On Behalf of Their Citizens: The State Role in Federal Environmental Litigation

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With the Trump administration's shifting policy priorities and proposed agency funding cuts, there is a renewed focus on the states' roles in implementing environmental-protection and quality measures. This emphasis manifests itself in several ways, from an organization of state attorneys general announcing the creation of a joint database and resources to track state efforts to pursue environmental-protection goals through litigation, to a continued trend of state involvement in environmental litigation, and pledges from several state officials to pursue their own environmental-protection standards and agendas—including those related to climate change—regardless of the direction taken at the federal level.

Much of the current state environmental advocacy can be traced to *Massachusetts v. EPA*, 549 U.S. 497 (2007), an action by twelve states against the U.S. Environmental Protection Agency (EPA) to force that agency to regulate carbon emissions from motor vehicles. But viewed historically, environmental advocacy by the states on behalf of their citizens is not new. In many instances—with mixed success—states have exercised their quasi-sovereign powers to sue the federal government or private parties on environmental matters. *E.g.*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (state challenge to EPA interpretation of Clean Air Act § 112(n)(1)(A)); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (state challenge to federal Wild Free-Roaming Horses and Burros Act); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) (state action against corporations for discharging mercury); *Michigan v. U.S. Army Corps of Engineers*, 758 F.3d 892 (7th Cir. 2014) (state public nuisance action alleging Corps' failure to stop spread of invasive carp species in the Great Lakes); *In re Polar Bear Endangered Species Act Listing*, 709 F.3d 1, 19 (D.C. Cir. 2013) (state challenge to polar bear threatened listing); *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (state challenge to Forest Service environmental impact statement for allocation of national forest roadless areas); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (action to enjoin New Mexico residents from using pesticide allegedly polluting Texas streams); *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal., Sept. 12, 2007) (state suit for damages from automakers for contributing to global warming).

Since the start of the Trump administration in January 2017, the anticipated and occurring retrenchment of federal environmental regulation has spurred some states to declare their intent to take legal action. For instance, California Governor Jerry Brown vowed to fight efforts by the Trump administration to roll back climate change policies. *See* Mike McFate, *California Today: A Fiery Anti-Trump Message from the Governor*, N.Y. Times, Jan. 25, 2017. In March 2017, the California Air Resources Board indicated it intended to seek a waiver from EPA under the Clean Air Act allowing the state to set automobile emission standards more stringent than federal standards. *See* Chris Megerian, *State Revs Up Goals in Smog Battle*, L.A. Times, Mar. 25, 2017, at A1. *See also* http://columbiaclimatelaw.com/resources/state-ag-database (database of environmental legal actions undertaken by state attorneys general).

While significant state-led legal battles have yet to commence over the administration's environmental policies, ongoing legal challenges to the administration's immigration initiatives suggest the role of the states and issues that may be encountered on the environmental front. Washington and Minnesota, among others, have challenged the Trump administration's immigration policy travel ban. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). Of interest for environmental advocacy litigation, the Ninth Circuit held that the states had made a sufficient showing of concrete and particularized injury to their proprietary interests to establish standing. *Id.* at 1158–61.

In this article, we briefly survey a sampling of state-led environmental advocacy litigation to explore the role that the states may play on behalf of their citizens. We focus on two key areas. First, standing issues, because standing concerns identify the unique interests and role of the states in challenging federal environmental decisions. Also, the standing inquiry highlights the various procedural obstacles—including ripeness, exhaustion, standard of review, remedies, and more—that states will face in trying to implement their citizens' policy interests through litigation. Second, we look at the specific roles that states can fill—especially in bringing detailed and specific scientific, economic, and other information to bear. We close with some conclusions about the historic background of state environmental advocacy and what it may mean for future efforts.

Standing and the Special Role of States in Federal Environmental Litigation

To demonstrate Article III standing and invoke a federal court's jurisdiction, a plaintiff usually must show that: (1) it has suffered an "injury in fact" that is both concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See, e.g.*, *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1177–78 (9th Cir. 2011).

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Published in *Natural Resources & Environment* Volume 32, Number 2, Fall 2017.

The federal courts recognize that states are not "normal litigants for the purposes of invoking federal [court] jurisdiction." *Massachusetts v. EPA*, 549 U.S. at 518. Alternative standing thresholds may aid states in establishing Article III standing. For example, a state's "well-founded desire to preserve its sovereign territory" supports federal jurisdiction, which may be further reinforced by ownership of "a great deal of the 'territory alleged to be affected'" by a challenged federal action. *Id.* at 519 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

Despite *Massachusetts v. EPA* and subsequent cases, state standing in federal environmental advocacy cases is not automatic; it must be established with the requisite proof in each instance.

A state or political body may also uniquely "sue to protect its own 'proprietary interests' that might be 'congruent' with those of its citizens," including "responsibilities, powers, and assets." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (quoting *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985)). A state's unique interests may include the "ability to enforce land-use and health regulations" and "protecting its natural resources from harm." *Sausalito*, 386 F.3d at 1198.

In a National Environmental Policy Act (NEPA) challenge, the Ninth Circuit held that California, for instance, "unquestionably" had "a well-founded desire to protect both its territory and its proprietary interests both from direct harm and from spill-over effects resulting from action on federal land, including ownership and trusteeship over wildlife, water, State-owned land, and public trust lands." *Sherman*, 646 F.3d at 1178 (internal quotation omitted). These unique interests distinguish state plaintiffs from individual citizens, nongovernmental organizations (NGOs), and NGO members on standing issues. *Id.* Nonetheless, a state as a potential plaintiff still needs to document its interests and allege injury through affidavits or declarations to establish the state's standing. *See id.* at 1178–79.

States also have established the requisite interests and injury to pursue litigation regarding air quality within their borders and beyond. In 2003, citing concerns about global warming, Massachusetts and 11 other states, along with 4 local governments, challenged whether EPA could decline to issue emissions standards based on policy considerations not enumerated in Clean Air Act section 202(a)(1) and whether EPA could regulate carbon dioxide and other greenhouse gases associated with climate change. The U.S. Supreme Court noted the unique role of the states in this area and stated that it was of "considerable relevance that the party seeking review [was] a sovereign State and not . . . a private individual." 549 U.S. at 518.

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.
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> *Id.* at 519.

The Court explained that because those sovereign prerogatives are lodged in the federal government through EPA, Massachusetts' right in protecting its quasi-sovereign interests had to be considered. The Court then concluded that Massachusetts had "satisfied the most demanding standards of the adversarial process" in showing that EPA's refusal to regulate greenhouse gas emissions would have an "actual" and "imminent" harm on Massachusetts. *Id.* at 520. The Court ultimately ruled that EPA had authority under the Clean Air Act to regulate greenhouse gas emissions as "air pollutants."

Even this contemporary ruling had historical underpinnings. In *Massachusetts* the Supreme Court relied on its earlier decision in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), where Georgia sued Tennessee mining and smelting companies over interstate air pollution affecting large areas in Georgia. Acknowledging that Georgia owned very little of the affected territory and that the quantifiable monetary damages were small, the Court nonetheless held that Georgia had the right to sue "in its capacity of a quasi-sovereign." Specifically, "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain" and "the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Id.* at 237.

Similarly, in *Hanford Challenge v. Moniz*, 2016 WL 6902416 (E.D. Wash. Nov. 3, 2016), the district court had little difficulty determining that Washington State had *parens patriae* standing to bring an action against the Department of Energy (DOE) under the Resource Conservation and Recovery Act. The state alleged that DOE storage, handling, and treatment of hazardous waste at the Hanford nuclear facility presented an imminent and substantial endangerment to human health and the environment. The court held that Washington had "adequately asserted at least one quasi-sovereign interest—protection of the health and well-being of Washington residents"—that was sufficiently distinct from its citizens' interests to support standing. *Id.* at *6. These interests included the state's interest "in ensuring worker safety throughout Washington and the protection of future Hanford workers." *Id.* at *7.

Conversely, in *Otter v. Jewell*, 2017 WL 61924 (D.D.C. Jan. 5, 2017), *appeal docketed*, No. 17-5050 (D.C. Cir. Mar. 28, 2017), the district court held that Idaho lacked standing to challenge amendments to Bureau of Land Management (BLM) and Forest Service land-use plans to provide conservation measures for greater sage-grouse habitat. Specifically, the court held that Idaho failed to demonstrate that the state would suffer an injury-in-fact: (1) as a result of the standards and self-implementing aspects of the land-use plan amendments, (2) to the state governor's ability to carry out his constitutional responsibilities, or (3) from spillover effects on state-owned or private lands. Thus, despite *Massachusetts v.*

EPA and subsequent cases, state standing in federal environmental advocacy cases is not automatic; it must be established with the requisite proof in each instance.

The State Role in Advocating Its Substantive and Policy Expertise

Many state environmental advocacy cases will be reviewed based on the federal agency's administrative record. The applicable standard of review constrains both the arguments available to state litigants as well as the remedies obtainable. States have unique roles to play in developing and challenging agency administrative records due to the states' policy and technical expertise in various environmental regulatory areas. Sections 706(2)(A) and (D) of the Administrative Procedure Act (APA) authorize a reviewing federal court to hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(A), (D). The factual and scientific determinations within the federal agency's expertise generally are entitled to deference. *See Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 378 (1989). However, the agency still must explain cogently why it has exercised its discretion in a given manner. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983); *see also Catskill Mtns. Chap. Trout Unlimited v. EPA*, 846 F.3d 492, 521 (2d Cir. 2017) ("*State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decision-making process. *Chevron*, by contrast, is generally used to evaluate whether the conclusion reached as a result of that process—an agency's interpretation of a statutory provision it administers—is reasonable.")

A critical need exists for states to be able to handle scientific issues properly, as well as issues that involve both science and policy. Often states are best suited to address such issues because they possess or have access to particular environmental, economic, and other information. At the same time, the role of the federal courts in evaluating and considering scientific information in agency review cases is continually evolving. For instance, the Ninth Circuit indicated that under the APA standard of review the court generally does not sit to conduct "fine-grained judgments of [the] worth" of agency wildlife viability analyses or similar scientific information evaluated in federal agency decision-making. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (*en banc*). Although subsequent cases have applied this approach, other decisions have tempered its full application. *Compare Trout Unlimited v. Lohn*, 559 F.3d 946, 955-56, 958 (9th Cir. 2009), *with Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010).

How might—and have—states worked within these limitations of the standard of review to advocate effectively the states' positions and interests? Significantly, states—and other litigants—have not fared well when their challenges could be cast as mere policy disagreements with federal environmental decisions. Instead, successful challenges have advanced more readily when reframed under more familiar APA standards of review, including arguments that a decision failed to consider the relevant factors, failed to rely on complete studies and information, ran counter to the evidence before the agency, or was so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Also, reframing the matter as a legal issue and identifying a legal duty or procedure that has not been followed has proven an effective basis for state challenges to federal agency decisions, just as the same approach has been used by NGOs and other stakeholders to move forward their policy agendas. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. at 2712 (framing issue as one of legal interpretation under Clean Air Act); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1085–86 (9th Cir. 2011) (framing issue as duty to consult with state under Energy Policy Act).

In other instances, states have highlighted the information gaps or missing details in the administrative records underlying federal decisions and used those gaps to show either or both a failure of procedure or a failure to consider the relevant factors. For instance, in *California v. Block*, the state highlighted the lack of site-specific information concerning the roadless areas being addressed in the Forest Service's environmental impact statement (EIS) to show that the agency failed to provide a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." 690 F.2d at 761. In *Alaska v. Lubchenco*, No. 3:10-cv-00271-TMB (D. Alaska Mar. 5, 2012), *aff'd on other grounds*, 723 F.3d 1043 (9th Cir. 2013), the state pressed both procedural and factual arguments to persuade the court that the National Marine Fisheries Service (NMFS) was required to prepare a complete EIS, instead of a less-detailed environmental assessment, on proposed Steller sea lion protection measures. Alaska presented detailed information on the potential economic and environmental impact of the federal agency's proposed actions to demonstrate that the agency "did not provide the public with a sufficient opportunity for review and comment" on the NEPA document and did not take a "hard look" at the environmental consequences of its action. *Id.* at 6. In another example involving Alaska, in the context of defending a NMFS decision not to list the ribbon seal under the Endangered Species Act (ESA), the court specifically cited studies and data from the Alaska Department of Fish and Game to support the federal agency's decision not to list the species and noted that those studies corroborated a lack of decline in the species' populations. *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 950 (N.D. Cal. 2010).

In *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1168 (9th Cir. 2003), the Ninth Circuit set aside a Forest Service EIS because it failed to disclose and discuss opposing viewpoints, including those presented by the Arizona Game and Fish Department. And in *San Luis & Delta-Mendota Water Authority v. Badgley*, 136 F. Supp. 2d 1136, 1150–51 (E.D. Cal. 2000), the court set aside a Fish and Wildlife Service (FWS) listing of the Sacramento splittail fish as a threatened species. The court concluded that the FWS had "ignor[ed] significant data, and a diametrically opposed opinion from" the California Department of Fish and Game, "a state fish and game agency vested with the same responsibility to protect fish" as the FWS. *Id.* at 1151. Thus, the FWS rule was arbitrary and capricious and violated ESA listing standards. As these last two examples show, even when a state is not involved directly as a party in litigation challenging federal agency decisions, the state's role at the administrative agency phase still can have important implications for later litigation brought by other interests. The courts—often encouraged by specific statutory or regulatory frameworks granting procedural or other rights to the states or state agencies—give these comments and information from the state serious consideration in evaluating other stakeholders' claims.

The Program-Specific Nature of the State Role

There is, of course, no uniform procedure for state response to shifts in federal environmental policy, and no uniform federal court treatment of states' litigation responses. As the above examples suggest, state and judicial responses depend largely on the specific substantive areas and regulatory regimes in which the states raise these issues. In the myriad federal approaches adopted by Congress across the environmental programs, roles for the states in many of these statutes differ widely.

Under the Wild and Scenic Rivers Act, for example, a state may apply—through its governor—to the secretary of the interior to designate a river as part of the national wild and scenic rivers system. *See* 16 U.S.C. § 1273(a)(iii). The Coastal Zone Management Act requires a consistency determination to ensure federal consistency with state-developed coastal management programs. 16 U.S.C. § 1456(c). Under the ESA, federal authorities must provide a "written justification" to a state filing comments disagreeing with a proposed ESA Section 4 regulation when the final regulation conflicts with such comments. That justification must address the secretary's "failure to adopt regulations consistent with the [state's] comments or petition." 16 U.S.C. § 1533(i). The courts so far have been reluctant to give substantial credence to the states' role under this ESA provision. *See, e.g.*, *In re Polar Bear*, 709 F.3d at 18–19; *Alaska Oil and Gas Ass'n v. Jewell*, 815 F.3d 544, 562–63 (9th Cir. 2016).

Under the Federal Land Policy and Management Act (FLPMA), BLM land-use plans for the public lands are to "be consistent with State and local plans to the maximum [that the Secretary of the Interior] finds consistent with Federal law and the purposes of" the act. 43 U.S.C. § 1712(c)(9). A state governor may identify inconsistencies with state plans and provide written recommendations to the BLM. The BLM director is required to accept the governor's recommendations if the director determines "that they provide for a reasonable balance between the national interests and the State's interest." 43 C.F.R. § 1610.3-2(e). The efficacy of FLPMA's state consistency review provision is being tested in litigation over BLM and Forest Service plan amendments for the conservation of the greater sage-grouse. *See, e.g.*, *W. Watersheds Project v. Schneider*, No. 1:16-cv-83-BLW (D. Idaho filed Feb. 25, 2016); *Herbert, State of Utah, et al. v. Jewell*, No. 2:16-cv-00101 (D. Utah filed Feb. 4, 2016).

On the other hand, NEPA—while it is solely a procedural statute—has provided some significant access and leverage for the states to exert their own policy preferences and disagreements with federal environmental decisions, as the *California v. Block*, *Center for Biological Diversity v. U.S. Forest Service*, and *Alaska v. Lubchenco* examples show.

Possible Paths Forward

Many state challenges to particular federal environmental decisions begin during one administration and carry over into the next. The polar bear listing litigation, for instance, began as a challenge to a George W. Bush administration ESA listing decision but continued during the Obama administration. Thus, taking a slightly longer view, the party affiliation or policy programs of a given federal administration is not always determinative of the level of, or need or motivation for, state environmental advocacy.

Rather, the phenomenon is more of an ongoing feature of the American experiment, our republican form of government, and the constant pull and tug between the states and the federal government over the allocation of power and direction of environmental policy. *See* Suzanne Mettler, *Democracy on the Brink*, Foreign Affairs, May–June 2017, at 121, 124 (book review) ("discord is to be expected: democracy does not function like a machine, with neatly humming checks and balances"). As the historical examples show, there were frequent state challenges to federal environmental regulatory decisions in past administrations, regardless of party affiliation. To some extent, the current phenomenon may merely reflect a shift in which states are doing the suing. Even in *Massachusetts v. EPA*, for instance, 10 states intervened on behalf of EPA.

In general, successful public policy implementation requires the support of various sovereign stakeholders. *See* Daniel A. Mazmanian & Paul A. Sabatier, *Implementation and Public Policy* (1983). To the extent the federal government hopes to be successful with the resetting of its environmental policy and implementation of ongoing statutory environmental programs, it needs to cultivate the states' support. However, in the current polarized political climate, it may not be possible to get a consensus or even a majority of that state support. In the sense that litigation is the ultimate form of public involvement for NGOs and other stakeholder interests, so too it is for state litigation over federal environmental policy. When the states interpret federal environmental policy direction as if the states' concerns are not being heard or that their citizens' interests are not being protected, then the states may be motivated to litigate to try to bring those interests into the federal decision-making.

Given the noted proclivity of some states to litigate these environmental issues and an apparent willingness as documented by the numerous states that jumped into both sides of the travel ban litigation, query what the endgame may be. Will there ultimately be attempts at creative solutions such as the Clinton administration's Pacific Northwest Forest Summit and Plan, innovative land exchanges, or the increased use of environmental mediation and collaboration? Or will entrenched positional conflict be the order of the day as it has been so far in the early part of the Trump administration? For a president who prides himself on the ability to make deals, if the states achieve some key, early victories in the likely litigation concerning federal environmental policy and decisions, then the stage may be set for creative solutions and attempted deals to resolve the forthcoming state-federal conflicts over environmental policy. And for an administration elected through a system (the Electoral College) focused on preserving the influence and sovereignty of the states over that of the nation's individual citizens, it is ironic that many of the present and planned federal environmental policy initiatives could be thwarted by the states themselves—acting on behalf of their citizens—under well-established federalism principles.