



Clean Water, Federalism and the Res Judicata Impact of State Judgments in Federal Environmental Litigation

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Clean Water, Federalism and the Res Judicata Impact of State Judgments in Federal Environmental Litigation

INTRODUCTION

During the 1970's Congress enacted a comprehensive series of statutes aimed at protecting the nation's environment.¹ Those acts typically allocate responsibility for regulating the environment to federal administrative agencies which are empowered to establish pollution control standards that may be enforced by state agencies subject to supervision of, and even preemption by the federal agencies.² The primacy of fed-

¹ See, e.g., Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (codified at 7 U.S.C. § 136-136y (1976 & Supp. V 1981)); Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (Supp. V 1981)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981) [hereafter Clean Water Act]); Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified at 42 U.S.C. §§ 300f-300j-9 (1976 & Supp. IV 1980)); Resource Conservation and Recovery Act of 1976 (Solid Waste Disposal Act), Pub. L. No. 89-272 as added Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980)); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified at 42 U.S.C. §§ 7401-7642 (Supp. IV 1980)).

² See, e.g., Federal Pesticide Act of 1978, 7 U.S.C. § 136b(a)(1) (1976 & Supp. V 1981) (federal authority to prescribe standards for certification of applicators of pesticides); *id.* § 136b(a)(2) (state may submit its own plan for approval by EPA Administrator); *id.* § 136b(b) (EPA Administrator may approve or reject state plan and may later withdraw approval of plan if state has failed to follow plan); *id.* § 136 (EPA Administrator is authorized to prescribe regulations); *id.* § 136w-1 (state is given primary enforcement responsibility for pesticide use violations); *id.* § 136w-2 (EPA Administrator may rescind state's primary enforcement responsibility if state fails to enforce regulations); *id.* § 136w-2(c) (EPA Administrator may take immediate action in an emergency situation if state fails to act).

See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1251 (Supp. V 1981) (Secretary of the Interior is authorized to promulgate standards for

eral power in this legislative scheme to control major environmental policy decisions is clear.

The continuation of that dominate federal role, however, is in jeopardy. While the resurgence of political forces with a "states' rights"

surface mining); *id.* § 1253 (state may propose and enforce its own program); *id.* § 1265 (any permits issued to conduct surface mining operations must meet the minimum performance standards set forth in the Act); *id.* § 1253(b) (Secretary of the Interior may approve or disapprove state program); *id.* 1254(b) (if state has a program and fails to enforce it, the Secretary may provide for federal enforcement); *id.* § 1254(g) (whenever a federal program is promulgated for a state, the federal program preempts any inconsistent state statutes or regulations); *id.* § 1271 (Secretary of the Interior may take enforcement action if state fails to do so).

See, e.g., Federal Water Pollution Control Act, 33 U.S.C. §§ 1311, 1312, 1314, 1316, 1317, 1343 (1976 & Supp. V 1981) (federal authority to issue guidelines); *id.* §§ 1342, 1344 (states may develop their own permit programs which must comply with the federal guidelines); *id.* §§ 1342 (c)(3), 1344(i) (EPA Administrator may withdraw approval of state programs); *id.* § 1364 (EPA Administrator may take immediate action in an emergency situation involving an imminent and substantial health danger); *id.* § 1319 (federal authority to enforce provisions of the Act).

See, e.g., Safe Drinking Water Act, 42 U.S.C. § 300g-1 (1976 & Supp. IV 1980) (EPA Administrator authorized to establish interim drinking water regulations and recommend maximum contaminant levels); *id.* § 300g-2 (state may apply for approval of its own plan and be given primary enforcement responsibility but must adopt regulations which are at least as strict as the federal standards); *id.* § 300g-2(b)(2) (EPA Administrator may approve or reject state plan); *id.* § 300g-3 (EPA Administrator may bring civil action to force compliance with federal standards); *id.* § 300i (EPA Administrator may take action in case of an emergency involving an imminent and substantial danger to health, if the state fails to act).

See, e.g., Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6907, 6921-6924 (1976 & Supp. IV 1980) (EPA Administrator is authorized to establish standards and minimum federal guidelines for disposal of solid and hazardous wastes); *id.* § 6926(b) (states may develop their own programs for hazardous waste management); *id.* § 6926(e) (EPA Administrator may withdraw approval of state program); *id.* § 6928 (EPA Administrator may enforce regulations by bringing a civil action in U.S. district court); *id.* §§ 6942-6943 (federal guidelines and minimum requirements for solid waste disposal); *id.* § 6946 (states may develop their own plans); *id.* § 6947(a) (EPA Administrator may approve or reject state plan and may later withdraw approval of plan); *id.* § 6973 (EPA Administrator may take necessary action in situations presenting an "imminent and substantial endangerment to health or the environment").

See, e.g., Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7409(a), 7411, 7412 (Supp. IV 1980) (federal authority to set national standards); *id.* § 7410 (states are required to submit their own plan for implementation of federal standards); *id.* § 7410(a)(2), (c)(1) (EPA Administrator may disapprove state plan or submit its own plan if proposed state plan fails to comply with federal requirements); *id.* § 7413 (EPA Administrator may enforce the implementation plans by bringing a civil action in U.S. district court); *id.* § 7603 (EPA Administrator may act in an emergency involving an imminent and substantial danger to health, if the state fails to act).

orientation threatens the legislative fruits of the "decade of the environment," the framework of the environmental statutes may carry the seeds of their own destruction. Much litigation under those statutes arises in connection with state court review of state agency enforcement efforts.³ Since this body of legislation empowers federal agencies to supervise and even overrule certain state agency decisions and seek independent federal court enforcement, many issues concerning the appropriate relationship between state and federal courts emerge. Among the most significant of those issues is whether the judgment of a state court reviewing the actions of a state agency is entitled to res judicata effect in a subsequent federal court enforcement action.⁴ Although the body of environmental legislation prompting this question does not explicitly contemplate its resolution, it implicitly argues against the application of res judicata. Affording a state judgment the protection of res judicata would, as this article demonstrates, undercut the federal supervisory powers built into the nation's principle pollution control laws and shift the balance of power to decide regional and even national environmental issues to state courts.

This article considers whether the doctrine of res judicata should be applied to state judgments in subsequent federal enforcement litigation. The first section focuses on the distribution of power between the states and the federal government under a representative federal environmental statute, the Federal Water Pollution Control Act Amendments of 1972 (the Clean Water Act, or the Act).⁵ This section describes the preeminence of federal power under the Act. The second section analyzes whether applying res judicata in order to prevent relitigation in federal court of water pollution issues decided in state court is consistent with the intent of the Act, sound pollution control policy, federal-

³ See, e.g., *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980); *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978); *Town of Suttan v. Water Supply & Pollution Control Comm'n*, 116 N.H. 154, 157-58, 355 A.2d 867, 870 (1976); cf. Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1227 (1977).

⁴ The term "res judicata" as used in this article encompasses the doctrines of merger, bar, and issue preclusion, unless otherwise indicated. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1980).

⁵ Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981)). The Clean Water Act, note 1 *supra*, is representative of the statutes cited in note 2 *supra*, in that it provides for a division of enforcement responsibilities between the states and the federal government yet retains significant supervisory powers in the federal government. The Clean Water Act was selected for discussion because many of the reported decisions significant to the issues considered herein are Clean Water Act cases.

state comity and traditional res judicata doctrine. It concludes that res judicata should not be applied when its application might jeopardize the realization of one of the basic goals of the Act: maintenance of nationally uniform pollution control standards. The third section evaluates the impact on this res judicata issue of recent cases delineating the proper relationship between the states and the federal government under the Tenth Amendment. This section reasons that granting a state court judgment res judicata impact must presuppose a relationship between federal and state agencies that infringes on state sovereignty and encourages that relationship. This compels the conclusion that applying res judicata cannot be justified in order to advance federal-state comity but, on the contrary, is inconsistent with our federalist scheme of government.

I. THE CLEAN WATER ACT

The historical and legislative background of the Clean Water Act, as well as the language of the Act itself, make it clear that Congress intended the federal government to play the major role in setting pollution control policy, leaving to the states the job of implementing that policy with federal supervision. The stated purpose of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters by eliminating the discharge of all pollutants into navigable water" by 1985.⁶ With this laudable, if not unrealistic,⁷ goal in mind, Congress enacted one of the most complicated pieces of legislation in its history.⁸ Prominent among its complexities is the relationship created between the states and the federal government to establish and implement water pollution controls.

While this legislation bears the title "Amendments," that characterization is misleading. The Clean Water Act embodied a major departure from prior legislation.⁹ Under earlier versions of the Act, the states

⁶ 33 U.S.C. § 1251(a)(1) (1976 & Supp. V 1981).

⁷ One commentator has speculated that sponsors of environmental legislation in the early 1970's may deliberately have set radical and unrealistic goals for eliminating pollution to dramatize environmental issues, arouse public support, and demonstrate to polluters that the federal government meant business. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1199 (1977) [hereafter Stewart].

⁸ H. LIEBER, FEDERALISM AND CLEAN WATERS 7-8 (1975).

⁹ *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). One of the most basic changes involved employment of an entirely new mechanism to control water pollution. Before it was superseded in 1972, the Clean Water Act employed ambient water quality standards specifying acceptable levels of water pollution in a state's interstate naviga-

were entrusted with primary responsibility for setting and enforcing water quality standards while the federal government merely provided financial, technical and enforcement support.¹⁰ By 1972 Congress was faced with evidence indicating many state pollution control programs were ineffectual, had fallen victim to local political and economic interests and, as a result, the nation's waters were deteriorating.¹¹ Concluding that existing federal legislation was "inadequate in every vital aspect,"¹² Congress shifted the power to make major policy decisions concerning water pollution control from the states to the federal government.

The most significant shift occurred in the setting and enforcing of pollution control standards. The Act gives the Environmental Protection Agency (EPA) power to establish nationally uniform water pollution standards¹³ and creates what has been referred to as a "delicate

ble waters. 33 U.S.C. § 1160(c) (1970) (superseded) (repealed 1972). The new statute seeks to control pollution at its source by prohibiting the discharge of any pollutant without a permit. 33 U.S.C. §§ 1311, 1342 (1976 & Supp. V 1981).

¹⁰ SENATE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. REP. NO. 414, 92d Cong., 1st Sess. 1, *reprinted in* 2 SENATE COMM. ON PUBLIC WORKS, 92D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1419 (Comm. Print 1973) [volumes 1 and 2 hereafter WATER POLL'N LEG. HIST.]; *see also* H. LIEBER, note 8 *supra*, at 11-13.

Congress continued the legislative history of the Federal Water Pollution Control Act Amendments of 1972, WATER POLL'N LEG. HIST., this note *supra*, after the passage of the Clean Water Act in 1978. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977: A CONTINUATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT (Comm. Print 1978) [volumes 3 and 4 hereafter CLEAN WATER LEG. HIST.].

¹¹ House Debate on H.R. 11896, Mar. 27, 1972 (remarks of Representatives Dorn and Dingell, testimony of Governor Wendell R. Anderson, Minnesota), *reprinted in* 1 WATER POLL'N LEG. HIST., note 10 *supra*, at 467-76; *see also* Mianus River Preservation Committee v. Administrator, Environmental Protection Agency, 541 F.2d 899, 906 (2d Cir. 1976); United States v. Cargill, Inc., 508 F. Supp. 734, 740, n.19 (D. Del. 1981); United States v. Duracell International, Inc., 510 F. Supp. 154, 155 (M.D. Tenn. 1981); H. LIEBER, note 8 *supra*, at 87-88.

¹² S. REP. NO. 414, 92d Cong., 1st Sess. 5, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3674; SENATE COMM. ON PUBLIC WORKS, REPORT ON THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. REP. NO. 414 92d Cong., 1st Sess. 7, *reprinted in* WATER POLL'N LEG. HIST., note 10 *supra*, at 1425.

¹³ *See, e.g.*, 33 U.S.C. § 1311 (1976 & Supp. V 1981) (effluent limitations); *id.* § 1312 (water quality related effluent limitations); *id.* § 1316 (national standards of performance); *id.* § 1317 (toxic and pretreatment effluent standards); *id.* § 1319 (Administrator's enforcement powers). The states remain free to adopt and enforce standards

partnership"¹⁴ between the states and the EPA to implement and enforce these standards. While the Act pays occasional lip service to the importance of the states' role in this "partnership,"¹⁵ the Act's basic structure firmly establishes federal control.¹⁶

The keystone of the Act's water pollution control strategy is the National Pollutant Discharge Elimination System (NPDES). The Act prohibits any discharge of pollutants into the nation's waters¹⁷ without a NPDES permit and gives the EPA initial authority to issue permits and administer the NPDES program.¹⁸ A state may administer its own NPDES program by securing EPA's approval if the state program conforms to the pollution standards promulgated by the EPA.¹⁹ Once ap-

that are more stringent than the federal standards. 33 U.S.C. § 1370 (1976).

¹⁴ *Save the Bay, Inc. v. Administrator of the EPA*, 556 F.2d 1282, 1284 (5th Cir. 1977).

¹⁵ See, e.g., 33 U.S.C. § 1251(b) (1976 & Supp. V 1981): "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"

¹⁶ See note 2 *supra*. Recent proposals to revise the Clean Water Act, however, recommend a return to state established standards. Josephson, *Water Regulations*, 15 ENVTL. SCI. & TECH. 620 (1981).

¹⁷ 33 U.S.C. §§ 1311(a), 1342 (1976 & Supp. V 1981); see *EPA v. State Water Resources Control Board*, 426 U.S. 200, 203-08 (1976). Section 1311(a) specifically prohibits discharge into "navigable waters," which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1976). What constitutes "the waters of the United States," however, is not completely clear. One commentator cites the possibility that this key terminology was left deliberately ambiguous so that courts could extend its coverage to all the nation's waters, even those wholly intrastate. LIEBER, note 8 *supra*, at 47. Congress was open about its intent that "navigable waters" be given the "broadest possible constitutional interpretation." CONF. COMM. REP. NO. 1236, 92d Cong., 2d Sess. 144, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3776, 3822. The EPA has accordingly defined "waters of the United States" to include all interstate waters and all intrastate waters, the use of which could impact interstate commerce. 40 C.F.R. § 122.3 (1981). The Clean Water Act, thus, has been administratively construed to cover not merely navigable interstate waterways but practically every significant body of water in the nation, even those wholly intrastate and non-navigable. See *United States v. Ashland Oil & Trans. Co.*, 504 F.2d 1317, 1323 (6th Cir. 1974) ("navigable waters" includes all the waters within the geographic confines of the United States).

¹⁸ 33 U.S.C. § 1342(a) (1976 & Supp. V 1981).

¹⁹ *Id.* § 1342(b)(1)(A) (1976 & Supp. V 1981); *Mianus River Preservation Comm. v. Administrator of EPA*, 541 F.2d 899, 906 (2d Cir. 1976). The following states have NPDES programs and are listed in their order of approval with the dates of approval: California (May 14, 1973); Oregon (Sept. 26, 1973); Connecticut (Sept. 26, 1973); Michigan (Oct. 17, 1973); Washington (Nov. 14, 1973); Wisconsin (Feb. 4, 1974); Ohio (Mar. 11, 1974); Vermont (Mar. 11, 1974); Delaware (Apr. 1, 1974); Mississippi (May 1, 1974); Montana (June 10, 1974); Nebraska (June 12, 1974); Georgia

proval is granted, the state assumes responsibility for issuing permits.²⁰ Applications for permits are made directly to the appropriate state agency, which is empowered to make the initial evaluations and tentative decisions concerning issuance.²¹ But the EPA retains significant supervisory authority over these state programs. Each permit application filed with a state and each permit proposed to be issued by a state must be submitted to the EPA,²² which may veto any permit a state proposes to issue if the EPA considers it "outside the guidelines and requirements"²³ of the Act. If the EPA determines that a state is not properly administering its program, the EPA may withdraw its approval of the state program²⁴ and resume issuing federal permits. Thus, while a state is given responsibility for making the first administrative evaluation of a proposed discharge into water within its boundaries, the EPA is equipped with the means to overturn the state determination. Other major federal environmental legislation follows the same pattern of state implementation of federal standards, with EPA supervision and the possibility of federal preemption.²⁵

The Clean Water Act also gives the EPA broad enforcement authority in states with approved programs. If the EPA determines that a permit violation has occurred, it may ask the state involved to take action, or it may immediately initiate its own enforcement litigation in federal district court.²⁶ The EPA may assume all enforcement powers in a state where violations are so widespread as to indicate a general

(June 28, 1974); Kansas (June 28, 1974); Minnesota (June 30, 1974); Maryland (Sept. 5, 1974); Missouri (Oct. 30, 1974); Hawaii (Nov. 28, 1974); Indiana (Jan. 1, 1975); Wyoming (Jan. 30, 1975); Colorado (Mar. 27, 1975); Virginia (Mar. 31, 1975); South Carolina (June 10, 1975); North Dakota (June 13, 1975); Nevada (Sept. 19, 1975); North Carolina (Oct. 19, 1975); New York (Oct. 28, 1975); Illinois (Oct. 23, 1977); Tennessee (Dec. 28, 1977); Pennsylvania (June 30, 1978); Iowa (Aug. 10, 1978); Alabama (Oct. 19, 1979). [State Water Laws] ENV'T REP. (BNA) 611:0111 (May 2, 1980).

²⁰ 33 U.S.C. § 1342(b)(2)(A) (1976).

²¹ *Id.* § 1342(d)(1) (1976).

²² *Id.*

²³ 33 U.S.C. § 1342(d)(2) (1976 & Supp. V 1981). The bill originally introduced in the House of Representatives provided that, once a state had an approved permit program, it could then issue permits according to EPA's guidelines without permit-by-permit review by the federal agency and without the threat of veto. The Senate bill required approval by the EPA of all state proposed permits. Congress ultimately bestowed power on EPA to individually review all state permits for conformance with EPA standards. See LIEBER, note 8 *supra*, at 46-47, 69, 78-79.

²⁴ 33 U.S.C. § 1342(c)(3) (1976 & Supp. V 1981).

²⁵ See note 2 *supra*.

²⁶ 33 U.S.C. § 1319(a)(1), (3) (1976 & Supp. IV 1980).

failure of state enforcement.²⁷ Although one condition for approval of a state permit program is sufficient state authority to judicially enforce compliance,²⁸ the Clean Water Act specifies that the existence of a state program in no way limits the power of the EPA to bring enforcement actions in federal court.²⁹ Again, other federal environmental legislation constructs this same scheme of independent EPA enforcement in states operating their own pollution control programs.³⁰

The structure of this "delicate partnership" was dictated by dual congressional goals of efficiency and efficacy. First, to avoid the waste and duplication that would follow from the creation of a centralized bureaucracy to deal with thousands of local implementation problems, Congress desired to utilize existing state agency personnel and other state resources to administer the NPDES program. Second, the need to reverse the history of environmental degradation under state programs required the establishment of a central authority to set and enforce uniform national standards.³¹ State agencies, consequently, were given the opportunity to take the initiative in implementation and enforcement, but only so long as they adhered to the standards set by the EPA, which was delegated power to supervise pollution control efforts even in states with NPDES programs.³² The federal government, thus,

²⁷ *Id.* § 1319(a)(1), (2).

²⁸ *Id.* § 1342(b)(7); 40 C.F.R. § 123.5 (1981).

²⁹ 33 U.S.C. § 1342(i) (1976).

³⁰ See note 2 *supra*.

³¹ See House Debate on H.R. 11896, Mar. 27, 1972, (remarks of Representative Blatnik), reprinted in 1 WATER POLL'N LEG. HIST., note 10 *supra*, at 355-56; see also 1 WATER POLL'N LEG. HIST., note 10 *supra*, at 132, 162, 170, 309, 466-67, 517, 577, 711; 2 WATER POLL'N LEG. HIST., note 10 *supra*, at 1219, 1405 (Clean Water Act requires uniform enforcement of standards promulgated by EPA); *id.* at 1366, and CLEAN WATER LEG. HIST., note 10 *supra*, at 664 (purpose of state programs is to avoid unnecessary growth of federal bureaucracy); see also *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 628 (7th Cir. 1980), *vacated and remanded*, *Outboard Marine Corp. v. Illinois*, 453 U.S. 917 (1981) (listing provisions of Clean Water Act demonstrating policy favoring uniformity). The same policies were also central to the Clean Air Act. *District of Columbia v. Train*, 521 F.2d 971, 981 & n.17, 982 (D.C. Cir. 1975), *vacated and remanded per curiam, sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977).

³² Some members of the Congress that enacted the Clean Water Act envisioned that the supervisory powers of the EPA would be used with a sense of restraint engendered by the deference due the states in our federal system. It was hoped that the states would do their job, thereby relieving the EPA of the need to do its job. See House Consideration of the Report of the Conference Comm., Oct. 4, 1972 (remarks of Representative Wright), reprinted in 1 WATER POLL'N LEG. HIST., note 10 *supra*, at 262; see also *Mianus River Preservation Committee v. Administrator of EPA*, 541 F.2d 899, 907

(2d Cir. 1976); *United States v. Cargill, Inc.*, 508 F. Supp. 734, 740 (D. Del. 1981). It soon became clear that this vision had roughly the same connection to reality as the Marxist notion that the dictatorship of the proletariat would wither away on its own accord. See Marx, *Critique of the Gotha Program*, and Engels, *Socialism: Utopian and Scientific*, in MARX AND ENGELS, SELECTED WORKS IN ONE VOLUME 331, 429 (1968).

California was the first state to secure approval for its NPDES program. At the time approval was granted, the EPA and California entered into a "Memorandum of Understanding" which significantly expanded the EPA's power over California's program, beyond even that granted by the Act. Memorandum of Understanding Regarding Permit and Enforcement Programs Between the State Water Resources Control Board and the Regional Administrator, Region IX, EPA (Mar. 26, 1973), cited in LIEBER, note 8 *supra*, at 98 [hereafter Memorandum of Understanding]. The Clean Water Act requires states to submit permit applications and proposed permits to the EPA and grants the EPA the power to veto proposed permits. 33 U.S.C. § 1342 (d)(1)-(2) (1976 & Supp. V 1981). Under the Memorandum of Understanding, the EPA also obtained the right to participate in state agency staff meetings concerning permit applications and to "comment" on those applications. LIEBER, note 8 *supra*, at 98. California agreed to issue no permit unless the EPA first approved the application. *Id.*; see also *Shell Oil Co. v. Train*, 585 F.2d 408, 416 n.4 (9th Cir. 1978); CAL. ADMIN. CODE tit. 23, § 2235.5(a)(I)(C) (1974). Having included the EPA in the preliminary application process, California frustrated the congressional intent to leave the states with at least the initiative in implementing the Clean Water Act. Inexplicably, then-Governor of California Ronald Reagan hailed the agreement as "giving full authority to the state Water Resources Control Board to run the water pollution control program in California." He characterized the agreement as "a solid example of the return of autonomy to a level of government closer to the problems involved and in a better position to provide solutions." Press Release #262, May 15, 1973, Office of Governor Ronald Reagan, cited in LIEBER, note 8 *supra*, at 99. The EPA's involvement in the permit application processes of all states with approved programs is now sanctioned by the EPA's own regulations. 40 C.F.R. § 123.38(a) (1981).

Consistent with these actions, the EPA has generally been reluctant to meaningfully delegate to the states the enforcement responsibilities Congress intended them to exercise. This has purportedly resulted in the growth of the federal bureaucracy Congress sought to constrict, enormous delays in processing permit applications, and tension between the members of the "partnership." Many state administrators thus conclude that the NPDES permit program is on the verge of collapse. SUBCOMM. ON OVERSIGHT AND REVIEW OF THE HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, 96TH CONG., 2D SESS., REPORT ON IMPLEMENTATION OF THE FEDERAL WATER POLLUTION CONTROL ACT at 52-56, 60 (Comm. Print 1980).

The EPA's vigorous use of its supervisory powers to dominate state NPDES programs has been attacked on several occasions as being inconsistent with Congressional intent to create a "partnership" in which the states played a meaningful role. See, e.g., *id.* at 55-56. ("EPA exhibits an excessive tendency to second guess the States in the NPDES permit program, which the record shows never to have operated as the delegated program intended"); [11 Current Developments] ENV'T. REP. (BNA) 649-50 (Aug. 29, 1980) (quoting the General Accounting Office: "The state/Environmental Protection Agency partnership crucial to the implementation of federal environmental regulations is under 'severe strain' because state officials feel the agency exerts excessive

clearly was intended to dominate water pollution control policy.³³

II. RES JUDICATA AND CLEAN WATERS

The division of enforcement responsibilities under the Clean Water Act between state and federal agencies raises complex procedural questions for which the Act fails to provide explicit answers.³⁴ For example,

control over their programs"). *But see* SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, CLEAN WATER ACT OF 1977, S. REP. NO. 370, 95th Cong., 1st Sess. 73, reprinted in 4 CLEAN WATER LEG. HIST., note 10 *supra*, at 706 ("EPA has been much too hesitant to take any actions where States have approved permit programs").

³³ An ad hoc panel of nonpartisan experts in the fields of engineering, economics and ecology convened by the Office of Science and Technology characterized the balance of power between the states and the federal government under the then proposed Clean Water Act as follows:

If there were any lingering doubts about the primacy of the states in the regulation of water quality control, these doubts are effectively erased by the current proposed federal legislation. The states are told what they must do and when it is to be accomplished, and within a framework of constraints that are ill-defined. In brief, the states have been delegated to the role of regulatory puppets.

Hearings on H.R. 11896, H.R. 11895 Before the Comm. on Public Works of the House of Representatives, 92d Cong., 1st Sess. 757 (1971), quoted in LIEBER, note 8 *supra*, at 86; see also *Cleveland Elec. Illuminating Co. v. EPA*, 603 F.2d 1, 5 (6th Cir. 1979) ("There can be no doubt that U.S. EPA [sic] remains the dominant agency for achieving the purposes and goals of the 1972 Amendments even after a state permit program has been approved"); *United States v. Cargill, Inc.*, 508 F. Supp. 734, 742 (D. Del. 1981) ("the leading role was granted to the EPA, which was to set the parameters of the state's authority, to determine the minimum standards for regulation, to oversee closely the state's implementation of the NPDES program, and to step in where in the Administrator's judgment it was necessary"); cf. B. SHAW, ENVIRONMENTAL LAW — PEOPLE, POLLUTION AND LAND USE 339 (1976) ("While the [Clean Air] Act officially endorses state and local government as the primary instruments for prevention and control of air pollution, it must be acknowledged in fact that the federal government exerts the dominant force.").

³⁴ The Clean Water Act establishes a complex and often confusing scheme for judicial review of agency action. One court characterized the Act as "poorly drafted and astonishingly imprecise . . ." *E. I. du Pont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *aff'd in part and rev'd in part*, 430 U.S. 112 (1977). The Act provides that EPA action in "making any determination as to a State permit program," "issuing or denying any permit," or promulgating pollution control standards is to be reviewed directly by the appropriate United States court of appeals. 33 U.S.C. § 1369(b)(1) (1976). Federal district courts were given jurisdiction over enforcement actions brought by the EPA, *id.* § 1319(b) (1976), and citizen's suits authorized by the Act, 33 U.S.C. § 1365(a)(1) (1976 & Supp. V 1981). The district courts also have been held to have federal question jurisdiction to interpret the Act, *Chesapeake Bay Found. v. Virginia State Water Bd.*, 495 F. Supp. 1229, 1233-34 (E.D. Va. 1980), and, under

when a state agency brings an enforcement action in state court, or agency decisions are reviewed by a state court at the request of an alleged polluter, the Act does not specify what impact the resulting judgment has in subsequent EPA enforcement litigation. This is a vital question since the Clean Water Act anticipates that state agencies will make the initial enforcement efforts and, presumably, state courts will usually be the first judicial forums to consider enforcement issues.³⁵ If

Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1976 & Supp. V 1981), to review "final agency action" of the EPA not otherwise covered by the specific judicial review provisions of the Act. *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978). See generally Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1280 (1977) (judicial review provisions of federal environmental legislation criticized as inconsistent, incomplete and ambiguous).

³⁵ The Clean Water Act makes no provision for federal court review of the actions of state agencies operating approved NPDES programs. The division of responsibilities between state and federal agencies under the Act causes difficulty in determining the appropriate forum for judicial review of state agency actions. State agency decisions could clearly involve issues arising under the federal statute, thus providing a basis for federal question jurisdiction. *District of Columbia v. Schramm*, 631 F.2d 854, 859 n.10 (D.C. Cir. 1980) (federal question jurisdiction exists under 28 U.S.C. § 1331 (1976 & Supp. V 1981) to review state issuance of NPDES permits allegedly violative of Clean Water Act requirements); *Chesapeake Bay Found. v. Virginia State Water Bd.*, 495 F. Supp. 1229, 1233-34 (E.D. Va. 1980) (same). However, since state NPDES programs are created by state law and merely implement the federal statute, state agency decisions made under that state law might more appropriately be evaluated in state court. *District of Columbia v. Schramm*, 631 F.2d 854, 863 & n.15 (D.C. Cir. 1980) (challenges to state issued NPDES permits should be brought in state court, notwithstanding existence of federal jurisdiction, based on existence of adequate state remedies and federalism principles inherent in the Clean Water Act); *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978) (same); House Consideration of the Report of the Conference Committee, Oct. 4, 1972 (remarks of Representative Wright), reprinted in 1 WATER POLL'N LEG. HIST., note 10 *supra*, at 262 (state permits are issued under state law and are state, not federal, actions). In *Town of Sutton v. Water Supply and Pollution Control Comm'n.*, 116 N.H. 154, 156-59, 355 A.2d 867, 869-871 (1976), the New Hampshire Supreme Court reached the same result relying on a thorough analysis of the Act and its legislative history. See also *Mobil Oil Co. v. Kelley*, 426 F. Supp. 230, 235-236 (S.D. Ala. 1976) (review by state court appropriate; federal court could or should abstain).

Professor Currie has concluded that the structure and explicit provisions of the Act for review of EPA's actions in federal court provide "persuasive if not compelling evidence of an intention to preclude all initial federal court review, especially since the presence of a state officer as defendant and the probable existence of ancillary state law issues furnish plausible reasons for such an intention." Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1228 (1977). On the other hand, given the intimate involvement of the EPA in creating the standards employed in state programs and even influencing how they are applied in specific cases (see note 32 *supra*) state agency action in this area may take on the color of federal action. Faced with

the decisions of state courts are accorded res judicata effect in subsequent federal litigation, the EPA's power to supervise state programs may be seriously undermined. The following analysis concludes that res judicata should not be applied in this context on the grounds that it would frustrate Congress' intent to establish a central authority to enforce nationally uniform pollution control standards.

Only one reported decision has directly confronted the question of the res judicata impact of a state judgment in subsequent Clean Water Act litigation in federal court. In *United States v. ITT Rayonier*,³⁶ the Ninth Circuit Court of Appeals concluded that res judicata should be applied against the EPA. That decision provides a useful foil for analyzing the issues in this area.

A. *The ITT Rayonier Decision*

ITT Rayonier operated a pulp mill in the state of Washington, which had an EPA-approved NPDES program. ITT Rayonier applied for and obtained a Washington NPDES permit to operate the mill. The EPA did not veto the permit. Since the EPA had not yet established national effluent limitations³⁷ for the pulp industry, the permit incorporated discharge limits from prior legislation and contained a provision indicating that the limits would be modified to be consistent with EPA guidelines when promulgated "or as thereafter modified by final action consequent upon any appeal from such guidelines."³⁸ The permit contained a separate provision setting forth a schedule for compliance with whatever standards applied.

Two years after the permit was issued, the EPA promulgated guidelines for the pulp industry. ITT Rayonier and others immediately challenged those guidelines in the court of appeals. While the action was pending, the EPA demanded that the state agency compel ITT

these conflicting considerations, at least one federal court has acknowledged the possibility of concurrent jurisdiction in the United States courts of appeals, the United States district courts and the state courts to review state agency implementation of an NPDES program. *Chesapeake Bay Found. v. Virginia State Water Bd.*, 453 F. Supp. 122, 127 (E.D. Va. 1978). The prevailing view, articulated by the Ninth Circuit Court of Appeals in *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978) favors the state forum. *Id.* at 414.

³⁶ 627 F.2d 996 (9th Cir. 1980).

³⁷ National effluent limitations are "any restriction established by . . . the [EPA] Administrator on quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . ." 33 U.S.C. § 1362(11) (1976).

³⁸ *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 999 (9th Cir. 1980).

Rayonier to comply with the new standards. The state agency ordered compliance but was ultimately reversed by the Washington Supreme Court. The state supreme court interpreted the terms of the permit as not requiring compliance with the new guidelines until judicial review of those guidelines was completed.³⁹

The state agency having been thwarted, the EPA brought its own action in federal district court seeking injunctive relief and civil penalties under the Clean Water Act. The validity of the EPA's guidelines was eventually upheld by the court of appeals⁴⁰ and ITT Rayonier then complied. However, the EPA maintained its action in district court, demanding civil penalties for the period of noncompliance. ITT Rayonier defended on the grounds the state court decision interpreting the permit's compliance schedule was binding in the federal action and, thus, precluded the EPA from contending that penalties could be assessed for violations of the new guidelines prior to completion of judicial review.⁴¹ The district court rejected ITT's defense, relying exclusively upon Section 402(i) of the Clean Water Act which, in qualifying the power of the states to operate an approved NPDES program, provides that "[n]othing in this section shall be construed to limit the authority of the Administrator to take [enforcement] action."⁴²

The Ninth Circuit reversed, holding that the EPA was bound by the state court decision. Acknowledging that the application of *res judicata* in favor of a state judgment in federal environmental litigation was essentially an issue of first impression,⁴³ the court's analysis rested on two

³⁹ ITT Rayonier, Inc. v. Washington Dep't of Ecology, 91 Wash. 2d 682, 690, 586 P.2d 1155, 1161 (1978).

⁴⁰ Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1028-31 (D.C. Cir. 1978).

⁴¹ United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980).

⁴² 33 U.S.C. § 1342(i) (1976).

⁴³ The court observed that "[a]lthough no court has directly addressed the preclusive effect of prior judicial enforcement actions under FWPCA, courts in dicta have assumed the doctrine is not abrogated." United States v. ITT Rayonier, Inc., 627 F.2d 996, 1001 (9th Cir. 1980). The authority cited for even this timid assertion provides little support. United States v. Pennsylvania Env'tl. Hearing Bd., 584 F.2d 1273, 1276 n.15 (3d Cir. 1978), is cited as "implying earlier state administrative determination under NPDES has *res judicata* effect in federal court action." However, the footnote cited merely states that, since the issue of *res judicata* was not raised in that case, the court would not consider the question.

Reserve Mining Co. v. EPA, 514 F.2d 492, 534 (8th Cir. 1975), *modified on other grounds*, 529 F.2d 181 (8th Cir. 1976), is cited for the principle that a "non-final decision in [a] state enforcement action [is] not a bar to federal action under [the] FWPCA." United States v. ITT Rayonier, Inc., 627 F.2d 996, 1001 (9th Cir. 1980). *ITT Rayonier* apparently suggests this implies that a final state decision would bar a federal action. But the *Reserve Mining* decision does not so hold and says nothing to

key conclusions. First, the court held there is no countervailing statutory policy inherent in the Clean Water Act preventing the application of normal res judicata rules. Second, the court reasoned the EPA was in privity with the state agency, which was a party to the state court action and, thus, could be bound by the state judgment.

Both conclusions are necessary for the application of res judicata in federal litigation following a state judgment. As the following analysis indicates, both points were incorrectly analyzed in *ITT Rayonier*.

permit the implication suggested by *ITT Rayonier*. It should be noted that the res judicata problem faced by the court in *Reserve Mining* dealt with a motion by the EPA to join the parent corporations of defendant in an action brought to restrain a discharge into Lake Superior. The district court had ordered joinder on the ground that the defendant was the mere instrumentality of its parents and, thus, any judgment against defendant could be asserted offensively as res judicata as against its parents with which it was in privity. *U.S. v. Reserve Mining Co.*, 380 F. Supp. 11, 27, 29 (D. Minn. 1974). The court of appeals did not discuss the district court's res judicata argument. *ITT Rayonier* confronted an entirely different issue: whether a judgment against a state could be asserted as res judicata against the EPA. As sections II and III of this article illustrate, there are significant statutory, constitutional, and policy issues surrounding the application of res judicata in such a context which are not present when only a private party is to be barred from further litigation.

The citation in *ITT Rayonier* of *Menzel v. County Utilities Corp.*, 14 Env't Rep. Cases (BNA) 1126 (E.D. Va. 1979), must be viewed similarly. In *Menzel* a state court decision upholding the validity of a state-issued NPDES permit was given res judicata effect in a subsequent citizens' suit brought in federal district court. 14 Env't Rep. Cas. (BNA) 1126, 1128 (1979). Again, the issues discussed below, which arise in connection with an attempt to bar EPA litigation under the Act, were simply not before the court in *Menzel*. Finally, the citation in *ITT Rayonier* to *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973) is even more problematic. The court in *Buckeye* suggested that in an enforcement action under the Clean Air Act, the court which first acquired jurisdiction of enforcement proceedings, whether state or federal, would have "exclusive jurisdiction" to proceed and its judgment would be entitled to res judicata impact. *Id.* at 167 n.2. The court observed that "[i]n view of the fact that both federal and state courts acquire jurisdiction by a single Act of Congress, we do not think that Congress ever intended that the parties defendant to enforcement proceedings would be subject to double penalties, i.e., penalties in each jurisdiction." *Id.* *ITT Rayonier* again simply presents a different issue: the question is not whether a polluter who has been once penalized in a state proceeding can also be penalized a second time for the same act in federal court. Rather, the issue presented to the court in *ITT Rayonier* was whether a state judgment which fails to assess a penalty can be asserted as res judicata in order to avoid penalty in federal court. The distinction is a significant one in light of the fact that both the Clean Water Act and the Clean Air Act provide for federal enforcement of environmental standards in the event the states have failed to enforce them.

B. *The Countervailing Statutory Policy Exception to Res Judicata*

According res judicata effect to state judgments in federal water pollution litigation jeopardizes the basic goals of the Clean Water Act. Nationally uniform enforcement of pollution controls cannot be achieved without a central federal authority to harmonize state enforcement efforts. Granting state judgments res judicata impact erodes the power of the EPA and the federal courts to supervise state enforcement. Neither res judicata nor related principles of federal-state comity justify this frustration of congressional intent.

Res judicata doctrines — bar, merger and collateral estoppel — have the dual purpose of protecting litigants from the burden of relitigating issues or claims already adjudicated and of promoting judicial economy by preventing needless litigation.⁴⁴ The application of res judicata in order to advance these interests is not normally prevented by the fact that the judgment in question is wrong.⁴⁵

The deference given prior state court determination by the federal courts is based not only on common law rules of res judicata but also on Section 1738 of Title 28 of the United States Code,⁴⁶ which seeks to promote comity as well as judicial efficiency. Section 1738, which implements the full faith and credit clause of the Constitution,⁴⁷ requires that “the . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State”⁴⁸

Res judicata rules, however, are not always applied mechanically. Occasionally competing policy considerations may outweigh the concern for judicial economy and protracted litigation.⁴⁹ Similarly, Section 1738

⁴⁴ *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979).

⁴⁵ *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

⁴⁶ 28 U.S.C. § 1738 (1976).

⁴⁷ U.S. CONST. art. IV, § 1.

⁴⁸ 28 U.S.C. § 1738 (1976).

⁴⁹ See, e.g., *Standefer v. United States*, 447 U.S. 10, 24-25 (1980); *Montana v. United States*, 440 U.S. 147, 162 (1979). See generally 1 B. MOORE'S FEDERAL PRACTICE § 0.405[12], at 791 (1974); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1362 (1967).

The Supreme Court may have signaled an important departure from the policy exception to res judicata doctrine in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). In that case the Supreme Court reversed the decision of the court of appeals which had refused to apply res judicata to bar a private antitrust action brought by plaintiffs who were parties to a prior unsuccessful action. Concluding that res judicata should apply even though other parties in the prior action had appealed and secured

does not state an absolute rule. Countervailing statutory policy embodied in federal legislation may permit the relitigation in a federal forum of matters decided by a state court.⁵⁰

The court in *ITT Rayonier* found no such countervailing policy in the Clean Water Act. Section 402(i) of the Act was found not to preclude the application of res judicata in favor of state judgments, but merely to preserve the EPA's power to bring an enforcement action in federal court concurrent with state proceedings. If the EPA was dissatisfied with state agency efforts and state court decisions, the court suggested it could bring a concurrent federal action or simply revoke the state program altogether.⁵¹ The court reasoned that state and federal enforcement actions under the Act are based on permits issued under a "single system."⁵² This coordination distinguished for the court the

reversal as to themselves, Justice Rehnquist writing for the majority stated,

The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Association*, 283 U.S. 522, 525 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts."

452 U.S. at 401.

The concurring opinion disagreed with that of the Court on this issue: "First, I, for one, would not close the door upon the possibility that there are cases in which the doctrine of res judicata must give way to what the Court of Appeals referred to as 'overriding concerns of public policy and simple justice.'" *Id.* at 402-403 (citation omitted) (Blackmun, J., concurring).

It seems unlikely that the Court has in fact overturned the policy exception to res judicata since its recent decisions have assumed without question the viability of that exception. The general comments of Justice Rehnquist, however, probably signal a preference for applying res judicata which can be overcome only by a clear showing of a strong countervailing policy. *Cf. Allen v. McCurry*, 449 U.S. 90, 103-04 (1980).

⁵⁰ *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (an exception to § 1738 will be recognized if a later statute contains an express or implied partial repeal thereof); *Brown v. Felsen*, 442 U.S. 127, 135-36 (1979) (state court rulings on bankruptcy issues not binding on federal court).

⁵¹ *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1001-02 (9th Cir. 1980).

⁵² *Id.* at 1002.

Clean Water Act from Title VII of the 1964 Civil Rights Act,⁵³ making inapposite Title VII decisions which had refused to give preclusive effect to prior state determinations in employment discrimination proceedings. The court in *ITT Rayonier* concluded that denying preclusive effect to state court decisions would disrupt the "delicate partnership" of the Clean Water Act and run counter to congressional intent.⁵⁴

But if the relationship between the EPA and the states under the Act in some respects resembles a partnership, it is in no respects an equal one. While Congress hoped the states would assume the burden of implementing the Clean Water Act and gave them the opportunity to do so,⁵⁵ the power to make significant policy decisions and force the states to comply with them was delegated to the EPA.⁵⁶ Unhappy with the dismal history of state efforts to control water pollution, Congress amended the Clean Water Act in 1972 for the express purpose of shifting power to a central authority to impose uniform national standards.⁵⁷

1. The Policy of Uniformity

The need for nationally uniform pollution control standards implemented by a central authority results from the very nature of environmental problems in a federal system. Waters flow and breezes blow unmindful of state boundaries.⁵⁸ As localized pollution worsens, its effects may become regional, national or even international in scope.⁵⁹ Without meaningful federal control, a state might be encouraged to re-

⁵³ 42 U.S.C. § 2000e-2000h-6 (1976 & Supp. IV 1980).

⁵⁴ *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1002 (9th Cir. 1980).

⁵⁵ See 33 U.S.C. § 1342 (1976 & Supp. IV 1980). While the legislative history of the Clean Water Act is replete with speeches by members of Congress with a states' rights orientation, it is possible to find support in that voluminous history for virtually any alleged legislative intent. Thus, the conclusion stated herein that Congress intended the states to play a significant role in the implementation of the Clean Water Act may be questioned. It may be argued, for example, that by equipping the EPA with the means to convert the states into its "puppets," a majority of Congress must have expected and intended that the EPA would do so, thereby indirectly accomplishing what could not politically be advocated publicly. A contrary conclusion, however, is suggested not only by the legislative history described above but also by the practical problems associated with policing from Washington, D.C. every discharge into any water in the entire nation.

⁵⁶ See notes 17-33 and accompanying text *supra*.

⁵⁷ *Id.*

⁵⁸ *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 628 (7th Cir. 1980) ("fish swim").

⁵⁹ See F. GRAD, 1 TREATISE ON ENVIRONMENTAL LAW, 2-126 to 2-127 (§ 2.03) (1981), and authorities cited therein.

lax pollution standards to encourage industries with pollution problems to move to that state.⁶⁰ This would work economic hardship on environmentally conscious states, which would also ultimately suffer from the interstate impact of pollution emanating from the offending state.⁶¹ Without meaningful federal court review of pollution problems, precedents set by the various states could conflict, causing confusion on the part of polluters sincerely interested in complying with the law.⁶² The Clean Water Act embodies a congressional determination that, based on these considerations, there is an overriding federal interest in national uniform water pollution control.⁶³

The Ninth Circuit in *ITT Rayonier* all but ignored the statutory policy of providing national standards, noting only that uniformity would not be promoted by “conflicting judicial constructions and repeated agency prosecutions” that might result if res judicata was not applied.⁶⁴ Thus, while concerned that uniformity of decision might be maintained in a given case by precluding federal relitigation of matters already decided by a state court, the court in *ITT Rayonier* failed to consider the broader issue of uniformity which concerned Congress — maintenance and enforcement of uniform pollution control standards.⁶⁵

⁶⁰ See House Debate on H.R. 11896, Mar. 27, 1972 (Statement to the House Public Works Comm. by Mrs. Donald E. Clusen of the League of Women Voters, inserted into Record by Representative Gude), reprinted in 1 WATER POLL’N LEG. HIST., note 10 *supra*, at 433; Continuing House Debate on H.R. 11896, Mar. 28, 1972 (remarks of Representative Holifield), reprinted in *id.* at 546-47; Continuing House Debate on H.R. 11896, Mar. 28, 1972 (remarks by Representative Reuss), reprinted in *id.* at 577; HOUSE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACTS AMENDMENTS OF 1972, H.R. REP. 911, 92d Cong., 2d Sess. 158, reprinted in 1 WATER POLL’N LEG. HIST., note 10 *supra*, at 845; HOUSE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, H.R. REP. 92-911, 92d Cong., 2d Sess. 401 (additional views of Hon. Bella S. Abzug and Charles B. Rangel), reprinted in 1 WATER POLL’N LEG. HIST., note 10 *supra*, at 870.

⁶¹ *Id.*; see also *United States v. Ashland Oil & Trans. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

⁶² The lack of uniformity among state court decisions has long been cited as a justification for federal court review. See, e.g., A. HAMILTON, *THE FEDERALIST* No. 80, at 341 (C. Beard ed. 1948). “Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.” *Id.*

⁶³ See *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972); note 32 *supra*.

⁶⁴ *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1001 (9th Cir. 1980).

⁶⁵ In one of the few decisions to consider the ramifications of *ITT Rayonier*, the court in *United States v. Cargill, Inc.*, 508 F. Supp. 734, 750 (D. Del. 1981) observed that, if collateral estoppel were applied to bar the EPA from seeking a larger penalty for an NPDES permit violation than that awarded by a state court, “the concerns

Ignoring uniformity in the sense it was contemplated by Congress could have a devastating impact on the chances for achieving that legislative goal. Granting *res judicata* effect to state court decisions subverts the congressional intent that the EPA police state implementation of the Act for consistency with both federal standards and other states' application of those standards. For example, a state court decision compelling a state agency to issue a permit would, if granted full *res judicata* impact, preclude the EPA from exercising its power to veto proposed state permits.⁶⁶ Any attempt by the EPA to do so could be challenged by the polluter in the courts of appeal, which have original jurisdiction over such cases.⁶⁷ Those courts would be required to enforce the state court decision if *res judicata* applied. Such a result would bind the very courts that Congress believed to be most familiar with the federal standards involved, most concerned with the interstate implications of water pollution, and least susceptible to local economic and political concerns. Congress recognized that these concerns sometimes motivate state courts, and sought to neutralize their effect in pollution control policy.⁶⁸

2. Uniformity and *ITT Rayonier*

The Ninth Circuit, in *ITT Rayonier*, suggested that the statutory

relating to national uniformity . . . would be disserved."

⁶⁶ See 33 U.S.C. § 1342(d)(2) (1976 & Supp. V 1981).

⁶⁷ 33 U.S.C. § 1369(b)(1) (1976); *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980).

⁶⁸ Original jurisdiction in the courts of appeal was created to ensure rapid resolution of significant environmental issues by courts with a national or regional perspective. See *Crown Simpson Pulp Co., v. Costle*, 445 U.S. 193, 196-97 (1980) (citing *Crown Simpson Pulp Co. v. Costle*, 599 F.2d 897, 905 (9th Cir. 1979) (Renfrew, J., concurring)); SENATE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. REP. NO. 414, 92d Cong., 1st Sess. 85, reprinted in 2 WATER POLL'N LEG. HIST., note 10 *supra*, at 1503; see also note 11 and accompanying text *supra*.

The possibility of review by the United States Supreme Court of decisions rendered by the highest state courts (see 28 U.S.C. § 1257 (1976 & Supp. V 1981)) does not provide sufficient federal court involvement to ensure uniformity. Many state actions, of course, never reach the highest state court. Even if they do, the United States Supreme Court's heavy caseload limits its review to a relatively small number of cases. Even if a case is heard by the Supreme Court, the litigants have still been denied the benefits of the liberal federal discovery rules and a federal fact finding, either of which could be significant. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964); *Red Fox v. Red Fox*, 564 F.2d 361, 365 n.4 (9th Cir. 1977).

A deceptively simple resolution of this problem would be to permit EPA to intervene in selected state litigation which it perceived to be of potential significance in terms of precedent or interstate impact. Once a party to such an action, the EPA could request

policy of achieving uniformity through EPA supervision would not be frustrated by applying res judicata since the EPA could, if dissatisfied with state court enforcement, bring a concurrent enforcement action in federal court or revoke the state NPDES program.⁶⁹ Initiation of a concurrent action would, of course, relieve the federal courts of res judicata only if a final judgment was obtained first in the federal court. The concurrent action suggestion, thus, might result in a rush to judgment in which substantive pollution control concerns could become subordinate to procedural corner-cutting.⁷⁰ This suggestion is also inconsistent with Congress' intent that the primary responsibility for initial enforcement of the NPDES program rest with the states. This intent could be asserted as a basis for abatement or even abstention in a concurrent federal action.⁷¹ The suggestion that a concurrent action be filed also seems impossible to rationalize with the policies underlying both comity and res judicata. The filing of a concurrent federal action

its removal to federal district court. See 28 U.S.C. § 1442 (1976). Granting EPA the right to intervene under state law could even be made a condition to approval of a state program. Such a resolution, however, is likely to confound the basic policies and goals of the Act even further. Power to intervene in the state proceedings would constitute a further encroachment by EPA of the state's authority to take the initiative in implementing the legislation. Moreover, intervention and removal might needlessly expend the resources of the EPA and the federal judiciary since the state courts will probably render judgments acceptable to the EPA in a great number of cases. The increased litigation burden of the EPA, in addition to the increased administrative burden of culling state proceedings for intervention candidates, would result in precisely the kind of increase in cost and duplication of effort that Congress sought to avoid by giving initial implementation responsibility to the states. See note 31 and accompanying text *supra*.

For similar reasons, the Clean Water Act has been held to preclude an alleged polluter from joining the EPA in state court action for the purpose of avoiding subsequent federal litigation. *Aminoil U.S.A., Inc. v. California State Water Resources Control Board*, 674 F.2d 1227, 1237 (9th Cir. 1982) (“[T]he preclusion of state court jurisdiction [over the EPA] is a product of the congressional policy judgement underlying the Act itself. It is not for us to revise that judgment merely because it may place private litigants in the unenviable and burdensome position of being required to litigate their liability under the Act in two separate judicial systems.”).

⁶⁹ *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1002 (9th Cir. 1980).

⁷⁰ See Comment, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281, 1281-82 n.7 (1978).

⁷¹ *United States v. Cargill, Inc.*, 508 F. Supp. 734, 745-51 (D. Del. 1981) (abatement, but not abstention, appropriate in federal action filed while state NPDES proceedings in progress); *Mobil Oil Corp. v. Kelly*, 426 F. Supp. 230, 235 (S.D. Ala. 1976) (federal court abstention proper while state NPDES decision still subject to state appeals).

would hardly demonstrate respect for state processes and would certainly fail to conserve judicial resources or protect litigants from multiple lawsuits.

The other suggestion of *ITT Rayonier*, that the EPA simply revoke the states' permit program, also makes little sense in light of the Act's goals. While the EPA was given the power to withdraw approval for state programs, it seems Congress hoped that this power, like all supervisory powers of the EPA, would be judiciously employed.⁷² Revocation of a state program each time the EPA had reason to believe a state court might render an ill advised decision undoubtedly would cause the collapse of the "delicate partnership."

Congress' intent to encourage nationally uniform application of pollution control standards should be viewed as a sufficient "countervailing statutory policy" of the Clean Water Act to overcome the application of res judicata in a case in which uniformity might be jeopardized by conflicting pronouncements by the courts of the various states. This policy of the Clean Water Act is comparable to the policies of other federal statutes which have been held to provide a basis for denying res judicata effect to state judgments.

In the seminal decision in this area, *Lyons v. Westinghouse*,⁷³ Judge Learned Hand stated that a state court judgment against a defendant asserting antitrust claims as an affirmative defense to a breach of contract action would not be given estoppel effect in a subsequent federal court antitrust action brought by the former state court defendant. Judge Hand reasoned that federal courts should apply the federal antitrust laws unconstrained by state court decisions because that legislation "was part of the effort to prevent monopoly and restraints of commerce; and it was natural to wish it to be uniformly administered, being national in scope."⁷⁴

The same policy behind the Clean Water Act, the need for uniform application of standards to a problem national in scope, should be the basis for an exception to normal rules of preclusion.⁷⁵ Federal environmental laws, like the antitrust laws, exist to protect significant public interests. Thus, litigation under those statutes differs from a common

⁷² See note 32 *supra*. But see note 55 *supra*.

⁷³ 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

⁷⁴ *Id.* at 189.

⁷⁵ The same policy, the need for uniformity in the application of the nation's laws, was advanced as one of the rationales for justifying the Supreme Court's power to review state court decisions. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816); A. HAMILTON, *THE FEDERALIST* No. 80, at 341 (C. Beard ed. 1948).

contract or tort action in which normally only the rights of private litigants are at stake. While the policy of relieving the courts of repetitive actions may outweigh the need for perfect justice and accuracy in a contract suit, the balance should be reversed when the national interest in significant environmental issues is at stake.⁷⁶

Lyons is not distinguishable on the ground that federal courts have exclusive jurisdiction under the antitrust laws⁷⁷ while state and federal courts share concurrent jurisdiction to control water pollution.⁷⁸ The creation of exclusive jurisdiction in the federal courts to hear particular disputes may be evidence of congressional intent to deny res judicata impact to state decisions, but it is not the only evidence of such intent. The supervisory powers of the EPA under the Clean Water Act, particularly the right to bring an enforcement action in federal court, were meant to remain viable notwithstanding the maintenance of a state approved program.⁷⁹ The very purpose of a supervisory power would be denied if, at the moment the entity to be supervised makes a decision, the supervisory power evaporates. The elaborate structure of the EPA's supervisory powers under the Act should be read as evidence that Con-

⁷⁶ Congress clearly struck such a balance in the citizens' suit provision of the Clean Water Act, which allows any citizen to bring an independent action unless the EPA or the state is "diligently prosecuting a civil or criminal action . . . to require compliance." 33 U.S.C. § 1365 (1976 & Supp. V 1981). The legislative history of this section of the Act makes it clear that a citizen's suit could be filed and separately conducted in federal court even if a state action was ongoing, so long as it appeared the state action was unlikely to achieve the proper results:

It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.

SENATE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. REP. NO. 92-414, 92d Cong., 1st Sess. 81, *reprinted in 2 WATER POLL'N LEG. HIST.*, note 10 *supra*, at 1498; *see also* *Standefer v. United States*, 447 U.S. 10, 24-25 (1980) (public interest in accuracy and justice of a judgment in a criminal trial justify relaxation of preclusion rules while different result would obtain in action between private litigants over private rights).

⁷⁷ *General Investment Co. v. Lake Shore & Mich. So. Ry.*, 260 U.S. 261, 286 (1922).

⁷⁸ *See United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000-01 (9th Cir. 1980).

⁷⁹ *See* notes 17-29 and accompanying text *supra*.

gress intended meaningful federal court proceedings even after state court decisions. *ITT Rayonier* at once undermines both basic goals of the Act: it impairs the EPA's supervisory powers to insure the enforcement of uniform national standards, and simultaneously suggests resolutions to that problem which could result in the creation of an even more massive federal bureaucracy to administer the NPDES program at the local level.⁸⁰

Recognition of a "countervailing statutory policy" in the Clean Water Act should not unduly burden litigants or the courts with multiple actions. Many state court decisions would probably be either acceptable to the EPA or not considered worthy of further litigation. Even in matters which the EPA does consider worthy of further action in federal court, many findings of fact or conclusions of law reached by the state court could be given collateral estoppel effect without threatening uniformity. The policy of uniformity would compel relitigation of only those judgments and findings of state courts with broad precedential or environmental impact, such as decisions involving interstate pollution.⁸¹ The Clean Water Act does not suggest that state agencies or courts are incompetent to apply the federal standards. The Act concludes only that the need for uniformity requires that the EPA and the federal courts have the power to enforce those standards unencumbered by the decisions of the states. Finally, federal courts would, in all likelihood, be conservative in denying preclusive effect to state decisions in light of considerations of comity and the resulting increase in their caseload.

Recognition of a statutory policy in the Act permitting federal courts to reconsider certain matters previously decided by state courts would not do serious damage to federal-state comity. Congress created in the Clean Water Act a pervasive system of federal regulation in which the states have been given an important but lesser role. State court decisions in this area are rendered to enforce state law enacted in order to

⁸⁰ See note 31 and accompanying text *supra*.

⁸¹ The matter at issue in *ITT Rayonier*, the meaning of a provision in a single NPDES permit, would probably have no import beyond that lawsuit. If so, applying *res judicata* might be justified in that case on the grounds the statutory policy of national uniformity would be unimpaired thereby. The Ninth Circuit Court of Appeals itself described the case as "sui generis." *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1004 (9th Cir. 1980). The Ninth Circuit has also recently suggested that the *ITT Rayonier* decision might not extend so far as to preclude relitigation in federal court of a state court decision concerning the extent of federal jurisdiction under the Act. *Ami-noil U.S.A., Inc. v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1236-37 (9th Cir. 1982).

meet the specific requirements of the federal law and EPA regulations.⁸² State NPDES programs are created only with EPA approval and operate under continuing federal supervision.⁸³ Under this statutory scheme, considerations of comity militating in favor of giving full res judicata impact to state judgments are weakened.⁸⁴ No legitimate state interest is advanced by granting res judicata impact to a state court's misinterpretation of what is, in essence, federal law.⁸⁵ Federal-state comity would, in all probability, be more seriously damaged by the application of res judicata if that application resulted in the filing of concurrent federal actions or revocation of state NPDES programs. Such a result would erode state powers in the very areas left to state control in the Clean Water Act scheme.⁸⁶

Thus, granting state judgments res judicata impact in federal litiga-

⁸² *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972) (the predecessor of the Clean Water Act declares that it is federal policy to preserve and protect the prerogatives of the states in controlling water pollution, "[b]ut the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters"); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 628 (7th Cir. 1980) (while states are permitted to sue polluters, "[t]he applicable law is federal . . . and should be uniform").

⁸³ See notes 17-29 and accompanying text *supra*.

⁸⁴ See *United States v. Cargill*, 508 F. Supp. 734, 747 (D. Del. 1981).

⁸⁵ Denial of res judicata impact to state judgments in federal court should not offend *Younger v. Harris*, 401 U.S. 37 (1971) (principles of comity and federalism preclude a federal court injunction of state criminal proceedings). Denial of res judicata impact obviously would not directly interfere with the conduct of state proceedings as would an injunction. Thus, comity is not as severely strained as in *Younger*. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975) ("The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state court dispositions of federal questions."). While the rule suggested here could lead to inconsistent federal and state judgments, "the interest in avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claim of federalism in this particular area of the law." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975) (federal courts may decide questions simultaneously at issue in pending state proceedings). See Note, *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1341-42, 1342 n.51 (1977) (denial of collateral estoppel impact to state determinations in actions in federal court under 42 U.S.C. § 1983 does not violate *Younger v. Harris*).

⁸⁶ Federal-state comity would also be adversely affected by applying res judicata in favor of state decisions in subsequent federal litigation since, as described below, that application would encourage the EPA to interfere with state litigation in order to insure it gets its day in court. See notes 106-110 and accompanying text *infra*. That interference may constitute an unconstitutional federal erosion of state sovereignty. See section III *infra*.

tion under the Clean Water Act could seriously jeopardize the congressional goal of nationally uniform pollution controls. Application of res judicata in this context would not meaningfully advance federal-state comity. On the contrary, a rule requiring federal courts to give full preclusive effect to state judgments could, as the following section illustrates, lead to a serious federal intrusion into state proceedings by encouraging the EPA to directly insinuate itself into state administrative and judicial processes.

C. Privity Between Federal and State Agencies

Even if the Clean Water Act does not embody legislative policy justifying suspension of the normal rules of res judicata, a state court judgment enforcing or reviewing state agency decisions would not automatically be binding upon the EPA. Since the EPA would not normally be a party to such action it could be bound only if it were in privity with the state administrative agency which was a party. Privity would exist if the EPA authorized the state agency to represent its interests or controlled the state agency in the conduct of its litigation. Either of these relationships between the EPA and a state agency would be inconsistent with the respective roles envisioned for them by Congress. A rule permitting the application of res judicata against the EPA would only encourage the creation of such a relationship.

While it is difficult to formulate a definitive statement of the doctrine of privity, the factual circumstances under which privity has been held to exist do fall into several distinct patterns.⁸⁷ The relationship between the EPA and a state agency under the Act arguably might fit into two of these patterns: (1) representation of the interests of the nonparty at the prior proceeding, or (2) control of the prior litigation by the

⁸⁷ See generally *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84, 95 (5th Cir. 1977), cert. denied, 434 U.S. 832 (1977); 1B MOORE'S FEDERAL PRACTICE 1255, § 0.411 (2d ed. 1980). The continued viability of these traditional "patterns" of privity in the Ninth Circuit, however, is questionable. That court has expressly recognized that its decisions have "eroded" and "attenuated" the doctrine of privity as a prerequisite to the application of res judicata against a non-party to prior proceedings. *Hinkle Northwest, Inc. v. SEC*, 641 F.2d 1304, 1309 (9th Cir. 1981) (citing *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980)).

nonparty.⁸⁸

1. Representation of the Interest of Nonparty at the Prior Proceeding

The concept of "representation" presumes something more than mere coincidence of interest between the party to the prior action and the non-party sought to be bound.⁸⁹ Privity is not established unless the party in the prior action was somehow given authority to represent the interests of the non-party.⁹⁰ This authority may be expressly created, or implied by virtue of the nature of the relationship between the party and the non-party.⁹¹

The nature of the relationship created by the Clean Water Act between the EPA and state agencies precludes the express creation of such authority, and any finding of implied authority. As described above, the Act erects a system of supervisory powers which the EPA

⁸⁸ These two bases for asserting the existence of a privity relationship are described in the Restatement (Second) of Judgments as follows:

§ 39. Person Who Controls Participation. A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.

§ 41. Person Represented by a Party. (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is: (a) The trustee of an estate or interest of which the person is a beneficiary; or (b) Invested by the person with authority to represent him in an action; or (c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or (d) An official or agency invested by law with authority to represent the person's interests; or (e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

RESTATEMENT (SECOND) OF JUDGMENTS §§ 39, 41 (1980). Other bases for privity not applicable here include: agreement to be bound, *id.* § 40, the existence of a trust or fiduciary relationship, *id.* § 41(1)(a), (c) and participation in a class action, *id.* § 41(1)(e).

⁸⁹ *General Foods Corp. v. Massachusetts Dept. of Public Health*, 648 F.2d 784, 789 (1st Cir. 1981); *Pollard v. Cockrell*, 578 F.2d 1002, 1009 (5th Cir. 1978); *Griffin v. Burns*, 570 F.2d 1065, 1071 (1st Cir. 1978).

⁹⁰ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403 (1940); RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(b) comment a (1980); Comment, *Developments In the Law: Res Judicata*, 65 HARV. L. REV. 818, 857-60 (1952) (disapproving cases finding privity absent a grant of authority).

⁹¹ *General Foods Corp. v. Massachusetts Dept. of Pub. Health*, 648 F.2d 784, 787 (1st Cir. 1981); RESTATEMENT (SECOND) OF JUDGMENTS § 41 comment a (1980).

may employ to negate state implementation of the Act.⁹² These powers were thought to be absolutely crucial to the achievement of the Act's goals.⁹³ The creation of these supervisory powers embodies an implicit recognition by Congress that the states might deviate from acceptable pollution control standards and that, when such deviation occurs, there is a need for EPA action. The existence of these supervisory powers and the nature of the relationship between the EPA and the states under the Act rebut any possible implication that the states are or could be authorized to represent the EPA.⁹⁴ Any such authorization would constitute an abandonment by the EPA of the crucial role it was intended to play.⁹⁵

2. Control of the Prior Litigation By the Nonparty

The second possible basis for privity, control by the nonparty of

⁹² See notes 17-29 and accompanying text *supra*.

⁹³ See note 31 *supra*. The need for federal oversight was emphatically restated in the Senate report accompanying a proposal to amend the Clean Water Act in 1977. See SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, CLEAN WATER ACT OF 1977, S. REP. NO. 370, 95th Cong., 1st Sess. 74, reprinted in 4 CONT. LEG. HIST., note 10 *supra*, at 706.

⁹⁴ In another context, it has been held that state agencies enforcing the Clean Water Act cannot be viewed as agents of the EPA or as beneficiaries of any grant of authority to act on the EPA's behalf. *Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899, 902-03 (2d Cir. 1976) (action by state administrator in modifying NPDES permit is not action by the EPA which is reviewable in federal court); *cf. Williams v. Sclafani*, 444 F. Supp. 906, 916 n.22 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1046 (2d Cir. 1978) (action by voters under New York election law not subject to collateral estoppel on issues previously decided in action brought by candidate, since existence of separate right of action under the law in favor of voters implies interests of voters and candidate are not identical).

⁹⁵ The court in *ITT Rayonier* noted that, in some contexts, the relationship between a public official or agency and a private party with standing to seek enforcement of a public law as a private attorney general is close enough to preclude the latter from relitigating matters decided adversely to the former. See RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(d) (1980). The court concluded that the connection between the EPA and the states was an "analogous relationship" since both "acted to enforce the same permit." *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980). This analogy, however, fails to take into consideration a crucial distinction between the two situations. The rule cited by the court is based on the assumption that the governmental entity that conducts the first suit will adequately represent the interests of its citizens who subsequently seek to sue as private attorney generals. See *Menzel v. County Utilities Corp.*, 501 F. Supp. 354, 357 (E.D. Va. 1979) (citizens' suit filed in federal court to enforce Clean Water Act barred by prior judgment for defendant in action brought by state agency in state court). The reverse simply cannot be assumed. In the event an individual litigates for the government, there is no guarantee

prior litigation, runs into similar problems. "Control" in this context means more than merely assisting in the conduct of the case: the non-party must bear the "laboring oar"⁹⁶ in the litigation and "have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action."⁹⁷ Such control of state court litigation by the EPA would infringe upon the states' power under the Act to take the initiative in enforcement and implementation. Congress intended that the states would make the initial efforts to implement and enforce the NPDES program, utilizing existing personnel and resources to cope with the many local problems of water pollution control, thereby avoiding the growth of a massive federal bureaucracy to deal with those problems.⁹⁸ Control by the EPA over the efforts of the states to judicially enforce the NPDES program would frustrate congressional intent, and threaten the creation of a huge EPA operation aimed at monitoring and running litigation in the courts of the over thirty states with

that the individual's interests will not dominate the proceedings to the detriment of the government's objectives. There is also the danger that the private party will not competently represent the interests of the government. See *United States v. East Baton Rouge Parish School Bd.*, 594 F.2d 56, 58 (5th Cir. 1979) ("the United States will not be barred from independent litigation by the failure of a private plaintiff . . . the United States has an interest in enforcing federal law that is independent of any claims of private citizens"). Since the state agency enforcing the NPDES program may also pursue narrower or even diverse interests from those pursued by the EPA, the analogy suggested by the court fails. In fact, the creation of the EPA's enforcement powers was largely motivated by Congressional distrust of the reliability of state enforcement. See notes 9-32 and accompanying text *supra*.

⁹⁶ *Drummond v. United States*, 324 U.S. 316, 318 (1945). There is no precise formula for determining the existence of control, which is largely a matter of evaluating the specific circumstances of each case. In *Montana v. United States*, 440 U.S. 147 (1979), the Supreme Court held that the federal government controlled and was, thus, bound by the judgment in a state action in which it: (1) required the complaint to be filed, (2) reviewed and approved the complaint, (3) paid attorney's fees and costs, (4) directed the appeal to the state supreme court, (5) appeared and submitted a brief as amicus in the state supreme court, (6) directed the filing of a notice of appeal to the U.S. Supreme Court, and (7) effectuated the abandonment of that appeal. *Id.* at 155.

⁹⁷ RESTATEMENT (SECOND) OF JUDGMENTS § 39 comment c (1980); see also Comment, *Developments in the Law: Res Judicata*, 65 HARV. L. REV. 818, 856-57 (1952). In *ITT Rayonier*, the EPA's involvement in the state proceedings was apparently limited to prompting the state to commence enforcement action. *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980). Although the tests for control are admittedly vague, the sole fact that the EPA prompted the litigation seems too weak a foundation for the conclusion in that case that control existed.

⁹⁸ See notes 31 and 32 and accompanying text *supra*.

NPDES programs.

3. The Reaction of the EPA

A conclusion that the EPA was in privity with a state administrative agency must, therefore, presuppose a relationship between the EPA and the state agency that is inconsistent with congressional intent, whether that conclusion is based upon a finding of "representation" or "control." Applying *res judicata* in this context, however, not only assumes that the EPA and the states have violated the spirit of the Act, it also encourages that violation.

A rule granting state judgments *res judicata* impact when the EPA is in privity would naturally create in the EPA the fear of being bound by the state judgment without ever getting its day in court. The EPA would probably fear that it could be deemed in control of state agency litigation simply by virtue of the exercise of one or more of its supervisory powers. The court in *ITT Rayonier* partially based its finding of privity on such grounds.⁹⁹ The danger would be reinforced if the EPA in any way assisted or consulted with the state agency involved in litigation, even though the Act calls for the EPA to lend this assistance.¹⁰⁰ Even informal contacts between the EPA and the states could be cited as evidence of control.¹⁰¹ Faced with a statutory scheme that mandates contacts between the EPA and the states, and mindful of the ambiguity inherent in any test for "control," the EPA would be encouraged to fully dominate state litigation in order to ensure EPA involvement before a binding decision was rendered.¹⁰² Such a policy would be fully consistent with the EPA's past performance. The EPA frequently has been accused of both attempting to exercise control of state NPDES litigation, and dominating the administration of the state NPDES

⁹⁹ *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980).

¹⁰⁰ *See* 33 U.S.C. § 1361(f) (1976) (EPA personnel to assist state agencies in administration of Clean Water Act).

¹⁰¹ *See* *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978).

¹⁰² It is arguable that *ITT Rayonier* will have just the opposite result. Since the EPA is on notice that it may be bound by state litigation if it is in privity with a party thereto, the EPA may try to avoid involvement of any sort in state initiated litigation. It seems unlikely, however, that the EPA would react in this manner. Such conduct would be inconsistent with the EPA's obligations under the Act to supervise and assist state enforcement. Moreover, the history of the Clean Water Act's implementation shows no inclination of the EPA to shrink from insinuating itself in state business even beyond that mandated by the Act. *See* note 32 *supra*. Finally, when serious environmental interests are at stake which might be irreparably damaged before the conclusion of state proceedings, it may be undesirable for the EPA to refrain from at least some advisory involvement in those proceedings.

programs.¹⁰³

Faced with the threat of program revocation or preemptive federal court litigation, both of which are within the EPA's powers, the states are unlikely to resist control by the EPA. Adopting a rule that affords res judicata impact to state judgments in federal environmental litigation may, thus, become a self-fulfilling prophecy: the rule encourages EPA control of state litigation, which results in the creation of privity necessary to apply res judicata. Since the control relationship is incon-

¹⁰³ See note 32 *supra*. EPA control of state litigation was evident in *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978), which also illustrates the connection between such control and res judicata problems in subsequent federal litigation. Shell Oil applied for a California NPDES permit for an industrial complex. The state agency presented Shell with a proposed permit, but Shell was dissatisfied with the classification given the facility under state sanctioned federal guidelines and applied for a variance. Pursuant to the Memorandum of Understanding, see note 32 *supra*, the California agency forwarded Shell's application to the EPA, which recommended denial of the variance. The state agency accordingly denied Shell's application. *Shell Oil Co. v. Train*, 585 F.2d 408, 411 (9th Cir. 1978). Shell filed actions seeking review of the denial decision in both the court of appeals and the district court. Shell asserted the appropriateness of a federal forum on the grounds that the state acted as the mere agent of the EPA, given the EPA was the actual decision maker. *Id.* at 413. The action filed in the court of appeals was dismissed on the ground that Shell's claim was outside the court's original jurisdiction under the Act to review "the Administrator's action . . . in issuing or denying any permit." See 33 U.S.C. § 1369(b)(1) (1976). The district court also dismissed, finding an absence of final federal agency action reviewable under the Administrative Procedure Act. The court of appeals affirmed the district court dismissal, holding that once a state has an approved NPDES program, agency decisions made thereunder are state action under state law, not federal government action under federal law. *Shell Oil Co. v. Train*, 585 F.2d 408, 410, 412 (9th Cir. 1978). The court went on to state there was no basis for district court jurisdiction under the Administrative Procedure Act which provides for review of "final agency action for which there is no adequate remedy in a court," on the ground that the state courts were available to review the state agency decisions in question. *Id.* at 414. The dissent perceived the central fallacy in the court's opinion and presaged the res judicata problems which were to flow from it. Even if Shell were able to persuade a state court to grant it relief by compelling the state agency to issue an appropriate permit, the EPA then might exercise its supervisory power to veto the permit. *Id.* at 420 (Wallace, J., dissenting). Review of that action would then be appropriate in the court of appeals. 33 U.S.C. § 1369(b)(1)(F) (1976). Given the likelihood of a second federal action if Shell prevailed in state court, the remedies available in the state court proceeding hardly seemed "adequate." *Shell Oil v. Train*, 585 F.2d 408, 420 n.9 (9th Cir. 1978). See Note, *Jurisdiction to Review Informal EPA Influence Upon State Decisionmaking Under the Federal Water Pollution Control Act: Shell Oil Co. v. Train*, 92 HARV. L. REV. 1814, 1821-22 (1979). But those state court remedies could be made adequate, and the rationale of *Shell* justified, if that initial state court proceeding had preclusive effect in any subsequent federal action. *Id.*

sistent with congressional intent, adopting a rule that encourages the creation of such a relationship seems ill-advised.

The Clean Water Act's policy of uniformity, therefore, should be deemed a significant countervailing factor against applying normal rules of *res judicata* in favor of state judgments in subsequent federal actions. Refusing to recognize the policy of uniformity as grounds to suspend the application of normal *res judicata* doctrine would encourage the creation of an improper relationship between the states and the EPA in which the EPA would attempt to control enforcement litigation brought by the states. That relationship would not only frustrate the intent of Congress but, as suggested in the following discussion, may embody an unconstitutional federal interference with state sovereignty.

III. RES JUDICATA AND FEDERALISM: IMPAIRMENT OF STATE SOVEREIGNTY

When a federal agency directs a state's actions in an area properly subject to state control in our federal system, state sovereignty may be unconstitutionally impaired.¹⁰⁴ As noted above, the application of *res judicata* against the EPA in a federal court action requires privity between the EPA and the state. Privity may exist when the EPA controls the conduct of the state agency in the prior state litigation. Thus, the decision to impose *res judicata* may be based upon federal interference with state administrative and judicial processes which unconstitutionally impinges upon state sovereignty.¹⁰⁵

¹⁰⁴ *Shell Oil Co. v. Train*, 585 F.2d 408, 413, (9th Cir. 1978) (citing *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

¹⁰⁵ In *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978), the court refused to hold that the EPA had dominated the decisionmaking of a state agency even though the EPA clearly had influenced the state's NPDES permit decisions, albeit in an informal manner. The court refused to reach such a conclusion because of the "grave constitutional questions" that would be raised by a finding that a federal agency had controlled the actions of a state agency. *Id.* at 413. The court's logic is difficult to understand. Because federal control of the states raises constitutional issues going to the heart of our federal system, courts should be sensitive to the possibility that such control has occurred, rather than use the difficulty of such issues as an excuse for ignoring that control. Apparently sensitive to its decision in *Shell*, the Ninth Circuit in *ITT Rayonier* insisted that, while the EPA had not so dominated the state agency as to raise these constitutional issues, the relationship between EPA and the state agency was "sufficiently close" to constitute privity. *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980). As demonstrated above, however, that relationship cannot be "sufficiently close," so as to constitute a privity relationship unless the EPA actually

Since applying res judicata in favor of state judgments in subsequent federal Clean Water Act litigation would probably encourage the EPA to control state litigation,¹⁰⁶ the question of whether res judicata should be so applied must not be answered without considering the constitutionality of EPA control. Obviously, resolution of the res judicata issue should not encourage a federal-state relationship which is inconsistent with the Constitution.

As the following discussion suggests, EPA control of state litigation constitutes an interference with state sovereignty. This interference is unconstitutional absent some vital federal interest advanced by the control over state litigation. The need for a central federal authority to ensure uniform application of pollution control standards is a possible justification for federal control of state enforcement litigation. This justification fails, however, since uniform federal standards can be enforced in a manner less intrusive of state sovereignty by permitting litigation in federal court by the EPA, unencumbered by res judicata in favor of prior state decisions.

The evaluation of the constitutionality of EPA control of state environmental litigation must begin with a discussion of the Supreme Court's landmark effort to delineate the limits of federal power over the states in *National League of Cities v. Usery*¹⁰⁷ (*NLC*) and the Court's recent attempt to clarify that delineation in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*¹⁰⁸ The analysis of the constitutionality of EPA control concludes with an elaboration of the themes present in *NLC* and *Hodel*, and attempts to make those decisions consistent with the realities of modern federalism.

A. *The NLC and Hodel Decisions*

NLC invalidated the 1974 amendments to the Fair Labor Standards Act (FLSA) which extended federal minimum wage and maximum hour protection to most state and municipal employees.¹⁰⁹ The statute, which the Supreme Court conceded to be within Congress' power to

controlled the state litigation. Such interference with state decisionmaking constitutes a serious challenge to state sovereignty and requires confrontation of the constitutional issues discussed *infra*. By failing to articulate a coherent privity analysis, the court in *ITT Rayonier* relieved itself of the need to confront these constitutional issues.

¹⁰⁶ See notes 106-110 and accompanying text *supra*.

¹⁰⁷ 426 U.S. 833 (1976).

¹⁰⁸ 452 U.S. 264 (1981).

¹⁰⁹ Pub. L. No. 93-259, § 6(a)(1), (5), (6), 88 Stat. 58 (1974) (codified at 29 U.S.C. § 203(d), (s)(5), (x) (1970 & Supp. IV 1974) (superseded)).

enact under the Commerce Clause,¹¹⁰ was declared unconstitutional on the grounds that it represented a federal intrusion into state sovereignty.¹¹¹ *NLC* distinguished federal regulation of private activity, which was “necessarily subject to the dual sovereignty of the government of the Nation and the State”¹¹² from the FLSA, which was “directed not to private citizens, but to the States as States.”¹¹³ The Court concluded that the FLSA constituted an impermissible exercise of federal authority because it concerned the power to set state employee wages, which was an attribute of state sovereignty.¹¹⁴ It also held that the FLSA interfered with “integral operations in areas of traditional [state] functions,”¹¹⁵ since it impacted upon state-employee relations in areas such as fire prevention, police protection, sanitation, public health, and parks and recreation.¹¹⁶

The decision generated an enormous amount of criticism. Most commentators noted that the standards “attribute of state sovereignty” and “integral operations in areas of traditional functions” were ambiguous and would provide lower courts with no more guidance as to their application than the few specific examples expressly mentioned by the Court.¹¹⁷ The decision was also strongly criticized for suggesting, by its

¹¹⁰ *National League of Cities v. Usery*, 426 U.S. 833, 841 (1976).

¹¹¹ *Id.* at 851-852. The Court was not clear as to what provision of the Constitution formed a basis for invalidating Congress' exercise of its powers under the commerce clause. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 5-22, at 308 n.9 (1978). The Supreme Court later identified the tenth amendment as the constitutional foundation for the *National League of Cities* opinion. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-87 (1981).

¹¹² *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 852.

¹¹⁶ *Id.* at 851. The Court distinguished *Fry v. United States*, 421 U.S. 542 (1975), decided during the preceding term, which had upheld a federal wage freeze that extended to state and local as well as private employees. Noting that the freeze was created to deal with a serious economic crisis and was carefully drafted to limit interference with state freedom, the Court in *National League of Cities* concluded that the protections afforded the states under federalism are “not so inflexible as to preclude temporary enactments tailored to combat a national emergency.” *National League of Cities v. Usery*, 426 U.S. 833, 853 (1976).

¹¹⁷ See, e.g., Kilberg & Fort, *National League of Cities v. Usery: Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613, 617 (1977); Matsumoto, *National League of Cities — From Footnote to Holding — State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 73; Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1172 & n.26 (1977); Note, *Practical Federalism After National League of Cities: A*

use of the term “traditional functions,” that the proper distribution of authority between the states and the federal government was static. This criticism was based on the assertion that one of the great strengths of a federal system is its flexibility.¹¹⁸

The very nature of the test created was the subject of confusion even among members of the majority. Justice Blackmun, who appeared to cast the crucial fifth vote in favor of invalidating the FLSA,¹¹⁹ stated in concurrence that he read the opinion of the Court, written by Justice Rehnquist, as adopting a balancing test which “does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater”¹²⁰ Justice Rehnquist, however, never mentioned balancing. Moreover, the Court’s opinion gave only the limited example of a national emergency as an instance in which any flexibility would be appropriate when state sovereignty was improperly infringed upon.¹²¹ There has been no consensus among the commentators or the lower federal courts as to whether *NLC* in fact established a balancing test.¹²² The Supreme Court seemed to clarify

Proposal, 69 GEO. L.J. 773, 785 (1981); Comment, *National League of Cities Crashes on Takeoff: Balancing Under the Commerce Clause*, 68 GEO. L.J. 827, 836-37 & n.60 (1980); Comment, *Commerce Power Limited to Preserve State’s Role in the Federal System — National League of Cities v. Usery*, 30 RUTGERS L. REV. 152, 169 (1976); Note, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power*, 128 U. PA. L. REV. 402, 411 (1979).

Justice Brennan, in a bitter dissent, accused the majority of creating “abstraction without substance” and “meaningless limitation on the Court’s state-sovereignty doctrine.” *National League of Cities v. Usery*, 426 U.S. 833, 860, 871 (1976).

¹¹⁸ See, e.g., Matsumoto, note 117 *supra*, at 74-75; Note, *Practical Federalism After National League of Cities: A Proposal*, 69 GEO. L.J. 773, 788 n.125 (1981).

¹¹⁹ It has been suggested, however, that Justice Stewart, not Justice Blackmun, was the swing vote making the majority in *National League of Cities*. See B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 406-10 (1979).

¹²⁰ *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976).

¹²¹ See note 117 *supra*.

¹²² See also Comment, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery*, 26 AM. U.L. REV. 726, 730 (1977); Note, *Practical Federalism After National League of Cities: A Proposal*, 69 GEO. L.J. 773, 780 (1981); Comment, *National League of Cities Crashes on Takeoff: Balancing Under the Commerce Clause*, 68 GEO. L.J. 827, 846 (1980). Compare Matsumoto, note 117 *supra*, at 71 n.193, 73 & n.204 (asserts that *National League of Cities* did not establish a balancing test) with Kilberg & Fort, *National League of Cities v. Usery: Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613, 620 (1977) (asserts that *National League of Cities* established a balancing test).

The Sixth Circuit Court of Appeals has on separate occasions taken both a balancing approach (*United States v. Ohio Dept. of Hwy. Safety*, 635 F.2d 1195 (6th Cir. 1980)), and an approach that concentrates on defining the “integral” and “traditional”

this question five years later in *Hodel*.

Hodel upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act),¹²³ reversing a district court decision that the Surface Mining Act was invalid under *NLC*.¹²⁴ The Surface Mining Act, designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations,"¹²⁵ directed the Secretary of the Interior to promulgate and enforce federal performance standards and issue permits for surface mining operations.¹²⁶ The states were permitted, but not required, to pursue their own programs and assume permit issuing authority with the approval of the Secretary of Interior.¹²⁷ This approval could be secured only if the state program conformed to the standards established by the Surface Mining Act and the Secretary of the Interior.¹²⁸ The Surface Mining Act followed the basic structure set by the Clean Water Act and other federal environmental legislation, allowing for federal supervision of state implementation of federal standards.¹²⁹

The district court held the Surface Mining Act invalid on the ground it constituted land use regulation, which was an integral and traditional governmental function of the states under *NLC*.¹³⁰ The Supreme Court found it unnecessary to confront this issue,¹³¹ and concluded that the Surface Mining Act merely regulated private mine operators and did

terminology of *National League of Cities*, *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979). At least one federal court has held that *National League of Cities* compels recognition of a balancing approach in environmental cases in light of Justice Blackmun's concurrence and the positions taken by the four dissenters. *United States v. Duracell International, Inc.*, 510 F. Supp. 154, 156 (M.D. Tenn. 1981) (§ 309(e) of the Clean Water Act held constitutional under *National League of Cities*).

¹²³ Pub. L. No. 95-87, 91 Stat. 447 (1977) (codified at 30 U.S.C. §§ 1201-1328 (1976 & Supp. V 1981)).

¹²⁴ *Virginia Surface Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425 (W.D. Va. 1980). On the same day, the Supreme Court decided a companion case, *Hodel v. Indiana*, 452 U.S. 314 (1981), in which the Court reversed on substantially the same grounds the decision of another district court, *Indiana v. Andrus*, 501 F. Supp. 452 (S.D. Ind. 1980).

¹²⁵ 30 U.S.C. § 1202(a) (1976 & Supp. V 1981).

¹²⁶ *Id.* §§ 1251, 1252.

¹²⁷ *Id.* §§ 1252-54, 1256.

¹²⁸ *Id.* § 1253.

¹²⁹ See notes 2 and 17-29 *supra*.

¹³⁰ *Virginia Surface Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425, 432-433 (W.D. Va. 1980).

¹³¹ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293 n.34 (1981).

not burden the “states as states” as proscribed by *NLC*.¹³² Since the Surface Mining Act did not compel participation by states in the federal permit program, if a state voluntarily participated and thereby became bound to enforce federal standards, there was no interference with state sovereignty but merely an advancement of “cooperative federalism.”¹³³ The Court held that the threat of preemption by federal statute, if the states did not participate in the federal permit program, did not constitute improper federal coercion, since the tenth amendment does not shield states from preemptive federal regulation of private activity.¹³⁴ While the Surface Mining Act might displace or preempt state laws regulating private activity, the statute was constitutional so long as it was within Congress’ power to regulate interstate commerce. The Court concluded that “the Supremacy Clause permits no other results.”¹³⁵

The Court characterized its decision in *NLC* as establishing three requirements for identifying federal legislation that infringes upon state sovereignty: (1) the statute must regulate the “states as states”, (2) it must address matters that are indisputably attributes of state sovereignty, and (3) compliance by the states must directly impair their ability to structure integral operations in areas of traditional functions.¹³⁶ The Court in dicta cited *Fry*, and Justice Blackmun’s concurring opinion in *NLC*,¹³⁷ to the effect that, even when all three requirements were met, “the nature of the federal interest advanced may be such that it justifies state submission.”

Hodel thus appears to clarify at least one ambiguity posed by *NLC*: balancing is part of the test in at least some cases. Specifically, balancing occurs only if the *NLC* standards show an impact on state sovereignty. Interference with state sovereignty still may be constitutional if the nature of the federal interest advanced thereby outweighs the state interest in maintaining its powers unimpaired. This balancing, however, is a one way street. Even if the state interest in conducting an activity without federal interference outweighs the interest advanced by the federal government, if one or more of the three *NLC* standards are not fully satisfied, the Court will decline to balance and will uphold the regulation.

¹³² *Id.* at 287-90.

¹³³ *Id.*

¹³⁴ *Id.* at 289-91.

¹³⁵ *Id.* at 290.

¹³⁶ *Id.* at 287-88.

¹³⁷ *Id.* at 288 n.29.

Hodel leaves other ambiguities created by *NLC* unclarified. What constitutes "an attribute of state sovereignty" or "integral operations in areas of traditional [state] functions" or even the regulation of "states as states" is still left largely to the collective imaginations of the lower courts. *Hodel* raises the new problem of defining the nature of federal interests which might outweigh intrusions upon state sovereignty.¹³⁸ Consequently, the constitutionality of EPA control over state agency efforts to judicially enforce water pollution controls remains unclear.

B. NLC and Hodel Applied: The Constitutionality of EPA Control of State Agency Litigation

A literal application of the *NLC-Hodel* formulas suggests that there are no constitutional implications to EPA control of state litigation. Yet the conduct of Clean Water Act enforcement litigation in the name of a state, but at the behest of the EPA, conceals from public view and, hence, public accountability, the real makers of pollution control policy. Control by a federal agency of state administrative and judicial processes also removes from state officials the power over basic state functions. The resulting lack of accountability to their citizens by the states, and the concentration of vital state powers in federal officials, raises serious threats to state sovereignty which *NLC* and *Hodel* fail to identify.

Federal agency control of state agency litigation may be rationalized as legitimate under *Hodel* since the ultimate target of the litigation is private activity, that is, the polluter's discharge into water. Furthermore, control of the litigation by the EPA may take place only if the state agency voluntarily chooses to permit it: the EPA has no formal power under the Clean Water Act to compel state agencies to do anything.¹³⁹ In light of *Hodel*, informal EPA control of state agency litiga-

¹³⁸ The citation in *Hodel* of *Fry v. United States* reaffirms the conclusion reached in *National League of Cities* that federal interference with state sovereignty may be warranted when the exigencies of a national emergency are balanced against it. The *Hodel* Court's favorable citation of Justice Blackmun's concurrence in *National League of Cities* raises some interesting possibilities concerning other circumstances in which such interference might be justifiable. While Blackmun's concurrence can be expansively interpreted as suggesting that the federal interest in environmental protection always outweighs that of the states, it seems difficult to believe that the Supreme Court intended to adopt such a sweeping rule by such a casual reference.

¹³⁹ State agencies will probably permit informal EPA control because the alternatives, the filing of a concurrent action in federal court by the EPA or revocation of the state NPDES program, are even less desirable. The history of EPA-state relations in enforcing the Clean Water Act suggests that some states may need little prodding from

tion is arguably not the regulation of "states as states" and is therefore legitimate under the Supremacy Clause.¹⁴⁰

This conclusion, however, is unsatisfactory for a number of reasons. As Professor Tribe has pointed out, the language of the tenth amendment provides no basis to distinguish between federal regulation of private activity and the regulation of the "states as states."¹⁴¹ Thus, the validity of the states as states requirement is questionable. Even if the validity of this distinction is conceded, federal preemption of state regulation of private activity obviously interferes with the states as well as private parties. The promulgation and enforcement of laws to regulate private activity is a basic state function. Control of state administrative decisionmaking by the federal government necessarily interferes with that function, thus affecting the "states as states."¹⁴²

The basic failing of the *NCL-Hodel* approach is that it depends on vague concepts such as "states as states," "integral operations" and "traditional functions." The difficulty in applying these standards can divert attention from the basic question: Has state sovereignty been impaired? While lawyers may quarrel as to whether informal EPA control of state agency litigation regulates "states as states," the adverse impact of such control on state authority can be more directly analyzed.

If the federal government sought to control the states directly and formally by *requiring* their implementation of a federal environmental program aimed at regulating private conduct, the threat to state sovereignty would be obvious.¹⁴³ In the words of one court, "[a] Commerce

the EPA before deferring to EPA decisionmaking and that the EPA is more than eager to take control of state programs. See note 32 *supra*.

¹⁴⁰ The same reasoning, although largely unarticulated, lies behind the conclusion in *Shell Oil* that informal EPA control of pre-litigation state agency decisionmaking is not domination of a sovereign but merely "cooperative federalism." *Shell Oil Co. v. Train*, 585 F.2d 408, 409, 413-14 (9th Cir. 1978).

¹⁴¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-22, at 308-09 n.9 (1978). The tenth amendment has been identified by the Supreme Court as the constitutional source of the limitation on the power of the federal government to interfere with state sovereignty. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 286-87 (1981). The tenth amendment to the Constitution states 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." U.S. CONST. amend. X.

¹⁴² See Stewart, note 7 *supra*, at 1268 & n.244.

¹⁴³ In the early 1970's, the EPA promulgated regulations under the Clean Air Act regarding the use of private motor vehicles, and other transportation issues. The EPA sought to compel various states to enforce these federal regulations by threatening to impose civil and criminal sanctions on state officials who refused to carry them out. Three of the four courts of appeals that considered the regulations denied the EPA's authority to compel such action by the states based on a combination of statutory and

Power so expanded would reduce the states to puppets of a ventriloquist Congress."¹⁴⁴ Contrary to the implications of *Hodel*, the impact on state sovereignty is not relieved, and in some sense may be even more severe, when the federal control is indirect and informal — the product of “voluntary” submission to federal influence.¹⁴⁵

Even if a state voluntarily submits to informal federal control, the manner in which that control is exercised and the nature of the state function controlled suggests that a significant impairment of state sovereignty may still occur. When a federal agency informally insinuates itself into the decisionmaking of a state agency, the source of those deci-

constitutional analysis rooted in concern for state sovereignty. See *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded per curiam sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded per curiam sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975), *vacated and remanded as moot per curiam sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977); see also *Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976) (EPA regulations under the Clean Air Act do not impair state sovereignty when affirmative action of state to enforce is not required). State sovereignty might not be impaired, however, when EPA requires state enforcement of federal standards as against state facilities. *But see Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974) (EPA's statutory authority to compel state implementation of federal requirements is constitutional). The Supreme Court did not address this issue in vacating these decisions. See generally Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 758-61 (1977).

¹⁴⁴ *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated and remanded as moot per curiam sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977).

¹⁴⁵ Various factors may undermine the conclusion that state submission is voluntary. State acquiescence may occur without knowledge of undisclosed federal agency intentions which, if disclosed, might have resulted in rejection of federal control. A similar problem might evolve from a simple change in federal policy after initial state submission: while a state's choices might be limited when first considering whether to “voluntarily” participate in a federal program, thereby submitting to some aspect of federal control, those choices might be further limited or nonexistent after such a program is in place. *But see Shell Oil Co. v. Train*, 585 F.2d 408, 413-14 (9th Cir. 1978) (citations omitted):

Federal programs “with strings attached” are characteristic of federal-state dealings today If state and federal governments may be treated like individuals for the purpose of deciding the existence of undue influence and the ‘overbearing’ of the will of these sovereigns, these programs would be in serious constitutional jeopardy. The express conditioning of federal aid and the delegation of operational authority to states in compliance with federal guidelines are replete with ‘coercion.’ The unquestioned constitutional validity of these programs and other forms of cooperative federalism, secured by the Supreme Court's decisions . . . means that the concept of undue influence and duress are inappropriate in this context.

sions may be disguised from the public. Using state officers and resources to implement what is in essence a federal decision may mislead those individuals who are affected. If so, efforts by these parties to influence state agencies would not be aimed at the real decisionmakers. The resulting loss of public confidence and participation in state government would impair not only state sovereignty but also democracy and liberty, the protection of which is a basic goal of the fragmentation of governmental power in a federal system.¹⁴⁶ The substantive goal of the entire regulatory effort, cleaning up the environment, would be jeopardized by the decrease in voluntary compliance which might follow from this loss of public confidence.

There may, in fact, be greater reasons to be concerned with informal intrusions on state sovereignty by federal administrative agencies than the direct congressional control at issue in *NLC* and *Hodel*. Unlike members of Congress, federal administrators are not elected by the citizens of the various states. Thus, while Congress may be expected to be mindful of state sovereignty and cautious in the exercise of power over the states, federal agencies would not be directly susceptible to the same political safeguards.¹⁴⁷ Further, since Congress acts through a majority, the improvident aims of any single member tend to be nullified. Federal agencies may act at the direction of one or a handful of strategically located bureaucrats. Moreover, while Congress' actions usually follow public debate and the votes of each member are publicly known, the decision-making processes of federal agencies may be obscured and the real decisionmakers anonymous. To the extent that the frustration of democratic ideals has an adverse impact on the proper functioning of a

¹⁴⁶ In arguments about federalism, it has been less common to consider the degree to which complicity between and among levels of government may yield damaging choices for which no one is adequately answerable, than to address the degree to which action at one level may render another incapable of fulfilling its mission in the constitutional design. Yet the danger that federal-state cooperation may threaten individual rights in insufficiently accountable ways should not be overlooked

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-2, at 16 (1978).

The concept of state sovereignty inherent in this analysis owes much to Professor Tribe's interpretation of *National League of Cities*. He forcefully argues that *National League of Cities* should be taken to question the constitutionality of federal action which interferes with the provision of vital services by the states *not* because it strikes an improper balance between federal and state interests, but because it hinders state efforts to meet their citizens' legitimate expectation of services. *Id.* § 5-22, at 313.

¹⁴⁷ See generally Stewart, note 7 *supra*, at 1264; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954).

federal system, the federal government seems more of a threat to that system when it deals with the states informally through federal administrative agencies than when it acts through direct legislation.

Moreover, the state function involved in EPA control of state agency litigation, the administrative law making and enforcing process, is of a nature so vital to state sovereignty that even voluntary state submission to federal control does not erase all constitutional concern.¹⁴⁸ If the federal government proposed to fix the location of a state's capitol or make other fundamental choices concerning the form and operation of the most basic state functions, it would be difficult to conclude that state sovereignty had not been compromised even if the state submitted to such control. *NLC* suggests that such "attributes of sovereignty" are beyond federal control because of a constitutional prohibition, not a lack of congressional authority to legislate in a given area.¹⁴⁹ *NLC* further implies that even state consent to federal intrusion into these areas would not justify it.¹⁵⁰ Underlying these arguments may be a concern that state authorities may attempt to avoid their proper responsibilities by encouraging federal control, thereby preventing accountability to their constituencies.¹⁵¹ As noted above, federal control of state environmental litigation raises just such problems of accountability.

The *NLC-Hodel* formula seems inadequate to identify these threats to state sovereignty which may disrupt the proper functioning of our federal system. The ambiguities inherent in those formulas appear to impede rather than facilitate the identification of such threats. *Hodel's* addition of a balancing component fails to remedy this problem: Balancing may occur only after it has been concluded that state sovereignty has been impaired under the formulas. Balancing, therefore, is used not to identify threats to state sovereignty, but only to decide if they are justified.

As the following section indicates, the *NLC-Hodel* formulas should

¹⁴⁸ See *Chesapeake Bay Foundation v. Virginia State Water Control Bd.*, 495 F. Supp. 1229, 1237 (E. D. Va. 1980) ("There is a second area of traditional state concern . . . which clearly raises issues of federalism. That concern is the administration and supervision of a state's executive agencies."); *Oklahoma v. Federal Energy Regulatory Comm'n*, 494 F. Supp. 636, 659 (W. D. Okla. 1980) ("While not mentioned as an example in *National League of Cities*, a state's administrative and judicial processes must surely constitute a 'traditional governmental function.'").

¹⁴⁹ *National League of Cities v. Usery* 426 U.S. 833, 845 (1976).

¹⁵⁰ *Id.* at 841 n.12.

¹⁵¹ See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 5-22, at 315 n.34 (1978); Comment, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. PA. L. REV. 1460, 1477-78 (1981).

be integrated with a balancing test in a manner that is suggested by the way our federal system actually operates in contemporary society. Under this approach, balancing may be used to determine whether state sovereignty has been impaired. Applying this approach, the ambiguities of *NLC* and *Hodel* no longer impede the identification of threats to state sovereignty, and the control by the EPA over state agency litigation appears unconstitutional.

C. NLC, Hodel and "Cooperative Federalism"

Prior to the dramatic change beginning in 1937 in the Supreme Court's theory of federalism,¹⁵² it had been popular to approach problems of federal-state relations under the assumption that the Constitution created a system of "dual federalism." This theory suggested that certain governmental operations and functions were divided between the state and federal governments. Each was sovereign as against the other within its own sphere of power.¹⁵³ The Supreme Court repeatedly used this theory to strike down congressional attempts to regulate private activity thought to be within the states' sphere.¹⁵⁴

The theory of dual federalism has been rejected by modern scholars. Today both the state and federal governments have become involved in virtually every facet of governance. Rather than forming distinct divisions between two layers of governmental activity, the operations of the states and the federal government have been likened to a marble cake in which the two have been intermixed in every area.¹⁵⁵ This intermixing has the beneficial effect of making federal and state government dependent upon one another in conducting most of their functions, thus providing a disincentive to both to create a liberty threatening concentra-

¹⁵² See generally R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 174-79 (1960).

¹⁵³ See Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

¹⁵⁴ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding unconstitutional the Bituminous Coal Conservation Act of 1935 because it regulated intrastate mining activities); *United States v. Butler*, 297 U.S. 1 (1936) (holding unconstitutional a federal tax on agricultural commodities on the grounds that the tenth amendment reserved to the states the power to regulate agriculture). See generally R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 136-69 (1960); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4 (1978).

¹⁵⁵ See D. ELAZAR, R. CARROLL, E. LEVINE, & D. ST. ANGELO, *COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM* 83-84 (1969); M. GRODZINS, *THE AMERICAN SYSTEM* 4, 8 (D. Elazar ed. 1966); M. REAGAN, *THE NEW FEDERALISM* (1973); A. Fritschler and M. Segal, *Intergovernmental Relations and Contemporary Political Science: Developing an Integrative Typology*, 1 *PUBLIUS* 95 (1972).

tion of power.¹⁵⁶ This interdependence forms a pattern of governmental activity which has been referred to as "cooperative federalism."

Pollution control is a good example of the cooperative federalism phenomena. Historically, states have asserted authority to deal with environmental issues under their police powers to protect the health and safety of their citizens.¹⁵⁷ Simultaneously, the federal government has regulated the same issues under its Commerce Clause powers, which reach even those environmental problems that are ostensibly interstate in nature.¹⁵⁸ The Clean Water Act, the Surface Mining Act and many other federal environmental statutes involving the states and the federal government in a partnership of implementation and enforcement¹⁵⁹ are typical examples of modern cooperative federalism.¹⁶⁰ Rather than designating certain waters as subject to state control and others subject to federal control, the Clean Water Act covers virtually all the nation's water resources¹⁶¹ with the state and federal governments playing what are hopefully complementary functions in the operation of a single system.

Viewed against this backdrop, the ambiguous standards of *NLC* may take on new import. Concepts such as "integral operations," "attributes of state sovereignty," "states as states," and "traditional functions" should be interpreted in light of the fact that there is federal involvement in virtually all state operations, and the fact that the balance of power between the states and the federal government to control regulatory policy roughly changes to mirror shifts in societal attitudes con-

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¹⁵⁶ [N]ot even doctrinal developments reinforcing state autonomy are likely to alter the central realities that the federal and state governments will have to depend upon one another in virtually every significant area of endeavor, and that such mutual dependence must continue to provide the primary assurance that neither level of government will achieve a threatening hegemony over all of our public life. Thus, along both dimensions, that of federalism as well as that of separation of powers, it is *institutional interdependence* rather than *functional independence* that best summarizes the American idea of protecting liberty by fragmenting power.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-2, at 16-17 (1978) (citing *National League of Cities*, 426 U.S. 833 (1976)).

¹⁵⁷ See, e.g., *National Wood Preservers v. Pennsylvania Dept. of Env't'l Resources*, 414 A.2d 37, 43 (Pa. Super. 1980).

¹⁵⁸ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

¹⁵⁹ See note 2 *supra*.

¹⁶⁰ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

¹⁶¹ See note 17 *supra*.

cerning the appropriate repository of that power.¹⁶² The shift of power embodied in the Clean Water Act, which enables the federal government to set water pollution control policy, and the concomitant abdication by the states of what little authority was left to them by the Act, are good examples of such change.¹⁶³

The *NLC-Hodel* standards do not make sense in light of the realities of modern federalism if they presume a static concept of inviolate state power. If the states share responsibility with the federal government for virtually every governmental function, it is difficult to understand how any of those functions can be considered so purely the domain of the states to be characterized as "integral." The *NLC-Hodel* standards can be viewed in a manner consistent with cooperative federalism if they are considered not the tests to be applied but simply the conclusions to be reached after a weighing of the competing state and federal interests in a given area. Rather than abstractly inquiring as to whether a state activity is "integral," the proper approach would be to balance the competing state and federal interests in exercising regulatory power in a given area. If the state interest is clearly paramount, it may be concluded that the function must be "integral" and should be protected from federal intervention. This method would accommodate the spirit of the Supremacy Clause, but not threaten state sovereignty. This approach would also be responsive to the criticisms of *NLC*, unanswered by *Hodel*, that the Supreme Court's standards were both hopelessly vague, and embraced a stagnant vision of federalism frozen in time. Finally, this approach would rationalize the decision of the majority in *NLC* with Justice Blackmun's concurring opinion, a process that the Court in *Hodel* evidently deemed significant.

Applying this balancing technique to EPA control of state environmental litigation is simple if res judicata impact is not afforded to state court judgments. The federal interest presumably advanced by EPA control is the establishment of uniform pollution controls mandated by the Clean Water Act.¹⁶⁴ Assuming the EPA is not encumbered by prior state judgments, the need to control prior state litigation in order to protect this interest is small: the federal interest can be protected in a manner intruding less on state power by simply relitigating important

¹⁶² See *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) ("Although [*National League of Cities*] does not contain a specific outline of the dimension of the state sovereignty limitation, the definition suggests that the terms 'traditional' and 'integral' are to be given a meaning permitting expansion to meet changing times.").

¹⁶³ See notes 9-33 and accompanying text *supra*.

¹⁶⁴ See note 31 and accompanying text *supra*.

cases in federal court.¹⁶⁵ The interest in maintaining uniform standards would, in fact, be more effectively protected by federal court relitigation than by control of state court litigation since the federal courts are more likely to be familiar with the federal standards involved.¹⁶⁶ Selective federal relitigation in place of control of state proceedings would also advance the other basic goal of the Clean Water Act: avoiding the administrative costs associated with EPA involvement in local enforcement efforts.¹⁶⁷ Therefore, when *res judicata* does not apply, resolving the balance of state and federal interests against the federal control of state litigation not only protects the state interest in maintaining its sovereignty unimpaired, but advances the relevant federal interests as well.

Conversely, if state judgments are granted normal *res judicata* impact, striking the balance may be more difficult. The specific nature of the issues involved in a given case, as well as the extent of federal control of state decisions, obviously must be considered and may vary from case to case.¹⁶⁸

But it would make little sense to permit application of *res judicata* to limit federal environmental litigation. Federal control of state litigation would erode state power even if, on balance, that erosion was constitutional. If a basic purpose for applying *res judicata* in this context is to advance federal-state comity,¹⁶⁹ it is impossible to justify that application since it encourages the federal control which has an adverse impact on state sovereignty.¹⁷⁰ Much less damage would be done to the states if the impact of the decisions of state courts were occasionally constricted.

¹⁶⁵ In the rare case in which federal interests might be irrevocably damaged if the EPA waited for state proceedings to terminate before commencing federal litigation, those interests could be protected by a concurrent action in federal court, or simply consultation between the EPA and the states. See 33 U.S.C. §§ 1319(a)(1), (3) (1976 & Supp. V 1981); 33 U.S.C. §§ 1342(i) (1976).

¹⁶⁶ See note 68 and accompanying text *supra*.

¹⁶⁷ See note 31 and accompanying text *supra*.

¹⁶⁸ It is beyond the scope of this article to propose a framework for balancing in all cases raising tenth amendment issues. Justice Blackmun, in his concurrence in *National League of Cities*, seemed to imply that when environmental interests are at stake, the balance tips in favor of the federal government. *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976). For a discussion of some of the issues that might enter into the balance of the environmental cases, see Stewart, note 7 *supra*, at 1225-32. For a general critique of an ad hoc balancing approach, and a more structured alternative, see Note, *Practical Federalism After National League of Cities: A Proposal*, 69 GEO. L.J. 773 (1981).

¹⁶⁹ See notes 46-48 and accompanying text *supra*.

¹⁷⁰ See notes 99-103 and accompanying text *supra*.

For policy reasons rooted in federalism, therefore, *res judicata* should not be applied to limit federal environmental litigation even if federal control of state litigation is constitutional.

CONCLUSION

The Clean Water Act and other significant federal environmental legislation enacted over the past decade divide enforcement and implementation responsibilities between federal and state agencies. This division creates the potential for jurisdiction in both federal and state courts over the same disputes but encourages initial review of those disputes in state court. This raises the question of what effect state judgments should be given in subsequent federal litigation.

When federal environmental legislation reflects Congressional intent to place ultimate responsibility for enforcement in the hands of a central federal authority in order to guarantee uniform application of environmental standards, *res judicata* impact should not be afforded to state judgments. Such a countervailing statutory policy justifies the relaxation of normal rules of preclusion when uniformity is threatened.

Even if such a policy is not recognized, there are other significant reasons why *res judicata* should not be applied. A federal agency which is not a party to state litigation can be bound by a judgment rendered therein only if it is in privity with the state agency that is a party. This privity may be based on a finding that the federal agency controlled the state's conduct of that litigation. Such control is inconsistent with the Congressional intent that the states assume primary responsibility to implement the Clean Water Act at the local level. That control also constitutes an infringement of state sovereignty which may be unconstitutional. Since federal agencies will be encouraged to exercise this control if faced with the risk of a binding state judgment, *res judicata* should not be applied. While denial of *res judicata* impact to state judgments admittedly constitutes an affront to the states, the resulting erosion of state integrity pales against the damage that federal agencies might inflict if *res judicata* were enforced. The federal courts, the "least dangerous branch,"¹⁷¹ will probably be more sensitive to state interests when deciding what effect to give state judgments than even the best intentioned federal agency. The courts should, therefore, have the discretion to suspend the rules of *res judicata*. Such sensitivity is necessary to permit the "delicate partnership" created by the Clean Water Act to achieve its environmental goals:

¹⁷¹ THE FEDERALIST No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

We have been called upon to examine a statutory scheme that has the potential for the optimum of federalism. The legislation contains problems of accommodation that will require additional interstitial interpretation and environmental exploration as the partners pirouette. The success of their federalist venture will depend not only upon the grace, but also the substance of movement by both partners in the ballet. We have endeavored to ink a most self-effacing role for the federal judiciary, one which should foster a harmonious background to the dance and necessitate intervention only when a point of unmelodius discord seriously threatens the contrapuntal balance.¹⁷²

¹⁷² *Save the Bay, Inc. v. Administrator of the EPA*, 556 F.2d 1282, 1296-97 (5th Cir. 1977).