# State Attorneys General Powers and Responsibilities

Edited by
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National Association of Attorneys General

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*This book is dedicated to Attorneys General and the men and women who work for them in the 56 jurisdictions. They continue to make an important contribution to state govenment and the American legal system. Without them, there would be no book to write.*

# Acknowledgments

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This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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Chapter 8

# Environment

*By Micheline Fairbank, Senior Deputy Attorney General, Nevada*



The attorney general has a significant role in the enforcement of environmental laws in partnership with the state environmental agencies. State environmental programs have matured, and federal resources committed to environmental protection have recently decreased or remained flat, resulting in additional responsibilities being delegated to the states, and as a consequence, to state attorneys general. Many states have become increasingly involved in cooperative enforcement actions with the federal government. In many jurisdictions, interest in, and involvement with, criminal enforcement of environmental laws has also developed, along with the scope and nature of those enforcement actions. As a result of the continued evolution of the environmental laws, changing responsibilities, and increasing interest in enforcement of state laws the attorney general's role has become more significant, although not always coupled with an increase in resources to address them.

This chapter describes the role of attorneys general in the practice of environmental law. Specifically, the chapter discusses how the legal authority of the attorneys general has developed, the relationships among the attorneys general, state regulatory agencies and the federal government, and key issues that confront attorneys general.

## Legal Authority

State attorneys general derive their environmental enforcement powers from a combination of state and federal statutes and the common law. Decades after the enactment of the nation's principal environmental statutes, protection of the environment has become a routine component of the attorney general's law

enforcement role. In all but a handful of states, the attorney general is the public official charged with enforcing and prosecuting violations of state environmental laws in state courts. In this capacity, the attorney general usually represents the interests of state environmental and natural resource regulatory agencies; however, in many states the attorney general has independent authority to enforce state laws without the involvement or acquiescence of a state agency, sometimes acting on behalf of "the People" or in a *parens patriae* capacity.

In addition to the enforcement role, the attorney general in most states provides legal counsel to state agencies in developing regulations and legislative proposals and in defending agencies in administrative hearings and civil actions. Further, attorneys general represent the legal interests of states and state agencies in federal court proceedings when necessary and have argued cases related to state environmental laws in many federal courts of appeal and the United States Supreme Court.

Most attorneys general have several attorneys working exclusively on environmental matters, and some large offices have numerous environmental attorneys on staff, often working out of branch offices rather than in a central location in the state capitol. In a few larger offices, environmental attorneys work exclusively in a specific area, such as hazardous waste or water pollution. Attorneys general in some states also employ non-attorney staff, such as investigators or environmental scientists, in their environmental units, although such staffing is relatively rare. Because of the diversity and complexity of environmental laws, training for attorneys general staff remains especially important.



## Protection of Air

The Clean Air Act of 1970 (CAA) was the first "modern" federal environmental statute, and set in motion huge state and federal regulatory structures to address problems associated with air pollution. The CAA was also a catalyst for a later series of legislative enactments and rulemaking designed to address pollution of the air, water and land, such as the Clean Water Act[1] (CWA), the Safe Drinking Water Act[2] (SDWA), the Resource Conservation and Recovery

1 Pub. L. 92-500, 86 Stat. 816 (1972) (amending, and largely replacing, the Federal Water Pollution Control Act), codified at 33 U.S.C. § 1251 *et seq.*

2 Pub. L. 93-523, 88 Stat. 1661 (1974), codified at 42 U.S.C. § 300f *et seq.*

Act[3]3(RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act[4]4 (CERCLA). The Clean Air Act has an impact in virtually every facet of American commercial and societal behavior, from the cars we drive, the air we breathe in our local community, to the vistas we enjoy in national parks. As a result, it has frequently created tensions between state and local governments and businesses, among the several states, and between the states and federal government.

The basic structure of the CAA calls for EPA to set ambient air quality standards for a series of pollutants, and for the states to achieve those standards through state-specific permitting and enforcement programs known as state implementation plans or "SIPs". In 1990, Congress enacted sweeping changes to the CAA designed to address unresolved problems with air quality and air quality controls, in particular adding Title V to address permitting requirements.[5] These amendments significantly changed the involvement of state attorneys general in air pollution prevention and enforcement in many respects.

Air pollution sometimes involves multiple states in conflict with one another, because air travels easily across state boundaries and there are no physical structures to prevent such interstate movement. As a result, air pollutants generated in one state are transported to "downwind" states. Federal regulatory programs designed to mitigate or respond to such transport have generated significant litigation involving attorneys general since passage of the CAA Amendments of 1990.

Three air pollution cases are illustrative: *Whitman v. American Trucking Ass'ns, Inc.*[6] and *Alaska Department of Environmental Conservation v. EPA*[7] both framed technical interpretive issues in the context of EPA's authority over the matters. In each case, the Supreme Court held that EPA was within its authority: to revise rules (in the *American Trucking Association* case) and to countermand a



3 Pub. L. 94-580, 90 Stat. 2796 (1976) (amending Pub. L. 89-272 (1965), the Solid Waste Disposal Act, jointly codified at 42 U.S.C. 6901 *et seq*.

4 Pub. L. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. § 9601 *et seq*.

5 Pub. L. 101-549, 104 Stat. 2399 (1990).

6 531 U.S. 457 (2001). The case involved two separate, but related, lawsuits. The initial case, *American Trucking Assn., et al v. Browner*, 175 F.3d 1027 (1999), involved challenges to the standards themselves. The second case, *Browner v. American Trucking Assn., et al.,* 195 F.3d 4 (1999), involved EPA's challenge to the District of Columbia Circuit's decision not to grant EPA rehearing en banc in the other case, in which the Court of Appeals had held that EPA's interpretation of the CAA constituted an unlawful delegation of legislative authority to EPA. The two cases were consolidated for purposes of the Supreme Court's argument, and EPA Administrator Christine Whitman's name was subsequently substituted for that of former EPA Administrator Carol Browner.

7 540 U.S. 461 (2004); *see also Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208 (2009).

state permitting decision through enforcement orders (in the *Alaska Department of Conservation v. EPA* case).

More recently, states took sharply opposed positions with respect to power plant emissions, in *EME Homer City Generation v. EPA*.[8] In that case, petitioners—including 15 states—petitioned for review of the "Transport Rule," which set limits on power plant emissions that affect downwind states. Nine downwind states and the District of Columbia intervened to support the rule. The U.S. Court of Appeals for the District of Columbia Circuit vacated the rule, holding that EPA had exceeded its delegated authority, by creating an improper system for triggering and calculating emissions reductions required from sources in upwind states.

### New Source Review Cases

A series of air pollution cases highlight the differing interests and policies embraced by various blocs of states, as well as the broad impact of air pollution regulation in the United States. The cases may be grouped into the "New Source Review" cases and the "Climate Change" cases.

The "New Source Review" or "NSR" cases reflected fundamentally opposing interpretations of that portion of the Clean Air Act requiring heightened scrutiny in permitting new sources of air pollution and sources so significantly altered that they are treated as new.[9] In the late 1990's, EPA began an enforcement initiative designed to compel coal-fired power plants to comply with the new source review requirements. In some cases the EPA effort was supplemented by separate enforcement actions filed by states and non-governmental organizations filing or intervening as co-plaintiffs[10] under the citizen suit provisions of the Clean Air Act.[11] Defendants resisted, arguing that plaintiffs were misinterpreting the law, giving it a meaning more stringent than its historical interpretation. The initiative produced a variety of results, depending on the facts in each case, the courts' interpretation of the rules and the courts' views on the legitimacy of the rules.



While the enforcement cases were making their way through the judicial system, EPA in 2002 issued a new set of rules governing New Source Review. The

8 2012 U.S. App. LEXIS 17535 (D.C. Cir. Aug. 21, 2012).

9 42 U.S.C. 7411(a) (4).

10 *See, e.g.*, *United States v. Cinergy Corp*., 458 F.3d 705 (7th Cir. 2006), *United States v. American Electric Power Service Corp.*, 137 F. Supp. 2d 1060 (S.D. Ohio 2001) (New York, Connecticut, New Hampshire, New Jersey, Maryland, Massachusetts, Rhode Island, and Vermont intervening), *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *cert den., Leavitt v. TVA*, 541 U.S. 1030 (2004), *Sierra Club v. TVA*, 430 F.3d 1337 (11th Cir.2005).

11 42 U.S.C § 7604.

NSR rules were appealed in two cases decided by the Court of Appeals for the District of Columbia, as required by Section 307 of the Clean Air Act. The Court upheld the new rules in part and struck them down in part.[12] In 2005, the Fourth Circuit upheld a trial court's dismissal[13] of one of the NSR enforcement cases, in a decision commonly known as *Duke Energy*.[14] The court based its dismissal on its reading of the old NSR rules, a reading that had been rejected by the Court of Appeals for the District of Columbia. Shortly thereafter, the Seventh Circuit weighed in with a decision diametrically opposed to the Fourth Circuit on both jurisdictional and substantive grounds.[15] The Supreme Court upheld EPA's application of differing definitions for modifications under different air pollution initiatives (the New Source Performance Standards (NSPS) and the Prevention of Significant Deterioration (PSD) rules).[16] The Court, however, struck down EPA's strategy for calculating the amount of emissions increase, holding that it must use actual rather than potential emissions. The Court remanded the case to the lower court for review in light of its decision.

As the new rules have taken effect, the NSR cases addressing the fundamental question of how to read the old rules on PSD and NSPS has been resolved, but ongoing litigation suggests that the practical effect of the new rules will likely play out in the courts as well.



## Climate Change Cases

The control of greenhouse gases continues to loom as the subject of regulation, litigation, and speculation. The most prominent case, *Massachusetts v. EPA*, was decided by the Supreme Court in the October 2006 term. The case was brought in order to compel EPA to regulate carbon dioxide emissions. Plaintiffs, a group of states and environmental organizations, argued that EPA has a duty under the Clean Air Act's charge to "prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or

12 *New York v. United States EPA,* 413 F.3d 3 (D.C. Cir. 2005); *New York v. EPA,* 443 F.3d 880 (D.C. Cir 2006), *reh. en banc den., New York v. EPA*, 2006 U.S. App. LEXIS 17121 (June 30, 2006).

13 *United States v. Duke Energy Corp.*, 278 F. Supp 2d 619 (M.D.N.C. 2003).

14 *United States v. Duke Energy Corp.*, 411 F. 3d 539 (4th Cir. 2005), *vacated Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

15 *United States v. Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006).

16 *Envtl. Def. v. Duke Energy Corp.,* 549 U.S. 561 (2007); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

welfare."[17] At the appellate level, the government's arguments against such regulation prevailed, with the panel divided as to whether plaintiffs failed to establish standing or whether they failed to establish that EPA had a duty to issue such regulations.[18]

The Supreme Court held that the states had standing to challenge EPA's failure to regulate carbon dioxide omissions, stating that in its quasi-sovereign capacity, "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." The court then held that the Clean Air Act gave the EPA the authority to regulate tailpipe emissions of greenhouse gases, based on the broad wording of the Act. The case was remanded to EPA so that the agency could review its argument that it has discretion to regulate greenhouse gas emissions.[19]

After *Massachusetts v. EPA*, other cases were remanded with the consent of EPA or voluntarily dismissed for consideration in light of the Supreme Court's decision. *Massachusetts v. EPA* did not end climate change litigation; indeed cases have mushroomed since the seminal decision. States are parties and intervenors in a wide variety of legal action surrounding greenhouse gases, most arising under the Clean Air Act,[20] some under state statutes,[21] and a few based on other statutes or the common law.

In 2015, EPA published the final Clean Power Plan rule seeking to regulate emissions of greenhouse gasses (GHGs), specifically carbon dioxide (CO2), from existing fossil fuel-fired power plants.[22] Through the Clean Power Plan, EPA sought to protect human health and the environment from the impact of climate change contributed by GHGs by requiring states to submit plans to achieve state-specific CO2 emission rates for predominately coal and gas-fired power plants by 2030. In 2015, the Clean Power Plan was challenged in two separate cases, *West Virginia v. EPA* and *North Dakota v. EPA*. The States generally challenged the rule as being beyond the EPA's authority under section 111(b) of the CAA. The States sought to stay the implementation of the Clean Power Plan before the United



17 42 U.S.C. § 7521.

18 *Massachusetts v. EPA*, 415 F.3d 50 (D.C.Cir. 2005).

19 *Massachusetts v. EPA*, 549 U.S. 497 (2007).

20 *See, for example*, *Washington Envtl Council v. Sturdevant*, 834 F. Supp. 2d 1209 (W.D. Wash. 2011), *vacated Washington Envtl Council v. Bellon*, 732 F.3d 1131 (2013).

21 *See, for example, Barhaugh v. Montana*, 361 Mont. 537 (2011), and *Charnaik v. Kitzhaber,* No. 16-11-09273, slip op. (Lane Co. Or. Cir Ct., Apr. 5, 2012).

22 Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64622 (Oct. 23, 2015).

States Supreme Court, which was granted in 2016.[23] Interestingly, while numerous states sought to challenge the implementation of the Clean Power Plan, numerous states too sought to join EPA in defending the administrative rulemaking. The cases have been placed in a continuing stay pending the anticipated repeal of the Clean Power Plan by the EPA.[24]

## Protection from Water Pollution

### Water Pollution Control Laws

The Clean Water Act (CWA, also known as the Federal Water Pollution Control Act),[25] was enacted in 1972 for three primary purposes: to regulate discharges from point sources (primarily industrial plants and municipal sewage treatment plants); to address the problem of spills of oil and hazardous substances; and to provide financial assistance for construction of municipal sewage treatment plants. Attorneys general have been extremely active in enforcement of the CWA. Most states and territories have established comprehensive programs for water quality protection and use of state waters. Moreover, every state has independent state law authority to protect the waters of that state.

The CWA controls water pollution from any point source through the National Pollutant Discharge Elimination System (NPDES), banning discharge of any pollutants except in compliance with an NPDES permit issued under section 402 or other applicable requirements of the act. The vast majority of the states and the Virgin Islands have received the authority to implement and enforce their own NPDES programs. The attorneys general litigate many cases each year to enforce NPDES permits. They also defend hundreds of permitting decisions based on state law.

Since courts have generally interpreted the CWA to apply only to point sources of pollution and have further limited the CWA's reach by largely concluding that the statute does not apply to groundwater, states have addressed these issues through their own statutes and enforcement authority. Some states, such as Maryland, have addressed nonpoint source pollution through their erosion and sediment controls. Others, such as Utah and Delaware, address nonpoint



23 *North Dakota v. EPA*, 136 S. Ct. 999 (Mem), 84 USLW 3439 (2016).

24 *West Virginia v. EPA*, 15-1363 (D.C. Cir. Nov. 9, 2017), *North Dakota v. EPA*, 15-1381 (D.C. Cir. Aug. 10, 2017).

25 33 U.S.C. § 1251 *et seq.*

source pollution under the general statutory provisions that give authority to control water pollution. Other states use their water quality standards as their legal authority for regulating nonpoint source pollution.

Section 401 of the CWA requires that an applicant for any federally permitted or licensed activity that will potentially result in a discharge into navigable waters must obtain a state permit which shows that the proposed activity will comply with the state's water quality standards. The Supreme Court's decision in *PUD No. 1 v. Washington Department of Ecology*,[26] affirmed that states have the right to place any condition on water quality certificates issued under section 401 which are reasonably necessary to enforce both numeric criteria and narrative water quality standards as well as designated use standards. A subsequent Ninth Circuit decision, *Oregon Natural Desert Association v. Dombeck*,[27] limited the scope of the Supreme Court's decision to point sources. Looking again at hydroelectric facility certification in 2006, the Supreme Court ruled that states could withhold certification under Section 401 of the Clean Water Act when a hydroelectric dam captured river water, ran it through turbines to produce power and returned it to the river, holding that such activity is a "discharge" within the meaning of the law.[28]

Section 404 of the CWA gives authority to states to implement their own permit program regarding the discharge of dredge and fill materials into navigable waters, including wetlands. Some states also include "wetlands" within their statutory definitions of waters protected by state legislation and regulations and, thus, have the legal authority to protect those totally isolated wetlands that may no longer be protected under the CWA. The Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[29] which limited the federal government's exercise of the CWA's jurisdiction over totally isolated wetlands, has provided impetus for states to protect these intrastate wetlands through their own state laws. The Supreme Court revisited the scope of Clean Water Act wetlands coverage in *Rapanos v. United States*,[30] in a divided opinion that also points to the potentially critical role of state programs.

In 2012, the Supreme Court invalidated some aspects of EPA's long-standing approach to enforcement of Section 404 of the Clean Water Act.[31] In that



26 511 U.S. 700 (1994).
27 550 F.3d 778 (9th Cir. 2008).
28 *S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, (2006).
29 531 U.S. 159 (2001).
30 547 U.S. 715 (2006); *see also Nat'l Ass'n of Mfrs v. Dep't of Def.*, 138 S. Ct. 617 (2018).
31 *Sackett v. EPA*, 566 U.S. 120 (2012).

case, the plaintiffs allegedly filled in a wetland, in violation of the Act, and EPA filed a compliance order requiring them to restore the wetlands. The plaintiffs attempted to challenge the order under the Administrative Procedure Act. Lower courts sided with the federal government, and held that pre-enforcement review of the order was not available. The Supreme Court ruled that the availability of APA process is not contingent on the relative urgency or efficiency of administering regulations, and that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review--even judicial review of the question whether the regulated party is within the EPA's jurisdiction."[32]

Section 319 of the CWA does address nonpoint sources, arguably the primary cause of current water degradation, by requiring the states to identify broad categories of nonpoint sources and identify best management practices (BMPs) and other measures to control pollution from these sources. However, since there is no explicit grant of enforcement authority under this section, states largely have the discretion to determine what control and enforcement efforts are to be made.

States are required under section 303(d) of the CWA to establish total maximum daily loads (TMDLs) for water bodies within their jurisdictions for which established effluent limitations are not stringent enough to meet the water quality standards that have been set for them. Attorneys general defend the states' TMDLs in a variety of administrative proceedings. On a national level, whether the TMDL program may include load allocations for nonpoint sources is an unsettled issue except in the Ninth Circuit, which upheld EPA's interpretation of the CWA as authorizing it to establish a TMDL for waters polluted only by nonpoint sources[33]. Thus, at least for now, state laws and regulations remain the primary authority for controlling nonpoint pollution.

States have increasingly turned their attention to the problem of pollution caused by animal feeding and rearing operations. Although pollution from large combined animal feeding operations (CAFOs) is covered by the CWA, states have used their own regulatory and statutory schemes to address pollution from agricultural activities. States such as Maryland, Missouri, North Carolina, Minnesota and Ohio have approached the problem using a mix of state common law, the NPDES permitting system, state water protection statutes and statutory nuisance.



32 *Id.* at 1374.

33 *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002); *cert den.,* 539 U.S. 926 (2003); *see also Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281 (3rd Cir. 2015).

Prior United States Supreme Court rulings left a certain degree of uncertainty with respect to the extent the CWA extended to certain waterways. In a challenge to the interpretation and definition of "waters of the United States" applied by the U.S. Army Corps of Engineers to isolated wetlands, a divided Court in *Rapanos v. United States*, held that the interpretation and application the phrase "waters of the United States" did not include intermittent or ephemeral streams or channels providing draining for periodic rainfall.[34] Thus, the *Rapanos* Court plurality found that water fell under federal protection if there was a "significant nexus" to navigable waters.[35] The dissent relied upon *United States v. Riverside Bayview Homes, Inc*., 547 U.S. 715 (2006), finding that the Army Corp was permitted to broadly interpret "waters of the United States' and to exercise judgement in declaring certain wetlands as waters to advance the purpose of the CWA.[36] The dissent noted that there was no basis for a "continuing surface connection" to the body of water to support a finding that a wetland was within the definition of "waters of the United States."[37] However, as the *Rapanos* decision was rendered by a divided court, it left a significant question as to the appropriate interpretation and application of "waters of the United States" under the CWA.

In response to this uncertainty, in 2015, EPA and the U.S. Army Corps of Engineers adopted the Clean Water Rule expanding the definition of waters of the United States (WOTUS) under the CWA to include seasonal streams and wetlands.[38] The intent of WOTUS was to provide regulatory certainty to the scope of the CWA. Numerous challenges to WOTUS were initiated with the predominate case being brought by North Dakota, along with twelve other states, challenging the rule as unlawfully expanding federal agency jurisdiction over state land and water resources beyond those established by Congress under the CWA.[39] The initial issues addressed in the WOTUS cases involved the question of which was the proper court to hear the challenge to the rule. In 2018, the Supreme Court held that the federal district court is the proper venue which to bring the challenge to the administrative regulation.[40]



34 547 U.S. 715, 739 (2006).

35 *Id*. 547 U.S. at 792, 794.

36 *Id.* 547 U.S. at 793.

37 *Id.*

38 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015).

39 *North Dakota v. EPA*, 3:15-cv-00059-DLH-ARS (Dist. N.D. June 29, 2015).

40 *National Assn. of Mfrs. v. Dept. of Defense*, 583 U.S. ___ (2018) (slip op. at 8).

### Laws Protecting Drinking Water

The Safe Drinking Water Act (SDWA)[41] requires EPA to set drinking water standards that almost all systems providing drinking water to the public must meet. Standards have been set for approximately ninety contaminants. The 1996 amendments to the act required that primacy states (states to which the federal government has granted authority to operate their own programs) have administrative penalty authority.[42] The amendments also required states to perform a source water assessment for each public water system. Drinking water is also protected by the federal government through its Underground Injection Control (UIC) program.[43] Class I injection wells are also regulated under the Resource Conservation and Recovery Act.

### Laws Protecting Ocean Waters

Although the Clean Water Act protects waters within three navigable miles of the United States, Congress has also passed specific legislation that further protects the marine environment from the harmful effects of pollution. Legislation such as the Act to Prevent Pollution from Ships (APPS),[44] the Coastal Zone Management Act (CZMA),[45] the Marine Mammal Protection Act of 1972,[46] and the Oil Pollution Act of 1990[47]addresses specific issues of concern in protecting ocean waters and the marine environment. Of these statutes, only the CZMA reserves an active role for the states. It is administered by the National Oceanic and Atmosphere Administration but is primarily, as its name suggests, a program to implement national coastal management objectives through financial assistance and other services. About two-thirds of the states and territories have received federal approval for their coastal management programs. Of particular interest is that the CZMA requires coastal states to implement enforceable nonpoint pollution programs that conform to federal guidelines.

Some states, such as Alaska and California, have addressed the problem of pollution of their coastal waters caused by discharges from cruise ships. California passed the Large Passenger Vessels Program to evaluate environmental



41 42 U.S.C. § 300f *et seq.*

42 In order to be treated as primacy states, states must show that their laws are analogous to the relevant federal statute, that the state meets certain lab certification requirements, and that certain funding criteria are met.

43 42 U.S.C. § 300h.

44 33 U.S.C. § 1901 *et seq.*

45 16 U.S.C. § 1451 *et seq.*

46 16 U.S.C. § 1361 *et seq.*

47 33 U.S.C. § 2701 *et seq.*

practices and waste streams of large passenger vessels.[48] Alaska has a comprehensive law creating a commercial passenger vessel compliance program that directly regulates cruise ship discharges into state waters.[49]

Undoubtedly the largest, most dramatic incident endangering coastal waters—overshadowing even the Exxon Valdez spill in 1989—was the oil that leaked in the Gulf of Mexico in 2010 from BP's Deepwater Horizon oil rig. Private citizens, businesses, states, and the federal government filed hundreds of lawsuits against BP and its business associates. Many were consolidated in one Multi-District Litigation.[50] The federal government and five Gulf Coast states reached a settlement with BP under which the company paid $4.9 million to the states and $1 billion to local communities within those states. The total settlement is in excess of $20 billion and also included $7.1 billion for environmental restoration and $5.5 billion in settlement of civil claims.[51]



## Waste Management

### Hazardous Wastes

The Resource Conservation and Recovery Act (RCRA)[52] was enacted in 1976 to address the problems of solid waste management. RCRA was designed to allow states to assume responsibility for program implementation and enforcement from the federal government. Three programs were established under RCRA: Subtitle C for controlling hazardous waste; Subtitle D for managing non-hazardous solid waste; and Subtitle I for regulating underground storage tanks. Amendments to RCRA, the Hazardous and Solid Waste Amendments of 1984, expanded the scope and requirements of RCRA. States have the opportunity to assume authority for the Subtitle C and Subtitle I programs when their programs are deemed consistent with and equivalent to the federal program. Many states have adopted state statutes parallel to RCRA to provide for the cleanup of hazardous waste disposal sites; authorization of the state program components varies

48 Cal. Pub. Res. Code § 72400 *et seq.*

49 Alaska Stat. § 46.03.460 *et seq.*

50 *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, 2:10-cv-04536-CJB-SS, ECF No. 15.

51 Devin Henry, *Judge Approves $20B BP Oil Spill Settlement*, The Hill, April 4, 2016.

52 42 U.S.C. § 6901 *et seq.*

from state to state.[53] State attorneys general also play a role in defending administrative permitting decisions for hazardous waste facilities, although in some states that function is handled by the administrative agency's internal counsel.

## Solid Wastes

Most states enforce solid waste laws against the owners and operators of solid waste landfills. RCRA's Subtitle D, which covers the less toxic "garbage-type" waste known as "solid waste," does not provide for a uniform federal program delegated to the states. Therefore, the state statutes and actions of attorneys general are more varied in their scope than is the case with other environmental programs.

States have struggled with balancing the threat that solid waste may pose to the environment against the potential burden on interstate commerce, enacting statutes and local ordinances to protect local areas from a deluge of trash. As a direct result, attorneys general have also been active in litigation known as "flow control" cases, where a state statute or local ordinance purports to govern the flow of garbage through commerce. In 1994, the U.S. Supreme Court struck down a municipal waste authority's policy of controlling the destination of trash as a violation of the prohibition on state burdens on interstate commerce.[54]

Since 1994, state and local governments have experimented with different legal and regulatory approaches to the issue, which have been routinely challenged by the solid waste hauling and disposal industries. For example, attorneys general in Michigan[55]and Minnesota[56] have defended state statutes (or municipal ordinances ratified by the state) from challenges based on the Interstate Commerce Clause. Several Virginia municipal solid waste statutes[57] and a local ordinance in Van Wert County, Ohio[58] were also challenged.



53 EPA maintains the State Authorization Tracking System, which lists RCRA-authorized hazardous waste management programs in each of the authorized states at https://www.epa.gov/rcra/state-authorization-tracking-system-stats.

54 *C & A. Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

55 *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, et al.*, 71 F.3d 1197 (6th Cir. 1995).

56 *National Solid Waste Management Association, et al. v. Williams*, 877 F. Supp. 1367 (D. Minn. 1995), *aff'd* 146 F.3d 595 (8th Cir.1998), *cert den.* 525 U.S. 1012 (1998).

57 *Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316 (4th Cir.2001); *cert. den. sub nom. Murphy v. Waste Management Holdings, Inc.*, 535 U.S. 904 (2002).

58 *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001); *cert. den.*, 534 U.S. 1079 (2002).

Another line of cases culminated in the Supreme Court's decision to grant certiorari in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth*.[59] In that case, the Supreme Court characterized the New York ordinance in question as having been written to "benefit a clearly public facility, while treating all private companies exactly the same." The Court held that "such flow control ordinances do not discriminate against interstate commerce for purposes of the dormant Commerce Clause."[60]

## Waste Cleanup Laws

### *Development of State and Federal Cleanup Programs*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the federal Superfund law, established a special government fund that may be used to clean up waste sites when persons responsible for the contamination refuse to undertake the cleanup or cannot be found.[61]

State responsibilities and authorities were expanded under CERCLA by Superfund Amendments and Reauthorization Act (SARA). State regulatory agencies may enter into Superfund Memoranda of Agreement and Cooperative Agreements with EPA, and attorneys general are sometimes parties to such agreements. Through these agreements, states may take the lead in cleanup and enforcement activities at hazardous waste sites on the National Priorities List (NPL). The NPL is a list of the hazardous waste sites in the country that appear to pose the greatest threat to public health and the environment. EPA has committed to provide states with funds for cleanup activities at NPL sites.

Under CERCLA, states have the authority to bring suits to recover all costs incurred in the cleanup of hazardous waste sites. As a result of the creation of state "mini-superfund" laws and the access to the federal Superfund, attorneys general are involved extensively in Superfund cleanups and cost recovery actions. Such suits have required attorneys general to develop expertise in complex litigation activities including responsible party searches, mass mailings of notice letters, access to sites, hazardous waste removal actions and site investigations to develop a cleanup remedy. For instance, Minnesota enacted a statute aimed at maximizing recoveries from insurers of responsible parties at cleanup sites, and the attorney general's office began a series of negotiations heavily imbued with



59 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*550 U.S. 330 (2007).
60 *Id.*
61 42 U.S.C. § 9601 *et seq.*

the principles of insurance law.[62] Superfund cases also require expertise in preparing the record of decision, negotiating settlements and litigating cost-recovery actions. Many attorneys general have been involved in complex CERCLA litigation, in conjunction with the United States and independently.

SARA incorporated a new statute of limitations provision concerning natural resource damage claims. Under those amendments, trustees are appointed by the governor to assess damages to natural resources and to act on behalf of the public to recover these damages; in these lawsuits, the trustees are typically represented by the attorney general of their state. As a result, attorneys general also bring additional claims on behalf of state trustees against responsible parties for damages to natural resources under § 107(a)(4)(C) of CERCLA.

The 2002 Small Business Liability Relief and Brownfields Revitalization Act[63] modified key parameters of CERCLA to encourage redevelopment of formerly contaminated land. Its effect on state litigation is indirect. The Supreme Court's decision in *Cooper Industries Inc. v. Aviall Services*[64] had an impact on state litigation in these cases. In *Aviall,* the court held that those responsible parties who seek to hold other parties liable for cleanup costs under Section 113 of CERCLA may only do so when they have incurred the cost of cleanup during or following a civil action. Private parties will likely insist on formal settlement of government claims in order to insure their ability to seek contribution from co-polluters.



### The Recycling Exemption

In November of 1999, Congress enacted the Superfund Recycling Equity Act of 1999 (SREA).[65] The Act exempted recyclers from liability under CERCLA if they meet certain provisions. The attorney general of California litigated one of the first issues decided under the new Act. The Act provides that SREA does not apply to "any pending judicial action initiated by the United States prior to the enactment of" the statute.[66] One federal district court has ruled that the SREA's substantive provisions have retroactive effect,[67] consistent with the Supreme Court's retroactivity analysis.[68] The court further held that actions initiated by

62 *See generally* the Minnesota Landfill Cleanup Act, MINN. STAT.§§ 115B.441- 115B.445.

63 P.L. 107-118 (Jan. 18, 2002).

64 543 U.S. 157 (2004).

65 P.L. 106-113, § 6001, codified at 42 U.S.C. § 9627.

66 42 U.S.C. § 9627(I).

67 *Dept. of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 99 F. Supp. 2d 1123, 1127 (E.D. Cal. 2000).

68 *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

the state did not enjoy the exclusion from retroactive application that federal lawsuits have under the SREA.

## Additional Areas of Jurisdiction

### State Constitutional Provisions

A few states have included environmental protection in their state's constitution. Illinois's provision is illustrative. It says as public policy that it is the "duty of each person" to "provide and maintain a healthful environment for the benefit of this and future generations" and that each person "has the right to a healthful environment."[69] Such provisions are often cited when lawsuits are brought alleging a violation based on common law nuisance. The Montana Supreme Court has held that the Montana Constitution guaranteed a fundamental state constitutional right to a "clean and healthful" environment.[70]



### Species Protection Laws

The federal Endangered Species Act (ESA)[71] was passed to conserve species threatened with extinction. Currently, more than 1,200 United States species are listed as threatened or endangered. Under the statute, state conservation plans are considered prior to listing a species under the ESA.[72] Some plans, including those in Maine and Massachusetts and local conservation plans in Florida, have been challenged as violating the ESA. Other states and localities have been involved in litigation involving the reintroduction of species within their jurisdictions. Many states, including California, Idaho, Illinois, Michigan and Utah, also have state laws protecting endangered or threatened species.[73]

### NEPA and Similar State Laws

The National Environmental Policy Act of 1969 (NEPA),[74] establishes a policy to minimize adverse effects on the environment resulting from federal

69 Ill. Const. Art. 11, §§ 1, 2. *See also* Pa. Const. Art. 1I, § 27.

70 *Montana Environmental Information Center et al. v. Department of Environmental Quality,* 988 P.2d 1236 (Mont. 1999).

71 16 U.S.C. § 1531 *et seq.*

72 16 U.S.C. § 1533(b)(1)(A).

73 Cal. Fish & Game Code §§ 2062-2080, Idaho Code §§ 36-2401-05, 10 Ill. Comp. Stat. §§ 10/2-11; Mich. Comp. Laws Ann. §§ 324.36501-07; Utah Code Ann. § 23-20-4.5.

74 42 U.S.C. § 4321 *et seq.*

activity and government-funded activity. To accomplish this goal, NEPA requires the preparation of an environmental impact statement (EIS) for any action that may significantly adversely affect the environment. An EIS must identify the impact of the project and explore reasonable and prudent alternatives for carrying out the project. If a project may significantly adversely affect the environment and an EIS is not prepared or if the EIS is inadequate, a federal court may enjoin further work on the project. States frequently oppose federal decision-making in this context, most frequently by challenging the comprehensiveness of the environmental review conducted by the administrative agency proposing to take action.

Many states have passed their own state equivalent to NEPA. California, for example, has enacted the California Environmental Quality Act,[75] which requires that where a project is undertaken by a public agency or requires the issuance of a permit or other approval for use by a public agency, the project proponent must prepare an environmental impact report. The California attorney general's office has been extensively involved in filing written comments and making presentations at the project-approval stage, filing briefs and intervening in ongoing litigation as well as initiating enforcement action. Maryland and Hawaii also have mini-NEPA statutes.[76]



### Pesticide Use and Control Laws

The primary purpose of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[77] is to protect human health and the environment from exposure to acutely toxic chemicals. Under FIFRA, no one may sell, distribute or use a pesticide unless that pesticide is registered by EPA. EPA classifies each registered pesticide as either "general use," which may be applied by anyone, or "restricted use," which may only be applied by certified applicators. The state certifies an applicator if its program has been approved by EPA; forty-eight state programs have been approved. Forty-nine states have been delegated enforcement authority against those who misuse pesticides. With respect to enforcement of independent state pesticide laws, the Supreme Court held in *Wisconsin Public Intervenor v. Mortier,*[78] that states and localities may regulate pesticide application. FIFRA preempts state law to the extent that the law may be interpreted to impose labeling or packaging requirements in addition to, or different from, those required under the federal statute. New York has a program addressing the illegal

75 Cal. Pub. Resources Code §§ 21000 *et seq.*

76 Md. Nat. Res. §§ 1-301 to -305, Haw. Rev. Stat. §§ 343-1 to -8.

77 7 U.S.C. § 136 *et seq.*

78 501 U.S. 597 (1991).

sale of pesticides to New York citizens over the Internet.[79] Many states, such as Delaware, regulate pesticides and their application through their Agricultural Codes.[80] Some states, including Maryland and Iowa, have tailored their regulation of pesticides to avoid contamination of surface water. States regularly enforce the provisions of their state pesticide laws.[81]

### Right-to-Know Laws

Passed in response to concern regarding safety hazards posed by the storage and handling of toxic chemicals, the Emergency Planning and Community Right-to-Know Act (EPCRA),[82] helps local communities protect public health, safety and the environment from chemical hazards. Under EPCRA, each state must appoint an Emergency Response Commission, divide into Emergency Planning Districts and name a Local Emergency Planning Committee for each district. The statute also contains facility reporting requirements under which annual reports must be made to EPA and affected states. States and localities are also subject to EPCRA provisions. A 1993 Executive Order also directs federal agencies and facilities to comply with EPCRA.

Although states have no enforcement authority under EPCRA, some states, such as Illinois, have passed their own state version of the federal act.[83] California's unique Safe Drinking Water and Toxic Enforcement Act (Proposition 65) focuses on ensuring that the public has clear and reasonable warning by businesses before exposure to listed carcinogens or reproductive toxins, and the law may govern environmental contamination in some circumstances.

### The Federal Bankruptcy Act

There are many areas of bankruptcy law that affect state environmental enforcement efforts, including issues such as notification, dischargeability, application of the automatic stay and sovereign immunity. An understanding of federal bankruptcy laws is essential in an Attorney Generals environmental law practice. For a discussion of these issues, please see Chapter 20.



79 Press Release, Office of the Attorney General of New York, Five Companies Cited for Improper Internet and Mail Order Transactions (Feb. 11, 1999).

80 Del. Code Ann. tit. 3, chap. 12.

81 *See e.g. In the Matter of Thinh Quang and Thinh Quang Farm*, No. 97-PE-010 (Hawaii Bd. of Agriculture 2001).

82 42 U.S.C. 1001 *et seq.*

83 430 Ill. Comp. Stat. 100/1-19.

## Criminal Enforcement of Environmental Laws

Both state and federal criminal enforcement have significantly evolved since their inception as the nature of environmental crimes has become more complex and sophisticated. Criminal enforcement authority varies from state to state. In Pennsylvania, for example, only the attorney general has criminal environmental enforcement authority while in Florida, environmental crimes are prosecuted by local district attorneys. When the states and the Federal government began to investigate and prosecute polluters, they were often dealing with very blatant criminal conduct, such as midnight dumping of drums of hazardous waste. There are still some who violate environmental laws out of what appears to be greed or simply sheer laziness.[84] The new generation of polluters, however, generally does not work in the open and often employs intricate criminal schemes to avoid detection. In some states, criminal environmental prosecutions are handled by the same units that conduct fraud and white-collar crime investigation and prosecution.

Currently, many of those who are inclined to violate or evade environmental laws will try to do so by engaging in schemes to falsify documents and records required by law to be maintained. Criminal enforcement in this area remains a priority for the United States Department of Justice Environmental Crimes Section and for many states. In order to combat this fraudulent criminal conduct, which may conceal significant past, ongoing or potential environmental problems, state and federal prosecutors are now using their racketeering, civil forfeiture and money laundering statutes, as well as prosecution for traditional non-environmental crimes, such as fraud and forgery.

In New York, prosecutors used both civil forfeiture and criminal enforcement in dealing with 21 car junkyards whose runoff was polluting wetlands in the Flushing Bay.[85] Colorado indicted six individuals and two companies for racketeering and charges under Colorado's hazardous waste law.[86]

Unsurprisingly, polluters are finding less visible means of illegally disposing of their hazardous/toxic waste. Rather than openly dumping drums



84 *See, e.g., Roes v. State,* 2018 Md. App. Lexis 303 (Md. Ct. Spec. App. Apr. 4, 2018) (defendant was guilty of littering in an amount greater than 500 pounds when he abandoned two houseboats in a river).

85 Barbara Stewart, *28 in Queens Are Charged in Pollution at Junkyards*, New York Times, Apr. 26, 2001.

86 *People v. Homayoun Pourat, et al,* Case Nos. 01CR587 to 592 and 2001CR 617 and 618 Dist. Ct. (Dist. Ct. Jefferson Cty. Co, July 2002).

of waste, many of those who mishandle such wastes store them improperly for extended periods of time, dispose of the wastes in sewer systems or burn them and emit them into the air. New Jersey,[87] Georgia,[88] New Mexico,[89] Ohio,[90]Pennsylvania,[91]Texas[92] and Washington[93] have all prosecuted cases where wastes were illegally discharged.

Environmental criminal enforcement sometimes addresses environmental workplace safety issues. These are prosecutions brought under state law for crimes ranging from assault and battery with a dangerous weapon to manslaughter. For example, in 1994, the Massachusetts attorney general's Environmental Strike Force convicted a company and its president and manager of illegally storing hazardous waste in a manner potentially endangering human health safety or welfare and illegally storing hazardous waste.[94] In that case, workers at a lead smelting plant were exposed to high levels of lead contaminated dust because of inadequate ventilation and illegal work practices. Courts have found that the Occupational Safety and Health Act does not preempt state criminal prosecutions of employers for work related injuries to employees.[95]

Moreover, courts have found that simple negligence is sufficient for state or federal water pollution violations. In *State v. Hazelwood*,[96] the Alaska Supreme Court held that the jury need not use some higher standard of negligence to find the defendant, Exxon Valdez captain Joseph Hazelwood, guilty of negligently discharging oil from the Valdez into Prince George's Sound. In *United States*



87 *State v. Meadowlands Plating & Finishing, Inc.*, MPF Plating and Finishing, *et al.* Ind. No. 00-10-00140-S.

88 *Georgia v. Terek Von Green,* No. 01CR4722 (Super Ct. DeKalb County March 25, 2002).

89 *New Mexico v. Hector Villa III*, No. CR01-391 (N.M. 3d Jud. Dist. Ct.).

90 *State v. Grinstead*, 194 Ohio App. 3d 755, 958 N.E. 2d 177 (Ohio Ct. Apps. 2011).

91 *Commonwealth of Pennsylvania v. XTO Energy,* CR-002-2014 (C.C.P. Lycoming 2013) (criminal charges filed over discharge of 57,000 discharge of wastewater from fracking operation, settlement reached in 2016); *Pennsylvania v. Creed F. White and Robert L. White*, Nos. CR-0000256-99 *et al.* (C.P. Adams County).

92 *State v. Lashley*, 2006 Tex. App. Lexis 7391(Tex. Ct. App. 5th Dist. 2006).

93 *State v. Ryan Lewis and Cleaner Pressure Washing, LLC*, No. 16-1-03648-3 (Pierce County Superior Court 2017); *State v. George Campbell*, No. 17-9-11147-9 (King County Superior Court 2017).

94 *Commonwealth v. Bay State Smelting Co., Inc., et al.* No. 91-7428B (Super. Ct. Middlesex County Mar. 17, 1994).

95 *People v. Pymm*, 563 N.E.2d 1 (N.Y. 1990), *aff'd,* 76 N.Y.2d 511 (1990), *cert. den.* 111 S. Ct. 958 (1991); *People v. Hegedus*, 443 N.W.2d 127 (Mich. 1989); *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989), *cert. den.* 493 U.S. 809 (1989).

96 946 P.2d 875 (Alaska 1997).

*v. Hanousek*,[97] the court held that the CWA only required that the government prove ordinary negligence, not heightened "criminal negligence" for a negligent violation of the act. Similarly, Pennsylvania's Solid Waste Management provides for strict liability for reckless disregard as well as knowing violations.[98]

State criminal enforcement programs are generally well established. However, some states have not adopted comprehensive environmental criminal statutes and Attorneys General must look to the existing criminal statutes to provide a basis for the prosecution of environmental crimes. As individuals and companies become more sophisticated in the criminal schemes, prosecutors now must combat those very intricate and refined efforts to circumvent the environmental laws. To that end, Prosecutors need to creatively use both technological and forensic investigative techniques, as well as non-environmental statutes, such as money laundering, racketeering and forfeiture, to detect and prosecute their cases.



## Federal Facilities

For many years, attorneys general, in conjunction with the National Governors' Association, have been instrumental in requiring the U.S. Departments of Defense and Energy to comply with environmental law on the same basis as private parties. In 1992, the U.S. Supreme Court decided *United States Department of Energy v. Ohio*,[99] setting forth the limits of state authority over Department of Energy facilities under RCRA and the CWA. Partially in response to that decision, the states and local governments began to advocate changing the law. The National Association of Attorneys General worked with the National Governors' Association and the National Conference of State Legislatures to broaden the waiver of federal sovereign immunity to state environmental enforcement and participated in drafting the bill that became the Federal Facilities Compliance Act (FFCA).[100] On October 6, 1992, Congress enacted the FFCA, waiving the federal government's immunity from RCRA more clearly and comprehensively than under the RCRA's original language.

97 176 F. 3d 1116 (9th Cir. 1999), *cert. den.* 528 U.S. 1102 (2000).
98 35 Penn. Cons. Stat. Ann. § 6018.606.
99 503 U.S. 607 (1992).
100 42 U.S.C. 6961.

NAAG has also supported modifications to CERCLA that would require federal facilities to conduct cleanup operations on the same footing as private polluters and has advocated amending CERCLA with language identical to that in RCRA waiving federal sovereign immunity. Likewise, the attorneys general have supported amendment of the CWA, CAA and the SDWA.

Some of the most dangerous waste disposal sites in this country are associated with facilities owned by the United States. Because of the nature of the materials they handle and the activities they perform, the U.S. Departments of Energy (DOE) and Defense (DOD) are responsible for a great many sites with significant environmental problems that pose a serious threat to public health and the environment. Arguing that federal facilities should be held to the same standards as privately owned facilities, states have filed litigation at numerous sites throughout the country. The attorneys general have brought suit under every major environmental act to compel federal compliance with state law on a site-by-site basis. Because attorneys general have been so active in this area, the litigating states have established much of the leading case law in the area relied on by other states and by environmental groups in defining the scope of federal immunity from state environmental laws.

The states have brought suit to enforce various dimensions of CERCLA against federal facilities. Issues that have recurred in litigated cases and settlement agreements include: the range of the pre-emptive effect, if any, of CERCLA over state law; the requirements governing transfer of federal property before remediation; the scope of applicable or relevant and appropriate requirements, which are derived from state law and enforceable at CERCLA sites and the interplay between RCRA and CERCLA.[101]

In the context of the CAA, CWA and RCRA, Attorneys general have litigated a series of cases fleshing out the meaning of regulatory fees paid for licenses, permits and so forth. Most of the major federal statutes waive the United States' sovereign immunity with respect to administrative fees.[102]

Federal facility litigation under the CAA also includes *United States v. Tennessee Air Pollution Control Board*, holding that the statute's waiver of sovereign immunity covers civil penalties imposed by state air pollution law.[103] Another CAA case of interest is *California* v. *United States*, holding that the CAA does



101 42 U.S.C. 6961.

102 Clean Water Act: 33 U.S.C. § 1323; Resource Conservation Recovery Act: 42 U.S.C.§ 6961(a); and Clean Air Act: 42 U.S.C. § 7418(a).

103 185 F.3d 529 (6th Cir. 1999).

not require that a suit against a federal facility be removed to federal court upon motion of the defendant.[104]

## Common Law Authority

States have discovered that in some cases they can best protect the environment by bringing common law actions together with allegations based on statutory authority. This is particularly evident in the hazardous substance context, where CERCLA strictly limits the relief which can be granted by the court. By bringing a common law nuisance action together with an action based on CERCLA, a state may be able to recover more in damages, obtain injunctive relief (including an environmental restoration order) and receive the benefit of the broader coverage and more flexible interpretations of common law claims. New York, New Jersey and Massachusetts are three of the states that have included common law allegations in their lawsuits. The attorney general of Minnesota has also initiated suits against concentrated animal feeding operations on the basis of common law nuisance.

The public trust doctrine has been cited by courts to uphold state regulatory regimes aimed at protecting air, water and even wildlife. For instance, when Virginia and the federal government brought a joint action to recover damages to migratory birds from an oil spill, the court in *Complaint of Steuart Transport Co.*[105] held that both the federal and state governments have a "right and duty to protect and preserve the public's interest in natural wildlife resources." The public trust doctrine was also the basis for the California Supreme Court's landmark decision in *National Audubon Society v. Superior Court*,[106] which required that a decision allocating water resources must include environmental considerations. Citation of the public trust doctrine also defeated a takings claim in *Stevens v. City of Cannon Beach*,[107] where the court held that the public's right to walk on the beach justified a denial of the plaintiff's request for a permit to build a sea wall. States including Rhode Island, Texas and Wisconsin have successfully used



104 215 F.3d 1005 (9th Cir. 2000).

105 495 F. Supp. 38, 40 (E.D.Va 1980).

106 658 P.2d 709 (Cal.1983), *cert den. sub nom. City of Los Angeles Department of Water & Power v. National Audubon Society*, 464 U.S. 977 (1983).

107 835 P.2d 940 (Or. Ct. App.1992), *aff'd*, 854 P.2d 449 (Or. 1993), *cert. den.* 510 U.S. 1207 (1994).

common law authority to address environmental issues. More recently, plaintiffs have sought to extend the application of public trust doctrine to the air, specifically to control over greenhouse gas emissions.[108]

## The State-Federal Relationship

The relationship between states and the federal government in the context of environmental enforcement and regulation remains dynamic. All of the major environmental laws are based, in large part, on the concept of "cooperative federalism." This can be generally defined as a system wherein the federal government enacts comprehensive environmental regulatory programs that are delegated to states, or that states are "authorized" to run. Although under this system states are responsible for the bulk of regulation and enforcement, the federal government retains the authority to enforce such laws in federal courts and to impose additional regulatory requirements that states must implement.

The inherent tension in such a system was illustrated in the decade of the 1990s in two significant cases. *Harmon Industries v. Browne*[109] involved the settlement of hazardous waste violations between Harmon Industries and the state of Missouri, represented by the Missouri attorney general's office. During the settlement negotiations between Missouri and Harmon, the U.S. EPA filed a federal administrative complaint under RCRA.[110] Underlying EPA's administrative complaint was EPA's view that Missouri's enforcement action against Harmon was likely to be insufficient. Harmon subsequently appealed EPA's enforcement action and penalty assessment to the Eighth Circuit, which held that EPA and Missouri were in privity in the context of RCRA regulations and enforcement and that once Missouri had begun an enforcement action, EPA was without authority to engage in enforcement on its own.[111]



108 *See, e.g., Aronow v. Minnesota,* 62-CV-11-3952 (Dist. Ct. Ramsey Cty. Minn. Jan. 30, 2012).

109 191 F.3d 894 (8th Cir. 1999).

110 Harmon had self-reported its violations to Missouri and at the time of EPA's complaint, no formal charges had been brought against Harmon by the state.

111 Although *Harmon* arguments have been raised by RCRA defendants in federal courts in other circuits, so far only the 8th Circuit has adhered to its holding. *See, e.g., United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), *cert. den. sub nom. Elias v. United States*, 537 U.S. 812 (1994), and *United States v. Power Engineering Co.*, 125 F. Supp. 2d 1050 (D. Colo. 2000) *aff'd* 303 F.3d 1232 (10th Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

The comprehensive nature of federal regulation and control and its effect on state law was also illustrated in *United States v. Locke*,[112] in which the Supreme Court ruled that several provisions of Washington State's oil spill prevention regulations concerning oil tankers were preempted by federal law. Twenty-three states filed an *amicus* brief in the Supreme Court in support of Washington's regulations, which would have required, among other provisions, that tankers in state waters employ additional watch personnel on the bridge when underway. The Court unanimously held that federal provisions governing tanker operation and safety occupied the field and that additional state regulation would interfere with long-standing provisions of federal maritime law.

At the same time, states and the federal government have frequently demonstrated their willingness to work together toward common environmental enforcement goals. This point is well illustrated by the cooperative enforcement actions taken by several northeastern states and the United States against coal-fired electric utilities. These efforts, in part, were a catalyst for the formation of a workgroup involving state attorneys general offices and U.S. Department of Justice (DOJ) environmental attorneys, which developed a comprehensive joint civil litigation guide for state and federal enforcement attorneys to utilize in future cases.[113] Additionally, NAAG's Environment Project has worked closely with U.S. EPA and DOJ offices on comprehensive environmental training programs in a variety of environmental enforcement areas. The Environment Project has also developed a close working relationship with the Department for Energy's (DOE) Environmental Management office, which has helped to improve communications and relationships between state attorneys general and managers of DOE facilities in the states.



112 529 U.S. 89 (2000).

113 http://www.naag.org/assets/files/pdf/env-joint_enf_guidelines-full.pdf.