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State Control of Federal Pollution:
Taking the Stick Away from the States

Roderick Walston*

INTRODUCTION

One of the dominant trends of recent congressional legislation has been the development of a new form of federalism.1 Under this new federalism, Congress has given the states authority to achieve a broad range of national goals set by Congress itself, particularly the conservation and allocation of natural resources.2 The states have thus been given latitude to solve an array of national problems by programs tailored to local needs. The new federalism reflects an increasing congressional awareness of the finiteness of federal bureaucratic resources, and of the need to enlist the states in the effort to solve pressing national problems. The new approach also reflects a limited congressional commitment to allow decisions with a local impact to be made at the local level, to diffuse rather than concentrate the nation’s sources of power. Congress and the states have entered into a new partnership, one that gives

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1. For discussions of the “New Federalism” as it relates to the solution of urban problems see R. Gribbs, The New Federalism is Here to Stay, J. Conyers, Jr., The Politics of Revenue Sharing, J. James, Epitaph for an Experiment: Model Cities and the New Federalism, and J. Weinstein, Federal Revenue Sharing and the State’s Housing Role, all appearing in Symposium: The New Federalism and the Cities, 52 J. OF URBAN LAW 55-113 (1974).

renewed emphasis to our federal system of government. But the new federalism has not been without its problems. As we shall see, it has presented the courts with the difficult task of delineating the line of authority between federal and state agencies jointly charged with the responsibility of attaining Congress' goals.

Prime examples of the new federalism are the Clean Air Act and the Federal Water Pollution Control Act. These acts set forth comprehensive schemes for the control and eventual elimination of air and water pollution. Their central feature is a permit system, which requires polluters to obtain permits prior to discharging pollutants. The states bear the primary responsibility for establishing and operating these programs. Congress has thus directed the states to take the lead in the nationwide fight against air and water pollution. The United States Supreme Court recently characterized Congress, in so acting, as "taking a stick to the states."6

In two recent companion decisions, however, the Supreme Court appears to have taken away the stick, to the extent that federal polluters are involved. In Hancock v. Train7 and EPA v. California ex rel. State Water Resources Control Board,8 the Court held that the states lack authority to apply their permit systems to agencies of the federal government. The states cannot regulate federal activities in any way, the Court ruled, in the absence of a "clear and unambiguous" congressional authorization.9 The Court concluded that the air and water acts do not set forth with sufficient clarity the states' asserted authority to apply their permit programs to federal polluters.10

This Article will examine these decisions more closely in order to analyze their effect on the goals of the air and water acts as applied to federal polluters. The decisions, it will be argued, impair these goals by making it difficult for effective antipollution controls to be developed for federal polluters. Thus, the purpose of this Article is not to question the Court's

5. 33 U.S.C. §§ 1251 et seq. (Supp. V 1975). The Federal Water Pollution Control Act will hereinafter be referred to as the "water act."
7. 426 U.S. 200, 8 ERC 2089 (1976) [hereinafter cited as EPA v. California].
8. Hancock v. Train, 426 U.S. at 179, 8 ERC at 2105; EPA v. California, 426 U.S. at 211, 8 ERC at 2093.
9. Justices Stewart and Rehnquist dissented from both decisions.
10. EPA v. California reversed a decision of the Ninth Circuit, California ex rel. State Water Resources Control Bd. v. EPA, 511 F.2d 963 (9th Cir. 1975). Hancock v. Train affirmed a decision of the Sixth Circuit, Kentucky ex rel. Hancock v. Ruckelshaus, 497 F.2d 1172 (6th Cir. 1974). The Sixth Circuit's decision in the latter case was inconsistent with a decision of the Fifth Circuit, Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974).

For a general discussion of the issues in the cases, see Comment, Local Control of Pollution from Federal Facilities, 11 S. DIEGO L. REV. 972 (1974).
conclusion that the two acts fail to set forth the states’ authority in “clear and unambiguous” language. Rather, its purpose is to show that the decisions pay little attention to the acts’ objectives, and indeed impede them. The Article will conclude with the observation that the purposes of a legislative act should be consulted in order to understand its meaning; if those purposes are sufficiently clear, there should be a willingness to draw legitimate inferences from the language to support those purposes, and to harmonize the act’s terms with its objectives.

I

THE AIR AND WATER ACTS

Congress first turned its attention to the problems of air and water pollution in 1948 and 1955, when it passed the Water Pollution Control Act and the Air Pollution Control Act, respectively. Both acts have been profusely amended since that time, reflecting an increasing congressional awareness of the pollution problem and an increasing congressional commitment to its solution. In reviewing the evolution of these acts, several dominant themes emerge. First, the amendments consistently recognize that pollution control programs have traditionally been within the domain of the states rather than the federal government, and that, although the federal government should play a more vigorous role in achieving abatement, most planning and enforcement can best be done at the state level. Second, the amendments, in order to achieve more effective control of pollution, have focused increasingly on the activities of individual polluters, rather than on the activities of large classes of polluters. Third, the amendments have imposed increasingly tighter controls on federal polluters, to the point that such polluters are now, within limits, subject to the same controls that apply to others.

In their original form, the air and water acts did little more than encourage the states to do whatever they felt was appropriate to abate pollution. The acts authorized the states to develop “methods” and “programs” to correct pollution, without providing any guidelines for doing so. The acts specifically recognized that the “primary responsibilities and

13. A congressional report noted in 1971:
   For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States.
14. See text accompanying notes 18 to 22 and notes 28 to 34 infra.
15. See text accompanying notes 41 to 49 infra.
rights" for the control of pollution rested with the states. The acts reflected Congress' increasing concern with pollution, but did little to correct this problem.

About a decade ago, it became apparent that governmental efforts to combat pollution, at both the federal and state levels, were failing to keep pace with the growth of the problem and with the growing national concern. Congress at best had provided only a modest mandate to the states to solve the problem, and many states had failed to respond to even this modest mandate. Accordingly, Congress amended the acts in several vital respects.

A. Amendments to the Air Act

In 1970, Congress amended the air act to require the new Environmental Protection Agency (EPA) to adopt a national "standard" for "ambient air quality." The amendments require each state to adopt a "plan" for the "implementation" of the EPA's standards. As part of these plans, the states are to develop "emission limitations," including "schedules and timetables for compliance." Thus, the EPA is to develop the goals to be achieved for entire air basins, and the states are to develop plans to achieve those goals. In developing these plans, virtually all states have adopted permit systems, which enable the states to set limits on the amount of pollutants which each polluter is allowed to discharge.

B. Amendments to the Water Act

In 1965, Congress adopted amendments to the water act similar to those later adopted in 1970 for the air act. The 1965 amendments to the water act authorized each state to adopt "a plan for the implementation" of ambient "water quality standards." However, these standards were to be developed by the states rather than the federal government. Special problems quickly

17. Id.
19. Id. § 1857c-5(a)(1).
   "[EPA] is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. . . . The Act gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2) [42 U.S.C. § 1857c-5(a)(2)] . . . . Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.
22. Hancock v. Train, 426 U.S. at 184-85, 8 ERC at 2107.
25. Id.
emerged under the water act. The Army Corps of Engineers, pursuant to authority discovered in the Refuse Act of 1899,26 began to require polluters to obtain permits from the Corps as a condition to the discharge of pollutants into the nation’s navigable waters. The Corps’ newly asserted authority diminished, or at least conflicted with, the authority given to the EPA and the states under the water act. To resolve these difficulties, the water act was substantially overhauled by amendments passed in 1972.27

The 1972 amendments to the water act, beyond suspending the Corps’ permit-issuing authority under the Refuse Act of 1899,28 change the scheme of the water act in two fundamental respects. First, the amendments require polluters to meet “effluent limitations” established under the act, rather than merely the ambient “water quality standards” provided for in the pre-1972 act;29 the EPA is to develop these “effluent limitations” for “point sources” of pollution,30 and the states may develop more stringent limitations than those of the EPA.31 Second, under section 402, the amendments establish a permit system, the National Pollutant Discharge Elimination System (NPDES), under which no person may discharge pollutants into the nation’s navigable waters except pursuant to an NPDES permit.32

The amendments to the water act change the act’s focus from a generalized to a particularized approach to the problem of water pollution. Beyond continuing “ambient” standards for bodies of water, the amendments require individual point sources to meet specific “effluent limitations.”33 The amendments thus provide standards for individual polluters, as well as for the waters that they pollute. In this way, the amendments provide for more effective pollution control by focusing on the cause of water pollution, not merely its effect; they deal with the source of the problem, not merely its symptoms.

By requiring individual polluters to obtain NPDES permits, the amendments provide a mechanism for developing and enforcing the limitations imposed on pollutants discharged by individual polluters. The 1972 amendments to the water act thereby remove any lingering doubt concerning the

29. Id. §§ 1311-13.
30. Id. §§ 1311, 1362(14).
31. Id. § 1370.
32. Id. §§ 1342, 1311(a). Throughout the text of this Article, the author uses the convention of referring to the Federal Water Pollution Control Act Amendments of 1972 by the section numbers found in Pub. L. No. 92-500, 86 Stat. 816 (1972) and of referring to the Clean Air Act Amendments of 1970 by the section numbers found in Pub. L. No. 91-604, 84 Stat. 1676 (1970). The notes throughout the article refer the reader to the corresponding United States Code citations.
authority of the permit-issuing agency to set a particularized standard for the individual polluter most responsible for polluting a body of water, rather than merely a generalized standard for all polluters regardless of their individual culpability. The water act amendments doubtlessly reflect the helpful experience gained in administering the air act, and represent a refinement of the approach taken in the latter act.

The authority to implement NPDES permit programs under the water act rests primarily with the states, with the EPA playing an interim role. Under section 402(a) of the amendments, the EPA is to develop a permit program for each state, until the state develops its own program. Under section 402(b), the states are authorized to develop their own programs. If the state program meets the criteria spelled out in the act, the EPA must approve the state program, and must suspend its own program. In describing the purposes of the amendments, Congress left no doubt that the ultimate responsibility for administering the NPDES program rests with the states, and that the EPA is to exercise its authority during the "transition period." The amendments repeat the familiar admonition that the "primary responsibilities and rights" for the control of pollution rest with the states.

C. Pollution by Federal Facilities

Federal facilities, particularly military installations, contribute substan-

34. Id. § 1342(a).
35. Id. § 1342(b).
36. See id. §§ 1342(b)(1)-(9).
37. Id. § 1342(b). In its original form, this section provided that the EPA "may" approve a state NPDES permit program which meets the act's standards. § 402(a)(5), H. R. 11896, 92d Cong., 2d Sess., 118 Cong. Rec. 10824 (1972). The Conference Committee changed the word "may" to "shall," in order to require the Administrator of the EPA to approve such a program, "instead of only permitting the Administrator to do so." S. Rep. No. 1236, 92d Cong., 2d Sess. 139 (1972).
39. Senator Muskie, the chief spokesman for the bill in the Senate, commented during the debates:

What it [the bill] does is continue the Federal Government's authority with respect to major polluters . . . until such time as the States can develop permanent authority of their own. At that time it is the expectation of this bill and of this administration to have the States assume that permanent authority and to administer the law directly.

117 Cong. Rec. 3845 (1971). Similarly, the Senate report accompanying the bill noted, with respect to the NPDES program:

It is expected that the States will play a major role in the administration of this program.

The Committee believes that, after a transition period during which the State program and capability will be upgraded, the program should be administered by those States with programs which meet the requirements of this Act.

Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program. The Administrator would periodically assess the performance of the State program and have the authority to withdraw this delegation upon finding that the State is not carrying out its program properly.

temporarily to the national pollution problem by discharging large amounts of pollutants into the nation's air and waters.\textsuperscript{41} Such facilities received special attention under the air and water acts. In the pre-1970 acts, federal facilities were nominally required to "cooperate" with the states in the control of pollution.\textsuperscript{42} For all practical purposes, this limited requirement gave federal polluters the option of voluntarily complying with the states' pre-1970 programs.

Congress quickly recognized the need to impose tighter controls on federal polluters. In passing the 1970 amendments to the air act\textsuperscript{43} and the 1972 amendments to the water act,\textsuperscript{44} Congress noted that there were "many incidents of flagrant violations of air and water pollution requirements" by federal facilities, that "lack of Federal leadership" had been detrimental to Congress' air and water goals, and that "[t]he Federal government cannot expect private industry to abate pollution if the federal government continues to pollute."\textsuperscript{45} Accordingly, section 118 of the 1970 amendments to the air act was enacted to require federal polluters to comply with state "requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."\textsuperscript{46} Section 313 of the 1972 amendments to the water act imposed a similar obligation on federal polluters under that act.\textsuperscript{47} As noted in the Senate report, the latter section "requires that

\begin{itemize}
  \item As of 1973, there were a total of 49,008 federal installations in the nation.\textsuperscript{41} \textit{General Services Administration, Inventory Report—Real Property Leased to the United States Throughout the World} iv (June 30, 1973). In 1968, the U.S. Department of Defense alone discharged more than 335 million gallons of human waste each day, of which 25-30\% was given less than secondary treatment. D. Zwick & M. Benstock, \textit{Water Wasteland} 340 (1971).
  \item As the Council on Environmental Quality noted: "While progress is being made in cleaning up federal facilities, some individual facilities are still major polluters. Many of these are on military installations. As in the case of industrial pollution, management attitude is the crucial ingredient in complying with environmental standards." \textit{Council on Environmental Quality, Second Annual Report} (Aug. 1971).
  \item Clean Air Act Amendments of 1970, § 118, 42 U.S.C. § 1857f (1970). The section continues, in relevant part, as follows: "The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . ." \textit{Id.}
  \item Federal Water Pollution Control Act Amendments of 1972, § 313, 33 U.S.C. § 1323 (Supp. V 1975), provides:
    \begin{itemize}
      \item Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person
    \end{itemize}
\end{itemize}
Federal facilities meet all control requirements as if they were private citizens." However, the President of the United States may exempt a federal source of pollution from the requirements of both acts, if the exemption is in the "paramount interest" of the United States. Otherwise, federal polluters no longer have the option of voluntarily complying with the requirements imposed by the states under the acts. Rather, under sections 118 and 313, they must now comply with these requirements "to the same extent" as others.

II
THE COURT'S DISTINCTION BETWEEN "SUBSTANTIVE" AND "PROCEDURAL" REQUIREMENTS

In Hancock v. Train and EPA v. California, the Court held that sections 118 and 313 do not force federal facilities to comply with state permit programs under the acts. According to the Court, the sections, in requiring federal compliance with state "requirements" respecting control and abatement of pollution, refer only to state "substantive" requirements, not to state "procedural" requirements. The "substantive" requirements, the Court stated, include the "emission limitations" which the states adopt under the air act and the "effluent limitations" which they adopt under the water act; the "procedural" requirements include the permit programs which the states adopt as part of their implementation plans under the air act, and the NPDES permit programs which they adopt under the water act. Thus, the "substantive" requirements include the development of standards which define the steps that the polluter must take in controlling pollution, and the "procedural" requirements include the administrative means by which the enforcing agency insures that the steps are taken. According to the Court, the states can

is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so . . . .

It should be noted that § 313, unlike § 118, provides a clarifying example of "such requirements" by using the phrase "including the payment of reasonable service charges." See the discussion in note 59 infra.


However, the air and water acts contain express exemptions for federal polluters from certain state programs authorized under the acts. Under the air act, federal facilities are exempt from state programs to enforce standards for new stationary sources of pollution, 42 U.S.C. § 1857c-6(c)(1) (1970), state programs to enforce standards relating to hazardous pollutants, id. § 1857c-7(d)(1), and state programs relating to entry, inspection and monitoring of new stationary sources of pollution, id. § 1857c-9(b)(1). Under the water act, federal facilities are exempt from state programs relating to entry, inspection and monitoring, 33 U.S.C. § 1318(c), (Supp. V 1975), and from state programs to enforce standards for new sources of pollutants developed by the EPA, id. § 1316(c).

49. See portions of acts quoted in notes 46 & 47 supra.

50. Hancock v. Train, 426 U.S. at 181-86, 8 ERC at 2106-08; EPA v. California, 426 U.S. at 211-15, 8 ERC at 2093-95.

51. Hancock v. Train, 426 U.S. at 181-86, 8 ERC at 2106-08; EPA v. California, 426 U.S. at 211-15, 8 ERC at 2093-95.
FEDERAL POLLUTION

apply their "substantive" requirements to federal polluters, but not their "procedural" requirements. They can define the steps which must be taken by federal polluters, but cannot administratively insure that the steps are taken. The sole power to insure that these steps are taken, to apply "procedural" requirements to federal polluters, rests with another federal agency, the EPA. 52 Thus, the states can determine the content of the permit issued to a federal polluter, but only the EPA can issue the permit.

In reaching its conclusion, the Court relied on a line of cases originating in McCulloch v. Maryland. 53 In McCulloch, the Court held that the Supremacy Clause forbids state regulation of federal activities. Subsequent decisions have held that there can be no state encroachment on federal activities in the absence of a "clear and unambiguous" congressional authorization to the contrary. 54 These decisions impose a sizeable burden on the states in establishing their authority under federal law to regulate federal activities.

The Court concluded that sections 118 and 313 are not sufficiently clear to be construed as authority for the states to apply their permit programs to federal polluters. The sections do not, the Court noted, expressly require compliance with "all" state requirements under the acts. 55 The congressional reports that describe the sections' effects, the Court further noted, mention the "emission limitations" and "effluent limitations" which the states may adopt, but not the permit programs which the states may adopt. 56 Thus, the Court did not find an affirmative congressional intent to exempt federal polluters from state "procedural" requirements. Rather, it concluded that the acts fail to describe, with requisite clarity, the federal obligation to comply with such requirements. Its decisions were thus not based on what the acts say, but rather on what they fail to say.

A. The Language of the Acts

The acts certainly contain some indications that the states are to have "procedural" authority over federal polluters, whether or not these indications have the clarity expected by the Court. For example, sections 118 and 313, on their face, do not distinguish between "substantive" and "procedur-
al" requirements, which might indicate that no such distinction was intended. Although, as noted by the Court, the two sections do not specifically obligate federal polluters to comply with "all" state requirements, neither do the sections exempt such polluters from any state requirements. The absence of such an exemption is noteworthy in light of other provisions in the acts that expressly exempt federal polluters from certain specified state programs; the absence of an express exemption from state "procedural" requirements might suggest that no such exemption was intended.

There are a number of provisions in the water act that might support the conclusion that federal polluters are subject to state NPDES permit programs. For example, the act provides that the EPA "shall suspend" its own NPDES program as to the navigable waters covered by a state program, once the EPA approves the state NPDES program. This provision would indicate

57. For the relevant text of § 118, see note 46 and accompanying text supra. For the relevant text of § 313, see note 47 supra.
58. See note 48 supra.
59. For instance, § 313, 33 U.S.C. § 1323 (Supp. V 1975), obligates federal facilities to comply with both "Federal" and "State" requirements. See note 38 supra. The states thus argued that § 313 is the source of the federal obligation to comply with EPA-issued NPDES permits in those states where the EPA rather than the state operates the NPDES program. Since even the EPA agreed that federal facilities are subject to EPA-issued permits in such states, the states argued that § 313 necessarily includes permits issued under § 402, 33 U.S.C. § 1342 (Supp. V 1975), whether issued by the EPA or the states.

The Court stated simply that the source of the federal obligation to secure EPA-issued permits, and EPA's authority to issue them, are found in § 402 itself, not in § 313. EPA v. California, 426 U.S. at 221-22, 8 ERC at 2098. However, nothing on the face of the section the Court relied on (§ 402) imposes an obligation on polluters to comply with such permits. The latter obligation is imposed on non-federal polluters under § 301(a), 33 U.S.C. § 1311(a) (Supp. V 1975). That section makes it "unlawful" for a "person" to discharge pollutants without a permit. The states argued that the same obligation is imposed on federal polluters under § 313, which requires federal polluters to comply with control requirements "to the same extent that any person is subject to such requirements" (Emphasis added). The Court rejected this conclusion by ruling that the obligation of both federal and non-federal polluters to secure NPDES permits is found in § 402, and that noncompliance with § 402 is not "unlawful," especially since noncompliance by non-federal polluters is "unlawful," especially since noncompliance by non-federal polluters is "unlawful" under § 301(a).

The states also pointed out that § 313, unlike § 118, contains a phrase, "including the payment of reasonable service charges," which clarifies the meaning of the word "requirements" in § 313. See note 47 supra. The states argued that this phrase was inserted to assure that federal polluters have authority to pay fees for NPDES permit applications; such fees are analogous to taxes, and the states cannot impose taxes on federal activities without congressional authorization. See, e.g., United States v. Allegheny County, 322 U.S. 174 (1944). The EPA argued that the phrase was merely intended to enable federal polluters to pay for sewage services rendered by local agencies. The Court upheld the EPA's interpretation as "not . . . unreasonable." EPA v. California, 426 U.S. at 217, 8 ERC at 2098 n.37. It is difficult to understand how the failure of federal polluters to comply with their obligations under the act cannot be considered "unlawful," especially since noncompliance by non-federal polluters is "unlawful" under § 301(a).

The Ninth Circuit Court of Appeals had pointed out below that this interpretation would render the phrase meaningless, since it could not be seriously argued that federal agencies are without authority to pay for sewage services which they voluntarily receive pursuant to contracts entered into with local agencies. California v. EPA, 511 F.2d at 970, 7 ERC at 1671. The Supreme Court failed to respond to the Ninth Circuit's observation.

that the EPA lacks authority to issue permits to federal polluters once it approves the state program, and that—since it is inconceivable that Congress meant to exempt federal polluters from the act’s NPDES programs altogether—the states must have authority to apply their own programs to such polluters. The Court rejected this possibility by stating, without any citation of authority, that "we do not think" that the EPA loses its authority to issue permits to federal polluters once it approves a state program. The Court’s conclusion is not supported on the face of the act. On its face, the act supports only the conclusion that the state or the EPA is to operate the entire NPDES program applicable to a particular body of water, and that this authority is not to be shared by the state and the EPA.

Still, one would expect that Congress might have spoken more clearly if it had intended to subject federal polluters to state "procedural" requirements. However, since federal polluters are clearly subject to state "substantive" requirements, perhaps Congress believed it unnecessary to describe more explicitly their obligation to comply with "procedural" requirements, since "procedural" requirements are the means by which compliance with "substantive" requirements is assured. It is questionable whether the distinction between "substantive" and "procedural" requirements even occurred to Congress. As one court summarized the limited legislative history of section 118, this history only provides "a statement of the ultimate goal of the provision [section 118] rather than a road map of how to get there." Thus, the acts could have been construed as authorizing the states to exercise "procedural" authority over federal polluters, if the Court had not required that this authority be set forth with such high clarity. This raises the question, to which we shall now turn, whether the Court should have required such high clarity in light of the objectives of the air and water acts.

B. The Decisions’ Effect on the Acts’ Objectives

Hancock v. Train and EPA v. California result in a division of authority between the states and the EPA over federal polluters. Under this division of authority, the states are to develop "substantive" standards for such polluters, and the EPA is to apply these standards by "procedural" means. Thus, one agency is called on to apply and enforce the standards that are developed by another agency. This will probably result in at least minor duplication of the functions of the agencies, and hence a loss of administrative efficiency.

61. EPA v. California, 426 U.S. at 226, 8 ERC at 2099. The Court rejected the states’ position by observing that the EPA is not obligated to approve a state NPDES program that is beyond the statutory authority of the states. Id. at 226-27, 8 ERC at 2099. This observation was not responsive to the states’ position. Their position was that the EPA’s lack of authority to issue permits to federal polluters implied that the states have such authority, not that the EPA has a duty to approve state programs where the states lack such authority.


63. Such a duplication of functions is discouraged under § 101(f) of the water act, which provides:

It is the national policy that to the maximum extent possible the procedures utilized for
This problem can perhaps be largely overcome by the cooperative efforts of the agencies themselves.

This division of authority also threatens to produce new legal entanglements between federal and state agencies. For example, the EPA recently refused to include state-issued limitations in a permit issued to a federal polluter in California.\textsuperscript{64} Although the states clearly have authority under the acts to judicially enforce state-issued limitations contained in EPA-issued permits,\textsuperscript{65} it is not clear whether they may judicially enforce state-issued limitations which the EPA does not include in such permits. The Court readily acknowledged, in what promises to be an understatement, that its decisions may result in "some possible problems of coordination" between federal and state agencies.\textsuperscript{66}

1. \textit{The Permit Device as a Means to Develop "Substantive" Standards}

Aside from these inter-agency problems, the division of authority between the states and the EPA makes it difficult for the states to actually develop the "substantive" limitations that are concededly applicable to federal polluters. As noted earlier, the fundamental changes wrought by the 1970 and 1972 amendments to the acts were to change the focus from generalized limitations applicable to broad categories of polluters, to individualized limitations applicable to each polluter within these categories.\textsuperscript{67}

The primary virtue of the permit system is that it provides a means for the acquisition of information relevant, and indeed critical, in the development of these individualized limitations. The circumstances of pollution vary among polluters. To be effective, control limitations must also vary.\textsuperscript{68}

implementing this chapter shall encourage the drastic minimization of paper work and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.


64. The EPA recently issued permits for effluent discharges by the U.S. Air Force from the Norton Air Force Base and the Point Arena Radar Station in northern California. The EPA refused to insert conditions in the permits that were requested by California's Regional Water Quality Control Board, apparently on grounds that the conditions assertedly did not consist of "substantive" requirements authorized in the water act. Brief for Respondents at 38 n.36, EPA v. California, 96 S. Ct. 2022, 8 ERC 2089 (1976).


66. EPA v. California, 426 U.S. at 221, 8 ERC at 2097.

67. See text accompanying notes 18 to 22 and notes 28 to 34 supra.

68. For example, the NPDES permit program in California is administered by several Regional Water Quality Control Boards, which issue "requirements," the equivalent of permits, to individual dischargers. See note 84 infra. The "requirements" issued by the regional boards contain numerical limitations on the amount of pollutants that may be discharged by the polluter over a particular period of time, such as maximum and minimum levels of acidity ("pH"), maximum levels of biochemical oxygen demand ("BOD") and maximum levels of floating and suspended solids. The "requirements" also frequently contain time schedules within which the discharger must bring himself into compliance with the numerical limitations. The "requirements," both in terms of numerical limitations and time schedules, vary from discharger to discharger, depending on the several factors described above in the text.

As an example of the variable nature of these "requirements," the regional board for the San
permit system enables the states, in setting these limitations, to ask questions and obtain answers that are relevant to the particular circumstances of each polluter. If the states are unable to utilize the permit system, they will be unable to effectively shape their limitations to the contours of the specific problem of pollution.

To illustrate how the circumstances of pollution may vary, two canneries, otherwise engaged in the same kind of activity, may discharge different kinds of chemical waste into the same body of water. Or they may discharge the same kinds of waste into different bodies of water, and the waters may have an unequal capacity to disperse the waste. Or the waters may receive different quantities of pollutants from other sources. Or the waters may vary in the degree of their ecological sensitivity. Or the canneries may have an unequal capacity to eliminate their pollution within a particular time span, thus necessitating the formulation of different time schedules for the canneries; the air and water acts define such time schedules as a form of the "emission limitations" and "effluent limitations" which the states may impose under the acts.69

The above factors must be closely examined in any given case in order to select the most effective form of antipollution limitations. The permit process provides a method for examining these factors. In California, several regional boards are authorized to administer the air act and the water act.70 These boards, in issuing permits under the acts, conduct extensive hearings into the circumstances surrounding the pollution of each applicant for a permit; they examine the causes of the particular pollution, the abatement efforts of the polluter, the polluter's ability to abate his pollution within a particular time span, and so forth.71 If a state is unable to examine these factors in an administrative setting, there is little assurance that it can develop effective limitations for the polluter.

The permit process is also important in the administration of state-issued

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71. Id.
limitations after they are developed. If a polluter fails to comply with the limitations in his permit, the permit process enables the state to conduct a further proceeding to discover the reasons for the failure. Based on the evidence adduced in the proceeding, the state may choose to modify its limitations, particularly if circumstances have changed since the limitations were originally issued.\(^7\) Or the state may choose to pursue various administrative remedies that will encourage the polluter to comply with the limitations.\(^7\) However, if the state is unable to conduct an administrative proceeding, it has no recourse but to seek judicial relief whenever its limitations are violated. This result undermines the flexibility which is the virtue of the administrative system. It encourages the resolution of complex, technical problems by the courts, rather than by the agencies set up to handle the problems. Thus, Hancock v. Train and EPA v. California will probably result in greater litigation between federal and state agencies, as the states are left without administrative remedies to correct federal violations of state-issued limitations.


Since the states are unable to utilize the "procedural" permit process in developing "substantive" limitations for federal polluters, how otherwise are they to develop these limitations? The EPA, in its brief to the Court, suggested simply that federal agencies must "cooperate" with the states by supplying them with "whatever data are needed."\(^7\) Presumably the federal polluter, not the state, is to determine what data are "needed" by the state, since the state, unable to apply any "procedural" requirements against federal polluters, lacks the means to compel a federal polluter to supply data selected by the state. Of course, an agency which causes pollution may have a different perception of what data are "needed" than the agency charged with abatement of the pollution. Certainly the polluter has little interest in providing information that may lead to the imposition of tighter controls on its operations. In short, it is questionable whether federal polluters will voluntarily supply the states with the concrete, detailed information that the states normally acquire by administrative means. It is unlikely that the states can acquire this information by judicial means, since a federal obligation to "cooperate" with the states is virtually unenforceable. Although it is hoped that federal polluters will fully assist the states in applying the Court's

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72. For instance, the Regional Water Quality Control Board for the San Francisco Bay Region has, on several occasions, amended the time schedules within which the City and County of San Francisco is required to comply with the board's "requirements." However, the Board has also utilized several administrative remedies to compel such compliance. For instance, it has issued cease-and-desist orders to compel such compliance under the authority of CAL. WATER CODE § 13301 (West 1971). It has also imposed a limited ban on further connections to the municipality's sewage treatment facilities. Id. The availability of these administrative remedies has enabled the board, thus far, to avoid pursuing its judicial remedies.

73. See note 72 supra.

decisions, it is unlikely that the states will be able to develop the effective antipollution controls for federal polluters that they administratively develop for others.

The Court suggested another reason why the states need not use the permit process in developing "substantive" limitations for federal polluters. It stated that federal polluters need not comply with all state "substantive" standards. Rather, they must comply only with "general" substantive standards which the states apply to "other polluters," as contrasted to "individualized" standards. This means that a state can simply apply to federal polluters the same "general" standards that have been administratively worked out for other polluters. Since the states cannot apply "individualized" standards to federal polluters, there is no need for them to utilize administrative means to develop such standards.

It is difficult to understand the basis for the Court's distinction between "general" and "individualized" limitations. The Court suggested none. The distinction is not found in the acts, or their legislative history. As noted earlier, the recent amendments to the acts were designed to allow the development of standards tailored to the circumstances of individual polluters, not merely the development of "general" standards applicable to categories of polluters. This objective is not consistent with the Court's distinction between general and individual limitations. If the states are able only to apply "general" standards to federal polluters, they are unable to require a federal polluter with a singularly bad record of pollution to upgrade his performance more than other polluters.

The distinction between general and individual limitations also creates problems of classification not addressed by the Court. What is the difference between a "general" and an "individualized" limitation? Does a "general" limitation apply to two or more polluters, or to all polluters similarly situated, or to all polluters regardless of their situation? It is impossible to draw a workable line between general and individual limitations. In developing limitations, the states always consider the extent to which the polluter's circumstances are similar to those of other polluters. If the circumstances of the individual polluter are common to those of others, the limitations selected by the state will be applicable to many polluters. If the circumstances are applicable only to a few polluters, or to one polluter, the limitation will accordingly be restricted. Hence, the number of polluters affected by a limitation depends on the extent to which the polluter's circumstances resemble those of other polluters. There is no assurance that the circumstances of federal polluters will always resemble those of other polluters. Thus, there is no basis for binding federal polluters to general limitations and

75. EPA v. California, 426 U.S. at 221 n.36, 8 ERC at 2097 n.36.
76. See text accompanying notes 18 to 22 and notes 28 to 34 supra.
77. See note 68 supra and accompanying text.
not to individual limitations. The Court evidently assumed that state-issued limitations could be conveniently separated into "general" and "individual" categories. This assumption bears little resemblance to the states' actual practice in carrying out their responsibilities under the acts. The distinction suggested by the Court will almost certainly spawn further litigation between federal and state agencies, as these agencies seek to determine what this distinction means.

It is difficult, for those familiar with the states' actual practice in administering the air and water acts, to appreciate the various distinctions suggested by the Court, the distinctions between "substantive" and "procedural" requirements and between "general" and "individualized" limitations. The acts require the states to formulate and administer limitations that are applicable to the individual polluter, and the permit mechanism is the fundamental means by which this responsibility is carried out. Thus, there is an inherent relationship between "substantive" and "procedural" requirements, between the ends of the acts and the means by which they are attained. To deny the states' authority to issue permits to federal polluters is thus to deny, practically if not conceptually, their authority to develop effective "substantive" requirements for such polluters.

3. Different Standards for Federal Polluters

The distinctions suggested in Hancock v. Train and EPA v. California effectively create two classes of polluters. One class, consisting of non-federal polluters, must comply with the "procedural" mechanisms with which the states develop "substantive" standards; the other class, consisting of federal polluters, need not comply. This result suggests a lower, more tolerant standard for federal polluters than for others. Accordingly, the states will have to place a disproportionate share of the burden for controlling pollution on the shoulders of non-federal polluters. The Court frankly recognized this result, appearing to have no misgivings that its decisions may impede the functions of the states under the acts. It is difficult to reconcile this result with Congress' angry admonition that federal polluters have been "notoriously laggard" in responding to Congress' earlier air and water quality goals, and that such polluters should be subject to "all control requirements as if they were private citizens." Congress apparently did not mean to place federal polluters in a special class. It is evidently intended that, in the field of pollution control, ours is to be a classless society.

It is possible that the EPA will proceed to develop its own "substantive" standards for federal polluters, to the extent that the states are constrained in developing these standards by the Court's decisions. If so, the decisions will

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78. EPA v. California, 426 U.S. at 220, 8 ERC at 2097.
81. See text accompanying notes 41 to 49 supra.
82. See note 64 supra.
have resulted, in effect, in the development of national standards of pollution for federal agencies. The development of such national standards would not be illogical. In fact, Congress provided a method for developing national standards for certain specified federal activities, and it might have also provided a method for developing national "substantive" federal standards. However, this was not the approach favored by Congress. The Court apparently agreed, in holding that federal agencies are subject to the states' "substantive" standards.

There are a number of possible explanations for Congress' decision to subject federal agencies to state "substantive" standards, rather than to create national standards. Perhaps Congress recognized that the problems of air and water quality vary from state to state, and even from community to community, and that the states could not easily attack this problem if federal facilities, a major class of polluters, were exempt from the states' laws. Or perhaps Congress meant simply to tap the abundant resources of expertise and manpower that many states have developed in the long fight against pollution, resources which may exceed those available to the EPA. Or perhaps Congress believed that the states would be more impervious to the internal bureaucratic pressures that federal polluters might exert on the EPA. Whatever the explanation, Congress clearly expected the states to play a major role in developing standards for federal polluters. The Hancock and EPA v. California decisions, by making it difficult for the states to fulfill this role, have the unfortunate effect of impeding the goals of the air and water acts.

Perhaps recognizing the unfavorable impact of its decisions upon the acts' goals, the Court noted that Congress can always change the results of the decisions by amending the acts. This suggestion cuts both ways. Regardless of what decisions were reached by the Court, Congress could still amend the acts to change the effects of the decisions. Even so, it is not always easy to amend legislation that has been judicially construed. The vagaries of the

83. See note 48 supra.

84. For instance, California's first effort at water quality control, the Dickey Act, was enacted in 1949. 1949 Cal. Stat. ch. 1549. The Dickey Act was replaced by the Porter-Cologne Act, which became effective in 1970. 1969 Cal. Stat. ch. 482. CAL. WATER CODE §§ 13000-13951 (West 1971). The Porter-Cologne Act was supplemented by the enactment of legislation in 1972 providing for the adoption and administration of NPDES permit programs under the 1972 amendments to the water act. CAL. WATER CODE §§ 13370-13389 (West Supp. 1976); see note 68 supra.

All these acts were, and are, administered by regional water quality control boards, originally established by the 1949 legislation. Under the acts, the regional boards conduct hearings resulting in the issuance of "requirements," the equivalent of permits, to individual dischargers. The regional boards have also hired permanent staffs, which have acquired vast expertise in the subject of water pollution. See Note, Water Quality Control in California: Citizen Participation in the Administrative Process, 1 ECOLOGY L. Q. 400 (1971); Robie, Water Pollution: An Affirmative Response by the California Legislature, 1 PACIFIC L. J. 2 (1970); Moskovitz, Quality Control and Re-Use of Water in California, 45 CALIF. L. REV. 586 (1957); Note, California's Water Pollution Problem, 3 STAN. L. REV. 649 (1951).

85. Hancock v. Train, 426 U.S. at 198, 8 ERC at 2113; EPA v. California, 426 U.S. at 227-28, 8 ERC at 2100.
legislative process frequently result in amendatory bills being exposed to countless considerations unrelated to the merits of the bill. In fact, a recent congressional effort to overturn the \textit{Hancock} decision was aborted because other provisions in the bill were sufficiently controversial to invite a filibuster.\textsuperscript{86} Congress, with the distractions of the political process, is not always able to focus on the merits of proposed legislation. However, the Court is always able to focus on the merits of the legal questions before the Court, assuming that it has jurisdiction to reach them. Therefore, the Court has the responsibility to fully evaluate a controversy on its merits, and should not lightly presume that its mistakes can be corrected legislatively.

The administrative difficulties inherent in the Court's decisions eventually will impose pressures on Congress to amend the air and water acts, probably to subject federal polluters to state "procedural" requirements or to immunize them from state "substantive" requirements.\textsuperscript{87} However, the acts might not be amended until the administrative pitfalls suggested in this Article

\textsuperscript{86} S. 3219, considered by Congress in 1976, would have amended § 118 of the air act to provide that federal agencies:

\begin{quote}
shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) respecting control and abatement of air pollution in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States nor any agent, employee, nor officer thereof shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.
\end{quote}


The bill passed the Senate, and a companion measure passed the House of Representatives. A compromise bill was issued by a conference committee, which contained the proposed amendment of § 118. However, the conference bill was never acted on by the Senate, because of a filibuster. The filibuster focused primarily on the bill's provision that would have prevented a "significant deterioration" of air quality, and did not focus on the proposed amendment of § 118.

\textsuperscript{87} The recently enacted Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6901 \textit{et seq.} (West Supp. 1976) gives a strong indication that if the Congress amends section 118 of the air act and section 313 of the water act, it will overrule the \textit{Hancock} and \textit{EPA v. California} decisions by subjecting federal polluters to state "procedural" requirements. Section 6961 of the Resource Conservation and Recovery Act, which is the provision parallel to section 118 of the air act (see note 46 and accompanying text \textit{supra}) and to section 313 of the water act (see note 47 \textit{supra}), provides as follows:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, \textit{both substantive and procedural} (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges . . . The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . .

42 U.S.C.A. 6961 (emphasis added).
have been encountered. If the Court had given more heed to the underlying purposes of the acts, these pitfalls could have been avoided altogether.

III

LIMITATIONS ON STATE AUTHORITY UNDER THE ACTS

The Court expressed the fear that the states, if allowed to issue permits to federal polluters, would be able to prohibit these polluters from carrying on their normal operations and activities.\(^8\) In *Hancock* the Court stressed that Kentucky’s permit program “forbids” the polluter from continuing to operate, if it fails to meet Kentucky’s air quality standards.\(^9\) This fear better explains the Court’s decisions than its analysis of the language of the acts. Or, to be more precise, perhaps the fear explains the analysis. Just as the Court in the *McCulloch* case feared that the states’ power to tax may include the power to destroy federal functions, so the present Court evidently feared that the states’ power to issue permits may have the same effect. This fear may be somewhat exaggerated in light of the actual function of the permit power. That power, as noted above, is primarily intended as a means to formulate and administer a state’s antipollution standards, not as a means to shut down the operation of facilities that fail to meet the standards.\(^9\)

It is nonetheless possible that an enthusiastic state, in combatting pollution, might seek to curtail a federal operation that produces high levels of pollution. However, the state would have the power to achieve this result even under the Court’s own analysis. As acknowledged by the Court, federal polluters are subject to state “substantive” standards.\(^9\) A state could impose such a stringent “substantive” standard that the polluter would have no choice but to cease operations. For example, if a federal polluter fails to provide a state with all information which the state deems relevant in setting a “substantive” standard, the state could simply issue a “substantive” standard that requires the polluter to stop discharging pollutants immediately. The practical effect of this standard would be to prevent the polluter from continuing to operate, assuming that it lacks the technology to eliminate pollution immediately. Thus, it is the states’ “substantive” powers that enable them to define the exact steps which the federal polluter must take in controlling pollution, and to require that its operations be shut down if the steps are not taken. To deny the states’ “procedural” powers may make it more difficult for the states to develop “substantive” standards that are suitably tailored to the specific problem of federal pollution; it will not, however, prevent the states from developing “substantive” standards altogether, including standards so stringent as to effectively shut down the polluter. In view of the Court’s willingness to tolerate state “substantive” control of federal polluters, it is difficult to understand the Court’s concern.

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\(^8\) Hancock v. Train, 426 U.S. at 168, 180, 8 ERC at 2101, 2106.

\(^9\) Id.

\(^9\) See text accompanying notes 67 to 73 *supra*.

\(^9\) See note 50 *supra* and accompanying text.
that the states' "procedural" control of such polluters will give them a stranglehold over federal operations.

Congress did not ignore the possibility that the states may exert a stranglehold over federal operations, whether under their "substantive" or "procedural" powers. Congress solved this problem in several ways. First, it authorized the President to exempt any source of federal pollution from the acts' requirements whenever the President believes such an exemption to be in the "paramount interest" of the United States. The states, therefore, are unable to impose any burden on a federal facility, whether "substantive" or "procedural," unless the President is willing to tolerate that result. The President cannot be expected to tolerate a result that would inhibit a federal agency, to any material degree, from performing its functions under federal law. Second, Congress provided that state NPDES permit programs under the water act must be consistent with criteria spelled out in the act and that the programs must be approved by the EPA and thereafter monitored by the EPA. In this manner, Congress provided safety valves to protect vital federal interests from potential abuses of the powers which it gave the states. Although the effect of these safety valves was not considered in the Court's decisions, their presence lessens the validity of the Court's fear that the states might unduly impair federal interests.

IV
JUDICIAL ENFORCEMENT

The Hancock and EPA v. California decisions impede not only the states' authority to formulate and administer "substantive" standards for federal polluters, but also their authority to enforce these standards judicially. The air and water acts contain provisions enabling "citizens" to bring actions against polluters, including federal polluters, for violating the "emission limitations" and "effluent limitations" set up under the acts. According to the Court, this provision of the air act is "the only means provided by the Act" for the states to enforce judicially the obligations of federal polluters under section 118. Presumably the Court also meant to hold that the related provision in the water act, section 305, is the only means provided in that act for enforcing the obligation of federal polluters under section 313.

It is unlikely that the Court meant to preclude the states from resorting to remedies found outside the acts for enforcing federal obligations under

92. See notes 46 & 47 supra and text accompanying note 49 supra.
94. Id. § 1342(b).
95. Id. § 1342(c)(3).
98. Hancock v. Train, 426 U.S. at 196, 8 ERC at 2112.
sections 118 and 313. In *Larson v. Domestic & Foreign Corp.*, the Court held that actions may be brought against federal officials, notwithstanding the doctrine of sovereign immunity, to compel compliance with their obligations under federal law, whenever they violate or threaten to violate those obligations. Under the *Larson* decision, the states could sue federal officials to compel compliance with sections 118 and 313. In certain situations, the states' remedy under the *Larson* decision would be the only effective method to insure federal compliance with sections 118 and 313. Suppose, for example, that a federal agency undertakes to burn waste material on a daily basis, and that this activity violates the "emission limitations" imposed on the agency under section 118. Section 304 provides, as does section 505, that no action may be maintained thereunder until sixty days after notice has been given to federal and state officials, and to the polluter. The burning program may be completed by the time the sixty-day period expires. The only way that the state can insure compliance with section 118 in this circumstance is by its remedy under the *Larson* decision, not by its remedy in section 304. It can scarcely be imagined that the courts will hold that the states lack standing to maintain such an action. Although the Court held that section 304 provides the sole remedy in the act to insure compliance with section 118, it is unlikely that the Court meant to suggest that section 304 abrogates the states' remedy under the *Larson* decision to achieve the same result. This question awaits further judicial clarification.

**V**

**McCulloch v. Maryland**

*AS A GUIDE TO STATUTORY ANALYSIS*

Perhaps the most intriguing aspect of the *Hancock* and *EPA v. California* opinions is not the results of these decisions, but rather the way the results were reached. The Court, relying on a line of cases dating from *McCulloch v. Maryland*, held that the states cannot regulate federal activities in the absence of a "clear and unambiguous" congressional expression to the contrary. The *McCulloch* line of cases has never previously been used to determine the meaning of congressional acts that purportedly give the states limited regulatory authority over federal functions. Rather, that line of cases has been applied only to determine whether the states have constitutional authority to regulate federal functions in the absence of congressional consent. In *McCulloch*, it was held that Maryland lacked constitutional authority to levy a state tax on a national bank. Maryland's claim of authority was based on the

100. 337 U.S. 682 (1949).
103. *Hancock v. Train*, 426 U.S. at 179, 8 ERC at 2106; *EPA v. California*, 426 U.S. at 211, 8 ERC at 2093.
104. 17 U.S. (4 Wheat.) 316 (1819).
powers reserved to the states under the Tenth Amendment of the U.S. Constitution, not on the powers statutorily delegated to the states by Congress. Cases following *McCulloch* arose in a similar context. 105 *McCulloch* and its progeny thus sought to define the states' constitutionally-reserved powers, not the powers which Congress passes on to the states from its own constitutionally-delegated powers.

By way of contrast, the authority claimed by the states in the *Hancock* and *EPA v. California* cases was not based on the states' constitutionally-reserved powers, but rather on powers which Congress had purportedly delegated to the states from its own delegated powers. The states claimed that their authority to regulate federal pollution derived from the acts passed by Congress; they did not claim any authority beyond that found in those acts. They argued that they were acting pursuant to the national policies contained in federal legislation; they did not argue the right to pursue policies unique to the states, such as those policies that protect interests under the states' reserved police powers.

This is not to suggest that the *McCulloch* line of cases is only relevant in defining the states' constitutionally-reserved powers, that it has no relevance in defining powers delegated to the states by Congress. Indeed, our constitutional tradition, in which the powers of Congress and the states have been constitutionally delineated, presupposes that the states may not interfere with

105. In support of its decisions, the Court cited the decisions in Johnson v. Maryland, 254 U.S. 51 (1920), Mayo v. United States, 319 U.S. 441 (1943), and Paul v. United States, 371 U.S. 245 (1963). *Hancock v. Train*, 426 U.S. at 178-79, 8 ERC at 2105-06. In the *Johnson* case, the Court held that Maryland cannot constitutionally require employees of the U.S. Post Office Department, while operating vehicles in the course of their official duties, to obtain state licenses. In the *Mayo* case, the Court held that Florida cannot constitutionally impose inspection fees on fertilizers owned by the United States, and shipped by the United States into Florida. In the *Paul* case, the Court held that California cannot constitutionally apply its milk-pricing laws to the sale of milk on federal military enclaves.

The Court also noted the "'old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign' "without a clear expression or implication to that effect',"" citing the decisions in United States v. United Mine Workers, 330 U.S. 258, 272 (1947), United States v. Herron, 87 U.S. (20 Wall.) 251, 263 (1873), and United States v. Knight, 39 U.S. (14 Pet.) 301, 315 (1840). *Hancock v. Train*, 426 U.S. at 179, 8 ERC at 2105. In the *United Mine Workers* case, the Court held that § 20 of the Clayton Act, 29 U.S.C. § 52, does not preclude the United States from seeking to enjoin a coal-miners' strike, because the United States is presumptively not a "person" within the meaning of that provision. In the *Herron* case, the Court held that debts due the United States are not discharged under the provisions of the Bankruptcy Act, because the United States is presumptively not a "creditor" within the meaning of that Act. In the *Knight* case, the Court held that judgments entered in favor of the United States are included within the meaning of a 1928 federal statute that allows federal courts to fix "'jail-limits'" for debtors in accordance with the laws of the several states; in dictum, the Court noted that regulatory statutes are presumptively not applicable to the United States, in the absence of a clear expression of congressional intent.

Thus, the first group of cases dealt only with the constitutionality of state regulatory schemes, not the meaning of congressional acts. Although the latter group of cases dealt with the meaning of congressional acts, the acts did not give any regulatory authority to the states. The latter group presented no potential conflict between federal and state authority, and the Court did not rely on the *McCulloch* line of cases as a guide to the meaning of the acts.
the performance of federal functions. If that tradition is to be altered, Congress should speak with reasonable clarity. It is not for the Court to alter this historic tradition on the basis of illusory clues which it might detect in the works of Congress.

However, neither should this constitutional tradition be followed slavishly, without reference to the purposes of the congressional acts under which the states purport to act. Otherwise, these purposes might be impaired and their objectives frustrated. There is always a potential conflict between different national interests whenever states claim authority under federal law to regulate federal activities. On the one hand, a national interest is served by precluding a state from imposing a burden on a federal agency, since the burden may make it more difficult for the agency to carry out its specific mandate under federal law. On the other hand, a competing national interest may be served by allowing the burden to be imposed, if the burden is based on goals mandated by Congress itself. In resolving these conflicts, the Court should not simply presume that the burden cannot be imposed by the state. It should consider whether the imposition of the burden furthers, or hinders, the purposes of the federal act. Further, it should consider whether the federal act contains safeguards to insure that the imposition of the burden will not unduly restrict the federal agency in carrying out its specific duties under federal law. If the act's purposes are carried out by imposition of the burden, and if the act contains safeguards to limit state intrusion upon federal functions, there is little reason for presuming that the states cannot impose the burden. The principle of federal supremacy is simply not at stake.

This analysis is consistent with the *McCulloch* line of cases. Those cases affirm the immunity of federal agencies from state-imposed restraints that are not traceable to federal statutory law. Viewed broadly, the cases protect the national interest against the more parochial interests of the states, where these interests are in potential conflict. However, where the states claim authority to impose such restraints under federal statutory law, there is less potential for a conflict between federal and state interests. In fact, these interests may converge; if this is so, there is little basis for presuming that the national interest requires that federal agencies be free of such restraints.

**CONCLUSION**

The *Hancock* and *EPA v. California* decisions raise the question of how to construe statutes by which Congress delegates power to the states, where the exercise of that power results in the imposition of controls on federal agencies. Certainly Congress should spell out the extent of state power with abundant clarity. However, where Congress fails to do so, emphasis should be given to the goals and safeguards of the act, not to its lack of clarity. The overriding presumption should be that Congress meant to create an effective, workable program, not that the states cannot apply the program to federal agencies.
It is not uncommon for the courts, in construing ambiguous legislation, to presume that the legislation should be construed in furtherance of its purposes. The value of that presumption may be less where the legislation authorizes the states to apply controls on federal operations, since our constitutional tradition brings into play a competing presumption that the states may not control federal operations. Nonetheless, the latter presumption does not justify ignoring the former. The traditional inhibitions on the states' authority under our constitutional system of government do not justify neglecting the goals of congressional statutes that enlarge that authority. Otherwise, the courts run the risk of reaching a result that impairs those goals, and frustrates the national interest that led to their promulgation.

The Hancock and EPA v. California decisions make no effort to define the goals of the air and water acts as they apply to federal polluters, or to determine whether the national interest inherent in those acts is served by allowing the states to develop effective antipollution controls for such polluters. The decisions make it difficult for the states to develop the kind of controls that Congress intended for federal polluters, and thus impair the acts' goals as they apply to those polluters. The decisions also ignore the ample safeguards in the acts limiting state intrusion upon federal prerogatives. The cases simply construe the acts' language in favor of the presumption that the states are powerless to intrude into the federal domain, justifying this result on grounds of federal supremacy. The decisions fail to note, however, that the principle of federal supremacy is uninvolved, since the ultimate authority under review is that of Congress rather than the states. The decisions rely too much on the naked presumption that the states cannot regulate federal agencies, and too little on the goals and restraints of the acts themselves. A recent comment of the Senate committee that drafted both acts is revealing; the committee, in proposing an amendment to the air act that would clearly spell out the states' authority to issue permits to federal polluters, stated that "though this was the intent of the Congress in passing the 1970 Clean Air Amendments, some courts, encouraged by Federal agencies, have misconstrued the original intent." 106

106. The Senate Committee on Public Works, favorably commenting on the proposed amendment of § 118 contained in S. 3219, see note 86, supra, stated:

Section 118 has been amended to indicate unequivocally that all Federal facilities are subject to all of the provisions of State implementation plans. Though this was the intent of the Congress in passing the 1970 Clean Air Amendments, some courts, encouraged by Federal agencies, have misconstrued the original intent. One Federal Court of Appeals has correctly construed the intent of Congress (Alabama v. Seeber, 502 F.2d (5th Cir. 1974)).

Since the substantive requirements of the Clean Air Act and of State implementation plans would be unenforceable unless procedural provisions were also met, section 118 is amended to specify that, as in the case of water pollution, a Federal facility is subject to any Federal, State, and local requirement, respecting the control or abatement of air pollution, both substantive and procedural, to the same extent as any person is subject to these requirements. This includes, but is not limited to, requirements to obtain operating and construction permits, reporting and monitoring requirements, any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief, and the payment of reasonable service charges. The
As noted at the outset, Congress is in the process of establishing a new form of federalism, under which the states are entrusted with greater control of their natural resources. This new federalism increases the potential for new conflicts between federal and state entities, as the states seek to apply the same environmental controls to the federal government as they apply to others. Although the Hancock and EPA v. California decisions were the first in which the Court was called on to define the states’ role in applying such controls to the federal government, they will almost certainly not be the last. It is to be hoped that, when the Court next turns its attention to this unique role of the states, it will give less weight to the presumption that their

provisions of section 118 granting the President authority to exempt a Federal facility from compliance with local, State, or Federal requirements where specific conditions are met, are not altered by this amendment.

S. REP. No. 94-717, 94th Cong., 2d Sess. 45 (1976).

107. See text accompanying notes 1-40 supra.

108. It is impossible, of course, to anticipate the many controversies which might arise in this context. However, three controversies are sufficiently ripe to be mentioned for illustrative purposes. First, § 510 of the water act, 33 U.S.C. § 1370 (Supp. V 1975), authorizes the states to impose more stringent effluent limitations than those otherwise authorized in the act. Accordingly, many states have taken the position that, since § 313, 33 U.S.C. § 1323 (Supp. V 1975), requires federal facilities to comply with state “requirements” under the act, federal facilities must comply with limitations imposed by the states under § 510. California, for example, takes the position that the U.S. Bureau of Reclamation is required to comply with state-imposed water quality standards, and is required to release water from its upstream reclamation facilities when necessary to satisfy the state’s downstream standards applicable to the Sacramento-San Joaquin Delta. See Decision No. 1379 at 51-52, California Water Resources Control Board (July 28, 1971).

On the other hand, in Minnesota v. Hoffman, 543 F.2d 1198 (8th Cir. 1976), the court, reversing a lower court decision, 401 F. Supp. 524 (D. Minn. 1975), held that § 510 does not authorize Minnesota to regulate dredging operations of the Army Corps of Engineers, on grounds that such dredging operations are covered specially by § 404 of the water act, 33 U.S.C. § 1344 (Supp. V 1975). Minnesota has filed a petition for writ of certiorari with the U.S. Supreme Court.

Second, under the implementation plan which California has adopted under the air act, California’s Air Resources Board has adopted opacity standards for emissions from test cells operated by the Navy. The cells are designed to test jet engines. The standards are clearly “substantive” within the meaning of the Hancock decision. Accordingly, California contends that the standards are applicable to the Navy. The Navy contends that the standards are applicable to an “aircraft or engine thereof,” in violation of § 233 of the air act, 42 U.S.C. § 1857f-11 (1970). California responds that the standards are applicable to cells that test the engines, not the engines themselves. The federal district court recently upheld California’s position, California ex rel State Air Resources Bd. v. Dep’t of the Navy, Civ. No. C 76045 WHO (N.D. Cal., Apr. 12, 1977).

Third, § 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 (1970) requires the Secretary of the Interior to “proceed in conformity with” state laws relating to the “control, appropriation, use, or distribution” of water, when appropriating water for use in federal reclamation facilities. Based on this provision, California imposed conditions on the acquisition of water by the U.S. Bureau of Reclamation for storage behind the New Melones dam, a federal reclamation facility under construction on the Stanislaus River in northern California. The conditions limit the amount of water the Bureau can acquire for the facility until it develops a plan for the use of the water. The United States contends that § 8 does not authorize California to impose such conditions. A federal district court ruled in favor of the United States’ position, and the matter is now on appeal. See United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975), appeal docketed, No. 75-3554 (9th Cir. Oct. 25, 1975). See also Note, Allocation of Water from Federal Reclamation Projects: Can the States Decide? 4 ECOLOGY L. Q. 343 (1974).
...role is non-existent, and more to the importance of the goals which Congress meant to achieve. In *McCulloch*, Chief Justice Marshall wisely foresaw the need to protect the federal interest in an age which saw that interest under assault by states with more parochial concerns. Hopefully, the Burger Court will foresee the need to protect the federal interest in an age which sees that interest as increasingly served by states functioning as instruments of congressional policy.