Resisting Deregulation:

How Antibacksliding Principles and/or the States Can Limit the Damage that EPA May Seek to Inflict Under the Trump Administration

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Introduction:

We have long been accustomed to the idea that, in general, our environmental laws get stricter over time.

Or that, even in an era of legislative gridlock, they at least stay the same.

“Although non-experts such as ourselves may picture water pollution controls becoming steadily more stringent over time, this is apparently not the case.”

NRDC v. U.S.EPA, 859 F.2d 156, 195 (D.C. Cir. 1988) (per curiam).

Introduction (cont.)

- The major threat is not legislative change. It's administrative deregulation. We've seen some of this in the past, but never to the extent that appears to be threatened now.
- Administrator Pruitt recently referred to EPA as an agency that has been "weaponized against certain sectors of the economy."
- He seems intent on reversing this perceived attack—not just in terms of halting the issuance of new regulations, but by rolling back existing regulations on a scale that we have never seen before.

Introduction (cont.)

- WOTUS
- Clean Power Plan
- New ELGs for toxic pollutants from coal plants
- Emissions and mileage standards for new cars

- For the most part, the focus thus far has been on withdrawing new rules, or those that primarily will affect new projects (as under WOTUS).
- But see the withdrawal of “once in, always in” policy under NESHAPs

My focus

- Statutory constraints on regulatory rollbacks – “antibacksliding”
  - These prohibitions are not as strong as many may think. But where they do apply, they apply nationwide (meaning, even in states that may want to backslide).

- How progressive states can resist any further deregulatory efforts, and how their actions may affect the enforceability of the preexisting standards.

Antibacksliding

- A concept that virtually every student of environmental law has heard about.
- Most frequently expressed, particularly in the CWA context, as embodying the idea that, over time, standards and—and permits in particular—should, if anything, only get stricter, not weaker.
- Unfortunately there is less here than meets the eye, even under the CWA.

Antibacksliding under the CWA

- EPA first introduced this concept into its regulations in 1979, precluding the states from relaxing prior technology-based permit limits when renewing or reissuing permits, except in limited circumstances.
- The allowable circumstances varied depending on whether the conditions were based upon national ELGs or upon the permit issuer's "best professional judgment."
- This dichotomy continues today in what is now § 122.44(l).

Antibacksliding Under CWA

- Most notably, and sadly, EPA has always allowed backsliding from permit conditions based on national ELGs where **"[t]he standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations. . . ."** **§ 122.62(a)(3)** (as incorporated by reference in § 122.44(l)(1)).
  - Basic dynamic acknowledged in *NRDC v. EPA*, re NSPS standards.
  - Contrast with rationale in the BPJ context. Doesn't really make any sense.
  - But it hardly ever has happened, if ever.
- Going forward, though, if EPA were to weaken any ELGs under the CWA, the states would be free to follow suit.

Antibacksliding under CWA

- Nothing in Section 402(o) of the CWA is to the contrary. In that provision, Congress sought to shore up EPA's authority to limit backsliding in the BPJ and water-quality contexts.
- Section 402(o) says nothing about backsliding from standard ELGs. It certainly doesn't in any way undermine EPA's preexisting regulations on this point.

Backsliding When EPA Relaxes an ELG

- Permit holders would need to request changes w/in 90 days after the relaxed regulation appears in the federal register. § 122.62(a)(3)(i)(C).
- State would then need to make whatever changes would be necessary to its state program to align its regulations with the new ELGs.
- And then the State would have to revise the relevant permits to conform with the new relaxed ELG.

Antibacksliding Under the Clean Air Act.

- Nothing in the Title V permit program parallels the dynamics that apply under the CWA.
- In the nonattainment context, though, **Section 172(e)** requires that if EPA **relaxes** a “primary” NAAQS, it must “promulgate requirements” ensuring that “controls” are maintained for sources in areas that were in nonattainment with the relevant standard prior to the relaxation at issue.

Antibacksliding Under CAA

- In 2004, EPA interpreted this antibacksliding dynamic as also applying when EPA strengthens a primary standard.
- The D.C. Circuit deferred to this interpretation in *South Coast Air Quality Management District v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006):

  > Considered as a whole, the Act reflects Congress's intent that air quality should be improved until safe, and never allowed to retreat thereafter. Even if EPA set requirements that proved too stringent and unnecessary to protect public health, EPA was forbidden from releasing the states from these burdens.

- The court further determined that the term "controls"—as used within § 172(e)—was broad enough to encompass requirements as broad as those defining the scope of NSR, and contingency measures in a relevant SIP. *Id.* at 900-904.

Implications of §172(e)/*South Coast*

- Whenever EPA revises an air quality standard—in whatever direction—sources in areas that previously were in nonattainment must remain subject to at least the same NSR requirements that obtained prior to the relevant revision. This would include LAER.
- It's likely that the term "controls" would also include other requirements, such as those imposed under NSPS or NESHAPs, to the extent that those controls are incorporated into a relevant SIP.
- Interesting Q – Why would we treat nonattainment areas where the NAAQS are relaxed any differently than we would areas where the NAAQS remain the same?

RCRA

- No antibacksliding dynamics at all.
- This means, for example, that if the states embrace the Obama Administration's revisions to the definition of solid waste, as further weakened by the D.C. Circuit in *American Petroleum Institute v. EPA*, 862 F.3d 50 (2017), hundreds or thousands of hazardous waste generators may escape any continued regulation under the Act. The states will, however, have to make regulatory changes to support the relaxed federal dynamics.

Lessons re Antibacksliding

- CWA - If EPA backtracks re national ELGs, the states can probably pass the benefits along. Under the existing rules, though, regulated entities would have to be paying attention. And it would be procedurally cumbersome for the relevant states: first, they would have to change their state programs; then amend the relevant permits.
- CAA – No restrictions unless EPA changes a primary NAAQS. But if EPA does relax a primary NAAQS, it appears that all preexisting controls in the relevant SIP would become frozen.
  - This may dissuade EPA from relaxing any NAAQS.
- RCRA – No limits on backsliding.

What can Progressive States Do?

- New York is leading a coalition of 10 states in challenging the Administration's new rule seeking to put the 2015 WOTUS rule on ice until 2020.
- Massachusetts led a coalition of 12 states in successfully challenging EPA's decision not to even make a finding regarding whether greenhouse gases pose an endangerment within the meaning of § 202 of the CAA.
- Collectively, these states represent a disproportionate segment of the economy.
  - California, New York, Connecticut, Washington, New Jersey, Massachusetts, Oregon, Rhode Island, and Vermont were common to both.

Savings Clauses re More Restrictive State Schemes

- CAA § 116 – *Union Electric Co. v. EPA*, 427 U.S. 246, 263-264 (1976) (§ 116 "provides that the States may adopt emissions standards stricter than the national standards").
- CWA § 510 – *EPA v. California*, 426 U.S. 200, 217-218 (1976) (§ 510 "provides that the States may set more restrictive standards, limitations, and requirements than those imposed under [the CWA]").
- RCRA § 3009 – *Philadelphia v. New Jersey*, 437 U.S. 617, 620 (1978) (agreeing with the New Jersey Supreme Court that the relevant state restriction, which had no basis under RCRA, was not preempted by RCRA); see also 40 C.F.R. § 271.1(i)(1) (providing that, subject to narrow exceptions, nothing in EPA's regulations precludes states from "[a]dopting or enforcing requirements which are more stringent or more extensive" than the federal requirements).

If States Stand Pat ….

- These savings provisions indicate that States can do so. And at a minimum, the states would still be able to enforce these requirements as a matter of State law.
- If enough states stand pat, their doing so might decrease EPA's, and perhaps even Industry's, interest in relaxing the federal standards.
  - CBEC story.
  - Industry's interest in uniform standards?
- It may also more firmly establish a baseline for when Administrations change, and EPA wants to move back in a more protective direction.

Would the More Stringent State Standards be Federally Enforceable?

- In the short term, the key question here would involve citizen suits.
- CAA § 304(a)(1) and (f) (citizens may enforce, *inter alia*, SIP provisions, Title V permit conditions, and requirements of §§ 111 and 112);
- CWA § 505(a)(1) and (f) (referencing, *inter alia*, violations of § 301 and NPDES permit conditions); and
- RCRA § 7002(a)(1)(A) (referencing violations of "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter").

Key Cases re Federal Enforceability

- ***Union Electric***. The Supreme Court expressly rejected the notion that when states impose more stringent requirements, the relevant standards must be "must be adopted *and enforced* independently of the EPA-approved state implementation plan." 427 U.S. at 264 (emphasis added).
- Reasoning: The Court found that imposing such a requirement "would not only require the Administrator to expend considerable time and energy determining whether a state plan was precisely tailored to meet the federal standards, but would simultaneously require States desiring stricter controls to enact and enforce two sets of emission standards, one federally improved plan and one stricter state plan." *Id.*
- Thus, the Court held that states may implement more stringent state requirements through a SIP. As recognized by the Court, this in turn renders the relevant requirements enforceable as a matter of federal law.

Key Cases re Federal Enforceability (cont.)
EPA v. California

- In addressing whether federal facilities must obtain permits from authorized States, the Supreme Court considered the implications of § 505:
  - "The reference in § 505(f)(6) to [the Act's federal facilities provision] is to be read as making clear that *all* discharges (including federal dischargers) may be sued to enforce permit conditions, *whether those conditions arise from standards promulgated by the Administrator or from stricter standards established by the State*." 426 U.S. at 224 (second emphasis added).

Other Key Cases re Federal Enforceability

- *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (all permit conditions are enforceable under CWA).
- *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1005-1006 (11th Cir. 2004) (state permits and conditions are enforceable under CWA).
- *National Parks Conservation Ass'n, Inc. v. TVA*, 480 F.3d 410, 419 (6th Cir. 2007) (relying, as an alternative basis for its holding, on the fact that as a matter of state law, the relevant SIP imposed an ongoing obligation to apply for a permit).

“More Stringent” vs. “Broader in Scope”

- EPA often draws a distinction between “more stringent” state regulations and those which have “a greater scope of coverage” than required under Federal law. See, e.g., 40 C.F.R. §§ 123.1(i) (CWA) and 271.1(i) (RCRA).
- Those falling into the second category are not part of the Federally-approved program and thus, not federally enforceable. Id.
- This can be a hard line to draw. In *United States v. Southern Union Co.*, for example, the First Circuit addressed whether a Rhode Island regulation requiring conditionally-exempt generators to have a permit was merely stricter or ”broader in scope.” 630 F.3d 17 (1st Cir. 2010).

More Stringent vs. Broader in Scope

- Easy cases?
  - Where EPA determines this up front, in approving either the state program or an individual permit. This was the scenario in *Southern Union*. The court deferred to EPA's determination that the requirement was merely more stringent, not broader in scope.
  - Where a State designates a requirement as being a "State only" condition in, for example, an NPDES permit (and EPA lets that determination stand).
- Harder cases
  - Can courts do this on the fly? Even where a statute indicates, for example, that all permit conditions are enforceable? The Second Circuit did so, in *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993).

More Stringent vs. Broader in Scope
The Most Pertinent Question:

Can a state requirement that was equivalent to (or more stringent than) a federal requirement become unenforceable in federal court if it suddenly becomes broader in scope because of a change in the federal regulations?

- No existing precedent.
- I think the best answer to this Q is No.
  - EPA approved the relevant State program requirements. At that moment, they became the operative federal law in that State.
  - How can they suddenly lose that status as federal law?
  - For permitted facilities, the relevant permit will still be extant.

Conclusion

- Our best hope is the progressive states.
  - At the very least, they can maintain all aspects of the current regulatory programs as a matter of state law.
  - The better view is that citizens will still be able to enforce those regulations and permits in federal court.
  - If enough states resist, it may actually reduce EPA's incentive to go forward with some deregulatory measures.