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ENVIRONMENTAL ENFORCEMENT OF FEDERAL AGENCIES: A STRUGGLE FOR POWER UNDER THE "NEW FEDERALISM"

Prepared in Partial Fulfillment of the Requirements for the L.LM Degree at the University of Virginia School of Law.

Richard E. Sarver

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I. INTRODUCTION

The challenge to Federalism presented by the new wave of environmental statutes[1] is, while not unique in our history, a significant strain on state and federal relations.[2] Behind this tension is the question of who should enforce these laws, especially when the violator is a Federal agency. Traditionally Federal agencies have been free to perform their diverse missions without restraint either from other Federal agencies or the states. This freedom has led to abuse in the arena of environmental compliance. Recent congressional hearings concerning amendments to the Resource Conservation and Recovery Act saw a congressional feeding frenzy over what was termed the "abominable mess"[3] of federal facility environmental compliance. The obvious anger and

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[1]Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et. seq. (1982); Medical Waste Tracking Act (MWTA), Pub. L. No. 100-582, 102 Stat. 2950 (1988); Water Pollution Prevention and Control Act, 33 USC § 1251 et. seq. (1978), amended by the Clean Water Act (CWA) of 1977, Pub. L. No. 95-217, 91 Stat. 1567 (1977); Resource Conservation and Recovery Act (RCRA), 42 u.S.C. § 6901 et. seq. (1983); Clean Air Act (CAA), 42 U.S.C. § 7401 et. seq. (1983), as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et. seq. (1987).

[2]See, e.g., Berkowitz, Waste Wars: Did Congress "Make" State Sovereignty in the Low Level Radioactive Waste Policy Amendments Act of 1985? 11 Harv. Env. L. Rev. 437 (1987); Florini, Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?, 6 Harv. Env. L. Rev. 307 (1982); State Water Quality Planning Issues, Counsel of State Governments (1982).

[3]Environmental Compliance By Federal Agencies: Hearings on H.R. 1056 Before the Subcomm. on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 101st Cong., 1st Sess. 121 (1989) (statement of Congressman Thomas A. Luken of Ohio).

frustration directed toward federal agencies, including the Environmental Protection Agency (EPA), by representatives of the states is a clear indicator of the extent of the problem and also a catalyst for an ill-conceived and dangerous legislative fix.

Approximately one-third of the total land area of the United States is federally owned. There are over 20,000 federal facilities many of which produce contaminants controlled by various environmental laws. Over 1,400 federal facility hazardous waste sites exist with at least one such site located in every state in the union.[4] The environmental performance ratings of many Federal agencies is dismal; indeed the attitude expressed by some agencies has ranged from hostile recalcitrance to nearly defeated resignation.[5] Since 1959, federal facilities have been urged to lead the way toward environmental sanity,[6] yet they are accused of being some of the worst of the lunatics and are now threatened with a congressionally imposed and state applied straight jacket. House Bill 1056, which flew through committee and house votes with near unanimous support, will subject all Federal agencies in their operations involving hazardous waste, to control by state and local

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[4]EPA Federal Facilities Compliance Strategy, Office of Federal Activities U.S. Environmental Protection Agency, III-1 (1988); Kitfield, The Environmental Cleanup Quagmire, Mil. For. 36, 37, April 1989.

[5]Hearings supra note 3, at 121-42.

[6]See, e.g. Breen, Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law, 15 Env. L. Rep. 10326 (1985); Hearings supra note 3, at 1-23; Hancock v. Train, 426 U.S. 167, 171 Fn. 10 (1975).

regulators. Moreover, state regulators will be given direct access to federal funds, without limit, through unfettered use of fines and civil penalties as compliance tools?[7]

This effort by the states to gain control over federal pollution comes ironically at a time when the federal government is facing strident resistance from states in seeking much needed repositories for radioactive and other hazardous wastes.[8] A "reverse commons" problem has developed with each state shouting "not in my backyard" to any overture involving hazardous waste siting within its boundary.[9] Strains in the federal-state relationship have erupted recently over other environmentally related issues. The "sage brush rebellion" of the early 1980's was an example of states exercising greater political muscle and thereby compelling cooperative regulation of federally owned lands.[10] The controversy surrounding the application of the Coastal Zone Management Act led to a struggle termed the "seaweed rebellion." At issue again was the nature of the relationship between the national government and the states regarding control

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[7]H.R. Rep. No. 101-41, 101st Cong., 1st Sess. 2-9 (1989).

[8]Washington Post, Nov. 7, 1989 at 3, col. 1; Washington Post, oct. 9, 1989 at 1 col. 1; Washington Post, Oct. 10, 1989 at 5 col. 1.

[9]Washington Post, Aug. 31, 1989 at 22 col. 1; See Milsten, How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government?, 19 Rut. L. J. 123 (1986); Florini, supra note 2 at 324.

[10]See, Cowart and Fairfax, Public Lands Federalism: Judicial Theory and Administrative Reality, 15 Ecol. L. Quart. 375, 407 (1988).

over coastal waters. Congress sought to create a nearly equal partnership while the Reagan administration attempted to diminish the authority of coastal states in this area.[11]

The struggle for environmental power over Federal agencies is a product of the failure of the present enforcement regime to obtain Federal agency compliance, the reluctance of federal facilities to fully comply at the expense of efficient mission accomplishment, and most importantly the failure of Congress to set priorities among competing goals.[12] This paper will examine why Federal agencies have not seized the leadership role in environmental compliance envisioned for them by Congress and five successive administrations.[13] It will focus on the present enforcement mechanism employed by the Environmental Protection Agency and the Department of Justice and discuss the flaws that have made this system unworkable. Indeed, quite recently the trial judge presiding over the Rocky Mountain Arsenal litigation concluded that EPA oversight does not serve as an effective check on Agency cleanup efforts. He further chided the Department of Justice attorneys representing both the EPA and the Army as having

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[11]See, e.g., Fitzgerald, California v. Watt: Congressional Intent Bows to Judicial Restraint, 11 Harv. Env. L. Rev. 147 (1987); Eichenberg and Archer, The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism", 14 Ecol. L. Quart. 9 (1987).

[12]See H.R. Rep. supra note 7 at 48-60.

[13]R. Durant, When Government Regulates Itself, (1985) at 71-75; Exec. Order No. 12146, 44 Fed. Reg. 42657 (1979); Exec. Order No. 12529, 52 Fed. Reg. 2823 (1987).

a conflict of interest and held that were he to dismiss the claim by Colorado, the cleanup effort "would go unchecked by any party whose interest in a real sense is adverse to the Army."[14]

Why then is state control and enforcement of environmental laws against federal agencies to be feared? Issues of supremacy and federalism dating to the founding of this nation provide the answer. The parochialism of local interests must not subvert the important national roles of federal facilities. Yet effective enforcement authority is needed to remedy longstanding problems of noncompliance by federal agencies. This paper attacks the issue through the "New Haven" approach by thoroughly examining the problem and searching for the appropriate goals. The historical background of the problem, including the approaches taken by the various courts presented with this issue will be studied. Trends and conditioning factors including the relative enforcement capabilities of the EPA and the states and the amenability of federal agencies to compliance will be reviewed. Finally, Policy Alternatives and a Proposed Recommendation will be put forward. This paper will urge granting full and exclusive enforcement authority over Federal agencies to the EPA, rejecting the notion of sovereign immunity with respect to environmental compliance, and creating a status of cooperative federalism with the states by encouraging state participation in the negotiation of federal facility compliance agreements. As a check on the entire process,

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[14] Colorado v. Dep't. of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989).

citizen suits against federal agencies under all environmental statutes would be available and unimpeded by the hoary shibboleth of sovereign immunity.

II. DELIMITATION OF PROBLEMS

The federal government owns some 387,000 buildings located within 27,000 facilities and over 729 million acres of land. These federal facilities generate, manage, and dispose of large quantities of hazardous waste containing acids, nitrates, radioactive materials, and heavy metals such as mercury. The two largest federal producers of hazardous waste, the Department of Defense (DOD) and the Department of Energy (DOE) together generate approximately 20 million tons of hazardous waste yearly.[15] Recent testimony before the House of Representative Committee on Energy and Commerce indicate that federal facilities are some of the worst offenders of environmental laws. Testimony before the Subcommittee on Transportation and Hazardous Materials concerning the DOE's Feed Materials Production Center at Fernald, Ohio revealed a sordid history of thirty-five years of pollution.[16] Since 1951 DOE knew of the contamination at the Fernald plant and yet released over 300,000 pounds of radioactive uranium into the atmosphere. The agency willfully attempted to cover up this unlawful pollution and it is as yet unchecked. Groundwater contamination also occurred

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[15]See H.R. Rep. supra note 7 ate 3; Goeway, Assuring Federal Facility Compliance with RCRA and Other Environmental Statutes: An Administrative Proposal, 28 Wm. and Mary L. Rev. 513, 516 (1987).

[16]H.R. Rep. supra note 7 at 4-5.

at Fernald from six storage pits. At least three wells near the plant contain dangerous levels of uranium.[17]

The Hanford Reservation, also operated by DOE has had a similar history. During World War II President Roosevelt made it a national priority to develop an Atomic weapon. Hanford Reservation was the site of the United States' first production facility for plutonium.[18] Occupying over five hundred and seventy square miles in Central Washington State the Hanford Plant produced huge quantities of radioactive and mixed waste almost from its inception. Until relatively recently the waste management practices at Hanford were crude. Untreated waste was dumped into unlined holes in the ground. The more dangerous radioactive waste was put into 149 single-shell steel tanks, many of which have leaked allowing some 500,000 gallons of liquid, highly radioactive waste to seep into the ground.[19]

Cleanup at DOE's Defense Nuclear facilities is estimated to have a price tag of as much as $100 Billion and extend well into the twenty first century.[20] While Congress has portrayed Federal agencies as the villain in this national disaster, that is a gross over-simplification and even if it were true there is "no soul to

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[17]Id. at 4-5.

[18]Hearings, supra note 3 at 11-12 and 14-22 (statement of Kenneth O. Eikenberry, Washington Attorney General).

[19]Id. at 12.

[20]Kitfield supra note 4 at 2; H.R. Rep. supra note 7 at 57.

damn and no body to kick."[21] DOE has performed a vital national mission for over thirty years, successfully producing the heart of our nuclear deterrent. In accomplishing its mission, however, environmental costs were not considered and consequently the true social cost of this function was at best not recognized and at worst actively hidden. Complicating this issue is the difficulty inherent in balancing a national benefit against a primarily local cost.[22]

Other Federal agencies, most notably the Department of Defense, are experiencing compliance and cleanup difficulties similar to DOE's. The United States Army has earned the dubious distinction of owning this nation's worst toxic waste site at Rocky Mountain Arsenal.[23] The infamous "Basin F," subject of on-going

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[21]Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981). "Did you ever expect a corporation to have a conscience, when it has no soul to damn and no body to be kicked?" Edward, First Baron Thurlow 1731-1806 quoted in M. King, Public Policy and the Corporation 1 (1977).

[22]See, Hearings supra note 3 at 96-110 (statement of Leo P. Duffy, Department of Energy); H.R. Report supra note 7 at 4, 38-36.

[23]Colorado, supra note 14 at 1562-63; Hearings supra note 3 at 123. Congressional hostility was evident in this exchange between Congressman Luken and William H. Parker, Deputy Assistant Secretary of Defense:

Mr. Luken:	How about Rocky Mountain Arsenal? Is that your facility?
Mr. Parker:	Yes, it is.
Mr. Luken:	You say it doesn't pose an imminent risk to the public?
Mr. Parker:	If you'd like to talk about Rocky Mountain Arsenal, I have Colonel McAlear here this morning to talk about that.
Mr. Luken:	I'd like to hear about Rocky Mountain Arsenal, so bring on the whole Department.

litigation styled Colorado v. Department of the Army,[24] is the product of an unholy witches brew containing all varieties of chemical weapons, industrial wastes and pesticides. The twenty seven square mile site is located only ten miles north of Denver, Colorado and threatens to damage drinking water supplies for millions of residents.[25]

The Air Force in pursuing its national security mission is on the leading edge of new technology development, especially in the area of composites. Stealth technology is the product of chemically fused compounds that give aircraft the remarkable characteristic of absorbing rather than reflecting radar. This ability gives an enormous strategic and tactical edge to Air Force aircraft which are stealth equipped.[26] What is not so clear is the environmental cost of such an edge. Workers at a Lockhead plant producing the F-117A stealth fighter were exposed to a toxic fume never before produced and 160 were sickened. A similar illness struck workers at a Boeing plant who were also producing stealth composite materials.[27] One fear, as yet unrealized, is that in the search for the next great breakthrough in weapons technology a new strain of environmental containment will be produced, one that is

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[24]Colorado supra note 14.

[25]Id. at 1563-64; Hearings supra note 3 at 123 (statement of congressman Luken) "it is the most polluted 93 acres in the Nation."

[26]Washington Post, Oct. 9, 1989 at 1 col. 2; Washington Post, Oct. 10, 1989 at 1, 14 col. 1; Kitfield, supra note 4 at 4.

[27]Kitfield supra note 4 at 1-2.

so virulent it can not be controlled. While this fear is likely unfounded, some experts believe that the next generation of environmental crisis is "already brewing at defense plants across the country."[28]

Silicon Valley may be the paradigm model of this new generation environmental crisis. Toxic chemical wastes from the plants producing computer chips to serve this countries' burgeoning computer industry as well as many of DOD's most sophisticated weapons, have seeped into the groundwater that is the drinking water supply for residents of the Valley. Groundwater pollution has long been the most feared hazard of contamination and may be a "genetic time bomb."[29]

Federal agencies have a duty to clean up past environmental contamination and to comply with environmental statutes in present operations. This duty arises under Executive Orders issued by Presidents past and present, as well as clear congressional mandates in every pollution control and cleanup law. Executive Order 12088[30] is perhaps the clearest guide for federal agencies, reading in part:

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[28]A. Einstein, Out of My Later Years, 212-215 (1950). Perhaps the greatest mind in the history of mankind was fearful of what he termed the "military intrusion in sciences." He believed that "the military mentality raises 'naked power' as a goal in itself" and that it was not wise to entrust public funds to the military for pure science. " . . . most beneficent distribution should be placed in the hands of people whose training and life's work give proof that they know something about science and scholarship."

[29]Kitfield supra note 4 at 4-5; R. Patrick, E. Ford, J. Quarles, Groundwater Contamination in the United States (1987).

[30]Exec. Order No. 12088, 43 Fed. Reg. 4770 (1978).

101 The head of each Executive Agency is responsible for ensuring that all necessary actions are taken for the prevention, control and abatement of environmental pollution with regard to federal facilities and activities under the control of the agency.

1-102 The head of each Executive Agency is responsible for compliance with applicable pollution control standards . . .

1-501 The head of each Executive Agency shall ensure that sufficient funds for compliance with applicable pollution pollution control standards are requested in the agency budget.

Congress has spoken with increasing clarity regarding federal facility compliance. Section 118 of the Clean Air Act is representative: "Federal facilities shall be subject to, and comply with, all federal, state, interstate, and local requirements . . . respecting . . . air pollution in the same manner, and to the same extent as any nongovernmental entity."[31]

The Judicial Branch also recognized that the duty of federal agencies to comply with environmental statutes was beyond cavil. In Hancock v. Train[32] the Supreme Court began its opinion by noting that "federal agencies have been notoriously laggard in abating pollution."[33] At issue in this case was whether several Tennessee Valley Authority (TVA) power plants, four Army bases and an Atomic Energy Plant, were required to obtain permits from the state of Kentucky under a state law which implemented the Clean Air Act.

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[31]42 U.S.C. § 7418. The CAA calls on EPA to develop national ambient air quality standards as well as national air emission standards.

[32]426 U.S. 167 (1976).

[33]Id. at 171.

The statute provided that "no person shall construct, modify, use, operate, or maintain an air containment source . . . unless a permit therefore has been issued."[34] The driving force behind the defendants in this case was the TVA which produced massive quantities of sulfur dioxide at its coal fired power plants. Indeed, TVA was and is the largest emitter of sulfur dioxide compounds in the United States. TVA was particularly reluctant to be regulated, having been extraordinarily independent since its inception. The relationship between TVA and EPA which developed after Hancock will be an important framework for analysis throughout this paper demonstrating that inter-agency regulation is not only workable, but efficient.[35]

Hancock was unequivocal in finding Federal agencies duty bound to comply with pollution control and abatement measures. The case has, however, initiated an as yet unresolved dispute between states, the EPA, and Federal agencies by positing "there is no longer any question whether Federal installations must comply with established air pollution control and abatement measures. The question has become how this compliance is to be enforced."[36] EPA took the position in Hancock that Federal agencies were not obligated to comply with state procedural requirements such as permits and the court adopted the rule that Federal agencies must

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[34]Id. at 181.

[35]Durant supra note 13 at 30-71.

[36]Hancock supra note 172.

comply with substantive requirements, but not procedural ones. Hancock has prompted a great deal of litigation on the issue of sovereign immunity, but a careful reading of the opinion reveals that the courts' holding rests on the more solid rock of federalism and not, as often interpreted, on the shifting sands of sovereign immunity.[37]

In Hancock the state could have shut down the defendant federal agencies by withholding a permit. This control over a federal agency by a state was seen as dangerous. "The federal function must be left free of regulation."[38] Going back to the source of much of our constitutional history, Chief Justice John Marshall, the court cited M'Culloch v. Maryland: "the Constitution and laws made in pursuance thereof are supreme and control the laws of the respective states, and cannot be controlled by them. . . . it is the very essence of supremacy to remove all obstacles to its action within its sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."[39]

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[37]See e.g., EPA v. California ex. rel. State Water Resources Control Board, 426 U.S. 200 (1976); Florida Dept of Environmental Regulation v. Silvex, 606 F. Supp. 159 (M.D. Fla. 1985); Block v. North Dakota, 461 U.S. 273 (1983); Meyer v. Coast Guard, 644 F. Supp. 221 (E.D. N.C. 1986); State of Ohio ex. rel. Celebreeze v. Dep't of the Air Force No. C-2-86-0175 (S.D. Ohio, Mar. 31, 1987) (unpublished opinion); California v. Walters, 751 F.2d 977 (9th Cir. 1984).

[38]Hancock supra at 179 quoting Mayo v. United States, 319 U.S. 441 at 447-48 (1943).

[39]M'Culloch v. Maryland, 4 Wheat. 316, 426-27 (1819).

The court looked as well to the Plenary Power Clause which gives Congress exclusive control over federal enclaves. "The activities of the Federal government are free from regulation by any state."[40] The court's holding was not limited to those situations where a state could halt agency operations by denying a permit. In a companion case, EPA v. California ex. rel. State Water Resources Board,[41] the Federal agency could have obtained an EPA permit under Section 313 of the Federal Water Pollution Control Act. In doing so it could effectively bypass the state permit mechanism. This distinction was not important to the court and it held again that the states did not have authority to compel Federal agencies to obtain state permits under the Clean Water Act.[42]

There was one shared factor between Hancock and EPA v. California that is vital to a clear understanding of these cases. In each case the Environmental Protection Agency supported the Federal agency position against state regulation. The EPA stood ready to provide appropriate regulation as a federal monitor over Federal facilities. The court was not freeing Federal facilities to act as environmental renegades, rather it was rendering a policy decision about how these facilities were to be kept in compliance with environmental requirements. In what hindsight has shown to be a poor choice of words, Justice White wrote of his concern that

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[40]Art. I, § 8, CL. 17; Hancock supra at 179.

[41]426 U.S. 200 (1975).

[42]Id. at 211.

the federal function not be "divested in favor of a subordinate sovereign."[43] The policy being advanced was the notion that agencies with a national mission and national priorities should not be controlled or even curtailed by a state with a necessarily parochial perspective. This time honored principal of federalism has been misconstrued as sovereign immunity by many lower courts looking to Hancock for guidance on the issue of enacting environmental statutes against Federal agencies.[44]

a. Sovereign Immunity.

Since Hancock the issue of sovereign immunity has spawned a huge amount of needless and unproductive litigation. Federal agencies have hidden behind this defense rather than pursuing appropriate solutions to environmental issues. State and local governments have become increasingly frustrated and hostile as courts have dismissed enforcement efforts directed at federal polluters.[45] This outrage coalesced into political clout and Congress has passed increasingly clear statutory repudiation of

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[43]Hancock supra at 179.

[44]E.G. United States v. State of Washington, No. C-87-291-AAM (E.D. Wash. 1988) (Memorandum Opinion), aff'd. CIV. 87-4371 (9th Cir. 1989); McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986); United States v. Pennsylvania Environmental Hearing Bd., 534 F.2d 1273 (3rd Cir. 1978). See also note 37 supra.

[45]See S. Rep. No. 996, 94th Cong. 2d Sess. 3 (1976); Hearings supra note 3 at 8 (statement of Congressman Dennis E. Eckart).

sovereign immunity in recent environmental statutes.[46] An analysis of the cases reveals the lack of a principled framework for upholding sovereign immunity in the face of clear congressional animosity. The courts are attempting to uphold an important systemic federalism value in these cases, but the notion of sovereign immunity has clouded the true goals.[47]

Every important environmental statute includes a federal facility provision which compels compliance with "all federal, state, interstate, and local requirements."[48] This facially clear language has prompted a great deal of litigation concerning the meaning of "requirements." When the Supreme Court in Hancock and EPA v. California interpreted these words in the CAA and CWA to exclude procedural requirements, Congress acted very quickly to amend the statutes and tell the court that it had misunderstood congressional intent. The two cases were decided in June of 1976 and by October 1976 Congress had passed the RCRA and amended the federal facility provision of the CAA, CWA and SDWA. The amended language to the CAA now reads as follows:

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[46]E.g. Medical Waste Tracking Act, Pub. L. No. 100-582, 102 Stat. 2950 (1988); Clean Air Act, 42 U.S.C. § 7401 et. seq. (1983), as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977); Safe drinking Water Act, 42 U.S.C. § 300f et. seq., Pub. L. No. 99-339 (1986).

[47]S. Rep. No. 996, 94th Cong., 2d Sess. 3, 8 (1976), "Sovereign immunity beclouds the real issue of whether a particular government activity should be subject to judicial review, and if so, what form of relief is appropriate."

[48]See e.g. CAA, s 118; CWA § 313(a); RCRA § 6001, SDWA § 1449, TSCA § 22; CERCLA § 120.

> "[Federal Facilities] shall be subject to, and comply with, all federal, state, interstate and local requirements . . . respecting . . . air pollution in the same manner and to the same extent as any non-governmental entity."[49]

The "requirements" issue was not put to rest, however, as other courts offered their own narrow construction of its meaning.

Romero-Barcelo v. Brown[50] was a suit brought by Puerto Rico to stop the U.S. Navy's activities on an open ocean firing range. Ordinance was entering the ocean as a result of Navy firing on the range. Moreover, the Navy weapons made considerable noise during firing. Puerto Rico's action was based on both the CWA and the Noise Control Act. The court interpreted the word "requirements" to mean "relatively precise standards capable of uniform application." It went on to hold that the Noise Control Act's mandated consideration of the reasonableness of the defendant's activity did not qualify as such a relatively precise standard. Consequently, sovereign immunity precluded the state from applying those standards to the Navy.[51]

The requirement for precise standards in order for the court to find a waiver of sovereign immunity was also the undoing of Michigan statutes in Kelley v. United States.[52] The state laws

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[49]CAA 42 U.S.C. § 7418.

[50]478 F. Supp. 646 (D.P.R. 1979) rev. sub nom Weinberger v. Romero-Barcelo, 643 F.2d 835 (1st Cir. 1981) rev. 456 U.S. 305 (1982).

[51]Romero-Barcelo, 643 F.2d 835 at 856.

[52]618 F. Supp. 1103 (W.D. Mich. 1983).

were a hybrid of environmental statute and common law nuisance. Because the standard required a finding that the substances being discharged into waters of the state might be "injurious to the public health," the court found it lacked the "objective, quantifiable standards subject to uniform application"[53] that was necessary for a valid waiver of sovereign immunity. State of New York v. United States[54] saw a New York attempt to apply the CWA fall victim to the same requirement for precision. There were inadequate predetermined effluent standards, according to the court, hence it would not find a "requirement" sufficient to waive sovereign immunity.

Florida Department of Environmental Regulation v. Silvex Corp.[55] involved Florida waste disposal statutes, one of which imposed strict liability for damages resulting from a hazardous waste release. The issue, as posed by the District Court, was whether the Florida strict liability statute was a "requirement" so as to defeat a claim of sovereign immunity. The court concluded that it was "ambiguous at best"[56] whether the waiver of sovereign immunity under RCRA would apply to such a state statute. The court

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[53]Id. at 1108. See also Lotz, Federal Facility Provisions of Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties, 31 A.F. L. Rev. 7, 12 (1989).

[54]620 F.Supp. 374 (D.C. E.D. N.Y. 1988).

[55]606 F. Supp. 159 (M.D. Fla. 1985).

[56]Id. at 164. See Kongable, Civil Penalties Under the Resource Conservation and Recovery Act: Must Federal Facilities Pay? 30 A.F. L. Rev. 21 (1989); Breen supra note 6, at 10327-28.

found that an ambiguous waiver was not waiver at all and the statute could not be applied to the United States Navy.

The issue of whether state criminal sanctions could be "requirements" for the purposes of sovereign immunity waiver was before the court in California v. Walters.[57] California attempted to prosecute the Veteran's Administration for illegally dumping hazardous waste. California argued that criminal sanctions were substantive or procedural requirements for which § 6001 of RCRA had waived sovereign immunity. The court again narrowly construed the term "requirements", drawing a distinction between the means to enforce standards and the actual standards or requirements themselves. Finding no "clear and unambiguous" waiver of sovereign immunity with regard to criminal sanctions the court ruled that the state criminal statute did not apply to the Veteran's Administration.

One commentator wrote in 1986 that "not one state lawsuit against a federal agency has been successful."[58] While that is no longer true, such state victories remain the exception. One such case, again turning on the definition of "requirements," is Parola v. Weinberger.[59] Parola was an exclusive franchise under a municipal ordinance regarding the disposal of solid waste. Two

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[57]751 F.2d 977 (9th Cir. 1977).

[58]Milstein, How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government?, 18 Rut. L. J. 123 (1986).

[59]848 F.2d 956 (9th Cir. 1988).

federal facilities refused to award Parola the contract to remove waste from their sites, and instead achieved a cost savings through a competitive bidding process, awarding the disposal contract to the lowest bidder, not Parola. The Ninth Circuit decided that the city ordinance was a "requirement" that the Federal facilities must follow, the court reasoned that the state's unitary disposal plan as approved by EPA would be undercut by Federal facilities using a different contractor. The court found unpersuasive the argument that compelling a Federal agency to pay more than was necessary for services would burden the federal treasury. EPA oversight and approval of the state plan was an important factor for the Ninth Circuit and as a policy matter such EPA oversight is vital for any Federal facility enforcement plan. EPA control and involvement means that a Federal agency will serve as a check on any state effort to subvert national interests.

The most volatile issue currently being litigated is whether or not Federal facilities are subject to civil fines and penalties imposed by state agencies for environmental violations. Courts that have decided this issue are split, with decisions having been rendered on the CAA, CWA, and RCRA. The first case to consider this issue, Meyer v. Coast Guard,[60] involved a suit by North Carolina to impose modest civil penalties on the Coast Guard for

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[60]644 F. Supp. 221 (E.D. N.C. 1986). The fine in this case was a small one, $10,000, and the assertion of sovereign immunity so offensive to the state that North Carolina used this case as its reason for supporting H.R. 1056. See H.R. Report supra note 7 at 26.

RCRA violations. The Coast Guard put up the shield of sovereign immunity and the court held that section 6001 must be read narrowly to exclude the imposition of penalties by state agencies. McClellan Ecological Seepage Situation (MESS) v. Weinberger[61] reached the same result. The court looked to the statutory language and finding no clear waiver of sovereign immunity for civil fines and penalties awarded summary judgement to the defendant.

The Federal District Court for the Southern District of Ohio has put itself in the interesting position of reaching opposite results in cases arising under the CAA and CWA. In State of Ohio ex. rel. Calaboose v. Department of the Air Force[62] Ohio sought civil penalties for violation of emission standards and failure to obtain the necessary permits under the CAA. The Air Force's position was, in part, that the CAA does not allow civil penalties except as necessary to enforce existing injunctive relief. The court found that Congress did not clearly waive sovereign immunity for civil penalties under the CAA and ruled in favor of the Air Force. The same court reached the opposite result one year later in Ohio v. Dep't of Energy.[63] Looking to the language of Section 313 of the CWA, the court noted that Congress, in response to Hancock, had required federal agencies to comply with "all" state

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[61]655 F. Supp. 601 (E.D. Cal. 1986).

[62]No. C-2-86-0175 (S.D. Ohio Mar. 31, 1987) (unpublished opinion).

[63]689 F. Supp. 760 (S.D. Ohio 1988).

and local requirements. This wording was significant to the court because it revealed Congressional intent to do more than simply overrule Hancock, which could have been accomplished by simply requiring federal agencies to obtain state permits.[64] While this linguistical parsing was obviously important to the court, there was a more important policy consideration undertaken almost below the surface of the opinion. The penalties at issue were imposed for violation of the state administered National Pollutant Discharge Elimination System (NPDES). In ruling that the NPDES arose under Federal law the court looked to the fact that EPA had approved the state program and that the program was to be administered according to federal guidelines.[65] Although never mentioned in the opinion, the policy goal of protecting an appropriate federal-state relationship was taken into account by looking to EPA oversight of the state program.

California raised the same question as Ohio regarding penalties for violation of state issued NPDES permits and received the opposite answer from the Ninth Circuit Court of Appeals. In reaching this result the court determined that state programs under the CWA were "not a delegation of federal authority."[66] The court rejected California's argument that in order to gain EPA approval of its NPDES system, Section 802(b)(7) of the CWA require a state

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[64] Id. at 765.

[65] Id. at 766.

[66] State of California v. Dep't of the Navy, 845 F.2d 222 (9th Cir. 1988).

to possess the power to impose penalties as a means of enforcement, consequently such penalty provisions must "arise under federal law."[67] The Ninth Circuit's analysis was primarily a textual one, focusing on the meaning of the section 313(a)'s requirement that penalties imposed on Federal facilities must arise under federal law. The policy basis for this opinion is apparent. Fines and penalties imposed by state agencies on Federal facilities are so potentially disruptive of appropriate federal-state relationships that they are to be avoided even by engaging in a strained interpretation of statutory language and history. Even the presence of EPA approval and oversight was not sufficient protection in this court's view of correct federalism.

Washington met the same fate as California when the District Court for the Eastern District of Washington granted the motion for summary judgement filed by the United States on the issue of state imposed fines and penalties under RCRA. The court noted that Congress had expressly provided for fines and penalties under section 6001 only as court imposed sanctions to enforce injunctive relief.[68] The state approached the issue on policy grounds but was met with a formalistic answer that such policy determination should

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[67] Id. at 225.

[68] United States v. State of Washington, No. C-87-291-AAM (E.D. Wash. Jan 22, 1988) (memorandum opinion), aff'd CIV. 87-4371 (9th Cir. Apr. 12, 1989). The Washington state Attorney General argued that the court's decision was wrong and ought to be legislatively overturned. He asserted that the penalty is "an effective deterrent to environmental noncompliance." H.R. Report supra note 7, at 36.

be made by Congress rather than the courts. In granting summary judgement, however, the court was, of course, advancing its own policy of ordered federalism.

In Maine v. Navy[69] the court reached the opposite conclusion based upon the same statutory language of RCRA. Here the court attacked the problem semantically by looking to the dictionary definition of the word "requirements." The court decided that civil penalties were "a form of enforcement requirement." Once safe in this definitional haven, the court was free to find the "obvious" Congressional intent to allow the imposition of fines and penalties under section 6001 of RCRA.[70] The court found this intent even though the Magistrate assigned to make recommendations to the court in response to a motion for summary judgement had concluded that Congress had engaged in no serious consideration of civil penalties whatsoever. The Magistrate saw the issue as one of "wholesale confusion" yet recommended finding a waiver of sovereign immunity.[71] While not clearly expressing his policy choice, the Magistrate was obviously making a personal choice, finding as he did only confusion as guidance from the statute and prior case law.

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[69]Maine v. Navy, CIV. 86-0211 P (D. Me. Nov. 23, 1988).

[70]Id. at 11-15. See also Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20 (1988).

[71]Civil No. 86-021 P (D.C. Me. Nov. 16, 1987) (Recommended Decision on Defendant's Motion for partial Summary Judgement) at 11.

The most recent case involving Federal agency liability under RCRA is also one of the most perplexing. As noted previously, Colorado v. Department of the Army[72] involved Basin F within the confines of the Rocky Mountain Arsenal. Since 1942 the Army has been disposing of the toxic ingredients used to manufacture and assembe chemical weapons in dump sites on the arsenal.[73] Basin F is the worst of those disposal areas having been contaminated not only by the Army, but also by Shell Oil Company which had leased a portion of the Rocky Mountain Arsenal for many years to engage in the production of pesticides and herbicides. Shell's poisonous waste was also dumped into Basin F.[74] Colorado brought suit under the Colorado Hazardous Waste Management Act attempting to stop ongoing violations by the Army. One of the major allegations was that the Army was endangering the groundwater of the area by not adequately monitoring and testing the groundwater. Moreover, the Army had not closed a waste pond ordered closed by the Colorado Department of Health.[75]

Army's sovereign immunity claim is what makes this case perplexing. The Army, in an unprecedented move conceded that RCRA waived this defense in most cases, but argued that the Comprehensive Environmental Response, Compensation, and Liability

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[72]707 F. Supp. 1562 (D. Colo. 1989).

[73]See Hearings, supra note 3, at 123.

[74]See United States v. Shell Oil Company, 605 F. Supp. 1064 (D. Colo. 1985).

[75]Colorado supra note 72, at 1564-67.

Act (CERCLA) overrode this waiver.[76] CERCLA section 6961 states that sovereign immunity is not waived where there is an ongoing CERCLA cleanup action at the site that has the same hazardous waste requirements as those sought to be enforced by the state under RCRA.[77] The Rocky Mountain Arsenal is listed on the National Priority List (NPL) and the CERCLA process is underway, but cleanup had not yet started at the time of the suit. The Army argued that enforcement of the state RCRA claims would interfere with the CERCLA cleanup effort.[78] Colorado argued first that no cleanup action under CERCLA had yet begun and immediate steps were necessary to prevent further contamination. It also argued that Basin F was not on the NPL although the Army had assured the court that it would be placed on the list soon. The court ruled that CERCLA should not take precedence over a RCRA enforcement action. CERCLA was intended to operate separate of, and in addition to, RCRA. The two statutes were not mutually exclusive according to the court and consequently there was no reason to grant the Army's motion to dismiss on grounds of sovereign immunity.[79]

The court in Colorado v. Army was exceptionally clear in its employment of policy considerations in rendering a decision. Cleanup of present contamination and prevention of future pollution

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[76] Id. at 1567.

[77] 42 U.S.C. § 6961 (1987).

[78] Colorado supra note 72, at 1567.

[79] Id. at 1566-67.

was thought to be primarily an interest of the people in Colorado.[80] The spectre of the most dangerous toxic waste site in the country lying only ten miles North of its largest city and overlying the groundwater supplying the city, gave Colorado a real stake in the litigation. Victims, present and future, would go unrepresented if the state were dismissed from this case.[81] In so stating, the court rendered a blistering indictment of the EPA and the Justice Department. Repeated suggestions by the trial judge that representing both the EPA and the Army was a conflict of interest were ignored by DOJ attorneys. The court found the necessity of not dismissing the only party whose interest was "in a real sense adverse to the Army's"[82] adequate policy grounds for disposing of the Army's claim to sovereign immunity. Yet this assertion of sovereign immunity was, on the merits of the language of RCRA and CERCLA, far stronger than other claims of immunity that have been upheld in the cases discussed above.

b. EPA's Impotency.

How could it come to be that this Nation's primary environmental regulator was viewed by a federal district court as a wholly inadequate protection for the people of Denver, Colorado against contamination by the United States Army? This court was by no means the only source of criticism for EPA's performance as

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[80] Id. at 1569-70.

[81] Id. at 1570.

[82] Id. at 1570.

a regulator over other Federal agencies. Critics has said that EPA enforcement was "gravely deficient";[83] that the agency was a "toothless dragon"[84] and accused EPA of becoming the most serious obstacle to environmental preservation."[85] While some have blamed EPA, Congress places the majority of the fault on other Federal agencies. In hearings before the House Committee on Energy and Commerce, Representative Thomas Luken urged the passage of House Bill 1056 by asserting the following:

> These Federal polluters, aided and abetted by the Department of Justice, have managed to tie the hands of the EPA and the states, to hinder, and in many cases prevent, enforcement of the Reserve Conservation and Recovery Act, known as RCRA.[86]

Much of the criticism of EPA's enforcement record against federal facilities has been justified. Yet EPA's ability to act as a tough and wise regulator for the federal regulated community is a crucial ingredient to a system of environmental compliance and enforcement that is consistent with sound principles of federalism.[87]

EPA's impotency is the product of a conscious policy decision made by the executive branch of the Federal government. That

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[83]J. Sax, Defending the Environment (1971) at 62; Washington Post, October 4, 1989 at 22 col. 1.

[84]Id. at 83.

[85]Id. at xi. See also Mugdon and Adles, The 1984 RCRA Amendments: Congress as a Regulatory Agency, 10 Colum. J. of Env. L. 215 (1985).

[86]Hearings, supra note 3, at 1.

[87]Cl. Russell, W. Harrington, W. Vaughan, Enforcing Pollution Control Laws (1986); Stewart, Economics, Environment and the Limits of Legal Control, 9 Harv. Env. L. Rev. 1 (1985).

decision was, and is, flawed and should be changed. At least since the Nixon administration there has been a firm policy of non-litigation "against members of the federal family."[88] This policy rests primarily on two grounds of purportedly constitutional stature. The first is the notion of the "unitary executive"[89] which means that the Executive power is vested in a single person, the President. The idea goes back to the framers of the constitution who were concerned that the executive power not be watered down by distribution to various persons. The position has been that when there are disputes within the Executive branch, the President must resolve those disputes so that the Executive speaks with one voice. A lawsuit by one federal agency against another is forbidden because it would be an enforcement tool that interferes with the President's operation of the Executive arm of the government.

The second reason given for the policy of denying EPA the use of litigation as an enforcement tool against Federal agencies is that such suits would have only one "real party in interest" and lack the "concrete adverseness" necessary to meet the controversy requirement under Article III.[90] The court in Colorado v. Army accepted a version of this idea when it stated that EPA and the

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[88]R. Durant, When Government Regulates Itself (1985) at 72.

[89]See Hearings supra note 3, at 117-20. See also Myers v. United States, 272 U.S. 52, 161-62 (1926).

[90]See Letter From Robert A. McConnell to Congressman John. D. Dingell (October 11, 1983) reprinted in Federal Facilities Compliance Strategy, supra note 4, at 101-07.

Army lacked real adverse interests.[91]

Except for a short and uncertain hiatus during the Carter Administration, the EPA has been shackled by this Executive policy in its efforts to enforce compliance at federal facilities. EPA has also been accused of being "captured" or "coopted" by the Federal agencies it is attempting to regulate.[92] One such charge form the National Resources Defense Council (NRDC) came shortly after EPA was created. NRDC accused EPA of dragging its feet in enforcing sulfur dioxide emission standards against the Tennessee Valley Authority.[93] This criticism was misplaced because EPA was doing all it could do within the constraints of the restriction against inter-agency litigation. EPA was caught in the middle between environmentalists and the TVA.[94] As will be discussed more fully in another portion of this paper, it was the initiation of a citizen suit, with strong encouragement from EPA, that finally allowed EPA to perform its proper regulatory function. EPA was able to finance, guide and support a citizen suit against another federal agency. With the pending lawsuit as leverage EPA was able to negotiate one of the most important pollution control agreements in history. This positive result was obtained by circumventing the enforcement plan which EPA is required to use against Federal

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[91]Colorado supra note 72, at 1570.

[92]Sax supra note 83, at 107.

[93]Durant, supra note 88, at 34-35.

[94]Id. at 71.

agencies.

EPA has adopted a Federal Facilities Compliance Strategy which details the processes and means it may employ in seeking Federal agency compliance.[95] The compliance strategy is inadequate because it does not fully clarify the relative positions of EPA as a regulator with enforcement power and the other Federal agencies as regulated bodies subject to that power. Since Congress has "deliberately divided the executive branch against itself,"[96] by creating EPA and mandating Federal compliance with environmental laws, implementing Congressional intent requires giving EPA the power necessary to perform its mission.

The current compliance strategy bravely and correctly takes the position that Federal facilities must comply with all environmental laws and regulations as required by federal environmental statutes and by Executive Order (E.O.) 12088.[97] The strategy almost immediately reveals its flaws when it states that EPA will "utilize its available enforcement mechanisms;"[98] and further that "there are certain limitations and differences in the types of enforcement actions which EPA will take at federal

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[95]Federal Facilities Compliance Strategy, note 4.

[96]Durant, supra note 88, at 4. "EPA and TVA pursued goals that were at once consistent with individual agency charters and mutually inconsistent in their ends." Id. at 5.

[97]Federal Facility Compliance Strategy, supra note 4, at a.

[98]Id. at a.

facilities."[99] EPA is limited to taking purely administrative measures against Federal agencies and can not seek either civil judicial action nor the assessment of civil penalties.[100] The one minor exception to this rule is that penalties for violations of Interagency Agreements under Section 290 of the 1986 Superfund Amendments and Reauthorization Act (SARA) may be assessed.[101] However, the enforcement measures which are the primary tools used against environmental violators which are not Federal agencies are not available.

EPA's enforcement plan suffers from this lack of enforcement power in two major respects. First, enforcement actions against federal agencies take an inordinate amount of time to accomplish, if they can succeed at all. Second, EPA lacks sufficient power to successfully negotiate with other Federal agencies. Negotiating theory makes it clear that differences in power between negotiating partners can have a large impact on the resolution of disputes. Each negotiation exhibits an "inherent and initially-fixed balance of power."[102] Between EPA and Federal agencies the balance of power has been in favor of the Federal agency because of EPA's lack of enforcement power. The power imbalance also leads to a competitive, rather than cooperative approach to negotiation.

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[99] Id. at a.

[100] Id. at q.

[101] Id. at q, FN. 1.

[102] See J. Galbraith, The Anatomy of Power, 4-5 (1983).

Competitive theory views each negotiation as an opportunity to promote self-interest. This approach often neglects the possibility to reach a cooperative solution which could maximize the outcome for both parties. Where the parties to a negotiation are both federal agencies, the national interest will always be advanced by finding the solution that maximizes joint gains.[103]

The Administrative enforcement procedures employed by EPA require a step by step enforcement process which can take a very long time to complete. First, EPA must determine that a federal facility is not in compliance with an environmental statute or statutes. EPA monitoring mechanisms and procedures, as distinguished from enforcement procedures, are extremely efficient. It is these monitoring mechanisms that are likely to detect a violation.[104] Generally, EPA then issues a notice of violation (NOV) although this step varies somewhat from statute to statute. Once a Federal facility has received a notice of violation, the facility can either dispute the violation through a formal dispute resolute process or submit a remedial action plan or if the violation has already been corrected, a certification of violation correction.[105] There is no mandatory time period in which the

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[103]See, e.g., R. Fisher and W. Ury, Getting to Yes: Negotiating Agreement Without giving In (1981); Meukel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 U.C.L.A. L. Rev. 754, 798-801 (1984).

[104]Federal Facility Compliance Strategy, supra note 4 at VI-8-6.

[105]Id. at VI-5-6.

agency must comply, although the NOV usually gives a date after which EPA will escalate to the next step in its enforcement action plan. Once the facility responds, EPA must evaluate the response and has thirty days to determine if the response is adequate.[106]

If EPA decides that formal enforcement response is necessary because the Federal facilities' response has been inadequate, the next step is to attempt to use Compliance Agreements or Consent Orders to formalize bilateral agreements between EPA and the Federal agency.[107] Notice that EPA can not unilaterally issue an order, it must negotiate with the polluter it is supposed to regulate, but has no power to control. The Compliance Agreements ordinarily include a specific plan to return the facility to compliance with the statue. These compliance agreements or consent orders can take an extremely long time to negotiate because EPA has very little negotiating leverage.[108] It is important to remember that these Federal agencies found to be in violation are themselves engaged in a mission of National importance. The goals that these agencies are pursuing are absolutely consistent with their charter, but the means used are often totally inconsistent with EPA's

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[106] id. at VI-8.

[107] Id. at VI-8. See also Edwards, Implementing New EPA Federal Facilities Compliance Strategy: An EPA View of the Legal and Policy Issues, 31 F. F. L. Rev. 237 (1989); But see generally Mugden and Adles, The 1988 RCRA Amendments: Congress as a Regulatory Agency, 10 Colum. J. of Env. L. 215 (1985).

[108] Federal Facility Compliance Strategy, supra note 4, at VI-10-12; Hoard, Enforcement Tools Against Federal Facilities Violating RCRA: Is a Bigger Hammer Needed?, Vol. 3 No. 11 NAT'L ENVTL. ENFORCEMENT J. Dec. 1988-Jan. 1989.

mission and charter. It is natural that both agencies will be "reluctant to modify their behavior and goals and these federal targets are uniquely possessed of the political wherewithal to resist."[109] If the Federal agency believes it is right or that it can obtain an important National goal by not complying with environmental standards, it may resist EPA's strongest efforts to obtain a voluntary agreement. The next steps in EPA's enforcement scheme is hardly something to strike fear into the heart of federal agency heads such as DOE's Admiral James D. Watkins.[110] An unresolved issue is simply elevated up to the Deputy Regional Administrator who will then contact an equivalent level officer in the offending agency. Such bureaucratic maneuvering takes time and prompts criticism from those interested in prompt compliance.[111]

If negotiation with the federal agency is not successful, EPA may then issue a proposed administrative order or proposed Compliance Agreement. This step has some teeth because the agency involved must either accept the proposed order or agreement or trigger the formal dispute resolution process.[112] This stage has a thirty day time limit. The formal dispute resolution process is another stepped process seeking to produce a voluntary agreement.

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[109]Durant supra note 88, at 12.

[110]Hearings, supra note 3, at 110. " . . . Admiral Watkins, who is a man of obvious steely resolve and competence."

[111]Federal Facilities Compliance Strategy, supra note 4, at III-10; Hearings, supra note 3, at 63. "Frankly the order was issued after two years of promises by the Army. . . ."

[112]Id. at VI-8.

To initiate the process the EPA Regard Administrator formally refers the dispute to three Assistant EPA administers. This process is allotted sixty days. EPA views this step as the equivalent of referral of a civil enforcement action for prosecution. It is unlikely that the affected agency sees this action in a similar light. The agency does not face the same risk as it would if it were faced with the prospect of judicial enforcement. The EPA Headquarters then attempts to negotiate directly with the Federal Agency's Headquarter office and has ninety more days to reach agreement.[113] If there is no agreement, the EPA administrator consults directly with the head of the parent Federal agency in an effort to come to an agreement. If this step, which has no time limit, is unsuccessful the EPA Administrator may invoke Executive Order 12099 or Executive Order 12146 to involve the Office of Management and Budget or the Department of Justice to resolve the dispute.[114] E.O. 12146 allows the EPA Administrator to invoke E.O. 12088 for disputes related primarily to funding or scheduling issues, while E.O. 12146 itself should be used for resolving legal disputes. Consequently, legal disputes between EPA and any Federal agency are to be resolved by the Attorney General. While this process appears workable, surprisingly it has never been invoked.[115] This lack of use reflects the political muscle wielded

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[113] Id. at VI-10-11.

[114] Id. at VI-11-12.

[115] Hearings, supra note 3, at 76-80.

by Federal agencies accused of environmental violations. DOJ has consistently been allied with federal polluters and against EPA, making it unlikely that EPA would seek a resolution in that forum.[116] This alliance is almost unavoidable because of the DOJ obligation to defend federal agencies in civil litigation.

The lack of an efficient enforcement mechanism for use by EPA against Federal facilities has prompted strategies to circumvent the non-litigation rule which flows from the "unitary executive" theory. One method of getting around the rule is to have someone other than EPA initiate the litigation. EPA actively fosters this method by encouraging states to pursue enforcement actions against Federal facilities. The EPA Federal Facilities Compliance Strategy provides:

> States are not subject to the same constraints as EPA regarding enforcement actions against federal facilities. As a result, states generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at federal facilities. States should use the full range of their enforcement authorities. . .[117]

There are, however, certain limitations placed on the states by Congress. Only states with delegated or authorized federal environmental programs have the required authority for responding to violations at Federal facilities. Several statutes such as the

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[116] Id. at 1.

[117] Federal Facilities Compliance Strategy, supra note 4, at VII-1.

Toxic Substances Control Act (TSCA)[118] withhold this authority from the states. There has been little thought given to the broad policy implications of this strategy which uses the states as a trained falcon to hunt federal prey. In particular, there has been no consideration given to the wisdom of encouraging states to take control of enforcement actions against Federal agencies and thereby imposing state and local policy decisions on Federal agencies performing national missions.

There is also something disingenuous about using the states in this manner when EPA is statutorily mandated to retain parallel legal authority and responsibility to enforce environmental laws even where the states' programs have gained necessary approval or delegation.[119] Since this strategy only works in states which have approved programs there will not be uniform application across the nation. Federal facilities will be subject to these state enforcement actions based on the fortuity of geographical location and not on the nature of their environmental compliance record. EPA is also often deeply involved in these state enforcement actions yet abdicates its decision making role to the states. When EPA inspects a Federal facility and identifies violations, it "will immediately contact the state and offer them first opportunity to

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[118]Pub. L. No. 94-469, 90 Stat. 2003 (1976) (Current version codified at 15 U.S.C. §§ 2601-54) (1986). § 2617 of TSCA provides for EPA to promulgate requirements which preempt state law. See also Rollins Environmental v. Parish of St. James, 755 F.2d 627 (5th Cir. 1985).

[119]See supra note 1, CAA, CWWA, RCRA.

pursue timely and appropriate response."[120] This means that EPA will gather the information needed by the states to pursue the Federal agency and offer them the first shot, even before the Federal facility is given an opportunity to correct the problem. It is only if a state is unwilling or unable to take an enforcement action that EPA will attempt to work with the Federal facility to gain compliance.[121] By placing enforcement authority in the states the process of voluntary compliance may be short circuited in favor of a litigation process that has too often in the past been dominated by collateral issues such as sovereign immunity.

EPA's tacit encouragement of state litigation against federal agencies is not only a back door attempt to do what it can not do openly, it is a direct violation of its duty under E.O. 12099 to "make every effort to resolve . . . such conflicts between an Executive agency and a state . . ."[122] EPA also has a duty under the same Executive Order to provide technical assistance and advice to Federal agencies to ensure their compliance.[123] Abandoning its proper role in favor of state action is not the appropriate response to the problem created by the denial of enforcement power over Federal facilities. This criticism of EPA should be tempered, however, because EPA is reacting rationally to a problem it did not

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[120]Federal Facility Compliance Strategy, supra note 4, at VII-2.

[121]Id. at VII-2-3.

[122]Exec. Order No. 12088, 43 Fed. Reg. 44707-08 (1978).

[123]Id. at 47708.

create. The executive policy that deprives EPA of the full range of enforcement authority over federal agencies is the root of the problem.[124]

Another strategy employed by EPA to circumvent the unitary executive theory is to pursue non-federal parties who act on behalf of Federal agencies. The most common examples are government-owned, contractor-operated federal facilities, known as GOCO facilities. EPA makes its strategy regarding these facilities crystal clear:

> Although EPA will not bring civil judicial enforcement action or assess civil penalties under most statutes against other Executive Branch Departments and Agencies, EPA intends to exercise its full authority to bring civil suits and assess civil penalties, as appropriate against parties that are not subject to this constraint.[125]

DOJ supports this strategy and will take vigorous action against government contractors.[126] The federalism concerns that form the thesis for this paper are attenuated with regard to suits against government contractors, yet a close analysis of such suits will reveal them to be a clever means for EPA to employ certain enforcement mechanisms against federal agencies that it is forbidden to pursue openly.

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[124]See, H.R. Report supra note 7 at 43. ". . . the only tool I've got right now . . . is jawboning on most of these" (Statement of J. Winston Porter, EPA Assistant Administrator for Solid Waste Response).

[125]Federal Facility Compliance Strategy, supra note 4, at VI-14.

[126]See Hearings, supra note 3, at 90, 111-20.

Enforcement actions against government contractors for environmental violations often result in the federal agency being the real party in interest. The Federal Acquisition Regulation (FAR)[127] governs the relationship between the contractor and the Federal agency. The FAR directs the types of contracts that may be used for GOCO arrangements. One commonly used is a facilities' contract which resembles a lease under the FAR, part 85. Environmental compliance is not directly addressed in the standard facilities contract and most such contracts do not include special language covering these issues.[128]

There are general terms in the facilities' contract that allow the contractor to shift liability to the Government for environmental noncompliance in certain situations. If the facility is no longer "usable for performing existing related contracts . . ."[129] the contractor must notify the Government. This can be inferred to create a duty to notify the Government if the facility is not capable of meeting environmental compliance standards. Once notified, the Government is liable for any damages resulting from the continued operation of the non-complying facility. The contractor is often prevented from installing state of the art

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[127]Federal Acquisition Regulations (FAR), 48 C.F.R., ch. 1.

[128]FAR 52.245-7, 10 and 11. See Hourcle, Lingo and Esposito, Environmental Law in the Fourth Dimension: Issues of Responsibility and Indemnification With Government Owned - Contractor Facilities, 31 A.F. L. Rev. 285, 246 (1989).

[129]FAR 52.245-7(f)(2) and 52.245-11(e)(2); Hourcle, supra note 126, at 287.

pollution control technology by the terms of the contract. Any modification of the facility requires written approval from the contracting officer.[130] The contracting officer will be reluctant to approve a modification that will result in increased costs. Contracting officers are more attuned to preventing cost overruns than ensuring environmental compliance in this era of shrinking Federal funds. If the needed pollution abatement equipment is not installed and costs are incurred by the contractor as a result, the Government must indemnify the contractor.

A general indemnification provision is included in the facilities contract which operates in the practice to require the contractor to obtain a base level of insurance for damages and the Government assumes liability for any damages above the insurance limit set out in the contract.[131] The issue of liability for fines and penalties under environmental statutes, or even who bears the cost of environmental cleanup, are not specifically covered in these general facilities contract provisions. This problem was debated, but not resolved in United States v. Shell Oil Company.[132] Shell was sued in a CERCLA cleanup action by the United States for costs of cleanup and damage to natural resources at the Rocky Mountain Arsenal. This suit presages the litigation between Colorado and the United States Army discussed earlier. Shell

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[130]FAR 52.245-7(a)(6) and 52.245-11(c)(3); id. at 247.

[131]Id. at 287.

[132]605 F. Supp. 1064 (D. Colo. 1985).

attempted to join the Army as a defendant under Rule 19(a) of the Federal Rules of Civil Procedure.[133] The Army had already admitted liability under CERCLA Section 107(a). The United States argued that it would be improper to join the Army as a defendant because the United States was also the plaintiff and could not properly be on both sides of the issue. While denying Shell's motion to join the Army at that stage of the litigation, this court felt that interagency disputes may present a justiciable case or controversy, and if so, such disputes are properly decided by the courts.[134] Had the Army not admitted liability, the court made it clear that it would have been joined with Shell as a party defendant. That would have presented the DOJ with an even clearer case of conflict of interest than that complained of by Judge Carrigan in Colorado v. Army.

Because the Department of Defense is always searching for new technology to maintain a high level of defense readiness in an ever more sophisticated weapons environment it frequently enters into production contracts with advanced technology corporations. Such contacts are also governed by the FAR. Most of those contracts are "cost reimbursable" contracts in which the government pays all the costs associated with production of the product.[135] As a

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[133]Id. at 1079.

[134]Id. at 1082; see also U.S. v. Nixon, 418 683 (1974); U.S. v. Interstate Commerce Commission, 337 U.S. 426 (1989); U.S. v. Federal Maritime Commission, 694 F.2d 793 (D.C. Cir. 1982).

[135]FAR 31.201-3; Hourcle supra note 126, at 249.

result, environmental compliance costs that are not covered under general facilities' provisions may be accounted for under the production contract. Fines and penalties such as those imposable for violation of environmental statutes are covered generally in this portion of the FAR. Such penalties may be paid by the government if they result from "compliance with specific terms and conditions of the contract or written instructions from the contracting officer."[136] In most circumstances the government will have specified the terms and conditions of the contract in sufficient detail to make it likely that the Federal agency will be paying any fines and penalties imposed.

EPA has significant leverage in situations where government contractors have been guilty of past environmental violations. Contractors found in violation of the CAA or the CWA may be placed on a lists of contractors ineligible to be awarded government contracts. This listing is discretionary and EPA may use that discretion to obtain concessions from Federal agencies that rely on particular contractors.[137] Where the contractor is the sole producer of a product or component relied upon by a federal agency, EPA's leverage may be quite powerful.

The Supreme Court has recently made clear the parameters of the government contractors defense which is a shield to contractors from liability based on manufacturing products under a government

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[136]FAR 31.205-15; Hourcle, supra note 126, at 250.

[137]Federal Facilities Compliance Strategy, supra note 4, at VI-16.

contract. In Boyle v. United Technologies Corp.[138] the court established a three part defense that will be easily met in most contracts. This places the liability back on the federal agency rather than the contractor. Perhaps even more importantly the court upheld an important aspect of federalism in this case. It held that the procurement of equipment by the United States is an area of "uniquely federal interests"[139] and state laws that conflict are preempted. While Boyle was a case involving the manufacture of a helicopter and did not directly involve state environmental laws, the principle of preemption would be raised if state enforcement of environmental statutes threatened to disrupt the procurement of equipment by the United States.[140]

The preceding discussion was intended to demonstrate that EPA's policy of pursuing government contractors in situations where the federal agency is the true party in interest subverts the Executive policy against interagency litigation. The answer, it will be seen, lies not in subverting this policy, but in doing away with it entirely. EPA should not be forced to seek the power necessary for fruitful negotiation with federal agencies through the back door or subterfuge.

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[138]108 S. Ct. 2510 (1988).

[139]Id. at 2518.

[140]Id. at 2518.

c. Inverted Federalism.

State regulation and control of Federal agencies performing essential national duties turns federalism on its head. Yet, the denial of full enforcement authority to EPA over Federal agencies has created a regulatory power vacuum into which the states have leaped or been pushed by Congress and the EPA. What has resulted is a "crazy quilt"[141] of regulatory authority and control. No less than fifty four federal statutes with environmental requirements apply to Federal facilities. Only two, The National Environmental Policy Act (NEPA) and The Toxic Substances Control Act (TSCA) do not allow state counterparts.[142] Fifty states passing variations on fifty-two federal statutes along with statutes that have no federal counterpart inevitably must create a regulatory wonderland.

As an example of the extent of environmental regulation that limit federal agency action, consider the impact of one statute, The Endangered Species Act (ESA), on one agency, The United States Air Force. Section 7(a) of the ESA requires all federal facilities to ensure that its activities are "not likely to effect the continued existence of any listed species or modify or destroy critical habitat."[143] This seems a relatively small requirement in view of the worthwhile goal of protecting endangered wildlife.

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[141]Donnelly and Van Ness, The Warrior and the Druid, 33 Fed. Bar News and J. 4 No. 1, 1,2 (1986).

[142]L. Hourcle, Environmental Law for the Air Force, (1987) at 299-301.

[143]Id. at 361.

Yet when the Air Force commissioned a study by the National Coastal Ecosystem Team to learn more about the presence of endangered species on Air Force facilities, the results were astounding. One hundred and fourteen different Air Force facilities list at least one endangered, threatened, protected, or rare species.[144] Some are rather exotic creatures such a Chihuahua shiner and the conchos pupfish which are found on Lauglin Air Force Base, Texas. Compliance with the ESA is sometimes a difficult problem. Andersen Air Base, Guam is surrounded by dense jungle vegetation which presented a danger to aircraft operations by providing cover which could allow terrorists to gain access to the runway. This runway is routinely used by aircraft, some of which may carry nuclear weapons. The Air Force decided to clear some of the jungle, but was blocked because the Guam Rail, a small bird, resided in that jungle and is on the Endangered Species list of Guam, although it was not listed on the federal endangered species list.[145] After much turmoil and expense, the Guam Rail is being protected, but the Andersen runway is also safer.

Most environmental statutes have a more obvious and often farther reaching effect on Federal agency missions. Some statutes, if applied restrictively by the states, could effectively shut down important Federal facilities. The city of Oakland, California has recently passed a municipal ordinance declaring the city a "nuclear

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[144] Id. at 368-405.

[145] Id. at 367.

free zone."[146] The ordinance which was adopted in a voter referendum in 1988 prohibits the production and storage of nuclear weapons, weapons components and radioactive materials in Oakland. It also restricts the transportation of such materials passing through the city. The ordinance also prohibits "any person" which includes the federal government, from engaging in "nuclear weapons work"[147] in Oakland. There are over one hundred such local nuclear free zones in the United States.[148] Most are of a symbolic rather than practical nature. The Oakland ordinance, however, if enforced could seriously interfere with the national security missions of several Federal agencies.

DOE maintains an Oakland office that supervises much of the nation's nuclear weapons research, including some extremely sensitive work done at the Lawrence Livermore National Laboratory. The United States Navy also maintains the Naval Supply Center (NSC) in Oakland. The NSC was established in the World War II era to provide supply and repair facilities to Navy ships operating throughout the Pacific Ocean as well as other Naval shore bases in California, Hawaii, the Philippines and Japan. NSC berths supply ships which may carry radioactive materials; DOD policy is not to confirm or deny the presence of nuclear weapons on board ships. NSC also supplies spare parts for the nuclear weapons systems for

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[146]Washington Post, September 6, 1989 at 2 col. 4.

[147]Id. at col. 4.

[148]Id.

the entire Pacific Fleet. Many of the materials used by the NSC are carried by motor carriers through the City of Oakland in accordance with federal transportation regulations.[149]

There are four other Naval installations located in or adjacent to Oakland whose missions require them to engage in "nuclear weapons work." The Alameda Naval Air Station is adjacent to Oakland and serves as homeport to five nuclear powered ships, including two nuclear-powered aircraft carriers.[150] Maintenance and repair activities frequently call for shipment of radioactive materials to and from Alameda Air Station. All of the possible means of land based transportation pass through Oakland.[151] The Oakland ordinance could restrict and regulate such shipments even though federal transportation regulations already cover such transport. Naval Station Treasure Island, Mare Island Naval Shipyard and the Concord Naval Weapons Station all perform nuclear related work that would be subverted by the Oakland municipal ordinance.[152]

Section 4 of the Ordinance prohibits "knowingly engaging in nuclear weapons work" in the City of Oakland. It further requires in Section 10(b) an annual report from any nuclear weapons worker

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[149]United States v. City of Oakland, California, Plaintiff's Motion for Declaratory and Injunctive Relief, September 6, 1989, at 3-4.

[150]Id. at 5.

[151]Id. at 5.

[152]Id. at 5-6.

which contains the following:

> i. A description of the extent and nature of such activities and the hazardous radioactive materials or nuclear weapons involved; and
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> ii. A description of the steps being taken to cease such activities within two years of the date of passage of this Act . . .[153]

Section 10(f) provides that a violation of the statute is a criminal offense, 10(g) gives Oakland the power to issue a formal cease and desist order to any facility engaged in nuclear weapons work. If the facility does not comply the city may, in addition to pursuing criminal prosecution, impose the following sanctions.

> i. Cut-off any or all city services to the person concerned,
>
> ii. Levying of fines, and
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> iii. Advising citizens to avoid cooperation with the activities of the person concerned.[154]

DOJ has filed suit challenging the Oakland ordinance as being a violation of the War Powers Clause of the United States Constitution, Article I, Section 8, Subdivision 11-18.[155] The federal government has the exclusive authority to provide for the national defense. A state or any lower political subdivision has no authority to interfere with that national defense function.

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[153] Id. at 12.

[154] Id. at 14-15. This is the only modern statutory version of the ancient practice of shunning of which the author is aware. Even in Jewish Rabbinical Courts or "Din Torah" the threat of shunning or "sirov" is a very rare sanction in modern times. See In Re Mikel v. Sharf, 432 N.Y.S.2d 602 (1980> How Oakland would accomplish the obvious intention of making the federal agency a pariah is unclear.

[155] Id. at 16.

DOJ argue that the ordinance "directly effects the ability of the Navy and Energy Department to carry out their vital national defense missions."[156] DOJ also raised the issue of preemption because of the ordinance's requirement of reporting classified and sensitive unclassified information. The Atomic Energy Act prohibits the disclosure of the type of information required to be disclosed by the ordinance. Moreover, Executive Order 12356 and numerous DOD regulations prevent the disclosure of classified and other information that is required to be disclosed by the ordinance. The obvious conflict between the municipal ordinance and the security requirements of federal law can only be resolved by preemption under the Supremacy Clause.[157]

The conflict between national missions and local ordinances most often takes a less dramatic form, but perhaps has a more insidious result. Under the CAA, state air quality programs may be approved by EPA as the applicable regional standards.[158] California has further delegated the standard setting power to local air quality bodies under the California Clean Air Acts. One such body is the Santa Barbara Pollution Control District (SBPCD), a county agency. Vandenberg Air Force Base is located within the Santa Barbara District and is required under the CAA to seek permits from SBPCD for any stationary sources of pollution located

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[156]Id. at 17.

[157]Id. at 21-22.

[158]CAA 42 U.S.C. § 7476; Federal Facilities Compliance Strategy, supra note 4, at Appendix A 6-7.

on the base.[159] Because the district is in non-attainment status for both ozone and particulate matter, obtaining permits is often a grueling process. Vandenberg AFB has a mission closely tied into the United State's space program. Located within its confines are launch facilities for missiles and rockets as well as tracking stations vital to the space shuttle program.[160] Electrical power is essential to Vandenberg's space mission. An ongoing dispute with the SBPCD over permits for five electrical power turbines has prevented the Air Force from using these turbines which are more efficient and cleaner than the power generating system currently in use.[161] Each side to the dispute blamed the other in hearings before the House Energy and Commerce Committee. The Air Force claimed that the power generators were integral to the success of the space shuttle program, and that the Air Force's mission has been seriously compromised by the actions of the SBPCD. In response, the SBPCD argued that the Air Force was overstating the national security impact of the delay in permitting the generators and blamed the Air Force for not complying in good faith with the permit process.[162]

Whichever side is correct in this dispute, although one wonders what qualifies the SBPCD to dispute Air Force claims about

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[159]Hearings, supra note 3 at 178.

[160]Id. at 178.

[161]Id. at 178.

[162]Id. at 178-80.

the needs of the space program, it is clear that decisions by a California county had an impact on important national missions. What is more troubling is the counties' assertion that it would not consider issues of national security or funding in its treatment of Federal agencies because in its view these facilities must be "treated exactly the same as other major violators."[163] Its position regarding fines and penalties revealed little understanding of national issues:

> Arguments that money is not available for the payment of penalties, and that the Anti-Deficiency Act precludes the payment of penalties, do not seem persuasive in cases such as this. If Congress does not appropriate funds to cover penalties for environmental violations, then it would appear that Congress intends that federal facilities remain in compliance with all environmental regulations at all times.[164]

A $500,000 fine was imposed by SBPCD. Vandenberg has no funds available to pay that fine and is prohibited from using funds appropriated for other needs for that purpose.[165] The SBPCD position is an example of how local control of federal facilities

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[163] Id. at 180.

[164] Id. at 180. This argument completely misses the mark. A far more insightful comment was made during the hearings by Congressman Sonny Callahan of Alabama:

> But money is necessary to comply with the law. And if an agency does not get the money from Congress and, therefore, cannot comply with the law, why should you come after the agency? Why wouldn't you go after Congress or . . . when there is no capability of an agency complying with the law if he has insufficient moneys?

[165] 31 U.S.C. § 655.

through environmental enforcement authority is likely to allow parochial concerns to overshadow national goals. Even where the competing goals have national importance, is it appropriate for a local body to establish the relative priority of those national goals?

State environmental statutes that directly impinge on Federal agencies are now quite common. Since 1985 forty-six states either expanded existing hazardous waste laws or passed new statutes. These statutes are inteded to cover the activities of Federal agencies located within state boundaries. Thirty-seven states specifically list "Federal agency" or "the Federal government" or "the United States" as an entity covered by Federal activities as they would private facilities. The intrusiveness of these statutes vary considerably, some statutes like those in Ohio, California, Georgia and Connecticut are considerably more rigorous than the comparable federal law. At least twenty state statutes specifically call for state controlled and initiated actions at any RCRA permitted site. This growth in state law came about in part because of frustration over EPA's inability to adequately enforce existing Federal statutes against Federal agencies. By stepping into the breach states have demonstrated their intent to compete for power in the environmental regulation arena. Their grasp for power introduces an element of parochialism into environmental regulation that can ony be countered by a clear and efficient assertion of federal power. Currently that countervailing federal

power does not exist because of the restraints imposed on EPA.[166]

d. Separation of Powers Dilemma.

Congress has established ambitious environmental standards for federal Executive agencies. Presidential orders declare it a national goal to meet these standards. The Supreme Court has ruled that federal installations must comply with established pollution control laws.[167] But the three branches of our government have come to different conclusions about how these environmental laws should be enforced against Federal agencies. Congress has enacted increasingly broad waivers of statutory immunity. The Medical Waste Tracking Act of 1988 is an example of this new breed of environmental statute which lays open federal facilities to full enforcement control by the states.[168] The Clean air Act, as amended, contains a waiver of sovereign immunity so broad it allows fines and penalties to be imposed by states or Federal agencies.[169] Congress now stands poised to amend the Resource Conservation and Recovery Act to accomplish the same broad waiver even to the extent of allowing states to tap the Federal treasury for the payment of

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[166]See Study, Cleans Sites, Inc. prepared for DOD, October 1988. Study available at: CSI, 1199 N. Fairfax Street, Alexandria, VA 22314. Morissette and Hourcle, State Environmental Laws Redefine "Substantial and Meaningful Involvement", 31 A.F.L. Rev. 137 (1989).

[167]Hancock, supra note 6, at 172.

[168]Pub. L. No. 100-582, 102 Stat. 2950 (1988).

[169]Section 118 of the CAA (42 u.S.C. 7418).

fines and penalties.[170] The federal executive opposes this change to the law in large part because of the damage it can inflict on our system of federalism and the practical problems it will cause federal agencies in the achievement of their national goals. The courts, including the Supreme Court, have been receptive to the concerns voiced by the executives and have expressed reluctance to grant broad enforcement powers to the states with respect to the Federal facilities.[171]

The differences on this issue between the Legislative, Executive and Judicial branches are explained in large part by the differing political goals of the branches. The legislative branch, composed as it is of representatives from local districts within the states for the House of Representatives and state representation in the Senate, is far more attuned to local concerns than is the Executive, which has a nationwide constituency. This notion is, of course, basic to our political structure and implies a necessary separation of powers. In Federalist 48 Madison discussed the connections necessary to maintain a proper separation of powers:

> It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem

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[170]See H.P. Report, supra note 7.

[171]See cases cited at notes 36, 37, and 44.

to be solved.[172]

This paper takes the position that the higher priority given to local concerns in the Legislative branch has, in the area of environmental enforcement against Federal agencies, led to an encroachment on the powers needed by the Executive branch.

The hearings on the amendments to the Resource Conservation and Recovery Act pointedly illustrate the political motivation backing this encroachment. Sponsoring the amendment are Congressman Thomas A. Luken and Dennis E. Eckart, both democrats from Ohio.[173] These Congressmen were spurred by a valid and

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[172]The Federalist, No. 48 at 308 (J. Madison). (Emphasis added.)

[173]See Hearings, supra note 3, at 3. See also, Washington Post, October 3, 1989 at 1 col. 1. Political self-interest can create unusual alliances in Congress. Efforts to amend the Clean Air Act had stalled since 1977 because of a deep rift among House Democrats. At the head of the two coalitions are Representative Henry Waxman of California and Representative John Dingell of Michigan. Representative Dingell opposed stricter emissions standards because he represents a constituency dominated by the automobile industry. However, with President Bush pushing for stricter pollution standards, the two democrats were able to agree on a compromise that prompted another Representative to remark "I knew the Earth had moved." Id. at 1. The compromise was acceptable to both coalitions because it contained provisions to help many different sections of the country. The Midwest and Southeast would be responsible for cleaning up the nations 107 dirtiest plants, but Dingell's plan spreads the cost of the cleanup to other large facilities in different parts of the country. See Washington Post, November 3, 1989 at 6 col. 1. Where Congress itself is faced with divergent interests it is more able to approach issues with a national orientation. In this situation the national interest was represented because parochial concerns were divergent. Parochial concerns dominate the issue of Federal agency pollution enforcement to such a degree that one Congressman remarked: "Its kind of fun to bash all these Federal agencies; isn't it?" Hearings, supra note 3 at 81. In that situation there is a very real danger that national interests will be ignored.

important local concern that had outraged their constituents. What Congressman Lukens in his opening remarks termed "The Department of Energy's callous and wanton pollution at the Fernald plant in Ohio."[174] The hearings progressed in a predictable fashion. Nearly every state is the site of some Federal facility over which it would like to assert environmental enforcement authority. Naturally the most egregious examples of Federal facility pollution were presented first. The testimony of Kenneth O. Eikenberg, the Washington State Attorney General occurred early in the proceedings and consisted in large part of a depiction of the DOE Hanford Reservation as an environmental disaster. Mr. Eikenberg referred to a $49,000 civil penalty imposed by the state on the Hanford plant which was overturned by the Federal District Court on grounds of sovereign immunity. He urged Congress to give states the power to fine and impose civil penalties on Federal agencies as the only workable enforcement mechanism.[175]

Every state presented evidence, either live testimony or by letter, urging Congress to give them full enforcement authority over Federal facilities. There is nothing surprising about this unanimity. This is a situation where every state has an individual and parochial interest in controlling Federal facilities within its borders. Alexander Hamilton in Federalist 15 offered a useful perspective for this issue. "This tendency . . . has its origin

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[174] Id. at 2.

[175] Id. at 11-22.

in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged."[176] It is natural for states to seek this power and it is equally natural for the individual states to find allies in the body of the collective states, the Congress. This common motive drawing as it does on identical parochial motives is antithetical to any overarching national need. In such a situation the "principle of separation of powers can be invoked by either branch in objecting that the acts of the other are encroachments."[177] Madison argued that the most urgent danger to separation of powers under our system of government is the legislative, which is "more powerful . . . is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[178]

There is no effective check on the legislative power where the collection of local interests is so pervasive. If the national interest differs from the collective parochial interests, how is it to be vindicated? Every Executive agency allowed to offer testimony at the hearings on House Bill 1056 presented a version of the national perspective and argued that nationwide interests would be damaged by the bill's passage.[179] The DOE's

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[176]The Federalist, No. 15 at 111 (A. Hamilton).

[177]D. Epstein, The Political Theory of the Federalist (1988), at 131; See generally J. Vining, The Authoritative and the Authoritarian (1986).

[178]Epstein, supra note 174, at 131.

[179]Hearings, supra note 3, at 87-110.

representative, Mr. Leo P. Duffy argued that "H.R. 1056 . . . would interfere with the President's constitutional authority to direct his subordinates and ensure that the laws are faithfully executed."[180] He also saw the danger for local interference with national priorities which could magnify rather than eradicate problems. "A responsive and realistic approach of solving environmental problems requires a coordinated approach which deals with problems as a whole. Attempting to solve problems piecemeal may result in unintentional impediments to compliance."[181]

Two possible ways to avoid the legislative vortex are not politically realistic alternatives. The first, of course, is the Presidential veto which, while sometimes desirable as a matter of policy, carries with it a political price tag. This is especially true for a President quoted during the hearings as saying, "Unfortunately, some of the worst polluters are our own federal facilities. As President, I will insist that in the future Federal agencies meet or exceed environmental standards: The government should live within the laws it imposes on others."[182] Even if President Bush decided to spend some political capital on the veto, the tremendous popularity of this Bill would almost certainly lead to an override.

The second alternative is even less tenable. Each

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[180] Id. at 103.

[181] Id. at 103.

[182] Id. at 8. (Speech of Vice President Bush at the Washington Bussiness Luncheon, Seattle WA, May 16, 1988).

environmental statute carries with it a Presidential exemption provision. This provision allows the President to exempt a Federal facility from the application of an environmental statute if it is "necessary in the interest of national security or in the paramount interest of the United States."[183] Such exemptions are usually valid for one year, but may be renewed if necessary. Where the exemption is requested for lack of funds, it may only be granted if the President specifically requests such funds from Congress and they are denied.[184] These exemptions are not a tenable safeguard because they carry too much political baggage to be used. Only once in history has the President exercised this exemption and he did so then under extraordinarily unusual circumstances during the Haitian refugee crisis. Fort Allen, Puerto Rico was used as a refugee center for thousands of Haitians. Facilities there were totally inadequate to comply with environmental statutes while also housing such a large number of refugees. In Executive Order 12288, President Carter exempted Fort Allen from water, air, noise and solid waste pollution statutes. Even this rare decision based on highly unusual circumstances drew considerable criticism and prompted litigation in the cases of Puerto Rico v. Muskie[185] and

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[183]Federal Facilities Compliance Strategy, supra note 4, at VI-13, Exec. Order 12088, 43 Fed. Reg. 47707-08 (1978).

[184]Id. at VI-13. See also Office of Management and Budget Directive A-106 (requiring federal agencies to budget annually for environmental compliance).

[185]507 F. Supp. 1035 (D.P.R. 1981).

Marquez-Colon v. Reagan.[186]

There is a very real danger that where issues of local concern conflict with national needs, the legislature will subvert the nation's needs to comply with popular local sentiment. In this regard, the people are more likely to support the legislature than the executive or the judiciary if the branch's positions are different. Madison in Federalist 49 recognized this danger:

> The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.[187]

Unfortunately, very few elected representatives will be able to vote counter to a popular local position even if they are wise enough to recognize the compelling national interest in a different result.

An example of the national interests subverted by legislative espousal of popular parochial sentiment are those at stake if H.R. 1056 is enacted. The Bill allows states to impose fines and penalties not only for ongoing violations of RCRA, but also for past violations. Section 3004(a) requires all holders of RCRA permits to undertake cleanup of past releases, as a condition of

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[186]668 F.2d 611 (1st Cir. 1981).

[187]The Federalist, No. 49, at 316 (J. Madison).

the permit. This requirement applies regardless of when the release occurred.[188] For many federal facilities such releases could have occurred decades ago. As an example, on July 10, 1926, a lightning storm caused a tremendous explosion of munitions at the Picatinny Arsenal in New Jersey. The munitions were bulldozed into large dumps and buried shortly after the explosion.[189] RCRA requires full cleanup of this site. The Rocky Mountain Arsenal discussed earlier is a similar situation, as are the Hanford and Fernald plants operated by DOE. These releases occurred at a time before the dangers of such dumping were recognized and "present waste management practices were undreamed of."[190] By granting states the authority to tie needed operating permits to the cleanup of past dump sites Congress also allows states to determine which federal facilities must close and which can continue to operate.

The cleanups and corrective action at many of the older Federal facilities will be a long and expensive process. The DOE's Defense Nuclear facilities may require $100 billion and over thirty years to restore to acceptable standards.[191] Department of Defense facilities will also require lengthy and costly cleanup although not at the levels required for DOE. The current estimate for cleanup at DOD's old hazardous waste sites is $15 billion, although

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[188]H.R. Report, supra note 7, at 56.

[189]Hearings, supra note 3.

[190]Id. at 120-33.

[191]H.R. Report, supra note 7, at 57.

the present budget has allocated only $500 million for the cleanup effort for fiscal year 1990.[192] This restoration effort is a massive one that can only be carried out on a national basis.

The Federal government has the cleanup process underway on a priority system of "worst first."[193] The plan is coordinated with EPA in order to develop a national ranking system which includes a comparative index to ensure that consistent health and environmental benefits"[194] are assigned the highest priority for sites across the nation. EPA is well-suited to direct this ranking process, having access to relevant information on every hazardous waste site in the country. No one state can rival the data base and expertise possessed by EPA.

Federal agencies must continue to operate during the cleanup process. "Ships must sail, planes must fly, troops must train." Paying for cleanup must not deprive the agency of the ability to carry out its mission.[195] There is no backup if the Department of Defense goes out of business. The DOE must continue to meet his nation's energy needs as well as provide the weapons needed for our nuclear deterrent. These missions require money. Balancing all these competing interests is certainly a national function and the balance will depend on available resources. Not every cleanup can

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[192]Hearings, supra note 3, at 134; Fiscal Year 1990 Budget of the United States; Kitfield, supra note 4, at 2-3.

[193]Hearings, supra note 3, at 108.

[194]Id. at 108.

[195]H.R. Report, supra note 7, at 57.

take place first, the Federal budget can not support an across the board immediate cleanup.[196] The states can not be expected to perform this balancing and ordering process in a manner that is fair to national interests. Colorado can be expected to require the cleanup of Rocky Mountain Arsenal before it allows money to be spent on Fernald in Ohio or Hanford in Washington. Parochial interest would destroy the "worst first" cleanup process. Moreover, many state officials will not be aware of effects on national security if money is diverted from DOD operational accounts to pay for cleanup. These are national, not local interests.

Allowing states to impose fines and penalties on Federal agencies could produce a "new, unique form of revenue sharing."[197] There is no limit to the fines that states could impose because the fines may be backward looking. Conceivably, Ohio could fine DOE until Fernald is completely cleaned up, a process which will take many years. Washington could do the same with respect to Hanford. If one state becomes particularly aggressive, the Federal agency may be induced to deviate from the "worst first" policy to cleanup the aggressive state's site to the detriment of the state which did not heavily penalize the agency. If fines became too onerous, eventually the facility would close, thus inflicting potentially

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[196]Id. at 57. See also Washington Post, October 17, 1989 at 4 col. 1. Arbitrary across the board budget cuts went into effect on October 16, 1989 as part of the Gramm-Rudman-Hollings deficit reduction law.

[197]Lotz, supra note 53, at 22.

heavy damage to the national mission supported by that facility.[198]

In the drive to grant states full enforcement authority over Federal agencies, the source of the funds to pay fines and penalties seems to have been ignored. There was discussion of a permanent indefinate "judgement fund" set up by Congress.[199] But which has never been used for the purpose of paying large fines and penalties and consequently, the funds are simply not available. The reason for fines imposed against private pollutors does not even apply where the Federal government is the polluter. The goal is to remove any economic benefit gained by noncompliance. Yet, Federal agencies do not operate for profit and the net result of a fine is to punish the American people.[200]

Perhaps at the core of the separations of power problems is the effort by one branch of the federal government, the Legislative to take away power arguably granted to another branch, the Executive, and transmit the power to subordinate sovereigns, the states. If successful, this transfer of power could deprive the Federal government of the "energy" necessary to effectively govern in regards to environmental issues. One of the essential attributes of our national government is that the most impressive powers of the government -- "the purse and the sword -- be

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[198]H.R. Report, supra note 7, at 49.

[199]31 U.S.C. § 1304, H.R. Report, supra note 7, at 41.

[200]See e.g., Steward, Economics, Environment and the Limits of Legal Control, 9 Har. Env. L. Rev. 1 (1985); Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 Stan. L. Rev. 1267 (1985).

possessed . . . without limitation."[201] Alexander Hamilton recognized this need for power in a central government:

> These powers ought to exit without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. . . . There ought to to be no limitation of a power destined to effect a purpose which is itself incapable of limitation.[202]

Congress appears willing to turn over the national purse strings to the states by allowing almost direct access to the federal treasury through fines and penalties. The other "most impressive' power, the sword, is also at risk as Congress turns DOD and DOE over to state environmental regulation. The Savannah River nuclear weapons production plant was closed over environmental concerns and the Rocky Flats, Colorado plant was threatened with closure after three employees from the Aberdeen proving ground were convicted for their roles in environmental violations.[203] State control over environmental compliance at federal facilities is what Hamilton described as "fettering the government" in ways which "run counter to the necessities of society."[204] In Federalist 44 he goes on to state:

> No axiom is more clearly established in law, or in reason, than that whatever the end is required, the

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[201]Epstein, supra note 174, at 35.

[202]The Federalist, 23 at 153 (A. Hamilton).

[203]Washington Post, August 25, 1989, at 3, col. 4-5. Rocky Flats plant manager, Edward S. Goldberg, said he would "shut it down" unless he was given formal assurances that he would not be criminally prosecuted for the plant's environmental violation.

[204]Epstein, supra note 174, at 43.

> means are authorized; wherever a general power to do a thing is given, every particular power for doing it is included.[205]

If the restraints on Federal agencies are necessary to compel compliance with environmental statutes, then something is fatally flawed within our system. "A government, the constitution of which renders it unfit to be trusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the national interests."[206] Can we trust DOD to defend our skys and shores from enemy attack if we cannot trust this agency not to despoil that same air and water with containments? The answer is surely no. Yet it is clear that the federal agencies charged with performing vital national missions have done so for the most part quite well. Their environmental compliance can equally well be trusted to another Federal agency, the EPA, if we also grant EPA the power necessary to be an "energetic" regulator.

III. ESTABLISHMENT OF GOALS.

Since the 1960's Americans have been aware of an environmental crisis. Our air, water and land had become dangerously contaminated. Wildlife and human beings have been poisoned by an arsenal of chemicals from DDT to PCB's and hundreds of others. Our society has become increasingly aware of the dangers posed by the indiscriminate abuse of our environment. A national goal of

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[205]The Federalist, 44 at 285 (A. Hamilton).

[206]Epstein, supra note 174, at 45.

protecting and preserving the environment has enormous appeal. Polls indicate overwhelming popular support for pollution controls and an increased willingness to pay for those controls. In the past two decades this country has spent billions of dollars for clean air, water, and land.[207] Without question one primary goal must be the protection and preservation of America's environment.

A clean environment is not, however, the only important goal toward which this country should work. The safety and dignity of the citizenry is a goal that cannot be ignored. A healthy environment surely contributes to individual and collective safety and dignity, but is not sufficient to guarantee those goals. Democracy and economic freedom are the primary means America has chosen to meet these goals. Economic freedom and vitality are to some degree incompatible with pollution control measures because most such measures increase costs of production and operation. The tension between these goals is being managed by environmental regulation carried out in large part by the EPA.[208]

To protect democratic values, our government has established a number of Executive agencies. The Department of Defense protects the most basic value of safety from external oppression. The federalists took the protection that "safety seems to be the first"

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[207]Environmental Protection Agency, Environmental Progress and Challenges: EPA's Update, 3 (1988).

[208]Id. at 4; But see, Stewart, supra note 197, at 3, arguing that the conflict between environmental and economic development is a false one.

object for a wise and free people.[209] Other agencies perform equally vital roles. To perform these missions federal agencies must have the flexibility and energy to act without undue restraint. Consequently, a wise goal is to grant these agencies the authority to effectively perform their national missions. Authority implies freedom from restraint, consequently any unnecessary hindrance on federal agency function is contrary to this goal.

Another vital goal is the creation of a system of environmental regulation and enforcement sufficiently vital and flexible to fully account for all important national values in its decision making process. Such a goal must recognize the interrelated nature of our environment. Merely transferring pollutants from one medium to another is unacceptable so a system approach to environmental protection must be adopted.[210] This requires a ranking of priorities in order to efficiently use scarce national resources, including fiscal resources at a time of necessary budget restraint.

To effectively deal with a problem of national scope, but with tremendous local impact, a system is needed which receives inputs from both the national and local perspectives. "The people are the final judge of whether that government, or either government in

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[209]Epstein, supra note 174, at 41.

[210]Environmental Progress, supra note 204, at 5.

America, is in fact serving its legitimate objects."[211] A system which allows for and supports this citizen input while not allowing partisan politics to destroy national missions is a worthy goal. In attempting to meet this goal it is well to be reminded as Hamilton did in Federalist 15 that a "spirit of faction" causes men to act in ways that would ordinarily make them "blush" and may lead to actions that cause a flying apart from "a common center."[212] To meet this goal of local input as checked by national necessity, a central control authority for environmental matters appears desirable. The EPA is the logical choice as this authority. Therefore, one goal should be to enhance EPA's ability to perform this national mission.

A final goal is a system of environmental regulation that conforms to the conception of federalism established by the constitution. Ours is not a "society of societies" that would be the cause of "incurable disorder and imbecility in the government." The national government is and should be preeminent. There are some matters that can, in Hamilton's words, be "advantageously administered"[213] by state governments, but a national system of environmental regulation is not such a matter. This goal seeks participation by the states, but power and therefore energy, left to the national government and its agencies.

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[211]Epstein, supra note 174, at 52.

[212]Id. at 37.

[213]Id. at 51.

IV. HISTORICAL TRENDS

During the approximately twenty years in which this country has actively attempted to control environmental contamination, many important improvements have taken place. EPA reports that the air in most of our cities is "far cleaner and healthier than it was in the 1960's."[214] Our lakes and rivers have experienced a dramatic restoration under the Clean Water Act. Lead levels in urban air are down 87 percent from 1977. Sulfur dioxide levels are lower by 37 percent and even ozone and carbon monoxide have been reduced significantly. More than 127 million American have adequate public sewage, nearly 50 million more than were served by such facilities in 1972.[215] Coastal ecosystems that had been ignored before 1980 are now protected by the EPA. The Great Lakes have undergone a significant recovery through a cooperative effort between Canada and the United States. This progress is even more impressive when considered in light of demographic trends. The country has experienced economic expansion and population growth during this 20 year period, proving that economic growth and environmental health are not mutually exclusive.[216]

While some success has been achieved in reducing pollution levels in some medias such as air or water, environmentalists have learned that there "is no such place as 'away' where we can throw

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[214] Environmental Progress, supra note 204, at 3.

[215] Id. at 4.

[216] Id. at 4.

things."[217] Simply shifting pollution around has caused it to come to rest at the point of least regulation. For many years this has meant dumping in unregulated landfills. Unfortunately, the point of least regulation may not and usually is not the point of least risk. The most pressing problems of the 1970's were often visible, raw sewage, smoke and soot from cars and industrial smokestacks. There has been success in reducing levels of these visible pollutants, but new problems have been discovered. One of the most serious is the problem of hazardous waste. There is no one answer to the present problem or to massive problems created by past ignorance and abuse.[218]

Federal facilities have mirrored the trends experienced by the country in general. Problems such as air and water pollution have been, in large measure, abated under EPA's regulatory guidance. Most Federal facilities are in full compliance with all environmental laws and regulations. Federal facilities have a ninety-seven percent compliance rate for air emissions, compared to ninety-five percent for private facilities.[219] For water emissions, Federal facilities have an eighty two percent compliance

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[217] Id. at 6.

[218] R. Patrick, E. Ford, J. Quarles, Groundwater Contamination in the United States (1987). More than fifty percent of the population depends on groundwater for drinking water. Seventy five percent of our cities derive drinking supplies from groundwater. Yet groundwater is at tremendous risk from hazardous waste.

[219] H.R. Report, supra note 7, at 54.

rate, compared to ninety-three percent for private facilities[220] and eighty-six percent for municipal facilities. The most troublesome area is with hazardous waste compliance where private facilities have a fifty percent compliance rate with RCRA, while the Federal facility rate is forty-five percent.[221] Federal facilities are performing at about the same level as private facilities with respect to all major pollution control issues.

The major failures of federal facilities have come in cases of significant past contamination which was not understood at the time of the releases to be a major hazard. Examples of these failures have been discussed in earlier portions of this paper. Each of these extremely hazardous sites are undergoing or are scheduled to undergo cleanup. The Secretary of Energy has stated that the waste issue, including compliance, is his top priority.[222] DOE has prepared a five year cleanup plan for current waste management operations as well as inactive waste site cleanup. The most advanced technological developments such as vitrification are being employed to control radioactive waste at DOE facilities. The Defense Waste Processing Facility at the Savannah River nuclear weapons plant will turn liquid plutonium wastes into glass, fusing the wastes with sand at temperatures of 2,000 Fahrenheit.[223] This

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[220]Id. at 54.

[221]Id. at 54.

[222]Hearings, supra note 3, at 104.

[223]Washington Post, November 7, 1989 at 3 col. 1.

plant which cost $1.28 billion, is expected to cleanup over 40 years worth of liquid plutonium wastes. But even if the process is completely successful it will take over fifteen years to treat the accumulated waste.[224]

DOD has also undertaken an effort to cleanup past waste sites. One reason that such sites exist at DOD facilities was summed up by a Navy official who remarked, "people forget that war is hazardous to the environment."[225] The Defense Environmental Restoration Program (DERP) is a cleanup program that operates in close association with EPA and has achieved significant success in cleanup of some past waste sites. Full cleanup is estimated to cost around $14 billion. Congress has not yet provided complete funding for full cleanup. DERP requires DOD officials to coordinate cleanup action with the EPA as well as state and local authorities, including offering a public comment period.[226]

DOD views environmental compliance as a necessity. Major General George E. Ellis, the Air Force director of engineering and services, stated that the services may have to do without some weapons systems to provide resources for environmental compliance. In his view "this is a must pay bill, just like electricity."[227] Facing differing standards from individual states has caused

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[224] Id. at 3.

[225] Kitfield, supra note 4, at 38.

[226] Environmental Law For the Air Force, supra note 140, at 170.

[227] Kitfield, supra note 4, at 39.

compliance problems for DOD, even leading to moving hazardous waste around the country to avoid the harshest regulating authorities.[228] There has been little understanding of DOD's worst first cleanup policy which balances local concerns against more serious environmental needs at other facilities. A uniform national regulatory system controlled by EPA would solve many day to day compliance problems for DOD.

Federal facility compliance has not been complete, or uniform as the forty-five percent compliance rate for RCRA indicates, but this record mirrors the record of non-federal facilities quite closely.[229] Attitudes toward compliance have changed within Federal agencies as they have in private industry. When this compliance record is viewed in light of the Executive policy on enforcement, and the court's support of that policy, it is clear that voluntary compliance has to a large measure been successful. The Federal Executive has accepted its burden in the national environmental battle, but as yet the states have shown a marked reluctance to make sacrifices for the national welfare.

Low level radioactive waste is produced by the nuclear power plants that generate a significant portion of this nation's electricity.[230] The debate about what to do with nuclear waste has

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[228] Id. at 38.

[229] H.R. Report, supra note 7, at 54.

[230] Washington Post, August 24, 1989 at 1 col. 1, at 16 col. 1. One environmentalist group, the National Audobon Society, has changed its position and now supports nuclear development as a means of combatting global warming.

plagued the nuclear power industry since its inception and there is as yet no good solution. In the 1985 Low Level Radioactive Waste Policy amendments Act, Congress attempted to overcome the "not in my backyard" sentiment of every state in this nation.[231] The statute imposed a direct liability on states which fail to take federally directed action concerning radioactive waste, and as such was unprecedented. One commentator has concluded that the act does not constitutionally subvert state sovereignty because the national political process "provides substantial protection for states." [232] As noted previously, the political process of the Congress may provide too much protection for state interests at the expense of national needs. Yet when the national need is consistent with the parochial needs of at least a significant number of states, those states may join to take action in furtherance their collective interest and opposed to interests of the minority. The best example of this sort of political action was what has come to be known as "the screw Nevada Bill" of 1987.[233]

Congress ordered construction of the first permanent repository of radioactive wastes from nuclear power plants at Yucca Mountain, Nevada, a volcanic ridge about one hundred miles northwest of Las Vegas. The design involves building a cavern one

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[231]Berkowitz, Waste Wars: Did Congress "Nuke" State Sovereignty in its Low Level Radioactive Waste Policy Amendments Act of 1985?, 11 Harv. Env. L. Rev. 437, 438 (1987).

[232]Washington Post, October 3, 1989 at 1, 7 col. 1.

[233]Id. at 7.

thousand feet below Yucca Mountain to store these wastes for ten thousand years. Nevada has not taken the attempt at forced intercourse without a fight. A state law was passed almost immediately after Congress chose Nevada for the site, which prohibits any radioactive dumping at the site.[234] The state has also denied the requested environmental permits to conduct testing. The Department of Energy has stated that it can not abandon the Yucca Mountain site because Congress has chosen no other. Yet DOE Secretary James Watkins is attempting to placate Nevada saying "We will leave no stone upturned in trying to address the states concern and move forward."[235] Nevada has stood firm, however, Governor Robert J. Miller asserts that the Nevada statutes amounted to "a lawful veto of the Yucca Mountain site." Nevada appears to have found a unique definition of the veto power as it tests the limits of state power in our Federal system.

As a matter of constitutional law the issue appears relatively simple; the federal statute takes precedence under the Supremacy Clause of the Constitution, Article VI, clause 2. This rule was first articulated in 1824 in Gibbons v. Ogden.[236] While Chief Justice Marshall wrote the Gibbons opinion, Mr. Justice Joseph Story is credited for many of the ideas behind the Federal Supremacy doctrine. Story was the most uncompromising nationalist

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[234] Id. at 7.

[235] Id. at 7.

[236] 22 U.S. (9 Wheat.) 1 (1824).

on the Marshall court.[237] He attacked states rights ideology and theory as the work of "selfish, shortsigted, and ignorant men." During his era the notion of dual sovreignty became popular among the Southern states. The South Carolina faction led by John Calhoun took this notion one step further and argued that "nullification" was simply the method by which states as parties to the constitutional contract sought its renegotiation.[238] The Nevada "veto" seems to be the modern day version of the South Carolina "nullification." Both notions threaten the authority of the national government. History has made clear the invalidity of nullification and clarified the definition and location of sovreignty within the American federal system. Accepted wisdom holds that sovreignty resides in the people, but the actual deployment of power within the federal system was not made explicit by the framers. The courts and the political experiences since the Constitution have established the national government as the repository of the sovreignity of the American people. Any attempt by states to usurp that sovreignty must be rebuffed.

The problem as a practical matter is not nearly so simple. How does the federal government enforce the law against a hostile state? Does Congress authorize the President to use troops? What of the violations of state law, will federal marshals turn the

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[237] R. Newmyer, Supreme Court Justice Joseph Story 127 (1985).

[238] Id. at 186-89. "By federalism is meant not a narrow creed or doctrine but a set of collectively held and often vaguely defined general assumptions about American government and society: what it is as well as what it ought to be." Id. at XV.

state police away as they come to arrest the plant operators?[239] These questions all depend for their answers on the meaning of federalism one derives from the constitution. The Supreme Court has looked at an analogous issue in Philadelphia v. New Jersey[240] when it overturned a New Jersey statute which prohibited the importation of waste from other states. The court relied on the Commerce Clause to strike down the New Jersey statute. Yet, New Jersey could choose to close all its landfills and thereby avoid any duty to accept out of state waste. Nevada could easily argue that it is not discriminating against out of state waste because there are no legal radioactive waste sites in Nevada.

Nevada is not alone in seeking to prevent radioactive wastes from being deposited within its borders. In every state where such a site has been proposed there has been an outcry from local groups. The outcry is completely rational. Such waste sites create few benefits and impose many costs on the local community.[241] Host citizens bear the burdens for the environmental sins of a country. In this situation only a national authority with no tie to any parochial interest can be capable of making a rational

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[239]Variations of this idea have already occurred. "On June 6, 1989 some 70 agents of the Federal Bureau of Investigation (FBI) and EPA executed a search warrant at the DOE nuclear weapons plant at Rocky Flats, Colorado." H.R. Report, supra note 7, at 4. See also, Washington Post, August 25, 1989 at 3 col. 4-5. Three high level employees at the Aberdeen, Maryland Proving Ground were convicted of criminal violation of environmental laws.

[240]437 U.S. 617 (1977).

[241]See Florini, supra note 2, at 325.

national choice because the rational local choice is always - no.

Alabama, host to some of the nation's primary toxic waste storage sites recently passed a law banning hazardous waste shipments from twenty-two states. South Carolina had earlier enacted a similar law. The Alabama law prohibits the shipment of hazardous waste from any state that does not allow for the disposal of hazardous waste within its borders or that does not have a cooperative agreement with Alabama.[242]

Seven other states have refused the pleas of DOE for a temporary storage site for plutonium wastes produced at the Rocky Flats plant in Colorado. The Rocky Flats plants produces all at the plutonium trigger for their nation's nuclear weapons arsenal.[243] The plant is running out of storage space and Governor Roy Romer of Colorado has told DOE that the state will not permit storage in excess of sixteen hundred cubic yards. The limit will likely be reduced in March 1990.[244] The response of the seven states contacted by DOE is reflected in Washington Governor Booth Gardner's statement "Do not look my way for anything."[245] Behind

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[242]Washington Post, August 3, 1989 at 22 col. 1.

[243]Washington Post, October 12, 1989 at 5 col. 1.

[244]Id. at 5.

[245]Washington Post, October 10, 1989 at 5 col. 1; See also Washington Post, November 24, 1989 at 25 col. 1. Due to the refusal of states to accept this plutonium waste DOE has entered negotiations with DOD to temporarily use military reservations as storage sites. However, no military base has the necessary environmental permits to store such waste. DOE has indicated that it will seek a Presidential exemption for these bases. The issue is so crucial that DOE Secretary james Watkins has stated that unless a solution is found there will be "unilateral disarmament"

the problem at Rocky Flats is the delay in opening the Waste Isolation Pilot Project near Carlsbad, New Mexico which was intended to receive this waste.

The trend identified is the unwillingness, or inability of individual states to subvert their parochial interests to the good of the nation. What is perhaps as troubling is the direct linkage of these parochial interests to the national legislature. Congress should make these painful political choices, but is often rendered helpless by political self-defense. No legislator who is interested in reelection will vote for a dump site in her site. Federal Executive agencies, if subjected to state environmental enforcement, will be subject to control by those same parochial interests.

The trend of increasing state ability to regulate federal agencies and the growing reluctance of states to subvert their interests to national goals is incongruous when contrasted with the trend denying state enforcement power over environmental matters on Indian reservations. EPA policy toward Indian reservations is basically a government to government one.[246] States are denied regulatory authority over reservations, leaving EPA the

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by the United States. State parochialism is forcing decisions that are not wise or efficient because no military storage site is as suitable for radioactive was as those located in several states.

[246]See, Dubey, Tano and Parker, Protecting the Reservations Environment: Hazardous Waste Management on Indian Lands, 18 Env. L. 449, 451 (1988).

sole regulator. Washington Department of Ecology v. EPA[247] supported this position and denied the state enforcement authority over Indian lands within the state. The court acknowledged Washington's real interest in regulating Indian lands, but supported the federal interests in protecting Indian lands stemming from the federal trust responsibility owed to the Tribes.[248] The court also worried that extending state jurisdiction would create a confusing overlay of regulatory authority. Since federal standards provide a basis of uniformity throughout the United States, there was no need for duplicative state control. These arguments apply with equal force to the issue of state regulation of Federal agencies.

Another trend, of a more positive nature, is the important role played by citizen suits in enforcing environmental statutes. Citizen suits have made important contributions in protecting local and national environmental interests, but have not been unduly burdensome on the performance of federal agency missions.[249] Almost since the beginning of the environmental era, citizen suits were

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[247]752 F.2d 1465 (9th Cir. 1985).

[248]See, Dubey, Tano and Parker, supra note 241, at 469; But see, Allen, Who Should Control Hazardous Waste on Native American Lands?, 14 Ecol. L. Quart. 69 (1987). Arguing that if EPA does a poor job regulating Indian reservations there will be pressure to locate hazardous waste disposal sites on Indian lands.

[249]See, e.g. Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977); Friends of the Earth, Inc. v. Weinberger, 562 F. Supp. 265 (D. D.C. 1983) appeal dismissed, 725 F.2d 125 (D.C. Cir. 1983); Westside Property Owners v. Schlesinger, 579 F.2d 1214 (9th Cir. 1989).

viewed as the "most effective means"[250] for citizens to participate directly in environmental decisions. Many commentators were critical of the ability of administrative agencies to protect the public interest on environmental issues. It was argued that most administrative decisions were "sub-optimizing"[251] reflecting the political nature of bureaucratic decision making. The administrative process was said to produce "not the voice of the people, but the voice of the bureaucrat."[252] These predictions were validated by some extremely important environmental victories due in large part to citizen suit impetus.

The EPA's ability to regulate the Tennessee Valley Authority was not clearly demonstrated until it joined in a citizen suit against TVA which some commentators believe was instigated by EPA itself. TVA was resisting the expensive compliance measures that would be necessary to bring its sulfur dioxide emissions within CAA standards.[253] Because of the Executive branch's interagency suit restriction, EPA had very little negotiating leverage to bring TVA into compliance. The state of Tennessee was absolutely no help in regulating TVA because the state took TVA's side in its battle with EPA.[254] This was an excellent example of parochial interests

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[250]J. Sax, Defending the Environment (1971) at 7.

[251]Id. at 53.

[252]Id. at 56.

[253]See Durant, supra note 13, at 34.

[254]Id. at 76.

influencing the way state regulators conduct enforcement. In this case politics dictated lax enforcement because of the tremendous influence of TVA in Tennessee state government and industry. Even at the national level, Tennessee's legislators attempted to hinder full enforcement of the CAA against TVA. Senator Howard Baker introduced legislation to "grandfather" TVA's older coal fired power plants, and prevent application of the stricter sulfur dioxide standards.[255]

Negotiations between EPA and TVA were tremendously hostile and were essentially deadlocked for several years. The nonlitigation policy against members of the "federal family" was continued in the Nixon and Ford administrations, but when President Carter was elected there was hope in EPA region IV, the region charged with regulating most of TVA's plants, that the policy would change.[256] DOJ frustrated EPA by taking the position that the policy of the unitary executive should not change. At this critical juncture a citizen suit was filed under § 304 of the CAA. The plaintiffs were a resource poor citizen group who were literally operating out of a garage.[257] But they were seen by EPA as a savior and were lavished with economic and technical support as EPA pledged to put their full resources behind them. After EPA

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[255] Id. at 81.

[256] Id. at 72.

[257] Id. at 79-80.

joined the suit, Tennessee still remain on the sidelines.[258] At about this time, President Carter overruled DOJ and indicated his approval of prosecution of Federal facilities in noncompliance. EPA was urged to "run like hell" to catch up with citizen groups by joining in their lawsuits.[259] TVA was finally rendered willing to negotiate in good faith because of the leverage created by the § 304 citizen suit and the most important environmental settlement in history was reached as a direct result of that leverage.

The scenario which brought DOE into compliance took much the same form as that with TVA. Again, it was a citizen suit that brought about compliance. DOE had almost complete discretion over waste disposal at its thirty nuclear weapons facilities throughout the country until RCRA was enacted. Even then DOE asserted a categorical exemption for all its nuclear weapons facilities under the Atomic Energy Act (AEA).[260] EPA had accepted this position, as had the states, and as a result DOE was not being forced to comply with RCRA. The inaction by both the states and EPA led to a citizen suit, LEAF v. DOE. When the court in LEAF rejected the DOE's contention that RCRA did not apply to its operations, EPA quickly moved to regulate DOE facilities.[261] EPA acted so well

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[258] Id. at 81.

[259] Id. at 86.

[260] LEAF v. Dep't of Energy, 586 F. Supp. 1163 (E.D Tenn. 1984).

[261] See Finamore, Regulating Hazardous and Mixed Waste at Department of Energy Nuclear Weapons Facilities, Reversing Decades of Environmental Neglect, 9 Harv. Env. L. Rev. 83, 86 (1985).

before the states became involved and was able to establish regulation without state participation. In regulating DOE's nuclear weapons facilities, EPA had a distinct advantage over the states. The Federal Facilities Compliance Strategy provides a mechanism for EPA inspectors to gain the necessary security clearances for access to national security information and restricted Federal facilities.[262] State environmental regulators have no similar program and must seek access through the EPA.

These examples demonstrate the inadequacy of negotiation and mediation to enforce compliance with environmental statutes without the strength to compel compliance. Citizen suits have contributed that strength. Citizen suits also promote environmental values by putting a price tag on these values. The legislatively adopted public policies are also advanced through such litigation. Often such suits are criticized as being brought by environmental extremists. Yet, these plaintiffs are often preservationists who have been compared to "the patriot who objects when someone tramples on the American flag . . . it is not the physical act that offends, but the symbolic act."[263] While the plaintiff may be a member of a minority, he represents values that "are majoritarian."[264]

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[262]Federal Facility Compliance Strategy, supra note 4, at V-6.

[263]J. Sax, Mountains Without Handrails (1980) at 14.

[264]Id. at 14.

Citizen suits have contributed to the advancement of environmental values without creating unnecessary and costly litigation. Many citizen suits, indeed the vast majority, have been brought under NEPA. Calvert Cliff Coordinating, Inc. v. U.S. Atomic Energy Commission[265] was such a suit brought to insure that "environmental costs and benefits will assume their proper place along with other considerations."[266] These suits have generally sought injunctive relief, but so long as the federal agency has complied with the statute in good faith, the injunction will not be issued. This was the case in Concerned About Trident v. Rumsfeld.[267] Very seldom is the federal agency seriously hindered in performing its mission by these citizen suits. For example, a Maine winter landing training mission was a time sensitive operation, but the requested injunction was denied in time for the training operation to proceed in Citizen For Reid State Park v. Laird.[268] Indeed, one commentator has written that only one federal action of importance has been delayed by a citizen suit and that was a case in which the Army had conducted a wholly inadequate environmental impact statement.[269]

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[265]449 F.2d 1109 (D.C. Cir. 1971), cert denied 404 U.S. 942 (1972).

[266]Id. at 945.

[267]55 F.2d 817 (D.C. Cir. 1977).

[268]336 F. Supp. 783 (D.C. Me. 1982).

[269]Warrior and the Druid, supra note 139, at 348.

Citizen suits have provided the appropriate voice for local interests, contributing positively toward accomplishing environmental goals without damaging national missions. One of the reasons for the success of these citizen suits is that there are procedural safeguards which can efficiently dispose of meritless suits. Each environmental statute requires a citizen plaintiff to give written notice of intent to sue to the EPA as well as the Federal agency prior to actually filing suit. If there is already an enforcement action that is being "diligently prosecuted" the private action can not proceed.[270] Once filed, every citizen suit is subject to summary judgement dismissal and many suits are disposed of quickly through this process.

The relief authorized under citizen suit provisions is limited in most cases to injunctive relief. There is no danger of draining the Federal treasury with massive damage awards.[271] While the CWA and RCRA authorize a Federal District Court to impose civil penalties, these penalties go to the United States Treasury not to the plaintiffs.[272]

These restrictions are among the reasons why citizen suits are preferable to state enforcement actions against Federal agencies. At a more basic level, the interests of federalism are also promoted effectively by citizen suits, while, as noted earlier,

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[270] Id. at 347.

[271] Id. at 347.

[272] § 505(a) of the CWA, 33 U.S.C. § 1365(a) (1982); § 7002(c) of the RCRA, 42 U.S.C.A. § 6972(a) (1985).

state enforcement is disruptive to ordered federalism. A citizen suit is an appropriate means for the government to subject itself to challenge on the merits of the decisions made by its officials. Providing such a mechanism is a reflection of the sovereignty of the people over its government.

> The fabric of American empire ought to rest on the solid basis of the consent of the people. The stream of national power ought to flow immediately from that pure, original fountain of all legitimate authority.[273]

State enforcement against federal agencies does not advance the interests of individual citizens, it rather subverts the appropriate relationship between the federal sovereign and the subordinate state sovereigns.

V. CONDITIONING FACTORS.

Since the early 1970's there has been an ever intensifying struggle for law and power between the Federal government and the states in the area of environmental regulation. Not since the federalists and anti-federalists skirmished over the basic structural form of our government has the debate over the relative powers of the Federal government and the states been so fierce. In the battle over the fate of the $6 billion dollar Shoreham nuclear power plant the DOE and the state of New York are on opposing sides. DOE wants to open the plant, arguing:

> The destruction of Shoreham will result in consequences adversely affecting a number of national interests - adequate and reliable energy supply, energy security,

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[273]Epstein, supra note 174, at 11.

the nation's trade balance and the environment.[274]

New York's Governor Mario Cuomo argues that the issue is solely one of the state concern and any federal intervention is "repugnant." He insisted "the matter has been adjudicated in New York. It can't be change by a ukase from Washington."[275] The Congressman whose distinct includes Shoreham took a more emotional tack saying "How dare you move in on our plant . . . Don't hurt my people."[276] America is faced once again with the issue confronting the framers, how to establish a powerful national government and yet preserve state powers. As Hamilton understood, the necessity of powers "without limitation" is antithetical to the notion that national powers can not be absolute if state rights are to survive.[277]

At least two of the federal-state conflicts over environmental issues have been extensive enough to be termed "rebellions." The "seaweed rebellion"[278] was prompted by the economic development of the continental shelf. To date that development has taken the form of oil and gas leasing. During an earlier confrontation commonly called the tidelands controversy, both the federal government and the states claimed title to offshore coastal lands. This issue was

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[274]Washington Post, November 10, 1989 at 12 col. 1.

[275]Id. at 12.

[276]Id. at 12.

[277]Epstein, supra note 74, at 35.

[278]See Fitzgerald, California v. Watt, Congressional Interest Bows to Judicial Restraint, 11 Harv. Env. L. Rev. 147 (1987).

resolved by the Supreme Court in the 1940's in favor of federal ownership.[279] Congress acted in 1953, consistently with what this paper views as a congressional parochial bias, to overturn these cases and give the states title to area up to three miles offshore. The Submerged Lands Act give the states quit claim title to these lands.[280] Later the Outer Continental Shelf Lands Act (OCSLA) gave the federal government title and jurisdiction beyond three miles to the extent of national claims.[281]

The national demand for oil instigated off-shore oil leasing and with it considerable state and local opposition. The conflict between national demand and local concerns was addressed in OCSLA which requires the Secretary of Interior to reach "an equitable sharing of developmental benefits and environmental risks among the various regions."[282] The intent of the statute was to require the Interior Department to consider environmental values and state concerns before initiating outer continental shelf development. To accomplish this the Interior Department performed a costs-benefit analysis which ranked areas for leasing according to "net social value." One problem with this system was that there was very little scientific input into the net social value formula and

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[279]United States v. California. 332 U.S. 19 (1987); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

[280]43 U.S.C. §§ 1311-1315 (1982).

[281]43 U.S.C. §§ 1331-1336 (1982); See also Christopher, The OCSSLA: Key to a New Frontier, 6 Stan. L. Rev. 23 (1953).

[282]See Fitzgerald, supra note 273, at 179.

states charged that local interests were being ignored.[283] At one point the Secretary of Interior agreed that analysis of the leasing program revealed inequities in the distribution of environmental risks and benefits, but argued that it was not necessary to change the program because "restricting leasing in particularly burdened areas would reduce national benefits."[284] Given this perspective, the program was fairly criticized as subordinating "the interests of the states to the interests of the Federal government."[285]

States refused to accept the subordinate role in decisions made concerning their coastal areas. Pressure from the states led to the enactment of the Coastal Zone Management Act (CZMA), which redefined the roles of state and Federal governments in the coastal region. This act created more of an "equal partnership" because after the Federal government approves a state's Coast Management Plan (CMP),[286] the activities of Federal agencies within the coastal zone must be consistent with the state plan. During the Reagan administration there was an attempt to diminish the authority of the states over Federal activities outside the coastal zone. One study found that out of 1762 federal programs which were reviewed for consistency with state CMP's, there were 984 that prompted

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[283] Id. at 186.

[284] Id. at 184.

[285] See Eichenberg and Archer, The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism", 18 Ecol. C. Quart. 9, 11 (1987).

[286] 16 U.S.C. §§ 1451-1464 (1982); 16 U.S.C. § 1456(c).

objection from states.[287] The CZMA allows two separate kinds of administrative mechanisms for resolving these disputes, mediation and administrative appeals. Mediation was to be conducted by the Secretary of Commerce between the Federal agency and the coastal state. The Federal agency refused to participate in five of the six cases in which mediation was requested. Federal agencies were equally as reluctant to allow state control over their actions as states were to allow Federal activities effecting the state to continue without state participation.[288]

Of necessity courts have been called upon to balance this competition between federal and state issues. One commentator has argued that the political process and not the courts should resolve these issues,[289] but as stated earlier Congress is beset with parochial pressures that skew its decisions in favor of local interests. The courts are not subject to the same pressures as the legislature. Perhaps as a result the courts have generally supported federal objectives over competing state concerns. One clear example of this tendency is the Supreme Court's decision in Secretary of the Interior v. California.[290] In that case the court interpreted § 307(c)(1) of the CZMA which requires federal activities "directly affecting" the coastal zone to be consistent

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[287]See Eichenberg, supra at 31.

[288]Id. at 33-35, U.S.C. § 1456(h); see 15 C.F.R. § 930.110 (1986).

[289]Fitzgerlad, supra note 273, at 149-52.

[290]464 U.S. 310 (1984).

with the CMP "to the maximum extent practicable." The court held that § 307 does not apply to the sale of oil and gas leases on the continental shelf because it is not an actively "directly affecting" the coastal zone. The court viewed the purpose of the CZMA as "to promote cooperation between federal and state agencies. . . ."[291] The court looked to several provisions of the statute such as 43 U.S.C. § 1345(a) which requires a state Governor's recommendation to be accepted . . . if they strike a reasonable balance between local and national interests"[292] to form this view. As the court read the CZMA, states had the power to "veto" a federal activity as inconsistent with the CMP subject only to an override by the Secretary of Commerce. This power was a major factor in the court's decision; so unusual was a state veto power that the court titled the scales in favor of the federal agency by engaging in a strained reading of the statute to prevent the exercise of that power. The result was to advance federal objectives, portrayed as national need, over state concerns.[293]

The second "rebellion" has been called the "sagebrush rebellion."[294] What this describes is a struggle for power between the states and Federal government over what uses the government may make of Federal lands, most of which are in the Western United

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[291] Id. at 318.

[292] Id. at 341.

[293] Id. at 342.

[294] Cowart and Fairfax, Public Lands Federalism: Judicial Theory and Administrative Reality, 15 Ecol. L. Quart. 375 (1988).

States. Traditionally, the control over federal lands was completely in the hands of the federal government, but with the advent of environmental consciousness, state and local governments have demanded a voice in decisions that will have adverse local impacts. Many Federal programs are advanced in the interest of the entire nation, but will cause local environmental degradation. the Western states' reaction to President Carter's plan to solve the nation's energy crisis by mining western coal was reflected in a popular bumper sticker referring to those in the East in need of energy sources: "Let the Bastards Freeze in the Dark." There was a marked unwillingness to sacrifice local interests for a national good.[295]

States have sought a partnership with the Federal government in Federal lands management. The "sagebrush" rebellion demonstrated the states' increased political power to compel their partnership. The MX missile project's delay and ultimate resolution was an example of state political power defeating a program proposed for national goals. The DOD preferred MX plan involved the use of thousands of square miles of federal lands over which railroad tracks would be built to allow the missiles to be transported in railway cars from location to location within the vast Federal reservation. The plan's purpose was to deter any preemptive first strike aimed at destroying this nation's land-based missiles. By moving the missiles they would become much more

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[295] Id. at 404.

difficult targets to find and destroy. The MX plan threatened a variety of adverse environmental impacts; there was even talk of "national sacrifice areas."[296] Local opposition to the plan became so heated that the Federal government withdrew the proposed plan and opted for the less secure system of siting the MX in preexisting missile silos in Wyoming and North Dakota.[297]

Encouraging state and local participation in decisions concerning nearby Federal lands is appropriate. The difficulty emerges when state and national interests conflict. Any solution to this problem must account for the increased state and local interest in environmental issues. Federal decisions and policies reflect a political accommodation of these local interests. Often Federal agencies do not take actions they are empowered to take because of the local pressures against such action.

Perhaps the best example of such Federal restraint is national policy concerning reserved water rights. Reserved water rights are propriety rights to water on Federal lands that were created by withdrawal of public lands from entry. Winters v. United States[298]

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[296]Id. at 405.

[297]Id. at 405. See also J. Edwards, Superweapon: The Making of MX (1982); Washington Post, November 17, 1989 at 18 col. 3. Congress has a long memory in these disputes, as do local environmental groups. These groups made the defeat of James E. Cason a top priority because of his record as an Interior Department official under James Watt. He was charged with consistently favoring private development in the management of public lands. He played a key role in Interior's decision to sell Federal oil shale tracts for $2.50 an acre, far below market value.

[298]207 U.S. 564, 577 (1908).

stated this right in broad terms, "The power of the Government to reserve the waters and exempt them from appropriation under state law is not denied and could not be." Yet this broad Federal property right has been under pressure because of the tremendous need for water in our dry western states. In United States v. New Mexico[299] the court narrowed the reserved water right to the water "necessary to fulfill the very purpose for which a federal reservation was created . . ." Secondary uses for water would have to be met by the United States acquiring water "in the same manner as any other private or public appropriator."[300] The court then so narrowly read the purpose of creating national forests as to exclude "aesthetic, environmental, recreational, or wildlife preservation purposes." If the court is willing to submit these purposes to state control, the power balance between the federal government and the states respecting Federal lands has shifted toward the states. That shift must be recognized as a significant conditioning factor. Equally important is the Federal policy not to exercise its power to demand reserved water rights. Instead, the policy is to acquire needed water through the existing state methods.

Another important conditioning factor that cannot be ignored is the increased capability and competence of EPA as an environmental regulator and enforcer. EPA has had tremendous

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[299] 438 U.S. 696, 708 (1978).

[300] Id. at 712.

success in reducing pollution through regulation. The accomplishments noted earlier in this paper relating to lead, sulfur dioxide and ozone levels have been gained because of EPA's ability to operate on a national basis.[301] EPA is organized into ten regions each with a Regional Administrator and full staff. The regions are the experts on problems within the area, but are under the overall control of the Headquarters Offices which provide coordination and national strategic planning.[302]

As a national enforcer, EPA has several important advantages over state authorities. One of the most crucial is the ability of EPA to deal effectively with "Ecoregions" which often cross several state boundaries. The landscape of the United States is the result of specific combinations of weather patterns, vegetation, and land forms. Variation in local areas that affect entire regions must be accounted for in developing sound environmental standards. The EPA research laboratory at Corvallis, Oregon as developed an approach which identified seventy-six "homogeneous ecoregions"[303] in the United States. EPA is working to develop standards specifically designed for these ecoregions. The ecoregion approach can only be effectively applied on a national basis and has demonstrated its usefulness already in protecting aquatic

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[301]Environmental Progress and Challenges, supra note 204, at 5.

[302]Federal Facility Compliance Strategy, supra note 4, at VIII-1.

[303]Environmental programs and challenges, supra note 208, at 51.

resources.

EPA is also more capable of providing national enforcement over federal agencies. A regulator must have authority coextensive with the entity it is charged with regulating. Only EPA has such a broad environmental enforcement mechanism. The mechanism is already in place for EPA's enforcement of Federal facilities in the Federal Facilities Compliance Strategy.[304] Procedures to resolve disputes and ensure compliance have been implemented. EPA is experienced with the regulation of Federal agencies while most states have no experience or systems in place to provide effective regulation. The deficiencies in EPA's enforcement regime can be fixed more efficiently than granting states full enforcement control over Federal facilities.

Doubts about the ability of one Federal agency to regulate another have proved unfounded. An extensive study of EPA's efforts to regulate the TVA clearly demonstrates that, given the necessary authority, the EPA is an efficient and tough regulator. This study found that the "interplay of social, economic, and political forces" occurring during intra governmental regulation led to a "new version of constitutional checks and balances."[305] The study found that an agency like EPA was less vulnerable to "capture" by the regulated agency because the relationship would always be an

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[304]Supra note 4.

[305]Durant, supra note 13, at 8.

adversarial rather than cooperative one.[306] Indeed, the only time that EPA was not providing adequate enforcement was during the early years when it had not yet developed the expertise to fully understand the pollution issues involved. Once that expertise was developed, EPA was able to stand firm in regulating TVA. Many states are not able to provide that level of knowledge and skill and would be at a disadvantage in regulating a powerful Federal agency.

The study found that once EPA obtained sufficient leverage it was able to compel compliance by TVA. The leverage came from the initiation of a citizen suit. As with any negotiation, power is a significant factor in inducing a favorable settlement. Another facet of this study disclosed that EPA was better able to enforce compliance with the CWA than were states.[307] When the administration of the National Pollution Discharge Elimination System was assigned to EPA rather than the states in 1972, the system operated more efficiently. There were clearer duties and quicker compliance. Another advantage of EPA over the states was the ability of EPA to withstand socioeconomic pressure. States were found to bend to that pressure more easily than EPA.[308]

EPA was able to effectively regulate another Federal agency in part because it understood the agency's national mission. It

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[306] Id. at 121.

[307] Id. at 78.

[308] Id. at 116.

was able to force the TVA to internalize the true costs of energy production, including social costs, whereas in the past those costs had been born by those affected by TVA's pollution. State officials that had traditionally supported the agency operations were simply unable to effectively regulate. As noted earlier, the state of Tennessee chose to remain completely out of litigation against TVA. The danger of agency "caputre" is greater where the state agency is the regulator.

Agency capture is always a danger when an administrative agency has a limited regulatory audience. EPA's audience is far broader than any state's. Moreover, the building alliance of "regulators, public interest groups and the media will dominate the politics of the new social regulation." What has been referred to as this "rubber triangle" should prevent any tendency toward agency capture.[309] The only comprehensive longitudinal study on the effects of intergovernmental regulation provides solid evidence that this is the most efficient and effective way to regulate Federal agencies.

A conditioning factor which can not be ignored is the effect of the Federal budgetary process on the ability of a Federal agency to comply with pollution control measures. In many cases, a Federal agency may be quite willing or even anxious to fully comply with environmental laws, but be unable to do so because of lack of funds. In this situation the Anti Deficiency Act prohibits an

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[309] Id. at 136.

agency from spending money which has not been appropriated for that purpose.[310] Because there are no competitors for most Federal agencies, TVA is an exception, there is no possibility of being put at a competitive disadvantage by investing in pollution control measures. Therefore there exists no economic disincentive to spending for environmental compliance. The Federal budget process is a long term affair. If a state imposes a penalty on a Federal agency, that agency cannot simply dip into past revenues or cut shareholders' dividends to come up with funds to pay the fine.

Fines may be appropriate in the private sector where it is EPA's strategy to remove any economic benefit from noncompliance by imposing a fine to take away this benefit. Yet this makes little sense for Federal agencies which do not operate on a profit basis. The public is punished by fines and penalties against these agencies. Moreover, the vast majority of Federal facility noncompliance is a result of past, not present, pollution. These old sites of contamination can be cleaned up, but the cleanup process takes time and money. Congress and the Executive must set appropriate goals and priorities for this cleanup process. Allowing a state to fine an agency for failing to cleanup faster than allowed under the Federal plan and funding program makes no sense.

The impact of this conditioning factor is highlighted under the Gramm-Rudmann Balanced Budget and Emergency Deficit Control

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[310] 31 U.S.C. § 655.

Act of 1985. If budget reduction goals are not met, as there were not for the fiscal year 1990 budget, an across the board ten percent reduction is mandated. This across the board cut went into effect in the fall of 1989 and President Bush indicated his willingness to allow the cuts to become permanent.[311] Such a cut would take away a portion of the funds that had been budgeted for environmental cleanup and perhaps put an agency into a noncompliance status. A state agency with the power to fine a Federal facility for noncompliance could subvert Federal law and policy by reaching into the Federal treasury in defiance of the mandated budget acts.

VI. INVENTION AND EVALUATION OF POLICY ALTERNATIVE.

The appropriate policy alternative must meet the goals articulated in part II of this paper. Compliance with environmental statutes must be fostered while allowing Federal agencies to perform national missions efficiently without undue restriction. Local and national interests must both be accounted for in a system of enforcement that promotes the ordered federalism envisioned in the Constitution.

Each of these goals can be achieved with several modifications to the existing enforcement regime. These modifications will not burden the Federal treasury or create additional bureaucratic encumbrances. First, sovereign immunity for Federal facilities with respect to federal environmental statutes should be abrogated

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[311] Washington Post, October 17, 1989 at 4 col. 1.

completely, reserving only a Presidential exemption for situations involving national security or a Presidential determination of "the best interests of the American people." Second, EPA should be designated as the sole governmental body with authority to enforce environmental statutes against Federal agencies. In performing this enforcement role EPA must have every enforcement option in its arsenal available for use against Federal agencies. Abrogation of both sovereign immunity and the unitary executive theory will give EPA the tools it needs to ensure compliance. Third, state and local governments may join in any settlement negotiations, litigation, or other alternate dispute resolution process involving EPA and a federal facility located within its borders. Fourth, state and local governments are precluded from regulating Federal agencies, or enforcing environmental statutes against Federal agencies. Fifth, the Justice Department must be precluded from representing two Federal agencies in any litigation. If EPA requests DOJ representation, then that representation must be provided leaving the defendant Federal agency to provide its attorneys in any litigation involving EPA. Finally, citizen suits against Federal agencies should be actively fostered and supported by EPA and the courts.

Sovereign immunity has been called the "most anachronistic and pernicious"[312] doctrine preventing environmental enforcement. Its abrogation will give EPA the leverage it needs to fully enforce

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[312]Sax, supra note 245, at xi.

environmental statutes against federal agencies. The leverage will not only induce compliance, but reduce the delays in enforcement that have been cause for criticism of both EPA and Federal agencies. Litigation should decrease as Federal agencies are deprived of their most effective shield to environmental suits. Without this shield, productive negotiation should proceed and yield compliance agreements that are stringent, yet with EPA's national perspective, fair to the agency involved.

Designation of EPA as the sole enforcement authority over federal agencies will eliminate the problem of states usurping control over national missions. EPA will also be able to regulate more efficiently on a national level than can states which are unable or unwilling to fully consider national goals. The "worst first" policy of cleanup at Federal agencies will not be inhibited by overzealous state enforcement. Congress will likely be pressured by constituents to provide funds for faster cleanup of federal facilities and that pressure will prompt the legislature to set clearer national priorities for cleanup. States will not be able to raid the federal treasury through fines and penalties that do nothing more than penalize the American public.

The unitary Executive theory has no role to play where two federal agencies are paired as regulator and regulated body. The adverse interest in such a case is clear. Justice Frankfurter called this issue correctly in 1939 when he wrote that there is a clear difference between the United States and a mere Federal

agency as a defendant in any litigation.[313] He would have allowed suit against a Federal agency in situations otherwise precluded by sovereign immunity. Justice Frankfurter recognized that there will be cases in which national interests pull in different directions with enough force to ensure true adverseness between Federal agencies.

When it is necessary for EPA to bring a Federal agency into court it is absolutely essential that there be DOJ representation of EPA. The lawyers of the United States should represent the enforcer of the nation's laws not the regulated agency. These agencies are fully able to provide staff attorneys as litigators in such suits. Most agencies have in place or are forming litigation groups quite able to handle any important lawsuits. This step makes it clear that the agency and the EPA are adverse parties. Such separation is crucial for EPA to act as an enforcer.

Citizen suits provide a check on the whole process. If EPA is not acting aggressively enough as an enforcer, a citizen suit is appropriate. Where local interests need a voice the citizen suit provides the purest message of the true local interest undiluted by a state or municipal bureaucracy. The sound of the preservationist among the populace will yield the truest standard for EPA and the federal government. Justice Carrigan in Colorado v. Dept. of the Army recognized this when he wrote:

> Sites like the arsenal . . . must be considered in the long perspective of generations yet unborn and centuries

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[313] Keifer and Keifer v. Reconstruction Finance Corp., 306 U.S. 381 at 388-89 (1939).

> still far over time's horizon. Indeed, if (federal) . . . action fails to achieve an adequate cleanup, it is the people of Colorado who ultimately must pay . . . It is not in appropriate that the present and future victims of this poison legacy . . . should have a voice . . .[314]

VII. CONCLUSION.

The struggle for power to enforce environmental statutes has produced a serious conflict between the Federal government and the states that threatens the very essence of federalism. States are asserting claims for control over Federal agencies that were heretofore unthinkable. For the past seventeen years Congress has been the solid ally of states in their battle for power. The Executive has staunchly resisted any transfer of power to the states. The courts have for the most part sided with the federal government, often using the doctrine of sovereign immunity to defeat state challenges.

A clear and consistent answer is needed to prevent this heated struggle from intensifying. The answer offered by the One Hundred First Congress wold give complete enforcement authority, and hence control, over Federal agencies to the states. This inverted federalism does not give appropriate deference to national missions and exalts the parochial interests of states to a dangerous level. The solution offered by Congress will not end the struggle, rather it will intensify as national concerns are sacrificed to local interests.

An appropriate solution offered by this paper is to grant full

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[314] Colorado v. Dep't of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989).

enforcement authority over Federal agencies to the EPA. To date the EPA has not had the power to compel compliance by another federal agency or to enforce compliance in the courts. The "unitary executive" policy which has denied this power to EPA should be abrogated. EPA has proved itself an efficient and vigorous environmental enforcer when given the necessary authority. As a national agency, EPA has tremendous advantages over state enforcement bodies. EPA is also better situated to take account of the national issues at stake regarding enforcement of Federal agencies. EPA has a Federal Facility Compliance Strategy in place that accounts for important issues such as national security matters and the federal budgetary process. Furthermore, EPA has proven itself capable of regulating federal agencies. The only long term longitudinal study done on this issue concluded that EPA with, necessary authority performs well as a Federal agency regulator.

The diverse viewpoints of our citizenry toward environmental matters must also receive full voice. Preservationists should have a voice in determining how Federal facilities comply with environmental statutes. Citizen suits provide this voice and should be encouraged and, where appropriate, supported by EPA. There may be wide ranges of opinion on environmental issues, for example, the great preservationist John Muir called sheep "hooved locusts."[315] But these views must be fully considered in making

[315]Mountains Without Handrails, supra note 258, at 7.

any decisions concerning the environment because there is no more universal national value than preserving a clean and safe environment.

Preservationist values are not exclusive to the private domain. EPA supports and defends these values nationwide as do other governmental agencies. Even in time of war the preservationists within the Federal government have stood firm to defend our national heritage. During World War II there was a tremendous demand for Sitka Spruce for use in building military aircraft. Loggers and the aircraft industry identified an expanse of giant and ancient Sitka Spruce in the Cascade Wilderness that would satisfy this need. Logging would also destroy this primeval forest. By looking for and finding other alternatives, a government agency was able to withstand pressure from other government agencies and private businesses even during a national emergency. By doing so, a national treasure was saved and the war effort was not hindered.[316]

The competing goals in the Sitka Spruce example are the same goals that must be satisfied presently and in years to come. An environmental enforcement regime which has the power to protect our national heritage, yet with a federal character that will account for nationally important missions must be implemented. An empowered EPA fully backed and support by citizen suits will meet these goals.

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[316] Id. at 65.