OBSTACLES TO THE DEVOLUTION OF ENVIRONMENTAL PROTECTION: STATES' SELF-IMPOSED LIMITATIONS ON RULEMAKING

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ABSTRACT

Federal decision makers considering a policy of devolving the responsibility for environmental protection to the states need to consider two kinds of limitations that states impose on their own rulemaking powers. "No more stringent" rules prohibit the state from imposing regulations that are more stringent than counterpart federal regulations; Private property rights acts discourage regulations that limit an owner's use of private property. This Note surveys twenty-seven "no more stringent" rules and twenty private property rights acts. It analyzes the extent to which they inhibit states from filling gaps caused by the rollback of federal authority. Each set of state rules is then ranked on a relative stringency scale. A case study analysis is used to show how a rollback in federal Clean Water Act authority might affect the assumption of responsibility to provide environmental protection to wetlands.

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I. INTRODUCTION

After thirty years of federal dominance in the sphere of environmental protection, there are increasing calls for transfer of responsibility for environmental protection to the states. Consequently, a general policy of devolving responsibility from the federal government to the states is gaining support at the national level. In fact, it is among the goals expressed by former Utah Governor Mike Leavitt, the recently appointed head of the Environmental Protection Agency (EPA).[1] While devolution of federal power is not limited to the field of environmental protection, it does present unique problems in this area where few issues are neatly confined within state political boundaries.

1. *Proposing an Amendment to the Constitution of the United States to Provide a Procedure By Which the States May Propose Constitutional Amendments: Hearing on H.R.J. 84 Before the House Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (Statement of Governor Mike Leavitt) ("Our mission . . . should be to restore the original balance between states and the national government. The best way to do that is for the states to be stronger. Stronger states will produce a better national government.").

The issue of devolution recently came to a head in the aftermath of the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.[2] Until this decision, one of the most sweeping federal environmental protections for water quality was jurisdictionally based on the "Migratory Bird Rule," declaring that Clean Water Act (CWA) jurisdiction will attach to any water that is used, or would be used, by birds in their seasonal migrations.[3] In effect, this rule granted jurisdiction over every surface water in the United States. In *SWANCC*, however, the Supreme Court declared that the Migratory Bird Rule could no longer serve as the sole basis for asserting jurisdiction over certain intrastate, nonnavigable waters.[4]

The Court's opinion had important federalist overtones: There are waters of the United States, which implies there are waters of the states.[5] By extension, since the decision permanently excluded a category of "isolated" waters from federal control under the CWA, the Court essentially demanded that states protect these "isolated" waters if they are to receive any protection at all. Despite the clarity in federalist ideology, the opinion was less than clear about which waters would be considered "isolated" for jurisdictional purposes.[6]

To resolve this uncertainty, EPA and the U.S. Army Corps of Engineers (USACE) published an Advance Notice of Proposed Rulemaking to solicit public comment on the jurisdictional limits of the CWA.[7] Over 100,000 public comments were submitted, including comments from national environmental organizations, major industry associations of the regulated community, and forty-six states.[8]

Industry groups, encouraged by the possibility of replacing cumbersome federal rules with potentially friendlier state rules, focused on one of the purposes of the CWA "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . ."[9] They argued that a focus on state control was not only

2. 531 U.S. 159 (2001) [hereinafter *SWANCC*].

3. 33 C.F.R. § 328.3(a)(3) (2003), *clarified in* 53 Fed. Reg. 20,765 (June 6, 1988); 51 Fed. Reg. 41,217 (Nov. 13, 1986).

4. *SWANCC*, 531 U.S. at 159.

5. *Id*. at 174.

6. *Id*. at 171-72.

7. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1,991 (Jan. 15, 2003).

8. U.S. Army Corps of Engineers & the U.S. Environmental Protection Agency, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (April 16, 2003) (eDocket ID OW-2002-0050)

9. 33 U.S.C. § 1251(b) (2000).

consistent with the CWA, but furthermore was necessary to rein in federal environmental protections that had become so sweeping that they unconstitutionally impinged on traditional notions of state sovereignty envisioned by our federalist system.[10]

In response to concerns from environmentalists that more state control would lead to a breakdown in environmental protection,[11] the regulated community argued that devolution was not a rollback, but merely a shift of power.[12] Thus, as the federal government steps out of its role, states would step in to fill the jurisdictional gap and maintain a constant level of environmental protection.

This scheme raises an obvious question: Can states really fill the gap? In grappling with this issue, one is immediately confronted with legal limitations that states impose on themselves to discourage state-level environmental protection. Even where state agencies show a willingness to fill the jurisdictional gap, the majority of state environmental agencies are hampered by one of two forms of legal limitations: "no more stringent" rules (NMSRs) and private property rights acts (PPRAs).[13]

So before one can answer whether states could indeed fill a jurisdictional gap, therefore, one needs to understand these legal limitations. How far do they reach? How do they serve to block state rulemaking? What are their policy justifications?

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10. *See, e.g.*, The Foundation for Environmental and Economic Progress et al., Comments in Response to the U.S. Army Corps of Engineers' and the U.S. Environmental Protection Agency's Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (Apr. 16, 2003) (eDocket ID OW-2002-0050-1829) [hereinafter FEEP Comments].

11. *See, e.g.*, Natural Resources Defense Council et al., Comments for the EPA Water Docket (Apr. 16, 2003) (eDocket ID OW-2002-0050-1674) [hereinafter Joint Greens Comment].

12. *See, e.g.*, FEEP Comments, *supra* note 10.

13. Even where state agencies are free to create environmental regulation in the absence of NMSRs and PPRAs, they are still bound by the jurisdictional limits that are set for them by the state legislature. In the field of water quality management, they are limited by the state's definition of "waters of the state, or its equivalent," in the same way that EPA and USACE are limited by the definition of "waters of the United States." 33 U.S.C. § 1362(7) (2000). Although states are free to define "waters of the state" as broadly as they choose—they are not bound by the Commerce Clause—they sometimes, be it through purpose, carelessness or lack of scientific knowledge at the time of drafting, have created situations where they have excluded certain waters from this definition. For example, in North Carolina, the definition of "waters of the state" does not include wetlands, only "swamps." N.C. GEN. STAT. § 143-212(6) (2003). If "swamps" were to be interpreted as "traditional swamps," then many wetlands could be excluded, like ones without year-round standing water. *See* Elizabeth Hendrix, The Legal Status and Protection of North Carolina's Isolated Wetlands 19-22 (2003) (unpublished Master's Project, Duke University) (on file with the Nicholas School of the Environment, Duke University). It is important to recognize that these state-to-state definitions of territorial waters are additional limitations on the ability of states to fill jurisdictional gaps. However, they are outside the scope of this paper, which is focused on deliberate limitations to rulemaking.

The purpose of this Note is to help answer the following question: In light of "no more stringent" rules and private property rights acts, would states be able to maintain federal levels of environmental protection? Following up on the *SWANCC* comments that prompted this Note, it focuses specifically on the issue of water quality.

Part II explains in more detail the policy justifications for devolution of federal power, and how and why some states have responded with self-imposed limitations. Part III is a taxonomy of NMSRs, followed by a categorization of each state. Part IV repeats this analytical process for PPRAs. Part V uses the state-by-state stringency categorizations to indicate how effectively states with high wetland acreages will be able to fill the gaps from any rollback in federal jurisdiction.

The analysis in Part V should provide an understanding of the interplay between state rulemaking limitations and wetland endowments, but it does not purport to make any conclusions about actual state by state responses to a federal rollback. The Note intends, rather, to give observers an idea of the extent to which states may be inhibited from filling gaps in federal protection of water quality. Thus, for example, it would be fallacious to conclude that a given stringency will result in a given acreage of unprotected wetlands. However, one could reasonably conclude that a state with a high stringency score and a large acreage of wetlands would have trouble maintaining existing levels of federal protection, if it chose to maintain protections at all. Furthermore, while many of the statutes considered are of general applicability, one should exercise care in extrapolating to issues other than water quality. The taxonomic keys were designed based on a survey of water quality related statutes alone.

II. STATE RESPONSES TO DEVOLUTION

A. *Debating Devolution*

The argument over devolution is, at its core, an argument over competing theories of efficient administration. Which of the governments in our federal system—state or federal—is better able to meet the needs of interested parties in a swift and satisfactory manner? This is a general question, and it spans much more than environmental issues, although those are all that are considered here.

It is important to distinguish devolution from cooperative federalism. Under cooperative federalism, the federal government delegates certain programmatic powers to the states, with the understanding that the states shall meet minimum requirements, and that the federal government may

intervene to the extent that states do not live up to their obligations.[14] The devolution considered in this paper occurs when the federal government withdraws its rulemaking authority. This withdrawal may occur when the federal government voluntarily abandons its rulemaking powers, or when its declines to assert its power to the extent permissible under the Constitution.[15] In either case, states are forced to create and enforce their own regulations to protect environmental resources that lose federal protection.

The arguments in favor of devolution have an intuitive appeal. Proponents argue that state and local governments are closer to affected parties, which makes them both more sensitive and more responsive to local needs.[16] Furthermore, this proximity allows for regulations tailored to specific local circumstances. Through devolution, "one-size-fits-all" national regulations and their consequent inefficiencies can be replaced with targeted regulations that achieve the same benefits at lower cost.[17] Finally, from a constitutional standpoint, those powers not delegated to the federal government are reserved for the states under the Tenth Amendment,[18] and there are no enumerated powers specifically directed to the environment.

The arguments against devolution are also compelling. First, ecological boundaries are quite distinct from political boundaries; therefore national standards are the most effective way to ensure consistent treatment of ecosystems that span political jurisdictions. Second, if states are allowed to have non-uniformity in their regulations, many commentators predict that it will lead to a so-called "race to the bottom," in which competitive economic pressures harm social welfare by forcing states to lower their levels of environmental protection—thereby lowering the cost of doing business—to attract industry to the state.[19] While this outcome is not

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14. For example, the National Pollutant Discharge Elimination System permitting program under § 402 of the CWA is a delegated program that would be considered an effort in cooperative federalism. The federal government authorizes states to issue discharge permits, but retains the ability to demand stricter permit limits, and to enforce against noncompliant permittees. 33 U.S.C. § 1342 (2000).

15. For example, in *SWANCC*, the Supreme Court never concluded whether Congress *could* regulate "isolated" wetlands under its Commerce power; it merely stated that Congress did not clearly intend to exercise its Commerce power to its fullest extent. SWANCC v. USACE, 531 U.S. 159, 172-73 (2001). Therefore, in the case of wetland regulation, the devolution occurs as a byproduct of the *SWANCC* decision and Congress' failure to assert its Commerce power fully in the interim.

16. James L. Huffman, *Thirtieth Anniversary Edition Essays: The Past and Future of Environmental Law*, 30 ENVTL. L. 23, 31 (2000).

17. *Id*.

18. U.S. CONST. amend. X.

19. *See* Kirsten H. Engel, *State Environmental Standard Setting: Is There a "Race" and Is It "To the Bottom?"*, 48 HASTINGS L.J. 271, 283-84 (1997) (debating the existence of a race to the bottom).

certain,[20] the very fact that "no more stringent" rules exist suggests that states *believe* a race to the bottom is possible (if not likely), and that they need to protect their statewide industry from anticompetitive environmental regulation. In this sense, states are not worried about racing to the bottom; rather, they do not want to get stuck at the top. Finally, even though many business entities favor devolution because it allows them to exert pressure on a smaller political body, others are less sanguine, because it means a patchwork of state laws to follow as opposed to a single national regulation.[21] Likewise, for smaller regional firms competing with national competitors, uniform environmental rules ensure a level playing field.[22]

There is no consistent state response to the possibility of devolution. In some cases, states welcome the increased authority. In its comments on the *SWANCC* decision, Alaska eagerly requested the opportunity to set its own wetland policy.[23] Many other states, in particular those with many bordering states, oppose devolution of federal control out of a fear of cross-border externalities resulting from states with weaker regulations.[24]

If a state has an interest in protecting its resources, there is no question that it may exercise its power to extend protection to environmental resources within its territorial borders. By way of its police power, which gives a state the right to protect the public health, welfare, and safety, the state could allow its environmental agencies to promulgate regulations that meet or even exceed prior federal rules.[25]

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20. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210-1212 (1992) (challenging the race to the bottom theory in the environmental context).

21. *A Conversation on Federalism and the States: The Balancing Act of Devolution*, 64 ALB. L. REV. 1091, 1095-96 (2001) (David L. Markell, moderator) (discussing the relative advantages of non uniform rules).

22. *See id.* at 1096 (opining on the effect a set of uniform laws would have on variably sized businesses).

23. *See* Letter from Frank Murkowski, Governor of Alaska, to the E.P.A. (Apr. 16, 2003) (on file with E.P.A.) (eDocket ID OW-2002-0050-1274) (commenting on the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," and stating that, "[w]e . . . believe states should be afforded much deference in land use and natural resource management. . . . Alaska has demonstrated that it is willing and able to protect its natural resources and the environmental quality of our state.").

24. *See, e.g.*, Letter from Jeffrey Wennberg, Comm'r, Department of Environmental Conservation, Agency of Natural Resources, Vt. (2003) (eDocket ID OW-2002-0050-1330) (commenting on the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters in the United States," and stating that, "Vermont is dependent on the protection of resources in other states in order to maintain Vermont's exceptional natural resources. Also, Vermont is in a keen race with other states for economic development and should not be disadvantaged in that competition by *ad hoc* decisions that relax regulatory requirements in other regions of the country.").

25. *See* Revesz, *supra* note 20, at 1228 (noting that some states have promulgated standards more stringent than federal standards in a variety of other environmental areas).

But just because states have the right to extend such protections does not mean that their agencies are permitted freely to do so. It is here that the legal limitations to be discussed in this Note come into play. There are various policy justifications for these limitations, mentioned below, but they all share a common feature: The legal limitations are created by the state legislature to restrict the state's inherent right to make environmental rules.

Finally, a brief word is warranted for the significant budget deficits currently facing states. For the 2004 fiscal year, every state except North Dakota, Wyoming, and New Mexico has shortfalls.[26] Even in the absence of legal limitations, these deficits suggest that states will be hesitant to fund the expansion of environmental programs that were formerly paid for by the federal government. Although budgetary concerns are a strong immediate argument against devolution, budgets may fluctuate and the argument may lose force in the future. The legal limitations, however, will still be obstacles to environmental rulemaking even if state governments are flush with funds to spend on environmental protection.

B. *"No More Stringent" Rules*

"No more stringent" rules, in their general form, require that state agencies not impose environmental regulations that are more stringent than those that are, or could be, imposed by the federal government.[27] These rules come in many varieties,[28] with significantly different levels of stringency, but by definition, all "no more stringent" rules affect limits that may be imposed, technology requirements, and other quantifiable standards. As long as federal environmental laws remain in place, and retain jurisdiction over large portions of the country, the consequences of these NMSRs are minimal.

NMSRs are not constitutional and can therefore be overridden by the legislative process. For example, Wisconsin passed a preemptive *SWANCC* gap-filling measure in 2001, overriding their NMSR in the wetland context.[29] Of course, whether other states will follow suit is an impossible question to answer, although it is worth noting that an effort is underway to

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26. Andrew Murr & Jennifer Ordonez, *Tarnished Gold*, NEWSWEEK, July 28, 2003, at 33, 35 (inset) (highlighting deficits that include CA at $38 billion; NY $9.3 billion; TX $3.7 billion; and NC $2 billion).

27. *E.g.*, S.D. CODIFIED LAWS ANN. § 1-40-4.1 (1993) ("No rule . . . may be more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue.").

28. *See* rules cited *infra* note 42.

29. *See* 2001 Wis. Laws 6 (extending protection to "nonfederal" wetlands).

encourage just such a trend.[30] In any case, it is important to remember that the upper extreme of most NMSRs are not part of state constitutions and can therefore be overridden by the ordinary legislative process.

The policy justifications for NMSRs are clearly based on concerns with states' inability to compete economically that may arise as a consequence of devolution.[31] State legislatures do not want their environmental rulemaking agencies to promulgate (or in some cases maintain) regulations that are any stronger than necessary for fear that those regulations will raise the cost of doing business in the state, leading to a flight of industry and jobs.[32] Whether such a flight would in fact happen is debatable, especially considering that some economically competitive states like California have passed rules more stringent than those required by the federal government,[33] but the fear is quite real.[34]

NMSRs interfere with gap-filling directly by imposing a cap on the standards that a state agency may require; they turn federal floors into regulatory ceilings. For statutes that impose a jurisdictional cap, the state agency would not be able to require permits or engage in enforcement actions against facilities that do not remain under federal jurisdiction. In these cases, gap-filling is *per se* prohibited. For the more benign statutes that allow exemptions for certain regulations, the gap-filling is not necessarily prohibited *per se*, but merely delayed and discouraged by the various hoops that the state agency must jump through in order to promulgate a rule. In these cases, the NMSRs have a deterrent effect on state regulators, in effect forcing them to think twice before proposing a rule not demanded by federal law.

C. *Private Property Rights Acts*

Private property rights acts are indirect limitations to gap-filling, but just as much of an obstacle to environmental protection. In their basic form, PPRAs require that state rulemaking agencies evaluate whether a rule or

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30. *See* Model State Wetland Statute to Close the Gap Created by *SWANCC* (Feb. 22, 2001) (furthering the effort of the Association of State Wetland Managers, which has created model legislation to fill the *SWANCC* gap), *available at* http://www.aswm.org/swp/model-leg.pdf.

31. *See* Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1388-90 (1995) (stating that, "[g]iven that state legislatures may believe that their state is competing with other states for industrial and commercial development, state legislatures also understandably may seek a competitive advantage by minimizing the state agencies' ability to impose environmental regulations").

32. *See, e.g.* Revesz, *supra* note 20, at 1228 (noting that Connecticut had supported more stringent environmental regulations until realizing the damaging economic impact they might have).

33. *See id* at 1228-29 (discussing California's pollution control requirements for automobiles).

34. *See generally* Engel, *supra* note 19.

exaction will cause a taking, and they implement safeguards to ensure that agency actions do not cause a taking. To determine what constitutes a taking, the PPRAs typically impose Supreme Court Fifth Amendment case law at the state level, either through codification or incorporation by reference.[35] Furthermore, a number of these PPRAs expand the definition of private property, creating the real possibility that an action that could be undertaken by the federal government without causing a taking would, in fact, result in a taking if that same action were performed by a branch of the state government.

The justification for PPRAs is not directly linked to devolution. In fact, they are a response to a perceived inadequacy of the courts to protect the rights of private property owners.[36] This reaction is not entirely surprising in an era where Justice Blackmun could argue seriously in his personal dissent to *Lucas v. South Carolina Coastal Council* that the owner was not entitled to compensation as a result of a restrictive zoning rule because his prime beachfront property could still be used as a place to "picnic, camp in a tent, or live . . . in a movable trailer."[37] Even under the majority opinion in *Lucas*, the threshold for triggering a taking is the deprivation of all economically beneficial use.[38] Only rarely will such a high threshold be crossed. Responding to this perceived judicial indifference to property owners, PPRAs place the initial burden of evaluating the takings impact on private property at the agency level, well before a controversy ever reaches the courts.

There are two ways in which PPRAs interfere with gap-filling, depending on the type of statute. Those statutes that expand private property rights, sometimes called "compensation" statutes,[39] interfere by lowering the threshold for what state action constitutes a taking. It is these statutes that are the most serious obstacles, because they block state action that might otherwise be legitimate if performed by the federal government.

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35. This may seem superfluous, since the Fourteenth Amendment would apply this law to state action regardless. U.S. CONST. amend. XIV § 1. Indeed, many of the Supreme Court decisions stemmed from controversies between property owners and state agencies. *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). Keep in mind, however, that those statutes that codify the law (as opposed to those that incorporate it by reference), will retain force even if federal takings law changes.

36. *See* Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 94-112 (2002) (arguing that property rights are inadequately protected in the U.S. courts).

37. *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting).

38. *Id.* at 1015-16.

39. Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187, 191 (1997).

Those statutes that do not expand private property rights but merely call for an evaluation prior to action, sometimes called "assessment" statutes,[40] are more indirect in their effect. By shifting the burden of evaluating the taking on to the state agency, not only is the agency saddled with additional administrative costs for each rule it must promulgate, but it also must face the public spotlight and political pressure. This pressure would tend to discourage far-reaching regulations by political actors concerned with appeasing key constituents in the regulated community. Consequently, the agency would likely scale back the scope of some environmental rules so as not to seem overly aggressive during the assessment phase.

III. TAXONOMY OF "NO MORE STRINGENT" RULES

Mechanically, NMSRs leave a significant portion of the responsibility for environmental decisionmaking to the federal government, because the state is in effect deferring to federal standards. Thus, as long as the federal government continues to exert broad power over environmental matters, the practical effect of NMSRs is slight, because the federal rules will themselves govern the field. But should federal jurisdiction lapse, as some suggest could happen with isolated wetlands because of the *SWANCC* decision,[41] "no more stringent" rules could be seriously tested. Would a federal rollback of jurisdiction require a state rollback? Or is a NMSR only about deferring to federal standard-setting, and distinct from jurisdictional issues? Is there any way to work around these self-imposed limitations on rulemaking in cases of state-specific need? To answer these questions, it is important to look at the NMSRs themselves and identify features that contribute to their severity.

40. *Id.* at 190.

41. *See* FEEP Comments, *supra* note 10.

The set of twenty-seven NMSRs surveyed here[42] represent those NMSRs in the United States that apply to rulemaking related to water quality. Seventeen states have NMSRs of general applicability, meaning that they apply to all water quality rules (and in some cases all environmental rules).[43] Another ten have rules that apply only to a specific category of regulation (for example, underground storage tanks).[44] Of the twenty-seven NMSRs, twenty-four are statutes, two are executive orders,[45] and one is a binding policy statement.[46] The fact that two NMSRs are executive orders does not change their practical effect. Although they are certainly easier to override (only the will of the governor is required), for most purposes they are the same in language and intent as the statutory NMSRs, just promulgated by a different branch of government.

This taxonomy identifies a basic set of distinct features in NMSRs whose presence makes a NMSR more severe. The most difficult aspect of creating this taxonomy was achieving the proper level of generality. While a few of the NMSRs seem like clones of one another, others are specific enough in their language that they could merit feature categories entirely to themselves. But such a fine level of detail would undermine the more general intentions of this Note, and it would subject the analysis to a potentially obfuscating degree of hair-splitting. In order to achieve the analytic goals of this Note, the taxonomy uses only groups with more than one member (although some only have two). While this grouping scheme

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42. The list originated with a footnote in Jerome Organ's foundation article, Organ, *supra* note 31, at 1376 n.13. It is updated here in response to additions, deletion, modifications and code renumberings in the almost ten years since Professor Organ's article. ALA. CODE §§ 22-35-10 (USTs), 22-36-7 (wellheads) (2002); ALASKA STAT. § 46.03.365 (2004) (USTs); ARIZ. REV. STAT. §§ 49-255.01 (AZPDES), 49-1009 (USTs) (West 2000); ARK. CODE ANN. § 8-7-803 (2003) (USTs); COLO. REV. STAT. § 25-8-202(8)(a) (2003); FLA. STAT. chs. 403.061(7), (31), 403.804(2) (West 2004); IDAHO CODE § 39-3601 (Michie 1997); IOWA CODE § 455B.173 (2003); KY. REV. STAT. ANN. §§ 13A.120 (administrative regulations generally), 224.16-050 (NDPES) (2003); ME. REV. STAT. ANN. tit. 38, § 341-D(1-B) (West 2002); Exec. Order No. 01.01.1996.03, 23-4 Md. Reg. 193 (1996); MISS. CODE ANN. § 49-17-34 (2003); MONT. CODE ANN. §§ 75-5-203, 75-5-309 & 80-15-110 (2002); NEB. REV. STAT. § 81-1505(22) (2003) (SDWA); NEV. REV. STAT. 459.824 (2004) (USTs); N.D. CENT. CODE § 23-01-04.1(1) (2002); OHIO REV. CODE ANN. § 121.39 (2004); OKLA. STAT. tit. 27A, § 1-1-206 (2004); OR. REV. STAT. § 468B.110(2) (2003) (forest operations); Penn. Exec. Order No. 1996-1 (1996); S.D. CODIFIED LAWS § 1-40-4.1 (2003); TENN. CODE ANN. § 4-5-226(l) (2003); UTAH CODE ANN. § 19-5-105 (2003); VA. CODE ANN. § 62.1-44.15:1 (Michie 2000) (WWTPs); W. VA. CODE § 22-1-3 (2003); Wis. Board Pol. NR 1.52(3) (1996); WYO. STAT. ANN. § 35-11-1416 (Michie 2003) (USTs).

43. Colorado, Florida, Idaho, Iowa, Kentucky, Maine, Maryland, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, West Virginia, and Wisconsin.

44. Alabama, Alaska, Arizona, Arkansas, Nebraska, Nevada, Oregon, Tennessee, Virginia, and Wyoming.

45. Maryland, Exec. Order No. 01.01.1996.03 (1996), and Pennsylvania, Penn. Exec. Order No. 1996-1 (1996).

46. Wisconsin, Wis. Board Pol. NR 1.52(3) (1996).

obviously results in a loss of precision, all the major features in all the NMSRs are accounted for, and on the whole the result—in the form of the state-by-state ranked order—is consistent with what one would expect from reading the NMSRs as a group.

In some instances, the feature names themselves seem awkwardly phrased, but this contortion was necessary from an analytical standpoint to arrange all the names such that the presence of the feature indicates an increased stringency level.[47] As a result, the features listed are distinct from those that have been identified in the literature to date. Previous literature has been more concerned with identifying features that create interpretive problems, rather than features that create gap-filling problems.[48] In no way does this Note intend to downplay the importance of the earlier works—indeed it would have been impossible without them—the Note merely distinguishes the earlier linguistic taxonomies from its own functional taxonomy.

A concomitant benefit to the use of a functional taxonomy is that the Note can focus on readily identifiable features that may be read off the face of a statute, without becoming dependent on shifting case law or having to guess how courts will resolve the interpretive issues. The implicit assumption, of course, is that a given term will, at some point in the future, receive the same or similar interpretation across statutes.

A. *Distinct Features of "No More Stringent" Rules*

1. Affects Quantifiable Limits

This feature is basically the litmus test for inclusion in the NMSR group.[49] If a NMSR does not affect some kind of quantifiable limit, procedural requirement, or technology standard, then it is not considered in this Note. There is no attempt to distinguish between the stringency of different kinds of limits, or even to answer, for example, what is a federal standard.[50] These interpretive issues are open questions that will be decided

47. *But see infra* Part III.B (discussing the exception to this rule for the Limited Applicability feature that is a multiplier which reduces the overall score).

48. *See, e.g.*, Organ, *supra* note 31.

49. If all NMSRs are included in this category, it seems like there is no purpose to it, because it does not help distinguish between NMSRs. However, it must be included to account for the multiplier for Limited Applicability, discussed *infra* Part III.A.6.

50. The questions of what is a "federal standard" and what is "stringent" are actually quite important to the implementation of NMSRs, and a few courts have had occasion to consider them. *E.g.*, Fla. Elec. Power Coord. Group v. Askew, 366 So. 2d 1186 (Fla. Dist. Ct. App. 1978) (holding that a state law requiring different pollution control "methods" for achieving temperature control were not "more stringent" because they were not "in counterpoise" to federal standards); Franklin v. Natural Res.

by the courts and their commentators; they do not affect the relative stringency of a statute once we make the assumption that there will be *some* consistent interpretation.

2. Jurisdictional Ties to Federal Regulation

Most "no more stringent" laws are silent on the issue most important following *SWANCC*, namely, whether the absence of jurisdiction for the federal government should preclude jurisdiction for the state regulatory agency. Jurisdictional limitations are the most severe gap-filling limitation, because they mean that the state agency is prohibited from protecting any resource that cannot be protected under a federal statute. In the case of *SWANCC*, a loss of federal jurisdiction over "isolated" wetlands would mean that a state with a jurisdictional tie to the CWA would also be precluded from regulating those waters.

Some NMSRs clearly separate jurisdictional issues from standards. They focus exclusively on capping the state standards at federal levels, ignoring whether the federal government would have jurisdiction to enforce those standards in all instances. These rules are *not* included in this category. Two examples are the NMSRs of Florida and Iowa.

The Florida law focuses on a "[standard] which has been *set* by federal agencies pursuant to federal law or regulation."[51] The word "set" is devoid of connotations of jurisdiction. This law suggests that what matters is the limit that the federal government has deemed appropriate. It defers to the federal environmental decisionmaking process. This law implies that Florida is free to regulate waters that are non-jurisdictional under the CWA, but any standards imposed must be "no more stringent" than the federal government would impose if it did have jurisdiction.[52]

Iowa's law is even more explicit. It states that a state standard may not be more stringent than an "effluent standard or pretreatment standard [promulgated] pursuant to . . . the federal Water Pollution Control Act . . . *for such a source*."[53] By using "such a source," the law is directed at a class of sources—which is independent of jurisdiction—and not a particular source that may or may not be jurisdictional. The practical ramifications are the same as for Florida: Iowa is free to regulate CWA non-jurisdictional waters, but for certain sources the limits that can be imposed are capped.

& Env. Prot. Cabinet, 799 S.W.2d 1 (Ky. 1990) (holding that a restricted hearing procedure was "more stringent" than federal law because federal law did not require prepayment of fines).

51. FLA. STAT. ch. 403.804(2) (West 2004) (emphasis added).

52. *Id.*

53. IOWA CODE § 455B.173(2) (2003) (emphasis added).

In the NMSRs which *are* included in this category, the rule language asserts that state jurisdiction should be limited by federal jurisdiction. Eleven rules are of this type.[54] To determine whether a statute falls in this category, the key question is whether the state rule ties itself directly to a federal statute, which would imply that the state rule shall accomplish no more protection than the federal statute, thus implicating jurisdiction. The most common way of tying state rules to federal statutes is through language whereby the state rule shall be "no more stringent" than "corresponding federal law"[55] or "federal regulations . . . that address the same circumstances."[56]

Mississippi is an example of this jurisdiction-tying approach. Its NMSR declares that state rules "shall not exceed *requirements of federal statutes* and federal regulations . . . ."[57] Federal jurisdiction is automatically implicated by using the term "requirements of federal statutes." If the federal statute cannot reach some environmental resources of the state, Mississippi cannot impose standards that will. [58]

Kentucky's law achieves a jurisdictional tie in a more subtle way. It prohibits the imposition of standards in a permit that are more stringent than those "which would have been applicable under federal regulation *if the permit were issued by the federal government*."[59] Although an argument could be made that CWA non-jurisdictional waters can still be regulated by the State, the plain reading of this statute is that if federal regulation cannot impose the condition, neither can Kentucky.[60] Federal jurisdiction is not mentioned, but it is implied, because otherwise the act of issuing a permit is irrelevant, and the quoted qualification could be reduced to a statement about federal standards, as in Florida or Iowa.

The most direct of all jurisdictionally tied NMSRs is from Idaho, which mentions the federal statute by name: "[R]ules promulgated under this chapter [shall] not impose requirements beyond those of the federal clean water act."[61] Here, there is no doubt that if the CWA cannot reach a water, neither can Idaho's state environmental agency.

54. *See infra* Table 2.
55. *E.g.*, S.D. CODIFIED LAWS ANN. 1-40-4.1 (1993)
56. *E.g.*, MONT. CODE ANN. § 75-5-203(1) (2002).
57. MISS. CODE ANN. § 49-17-34(2) (2003) (emphasis added).
58. *Id*.
59. KY. REV. STAT. ANN. § 224.16-050(4) (2003) (emphasis added).
60. *See id*.
61. IDAHO CODE § 39-3601 (Michie 1997).

3. Federal Silence Preempts

Many NMSRs apply in a blanket fashion, such that state agencies are not only prohibited from exceeding existing federal standards, but also prohibited from setting standards in areas[62] that have not been addressed *a priori* by federal standards. In essence, these laws place the full responsibility for environmental regulation squarely with the federal government. In most cases, it is impossible to tell whether federal silence is meant to preempt state rulemaking. To identify those rules that are meant to allow federal preemption of the field, one must look closely at the intent behind the language. Among all the categories, this one strays furthest from the realm of function into the realm of interpretation. For this reason, few statutes are included in this category.

The Arkansas NMSR, for example, demands that the "regulations . . . shall as much as possible be identical to and no more stringent than the federal regulations adopted by [EPA]."[63] The intent is clearly to keep the state regulations consistent with federal regulations, which by necessity would prevent the state from creating new regulations in the face of federal silence.

A few NMSRs apply only when the federal government has spoken. In other words, if the federal agency has set a standard, then a state agency cannot exceed that standard; if the federal government has not set a standard, then the state agency is free to act. Both Iowa and West Virginia have NMSRs of this type. They are *not* included in this category.

Iowa's law explicitly declares that federal silence does not prohibit the imposition of a standard: "This section may not preclude . . . the establishment of an effluence standard for a source or class of sources for which the federal environmental protection agency has not promulgated standards pursuant . . . to the Federal Water Pollution Control Act."[64] In the case of West Virginia: "In 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."[65]

Regrettably, in the majority of cases, it is impossible to determine whether a statute intends for federal silence to preempt state rulemaking. Colorado's NMSR exemplifies this difficulty. It states that the state

62. "Areas" is a broad term, which is in fact used by the Alaska statute. ALASKA STAT. § 46.03.365(c) (2002). As used here, the term includes all manner of sources, parameters, outfalls and anything else that could be the substantive basis for a difference between two regulated activities.

63. ARK. CODE ANN. § 8-7-803 (2003).

64. IOWA CODE § 455B.173(2) (2003).

65. W. VA. CODE § 22-1-3a (2003).

commission "may [not] adopt rules more stringent than corresponding *enforceable* federal requirements."[66] Under one interpretation, the term "enforceable" could be read to mean that federal silence only matters where a federal statute is jurisdictional. This interpretation would create the awkward situation where the state could potentially have two sets of rules, one for CWA jurisdictional waters, and one for non-jurisdictional waters. Under a different interpretation, "enforceable" could be read to mean that the requirements must already exist before there is a stringency limitation; in the absence of federal requirements, then, the state is free to act. This latter interpretation seems more plausible; regardless, the statute was not included in this category for lack of clarity.

4. Retroactive

Most NMSRs are prospective in nature, meaning that they only apply to rules that are promulgated *after* the enactment of the NMSR. By being prospective in application, they function to preserve the status quo at the time of enactment. While these provisions may assist in the situation where currently regulated waters are threatened with losing their existing protections, they still serve as hurdles in the event that the state must enact new rules to fill a jurisdictional gap created by a rollback of the CWA.

The Wisconsin policy statement is an example of a prospective NMSR. It applies only when an agency "seeks to adopt" new rules after the date of August 1, 1996.[67] This policy statement clearly leaves in place rules adopted prior to that date, and therefore prior to any future federal rollback.

Retroactive NMSRs are less common than prospective NMSRs, but potentially quite devastating to preexisting state environmental protection programs. A retroactive NMSR requires a review of in-place state rules, and a withdrawal of those rules that could not be promulgated at the present time because of the NMSR. Consider the hypothetical case of a state that implemented its own CWA § 402 program and issued a National Pollutant Discharge Elimination System (NPDES) permit for an outfall into what later became a CWA non-jurisdictional water because of a federal rollback. Assuming that the NMSR affected jurisdiction,[68] this permit could potentially be declared invalid for lack of jurisdiction, and the state agency would not be able to reassert authority. Retroactive rules may therefore affect more than gap-filling; they may in fact re-open once-filled holes.

66. COLO. REV. STAT. § 25-8-202(8)(a) (2003) (emphasis added) (allowing, however, more stringent rules "only if it is demonstrated at a public hearing, and the commission finds, based on sound scientific evidence . . . [that the rules] are necessary to protect the public health, beneficial use of water, or the environment of the state.").

67. WIS. ADMIN. CODE § 1.52(3) (2004).

68. *See supra* Part III.A.1.

Pennsylvania's executive order is one of the few NMSRs clear in its intent to apply retroactively: "Existing regulations shall be reviewed by agencies for consistency [with the NMSR requirements]. Any regulations that are inconsistent . . . shall be considered for amendment or repeal."[69] While this NMSR does not *demand* repeal in all instances, it clearly puts preexisting rules in the spotlight.

When a statute is silent on whether it is prospective or retrospective, that silence is assumed to be prospective. There are two reasons for this assumption. First, the principle that "[r]etroactivity is not favored in the law"[70] should apply equally to the states as to the federal government. Second, the practice of this Note is to resolve ambiguity against inclusion.[71]

5. Exemptions

About half of the NMSRs have some form of exemption process that allows a state agency to create a regulation more stringent than a federal one. An exemption process has the potential for removing the teeth from an NMSR. Whether this happens, however, entirely depends on how difficult it is for the agency to earn the exemption. The simplest exemption procedures require a statement of findings; more complicated ones require public hearings; the most severe require detailed environmental and economic impact studies, or some combination of findings and hearings. When there is no exemption process, which is assumed when one is not specifically created by the rule, the NMSR is considered more severe than an otherwise identical NMSR that allows exemptions. Accordingly, NMSRs that allow exemptions are considered less inhibitive of a state's ability to fill gaps in the federal regulatory scheme.

Maine has one of the simplest exemption procedures. It requires that the agency identify "when feasible, and using information available to it," provisions of the proposed rule it "believes" would impose a regulatory burden more stringent than that imposed by a federal standard, and then to set forth a justification for the differences.[72] This provision does not require the agency to make any findings that it has not already made, nor to identify anything at all if the agency determines it would be infeasible. This exemption process makes the NMSR not so much a limitation as a minor formality in the state rulemaking process.

The Montana exemption process, by contrast, is much more complicated. It requires written findings that the proposed rule protects

69. Pa. Exec. Order No. 1996-1(2)(a) (1996).

70. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

71. *See infra* Part III.C.

72. ME. REV. STAT. ANN. tit. 38, § 341-D(1-B) (West 2002).

public health or the environment, based on peer-reviewed scientific evidence in the record, following a public hearing and opportunity for public comment.[73] Furthermore, there must be economic findings on the cost to the regulated community, and findings that the proposed rule can mitigate harm to the public health or environment using current technology.[74] This process is not only time-intensive, but potentially expensive and fraught with opportunity for political forces to derail the rulemaking. This exemption process makes the NMSR function like a nonexpansive PPRA—it discourages promulgation of far-reaching regulations for fear that this complicated exemption process will be triggered.

In Tennessee, the exemption process requires the state to provide money to municipalities for any more stringent regulation that it imposes that requires increased municipal expenditures.[75] This exemption effectively requires the state legislature to fund the rule through an allocation process, where it is subject to delay and politicization.

Two NMSRs even require executive approval before a rule may go into effect. In Florida, "[f]inal action shall be by the Governor and Cabinet, who shall accept, reject, modify, or remand . . . the standard."[76] To some extent this additional step in the exemption process is moot since environmental agencies are part of the executive anyway—and thus presumably the Governor's office can make its wishes known early in the process—but this may not always be the case, especially as administrations change power.[77] In any case, executive approval delays implementation, and opens the rulemaking to an additional level of political scrutiny.

It should be clear that the mere availability of an exemption process does not completely eliminate the effect of the NMSR. Even in Maine, where the exemption is easy to earn, the NMSR still imposes an extra step in the rulemaking process. In Montana, the cost of the exemption process in terms of time and effort is so high that it might even approach the upper limit of the political will of the state legislature to override their NMSR in a select instance. In Tennessee, in which the NMSR requires that money be allocated in the state budget, any new rule that imposes costs on municipalities requires legislative acquiescence. Thus, even though the

73. MONT. CODE ANN. §§ 75-5-203(2)-(3) (2003).

74. *Id*.

75. TENN. CODE ANN. § 4-5-226(l) (1999).

76. FLA. STAT. ch. 403.804(2) (West 2004).

77. *See* Ergonomics Program, 65 Fed. Reg. 68,261 (Nov. 14, 2000) (creating a workplace ergonomics rule under the Clinton administration); Steven Greenhouse, *Bush Plan to Avert Work Injuries Seeks Voluntary Steps by Industry*, N.Y. TIMES, Apr. 6, 2002, at A1 (rejecting the workplace ergonomics rule created under the Clinton administration).

possibility of an exemption exists, it does not necessarily lower the barrier to environmental rulemaking.

Finally, even where there are exemption processes, most NMSRs do not allow blanket exemptions for emergency conditions. This lack of emergency awareness is an interesting oversight in the NMSRs, particularly since many PPRAs go to lengths to establish such provisions.[78] But this lack of explicit emergency authorization does not necessarily mean that states are handicapped in an emergency. In the Florida statute, for instance, proposed regulations go into effect immediately, then are subsequently subject to a review process by which they may be terminated

6. Limited Applicability

Most NMSRs are generally applicable, meaning that they impact all state environmental rulemaking in the water quality field. Seventeen rules are of this type.[79] Although some of these seventeen apply to all environmental rulemaking (including air quality, zoning, and the like), and others only apply to rulemaking related to water quality protection, these two groups are considered here as one. This Note considers a state's rule to be generally applicable unless it specifically limits itself to a certain aspect of water quality protection.

The other ten NMSRs limit themselves to a small class of regulation within the broader context of water quality protection. Six of the ten apply only to underground storage tank regulation;[80] the rest apply exclusively to narrow classes of regulations, such as those for forestry operations[81] or waste-water treatment plants.[82] These laws with limited applicability do not prohibit regulation except in their small target area. They are not limitations on a scale even close to that of their generally applicable cousins. Therefore, as a matter of relative stringency, this Note considers NMSRs of limited applicability as much less stringent than those of general applicability, regardless of the other provisions of the rule.

B. *Assignment of Stringency Points*

After the features were identified, each feature was assigned a "stringency score" depending on how much it interfered with gap-filling. The maximum possible stringency score is 100, which is the score if all

78. *See infra* Part IV.A.10.

79. *See infra* Table 2.

80. ALA. CODE § 22-35-10 (1997); ALASKA STAT. § 46.03.365 (Michie 2002); ARIZ. REV. STAT. § 49-1009 (1997); ARK. CODE ANN. § 8-7-803 (Michie 2002); NEV. REV. STAT. 459.824 (2000); WYO. STAT. ANN. § 35-11-1416 (Michie 2003).

81. OR. REV. STAT. § 468B.110(2) (2003).

82. VA. CODE ANN. § 62.1-44.15:1 (Michie 2001).

identified features are present and there is no exemption process. All the scores are additive except for Limited Applicability, which is a multiplier of 1/10 for the scores of those NMSRs that are not generally applicable. In other words, the final score for a limited applicability rule is 10% of what the score would be for an otherwise identical generally applicable rule. As a consequence of this multiplier, coupled with the Affects Quantifiable Limits feature that is present in all NMSRs (and which has a stringency value greater than ten), it is impossible for a limited applicability NMSR ever to be more stringent than a general applicability rule under this scoring scheme. This condition is intended to ensure that the limited applicability statutes, which are generally quite stringent but narrowly focused, do not overweight the index.

Table 1 on the following page shows the breakdown of points, and explains how the 100 possible points were divided among the features. Reasonable minds could obviously differ over the assignment of stringency points, but every effort was made to assign the points in such a way that the score reflected a feature's relative ability to interfere with state gap-filling as discussed in Part IV.A. Throughout the process, limited sensitivity tests were run on the scores to ensure that no score exerted excessive weight on the state rankings, unless the score was merited (such as the ones for Limited Applicability and No Exemptions).

Where there is an exemption process, the stringency increases with each additional action that is required to earn an exemption. The actions have been broken down into parts that reflect each of the most common exemption process requirements. Where the exemption process requires some unique action—such as the Montana requirement for evidence from peer-reviewed scientific studies—the Other category is used. The At Least Environment category is for when a NMSR allows an exemption for *either* findings of an impact on the environment *or* some other relevant findings. In this case, the assigned score was the same as the score for environmental impact findings alone, because it is the lowest of the findings scores. Even if all findings, public hearings, and approval are required, the stringency of the exemption process is still slightly less than having no exemption process at all.

Table 1: No More Stringent Rules Scoring

Provision	Description	Score	Justification
Affects Quantifiable Limits	State limits may not be more stringent than federal limits, regardless of whether there is federal jurisdiction.	12	This is the identity test for inclusion in the NMSR list. Therefore, all statutes have this feature. The reason it is included at all is because of the multiplier for General Applicability, which is only meaningful if there is a base set of points.
Jurisdictional Ties to Federal Regulations	State may only assert jurisdiction if the federal government could also assert jurisdiction.	30	This is one of the most stringent conditions possible, because it implies that the state may never regulate any item that could not also be regulated by the federal government, thereby subjecting the state to the U.S. Commerce Clause and other limitations on Congressional power.
Federal Silence Preempts	Federal silence means that the state may not regulate areas for which no federal rules exist.	8	This condition means that the ambit of state regulations is determined by the federal government. Nonetheless, this is not as stringent as a restriction on jurisdiction because the state may

			establish its own jurisdictional limits; the state is just prevented from creating new classes of regulation. The score is relatively low in part because of the uncertainty involved with including states in this category.
Retroactive	The restriction applies to state regulations then-existing at the time when the federal rule was changed, potentially invalidating existing state rules.	20	Retrospective provisions are stringent because they may destroy existing state rules. For this reason there is a meaningful penalty associated with them. However, over the long term, the retrospective application will be overshadowed by the ongoing restrictions discussed above.
No Exemptions Allowed	No exemption procedure is available.	30	If no exemptions are allowed, the stringency requirement is absolute regardless of environmental consequences. Since no exemptions are allowed, the score of this provision is greater than the sum of all the possible exemption requirements listed.
	OR		

Exemption if… Findings as to…			
Economic Impact	To overcome the restriction, there must be a finding that economic harm would be incurred.	6	Economic findings are hard to make, because they require costly and time-consuming analyses, and because there is often considerable uncertainty about the data and results.
Health Impact	To overcome the restriction, there must be finding that human health would be harmed.	6	Health impacts are also difficult to make, because small impacts are difficult to quantify, and epidemiological experiments are time-consuming.
Environmental Impact	To overcome the restriction, there must be a finding that the environment would suffer adverse impact.	2	Environmental impacts are easier to observe, especially where a natural resource is being immediately touched by the regulation.
Other	Additional, state-by-state showings are required to overcome the restriction.	2	Some states require additional findings, although these tend to be relatively straightforward determinations of "necessity" that presumably may be prepared more easily than an impact analysis.
At Least Environmental	There are multiple findings that may satisfy the exemption process, but at the very least environmental	2	This feature receives the same score as environmental impact findings alone.

	findings are sufficient.		
Public Hearing	A public hearing must be held prior to any exemption decision, including a process for public comment.	8	Public hearings are time-consuming, regardless of whether they involve opportunity for oral or written comments. They are also time-consuming in that the hearing implies an additional period of reflection to determine whether the agency action is appropriate in light of new information.
Approval	Legislative executive approval is required before an exemption may be granted.	5	Legislative or executive approval is subject to political forces, and may lead to results that are more consistent with special interests than regulatory prudence.
Limited Applicability	The stringency requirement applies only to select types of water quality regulation.	x0.1	This category is included to give a break to states whose no more stringent rules only apply to a select field of regulation. If the statute is of limited applicability, the entire score is multiplied by 1/10. Otherwise, the score stands (i.e. no discount).
	Minimum Score = 0 (least stringent) Maximum Score = 100 (most stringent)		

C. *Categorization by State*

All twenty-seven rules were analyzed according to whether the features described above were present or absent in the NMSR. In most cases, this was a straightforward process. In others, a limited amount of interpretive freedom was utilized in determining the intent of the NMSR. As a rule, though, where an NMSR was not clear one way or the other (for example, the Colorado statute in relation to federal silence[83]), the NMSR was not included in a category. Thus, the categorizations err on the side of under-inclusion, and therefore may underestimate actual stringency. That said, where a decent argument could be made for listing, the state was included in a category.

To minimize the inevitable influence from personal interpretation, a simple sensitivity analysis was used to calibrate the scoring in a back-and-forth process to ensure that the rankings of the states did not change significantly depending on a few stringency points allocated between one feature or another.

Table 2 shows the breakdown by state of the features identified, along with each state's final stringency score. All scores have been rounded to the nearest integer.

Based on the stringency scores, Map 1 shows a map of the United States shaded by stringency. The scores are grouped in bins of ten points, which loses some precision, but does further account for the scoring uncertainty.

83. *See supra* note 66 and accompanying text.

Table 2: No More Stringent Rules by State

Category	Pts	Alabama	Alaska	Arizona	Arkansas	Colorado
Affects Limits	12	•	•	•	•	•
Jurisdictional Ties	30					
Federal Silence Preempts	8	•		•	•	
Retroactive	20					
No Exemptions Allowed	30	•	•	•		
Exemption if…						
Findings as to…						
Economic Impact	6					
Health Impact	6					
Environmental Impact	2					
Other	2				•	
At Least Environmental	2					•
Public Hearing	8					•
Approval	5					
Limited Applicability	x0.1	•	•	•	•	
STRINGENCY		5	4	5	2	22

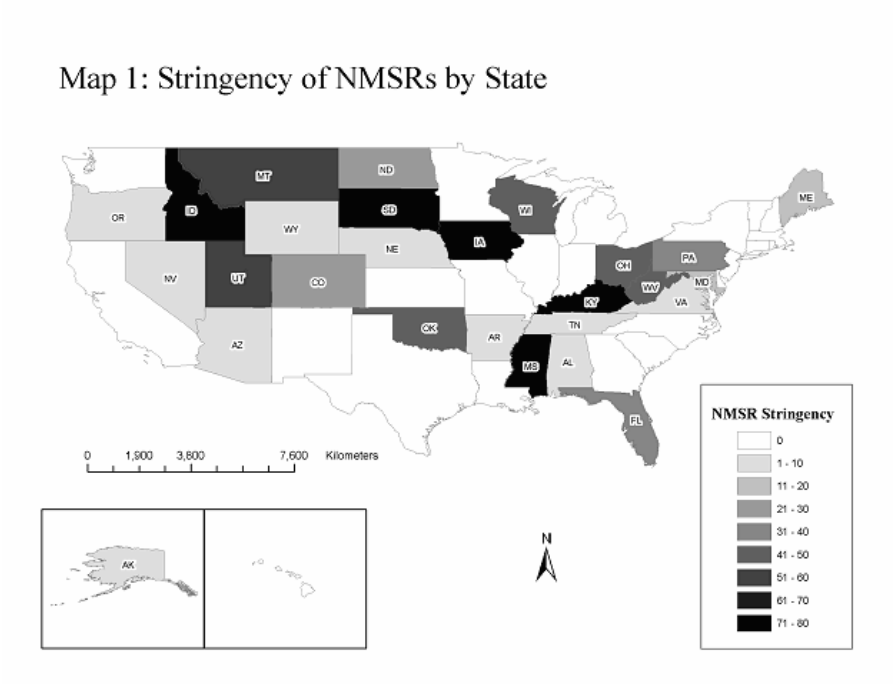
		Florida	Idaho	Iowa	Kentucky	Maine
Category	Pts					
Affects Limits	12	•	•	•	•	•
Jurisdictional Ties	30		•	•	•	
Federal Silence Preempts	8	•	•		•	
Retroactive	20					
No Exemptions Allowed	30		•	•	•	
Exemption if…						
Findings as to…						
Economic Impact	6	•				
Health Impact	6					
Environmental Impact	2	•				
Other	2					•
At Least Environmental	2					
Public Hearing	8					
Approval	5	•				
Limited Applicability	x0.1					
STRINGENCY		33	80	72	80	14

		Maryland	Mississippi	Montana	Nebraska	Nevada
Category	Pts					
Affects Limits	12	•	•	•	•	•
Jurisdictional Ties	30		•	•		
Federal Silence Preempts	8					•
Retroactive	20					
No Exemptions Allowed	30		•		•	•
Exemption if…						
Findings as to…						
Economic Impact	6					
Health Impact	6					
Environmental Impact	2					
Other	2			•		
At Least Environmental	2	•		•		
Public Hearing	8			•		
Approval	5					
Limited Applicability	x0.1				•	•
STRINGENCY		14	72	54	4	5

		North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania
Category	Pts					
Affects Limits	12	•	•	•	•	•
Jurisdictional Ties	30		•	•		
Federal Silence Preempts	8				•	
Retroactive	20					•
No Exemptions Allowed	30				•	
Exemption if…						
Findings as to…						
Economic Impact	6			•		
Health Impact	6	•				
Environmental Impact	2	•		•		
Other	2		•			•
At Least Environmental	2					
Public Hearing	8	•				
Approval	5					
Limited Applicability	x0.1				•	
STRINGENCY		28	44	50	5	34

Category	Pts	South Dakota	Tennessee	Utah	Virginia	West Virginia
Affects Limits	12	•	•	•	•	•
Jurisdictional Ties	30	•		•		•
Federal Silence Preempts	8		•		•	
Retroactive	20		•			
No Exemptions Allowed	30	•			•	
Exemption if…						
Findings as to…						
Economic Impact	6					
Health Impact	6			•		
Environmental Impact	2			•		
Other	2					
At Least Environmental	2					•
Public Hearing	8			•		
Approval	5		•			
Limited Applicability	x0.1		•		•	
STRINGENCY		72	5	58	5	44

		Wisconsin	Wyoming
Category	Pts		
Affects Limits	12	•	•
Jurisdictional Ties	30	•	
Federal Silence Preempts	8		•
Retroactive	20		
No Exemptions Allowed	30		•
Exemption if…			
Findings as to…			
Economic Impact	6		
Health Impact	6	•	
Environmental Impact	2	•	
Other	2		
At Least Environmental	2		
Public Hearing	8		
Approval	5		
Limited Applicability	x0.1		•
STRINGENCY		50	5



IV. TAXONOMY OF PRIVATE PROPERTY RIGHTS ACTS

State private property rights acts protect the rights of owners to exercise the free enjoyment of their property without the burden of government regulation.[84] In the field of water quality regulation, dealing inherently with the interaction of real property and the biosphere, almost any regulation is going to interfere in some way with private property rights. But as Justice Holmes noted in *Pennsylvania Coal Company v. Mahon*, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[85] The PPRAs, therefore, must balance this necessity for *some* legitimate regulation against the possibility of the government interfering excessively with an owner's use and enjoyment of their property.

For this reason, only a minority of the PPRAs actually expand property rights and create a cause of action against the state for deprivation under the state constitution when that same claim would be invalid under

84. Ann L. Renhard Cole, Note, *State Private Property Rights Acts: The Potential for Implicating Federal Environmental Programs*, 76 TEX. L. REV. 685, 685 (1998).

85. 260 U.S. 393, 413 (1922).

the United States Constitution.[86] The rest of the PPRAs limit themselves to assessment procedures.[87] These nonexpansive statutes require the state to analyze the potential for a takings claim prior to regulation. They do not create any new cause of action; they merely slow down and discourage the environmental regulatory process.

Twenty PPRAs are surveyed here.[88] Seventeen of these are of general applicability, meaning that they apply to all forms of environmental regulation.[89] Only three apply to limited circumstances,[90] but importantly, these three are all expansive PPRAs. Only two generally applicable PPRAs expand private property rights to create new causes of action.[91]

As with the NMSRs, the most difficult part of creating the taxonomy for PPRAs was identifying the proper level of generality for each of the features, but the relative uniformity of language in PPRAs facilitated this process. Two features—"Affects Legislature" and "Paid Repeals"— are so unusual (and potentially stringent) that they merited creation of special categories. Again, the names of a few categories sound contorted. This contortion was necessary for the same reason: the features are named in such a way that their inclusion in a PPRA indicates an increased level of stringency.[92]

While continuing to highlight the distinction between compensation and assessment, this Note prefers the terms "expansive" and "nonexpansive" for three reasons. First, calling a PPRA a "compensation" statute may give the misleading impression that compensation is required for any regulatory action that impinges on private property rights. This is

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86. *See infra* Part IV.A.2.

87. *See infra* Part IV.A.2.

88. ARIZ. REV. STAT. §§ 11-810 to -811 & 41-1311 to -1313 (West 2000); DEL. CODE ANN. tit. 29, § 605 (2002); FLA. STAT. ch. 70.001 (West 2004); IDAHO CODE §§ 67-8001 to -8004 (Michie 1997); IND. CODE § 4-22-2-32 (Michie 1998); KAN. STAT. ANN. §§ 77-701 to -707 (1994); LA. REV. STAT. ANN. §§ 3:3608-3612, 3623 (West 2001) (agriculture & forestry lands); ME. REV. STAT. ANN. tit. 5, § 8056 (West 2002); MICH. COMP. LAWS §§ 24.421-425 (West 2001); MISS. CODE ANN. §§ 49-33-1 to -17 (2003) (agriculture & forestry lands); MO. REV. STAT. §§ 536.017-.018 (2001); MONT. CODE ANN. §§ 75-1-102 to -201 (2002); N.C. GEN. STAT. § 113-206(e) (2002) (shellfisheries); TENN. CODE ANN. §§ 12-1-201 to -204 (1999); TEX. GOV'T CODE ANN. §§ 2007.001-.045 (Vernon 2000); UTAH CODE ANN. §§ 63-90-1 to -4 & 63-90a-1 to -4 (2002); VA. CODE ANN. § 2.2-4007 (Michie 2000); WASH. REV. CODE § 36.70A.370 (2002); W. VA. CODE § 22-1A-1 to -6 (2003); WYO. STAT. ANN. § 9-5-301 to -305 (Michie 2003).

89. *See supra* note 43.

90. LA. REV. STAT. ANN. §§ 3:3608-3612, 3623 (West 2003) (agriculture & forestry lands); MISS. CODE ANN. §§ 49-33-1 to -17 (2003) (agriculture & forestry lands); N.C. GEN. STAT. § 113-206(e) (West 2000) (shellfisheries).

91. FLA. STAT. ch. 70.001 (West 2004); TEX. GOV'T CODE ANN. §§ 2007.001-.045 (Vernon 2000).

92. With the exception of Limited Applicability, which is a multiplier that reduces the overall score. *See infra* Part IV.B.

not in fact the case. Second, the assessment statues rarely use the word "assessment," but more typically use "expansion" terminology in language like "[i]t is not the purpose of this [law] to *expand* or reduce the scope of private property protections."[93] Third, the use of the expansive/nonexpansive dichotomy accurately describes the set of PPRAs—all fall in one of the two categories.

A. *Distinct Features of Private Property Rights Acts*

1. Nonexpansive

Nonexpansive PPRAs do not create new property rights or expand existing ones, they merely call for an assessment of takings implications prior to agency action. Thus, they do not create an increased chance that the state will be forced to pay large compensation awards as a result of environmental regulation, but they do subject the process of creating regulation to additional procedures that lay bare the ways in which the regulation will interfere with private property. This process leads to heightened scrutiny from the public, exposure to political pressure, and the possibility of politically embarrassing confrontations with private property rights advocates. Consequently, an agency seeking to avoid unwelcome scrutiny or confrontation should tend to scale back potentially far-reaching regulations to make the assessment process more politically palatable.[94] For this reason, nonexpansive PPRAs are not so much an obstacle to gap-filling as a deterrent.

The language in the Idaho statute is typical of many nonexpansive PPRAs: "The purpose of this [law] is to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law."[95] This language does not suggest any intention to curtail regulatory activity, but rather it purports to protect the due process rights of property owners. While seemingly innocuous on its face, one must remember that the property owner would not be denied due process in any event; this statute merely shifts the burden of assuring due process to the state agency, which is more easily subjected to political pressure than the courts.

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93. IDAHO CODE § 67-8001 (Michie 1997) (emphasis added).

94. Eagle, *supra* note 36, at 121 (arguing nonetheless that agencies are unlikely to "zealously police themselves").

95. IDAHO CODE § 67-8001 (Michie 1997).

2. Expansive

The expansive PPRAs establish new property rights at the state level. Whereas the nonexpansive PPRAs are deterrents to regulation, the expansive PPRAs are outright obstacles. By establishing broader property rights, the expansive PPRAs lower the threshold for what constitutes a regulatory taking.[96] Although the federal government could continue to regulate without causing a taking under the Fifth Amendment, a state agency promulgating an identical regulation might cause a taking under the expanded state definition of property if that regulation impinges on these new property rights. It is for this reason that expansive PPRAs are particularly effective at curtailing gap-filling. That said, there are only two expansive PPRAs of general applicability.[97] Finally, it should be noted that expansive statutes may also call for assessment, but since this requirement has much less impact than the compensation threat, the statutes are categorized as Expansive.[98]

Perhaps the most well-known of all the PPRAs, the Harris Act in Florida "creates a new cause of action to provide compensation to a landowner when the actions of a government entity impose an 'inordinate burden' on the owner's real property."[99] The inordinate burden standard is new to the field of takings. There are two ways that a regulation may impose an inordinate burden: (1) by causing a permanent loss of the [landowner's] reasonable, investment-backed expectations, or (2) by leaving the landowner with a use that is unreasonable and forces the landowner to bear a greater burden than borne by the public at large.[100] This standard is much lower than the Fifth Amendment takings standard,[101] and therefore is said to create expanded rights and a new cause of action.

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96. This can occur by either lowering the property value diminution needed, *e.g.* TEX. GOV'T CODE ANN. §2007.001-.045 (Vernon 2000), or by lowering the standard of proof, *e.g.* FLA. STAT. CH. 70.001 (West 2004).

97. FLA. STAT. ch. 70.001 (West 2004); TEX. GOV'T CODE ANN. §§ 2007.001-.045 (Vernon 2000).

98. *E.g.*, LA. REV. STAT. ANN. § 3:3609 (West 2001) (requiring that a "government entity shall prepare a written assessment of any proposed governmental action prior to taking any proposed action that will likely result in a diminution in value of private agricultural property").

99. David L. Powell et al., *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 265 (1995).

100. *Id.* at 273-274; *see also*, Jane Cameron Hayman & Nancy Stuparich, *Private Property Rights: Regulating the Regulators*, 70 FLA. BAR J. 55, 56 (1996) (stating that temporary impacts are not inordinate burdens, nor are actions to abate a nuisance).

101. Stemming a long line of cases following from *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (''The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a

The Texas act takes a different approach that is much more precise in the way that it creates the expanded property rights. It declares that, by definition, a taking is a government action that "is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property."[102] It is easy to imagine an environmental regulation that in some instances causes a diminution in value of twenty-five percent or more. For example, a general regulation protecting wetlands might result in the denial of a construction permit to build a commercial shopping center, dramatically reducing the development value of the land. Even if only a small percentage of properties touched by a regulation have a diminution of value that exceeds the twenty-five percent threshold, the burden on the fiscal purse could be significant. This rule effectively prevents state agencies from promulgating serious environmental regulations.

3. Affects Executive Agencies

All the PPRAs surveyed in this paper apply to executive agencies. This category is in effect a threshold requirement for inclusion as a PPRA, like the Affects Quantifiable Limits category for NMSRs.[103] The reason that PPRAs apply to executive agencies is that they are the ones that may promulgate environmental rules without direct legislative oversight. Although always subject to legislative override, the purpose of PPRAs is to move the assurance of due process to an earlier point in the regulatory process, which is why it makes sense to target the rulemakers and not simply wait for legislative disapproval.

4. Affects Local Governments and Municipalities

Some PPRAs go a step further and include local governments and municipalities within their purview. This paper views application to local governments as a measure of increased severity, because such an application imposes additional assessment or compensation costs on local governments that are less likely than the state to have the budget to pay for them. Furthermore, local zoning regulations may be an effective way to mitigate environmental harm to especially sensitive areas, but even these zoning regulations become subject to the PPRA if it applies to local governments. Ironically, one of the arguments for devolution is that targeted local regulations are more efficient than "one-size-fits-all" national

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physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'' (citations omitted)).

102. TEX. GOV'T CODE ANN. § 2007.002(5)(B)(ii) (Vernon 2000).

103. And it is included for the same reason: to establish a baseline set of points so that in combination with the Limited Applicability multiplier it yields a meaningful distinction between generally applicable PPRAs and limited applicability PPRAs.

rules,[104] but PPRAs that apply to local governments might in fact discourage this sort of targeted regulation.

5. Affects Legislative Branch

The Mississippi PPRA is particularly noteworthy because not even direct legislative action escapes its compensation requirements. Although the effect is somewhat mitigated by the fact that it only applies to forest and agricultural lands, this PPRA is so far-reaching that it discourages environmental regulation from "the State of Mississippi, any county, municipality or any political subdivision thereof."[105] While it might seem strange that the legislature would bind its own hands—especially since the same legislature could presumably vote itself exceptions—this kind of rule is not entirely unheard of. For example, the Unfunded Mandates Reform Act of 1995[106] forces the U.S. Congress to go through an assessment process prior to creating federal mandates.

6. Applies to Exactions

An exaction is a conditioned demand by a state agency that a real property owner convey certain property rights in return for a permit or other desired benefit.[107] For example, in *Nollan v. California Coastal Commission*, [108] the Coastal Commission conditioned the approval of a construction permit on the grant of an easement for public beachfront access. There is little practical difference between taking the easement directly (which would clearly require compensation) and demanding this relinquishment of property rights as part of an exaction. While exactions continue to be covered by U.S. Fifth Amendment takings law as applied through the Fourteenth Amendment, the PPRAs that apply to exactions force a state agency to consider the takings consequences up front, well before the controversy reaches a court.

Many of the PPRAs that apply to exactions are also expansive statutes. This correlation makes sense, because exactions by definition reduce the property rights of the landowner. For example, the Texas PPRA applies to any government action that "requires a dedication or exaction of private real property."[109]

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104. *See supra* notes 16-18 and accompanying text.

105. MISS. CODE ANN. § 49-33-7(j) (2003).

106. 2 U.S.C. § 1501 (2000).

107. Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 348 n.1 (1999) (defining an exaction as "a condition of development permission that requires a public facility or improvement to be provided at the developer's expense").

108. 483 U.S. 825 (1987).

109. TEX. GOV'T CODE ANN. § 2007.003(a)(2) (Vernon 2000).

Some nonexpansive statutes also apply to exactions. Consider the Michigan PPRA, which among other things applies to "[a] decision on an application for a permit or license . . . [and] required dedications or exactions of private property."[110] This application to exactions makes the statute quite onerous, because it requires a takings review for basically any land use decision. It is this potential for costly and numerous as-applied challenges that makes application to exactions a particularly stringent feature of a PPRA.

7. Applies to Final Rules

The majority of PPRAs apply to final rules,[111] which are rules that have passed through the negotiated rulemaking process and are ready for implementation and enforcement. For nonexpansive statutes, application at this phase means that the takings assessment is basically a final step prior to implementation. For compensation statutes, application at this phase creates the immediate possibility of takings claims, although constitutional questions of ripeness may remain.[112] Nonetheless, the intention of applying to final rules is to force the takings issue as soon as possible after the political wrangling over the rule has subsided.

PPRAs do not state explicitly that they apply to final rules, but the intent can be inferred from other language. For example, the Michigan PPRA applies to the "enforcement of a statute or rule,"[113] which can only occur once a rule has been finalized. Perhaps needless to say, the PPRA does not apply to a "formal exercise of the power of eminent domain"[114]—the state can always avoid the assessment process as long as it is willing to compensate the landowner up front.

8. Applies to Proposed Rules

PPRAs that do not apply to final rules instead apply to proposed rules, and sometimes they apply to both.[115] To some extent, the difference between a proposed rule and a final rule is insignificant—the proposed rule is merely at an earlier stage in its development. But when a PPRA applies to proposed rules, it creates an incentive for the regulated community to challenge rules at an initial stage, discouraging the agency from promulgating any rule that it cannot be certain will not cause a regulatory

110. MICH. COMP. LAWS ANN. § 24.422(c) (West 2001).
111. *See infra* Table 4.
112. U.S. CONST. art III, § 2.
113. MICH. COMP. LAWS ANN. § 24.422(c)(iv) (West 2001).
114. *Id*. § 24.422(d)(i).
115. *See infra* Table 4.

taking.[116] This focus on takings at an early stage implies that there will be less thinking about environmental benefits and more thinking about property rights consequences, likely leading to fewer environmental benefits.

PPRAs that apply to proposed rules are generally quite clear in their intent. For instance, the Wyoming language is typical: The PPRA applies to "[p]roposed rules by a state agency that if adopted and enforced may limit the use of private property."[117] Once again—a small consolation to the state agency—a formal exercise of eminent domain avoids the requirements of the statute.[118]

9. Outside Review

One important question is who performs the takings analysis. Is it performed by the agency that promulgates the rule; or by another government agency; or by a nonexecutive party? The answer to this question plays a major role in determining how much political pressure can be brought to bear on the rulemaking process. Presumably, a review by an outside agent, or a different branch of the government, will tend to discourage far-reaching rules, because more diverse interests will have a veto power over the rule.

In a few states, the review is completely internal. For example, the Missouri law dictates that "[n]o department or agency shall transmit a proposed rule or regulation which limits or affects the use of real property . . . until a takings analysis has occurred,"[119] but gives no guidance as to the actual analytical procedure, leaving the promulgating agency free to interpret how rigorous an analysis is demanded. This completely internal review exposes the rulemaking process to less politicization, so it is considered to be less severe than outside review.

The most common process is a mix of inside and outside review, where the attorney general's office writes and maintains a "checklist" that can be used internally by the promulgating agency to identify rules that have the potential to cause regulatory takings. For example, in Idaho "[t]he attorney general shall establish . . . a checklist[] that better enables a state agency . . . to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. . . . All state agencies . . . shall follow the guidelines of the

116. *E.g.*, WYO. STAT. ANN. § 9-5-302(a)(iii)(A)(I) (Michie 2003).

117. *Id.*

118. *Id.* § 9-5-302(a)(iii)(B)(I).

119. MO. REV. STAT. § 536.017 (2001).

attorney general."[120] For purposes of this Note, this form of review is considered internal, even though the checklist is created by an office outside the promulgating agency.

The Maine rule, by contrast, requires the agency to "[s]ubmit the rule to the Attorney General for approval as to form and legality,"[121] upon which "[t]he Attorney General may not approve a rule if it is reasonably expected to result in a taking of private property."[122] Since there is no clear line as to what may "reasonably be expected to constitute a taking," this PPRA gives a veto power over the regulation to an outside reviewer, exposing the process to politicization, and discouraging the promulgating agency from stepping too close to the takings line. This is not to say that the attorney general's office is inherently opposed to environmental rulemaking, only that rulemaking (and therefore gap-filling) becomes more difficult when there are more parties that must be satisfied.

Arizona's process is unique: The law creates an "advocate office" that represents "the interests of private property owners in proceedings involving governmental action."[123] The advocate is appointed by the legislative council, giving the legislative branch an extra level of influence over the executive branch. While this sort of legislative veto is arguably impermissible at the federal level,[124] this is a further example of how states can impose rules on themselves that may create unforeseen hurdles in the devolutionary process.

Finally, states vary with whether the outside review is covered by attorney-client privilege. While the issue of privilege could merit a category to itself—since privileged review potentially frees regulators to make far-reaching decisions even when deemed questionable by the reviewers—it is too hard to tell whether some reviews would be confidential under state ethics or other rules, regardless of the silence of the PPRA on this matter. For the record, the three PPRAs that clearly privilege the review are Idaho,[125] Indiana,[126] and Washington.[127]

120. IDAHO CODE § 67-8003(1) (Michie 1997).

121. ME. REV. STAT. ANN. tit. 5, § 8056(1)(A) (West 2002); *see also id.* § 8056(6) (specifying further that "the review . . . may not be performed by any person involved in the formulation or drafting of the proposed rule").

122. ME. REV. STAT. ANN. tit. 5, § 8056(6) (West 2002) (allowing a few exceptions).

123. ARIZ. REV. STAT. § 41-1312(A) (West 2000).

124. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

125. IDAHO CODE § 67-8003(2) (Michie 1997).

126. IND. CODE § 4-22-2-32(f) (Michie 1998).

127. WASH. REV. CODE § 36.70A.370(4) (2002).

10. No Emergency Exceptions

A number of states go out of their way to exclude rules promulgated on an emergency basis from review under the PPRA.[128] For example, one can imagine the urgent need to deny a construction permit on a wetland that is serving a major flood control purpose for which no alternative control technology is in place. Statutes that deny exceptions for emergency conditions are more stringent than others because they force the route of condemnation in a true emergency where there is no time to wait for assessment or outside review.

Of the statutes that create specific emergency exemptions, Kansas is typical: "If there is an immediate threat to public health, safety or welfare that constitutes an emergency requiring immediate action to eliminate the risk, the report required by this section shall be prepared when the emergency action is completed, in which case the report shall include a complete description of the facts relied upon by the agency in declaring the need for emergency action."[129] Where a statute is silent on the issue of emergency exceptions, this Note assumes there are none.

11. Fee-Shifting

One of the most powerful features of some PPRAs is a provision allowing for the reimbursement of costs and attorneys' fees to the plaintiff in the event the state action has indeed caused a regulatory taking. These provisions generally encourage litigation and administrative challenges, because they create an incentive for attorneys to take cases that might otherwise not be remunerative on a contingency fee basis.[130] State agencies, under threat of paying fees and costs, will be seriously discouraged from promulgating any rule that might push the line of what is considered a regulatory taking. This category includes both those PPRAs where fees *must* be paid, as well as those where fees *may* be paid. The reason is that both have the same incentive—even if different in degree—to encourage legal challenges, especially on otherwise small cases.

The West Virginia statute requires payment of reasonable attorneys' fees and costs if either "the court determines that the division failed to perform the assessment required [by the PPRA]; or [i]f the court determines that the division . . . failed to conclude that its action was reasonably likely to require compensation to be paid."[131] Here, the penalty

128. *See infra* Table 4.

129. KAN. STAT. ANN. § 77-706(6)(b) (1994).

130. *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 687 (1983) (citing legislative history of the Clean Air Act stating that fee-shifting provisions are intended to "encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest").

131. W. VA. CODE § 22-1A-5 (2003).

for an erroneous conclusion as to the takings assessment can result in major additional costs to the state agency, above the costs of the inverse condemnation. This rule acutely discourages far-reaching environmental rules for fear of the serious consequences of overstepping the line. The Texas PPRA is even more direct: "The court or state agency *shall* award a private real property owner who prevails . . . reasonable and necessary attorney's fees and court costs."[132]

The Florida statute, by contrast, leaves significantly more discretion to the court. Attorneys' fees are only awarded where the property owner prevails and the government did not make a bona fide settlement offer. As a measure of symmetry the government can recover its own attorneys' fees if it prevails and the property owner had earlier failed to accept a reasonable settlement offer.[133]

12. Paid Repeals

One unusual provision in the Mississippi statute merits a category of its own.[134] In the event that the state repeals a rule before a decision becomes final (in other words, before the taking occurs), the owner may recover its "damages arising out of the action before the repeal, and, in the discretion of the court, its costs of litigation (including reasonable attorney and expert witness fees)."[135] It is easy to imagine what damages there are before the taking occurs, for instance, real property taxes, planning costs, and interest expenses associated with development delay.

13. Limited Applicability

The majority of PPRAs are considered generally applicable, meaning that they apply to any environmental regulatory decision that impacts private property rights. Seventeen PPRAs are of this type.[136] Because of their broad reach, these generally applicable statutes have much more potential to interfere with gap-filling than limited applicability statutes, which only apply in narrow circumstances.

There are three limited applicability PPRAs: In both Louisiana[137] and Mississippi,[138] the PPRA is applicable only to regulations of forestry or agricultural activity; In North Carolina, the law is applicable only to

132. TEX. GOV'T CODE ANN. § 2007.026(a) (Vernon 2000) (emphasis added).

133. FLA. STAT. ch. 70.001(6)(c)(1)&(2) (West 2004); *see also* TEX. GOV'T CODE ANN. § 2007.026(b) (Vernon 2000) (similar provision).

134. Although it only applies to forest and agricultural lands.

135. MISS. CODE ANN. §§ 49-33-9(2) (2003).

136. *See infra* Table 4.

137. LA. REV. STAT. ANN. §§ 3:3608-3612, 3623 (West 2001).

138. MISS. CODE ANN. §§ 49-33-1 to -17 (2003).

property interests in shellfisheries in state waters.[139] Although it is likely that the Mississippi and Louisiana statutes will have broader gap-filling implications than the North Carolina statute, none of the three is considered generally applicable for the purposes of this Note. While the disparate impact is recognized, this Note draws a clear line between those statutes that restrict their applicability and those that do not. All limited applicability PPRAs are considered significantly less stringent than otherwise identical generally applicable statutes.

B. *Assignment of Stringency Points*

As with the NMSRs, after the features were identified each feature was assigned a "stringency score" depending on how much it added to the statute's severity in discouraging regulatory gap-filling. The maximum possible stringency score is 100, which is the score if the PPRA is expansive and all the other features are present. Again, all the scores are additive except for Limited Applicability, which is a multiplier or 1/10 for PPRAs that are not of general applicability. As a consequence of this multiplier, coupled with the either Expansive or Nonexpansive feature and the Affects Executive Bodies feature that is present in all PPRAs—together they have a stringency value greater than ten—it is impossible for a limited applicability PPRA ever to be more stringent than a general applicability rule under this scoring scheme.

Table 3 on the following page shows the breakdown of points, and explains how the 100 possible points were divided among the features. The same caveat applies here as with the NMSRs: Reasonable minds could obviously differ over the assignment of stringency points, but every effort was made to assign the points in such a way that the score reflects a feature's relative ability to interfere with state gap-filling. Throughout the process, limited sensitivity tests were run on the scores to ensure that no score exerted excessive weight on the state rankings, unless the score was merited (such as the ones for Limited Applicability and Expansive).

Except for the Expansive/Nonexpansive distinction, none of the other categories are mutually exclusive. That said, it was rare that a PPRA would apply to both final rules and proposed rules, although in two instances this was the case. Consequently, these categories remain additive, even though the marginal stringency of one on top of the other is perhaps less than either of the two measured independently.

Table 3: Private Property Rights Acts Scoring

139. N.C. GEN. STAT. § 113-206(e) (2000).

Provision	Description	Score	Justification
Nonexpansive (Assessment)	This act does not create a right of action against the government, it merely requires the government to perform a takings assessment prior to action.	10	While an assessment-only act seems innocuous, the fact that the act is on the books discourages environmental regulation, earning this provision a small penalty.
Expansive (Compensation)	The act expands the private property rights of state residents and creates a cause of action requiring compensation for diminution in value.	30	By expanding private property rights of state residents, the state makes some state regulations require compensation even though the same regulations, were they promulgated by the federal government, would not.
Affects Executive Bodies	The act only applies to actions of the executive, including state administrative agencies	5	Identity test. Executive agencies are the default targets of all private property rights acts.
Affects Local Governments	The act also applies to the legislative action of local governments, including cities, counties or municipalities	6	An act that also applies to local governments is significantly more restrictive, because it discourages gap-filling at a local level, even where there is political will and money.
Affects State Legislature	The act is binding on the state legislature itself.	10	In the absence of a repeal, the state legislature may not even pass laws that regulate private property without scrutiny. This is a potent restriction because it significantly discourages environmental regulation.

Applies to Exactions	The act applies to exactions, and therefore determinations may be challenged on an as-applied basis.	8	By applying to exactions, every aggrieved property owner may challenge the agency action, resulting in considerable expense and uneven enforcement.
Applies to Final Rules	The act allows challenges to final agency rules, regardless of whether they have been applied.	5	By allowing challenges to final rules, the agency is discouraged from promulgating far-reaching regulations for fear that they will be struck down before they are ever applied.
Applies to Proposed Rules	The act allows challenges to proposed agency rules that have not yet gone into effect.	6	This is an even more aggressive way of discouraging agency action, because the agency can be challenged before their rules are finalized, in effect creating a threat for even considering regulation that might affect private property.
Outside Review	The review of whether an agency action will cause a taking is performed in whole or in part by a reviewer outside the promulgating agency, usually the attorney general.	7	The use of outside review exposes the process to politicization, and discourages the promulgation of far-reaching regulations.
No Emergency Exceptions	The act makes no provision for emergency regulation that may interfere with private property rights.	3	A small penalty is given for providing no emergency exception, because it means a private landowner could potentially block critical stop-gap regulation while a compensation claim

			was being assessed.
Fee-Shifting	Successful challenges to the act require that the promulgating body pay the attorneys' fees of the challenger.	12	Fee-shifting provisions create incentives for aggrieved parties to challenge a regulation, because their attorneys' fees may be paid by the government if the challenge is successful. Likewise, they encourage challenges of small claims that might otherwise be too small for an attorney to take.
Paid Repeals	The act requires the promulgating agency to pay the costs of a challenge even where it repeals the act prior to a final takings determination.	8	This is another aggressive means of encouraging challenges to regulation, because the promulgating agency cannot escape paying compensation for the temporary imposition even by repealing the act.
Limited Applicability	The act applies only to select types of private property regulation.	x0.1	This category, in effect, dramatically lowers the stringency of acts that require review of only select regulations. If the statute only applies in limited circumstances, the entire score is multiplied by 1/10.

Minimum Score = 0 (least discouraging)
Maximum Score = 100 (most discouraging)

C. Categorization by State

The same state-by-state categorization process was repeated with the PPRAs. All twenty statutes were analyzed according to whether the features described above were present or absent in the statute. For the most part, this process was much more straightforward for the PPRAs than it was for the NMSRs. The PPRAs tend to be more explicit in their intentions, and

the categories used in this paper are more closely tied to language in the statutes. Once again, though, where a PPRA was not clear one way or the other, the PPRA was not included in a category. Thus, the categorizations err on the side of under-inclusion, and therefore may underestimate actual stringency. As before, where a decent argument could be made for listing, the state was included in a category.

Again, to minimize the inevitable influence from interpretive bias, a simple sensitivity analysis was used to test the scoring in an iterative process to ensure that the rankings of the states did not change significantly depending on a few stringency points allocated between one feature or another.

Table 4 shows the breakdown by state of the features identified, along with each state's final stringency score. All scores have been rounded to the nearest integer.

Based on the PPRA stringency scores, Map 2 shows a map of the United States shaded by stringency. The scores are grouped in bins of ten points.

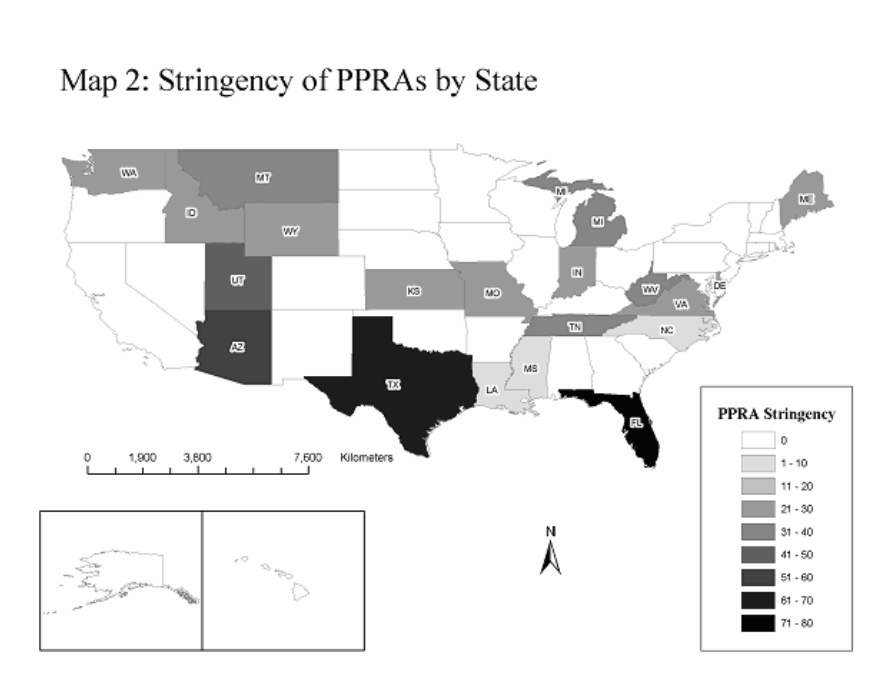
Table 4

Category	Pts	Arizona	Delaware	Florida	Idaho	Indiana
Nonexpansive (Assessment)	10	•	•		•	•
Expansive (Compensation)	30			•		
Affects Executive Bodies	5	•	•	•	•	•
Affects Local Governments	6	•		•	•	
Affects State Legislature	10					
Applies to Exactions	8	•		•		
Applies to Final Rules	5		•	•		•
Applies to Proposed Rules	6	•			•	
Outside Review	7	•	•	•		
No Emergency Exceptions	3	•	•	•	•	•
Fee-Shifting	12	•		•		
Paid Repeals	8					
Limited Applicability	x0.1					
STRINGENCY		57	30	76	30	23

		Kansas	Louisiana	Maine	Michigan	Mississippi
Category	Pts					
Nonexpansive (Assessment)	10	•		•	•	
Expansive (Compensation)	30		•			•
Affects Executive Bodies	5	•	•	•	•	•
Affects Local Governments	6		•			•
Affects State Legislature	10					•
Applies to Exactions	8		•		•	•
Applies to Final Rules	5		•	•	•	•
Applies to Proposed Rules	6	•			•	
Outside Review	7			•		
No Emergency Exceptions	3			•		
Fee-Shifting	12					•
Paid Repeals	8					•
Limited Applicability	x0.1		•			•
STRINGENCY		21	5	30	34	8

		Missouri	Montana	North Carolina	Tennessee	Texas
Category	Pts					
Nonexpansive (Assessment)	10	•	•		•	
Expansive (Compensation)	30			•		•
Affects Executive Bodies	5	•	•	•	•	•
Affects Local Governments	6					•
Affects State Legislature	10					
Applies to Exactions	8		•		•	•
Applies to Final Rules	5			•		•
Applies to Proposed Rules	6	•	•		•	
Outside Review	7				•	
No Emergency Exceptions	3		•	•		
Fee-Shifting	12					•
Paid Repeals	8					
Limited Applicability	x0.1			•		
STRINGENCY		21	32	4	36	66

Category	Pts	Utah	Virginia	Washington	West Virginia	Wyoming
Nonexpansive (Assessment)	10	•	•	•	•	•
Expansive (Compensation)	30					
Affects Executive Bodies	5	•	•	•	•	•
Affects Local Governments	6	•		•		
Affects State Legislature	10					
Applies to Exactions	8	•				•
Applies to Final Rules	5	•			•	
Applies to Proposed Rules	6	•	•	•		•
Outside Review	7		•			
No Emergency Exceptions	3	•		•	•	
Fee-Shifting	12				•	
Paid Repeals	8					
Limited Applicability	x0.1					
STRINGENCY		43	28	30	35	29



V. CASE STUDY: DEVOLUTION OF WETLANDS PROTECTION RESPONSIBILITY

The purpose of this brief case study is to gain insight into the impact that devolution will have in the wetlands context. Although the potential devolution of Clean Water Act authority following *SWANCC* would impact much more than wetlands,[140] wetlands do make for a compelling study for the following reasons: (1) only sixteen states[141] have existing wetlands protections, meaning that many states would have to adopt new rules in the event of a federal rollback; and (2) wetlands continue to be major targets for development.[142]

Results are reported both with and without Alaska's wetlands included in the national total. With more wetlands in Alaska than the rest of the

140. The Supreme Court limited the scope of the term granting jurisdiction to, "waters of the United States," which is used in parts of the Clean Water Act other than just § 404. *See* N. Cook County. v. Army Corps of Eng'rs, 531 U.S. 159, 163-164 (2001).

141. Sixteen states have independent (nonfederal) wetlands protections: Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Wisconsin. The other two-thirds of states depend on the Federal wetlands programs. And just because there are existing state protections does not mean those protections necessarily cover all wetlands. Ass'n of State Wetlands Mgrs., State Wetland Programs, *available at* http://www.aswm.org/swp/states.htm (last visited Nov. 3, 2004).

142. As of 2000, the Corps averaged around 80,000 nationwide and general permits each year, and 5,000 individual permits. *See* http://www.hq.usace.army.mil/cepa/releases/nationwidepermits.htm (last visited Oct. 19, 2004).

states combined, the results are excessively skewed, and may create a misleading statistical picture.

As a second preliminary matter, there is no distinction made here between the quality or type of wetlands. While this is certainly a useful avenue for future analysis, only total acreages are examined here.[143] Thus, the question of whether wetlands are "isolated" or not, and the corollary question of what "isolated" means, are totally avoided. This analysis is simply to gain an understanding of how legal limitations to state rulemaking are related to actual wetland endowments.

The first question is how many acres of wetlands are in states that are subject to either NMSRs or PPRAs.[144] The number of acres in states subject to any kind of NMSR is approximately 220 million acres. These represent 77% of the wetlands in the United States (42% excluding Alaska). The number of acres subject to generally applicable NMSRs is approximately 35 million acres. These represent approximately 12% of wetlands in the United States (30% excluding Alaska).

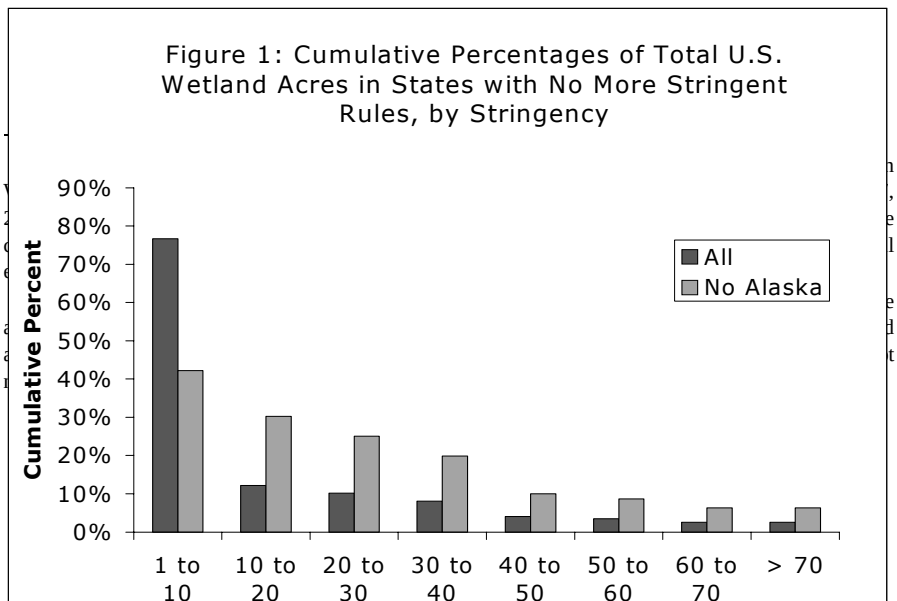


Figure 1 shows the cumulative percentages of wetland acres in each stringency class. Because of the strong influence of Alaska and its limited applicability rule, most of the total wetland acres in the United States are in fact subject to some kind of NMSR. Nonetheless, even when Alaska is excluded, the cumulative percentage does not drop below 25% until the stringency class of 30-40.

The number of wetland acres in states subject to any kind of PPRA is approximately 60 million acres. These represent 21% of the total wetland acres in the United States (52% excluding Alaska). The number of acres subject to generally applicable PPRAs is approximately 40 million acres. These represent approximately 14% of wetlands in the United States (34% excluding Alaska).

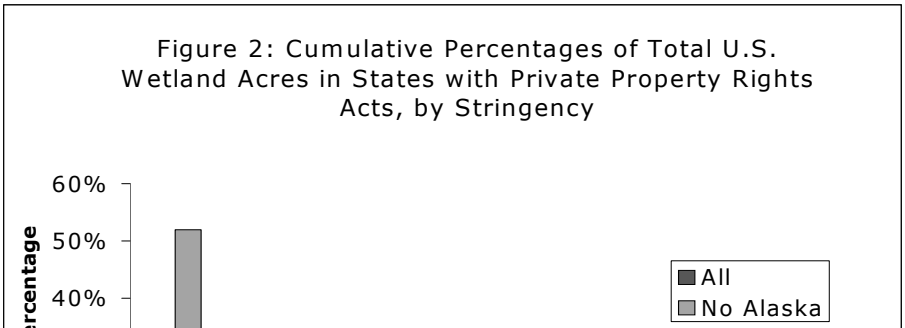


Figure 2 shows the cumulative percentages of wetland acres in each stringency class. Because Alaska does not have a PPRA, the results are skewed to the low end while the state is included. But when Alaska is removed, one can see that more than half of the wetland acres in the remainder of the United States are subject to some kind of PPRA. Furthermore, the cumulative percentage does not fall below 25% until the 40-50 class, and the highest stringency class still holds about 10% of the wetlands in the United States.

If we consider the combined effects: The number of acres subject to either a NMSR, PPRA, or both, is approximately 251 million acres. These represent around 88% of the wetlands in the United States (70% excluding Alaska). If only generally applicable NMSRs and PPRAs are included, the total acreage is approximately 55 million acres. These represent 19% of the country's wetlands; 48% if Alaska is excluded. Thus, about half of the wetlands in the contiguous United States are subject to at least one of the generally applicable legal limitations to state rulemaking.

From this brief analysis, one can conclude that well more than half of the country's wetlands are in states that may experience difficulty filling in the gap in the event of a federal rollback. Of course, it is unlikely at this time that *all* wetlands will lose federal protections. But if one assumes that there is some correlation between the number of "isolated" wetlands and the number of total wetlands in any given state, then this analysis can be used as a starting point for predicting the actual number of wetlands that may lose protection.

VI. CONCLUSION

Before federal policymakers choose to devolve their responsibility for environmental protection to the states, they should consider the potential for limitations that states impose on themselves to interfere with the assumption of such responsibility. In terms of the original question, whether states could indeed maintain existing levels of environmental protection in the absence of current federal programs, this paper suggests that the gap-filling process, on a national scale, would be made more difficult because of "no more stringent" rules and private property rights acts. "No more stringent" rules represent outright obstacles to rulemaking; Private property rights acts serve as deterrents. In both cases, they inhibit states from protecting environmental resources to the same extent as the federal government.

Thirty-five states have at least one—if not both—of these legal limitations to gap-filling. In the wetlands context alone, these states contain approximately 88% of the nation's wetlands. In the event of a federal rollback, these wetlands, as well as other natural resources, could consequently receive lowered levels of environmental protection.

Of course, neither NMSRs nor PPRAs have undergone meaningful legal challenges to date. It is entirely possible that courts will limit the applicability of these limitations if they are triggered by state rules filling in for a federal rollback. If a court were to determine, for example, that a particular NMSR does not apply to jurisdictional boundaries, that NMSR would present little obstacle to gap-filling in the *SWANCC* context.

But this uncertainty over interpretation is no reason for devolution to proceed without considering the potential environmental consequences. If maintaining current levels of protection is indeed a goal, these self-imposed legal limitations must not be ignored.