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THE SEESAW OF ENVIRONMENTAL POWER FROM EPA TO THE STATES: NATIONAL ENVIRONMENTAL PERFORMANCE PLANS

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I. INTRODUCTION

AMONG the multitude of pressing issues facing the United States, one issue in particular has dominated political debates over the past few years. While some have argued for a centralized nation whose power lies primarily in the hands of the federal government and Congress, others have supported a decentralized country with political power distributed among the states.¹ Determining the appropriate balance of power has significant effects on the relationship between the federal government and the states with regard to the enforcement of environmental law. Attempts to

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1. In 1995, a New York Times columnist wrote:

In a hectic, clamorous year such as this one, it is remarkable to find one issue common to so many debates. But such a theme leaps from the record of 1995, and it is as old as the Republic: the nature of American federalism. Are we to have a centralized government, or a decentralized one? The question has a corollary: is the central government too big?

R.W. Apple, Jr., *Washington, 1995: Echoes of a 200-Year Debate*, N.Y. TIMES, Dec. 24, 1995, § 4, at 1.

(1)

shift power between the federal government and state governments have given rise to a number of key concerns. First, current environmental devolution lacks due process.² Second, the federal government does not accommodate requisite shifts in responsibility to the states with adequate federal oversight, and, as a result, a reduction in environmental protection and quality has surfaced. In response to these concerns, the Environmental Protection Agency (EPA) has established the National Environmental Performance Partnership System (NEPPS),³ a program that will fundamentally alter the relationship between the states and the federal government in the regulation of pollution.⁴

Under NEPPS, EPA and the states sign contracts setting environmental priorities and shifting responsibility for these priorities from the federal government to the states.⁵ NEPPS encourages

2. See George Cameron Coggins, "Devolution" in *Federal Land Law: Abdication by Any Other Name*, 3 HASTINGS W. - N.W.J. ENVTL. L. & POL'Y 211, 211 (1996). "Devolution" is the term used to describe the delegation of power from the federal government to state and local governments. See *id.* Environmental devolution is, as the name indicates, the title given to devolution from the federal government to states with regard to environmental regulation and protection. See *id.* For a discussion of the general trend toward devolution, see *infra* notes 23-43 and accompanying text. For a discussion of environmental devolution, see *infra* notes 86-94 and accompanying text.

3. See Performance Partnership Grants for State and Tribal Environmental Programs: Revised Interim Guidance, 61 Fed. Reg. 42,887 (1996) [hereinafter Revised Guidance on Performance Partnership Grants]; see also ENVIRONMENTAL PROTECTION AGENCY (EPA), *Performance Partnership Grants for State and Tribal Environmental Programs: Interim Guidance* (Dec. 1995) (on file with author) [hereinafter *Performance Partnership Grants*]. Key goals of NEPPS are "to allow States and EPA to achieve improved environmental results by directing scarce public resources toward the highest priority, highest value activities; to provide States with greater flexibility to achieve those results; and to enhance accountability to the public and taxpayers." Revised Guidance on Performance Partnership Grants, *supra*, at 42,890.

4. See Revised Guidance on Performance Partnership Grants, *supra* note 3, at 42,888; see also Letter from Fred Hanson, EPA Deputy Administrator, to Senior State Environmental Protection Officials 1 (July 15, 1996) (on file with author) (stating that "[t]he goal of [NEPPS] is to strengthen protection of public health and the environment by directing scarce public resources toward the most pressing environmental needs, providing states with more flexibility in how they achieve environmental results, and enhancing accountability") [hereinafter Letter from Fred Hanson]. For a further discussion of NEPPS and its accompanying problems, see *infra* notes 95-132 and accompanying text.

5. See U.S. EPA, *Joint Commitment to Reform Oversight and Create a National Environmental Performance Partnership System* (visited Sept. 27, 1997) <<http://www.epa.gov/regional/Oversight/oversite.html>> [hereinafter *Creation of Partnership System*]. EPA Administrator Carol Browner and state environmental agency heads formed NEPPS in an effort to increase the role of states in assessing their environmental programs, while decreasing EPA's role in overseeing state programs. See Merry Goodenough, *Public Participation in a State-Assumed Wetlands Permit Program: The Michigan Example*, 10 J. ENVTL. L. & LITIG. 221, 296 (1995).

states to develop individual assessments of their environmental goals and to negotiate "contracts for services" with EPA.⁶ Congressional involvement in the NEPPS devolution processes has been, thus far, limited to appropriating necessary funds via the massive Omnibus Appropriations Act of 1996.⁷ Twenty-five states have signed NEPPS contracts for fiscal year 1998.⁸ Although the intent to provide increased flexibility and to transfer power to the states is a positive development, the effectiveness of NEPPS may be frustrated by the carefully developed statutory and regulatory requirements which define the relationship between EPA and the states in the field of environmental protection.⁹

This Article analyzes NEPPS from a variety of perspectives, including public choice theory, by applying an economist's regulatory methodology to current public law.¹⁰ Section II of this Article dis-

6. See *Creation of Partnership System*, *supra* note 5, at 5; see also Goodenough, *supra* note 5, at 296. The pertinent statutory language reads as follows: "The Administrator is authorized to make grants to any state, municipality, or intermunicipal or interstate agency for the construction of publically owned treatment works. . . . [G]rants made under this subsection shall be made only to projects for secondary treatment, or any cost effective alternative thereto." Clean Water Act § 201(g)(1), 33 U.S.C. § 1281(g)(1) (1994). There are, however, limits on the Administrator's power to make these grants. See *id.* §§ 201(g)(2)-(3), (5)-(6), 33 U.S.C. §§ 1281(g)(2)-(3), (5)-(6).

7. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of U.S.C.).

8. See *NEPPS Notes - February 1998, Summary of Developing Performance Partnership Agreements Under NEPPS* (visited March 4, 1998) <<http://www.sso.org/ecos/nepps.htm>> [hereinafter *NEPPS Notes*]; see also EPA, *Twenty States in Performance Partnerships, Others Expected to Participate in Program*, 27 Env't Rep. (BNA) 1907 (Jan. 17, 1997).

9. For a discussion of NEPPS and its accompanying problems, see *infra* notes 95-132 and accompanying text.

10. See Daniel A. Farber & Philip P. Frickey, *Symposium Forward: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 457-67 (1992). "Public choice" is defined as "the application of the economist's methods to the political scientist's subject." *Id.* at 458. Public choice has also been referred to as "the economic study of nonmarket decision making." DENNIS C. MUELLER, PUBLIC CHOICE II 1 (1989). Public choice involves the study of how legislation, which is the heart of public law, affects public policy decisions. See Farber & Frickey, *supra*, at 461.

Scholars argue that the legislature represents the public interest. See *id.* at 459-62. However, statutes may reflect private interests, due to undue influence of special interest groups. See *id.* It is also arguable that a statute may not be representative of any identifiable public interest because the public itself is too fragmented to generate any one public policy. See *id.* at 459-60.

Public choice scholars have attempted to analyze public decision-making based on interest group in-fighting. See *id.* at 460. Under certain conditions, groups attempting to choose among three or more alternatives by majority vote may be unable to reach a consistent decision. This analysis is difficult at best for NEPPS because Congress, state legislatures, interest groups and ordinary citizens are seemingly absent from the process. See Gary Minda, *Jurisprudence at Century's*

cusses federalism and the current trend to devolve central responsibility and authority from the federal government to the states. Section II also sets forth the background and current status of environmental protection and policy in the United States.¹¹ Next, Section III discusses the current trends in environmental regulation.¹² Finally, after an analysis of NEPPS and the potential problems NEPPS poses in Section IV,¹³ the Article concludes in Section V by suggesting that the judiciary may be in the best position to impact the pace and procedures of the implementation of NEPPS.¹⁴

II. LAYING THE HISTORICAL FRAMEWORK

A. Federalism

Federalism is a concept that has expanded and contracted with the political winds of our nation's history. Defining the bounds of federalism begins and ends with an examination of the federal government's relationship with the states. While some theorists believe that a nation requires a strong centralized government, others suggest that the federal government should vest a majority of its power within the individual states.¹⁵ This age-old debate continues into the context of environmental devolution.

The Tenth Amendment¹⁶ of the Constitution provides the rallying cry for champions of states' rights and limited government. Supporters of states' rights insist that a government closest to the people is best because the people are aware of and can control such a government.¹⁷ The nation, however, initially espoused a weak

End, 43 J. LEGAL EDUC. 27, 32 (1993); see generally Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353 (1994).

11. For a discussion of federalism and devolution, see *infra* notes 15-43 and accompanying text.

12. For a discussion of current trends in environmental regulation, see *infra* notes 66-94 and accompanying text.

13. For a discussion of NEPPS and the problems it poses, see *infra* notes 95-132 and accompanying text.

14. For a discussion of the authors' view that the judiciary may be in the best position to impact the pace and procedures of the implementation of NEPPS, see *infra* notes 133-35 and accompanying text.

15. See Irwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1333-34 (1994) (reviewing SAMUEL H. BEEV, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993)).

16. U.S. CONST. amend X. The Tenth Amendment provides that "[t]he Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." *Id.*

17. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 491-92 (1995) ("State governments represent the 'real' governments of the people. The federal government exists as a somewhat mistrusted

central government coupled with state supremacy and found such a system unworkable. Specifically, the leaders of the individual states deemed the Articles of Confederation, America's first attempt at self-government, a failure.¹⁸ Although the Articles of Confederation afforded great independence and self-determination to the states, the political structure proved too loose and, ultimately, ineffectual.¹⁹

In an attempt to balance competing considerations and to control potential conflicts through a system of checks and balances, the founders settled on and ratified the Constitution.²⁰ Under the Constitution, the division of power between the federal government

agent of the states, with states retaining the power to protect their people (and themselves) by checking the actions of the federal government where necessary to prevent overreaching.”). The Supreme Court recently addressed the issue of states' Tenth Amendment rights in *United States v. Lopez*, 514 U.S. 549 (1995). For a discussion of *Lopez*, see *infra* notes 27-31 and accompanying text.

18. See ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 127-47 (1935).

19. See *id.* at 155.

20. See *id.* at 147-97. In *Carter v. Carter*, the Court noted the following: Those who framed and those who adopted [the Constitution] meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated — with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. Thus, “when it was found necessary to establish a national government for national purposes,” this court said . . . “a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.” While the states are not sovereign in the true sense of that term, but only quasi-sovereign, yet in respect of all powers reserved to them they are supreme — “as independent of the general government as that government within its sphere is independent of the States.” And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of several grants or the implications necessarily to be drawn therefrom. . . . The determination of the Framers' Convention and the ratifying convention to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State power can neither be appropriated on the one hand nor abdicated on the other.

298 U.S. 238, 294-95 (1936); see also *Texas v. White*, 74 U.S. 700, 724 (1868).

and the states is imprecise.²¹ Historically, the balance of power has fluctuated between the federal and state governments, with the federal government assuming preeminence over the past seventy years.²² The most recent trend is a shift of power away from the federal government toward the states. This may represent a permanent shift or just a minor interruption in the ongoing movement of centralization. Regardless, before the federal government divests power to the states for such major programs as welfare, education and environmental protection, the impact of this devolution should be analyzed for unintended consequences or irreversible side-effects.

B. General Trend Toward Devolution

Contemporary debates over federalism represent very different concepts of how the nation should divide power, resources and responsibility among the federal government, the state governments and local public entities. After decades of continually increasing federal presence on the political forefront, it appears that the states are gaining strength through devolution.²³ An examination of recent developments in politics and Supreme Court decisions further evidences the rise in the devolution of power from the federal government to the states.

By looking at campaign platforms over the past few years, one may see the trend toward devolution and the public's acceptance of

21. See THE FEDERALIST NO. 45 (James Madison). James Madison noted that "[w]hile the powers the Constitution delegates to the federal government are few and defined, those it delegates to the States are numerous and indefinite." *Id.* When faced with criticism of the competing interests inherent in the federal-state structure, Madison further stated that "the federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." THE FEDERALIST NO. 46 (James Madison).

22. See Apple, *supra* note 1, § 4, at 1. The following is a brief history of the division of power between the federal government and state governments since the Civil War:

During Reconstruction, Washington ruthlessly imposed its will on the defeated southern states. Then came a period of isolationism and weak central government, and then the New Deal, grudgingly and narrowly permitted by the Supreme Court, which broadened its interpretation of the commerce clause to allow Washington to respond to the Depression. That opening allowed succeeding administrations, Republican and Democratic, to create a huge Federal apparatus to grapple with the nation's social ills.

Id.

23. For a discussion about current environmental devolution programs, see NEPPS Notes, *supra* note 8. For a definition and explanation of devolution, see *supra* note 2.

this trend. For example, in 1994, the republican party gained control of the House of Representatives and the Senate by calling for more state power in the implementation of federal legislation, including environmental regulations.²⁴ Likewise, both 1996 presidential candidates recognized the public's negative attitude toward "big government" and called for more power to the states.²⁵ President Clinton showed support for a shift in power from the federal government to the states in August 1995 when, speaking before Congress, he stated that "[t]he days of made in Washington decisions, dictated by a distant government, are gone. Instead, solutions must be locally crafted, and implemented by entrepreneurial public entities, private actors and a growing network of community-based firms and organizations."²⁶

The Supreme Court reinforced the overall trend toward devolution with its 1995 decision in *United States v. Lopez*.²⁷ For the first time in forty years, the Court found a federal act to be a violation of the Commerce Clause.²⁸ In *Lopez*, the Court had to determine the

24. See *Apple*, *supra* note 1, § 4, at 1. One commentator noted the following: Newt Gingrich and his band of self-styled Republican revolutionaries have cast themselves as the champions of states' rights and limited government. Give more responsibilities back to the states and the localities, they cry; government closest to the people is best, because they can keep an eye on it. . . . [Nevertheless i]t is not clear whether the 1994 elections represent a historic shift toward the Republicans; some poll data suggest that they have overplayed their hand and may face reversals in the elections of 1996 and 1998. But there is no doubt at all that the terms of the political battle have changed. Notice: President Clinton resists Mr. Gingrich and his allies in the Senate on what parts of the government will be downsized, and how, but not on the idea that government is too big.

Id.

25. See *Key Issues: The Candidates' Positions*, USA TODAY, Nov. 4, 1996, at 3E. One commentator noted:

It is not just the legislative Republicans, exalted by their return to control of Congress after decades in the wilderness, who conspired to cede or shift power back to the states in 1995. President Clinton, a former governor who campaigned in 1992 as a new kind of Democrat who would not look to the Federal Government to solve every problem, had his own ideas about how to shrink government.

Apple, *supra* note 1, § 4, at 1.

26. President's Message to Congress Transmitting the National Urban Policy Report, 31 WEEKLY COMP. PRES. DOC. 1364 (Aug. 3, 1995). President Clinton campaigned in 1992 as a Washington outsider. In 1996, over his own party's objections, he signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Pub. L. No. 104-193, 110 Stat. 2105 (1995) (codified as amended in scattered sections of U.S.C.); see generally Brian Sierra, *House Passes GOP Welfare Plan*, UNITED PRESS INT'L, Mar. 24, 1995.

27. 514 U.S. 549 (1995).

28. See *id.* at 551. Writing for the majority, Chief Justice Rehnquist observed that "[t]he [Gun-Free School Zones] Act neither regulates a commercial activity nor contains a requirement that the possession [of a gun] be connected in any way

constitutionality of the Gun-Free School Zones Act.²⁹ The Court held that when viewed in the aggregate, the possession of guns in school zones failed to “substantially affect interstate commerce” and, therefore, the Gun-Free School Zones Act was unconstitutional.³⁰ The *Lopez* standard, whether a given law regulates an activity which substantially affects interstate commerce, is subjective and lends itself to a totality of the circumstances analysis. Since *Lopez* has been decided, the Court had not yet established a bright-line test for determining the parameters of Congress’s powers under the Commerce Clause or the states’ Tenth Amendment powers.³¹

In the last two years, the Supreme Court has heard several other cases involving federalism issues. In *Printz v. United States*,³² the Court considered the constitutionality of the Brady Handgun Violence Prevention Act (Brady Handgun Act).³³ The Brady Handgun Act required local sheriffs to conduct checks on individuals

to interstate commerce.” *Id.* at 551. Chief Justice Rehnquist concluded by commenting:

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. at 567.

29. *See id.* at 549. The Gun-Free School Zones Act, which prohibited the presence of guns within one mile of schools, was challenged as an unconstitutional extension and application of Congress’s Commerce Clause authority. *See id.* at 551.

30. *See id.* at 549.

31. *See id.* One commentator noted the following with respect to the Court’s holding in *United States v. Lopez*:

The Supreme Court, long an engine of Federal hegemony, began to have its doubts as well. It ruled that Congress had exceeded its power under the Constitution’s commerce clause by enacting a law prohibiting people from carrying guns in the vicinity of the schools, and it came within a single vote of permitting the states to impose limits on the terms of members of Congress as a national institution, the essence of Lincoln’s “more perfect union,” and not merely, as John C. Calhoun had it, a creature of the states that created it.

Apple, *supra* note 1, § 4, at 1.

32. 117 S. Ct. 2365 (1997).

33. *See id.* The Brady Handgun Violence Prevention Act provided: A chief law enforcement officer to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General. . . . Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferor violates Federal, State or local law shall . . . communicate [such] information . . . to the chief law en-

who applied for handgun permits. The Court found the Brady Handgun Act to be unconstitutional on the ground that it was unduly burdensome on local and state law enforcement authorities.³⁴ This decision affirmed the Tenth Amendment's grant of sovereignty to the states.³⁵

The Supreme Court continued to hold in favor of state sovereignty in *Idaho v. Coeur d'Alene Tribe of Idaho*.³⁶ In that 1997 decision, the Court considered the relationship between an Indian Tribe and the State of Idaho with respect to the ownership of riverbed property. The Coeur d'Alene Tribe claimed the rights to the riverbeds of all waterways flowing through its reservation, as well as the valuable mineral deposits contained beneath them. The State of Idaho, however, asserted ownership of all navigable waterways within state boundaries, including the property claimed by the Coeur d'Alene Tribe.³⁷ Asserting that state ownership of lands underlying navigable waterways was historically considered an attribute of state sovereignty, the Court held in favor of the State of Idaho.³⁸

In its recent 1997 decision, *Washington v. Glucksberg*,³⁹ the Court examined an individual state's authority to enact a law banning assisted suicide.⁴⁰ The Court held that the State of Washing-

forcement officer of the place of business of the transferor; and the chief law enforcement officer of the place of residence of the transferee.

Brady Handgun Violence Prevention Act §§ 102 (s) (2), (s) (4) (A) - (B), 18 U.S.C. §§ 922(s) (2), (s) (4) (A) - (B) (1994), held unconstitutional in *Printz v. United States*, 117 S. Ct. 2365 (1997).

34. See *Printz*, 117 S. Ct. at 2369-70. For the specific statutory language requiring law enforcement officers to perform background checks, see *supra* note 33. In *Printz*, the Court noted that "[t]he petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional." *Id.* at 2369-70.

35. See *id.* at 2384. The *Printz* Court stated that "[w]e adhere to that principle today . . . [that] '[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.' The mandatory obligation imposed on [local law enforcement officials] to perform background checks on prospective handgun purchasers plainly runs afoul of that rule." *Id.* at 2383.

36. 117 S. Ct. 2028 (1997).

37. See *id.* at 2031.

38. See *id.* at 2043. Justice Kennedy, writing for the majority noted: [I]f the Tribe were to prevail, Idaho's sovereign interest in its land and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. . . . The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id.

39. 117 S. Ct. 2258 (1997).

40. See *id.*

ton's statutory scheme did not violate the Due Process Clause because the right to assisted suicide was not a fundamental liberty protected by the Constitution.⁴¹ The Court reasoned that Washington's statutory ban was valid because it was rationally related to legitimate government interests.⁴² All three of these Supreme Court decisions reflect the Court's affirmation of states' rights under the Tenth Amendment and illustrate the current trend toward recognition of the states as sovereign decision-making entities.

Anticipating how the Supreme Court will rule on future legislation, and in particular federal regulations designed to address pollution, may prove more complex than simply looking to these recent decisions and concluding that the Court will favor devolution. Although the Court has always interpreted federal regulation of pollution as resting under the protective cover of the Commerce Clause, and, therefore, within the purview of the federal government, the Supreme Court's decision in *Lopez* calls into question the continued appropriateness of the federal government's preeminent presence in a field which it has dominated since 1970.⁴³

C. Environmental Legislation

National environmental laws and regulations are the product of tensions between coexisting desires for a unified, national pollution standard and a preference for local control of land use, garbage disposal and natural resource restrictions more responsive to

41. *See id.* at 2271. The Court stated that Washington's statute "does not violate the Fourteenth Amendment, either on its face or 'as applied to competent terminally ill adults who wish to hasten their deaths . . .'" *Id.* at 2275.

42. *See id.* The Court reasoned as follows:

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met here.

Id. at 2271 (citations omitted).

43. *See generally* United States v. *Lopez*, 514 U.S. 549 (1995); *cf.* *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Court stated that "we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel*, 452 U.S. at 282; *see also* United States v. *Byrd*, 609 F.2d 1204, 1209-10 (7th Cir. 1979); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 663 (3d Cir. 1976); *Sierra Club v. EPA*, 540 F.2d 1114, 1139 (D.C. Cir. 1976).

local needs.⁴⁴ Although issues of environmental protection were initially considered local concerns, Congress mandated national environmental standards in 1970 after most states failed to meet even the minimum national standards recommended at the federal level.⁴⁵ In response to these shifts in the allocation of responsibility for environmental protection, several models depicting the interaction between the federal government and the states materialized and were implemented in various environmental statutes.⁴⁶

One model provided for minimal involvement on the part of the federal government and encouraged states to adopt their own environmental regulations in light of federal incentives.⁴⁷ There were numerous drawbacks to this model, including the lack of authority or final accountability for control of pollution on the part of both the federal government and the states.⁴⁸ Moreover, this model fostered a lack of uniformity of standards and enforcement procedures across state borders and the nation as a whole. Regulators that followed this model imposed requisite regulations solely at the state level, or uniformly imposed such regulations but failed to enforce them.⁴⁹ It is likely that the use of this model prior to 1970 resulted in little or no improvement in pollution control levels because it did not grant the federal government the authority to impose its own regulations or enforce those of the states.⁵⁰

44. See E. Donald Elliot et. al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 318-20 (1985) (discussing federal legislation enacted from 1965 to 1970 while environmentalists were not well-organized).

45. See *id.* at 335-36; see also *Washington v. General Motors Corp.*, 406 U.S. 109, 116 (1972) ("As a matter of law as well as practical necessity, corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations. We conclude that the causes should be heard in the appropriate federal district courts.").

46. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1173 (1995) (providing general discussion of environmental federalism, its history and its implications).

47. See *id.* (noting federal government used regulatory or financial incentives to encourage states). This model has been described as "consistent with constitutional principles of federalism outlined in *New York v. United States*, where the Court expressly approved Congress's use of its spending power to encourage states to implement federal programs." *Id.* at 1173-74.

48. See *id.* at 1174 (positing that "[t]he power of this approach as a tool for motivating states to act depends in large part on the amount of federal financial assistance involved").

49. See *id.* (stating that "[t]he two other models of environmental federalism feature much more aggressive regulatory roles").

50. See *id.* at 1173 (noting although "this approach proved to be largely ineffective at controlling air and water pollution, it is still the principal federal approach to issues such as land-use regulation where political sensitivity to federal regulation is particularly high").

A second model, represented in a majority of state statutes, is called "cooperative federalism."⁵¹ Under this model, Congress either made the major policy decisions or assigned them to EPA.⁵² When Congress delegated policy decisions to EPA, EPA established national environmental standards which provided a minimum level of environmental protection or a regulatory floor.⁵³ In turn, state authorities applied for delegation of the environmental program. The following are typical steps necessary for a state to have an environmental program delegated to it: (1) designation of a lead agency to receive delegation; (2) enactment of pollution controls paralleling federal statutes; and (3) completion of a lengthy delegation application.⁵⁴ Once the program was delegated, the state administered it and enforced its provisions against violators.⁵⁵ Additionally, EPA dispensed funds and a list of responsibilities to the state for implementation of the program.⁵⁶ If a state did not enforce the standards EPA set, EPA either cut or withdrew the allocated funds, or canceled the delegation and operated the environmental program itself.⁵⁷ The practical necessity of this model was the inability of the federal government to administer all, or even some, of the local and state programs.⁵⁸ Furthermore, since federal regulators showed a lack of understanding and sympathy for local industry problems, it was unlikely that industry would have preferred regulation at the federal level.⁵⁹

51. See Percival, *supra* note 46, at 1174 (describing this model as "predominant approach to environmental federalism currently employed by federal environmental statutes").

52. See *id.*

53. See *id.* (stating that "[t]he Clean Air Act, the Clean Water Act, [the Resource Conservation and Recovery Act], and the Safe Drinking Water Act all require EPA to establish minimum national standards that can be implemented and administered by states subject to federal supervision").

54. See *id.*

55. See *id.*

56. See Percival, *supra* note 46, at 1174.

57. See *id.* (stating that this concept is "consistent with constitutional principles of federalism approved by the Supreme Court . . . because it offers states a choice of regulating an activity 'according to federal standards or having state law pre-empted by federal regulation'" (citing *New York v. United States*, 505 U.S. 144, 167 (1992))).

58. See *id.* (stating that "the federal government cannot implement its air pollution program without substantial resources, expertise, information, and political support of state and local officials" (citing John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995))).

59. See *id.* at 1175 (indicating that "state autonomy is preserved because most federal environmental standards established under this model are minimum standards").

A third model involved coercive federal control and called for the preemption of state statutes by federal law.⁶⁰ Statutes embodying this model include the Toxic Substances Control Act,⁶¹ the Federal Insecticide, Fungicide and Rodenticide Act,⁶² the Clean Air Act,⁶³ the Coastal Zone Management Act,⁶⁴ and the Clean Water Act.⁶⁵

III. CURRENT ENVIRONMENTAL REGULATION

A. Federalism

Under the cooperative federalism model, the federal government currently dominates the field of environmental protection policy.⁶⁶ This, however, has not always been the case. The federal government did not enact any major protection programs until the 1970s, following a long history of states' failures to deal with intra-state and interstate pollution problems.⁶⁷ Prior to the federal gov-

60. *See id.* at 1176 ("Preemption of state law has been employed sparingly in federal environmental laws. It usually is reserved for regulation of products that are distributed nationally.")

61. Toxic Substances Control Act §§ 1-311, 15 U.S.C. §§ 2601-71 (1994).

62. Federal Insecticide, Fungicide and Rodenticide Act §§ 1-34, 7 U.S.C. §§ 135-136y (1994).

63. Clean Air Act §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994).

64. Coastal Zone Management Act §§ 301-31, 16 U.S.C. §§ 1451-64 (1994).

65. Clean Water Act §§ 1-607, 33 U.S.C. §§ 1251-1387 (1994).

66. *See Percival, supra* note 46, at 1174-75. The following illustrates the cooperative federalism model:

The Clean Air Act, the Clean Water Act, [the Resource Conservation and Recovery Act] and the Safe Drinking Water Act all require EPA to establish minimum national standards that can be implemented and administered by states subject to federal supervision. These statutes generally permit federal authority to be delegated to state officials once they demonstrate that they are capable of operating the programs in a manner that meets minimum federal requirements. In states that choose not to apply for program delegation, the federal programs are operated and enforced by federal authorities.

Id. at 1174.

67. *See id.* at 1158 (stating that "the primary targets of environmental regulation [prior to 1970] were federal agencies rather than private industry"). The federal government initially became involved in environmental reform because of inadequate judicial redress and for public policy reasons. These public policy reasons included the following: (1) federal statutes are the most effective means for overcoming states' parochialism; (2) federalization is the only means of controlling transboundary pollution; (3) federal control is a guarantee of a minimum level of environmental protection across the nation; (4) federal control is an aid to states' resistance of pressures to relax regulatory standards; and (5) federalization is a mechanism to create economies of a scale equivalent to that of the federal government in certain environmental regulation. *See generally* Percival, *supra* note 46; *see also* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 76 (1991) (discussing the methods in which states compete to impose externalities on other states); James E. Krier, *Marketable Pollution Allowances*, 25 U. TOL. L. REV. 449,

ernment's enactment of statutory law, a number of piecemeal judicial decisions provided an incomplete and inadequate guide to the resolution of conflicts involving environmental issues.

For example, in *Missouri v. Illinois*,⁶⁸ the Supreme Court addressed the issue of the right of the State of Illinois "to discharge the sewage of Chicago through an artificial channel into the Desplaines River, which emptied into a tributary of the Mississippi River."⁶⁹ Because the Court found that the State of Missouri's evidentiary showing unconvincing and that it had "unclean hands" in funneling its own sewage to cities further south, it deemed the State of Missouri undeserving of relief.⁷⁰ Notably, the Court discussed the absence of legislation addressing this specific issue⁷¹ and the appropriateness of judicial interpretation of the Constitution to resolve the conflict.⁷² The following year, the Court in *Georgia v. Ten-*

451-52 (1994) (outlining various problems associated with legislative control and regulation of pollution, particularly marketable pollution allowances under Title IV of Clean Air Act Amendments of 1990); James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System — And Why It Matters*, 54 MD. L. REV. 1226, 1231-32 (1995) [hereinafter Krier, *On the Topology*] (outlining policy issues, particularly administrative efficiency, associated with uniform environmental standards).

68. 200 U.S. 496 (1906).

69. *Id.* at 497. As a result of the discharging of large amounts of raw sewage, the downstream water of St. Louis was severely contaminated with infectious materials and diseases. *See id.* at 498-99. In turn, the polluted water of St. Louis led to an "enormous increase in deaths and cases of typhoid" and was a "source of financial loss" to St. Louis. *Id.* at 499. Accordingly, the State of Missouri sought relief for the discharge of raw sewage. *See id.* at 516-17.

70. *See id.* at 526. The Court found in favor of the State of Illinois. *See id.* To support its contentions, the State of Illinois argued the following:

A court of equity will not grant an injunction to restrain a party from committing a nuisance when the evidence shows that the party complaining is guilty of contributing to the nuisance of which it complains. If the granting of an injunction will not relieve him from the consequences of his own acts the injunction will not issue. If the complainant contributes to the conditions which it claims in its bill of complaint will injure it as a State, it cannot obtain equitable relief.

It is the fundamental principle of equity that "He who seeks equity must do equity," and out of this grows the maxim that "He who comes into equity must come with clean hands." In other words, courts of equity will not enjoin one from doing a lawful act upon the application of one who, while claiming said act will cause him great and irreparable injury, is himself contributing to the injurious condition complained of.

Id. at 515.

71. *See id.* at 519-20. The Court asserted that Congress had the power to deal with this matter by enacting legislation under the Commerce Clause. *See id.* at 518-19. However, the Court also stated that "whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois." *Id.* at 519.

72. *See id.* at 520-22. Specifically, the Court stated the following:

If we suppose a case which did not fall within the power of Congress to regulate the result of a declaration of rights by this court would be the

Tennessee Copper Co. imitated, although not without reservation, the approach it utilized in the resolution of *Missouri v. Illinois*.⁷³

Recognizing the institutional investment it would be forced to make in case-by-case adjudication of similar transboundary disputes, the Supreme Court continued, in following years, to resolve conflicts over pollution through costly judicial decisions.⁷⁴ Nevertheless, the Court did not continue to utilize the same approach which it had applied in *Missouri v. Illinois*. The Court first diverged from this approach in *Illinois v. City of Milwaukee*,⁷⁵ a 1972 case in which the Court found the federal district court to be the appropriate forum for resolution of a nuisance action brought by Illinois against four Wisconsin cities.⁷⁶ Nine years later in *City of Milwaukee v. Illinois*,⁷⁷ the Supreme Court determined that federal common law did not impose more stringent standards than those set forth

establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

Id. at 520.

73. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907). *Tennessee Copper* involved a dispute concerning sulfur dioxide emissions from a Tennessee copper smelting company. See *id.* As a consequence of the noxious emissions, "wholesale destruction of forests, orchards, and crops [was] going on, and other injuries [were] done and threatened in five counties" near the plant. *Id.* The Court stated that "[t]he caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*." *Id.* at 237. Thereafter, the Court determined that "there is no alternative to issuing an injunction." *Id.* at 239.

74. See, e.g., *New York v. New Jersey*, 256 U.S. 296 (1921) (holding that right of New York to maintain such a suit on behalf of her citizens was clear, without regard to precise location of boundary between two states or without regard to New York's claim of jurisdiction over waters of New York Bay); see also *New Jersey v. City of New York*, 289 U.S. 712 (1933) (appointing a special master to oversee court order); *New Jersey v. City of New York*, 284 U.S. 585 (1931) (per curiam) (ordering enjoinder of operation and utilization of "existing incinerators and other facilities").

75. 406 U.S. 91 (1972).

76. See *id.* at 93, 108. Plaintiff alleged that the defendants had polluted Lake Michigan. See *id.* at 93. Moreover, plaintiff requested the court to abate the public nuisance. See *id.* The Court responded:

It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. While federal law governs, consideration of state standards may be relevant.

Id. at 107. However, the Court pointed out that "[t]here are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern." *Id.* at 107-08.

77. 451 U.S. 304 (1981).

under the Clean Water Act.⁷⁸ Thus, the Court's decision indicated a judicial shift toward stricter adherence to authoritative federal legislation.

In the 1990s, the inadequacy of environmental regulation has captured national attention. For example, in 1995 Speaker of the House Newt Gingrich referred to the federal environmental system as "a national disgrace."⁷⁹ The creation of EPA and enactment of the environmental statutory system was, however, as public choice theorists indicate, a response to the desire of interest groups to have wealth redistributed to the poor.⁸⁰ Interestingly enough, environmentalists were not a well-organized force at the federal level in the early days of the enactment of federal environmental laws. This lack of environmentalist presence at the federal level actually resulted in the passage of more stringent federal legislation.⁸¹

In the 1970s, industry was caught in a chain reaction. Industry had the option to either fight against national legislation or support a uniform federal system to offset the danger of environmentalists' encouragement of more stringent state laws.⁸² For example, Ralph

78. *Id.* at 312. The Court reasoned:

Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," the Court has found it necessary, in a "few and restricted" instances, to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. We have always recognized that federal common law is "subject to the paramount authority of Congress."

Id. at 312-13 (citations omitted).

79. *Environmental Risks and Benefits*, WASH. POST, Mar. 7, 1995, at A16.

80. See Richard A. Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 63, 264 (1982). With reference to the public interest theory, Posner asserted:

The "public interest" theory . . . is well represented in the writing of such economists as Baumol and Pigou. It conceives both the ideal and the actual function of legislation to be to increase economic welfare by correcting market failures such as crime and pollution. Some laws designed to transfer wealth from rich to poor can be fitted into the theory.

Id. at 265.

81. See Elliot, *supra* note 44, at 320-21 (discussing federal legislation while environmentalists were not well-organized).

82. See *id.* at 320.

Nader's criticism of Senator Muskie's "pitiful efforts" to legislate in the area of air pollution prior to 1970 forced Senator Muskie to support stringent federal legislation designed to protect the environment.⁸³ If there had been a unified presence for environmentalists, however, Senator Muskie may not have supported stringent federal legislation and thereby provided the states with the opportunity to regulate. It is likely that environmentalists would have supported the enactment of stringent legislation by the states.⁸⁴

Uniform national regulatory standards exist under current environmental laws. Almost all federal environmental statutes provide for state implementation of programs and standards no less stringent than the federal standards.⁸⁵ Accordingly, states may enact controls more stringent than those established by the federal government, but the environmental standards they set may not fall below the floor created by the federal government.

B. Environmental Devolution

After two and one-half decades of almost unquestioned support from Congress and the public, environmental regulation faced a fierce political backlash in the mid-1990s when regulatory reform sought to limit the enactment of new regulations and the enforcement of existing regulations.⁸⁶ Reflecting these new sentiments, the House of Representatives passed a bill in the 104th Congress which served to dramatically relax the requirements of the Clean Water Act.⁸⁷ An onslaught of statutory and program demands combined with limitations on funds slowly drove the states into perennial shortfalls. Consequently, states looked for ways to effectively manage environmental programs. The National Association of Public Administrators Report summarized the situation between EPA and the states as a "system [that] is broken and must be fixed."⁸⁸ The report concluded that it was imperative that EPA im-

83. *See id.* at 327.

84. *See id.*

85. *See, e.g.*, Clean Air Act § 183(f)(4), 42 U.S.C. § 7511b(f)(4) (1994); Clean Water Act § 303, 33 U.S.C. § 1313 (1994); Resource Conservation and Recovery Act § 9004(b)(1), 42 U.S.C. § 6991c(b)(1) (1994).

86. *See* ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 112 (2d ed. 1996).

87. *See generally* H.R. REP. NO. 104-2567 (1996).

88. EPA, *Report of the Task Force to Enhance State Capacity—Strengthening Environmental Management in the United States*, Pub. No. EPA-270-R-93-001 (1993) [hereinafter *Task Force to Enhance State Capacity*]. A report written by EPA recommended a major new emphasis on the working relationship between EPA and the states. *See id.* at 1. EPA Administrator, Carol M. Browner, wrote that "[t]he report recognizes the interdependence between state and federal environmental programs and of-

prove its relationship with state and local authorities, because the bottom-line lesson is that if the states fail, EPA fails.⁸⁹

Many states authorized to manage federal environmental programs have, at times, not met the requirements necessary for the implementation of these programs.⁹⁰ The result of a state's inability to comply with requisite standards has served as a major strain on the relationship between EPA and the states. According to EPA and state officials, resource limitations are the major cause of these existing problems. Federal funding has not kept pace with new environmental requirements and states have been unable to make up the difference.⁹¹ From the start, states sought both federal funds to support their environmental efforts and local control over the environmental programs.⁹² A 1995 General Accounting Office report evidences these sentiments by concluding that eighty-five percent of program managers surveyed wanted increased federal funding to meet their environmental obligations.⁹³ The report also indicates, however, that state government officials surveyed complained of "micromanagement of their programs by EPA regions."⁹⁴

fers a number of specific recommendations on how to succeed in carrying out [the] shared mission." *Id.* The report focused on four areas: (1) improving the relationship between the states and EPA; (2) encouraging alternative financing mechanisms; (3) investing in state management infrastructure; and (4) streamlining the grants assistance process. *See id.* at 2.

89. *See id.* at 2.

90. *See UNITED STATES GENERAL ACCOUNTING OFFICE, Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, EPA and the States: Environmental Challenges Require a Better Working Relationship*, Pub. No. GAO/RCED-95-64 3 (1995) [hereinafter *GAO Report*]. According to a 1995 General Accounting Office report, "[m]any states have had difficulty performing key functions, such as monitoring environmental quality, setting standards, issuing permits, and enforcing compliance. Consequently, states have become increasingly reluctant to accept the additional responsibilities associated with recent environmental laws." *Id.*

91. *See id.* States have often been unable to provide the necessary funding "because EPA has sometimes required states to apply scarce resources to national priorities at the expense of some of their own environmental concerns." *Id.*

92. *See id.* at 5-6.

93. *See id.* at 5.

94. *Id.* at 5. The Executive Summary of a 1995 General Accounting Office report stated, in relevant part:

Although some states noted improvement in the area, 63 percent of the state managers responding to GAO's questionnaire still found EPA's controls excessive. EPA countered — with some justification, according to past GAO reviews — that basic problems with state programs sometimes warrant close oversight. Despite these differences, however, state and EPA officials contacted by GAO agree that EPA should focus on providing the states with technical assistance, clarifying regulations, performing the technical research needed to support state environmental regulations, and giving states the flexibility to achieve environmental results from their programs without prescribing the precise steps they must take to achieve them.

IV. NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM

NEPPS is an attempt by EPA and the states to alter their traditional statutory and regulatory relationship. Under the traditional system, statutes provide legislative authority for environmental protection measures, appropriation bills provide funding and regulations outline fundamental procedures.⁹⁵ As an alternative, and to provide a new framework for relations between EPA and the states, NEPPS encourages “shared responsibility for success.”⁹⁶

Id.

95. See *Creation of Partnership System*, *supra* note 5, at 1. The State/EPA Capacity Steering Committee, a committee established to assist in the implementation of NEPPS, stated that EPA must direct scarce public resources toward improving environmental results, allow states greater flexibility to achieve those results and enhance EPA’s accountability to the public and taxpayers. See generally *Creation of Partnership System*, *supra* note 5. The State/EPA Capacity Steering Committee set forth the following principles to provide guidance for the implementation of NEPPS:

1. Continuous environmental improvements are desirable and achievable throughout the country.
2. A core level of environmental protection must be maintained for all citizens.
3. National environmental progress should be reported using indicators that are reflective of environmental conditions, trends, and results.
4. Joint USEPA/State planning should be based on environmental goals that are adaptable to local conditions while respecting the need for a “level playing field” across the country.
5. USEPA/State activity plans and commitments should allocate federal and state resources to the highest priority problems across all media, and should seek pollution-prevention approaches before management, treatment, disposal, and cleanup.
6. The new approach to the USEPA/State relationship should facilitate and encourage public understanding of environmental conditions and government activities.
7. A different approach to oversight should provide an incentive for State programs to perform well, rewarding strong state programs and freeing up federal resources to address problems where state programs need assistance.

Id.

96. See Letter from Fred Hanson, *supra* note 4, at 1. Prior to NEPPS, the federal government’s funding of state programs was based on federal initiatives legislated by Congress, and success was measured by counting the number of enforcement actions taken, inspections conducted and permits issued. See *id.* Now, under the new system, individual NEPPS agreements between states and EPA define appropriate oversight. See *id.* Under the agreements, program elements change, self-assessment supplants bureaucratic oversight of statutory programs by EPA, technology is maximally employed to monitor and report compliance, and individual program grants are consolidated to reduce red tape and promote state autonomy. See *id.*

NEPPS prompts states to develop individual assessments of goals and strategies as well as to negotiate a "contract for services" with EPA.⁹⁷ Fred Hansen, EPA Deputy Administrator, refers to such contracts as central to . . . reinvention efforts."⁹⁸ EPA Administrator, Carol Browner, similarly describes NEPPS as "more progressive beyond the current system which relies on numbers of permits, inspections made or other similar quantitative methods."⁹⁹ However, the need to maintain a core level of environmental protection consistently in all states raises questions. In particular, NEPPS does not provide clear answers for all the issues. For example, NEPPS does not provide an assessment of environmental protection and insurance that a core level will continue to exist. Additionally, NEPPS does not guarantee that the concept of a "level playing field" will be respected and maintained under a system of individual contracts between EPA and the states in the absence of assessment standards.

A. Background on National Environmental Performance Partnerships

In 1993, EPA and the states created the State/EPA Capacity Task Force to develop a fundamental framework for improving their relationship.¹⁰⁰ EPA and the states agreed in a 1993 task force report to shift responsibility for implementing and enforcing federally mandated environmental programs to the states.¹⁰¹ On March

97. *See id.*

98. Memorandum from Fred Hansen, EPA Deputy Administrator, to Senior State Environmental Protection Officials 1 (July 15, 1996) (on file with author). The Deputy Administrator stated, in relevant part:

The new system recognizes the vital role the States play in environmental protection and provides the flexibility States need to design strategies that meet their own conditions and needs. With a focus on results, performance partnerships direct resources where they are most needed and facilitate implementation of common sense, multi-media approaches to public health protection and environmental problem-solving. The States and Regions pioneering this new approach are already beginning to see these benefits. Their experiences reinforce our commitment to put the concept of performance partnerships into practice across the nation.

Id.

99. *Creation of Partnership System, supra* note 5, at 2.

100. *See GAO Report, supra* note 90, at 15. A 1995 General Accounting Office report noted that the United States General Accounting Office conducted its "work between February 1993 and February 1995 in accordance with generally accepted government auditing standards." *Id.*

101. *See generally Task Force to Enhance State Capacity, supra* note 88. "By the mid-1980's, states had assumed primary responsibility for day-to-day operations of many environmental programs, under authority delegated from EPA." *Id.* at 9.

3, 1995, as part of his “Reinventing Government” effort, President Clinton announced the creation of NEPPS.¹⁰²

In May 1995, EPA and the states signed an agreement entitled the Joint Commitments to Reform Oversight and Create a National Environmental Performance Partnership System.¹⁰³ Although unheralded by most individuals in the environmental field, the underlying basis of a NEPPS agreement is a set of environmental goals that adapt to local conditions and aspire to be respectful of the need for a “level playing field” across the country.¹⁰⁴ NEPPS enables state development of agreements with EPA based on a particular state’s respective needs and capacities.¹⁰⁵ Its goal is to shift from control of separate media (air, water, waste) and priority-setting to overall planning for the states’ environments.¹⁰⁶ By focusing on environmental improvement and community-based environmental protection, NEPPS aims to ensure progress in pursuit of environmental goals, establish partnerships between states and regional EPA offices, and foster the transition to greater state autonomy.

Under the traditional system, EPA performed its mandatory statutory mission with accountability to Congress and the public. NEPPS, however encourages the success of state programs through EPA’s “differential oversight” of state action.¹⁰⁷ Under NEPPS,

102. For a discussion of President Clinton’s role in the general trend toward devolution, see *supra* notes 25-26 and accompanying text.

103. See generally *Creation of Partnership System*, *supra* note 5. Emphasizing the need for its implementation, the parties to NEPPS commented that “[w]e are in the midst of a critical transitional period for our nation’s environmental policy. We have accomplished much in 25 years to protect the health of our people and preserve natural treasures for future generations. But much remains to be done.” *Id.*

104. See *id.* at 1. The purpose of NEPPS is described as follows: States and [EPA] propose a new environmental partnership that will encourage continuous improvement and foster excellence in state and federal environmental programs. This new approach will reflect the advances made in environmental protection in the United States over the past two decades and recognize that existing policies and management approaches must be modified to ensure continued environmental progress. We must direct scarce public resources toward improving environmental results, allow states greater flexibility to achieve those results, and account our accountability to the public and taxpayers.

Id.

105. See *id.* at 2-3.

106. See *id.* at 3.

107. See *id.* at 5-6. NEPPS describes the “differential oversight” approach in the following manner:

EPA will work with all states using the new environmental performance partnership system and reaching agreements on environmental performance based on an up-front assessment of environmental conditions in each state. After agreement is reached, EPA will focus on program-wide, limited after-the-fact reviews rather than case-by-case intervention and will

although jointly accountable with EPA to Congress and the public for implementing environmental programs and initiatives, the states are primarily responsible for environmental management.¹⁰⁸

The performance of the states under NEPPS is assessed on the basis of “environmental indicators,” the purpose of which are to facilitate the detection of trends or phenomena that are not readily detectable.¹⁰⁹ These measures of condition, action, or progress toward goals or objectives are intended to show environmental trends as well as reflect changes in human welfare caused by varying environmental conditions including stress and management responses.¹¹⁰ Based on raw data and instrument measurements, environmental indicators include, but are not limited to: (1) the percentage of a state’s landfills equipped with engineered liner systems; (2) the percentage of a state’s fish that is safe to eat; and (3) improvements in a state’s air quality.¹¹¹ While laudatory in its objectives, environmental indicators have some intrinsic problems, as does NEPPS, as a whole.

work with states to identify other ways to reduce oversight. Using differential oversight will serve as an incentive for strong state performance and enable EPA to focus resources on state programs that need more assistance to perform well.

Id.

108. See *Creation of Partnership System*, *supra* note 5, at 5-6. NEPPS provides for the following:

The states should serve as the primary front-line delivery agent, managing their own programs, adapting to local conditions, and testing new approaches for delivering more environmental protection for less. Among its other responsibilities, such as ensuring good science and strong national health and environmental standards, the federal government should provide analysis of environmental and compliance trends, provide expertise to and facilitate learning among the states, work in a collaborative and more flexible partnership with the states, address interstate issues, and *serve as a backstop, ensuring that all states provide fundamental public health and environmental protection.*

Id. (emphasis added).

109. See *GAO Report*, *supra* note 90, at 44-45 (“Environmental indicators are direct measures of the health of the environment, such as the numbers and health of specific, key flora and fauna in an ecosystem. Theoretically, these indicators can show the condition of the environment at a given point in time — a ‘snapshot’ of environmental quality.”).

110. See *id.* at 44. A 1995 General Accounting Office report provides, in pertinent part:

[W]hen measured over time, [environmental indicators] may be able to show trends in the condition of the environment, thus enabling EPA and the states to (1) pinpoint polluted areas or areas at risk from pollution so that efforts can be made to identify and control the source(s) of the pollution and (2) assess the effectiveness of current and previous program actions.

Id.

111. See *id.*

B. Problems with NEPPS

The most fundamental weakness of NEPPS agreements is that the statutory authority to implement and enforce the individual media programs is governed by delegation.¹¹² The statutory delegation language contained in various environmental statutes has made it increasingly difficult for Congress in the past several sessions to reauthorize major bills.¹¹³ Yet, without statutory changes, some of the contemplated NEPPS agreements could threaten delegation in particular states.

Another potential problem for the states and EPA operating under NEPPS is the questionable ability of the states to continue to satisfy the statutory and regulatory mandates set forth in other environmental statutes and in the Code of Federal Regulations.¹¹⁴ Specific provisions of the Omnibus Appropriations and Rescissions Act, however, provide NEPPS with basic funds and continuing appropriations.¹¹⁵ It is important to realize that these provisions of the Omnibus Appropriations and Rescissions Act do not negate the specific mandates or grant language of other statutes, such as the Clean Water Act, which provides specific guidelines as to how states should spend the grant money.¹¹⁶

112. *See id.* Under statutory authority, EPA may delegate certain federal powers to the states. *See id.* The federal government provides funding for states' programs on the condition that the states provide EPA with documentation assuring that appropriate standards for compliance and enforcement are being met. *See id.* For a further discussion of the interrelationship between the federal government and the states, see *supra* notes 15-43 and accompanying text.

113. For a discussion of the federal government's historical involvement in the development of environmental legislation, see *supra* notes 44-65 and accompanying text.

114. For a discussion of the difficulties which have historically surrounded reconciliation of federal and state legislation, see *supra* notes 15-22 and accompanying text.

115. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of U.S.C.).

116. *See* Clean Water Act § 319, 33 U.S.C. § 1329 (1994). The Clean Water Act provides, in pertinent part:

For each fiscal year beginning after September 30, 1987, the Administrator may give priority in making grants under this subsection, and shall give consideration in determining the Federal share of any such grant, to States which have implemented or are proposing to implement management programs which will—

(A) control particularly difficult or serious nonpoint source pollution problems, including, but not limited to, problems resulting from mining activities;

(B) implement innovative methods or practices for controlling nonpoint sources of pollution, including regulatory programs where the Administrator deems appropriate;

(C) control interstate nonpoint source pollution problems; or

According to a 1995 task force report, implementation of NEPPS would require exceptions to the regulations governing federal-state grants for environmental programs.¹¹⁷ Title 40, Part 31 of the Code of Federal Regulations requires that the money awarded by the federal government be accounted for in a very precise manner. Such measures are the equivalent of notice and comment, which are two due process requirements that the federal government cannot eliminate.¹¹⁸ EPA has initiated rule making to revise the regulations, but until that process is complete, EPA is bound to abide by the regulations already in place. The scheme of NEPPS attempts to avoid basic funding decisions and program oversight by specific media, and instead provide block grant funding to the

(D) carry out ground water quality protection activities which the Administrator determines are part of a comprehensive nonpoint source pollution control program, including research, planning ground water assessments, demonstration programs, enforcement, technical assistance, education, and training to protect ground water from nonpoint sources of pollution.

Id. § 319(h)(5), 33 U.S.C. § 1329(h)(5).

117. *See* Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments, 40 C.F.R. § 31 (1997). The purpose and scope of these requirements is to establish "uniform administrative rules for federal grants and cooperative agreements and sub-awards to state, local and Indian tribal governments." *Id.* § 31.1.

118. *See* Administrative Procedure Act § 553, 5 U.S.C. § 553 (1994). The Administrative Procedures Act describes the notice and comment procedure as follows:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . .

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Id. § 553 (b)-(c), 5 U.S.C. § 553(b)-(c). Changing NEPPS without either statutory or regulatory changes may run afoul of the traditional due process requirements of public notice and opportunity to comment. *See* Friends of the Earth v. Hall, 693 F. Supp. 904, 912 (W.D. Wash. 1988) (holding Environmental Impact Statements prepared by Navy and Army Corps of Engineers were inadequate to permit informed decision making and informed public participation). The *Friends of the Earth* court stated that "[w]here a detailed Environmental Impact Statement fails to contain a detailed mitigation plan, the agency fails to meet its touchstone obligation of fostering informed decision making and informed public participation." *Id.* at 939; *see also* Deficit Reduction Act § 20(b), 41 U.S.C. § 418(b) (1994) (providing specifically for notice and comment processes for amendment or modifications relating to expenditure of appropriated federal funds).

states, which departs from the requirements of the regulations.¹¹⁹ Although block grant funding is an appropriate and defensible course to follow, EPA needs to first change the regulations through notice and comment. While EPA has taken steps to alter rule making procedures, these efforts may prove futile, however, if devolution of power to the states moves too quickly to await EPA's predicted 1998 completion of its regulatory alterations.¹²⁰

A separate problem is that grant agreements from prior years may require on-going contractual activities. As with most governmental activities, there are no uniform starting and stopping dates for environmental grant projects.¹²¹ Thus, some grants funded prior to NEPPS will require on-going funding, even after NEPPS is in place. For example, NEPPS does not cover the Clean Air Act Inspection and Maintenance Program,¹²² the Asbestos Hazard Emergency Response Act,¹²³ the National Emission Standards for Hazardous Air Pollutants under the Clean Air Act,¹²⁴ or the Clean Air Act Title V¹²⁵ programs run by states.

An additional problem with NEPPS is that it does not discuss national uniformity, a longtime goal of environmental protection efforts.¹²⁶ Because each state establishes priorities with the appropriate EPA regional office under NEPPS, those priorities may vary considerably across the nation. Similarly, EPA's decreased oversight of state environmental agency performance leads to the likelihood that uniformity of environmental standards will decrease

119. For a discussion of NEPPS, see *Performance Partnership Grants*, *supra* note 3, at 8.

120. See Letter from Fred Hanson, EPA Deputy Administrator, to Associates I (July 24, 1996) (on file with author) (discussing EPA Revised Interim Guidance report and explaining how "guidance will serve as the operating guidance for States and Tribes interested in applying for [Performance Partnership Grants]").

121. It would be impossible to have exact dates to begin and end these projects because it would be necessary to shut down projects totally and then begin the new projects. As with any new system, there must be overlap time.

122. Clean Air Act § 181, 42 U.S.C. § 7511 (1994) (requiring states to implement enhanced Inspection and Maintenance Program for vehicles in severe ozone nonattainment areas).

123. Asbestos Hazard Emergency Response Act §§ 201-14, 15 U.S.C. §§ 2641-54 (1994) (requiring states to implement a federally supervised program).

124. Clean Air Act § 112, 42 U.S.C. § 7412 (1994) (setting forth definitions and list of hazardous air pollutants, and describing method of revising emission standards through submission of modification petitions).

125. Clean Air Act §§ 501-07, 42 U.S.C. §§ 7661-7661f (1994) (dealing with permits, relevant definitions, programmatic details, application processes, and other various requirements and conditions).

126. For a discussion concerning the general goals of EPA, see *EPA's Mission* (visited Oct. 23, 1997) <<http://www.epa.gov/epahome/epa.html>> (providing overview of EPA's history as well as details of future plans).

through EPA's encouragement of an even lesser standard of review.¹²⁷ Moreover, NEPPS's discouragement of "bean counting" and reliance instead on "environmental indicators" is problematic because there is neither uniform understanding of precisely what qualifies as an "environmental indicator"¹²⁸ nor an indication of when improvements in indicators have been achieved. Given the vagueness of the parameters and measures of success, concerns about EPA oversight of states' performance may increase.

The final weakness of NEPPS involves the determination as to when enforcement authority arises in a NEPPS state. Markedly, quantification of enforcement actions taken is no longer a critical component under NEPPS.¹²⁹ Both individual states and EPA are publicly emphasizing compliance assistance over enforcement actions.¹³⁰ Recently, state enforcement under a "race to the bottom" scenario has been implicated as unsound environmental protection.¹³¹ Citizens in Ohio, Michigan, Idaho and Texas filed petitions requesting that EPA withdraw delegated programs in these states.¹³² The main contention in these states is that state regulators have

127. See *Superfund Sites May Receive Less Oversight Under EPA's 'Cooperative' Approach*, 34 Air/Water Pollution Report's Env't Week (Business Publishers, Inc.) No. 33, at 516 (Aug. 19, 1996) ("To qualify [for reduced federal oversight], potentially responsible parties (PRPs) must consistently produce sound documents and perform well in laboratory or field audits A PRP also must agree to a reasonable time frame to complete a cleanup and comply with the terms of its agreement with EPA.").

128. See *Performance Partnership Grants*, *supra* note 3, at 5. EPA defines environmental indicators as "measures of actual changes in air and water quality, land use, and changes in living resources and human health." *Id.* Under section 1.7 of EPA's report, entitled *Performance Partnership Grants for State and Tribal Environmental Programs: Interim Guidance*, EPA requires that Performance Partnership Grants program commitments "must be quantifiable, measurable and verifiable." *Id.* Although these are vague terms, they are only intended to act as guiding principles. See *id.*

129. See *id.* at 6 (stating that "[s]pecific performance measures are required only if they are required by statute, regulation or standing legal agreement between EPA and States/Tribes (e.g. Delegation Agreements), or if EPA National Program Managers or Regions have required them in guidance or policy").

130. See generally Kyle Niederpruem, *Environmental Agency Picks New Commissioner*, INDIANAPOLIS STAR, May 22, 1996. Michael O'Connor, Commissioner, Indiana Department of Environmental Management, stated that "I intend to continue the direction we've been taking toward compliance-driven activities, helping people to understand what they have to do to come into compliance." *Id.*

131. See Krier, *On the Topology*, *supra* note 67, at 1236-37.

132. See John H. Cushman, Jr., *Colorado and Ohio Accused of Skirting Federal Environmental Laws*, N.Y. TIMES, Jan. 30, 1997, at B1 (explaining that "these petitions, filed with the Environmental Protection Agency, could strengthen the Federal Agency's hand in a long-running dispute between Washington and the states over how far to go in protecting compliance where states voluntarily audit and correct their own pollution problems").

initiated few or no enforcement actions in recent years. The question remains whether state enforcement will deteriorate without the presence of a strong federal back-up.

V. CONCLUSION

Public choice theory discredits major public policy issues on economic terms, frequently concluding that self-interest and self-preservation are motivators for legislators, lobbyists and bureaucrats.¹³³ Likewise, it suggests that legislatures pass laws and administrative agencies promulgate rules that result from compromises involving public interest groups who would benefit from them.¹³⁴ Public choice groups seeking higher levels of environmental quality are more effective at the federal level than at the state or local levels.¹³⁵

The lack of compromise under NEPPS caused by the non-involvement of the legislative process may ultimately invalidate the entire program. Although its ends of flexibility and decreased bureaucracy are laudable, regulators need to structure NEPPS through federal and state legislatures to ensure that procedures are followed and that room is made for the participation of elected officials, citizens and interest groups. Congress needs to either set or delegate the priorities of states that have not yet contracted with EPA.

Like all proposed devolutions, NEPPS will change the status quo. As such, the consequences to conflicting interest groups are relevant. The NEPPS process of shifting power from the federal government to states is occurring at a level where only organized interest groups can have enormous influence. Individual citizens, however, are not provided access to this process. Although citizen environmentalists are not effective at the federal level, they have a strong federal presence. Moreover, regulated industry may ultimately prosper from a new-found ability to play states against one another as a result of authority being set at the state level.

While it is far too early to determine whether the 1990s "states' rights" movement represents a historic development within our nation's expanding and contracting interpretations of federalism, its

133. For a complete analysis of public policy issues as seen through public choice theory, see *supra* notes 112-32 and accompanying text.

134. For a discussion of models of environmental regulation supported by both federal and state legislatures, see *supra* notes 44-65.

135. See Robert Glicksman & Christopher H. Shroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 308-09 (1991) (presenting history of EPA by discussing significant court cases).

expression in environmental protection should trouble us all. NEPPS appears to fit the present times and is consistent with the “back to the states” movements. However, there are significant legal and public policy problems in such an abrupt shift of authority. NEPPS suggests that unelected officials at the federal and state levels can alter their relationship through a contract, while the rest of us, regardless of our interest, will neither know of nor influence the change. This new relationship may lack the validity that even cynical public choice theorists ascribe to models that operate within an acknowledged interest group framework. NEPPS lacks procedural validity and may be doomed to failure despite the legislature’s good intentions of “returning power to the states” and infusing flexibility into an admittedly rigid federalized system.

Because NEPPS has begun and more states are signing on, the best hope for correction lies within the federal courts. The judicial system can evaluate NEPPS by a standard of “due process of law making” and invalidate the program on the grounds of its inherent legislative quality. Finding current NEPPS devolution in violation of “due process of lawmaking” would make no statement about the value of its goals, but would require the correct implementation of those goals in accordance with due process.