

# Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems

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**LIMITATIONS ON STATE AGENCY AUTHORITY TO ADOPT  
ENVIRONMENTAL STANDARDS MORE STRINGENT  
THAN FEDERAL STANDARDS: POLICY  
CONSIDERATIONS AND  
INTERPRETIVE PROBLEMS**

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In the early 1970s, in response to the states' inability to address adequately the degradation of environmental resources in the face of ever-expanding industrialization and urbanization, Congress concluded that a national system of environmental regulation was necessary to improve the environment and avoid "environmental balkanization."<sup>1</sup> Accordingly, Congress enacted, among other stat-

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1. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-12 (1977). Stewart noted that "[t]he characteristic insistence in federal environmental legislation upon geographically uniform standards and controls strongly suggests that escape from the Tragedy of the Commons by reduction of transaction costs has been an important reason" for federal environmental legislation. *Id.* at 1212 (referring to Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968)). In debating amendments to the Clean Air Act in 1970 and 1977, Congress expressed its concern that interstate competition for industry would lead to lower environmental standards. The legislative history of the Clean Air Act Amendments of 1970 contained the following language regarding the need for New Source Performance Standards: "The promulgation of Federal emission standards for new sources . . . will preclude efforts on the part of States to compete with each other . . . to attract new plants and facilities without assuring adequate control of . . . emissions therefrom." Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV., 1210, 1227 (1992) (quoting H.R. REP. NO. 1146, 91st Cong., 2d Sess. 3 (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5358). The legislative history of the Clean Air Act Amendments of 1977 contained the following language regarding the need for a prevention of significant deterioration program:

Without national guidelines for the prevention of significant deterioration a State deciding to protect its clean air resources will . . . become the target of "economic-environmental blackmail" from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls.

Revesz, *supra*, at 1227 (quoting H.R. REP. NO. 294, 95th Cong., 1st Sess. 134 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1213).

utes, the Clean Air Act Amendments of 1970<sup>2</sup> [hereinafter Clean Air Act] and the Federal Water Pollution Control Act Amendments of 1972<sup>3</sup> [hereinafter Clean Water Act]. These statutes required the Environmental Protection Agency (EPA) to establish national ambient air quality standards [hereinafter NAAQS] and national emission and effluent standards to regulate how much pollution certain categories of sources could discharge into the air or water.<sup>4</sup> At the same time, however, Congress showed a desire to promote federalism and experimentation in environmental regulation by giving the states the responsibility to develop implementation plans to assure compliance with the NAAQS,<sup>5</sup> the opportunity to administer the federal programs,<sup>6</sup> and the freedom to impose standards more stringent than those imposed by the Clean Air Act<sup>7</sup> and Clean Water Act.<sup>8</sup>

In many of the other environmental statutes Congress has enacted since the Clean Air Act and Clean Water Act, Congress similarly has given the states the right to administer the regulatory program

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2. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993)).

3. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)).

4. See Clean Air Act Amendments of 1970, § 4(a), 84 Stat. at 1679 (codified as amended at 42 U.S.C. § 7409 (requiring EPA to promulgate National Ambient Air Quality Standards); *id.* § 4(a), 84 Stat. at 1683 (codified as amended at 42 U.S.C. § 7411) (requiring EPA to promulgate New Source Performance Standards); Federal Water Pollution Control Act Amendments of 1972, § 2, 86 Stat. at 854 (codified at 33 U.S.C. § 1316) (requiring EPA to promulgate New Source Performance Standards).

5. Clean Air Act Amendments of 1970, § 4(a), 84 Stat. at 1680 (codified as amended at 42 U.S.C. § 7410) (describing state implementation plan process).

6. Clean Air Act Amendments of 1970, § 4(a), 84 Stat. at 1687 (codified as amended at 42 U.S.C. § 7414(b) (authorizing delegation of enforcement responsibility under the Clean Air Act to the states); Federal Water Pollution Control Amendments of 1972, § 2, 86 Stat. at 858 (codified as amended at 33 U.S.C. § 1318(c)) (authorizing delegation of enforcement responsibility under the Clean Water Act to the states).

7. Clean Air Act Amendments of 1970, § 4(a), (c), 84 Stat. at 1678, 1689 (codified as amended at 42 U.S.C. § 7416) (providing that, except for preemption of certain state regulation of moving sources, "nothing in this chapter shall preclude or deny the right of any State or any political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution," and further providing that no state or political subdivision may adopt or enforce any emission standard or limitation less stringent than a standard or limitation in effect under an applicable State Implementation Plan or under §§ 7411 or 7412 of the Clean Air Act); see *Union Elec. Co. v. EPA*, 427 U.S. 246, 260-65 (1976) (recognizing that states may adopt a State Implementation Plan that results in more stringent emission standards than the Clean Air Act).

8. Federal Water Pollution Control Amendments of 1972, § 2, 86 Stat. at 893 (1972) (codified at 33 U.S.C. § 1370) (similarly authorizing states to adopt or enforce standards or limitations that are more, but not less, stringent than any effluent limitation, effluent standard, prohibition, pretreatment standard, or standard of performance in effect under the Clean Water Act).

and/or the authority to impose standards more stringent than the federal environmental statute required.<sup>9</sup> Although many states have accepted the responsibility to administer the federal environmental programs,<sup>10</sup> some state legislatures, through their environmental legislation, have shown an increasing tendency to constrain state environmental agencies from promulgating standards more stringent than federal standards.<sup>11</sup>

This Article addresses policy questions and interpretive difficulties presented by these state legislative constraints on the authority of state environmental agencies. Part I summarizes the different approaches state legislatures have taken to constrain state environmental agencies from promulgating standards more stringent than federal environmental law. Part II discusses possible reasons for, and policy implications of, these ever-increasing state legislative constraints on the authority of state environmental agencies. Part III analyzes the extent to which the different statutory approaches to constraining the authority of state environmental agencies present three different statutory interpretation problems. Acknowledging that state legislatures may continue to find good reasons for constraining the authority of state environmental agencies to promulgate standards more stringent than federal environmental law, the Article concludes in Part IV with proposed model language for state legislatures to use. This language

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9. See, e.g., Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, § 2, 90 Stat. 2795, 2809 (1976) (codified as amended at 42 U.S.C. § 6926 (1988) (providing mechanism for states to administer and enforce their own hazardous waste programs); *id.* § 2, 90 Stat. at 2812 (codified as amended at 42 U.S.C. § 6929) (providing that “[n]othing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, . . . which are more stringent than those imposed by such regulations”); Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, § 503, 91 Stat. 447, 470 (1977) (codified at 30 U.S.C. § 1253 (1988) (providing mechanism for states to obtain “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations”); *id.* § 505, 91 Stat. at 473 (codified at 30 U.S.C. § 1255) (providing that any state law or regulation more stringent than a similar provision in SMCRA, or addressing an aspect of surface mining and reclamation operations for which SMCRA contains no provision, shall not be construed as inconsistent with SMCRA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, § 114, 94 Stat. 2767, 2795 (1980) (codified as amended at 42 U.S.C. § 9614(a) (1988)) (providing that nothing in CERCLA shall be construed to preempt “any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State”).

10. Over 40 states have received authorization to administer portions of the Clean Air Act, the Clean Water Act, and the Resource Conservation Recovery Act. States that receive authorization essentially agree to incur the additional costs associated with administering these federal regulatory programs. States are willing to incur these costs because they perceive a benefit in having primary enforcement authority with respect to regulated entities within the state, rather than leaving primary enforcement authority with EPA.

11. See *infra* Part I (discussing statutory restrictions on state agency authority).

will minimize the extent to which state statutory constraints on the authority of state environmental agencies create ambiguity and generate disputes over the scope of the agencies' authority.

### I. SUMMARY OF STATE LEGISLATIVE ENACTMENTS LIMITING THE AUTHORITY OF STATE AGENCIES TO PROMULGATE ENVIRONMENTAL REGULATIONS

The mid-1970s saw the earliest state legislation constraining the authority of state agencies to promulgate environmental regulations more stringent than federal environmental law.<sup>12</sup> During the last decade, however, an increasing number of states have enacted legislation that constrains, at least to some degree, the authority of state agencies to promulgate environmental regulations more stringent than federal environmental statutes.<sup>13</sup> In general, the statutes fall into one of two

12. Florida enacted the first statutory constraint on state agency authority in 1975. 1975 Fla. Laws ch. 75-22, § 6 (codified as amended at FLA. STAT. ANN. § 403.804 (West 1993)). Iowa enacted a statutory constraint relating to water quality in 1976. 1976 Iowa Acts (66 G.A.) ch. 1204, §§ 6-8, 23 (codified at IOWA CODE § 455B.173(2) (1993)). Missouri enacted a statutory constraint on the authority of the Air Conservation Commission in 1979. 1979 Mo. Laws S.B. 21 (codified as amended at MO. REV. STAT. § 643.055(1) (1993)).

13. Since 1987, 19 states have enacted at least one statute constraining the authority of a state agency to promulgate rules more stringent than required by federal environmental law. See 1988 Ala. Acts 88-378, § 10 (codified at ALA. CODE § 22-35-10 (1993)) (concerning underground storage tanks); 1990 Alaska Sess. Laws 96, § 2 (codified at ALASKA STAT. § 46.03.365(c) (1993)) (same); 1989 Ariz. Sess. Laws 201, §§ 4, 7, 9 (codified at ARIZ. REV. STAT. ANN. §§ 49-1003(C), -1006(B), -1009(C) (1993)) (same); 1989 Ark. Acts 172, § 3 (codified at ARK. CODE ANN. § 8-7-803 (Michie 1993)) (same); 1992 Colo. Sess. Laws 92-105, § 18 (codified at COLO. REV. STAT. ANN. § 25-7-114.2 (West 1994)) (concerning indirect air pollution sources); 1989 Colo. Sess. Laws 181, § 2 (codified at COLO. REV. STAT. ANN. § 25-8-202(8)(a) (West 1994)) (concerning water quality control); 1985 Iowa Acts 162, § 4 (codified at IOWA CODE ANN. § 455B.474.7 (West 1993)) (concerning underground storage tanks); 1989 Nev. Stat. 371, § 13 (codified at NEV. REV. STAT. § 459.824 (1991)) (same); 1989 N.H. Laws 249:17 (codified at N.H. REV. STAT. ANN. § 146-C:9 (1993)) (same); 1989 N.D. Laws 299, § 1 (codified at N.D. CENT. CODE § 23-01-04.1 (1993)) (addressing all areas of environmental regulation); 1993 Ohio Laws File 62, § 1 (S.B. 153) (codified at OHIO REV. CODE ANN. § 3704.036 (Anderson 1994)) (relating to the Title V permit program under the Clean Air Act); 1994 Okla. Sess. Law Serv. ch. 96 (H.B. 1919) (West) (codified at OKLA. STAT. tit. 27A, § 1-1-206 (1994)) (relating to economic impact analysis for any environmental rules "more stringent than corresponding federal requirements"); 1989 Okla. Sess. Laws 90, §§ 7-8 (codified at OKLA. STAT. tit. 17, §§ 307-308 (1993)) (concerning underground storage tanks); 1992 Okla. Sess. Laws 215, § 14 (codified at OKLA. STAT. tit. 63, § 1-1815(A)(1)-(2) (1993)) (concerning hazardous air pollutants); 1991 Or. Laws 863, § 14 (codified at OR. REV. STAT. § 466.746(1)(e), (2)(b) (1993)) (concerning underground storage tanks); 1992 Pa. Laws 460, § 9 (codified at 35 PA. CONS. STAT. ANN. § 4006.6 (1993)) (concerning hazardous air pollutants); 1992 S.D. Laws 254, § 100 (codified at S.D. CODIFIED LAWS ANN. § 1-40-4.1 (1993)) (addressing all areas of environmental regulation); 1994 Tenn. Pub. Acts Ch. 878 (S.B. 2040) (codified at TENN. CODE ANN. § 4-5-225 (1994)) (relating to the invalidation of environmental requirements "on

classifications: (1) statutes imposing an unconditional restriction on state agency authority,<sup>14</sup> and (2) statutes imposing a conditional restriction on state agency authority.<sup>15</sup> Although most of the statutes are media-specific or source-specific statutes,<sup>16</sup> several states recently have enacted statutes that generally constrain the state environmental agency from promulgating any regulation more stringent than federal environmental laws or regulations.<sup>17</sup>

### A. *Statutes Imposing an Unconditional Restriction on State Agency Authority*

Statutes imposing unconditional restrictions on state agency authority generally contain some language, the exact phrasing of which varies from state to state, expressly prohibiting an agency from promulgating any standards or regulations more stringent than federal laws and regulations. These statutes may be either media-specific or source-specific, or they may impose significantly broader constraints.

#### 1. *Media-Specific and Source-Specific Statutes Containing Unconditional Restrictions.*—

a. *Air Pollution.*—An example of a media-specific statute is New Mexico's statute that generally constrains its environmental agency from promulgating air pollution regulations more stringent than the Clean Air Act. This statute authorizes the adoption of air pollution regulations, provided that the regulations

(a) shall be no more stringent than but at least as stringent as required by the federal act and federal regulations per-

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municipalities or counties that are more stringent than federal statutes or rules"); 1987 Tex. Gen. Laws 277, § 1 (codified at TEX. WATER CODE ANN. § 26.357(b) (West 1988)) (concerning underground storage tanks); 1987 Utah Laws 12, §§ 4, 6 (codified at UTAH CODE ANN. §§ 19-2-106, 19-5-105 (1991) (concerning air and water quality control); 1994 W. Va. Acts 61 (codified at W. VA. CODE § 22-1-3a (1994) (concerning environmental provisions generally) and § 22-17-6 (1994) (concerning underground storage tanks)); 1990 Wyo. Sess. Laws 88, § 1 (codified at WYO. STAT. § 35-11-1416(a)(i) (1993)) (concerning underground storage tanks).

Because this Article focuses generally on state agency authority to regulate air pollution, water pollution and underground storage tanks, it does not purport to set forth an exhaustive listing of all state statutes which impose some type of constraint on the authority of state agencies to promulgate environmental regulations more stringent than federal environmental laws.

14. See *infra* Part I.A.

15. See *infra* Part I.B.

16. See *infra* notes 18-27, 33-59 and accompanying text.

17. See *infra* notes 28-32, 60-66 and accompanying text.

taining to visibility protection in mandatory class 1 areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas; and (b) shall be applicable only to sources subject to such regulation pursuant to the federal act.<sup>18</sup>

The New Mexico statute further authorizes the promulgation of standards of performance for sources and emission standards for hazardous air pollutants, provided that the standards "(a) shall be no more stringent than but at least as stringent as required by federal standards of performance; and (b) shall be applicable only to sources subject to such federal standards of performance."<sup>19</sup>

Colorado also has a statute constraining state agency regulation of air pollution, although it applies only to regulation of indirect air pollution sources.<sup>20</sup> The statute provides that regulations relating to indirect air pollution sources "shall not be more stringent than those required for compliance with the federal act and final rules and regulations adopted pursuant thereto."<sup>21</sup> Similarly, Ohio recently enacted a statute limiting the authority of its state agencies to promulgate regulations more stringent than federal laws or regulations. Ohio's statute authorizes the promulgation of rules for purposes of implementing the Title V permit program under the Clean Air Act, provided the rules "are consistent with, and no more stringent than, the requirements of Title V of the federal Clean Air Act and 40 C.F.R. part 70."<sup>22</sup>

*b. Underground Storage Tanks.*—Examples of source-specific constraints exist in several states which recently have enacted unconditional constraints on the authority of state agencies to promulgate standards more stringent than federal regulations in the context of underground storage tanks. For example, one Alaska statute provides that if state underground storage tank regulations "address areas governed by federal laws or regulations, the state regulations must be consistent with federal laws and regulations and may not be more stringent than the federal laws and regulations."<sup>23</sup> Arizona likewise

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18. N.M. STAT. ANN. § 74-2-5C(1)(a), (b) (Michie 1993).

19. *Id.* §§ 74-2-5C(2)(a), (2)(b), (3). The statute makes one exception, providing that regulations governing emissions from solid waste incinerators may be more stringent than federal emission limitations. *Id.*

20. COLO. REV. STAT. ANN. § 25-7-114.23 (West 1993).

21. *Id.*

22. 1993 Ohio Laws File 62, § 1 (S.B. 153) (codified at OHIO REV. CODE ANN. § 3704.036 (Anderson 1994)).

23. ALASKA STAT. § 46.03.365(c) (1993). Section 46.03.420(c)(2)(A) is the only exception to the requirement that state regulations for underground storage tanks be no more

has a statute providing that underground storage tank rules "shall be consistent with and no more stringent than the federal regulations in effect on the date on which the rules are adopted."<sup>24</sup> New Mexico also has a statute providing for "regulations concerning underground storage tanks that are equivalent to, and no more stringent than, federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation Recovery Act of 1976, as amended."<sup>25</sup> Several other state statutes concerning underground storage tanks have similar language prohibiting promulgation of regulations more stringent than federal law.<sup>26</sup>

*c. Water Pollution.*—A Virginia water pollution control statute prevents the pollution control board from requiring "the Commonwealth, or any political subdivision thereof, to upgrade the level of treatment in any works to a level more stringent than that required by applicable provisions of the Federal Water Pollution Control Act, as amended."<sup>27</sup>

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stringent than federal law. It allows the state agency to require the upgrading of underground storage tanks before federal law so requires. *Id.*

24. ARIZ. REV. STAT. ANN. §§ 49-1003, -1006, -1009 (1993).

25. N.M. STAT. ANN. § 74-44C (Michie 1993).

26. ALA. CODE § 22-35-10 (1993) (providing that rules and regulations pertaining to underground storage tanks shall not be "more stringent than those provided by federal rules or regulations"); ARK. CODE ANN. § 8-7-803 (Michie 1993) (providing that any regulations relating to underground storage tanks "shall as much as possible be identical to and no more stringent than the federal regulations adopted by the United States Environmental Protection Agency"); IOWA CODE §§ 455B.474(1)(g), (3)(d), 7 (1993) (providing that rules adopted shall be "consistent with" and "shall not exceed" the requirements of federal regulations once federal regulations are adopted); NEV. REV. STAT. ANN. § 459.824 (Michie 1993) (providing for administration of the provisions relating to storage tanks "in a manner that is consistent with, and not more stringent than, the applicable provisions of federal law"); N.H. REV. STAT. ANN. § 249:17 (1993) (providing that rules relating to financial responsibility for underground storage tanks adopted pursuant to § 149-C:9 "shall not be more stringent than the federal rules"); N.D. CENT. CODE § 23-20.3-04.1 (1993) (providing that regulations relating to underground storage tanks "may not be more stringent than applicable federal rules" adopted pursuant to RCRA); OKLA. STAT. tit. 17, § 308(H) (1993) (providing that regulations regarding financial responsibility coverage with respect to underground storage tanks "shall not be more stringent than is required by the federal Environmental Protection Agency for underground storage tank systems of equal type, age, and classification"); W. VA. CODE § 22-17-6 (1994) (providing that rules relating to underground storage tanks "shall be no more stringent than the rules and regulations promulgated by the United States environmental protection agency pursuant to Subtitle I"); WYO. STAT. § 35-11-1416 (1993) (requiring that rules and regulations shall "[p]rovide for performance, operating and installation standards for underground storage tanks which shall be no less or no more stringent than the federal standards").

27. VA. CODE ANN. § 62.1-44.15:1 (Michie 1993).



2. *General Statutes Containing Unconditional Restrictions.*—Two states have statutes that unconditionally restrict the authority of state agencies to promulgate *any* environmental regulations more stringent than federal regulations. A South Dakota statute addressing air pollution control, water pollution control, and several other forms of environmental control prohibits promulgation of rules that are “more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue.”<sup>28</sup> Similarly, Kentucky’s statute relating to the adoption of administrative regulations provides that “[a]n administrative body may adopt administrative regulations to implement a statute only when the . . . [legislature] specifically authorizes the adoption of such regulations or such regulations are required by federal law, in which case such regulations shall be no more stringent than the federal law or regulations.”<sup>29</sup> Although the Kentucky statute does not relate solely to environmental regulation, Kentucky has several other statutes that deal specifically with air pollution,<sup>30</sup> hazardous wastes<sup>31</sup> and surface mining<sup>32</sup> which are consistent with the aforementioned statute in prohibiting promulgation of regulations more stringent than federal law.

*B. Statutes Imposing a Conditional Restriction on State Agency Authority*

Statutes imposing a conditional restriction on state agency authority generally contain some language, the exact phrasing of which varies from state to state, prohibiting an agency from promulgating standards or regulations more stringent than federal law unless unique circumstances justify more stringent regulations. These statutes also may permit or require the appropriate agency to make a

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28. S.D. CODIFIED LAWS ANN. § 1-40-4.1 (1993).

29. KY. REV. STAT. ANN. § 13A.120(1) (Baldwin 1993).

30. Section 224.10-100(26) provides that the environmental protection cabinet may “preserve existing clean air resources while ensuring economic growth by issuing regulations, which shall be no more stringent than federal requirements, setting maximum allowable increases from stationary sources over baseline concentrations of air contaminants to prevent significant deterioration in areas meeting the state and national ambient air quality standards.” *Id.* § 224.10-100(26).

31. Section 224.46-510 provides that regulations relating to generators of hazardous waste “shall be no more stringent than the federal requirements” and that criteria and lists for identifying hazardous waste “shall be identical to any such criteria and lists proposed or promulgated by the United States Environmental Protection Agency.” *Id.* § 224.46-510(1) (Hist. Note), (3).

32. Sections 350.028, 350.069 and 350.465 provide that administrative regulations relating to surface mining and surface mining operation performance standards shall be “no more stringent than” provided for in the Surface Mining Control and Reclamation Act of 1977. *Id.* §§ 350.028, .069, .465(2).

specific finding, sometimes following a hearing, about the need for the more stringent regulation under given criteria.

1. *Media-Specific and Subject-Specific Statutes Requiring Satisfaction of a Condition or of Specific Procedures.*—Several states have media-specific or subject-specific statutes that limit an agency's authority to promulgate regulations or standards more stringent than federal law except after satisfaction of certain criteria or procedures.

a. *Air Pollution.*—Oklahoma and Rhode Island have statutes imposing conditional constraints on the authority of their respective state environmental agencies concerning the regulation of certain aspects of their air pollution programs. Oklahoma's statute provides that the state must establish a program for implementing and enforcing the federal emission standards for hazardous air pollutants under section 112 of the Clean Air Act "that is consistent with and not more stringent than the federal requirements."<sup>33</sup> The statute further provides, however, for the adoption of "rules which establish emission limitations for hazardous air pollutants which are more stringent than the applicable federal standards upon a determination . . . that more stringent standards are necessary to protect public health."<sup>34</sup> The statute also authorizes establishment of "a separate and distinct program only for the control of the emission of those toxic air contaminants not otherwise regulated by a final emission standard under Section 112(d) of the Federal Clean Air Act."<sup>35</sup>

Rhode Island's statute imposes a similar conditional constraint. The statute addresses regulation of the emission characteristics of all fuels used by stationary and mobile sources of air contaminants. The statute provides that such regulations "shall not be more stringent than the mandatory standards established by federal law or regulation, unless it can be shown that such control technology and emission characteristics of fuels are needed for the attainment or maintenance of air quality standards."<sup>36</sup>

Missouri,<sup>37</sup> West Virginia<sup>38</sup> and Pennsylvania<sup>39</sup> have statutes requiring written findings regarding the need for a more stringent rule.

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33. OKLA. STAT. ANN. tit. 27A, § 2-5-114 (West Supp. 1994). To assure that the state program is consistent with and not more stringent than the federal requirements, the statute further provides that any rule "regarding hazardous air pollutants and regulated substances shall only be [promulgated] by adoption by reference of final federal rules." *Id.*

34. *Id.* § 2-5-114(A)(2).

35. *Id.* § 2-5-114(B).

36. R.I. GEN. LAWS § 23-23-5(12) (1993).

37. MO. ANN. STAT. § 643.055(1) (Vernon Supp. 1994).

Missouri's statute<sup>40</sup> authorizes the promulgation of standards and guidelines to ensure compliance with the Clean Air Act, provided that

[t]he standards and guidelines so established shall not be any stricter than those required under the provisions of the federal Clean Air Act, as amended; nor shall those standards and guidelines be enforced in any area of the state prior to the time required by the federal Clean Air Act, as amended.<sup>41</sup>

Section 643.055.1 of the Missouri Act further provides, however, that

[t]he restrictions of this section shall not apply to the parts of the state implementation plan developed by the commission to bring a nonattainment area into compliance and to maintain compliance when needed to have a[n] . . . approved state implementation plan. The determination of which parts of a state implementation plan are not subject to the restrictions of this section shall be based upon specific findings of fact by the air conservation commission as to the rules, regulations and criteria that are needed to have a[n] . . . approved plan.<sup>42</sup>

West Virginia's statute<sup>43</sup> provides that no legislative rule or program relating to air pollution "shall be any more stringent than any federal rule or program except to the limited extent that . . . [there is] a specific written finding for any such departure that there exists scientifically supportable evidence for such rule or program reflecting factors unique to West Virginia or some area thereof."<sup>44</sup>

Pennsylvania has a statute imposing a similar constraint on one very specific aspect of its air pollution control program. Pennsylvania's statute forbids "a more stringent performance or emission standard for hazardous air pollutant emissions from existing sources" than the standard in federal regulations establishing performance or emission standards under section 112 of the Clean Air Act.<sup>45</sup> The Pennsylvania statute contains an exception, however, allowing operating practice requirements or emission standards based on health risk "when needed to protect public health, welfare and the environment

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38. W. VA. CODE § 22-5-4(a)(4) (1994).

39. 35 PA. CONS. STAT. ANN. § 4006.6 (1993).

40. MO. ANN. STAT. § 643.055(1) (Vernon Supp. 1994).

41. *Id.*

42. *Id.*

43. W. VA. CODE § 22-5-4(a)(4) (1994).

44. *Id.*

45. 35 PA. CONS. STAT. ANN. §§ 4006.6(a), (d)(1) (1993).

from emissions of hazardous air pollutants,"<sup>46</sup> provided that the agency explains the need for such standards or requirements.<sup>47</sup> The statute also authorizes state agencies to establish "performance or emission standards for sources or categories of sources absent from the list of source categories established under Section 112(c) of the Clean Air Act."<sup>48</sup>

*b. Underground Storage Tanks.*—Regarding regulation of underground storage tanks, three states impose some type of conditional constraint on a state agency's authority to promulgate standards more stringent than federal law requires. For example, Texas has a statute prohibiting the imposition of "standards or rules more stringent than the federal requirements unless . . . the more stringent standards or rules are necessary to protect human health or the environment."<sup>49</sup> Oklahoma has a statute providing that for "any rule that is different from a federal standard or regulation on the same subject,"<sup>50</sup> the agency must state the deviation from the federal standard or regulation and the reason for the deviation "at a public hearing or at the time of adoption of the rule."<sup>51</sup> Oregon likewise authorizes the establishment of: (1) performance standards for underground storage tanks "consistent with standards adopted by the Federal Government"; and (2) "[r]equirements for soil assessment and tank tightness tests

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46. *Id.* In the case of coke oven batteries, however, the statute prohibits promulgation of "health risk-based emission standards more stringent than Federal requirements until eight (8) years after promulgation of maximum achievable control technology (MACT) standards and not until the year 2020 for Coke Oven Batteries which satisfy the requirements of Section 112(i)(8)(A) of the Clean Air Act." *Id.* § 4006.6(d)(2). The statute provides an exception, however, "where the operation of a coke oven battery would result in serious substantial and demonstrable harm to public health, welfare and the environment," in which case the state agency may impose health risk-based emission standards that use proven commercially and economically available methods of technology. *Id.* § 4006.6(d)(2), (3).

47. *Id.* § 4006.6(d). The statute also provides for public review and comments on plan approvals, operating permits, guidelines, and regulations that contain health risk-based emissions standards or operating practice requirements. *Id.*

48. *Id.* Additionally, if the federal government fails to promulgate a standard to control the emissions of hazardous air pollutants under § 112 of the Clean Air Act, "pursuant to a schedule to establish pursuant to Section 112(c) of the Clean Air Act," the statute authorizes promulgation of "a performance or emission standard on a case-by-case basis for individual sources or categories of sources." *Id.* § 4006.6(b).

49. TEX. WATER CODE ANN. § 26.357(b) (West 1993).

50. OKLA. STAT. tit. 17, § 307(D) (1993).

51. *Id.* But see *supra* note 26 (discussing tit. 17, § 308 of the Oklahoma Statutes, which provides that regulations regarding financial responsibility coverage with respect to underground storage tanks "shall not be more stringent than is required by the federal Environmental Protection Agency for underground storage tank systems of equal type, age, and classification").

which shall not be more stringent . . . than required by the Federal Government."<sup>52</sup> The Oregon statute provides an exception, however, when "[m]ore stringent rules are necessary: (A) To protect . . . sensitive environmental amenit[ies]; or (B) Because conditions peculiar to that area require different standards to protect public health, safety, welfare or the environment."<sup>53</sup> The statute further states that if "any standard or rule . . . is different than [sic] a federal standard or regulation on the same subject, the report submitted . . . at the time the commission adopts the standard or rule shall indicate clearly the deviation from the federal standard or regulation and the reason for deviation."<sup>54</sup>

*c. Water Pollution.*—Regarding the regulation of water pollution, three states impose some type of conditional constraint on the authority of a state agency to promulgate standards more stringent than federal law requires. In two states, the specific circumstances under which an agency may promulgate more stringent standards involve compliance with water quality standards.<sup>55</sup>

Arkansas has a statute concerning water pollution control that requires conditions in permits assuring the achievement of effluent limitations through the application of treatment technology and processes at the levels the Clean Water Act mandates "or any more stringent effluent limitations necessary to meet water quality criteria or toxic standards established pursuant to any state or federal law or regulation."<sup>56</sup> Iowa has a similar statute relating to the establishment of water quality standards, pretreatment standards, and effluent standards. The statute provides that if the EPA "has promulgated an effluent standard or pretreatment standard pursuant to section 301, 306 or 307 of the federal Water Pollution Control Act, a pretreatment or effluent standard adopted pursuant to this section shall not be more stringent than the federal effluent or pretreatment standard for such source."<sup>57</sup> This statute, however, does "not preclude the establishment of a more restrictive effluent limitation in the permit for a particular point source if the more restrictive effluent limitation is necessary to meet water quality standards."<sup>58</sup>

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52. OR. REV. STAT. §§ 466.746(1)(a), (1)(l) (1993).

53. *Id.* § 466.746(2)(a).

54. *Id.* § 466.746(4).

55. See *infra* notes 56-58 and accompanying text.

56. ARK. CODE ANN. § 8-4-207(1)(A) (Michie 1993).

57. IOWA CODE ANN. § 455B.173(2) (West 1993).

58. *Id.*

Colorado has a statute that provides for the adoption of rules more stringent than corresponding federal requirements "only if it is demonstrated at a public hearing, and [there is a finding], based on sound scientific or technical evidence in the record, that [such] rules . . . are necessary to protect the public health, beneficial use of water, or the environment of the state."<sup>59</sup>

2. *General Statutes Requiring Satisfaction of Specific Procedures.*— Four states, Florida, North Dakota, Oklahoma and West Virginia have statutes that generally require state agencies interested in promulgating environmental regulations more stringent than federal regulations to comply with specific procedures. Florida's statute, which relates to environmental regulations generally, requires a cost/benefit analysis of "any proposed standard that would be stricter or more stringent than one which has been set by federal agencies pursuant to federal law or regulation."<sup>60</sup> Much like Florida's statute, Oklahoma's statute requires each state environmental agency "to determine the economic impact and environmental benefit" of "any rule that is more stringent than corresponding federal requirements."<sup>61</sup> North Dakota's statute prohibits the adoption of any rule providing for state administration of

a program under the federal Clean Air Act, federal Clean Water Act, federal Safe Drinking Water Act, federal Resource Conservation and Recovery Act, federal Comprehensive Environmental Response Compensation and Liability Act, federal Emergency Planning and Community Right to Know Act of 1986, federal Toxic Substances Control Act, or federal Atomic Energy Act of 1954, [that] may be more stringent than corresponding federal regulations which address the same circumstances.<sup>62</sup>

The North Dakota statute, however, allows for adoption of

rules more stringent than corresponding federal regulations or . . . rules [for which] there are no corresponding federal regulations, . . . only . . . [upon] a written finding after public comment and hearing based upon evidence in the rec-

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59. COLO. REV. STAT. ANN. § 25-8-202(8) (a) (West 1994).

60. FLA. STAT. ANN. § 403.804(2) (West 1993). Two separate statutes, one relating to regulation of air and water pollution, and the other addressing solid waste management, cross-reference the procedures set forth in § 403.804 as the prerequisites for adoption of regulations more stringent than federal law requires. *Id.* § 403.061(7) (regarding air and water pollution) & § 403.704(15) (regarding solid waste management).

61. OKLA. STAT. tit. 27A, § 1-1-206 (1994).

62. N.D. CENT. CODE § 23-01-04.1.1 (1993).

ord, that corresponding federal regulations are not adequate to protect public health and the environment of the state.<sup>63</sup>

West Virginia's statute provides that the Director of the Division of Environmental Protection may promulgate rules "more stringent than the counterpart federal rule or program to the extent that the director first provides specific written reasons which demonstrate that such provisions are reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety."<sup>64</sup> The statute further provides that "[i]n the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than a federal rule, unless the absence of a federal rule is the result of a specific federal exemption."<sup>65</sup>

In addition, Utah employs statutory language similar to North Dakota's. Utah lacks one general statute conditionally prohibiting the promulgation of regulations more stringent than federal law, however. Instead, it has several subject-specific statutes that incorporate language prohibiting promulgation of regulations "more stringent than the corresponding federal regulations," absent "a written finding after public comment and hearing, . . . that the corresponding federal regulation is not adequate to protect public safety and the environment."<sup>66</sup>

Finally, Tennessee recently enacted a statute allowing for the Tennessee Government Operations Committee to invalidate rules that impose "environmental requirements or restrictions on municipalities or counties that are more stringent than federal statutes or rules on the same subject, and that result in increased expenditure requirements on municipalities or counties beyond those required to meet federal requirements unless" funds have been appropriated to cover the increased expenditures.<sup>67</sup>

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63. *Id.* § 23-01-04.1.2.

64. W. VA. CODE § 22-1-3a (1994).

65. *Id.*

66. UTAH CODE ANN. § 19-2-106(1), (2) (1993) (relating to air pollution); § 19-4-105(1), (2) (relating to safe drinking water); § 19-5-105(1), (2) (relating to water pollution); § 19-6-106(1), (2) (relating to state administration of RCRA, CERCLA and the Emergency Planning and Community Right to Know Act of 1986); § 40-10-6.5(1), (2) (relating to surface coal mining and reclamation).

67. TENN. CODE ANN. § 4-5-225 (1994).

## II. ANALYSIS OF POSSIBLE REASONS FOR, AND POLICY IMPLICATIONS OF, THE INCREASING STATE LEGISLATIVE CONSTRAINTS ON STATE AGENCY PROMULGATION OF ENVIRONMENTAL REGULATIONS

When a state legislature enacts enabling legislation imposing an unconditional constraint on a state environmental agency's authority to promulgate rules more stringent than federal environmental legislation, the state legislature—to an extent that the state legislature does not always clearly define<sup>68</sup>—effectively shifts to Congress and federal agencies the responsibility for specific policy decisions on the scope of environmental regulation in the state. In enacting these legislative constraints on state agency authority, state legislators essentially express general satisfaction with the way Congress and/or federal agencies have resolved, or may resolve,<sup>69</sup> political battles over the scope of environmental regulation. In addition, state legislatures express confidence that the process of developing federal environmental legislation or regulations has sufficiently addressed, and will continue to address, their constituents concerns such that they do not need to provide their constituents with an opportunity to revisit such issues at the state administrative level.<sup>70</sup>

### A. *Reasons for State Legislative Constraints*

Why might the members of an increasing number of state legislatures decide to constrain their state environmental agencies from imposing standards more stringent than federal environmental laws and regulations? The following sections explore several possible explanations.

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68. See *infra* Part III (discussing the extent to which ambiguities in statutory language create interpretive problems concerning the extent of the agency's authority).

69. Several state statutes implicitly or explicitly contemplate the possibility of an evolving federal standard. See, e.g., MO. REV. STAT. § 643.055.1 (1993) (referencing the "Clean Air Act, as amended"); N.M. STAT. ANN. § 74-4-4 (Michie 1993) (referencing the "Resource Conservation and Recovery Act of 1976, as amended"). Although some of these statutory constraints may be subject to state constitutional challenges because they delegate excessive authority or are unconstitutionally vague, such constitutional questions are beyond the scope of the present analysis. Instead, this Article focuses solely on interpretive issues that arise under these types of statutes, with the goal of providing guidance to legislatures that may be considering enacting such statutory constraints, and to agencies, regulated parties and courts, each of whom may have to assess the scope of these types of statutes.

70. If a statute contains a conditional, rather than an unconditional, constraint on state agency authority, the statute would, in all likelihood, not preclude concerned citizens from addressing interpretive issues at the state administrative level, but would constitute an additional hurdle for concerned citizens pursuing such issues through state agencies.



1. *Economic Concerns.*—The first possible explanation arises from the increasing demands on state coffers generally, and the perception that federal environmental legislation imposes “unfunded federal mandates” on the states.<sup>71</sup> Even as state legislatures accept fiscal responsibility for a regulatory program by implementing enabling legislation, they understandably may desire to preclude state environmental agencies from promulgating rules or regulations that place additional stress on state budgets.

Another possible explanation lies in the private sector compliance costs of increasingly complex environmental regulations.<sup>72</sup> State legislatures, again, understandably may decide to protect local industry from additional compliance costs by precluding state environmental agencies from promulgating rules or regulations that impose additional demands on the regulated community.<sup>73</sup> Given that state legislatures may believe that their state is competing with other states for industrial and commercial development, state legislatures also un-

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71. See William Claiborne, *Reining In Unfunded Mandates: Bill Would Require Congress to Estimate the Cost of Installing Laws*, WASH. POST, June 17, 1994, at A23 (“Unfunded mandates—the pass-along of complying with hundreds of federal laws and regulations adopted by Congress without providing funds to pay for them—have become an increasing concern for governors, mayors, and county officials faced with budget crises.”); *Unfunded Mandates: Cities, States Said to be Caught in Squeeze Between Wave of Regulations, No Fed Funds*, Daily Env. Rep. (BNA), Mar. 23, 1994. Notably, the 104th Congress responded to some of the states’ concerns by enacting unfunded mandates legislation earlier this year. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995).

72. See, e.g., *Air Pollution: Compliance With Clean Air Act Rules Costly to Small Businesses, Report Says*, Daily Env. Rep. (BNA), Nov. 9, 1992 (describing costs of compliance with underground storage tank regulations and Clean Air Act Amendments of 1990); Michael Silverstein, *Facing a Huge Environmental Debt*, CHI. TRIB., Nov. 25, 1989, at 13 (discussing overall costs of cleaning up the environment and complying with environmental regulations).

73. See *Missouri Hosp. Ass’n v. Air Conservation Comm’n*, 874 S.W.2d 380 (Mo. Ct. App. 1994). Reflecting on the policy choice the General Assembly made in enacting § 643.055.1 of the Missouri Statutes, the court stated:

[T]he General Assembly clearly recognized the burden imposed on the regulated community in attempting to comply with three separate levels of laws and regulations (federal, state and local), as well as the extreme difficulty of trying to comply with multiple bodies of regulations in given areas. It further understood that where there are two or more sets of standards and guidelines with which those affected by regulations must comply, the enormous compliance costs could devastate Missouri’s economy and lead to job losses for its citizens. The General Assembly therefore concluded that it was essential to the well being of the state’s economy and its workers that Missouri follow federal law and regulations (where they exist) in the area of air quality, for the dual purposes of assuring industry and the regulated community that they would only need to meet the requirements of a single regulatory scheme, as well as assuring the public that air quality would be protected by compliance with the federal Clean Air Act.

*Id.* at 397.

derstandably may seek a competitive advantage by minimizing the state agencies' ability to impose environmental regulations.<sup>74</sup>

A final possible explanation lies in the principle of externalities, that is, the shifting of some costs to other jurisdictions, generally by sending uncontrolled pollution across state lines. Again, state legislatures understandably may want to prevent the state environmental agency from requiring internalization of expensive and unpleasant externalities through more stringent regulations.<sup>75</sup>

The more powerfully organized lobbying presence of industry and trade groups, as compared to environmentalists, at the state legislative level, makes all the more plausible each of these rationales for state legislative constraints on the promulgation of state environmental regulations that exceed federal requirements.<sup>76</sup>

2. *Institutional Concerns.*—If a state legislature distrusts its state agencies,<sup>77</sup> or believes that the federal government's regulatory system

74. Commentators disagree about whether lax environmental regulations serve as an incentive that lures industry to a state or retains industry within a state. Compare Stewart, *supra* note 1, at 1212 ("Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards . . . for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.") and *Environmental Regulations Force Commerce Out of State, Business Roundtable Survey Finds*, 22 *Env't Rep.* (BNA) 1839 (Nov. 29, 1991) ("Excessive environmental regulation is one of the top reasons one of three businesses in California will relocate . . ."); with CHRISTOPHER J. DUERKSEN, ENVIRONMENTAL REGULATION OF INDUSTRIAL PLANT SITING: HOW TO MAKE IT WORK BETTER 58-71 (1983) (suggesting that environmental regulations, in comparison with other factors, have little effect on siting decisions) and HOWARD A. STAFFORD, PRINCIPLES OF INDUSTRIAL FACILITY LOCATION 76-83 (1979) (same). Nonetheless, the mere perception that nonuniformity in environmental regulation matters to industry may be enough to trigger a legislative reaction. See WILLIAM R. LOWRY, THE DIMENSIONS OF FEDERALISM: STATE GOVERNMENTS AND POLLUTION CONTROL POLICIES 13-14 (1992); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Authority is Shared by the United States, the States, and Their Citizens*, 54 *MD. L. REV.* 1552 (1995).

75. See LOWRY, *supra* note 74, at 14; Stewart, *supra* note 1, at 1215-16.

76. See Stewart, *supra* note 1, at 1213-14. Stewart posits that, at the state level [i]ndustrial firms, developers, unions and others with incentives to avoid environmental controls are typically well-organized economic units with a large stake in particular decisions. The countervailing interest in environmental quality is shared by individuals whose personal stake is small and who face formidable transaction costs in organizing for concerted action. These factors tend to produce more effective and informed representation before legislative and administrative decisionmakers of interests favoring economic development as opposed to those favoring environmental quality.

*Id.* at 1213 (citations omitted). See generally GRANT MCCONNELL, PRIVATE POWER & AMERICAN DEMOCRACY (1967) (discussing the power of private interests in influencing government policy).

77. See Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 *MO. L. REV.* 1157, 1159-61, 1184-85 (1992) (discussing generally growth in

goes too far,<sup>78</sup> a state legislature understandably might embrace the general grant and general constraint approach to state enabling legislation. Such an approach assures the state legislature that state environmental standards are coextensive with federal law, thus allowing the state to obtain state authorization to administer the regulatory regime<sup>79</sup> without risking overreaching by the state environmental agency. With the increasing complexity of federal environmental legislation,<sup>80</sup> state legislatures also might embrace a general grant and general constraint approach to state enabling legislation to avoid the resource demands of learning every nuance of federal environmental legislation and the burden of drafting enabling legislation specifically matching state standards to the detailed federal mandate.<sup>81</sup>

### *B. Policy Implications of State Legislative Constraints on State Agency Authority*

State agencies are creatures of statute whose authority comes from the state legislature. Therefore, there is nothing inherently wrong with a state legislature constraining the authority of a state envi-

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use of legislative veto as a control over administrative rule-making and discussing specifically dispute between the Missouri Department of Natural Resources and the Missouri General Assembly). For another example of the legislative veto, see *supra* note 67 and accompanying text, discussing 1994 Tenn. Pub. Acts Ch. 878 (S.B. 2040) (codified at TENN. CODE ANN. § 4-5-225 (1994) (authorizing the Tennessee Government Operations Committee to invalidate certain environmental rules)).

78. See Stewart, *supra* note 1, at 1219-22.

79. By obtaining state authorization for administration of federal environmental programs, the state obtains primary enforcement authority. See *supra* notes 9-10 and accompanying text.

80. See Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1742 (1991) (noting that "[t]o an extent unprecedented in prior environmental statutes, the pollution control programs of the 1990 Amendments include very detailed mandatory directives to EPA," and observing that the page proofs for the final conference report "were more than 700 pages long").

81. See Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process*, 39 PUB. CHOICE 33, 44-52 (1982) (noting that, by enacting vague legislation, legislatures not only avoid the time and trouble involved in making difficult decisions, but also shift some of the responsibility for the consequences of decisions); cf. LOWRY, *supra* note 74, at 12 (describing strong incentives that exist for national policy-makers to pass vague legislation and leave details to others). For example, as evidence of its desire to shift responsibility for the consequences of its decision to expand automobile inspection and maintenance programs in the St. Louis metropolitan area, the Missouri General Assembly recently enacted legislation requiring that each inspection station conspicuously post a sign on the premises, "which is at least eight feet high and sixteen feet wide" bearing the following legend: "This inspection is mandated by the United States Environmental Protection Agency under powers granted to it by your United States Senators and Representatives in Washington, D.C." 1994 Mo. Laws 590. The legislation further provides that "[t]he certificate or approval issued shall bear the legend: 'This cost is mandated by your United States Congress.'" *Id.*

ronmental agency. There also is nothing inherently wrong with a state legislature transferring to the federal government the responsibility for environmental policy-making. This is particularly true when the state legislature believes that Congress or EPA has gone far enough in setting national standards and fears the economic consequences of regulations more stringent than federal law.

One can question, however, the empirical validity of a state legislature's implicit presumption that the resolution of national political battles definitively addresses the desires of the state's citizens. First, environmental issues of concern to a state's citizens might not be of sufficient national significance to have entered the national debate.<sup>82</sup> Second, as noted above, certain constituencies at the state level—specifically, commercial and industrial entities that generally favor state legislation limiting the authority of state environmental agencies—may have a greater voice in the state legislature than those constituencies interested in additional state regulation.<sup>83</sup>

Even if a federal environmental statute or regulation initially satisfies citizens of a particular state, a state legislature's enactment of constraints on a state environmental agency's authority creates the potential for problems in the long term. At a minimum, such a constraint increases the burden citizens will face when seeking additional regulation administratively, as the agency will have to comply with the constraining statute before promulgating further, stricter regulations. When the constraint the state legislature enacts is unconditional, the legislature entirely precludes citizens from pursuing additional regulation in an administrative forum. Consequently, citizens interested in pursuing additional regulation must take their campaign either to the state legislature, which retains the authority to enact legislation imposing more stringent regulations than federal law requires, or to Congress or a federal administrative agency. Therefore, although state legislation does not completely foreclose the possibility of additional

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82. For instance, the Clean Air Act does not regulate charcoal kilns as a source category, even though charcoal kilns create significant pollution. This omission occurred largely because pollution problems associated with charcoal kilns exist primarily in Missouri, which is the leading producer of charcoal in the country. Conversation with Cindy Kemper, Director of Air Pollution Control Program, Missouri Department of Natural Resources (June 28, 1993).

83. See *supra* note 76. Professor Stewart suggests that because environmental groups are at a "comparative disadvantage" at the state level, they can "exert far more leverage by organizing into one or a few units at the national level." Stewart, *supra* note 1, at 1213-15. This might explain why some state governments believe the federal government's environmental mandates are sufficiently protective. See *supra* note 78 and accompanying text.

regulation, it does greatly decrease the impact of citizens' participation in environmental policy-making.

State legislative constraints on state environmental agencies' authority to promulgate regulations more stringent than federal law also implicate larger concerns. To the extent that state legislatures prevent state environmental agencies from promulgating regulations more stringent than federal law, such states will fail to fulfill their role as "laboratories" within our federal system.<sup>84</sup> Several states have relished their roles as laboratories, developing standards more stringent than federal environmental legislation requires.<sup>85</sup> Those state legislatures that have enacted constraints on the authority of state environmental agencies, however, have opted out of serving as "laboratories," or at least have chosen to experiment in areas other than those subject to the statutory constraint.<sup>86</sup>

Do these developments in the states tell us anything about the validity of the "Tragedy of the Commons" or "race to the bottom" rationale for environmental regulation at the federal level?<sup>87</sup> On the one hand, the existence of "laboratory" states, which are willing to enact regulations more stringent than federal law requires, may suggest that the "race to the bottom" is just a myth. On the other hand, the existence of states that make the federal minimum standards their own maximum may suggest that the "race to the bottom" is a legitimate concern. The existence of "laboratory" states, however, does not necessarily negate the possibility of a "race to the bottom" in the ab-

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84. Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

85. See LOWRY, *supra* note 74. Lowry discusses four instances of "state leadership," in which states have developed programs that exceed the federal minimum requirements. Four states Lowry identifies as leaders include Wisconsin (air pollution regulation), North Carolina (point source water pollution regulation), Iowa (nonpoint source water pollution regulation) and California (mobile source air pollution regulation). *Id.* at 27-120; see also Revesz, *supra* note 1, at 1228-29 (citing other examples of states or municipalities developing environmental regulations more stringent than federal law requires).

86. In many respects, the wave of state legislation imposing statutory constraints on state agency authority to promulgate regulations more stringent than federal law is merely another manifestation of the states' reluctance to implement the federal environmental agenda, a reluctance Professor Stewart highlighted in his seminal article in 1977. See Stewart, *supra* note 1.

87. Stewart refers to this phenomenon as a "Tragedy of the Commons" problem. Stewart, *supra* note 1, at 1211-12. Revesz refers to it as a "race to the bottom" problem. Revesz, *supra* note 1, at 1210-11.

sence of federal minimum standards.<sup>88</sup> Similarly, the existence of "federal minimum/state maximum" states does not necessarily demonstrate that the absence of federal minimum standards would trigger a "race to the bottom."<sup>89</sup> Nonetheless, the trend among state legislatures to embrace federal minimum standards as state maximum standards, viewed in the context of the states' historical failure to produce socially desirable environmental improvements through state legislation and regulation,<sup>90</sup> provides some evidence that the concern about a "race to the bottom" in the absence of federal minimum standards remains valid.<sup>91</sup>

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88. One would not expect that the states embracing federal minimum standards as their maximum standards to affect the experimentation occurring in "laboratory" states. These "laboratory" states presumably already understand the extent to which their standards differ from the federal minimum. Nonetheless, the existence of these "federal minimum/state maximum" states allows an inference that the federal government either has reached or has gone beyond what many states would view as the appropriate level of regulation in particular areas. Therefore, the absence of a federal minimum could foreseeably jeopardize the experimentation of "laboratory" states in the following manner. If certain "minimalist" states were to lower their environmental standards, then the difference between their regulatory regimes and those in "laboratory" states would be greater than under the current system. This greater difference likely would impose more pressure on "laboratory" states to refrain from additional regulation or to reduce their experimentation. See Revesz, *supra* note 1, at 1227-33 (suggesting that even though some states establish an equilibrium at a standard *more stringent* than federal law when federal law establishes a minimum standard, they also might establish an equilibrium at a *less stringent*, suboptimally lax standard in the absence of a federal minimum).

89. The existence of "federal minimum/state maximum" states allows more than one inference—that the federal government either (1) just has reached, or (2) has gone beyond—what many states would view as the appropriate level of regulation in particular areas. Therefore, the existence of "federal minimum/state maximum" states does not require the conclusion that without federal minimum standards some states would lower their environmental standards. See Revesz, *supra* note 1, at 1236-44 (reviewing three models from economic literature and concluding that "race-to-the-bottom arguments in the environmental area have been made for the last two decades with essentially no theoretical foundation" because state competition does not necessarily reduce social welfare).

90. See *supra* notes 1-3 and accompanying text.

91. The theoretical framework Revesz establishes for his assertion that the "race-to-the-bottom" rationale might be unsupportable suggests that "interstate competition is not inconsistent with the maximization of social welfare." Revesz acknowledges, however, that if states fail to act in an economically rational manner, interstate competition will lead to suboptimal results. Revesz, *supra* note 1, at 1242-43. Revesz suggests that this "outcome is due to an 'error' on the part of state regulators rather than to a structural failure of state autonomy in a federal system." *Id.* This argument, however, may be little more than a semantic distinction. One can argue just as easily that in the real world a state government's failure to act in an economically rational manner is a given, to be viewed as part of the "structural failure of state autonomy in a federal system," *id.*, given that state governments are comprised of decision-makers who are not perfectly rational and who must base decisions on imperfect information.

III. INTERPRETIVE PROBLEMS OF STATE LEGISLATIVE CONSTRAINTS ON THE AUTHORITY OF STATE ENVIRONMENTAL AGENCIES TO PROMULGATE STANDARDS MORE STRINGENT THAN FEDERAL ENVIRONMENTAL LAW

Through constraints on state agency authority, state legislatures delegate some responsibility for environmental policy-making to Congress, EPA, and other federal agencies. This practice raises a significant issue, with both policy and practical implications, concerning the scope of the delegation. When a state legislature prohibits a state agency from promulgating standards more stringent than federal law, to what extent is the state legislature limiting the authority of the state agency? To what extent is the state legislature agreeing with the resolution of environmental policy disputes at the national level?

For example, when Congress has decided to regulate the emission of certain pollutants from certain sources, and a state legislature authorizes a state agency to promulgate only regulations that are no more stringent than federal law, the state legislature may be saying one of three things:

- (1) It agrees with Congress's explicit choice to regulate the emission of certain pollutants from certain sources, such that the state agency lacks the authority to promulgate any regulation different from the federal regulations with respect to the emission of such pollutants from such sources. With respect to the emission of other pollutants from such sources, however, or with respect to other sources, the state agency retains the authority to promulgate regulations. Or,
- (2) It agrees with Congress's explicit or implicit choice to regulate only the emission of certain pollutants from certain sources, such that the state agency lacks authority to promulgate any regulation that differs from the federal regulation with respect to the emission either of such pollutants from such sources, or of other pollutants from such sources. With respect to other sources, however, the state agency retains the authority to promulgate regulations. Or,
- (3) It agrees with Congress's explicit or implicit choice to regulate only the emission of certain pollutants only from certain sources, such that the state agency lacks the authority to regulate any pollutants or any sources other than those Congress has regulated.

Thus, regardless of whether a state statute contains an unconditional constraint or a conditional constraint on a state environmental agency's authority, and regardless of the statute's subject matter, such statutory constraints generally present three problems of statutory in-

terpretation.<sup>92</sup> The first interpretive problem concerns whether these constraints limit an agency's authority to impose "additional regulations" on sources that federal environmental legislation regulates.<sup>93</sup> The second interpretive problem concerns how much these constraints limit an agency's authority to regulate "additional sources" that federal environmental legislation does not regulate.<sup>94</sup>

A third interpretive problem arises from the Clean Air Act's and Clean Water Act's requirements of compliance with both ambient standards and source-specific standards. The interpretive problem concerns how much state legislative constraints limit an agency's authority to impose pollutant-specific, source-specific standards more stringent than the Clean Air Act and Clean Water Act in order to comply with the general ambient standards imposed by the Clean Air Act and Clean Water Act.<sup>95</sup>

The following analysis highlights how a state legislature's use of simple language in framing a constraint on the authority of a state agency may cause each of these interpretive problems, because the simple language is irreconcilable with the inherent complexity of a given federal regulatory regime. Because this Part of the Article merely highlights these three interpretive issues, it makes no attempt to construe each statute discussed in the context of each state's approach to statutory interpretation. Rather, this Part adopts the premise that one of the fundamental rules of statutory construction is to look solely at the plain meaning of the language, in context, to determine whether any ambiguity exists that would invoke additional rules of statutory construction.<sup>96</sup> Therefore, this Part of the Article merely

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92. The interpretive issues arise whether the statute contains an unconditional or conditional constraint because, in either instance, the agency must determine whether the proposed rule falls within the scope of the statutory constraint. The impact of a statute containing an unconditional constraint differs from the impact of a statute containing a conditional constraint only because the former prohibits promulgation of any rule which falls within its mandate while the latter simply requires that an agency comply with a given procedure before promulgating a rule that falls within the statutory mandate. With that in mind, an unconditional constraint clearly favors the status quo more than a conditional constraint, because the existence of the condition gives the agency a means to regulate that the unconditional constraint completely forecloses.

93. See *infra* Part III.A.

94. See *infra* Part III.B.

95. See *supra* Part III.C.

96. See NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION §§ 45.02, 46.01 (5th ed. 1992) (discussing the problem of ambiguity and the plain meaning rule).



attempts to identify those statutes that appear facially ambiguous<sup>97</sup> or unambiguous.<sup>98</sup>

A. *Impact on Regulation of Pollutants Not Regulated Under Federal Law*

Assume that a state legislature passes a statute directing the state environmental agency to promulgate regulations concerning air pollution, provided that the state environmental agency may not promulgate any rules more stringent than federal law. Assume also that the state environmental agency proposes, for sources regulated under the Clean Air Act, regulations that include additional pollutants not covered by the Clean Air Act. Under these circumstances, would the state environmental agency be acting beyond its authority by attempting to impose a standard more stringent than federal law?

To answer this question, one must answer the following questions: When state legislation prohibits a state environmental agency from promulgating standards more stringent than federal law, what does the state legislature mean? Does it agree with the nature of the federal regulation of certain *sources*, such that with respect to those sources, the state environmental agency may promulgate only regulations coextensive with the federal environmental legislation? Or does the state legislature mean that it agrees with the federal regulation of certain *pollutants* from certain sources, such that the state environmental agency may not promulgate more stringent standards relating to those specific pollutants from those specific sources, but may promulgate standards for "additional pollutants" from those sources, which pollutants the federal environmental legislation omits?<sup>99</sup>

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97. Statutes have been classified as ambiguous to the extent that they are reasonably susceptible to two or more interpretations. Cf. SINGER, *supra* note 96, §§ 45.02, 46.01 ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."). The classifications in this part of the Article are based solely on the author's view of the ordinary meaning of the statutory language taken in context, as amplified by any judicial decisions or attorney general opinions that address issues relating to interpretation of the statute. As the following discussion highlights, the judicial decisions and attorneys general opinions frequently provide no greater clarity than the statutes themselves. See *infra* Part III.A.3 (discussing decisions by courts of appeals in Florida and Missouri and an attorney general's opinion from New Mexico).

98. Because all three interpretive issues arise under the Clean Air Act, this analysis focuses primarily on statutes relating to that Act. The analysis includes classification of virtually all of the other state statutes discussed in Part I, however, because many of the statutes, regardless of whether they relate to the regulation of air pollution, water pollution, or underground storage tanks, contain some ambiguous language creating one or more of these interpretive problems.

99. These two options presuppose that Congress and EPA have been silent on the question of whether they have decided to decline to regulate certain pollutants. Clearly, any

1. *Statutes That Fairly Clearly Limit the State Agency's Authority to Regulate Additional Pollutants from Regulated Sources.*—An Iowa statute concerning water quality contains a source-specific constraint that makes it clear that the state agency may not regulate additional pollutants from a source for which the EPA has promulgated “an effluent . . . or pretreatment standard pursuant to section 301, 306 or 307 of the federal Water Pollution Control Act.”<sup>100</sup>

North Dakota's statute similarly provides clear language prohibiting the state agency from regulating “additional pollutants,” absent a written finding following public comment and a hearing.<sup>101</sup> The statute's initial language generally prohibits adoption of rules “more stringent than corresponding federal regulations addressing the same circumstances.”<sup>102</sup> The statute adds, however, that “[t]he department may adopt rules more stringent than corresponding federal regulations or adopt rules where there are no corresponding federal regulations,” only after making a written finding following public comment and a hearing.<sup>103</sup> Because there would be no corresponding federal regulations for a state regulation addressing additional pollutants, the statute clearly precludes regulation of additional pollutants without a written finding following public comment and a hearing.

Other states also have statutes designed to constrain state agency authority that contain language fairly clearly indicating that the state agency lacks authority to regulate additional pollutants. For example,

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state regulation controlling a pollutant that Congress or EPA specifically has refrained from regulating would be more stringent than federal law. In this context, *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 62 (1994), is instructive. *Atlantic States Legal Foundation* commenced a citizens' suit against *Eastman Kodak* claiming that the company was violating the Clean Water Act “by discharging large quantities of pollutants not listed in its SPDES [State Pollutant Discharge Elimination System] permit.” *Id.* at 355. *Atlantic States* argued that *Kodak's* “permit . . . and section 301 of the CWA, 42 U.S.C. § 1311, prohibit absolutely the discharge of any pollutant not specifically authorized under *Kodak's* SPDES permit.” *Id.* at 356. The Second Circuit rejected this argument, holding that the Clean Water Act's regulatory scheme is directed toward identifying and limiting “the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements.” *Id.* at 357. “[P]olluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants.” *Id.* Because the *Atlantic States* court held that the Clean Water Act allows the discharge of pollutants for which a permit contains no limitation, the decision suggests that any state regulation resulting in permit limitations on pollutants for which the Clean Water Act requires no permit limitation inherently would be more stringent than the Clean Water Act.

100. IOWA CODE ANN., § 455B.173.2 (West Supp. 1994).

101. N.D. CENT. CODE § 23-10-04.1 (1993).

102. *Id.* § 23-01-04.1.1.

103. *Id.* § 23-01-04.1.2.

Pennsylvania's statute "incorporate[s] by reference into the department's permitting program" the "regulations establishing performance or emission standards promulgated under section 112 of the Clean Air Act."<sup>104</sup> The statute further prohibits the promulgation of "a more stringent performance or emission standard for hazardous air pollutant emissions from existing sources" without specific findings that more stringent standards are necessary.<sup>105</sup> This language fairly clearly prohibits the setting of standards for additional pollutants from existing sources absent the required finding of necessity. Rhode Island's statute, by providing that regulations relating to the "specific control technology and emission characteristics of fuels shall not be more stringent than the mandatory standards established by federal law or regulation," similarly appears to constrain the state agency's authority to promulgate regulation of "additional pollutants" from fuels, absent a finding that such regulations are necessary to assure compliance with the ambient standards. Such an additional finding would be necessary because such regulations would go beyond the "mandatory standards established by federal law or regulation."<sup>106</sup>

The Kentucky statute likewise appears to prohibit state agencies from regulating additional pollutants. The statute, which gives state agencies authority to promulgate regulations when "required by federal law," further limits the state agencies' authority in such circumstances by providing that any resulting regulations "shall be no more stringent than the federal law or regulations."<sup>107</sup> Because in this context the state agencies have authority to promulgate regulations only to the extent that federal law requires, the statute appears to constrain the state agencies from regulating beyond federal law, as such regulations could not be "required by federal law."<sup>108</sup> Kentucky has a spe-

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104. 35 PA. CONS. STAT. ANN. § 4006.6(a) (1993).

105. *Id.* § 4006.6(a), (d)(1).

106. R.I. GEN. LAWS § 23-23-5(12) (Supp. 1994).

107. KY. REV. STAT. ANN. § 13A.120(1) (Baldwin Supp. 1993).

108. *Id.* The only decision interpreting § 13A.120(1) is *Franklin v. Natural Resources and Env'tl. Protection Cabinet*, 799 S.W.2d 1 (Ky. 1990), in which four mining companies contested a regulation of the Natural Resources and Environmental Protection Cabinet (NREPC). *Id.* at 2. The regulation provided for an informal hearing following a "Notice of Non-Compliance and Order for Remedial Measures." *Id.* If the informal hearing resulted in fines or penalties, the sole remedy was a request for a formal hearing within 30 days, which "must be accompanied by a payment into escrow of all sums assessed for the non-compliance." *Id.* The companies challenged the regulation on the grounds that, *inter alia*, it violated § 13A.120(1). *Id.* at 3.

In addressing the challenge, the court looked to the hearing procedure provided by the Federal Surface Mining Control and Reclamation Act of 1977. That Act states that an accused strip miner "is provided a formal hearing, with a full record, rights of examination, cross-examination, subpoenas, etc.," from which "there is an appeal to an Administrative

cific statute addressing one aspect of air pollution that similarly precludes regulation of additional pollutants.<sup>109</sup> This statute directs the cabinet to “preserve existing clean air resources while ensuring economic growth by issuing regulations, which shall be no more stringent than federal requirements.”<sup>110</sup> Because federal requirements relating to the prevention of significant deterioration, a discrete program within the Clean Air Act, address only a handful of pollutants, section 224.10-100(26) appears to impose a constraint on agency authority to regulate additional pollutants, a specific constraint which is consistent with the general constraint on administrative agency authority in section 13A.120(1).

With respect to the regulation of underground storage tanks, Arkansas<sup>111</sup> and New Mexico<sup>112</sup> have statutes that appear to limit their respective state agencies from imposing additional regulations on federally regulated sources. Arkansas’s statute provides that any regulations of underground storage tanks, as much as possible, shall “be identical to and no more stringent than the federal regulations adopted by the United States Environmental Protection Agency.”<sup>113</sup> New Mexico’s statute likewise limits the state agency’s authority to promulgate regulations “concerning underground storage tanks . . . that are equivalent to and no more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation Recovery Act of 1976, as amended.”<sup>114</sup> Because these statutes require that state regulations be “identical to” or “equivalent to” federal regulations, they suggest that the state agencies lack authority to promulgate “additional regulations” related to federally regulated sources, given that such “additional regulations” would not be “identical to” or “equivalent to” the federal regulations.

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Law Judge and ultimately to the federal court system.” *Id.* In finding that the regulation violated § 13A.120(1), the court specifically noted that “[b]y not providing a similar proceeding, the Kentucky regulations are more stringent than the federal law and regulations.” *Id.* Although the case focused on a regulation that provided less complete procedural protection than the federal statute, its holding supports the conclusion that under § 13A.120(1), the Cabinet lacks the authority to impose regulations regarding additional pollutants for which the federal law requires no regulation.

109. KY. REV. STAT. ANN. § 224.10-100(26) (Baldwin Supp. 1994).

110. *Id.*

111. ARK. CODE ANN. § 8-7-803 (Michie 1993).

112. N.M. STAT. ANN. § 74-4-4C (Michie 1993).

113. ARK. CODE ANN. § 8-7-803.

114. N.M. STAT. ANN. § 74-4-4C.

2. *Statutes That Clearly Allow an Agency to Regulate Additional Pollutants from Regulated Sources.*—Oklahoma appears to have the only statute that clearly allows regulation of “additional pollutants,” at least in the context of hazardous air pollutants. The statute initially provides that “to assure that [the state] program shall be consistent with, and not more stringent than, federal requirements,” any rule “regarding hazardous air pollutants and regulated substances shall only be [promulgated] by adoption by reference of final federal rules,” unless there is a determination that “more stringent standards are necessary to protect the public health.”<sup>115</sup> The statute further provides specific authority, however, for establishing a program “for the control of the emission of those toxic air contaminants not otherwise regulated by a final emission standard under section 112(d) of the Federal Clean Air Act.”<sup>116</sup>

3. *Statutes Containing Ambiguous Language Regarding the Extent of the Agency's Authority to Regulate Additional Pollutants from Regulated Sources.*—Most statutory constraints on state agency authority lack any clear statement of the extent of the state agency's authority to regulate additional pollutants. Indeed, the extent to which a statutory constraint precludes regulation of additional pollutants frequently remains as ambiguous after judicial interpretation as it was before.

a. *Florida.*—For example, section 403.804 of the Florida Statutes requires performance of a cost-benefit analysis of “any proposed standard that would be stricter or more stringent than one which has been set by federal agencies pursuant to federal law or regulation.”<sup>117</sup> The statute, however, contains no language stating whether regulation of “additional pollutants” from a federally regulated source would trigger the obligation to perform the cost-benefit analysis.<sup>118</sup>

In *Florida Electric Power Coordinating Group, Inc. v. Askew*,<sup>119</sup> however, the Florida District Court of Appeal was asked to interpret section 403.804. The electric power companies of Florida asked the court whether (1) “a state standard approved by the federal Environmental Protection Agency (EPA) can be more stringent than a federal standard,” and (2) “a state standard which limits the same pollutant

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115. OKLA. STAT. ANN. tit. 27A, § 2-5-114 (West Supp. 1995).

116. *Id.*

117. FLA. STAT. ANN. § 403.804 (West 1993).

118. *Id.*

119. 366 So. 2d 1186 (Fla. Dist. Ct. App. 1978).

from the same source as a federal standard, but by a different method, can be compared to determine which is more stringent.”<sup>120</sup>

The court noted that “for a Florida standard to be ‘a stricter or more stringent standard than one which has been set by federal agencies pursuant to federal law or regulations,’ *the federal standard must be in counterpoise to the state standard.*”<sup>121</sup> Applying this rule to the first issue the electric power companies had raised, the court discussed how ambient water quality standards, which the state adopts and EPA approves, compare with technology-based effluent limitations that the EPA alone sets.<sup>122</sup> Acknowledging that a discharger “may be required to achieve a greater reduction in effluent than the federal [technology-based effluent limitations] require if the prevailing water quality standards so require,” the court nonetheless concluded that the state water quality standards had no federal counterpart against which to be compared to determine whether the Florida standards were stricter.<sup>123</sup> By comparison, the court noted that under the Clean Air Act, EPA has set national primary and secondary ambient air quality standards that provide a basis for comparison with state ambient air quality standards.<sup>124</sup>

The court then applied this rule to the second issue the electric power companies had raised, namely the extent to which standards containing different methods to address the same pollutant from the same source are comparable to determine which is stricter.<sup>125</sup> Using thermal pollution as an example, the court noted that EPA requires installation of a specific type of water cooling system at new power plants, whereas the state regulation simply prohibits the discharge of “heated water having a temperature at the point of discharge more than five degrees Fahrenheit higher than the natural temperature of [a receiving] stream.”<sup>126</sup> The court concluded that when state and federal standards regulate a pollutant by different methods, the court cannot find as a matter of law that Florida standards are stricter than federal standards.<sup>127</sup>

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120. *Id.* at 1188.

121. *Id.* (emphasis added).

122. *Id.*

123. *Id.*

124. *Id.* The court noted that the Commission did direct the Department to review certain ambient air quality standards, some of which were indeed more stringent than their federal counterparts, requiring a study of the costs and benefits of such standards. *Id.*

125. *Id.* at 1188-89.

126. *Id.*

127. *Id.* at 1189.

The court's conclusion that the statute applies only when there is "a federal standard in counterpoise to the state standard,"<sup>128</sup> however, merely begs the question. If a federal agency has set a standard for a source, but has not set a standard with respect to the pollutant in question, is the federal standard "in counterpoise to the state standard"? To ascertain whether the statute applies, the court would have to determine the breadth of the definition of a "standard." Does "standard" denote a set of regulations relating to emissions from a source generally, or to each individual pollutant-specific regulation for each such source? The definition of "standard" in section 403.803(13) of the Florida Statutes provides no answer.<sup>129</sup> Because the language of both section 403.804 and the *Florida Electric Power* decision are vague, neither helps resolve this issue.<sup>130</sup>

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128. *Id.* at 1188.

129. FLA. STAT. ANN. § 403.803(13) (West Supp. 1995). Section 403.803(13) states: "'Standard' means any rule of the Department of Environmental Protection relating to air and water quality, noise, solid-waste management, and electric and magnetic fields associated with electrical transmission and distribution lines and substation facilities." *Id.*

130. South Dakota's statute differs from Florida's in that it provides that the state agency may not promulgate rules "more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue." S.D. CODIFIED LAWS ANN. § 1-40-4.1 (1992). The South Dakota statute, however, presents an interpretive problem similar to the "counterpoise" problem in the Florida statute. The interpretive problem arises because it is unclear whether the reference to an "essentially similar subject or issue," § 1-40-4.1, concerns a regulation of a specific source or the regulation of a specific pollutant.

Oklahoma's recently enacted statute, which is a cross between the Florida and South Dakota language in that it requires a determination of economic impact with respect to "any rule more stringent than corresponding federal requirements," similarly presents the same problem as Florida's statute: Does the reference to "corresponding federal requirements" focus on regulation of a specific source or regulation of a specific pollutant. Notably, however, because the statute does not apply when "such stringency is specifically authorized by state statute," it would appear that no economic impact analysis would be required with respect to a program addressing toxic air contaminants as discussed *supra* at note 117 and accompanying text.

The Utah statutes, likewise, contain ambiguous language that presents a problem similar to the Florida, South Dakota, and Oklahoma statutes. The Utah statute prohibits the state agency from promulgating rules "more stringent than corresponding federal regulations which address the same circumstances," when the state agencies are promulgating rules "for the purpose of the state administering a program under" one of the federal environmental statutes. UTAH CODE ANN. § 19-2-106(1), (2) (Supp. 1994) (concerning air pollution); *id.* § 19-4-105(1), (2) (concerning safe drinking water); *id.* § 19-5-105(1), (2) (concerning water pollution); *id.* § 19-6-106(1), (2) (concerning state administration of RCRA, CERCLA, and the Emergency Planning and Community Right to Know Act); *id.* § 40-10-6.5 (concerning surface coal mining and reclamation). The question arises whether the reference to "corresponding federal regulations which address the same circumstances" concerns a regulation of a specific source or the regulation of a specific pollutant. The question also arises whether the language "for the purpose of the state administering a program under" one of the federal statutes implies that the state agency retains authority to regulate additional pollutants not covered by a federal statute, because regulation of such pollutants would not be "for the purpose of the state administering" the

b. *Missouri*.—The Missouri statutes<sup>131</sup> contain no clear language indicating how much they limit the Air Conservation Commission's (Air Commission) authority to regulate additional pollutants. Section 643.050 of the Missouri Statutes gives the Air Commission broad powers to regulate air pollution "consistent with the general intent and purposes of sections 643.010 to 643.190 . . . and Titles V and VI of the federal Clean Air Act, as amended."<sup>132</sup> Section 643.055.1 also authorizes the Air Commission "to promulgate rules and regulations . . . to insure that the state of Missouri is in compliance with the provisions of the federal Clean Air Act," but does not allow the Air Commission to promulgate any standards or guidelines "stricter than those required under the provisions of the federal Clean Air Act, as amended."<sup>133</sup>

On the one hand, the broad delegation of authority in section 643.050.1 suggests that the Air Commission has authority to regulate additional pollutants. On the other hand, the regulation of pollutants not regulated in the Clean Air Act arguably cannot be "required under the provisions of the federal Clean Air Act, as amended";<sup>134</sup> therefore, section 643.055.1 appears to limit the Air Commission's regulatory authority to those pollutants regulated in the Clean Air Act. Does the limitation in section 643.055.1 extend to regulations promulgated under section 643.050.1 that are not necessary "to insure that the state of Missouri is in compliance" with the Clean Air Act?

The Missouri Court of Appeals addressed these questions in *Missouri Hospital Ass'n v. Air Conservation Commission*.<sup>135</sup> In that case, the Missouri Hospital Association and Associated Industries of Missouri (AIM) [hereinafter Plaintiffs] sought to enjoin the Air Commission and the Missouri Department of Natural Resources [hereinafter State] from enforcing regulations affecting incinerators for burning

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federal statute. The additional language in the Utah statutes makes them no less ambiguous than the Florida, South Dakota, and Oklahoma statutes.

In the context of water pollution, Colorado's statute also presents a problem similar to the "counterpoise" problem evident in the *Florida Electric Power* court's interpretation of the Florida statute. Colorado's statute provides that the state agency "may adopt rules more stringent than corresponding enforceable federal requirements" only if there is a finding, "based on sound scientific or technical evidence in the record" that more stringent rules "are necessary to protect the public health." COLO. REV. STAT. ANN. § 25-8-202(8) (West 1990).

131. MO. ANN. STAT. § 643.050.1(1) (Vernon Supp. 1994).

132. *Id.*

133. *Id.* § 643.055.1. As mentioned *supra* note 42 and accompanying text, however, the restrictions in § 643.055.1 do not apply when stricter regulations are needed to obtain EPA approval of the State Implementation Plan.

134. *Id.*

135. 874 S.W.2d 380 (Mo. Ct. App. 1994).



medical waste, solid waste, industrial waste, and sewage sludge.<sup>136</sup> The Plaintiffs claimed that the Air Commission exceeded its authority in promulgating the regulations because the regulations were more stringent than and took effect sooner than federal law required, contrary to the dictates of section 643.055 of the Missouri Statutes.<sup>137</sup> The Circuit Court for Cole County granted the Plaintiffs' motion for summary judgment, holding that in promulgating the challenged rules the Air Commission exceeded section 643.055's limitation on the Air Commission's authority.

The State appealed,<sup>138</sup> arguing that section 643.055.1 constituted an independent grant of authority to the Air Commission, and that this grant was intended to supplement the general enabling language in section 643.050.1, in order to assure that the Air Commission had authority "to promulgate rules . . . to ensure compliance with the federal Clean Air Act."<sup>139</sup> Accordingly, the State contended that the limi-

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136. *Id.* at 385. The Association challenged the medical waste and solid waste incinerator rules, Mo. CODE REGS. tit. 10, § 10-6.160 (1991), while AIM challenged the industrial waste and sewage sludge incinerator rules, *id.* § 10-6.190 (1991). First Amended Petition for Declaratory and Injunctive Relief, Missouri Hosp. Ass'n v. Air Conservation Comm'n (Cole County Cir. Ct.) (No. CV 191-1098CC) [hereinafter Plaintiff's Petition]. Both rules regulated incinerator design, operational controls, emissions limitations for specific air pollutants, operator training, performance testing methods, exemptions, and compliance schedules. Both rules also provided for compliance schedules for existing incinerators and require new incinerators to comply with the regulations upon start-up. Mo. CODE REGS. tit. 10, §§ 10-6.160, -6.190.

137. Plaintiff's Petition at 3-5. The plaintiffs also asserted that the rules were void because the Air Commission had not promulgated the rules in accordance with §§ 536.200 and 536.205 of the Missouri Statutes. *Id.* Sections 536.200 and 536.205 provide that when a Missouri agency proposes a rule that will require or cause an expenditure of public funds for any agency or political subdivision, the agency must file a fiscal note with the Secretary of State. The note must be published in the Missouri Register contemporaneously with and adjacent to the notice of proposed rule-making, and must estimate the compliance cost for each affected agency or each affected political subdivision. Mo. ANN. STAT. §§ 536.200, .205 (Vernon 1988 & Supp. 1994). Although both the circuit court and the court of appeals agreed with the plaintiffs on this point, *Missouri Hosp. Ass'n*, 874 S.W.2d at 385-89, the court of appeals addressed the interpretation of § 643.055, "[b]ecause of its importance to the public, the State and the regulated community." *Id.* at 392.

138. *Id.* at 385.

139. *Id.* at 394. Section 643.050.1 provides that,

[i]n addition to any other powers vested in it by law, the Air Commission shall have the following powers: (1) to adopt, promulgate, amend, and repeal rules and regulations consistent with the general intent and purposes of sections 643.010 to 643.190, chapter 536 RSMo, and Titles V and VI of the federal Clean Air Act, as amended, 42 U.S.C. § 7661 et seq., including but not limited to: (a) regulation of use of equipment known to be a source of air contamination; (b) establishment of maximum quantities of air contaminants that may be emitted from any air contaminant source; and (c) regulations necessary to enforce provisions of Title VI of the Clean Air Act, as amended, 42 U.S.C. § 7671, et seq., regarding any Class I or Class II substances as defined therein.

tation on the Air Commission's authority in the second sentence of section 643.055.1 applied only "to rules made pursuant to the expanded power to make rules."<sup>140</sup>

The court of appeals began its analysis by comparing the language of section 643.050.1 with the language of 643.055.1 and setting out the operative standards for statutory construction.<sup>141</sup> The court first noted that it should construe statutes relating to the same subject as though they constituted one act, with any conflict between a general statute and a more specific one on the same subject to be resolved in favor of the more specific statute, which is read to qualify the more general statute.<sup>142</sup> Applying these principles of statutory construction, the court rejected the State's argument that the more specific language in section 643.055.1 supplemented the general enabling language of section 643.050.1.<sup>143</sup> The court found that because section 643.050.1 gave the Commission all the rule-making authority necessary to ensure Missouri's compliance with the Clean Air Act, section 643.055.1 was not a grant of additional authority.<sup>144</sup> Instead, the court viewed section 643.050 as a direction to the Air Commission to ensure Missouri's compliance with the Clean Air Act without adopting rules stricter than that Act required.<sup>145</sup>

Having concluded that section 643.055.1 generally limited the Air Commission's authority, the court then considered whether the challenged rules exceeded the Air Commission's authority— whether the challenged regulations were stricter than federal law required, or took effect earlier than federal law required.<sup>146</sup> The court interpreted the limitation in section 643.055.1 to operate as follows: "[I]f Congress has spoken on a particular issue in the federal Clean Air Act, the Com-

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MO. ANN. STAT. § 643.050.1 (Vernon Supp. 1994).

The first sentence of § 643.055.1 provides the Air Commission with the authority "to establish standards and guidelines to insure that the state of Missouri is in compliance with the provisions of the federal 'Clean Air Act,' as amended." *Id.* § 643.055.1.

140. *Missouri Hosp. Ass'n*, 874 S.W.2d at 396. The second sentence of § 643.055.1 of the Missouri Statutes prohibits the Commission from promulgating any standards or guidelines "stricter than those required under the provisions of the federal Clean Air Act, as amended" and also prohibits the Commission from enforcing any such regulations "prior to the time required by the federal Clean Air Act, as amended." MO. ANN. STAT. § 643.055.1 (Vernon Supp. 1994).

141. *Missouri Hosp. Ass'n*, 874 S.W.2d at 392-94.

142. *Id.* at 394.

143. *Id.*

144. *Id.* at 395.

145. *Id.* at 396. The court noted that "the General Assembly has chosen to allow federal law to preempt the Commission's rulemaking authority as to areas covered by the Clean Air Act." *Id.*

146. *Id.*

mission is prohibited from adopting rules or regulations on that issue that are either stricter than federal law or enforceable sooner."<sup>147</sup> The court noted that in section 129 of the Clean Air Act Amendments of 1990,<sup>148</sup> Congress "required the EPA to promulgate standards for certain classes and sizes" of municipal and infectious waste incinerators by specific deadlines.<sup>149</sup> Based on this directive, the court concluded that the challenged rules violated section 643.055.1 in two respects:

[First, because] Congress has directed EPA to adopt rules establishing standards for such units, and further specified dates as to when there must be compliance with such rules . . . any rule adopted by the [Air] Commission at this time will be stricter than federal requirements because no federal standards currently exist. Furthermore, the compliance dates established by the [Air] Commission in [the challenged rules] are, in some instances, earlier than those required by Congress to be used by EPA in its rules and, therefore, would require compliance sooner than mandated by federal law.<sup>150</sup>

Accordingly, the court struck down the challenged rules because the Air Commission acted outside its authority under section 643.055.1 in promulgating them.<sup>151</sup>

147. *Id.*

148. Pub. L. No. 101-549, § 129, 104 Stat. 2399, 2578 (1990).

149. *Missouri Hosp. Ass'n*, 874 S.W.2d at 396-97 n.24. The court noted that the 1990 Amendments to the Clean Air Act directed EPA "to establish federal standards by November 15, 1992 for incinerators burning hospital, medical or infectious waste and municipal waste incinerators with a capacity less than or equal to 250 tons per day." *Id.* The court further noted, however, that EPA

failed to meet that deadline and has yet to promulgate rules for such incinerating units. Indeed, EPA has not even announced rule proposal and promulgation dates for large and small municipal waste incinerators (Municipal Waste Combustion, 58 Fed. Reg. 25,060 (1993)), and now projects rule proposal for infectious, hospital and medical waste incinerators in March, 1994 with final action in August, 1995 (Medical Waste Incinerators, 58 Fed. Reg. 25,059 (1993)).

*Id.* The court also noted that "[t]he 1990 Amendments did not require standards to be proposed for units combusting 'commercial or industrial waste' until November 15, 1993, with promulgation required by November 15, 1994. *Id.*

One of the main reasons that the state wanted to enforce the proposed regulations was to fill the gap created by EPA's failure to promulgate regulations in a timely manner. Brief of Appellants Missouri Air Conservation Commission and Missouri Department of Natural Resources, *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380 (Mo. Ct. App. 1994) (No. WD 47706).

150. *Missouri Hosp. Ass'n*, 874 S.W.2d at 396-97.

151. *Id.* at 397.

The court rejected the State's argument that this interpretation of section 643.055.1 would nullify "all the [Air] Commission's rules which are not duplicative of federal standards."<sup>152</sup> The court stated, in dicta, "[t]he [Air] Commission continues to have rulemaking authority to regulate Missouri air quality in all ways, and in all areas, not covered by the federal Clean Air Act."<sup>153</sup> The court noted that although the General Assembly had "decided to limit the [Air] Commission's authority by permitting federal law to preempt on subjects where Congress has spoken,"<sup>154</sup> the General Assembly still retained the authority to regulate air quality in the state more stringently than federal law requires.<sup>155</sup>

The court's opinion, unfortunately, provides little concrete guidance and presents a problem similar to the "counterpoise" problem in the Florida court's interpretation of the Florida statute.<sup>156</sup> Whether section 643.055.1 constrains the Air Commission's authority to regulate "additional pollutants" depends on the court's intention in holding that the Air Commission has no authority when Congress "has spoken on a particular issue."<sup>157</sup> Did the court mean that when Congress has decided to regulate a source, the Air Commission no longer has authority to regulate that source any differently? Alternatively, did the court mean that to the extent Congress has regulated specific pollutants from a source, the Air Commission may not regulate differently with respect to those particular pollutants, but may regulate "additional pollutants" that Congress did not?<sup>158</sup>

In addition, what did the court mean when it said that the Air Commission "continues to have rulemaking authority . . . in all ways,

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152. *Id.* The State's argument implicitly presumed that, under the court's decision, the Air Commission would have lacked the authority under § 643.050.1 to regulate pollutants or sources the Clean Air Act did not cover because such regulations would violate § 643.055.1's dictate that regulations not be "stricter than required under the provisions of the federal Clean Air Act, as amended." *Id.*

153. *Id.* Although the court's statement implies that the word "required" does not have the restrictive meaning the State implicitly subscribed to it, the court arguably violated one of the canons of statutory interpretation by not offering an interpretation of the statute that gives the word "required" any meaning. See, e.g., SINGER, *supra* note 96, § 46.06 (stating that statutes should be interpreted to give each word meaning and effect).

154. *Missouri Hosp. Ass'n*, 874 S.W.2d at 397.

155. *Id.*

156. See *supra* notes 120-130 and accompanying text.

157. *Missouri Hosp. Ass'n*, 874 S.W.2d at 396.

158. As noted *supra* at note 67 and accompanying text, Tennessee recently enacted legislation that raises this same issue by authorizing the Government Operations Committee to invalidate environmental requirements "on municipalities that are more stringent than federal statutes or rules on the same subject." 1994 Tenn. Pub. Acts Ch. 878 (S.B. 2040) (codified at TENN. CODE ANN. § 4-5-225 (1994)).

and in all areas, not covered by the federal Clean Air Act"?<sup>159</sup> Although the court's opinion is not particularly instructive, the court's focus on the need to protect the regulated community from multiple sets of regulations<sup>160</sup> suggests that it would interpret the Missouri statute restrictively, such that when Congress has regulated a source in any way, it has "spoken on a particular issue,"<sup>161</sup> thereby foreclosing the Air Commission from regulating emissions of additional pollutants from such a source.

*c. New Mexico.*—Although section 74-2-5 of the New Mexico statute contains more specific language than either the Florida or the Missouri statutes, it likewise presents a variation of the Florida "counterpoise" problem<sup>162</sup> or the Missouri "spoken on a particular issue" problem.<sup>163</sup> Section 74-2-5 prohibits state regulations more stringent than "required by federal standards of performance," with respect to regulations that:

- (1) protect visibility in mandatory class 1 areas;
- (2) prevent significant deterioration of air quality;
- (3) achieve national ambient air quality standards in nonattainment areas;
- (4) prescribe standards of performance for emission sources;
- (5) prescribe emission standards for hazardous air pollutants; and
- (6) concern permits for the construction or modification of any air emission source.<sup>164</sup>

One could read the language of section 74-2-5 as suggesting that once the federal government has established a "standard of performance" for any source, the New Mexico Air Quality Control Board (NMAQCB) may promulgate only a coextensive "standard of performance" that addresses only the pollutants covered by the federal standard and imposes limitations the same as the federal limitations.<sup>165</sup>

A 1987 opinion by the New Mexico Attorney General, however, suggests that things may not be so clear. According to the Attorney General, for those areas that the New Mexico Air Quality Control Act

159. *Missouri Hosp. Ass'n*, 874 S.W.2d at 396.

160. *Id.* See *supra* note 73 for the court's interpretation of the Missouri General Assembly's intent in enacting § 643.055.1.

161. *Missouri Hosp. Ass'n*, 874 S.W.2d at 396.

162. See *supra* notes 120-130 and accompanying text.

163. See *supra* notes 131-161 and accompanying text.

164. N.M. STAT. ANN. § 74-2-5 (Michie 1993).

165. *Id.* § 74-2-5C(3).

does not preclude, the NMAQCB may "promulgate standards and regulations that are more stringent than the federal standards and regulations and can promulgate standards and regulations for which there is no equivalent federal standard or regulation."<sup>166</sup> The language of the Attorney General's opinion raises a problem similar to the "counterpoise"<sup>167</sup> and "spoken on a particular issue"<sup>168</sup> problems discussed above. When referring to an "equivalent federal standard or regulation," did the Attorney General mean a set of regulations relating to emissions from a source generally, or to each individual pollutant-specific regulation established for such a source? In addition, what did the Attorney General mean when referring to areas "not specifically precluded"<sup>169</sup> in the New Mexico Air Quality Control Act? In contrast with the *Missouri Hospital Ass'n* opinion,<sup>170</sup> which contained some language allowing an inference that the Air Commission lacked authority to regulate additional pollutants, the language in the New Mexico Attorney General's opinion suggests that the statute does not limit the NMAQCB's authority to regulate additional pollutants. By citing several examples of allegedly valid state regulations relating to additional pollutants, including "standards for hydrogen sulfide, heavy metals, and total hydrocarbons for which no federal standards exist," the opinion implies that the statute does not specifically preclude the NMAQCB's regulation of such additional pollutants.<sup>171</sup>

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166. 87 Op. N.M. Att'y Gen. No. 11, at 3 (1987). After the legislature amended § 74-2-5 to provide specifically that the Board should adopt regulations that are no more stringent than, but at least as stringent as, the federal requirements, the Attorney General was asked specifically to opine on the extent to which New Mexico's Air Quality Control Act was more stringent than the federal Clean Air Act.

167. See *supra* notes 120-130 and accompanying text (discussing the interpretive problem in Florida Elec. Power Coordinating Group, Inc. v. Askew, 366 So. 2d 1186 (Fla. Dist. Ct. App. 1978)).

168. See *supra* notes 131-161 and accompanying text (discussing the interpretive problem in Missouri Hosp. Ass'n v. Air Conservation Comm'n, 874 S.W.2d 380 (Mo. Ct. App. 1994)).

169. 87 Op. N.M. Att'y Gen. at 3.

170. 874 S.W.2d 380 (Mo. Ct. App. 1994); see *supra* notes 136-153 and accompanying text.

171. *Missouri Hosp. Ass'n*, 874 S.W.2d at 380. Much like the Missouri Court of Appeals construction of the Missouri statute in *Missouri Hospital Ass'n*, the New Mexico Attorney General's opinion failed to give meaning to the word "required" in § 74-2-5. See *supra* note 153.

Colorado, Ohio, and Arkansas all have statutes containing language that presents problems similar to those in Missouri and New Mexico. Section 25-7-114.2 of Colorado's air pollution statute constrains the state agency from imposing regulations regarding indirect air pollution sources that are "more stringent than those required for compliance with the federal act and final rules and regulations adopted pursuant thereto." COLO. REV. STAT. ANN. § 25-7-114.2 (West Supp. 1994). Ohio's recent legislation authorizes the adoption of rules provided that they "are consistent with, and no more stringent than, the re-

*d. West Virginia.*—The recently enacted West Virginia statutes present the same type of “counterpoise” problem. Section 22-1-3a gives the Director of the Division of Environmental Protection (DEP) the authority to promulgate rules with “environmental provisions which are more stringent than the counterpart federal rule or program” provided that the director sets forth the specific reasons.<sup>172</sup> The statute further provides, however, that “[i]n the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than a federal rule unless the absence of a federal rule is the result of a specific federal exemption.”<sup>173</sup> Does the statute’s reference to a “counterpart federal rule” mean any rule applicable to a source or any rule applicable to a specific pollutant from such source? Section 22-5-4 presents similar ambiguities as it provides that no rule or program related to air pollution “shall be any more stringent than any federal rule or program except to the limited extent that the director [of the DEP] first makes a specific written finding for any such departure.”<sup>174</sup>

*e. Underground Storage Tanks.*—Several state statutes relating to underground storage tanks similarly fail to indicate clearly whether the state environmental agency lacks the authority to impose additional regulations beyond federal requirements. Section 46.03.365(c)

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quirements of Title V of the federal Clean Air Act.” 1993 Ohio Laws File 62, § 1 (S.B. 153) (codified at OHIO REV. CODE ANN. § 3704.036 (Anderson 1994)). Section 8-4-207(1)(A) of the Arkansas Code, which relates to water pollution control, authorizes conditions in permits to assure the achievement of effluent limitations based upon applying levels of treatment technology and processes “as are required under the federal act or any more stringent effluent limitations necessary to meet water quality criteria or toxic standards established pursuant to any state or federal law or regulation.” ARK. CODE ANN. § 8-4-207(1)(A) (Michie Supp. 1989). The use of the word “required” or “requirements” in each of these statutes suggests that the state agency is not authorized to regulate additional pollutants, because the regulation of pollutants not covered by the Clean Air Act or Clean Water Act arguably cannot be “required for compliance with the federal act,” or be “required under the federal act.” Because the Missouri court and the New Mexico Attorney General failed to give meaning to the word “required” in their respective state statutes, the existence in a statutory constraint of the phrase “no more stringent than required” under federal law may not clarify an otherwise ambiguous statute.

172. W. VA. CODE § 22-1-3a (1994).

173. *Id.*

174. *Id.* § 22-5-4. Interestingly, a previous version of § 22-5-4, § 16-2-5(4), which was repealed by 1994 W. Va. Acts 61, in which § 22-5-4 was enacted, arguably contained language making it fairly clear that any regulation of additional pollutants from a source regulated under federal law would constitute “more stringent” regulation requiring a specific written finding explaining the reasons for the more stringent regulation. See 58 Op. W. Va. Att’y Gen. 127, 135 (1979) (concluding that § 16-20-5(4) applied “when the federal government has a rule, regulation, program, plan or standard for the same sources” regulated under a given rule).

of the Alaska Statutes provides that when state underground storage tank regulations "address areas governed by federal laws or regulations, the state regulations must be consistent with federal laws and regulations and may not be more stringent than the federal laws and regulations."<sup>175</sup> This presents a variation on the "counterpoise" issue presented by the court's discussion of the Florida statute in *Florida Electric Power*.<sup>176</sup> Does "areas" refer to specific categories of sources, or to specific pollutants or obligations applicable to a given source?

Sections 49-1003, -1006, and -1009 of the Arizona statutes likewise simply provide that underground storage tank rules "shall be consistent with and no more stringent than the federal regulations in effect on the date on which the rules are adopted."<sup>177</sup> The language does not indicate whether additional regulations applicable to a source are "consistent with" federal regulations applicable to that source. Several other states also have statutes containing similar language prohibiting promulgation of underground storage tank regulations that are more stringent than federal law, without providing any indication of the state agency's authority to promulgate additional regulations.<sup>178</sup>

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175. ALASKA STAT. § 46.03.365(c) (1994).

176. See *supra* notes 120-130 and accompanying text.

177. ARIZ. REV. STAT. ANN. §§ 49-1003, -1006, -1009 (Supp. 1994).

178. See, e.g., ALA. CODE § 22-35-10 (Supp. 1994) (providing that rules and regulations pertaining to underground storage tanks may not be more stringent than those provided by federal rules or regulations); IOWA CODE ANN. § 455B.474.1, 3.D., 7 (West 1990) (providing that rules adopted shall be "consistent with" the requirements of federal regulations once federal regulations are adopted); NEV. REV. STAT. § 459.824 (1991) (providing for administration of the provisions relating to storage tanks "in a manner that is consistent with, and not more stringent than, the applicable provisions of federal law"); N.H. REV. STAT. ANN. § 249:17 (1993) (providing that rules relating to financial responsibility for underground storage tanks adopted pursuant to § 149-C:9 "shall not be more stringent than the federal rules"); N.D. CENT. CODE § 23-20.3-04.1 (1991) (providing that regulations relating to underground storage tanks "may not be more stringent than applicable federal rules" adopted pursuant to RCRA); OKLA. STAT. ANN. tit. 17, § 307 (West Supp. 1995) (requiring that for any standard different from a federal standard on the same subject the agency shall "clearly express the deviation from the federal standard . . . and the reasons for the deviation"); OR. REV. STAT. § 466.746 (1992) (providing that performance standards shall be consistent with federal standards and that soil assessment and tank tightness requirements "shall not be more stringent than" federal requirements, absent a finding that more stringent standards are necessary); TEX. WATER CODE ANN. § 26.357(b) (West 1988) (providing that standards and rules "may not [be] . . . more stringent than the federal requirements" unless there is a determination that more stringent standards are necessary); W. VA. CODE § 22-17-6 (1994) (providing that rules "shall be no more stringent than the rules and regulations promulgated under Subtitle I"); WYO. STAT. § 35-11-1416(a)(i) (1994) (providing that rules and regulations shall "[p]rovide for performance, operating and installation standards for underground storage tanks which shall be no less or no more stringent than the federal standards").



*B. Impact on Regulation of Sources Not Regulated Under Federal Law*

Assume that a state legislature passes a statute directing the state environmental agency to promulgate regulations concerning air pollution, provided that the agency may not promulgate any rules more stringent than federal law. Next assume that the state environmental agency proposes regulations that would apply not only to the categories of sources covered by the Clean Air Act, but also to categories it does not cover. Under these circumstances, would the state environmental agency be acting beyond its authority by attempting to impose a standard more stringent than federal law?

To answer this question, one must answer the following questions: When state legislation prohibits a state environmental agency from promulgating standards more stringent than federal law, what does the state legislature mean? Is the state legislature agreeing with the federal decision to regulate only certain sources, such that the state environmental agency may not promulgate any regulations of sources that federal environmental law leaves unregulated? Alternatively, is the state legislature simply agreeing with the manner in which federal environmental law regulates certain sources, such that the state environmental agency may promulgate standards for sources that federal environmental legislation ignores?

*1. Statutes That Fairly Clearly Allow an Agency to Regulate Additional Sources.*—Several states have adopted statutes that allow state regulation of additional sources. For example, Pennsylvania's statute regulating hazardous air pollutants, which provides for the establishment of "performance or emission standards for sources or categories of sources which are not included on the list of source categories established under section 112(c) of the Clean Air Act," clearly authorizes the regulation of additional sources.<sup>179</sup> Other states also have statutes that appear to enable their respective state agencies to regulate additional sources, because the statutes' language limits the agencies' authority only when a federal regulation exists for comparison. For instance, the limitations contained in the most recently enacted

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179. 35 PA. CONS. STAT. ANN. § 4006.6(a) (1993). Oklahoma's statute regulating hazardous air pollutants also appears to allow for at least some regulation of additional sources. The statute provides specific authority to establish a program "for the control of the emission of those toxic air contaminants not otherwise regulated by a final emission standard under section 112(d) of the Federal Clean Air Act." OKLA. STAT. ANN. tit. 27A, § 2-5-114.B (Supp. 1995). This language appears to provide authority for regulation of additional sources, at least with respect to toxic contaminants not regulated by § 112(d) of the Clean Air Act, although it also suggests a lack of authority for regulation of additional sources with respect to those hazardous air pollutants regulated under the Clean Air Act.

Oklahoma statute,<sup>180</sup> and the South Dakota<sup>181</sup> and Utah<sup>182</sup> statutes apply only when there is a "corresponding federal requirement" (Oklahoma, South Dakota) or "corresponding rule" (Utah) addressing the same, or essentially similar, circumstances.<sup>183</sup>

Section 22-1-31 of the West Virginia Code similarly provides that rules may be more stringent than "counterpart federal rules" only if the Director of the DEP makes specific findings.<sup>184</sup> Section 22-1-3a further clarifies that the Director generally has authority to regulate sources not regulated under federal law, as it provides that "[i]n the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than a federal rule, unless the absence of a federal rule is the result of a specific federal exemption."<sup>185</sup> Colorado also has a statute that appears to allow for regulation of additional sources, as it limits the state agency's authority to promulgate more stringent rules, absent a written finding following public comment and a hearing, only when there are "corresponding enforceable federal requirements."<sup>186</sup> Iowa's statute controlling water quality similarly seems to allow state environmental agencies to regulate additional sources, as it limits the state agency's authority to promulgate more stringent standards only to the extent that EPA has promulgated "an effluent or pretreatment standard pursuant to section 301, 306 or 307 of the federal Water Pollution Control Act."<sup>187</sup>

Alaska's statute controlling underground storage tanks constrains the state agency from promulgating regulations more stringent than federal law only when the state regulations "address areas governed by federal laws or regulations."<sup>188</sup> Similarly, Oklahoma's statute authorizing the development of financial responsibility requirements with re-

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180. 1994 Okla. Sess. Law Serv. Ch. 96 (H.B. 1919) (West) (codified at OKLA. STAT. tit. 27A, § 1-1-206 (1994)).

181. S.D. CODIFIED LAWS ANN. § 1-40-4.1 (1993).

182. UTAH CODE ANN. § 19-2-106(1), (2) (concerning air pollution); *id.* § 19-4-105(1), (2) (concerning safe drinking water); *id.* 19-5-105(1), (2) (concerning water pollution); *id.* § 19-6-106(1), (2) (concerning state administration of RCRA, CERCLA and the Emergency Planning and Community Right to Know Act of 1986); *id.* § 40-10-6.5(1), (2) (Supp. 1994) (concerning surface coal mining and reclamation).

183. Tennessee's recently enacted legislation likewise would appear to allow for regulation of "additional sources," as it authorizes the Government Operations Committee to invalidate only rules "that are more stringent than federal statutes or rules on the same subject." 1994 Tenn. Pub. Acts Ch. 878 (S.B. 2040) (codified at TENN. CODE ANN. § 4-5-225 (1994)).

184. W. VA. CODE § 22-1-3a (1994).

185. *Id.*

186. COLO. REV. STAT. § 25-8-202(8) (1990).

187. IOWA CODE ANN. § 455B.173.2 (West 1990).

188. ALASKA STAT. § 46.03.365(c) (1994).

spect to underground storage tanks prohibits any regulation "more stringent than is required by the federal Environmental Protection Agency"<sup>189</sup> only with respect to "underground storage tank systems of equal type, age, and classification."<sup>190</sup>

2. *Statutes That Fairly Clearly Prohibit a State Agency from Regulating Additional Sources.*—Several states have adopted statutes that forbid state regulation of additional sources. North Dakota's statute<sup>191</sup> provides fairly clear language forbidding state agency regulation of additional sources, absent a written finding following public comment and a hearing. The statute's initial language generally prohibits the state agency from adopting rules "more stringent than corresponding federal regulations that address the same circumstances."<sup>192</sup> The statute further states, however, that "[t]he department may adopt rules more stringent than corresponding federal regulations or adopt rules where there are no corresponding federal regulations"<sup>193</sup> only after making a written finding following public comment and a hearing.<sup>194</sup> Because there would be no corresponding federal regulations for a state regulation addressing additional sources, the statute implicitly precludes regulation of additional sources without a written finding following public comment and a hearing.

The Kentucky<sup>195</sup> and Rhode Island<sup>196</sup> statutes also fairly clearly preclude state regulation of additional sources, at least with respect to the specific subject areas addressed by the statutes. Kentucky's statute gives state agencies authority to promulgate regulations only when such regulations are "required by federal law," and further limits the state agencies' authority by providing that state regulations "shall be no more stringent than the federal law or regulations."<sup>197</sup> The statute therefore appears to constrain the state agency from promulgating regulations for additional sources not regulated under federal law, as such regulations could not be "required by federal law."<sup>198</sup> Rhode Island's statute, which provides that regulations relating to the "specific control technology and emission characteristics of fuels shall not be

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189. OKLA. STAT. ANN. tit. 17, § 308 (West Supp. 1995).

190. *Id.*

191. N.D. CENT. CODE § 23-01-04.1.1 (1991).

192. *Id.*

193. *Id.* § 23-01-04.1.2.

194. *Id.*

195. KY. REV. STAT. ANN. § 13A.120(1) (Baldwin 1988 & Supp. 1994).

196. R.I. GEN. LAWS § 23-23-5(12) (Supp. 1994).

197. KY. REV. STAT. ANN. § 13A.120(1) (Baldwin 1988 & Supp. 1994).

198. *Id.*

more stringent than the mandatory standards established by federal law or regulation,"<sup>199</sup> also appears to constrain the state agency's authority to promulgate regulations of additional sources of fuel emissions, as the statute prohibits the state agency from regulating beyond the "mandatory standards" of federal law.

The Arkansas and New Mexico statutes concerning regulation of underground storage tanks similarly appear to constrain the regulation of additional sources. The Arkansas statute provides that any regulations of underground storage tanks shall, as much as possible, "be identical to and no more stringent than the federal regulations adopted by the United States Environmental Protection Agency."<sup>200</sup> This language seems to preclude state regulation of additional sources because such regulation would not be "identical to" federal regulations. New Mexico's statute prohibits the state agency from promulgating regulations concerning underground storage tanks unless the state regulations "are equivalent to and no more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation Recovery Act of 1976, as amended."<sup>201</sup> This language, like that in the Arkansas statute, appears to preclude regulation of additional sources because such regulations would not be "equivalent to" federal regulations.

3. *Statutes Lacking a Clear Statement of the Extent of the Agency's Authority to Regulate Additional Sources.*—Section 403.804 of the Florida Statutes requires a cost-benefit analysis of "any proposed standard that would be stricter or more stringent than one which has been set by federal agencies pursuant to federal law or regulation."<sup>202</sup> Just as section 403.804 lacks language addressing the regulation of additional pollutants,<sup>203</sup> it also lacks language addressing the regulation of additional sources. The Florida District Court of Appeals' analysis in *Florida Electric Power Coordinating Group v. Askew*<sup>204</sup> may provide some insight, however. In that case, the Florida District Court of Appeals interpreted section 403.804 to apply only when there is a "federal standard in counterpoise to the state standard."<sup>205</sup> The court's holding suggests that the statute does not require a cost-benefit analysis of reg-

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199. R.I. GEN. LAWS § 23-23-5(12) (Supp. 1994).

200. ARK. CODE ANN. § 8-7-803 (Michie 1991).

201. N.M. STAT. ANN. § 74-4-4C (Michie 1993).

202. FLA. STAT. ANN. § 403.804 (West 1993).

203. See *supra* note 118 and accompanying text.

204. 366 So. 2d 1186 (Fla. Dist. Ct. App. 1978); see *supra* notes 120-130 and accompanying text.

205. *Florida Elec. Power*, 366 So. 2d at 1188.

ulations for sources that federal environmental regulations do not address.

Section 643.055.1 of the Missouri Statutes prohibits the Air Commission from promulgating any standards or guidelines "stricter than those required under the provisions of the federal Clean Air Act, as amended."<sup>206</sup> Section 643.055.1, like the Florida statute,<sup>207</sup> lacks clear language addressing the Air Commission's authority to regulate additional sources. The Missouri Court of Appeals' analysis in *Missouri Hospital Ass'n v. Air Conservation Commission*<sup>208</sup> results in an interpretation similar to the Florida District Court of Appeals' interpretation of the Florida statute,<sup>209</sup> although with less precision. Recall that, in *Missouri Hospital Ass'n*, the court ruled that if Congress had spoken on a particular issue in the federal Clean Air Act, section 643.055.1 prohibits the Air Commission "from adopting rules or regulations on that issue that are . . . stricter than federal law."<sup>210</sup> The court added, however, that the Air Commission "continues to have rulemaking authority to regulate Missouri air quality in all ways, and in all areas, not covered by the federal Clean Air Act."<sup>211</sup>

The court's recognition of the Air Commission's rule-making authority in areas not effectively precluded by the Clean Air Act suggests that the Air Commission may regulate sources not regulated in the Clean Air Act. The court's statement that the Air Commission has no authority to regulate when Congress has "spoken on a particular issue,"<sup>212</sup> however, somewhat confuses the matter, creating a problematic ambiguity much like that created by the *Florida Electric Power* opinion's "counterpoise" language.

Whether the Missouri statute constrains the Air Commission from regulating additional sources depends on what the court meant by saying that the Air Commission lacks authority when Congress has spoken on a particular issue. Did the court mean that when Congress has decided to regulate only certain categories of sources, it has spoken on the regulation of additional sources, such that the Air Commission no longer may regulate sources that Congress did not regulate? Alternatively, did the court mean that inasmuch as Congress has decided to regulate certain categories of sources, it only has

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206. MO. REV. STAT. § 643.055.1 (1993).

207. FLA. STAT. ANN. § 403.804 (West 1993).

208. 874 S.W.2d 380 (Mo. Ct. App. 1994).

209. See *supra* notes 120-130 and accompanying text.

210. *Missouri Hosp. Ass'n*, 874 S.W.2d at 396.

211. *Id.* at 397.

212. *Id.* at 396.

spoken on the regulation of those specific sources such that the Air Commission may regulate sources that Congress did not regulate? In addition, it is unclear what the court meant by saying that the Air Commission "continues to have rulemaking authority . . . in all ways, and in all areas, not covered by the federal Clean Air Act."<sup>213</sup> Although *Missouri Hospital Ass'n* does not address this issue as clearly as *Florida Electric Power*, the Missouri court's focus on protecting the regulated community from multiple sets of regulations<sup>214</sup> suggests that when Congress has left sources unregulated it has not "spoken on" the issue, which would allow the Air Commission to regulate such sources.<sup>215</sup>

New Mexico presents the converse of the problem presented by the Florida and Missouri statutes. Although section 74-2-5 of the New Mexico Statutes contains language that appears to preclude the regulation of sources not covered by the federal Clean Air Act, an opinion by the New Mexico Attorney General muddies the issue somewhat.<sup>216</sup> Section 74-2-5 provides that regulations "pertaining to visibility protection in mandatory class 1 areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas," must be no more stringent than the federal Clean Air Act requires, but also "shall be applicable only to sources subject to such regulation pursuant to the federal act."<sup>217</sup> The statute further provides that performance standards for sources, and emission standards for hazardous air pollutants, must be no more stringent than required under the federal Clean Air Act, but also "shall be applicable only to sources subject to such federal standards of performance."<sup>218</sup> The language of the statute thus suggests that once EPA has established standards of performance for certain categories of sources, the New Mexico Air Quality Control Board (NMAQCB) has authority to promulgate "standards of performance" that address only those categories of sources.

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213. *Id.*

214. *See supra* notes 73, 160, 171 and accompanying text.

215. The court's language is not particularly instructive, however, for it does not discuss the circumstances in which the federal law does not encompass an entire category of sources, such as the Clean Air Act's exemption from stack height regulations of sources in existence before December 31, 1970. *See* 42 U.S.C. § 7423 (1988). Has Congress spoken to the regulation of the exempted stacks in deciding to exempt them from federal regulation? If so, then the state agency may not have the authority to regulate such stacks, as such regulation would be more stringent than the Clean Air Act. If Congress has not spoken to the regulation of such stacks, then the state agency perhaps does have the authority to regulate such stacks.

216. 87 Op. N.M. Att'y Gen. 2 (1987); *see supra* notes 166-171 and accompanying text.

217. N.M. STAT. ANN. § 74-2-5C(1)(b) (Michie 1993).

218. *Id.* § 74-2-5C(2)(b).

The Attorney General's opinion states, however, that in those areas not specifically precluded by the New Mexico Air Quality Control Act, the NMAQCB may "promulgate standards and regulations that are more stringent than the federal standards and can promulgate standards and regulations for which there is no equivalent federal standard or regulation."<sup>219</sup> To determine whether the NMAQCB can regulate additional sources, one must determine the extent to which section 74-2-5 specifically precludes regulation of such sources. A plain meaning reading suggests that section 74-2-5 does specifically preclude promulgation of regulations of additional sources in any of the six categories set forth in the statute.<sup>220</sup> This interpretation could square with the Attorney General's opinion, because the six categories the statute sets forth are not exhaustive. This allows an inference that the statute does not specifically preclude the promulgation of other types of regulations that may apply to additional sources. Nonetheless, the Attorney General's opinion robs section 74-2-5 of much of its apparent initial clarity.

Other statutes are similarly susceptible to more than one interpretation. A Colorado statute<sup>221</sup> addressing indirect air pollution sources prohibits regulations that are "more stringent than those required for compliance with the federal act and final rules and regulations adopted pursuant thereto."<sup>222</sup> Ohio recently enacted a statute for the purpose of implementing the Title V permit program under the Clean Air Act which authorizes the adoption of rules "that are consistent with, and no more stringent than, the requirements of Title V of the federal Clean Air Act."<sup>223</sup> The Arkansas statute regarding water pollution control authorizes conditions in permits to achieve effluent limitations by applying only such levels of treatment technology and processes "as are required under the federal act or any more stringent effluent limitations necessary to meet water quality criteria or toxic standards established pursuant to any state or federal law or regulation."<sup>224</sup> The regulation of additional sources not covered by the Clean Air Act and Clean Water Act cannot, perhaps, be "required for compliance with the federal act," or be part of "the requirements

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219. 87 Op. N.M. Att'y Gen. at 2. Indeed, to bolster the point, the opinion specifically referred to the existence of emission standards for pollutants that the federal Clean Air Act did not specifically regulate. *Id.*

220. N.M. STAT. ANN. § 74-2-5.

221. COLO. REV. STAT. ANN. § 25-7-114.2 (West Supp. 1994).

222. *Id.*

223. 1993 Ohio Laws File 62, § 1 (S.B. 153) (codified at OHIO REV. CODE ANN. § 3704.036 (Anderson 1994)).

224. ARK. CODE ANN. § 8-4-207(1)(A) (Michie 1991).

of Title V," or be "required under the federal act"; therefore, the Colorado, Ohio, and Arkansas statutes appear to prevent state agencies from promulgating regulations applicable to additional sources not covered by the Clean Air Act and Clean Water Act, respectively. However, because the Missouri Court of Appeals and the New Mexico Attorney General failed to define the word "required" when interpreting their respective state statutes,<sup>225</sup> the presence of the word "required" or "requirement" in these three statutes may not constrain the state agencies' authority to regulate additional sources.

Several state statutes concerning underground storage tanks are analogous. These statutes not only fail to indicate state environmental agencies' authority to impose additional regulations on federally regulated sources, but also fail to indicate state agencies' authority to regulate additional sources. For example, Arizona's statute simply provides that underground storage tank rules "shall be consistent with and no more stringent than the federal regulations in effect on the date on which the rules are adopted."<sup>226</sup> This language offers no insight into the state agency's authority to promulgate regulations applicable to categories of underground storage tanks that federal law does not address. This ambiguity is characteristic of comparable statutes in other states.<sup>227</sup>

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225. See *supra* notes 153, 171 and accompanying text.

226. ARIZ. REV. STAT. ANN. §§ 49-1003, -1006, -1009 (1993) (emphasis added).

227. See, e.g., ALA. CODE § 22-35-10 (Supp. 1994) (providing that rules and regulations pertaining to underground storage tanks shall "not be more stringent than those provided by federal rules or regulations"); IOWA CODE ANN. § 455B.474 (West Supp. 1994) (providing that rules adopted shall be "consistent with" and "shall not exceed" the requirements of federal regulations once federal regulations are adopted); NEV. REV. STAT. § 459.824 (1991) (providing for administration of the provisions relating to storage tanks "in a manner that is consistent with, and not more stringent than, the applicable provisions of federal law"); N.H. REV. STAT. ANN. § 249:17 (1993) (providing that rules relating to financial responsibility for underground storage tanks adopted pursuant to § 149-C:9 "shall not be more stringent than the federal rules"); N.D. CENT. CODE § 23-20.3-04.1 (1991) (providing that regulations relating to underground storage tanks "may not be more stringent than applicable federal rules" adopted pursuant to RCRA); OKLA. STAT. ANN. tit. 17, § 307 (West Supp. 1995) (requiring that for any standard different from a federal standard on the same subject the agency shall "clearly express the deviation from the federal standard . . . and the reasons for the deviation"); OR. REV. STAT. § 466.746 (1991) (providing that performance standards shall be consistent with federal standards and that soil assessment and tank tightness requirements "shall not be more stringent" than federal requirements, absent a finding that more stringent standards are necessary); TEX. WATER CODE ANN. § 26.357 (West 1991) (providing that standards and rules "may not [be] . . . more stringent than the federal requirements" unless there is a determination that more stringent standards are necessary); W. VA. CODE § 22-17-6 (1994) (providing that rules relating to underground storage tanks "shall be no more stringent than the rules" EPA promulgates pursuant to subtitle I); WYO. STAT. § 35-11-1416 (1994) (providing that rules and regulations shall



C. *Impact on Source-Specific Regulations Related to Compliance with Ambient Standards*

State statutes governing state implementation of the Clean Air Act and Clean Water Act present an additional interpretive problem. This problem results from the duality of these regulatory systems, which contain both ambient standards and source-specific standards.<sup>228</sup> State agencies are in something of a catch-22, inasmuch as they must assure compliance with the requirements of the federal Acts while under constraint not to promulgate standards more stringent than federal law. In order to assure compliance with ambient standards under the Clean Air Act, for example, a state environmental agency almost certainly must impose standards more stringent than specifically required by the Clean Air Act because the Act's source-specific standards in themselves are generally insufficient to assure compliance with the ambient standards.<sup>229</sup> Nonetheless, many state statutes fail to recognize a state agency's possible need for authority to promulgate more stringent source-specific standards to assure compliance with federal ambient standards. Moreover, even when a state statute gives a state environmental agency such authority, the statute frequently fails to define the authority's scope.<sup>230</sup>

1. *The Authority to Impose More Stringent Source-Specific Standards.*— In response to congressional direction under the Clean Air Act, EPA has established national ambient air quality standards (NAAQS) for several pollutants.<sup>231</sup> Congress made the states responsible for developing plans to assure compliance with the NAAQS.<sup>232</sup> A hypothetical illustrates the consequences of this delegation. Assume that a given state's legislature passes a statute directing the state environmental agency to promulgate rules to assure compliance with the Clean Air Act, provided that the rules are no more stringent than that Act. Assume further that one or more air quality control regions within the state are not in compliance with the ambient standard for one or

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"[p]rovide for performance, operating and installation standards for underground storage tanks which shall be no less or no more stringent than the federal standards").

228. See *supra* note 4 and accompanying text.

229. This problem arises because the Clean Air Act and Clean Water Act do not contain source-specific standards for the entire universe of sources of pollution.

230. For instance, it is often unclear whether a state environmental agency can impose more stringent source-specific standards to create a sufficient margin of safety to assure that the state will continue to comply with the ambient standard as new sources of emissions start operation.

231. See *supra* note 4 and accompanying text.

232. See *supra* notes 5-6 and accompanying text.

more of the criteria pollutants for which EPA has established NAAQS. Finally, assume that the state environmental agency proposes regulations designed to ensure compliance with the Clean Air Act by imposing on sources covered by the Clear Air Act, emission standards more stringent than the Act requires. In such a scenario, would the state environmental agency be acting beyond its authority by attempting to impose a standard more stringent than federal law?

To answer this question, we need to answer the following questions: When state legislation prohibits a state environmental agency from promulgating standards more stringent than federal environmental law, what does the state legislature mean? Is it agreeing with federal decisions regarding both ambient standards and source-specific standards, such that the state agency must assure compliance with the ambient standards by regulating additional sources because it lacks authority to impose more stringent source-specific standards on sources regulated under the Clean Air Act? Alternatively, is the state legislature primarily agreeing with the federal legislative decision regarding ambient standards, and only secondarily agreeing with the federal decision regarding source-specific regulation, such that the state environmental agency may assure compliance with the ambient standards by imposing more stringent source-specific standards on sources regulated under the Clean Air Act, to the extent such stringency is necessary to assure compliance with the ambient standards?

*a. Statutes That Clearly Allow More Stringent Source-Specific Regulations When Necessary to Assure Compliance with Ambient Standards.*—Several state statutes provide a clear answer to this dilemma with express statutory language authorizing the state agency to promulgate regulations more stringent than federal regulations to the extent necessary to assure compliance with ambient standards. For instance, the Missouri General Assembly recently amended section 643.055.1 of the Missouri statutes to provide that its restrictions “shall not apply to the parts of a state implementation plan developed by the commission to bring a nonattainment area into compliance and to maintain compliance when needed to have a[n EPA] approved state implementation plan.”<sup>233</sup> Rhode Island’s statute relating to the regulation of emissions from fuels likewise allows state agencies to promulgate regulations more stringent than the mandatory standards established by federal law, to the extent that such more stringent standards “are needed for the attainment or maintenance of air quality standards.”<sup>234</sup>

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233. 1994 Mo. Laws 590.

234. R.I. GEN. LAWS § 23-23-5(12) (Supp. 1994).

Two other states include similar language in their statutes controlling water quality. The Arkansas statute<sup>235</sup> regarding water pollution control requires that permits issued achieve effluent limitations required under the federal act, "or any more stringent effluent limitations necessary to meet water quality criteria or toxic standards established pursuant to any state or federal law or regulation."<sup>236</sup> Iowa's statute<sup>237</sup> concerning water quality standards, pretreatment standards and effluent standards, provides that if EPA "has promulgated an effluent standard or pretreatment standard pursuant to sections 201, 306 or 307 of the federal Water Pollution Control Act, a pretreatment or effluent standard adopted pursuant to this section shall not be more stringent than the federal effluent or pretreatment standard for such source."<sup>238</sup> This statute, however, specifically does "not preclude the establishment of a more restrictive effluent limitation in the permit for a particular point source if the more restrictive effluent limitation is necessary to meet water quality standards."<sup>239</sup>

*b. Statutes That Lack Any Language Regarding the State Agency's Authority to Impose More Stringent Source-Specific Regulations When Necessary to Assure Compliance with Ambient Standards.*—Several states have statutes that constrain the state agency's authority to impose regulations more stringent than the Clean Air Act or Clean Water Act, but contain no language reconciling the tension between a state agency's responsibility to achieve compliance with federal ambient standards and its inability to impose source-specific standards more stringent than federal requirements.<sup>240</sup> An Attorney General's opinion interpreting a recently revised West Virginia statute<sup>241</sup> perhaps most clearly

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235. ARK. CODE ANN. § 8-4-207(1)(A) (Michie 1991).

236. *Id.*

237. IOWA CODE ANN. § 455B.173.2 (West Supp. 1994).

238. *Id.*

239. *Id.*

240. *See, e.g.*, COLO. REV. STAT. ANN. § 25-7-114.2 (West Supp. 1994) (regulating indirect air pollution sources); COLO. REV. STAT. ANN. § 25-8-202(8)(a) (West 1990) (enumerating duties of water quality control commission); FLA. STAT. ANN. § 403.804 (West 1993) (enumerating powers and duties of state environmental regulation commission); KY. REV. STAT. ANN. § 13A.120(1) (Baldwin 1988) (addressing adoption of administrative regulations); N.M. STAT. ANN. § 74-2-5 (Michie 1993) (governing air pollution standards); N.D. CENT. CODE § 23-01-04.1.1 (1991) (limiting state agency's rule-making authority); S.D. CODIFIED LAWS ANN. § 1-40-4.1 (1992) (limiting stringency of rules that state environmental agency may promulgate); UTAH CODE ANN. §§ 19-2-106, -5-105 (1991) (addressing authority to administer Clean Air Act and Clean Water Act); VA. CODE ANN. § 62.1-44.15:1 (Michie 1992) (forbidding state agency to promulgate standards more stringent than required under the Clean Water Act).

241. W. VA. CODE § 16-20-5(4) (1993), *repealed by* 1994 W. Va. Acts 61, *replaced by* W. VA. CODE § 22-5-4(4) (1994); *see supra* note 174.

illustrates the tensions that arise in interpreting a statute that constrains a state agency's authority to promulgate standards more stringent than federal law when the federal law imposes both ambient and source-specific standards.<sup>242</sup>

Section 16-20-5(4) of the West Virginia Code provided the APC Commission with the authority to adopt and promulgate reasonable rules and regulations relating to air pollution, provided "that no rule or program of the [Commission] shall be any more stringent than any federal rule or program," absent a specific written finding regarding the need for the more stringent standard.<sup>243</sup> The statutory language offered nothing to resolve the tension between ambient standards and source-specific standards.

In 1979, however, the Director of the APC Commission requested an opinion from the West Virginia Attorney General on the extent to which two aspects of a regulation of particulate emissions complied with section 16-20-5(4).<sup>244</sup> The West Virginia Attorney General's opinion clearly acknowledged the tension that exists, in the absence of clear legislative direction, between a state agency's obligation to assure compliance with ambient standards and its inability to impose source-specific standards more stringent than federal regulations. The Attorney General's opinion also proposed a resolution of the problem that could serve as a guide for other states.<sup>245</sup>

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242. 58 Op. W. Va. Att'y Gen. 127 (1979). The reader should note that any subsequently referenced citations in the Attorney General's opinion may refer to statutes and regulations that have been amended, revised, or repealed since the opinion's issuance in 1979.

243. W. VA. CODE § 16-20-5(4).

244. 58 Op. W. Va. Att'y Gen. 127 (1979).

245. *Id.* The Commission promulgated regulations partly because portions of West Virginia failed to attain ambient standards for particulate matter. The Attorney General's opinion relied on an earlier version of § 16-20-5(4) that read, in pertinent part: "[N]o rule, regulation, standard, program or plan of the commission to control air pollution from any source hereafter promulgated, adopted or implemented, may be more stringent than any federal rule, regulation, standard, program or plan applicable to the control of air pollution from that source." *Id.* at 128.

From this language, the Attorney General drew several conclusions. First, the section applied only to "rules, regulations, standards, programs or plans of the [APC] Commission to control air pollution which apply to sources." *Id.* at 131. The Attorney General reached this conclusion by reasoning that any other interpretation of the statute would render the phrases "from any source" and "from that source" meaningless. *Id.* Next, the Attorney General concluded the statute applied only "when the federal government has a rule, regulation, program, plan or standard for the same sources which the [APC] Commission will regulate." *Id.* In addition, the Attorney General concluded that "[f]ederal rules, regulations, programs, plans and standards for sources include: new source performance standards, national emission standards for hazardous air pollutants, prevention of significant deterioration permits and mobile source emission limitations." *Id.* at 132-33. Finally, the

The Attorney General's opinion initially focused on whether the regulation, which addressed prevention and control of particulate air emissions, violated section 16-20-5(4) in that it required "a facility located in an attainment area . . . which may impact on a nonattainment area . . . to meet the same emission limitations as in the nonattainment area."<sup>246</sup> The Attorney General's opinion started from the premise that the state has an obligation to develop a State Implementation Plan to assure attainment of ambient air standards.<sup>247</sup> The opinion further noted that, in the context of developing a State Implementation Plan, the designation of a source's location as attainment or nonattainment does not determine, in itself, the emissions limitations applicable to that source. This is so because the mobility of air pollution ensures that sources that contribute to the violation of ambient standards may be far from the emitting site.<sup>248</sup> Because the state must assure attainment of the ambient air standards, and because sources outside a nonattainment area may affect that area, the Attorney General's opinion concluded that the APC Commission did not violate section 16-20-5(4) by requiring that a facility in an attainment area comply with the standards for equivalent facilities in a nonattainment area.<sup>249</sup>

Next, the Attorney General's opinion focused on whether the regulation's ten percent opacity requirement violated section 16-20-5(4).<sup>250</sup> The opinion concluded that section 16-20-5(4) did not affect the APC Commission's authority to apply the ten percent opacity requirement to existing sources, because EPA did not set emission limitations for those sources.<sup>251</sup> The opinion then examined the narrower issue of whether section 16-20-5(4) precluded the APC Commission from applying the ten percent opacity standard to new sources for which federal regulations do exist.<sup>252</sup> The opinion noted

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Attorney General concluded that the statute applied only "to rules, regulations, programs, standards or plans put into effect after enactment of the [statute]." *Id.* at 134.

246. *Id.* at 137. Four areas within West Virginia had been designated nonattainment for total suspended particulates. *Id.*

247. *Id.* at 137-38 (citing 42 U.S.C. § 7410(a)(2)(A)).

248. *Id.* at 138-39.

249. *Id.* at 139.

250. *Id.* Section 4.01 of the regulation provided that "No person shall cause, suffer, allow, or permit the discharge of particulate matter from any materials handling and/or preparation activity in excess of ten (10%) percent opacity averaged over a six (6) minute period." *Id.*

251. *Id.* One of the preliminary conclusions the Attorney General reached was that § 16-20-5(4) applied only when a federal rule, regulation, program, or plan existed for the source which the APC Commission was to regulate. *See supra* note 245.

252. 58 Op. W. Va. Att'y Gen. at 139.

that EPA had promulgated new source performance standards containing opacity limits of ten percent, twenty percent, and twenty percent, respectively, for emissions of "particulate matter from material handling and/or preparation activities of Portland Cement Plants, asphalt concrete plants and coal preparation plants."<sup>253</sup> The Attorney General then concluded that "it *appears* that the [APC] Commission cannot regulate new asphalt concrete plants and coal preparation plants more stringently than twenty percent opacity for particulate matter."<sup>254</sup>

The Attorney General's opinion also noted, however, that this conclusion raised an interpretive question: When a federal regulation under the Clean Air Act prescribes a specific standard for sources that a state regulation also covers, and the Clean Air Act requires attainment with ambient air quality standards, which federal requirement controls for the purposes of section 16-20-5(4)?<sup>255</sup> To resolve this dilemma, the opinion employed a fundamental rule of statutory construction, namely that a statute's overall purpose controls its separate provisions.<sup>256</sup> Because section 16-20-1 of the West Virginia Code provided that it was the state's public policy to assure air quality in compliance with the Clean Air Act by attaining and maintaining ambient air quality standards, the opinion resolved any ambiguity in favor of the federal statute requiring attainment of ambient standards, and against the federal regulation prescribing a new source performance standard.<sup>257</sup> Accordingly, the opinion concluded that the APC Commission's application of the ten percent opacity standard to new sources did not violate section 16-20-5(4) because it aimed to assure compliance with the ambient air standard.<sup>258</sup>

Thus, even though section 16-20-5(4) contained no specific language resolving the tension between ambient standards and source-specific standards, under the Attorney General's interpretation of section 16-20-5(4), the APC Commission had the authority both to impose regulations on sources ignored by the Clean Air Act, and to impose more stringent standards than the Act requires on sources regulated by the Clean Air Act. The state agency could exercise both of

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253. *Id.* at 139-40 (citing 40 C.F.R. §§ 60.62(c), 60.92(a)(2), 60.252(c)).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

these powers to the extent necessary to fulfill the state's obligation to assure compliance with the NAAQS.<sup>259</sup>

The reasoning in the West Virginia Attorney General's opinion interpreting section 16-20-5(4) offers guidance to other states in which statutory constraints on state agency authority create tension between the need to assure compliance with ambient standards and the obligation to promulgate source-specific standards no more stringent than federal law. As well-reasoned as the opinion is, however, it offers incomplete guidance because it fails to acknowledge and discuss an alternative construction of the state agency's statutory authority. West Virginia's statute generally precluded more stringent state regulations of federally regulated sources, but allowed regulations of sources not addressed by federal law. Therefore, the Attorney General just as easily could have interpreted the statute to limit the state agency's authority to regulating federally unregulated sources when seeking compliance with ambient standards.<sup>260</sup>

2. *Extent of Authority to Impose More Stringent Standards.*—A further hypothetical may shed light on the issue of an agency's authority to impose standards more stringent than federal law requires. Assume that a given state's legislature passes a statute directing the state environmental agency to promulgate rules to assure compliance with the Clean Air Act, provided that the rules are no more stringent than that Act, except when necessary to assure compliance with the NAAQS. Assume further that one or more air quality control regions within the state are not in compliance with the NAAQS for one or more of the criteria pollutants for which EPA has established NAAQS. Next, assume that the state environmental agency proposes regulations designed to assure compliance with the Clean Air Act by creating a margin of safety between the ambient levels of a given pollutant and the NAAQS for such pollutant. Finally, assume that the proposed regulations impose on sources covered under the Clean Air Act emission standards more stringent than required under that Act. Under these circumstances, would the state environmental agency be acting be-

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259. See *id.* at 143-44.

260. Interestingly, when the West Virginia Legislature recently repealed § 16-20-5(4) and replaced it with § 22-5-4(4), it failed to address completely the ambiguities discussed in the Attorney General's opinion. Although § 22-1-31 makes it clear that a regulation applicable to sources not regulated under federal law is not "more stringent" than federal law, neither § 22-1-3a nor § 22-5-4(4) addresses the director's authority to impose on sources regulated under federal law standards more stringent than federal law when necessary to assure compliance with ambient standards.

yond its authority by attempting to impose a standard more stringent than required under federal law?

To answer this question, we need to answer the following questions: When state legislation prohibits a state environmental agency from promulgating environmental standards more stringent than federal law, except to the extent necessary to comply with NAAQS, what does the state legislature mean? Is it giving the state agency the authority to impose more stringent standards only to the extent needed just to meet, but not exceed, the ambient standard? Alternatively, is the state legislature giving the state agency the authority to impose more stringent standards to the extent needed to create a margin of safety to assure continued compliance with the ambient standard in the dynamic environment affecting ambient air quality?

*a. The Nature of the Problem: Public Service Co. v. New Mexico Environmental Improvement Board.*—A New Mexico case presents perhaps the clearest discussion of this problem. Even before the New Mexico Legislature added the language in section 74-2-5(c)(1)-(2) of the New Mexico Statutes constraining the New Mexico Air Quality Control Board from enacting regulations more stringent than required under federal law,<sup>261</sup> litigation had arisen concerning the scope of the Environmental Improvement Board's (Board) authority to enact regulations more stringent than federal law. In *Public Service Co. v. New Mexico Environmental Improvement Board*,<sup>262</sup> several utilities challenged the Board's amendment of a regulation of sulfur dioxide emissions, asserting that the Board's amendment was not in accordance with the law.<sup>263</sup> In issuing its regulation, the Board expressly noted that it was limiting sulfur dioxide emissions more than the Clean Air Act requires because by "reducing the amount of sulfur dioxide permitted in the air from existing sources, more room will be made available, up to the state sulfur dioxide standard, for new industry in the Four Corners area."<sup>264</sup> The Board further noted that the regulations were necessary "[i]n order for New Mexico to regain control over its air in the Four Corners region."<sup>265</sup> The utilities contended that section 12-14-5(A), which provided, "[t]he board shall prevent or abate air pollution,"<sup>266</sup> strictly limited the Board's authority. The challenged amendment, according to the utilities, was be-

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261. N.M. STAT. ANN. § 74-2-5(c)(1)-(2) (Michie 1993).

262. 549 P.2d 638 (N.M. Ct. App. 1976).

263. *Id.* at 640-41.

264. *Id.* at 641.

265. *Id.*

266. *Id.* at 640.



yond the Board's authority because it was not necessary "to prevent or abate air pollution."<sup>267</sup>

The first premise of the New Mexico Court of Appeals's decision was that "[a]dministrative bodies are the creatures of statutes . . . [that] can act only as to those matters which are within the scope of the authority delegated to them."<sup>268</sup> The court found that the Board's legislative mandate was "expressed in simple and direct language: The board shall prevent or abate air pollution."<sup>269</sup> The court noted that in adopting the ambient air standard for sulfur dioxide, the Board established the criterion "for determining what concentration of this particular air contaminant, in a specific time frame, constituted air pollution."<sup>270</sup> With this limitation in mind, the court ruled that the Board had no authority to promulgate standards for the emission of sulfur dioxide that anticipated future industrial development in the area.<sup>271</sup> The court further concluded that the Board had no authority to promulgate regulations more stringent than required by federal law in order for New Mexico to regain control over its air.<sup>272</sup> The court found that "[t]here is no evidence in this record of any present need, or a reasonably anticipated future need, to warrant the adoption of [the regulation] to prevent or abate a violation of the ambient air quality standard" for sulfur dioxide.<sup>273</sup>

Judge Lopez dissented, viewing the fundamental dispute as one concerning "the manner in which emission regulations are fixed."<sup>274</sup> According to Judge Lopez, the utilities contended that once the Board set the ambient air standard for sulfur dioxide, the "emission regulations [for existing sources] must be set at such a level that the New Mexico standard will be just met, but not exceeded."<sup>275</sup> Phrased differently, Judge Lopez interpreted the utilities' argument, and the majority's holding, as follows: (1) the Board has authority only to prevent or abate "air pollution"; (2) "air pollution" exists when ambient air standards are exceeded; (3) therefore, the Board has no authority to regulate emissions to reduce ambient air concentrations below the ambient standards.<sup>276</sup> Further, Judge Lopez interpreted the Board's

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267. *Id.* at 642.

268. *Id.* at 641 (citing *Maxwell Land Grant Co. v. Jones*, 213 P. 1034 (N.M. 1923)).

269. *Id.* at 641-42.

270. *Id.* at 642.

271. *Id.*

272. *Id.*

273. *Id.* at 644.

274. *Id.* at 646 (Lopez, J., dissenting).

275. *Id.*

276. *Id.* at 647.

argument to be that the ambient standard does not directly dictate the appropriate emissions limitations for existing sources because in setting emissions limitations, the Board must examine different factors than it must when setting ambient standards.<sup>277</sup>

Accordingly, Judge Lopez suggested that the first issue to resolve in deciding the case must be whether the Board had the authority to "set emission regulations at a level lower than that necessary to meet the [ambient air] standard."<sup>278</sup> If the Board had such authority, then the second issue must involve an interpretation of the statutory framework within which the Board may set lower emission levels; only by resolving this second issue can one determine whether the Board acted within its delegated discretion.<sup>279</sup> After studying the statute, Judge Lopez concluded that the Board "is not compelled to set the emissions regulations at such a level as to meet the [ambient air] standard," and that the regulations were well within the Board's mandate to consider the "public interest."<sup>280</sup> Specifically, Judge Lopez stated:

The "public interest" is a broad enough concept to permit the Board to weigh how the public will best be served: by permitting the first plants in the area to "use up" the clean air, or by weighing the hardship to these appellants against the "social and economic value" of the new industries which the area expects to attract.<sup>281</sup>

Subsequently, the Board asked the New Mexico Attorney General to give his opinion on whether the Board could "adopt emission regulations for existing stationary sources which would take into consideration air contaminant emissions for reasonably anticipated future growth in the area."<sup>282</sup> Noting that the court in *Public Service Co.* nar-

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277. *Id.* at 646.

278. *Id.*

279. *Id.*

280. *Id.* at 647-48.

281. *Id.* at 648. Judge Lopez clearly understood that the case presented a question of resource allocation pitting the existing utilities' interests against the interests of potential new sources.

The United States Supreme Court issued its decision in *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976), in the same year as the decision in *Public Service Co.*, and reached a decision consistent with Judge Lopez's dissent. In *Union Electric*, the Court specifically recognized that § 116 of the Clean Air Act gives states the freedom to develop a State Implementation Plan (SIP) that would result in air quality better than the NAAQS minimum. The Court rejected the argument that the Clean Air Act precludes EPA from approving SIPs that are more stringent than necessary to assure compliance with the national ambient air standards by the statutory deadlines. *Id.* at 260-66.

282. 77 Op. N.M. Att'y Gen. 118 (1977).

rowly construed the Board's authority, the Attorney General's opinion described the court's reasoning as follows:

- 1) the board had the authority to prevent or abate air pollution;
- 2) air pollution was defined by the applicable ambient air standard;
- 3) regulations explaining or implementing such standard must be for the purpose of preventing or abating emissions which would result in the standard being exceeded; and
- 4) there was no evidence in the record of present or reasonably anticipated future need for a new regulation to prevent violation of the standard.<sup>283</sup>

According to the Attorney General, the court held that "although the board does not have the authority to plan generally for the industrial development of the state,"<sup>284</sup> the Board may adopt new emission regulations for both existing and proposed sources "if there is substantial evidence in the record of a present or reasonably anticipated future need for a stricter regulation in order to prevent air pollution in excess of the standard."<sup>285</sup>

Subsequently, in *Kennecott Copper Corp. v. New Mexico Environmental Improvement Board*,<sup>286</sup> Kennecott, relying on the decision in *Public Service Co.*, contested the Board's revised sulfur dioxide emission standard for copper smelters, claiming that the Board exceeded its authority under the state air quality statute.<sup>287</sup> The court noted that "[w]hen New Mexico standards are amended and thus made more stringent in order to comply with federal requirements, the Board is doing no more than it is obliged to do" under the Clean Air Act.<sup>288</sup> At the same time, the court observed, the Board is fulfilling its duty under section 74-2-5 of the New Mexico Statutes to "prevent or abate air pollution."<sup>289</sup> The court specifically distinguished the *Public Service Co.* decision, noting that in that case the Board had adopted regula-

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283. *Id.* at 120.

284. *Id.*

285. *Id.* Although the Attorney General's opinion recognized that the court did not provide a bright line test with respect to circumstances that would constitute sufficient "evidence of reasonably anticipated future need," the opinion suggested that "[t]he board may act 'to prevent or abate air pollution' when presented with persuasive evidence that emission sources are growing in number and that the totality of new and existing emissions will, if left at presently regulated rates, exceed the Ambient Air Quality Standard." *Id.* at 120-21.

286. 614 P.2d 22 (N.M. Ct. App. 1980).

287. *Id.* at 24.

288. *Id.* at 25.

289. *Id.*

tions requiring performance far beyond that necessary to meet its own standard, whereas in the case under consideration the Board had adopted regulations requiring only that level of performance necessary to attain the standard.<sup>290</sup>

Notably, in spite of this history of litigation, when the New Mexico Legislature enacted section 74-2-5 it failed to address the issue of the extent of the state agency's authority to assure compliance with ambient standards by providing a margin of safety. Rather, the legislature simply provided that the NMAQCB had the authority to impose more stringent source-specific standards than required by federal law only when necessary "to achieve national ambient air quality standards in nonattainment areas."<sup>291</sup>

*b. States with Some Language Addressing the Extent of Authority to Impose More Stringent Source-Specific Standards to Assure a Margin of Safety for Ambient Standards.*—In addition to New Mexico, four states have statutes containing language giving the state agency authority to impose more stringent source-specific standards to assure compliance with ambient standards. Two of these states have statutes whose language appears to address the issue presented in *Public Service Co.*

For example, the Missouri legislature recently amended its statute to provide that "[t]he restrictions of [section 643.055.1] shall not apply to the parts of a state implementation plan developed by the commission to bring a nonattainment area into compliance and to maintain compliance when needed to have a[n] . . . approved state implementation plan."<sup>292</sup> Rhode Island's statute similarly provides that regulations governing fuel emission characteristics "shall not be more stringent than the mandatory standards established under federal law or regulation, unless it can be shown that such [regulations] . . . are needed for the attainment or maintenance of air quality standards."<sup>293</sup> Because both of these statutes provide authority both to attain and to maintain compliance with ambient standards, both appear to give

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290. *Id.* Judge Andrews dissented, believing that the regulation was not in accordance with § 74-2-5 because the Board failed to consider economic concerns and because the regulation obligated Kennecott to employ a specific method of control. *Id.* at 26 (Andrews, J., dissenting).

291. N.M. STAT. ANN. § 74-2-5 (Michie 1993). By granting the state agency authority to impose standards to achieve national ambient air quality standards in nonattainment areas, the New Mexico statute arguably affirms *Public Service Co.*, which held that the Board only can impose standards to achieve, but not to go beyond, the ambient air standards.

292. 1994 Mo. Laws 590 (emphasis added).

293. R.I. GEN. LAWS § 23-23-5(12) (Supp. 1994) (emphasis added).

their state agencies the authority to require more stringent source-specific standards to provide a margin of safety.

The statutes of the other two states, however, share the problem evident in the New Mexico statute. The Arkansas<sup>294</sup> and Iowa<sup>295</sup> statutes contain clear language authorizing the state agency to impose more stringent source-specific standards than the Clean Water Act, to the extent necessary to assure compliance with the Act's water quality standards. The Arkansas and Iowa statutes, however, never clarify whether the state agencies have authority to assure that a margin of safety exists to ensure continued maintenance of the water quality standards, or authority only to assure that the water quality standards are merely achieved.<sup>296</sup>

#### IV. CONCLUSION AND PROPOSED MODEL LEGISLATION

This Article has analyzed the extent to which state legislative constraints on the authority of state environmental agencies demonstrate the state legislature's agreement with the resolution or apparent resolution of issues under federal law. The Article highlights that a statute providing that a state agency "may not promulgate rules more stringent than federal law" creates a problematic ambiguity and offers the affected agency, the regulated community, concerned citizens and the courts little insight into the actual extent of the state agency's authority.

The Article suggests that state legislatures that have enacted such simplistically drafted statutory constraints on state agency authority have overlooked significant problems arising from the intersection of such spare language and the complexity of federal environmental law. Accepting that such statutory constraints, at a minimum, demonstrate a state legislature's agreement with the federal government's decision to regulate certain sources in a certain manner, this Article posits that these state statutory constraints nonetheless raise three issues regarding how much a state legislature agrees with the federal government's decision to refrain from regulating sources. The first question is, what is the state agency's authority to impose additional regulations on reg-

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294. ARK. CODE ANN. § 8-4-207(1)(A) (Michie 1989) (providing for more stringent effluent limitations if "necessary to meet water quality criteria or toxic standards established pursuant to any state or federal law or regulation").

295. IOWA CODE ANN. § 455B.173.2 (West 1993) (allowing for more stringent effluent limitations "if the more restrictive effluent limitation is necessary to meet water quality standards").

296. ARK. CODE ANN. § 8-4-207(1)(A) (Michie 1989); IOWA CODE ANN. § 455B.173.2 (West Supp. 1994).

ulated sources?<sup>297</sup> The second question is, what is the agency's authority to impose regulations on additional sources?<sup>298</sup> The third question is, how should one interpret these statutory constraints with respect to the agency's authority to impose more stringent source-specific standards when necessary to assure compliance with ambient standards?<sup>299</sup>

With respect to the first and second questions, state legislatures quite simply need to be more specific. They could provide a great deal of guidance to state agencies, the regulated community, concerned citizens, and the courts by adding a few words detailing the state agency's authority to promulgate regulations for additional pollutants or additional sources.

For example, if a state legislature wishes to authorize a state agency to administer the federal air program, but also wishes to preclude the state agency from regulating additional pollutants and additional sources not within the Clean Air Act, it could use the following language:

To assure that state regulations are not more stringent than federal law: (1) the state agency may not regulate sources not regulated under federal law; and (2) when a state agency promulgates regulations applicable to a source regulated under federal law, the state regulations applicable to such source may not include pollutants or obligations not regulated or imposed under federal law with respect to such source.<sup>300</sup>

This language clearly limits the state agency's authority to the scope of federal regulations. It permits no extension to additional pollutants or additional sources, and also precludes imposing additional obligations, such as testing or reporting.<sup>301</sup>

The third question, namely the tension between a state agency's obligation to assure compliance with ambient standards under the

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297. See *supra* Part III.A.

298. See *supra* Part III.B.

299. See *supra* Part III.C.

300. Other formulations of statutory language likely would be effective as well, including some of the language discussed earlier in the Article. See, e.g., *supra* notes 104-105 and accompanying text (discussing 35 PA. CONS. STAT. ANN. § 4006.6(a) (1993) which incorporates by reference federal regulations of pollutants under the Clean Air Act), and *supra* notes 191-194 and accompanying text (discussing the language of § 23-01-04.1.1 of the North Dakota Code providing that "[t]he state agency may not adopt rules . . . for which there are no corresponding federal regulations.").

301. One could modify this language to make the constraint conditional, see *generally supra* Part I.B.

Clean Air Act and Clean Water Act and its statutory inability to impose source-specific standards more stringent than federal law is more complex. This unfortunate complexity would diminish considerably, however, if state legislatures included language like the following in their statutes limiting the authority of state environmental agencies:

The state agency shall not impose standards more stringent than the standards of federal law, except to the extent that more stringent regulations are needed to assure that the state attains compliance with, and will be able to continue to maintain compliance with, national ambient air quality standards (or water quality standards).<sup>302</sup>

This language clarifies that the state agency not only may promulgate more stringent source-specific standards to assure that the state meets the ambient standards, but also may promulgate standards that create a margin of safety allowing further growth without constant reevaluation of source-specific standards to assure continued compliance with ambient standards.<sup>303</sup>

Regardless of whether one believes in the wisdom of such statutory constraints on state agency authority, the trend of the law suggests that state legislatures will continue to enact them. The preceding suggestions offer no panacea, for they likely would not resolve all disputes over the interpretation of such statutory constraints. This is especially true given the increasing complexity of federal environmental law. Nonetheless, the suggested statutory language could minimize disputes over the interpretation of statutory constraints on state agency authority by more clearly indicating to all interested parties how much the state legislature agrees and disagrees with federal decisions on the scope of environmental regulation.

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302. See *supra* notes 292-293 (discussing language in 1994 Mo. Laws 590 and R.I. GEN. LAWS § 23-23-5(12) (Supp. 1994)). Of course, this language could be modified to apply to water quality standards under the Clean Water Act.

303. One could modify this language to make the constraint conditional, see generally *supra* notes 33-36.