts starkly with conditions in countries employing a top-down, command-and-control approach to environmental protection such as China where air quality remains dangerously poor.³¹ Equally important, a top-down, federally-controlled approach is neither workable nor sustainable long-term in a nation that values the role of the States and

²⁸ White, *supra* note 8, at 4.

²⁹ American Coalition for Clean Coal Electricity (ACCCE), *Air Quality Trends*, AMERICA'S POWER, <http://www.americaspower.org/issues-policy/air-quality-trends> (last visited Sept. 23, 2013).

³⁰ Steven Hayward, American Enterprise Institute (AEI), *Two Cheers for the Clean Air Act* (Sept. 17, 2010), THE AMERICAN <http://www.american.com/archive/2010/september/two-cheers-for-the-clean-air-act> ("The nominal cost of air quality improvements is well above \$1 trillion since 1970.").

³¹ Edward Wong, *On Scale of 0 to 500, Beijing's Air Quality Tops 'Crazy Bad' at 755*, NY TIMES (Jan. 12, 2013), available at http://www.nytimes.com/2013/01/13/science/earth/beijing-air-pollution-off-the-charts.html?_r=0.

local governments. The Heritage Foundation’s “Eight Principles of the American Conservation Ethic” helps explain the reason for this:

A site- and situation-specific management approach also allows conservation efforts to reflect unique environmental characteristics and variables as well as the needs and desires of local populations. Rigid government mandates and standards lack this flexibility. Additionally, a site- and situation-specific approach is more consistent with policies carried out at lower levels of government. Centralized management is more likely to be arbitrary, ineffectual, or even counterproductive as it lacks the insight of local populations. A site- and situation-specific approach avoids the institutional power and ideological concerns that dominate politicized central planning. Where laws and regulations to achieve environmental goals must be set, they should be meaningful, measurable, and objective and should contain bright legal lines – rather than bureaucratic requirements – as to how such standards are to be met.³²

Regrettably, the current EPA regularly circumvents the States in implementation and enforcement of the Clean Air Act. As explained in a recent letter signed by 17 State Attorneys General and the environmental official of an 18th State, there is a **“serious, ongoing problem in environmental regulation: the tendency of the EPA to seek to expand the scope of its jurisdiction at the cost of relegating the role of the States to merely implementing whatever Washington prescribes, regardless of its wisdom, cost, or efficiency in light of local circumstances.”**³³

There is a growing concern that EPA, instead of cooperating with the States as equal and valued partners, is coopting and coercing the States by treating them as mere regional offices of a massive federal environmental bureaucracy. Cooperative federalism is treated as an obstacle to be overcome, rather than a principle which

³² The Heritage Foundation, *Eight Principles of the American Conservation Ethic* at 3 (2012), available at http://thf_media.s3.amazonaws.com/2012/EnvironmentalConservation/Eight-Principles-of-the-American-Conservation-Ethic.pdf (last visited Sept. 23, 2013) (emphasis added).

³³ Att’y Gen. Jon Bruning et al., White Paper, *Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act*, at 2 (2013) (accompanying letter from Jon Bruning, Neb. Atty Gen., to Gina McCarthy, Adm’r, U.S. EPA (Sept. 11, 2013) (see *supra* note 11) (emphasis added).

guides and informs. This trend, if left uncorrected, threatens to undermine the cooperative strategy that has helped to ensure the CAA's success and garnered it broad public support. It also threatens to undermine job growth and America's global economic competitiveness.

COOPERATIVE FEDERALISM IN THE CLEAN AIR ACT

The Clean Air Act—in its modern form as enacted in 1970 and significantly amended in 1977 and 1990—establishes a cooperative framework whereby EPA and the States work in partnership to achieve air quality objectives. The CAA's "cooperative federalism structure is a defining feature of the statute."³⁴ This approach to improving air quality in a cooperative, economically prudent manner is foundational to the CAA. When enacting this instrumental law, Congress found that "air pollution prevention ... and air pollution control at its source is the *primary responsibility of States and local governments*"³⁵ and that "Federal financial assistance and leadership is essential for the development of *cooperative Federal, State, regional, and local programs* to prevent and control air pollution."³⁶

In statute, Congress stated that the purposes of the CAA are:

- (1) *to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and **the productive capacity of its population**;*
- (2) *to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;*
- (3) *to **provide technical and financial assistance to State and local governments** in connection with the development and execution of their air pollution prevention and control programs; and*
- (4) *to encourage and assist the development and operation of **regional** air pollution prevention and control programs*³⁷

Further, Congress stated that a "primary goal" of the Act is "to encourage or otherwise promote *reasonable Federal, State, and local governmental actions*,

³⁴ See, e.g., *GenOn REMA, LLC v. EPA*, No. 12-1022, 2013 WL 3481486, *1 (3d Cir. July 12, 2013) (internal quotations omitted).

³⁵ 42 U.S.C. § 7401(a)(3).

³⁶ 42 U.S.C. § 7401(a)(4).

³⁷ 42 U.S.C. § 7401(b) (emphasis added).

consistent with the provisions of this chapter, for pollution prevention.”³⁸ As the U.S. Court of Appeals for the Eleventh Circuit recently explained:

The Clean Air Act thus provides a cooperative-federalism approach to air quality regulation... Congress chose a balanced scheme of state-federal interaction to implement the goals of the Clean Air Act. Under this approach, states have primary responsibility for ensuring that the ambient air meets the NAAQS for the identified pollutants, and so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation... The great flexibility accorded the states under the Clean Air Act is [...] illustrated by the sharply contrasting, narrow role to be played by the EPA...³⁹

Congress created a national air quality program where EPA would oversee and approve the States’ design and implementation of federal requirements, only stepping in when necessary to maintain federal standards.⁴⁰ When Congress developed the CAA, it intended a partnership between EPA and the States where the two entities could work together to effectively balance economic progress with environmental protection.⁴¹

Under the CAA, EPA establishes “primary” and “secondary” national ambient air quality standards (NAAQS) for air pollutants. Primary standards are those “the

³⁸ 42 U.S.C. § 7401(c) (emphasis added).

³⁹ Ala. Env'tl. Council v. EPA, 711 F. 3d 1277, 1280 (11th Cir. 2013) (internal citations and punctuation omitted).

⁴⁰ See, e.g., EME Homer City Generation, L.P. v. E.P.A., 696 F.3d 7, 28 (D.C. Cir. 2012) *cert. granted in part*, 133 S. Ct. 2857 (U.S. 2013) *and cert. granted in part*, 133 S. Ct. 2857 (U.S. 2013) (“The Clean Air Act ordinarily gives States the initial opportunity to implement a new air quality standard on sources within their borders...by preemptively issuing FIPs, EPA denied the States that first opportunity to implement the reductions required under their good neighbor obligations.... EPA’s approach punishes the States for failing to meet a standard that EPA had not yet announced and the States did not yet know...Under the Act, EPA has authority to set standards, but the statute reserves the first-implementer role for the States.”).

⁴¹ WILLIAM YEATMAN, AM. LEGISLATIVE EXCH. COUNCIL (ALEC), THE U.S. ENVIRONMENTAL PROTECTION AGENCY’S ASSAULT ON STATE SOVEREIGNTY 1, (2013), *available at* http://alec.org/docs/EPA_Assault_State_Sovereignty (hereinafter Yeatman, *EPA’s Assault on State Sovereignty*).

attainment and maintenance of which ... are requisite to protect the public health.”⁴² While EPA must allow an “adequate margin of safety” when setting primary standards, the CAA’s legislative history indicates that these standards should be set at “the maximum permissible ambient air level...which will protect the health of any [sensitive] group of the population.”⁴³ Secondary standards “specify a level of air quality the attainment and maintenance of which...is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.”⁴⁴

While EPA establishes the NAAQS, the “task of deciding precisely how to achieve them is left largely to the states, subject to EPA review and approval.”⁴⁵ States develop, submit for EPA approval, and administer a State Implementation Plan (SIP) that specifies control measures to achieve these national standards.⁴⁶ States are responsible for developing SIPs to ensure “implementation, maintenance, and enforcement” of NAAQS.⁴⁷

EPA’s discretion to disapprove SIPs is not plenary. The CAA gives EPA no authority to question the wisdom of a State’s choices of emissions control plans if they are part of a SIP that satisfies the standards of section 110(a)(2).⁴⁸ Furthermore, EPA has very limited authority to “disapprove” a State’s strategy to meet the NAAQS.⁴⁹ In fact, “so long as the ultimate effect of a State’s choice of emission

⁴² 42 U.S.C. § 7409(b)(1).

⁴³ See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970) (emphasis added).

⁴⁴ 42 U.S.C. § 7409(b)(2).

⁴⁵ ROBERT V. PERCIVAL & CHRISTOPHER H. SCHROEDER, ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY, at 571 (3d ed. 2000); see also Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans -- Thirty-Seven Years Of Increasing Complexity*, 15 Vill. Envtl. L.J. 209, 211 (2004) (“The 1970 Clean Air Act Amendments began to shape the Clean Air Act (CAA) into its current form. . . . (NAAQS) were to be set by the Environmental Protection Agency (EPA) . . . each state [was] to develop a state implementation plan (SIP) providing for attainment and maintenance of the NAAQS.”).

⁴⁶ 42 U.S.C. §§ 7409, 7410.

⁴⁷ *Id.* at § 7410(a)(1).

⁴⁸ See *Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975) (holding that SIPs must “meet eight general conditions set forth in § 110(a)(2), the principal one of which is that the plan provide for the attainment of the national primary ambient air quality standards in the State ‘as expeditiously as practicable’”).

⁴⁹ 42 U.S.C. § 7410(k)(3); and see Reitze, *supra* note 45 at 211-213 (“The SIP was to include the elements in section 110(a)(2)(A)-(H) and had to be submitted to EPA for approval. If the SIP met the statutory requirements, the Administrator of EPA was to approve it. If, however, a state failed to submit a SIP, submitted an inadequate SIP or failed to revise a plan when required to do so, the Administrator was required to promulgate a federal implementation plan (FIP). . . . EPA’s role in the SIP development process is limited. Section 110 leaves to the states ‘the power to determine which sources would be burdened by the regulations and to what extent.’ EPA may devise its own plan if a state fails to submit

limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”⁵⁰ As one commenter noted, States have “considerable freedom to choose what regulatory strategies to employ to meet the NAAQS.”⁵¹ Importantly, as written in the statute, mere inadequacy of a SIP in the eyes of EPA is not a sufficient basis for disapproving a SIP. As the U.S. Court of Appeals for the D.C. Circuit explained last year when vacating the EPA’s Cross State Air Pollution Rule (CSAPR) on concerns related to cooperative federalism:

*To deal with [the CAA’s] complex regulatory challenge, Congress did not authorize EPA to simply adopt limits on emissions as EPA deemed reasonable. Rather, Congress set up a federalism-based system of air pollution control. Under this cooperative federalism approach, both the federal government and the states play significant roles. The federal government sets air quality standards for pollutants. The States have the primary responsibility for determining how to meet those standards and regulating sources within their borders.*⁵²

Only where a SIP is legally deficient may EPA disapprove it and, in some cases, impose a Federal Implementation Plan (FIP).⁵³ For that to occur, the law requires a

one that satisfies CAA section 110(c), but it cannot specify what must be in a SIP that is adequate to attain and maintain the NAAQS. EPA may not, under the guise of partially approving a SIP, render the plan more stringent than the state intended. “[T]he 1990 CAA Amendments did not change the substance of the SIP approval process or alter the division of responsibilities between EPA and the states in the section 110 process.” (citations omitted).

⁵⁰ *Train*, 421 U.S. at 79.

⁵¹ *Percival & Schroeder*, *supra* note 45, at 12.

⁵² *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012); *reh’gs denied*, No. 11-1302 (D.C. Cir. Jan. 24, 2013); *petition for writ of cert. granted*, No. 12-1183 (D.C. Cir. June 24, 2013 (limited to questions presented by petition No. 12-1182)). Notably, where downwind States are concerned about the impacts of interstate emissions, the CAA authorizes those States to petition EPA to address pollution concerns. *Michigan v. EPA*, 213 F. 3d 663 (D.C. Cir. 2000) (“Section 126(b) enables an individual state or a political subdivision of a state to petition EPA to make a ‘finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of [§ 110(a)(2)(D)(ii)].” (citing 42 U.S.C. § 7426(b)); *EPA, Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone*, 63 Fed. Reg. 57,356, 57,360 (Oct. 27, 1998) (“section 126,...in general, authorizes a downwind State to petition EPA to impose limits directly on upwind sources found to adversely affect that State.”).

⁵³ 42 U.S.C. § 7410(k)(5) (“Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard...the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable

finding of substantial inadequacy.⁵⁴ This is vital because SIP disapprovals are not without potentially significant consequences. State officials expend numerous man-hours and extensive resources to develop SIPs that best address the State's needs, and alternative federal requirements are often more draconian and expensive yet less effective.

It is axiomatic that cooperative federalism is a cornerstone of the Clean Air Act; regrettably, however, EPA increasingly ignores this foundational principle, as demonstrated by recent "sue and settle" actions by EPA that are discussed in more detail in the next section of this report.

"SUE AND SETTLE": COERCING THE STATES THROUGH SECRETIVE SETTLEMENT AGREEMENTS

In recent years, EPA has increasingly employed a strategy referred to as "sue and settle." Under this political and legal tactic, environmental groups aligned with the current Administration have filed "friendly lawsuits" against the federal government in hand-picked courts, claiming that an agency, often the EPA, is not satisfying some specified duty (e.g., the agency failed to issue a new regulation favored by the group). Then, instead of challenging these lawsuits, the groups and agency officials will draft a settlement agreement behind closed doors without consulting the adversely affected entities (most commonly, the States). Once the settlement is approved by the court selected by the parties, EPA imposes on the States costly regulations that were privately agreed upon.⁵⁵ EPA officials are able to argue that their hands are tied by the compressed, court-imposed deadlines, effectively bypassing the normal administrative procedures and political checks that accompany major regulatory actions with serious economic consequences. In effect, this "sue and settle" practice places litigious environmental groups in a position to dictate official government policy and allows EPA officials to direct resources to

deadlines...for the submission of such plan revisions."); and see, *contra, id.* at § 7410(k)(3) ("In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter." (emphasis added)).

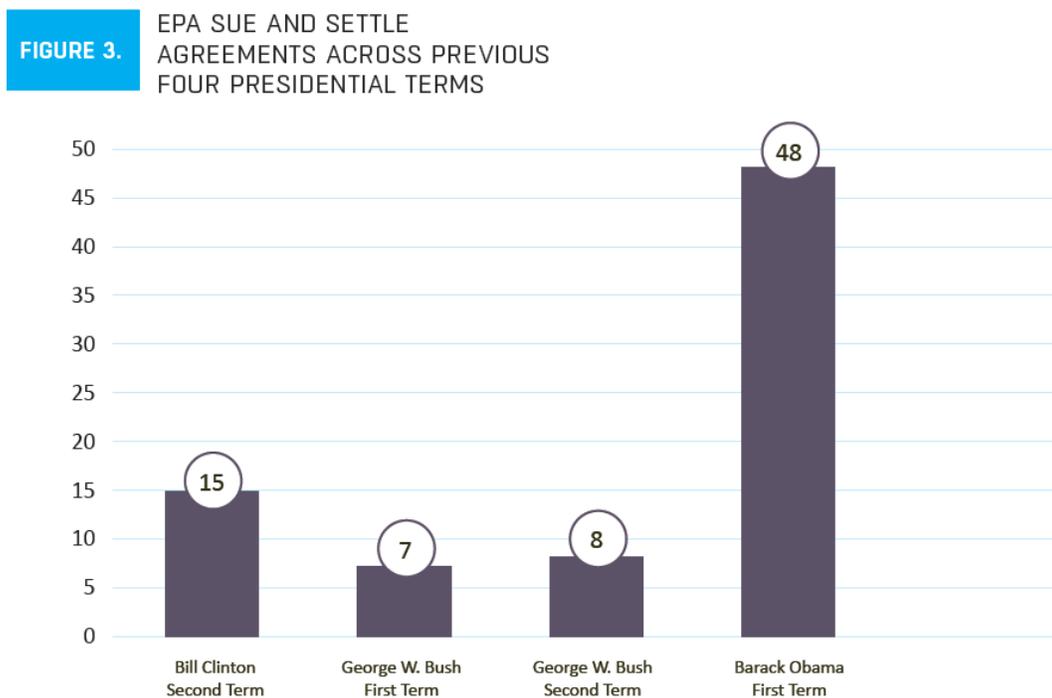
⁵⁴ *Id.*

⁵⁵ *Eye on the EPA: Transparency Request #5, Share 'Intent to Sue' Notices with the Public*, S. Comm. on Env't & Public Works (Apr. 26, 2013), http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=55F0F1AC-09D5-71F4-5F08-54059AF9E37F.

actions which might not otherwise be economically or politically feasible to pursue as an express agency priority.⁵⁶

States, much to their dismay, are frequently unaware of these “sue and settle” agreements until it is too late, since neither EPA nor the environmental groups have significant interest in informing the States of—much less involving them in—their negotiations. “Sue and settle” allows EPA to prevent input from the States in favor of litigious groups and bolsters EPA’s ability to circumvent statutory requirements to advance its own regulatory agenda with minimal oversight and interference.⁵⁷ As illustrated in the following table produced by the American Legislative Exchange Council, EPA entered more “sue and settle” agreements during President Obama’s first term than all three previous presidential terms combined.

Figure 3.



Source: William Yeatman, *The U.S. Environmental Protection Agency’s Assault on State Sovereignty*, Am. Legislative Exchange Council (2013).

⁵⁶ John Eick & Todd Wynn, American Legislative Exchange Council (ALEC), *The EPA’s Assault on State Sovereignty Part I*, AMERICAN LEGISLATOR (June 26, 2013) (hereinafter, “Eick & Wynn”), <http://www.americanlegislator.org/the-epas-assault-on-state-sovereignty-part-i/>.

⁵⁷ Yeatman, *EPA’s Assault on State Sovereignty*, *supra* note 41 at 12.

SIP disapprovals (along with the subsequent imposition of a FIP) have resulted from these “sue and settle” tactics. The new federal requirements that result from these dubious settlements allow EPA to circumvent the intended coordinated role of States and EPA as co-regulators under the CAA’s cooperative federalism structure.

One recent example of the practice of “sue and settle” involves the Regional Haze provisions of the CAA.⁵⁸ This unique program was established by Congress in an effort to improve visibility at Federal National Parks and Wilderness Areas. Under this program, States develop “Regional Haze SIPs” based on the value each State assigns the aesthetic benefit of improved visibility at designated parks and areas. These SIPs include State-determined emission standards and controls. States then submit their Regional Haze SIPs to EPA for approval. However, the CAA stipulates that EPA is to perform a limited procedural and technical function;⁵⁹ that is, EPA may only object to a SIP based on the process the State used to develop its plan.⁶⁰ Only after EPA disapproves a SIP may EPA proceed with imposing a FIP.

Federal courts have reaffirmed the primary role of the States in this context by remanding EPA rules under the Regional Haze program.⁶¹ Despite the express intent of Congress and affirmation of the courts, EPA has made a practice of pushing the boundaries of the CAA and is now in the process of usurping State control of the Regional Haze program. While EPA and State officials from New Mexico, Oklahoma, and North Dakota disagreed over emission controls under the program, environmental groups simultaneously filed lawsuits against EPA alleging that EPA failed to meet non-discretionary deadlines to approve the SIPs.

Rather than litigate these cases, five consent decrees were negotiated.⁶² Under these decrees, EPA agreed to set deadlines on Regional Haze SIPs without notice to

⁵⁸ See 42 U.S.C. § 7491(b)(2)(A).

⁵⁹ WILLIAM YEATMAN, U.S. CHAMBER OF COMMERCE, *EPA’S NEW REGULATORY FRONT: REGIONAL HAZE AND THE TAKEOVER OF STATE PROGRAMS*, 4-7 (2012) (hereinafter, “Yeatman, *EPA’s New Regulatory Front*”), available at http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf

⁶⁰ 40 C.F.R. § 51.308; see also *American Corn Growers Ass’n v. EPA*, 291 F.3d 1, 4-5 (D.C. Cir. 2002).

⁶¹ *Am. Corn Growers Assoc.*, 291 F.3d at 8 (vacating BART rules and remanding to EPA because, among other things, “the Haze Rule’s BART provisions are inconsistent with the [CAA’s] provisions giving the states broad authority over BART determinations. . . . The Haze Rule ties the states’ hands and forces them to require BART controls at sources without any empirical evidence of the particular source’s contribution to visibility impairment in a Class I area.”)

⁶² See Proposed Consent Decree, *Nat’l Parks Conservation Assoc. v. Jackson*, No. 11-cv-01548 (D.D.C. Nov. 9, 2011); Lodged Consent Decree, *Sierra Club v. Jackson*, No. 10-cv-02112 (D.D.C. Aug. 3, 2011); Consent Decree, *WildEarth Guardians v. Jackson*, No. 09-CV-02453 (N.D. Cal. Nov. 10, 2009); Proposed

the affected States until after the terms of the consent decrees were already set.⁶³ Subsequently, EPA rejected the SIPs just before the deadline. In effect, States were left with no meaningful opportunity to modify their plans. Notwithstanding the deadlines, States submitted additional information to satisfy EPA's concerns, but EPA refused to give any further review or consideration to the States' concerns. Absent an approved SIP, EPA then claimed that it was mandated by the court to implement Regional Haze FIPs.⁶⁴

EPA's Regional Haze FIPs have not only usurped the States under this program, but have also imposed costs on the States that far exceed the benefits. For instance, EPA's plans for North Dakota, Oklahoma, Arizona, and Wyoming add significant

Consent Decree, *WildEarth Guardians v. Jackson*, No. 11-cv-00001 (11-cv-00743) (D. Col. June 6, 2011); Proposed Consent Decree, *WildEarth Guardians v. Jackson*, No. 10-cv-01218 (D. Col. Oct. 28, 2010).

⁶³ Under CAA Section 113, EPA is required to give 30-days' notice and to solicit comments before entering a consent decree, but not before negotiating and drafting its terms. 42 U.S.C. § 7413(g); *and see* Proposed Consent Decree, *Clean Air Act Citizen Suit*, 76 Fed. Reg. 75,544, 75,544 (Dec. 2, 2011) (“[N]otice is hereby given of a proposed consent decree to address a lawsuit . . . National Parks Conservation Association, et al. v. Jackson, No. 1:11-cv-1548 (D.D.C.). Plaintiffs filed a complaint alleging that EPA failed to promulgate regional haze federal implementation plans (FIPs) or approve regional haze state implementation plans (SIPs) for 34 states, as required by section 110(c) of the CAA. The complaint further alleges that EPA has also failed to act on ten regional haze SIPs submissions, as required by section 110(k) of the CAA. The proposed consent decree establishes proposed and final promulgation deadlines for EPA for meeting these obligations.”). While Section 113(g) does not compel EPA to withdraw from a settlement agreement based on the comments it receives—even if comments show that the consent decree is improper or inappropriate—it does presume that the agreement is not “a product of collusion.” *See WildEarth Guardians v. Jackson*, No. 11-CV-00001, 2011 WL 4485964, at *4 (D. Colo. Sept. 27, 2011) (citing *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)). In other words, Section 113(g) takes it for granted that EPA will defend its actions and policies, and negotiate settlements at arm's length. Section 113(g) does not create a backdoor through which EPA can circumvent the requirements of the CAA, disregard scientific evidence, or conduct de facto rulemaking on a mere 30 days' notice. *See WildEarth Guardians v. Jackson*, No. 11-CV-00001, 2011 WL 4485964, at *7 (D. Colo. Sept. 27, 2011) (“Although a consent decree may provide for greater relief than a district court could award, ‘the parties may not agree to take action that conflicts with or violates the statute upon which the complaint was based.’” (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986))).

⁶⁴ EPA's Regional Haze FIPs have been judicially challenged and remain the subject of pending litigation in at least nine states. Most recently, on September 23, 2013, the Eighth Circuit Court of Appeals ruled in accordance with precedent set by the Tenth Circuit Court of Appeals on July 19, 2013, upholding EPA's authority on procedural grounds to reject SIPs, as opposed to substantive grounds regarding the Agency's authority under the Clean Air Act. *See North Dakota v. EPA*, No. 12-1844 (8th Cir., Sept. 23, 2013); *Oklahoma v. EPA*, Nos. 12-9526, 12-9527 (10th Cir., July 19, 2013). While the Tenth Circuit Court of Appeals upheld EPA's Regional Haze FIP for Oklahoma, the Eighth Circuit remanded EPA's FIP because the Agency failed to comply with the statutory factors in its best available retrofit technology analysis. . On September 3, 2013, Oklahoma filed a Petition for *en banc* review of the decision, and on September 10, 2013, thirteen state attorneys general and one state environmental department filed an amicus brief in support of Oklahoma's petition. *See Brief for States of Alabama, et al. as Amici Curiae Supporting Petitioners, Oklahoma v. EPA*, Nos. 12-9526, 12-9527 (10th Cir., July 19, 2013), pet. for panel or *en banc* reh'g filed (Sept. 3, 2013).

annual costs to the preferred State plans; yet, the data submitted by the States suggest that the visibility improvement from EPA's takeover is indistinguishable from that of the State standards.⁶⁵ Even neighboring States have expressed concerns. For example, Governor C.L. Otter of the State of Idaho wrote EPA on August 23, 2013, to express concerns about EPA's Regional Haze proposal for Wyoming and the adverse effects that EPA's proposal would have in Idaho.⁶⁶ Governor Otter strongly disagreed with EPA's decision "forcing Wyoming to accelerate compliance to address regional haze goals," stating that EPA "appears not to be following the intent of Congress in its implementation of the Regional Haze Rule."⁶⁷ His letter explains that States in the Western Regional Air Partnership have worked collaboratively to address each State's "overall reductions, long-range plans and reasonable benchmarks."⁶⁸ Since neighboring Idaho is in "agreement with Wyoming's regional haze emission reductions and overall plan," Governor Otter expressed dismay that EPA has decided on its own to make "blanket determinations" about specific technologies and actions that must be taken in those States.⁶⁹

In another sue and settle situation, EPA committed to issuing regulations for new and existing coal fired power plants with respect to greenhouse gas emissions (GHGs).⁷⁰ While EPA's authority to issue these regulations under Section 111(d) of the CAA is in dispute,⁷¹ the States are clearly in charge of establishing the substance

⁶⁵ Yeatman, *EPA's New Regulatory Front*, *supra* note 57, at 7 ("Because all but one of the visibility improvements mandated by EPA's proposed regional haze rule will only result in deciview reductions of less than 2, these visibility improvements will not be discernible. In other words, utilities may have to spend billions of dollars for visibility improvements that no one will be able to see or even notice."); *see also* Brief for Petitioners, *State of Oklahoma ex rel. Scott Pruitt v. EPA*, No. 12-9526 (10th Cir. 2012); *Mandate Madness: When Sue and Settle Just Isn't Enough: Hearing before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of H. Comm. on Oversight and Gov't Reform* (June 28, 2012) (testimony of William Yeatman, Asst. Dir., Ctr. for Energy and Env't Competitive Enter. Inst., at 5-6); *available at* <http://oversight.house.gov/wp-content/uploads/2012/06/6-28-12-TechIP-Yeatman.pdf>.

⁶⁶ Letter from Gov. C.L. Otter to EPA Administrator Gina McCarthy dated August 23, 2013 (on file with Senate EPW Committee Minority Staff).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Settlement Agreements: Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392 (proposed Dec. 30, 2010) (Supp. 2011).

⁷¹ *See* William J. Haun, The Federalist Society, *The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants* (Mar. 2013) (a Federalist Society White Paper), *available at* <http://www.fed-soc.org/publications/detail/the-clean-air-act-as-an-obstacle-to-the-environmental-protection-agencys-anticipated-attempt-to-regulate-greenhouse-gas-emissions-from-existing-power-plants>.

of any emissions standards to be placed on existing power plants under that section. The plain language of Section 111(d) echoes the underlying principle of cooperative federalism inherent in the CAA. Congress intended for the States to submit plans for establishing the standards of performance for any existing source for any air pollutant to which a standard of performance would apply if such existing source were a new source.⁷² While Section 111(d) requires as a condition precedent the existence of a new source performance standard for new plants (which EPA has yet to finalize),⁷³ EPA's role in setting existing source emissions standards is limited.⁷⁴

Recently, 17 State Attorneys General and the senior environmental regulator of an 18th state wrote EPA Administrator Gina McCarthy expressing concerns with EPA's clear lack of deference to State authority under the CAA, citing not only the Agency's proposed GHG performance standards for new power plants but also the potential for the same concern in the context of standards for existing power plants.⁷⁵

Under its CAA regulations, EPA issues a guidance document along with the proposal of standards of performance for emissions control from existing sources so as to provide information on the development of state plans and a description of the best system of emission reduction that has been adequately demonstrated.⁷⁶ The cost of such reduction is considered as well as physical limitations and geographical location so as to allow for subcategorization.⁷⁷ Importantly, the determination of the actual substance of the standards is in the hands of the States; for instance, States are permitted to make a case-by-case determination whether a specific facility or class of facilities may be subject to a less stringent standard or longer compliance schedule.⁷⁸ A central issue involves whether certain technologies or systems have been adequately demonstrated. EPA in its GHG proposal for new plants provided that carbon capture and storage (CCS) is a viable option even though, in reality,

⁷² 42 U.S.C. § 7411(d).

⁷³ See EPA Withdrawal of Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units, EPA-HQ-OAR-2011-0660 (Sept. 20, 2013), available at <http://www2.epa.gov/sites/production/files/2013-09/documents/20130920withdrawal-notice.pdf>. For more information on the status of EPA's proposed NSPS for GHGs, visit <http://www2.epa.gov/carbon-pollution-standards/2013-proposed-carbon-pollution-standard-new-power-plants>.

⁷⁴ 42 U.S.C. §§ 7409-7411.

⁷⁵ Bruning et al., *supra* note 11, at 10.

⁷⁶ 40 C.F.R. § 60.22.

⁷⁷ *Id.*

⁷⁸ 40 C.F.R. § 60.24.

substantial questions exist as to whether CCS is technologically feasible or cost effective.⁷⁹

State Attorneys General have raised another concern in this context. In the absence of CCS, EPA has stated that it may dictate other emissions control options, such as emissions trading programs, fuel switching, and demand-side reductions.⁸⁰ Again, this raises serious concerns about whether EPA truly respects the States' primary role in the development of standards for existing sources. If an adequately demonstrated system of emissions reduction does not exist for existing plants, EPA does not have the authority to simply make one up and force it on the States.

In short, regulation by litigation marginalizes the role of the States and favors the goals of litigious groups aligned with the current Administration, leaving the vital role of policymaking to these unelected entities and the courts—a role that is properly reserved only for Congress.

EPA'S EFFORTS TO UNILATERALLY REVOKE LONG-STANDING PROVISIONS OF STATE IMPLEMENTATION PLANS

The number of SIP disapprovals has shown a marked increase under the Obama Administration. The data suggest that the current Administration is usurping the States to an unprecedented degree.⁸¹ As illustrated in the following table produced by the American Legislative Exchange Council, EPA issued 95 regulatory disapprovals during President Obama's first term in comparison to 44 such disapprovals under President Clinton. Throughout the course of George W. Bush's entire 8-year term, only 54 were issued. Perhaps more troubling, EPA also increased the number of FIPs imposed on the States.⁸² During President Obama's first term, an unprecedented 19 FIPs were issued compared to just one issued during the entire Bush Administration. This troubling dynamic at the current EPA has been criticized by Pennsylvania as a "FIP first approach."⁸³

⁷⁹ See, e.g., Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392, 22,414 (proposed April 13, 2012 and subsequently withdrawn on Sept. 20, 2013 with the issuance of a new proposal).

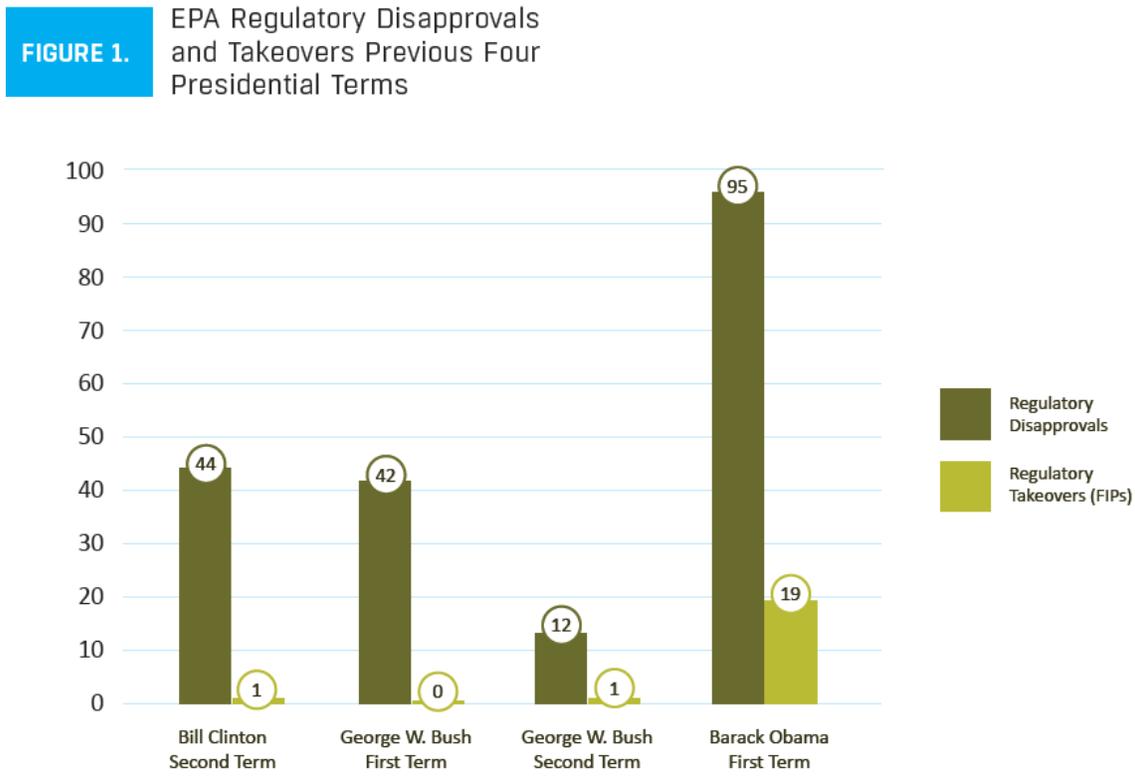
⁸⁰ See Bruning et al., *supra* note 11, at 7-8.

⁸¹ Eick & Wynn, *supra* note 56, at 15.

⁸² *Id.* at 3.

⁸³ See *supra* at 19.

Figure 4.



Source: William Yeatman, *The U.S. Environmental Protection Agency's Assault on State Sovereignty*, Am. Legislative Exchange Council (2013).

An illustration of this problem recently arose in the context of the so-called “SSM” provisions commonly found in most SIPs. Since the 1970s, most States have included provisions in their SIPs dealing with excess emissions at power plants or factories during periods of startup, shutdown, or malfunction (SSM). Elevated levels of emissions during SSM are viewed by most States as necessary, unavoidable, brief in duration, and limited in adverse environmental impacts. As a result, most States do not regulate SSM emissions in the same manner as emissions during normal operating conditions.

On February 12, 2013, in response to a Sierra Club petition arguing that EPA should find SSM provisions in existing SIPs to be “substantially inadequate” under the CAA,⁸⁴ EPA proposed a rule that would ensure States have plans in place

⁸⁴ Sierra Club’s Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions, Docket ID No. EPA-HQ-OAR-2012-0322-0002 (June 30, 2011).

requiring industrial facilities to follow air pollution rules even during periods of startup, shutdown, or malfunction.⁸⁵ EPA issued a “SIP call” (a regulatory maneuver to force States to revise their SIPs or face adverse EPA action) to 36 States identified by the Sierra Club. Ironically, the SIPs of all 36 States identified in the SSM SIP call had been approved previously by EPA, some for several years during different Administrations.⁸⁶

To the frustration of many States, this is yet another rulemaking initiated by EPA in response to “sue and settle” agreements with special interest groups.⁸⁷ The SSM exemption has been approved by EPA since 1972 and has been a key element of most EPA-approved SIPs. In fact, EPA has included SSM exemptions in its own standards, including the New Source Performance Standards, for decades.⁸⁸

Notwithstanding decades of precedent to the contrary, EPA decided that the SIPs of 36 States were legally inadequate because of their SSM provisions. This determination blatantly ignores the proper roles of the States and EPA under the

⁸⁵ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 Fed. Reg. 12460 (February 22, 2013) (hereinafter, “Proposed SSM Rule”), Docket ID No. EPA-HQ-OAR-2012-0322-0055, at 4 (Feb. 22, 2013).

⁸⁶*Id.* at 12,463 (“The Petition concerns how air agency rules in EPA-approved SIPs treat excess emissions during periods of startup, shutdown, or malfunction of industrial process or emission control equipment.” (emphasis added)).

⁸⁷ Letter from Sens. David Vitter, Ranking Member, S. Comm. on Env’t & Public Works and Jeff Sessions, Ranking Member, S. Subcomm. on Clean Air & Nuclear Safety, to Gina McCarthy, Office of Air and Radiation Assistant Adm’r, U.S. Env’tl. Prot. Agency (Apr. 1, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c2e0f287-15be-485f-8668-03a7f343755b.

⁸⁸ Examples where EPA issued NSPS with SSM exemptions include, but are not limited to, the following: (1) Subpart D (Standards of Performance for Fossil-Fuel-Fired Steam Generators), 40 C.F.R. § 60.45(b)(6)(iii) (“You must evaluate the preceding 24-hour average CO emission level each boiler operating day excluding periods of affected source startup, shutdown, or malfunction. . . .”); Subpart Db (Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units), 40 C.F.R. § 60.43b(g) (“The PM and opacity standards apply at all times, except during periods of startup, shutdown, or malfunction.”); Subpart Dc (Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units), 40 C.F.R. § 60.43c(d) (“The PM and opacity standards under this section apply at all times, except during periods of startup, shutdown, or malfunction.”); Subpart Ea & Eb (Standards of Performance for Municipal Waste Combustors), 40 C.F.R. §§ 60.58a(a) (“The standards under this subpart apply at all times, except during periods of start-up, shutdown, or malfunction; provided, however, that the duration of start-up, shutdown, or malfunction shall not exceed 3 hours per occurrence.”) and 60.58b(a)(1) (“Except as provided by § 60.56b, the standards under this subpart apply at all times except during periods of startup, shutdown, and malfunction.”). However, in its NSPS proposal for GHGs from EGUs, EPA has proposed to apply these new standards “at all times, including during startups and shutdowns,” and to allow an “affirmative defense to civil penalties for violations of emissions standards that are caused by malfunction” (pages 98-103 of the EPA NSPS proposal of September 20, 2013).

CAA’s cooperative federalism structure.⁸⁹ A review of comments of various States in response to the proposed SSM rule, as shown in Table 1, is indicative of widespread concerns among the States about recent EPA actions.

Table 1: Review of Comments filed by States in SSM Rulemaking

<u>State</u>	<u>Examples of States’ Concerns</u>
Alabama	“Rather than defend itself, or the SIPs that it has previously approved, <u>EPA entered into confidential settlement discussions with Sierra Club behind closed doors.</u> These confidential negotiations improperly excluded the primary parties affected by the consequent rulemaking—States—from participating in a process that should be open and transparent to the public...” ⁹⁰
Alaska	“Further, in responding to the Sierra Club petition, <u>EPA failed to appropriately consult with Alaska</u> on the specific issues and findings related to Alaska’s SIP before proposing this SIP call.” ⁹¹
Arizona	“Indeed, EPA and Petitioner Sierra Club repeatedly extended self-imposed deadlines in the settlement agreement that led to this proposal, in part so EPA could prepare for this rulemaking. <u>ADEQ was at no time a party to these proceedings.</u> ” ⁹²
Florida	“ <u>Had EPA reached out to Florida at any point during the federal agency’s year-and-a-half of closed door negotiations with the third party, Florida would have addressed each of EPA’s apparent concerns . . .</u> ” ⁹³
Georgia	“EPA exceeded its authority under Section 110 of the CAA in this proposed SIP call. Under the CAA, EPA has the authority to set the national ambient air quality standards (NAAQS). The States have the primary responsibility for determining how to meet those standards. . . . <u>EPA’s proposed SIP Call would require Georgia to depart from this longstanding successful approach and devise a completely different approach. The courts have held that EPA has no authority to do so. . . .</u> ” ⁹⁴

⁸⁹ See supra n. 87.

⁹⁰ Comments of the Alabama Attorney Gen. to EPA’s Proposed SSM Rule, *supra* note 14 at 5.

⁹¹ Comments of the Alaska Dep’t of Env’tl. Conservation to EPA’s Proposed SSM Rule, *supra* note 13 at 5.

⁹² Comments of Arizona Dep’t of Env’tl. Quality to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0101, at 1 (March 25, 2013).

⁹³ Comments of the Florida Dep’t of Env’tl. Prot. to EPA’s Proposed SSM Rule, *supra* note 12, at 5.

⁹⁴ Comments of the Georgia Env’tl. Prot. Div., Georgia Dep’t of Natural Res. to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0557, at 4 (May 13, 2013).

Kansas	“EPA has had years to contemplate, evaluate, and work with the Sierra Club to compromise and resolve issues in the Sierra Club's petition. <u>During this time, no outreach by EPA to the States or to regulated entities occurred.</u> ” ⁹⁵
Kentucky	“ <u>Without the benefit to participate in the monthly meetings held between the Sierra Club and EPA,</u> the Division cannot discern whether EPA and the Sierra Club evaluated the Kentucky SIP in its entirety or narrowly focused on one regulatory provision ...” ⁹⁶
Louisiana	“The CAA utilizes the concept of ‘cooperative federalism.’ In these very limited circumstances, Louisiana has examined the conditions applicable to startup and shutdown procedures and established the standards appropriate to those conditions. The validity of this determination is undeniable as witnessed by the continuous improvement in air quality for all criteria pollutants through the years. <u>The EPA is without authority to ‘second-guess’ Louisiana on its choices of appropriate air regulations emission reductions necessary to produce this verifiable reduction in ambient air levels of criteria pollutants.</u> ” ⁹⁷
Mississippi	“In issuing this SSM SIP call, EPA is proposing a ‘one size fits all’ SIP for all states without allowing the states an opportunity to determine whether their SIPs are truly deficient. <u>EPA’s approach will require the states to devote already stretched resources to develop an unnecessary SIP.</u> ” ⁹⁸
Montana	“My primary concern is that <u>EPA developed this proposed rulemaking without input from the affected states.</u> ” ⁹⁹
Nevada	“ <u>USEPA’s interpretation that director’s discretion is not allowable is contrary to the spirit of cooperation between the states and the federal government embodied in the CAA.</u> States should be allowed the ability to use discretion in determining whether excess emissions during an SSM event should be considered a violation. The USEPA has not demonstrated how such provisions have actually resulted in violations of the NAAQS. Without doing so, the NDEP believes that SIP calls based on director’s discretion provisions are premature.” ¹⁰⁰

⁹⁵ Comments of the Kansas Dep’t of Health & Env’t, *supra* note 15, at 5.

⁹⁶ Comments of the Kentucky Dep’t of Env’t. Prot. to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0473, at 1 (May 13, 2013).

⁹⁷ Comments of the Louisiana Dep’t of Env’t. Quality to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0478, at 8 (May 13, 2013).

⁹⁸ Comments of the Mississippi Dep’t of Env’t. Quality to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0139, at 2 (April 25, 2013).

⁹⁹ Comments of the Montana Dep’t of Env’t. Quality to EPA’s Proposed SSM Rule, *supra* note 16, at 5.

¹⁰⁰ Comments of the Nevada Dep’t of Env’t. Protection to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0451, at 2 (May 10, 2013).

North Carolina	<p><u>“The NCDAQ believes that the federal/state partnership principles envisioned by Congress when the CAA was enacted are being violated by EPA’s actions.</u> The proposed action is inconsistent with precedent from the U.S. Supreme Court that has confirmed the CAA was designed to allow states to design their air quality programs with limited federal EPA involvement. States rely on EPA to use proper judgment in its discretionary decisions involving MACT and NSPS rules. The <u>EPA should trust states to do the same in SIP rules and give states authority and discretion as the primary implementers of the nation’s air pollution control programs.</u>”¹⁰¹</p>
Ohio	<p>“Because U.S. <u>EPA did not consult with Ohio EPA</u> prior to the issuance of the proposal, there are many errors in the application and interpretation of the Ohio rules.”¹⁰²</p>
Oklahoma	<p><u>“This proposed rule undermines the federal-state partnership fostered by the Clean Air Act.</u> It is the state[’s] job to regulate these standards. The EPA is circumventing the states right to create air quality standards that best meet their own needs by cutting them out of the process.”¹⁰³</p>
South Carolina	<p>“We also continue to be concerned about rulemakings that are made in response to settlement agreements which <u>do not allow participation of the affected states.</u> As a result, the role of states and the EPA, as co-regulators, under the Clean Air Act’s <u>cooperative federalism</u> structure is ignored. ...Regulation-by-litigation reduces the role of states and EPA and has the result of privileging petitioner’s goals over those of other stakeholders, leaving the vital role of policymaking to the courts. ...With abbreviated schedules, EPA has neither the time nor the resources to involve states and other stakeholders in a meaningful way in the rulemaking process, or do the necessary work to develop implementation tools.”¹⁰⁴</p>
South Dakota	<p><u>“EPA’s Proposed Rule encroaches upon the principles of cooperative federalism</u> on which the Clean Air Act ... is based.”¹⁰⁵</p>

¹⁰¹ Comments of the North Carolina Dep’t of Env’t. and Natural Res. to EPA’s Proposed SSM Rule, *supra* note 17, at 6.

¹⁰² Comments of the Ohio Env’t. Prot. Agency to EPA’s Proposed SSM Rule, *supra* note 18, at 6.

¹⁰³ Comments of the Oklahoma Att. Gen.’s Office to Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0544, at 3 (May 13, 2013).

¹⁰⁴ Comments of the South Carolina Dep’t of Health and Env’t. Control to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0533, at 2 (May 13, 2013).

¹⁰⁵ Comments of the South Dakota Dep’t of Env’t and Natural Res. to EPA’s Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0441, at 1 (May 10, 2013).

Tennessee	EPA's proposal " <u>flies in the face of the oft-repeated concept of 'cooperative federalism' in the CAA partnership between the EPA and states</u> to allow EPA to rely on speculative as opposed to actual demonstrated problems to lead to a finding of 'substantial inadequacy' in a State Implementation Plan (SIP)." ¹⁰⁶
Virginia	"Absent clear evidence that the Virginia SIP is 'substantially inadequate' to meet the requirements of the Clean Air Act, and is not merely at odds with EPA guidance, <u>EPA should respect the federal-state partnership required by the Act.</u> " ¹⁰⁷
Wyoming	" <u>EPA's Proposed SIP Call conflicts with the partnership between EPA and the states</u> for the attainment and maintenance of ambient air quality standards... EPA's SIP Call effectively eliminates states' ability to fully determine how best to meet air quality standards with the state. The Division requests that EPA withdraw its Proposed SIP Call instead of eliminating an approach that has proven workable and effective for over 40 years... <u>Rather than allow special interest deadline suits to dictate the relationship between EPA and states, the Division maintains that it is time for EPA to fulfill its role and act as a 'cooperative partner.'</u> Under partnership principles, EPA should require these groups to first raise their concerns with the state. Instead, EPA's actions encourage groups to do an end-run around the states." ¹⁰⁸

In a letter dated April 1, 2013, Senators Vitter and Sessions wrote EPA to express concerns with the SSM proposal. The Vitter-Sessions letter explained:

First, this is the latest in a series of rulemakings initiated by this Administration in response to so-called "sue and settle" agreements with special interest groups...Oddly, it appears that, instead of defending EPA's own regulations and the SSM provisions in the EPA-approved air programs of 39 states, EPA simply agreed to include an obligation to respond to the petition in the settlement of an entirely separate lawsuit. In other words, EPA went out of its way to resolve the SSM petition in a coordinated settlement with the Sierra Club...

¹⁰⁶ Comments of the Tennessee, Dep't of Env't & Conservation to EPA's Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0547, at 1 (May 13, 2013).

¹⁰⁷ Comments of the Virginia Dep't of Env'tl. Quality to EPA's Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0613, at 2 (May 13, 2013).

¹⁰⁸ Comments of the Wyoming Dep't of Env'tl. Quality to EPA's Proposed SSM Rule, Docket ID: EPA-HQ-OAR-2012-0322-0565, at 1-2 (May 13, 2013).

Second, EPA’s new approach, embodied in the SSM proposal, contravenes four decades of prior EPA practice. The SSM exemption has been approved by EPA since 1972 and has been a key element of most EPA-approved State Implementation Plans (SIPs). In fact, EPA has included SSM exemptions in EPA’s own standards, including the New Source Performance Standards, for decades. Notwithstanding 40 years of precedent to the contrary, EPA has now decided that the SIPs of 36 states are legally inadequate because of their SSM provisions.

Third, EPA aims to command by federal edict that 36 States submit revised SIPs for EPA review and approval. This approach – confounded by “sue and settle” style tactics – blatantly ignores the proper role of the States and EPA under the Clean Air Act’s cooperative federalism structure... EPA’s latest proposal on SSM exemptions would suggest that EPA believes the States have been relegated to mere regional offices of the EPA...¹⁰⁹

In addition, Senators Vitter and Sessions asked EPA a series of questions regarding the SSM proposal. The following table provides each question asked by the Senators along with the status of EPA’s responses:

Table 2.

Vitter-Sessions Question	EPA Response
Will EPA provide all records, electronic or otherwise, of meetings, conversations, e-mails, letters, or other communications or other documents in EPA’s possession referring or relating to the Sierra Club SSM petition and settlement agreement?	No ¹¹⁰
Did EPA or any other federal entity make any payments, for attorneys’ fees or otherwise, to the Sierra Club in relation to the above-referenced litigation or settlement agreement?	Yes ¹¹¹

¹⁰⁹ Vitter-Sessions Letter, *supra* note 87, at 1-2.

¹¹⁰ In its May 22, 2013 response, EPA wrote: “The EPA is collecting potentially responsive documents in response to other inquiries and we will work with your staff to respond appropriately to this request.” However, as of the issuance of this report, EPA has not yet provided the Senate EPW Committee Minority with any additional information on this question.

¹¹¹ EPA wrote: “As required by statute, fees were paid by DOJ on the EPA’s behalf consistent with the agency’s obligations under the Clean Air Act.”

Did EPA invite the States to participate in the settlement discussions with the Sierra Club in this matter?	No ¹¹²
Did EPA amend the settlement agreement in December 2012 to require that “EPA shall confer with counsel for Sierra Club concerning the Agency’s progress towards meeting these obligations”?	Yes ¹¹³
Did EPA amend the settlement agreement to require that EPA or Sierra Club confer with the affected States concerning the settlement?	No ¹¹⁴
Did EPA invite the States to review the draft settlement agreement with the Sierra Club?	No ¹¹⁵
In a letter dated March 15, 2013, the Attorneys General of seventeen States requested that the public comment period for the SSM proposed rule be extended by a minimum of 120-days from February 22, 2013. We believe this request should be granted. Will EPA grant this request?	No ¹¹⁶

¹¹² EPA wrote: “The EPA engaged in an open and transparent process before deciding whether to enter the settlement agreement. No states sought to intervene in the litigation. Before agreeing to the settlement, the EPA published a notice in the Federal Register describing the proposed agreement and the petition, and requesting comment on the proposed settlement. The EPA did not receive any comments opposed to the obligation in the proposed settlement agreement for EPA action on the Sierra Club petition. The only adverse comment on the proposed settlement agreement was from Alabama, which said that the deadline for EPA action on the Sierra Club petition should have been longer.”

But it is clear that EPA did not provide the States with any notice of the settlement discussions or meetings, or otherwise invite the States to participate.

¹¹³ EPA wrote: “In exchange for receiving an extension to the otherwise applicable deadline in the settlement agreement, the EPA agreed to inform Sierra Club counsel on our progress towards complying with the extended deadlines in the amended settlement agreement. The EPA did not agree to confer with Sierra Club regarding the substance of the proposed SSM rulemaking.”

¹¹⁴ EPA wrote: “During the development of the startup, shutdown, and malfunction (SSM) rulemaking, the EPA has communicated frequently with the states about the substance of the Sierra Club petition and the proposed SSM rulemaking. These communications are not required by the settlement agreement.”

¹¹⁵ EPA wrote: “Before agreeing to the settlement, the EPA published a notice in the Federal Register describing the proposed agreement and the petition, and requesting comment on the proposed settlement. The EPA did not receive any comments opposed to the obligation in the proposed settlement agreement for EPA action on the Sierra Club petition. The only adverse comment on the proposed settlement agreement was from Alabama, which said that the deadline for EPA action on the Sierra Club petition should have been longer.”

¹¹⁶ EPA wrote: “The EPA extended the public comment period by 30 days, to May 13, 2013. The proposed SSM rulemaking was signed on February 12, 2013, posted on the EPA's website on February 13, 2013, and was published in the Federal Register on February 22, 2013, which means commenters will have had almost three months to review the proposal. We believe this is sufficient time for public comment, particularly since the specific issues raised by the petition and the specific SIP provisions alleged to be deficient were identified publicly in the Sierra Club petition in 2011 and the EPA has communicated with state environmental agencies throughout the development of the proposed rulemaking.”

In a letter dated August 10, 2012, the Attorneys General of thirteen States requested, pursuant to the Freedom of Information Act, documents concerning, among other things, recent Clean Air Act settlements with non-governmental organizations. Will EPA provide the requested documents?	No ¹¹⁷
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EPA'S UNREASONABLE DEADLINES FOR STATES TO COMMENT ON COMPLEX RULES

The principle that States are EPA's partners under the Clean Air Act should be reflected in how EPA conducts rulemaking proceedings that impact the States. Regrettably, the evidence suggests that the current EPA often seeks to undermine a cooperative process with the States by providing little or no advance consultation with the States prior to publication of a proposed rule, as well as providing very short timeframes for States to comment on proposals. This is particularly egregious considering that EPA is often "forced" to settle with environmental groups because of apparently untenable deadlines set by the CAA.¹¹⁸

For instance, when EPA recently issued its SSM proposal, the Agency allowed an unreasonably brief time period for State comments on the proposal. EPA originally allowed just 30 days for States to comment. Clearly, more time than that would be required for a proposal altering four decades of EPA precedent and impacting the SIPs of 36 States. On April 1, 2013, Senators Vitter and Sessions wrote EPA to request that, at a minimum, EPA grant an extension of the public comment period of at least 120 days, as requested by the Attorneys General of 17 states. In response,

¹¹⁷ EPA wrote: "The EPA responded to an August 10, 2012 request from 13 state attorneys general for all records related to discussions with organizations about a broad array of EPA actions and authorities (designated HQ-FOI-01841-12) on August 21, 2012, and on September 14, 2012. The EPA's first response was a denial of the fee waiver sought by the requesters. The EPA then sought to develop a fee estimate for the request but found such an estimate to be impossible based on the requesters' description of the documents sought. The EPA's September 14, 2012, response explained that the incoming request failed to adequately described the records sought as required by 40 C.F.R. §2.102(c), and invited the requesters to contact the agency to discuss scope modifications. The EPA received a very similar request February 20, 2013, which is designated IQ-2013-003886, and is currently on hold as the agency works to resolve the requesters' appeal of the agency's initial denial of their fee waiver request."

¹¹⁸ See, e.g., Complaint, *WildEarth Guardians v. Jackson*, No. 09-cv-02453 (June 3, 2009) ("WildEarth Guardians . . . brings this action against Lisa Jackson, Administrator of the EPA, in her official capacity . . . in order to compel EPA to create federal good neighbor plans for soot and smog for California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon. These federal plans were due on May 25, 2007. . . . EPA is two years late in fulfilling its mandatory duty to prepare federal good neighbor plans protecting the public from interstate soot and smog."); Consent Decree, *WildEarth Guardians v. Jackson*, *supra* note 62;

EPA granted an extension of just 30 days.¹¹⁹ In contrast, EPA took nearly 20 months to issue its Proposed SSM Rule after receiving Sierra Club’s petition (June 30, 2011 to February 22, 2013) despite EPA’s persistent claim that the SIP call was required by the Agency’s interpretation of the text of the CAA, not by any technical analysis or new scientific data.¹²⁰ Other recent EPA air proposals have provided unreasonably brief time periods for States to comment as well, such as the 60 days allowed for comments on the recent NSPS greenhouse gas re-proposal,¹²¹ or the 60 days initially allowed for comment on the complex and lengthy CSAPR proposal.¹²²

EPA’S REFUSAL TO PROVIDE EQUAL TREATMENT TO THE STATES IN RESPONDING TO INFORMATION REQUESTS

Under the Freedom of Information Act (FOIA), States have a right to access information from the federal government. FOIA’s “basic policy” of “full agency disclosure” –barring some clear statutory exemption–“focuses on the citizens’ right to be informed about what their government is up to. Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose.”¹²³ This right to access federal agency information is particularly critical to the States who often have to implement and administer federal regulatory programs.

Nonetheless, recent data suggests that EPA is not cooperating with the States in achieving the purposes of FOIA in the context of the Clean Air Act. In one recent example, the Attorneys General of 12 States—Oklahoma, Alabama, Arizona, Georgia, Kansas, Nebraska, Michigan, North Dakota, South Carolina, Texas, Utah, and Wyoming—filed a FOIA request with EPA seeking information concerning EPA’s settlements in 45 lawsuits brought by environmental groups.¹²⁴ EPA denied the FOIA request outright for being overly broad and for failing to “adequately

¹¹⁹ Notice of Extension of Public Comment Period, Proposed SSM Rule, 78 Fed. Reg. 20,855 (Apr. 8, 2013), Docket ID No. EPA-HQ-OAR-2012-0322-0126. Subsequently, on September 26, 2013, EPA entered another modification of its settlement agreement with Sierra Club further extending the deadline to finalize the SSM proposed SIP call until May 15, 2014.

¹²⁰ Proposed SSM Rule, *supra* note 85, at 12,464-65.

¹²¹ *How to Comment on the 2013 Proposed Carbon Pollution Standard for New Power Plants*, EPA, <http://www2.epa.gov/carbon-pollution-standards/how-comment-2013-proposed-carbon-pollution-standard-new-power-plants> (last visited Sept. 27, 2013).

¹²² CSAPR, *supra* note 21 at 45,210.

¹²³ U.S. Dep’t of Defense v. Fed. Labor Relations Bd., 510 U.S. 495-96, 1012-13 (1994) (citations omitted).

¹²⁴ FOIA Request Letter from E. Scott Pruitt, Okla. Att’y Gen., to Freedom of Info. Officer, FOIA & Privacy Branch, U.S. EPA (Aug. 10, 2012).

describe the records sought.” Subsequently, the States submitted several modifications to the request which EPA continued to deny. On February 6, 2013, the States filed a new FOIA request and request for a fee waiver that was limited to documents regarding the Clean Air Act’s Regional Haze program.¹²⁵ Despite the States’ efforts to work with EPA’s confounding FOIA process, EPA again denied the States’ request and fee waiver.¹²⁶ On March 15, 2013, the Attorneys General appealed EPA’s fee waiver denial, which EPA deemed moot.¹²⁷ As a result, the States filed a federal lawsuit against EPA seeking judicial review of EPA’s denial of their States’ FOIA request and request for a fee waiver.¹²⁸

Notwithstanding EPA’s assertions, these States contend that their request clearly describes the information sought from EPA and, thus, EPA has violated its duties under FOIA by withholding the responsive documents. The States also allege that “EPA’s denial of the States’ FOIA request is consistent with their apparent protocol to avoid compliance with FOIA by telling requestors that their FOIA request is overbroad.”¹²⁹ The States highlight e-mail exchanges between EPA employees discussing ways to avoid complying with FOIA requests.¹³⁰ The States also argue that “[a] recent study found that EPA disproportionately denies fee waiver requests from noncommercial requesters who seek records so as to understand whether EPA is faithfully complying with applicable law,” and that “92 percent of the time EPA grants fee waiver requests from noncommercial requesters who are supportive of EPA’s policies and agendas.”¹³¹

Senator Vitter, as Ranking Member of this Committee, has led significant efforts to obtain improvements from both EPA and the Department of Justice concerning

¹²⁵ FOIA Request Letter from E. Scott Pruitt, Okla. Att’y Gen., to Freedom of Info. Officer, FOIA & Privacy Branch, U.S. EPA (Feb. 6, 2013).

¹²⁶ Letter from Larry F. Gottesman, Nat’l FOIA Officer, U.S. EPA, to P. Clayton Eubanks, Dep. Solicitor Gen., Off. of Okla. Att’y Gen. (Feb. 22, 2013).

¹²⁷ See Letter from Kevin M. Miller, Assistant Gen. Counsel, U.S. EPA, to P. Clayton Eubanks, Dep. Solicitor Gen., Off. Of Okla. Att’y Gen. (May 31, 2013).

¹²⁸ See *Oklahoma v. EPA*, No. 5:13-cv-00726-M (W.D. Okla., filed July 16, 2013).

¹²⁹ Complaint, *Okla. v. EPA*, No. 5:13-cv-00726, at ¶ 25.

¹³⁰ In one such e-mail exchange, an EPA employee stated that “[u]nless something has changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests. One of the first is to alert the requestor that they need to narrow their request because it is overbroad, and secondarily that it will probably cost more than the amount of \$ they agreed to pay.” *Id.* at Ex. 7, p.6.

¹³¹ Complaint, *supra* note 129, at ¶ 10.

responses to these FOIA requests;¹³² however, a key question remains: why wouldn't EPA allow the States, as partners in a cooperative federalism system, open access to EPA data and information pertaining to air quality issues and regulations?

EPA'S PREMATURE RECONSIDERATION OF AIR STANDARDS

Concerns about EPA's disregard for the role of the States have also arisen in the context of EPA's premature reconsideration of certain NAAQS. Importantly, while EPA sets the NAAQS, the Clean Air Act expressly limits EPA's ability to change those NAAQS. Under Section 109(d)(1) of the CAA, EPA must complete a "thorough review" of the NAAQS "at 5-year intervals" and revise as appropriate. While there are important public policy arguments in favor of a longer interval for reviewing these standards, it is important for States and the regulated community to be able to rely on some degree of regulatory certainty in relation to these national standards, no matter the timeframe for review. In other words, States need to be able to plan for when NAAQS may be revised, which is one reason the CAA sets up a regular, orderly process for reviewing and, when appropriate, revising these national air standards. The CAA is written to prevent EPA from changing the NAAQS on a whim.

One of the most controversial EPA decisions in the current Administration was the proposal to reconsider the NAAQS for ozone three years ahead of the normal 5-year schedule. Many States commented about the adverse impacts of this unwarranted reconsideration (see Table 3):

¹³² Letter from Sens. David Vitter et al., Ranking Member, S. Comm. on Env't & Public Works, to Bob Perciasepe, Acting Adm'r, U.S. EPA (Apr. 29, 2013); *see also Vitter: After EPA FOIA Failures, DOJ Commits EPA to Higher Standard, More Accountability*, U.S. SENATE COMM. ON ENV'T & PUB. WORKS (July 29, 2013), http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=2ba0f6a7-a9ec-6e91-02a6-521c83f4972f&Region_id=&Issue_id=; Letter from Sen. David Vitter, Ranking Member, S. Comm. on Env't & Public Works, Sen. Grassley, and Rep. Darrell Issa, Chairman H. Oversight and Gov't Reform Comm., to U.S. Att. Gen. Eric Holder (March 7, 2013); *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=44990.

Table 3: States’ Comments re: 2010 Ozone NAAQS Reconsideration¹³³

State	Example of States’ Concerns¹³⁴
Ohio	“...Ohio EPA equally believes that the timing of the proposal, i.e., reopening the standard just two years after it was set, is ill-considered and inconsistent with the schedule for review of NAAQS contained in the Clean Air Act... Attempting to implement a new standard while the previous standard is still being implemented has consistently caused strain, redundancy and inefficiency in the process and has led to seemingly endless rounds of litigation that takes the focus away from the important task at hand--real air quality improvements... U.S. EPA...should not add to the uncertainty and strain generated by the existing Clean Air Act obligations for attaining the ozone standard and generated by the five-year review of that NAAQS by prematurely reevaluating and reestablishing the ozone standard when neither law nor science requires it.” ¹³⁵
West Virginia	“The DAQ believes EPA is acting prematurely to revise the standard, and encourages EPA to wait until the next scheduled periodic review. That would allow the implementation of the current standard to unfold on the schedule established under the Clean Air Act.” ¹³⁶
Mississippi	“Although cost is proscribed from consideration in establishing a new ozone standard, it is obvious that the implementation of a new ozone standard (particularly in the lower portion of the range being considered) will have a profound cost impact on this country's economy, energy infrastructure, fuels, transportation, and consumer goods.” ¹³⁷

¹³³ National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2,938 (Jan. 19, 2010), Docket ID No. EPA-HQ-OAR-2005-0172-7239 (hereinafter, “Proposed 2010 Ozone Standards”). This table provides just a few examples of the many States and other stakeholders who expressed serious concerns with EPA’s 2010 reconsideration decisions.

¹³⁴ Tribal groups have also expressed concerns similar to the States. For example, the Little River Band of Ottawa Indians wrote EPA: “By not defending the Agency's own decision, EPA is setting up a dangerous precedence which allows future leaders to undo everything good the EPA has stood for and accomplished... Perhaps, the most confusing part for this action is why the Agency is doing this now when this Administration would still have ample time to make amendments during the next review of the standard... Now, the whole cycle is out of alignment and states and tribes will be hard pressed to come up with emission control strategies.” Comments Little River Band of Ottawa Indians on EPA’s Proposed 2010 Ozone Standards, Docket ID No. EPA-HQ-OAR-2005-0172-11918, at 2 (March 19, 2010).

¹³⁵ Comments of Ohio Env’tl. Prot. Agency on EPA’s Proposed 2010 Ozone Standards, [Docket](#) ID No. EPA-HQ-OAR-2005-0172-12376, at 3-4 (March 22, 2010).

¹³⁶ Comments of W. Va. Dep’t of Env’tl. Prot. on EPA’s Proposed 2010 Ozone Standards, [Docket](#) ID No. EPA-HQ-OAR-2005-0172-12131, at 1-2 (March 19, 2010).

¹³⁷ Comments of Miss. Dep’t of Transp. on EPA’s Proposed 2010 Ozone Standards Docket ID No. EPA-HQ-OAR-2005-0172-12918, at 4 (March 16, 2010).

Missouri	“It cannot be overemphasized how much of an impact the reconsidered standard will have on limited resources at the state level... [T]he statewide public outreach effort required to provide information and notice to all affected areas will be unprecedented.” ¹³⁸
Virginia	“Key objectives of establishing threshold criteria for reconsiderations would be to not only help maintain the integrity of the overall standard-setting process but also provide certainty for stakeholders and other parties that would be affected by any irregularly scheduled changes.” ¹³⁹

In addition, members of Congress spoke out against this clear violation of the Clean Air Act. On July 25, 2011, Senator Jeff Sessions (R-AL), leading a bipartisan letter joined by 33 other U.S. Senators, urged EPA not to finalize its proposed air quality standards for ground level ozone.¹⁴⁰ The Sessions letter explained:

EPA’s reconsideration is occurring outside of the statutorily directed 5-year review process for NAAQS and without any new scientific basis necessitating a change in the 2008 standard. Moreover, this decision will burden state and local air agencies that, in the current budgetary climate, can hardly cope with existing obligations. Likewise, the economic impact of EPA’s proposal, while not determinative in setting NAAQS, are highly concerning, particularly in light of the billions of dollars in new costs that EPA has acknowledged would be imposed on America’s manufacturing, energy, industrial, and transportation sectors.

After receiving this bipartisan Senate letter, EPA announced that it was delaying the issuance of the ozone rule and would be giving the matter further consideration. Ultimately, the President agreed with this request and directed EPA to put a halt to

¹³⁸ Comments of Mo. Dep’t of Natural Res. on EPA’s Proposed 2010 Ozone Standards, Docket ID No. EPA-HQ-OAR-2005-0172-12905, at 1-3 (March 16, 2010).

¹³⁹ Comments of Va. Dep’t of Transp. on EPA’s Proposed 2010 Ozone Standards, Docket ID No. EPA-HQ-OAR-2005-0172-12194, at 2 (March 18, 2010).

¹⁴⁰ In addition to Senators Sessions and Landrieu, the letter was signed by Senators McConnell, Inhofe, Manchin, Blunt, Wicker, Vitter, Lugar, Moran, Isakson, Coats, Corker, Chambliss, Shelby, Cornyn, Thune, Hoenes, Hutchison, Barrasso, Murkowski, Roberts, Burr, Boozman, Enzi, Portman, Kyl, Johanns, DeMint, Cochran, Coburn, McCain, Grassley, and Hatch. See Letter from Sen. Sessions, et al., to Lisa Jackson, Admin. U.S. EPA (July 25, 2011) available at http://www.sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=2b72f957-f08f-404f-58f3-0950de0d5120&Region_id=&Issue_id=727c1134-a9e6-7be1-28dd-f09041a6b5fc.

its ozone reconsideration process.¹⁴¹ However, this Presidential decision came 18 months after EPA commenced the ozone reconsideration process—a long period of time that caused great economic uncertainty and required the States to spend scarce resources studying and preparing for the ozone process. This process also wasted federal tax dollars unnecessarily—a currently unknown amount of tax dollars as EPA has repeatedly refused to disclose how much it spent on the ozone reconsideration process.¹⁴²

6 WAYS TO HELP RESTORE A COOPERATIVE RELATIONSHIP BETWEEN EPA AND THE STATES UNDER THE CLEAN AIR ACT

As suggested by the evidence provided in this report, a cornerstone of the Clean Air Act—the cooperative partnership between the States and EPA—is under immense stress. The concerns raised by a majority of the States about EPA overreach are too important to ignore, and if left unaddressed, could undermine the effectiveness of the Clean Air Act going forward. Clearly, these cooperative federalism concerns need to be given attention. We believe at least 6 steps should be considered in order to ensure the continued success of our nation’s most important air quality program:

- 1. Congress and EPA Should Listen to the Concerns and Ideas of the States.** We believe Congressional oversight on this matter is timely and necessary. Within the Senate, that oversight should include EPW

¹⁴¹ Letter from Cass Sustein, Off. of Info. and Reg. Affairs, to Lisa Jackson, Admin. EPA (Sept. 2, 2011) (“On July 11, 2011, the Environmental Protection Agency (EPA) submitted a draft final rule, ‘Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards,’ for review by the Office of Information and Regulatory Affairs (OIRA) under Executive Orders 13563 and 12866. The President has instructed me to return this rule to you for reconsideration. He has made it clear that he does not support finalizing the rule at this time.”).

¹⁴² Senator Sessions—as the Ranking member of the Senate Budget Committee—followed-up on this matter with a letter to EPA in September 2011 asking for information about taxpayer funds spent on reconsidering the ozone standard. Letter from Sen. Jeff Sessions to EPA Admin. Lisa Jackson (Sept. 12, 2011). Now, over two years later, EPA still has not provided any cost figures related to the ozone reconsideration process. Senator Sessions again asked EPA, during Administrator Gina McCarthy’s confirmation process: “Did EPA incur significant costs as part of the ozone reconsideration process; if so, how much?” *Hearing on the Nomination of Gina McCarthy to be Administrator of the U.S. Environmental Protection Agency*, S. COMM. ON ENV’T AND PUBLIC WORKS (April 11, 2013), available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=d71fd4b6-ce77-3a98-46a0-fb02b0cae0ed. In her written responses, McCarthy did not answer the specific question raised by Sen. Sessions or provide the requested data relating to the costs incurred as part of that effort. As the Assistant Administrator at the EPA Air Office, McCarthy had primary responsibility over EPA’s ozone reconsideration process.

hearings targeted to the issue of cooperative federalism under the Clean Air Act. On April 1, 2013, Senator Jeff Sessions (R-AL), the Ranking member of the Senate Subcommittee on Clean Air and Nuclear Safety, wrote to ask that the Subcommittee “take time to listen to ideas from the States on how to make common-sense, bipartisan improvements to the Clean Air Act (CAA).” Senator Sessions’ letter explained that “we need to restore a more cooperative relationship between the U.S. Environmental Protection Agency (EPA) and the States on air quality issues, as was originally envisioned when the CAA was enacted over forty years ago.” He specifically asked for a hearing entitled, “Cooperative Federalism: States’ Suggestions for Improving Clean Air Programs.” We continue to believe such a hearing would provide a good venue for highlighting ways the federal government and the States can work in a more cooperative fashion to address air quality issues. To date, no such hearing has been scheduled.

2. **End EPA’s “Sue & Settle” Tactics.** These undemocratic tactics run counter to the principle of cooperative federalism and must come to an end. EPA and the States—not EPA and litigious special interest groups—should be collaborating in an open, transparent, science-based, and economically-sound process aimed at addressing shared environmental challenges. As part of EPW Republicans’ 5 Transparency Requests during the EPA Administrator’s nomination process, the Agency committed to post notices of intent to sue on the EPA website. Further, EPA also committed to establishing a website to post petitions for rulemaking submitted to the Agency.¹⁴³ But more changes at EPA are needed to bring these sue and settle tactics under control.
3. **Defend Long-Standing, Well-Accepted Provisions of State Implementation Plans.** EPA has become all too willing to abandon support for provisions in State Implementation Plans that have been approved by EPA for many decades. This undercuts the States and

¹⁴³ See *Petitions for Rulemaking*, EPA; <http://www2.epa.gov/aboutepa/petitions-rulemaking> (last visited October 18, 2013).

their ability to fashion appropriate programs that achieve national standards.

- 4. Provide Reasonable Timeframes for States to Comment on EPA Proposals.** EPA often spends many months or even years working on a new regulatory proposal, but EPA often gives the States just 30 or 60 days to provide comments. We believe that EPA should engage impacted States at the commencement of any regulatory process. In addition, when States request an extension of deadlines for submitting comments on EPA proposals, we believe that those requests should be routinely granted.
- 5. Treat States Fairly under FOIA.** We believe EPA should make all necessary improvements to its FOIA procedures to ensure reasonable access by the States to EPA data and information. EPA should allow the States, as partners in a cooperative federalism system, to have access to EPA data and information pertaining to air quality issues and regulations.
- 6. Review National Air Standards on the Schedule Provided in the Clean Air Act.** EPA's reconsideration of the ozone standard in 2010—just two years after it was revised in 2008—imposed an unnecessary burden on the States, generated substantial economic uncertainty, and cost federal taxpayers an undetermined amount of tax dollars. This mistake should not be repeated. In addition, we believe Congress should ask the States whether changes to the current 5-year review schedule are warranted.

Cooperative federalism is a cornerstone of the Clean Air Act and a key reason for significant improvements in air quality in the United States over the last four decades. But today's EPA threatens to topple this cooperative framework in the interest of imposing heavy-handed, one-size-fits-all solutions from Washington DC. This report shows how most States are now raising concerns about these coercive and uncooperative EPA actions in the Clean Air Act context. If Congress and EPA will reach out to the States in a more cooperative spirit, many other ideas for making positive improvements to the nation's air quality programs will undoubtedly emerge.

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