

# Postcards From the Edge: Perspectives to Reinvigorate Clean Water Act Cooperative Federalism

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Cooperative federalism is an inherent guiding principle of both American legal foundations<sup>1</sup> and American environmental law.<sup>2</sup> Although many have defined the term, cooperative federalism is generally understood to refer to the collaboration between the federal and state governments to achieve a common goal.<sup>3</sup> Such cooperation—specifically in carrying out laws, regulations, and policies—is essential for America’s system of government to function properly.<sup>4</sup> To be successful, however, cooperative federalism requires the reservation of certain powers to the federal government and other powers to

the states—a matter dictated in large part by the United States Constitution.<sup>5</sup>

The Clean Water Act (“CWA”) was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>6</sup> To achieve this goal, Congress adopted a cooperative federalism approach.<sup>7</sup> Although not a new concept in federal law, the application of cooperative federalism to the suite of rapidly evolving and sweeping federal environmental laws was relatively untested.<sup>8</sup> Specific to the CWA, cooperative federalism has been explained as an approach in which “the federal and state governments work together in structured, overlapping, and synergistic ways to achieve mutual goals—in the case of the [Clean Water Act], improved water quality nationwide.”<sup>9</sup> Although each level of government—federal, state, and local—<sup>10</sup> has its defined roles and responsibilities, all levels of government must work together in the pursuit of clean water.<sup>11</sup> Accordingly, even though the Environmental Protection Agency (“EPA”) promulgates national requirements, provides some financial resources, and conducts federal oversight,<sup>12</sup> it is

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1. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI, cl. 2; U.S. CONST. amends. X–XI.
2. John M. Stafford, *Environmental Law Survey*, 72 DENV. U. L. REV. 685, 685 (1995).
3. BLACK’S LAW DICTIONARY defines “cooperative federalism” as the “distribution of power between the federal government and the states in which each recognizes the powers of the other while jointly engaging in certain governmental functions.” BLACK’S LAW DICTIONARY 284 (Bryan A. Garner ed., 3d ed. 2006). Each level of government recognizes the others’ power as well as their own limitations. When these powers and limitations are channeled together, complex and long-term actions—such as restoring the nations’ waterways—can be undertaken more effectively.
4. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI, cl. 2; U.S. CONST. amends. X–XI.

5. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI, cl. 2; U.S. CONST. amends. X–XI.
6. Clean Water Act (“CWA”) § 101(a), 33 U.S.C. § 1251(a) (2006).
7. Robin Kundis Craig, *Adapting Water Federalism to Climate Change Impacts: Energy Policy, Food Security, and the Allocation of Water Resources*, 5 ENVTL. & ENERGY L. & POL’Y J. 183, 184 (2010).
8. See Stafford, *supra* note 2, at 685; *infra* Part II.
9. Craig, *supra* note 7, at 202.
10. It is important to note that local government plays a crucial part in moving our nation towards achieving water quality goals. Local governments control much of our land use, construction, transportation, farming, and other activities that can have a significant impact on water quality. See, e.g., *Low Impact Development*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/green> (last updated Dec. 4, 2012) (discussing local land use approaches to reduce water pollution). Senator Jennings Randolph, then chairman of the Senate Public Works Committee, identified local governments’ role in implementing the Clean Water Act: “[t]he measure will enable the United States to accelerate the movement toward clean water and to assist the States and local communities in their part of what must be an undertaking in which all levels of government are involved.” 118 CONG. REC. 33702 (1972). A detailed analysis of the role of local governments in achieving water quality, however, is beyond the scope of this Article.
11. 118 CONG. REC. 33702.
12. *EPA Roles and Responsibilities*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/homelandsecurityportal/roles.htm> (last updated Mar. 3, 2010).

up to the states to tailor national regulations to meet state-specific needs based on their ground-level knowledge of local watersheds.<sup>13</sup>

From its very opening provisions, the CWA directly addresses the delicate federal and state balancing act that lies at the heart of the legislation. For example, the Act's savings clause states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ."<sup>14</sup> This segment of the CWA shines a light on Congress' recognition that, in enacting a major federal law to control water pollution, the federal government still has to respect state autonomy.<sup>15</sup>

Over time, just as the CWA intended, EPA received state requests to administer the Act in place of the federal government through delegation, allowing the Act's elements to be refined and enhanced as needed by each state.<sup>16</sup> While states

began to gain comfort with these roles and responsibilities, the federal program continued to grow and evolve. This required states to continually adapt, expand, and change their delegated programs, as well as to carry out additional programs in order to comply with the Act.<sup>17</sup> At first, the federal government provided the states significant support in implementing the Act by dispersing federal funds to aid state programs, providing guidance to states, setting requirements for state programs to meet, and overseeing the implementation of state programs.<sup>18</sup> If a state did not meet EPA's expectations or failed to sustain its programmatic investment in terms of staff and funding, the state ran the risk of EPA revoking their delegated authority to administer the CWA programs<sup>19</sup> and having the federal government implement the program instead.

As the CWA matured, and the nation's waters remained impaired, public dissatisfaction with a lack of progress increased the pressure on both the states and the federal government to perform.<sup>20</sup> Oversight of state programs

13. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 192–93 (2005).

14. CWA § 101(b), 33 U.S.C. § 1251(b) (2006). The Committee on Public Works stated, "[t]he committee has exercised extreme care to assure that the language of the bill will allow continued comprehensive action by the States in the field of water pollution control. There certainly can be no assumption that the Federal interest in the field of water pollution abatement authorized by this bill is so dominant as to preclude State action. The proposition is well established that the protection of the health and welfare of the citizens of a State is a proper subject for the exercise of the State police power. The bill provides specifically for cooperation with the States and its aim is to encourage and assist States and local communities in their efforts to control water pollution, not to usurp or preempt their rights, powers, or responsibilities in this field." H.R. REP. NO. 87-306, at 321 (1961). In the House Debate, Congressman John C. Kluczynski stated, "I support this bill because it is absolutely sound in concept. It assigns the responsibilities where they can best be handled and abandons the outmoded idea that all wisdom and responsibility in confronting national problems is found within a 25-mile radius of the Capitol dome. The States must play a prominent part in making the water pollution law work. Why should we believe their conviction is any less than ours? It is at the State and local levels where all the elements included in this bill come together, and where the job of cleaning up the water must be merged with economic and social realities." 118 CONG. REC. 10209 (1972).

15. H.R. REP. NO. 87-306, at 321.

16. See, e.g., CWA §§ 402, 404, 503, 33 U.S.C. §§ 1342, 1344, 1363 (2006). In particular, section 402(a)(5) of the CWA authorizes the Administrator to issue a permit for the discharge of any pollutant or combination of pollutants from a point source into the navigable waters of the United States. The Administrator may delegate that power to a state "which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State." CWA § 402(a)(5), 33 U.S.C. § 1342(a)(5). If a state wants to administer its own permitting program, the Governor of that state must submit to the Administrator "a full and complete description of the program it proposes to establish and administer under State law" and a statement from the attorney general that the laws of the state provide adequate authority to carry out the described program. CWA § 402(b), 33 U.S.C. § 1342(b). The Administrator has the discretion to determine that the state does not have adequate authority to administer its own program. See *id.*; see also *National Pollutant Discharge Elimination System (NPDES): Specific State Program Status*, U.S. ENVTL. PROT. AGENCY, [http://cfpub.epa.gov/npdes/statstats.cfm?program\\_id=45&view=specific](http://cfpub.epa.gov/npdes/statstats.cfm?program_id=45&view=specific) (last updated Apr. 14, 2003, 1:58 PM) (describing when each state and territory received authorization for its programs). California was the first state to receive approval by EPA for its NPDES Permit Program on May 14, 1973, with Connecticut, Michigan, and Oregon receiving approval

soon after. *Id.* Maine, Arizona, and Alaska did not receive approval for their NPDES programs until the 2000s, with Alaska being the newest state receiving NPDES authority as of 2008. *Id.* Massachusetts, New Hampshire, Idaho, and New Mexico have still not assumed authority for NPDES permitting. *Id.* The U.S. Virgin Islands is the only U.S. territory that has its own permitting system, which they have had since 1976. *Id.*

17. Jack Lewis, *Looking Backward: A Historical Perspective on Environmental Regulations*, EPA JOURNAL (Mar. 1988), available at <http://www.epa.gov/aboutepa/history/topics/regulate/01.html>.

18. Fischman, *supra* note 13, at 190–92.

19. See CWA § 402, 33 U.S.C. § 1342(c)(3) (2006). To date, EPA has shown a reluctance to take such actions, because it would be disruptive to the regulatory system and likely set back environmental results. See Kenneth M. Murchison, *Learning From More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 594–95 (2005) ("EPA can revoke a state's delegation of authority to administer the discharge permit program under section 402, but Congress has not funded or staffed the federal agency to administer the programs when states fail. As a result, EPA has never revoked a state's authority to administer the section 402 program when the state has failed to perform its obligations.").

20. Although EPA historically has been reluctant to revoke state authority, as the statute has matured, advocacy groups unhappy with state performance are filing petitions for EPA to withdraw particular states' CWA delegation. A Google search of "petitions to withdraw NPDES delegation" yields a variety of examples and articles discussing this phenomenon. See, e.g., CITIZENS PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE STATE OF MARYLAND 1 (filed Dec. 7, 2009), available at [http://www.law.umaryland.edu/programs/environment/documents/NPDES\\_petition.pdf](http://www.law.umaryland.edu/programs/environment/documents/NPDES_petition.pdf) (asserting that Maryland is "not administering the NPDES permit program for discharges into Maryland waters in accordance with the CWA."); PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE STATE OF KENTUCKY 4 (filed Mar. 15, 2010), available at [http://www.sierraclub.org/environmentallaw/lawsuits/docs/KY-NPDES-Petition\\_3.15.10.pdf](http://www.sierraclub.org/environmentallaw/lawsuits/docs/KY-NPDES-Petition_3.15.10.pdf) (asserting that "Kentucky has shown that it does not have the ability to administer or enforce its NPDES program in accordance with the CWA"); *Discharge Suits Could Boost Bid to Revoke Kentucky Water Act Authority*, INSIDEEPA.COM (Oct. 14, 2010), <http://insideepa.com/201010142341753/EPA-Daily-News/Daily-News/discharge-suits-could-boost-bid-to-revoke-kentucky-water-act-authority/menu-id-95.html>; *Faulting Mine Permits, Activists Ask EPA to Withdraw Virginia's CWA Power*, INSIDEEPA.COM (Mar. 1, 2012), <http://insideepa.com/Water-Policy-Report/Water-Policy-Report-03/12/2012/faulting-mine-permits-activists-ask-epa-to-withdraw-virginias-cwa-power/menu-id-155.html> (nongovernmental organizations ("NGO") assert Virginia's NPDES program fails to appropriately control coal mining activities); see

increased in intensity in an effort to deliver cleaner water. Litigation grew, frustrations increased, funding declined,<sup>21</sup> and the cooperative federalism relationship began to fragment. At the same time, the nature of the water quality problems faced by our nation increased exponentially in complexity. Take, for example, the watershed-wide restoration project occurring in the Chesapeake Bay,<sup>22</sup> something not contemplated by the early CWA. Or, the restoration effort ongoing in the Florida Everglades<sup>23</sup> bringing multiple parties, authorities, and laws beyond the CWA to bear on the altered landscape. Addressing the pervasive invasive species problem in the Great Lakes<sup>24</sup> is similarly daunting. So too are the watershed management challenges presented by both water shortages and water overabundance<sup>25</sup> that

have led to “water wars;”<sup>26</sup> similarly daunting is the dead zone in the Gulf of Mexico.<sup>27</sup> Consider also the water quality impacts of natural gas extraction activities,<sup>28</sup> mercury toxicity in fish,<sup>29</sup> pharmaceutical and personal care products in our nation’s waterways,<sup>30</sup> and failing infrastructure.<sup>31</sup> Solving these persistent and difficult water quality challenges requires healthy cooperative federalism—and for states and the federal government to work together.

Part I of this Article provides a detailed overview of the cooperative federal relationship intended under the CWA. Part II shows that, through examples of current rulemaking, settlements, and enforcement actions, the state/federal relationship remains strained and is not working as effectively as it could. Part III offers a case study in recent efforts to manage the state-federal relationship through EPA oversight of CWA program delegation agreements, and offers insights into the effect of the effort on the state-federal relationship.

Based on the examples and case studies provided in Parts I through III, Part IV concludes that it is time for a cooperative federalism renaissance. Such a rebirth is essential to address the complex nature of the water impairment and management problems facing our nation’s waters today. These pervasive and wide scale water challenges, which know no political boundary, call for effective state/federal cooperation. When the federal and state governments use

*also Activists Poised to Press EPA to Step Up Pressure on State Water Programs*, INSIDEEPA.COM (Sept. 17, 2010), <http://insideepa.com/201009162338475/EPA-Daily-News/Daily-News/activists-poised-to-press-epa-to-step-up-pressure-on-state-water-programs/menu-id-95.html> (discussing the increase in NGO requests to withdraw state CWA programs due to alleged ineffectiveness); *Groups Call on EPA to Take Away Alabama’s Authority over Water Permitting Program*, CLEAN WATER NETWORK, <http://www.cleanwaternet.org/news-events/news/clean-water-network-groups-call-epa-take-away-alabamas-authority-over-water-permitt> (last visited Dec. 15, 2012) (fourteen NGOs assert Alabama’s NPDES program fails to meet minimum CWA standards).

21. STATE WATER QUALITY MGMT. RES. ANALYSIS TASK FORCE, STATE WATER QUALITY MANAGEMENT RESOURCE ANALYSIS INTERIM REPORT ON RESULTS 13 (2002) [hereinafter INTERIM REPORT ON RESULTS], *available at* [http://www.ecos.org/files/4238\\_file\\_Interim\\_Report\\_4\\_02.pdf](http://www.ecos.org/files/4238_file_Interim_Report_4_02.pdf) (“The message that can be most clearly drawn from the Resource Analysis is that there is nationally a huge gap in resources needed by states for managing water quality programs. At the highest level of aggregation, this resource gap indicates that states are receiving *less than one-half* of the resources that they need to fully implement the requirements of the federal Clean Water Act . . . Further, of the resources states do receive for implementing federally required programs, only about one-third or less comes from federal sources.”)
22. The overabundance of nutrients such as nitrogen and phosphorous are problematic for our nation’s waters. *See Nutrient Pollution: The Problem*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/nutrientpollution/problem/index.html> (last updated Aug. 6, 2012). The Chesapeake Bay in particular has been plagued by high levels of nitrogen, phosphorus, and sediment. These pollutants can cause algae blooms, which block out sunlight for underwater plants, smother bottom dwelling aquatic life and consume the oxygen in the Bay’s waters causing fish and shellfish to die in the Bay. *See* U.S. ENVTL. PROT. AGENCY, CHESAPEAKE BAY TMDL EXECUTIVE SUMMARY 1, 3 (2010), *available at* [http://www.epa.gov/reg3wapd/pdf/pdf\\_chesbay/FinalBayTMDL/BayTMDLExecutiveSummaryFINAL122910\\_final.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/BayTMDLExecutiveSummaryFINAL122910_final.pdf).
23. Described as “the largest environmental restoration project in the nation’s history—Florida is restoring wetlands, revitalizing water quality and reviving the habitats for more than 60 endangered and threatened species” in the Everglades. *Everglades Restoration*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/secretary/everglades/> (last updated May 23, 2012).
24. The Great Lakes have an acute invasive species problem. *Great Lakes: Invasive Species*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/greatlakes/invasive/> (last updated May 13, 2011). There are over twenty-five nonnative fish that have taken residence in the Great Lakes such as round goby, sea lamprey, Eurasian ruffe, and the alewife. *Id.* However, the most burdensome invasive species is the zebra mussel. *Id.* The zebra mussel has been extremely successful at surviving and multiplying in the Great Lakes outcompeting native clams. *Id.* Zebra mussels have also “caused severe problems at power plants and municipal water supplies, clogging intake screens, pipes, and cooling systems.” *Id.*
25. *See* WILLIAM R. WALKER, MARGARET S. HREZO & CAROL J. HALEY, U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF THE INTERIOR, MANAGEMENT OF WATER RESOURCES FOR DROUGHT CONDITIONS 1, 3 (1991), (noting that low water flow has an adverse effect on water quality). As of the end of April 2012, “about 38 percent of the contiguous U.S. fell in the moderate to extreme drought categories.” *State of the Climate Drought April 2012*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.ncdc.noaa.gov/sotc/drought/2012/4> (last updated Dec. 6, 2012). Fifty percent of the United States was abnormally dry as defined by the Palmer Drought Index. *Id.* When the nation receives an overabundance of rain, sediment and pollutants wash into waterways. *See Floods & Stability: The Influence of Major Flooding on River Stability/Sediment*, U.S. ENVTL. PROT.

AGENCY, <http://water.epa.gov/scitech/datatit/tools/warsss/examples.cfm> (last updated Mar. 6, 2012).

26. Robert Abrams, *Settlement of the ACF Controversy: Sisyphus at the Dawn of the 21st Century*, 31 HAMLIN L. REV. 679, 680 (2008). The Apalachicola-Chattahoochee-Flint (“ACF”) basin is a prime example of water conflict in the United States. Droughts in the southeast increase the competition for the availability of the ACF water. Alyssa S. Lathrop, *A Tale of Three States: Equitable Apportionment of the Apalachicola-Chattahoochee-Flint River Basin*, 36 FLA. ST. U. L. REV. 865, 873–77 (2009).
27. The Dead Zone in the Gulf of Mexico is caused by an overload of nutrients from rivers such as the Mississippi, emptying into the Gulf. For the latest report on the Dead Zone, see Press Release, La. Univs. Marine Consortium (July 31, 2011), *available at* <http://www.epa.gov/gmpo/pdf/2011-dead-zone.pdf>.
28. Natural gas can be extracted from the ground by means of hydraulic fracturing. *See The Process of Hydraulic Fracturing*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/hydraulicfracturing/process.html> (last updated Oct. 18, 2012). Hydraulic fracturing produces cracks in the rock that contains natural gas, stimulating the flow of the gas, facilitating extraction and causing impacts on groundwater, surface water, and drinking water. *See id.*
29. Consumption of fish with high methylmercury levels can elevate the level of mercury in the bloodstream of unborn babies and young children and can harm their developing nervous system. *See Mercury: Human Exposure*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/mercury/exposure.htm> (last updated Feb. 7, 2012). EPA advises women who are or may become pregnant, nursing mothers, and young children to avoid fish with high mercury levels. *See id.*
30. Pharmaceuticals and personal care products (“PPCP”) have been found in our nation’s waterways. *See Pharmaceuticals and Personal Care Products (PPCPs) in Water*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/scitech/swguidance/ppcp/index.cfm> (last updated May 2, 2012). These PPCPs may have an adverse impact on aquatic life. *See Aquatic Life: Contaminants of Emerging Concern*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/ccc.cfm> (last updated Mar. 6, 2012).
31. In 2009 the American Society of Civil Engineers published a report card for America’s water and wastewater infrastructure, giving it a D–. AM. SOC’Y OF CIVIL ENGRS, FAILURE TO ACT: THE ECONOMIC IMPACT OF CURRENT INVESTMENT IN WATER AND WASTEWATER TREATMENT INFRASTRUCTURE iii (2011), *available at* [http://www.asce.org/uploadedFiles/Infrastructure/Failure\\_to\\_Act/ASCE%20WATER%20REPORT%20FINAL.pdf](http://www.asce.org/uploadedFiles/Infrastructure/Failure_to_Act/ASCE%20WATER%20REPORT%20FINAL.pdf).

their CWA authorities and limited funding<sup>32</sup> synergistically in the areas of rulemaking, enforcement, and assessment, Americans will see greater progress to restore and protect the nation's waterways.

## I. The Legislative Evolution of Cooperative Federalism

Although the CWA's ultimate statutory structure and legislative history make it clear that Congress intended for federal and state collaboration to play a part in the Act's implementation, cooperative federalism was not always a part of the CWA.<sup>33</sup> Originally, the Federal Water Pollution Control Act ("FWPCA") left the enormous task of eliminating water pollution to the states, with the Federal government providing only technical advice and minimal funding.<sup>34</sup> When Congress amended the FWPCA in 1972, however, it recognized that the federal government needed to play a larger role in implementing the Act in order to rehabilitate and preserve waterways across the nation.<sup>35</sup>

The legislative history of the 1972 FWPCA Amendments illustrates the federal government's disappointment in the states' ability to achieve the goals of the FWPCA and its

subsequent amendments.<sup>36</sup> The Senate Committee found after a two year study of the FWPCA that, "[m]any of the Nation's navigable waters are severely polluted, and major waterways near the industrial and urban areas are unfit for most purposes."<sup>37</sup> The solution: increase federal guidance and oversight.<sup>38</sup>

Senator Edmund Muskie's 1971 Senate Bill sought to increase the FWPCA's effectiveness by seeking more stringent water quality standards for intra- and inter-state navigable waterways.<sup>39</sup> To foster progress, states would have to submit their water quality standards to EPA for approval and create specific limits on discharges for polluting facilities.<sup>40</sup> Furthermore, EPA would be required to issue information on the latest available effluent control technology to help the states form their new implementation plans to achieve water quality standards.<sup>41</sup> The Muskie Bill also sought to establish stronger enforcement and federal oversight by allowing EPA to issue compliance orders or bring civil actions against polluters when states inadequately responded to a violation.<sup>42</sup>

The Senate Committee supported more federal and state cooperation, as evidenced by the report's statement that "[t]he Committee expects the Administrator as a first priority to take steps to provide the leadership to create a meaningful working relationship with the States."<sup>43</sup> With its stricter standards and provisions for state and federal enforcement,<sup>44</sup> the Senate's version of the CWA passed with few objections. Senator James Buckley, however, questioned—with impressive prescience—"whether competent state officials will approach their responsibilities with dedication and enthusiasm, if their every act is subject either to prior approval or subsequent review by the Administrator."<sup>45</sup> Senator Buckley opined that "[t]he federal government cannot possibly, as I see it, administer this program without the active cooperation of the states,"<sup>46</sup> demonstrating a concern that, if the fed-

32. In 2002, the State Water Quality Management Resource Analysis Task Force found that there is a significant gap in resources for states to manage water quality programs. See INTERIM REPORT ON RESULTS, *supra* note 21, at i-ii. The little funding coming from the federal government places a large burden on states to generate funds to keep the required programs running. See *id.* ("the magnitude of the current resource need gap (about \$800 million) is significantly larger than previously estimated in other national reports."). Unfortunately, the gap will only widen with States underfunded water quality program budget being stretched even further with new mandatory programs being initiated. See *id.* ("Many states report that existing and core programs are underfunded, yet new program demands lead to further erosion of finite resources for core programs."). States will have to tailor their limited resources to resolve the water quality issues within their borders and meet the federal requirements of the CWA.

33. S. REP. NO. 92-414, at 19 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3686.

34. The Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, § 1, 62 Stat. 1155, 1155 states "it is hereby declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution, to support and aid technical research to devise and perfect methods of treatment of industrial wastes which are not susceptible to known effective methods of treatment, and to provide Federal technical services to State and interstate agencies and to industries, and financial aid to State and interstate agencies and to municipalities, in the formulation and execution of their stream pollution abatement programs."

35. Senator James Buckley from New York was a member of the Conservative Party while serving in Congress. See Buckley, James Lane, U.S. HOUSE OF REPRESENTATIVES, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001026> (last visited Dec. 15, 2012). Senator Buckley stated "I readily acknowledge the need for a strong, residual federal presence behind environmental quality programs. The problems of the environment, as a rule, respect no political boundaries, and are, therefore national. Where state and local governments, for whatever reason, are unwilling to act or unable to act, the federal government has a necessary obligation to intervene." S. REP. NO. 92-414, at 105, reprinted in 1972 U.S.C.C.A.N. 3668, 3766-67. The CWA allows the Administrator to intercede when the state is unable or unwilling to meet the requirements of the act, and this administrator intervention will prevent further degradation of waterways due to state inaction. See CWA § 309, 33 U.S.C. § 1319 (2006). This increased federal enforcement authority is especially evident in section 309, in which the Administrator "shall," upon learning of a violation, commence actions against a person to bring them into compliance with the Act if the state does not take action. *Id.* § 309(a)(1), 33 U.S.C. § 1319(a)(1).

36. See S. REP. NO. 92-414, at 4-5, 7, reprinted in 1972 U.S.C.C.A.N. 3668, 3671-72, 3674.

37. *Id.* at 7, reprinted in 1972 U.S.C.C.A.N. at 3674.

38. See *id.* 8-10, reprinted in 1972 U.S.C.C.A.N. at 3675-77.

39. See *Water Pollution Control Legislation: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Pub. Works*, 92d Cong. 523 (1971); 117 CONG. REC. 1347 (1971); William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215, 261-62 (2003).

40. 117 CONG. REC. at 1347.

41. *Id.* Section 304 of the CWA requires EPA to publish effluent limitation guidelines for discharges from industrial and other sources. CWA § 304, 33 U.S.C. § 1314 (2006). Section 304(m) requires EPA to publish and review its effluent guidelines program plan. *Id.* § 304(m), 33 U.S.C. § 1314(m); see, e.g., Notice of Final 2010 Effluent Guidelines Program Plan, 76 Fed. Reg. 66826, 66286 (Oct. 26, 2011) (to be codified at 50 C.F.R. pt. 226) (an example of an Effluent Guidelines Program Plan); *Effluent Guidelines (Clean Water Act Section 304(m))*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/lawsregs/lawguidance/cwa/304m/> (last updated Sept. 26, 2012) (presenting EPA information about the 2010 plan).

42. 117 CONG. REC. 1347.

43. S. REP. NO. 92-414, at 19 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3686 (including federal enforcement against state actors).

44. See CWA § 309, 33 U.S.C. § 1319 (2006).

45. S. REP. NO. 92-414, at 106, reprinted in 1972 U.S.C.C.A.N. 3668, 3767.

46. *Id.* Senator Buckley also states, "from the outset of the Committee's deliberations, I have been, and remain, concerned that the detailed requirements of this Act will work to erode the initiative and flexibility of the States in exercising their primary responsibility and rights . . . to prevent and eliminate water pollution." *Id.* "[T]he overall effect of this bill is to mandate to the federal

eral government's power was too great, the states would not act proactively.<sup>47</sup>

Despite the CWA's victory in Congress, President Nixon vetoed the CWA on October 17, 1972, because of the CWA's "unconscionable \$24 billion price tag."<sup>48</sup> In response, the CWA's proponents worked rapidly and with inspiration, highlighting the perilous price of inaction.<sup>49</sup> Senator Muskie weighed in, citing the depth and conscientiousness of the work underlying the CWA.<sup>50</sup> In a story now legend to students of the Act, the CWA passed over President Nixon's veto and became law in 1972.<sup>51</sup>

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Administrator what I believe to be excessively broad and detailed responsibility over the most minute aspects of the States [sic] programs." *Id.*

47. *Id.*

48. 118 CONG. REC. 36859 (1972) (veto message from the President). In full, the President relayed the message that "I am compelled to withhold my approval from S. 2770, the Federal Water Pollution Control Act Amendments of 1972—a bill whose laudable intent is outweighed by its unconscionable \$24 billion price tag." *Id.* The President also noted his concern "that we attack pollution in a way that does not ignore other very real threats to the quality of life, such as spiraling prices and increasingly onerous taxes. Legislation which would continue our efforts to raise water quality, but which would do so through extreme and needless overspending, does not serve the public interest. There is a much better way to get this job done." *Id.* President Nixon anticipated the Senate and the House overriding him and, most likely to deter them, tried to make them vote on taxes instead of saving the environment, stating, "I am prepared for the possibility that my action on this bill will be overridden. . . . If this veto is not sustained, however, let the issue be clearly drawn. As with the spending ceiling, so with this bill, a vote to sustain the veto is a vote against a tax increase. A vote to override the veto is a vote to increase the likelihood of higher taxes." *Id.*

49. In a speech to the House of Representatives, Representative Robert Jones of Alabama stated, "To those who say that we cannot afford to start now on the restoration of our waters, on the scale that Congress believes is essential, I say that we dare not postpone this undertaking. Every day of inaction most certainly will add to the ultimate cost; another year of inaction may well destroy all hope of saving our environment. The price of action is high. But the price of inaction is a national disaster beyond all reckoning. . . . To override a Presidential veto is a most serious and most unwelcome step that should be taken only on matters of overriding national interest. This is a matter of such overriding interest." 118 CONG. REC. 37055 (1972).

50. "I cannot recall, in my entire experience in the Senate of 14 years, a bill which has had more hard work, was more soundly weighed, had a better staff rapport and had a more thoughtful consideration of the issues than this one. The bill reflects the input, as I have indicated not only of the Senate and of the House but of the administration, of the Environmental Protection Agency, and of the President himself. . . . [T]here is no justification for this veto." 118 CONG. REC. 36872 (1972) (statement of Sen. Edmund Muskie). Senator Muskie goes on to state, "It seems to me, . . . and I think most Members will agree, that we have reached a point in our struggle against water pollution where as we say in New England—we must either 'fish or cut bait.' If we are serious about restoring the quality of our Nation's waters to a level that will support life in the future, then we ought to be prepared to make some sacrifices in that effort now. If we are not serious, then let us bury our heads in the sand, sustain the President's veto, and count on some unlikely providence to save us from ourselves. This bill does not discriminate against Republicans or Democrats, industrial or municipal polluters, small businesses or conglomerates, private citizens or public officials. It simply says to everybody: We have no choice. Water pollution must stop. And here is a uniform, effective law to make sure that it does." *Id.* at 36874.

51. In the House Debate on Overriding the President's Veto of S. 2770, October 18, 1972, the Speaker stated, "[t]he question is, Will the House, on reconsideration, pass the bill, the objections of the President to the contrary notwithstanding?" 118 CONG. REC. 37060 (1972) (statement of Rep. Carl Albert). There were 247 yeas and 23 nays, 1 present, and 160 not voting. *Id.* Because two-thirds of the House voted in favor of the CWA, the bill was passed. *Id.* at 37061. In the Senate Debate on Overriding the President's veto of S. 2770, October 17, 1972, the Senate proceeded to vote on the question, "Shall the bill pass, the objections of the President of the United States to the contrary notwithstanding?" 118 CONG. REC. 36878 (1972). There were 52 yeas and 12 nays which passed the CWA. *Id.* at 36879.

The CWA's cooperative federalism intertwines and involves the federal and state governments in a dance from which neither can exit.<sup>52</sup> If the federal government is given too little power, states may not take requirements and deadlines seriously. If the federal government possesses too much power, however, states may find their innovations squashed and creativity hindered, and ultimately become less cooperative. The goal, therefore, must be to strike a balance of power—states should be accountable for results and encouraged to solve their water quality problems, while the federal government should use its vast resources to drive results, support state initiatives, further research, and provide for increased accountability and public trust.

## II. Rulemaking and Enforcement Case Studies in Contemporary Cooperative Federalism

To work well, cooperative federalism requires a careful balancing of roles. The following selected examples of rulemaking, settlements, and enforcement actions occurred relatively recently and provide simple snapshots of the strained state/federal relationship that exists today as both levels of government attempt to achieve improved water quality in the United States.<sup>53</sup>

### A. Rulemaking Case Studies

Rulemaking is an important federal function under the CWA, with most CWA rulemakings involving establishing and clarifying the role of the states and the federal government.<sup>54</sup> The following examples illustrate difficulties associated with cooperative federalism in three current rulemaking areas—water quality standards for nutrients, concentrated animal feeding operations ("CAFO"), and stormwater.

#### I. Water Quality Standards: State-Led, Heavy EPA Oversight

The water quality standards ("WQS") program is a good example of the cooperative federalism relationship because it involves both state adoption of very detailed standards through state rulemaking and significant, and sometimes complicated, federal oversight. One of the CWA's ambitious goals is to attain an ambient water quality in our nation's waterways that "provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in

52. CWA § 101(b), 33 U.S.C. § 1251(b) (2006); see, e.g., Philip Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1700 (2001) ("As a result of this need for cooperation, both the states and the federal government are well aware that they are tied together in their ability to administer cooperative federalism programs. The resulting interdependence gives each important influence over the other.")

53. These examples are not exhaustive and are drawn from ACWA recent experiences. Other examples certainly exist and could be offered. Other perspectives on cooperative federalism also exist. It is the authors' hope that these examples prompt discussion and reflection.

54. Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 ENVTL. & ENERGY L. & POL'Y J. 63, 73 (2011).

and on the water”<sup>55</sup>—commonly known as the “fishable/swimmable” goal. States’ WQS are adopted to achieve this goal.<sup>56</sup> In setting WQS, states must first designate the uses of a waterbody and then establish the criteria needed to protect those uses.<sup>57</sup> States then submit their WQS standards to EPA for approval.<sup>58</sup> If EPA finds that the standards are consistent with the CWA and protective of the waterbody’s designated uses, EPA approves the standards; if not, EPA notifies the state of any needed changes.<sup>59</sup> If the state does not subsequently submit new standards that comply with the CWA in a timely fashion, EPA can itself promulgate standards.<sup>60</sup>

WQS criteria may take either a narrative or numeric form, though EPA recommends that “an effective State water quality standards program should include both parameter-specific (e.g., ambient numeric criteria) and narrative approaches.”<sup>61</sup> Numeric criteria are required when pollutants are either impairing a waterbody or when they may cause adverse health impacts.<sup>62</sup> Narrative criteria may exist alone, or in addition to numeric criteria, and target harmful waterbody characteristics.<sup>63</sup> Recently the cooperative federalism relationship has been strained by controversy over the amount of EPA involvement in state WQS setting, as shown by the following example.

### a. Cooperative Federalism Waning: Florida’s Nutrient Battle

EPA, states, and the public see more and more U.S. waters impaired for excessive nutrients. To help rectify this situation EPA began to pressure states to develop numeric nutrient criteria (“NNC”). The escalated battle between EPA and government officials in the state of Florida became a “poster child” for failed cooperative federalism.<sup>64</sup> Although WQS set-

ting is primarily a state function, EPA became very involved in Florida’s efforts. Because of the litigation that often results, such an unbalanced conflicting state/federal relationship can delay water quality progress.

Nutrients, such as nitrogen and phosphorus, are a leading cause of water quality impairment in our nation’s waterways.<sup>65</sup> In 1998, given the growing and widespread problem of nutrient-related water impairments across the nation, EPA announced the “National Strategy for the Development of Regional Nutrient Criteria.”<sup>66</sup> The guidance document provided direction to states to develop nutrient water quality criteria in a numerical form specific to each region of the country.<sup>67</sup> Accordingly, states across the nation began to incorporate NNC, albeit slowly.<sup>68</sup>

As a state with diverse and rich waters, both inland and coastal, Florida was one of the many states with narrative water quality standards for surface waters designated to protect the uses of those waters.<sup>69</sup> In May 2002, Florida’s Department of Environmental Protection (“FDEP”) submitted its initial plan for numeric nutrient criteria development to EPA Region IV,<sup>70</sup> which EPA concurred with in July 2004.<sup>71</sup> Concerned that the narrative criteria were insufficiently protective of Florida’s waters and that Florida was not moving aggressively enough towards numeric criteria, non-

55. CWA § 101(a)(2), 33 U.S.C. § 1251(a)(2).

56. For a basic overview of the state water quality standard setting process, see U.S. ENVTL. PROT. AGENCY, REP. NO. EPA/820/F-11/001, WATER QUALITY STANDARDS: PROTECTING HUMAN HEALTH AND AQUATIC LIFE 1 (2011), available at [http://water.epa.gov/scitech/swguidance/standards/upload/WQS\\_basic\\_factsheet.pdf](http://water.epa.gov/scitech/swguidance/standards/upload/WQS_basic_factsheet.pdf).

57. *Id.*

58. CWA § 303, 33 U.S.C. § 1313(c)(1), (2)(a) (2006).

59. *Id.* § 303(3), (4), 33 U.S.C. § 1313(3), (4).

60. *Id.* § 303(4), 33 U.S.C. § 1313(4). Federal promulgation of water quality standards do not often happen and EPA has a list of only forty federally proposed or promulgated standards. See *Water Quality Standards Regulations and Federally Promulgated Standards*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/scitech/swguidance/standards/Laws-and-Regulations.cfm> (last updated Dec. 2, 2012).

61. U.S. ENVTL. PROT. AGENCY, WATER QUALITY HANDBOOK CHAPTER 3: WATER QUALITY CRITERIA, § 3.5, available at <http://water.epa.gov/scitech/swguidance/standards/handbook/chapter03.cfm#section5> (last updated Dec. 4, 2012); see also *Basic Course: Key Concepts (Module 3.e)*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/learn/training/standardsacademy/mod3/page6.cfm> (last updated Mar. 6, 2012) (describing a comparison of narrative and numeric nutrient criteria).

62. See WATER QUALITY HANDBOOK CHAPTER 3, *supra* note 61, at §§ 3.5, 3.5.1.

63. See *id.* at § 3.5.2. Narrative criteria can be insufficient because “there are no measurable or quantifiable baselines for assessing progress or for determining violations of WQS.” Malloy, *supra* note 54, at 93.

64. The battle between Florida and EPA to produce NNC for Florida’s waterways has been all over the environmental media. Here are just a few examples from the Bureau of National Affairs. See *Judge Upholds State’s Numeric Limits on Nutrients for Inland Waters, Estuaries*, 43 Env’t Rep. (BNA) No. 1574 (June 15, 2012); *State Proposes Water Standards for Nutrients; EPA Signals Approval*,

42 Env’t Rep. (BNA) No. 2492 (Nov. 4, 2011); *Florida Industries Urge EPA to Respond to Petition to Withdraw Nutrient Limit Rule*, 42 Env’t Rep. (BNA) No. 1708 (July 29, 2011); *EPA Official Pledges State Collaboration on Numeric Approach to Nutrient Reduction*, 42 Env’t Rep. (BNA) No. 2294 (Oct. 7, 2011); *State Agency Petitions EPA to Rescind Finding for Numeric Nutrient Standards*, 42 Env’t Rep. (BNA) No. 952 (Apr. 29, 2011).

65. As of 1996, out of the waterways surveyed, forty percent of rivers, fifty-one percent of lakes, and fifty-seven percent of estuaries were impaired due to nutrient enrichment. *National Strategy for the Development of Regional Nutrient Criteria*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/strategy/nutsi.cfm> (last updated Mar. 6, 2012). Nutrient enrichment was also “implicated with both the large hypoxic zone in the Gulf of Mexico, hypoxia observed in several East Coast States, and Pfiesteria-induced fish kills and human health problems.” *Id.*

66. Notice of National Strategy for the Development of Regional Nutrient Criteria, 63 Fed. Reg. 34648, 34648 (June 25, 1998).

67. *Id.* at 34649.

68. See *Status: State Adoption of Numeric Nutrient Standards*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/strategy/status.cfm> (last updated Mar. 6, 2012) (showing little progress with regard to state nutrient criteria between 1998 and 2008); see also *Nutrient Indicators Dataset*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/dataset.cfm> (last updated Aug. 29, 2012) (providing current information on nutrient pollution, database shows pollution impacts, and states’ actions with regard to nutrient pollution).

69. See FLA. ADMIN. CODE ANN. r. 62-302.100 to .800 (2010), available at <http://www.dep.state.fl.us/legal/Rules/shared/62-302/62-302.pdf>. An example of narrative criteria in Florida are those for Biochemical oxygen demand which “shall not be increased to exceed values which would cause dissolved oxygen to be depressed below the limit established for each class and, in no case, shall it be great enough to produce nuisance conditions.” *Id.* r. 62-302.530 at 32. Another example is that for color which states, “only such amounts as will not render the waters unsuitable for agricultural irrigation, livestock, watering, industrial cooling, industrial process water supply purposes, or fish survival.” *Id.* r. 62-302.530 at 34.

70. FDEP’s progress is discussed in STANDARDS & ASSESSMENT SECTION, FLA. DEP’T OF ENVTL. PROT., TECHNICAL SUPPORT DOCUMENT: DEVELOPMENT OF NUMERIC NUTRIENT CRITERIA FOR FLORIDA LAKES, SPRING VENTS AND STREAMS 11 (2012) [hereinafter FDEP TECHNICAL SUPPORT DOCUMENT], available at <http://www.dep.state.fl.us/water/wqssp/nutrients/docs/tsd-numeric-lakes-springs-streams.pdf>.

71. *Id.*; see also Wayne E. Flowers & James E. Charles, *Numeric Nutrient Water Quality Criteria: Lessons From Florida*, 26 NAT. RES. & ENV’T 40, 41 (2012).

governmental organizations (“NGO”) filed suit in July 2008 asking EPA to develop and set NNC for Florida.<sup>72</sup> In January 2009, EPA made a determination that Florida’s waterways needed NNC and that the federal government would proceed to develop them in lieu of the state.<sup>73</sup> Subsequently, in August 2009, EPA entered into a consent decree with the NGO plaintiffs that supplanted the NNC plan.<sup>74</sup> The U.S. Court of Appeals for the Eleventh Circuit upheld the decree in August 2011.<sup>75</sup>

EPA’s final NNC for all fresh waterbodies (all lakes, springs, and flowing water in the state with the exception of south Florida) were published on December 6, 2010, and also referred to as the November 2010 federal rulemaking.<sup>76</sup> Under EPA’s standards, one out of four pristine Florida waterways would not meet the criteria.<sup>77</sup> More litigation ensued, with state, local, environmental, and industry interests asserting that EPA’s standards were arbitrary and capricious.<sup>78</sup> EPA’s final NNC, published December 6, 2010, were to be effective March 6, 2012.<sup>79</sup>

EPA then published a March policy memorandum endorsing state flexibility in NNC.<sup>80</sup> Subsequently, FDEP petitioned EPA to withdraw the 2009 determination that NNC were needed in Florida based on an evaluation that the state of Florida meets all the expectations of the policy memorandum endorsing state flexibility in NNC.<sup>81</sup> Additionally, FDEP petitioned for EPA to repeal the November 2010 federal rulemaking that established NNC for inland lakes and streams and requested that EPA not propose or promulgate any further NNC.<sup>82</sup>

72. See Fla. Wildlife Fed’n, Inc. v. Johnson, No. 4:08cv324-RH/WCS, 2009 WL 248078, at \*1 (N.D. Fla. Feb. 2, 2009).

73. Although if the state’s progress superseded that of the federal government, EPA could change its course. See Letter from Benjamin H. Gumbles, Assistant Adm’r, U.S. Envtl. Prot. Agency, to Michael Stole, Sec’y, Fla. Dep’t of Envtl. Prot. at 8–10 (Jan. 14, 2009), available at [http://www.dep.state.fl.us/water/wqssp/nutrients/docs/benjamin\\_grumbles\\_epa\\_01142009.pdf](http://www.dep.state.fl.us/water/wqssp/nutrients/docs/benjamin_grumbles_epa_01142009.pdf).

74. Fla. Wildlife Fed’n, Inc. v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296, 1300–01 (2011).

75. *Id.*

76. See DIV. OF ENVTL. ASSESSMENT & RESTORATION, FLA. DEP’T OF ENVTL. PROT., OVERVIEW OF EPA’S PROMULGATED NUMERIC NUTRIENT CRITERIA FOR FLORIDA’S STREAMS, LAKES AND SPRINGS 6 (2012), available at [http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/upload/day1\\_joyner.pdf](http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/upload/day1_joyner.pdf). The NNC that EPA produced were not exactly what FDEP was working on. EPA “excluded sites that were impaired for Dissolved Oxygen (DO), which excluded many sites that drain wetlands areas, which tend to have naturally higher TN [nitrogen] levels.” *Id.* at 10. EPA also did not “require biological validation of impairment” or “establish requirement for SSAC [site-specific alternative criteria] process.” *Id.*

77. Flowers & Charles, *supra* note 71, at 41–42.

78. *Id.* at 42.

79. Water Quality Standards for the State of Florida’s Lakes and Flowing Waters, 75 Fed. Reg. 75762, 75762 (Dec. 6, 2010) (to be codified at 40 C.F.R. pt. 131).

80. Memorandum from Nancy Stoner, Acting Assistant Adm’r, U.S. Envtl. Prot. Agency, to Reg’l Adm’rs, U.S. Envtl. Prot. Agency (Mar. 16, 2011), available at [http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/memo\\_nitrogen\\_framework.pdf](http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/memo_nitrogen_framework.pdf).

81. PETITION FOR WITHDRAWAL OF EPA’S 303(c)(4)(B) DETERMINATION FOR FLORIDA 30 (filed Apr. 22, 2011), available at <http://www.dep.state.fl.us/water/wqssp/nutrients/docs/tsd-nnc-lakes-springs-streams.pdf>.

82. Letter from Nancy Stoner, Acting Assistant Adm’r, U.S. Envtl. Prot. Agency, to Herschel T. Vinyard Jr., Sec’y, Fla. Dep’t of Envtl. Prot. (June 13, 2011), available at [http://water.epa.gov/lawsregs/rulesregs/upload/epa\\_response\\_fdep\\_petition.pdf](http://water.epa.gov/lawsregs/rulesregs/upload/epa_response_fdep_petition.pdf).

EPA’s response reflected a resurgence of cooperative federalism—noting that “if FDEP adopts and EPA approves protective nutrient criteria that are sufficient to address the concerns underlying our determination and rule, and if such criteria enter into legal force and effect in Florida, EPA will promptly initiate rulemaking to repeal the corresponding federally promulgated numeric nutrient criteria.”<sup>83</sup> This encouraging statement reflected a more ideal cooperative federalism approach, as opposed to EPA merely assuming Florida’s standard-setting role. FDEP developed NNC that were statistically similar to EPA’s, except that FDEP used the criteria to supplement and interpret the narrative water quality standards.<sup>84</sup> FDEP submitted revisions of the Florida NNC to EPA<sup>85</sup> and, along with those revisions, requested that EPA “return to Floridians the responsibility for protecting Florida’s waters.”<sup>86</sup>

In February 2012 a federal court upheld EPA’s 2009 “determination that numeric nutrient criteria are necessary for Florida waters to meet the Clean Water Act’s requirements.”<sup>87</sup> EPA, however, extended the effective date of some of its criteria.<sup>88</sup> One explanation for the delay is that EPA underestimated the cost of implementing NNC in Florida,<sup>89</sup> the number of newly impaired waters, and the mitigation costs for the stormwater, agricultural, septic system, and government sectors.<sup>90</sup> Another explanation is that EPA sought to provide FDEP more time to complete its work, allowing EPA to step aside.

As such, FDEP submitted its NNC for lakes, spring vents, streams, and certain estuaries to EPA for approval.<sup>91</sup> After EPA received FDEP’s NNC, it again delayed the implementation of their inland water NNC rule to January 6, 2013, so that they would be able to review FDEP’s criteria.<sup>92</sup> Reflecting the ongoing tension, FDEP included in its regulations a

83. *Id.*

84. *Id.* See generally FDEP TECHNICAL SUPPORT DOCUMENT, *supra* note 70, at 1–4, 18, 23, 26, 40.

85. See H.R. 7051, 2012 Leg., Reg. Sess. (Fla. 2012), available at [http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=PCB%20ANRS%2012-07.DOCX&DocumentType=Proposed%20Committee%20Bills%20\(PCBs\)&Session=2012&CommitteeId=2619](http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=PCB%20ANRS%2012-07.DOCX&DocumentType=Proposed%20Committee%20Bills%20(PCBs)&Session=2012&CommitteeId=2619).

86. Letter from Herschel T. Vinyard Jr., Sec’y, Fla. Dept. of Envtl. Prot., to Gwendolyn Keyes Fleming, Reg’l Adm’r, U.S. Envtl. Prot. Agency (Feb. 20, 2012), available at [http://www.floridaenvironmentallawblog.com/wp-content/uploads/2012/02/2\\_20\\_Gwen\\_Fleming\\_re\\_NNC.pdf](http://www.floridaenvironmentallawblog.com/wp-content/uploads/2012/02/2_20_Gwen_Fleming_re_NNC.pdf).

87. Fla. Wildlife Fed’n, Inc. v. Jackson, 853 F. Supp. 2d 1138, 1142 (N.D. Fla. 2012).

88. *Id.* at 1177.

89. See NAT’L ACAD. OF SCI., REVIEW OF EPA’S ECONOMIC ANALYSIS OF FINAL WATER QUALITY STANDARDS FOR NUTRIENTS FOR LAKES AND FLOWING WATERS IN FLORIDA 2–3 (Glen T. Daigger et al. eds., 2012), available at <http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/EPA-Econ-Analysis-Florida-Final.pdf>.

90. See *id.* at 2.

91. Letter from Thomas M. Beason, Gen. Counsel, Fla. Dep’t of Envtl. Prot., to Gwendolyn Keyes Fleming, Reg’l Adm’r, U.S. Envtl. Prot. Agency 5 (June 13, 2012), available at [http://www.llw-law.com/files/presentations/FDEP\\_Regulatory\\_and%20Policy%20Update,%20Water%20Issues\\_00113051.PDF](http://www.llw-law.com/files/presentations/FDEP_Regulatory_and%20Policy%20Update,%20Water%20Issues_00113051.PDF).

92. *Federal Nutrient Water Quality Standards for the State of Florida’s Lakes and Flowing Waters Outside of the South Florida Region (Inland Rule)*, U.S. ENVTL. PROT. AGENCY, [http://water.epa.gov/lawsregs/rulesregs/florida\\_inland.cfm](http://water.epa.gov/lawsregs/rulesregs/florida_inland.cfm) (last updated Dec. 11, 2012).

provision that would make the whole rule ineffective if EPA amends or revises any portion of its submitted regulations.<sup>93</sup>

In November 2012, EPA submitted what is anticipated to be its approval of Florida's numeric criteria to the White House.<sup>94</sup> EPA in fact approved Florida's numeric nutrient criteria for inland waterways in Florida.<sup>95</sup> In light of this approval, EPA is seeking to amend its consent decree to exclude the need to adopt numeric criteria for downstream protection.<sup>96</sup> However, EPA is still proposing its own federal rules for Florida's coastal waters in order to comply with the consent decree.<sup>97</sup>

This cooperative federalism case study shows that pooling federal and state time, resources, and expertise toward a single outcome, rather than operating in an uncomfortable and inefficient dance, could have yielded a more effective result. Rather than EPA stepping in to do the state's job of developing criteria, a cooperative federalism approach early on could have yielded a better and more efficient result. The next case study shows that EPA and states have adjusted with the twenty-twenty hindsight of the Florida experience.

## b. Cooperative Federalism Resurgence: The Mississippi River Nutrients Battle

A large group of NGOs petitioned EPA for rulemaking to develop and promulgate NNC for all navigable waters in all states where such criteria do not exist.<sup>98</sup> The NGOs were

primarily concerned with nitrogen and phosphorus deposits in the waters and requested that EPA establish total maximum daily loads ("TMDL") for these pollutants.<sup>99</sup> EPA's 2011 response denying the petition showed a rekindling of cooperative federalism, and likely a reluctance to walk down a similar path to that it did with Florida.<sup>100</sup> EPA recognized the limitations of its actions in Florida,<sup>101</sup> and clearly stated that the best pathway forward on the nutrients issue was to allow states themselves to take the necessary action with EPA's support.<sup>102</sup> EPA also made clear that it would not develop TMDLs for the Mississippi River.<sup>103</sup> EPA did, however, leave open the option for future rulemaking, if the cir-

loads ("TMDL") for the Mississippi River and the Gulf of Mexico at 3–10, Gulf Restoration Net. v. Jackson, No. 2:12-cv-00677 (E.D. La. filed Mar. 13, 2013), available at [http://docs.nrdc.org/water/files/wat\\_12031401b.pdf](http://docs.nrdc.org/water/files/wat_12031401b.pdf). In the alternative, the group petitioned EPA to promulgate NNC for the Mississippi-Atchafalaya River Basin and the Northern Gulf of Mexico, and, at a minimum, to promulgate NNC in states along the mainstem of the Mississippi River and the northern Gulf of Mexico. *Id.* at 4–5.

99. *See id.* at 10–11.

100. Letter from Michael Shapiro, Deputy Assistant Adm'r, U.S. Env'tl. Prot. Agency, to Kevin Reuther, Legal Dir., Minn. Ctr. For Env'tl. Advocacy, & Albert Ettinger 1 (July 29, 2011) [hereinafter Shapiro Letter], available at <http://www.mncenter.org/LinkClick.aspx?fileticket=t0omayj3tjs%3d&tabid=494>. This letter is the official denial by EPA of the 2008 petition.

101. *See id.* EPA's letter notes, "[t]he EPA has used this authority in one recent instance (Florida) to develop federal NNC and retains its discretion to use it elsewhere, where appropriate. However, long-standing policy, consistent with the CWA, has been that states should develop and adopt standards in the first instance, with EPA using its own rulemaking authority only in cases where it disapproves a new or revised standard, or affirmatively determines that new or revised standards are needed to meet CWA requirements." *Id.* at 5.

102. *See id.* "While the EPA may at some future time use its authority in response to specific circumstances, the EPA's current approach, consistent with the CWA and Agency policy, is to address N[itrogen] and P[hosphorus] pollution and accelerate state adoption of NNC by working in partnership with states and stakeholders to reduce nutrient loadings from both point and nonpoint sources." *Id.* at 5. The ACWA executed a survey to gather state perspectives on cooperative federalism for this article and other purposes. ASS'N OF CLEAN WATER ADMINS., COOPERATIVE FEDERALISM UNDER THE CLEAN WATER ACT SURVEY (on file with the GW JEEL) [hereinafter ACWA SURVEY]. One survey response articulated that cooperative federalism in rulemaking is demonstrated by the fact that the "EPA may promulgate rules that affect state waters but typically states are consulted prior to the drafting of those rules. States may also promulgate rules affecting state waters but their rules can be no less stringent than federal rules." ACWA SURVEY at 13 (question 4, response 2). Another survey response identified a strength of cooperative federalism as the balance that EPA maintains, "Federal oversight vs. federal mandates to states. It is appropriate for states to attempt to address local water quality problems in the first instances. However the federal government must have a role in determining whether the state solution meets nationwide standards as the 'floor.'" *Id.* at 34 (question 11, response 2).

103. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (2006), explains the TMDL program: "[e]ach state shall establish for the waters identified in paragraph (1) (A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." For an overview of the TMDL program, see *Overview of Impaired Waters and Total Maximum Daily Loads Program*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/intro.cfm> (last updated Mar. 6, 2012). The Shapiro Letter further states: "For the MARB waters at issue, the EPA believes that the best use of its resources and personnel is to provide national technical and policy guidance regarding impaired waters listing and TMDL development associated with nutrient pollution, working in partnership with states and stakeholders at both the national and Regional level to reduce nutrient loadings from both point and non-point sources." Shapiro Letter, *supra* note 100, at 5.

93. "Poison Pill" in Florida Nutrient Rule May Shape EPA Review, *Legal Fight*, INSIDEEPA.COM (July 3, 2012), available at [http://environmentalnewsstand.com/component/option,com\\_ppv/id,2403644](http://environmentalnewsstand.com/component/option,com_ppv/id,2403644).

94. Allen Fugler, *InsideEPA.com Reports: EPA Advances Florida NNC Rules, Legal Action Anticipated* Citation, FLA. PEST MGMT. ASS'N, INC. (Nov. 20, 2012), <http://www.flpma.org/insideepa-com-reports-epa-advances-florida-nnc-rules-legal-action-anticipated/>.

95. *Nutrients Water Quality Standards for the State of Florida*, U.S. ENVTL. PROT. AGENCY, [http://water.epa.gov/lawsregs/rulesregs/florida\\_index.cfm](http://water.epa.gov/lawsregs/rulesregs/florida_index.cfm) (last updated Dec. 11, 2012). EPA found that FDEP's numeric nutrient criteria were in accordance with the Clean Water Act as well as other federal regulations that apply to Florida's inland waterways. *Id.* For FDEP's NNC for inland waterways in Florida, see *Federal Nutrient Water Quality Standards for the State of Florida's Lakes and Flowing Waters*, *supra* note 92.

96. *Consent Decree and Determination*, U.S. ENVTL. PROT. AGENCY, [http://water.epa.gov/lawsregs/rulesregs/florida\\_consent.cfm](http://water.epa.gov/lawsregs/rulesregs/florida_consent.cfm) (last updated Dec. 1, 2012). EPA is seeking to amend the January 2009 consent decree that requires them to specify numeric criteria for inland waterways in Florida because those criteria established by Florida were sufficient to meet all CWA and federal regulations. EPA needs the District Court to modify the Consent Decree in order to be relieved of its obligations in this area. *Id.*

97. *Nutrients Water Quality Standards for the State of Florida*, *supra* note 95. For EPA to comply with the consent decree, they are still proposing federal rules that will address coastal water bodies in Florida because the FDEP rule only covered inland waterways. *Id.* On November 30, 2012, EPA released the proposed rule for Florida's coastal waters. The deadline for the final rulemaking on the "Coastal Rule" is September 30, 2013. *See Federal Nutrient Water Quality Standards for the State of Florida's Estuaries, Coastal Waters, and South Florida Inland Flowing Waters (Coastal Rule)*, U.S. ENVTL. PROT. AGENCY, [http://water.epa.gov/lawsregs/rulesregs/florida\\_coastal.cfm](http://water.epa.gov/lawsregs/rulesregs/florida_coastal.cfm) (last updated Dec. 11, 2012); *EPA Signs Final Florida Nutrient Criteria after Court Declines Extension*, INSIDEEPA.COM (Nov. 30, 2012), <http://insideepa.com/20121120121417758/EPA-Daily-News/Daily-News/epa-signs-final-florida-nutrient-criteria-after-court-declines-extension/menu-id-95.html>. EPA has indicated Florida will develop its own rules for Florida's Coastal Waters and that EPA and FDEP are discussing FDEP's plan to revise the water quality standards for waterways not covered in FDEP's current rule. *Id.*

98. *See* Petition for Rulemaking Under the Clean Water Act: Numeric Water Quality Standards for Nitrogen and Phosphorus and total maximum daily

cumstances so required.<sup>104</sup> On March 13, 2012, the groups filed suit claiming EPA's denial of their petition was arbitrary and capricious.<sup>105</sup> Recently, EPA answered the petitioner's complaint, agreeing that there were nutrient problems in that area, but that the plaintiffs were not entitled to any relief from EPA.<sup>106</sup>

Although EPA's denial of the petition is now subject to litigation, EPA's response to the petition revealed the lessons it learned from its Florida experience—namely that cooperative federalism is more effective than unilateral actions because it supports, rather than undercuts, state actions and that the clean water progress many Americans desire still will take time. EPA's response implicitly supports the Mississippi River Basin states and endorses their knowledge of their waters, discharges, and impairments. Although the litigation could change the trajectory of this case study, EPA's response reveals its recognition of the value in guiding and supporting states.

### c. Cooperative Federalism Clarity: Maine's Nutrient Biocriteria Experience

A key element to successful cooperative federalism in the clean water context is EPA's ability to give states clear directions that the Agency wants to see followed, while still allowing states to individually tailor the means to meet EPA's needs.<sup>107</sup> Such a balance can lead to improved relationships, less frustration, and better public policy.<sup>108</sup> A good example of EPA and state collaboration is Maine's recent experience of seeking guidance and direction from EPA regarding the development of its draft NNC for surface waters.<sup>109</sup>

Maine developed a preliminary rule that proposed "nutrient criteria for fresh water rivers, streams, lakes, and impoundments" and submitted it to EPA for review.<sup>110</sup> EPA responded with several recommendations to improve the rule.<sup>111</sup> EPA's clear and direct recommendations, as well as its approval of what Maine has done well to date, will hope-

104. See Shapiro Letter, *supra* note 100, at 6.

105. See Complaint at 3, Gulf Restoration Network et al. v. Jackson, No. 2:12-cv-00677 (E.D. La. filed Mar. 13, 2012), available at <http://www.iaenvironment.org/documents/2012/EPA-MRC/nutrient%20complaint.pdf>.

106. For EPA's Answer to the Complaint, see Answer of Respondent, Gulf Restoration Network, et al. v. Jackson, No. 2:12-cv-00677 (E.D. La. filed May 21, 2012), available at <http://image.exct.net/lib/fe651570766002797017/m/1/Gulf+Restoration+Case+EPA+Answer+to+Complaint.pdf>. The Answer states, "EPA denies that plaintiffs are entitled to any relief." Answer of Respondent at 7. EPA makes this statement after acknowledging that, "nutrient pollution in the Mississippi River Basin and northern Gulf of Mexico causes or contributes to a low-oxygen 'dead zone' in the Gulf of Mexico; that such pollution degrades and impairs water quality, and that such pollution harms aquatic life, human health, and the economic, aesthetic, and recreational values of rivers, lakes, streams, estuaries, and coastal waters." *Id.* at 2.

107. See Letter from Stephen J. Silva, Chief, Water Quality Branch, U.S. Env'tl. Prot. Agency, to David Courtemanch, Me. Dep't of Env'tl. Prot. (Dec. 22, 2011), available at <http://water.epa.gov/scitech/swguidance/standards/upload/Dec-2011-Letter-to-Maine-DEP.pdf> (reviewing state action from a federal perspective).

108. See *id.*

109. *Id.*

110. *Id.*

111. *Id.* EPA stated that, "we think your approach, when combined with our recommended technical edits to the rule, is consistent with the Clean Water Act

fully help the state complete its NNC. Moreover, by providing guidance in the development phase of NNC, EPA is less likely to have to have to step in at a later date and promulgate criteria in place of those developed by the state.

## 2. Undermining Cooperative Federalism Through Legal Settlements

Often, EPA is sued by advocacy groups seeking a certain result. During settlement negotiations, EPA will agree to promulgate a regulation.<sup>112</sup> This approach, while satisfying the litigants, can leave states and other stakeholders out of initial discussions.<sup>113</sup> By not allowing all concerned parties to participate in rulemaking, confusion and marginalization can prevail and adversely impact the cooperative federalism relationship. The following case studies illuminate this premise.

### a. Legal Settlements Fail to Leverage Existing State Information

One meaningful way to advance cooperative federalism is to maximize the use of information already gathered and maintained at the state level. When states are removed from the rulemaking process this valuable information is forgone. An example of this information collection issue can be drawn from recent activities surrounding EPA's CAFO program, and a federal settlement with NGOs.<sup>114</sup> CAFOs can discharge to CWA jurisdictional waters<sup>115</sup> and are required to have CWA National Pollutant Discharge Elimination System ("NPDES") permits.<sup>116</sup> Smaller animal feeding

and its implementing regulations. We would be happy to meet with you to discuss our comments and recommendations in greater detail." *Id.*

112. See John McArdle, *House Republicans Accuse EPA, Environs of Collusion*, N.Y. TIMES (July 15, 2011), <http://www.nytimes.com/gwire/2011/07/15/15greenwire-house-republicans-accuse-epa-enviros-of-collusion-69925.html>. This form of rulemaking happens in other agencies, and, in an effort to restrict this agency behavior, the Sunshine for Regulatory Decrees and Settlements Act of 2012 has been proposed. H.R. 3862, 112th Cong. (2012). If passed, it would impose limitations on consent decrees and settlements agencies have and instead require agencies to take regulatory action. *Id.*

113. See McArdle, *supra* note 112. See also *GOP AGs Seek Paper Trail on "Sue and Settle" Pacts Between EPA, Activists*, INSIDEEPA.COM (Aug. 27, 2012), <http://insideepa.com/201208132407280/EPA-Daily-News/Daily-News/gop-ags-see-paper-trail-on-sue-and-settle-pacts-between-epa-activists/menu-id-95.html> (thirteen Republican state attorney generals filed FOIA requests with EPA seeking EPA's correspondence with eighty public interest groups that were "party to settlements that resulted in deadlines for a host of new rules and permit decisions" with the expectation that the correspondence would show settlement collusion).

114. Settlement Agreement, Nat'l Resources Def. Council v. U.S. Env'tl. Prot. Agency, No. 09-60510 (5th Cir. Dec. 8, 2009), available at <http://www.caes.uga.edu/extension/water/documents/settlementagreement.pdf>.

115. For general information regarding CAFOs, see *National Pollutant Discharge Elimination System (NPDES): Animal Feeding Operations*, U.S. ENVTL. PROT. AGENCY, [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=7](http://cfpub.epa.gov/npdes/home.cfm?program_id=7) (last updated Feb. 16, 2012, 12:05 PM); CLAUDIA COPELAND, CONG. RESEARCH SERV., RL31851, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDLOTS (CAFOs) 3-5 (2010), available at <http://www.nationalaglawcenter.org/assets/crs/RL31851.pdf>.

116. See *National Pollutant Discharge Elimination System (NPDES): Concentrated Animal Feeding Operations (CAFO)—Final Rule*, U.S. ENVTL. PROT. AGENCY, <http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm> (last updated July 31, 2012, 2:01 PM) (providing the 2008 final CAFO regulations); *Regulatory Defini-*

operations (“AFO”) are regulated by state law.<sup>117</sup> States collect a variety of data points from CAFOs and AFOs, which may include the number of animals in the feeding operation, manure management data, and operational ownership data.<sup>118</sup> Due to a concern that oversight of CAFO and AFO activities was inadequate to protect water quality, NGOs brought suit against EPA, which the Agency settled.<sup>119</sup> In the settlement, EPA agreed to propose a regulation under CWA section 308<sup>120</sup> to federally collect information from animal operations that states already have collected through other means.<sup>121</sup>

States were concerned with the sue and settle approach to the proposal,<sup>122</sup> noting that the approach did not have “the benefit of scientific examination, co-regulator collaboration, cost benefit analyses, stakeholder input, and legal authorities review,” and that it completely lacked transparency.<sup>123</sup> States also noted that the proposal failed to take into account the impacts and effects of a variety of state CAFO and AFO programs.<sup>124</sup>

A more effective cooperative federalism-oriented approach, and the path which EPA ultimately took, was for EPA to decline to finalize the rule and instead to put in place a process for the Agency and states to work together to identify data gaps, information needed from CAFOs, and how existing resources could be channeled to yield better environmental results.<sup>125</sup>

*tions of Large CAFOs, Medium CAFOs, and Small CAFOs*, U.S. ENVTL. PROT. AGENCY, [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=7](http://cfpub.epa.gov/npdes/home.cfm?program_id=7) (last updated Feb. 16, 2012, 12:05 PM).

117. *AFO Virtual Information Center State Regulations*, U.S. ENVTL. PROT. AGENCY, [http://cfpub.epa.gov/npdes/afo/afoinfo.cfm?view=category&link\\_cat=23](http://cfpub.epa.gov/npdes/afo/afoinfo.cfm?view=category&link_cat=23) (last updated Sept. 29, 2004, 1:19 PM).
118. See COPELAND, *supra* note 115, at 7–8; Letter from Walter L. Baker, President, Ass’n of Clean Water Adm’rs, to Lisa P. Jackson, Adm’r, U.S. Env’tl. Prot. Agency (Jan. 19, 2012) [hereinafter Baker Jan. 2012 Letter], available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0188-1260>.
119. Settlement Agreement, Nat’l Resources Def. Council v. U.S. Env’tl. Prot. Agency, *supra* note 114.
120. CWA § 308(a)(A), 33 U.S.C. § 1318(a)(A) (2006). That section authorizes the Administrator to “require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require.” *Id.*
121. Settlement Agreement, *supra* note 114, at 2–3; see National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65431, 65431 (Oct. 21, 2011) (to be codified at 40 C.F.R. pts. 9, 122).
122. Baker Jan. 2012 Letter, *supra* note 118, at 1 (Director of Utah Division of Water Quality expresses concern with the practice of rule development by settlement agreement).
123. See Baker Jan. 2012 Letter, *supra* note 118. A survey response recognized that “States are not simply another stakeholder. States are co-regulators and should be accorded the privileges and deference associated with that responsibility. For EPA to not engage critical stakeholders, let alone co-regulators, in the actual development and vetting of a rule, prior to the general public notice of the same is a mistake of immense proportions.” ACWA SURVEY, *supra* note 102, at 14 (question 4, response 8).
124. *Id.*
125. EPA’s announcement noted that rather than a federal rule, “the EPA will collect CAFO information using existing sources of information, including state NPDES programs and other programs at the federal, state, and local level to help ensure CAFOs are implementing practices that protect water quality. . . . Although CAFO information is important, the Agency does not believe a rulemaking is necessary at this time to collect information on CAFOs.

## b. Legal Settlements Fail to Build on State Experience

Another meaningful way to advance cooperative federalism is to discuss with states plans to expand and enhance existing programs, and use the state experience to direct future activities. An example of where this was not recently done was in a settlement regarding stormwater runoff, a significant source of pollution in our nation’s waterways.<sup>126</sup> In order to minimize stormwater runoff, the federal and state governments need to work together on a program that will comprehensively regulate stormwater. Congress amended the CWA in 1987 to add section 402(p) to provide for the control of industrial and municipal stormwater and to treat stormwater as regulated point sources.<sup>127</sup> The NPDES Stormwater Program regulates the discharge of stormwater from “municipal separate storm sewer systems (“MS4”), construction activities, and industrial activities.”<sup>128</sup> MS4 operators must obtain NPDES permits and develop a stormwater management program.<sup>129</sup> EPA made a firm commitment to issue new national stormwater regulations when it settled an NGO lawsuit brought over the impairment of the Chesapeake Bay.<sup>130</sup>

The settlement obligated EPA to move forward with a national rulemaking, without the perspective of its co-regulators, who have significant experience managing stormwater in effective and diverse ways, undermining the cooperative federalism embodied in the CWA.<sup>131</sup> After committing to the rulemaking, EPA did, however, survey state approaches, and it used that information to begin building the mandated proposal.<sup>132</sup> North Carolina expressed significant concern with EPA’s plans to move forward with a national rulemaking, noting that the state has a successful existing program<sup>133</sup>

The Agency believes an efficient approach that first collects information from existing sources and does not duplicate efforts is the appropriate next step.” See OFFICE OF WATER, OFFICE OF WASTEWATER MGMT., U.S. ENVTL. PROT. AGENCY, FINAL ACTION ON THE PROPOSED NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) CONCENTRATED ANIMAL FEEDING OPERATION (CAFO) REPORTING RULE—QUESTIONS AND ANSWERS 2 (2012), available at [http://www.epa.gov/npdes/pubs/cafo\\_308\\_final\\_action\\_qa.pdf](http://www.epa.gov/npdes/pubs/cafo_308_final_action_qa.pdf).

126. *Water: After the Storm*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/action/weatherchannel/stormwater.cfm> (last updated Mar. 20, 2012).
127. *Clean Water Act (CWA)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oe-caagct/lcwa.html> (last updated June 27, 2012).
128. *National Pollutant Discharge Elimination System (NPDES): Stormwater Program*, U.S. ENVTL. PROT. AGENCY, [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=6](http://cfpub.epa.gov/npdes/home.cfm?program_id=6) (last updated Feb. 16, 2012, 12:05 PM).
129. Permits for municipal separate storm sewer systems “(i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods.” CWA § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (2006).
130. See U.S. ENVTL. PROT. AGENCY, CHESAPEAKE BAY TMDL EXECUTIVE SUMMARY 3 (2010).
131. See Craig, *supra* note 7, at 202.
132. EPA collected extensive information on state stormwater programs as an element of developing its rule concepts. See U.S. ENVTL. PROT. AGENCY, TOTAL MAXIMUM DAILY LOADS AND NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORMWATER PERMITS FOR IMPAIRED WATERBODIES: A SUMMARY OF STATE PRACTICES 15–38 (2007), available at [http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/state\\_practices\\_report\\_final\\_09\\_07.pdf](http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/state_practices_report_final_09_07.pdf).
133. See Letter from Dee Freeman, Sec’y, N.C. Dep’t of Env’t & Natural Res., to Gwendolyn Keys Fleming, Reg’l Adm’r., U.S. Env’tl. Prot. Agency (May 20,

and that a new federal rulemaking appeared to assume that existing state programs have failed.<sup>134</sup> North Carolina urged EPA to undertake more comprehensive reviews of the existing programs across the states before overhauling the program completely.<sup>135</sup> The request resonates with cooperative federalism, namely in that there should be a conversation between the federal government and the states concerning the best way to move forward with comprehensive programmatic reforms. Collective state regulators agree, and suggest the same, with an emphasis on allowing for state flexibility.<sup>136</sup> States believe their on-the-ground experiences in regulating stormwater discharges will be extremely beneficial to EPA in developing stormwater regulations and that states should therefore be consulted in the process.<sup>137</sup>

The rule now will be proposed by a new deadline of June 2013, with finalization expected by December 2014.<sup>138</sup> EPA is taking advantage of the additional time to engage in conversations with states and to refine its programmatic reform ideas. In particular, EPA is exploring how to allow comparable state programs to function in place of the federal program.<sup>139</sup> This additional time offers EPA the opportunity to build a true cooperative federalism relationship going forward.

### c. Enforcement: Striking the Elusive Federal–State Balance

A critical aspect of effective environmental rules and regulations is the ability to ensure that they are enforced by state and federal authorities.<sup>140</sup> This enforcement arena is one where cooperative federalism can easily break down.<sup>141</sup>

2011) [hereinafter Freeman May 2011 Letter] (on file with the GW JEEL); for a description of North Carolina's stormwater program, see generally N.C. DEPT OF ENV'T AND NATURAL RES., *North Carolina's Stormwater Requirements, in* NCDENR STORMWATER BMP MANUAL 2.1 (2009) (describing North Carolina's state and local stormwater regulations).

134. Freeman May 2011 Letter, *supra* note 133, at 1.

135. *Id.*

136. Letter from Andrew C. Fisk, President, Ass'n of State & Interstate Water Pollution Control, & Alexandra Dapolito Dunn, Exec. Dir. & Gen. Counsel, Ass'n of State & Interstate Water Pollution Control, to Lisa Jackson, Adm'r, U.S. Envtl. Prot. Agency, & Pete Silva, Assistant Adm'r for Water, U.S. Envtl. Prot. Agency 2 (Jan. 31, 2011) [hereinafter Fisk Letter], available at <http://wetweatherpartnership.com/WWPWebDocuments/Storm%20Water/2011-01-31%20ASIWPCA%20Ltr.pdf>. The letter suggests that EPA "divide the § 402 program into two categories: precipitation-driven discharges and traditional process wastewater, end of pipe discharges . . . . The new and revised precipitation-driven discharge regulations can be built around the unpredictability of stormwater, and recognize that BMPs, where selected as the most appropriate and protective control by the permitting authority, when designed, installed, and maintained to specified standards, fully meet permit requirements." *Id.* (citations omitted).

137. *See id.*

138. *See EPA Agrees to New 2014 Deadline for Post-Construction Stormwater*, INSIDEEPA.COM (July 17, 2012), <http://insideepa.com/201207172404821/EPA-Daily-News/Daily-News/epa-agrees-to-new-2014-deadline-for-post-construction-stormwater-rule/menu-id-95.html>.

139. *See id.*

140. *See, e.g.*, David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1571–74 (1995) (It is only through compliance and enforcement of the CWA that our nations waters can be protected. And enforcement by the state and federal government is the key to compliance.)

141. *See id.* at 1574–78.

Decades of experience have revealed that agreeing upon enforcement priorities, allocating responsibilities, and determining whether a state or the federal government will lead can be a challenging process with few replicable approaches.<sup>142</sup> States are frequently criticized as being captive to the industries they regulate, politically influenced and likely to cut sweetheart deals, perhaps well-intentioned but under resourced, or some combination of these factors.<sup>143</sup> EPA, on the other hand, is faulted for omnipresence, overfiling,<sup>144</sup> inflexibility, and lack of compromise.<sup>145</sup> NGOs generally urge EPA to take the lead so that there are consistent federal

142. *See id.* at 1568.

143. For example, in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, the court said the following:

We recognize that diligence on the part of the State is presumed. [T]he court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith. [] We surmise that this presumption is due not only to the intended role of the State as the primary enforcer of the Clean Water Act, but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems. Yet, we think a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement. 382 F.3d 743, 760 (7th Cir. 2004) (emphasis added) (citations omitted).

144. Overfiling occurs when the federal government files an action after the state has already taken action. Stephen C. Robertson, *State Permitting: United States v. Smithfield Foods, Inc. and Federal Overfiling Under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 593, 600 (1999). The government may overfile when it believes that the state's enforcement is ineffective. *Id.* The sharing of enforcement responsibilities inherent in cooperative federalism is evident in CWA § 309(a), 33 U.S.C. § 1319(a) (2006), where the federal government is prescribed the authority to pursue its own enforcement action against violators when the state is unwilling or unable to respond in an adequate manner. *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D. Va. 1997), is a prime example of overfiling under the Clean Water Act. "Smithfield falsely and inaccurately reported its discharges, and . . . the Commonwealth of Virginia issued consent orders allowing defendants to exceed the limits established in the Permit." *Id.* at 778. Although Virginia DEQ was bound by the consent order, EPA was not because "the EPA was not a participant nor a signatory to the Commonwealth issued consent orders and therefore, EPA never agreed nor intended to be bound by the consent orders." *Id.* (internal quotation marks and citations omitted). "When it became apparent that the Commonwealth's actions were not resulting in compliance, and the Commonwealth did not intend to seek a civil penalty for the violations, the EPA initiated its own enforcement action." *Id.* at 779 (internal quotation marks and citations omitted). EPA sought injunctive relief and civil penalties from Smithfield. *Id.* Stephen Robertson suggests that "Democratic forces in Washington, D.C. saw the *Smithfield* case as a chance to embarrass the Republican, 'pro-business' administration of Virginia's Governor George Allen." Robertson, *supra* note 144 at 594. Or perhaps it was "that the federal and state governments truly disagreed on how the government should address environmental issues." *Id.* Robertson also shed some light on why Virginia may have been so lenient, saying, "Smithfield's CEO, Joseph Luter III, had leveraged his company's economic power to threaten state regulators. . . . [H]e frequently suggested that he would move the entire Smithfield operation to a more pro-business state if Virginia regulators were too strict." *Id.* Luter also made substantial contributions to Governor Allen's PAC for environmental issues and Smithfield itself. *Id.* at 594–95. For further examples of relationships between state and federal enforcement of environmental statutes, see Ronald J. Krotoszynski Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599 (2012), and Ellen R. Zahren, Comment, *Overfiling Under Federalism: Federalism Nipping at State Heels to Protect the Environment*, 49 EMORY L.J. 373, 381 (2000) (finding that overfiling is a key part to cooperative federalism and is essential to effective enforcement of environmental goals).

145. *See, e.g.*, TED GAYER & JOSEPH A. PECHMAN, BROOKINGS INST., *LINKING CLIMATE POLICY TO FISCAL AND ENVIRONMENTAL REFORM* 9 (2012), available at

standards,<sup>146</sup> whereas states want EPA to agree to a division of labor that makes the most of each entity's limited time and resources.<sup>147</sup>

In 2009, EPA and the states set out to create a plan to achieve enforcement balance.<sup>148</sup> The Clean Water Act Action Plan ("the Plan") aimed to integrate permit and enforcement review results to address performance issues posing barriers to water quality protection.<sup>149</sup> Most significantly, the Plan sought to "target[] . . . enforcement for the most important water pollution problems, strengthen[] oversight of states, and improv[e] transparency and accountability"<sup>150</sup> by having EPA headquarters, regions, and states "include an evaluation of the results of recent review as part of the annual planning process, and as a prelude to conducting" future reviews.<sup>151</sup> The integration of permit and enforcement review results was intended "to focus oversight resources on the most pressing performance problems in states,"<sup>152</sup> and to "identify the most critical NPDES performance issues in each state and the appropriate immediate actions to address them and ensure the integrity of the NPDES program."<sup>153</sup>

The Plan presents progressive concepts by evaluating enforcement and permitting together. Several years into the Plan, however, challenges are still being encountered in achieving the intended alignment of EPA and State performance guidelines in such a way that limited resources are effectively utilized for the most pressing NPDES water quality problems.<sup>154</sup> Although states desire to select their own priorities, differences have not been worked out regarding the collaboration between the federal government and the states as to how states "choosing their own pathway" will be treat-

ed.<sup>155</sup> Turning this sensible approach into reality continues to pose challenges.<sup>156</sup>

States seek meaningful cooperation with the federal government, far beyond merely following federal directives.<sup>157</sup> States strongly want their opinions heard.<sup>158</sup> Rulemaking is an area where states often feel ignored.<sup>159</sup> One way the federal government can include states is to allow them to have meaningful comment periods during the rulemaking process, which can "improve national consistency while promoting flexibility, avoiding unintended consequences, curtailing duplicative efforts, adding clarity and certainty, increasing understanding and certainty, and enhancing focus on the most important water quality issues—ultimately better serving the public."<sup>160</sup> Similarly, the enforcement arena provides ripe territory to reset the cooperative federalism balance. When EPA, the regions, and the states can find ways to work together in true collaboration, the best environmental results can be achieved and limited resources can be extended further.<sup>161</sup>

<http://www.brookings.edu/research/papers/2012/03/02-climate-policy-gayer> (describing the traditional approach of EPA regulation as inflexible).

146. See Dustin Till, *Environmental Groups Press for Federal Regulation of Air Emissions From Animal Feeding Operations*, MARTEN LAW (Apr. 27, 2011), <http://www.martenlaw.com/newsletter/20110427-af0-air-emissions-regulations>.

147. See *ID, OR & WA Partnership with EPA for Developing TMDLs*, U.S. ENVTL. PROT. AGENCY, <http://yosemite.epa.gov/R10/WATER.NSF/webpage/ID,+OR+&+WA+Partnership+with+EPA+for+Developing+TMDLs> (last updated Dec. 15, 2012).

148. Memorandum from Lisa Lund, Dir., Office of Compliance, U.S. Envtl. Prot. Agency, & Jim Hanlon, Dir., Office of Wastewater Mgmt., U.S. Envtl. Prot. Agency, to Reg'l Enforcement Dirs. & Reg'l Water Dirs., U.S. Envtl. Prot. Agency 1 (Oct. 22, 2010) [hereinafter Lund Memorandum].

149. *Id.*

150. Letter from Walter L. Baker, President, Ass'n of Clean Water Adm'rs, to Jim Hanlon, Dir., Office of Wastewater Mgmt., U.S. Envtl. Prot. Agency, & Lisa Lund, Dir., Office of Compliance, U.S. Envtl. Prot. Agency (Apr. 17, 2012) [hereinafter Baker Apr. 2012 Letter], available at [http://media.wix.com/ugd/bd3580\\_f79ba78e495b12d04e5b1e4cfb4ee115.pdf?dn=ACWA%2BCWA%2BAction%2BPlan%2BImplementation%2BLetter%2B4-17-2012.pdf](http://media.wix.com/ugd/bd3580_f79ba78e495b12d04e5b1e4cfb4ee115.pdf?dn=ACWA%2BCWA%2BAction%2BPlan%2BImplementation%2BLetter%2B4-17-2012.pdf).

151. Lund Memorandum, *supra* note 148, at 1.

152. *Id.*

153. *Id.*

154. See OFFICE OF COMPLIANCE, U.S. ENVTL. PROT. AGENCY, CWA ACTION PLAN IMPLEMENTATION PRIORITIES: CHANGES TO IMPROVE WATER QUALITY, INCREASE COMPLIANCE & EXPAND TRANSPARENCY 1 (2011) available at <http://www.epa.gov/compliance/resources/publications/civil/programs/cwa/actionplan-implpriorities.pdf>. This document captured the suite of new approaches that EPA intended to move forward with to "improv[e] water quality by using 21st Century information technology and 'best practices' to more effectively and efficiently achieve greater pollution reductions." *Id.*

155. See, e.g., Baker Apr. 2012 Letter, *supra* note 150, at 4 (states have concerns if they move forward with their own initiatives, as EPA often prefers following their exact guidelines).

156. See, e.g., *id.* at 3–4 (describing how EPA and the states seem to have different views on as to how regions and states are meeting federal expectations, integrating real water quality problems into the review, compliance advisory letter distribution, and eReporting revision). The states note that the Action Plan should promote "improved coordination among CWA programs such as monitoring, standards, permitting, and compliance assurance, as well as data driven resource deployment to achieve positive water quality results." *Id.*

157. See, e.g., *id.* at 2 (states desire increased collaboration between EPA, regions, and states).

158. See, e.g., Fisk Letter, *supra* note 136 (requesting that EPA "hold robust and focused national and regional outreach session efforts to gather additional state input" of stormwater regulations).

159. See ACWA SURVEY, *supra* note 102, at 13–14 (question 4 and its corresponding responses). In the survey distributed as part of the research for this article, one respondent stated, "[a]s with all aspects of the interface between EPA and the states, cooperative federalism is spotty and uneven. Sometimes, EPA treats the state as partners. At other times, states are left in the dark until something that has not been shared is dropped on them. The recent standards rulemaking process is one where EPA's consultation with states has been very poor." *Id.* at 14 (question 4, response 9). Another responder states, "[t]his is not working well, in my opinion. Recent EPA efforts in rulemaking on water quality standards illustrate the problem. EPA sought state input into the issues but states were never allowed to see the proposed rule prior to EPA actually initiating rule making. States are not simply another stakeholder. States are co-regulators and should be accorded the privileges and deference associated with that responsibility. For EPA to not engage critical stakeholders, let alone co-regulators, in the actual development and vetting of a rule, prior to the general public notice of the same is a mistake of immense proportions." *Id.* at 14 (question 4, response 10).

160. See Letter from Walter L. Baker, President, Ass'n of Clean Water Adm'rs, to Susan Gilberston, Office of Compliance, U.S. Envtl. Prot. Agency, & Gary Hudiburgh, Office of Wastewater Mgmt., U.S. Envtl. Prot. Agency 2 (May 25, 2012) [hereinafter Baker May 2012 Letter], available at <http://www.acwa-us.org/#!/letters-fy12>. Recently EPA has provided only short time frames for states to comment on the NPDES-MOA review initiative, and the states want to have reasonable response periods so as to be able to provide meaningful research and commentary. See *id.* A survey response demonstrates the concern of EPA timing, "When rules are submitted for final approval by EPA the statutory deadlines for approval are openly ignored throughout the country and EPA refuses to disclose the legal standard of review being applied. . . . The timelines for EPA approval/disapproval of water quality standards formalize the intended level of deference to the states. The refusal to comply with these deadlines undermines federalism." ACWA SURVEY, *supra* note 102, at 13 (question 4, response 4).

161. See Krotoszynski, *supra* note 144, at 1632 (providing an overview of cooperative federalism in the NPDES program); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-883, EPA-STATE ENFORCEMENT PARTNERSHIP HAS IM-

### III. Documentation of Cooperative Federalism: NPDES MOA Case Study

The section above describes some of the areas in which cooperative federalism has been breaking down. This section will discuss one recent effort to revitalize cooperative federalism, and how the effort can be improved. EPA has, over time, authorized states to operate the NPDES program through Memoranda of Agreement (“MOA”).<sup>162</sup> The MOA are important tools for EPA and states to ensure nationally consistent and protective programs,<sup>163</sup> a “common denominator for State-authorized programs and should represent a common baseline.”<sup>164</sup> In EPA’s perspective, MOA for all state NPDES programs should be similar and promote effective EPA oversight of delegated state programs so that CWA objectives can be met.<sup>165</sup> Ideally, the MOA should also establish foundations for nationally consistent enforcement, defining the baseline roles and responsibilities for EPA and states.

A recent EPA Inspector General (“IG”) Report questioned the state of these MOA, shining a bright light on a true issue of cooperative federalism—how the delegation of programs is documented and reviewed.<sup>166</sup> After a review of state MOA, the IG determined that many NPDES MOA are insufficient to ensure effective EPA management and control over the State programs.<sup>167</sup> The IG recommended that EPA put in place a system that consistently reviews and updates MOA and for EPA to make the MOA publically available.<sup>168</sup>

This process is underway, highlighting difficult issues of cooperative federalism.<sup>169</sup> EPA created a checklist for NPDES MOA to help guide state MOA review and a draft model memorandum of agreement for states to use in revising their MOA.<sup>170</sup> EPA has also created criteria<sup>171</sup> and a checklist designed to review MOA.<sup>172</sup>

Although EPA’s expressed desire is to collaborate with states, this effort at cooperative federalism is already draw-

ing some concern from states.<sup>173</sup> Some states have questioned the value of the national effort to update all MOA.<sup>174</sup> For example, the New York Department of Environmental Conservation believes that although their MOA is out of date, their NPDES program is doing exceptionally well and they are in regular contact with EPA Region II to keep current on all policy and regulations.<sup>175</sup> States have also found the model memorandum of agreement to be prescriptive and that it “contains what are likely to be very unrealistic deadlines, schedules, and requirements.”<sup>176</sup> The cooperative federalism relationship could be enhanced by a constructive review of agreements. Too often, however, such reviews lose the needed precision, and become insufficient to meet the needs of all the individual states.<sup>177</sup> Rather than time and energy being spent on a more effective carrying out of joint responsibilities, the process becomes about the paperwork.<sup>178</sup>

On August 31, 2012, EPA finalized the EPA NPDES MOA revision process documents.<sup>179</sup> These documents were distributed to the states on April 16, 2012, so that states could submit comments on them.<sup>180</sup> EPA then revised the documents based on the comments.<sup>181</sup> EPA’s ultimate assessment was that not every memorandum required revision and that not every memorandum needed to mirror the model.<sup>182</sup> EPA clarifies that its goal is “to collaborate with individual states to identify and correct those MOA that prohibit or hinder the effective implementation of the state’s and EPA’s NPDES program.”<sup>183</sup> Although there remains some state apprehension about the MOA revamping program, EPA is taking proactive steps to work with the states to mitigate concerns—a positive example of cooperative federalism.

PROVED, BUT EPA’S OVERSIGHT NEEDS FURTHER ENHANCEMENT 23 (2007), available at <http://www.gao.gov/assets/270/264845.pdf> (concluding that “EPA has made substantial progress in improving priority setting and enforcement planning with states through its system for setting national enforcement priorities and NEPPS, which have fostered a more cooperative relationship”).

162. MOA between EPA and each of the states are available on the Agency’s website. See *Memorandum of Agreements Between EPA and States Authorized to Implement the National Pollutant Discharge Elimination System (NPDES) Program*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/resources/policies/state/moa/> (last updated Sept. 12, 2012).

163. See 40 C.F.R. § 123.24 (2012) (describing requirements of Memoranda of Agreement).

164. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 10-P-0224, EPA SHOULD REVISE OUTDATED OR INCONSISTENT EPA-STATE CLEAN WATER ACT MEMORANDA OF AGREEMENT 3 (2010), available at <http://www.epa.gov/oig/reports/2010/20100914-10-P-0224.pdf>.

165. See *id.* at 15.

166. *Id.* at 1–3.

167. See *id.* at 9 (noting that, for example, at least one MOA dates from the 1970s and is not consistent with current regulations).

168. *Id.* at 15–16.

169. Region III is currently reviewing Maryland’s MOA. See Chris Menen, EPA Region III, EPA-State CWA MOU, Presentation at 27th Annual NPDES States Meeting (May 16, 2012).

170. *Id.* EPA’s reviews and revisions should be complete by September 2017. *Id.*

171. EPA created two categories, “1) requirements for MOA documents; and 2) criteria not required in MOA but required for NPDES program.” *Id.*

172. *Id.*

173. See Baker May 2012 Letter, *supra* note 160 at 4 (commenting on the state review framework and MOA reviews).

174. *Id.* The letter states, “EPA should consider focusing on specific MOAs. Assessing and reviewing *all* MOAs is not the most efficient use of resources to address more limited issues.” *Id.*

175. Letter from NYDEC to Lisa Lund, Dir., Office of Compliance, U.S. Env’tl. Prot. Agency (May 25, 2012) (on file with the GW JEEL). The letter states that, “DEC and Region II have adapted to changes in policy and regulations through annual work planning and performance partnership grant process. We have also mutually agreed on priorities and how best to utilize federal and state resources, and or agencies meet on a quarterly basis to discuss programmatic and enforcement matters. As such, the current MOAs, while dated, have not impeded delivery of the SPDES program and effective enforcement in New York State. . . . If EPA’s direction is to focus on states that have spotty track records on Clean Water Act implementation in New York State.” *Id.*

176. *Id.* For a list of specific state concerns with regarding the model MOA see U.S. ENVTL. PROT. AGENCY, RESPONSE TO STATE COMMENTS ON MOA MATERIALS (Aug. 2012) (on file with the GW JEEL).

177. *Id.*

178. *Id.*

179. Letter from Lisa Lund, Dir., Office of Compliance, U.S. Env’tl. Prot. Agency, & Randolph Hill, Acting Dir., Office of Wastewater Mgmt., U.S. Env’tl. Prot. Agency to State Env’tl. Comm’rs, Reg’l Enforcement Dir’s., & Reg’l Water Dir’s. (Aug. 31, 2012), available at <http://www.epa.gov/compliance/resources/policies/state/moa/finalpastatemoa.pdf>. The documents included a set of review criteria, a checklist, and a model NPDES MOA. *Id.* at 1.

180. *Id.* Eighteen states submitted comments as well as the Environmental Council of States (“ECOS”) and the ACWA. *Id.*

181. *Id.* EPA then discussed the documents with ECOS and ACWA again on July 26, 2012. *Id.*

182. *Id.* at 2. EPA’s documents provide guidance for those programs that do need to be revamped.

183. *Id.*

#### IV. The Future of Cooperative Federalism Under the Clean Water Act

Congress intended for cooperative federalism to be at the heart of the CWA.<sup>184</sup> Given the challenging water quality issues that face our nation, we cannot achieve our nation's goals without it.<sup>185</sup> The level of frustration with ineffective state/federal communications is high, as evidenced by the introduction of the Clean Water Cooperative Federalism Act of 2011.<sup>186</sup> Despite the title of this bill, its purpose is to weaken the CWA by limiting federal oversight.<sup>187</sup> The two main areas of the CWA that are affected by this bill are the formulation of WQS and permits for dredged and fill material.<sup>188</sup>

This bill is not the answer, but rather is symptomatic of the problem: balance must be achieved between the federal government and the states with respect to clean water regulation. EPA's support of states goes far toward building a partnership relationship, rather than one more like parent-child. Neither the states nor the federal government alone

can achieve the CWA's ambitious and necessary goals.<sup>189</sup> They must work together to protect and restore our nation's waterways.<sup>190</sup> Today's water quality challenges mean that greater cooperation between the federal government and state regulators is needed to share resources, knowledge, and responsibilities.<sup>191</sup> A strong federal framework—which provides a floor for states to meet—with maximum flexibility for states to improve that framework and tailor responses to state-specific waterbody needs is essential. Federal oversight, and not micromanagement, of state programs is also critical. The congressional architects of the CWA envisioned a true partnership—with states and the federal government providing one another resources and support, guidance and mutual reinforcement, and checks and balances. Some of the examples in this Article reveal the potential that a cooperative federalism renaissance holds for America's waters. With such a rebirth, we can set a reinvigorated course towards achieving the CWA's goal of “restor[ing] . . . the physical, chemical, and biological integrity of the nation's waters.”<sup>192</sup>

184. CWA § 101(g), 33 U.S.C. § 1251(g) (2006).

185. Craig, *supra* note 7, at 202–07.

186. H.R. 2018, 112th Cong. (2011). The House adopted this bill on July 13, 2012 and the Senate recently introduced its version of the bill on September 20, 2012 by Senator Joe Manchin (D-W. Va) and Senator Pat Toomey (R-Pa.). See Bill Summary & Status, 112th Congress (2011–2012), H.R. 2018, All Congressional Actions, <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:/temp/-bdXPAH:@@X|/home/LegislativeData.php> (last visited Dec. 16, 2012). Senator Manchin states, “I’ve fought against the overreach of the EPA for my entire career, and I’ll continue to make sure that states take the lead when it comes to making sure they have a balance between their environment and their economy.” See *Senate Bill Would Strip EPA Authority to Veto State Water Quality Standards*, 12 Daily Env’t Rep. (BNA) No. 183 (Sept. 21, 2012).

187. Removing the Administrator’s ability to “promulgate a revised or new standard for a pollutant in any case in which the State has submitted to the Administrator and the Administrator has approved a water quality standard for that pollutant, unless the State concurs with the Administrator’s determination that the revised or new standard is necessary to meet the requirements of this Act.” See *Senate Bill Would Strip EPA Authority to Veto State Water Quality Standards*, *supra* note 186.

188. *Id.*

189. Malloy, *supra* note 54, at 86–87.

190. *Id.*

191. Baker May 2012 Letter, *supra* note 160, at 2–4 (providing information, states hope to persuade EPA of the importance of cooperation).

192. CWA § 101(a), 33 U.S.C. § 1251(a)(1) (2006).