

EPA and Its Sisters at 30: Devolution, Revolution, or Reform?

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The author is Professor of Law and Co-Director, Environmental Law Clinic, University of Maryland School of Law. This piece is dedicated to my wonderful students, clients, and colleagues: Catherine DeLorey, Melanie Flynn, Terry Harris, Rose Hindla, James Lichty, Jacqueline Savitz, Daniel Smith, Steven Solow, Katherine Squibb, and Wade Wilson, who followed every tortuous twist of the Bethlehem Steel permit dispute to discover the truth. I am also grateful to participants in the conference at which this piece was first presented: "EPA at Thirty: Evaluating and Improving the Environmental Protection Agency," held at Duke Law School on Dec. 7-8, 2000, and especially to the organizers of that meeting, Richard Lazarus, Robert Percival, and Christopher Schroeder. Thanks also to Eileen Gauna and Robert Kuehn for their comments and encouragement, and to Jessica Stuart for research assistance.

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A Cautionary Tale

Let us begin with a cautionary and, unfortunately, true tale. The Bethlehem Steel facility at Sparrow's Point, Maryland, is among the largest integrated steel mills in the country, with multiple production lines and a new \$ 300 million, state-of-the-art cold rolling mill.¹ With a capacity of 3.7 million tons of steel annually, the plant is a classic "Rust Belt" employer, anchoring Maryland's economy with some 4,000 unionized jobs.²

The plant is also the 48th largest discharger of toxic metals to surface waters in the nation, and the second largest discharger of persistent toxic metals to the Chesapeake Bay, with 43,150 pounds reported in the 1997 toxic release inventory (TRI).³ Its effluent travels from the Patapsco River to the Baltimore Harbor and from there to the Chesapeake Bay. The Baltimore Harbor is one of three "toxic hot spots" afflicting the Chesapeake Bay.⁴ The Baltimore Harbor is considered a sufficiently serious threat to the Chesapeake Bay that the Maryland Department of the Environment (MDE) has announced plans to issue new, more stringent, water quality-based standards, or total maximum daily loads (TMDLs), for toxic substances.⁵

In 1985, the state of Maryland, operating under authority delegated by the U.S. Environmental Protection Agency (EPA), issued a national pollutant discharge elimination system (NPDES) permit (1985 Permit) to the Sparrow's Point plant.⁶ The 1985 Permit reflected technology-based standards for a variety of pollutants, including total suspended solids (TSS), oil and grease, chromium, lead, zinc, and dissolved oxygen.⁷ Soon after the 1985 Permit was issued, state regulators signed a consent decree (1985 Consent Decree) with the company, modifying the permit's limits as follows:⁸

Figure 1: Comparison of Bethlehem Steel 1985 Permit and Consent Decree Limits

	1985 Permit Limits	1985 Consent Decree Limits	Percent Increase
TSS - Monthly Average	16,656	51,909	212%
TSS - Daily Maximum	43,359	112,343	159%
Oil & Grease - Monthly Avg.	5,388	11,860	120%

Oil & Grease - Daily Max.	11,498	35,580	209%
Chromium - Monthly Avg.	59.7	454	660%
Chromium - Daily Max.	114.8	1,362	1,086%
Lead - Monthly Average	31.8	351	1,004%
Lead - Daily Maximum	78.8	1,053	1,236%
Zinc - Monthly Average	73.1	991	1,256%
Zinc - Daily Maximum	171.4	2,973	1,635%
Dissolved Oxygen	5.0	4.0	-20%

Under the 1985 Consent Decree, the revised limits were supposed to be effective for three years, in order to give the company time to upgrade its treatment facilities.⁹ Once those improvements were complete, and the MDE made a separate determination regarding the "net credits" to award the facility, the 1985 Consent Decree would expire and the [31 ELR 11087] 1985 Permit would go into effect. The MDE never made that determination, and the 1985 Consent Decree's alternative numbers remained in effect until 2001, when a new permit and consent decree were negotiated.¹⁰

Although the 1985 Consent Decree's limits appear outrageous on paper, their true import depends of course on what the company actually discharged over the period during which the inflated standards remained effective. While the company upgraded its treatment facilities as required in 1985, those improvements clearly were not effective. According to the facility's discharge monitoring reports (DMRs), during the period from January 1998 to May 2000, the facility violated the 1985 Permit's daily maximum limit for TSS 7 times; its TSS monthly average limit 14 times; and its standard for dissolved oxygen 28 times.¹¹ The 1985 Consent Decree converted these violations into two, none, and one, respectively.

To add insult to injury, the 1985 Consent Decree not only imposed limits more lenient than best available technology for chromium, lead, and zinc, but allowed the company to test its effluent by first filtering out solid particles of the metals and then measuring only the levels of "soluble" metals.¹² This practice violates federal regulations, which require compliance with permit limits to be measured in terms of "total recoverable metals."¹³ In fact, federal prosecutors brought criminal charges against an individual for tampering with samples using the same method that MDE sanctioned for Bethlehem Steel.¹⁴

The 1985 Permit was issued for a five-year term and expired in 1990. Bethlehem filed an application for renewal that entitled it to continue to operate under the old standards, as modified by the 1985 Consent Decree.¹⁵ The company and state regulators then proceeded to spend more than a decade debating the terms of a new permit.

Meanwhile, back in the real world, throughout the long process of rewriting the 1985 Permit, Bethlehem conducted business as usual. In 1998, it announced construction of a brand new cold rolling mill that would cost \$ 300 million, eliminate 400 jobs, and put the company back on the worldwide steel-making map.¹⁶ In May 2000, amidst great fanfare, the ribbon was cut on this facility. The company announced that the new mill, which includes a new "pickler" that bathes the steel in hydrochloric acid, would replace its two old cold mills by the end of 2000, bringing its capacity up to 1.5 million tons of steel annually.¹⁷

The Clean Water Act (CWA) defines a "new source" as "any source, the construction of which is commenced after the publication of proposed regulations" imposing standards on the relevant industrial process.¹⁸ EPA regulations clarify this definition, describing a new source as one that "totally replaces the process or production equipment that causes the discharge of pollutants at an existing source."¹⁹ In 1984, EPA issued new source performance standards (NSPS) for cold rolling mills that would result in pollution reductions of 97.5% for the company's new mill and 77% for the mill's acid pickler.²⁰ Yet Bethlehem flipped the switch on the new mill without first obtaining a permit that incorporates these standards. The company did notify the MDE permit writer in charge of its renewal application, who assented to the startup.²¹

In the fall of 2000, for the first time in at least two decades, EPA Region III sent the MDE both "general" and "specific" objections letters, the threshold step in a process that could result in the Agency asserting authority to "pull" the Bethlehem Steel permit from state regulatory control in order to draft a different document acceptable to federal regulators.²² Everyone's attention immediately shifted to Philadelphia, with local environmentalists and the company's top officials meeting with senior federal and state regulators.²³ On the eve of his departure from office at the end of the Clinton Administration, Region III Administrator Bradley Campbell put the finishing touches on a new permit and consent decree endorsed by all of the disparate participants in those negotiations.²⁴

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Although this particular cautionary tale had a happy ending, the resources required to achieve that result were extraordinary and could not possibly be brought to bear on the dozens of other similar permit disputes now pending. There is no hope of recouping the damage already done to the Chesapeake Bay's ecology, which in itself is Maryland's most lucrative commercial enterprise, contributing an estimated \$ 31.6 billion to the Maryland and Virginia region in 1987, the last year for which figures are available.²⁵ Until fundamental changes are made in the institutional dynamics that produce such fiascos, history will undoubtedly repeat itself, not just in Maryland, but nationwide.

Policy by Anecdote

The academy, if not the legislature, is justifiably suspicious of policymaking by anecdote, and I am socialized enough to stop short of suggesting that the Bethlehem Steel story alone should drive us to reverse the strong trend toward devolution that is one of the three or four major characteristics of EPA's affairs at the dawn of the 21st century. Rather, I invoke it to suggest that we take a careful look at the checks and balances we have in place both to prevent and to respond to such situations. The Bethlehem Steel permit may or may not be "ground zero" in an epidemic of profound regulatory failures at the state and local level. Regardless, it represents the precise scenario that motivated the creation of an administrative state grounded in federalism.

Whether one describes the problem as Agency capture, bureaucratic inertia, failed political will, the tension between job creation and protection of the environment, or the systematic de-funding of government at all levels, the theory animating EPA's creation three decades ago was that a system of federal standard-setting and state implementation was the best we could do to keep these destructive influences at bay. If the safeguards of environmental federalism fail us even in the most extreme of situations, and violations of the law are sanctioned by state regulators without anyone noticing for 15 years, we must think twice about diminishing federal authority any further.

Before launching into that more tempered analysis, however, it is worth reviewing the reasons why the Bethlehem Steel situation may well be exemplary of broader and deeper problems with state and local government. These reasons fall into two categories: Maryland's individual characteristics and the manifestation of similar problems in the implementation of the CWA's NPDES program nationwide.

Maryland is one of the five political jurisdictions that hosts the Chesapeake Bay, one of the world's great natural resources, and that privilege has captured the imagination of its citizens for many decades. A self-described environmentalist, moderate Democrat Parris Glendening, has governed the state for six years. To the consternation of Maryland industrialists, Glendening appointed Jane Nishida as his MDE Secretary; she was the head of the Maryland office of the Chesapeake Bay Foundation at the time of her appointment.²⁶ In the wake of outbreaks of *Pfiesteria piscicida* (*Pfiesteria*) in the Bay's tributaries, Glendening took an aggressive stance, pushing through legislation imposing new controls on nonpoint runoff from poultry farms while his counter-parts in Delaware and Virginia hung back, fearful of offending the farmer lobby.²⁷ With Nishida's help, Glendening persuaded the legislature to pass one of the nation's first "smart growth" initiatives.²⁸

Nishida enjoys a cordial relationship with her EPA Region III colleagues, and Maryland was one of the first states to sign a performance partnership agreement (PPA) under former EPA Administrator Carol Browner's initiative to accomplish broader and faster devolution, the National Environmental Performance Partnership System (NEPPS).²⁹ Indeed, in the family of states included in EPA Region III, Maryland has the reputation of being a very good citizen, especially in comparison to its delinquent and incorrigible sister, the state of Virginia under conservative Republican leadership.

Of course, diligent students of the Glendening record understand that this reality, like most others, is not as rosy as it seems. Nishida's MDE, despite her enlightened leadership, has a weak enforcement record, especially with respect to major industries within the state.³⁰ Glendening's Smart Growth Initiative has been criticized for focusing on up-scale projects in the inner city, at the expense of low-income neighborhoods.³¹ *Pfiesteria* and nutrient loading in the Chesapeake Bay remain very difficult problems.

Nevertheless, Maryland is considered among the most environmentally conscious states in the country, with a governor who advertises his track record on those issues. The state has participated in the economic recovery of the last decade and has bright prospects for the future. Given these circumstances, it is more likely than not that the collapse of regulatory competence suggested by the Bethlehem Steel saga is not an isolated instance of rogue behavior at the state level.

National statistics confirm this hypothesis. In 1999, then-EPA Administrator Browner was compelled to report to Congress that delays in renewing expired NPDES permits were a "material weakness" in EPA's implementation of its statutory mandates.³² In 1999, EPA promised to reduce the overall number of expired permits to 20% at the end of calendar year 1999, and to 10% at the end of calendar

year 2001, primarily by providing additional support to the 43 states delegated to implement the NPDES program, although no amount of money was mentioned.³³ EPA not only [31 ELR 11089] failed to meet this goal, it fell further behind. By March 2000, senior officials admitted that the backlog of expired permits was increasing in 25 states, and that only 15 states would comply with the 2001 goals. Nearly one-half the facilities operating on expired permits discharge into waters classified as "impaired" under the CWA.³⁴

As mentioned earlier, companies that file timely applications for new permits are legally entitled to operate indefinitely on an expired permit so long as they do not build any new sources.³⁵ Lengthy delays in the permitting process nullify the effluent limitations and water quality standards developed by EPA over the last several years. Apart from the environmental degradation caused by more polluted discharges, expirations are unfair to competitors and, in some industries, may even serve as a significant barrier to new entrants.

The NPDES permit process is incredibly opaque and inscrutable, involving lengthy draft permits and thousands of pages of regulations, guidance documents, manuals for permit writers, and industrywide studies of regulatory alternatives. All of these characterizations apply with equal force to permitting under the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA).³⁶

While I have no way to prove it, I would be shocked to find anyone who would disagree with the assertion that public participation in the process of renewing existing permits is virtually nonexistent. Behind the scenes, the process amounts to a uneven struggle between the superior technical resources of the permittee and federal and state bureaucrats barely in control of their workloads. As long as it is cheaper to churn out data and engage in extensive debates about arcane conditions, permittees have only one incentive to bring the process to conclusion: their need to construct and operate new sources.

In Bethlehem Steel's case, even that incentive failed. State regulators agreed to allow the company to operate a new source, months before a draft permit was issued for public comment, indicating that permit writers at the lowest level of the bureaucracy were sufficiently politicized that they did nothing to thwart, and much to encourage, the company's efforts.³⁷

EPA Region III, admirable in so many respects, did not make the connection between the very public opening of the new cold rolling mill, the age of the expired permit, and the applicability of NSPS to the new portion of the facility. Instead, EPA Region III learned about the situation through constant advocacy by local environmentalists, who were in the rare position of having free legal and technical help to unravel the dense paper record compiled by the MDE and the company.³⁸

The next section of this Article explains why EPA and the states find it so difficult to address the problems exemplified by the Bethlehem Steel situation, as well as other, less serious versions of the same institutional failures. It then considers the first principles that should guide devolution in the future, advocating a return to more balanced federalism. It concludes with proposals to accomplish accountable devolution, as opposed to the unrestricted transfer of authority advanced by EPA's most avid critics.

In the wake of the 2000 presidential election, our national political dialogue is fraught with speculation about the condition of our democratic institutions at the millennium. While the outcomes at stake for EPA and her sisters are less portentous, they have one corrosive effect that is acknowledged too rarely. As long as we have complex environmental laws on the books, we risk the credibility of the entire system when they remain largely unenforced. Or, to frame the issue with admitted melodrama, the rule of law may well erode beyond easy repair if it is honored only by the few too foolish to understand their ability to escape it.

The Partnership at 30

Former Administrator Browner is but the most recent EPA Administrator to confront intractable tension in the Agency's relationship with its state and local sisters. Since William Ruckelshaus' first tour of duty, every EPA Administrator has struggled to implement programs that would restore comity to a relationship neither side can live without.³⁹ Browner's efforts to restore good will, if not parity, are the most ambitious ever attempted and come at a time when EPA itself is prey to overwhelming cross-currents of political opinion.

In the waning days of Browner's unprecedented eight years as head of EPA, the federal/state relationship had improved substantially. Compared to the outright nastiness of the mid-1990s, when state officials accused EPA of being drunk with power and in pursuit of senseless minutiae, courtesy once more reigns and outbreaks of open warfare are rare. As mentioned earlier, Browner's signature program, the NEPPS, not only allows state regulators to set their own substantive priorities, it gives them substantially greater autonomy with respect to the federal funding they receive.⁴⁰ Some version of this program, if not NEPPS itself, will almost certainly continue during the regime of Browner's replacement, former New Jersey Republican Governor Christine Todd Whitman.

NEPPS was initially designed to offer different degrees of devolution, depending on an evaluation of a state's actual performance. This "leadership track" dropped out of the program early on because EPA, which should have known better, realized that it could not grade states in such a high-profile endeavor without suffering a debilitating political backlash.⁴¹ As documented by the U.S. General Accounting Office (GAO), the results is that every state gets to participate in agreements that officially grant them greater autonomy, while EPA regional offices remain free to micro-manage [31 ELR 11090] unofficially.⁴² In some places, EPA staff give the states free rein to do what they wish, while in others EPA staff continue to engage in daily oversight. The debilitating and paradoxical legacy of these battles is intense frustration at the state level and a clear policy of noninterference on major matters requiring the expenditure of political capital by EPA's senior leadership, a condition that is also likely to continue during Whitman's tenure. In sum, it is not yet foreseeable when—if ever—EPA will exert systematically aggressive oversight regarding state performance of crucial regulatory tasks like the Bethlehem Steel permit or, for that matter, resolve to leave stronger states alone so that it can focus its limited resources on the highest priority regulatory failures.

Regardless of the swings in the pendulum of environmental policy, there are practical impediments to such oversight that dwarf the importance of political atmosphere.⁴³ EPA has never withdrawn a state's delegated authority under any environmental statute.⁴⁴ To be sure, the Agency regularly threatens behind-the-scenes, and tantalizing glimpses of these intra-family fights occasionally surface. But EPA is understandably terrified of actually retrieving the authority to implement state programs because it has no built-in capacity to assume the workload and no foreseeable way of obtaining those resources.⁴⁵ Indeed, there are disconcerting indications that however frustrating state lapses may be, worse problems would occur on an EPA watch. For example, the rate of expired NPDES permits in the few states where EPA runs delegated programs is 44%—significantly higher than the 28% average nationwide.⁴⁶

When threats to withdraw authority are never exercised and, more to the point, do not seem feasible, they become incredible. In some ways, the marvel is that the states listen to EPA at all. The likely reason, of course, is that governors, no matter what their political bent, have no wish to throw themselves on this political third rail. They perceive threats to withdraw their authority as the political equivalent of being declared an enemy of the environment. State regulators leverage this well-founded sensitivity to extract support for the adoption of politically unpopular regulatory measures, achieving in those cases the same ultimate result as an actual withdrawal.

The problem with this system is the escalation of malfeasance that must occur before action is taken. Until regulatory controversies rise to the level of attracting media attention, federal and state regulators are free to quarrel privately, allowing debilitating mistakes to drift.

Further, resource shortfalls put EPA Region III in the position of depending on local environmentalists and their volunteer lawyers to make the case that the permit was not just delayed, but offensive. Maryland environmentalists stumbled on the expired permit problem two years before Browner acknowledged it, while they were working with a neighborhood group in South Baltimore to achieve relocation of some 80 households stranded in the middle of an industrial park.⁴⁷ One resident, who worked six days a week at a job that provided her with long hours of daytime tedium, was culling through a local newspaper to keep track of the activities of her neighbors, a group of large chemical plants. She found notice of a permit hearing for a company that had caused one in a series of explosions and fires only days before. When the community showed up en masse at the hearing to ventilate its fear and anger, state officials admitted that the permit had expired five years earlier. A search of permit databases revealed that permits for many of South Baltimore's largest factories were in the same situation.

It took literally hundreds of hours of work over a two-year period to come to grips with the substance of the Bethlehem Steel permit dispute. A substantial portion of this time was spent fighting over requests to review documents under the state's Freedom of Information Act. Once they had reconstructed a decade's worth of permit negotiations, local environmentalists faced the daunting prospect of convincing local media to run the story. EPA might have exerted control over the permit without media attention, especially under the leadership of its pro-active regional administrator. But in today's political climate, overcoming the company's resistance to more rigorous limits and keeping regulators focused on the task at hand too often requires an ongoing threat of exposure in the media.

It is possible, of course, that this small scandal will stiffen the spine of state regulators and increase the wariness of federal supervisors, at least in the short-run. However, unless substantial changes in the assumptions and administrative framework of federal oversight change, history teaches that this destructive cycle will occur over and over again. While any participant in the regulatory state must tolerate incremental progress toward efficiency and effectiveness, there are four factors at play in the Bethlehem Steel situation that suggest that the integrity of the system as a whole is imperiled.

First, it is inconceivable that the government will ever recover the economic benefits achieved by Bethlehem Steel as a result of permit delays that were perfectly legal. The company estimated in 1991, that it would cost \$ 40 million to build a treatment plant capable of meeting revised permit limits and argued that it could not afford that amount.⁴⁸ The company has had the use of that money for a decade. The rudimentary premise of regulation is that as long as it costs less to evade standards, regulated entities have an

overpowering incentive to delay.

Second, the only realistic hedge on interminable permitting delays is industry's need to modify or replace equipment to the point that it becomes a new source that is illegal to operate under an expired permit. A catch-22 lurks in this dynamic, however. If companies are brazen enough to construct [31 ELR 11091] the new source without obtaining a new permit, regulators or citizens are left to prosecute the violation in litigation as costly as it is likely to be protracted. This phenomenon reverses the burden of regulation, imposing the costs of achieving compliance in the first instance on government and the public.

Third, the shifting of this burden places more pressure on the ultimate check and balance—citizen suit enforcement—than it can ever hope to support. It is extraordinarily difficult to raise the funding needed to retain technical experts and impossible to proceed without them. By the time a case is filed and discovery conducted, companies facing the prospect of losing can either negotiate a new permit providing a shield for their misconduct, or cease violations so that they can advance a *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*⁴⁹ defense. Courts are justifiably hesitant to trek through the permitting morass, and cannot be blamed for reacting with impatience to cases that the bureaucrats have in hand by the time a decision must be made.

To compound all of these troubling dynamics, EPA and its constituencies in Washington have moved beyond so-called first generation environmental problems and are now absorbed in the debate about how to solve "second generation" challenges such as nonpoint source pollution and global warming.⁵⁰ Somewhere along the way, a tacit assumption has taken hold that we can shelve any concern about first generation problems because we have them well under control. Whether couched in euphemistic terms by enthusiasts for "corporate environmentalism," or advocated by bureaucrats enervated by the thankless task of applying convoluted regulatory requirements in the field, the economic realities of permit delays demonstrate the fallacies of that complacency.

As we assess EPA and her sisters at 30, we would be better-served by revisiting the justifications for environmental federalism than proclaiming first generation problems off the table. Reforming the troubled federal/state partnership should begin with the negotiation of first principles that could lead to some rough consensus about the appropriate criteria for, in political science terms, "dividing the job."⁵¹

First Principles

As I have written before, a handful of principles justify a strong federal role in environmental protection: economies of scale in developing the scientific and technical foundation for regulation; transboundary pollution; distributive justice; and maintenance of a level playing field.⁵² On the other side of the equation, states have the right to be treated with respect and to be free of arbitrary micro-management. They can serve as "laboratories of democracy," as U.S. Supreme Court Justice Louis D. Brandeis opined,⁵³ although not at the expense of other first principles. Industry and the states also deserve some flexibility to tailor regulation to fit local conditions, but again only so long as the award of such variances depends on objective and immutable factors, e.g., climate or hydrogeology. To the extent that economic hardship justifies a relaxation of standards, those factors are taken into account as allowed by the law when EPA crafts the national rule.

These caveats on the state side of the equation may well suggest that I am biased in favor of strong central government. On a psychological level, I suppose I suffer from the common affliction of all children of the 1960s: the experiences of our generation suggest that the federal government is the better guardian of all progressive causes, from civil rights, to worker safety, to the Social Security system we will enter all too soon.

After years of exposure to EPA at its most exasperating, however, I am not suggesting that we resurrect the days when it felt freer to stomp on the states. For one thing, no one with the slightest pretense of pragmatism could entertain that outcome as a serious possibility, perhaps ever and certainly for a long time to come. The simple truth is that EPA cannot be successful in any endeavor without the active cooperation of the states, just as state environmental agencies cannot be successful without the active cooperation of EPA. The Agency's excessive indulgence of mutinous state officials in the last few years has not helped either side to see its self-interest, and the next administrator would do well to assume a less defensive tone.

The most logical way to explore first principles is to consider what EPA must do for the states and, with those boundaries established, to envision how the right measure of state autonomy can be preserved.

Regulatory Economies of Scale

In a recent report covering 2,863 organic chemicals produced or imported in amount above one million pounds annually, EPA concludes that there is no toxicity information available for 43% of such chemicals and that a full set of basic toxicity information is available for only 7%.⁵⁴ Our ignorance regarding the risks to public health posed by common pollutants is shocking, not least because we have the capacity to conduct the scientific inquiries necessary to develop this information, but have not made such research a priority.

The other dimension of the information deficit that undermines environmental protection concerns the actual state of the ambient environment. The fragmented and inconclusive efforts made thus far to characterize such conditions are the threshold hurdle that we must surmount in order to make significant progress in both cleaning up and preventing pollution.⁵⁵

[31 ELR 11092]

Finally, even if we understood the risks posed by common chemicals and could pinpoint their presence in the environment, we frequently lack the technology needed to mitigate them. The multi-billion dollar national effort to clean up toxic waste sites has foundered on the horns of this dilemma. Devolution, as well as other popular proposals to reform the existing system, must provide incentives to develop innovative pollution control technologies.

These yawning gaps in knowledge undermine regulatory initiatives at all levels, including and especially the adoption of a "performance-based" system that establishes goals and milestones, but leaves regulated entities to determine the best methods for achieving those results. Closing them is a task that deserves resources only the national government can provide, and it would be pointlessly inefficient to duplicate such efforts in each of the states.

Transboundary Pollution

The fact that jurisdictional boundaries are irrelevant to the transport of pollution, especially in air and water, is the most common justification for a strong federal role in protecting the environment. Closely related is the concern that local pollution harms natural resources of national importance, e.g., the Chesapeake Bay or the Grand Canyon. The unifying theme of the two arguments is that in a federalist system, people in a given locale should not have the exclusive power to make decisions affecting aspects of the environment valued by a different or broader group.

If we consider this factor in the context of the national government's obligation to protect the public health, it is even more compelling. The proposition that people in Chicago are not the appropriate group to decide whether to control air pollution that causes asthma among children in Philadelphia should not be controversial. Indeed, couched in these terms, it is difficult to imagine how radical devolution could be justified in the context of the nation's historical and constitutional commitment to the right of the individual to be free from assault by his neighbors.

Of course, it is possible to take these arguments too far. Many emissions do not travel beyond state lines. Whether or not pollution is transported, it causes harm in the immediate vicinity of the facility, giving state government ample motivation to take effective action. Lastly, there is the awkward fact that EPA has not done a very good job of addressing transboundary pollution.⁵⁶ Nevertheless, the only alternative to a federal agency responsible for mediating such disputes is a return to the bad old days of common-law nuisance litigation between states, an outcome that would ask judges with no expertise to do a job so complicated that bureaucratic experts have yet to conquer it.⁵⁷

Distributive Justice

After several years of trying, I have not yet succeeded in introducing the concept of distributive justice into the debate over environmental federalism, although Prof. Eileen Gauna's recent *Environmental Law Reporter* Article makes this case quite elegantly.⁵⁸ To raise the issue in an admittedly provocative format: are our citizens entitled to a floor of uniform environmental protection necessary to protect public health, as a matter of law, ethics, or shared values?

Some scholars have urged recognition of a constitutional right to a "clean" environment.⁵⁹ While this commentary is interesting intellectually and certainly well-intentioned, it has little chance of relieving us of the dilemmas posed by devolution any time soon. Achieving passage of a "clean environment" constitutional amendment, or persuading the courts to find the right embedded in the existing text, is but the first, very high hurdle. Defining a concept as amorphous as the right to a "clean" environment would take decades and, once again, there is no reason to think the courts are better suited than Congress or the executive branch to evaluate the

complex considerations that would underlie such decisions.

Regardless, the concept that people must receive equal protection under government programs should be assumed in a federal system. People unlucky enough to live in the country's most heavily industrialized areas should not be doomed to poorer health and shorter lives than those who use the products made in those areas but live in unaffected surroundings. The benefits of a national economy should not stop at the free exchange of goods, but should extend to the use of the nation's pooled resources to bear the costs of ameliorating the damage pollution causes to the public health.

Maintaining a Level Playing Field

The business community's strong interest in avoiding a "patchwork" of state regulatory requirements was a major motivation for enactment of federal environmental laws. To maintain the free flow of interstate commerce, companies doing business nationwide and internationally must be able to rely on a consistent system of uniform regulatory requirements. Bethlehem Steel's competitors have suffered significant harm, unless other states are as lax as Maryland, in which case EPA efforts to regulate the steel industry are truly a fraud on the public.

Ironically, this point is often obscured in the debate over devolution because the movement to accomplish reform of health and safety regulation is comprised of many interest groups that have forged temporary alliances to achieve their immediate goals. The most obvious devolutionists are the states themselves, and their generally conservative allies in Congress. These same congressional forces demand other reforms, including the imposition of requirements that EPA and other agencies prove that the benefits produced by a regulation will exceed its costs. Such proposals win the avid support of the business community, support that can lead to the misleading impression that industry also supports devolution.⁶⁰ [31 ELR 11093] As the history of modern federal environmental laws demonstrates, national uniformity is crucial to industry. Devolution that revived the specter of a patchwork of state environmental laws would be so damaging that the only plausible explanations for industry's support of the states' campaign for more autonomy are either short-sightedness or faith that the vast majority of states will scale back regulation.

The concept that industry in a global economy deserves a level national playing field is a more productive way to frame these issues than the rationale for centralized regulation that typically preoccupies us: that is, the possibility that states will "race to the bottom," weakening environmental protection in their competition for economic development. In the last few years, some scholars have challenged the belief that races between the states—no matter where they end up—are necessarily bad.⁶¹ They apply public choice theory, arguing that moving decisionmaking authority to the level of government closest to the people ensures that democratic and economically efficient decisions are made about the level of protection people are willing to finance and the level of pollution they are willing to tolerate. However intriguing these applications of economic theory, in the final analysis, the debate over the implications of interstate competition can be sidestepped without significantly affecting the remainder of the framework proposed above. The magnitude and content of such races are so difficult to identify that they provide a shaky foundation at best for calibrating the nature and scope of EPA's appropriate role.

Freedom From Micro-Management

A senior state environmental official once told me that EPA regional auditors objected when a video camera purchased with money from a federal grant to implement RCRA was used to document a CWA compliance inspection. Whether or not this particular story is true, it and others like it have the force of legend. Circulated and re-circulated, such anecdotes inspire anxiety and resentment far beyond the value of the money saved by federal audits, making comity between federal and state regulators much more difficult to achieve.

According to the Environmental Council of the States (ECOS), the federal share of funding to implement delegated programs has steadily declined, while the state share has risen dramatically.⁶² ECOS is an admittedly biased source, and EPA officials privately dispute these numbers. The fact remains, however, that the overall amount of federal funding is steadily shrinking at the same time that funding disputes remain a major irritant in EPA's relationship with the states. To combat these problems, the NEPPS program includes performance partnership grants, which are designed to convey federal funding with fewer strings attached.⁶³ The large majority of states have signed such agreements.

Although it would take significant courage, the next EPA administrator would be well-served by assigning audits of federal grants the lowest possible priority. The total amounts, when compared to the cost of regulatory failures at the state level, are not worth the friction caused by constant federal surveillance. In defense to allegations that she was ignoring waste, fraud, and abuse, the next administrator

should establish a more productive system of differential oversight, as discussed further below.

Laboratories of Democracy

EPA's first three decades are replete with examples of using states as laboratories for the incubation of new ideas. Consider the multiple examples of provisions in the federal statutes that use California rules as alternatives⁶⁴ or negative incentives.⁶⁵ Unfortunately, the ongoing debate over environmental federalism confuses this aspect of the states' role with more extreme demands that the states remain free to ignore federal statutory requirements by setting their own priorities without challenge. Two studies of NEPPS by the Environmental Law Institute have documented this phenomenon, although NEPPS has not been in effect long enough to evaluate its long-term ramifications.⁶⁶ As long as EPA tolerates this confusion, and mollifies the states by turning the other way when they shove unpopular federal programs off the table, the faster the crisis threatening the rule of law will grow. Only by insisting on compliance with statutory mandates will we compel disparate constituencies to collaborate on rewriting the law, an alternative far less dangerous to the system's integrity than reform through administrative nullification. Allowing the states to experiment freely with pilot projects that cover specific categories of facilities is far preferable to the diffuse and ineffective oversight that allows them to neglect federal standards without admitting they are doing so.

Overcoming One-Size-Fits-All

Disparaging so-called one-size-fits-all regulation has become the mantra of militant state regulators.⁶⁷ At the national level, it serves to amplify other critiques of command-and-control regulation, especially the proposition that uniform, technology-based standards are inefficient because they force all sources to use the same equipment, regardless of cost.⁶⁸ The charge that federal requirements are **[31 ELR 11094]** rigid has two components: the first is that federal programs overregulate in general and the second is that local conditions such as geology, hydrology, and climate make the requirement superfluous.

Most federal statutes contain variance or exemption provisions.⁶⁹ The reasons why federal and state regulators have difficulty exercising this authority remain elusive. The politics of appearing to favor a particular source undoubtedly play some role. Another cause may be the complexity of the variance procedure itself. In its anxiety about maintaining control, EPA may have imposed inordinate burdens of proof on states seeking to apply such exemptions. The intolerable result in an unknown number of cases is to drive the demand for regulatory relief underground where it is satisfied without any reasonable justification. Significant progress toward clarifying and easing the use of variances or exemptions could be made administratively, and the issue deserves elevation on EPA and the states' joint agenda.

Accountable Devolution

Restoring balance to its relationship with the states is arguably more important than any other domestic issue on EPA's agenda. By paying lip service to unrestricted devolution, neglecting meaningful oversight, and continuing to micro-manage, EPA finds itself constantly on the defensive at the national level, producing an atmosphere in which the regulatory failures exemplified by the Bethlehem Steel story can proliferate. Reform is possible in three areas: systemic reform, funding, and—most important of all in the short-run—differential oversight.

Systemic, "Performance-Based" Reform

Revolutionary changes are already underway in the methods used to keep EPA and the states accountable. Characterized generally as "performance-based" regulation, these new ideas have one overriding purpose: shifting the focus for measuring success from units of administrative action—the much-derided "beans"—to an ongoing assessment of the conditions of the ambient environment.⁷⁰ So, for example, a performance-based system would not focus on whether the Bethlehem Steel permit was expired, but instead would focus on the condition of the Patapsco River, the Baltimore Harbor, and the Chesapeake Bay. If any given type of contamination was a significant issue in these surface waters, Maryland would implement more stringent controls.

No one can plausibly argue that a command-and-control system based on a catalogue of possibly irrelevant administrative statistics is preferable to comprehensive and reliable performance-based accountability. To invoke yet again the Bethlehem Steel example, there is no question that we have Maryland's inertia to thank for dragging the substance of the permit into the limelight. Had state officials merely issued a renewal permit in a timely fashion, it is more likely than not that its contents would never have been scrutinized.

However, adopting a performance-based system and adopting a performance-based system *that is enforced* are two very different

propositions. Too often, proponents of performance-based systems ignore enforceability or, in other words, the crucial question of what happens when "goals" or "milestones" are missed. In the absence of mechanisms for enforcement, such systems are far less valuable because they must depend on public attention—and pressure—to achieve results, a condition precedent that is very difficult to meet, as the Bethlehem Steel parable also demonstrates.

That said, there is the further, awkward fact that the data gap that afflicts environmental policy throughout the nation confounds any smooth or timely transition to a performance-based system. We may be able to list water bodies as impaired, but we do not have enough information to develop effective water quality standards. It is impossible at this juncture to determine on the basis of existing information what levels of contamination by individual toxic metals afflict the Baltimore Harbor and the Chesapeake Bay. Confronted with the mandate to set TMDLs for the Baltimore Harbor, Maryland just initiated a multi-year study to determine those specifics.⁷¹

I have also written, perhaps ad nauseam, about the dangers of relying on incomplete and unreliable information to adopt performance-based standards prematurely. EPA's initial experiences with the Government Performance and Results Act (GPRA) demonstrate that the pressure to show results in order to justify their existence often brings out the worst in otherwise sensible human beings.⁷² To compensate for what it does not know, EPA reverts either to inane generalities or numbers that sound good but represent an artificially constrained vision of reality. States forced to document success on the basis of results are in an equally difficult position.

The only solution to this dilemma is more resources to support a concerted effort to determine the condition of the ambient environment, both as a baseline and as a means of tracking the regulatory performance. Generally, when I make this point, the sincere devolutionists in the audience hasten to agree. It is not yet possible, however, to discern any congressional commitment to providing such resources. Rather, news from Congress on environmental policy for the last one-half decade has focused primarily on the opposite action: conditioning appropriations on the abandonment of controversial regulatory approaches.⁷³

More resources, of course, will not entirely solve the problem. The states share a deep antipathy to EPA's quests [31 ELR 11095] for information; some even see it as an offensive effort to seize credit for accomplishments at the state level.⁷⁴ At times, these disputes become unusually destructive. As EPA has struggled to implement the GPRA over the last few years, quelling the state rebellion against its requests for performance-based information required months of shuttle diplomacy behind the scenes to negotiate a uniform set of data that must be reported by the states. The upshot of those negotiations was to diminish both the scope and the quality of data reported.⁷⁵

Unless and until we manage to break the stalemates over enforcement and data collection, and advocates of a performance-based system stop selling the theory in a vacuum uninformed by reality, this superior method of achieving accountability will serve instead as a convenient excuse for rolling back regulation without putting more effective approaches in place.

Funding

Consistent with its role as national technocrat, EPA would be well-served by a significant, *additional* appropriation to fund state collection efforts. Not only would this money purchase badly needed state cooperation sooner rather than later, it would give federal officials the leverage they need to demand that information is collected and analyzed as effectively and efficiently as possible.

The GAO recently reported that the threshold problem undermining efforts to characterize surface waters is that it is extraordinarily expensive to monitor the tens of thousands of river and stream miles, as well as lake acres, in the country.⁷⁶ This reality places a premium on the collection of statistically valid, uniformly handled samples from which broader trends can be extrapolated.

Increased federal funding for the implementation of delegated programs is unlikely unless one of two extraordinary events occurs. The first is an environmental crisis directly traceable to a state regulatory failure. Crises occur routinely—consider the Code Red days that have become routine in many cities. To soften congressional resistance to enlarging federal regulatory programs, the crisis would have to be much more momentous.

The second, equally unlikely, scenario would be a noble, if unprecedented, decision by the new administrator to depart from the tradition of her predecessors of stoically accepting White House refusals to increase EPA funding to the point that it can reclaim its credibility by carrying out its statutory mandates. By any objective measure, EPA is in desperate shape, having achieved, in *real* dollars, only about a 15% increase in its total budget since 1984, despite the subsequent passage of massive new reauthorizations of its core statutes, especially the 1990 CAA Amendments.⁷⁷ Although it is hard to envision any person who qualified for consideration as EPA administrator ever committing such an act of political self-sabotage, the greatest legacy a new administrator could bestow on the

Agency would be to explain this calamitous dilemma publicly.

State and local governments have spent much of the past decade complaining to anyone who will listen about the "unfunded" mandates EPA pushes down on its sisters. Those protests conveniently ignore state and local regulators' inability to continue to perform their most fundamental missions without federal standards. For example, no public drinking water system could exist for long without delivering sanitary water; federal regulations do local operators the favor of explaining how to achieve that goal. Debating such issues with state and local officials is frustrating and generally fruitless. But the heads of state environmental agencies would be better-served if they also considered the predicament presented by EPA's deterioration to the point where it cannot update and develop the mandates they need so badly. It is too late for states to hope that federal funding will come close to keeping up with federal mandates. It is past time for them to realize that anything they do to aid or abet the Agency's slow starvation presents great hazards for them.

Differential Oversight

Like most powerful political movements, devolution has supporters with disparate agendas. True believers think that the democratic advantages of government that is closer to the people outweigh virtually all of the weaknesses of government that is more vulnerable to capture by regulated industries and less able to afford the research necessary to support a complex regulatory regime. Others make a virtue of the latter characteristics. They are convinced that the appropriate balance between economic development and costly environmental protection is more likely to be achieved at the state and local levels, precisely because regulators will be more susceptible to industry influence and will not be tempted to invent ever more complicated ways to produce incremental reductions in pollution.

If all levels of government are relatively healthy, with resources sufficient to carry out their fundamental missions, this debate would mirror the debate over environmental policy at the national level. In such an ideal context, it would be possible to talk sensibly about whether we have done enough to protect the environment, or need to do more, and whether the environment deserves greater or less emphasis in relationship to other social and economic problems.

But when an unknown number of state governments are floundering to the point indicated by the Bethlehem Steel example, the debate is instead based on dishonest, even fraudulent, assumptions about the status quo. Devolutionists advance their arguments as if the states are capable of enforcing the law and the only problem is that they and their constituents happen to disagree with it. They ignore the possibility that the law is systematically nullified by administrative incompetence. In an era when congressional **[31 ELR 11096]** gridlock is unlikely to end soon, and the law is frozen on the books, the gap between what the law says and what regulated entities do becomes more and more dangerous.

Even radical devolutionists do not argue that environmental laws are unnecessary. By blithely assuming that EPA and the states are competent, as well as equally competent, they sidestep harder questions about whether, when, and how to reform the law, leaving us in a situation in which devolution may well precede reform. In the worst-case scenario, when reform occurs, EPA's administrative apparatus will have deteriorated to the point that we become dependent in the first instance on states that EPA cannot supervise, beginning the destructive cycle of scofflaw all over again.

In 1995, the National Academy of Public Administration (NAPA) published what became a very influential report; entitled *Setting Priorities, Getting Results*, it proposed a range of reforms in the ways EPA is organized, authorized, and administered.⁷⁸ The report's most prominent recommendation was that EPA should undertake the "accountable devolution" of national environmental programs, using a system of "differential oversight" that would reduce federal supervision "when it is not needed."⁷⁹

NAPA assumes that EPA will develop "outcome measures" or "performance indicators" that would be used to assess whether state activities actually improve environmental conditions, putting EPA in the position to subject the states to different degrees of scrutiny on the basis of their achievements, with "high-performing" states rewarded by more autonomy and low performers punished by more intensive review.⁸⁰

The word "punish" is mine, and NAPA undoubtedly would never use it. But the report is so enthusiastic about use of oversight as an incentive for better performance that it goes so far as to suggest that regulated industries would reduce pollution if they could be confident that EPA and state regulators would leave them alone. If less oversight is such a strong positive incentive, it follows that more oversight is a strong negative incentive, or punishment, for those who do not make the grade.

NAPA recognizes that differential oversight and the use of performance indicators will have negative outcomes in some states,

recommending that EPA maintain a "credible capacity" to withdraw delegations when warranted, perhaps creating specialized teams that could be deployed promptly to assume responsibility for specific programs.⁸¹ Differential oversight would serve the equally important roles of offering meaningful incentives to strong and capable states and providing a safety net for their weak and incompetent colleagues.

Before EPA can offer such incentives, it must develop criteria for drawing distinctions between the states. As discussed above, it will take a great deal of time and money to develop a true performance-based system. Oversight criteria must measure institutional capacity as an initial matter, converting only gradually to an approach that evaluates actual progress in protecting the environment.

At the outset, institutional capacity must be gauged by the much-denigrated counting of beans: how many inspections? how many enforcement actions? how many expired permits? To those statistics, some "yard stick" of ideal effort must be added. How many times *should* state inspectors visit facilities categorized as "major" holders of permits under the CWA? What level of enforcement *will create the perception* that regulated entities causing the worst environmental degradation run a real risk of discovery if their compliance falters? Which categories of permits are subject to new requirements and therefore *cannot be allowed to expire* for more than short periods?⁸²

The second key component of a system for evaluating state capacity is to place these measures of institutional adequacy in the context of indicia that gauge the environmental challenges the states may face. Where are polluting facilities located and what is the nature and scope of the human and ecological populations near them? How many areas are nonattainment for one or more of the CAA's national ambient air quality standards? How many river miles and lake acres must be monitored and how many of those are impaired? How much progress has the state made in crafting water quality-based criteria where technology-based limits have failed?

The final component is a judgmental method for determining whether a state is meeting expectations. This evaluation cannot be mathematically precise, but instead must reflect subjective consideration of the discrepancy between a state's resource commitment and the challenges it faces, as well as the prospects for mitigating the imbalance in the foreseeable future. Such judgments must be made on a program-specific basis. A state may be doing a decent job of implementing one major program but fall far short with respect to others. EPA must stand ready to take over programs that are deemed insufficient, on an interim or permanent basis.

The states may well bridle at the suggestion that they should be evaluated in this manner, especially publicly. The best response to this inevitable backlash is to counter with equally determined efforts to relinquish control of programs in states that make the grade. ECOS has been effective in its campaign to put EPA on the defensive by submerging its own membership's major policy differences under a demand for state autonomy. The surest way to restore equilibrium is to adopt a merit-based system that compels the states to compete on more-or-less objective terms, drawing them out from behind the united front they have constructed on the basis of their shared resentment of federal hegemony.

Devolution, Revolution, or Reform?

There is uncomfortable truth in the accusation that by focusing on what we have failed to do, especially given the far more serious environmental problems elsewhere in the world, people like me sound like chronic malcontents, out of touch with the nation's real needs. Two responses to this observation are almost certainly true. First, we have no idea how much trouble we are in, because we have not bothered to take systematic measurements. We do know that the reason the Cuyahoga River is not on fire anymore is the implementation of technology-based standards. The cautionary tale at the center of this piece suggests that even those standards are being nullified by hollow government at the state level; how often, when, where, and to what effect is impossible [31 ELR 11097] to say. I think it is much too often. But without systematic information, I cannot prove my case and, for that matter, those who disagree with me are unable to disprove it.

Second, it should not take a scholarly paper to demonstrate to anyone that state governments display widely varying institutional capacity and that devolution in Louisiana or Mississippi has different implications than devolution in California or New York. What we need to maintain progress is a system for evaluating states objectively, as opposed to another swing of the pendulum too far to the right.

¹ Kristine Henry, *New Era to Begin at Beth Steel; Sparrows Point Plant Starts Mill Today, Saving Facility*, BALTIMORE SUN, Mar. 24, 2000, at 1D.

² Kristine Henry, *Md. Manufacturing to Grow Little; Better Off: If There Is a National Slowdown, the State Should Fare Better Than Others Since Many of the Job Losses Have Already Occurred*, BALTIMORE SUN, Jan. 21, 2001, at 1D.

3. Top 50 U.S. Facilities Reporting Releases of Persistent Toxic Metals to U.S. Waters (TRI 1997) (unpublished report on file with the author).

4. Timothy B. Wheeler, *Reversing History of Toxic Pollution; Harbor: Maryland Officials Are Weighing Various Plans to Clean Up Baltimore's Polluted Harbor, Widely Recognized as One of Three Toxic "Hot Spots" in the Chesapeake Bay*, BALT. SUN, Aug. 6, 1996, at 1A.

5. *Id.*

6. In the Matter of Bethlehem Steel Corp., Sparrows Point Plant (Md. Dep't of Health & Mental Hygiene, 1985) (Consent Decree) (on file with the author) [hereinafter 1985 Consent Decree].

7. Technology-based standards are set on the basis of the best pollution control methods and equipment available in a regulated industrial sector. They may—or may not—protect water quality to the point that it is fishable, swimmable, or drinkable. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 729-33 (3d ed. 2000) [hereinafter PERCIVAL]. The Baltimore Harbor's status as a toxic hot spot decades after technology-based standards were imposed illustrates this problem, although it is important to acknowledge that technology-based standards were never actually implemented at Bethlehem Steel and may well have suffered a similar fate at other facilities that also discharge into the Baltimore Harbor.

8. *See* 1985 Consent Decree, *supra* note 6.

9. *Id.* at Att. B, Note A (consent decree to last three years); 1 (three-year term to give opportunity to upgrade facilities).

10. At that point, MDE finally issued the company a new permit, accompanied by a new consent decree providing still more time for it to achieve compliance. Press Release, Maryland Dep't of the Env't., No. NR004-01, *Baltimore Waters to Benefit From Huge Reductions in Pollutants: MDE Announces Final Determination to Issue Discharge Permit for Bethlehem Steel* (Jan. 25, 2001) (copy on file with the author).

11. Bethlehem Steel Corp., Sparrows Point Plant, Discharge Monitoring Reports (May 1998 to June 2000) (on file with the author).

12. 1985 Consent Decree, *supra* note 6, at Attachment B.

13. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.45(c). This provision states that reported amounts of heavy metals must be "total recoverable metals" unless one of three narrow exceptions apply, none of which pertain to the Bethlehem Steel facility at Sparrow's Point.

14. United States v. Hopkins, [53 F.3d 533](#), 535, [25 ELR 21178](#), [21178](#) (2d Cir. 1995). The court described Hopkins' sample tampering as follows:

If a Wednesday sample failed the in-house test. Hopkins sometimes ordered that it too be discarded and that another sample be taken on Thursday; but he more often instructed Morrison and Anderson to dilute the Wednesday sample with tap water or to reduce the zinc concentration using an ordinary coffee filter.

Id.

15. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.6.

16. *See* Henry, *supra* note 1.

17. *See* Bethlehem Steel Corp., *New Cold Mill Start Up Underway at Sparrows Point Division*, at http://www.bethsteel.com/pubaffairs/releases/2000/may03nr00_2.shtml (last visited Feb. 23, 2001).

[18.](#) 33 U.S.C. § 1316, ELR STAT. FWPCA § 306.

[19.](#) 40 C.F.R. § 122.29(b)(ii).

[20.](#) *See generally id.* § 420, subpts. I & J.

[21.](#) *See* Letter from Edwal F. Stone, Chief, Industrial Discharge Permits Div., MDE, to Patricia Gleason, Chief, MD/DC Branch, Office of Watersheds, EPA Region III (July 28, 2000) (copy on file with the author) [hereinafter Stone Letter].

[22.](#) EPA regional administrators may agree, in their memoranda of agreement (MOA) to review draft permits rather than proposed permits. 40 C.F.R. § 123.44(j) (1999). Consequently, the MOA signed by EPA and MDE states that EPA will review all draft permits. *See Memorandum of Agreement Between [MDE] and Region III, U.S. EPA, May 18, 1989, at 6.* In the event the Region III Administrator objects to a draft permit, he must notify MDE. *Id.* at 7. MDE has the right to request a public hearing on the objections. *Id.* If EPA's objections are not satisfied within 90 days of the notice or within 30 days of the public hearing, if one is held, EPA may issue the permit pursuant to § 402(d) of the Act and the § 123.44 regulations. *Id.*

[23.](#) The author participated in those meetings in her capacity as co-director of the University of Maryland Environmental Law Clinic, on behalf of the Cleanup Coalition, an umbrella organization for the Baltimore community and environmental groups.

[24.](#) Mr. Campbell deserves much credit for this result, as does his career deputy, Thomas Voltaggio, and the Region III's technical and legal staff assigned to this matter. Robert Hoyt, MDE Assistant Secretary, was also instrumental in reaching the right outcome. Finally, David Tomlinson, the company's lead negotiator, was able to shift the considerable momentum of the company's previous resistance on these issues, perhaps the most difficult job of all.

[25.](#) The last year for which figures are available. OFFICE OF RESEARCH, MD. DEPT' OF ECON. & EMPLOYMENT DEV., ECONOMIC IMPORTANCE OF THE CHESAPEAKE BAY (1989) (copy on file with the author). This figure is comprised of returns from commercial fishing, tourism, port activities, ship building, boat building, and repair.

[26.](#) John W. Frece, *Environment Secretary Is OK. Skeptics Decide; Once Apprehensive Companies Call Nishida Sensitive to Problems*, BALT. SUN, Nov. 27, 1995, at 12C.

[27.](#) Sara Marsh & Associated Press, *House, Senate, OK Runoff Bills*, THE CAPITAL (Annapolis, Md.), Mar. 6, 1998, at B1.

[28.](#) Tom Horton, *Glendening Deserves Good Grade; Environment: Governor Has Delivered on His Promises in This Area, Including Rethinking Intercounty Connector, Preserving Land, Moving to Save Crabs*, BALT. SUN, June 12, 1998, at 2B.

[29.](#) Performance Partnership Agreement Between MDE & Natural Resources & U.S. EPA for Fed. Fiscal Year 1998 (copy on file with the author).

[30.](#) *Toothless Environmental Protection; State Inaction: Weak Enforcement Record Prompts Federal EPA Intervention*, BALT. SUN, Aug. 26, 1996, at 10A.

[31.](#) Deborah Povich, *Affordable Housing, Real Smart Growth*, BALT. SUN, Dec. 11, 2000, at 13A.

[32.](#) U.S. EPA, FISCAL YEAR 1998, INTEGRITY REPORT TO THE PRESIDENT AND CONGRESS B-3 (1998).

[33.](#) U.S. EPA, *EPA Draft Framework to Reduce NPDES Backlog, reprinted in INSIDE EPA*, June 25, 1999, at 7-11 [hereinafter *EPA Draft Framework*].

[34.](#) Susan Bruninga, *Backlog Increases in 25 States: Half Are for Impaired Waters, EPA Says*, 31 Env't Rep. (BNA) 489 (Mar. 17, 2000).

[35.](#) See *supra* note 15 and accompanying text.

[36.](#) 42 U.S.C. §§ 7661a-f, ELR STAT. CAA §§ 502-507 (CAA permits); *id.* § 6925, ELR STAT. RCRA § 3005 (RCRA permits).

[37.](#) See Stone Letter, *supra* note 21, and accompanying text.

[38.](#) Once again, I base this statement on direct participation in these events, as described *supra* note 23.

[39.](#) See, e.g., U.S. GAO, EPA AND THE STATES: ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP 6, 49-50 (1995) (GAO/RCED-95-64) (explaining that EPA has attempted to improve its relationship with the states since the 1970s and that the U.S. General Accounting Office (GAO) has reported many of the same problems with that relationship since 1980) [hereinafter GAO EPA/STATE REPORT].

[40.](#) For further analysis of the implications of NEPPs, see Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351 (2000) [hereinafter *Devolution and the Public Health*].

[41.](#) *Id.* at 429.

[42.](#) U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM 4, 37-50 (1999) (GAO/RCED-99-171).

[43.](#) We owe this colorful and accurate description of the volatile nature of environmental politics to William Ruckelshaus, who coined it in his famous article, William D. Ruckelshaus, *Stopping the Pendulum*, ENVTL. F., Nov./Dec. 1995, at 25.

[44.](#) See Susan Bruninga, *Rise in Backlog of Permit Renewals Caused by Program Growth, Lack of Funds*, 29 Env't Rep. (BNA) 927 (Sept. 4, 1998).

[45.](#) GAO EPA/STATE REPORT, *supra* note 39, at 18 (reporting EPA threats to withdraw primacy to implement drinking water programs from eight states); *id.* at 20-22 (explaining that EPA is not in a position to deliver on these threats).

[46.](#) U.S. EPA, BACKLOG STATUS REPORT FOR MAJORS (2000), available at <http://www.epa.gov/owmitnet/permits/backlog/grade.pdf>.

[47.](#) Joe Surkiewicz, *A Browse Through the Happy Hocker Led to Legal Battle With Beth Steel*, DAILY RECORD (Baltimore, Md.), Dec. 18, 2000, at 1C-2C.

[48.](#) See Bethlehem Steel Corp., Outline of Water Toxics Presentation for MDE Meeting (Aug. 14, 1991), at exh. 1 (copy on file with the author).

[49.](#) [484 U.S. 49](#), [18 ELR 20142](#) (1987).

[50.](#) For a description of the difference between "first" and "second" generation problems, see Michael P. Vandenberg, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 814-24 (1997).

[51.](#) See, e.g., ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM, THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT (1992).

[52.](#) *Devolution and the Public Health*, *supra* note 40, at 366-75.

[53.](#) *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[54.](#) *EPA Analysis of Test Data Availability for HPV Chemicals*, 22 Chem. Reg. Rep. (BNA) 261 (Feb. 12, 1998).

[55.](#) See, e.g., U.S. GAO, NATIONAL WATER QUALITY ASSESSMENT, GEOLOGICAL SURVEY FACES FORMIDABLE DATA MANAGEMENT CHALLENGES (1993) (GAO/IMTEC-93-30) (explaining that a national assessment of water resources has been difficult to perform because efforts to collect, analysis, and store data are expensive and labor-intensive); U.S. GAO, AIR POLLUTION, NATIONAL AIR MONITORING NETWORK IS INADEQUATE (1989) (GAO/RCED-90-15) (describing the obstacles to implementing a national air monitoring network, including insufficient funding at the federal, state, and local levels).

[56.](#) For an insightful discussion of these issues, see Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931 (1997).

[57.](#) For a discussion of that period of common law, see PERCIVAL, *supra* note 7, at 71-98.

[58.](#) Eileen Gauna, *EPA at 30: Fairness in Environmental Protection*, [31 ELR 10528](#) (May 2001).

[59.](#) See, e.g., Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in the United States and in Our Posterity*, 68 MISS. L.J. 565 (1998); Victor Sher, *Breaking Out of the Box: Toxic Risk, Government Actions, and Constitutional Rights*, 13 J. ENVTL. L. & LITIG. 145 (1998); Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107 (1997). Steven D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 1 (1994).

[60.](#) For an account of such contemporary legislative campaigns, see Margaret Kriz, *Risky Business*, 27 NAT'L J. 417 (1995).

[61.](#) See, e.g., Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

[62.](#) R. Steven Brown, *The States Protect the Environment*, ECOSTATES ENVTL. COUNCIL OF THE STATES, Summer 1999, at 4. Brown notes in his article that state funding for environmental programs increased by about 140% between 1986 and 1996, although total federal funding to the states decreased by about 17% during this same period. *Id.* at 5.

[63.](#) Performance Partnership Grants for State and Tribal Environmental Programs: Revised Interim Guidance, 61 Fed. Reg. 42887 (Aug. 19, 1996).

[64.](#) 42 U.S.C. § 7506, ELR STAT. CAA § 176.

[65.](#) *Id.* § 6924, ELR STAT. RCRA § 3004.

[66.](#) ENVIRONMENTAL LAW INST., MIXING MANAGEMENT METAPHORS: THE COMPLEXITIES OF INTRODUCING A PERFORMANCE-BASED STATE/EPA PARTNERSHIP SYSTEM INTO AN ACTIVITY-BASED MANAGEMENT CULTURE (2000); ENVIRONMENTAL LAW INST., AN INDEPENDENT REVIEW OF THE STATE-FEDERAL ENVIRONMENTAL PARTNERSHIP AGREEMENTS FOR 1996 (1996).

[67.](#) See, e.g., Margaret Kriz, *Feuding With the Feds*, 27 NAT'L J. 1598, 1600 (1997).

[68.](#) For a critique of technology-based standards for these reasons, see Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333(1985).

[69.](#) See, e.g., 33 U.S.C. § 1312(b), ELR STAT. FWPCA § 302 (modifications of effluent limitations under the CWA); 42 U.S.C. § 6924 (h), ELR STAT. RCRA § 3004(h) (variance from land disposal prohibitions under RCRA).

[70.](#) Two prominent documents advocating such systems are ENTERPRISE FOR THE ENV'T, THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION, TOWARD A MORE DESIRABLE FUTURE (1998) and NATIONAL ACAD. OF PUB. ADMIN., SETTING PRIORITIES, GETTING RESULTS, A NEW DIRECTION FOR EPA 71-81 (1995) [hereinafter SETTING

PRIORITIES].

[71.](#) Letter from Robert M. Summers, Ph.D. Dir., Tech. & Reg. Serv. Admin., MDE, to Melanie Flynn and Wade Wilson, Univ. of Md. School of Law 4 (Apr. 18, 2000) (copy on file with the author).

[72.](#) Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified in scattered sections of 5 and 31 U.S.C. (1994)). For a discussion of those pressures, see Rena I. Steinzor & William Piermattei, *Reinventing Environmental Regulation Through the Government Performance and Results Act: Where's the Money?*, [28 ELR 10563](#) (Oct. 1998) [hereinafter *Where's the Money?*].

[73.](#) Margaret Kriz, *Riding a Wave of Discontent*, 32 NAT'L J. 2792 (2000).

[74.](#) Pamela Najor, *EPA Vows to Use Voluntary State Data to Drive Federal Goals*, INSIDE EPA REINVENTION REP., Oct. 23, 1998, at 5 (reporting that Barry McBee, Chairman, Texas Natural Resource Conservation Comm'n, wrote a letter to colleague Tom Looby, an environmental official from Colorado's environmental agency who represented ECOS in negotiations with EPA on the issue, accusing him of "unwittingly positioning" ECOS "to be used as a tool by EPA" in the Agency's efforts to comply with the GPRA).

[75.](#) For a description of these negotiations, see *Devolution and the Public Health*, *supra* note 40, at 433-40.

[76.](#) U.S. GAO, NATIONAL WATER QUALITY ASSESSMENT: GEOLOGICAL SURVEY FACES FORMIDABLE DATA MANAGEMENT CHALLENGES I (1993) (GAO/RCED-93-30) ("The nation's water resources are its life-blood Since the 1970s, roughly \$ 500 billion has been spent on water pollution abatement; however, it is unclear whether this investment is having the desired impact because the data needed to assess the quality of our nation's water are not available.").

[77.](#) *Where's the Money?*, *supra* note 72, at 10563.

[78.](#) SETTING PRIORITIES, *supra* note 70, at 71-81.

[79.](#) *Id.* at 81.

[80.](#) *Id.* at 83, 87.

[81.](#) *Id.* at 87-88.

[82.](#) To its credit, EPA has taken exactly this approach in dealing with the expired permits problem administratively.