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**J. B. RUHL\***

# **Interstate Pollution Control and Resource Development Planning: Outmoded Approaches or Outmoded Politics?**

## **ABSTRACT**

*Arbitrary political boundaries are no barrier at all to the physical effects of pollution and resource development. Yet, despite the optimism that ushered in the heightened environmental consciousness of the past several decades, political boundaries have posed a substantial barrier to resolving transboundary pollution control and resource development planning issues. This phenomenon has received considerable attention on the international level; however, because of a stubborn adherence to the idea that the states must serve as the primary jurisdictional units for managing pollution and resource development in the United States, transboundary problems are equally as apparent on the interstate level. After reviewing the three principal approaches the federal and state governments have used to manage interstate pollution and resource development, this article concludes that each of the approaches has failed in practice not because of inherent theoretical deficiencies but due to a failure of political commitment. Only a rethinking of our politics will enable us to effectively confront and resolve interstate pollution control and resource development planning issues.*

## **INTRODUCTION**

Just over twenty years ago, one of the first scholarly looks at the problem of interstate pollution in the United States raised the question of whether cooperation among the states could provide the impetus for effective abatement of interstate water pollution. Some skepticism was present in the answer, but optimism generally carried the day in the conclusion:

[T]he handling of water quality regulation on a regional basis is so sensible that it is nearly inescapable. For the time being, the federal government is committed to the policy that pollution control is essentially a local matter. Whether the states can be wheedled or coerced

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into organizing themselves regionally to carry out their pollution control responsibilities admits of considerable doubt, if past history is any guide. Yet, it may happen that some catalytic factor, such as the recently enacted Clean Rivers Restoration Act or a report of unusual success in the young interstate-federal experiment in the Delaware basin, will generate a wave of new interstate pollution agencies. The social and political climates seem very good for such a development.<sup>1</sup>

Such optimism may have been well placed twenty years ago with respect to interstate pollution control and resource development planning concerns, whether the subject was air, water, or land. If the verdict were called in today, however, most observers would agree that true interstate constructs for pollution control and resource development planning remain mostly the "theoretically attractive solution."<sup>2</sup> Their implementation has not proven effective in dealing with the necessities of interstate transboundary pollution control and resource development planning problems. Yet it is even more apparent now than it was twenty years ago "that certain problems cannot be solved through jealous adherence to state boundaries."<sup>3</sup> Many pollution and planning problems have simply outgrown the notion of state boundaries. Even regional groupings may be too small a unit for the primary pollution control and resource development planning jurisdiction. In many ways, a continuing blind adherence to political boundaries has made solutions to interstate pollution and planning problems virtually unreachable. While much attention has been devoted of late to the transboundary pollution and planning problems of the international sphere,<sup>4</sup> no less effort should be directed towards solving

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1. Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality—Part II: Interstate Arrangements for Pollution Control*, 52 IOWA L. REV. 432, 457 (1966).

2. Hirsh & Abramovitz, *Clearing the Air: Some Legal Aspects of Interstate Air Pollution Problems*, 18 DUQ. L. REV. 53, 98 (1979).

3. Hines, *supra* note 1, at 432.

4. Because air pollutants are capable of moving great distances in the atmosphere, and of being conveniently studied and traced by scientists, air pollution has been the principal subject of legal commentaries on international pollution and resource planning. See Handl, *National Uses of Transboundary Air Resources: An International Entitlement Issue Reconsidered*, 26 NAT. RES. J. 405 (1986); Pallemarts, *Judicial Recourse Against Foreign Air Polluters: A Case Study of Acid Rain in Europe*, 9 HARV. ENVTL. L. REV. 143 (1985); Regens & Rycroft, *Options for Financing Acid Rain Controls*, 26 NAT. RES. J. 519 (1986); Scott, *The Canadian-American Problem of Acid Rain*, 26 NAT. RES. J. 337 (1986); Wetstone & Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89 (1984). However, water resources have also been the subject of international pollution and resource planning studies. See Sewell & Utton, "Getting to Yes" *In United States-Canadian Water Disputes*, 26 NAT. RES. J. 201 (1986); Teclaff & Teclaff, *Transboundary Toxic Pollution and the Drainage Basin Concept*, 25 NAT. RES. J. 589 (1985). The presence not only of numerous separate political sovereignties but also of wide inter-cultural differences makes international pollution and resource planning profoundly complicated. See Kindt, *International Environmental Law and Policy: An Overview of Transboundary Pollution*,

the obstacles posed by interstate boundaries, particularly when the solutions are, in theory, exclusively within our state and federal governments' control and grasp.

It goes without saying that pollution control and resource development planning problems can take on interstate and interregional dimensions. Air, water, and land—each medium is capable of transmitting pollution and resource development effects across political boundaries. Pollutants emitted into the air by one state may travel in the airstream and have deleterious effects on a downwind state's air quality. Polluted water similarly may cross state boundaries by way of oceans, lakes, rivers, and groundwater flow. Finally, the land and resource development planning policies of one state, whether a function of state or federal pronouncement, may affect contiguous states.

If interstate pollution control and resource development planning problems do not recognize man-made political boundaries, why then have the solutions attempted to date generally adhered to a narrow perception of the primary jurisdictional unit of control? This article examines that fundamental question of interstate environmental law, offering a prognosis of where solutions lie for the future. The first section of this article presents an overview of the essential problems of interstate environmental law and of the conventional rationales for and against federal involvement in the pollution control and resource development planning decisions. The second section examines the legal constraints—primarily constitutional in origin—imposed on the choice of the primary jurisdictional unit for interstate pollution control and resource development planning. Wholly interstate and wholly federal regulatory and enforcement mechanisms pose a myriad of constitutional problems. Private enforcement schemes face similar constraints. Thus, constitutional law has been instrumental in shaping interstate environmental law.

The third section offers a survey of approaches taken under various pollution control and resource development planning laws for dealing with problems of interstate dimension. The approaches may be divided into three broad categories: (1) those relying primarily on federal coercion of the state's individual programs of interstate environmental management (the "Federal Coercion" approach); (2) those relying primarily on cooperative interstate agreements relating to interstate environmental management, with or without ancillary federal participation (the "Interstate Cooperation" approach); and (3) those relying primarily on close cooperation between the federal government and the states, with the federal

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23 SAN DIEGO L. REV. 583 (1986); Goldie, *Equity and the International Management of Transboundary Resources*, 25 NAT. RES. J. 665 (1985); Nalven, *Transboundary Environmental Problem Solving: Social Process, Cultural Perception*, 26 NAT. RES. J. 793 (1986).

government taking on the role of coordinator of interstate environmental management (the "Federal Coordination" approach).<sup>5</sup> For each category, a representative program will be emphasized. For the Federal Coercion approach, the Clean Air Act<sup>6</sup> serves as the model program. For the Interstate Cooperation approach, the use of interstate water quality control compacts is examined. Finally, for the Federal Coordination approach, federal implementation of the Intergovernmental Cooperation Act<sup>7</sup> is emphasized.

Following this survey, the fourth section offers conclusions. To the extent that an assessment of the three suggested model approaches is necessary in order to suggest solutions for the future, the conclusion must be that none has proven satisfactory. This practical reality may be more a result of political infeasibilities caused by interstate competition and other impediments rather than of the theoretical basis of each of the approaches. The solutions thus may lie in a rethinking of the politics of interstate environmental law, not in a rethinking of the approaches.

#### THE ESSENTIAL PROBLEM OF INTERSTATE ENVIRONMENTAL LAW, AND THE CONVENTIONAL RATIONALES FOR AND AGAINST FEDERAL INVOLVEMENT IN THE SOLUTIONS

Pollution control and resource development planning problems frequently are of a scope that bears little resemblance to the jurisdictional boundaries of the affected political entities. When the primary jurisdictional unit for dealing with such problems has a planning and enforcement authority that is not congruent with the scope of the problems it must address, little success can be expected for reaching effective solutions. If the problem transcends political boundaries, so too must the primary unit of the control jurisdiction. Yet, as one commentator has concluded, enlarging the primary unit of the control jurisdiction "through some sort of regional construct is indeed an attractive idea; the problem is its political feasibility."<sup>8</sup>

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5. Other categorizations have been proposed. See, e.g., Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect*, 13 Sw. U.L. REV. 571 (1983). Lutz omits the Federal Coordination approach, but adds "private and public litigation under state and federal law" and "state unilateral restrictive practices." *Id.* at 576. However, these are not so much approaches to interstate environmental law as they are either features of constitutional law or manifestations of the various approaches suggested in this article. That is how they are dealt with herein. The Federal Coordination approach deserves mention primarily for resource development planning, which Lutz does not treat in any substantial way. Barring these differences, Lutz presents a comprehensive discussion of interstate environmental law, albeit with different emphasis and conclusions than are drawn herein. See also F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK §§ 7.27-7.32 (1981) (Federal Coercion and Federal Coordination approaches discussed).

6. 42 U.S.C. §§ 7401-7642 (1982).

7. 31 U.S.C. § 6506 (1982).

8. Hines, *supra* note 1, at 433.

The question, then, really is whether the states—currently the primary jurisdictional units of control—can be relied upon or expected to bring about the regional or larger constructs necessary to enlarge the primary unit to a scope congruent with the problems of interstate effects of pollution and resource development. If the states cannot be expected to fulfill this role, then perhaps the federal government—the largest jurisdictional unit of control for purposes of interstate pollution control and resource development planning in the United States—must somehow bring about regional constructs or take over the problem entirely. In any event, as long as the pollution and planning problems are of dimensions wider than state boundaries, current notions of political feasibilities must bend.

Stated in this way, the problem of interstate pollution and resource development effects invites rationales for federal involvement in the solutions. Proposals for substantial federal involvement in the field of environmental regulation are often based on four such rationales: (1) the “tragedy of the commons” effect; (2) jurisdictional constraints on state regulation of interstate pollution and resource development; (3) disparities in the power of different interest groups; and (4) superior federal ideals.<sup>9</sup> Of these four rationales, the first two provide the strongest reasons for employing centralized decisionmaking mechanisms to deal with the specific problems of interstate pollution control and resource development planning regulation. The first—the “tragedy of the commons” effect—is the subject of this section.

Centralized decisionmaking is more efficient than decentralized decisionmaking whenever conditions are such that the rational but independent pursuit by each decisionmaking unit of its own self-interest leads to results that leave all units worse off than they would have been had they been constrained to adopting consensual decisions applicable to all.<sup>10</sup> This potential inefficiency of decentralized decisionmaking is referred to as the “tragedy of the commons.”<sup>11</sup> Although the “tragedy of the commons” provides a rationale for federal involvement, that rationale is not as compelling in the case of interstate regulation as it is in the case of environ-

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9. See Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1196 (1977). Stewart calls such proposals the “dialectical logic of federalism,” positing that the states are reluctant to implement federal environmental policies to handle intrastate environmental issues. *Id.* at 1210-22. Indeed, a fundamental tension in environmental law is between national supremacy and local autonomy. In the interstate context, however, state autonomy is greatly diminished, and federal policy therefore can be imposed over the states’ reluctance.

10. See *id.* at 1211-12. As the primary jurisdictional unit of control decreases in geographical size and political authority, the variety of self-interested parties increases and the potential for decentralized decisionmaking to lead to inefficient results thus increases. This is not to say, however, that solving transboundary environmental problems between two political units necessarily will be any easier than solving them between two hundred.

11. *Id.* at 1211 n. 65.

mental regulation generally. The principle aptly describes problems often faced in interstate environmental law. If interstate pollution and planning regulation were left to each state's individual decisionmaking, each state could be faced with a trade-off between fostering its own economic growth and protecting the quality of other states' environments. It might be politically difficult for any state to sacrifice increments of its own economic growth for increments of interstate environmental protection, unless it were certain that other states would compensate the state for its economic sacrifice, either by direct wealth transfers or reciprocal sacrifices. Even if it were certain that other states would make such a sacrifice, a rational, self-interested state might choose to let all other states make the sacrifices necessary to protect the interstate environment, thus benefitting directly from their sacrifices without affecting its own economic conditions. With all states thinking this way, of course, no impetus for interstate pollution control or resource development planning exists. Consequently, each state suffers from its sister states' negligent care of the interstate environment, and *vice versa*. Hence the "tragedy of the commons"; each state pursues its own economic interests, regulating pollution and development only with respect to *intrastate* impacts when it is the *interstate* consequences that produce the most pernicious results.

As states become aware of the "tragedy of the commons" effect on interstate pollution control and resource development planning, they might attempt to negotiate with one another to offset the effect. The transaction costs of such negotiations would be enormous, however.<sup>12</sup> For example, if two states reached an agreement to protect their mutual interstate environment, their respective incremental economic sacrifices would place them at a competitive disadvantage with competing nonagreeing states. The same would be true of region-wide agreements. Indeed, assuming any one state is as self-interested as the next, only if *all* states in competition with one another agreed to make proportionally equal economic sacrifices would an agreement for interstate environmental regulation realistically be politically feasible in each state. Even if such an agreement could be achieved, the monitoring and enforcement costs would be monumental. Each state would face the same incentive to cheat on the agreement that a business cartel member faces. Hence, in the absence of centralized decisionmaking, monitoring, and enforcement mechanisms, the "tragedy of the commons" effect poses a significant barrier to successful interstate cooperation in addressing problems of interstate environmental regulation.

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12. See *id.* at 1212. As the number of jurisdictional units whose agreement is necessary to resolve transboundary environmental problems increases, so too do the transactions costs of negotiating toward such an agreement.



According to the "tragedy of the commons" doctrine, centralized decisionmaking mechanisms can avoid the deleterious effects of decentralized power without incurring the staggering transaction and enforcement costs associated with collective bargaining among decentralized decisionmaking units.<sup>13</sup> As one commentator posits:

The characteristic insistence in federal environmental legislation upon geographically uniform standards and controls strongly suggests that escape from the Tragedy of the Commons by reduction of transactions costs has been an important reason for such legislation. The statutory structure of federal environmental programs also reflects other economies of scale that help explain centralizing tendencies. Collection of data and analysis of environmental problems, standard setting, and (in some instances) selection of control measures involve recurring, technically complex issues; such steps can often be taken far more cheaply once on the national level than repeatedly at the state and local level.<sup>14</sup>

Nevertheless, this approach appears actually to ignore the problem rather than address the realities of localized interstate pollution control and resource development planning issues. In practice, the forces that lead to the "tragedy of the commons" among the states exist also at the federal legislative level, burdening the theoretical solution of centralized decisionmaking with transaction costs and enforcement problems similar to those present in decentralized decisionmaking. States are no more inclined to approve of their respective federal legislators making uncompensated economic sacrifices by way of federal legislation than they would be to approve of their state legislators doing the same through state legislation. Thus, it is one thing for the federal government to promulgate nationally uniform air quality standards.<sup>15</sup> In so doing, the federal government has acted as a centralized decisionmaking unit should—imposing uniform standards for the benefit of each state which, in the absence of centralized power, might not have been imposed. But it is an entirely different matter when interstate effects must be taken into account. Interstate environmental regulation, if it is to be effective, necessarily cannot be uniform in impact. For example, if one state in compliance with the national air

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13. *See id.* Of course, for this to hold true, the federal government must be vested with plenary authority to dictate the terms of the states' relations. The transactions costs of the process of the states relinquishing such authority to the federal government were incurred long ago, however, in the Constitution. The essential question now is whether the federal government can exercise its authority effectively. The political difficulties of such decisions are transactions costs in themselves, thus reducing the advantages of centralized decisionmaking in this particular situation.

14. *Id.*

15. *See, e.g.*, Clean Air Act §§ 109-111, 42 U.S.C. §§ 7409-7411 (1982). *See also* Federal Water Pollution Control Act § 301, 33 U.S.C. § 1311 (1982) (uniform water effluent standards).

quality standard for intrastate air pollutants nevertheless contributed to a downwind state's air pollution, pushing the downwind state over the national standard, the national standard no longer is useful for detecting and regulating the sources and causes of interstate pollution. Achieving a solution as between the upwind and downwind states through federal legislation would be no mean feat. That, nevertheless, is the task at hand, though the approach may involve something other than federal legislation.

The only meaningful response to this dimension of interstate environmental law may be an interstate agreement or federal law that completely relinquishes state autonomy in the field of interstate environmental regulation. The "tragedy of the commons" will persist unless such a control mechanism establishes a centralized authority with plenary power to direct the level of each state's interstate pollution control and environmental planning. Such a mechanism seems no more likely from a political perspective to come about in federal legislation than in an interstate agreement. Hence, the rationale for federal involvement that applies generally in the field of environmental law is not so strong in the field of interstate environmental law. Indeed, what has provided the basis for federal involvement in interstate environmental law has not principally been the "tragedy of the commons" effect, it has been the constitutionally-created jurisdictional constraints present in interstate environmental law.

### CONSTITUTIONALLY-IMPOSED CONSTRAINTS

Approaches for interstate environmental regulation are subject to certain restrictions insofar as the parameters for the exercise of federal and state powers are set by the United States Constitution. The constitutional demarcation of authority between state and federal governments largely dictates which jurisdictional unit of control is appropriate for dealing with interstate pollution and planning problems, and how such units are to be established.<sup>16</sup> The three interstate environmental regulatory approaches discussed herein were shaped in large part by such constitutional constraints.

Sources of federal power at play in the environmental arena include the power to legislate (and thereby preempt state legislation) with respect to interstate commerce,<sup>17</sup> the property power,<sup>18</sup> the power to consent to

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16. See Lutz, *supra* note 5, at 577-85; F. SKILLERN, §§ 7.22-7.32 (1981).

17. "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. 1, § 8, cl. 3.

18. Congress is granted exclusive jurisdiction over public domain lands. U.S. Const. art. IV, § 3, cl. 2. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

interstate compacts,<sup>19</sup> and the federal spending and taxing authority.<sup>20</sup> Of these, the interstate commerce and compact approval powers are the most significant in directing federal participation in interstate environmental regulation. Sources of state power include the police power, as it is provided for in the Tenth Amendment,<sup>21</sup> and the interstate compact power<sup>22</sup> (subject to the federal compact approval power). A brief review of these constitutional principles is useful as a prelude to the discussion of the three approaches to interstate environmental pollution and planning regulation.

### **The Federal Interstate Commerce Power Versus The States' Police Powers**

Congress looks to the Commerce Clause as the principal source of its power to regulate in the field of interstate environmental law. The interstate effects of pollution and resource development are generally considered to be within the scope of the Commerce Clause.<sup>23</sup> The extent of this authority is pervasive, affecting matters which may, on their face, appear to be solely intrastate in scope. For example, all "navigable waters", whether interstate in reach or not, are considered "highways of commerce" and are thus subject to Congress' plenary authority.<sup>24</sup> Hence, the interstate commerce power is a potent source of authority for Congress to participate in the decisionmaking of interstate environmental and resource planning law.

More significantly, however, the interstate commerce power creates a structural barrier to other approaches to interstate environmental law. Acting in conjunction with the Supremacy Clause,<sup>25</sup> the Commerce Clause

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19. A state may "enter into any Agreement or Compact with another State" with "the consent of Congress." U.S. Const. art. III, § 2. The approval requirement is limited to compacts "that are directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).

20. U.S. Const. art. I, § 8, cl. 1. The federal spending and taxing powers provide an effective method for the federal government to implement its commerce power "to accomplish various objectives of intergovernmental and interstate cooperation through incentive and disincentive provisions for certain types of private, municipal, and state behavior." Lutz, *supra* note 5, at 570 n. 19.

21. U.S. Const. amend. X.

22. U.S. Const. art. III, § 2.

23. There hardly could be a dispute over Congress' power to regulate interstate pollution and resource planning under its commerce clause authority. For example: fishery resources are affected by interstate water pollution; forestry resources are affected by interstate air pollution; land planning resources are affected by interstate development issues. See Lutz, *supra* note 5, at 577.

24. See *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708 (1899); see generally Lutz, *supra* note 5, at 577-78.

25. Laws of the United States are "the Supreme Law of the Land. . . ." U.S. Const. art. VI.

enables the federal government to "preempt" the field of interstate environmental regulation.<sup>26</sup> Preemption exists where Congress has provided law over a subject matter with the express intent that such law be exclusive of state regulation.<sup>27</sup> Preemption also exists where the subject matter inherently is of national scope or has been regulated pervasively, so that a congressional intent to preempt state regulation can be inferred.<sup>28</sup> Finally, in the case of the interstate commerce power, preemption has its "dormant" aspect: even where Congress has not acted to regulate a subject of interstate scope, state laws cannot prohibit or impede areas of interstate commerce within the exclusive domain of federal regulation.<sup>29</sup>

Through these mechanisms, preemption creates structural constraints in interstate environmental law. First, where Congress has actively preempted a field of interstate environmental regulation, state regulation is permitted only to the extent allowed by Congress.<sup>30</sup> Interstate pollution and development effects can thereby be controlled by active federal regulation.<sup>31</sup> Where the federal regulatory power is dormant, however, federal common law or state common law remedies still may be available.<sup>32</sup> But certain state regulatory efforts remain impeded by the dormant power of the

26. *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

27. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

28. See *id.*; see generally, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-1 to 6-5; G. GUNTHER, *CONSTITUTIONAL LAW* 277-93 (9th ed. 1975).

29. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Comm'n*, 461 U.S. 375, 389-90 (1983); see generally Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425 (1982); Lutz, *supra* note 5, at 581; Soper, *The Constitutional Framework of Environmental Law*, in *FEDERAL ENVIRONMENTAL LAW* 78-81 (E. Dolgin & T. Gilbert, eds. 1974).

30. Preemption thus is not an all-or-nothing proposition. Congress can, for example, prescribe minimum environmental standards which all states must meet but are free to exceed through separate state regulation. See, e.g., *Solid Waste Disposal Act* § 3009, 42 U.S.C. § 6929 (1982) (hazardous waste management standards); *Clean Air Act* § 116, 42 U.S.C. § 7416 (1982) (air quality standards).

31. See, e.g., S. 316 and S. 321, 100th Cong., 1st Sess. (1987). Recognizing that "current levels of emissions of air pollutants from existing sources as well as increased emissions from new and existing sources threaten public health and welfare and the environment in states and countries other than those in which emitted," these bills have as their specific goal protection against interstate transport of air pollutants. Both bills also posit that "the problem of acid deposition . . . cannot be addressed adequately without Federal intervention."

The problem of acid deposition, also known as acid rain, has been one of the most vexing for Congress in recent years and illustrates the difficulty of implementing the Federal Coercion approach when decisionmaking remains essentially decentralized or fixated on state political boundaries. Acid rain in the United States generally is portrayed as a problem caused by midwestern states' coal-powered industrial plants and suffered by northeastern states' lakes and forests. On the other hand, northeastern states import electric power from midwestern states, i.e., from the very coal-powered plants which are alleged to be the source of acid rain. Achieving a legislatively-directed solution balancing the interests of both regions will be a delicate process. It has proven beyond Congress' grasp thus far. See generally Wood, *Acid Rain and the Clean Air Act: Agency Inaction and the Need for Legislated Reform*, 6 *VA. J. NAT. RES. L.* 213 (1986).

32. See *International Paper Co. v. Ouellette*, 107 S. Ct. 805 (1987); *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Illinois v. Milwaukee*, 406 U.S. 91 (1972). This trilogy of cases describes the constitutional interplay between federal legislation, federal common law, and state statutory and

Commerce Clause. This effect is particularly acute in the field of interstate environmental laws. State laws designed to resist the infusion of transboundary pollution and resource development effects face stiff scrutiny under the Commerce Clause.<sup>33</sup> Similarly, state regulation affecting the export of resources has Commerce Clause implications.<sup>34</sup> The preemption doctrine, therefore, constricts the choices available for approaching problems of interstate environmental law.

The preemption doctrine has its limits, however, particularly as it operates under the Commerce Clause. The Tenth Amendment serves both to limit federal authority and to reserve a residual "police power" to each state. Among a state's police powers, the power to regulate land use within its boundaries has great import for environmental law.<sup>35</sup> Nevertheless, this aspect of the police power is unlikely to play an important

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common law for disputes involving interstate environmental pollution control and resource planning. That interplay essentially is as follows: In the absence of federal legislation, federal common law preempts state statutory and common law; however, federal legislation can preempt both federal common law and state statutory and common law, or it may preempt federal common law while resubjecting nonconflicting state statutory and common law. See generally, Murchison, *Interstate Pollution: The Need For Federal Common Law*, 6 VA. J. NAT. RES. L. 1 (1986).

33. For example, in *Philadelphia v. New Jersey*, 437 U.S. 617 (1980), the Court invalidated a New Jersey statute that prohibited disposal of solid waste generated outside New Jersey in landfills in the state, even though Congress had enacted no legislation covering the subject. See generally Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307 (1982); Dister & Schlesinger, *State Waste Embargos Violate the Commerce Clause: City of Philadelphia v. New Jersey*, 8 ECOLOGY L.Q. 371 (1979). The applicable principles in this area are likely to be tested again in the near future as states consider legislation which would nominally avoid interstate discrimination by banning or severely limiting all commercial disposals of hazardous waste within the state. For example, Alabama has considered banning all new commercial hazardous waste disposal facilities, see Ala. H.B. 327 (1988), and Mississippi has considered legislation requiring county-wide popular votes to decide whether to allow such new facilities, which is effectively a ban. See Miss. H.B. 333 (1988). Proponents of such legislation acknowledge its purpose is in part to restrict inflow of waste from other states. Federal policy is certain to conflict with any state law of this sort that is enacted. See Letter from J. Winston Porter, United States Environmental Protection Agency Assistant Administrator, to State Environmental Commissioners (Sept. 14, 1987) (suggesting possible actions against states "[e]recting statutory barriers to hazardous waste management"). But see *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987) (municipal ordinance proscribing use of landfill by those outside metropolitan area treated out-of-state and most in-state waste evenly and thus did not run afoul of commerce clause); *LeFrancois v. Rhode Island*, No. 87-361-P (D.R.I. Sept. 15, 1987) (state-run landfill may exclude out-of-state waste where much in-state waste also excluded).

34. See Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241 (1982). This question typically comes up in the case of severance taxes on resources such as coal.

35. The Supreme Court has had considerable difficulty delineating the boundary between federal supremacy powers, which must find their origin among the authorities enumerated in the Constitution, and state police powers, which are reserved to the states under the Tenth Amendment. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision). Land use regulation in the form of zoning was first concluded to be within the states' police powers in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387 (1926), and more recently was confirmed as being potentially so pervasive in scope and effect as to constitute a taking of property requiring just compensation under

role in interstate environmental law. Although it often is difficult to draw the line where federal authority ends and state police powers begin, the interstate effects of pollution and development necessarily fall within the federal domain.<sup>36</sup> Hence, the opportunity for federal participation in interstate environmental law has been attributable largely to constitutionally-based restrictions on unilateral state efforts to control interstate problems.<sup>37</sup> As is discussed below, however, that opportunity has not been taken advantage of to any meaningful degree.

### Interstate Compacts And The Federal Compact Approval Power

States are permitted by the Constitution, with the consent of Congress, to enter into agreements and compacts with each other.<sup>38</sup> While most such compacts involve boundary disputes, navigation, taxation, penal laws and public utilities,<sup>39</sup> a number of compacts have been entered into to deal with interstate pollution and resource development effects. Water pollution abatement has been the principal objective of such compacts,<sup>40</sup> but air pollution<sup>41</sup> and land use planning<sup>42</sup> have also been the subject of compacts.

Pursuant to the Compact Clause, federal approval of any interstate compact dealing substantially with interstate environmental regulation is necessary. Congress has at times indicated that it would encourage the use of the interstate compact device in dealing with interstate environ-

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the Fifth Amendment. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S.Ct. 2378 (1987). Although several federal enactments affect land development, see, e.g., Clean Water Act § 404, 33 U.S.C. § 1304 (1982) (restricting development in waters of the United States); Endangered Species Act § 7, 16 U.S.C. § 1536 (1982) (restricting development interfering with the critical habitat of endangered species), no comprehensive federal land use planning law exists. The extent to which Congress could regulate intrastate, as opposed to interstate, land use planning on a comprehensive, preemptive scale thus is uncertain. See generally Lutz, *supra* note 5, at 581-84; Note, *The Tenth Amendment and Environmental Legislation*, 13 ENVTL. L. 265 (1982).

36. See *International Paper Co. v. Ouellette*, 107 S. Ct. 805 (1987).

37. In a sense, however, the extent of federal participation is a function of the jealousy with which Congress guards its Commerce Clause authority rather than relinquishing it to the states as it may. Except in the realm of admiralty, see *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), the ability of Congress to authorize the states to regulate interstate commerce is unquestioned.

38. For discussions of interstate environmental compacts, see Hirsh & Abramovitz, *supra* note 2; Curlin, *The Interstate Water Pollution Compact—Paper Tiger or Effective Regulatory Device?*, 2 ECOLOGY L.Q. 333 (1972); Weakly, *Interstate Compacts in the Law of Air and Water Pollution*, 3 NAT. RES. L. 81 (1970); Hines, *supra* note 1; Note, *Glowing Their Own Way: State Embargoes and Exclusive Waste-Disposal Sites Under the Low-Level Radioactive Waste Policy Act of 1980*, 53 GEO. WASH. L. REV. 654 (1985); Note, *Interstate Agreements for Air Pollution Control*, 1968 WASH. U.L.Q. 260 [hereinafter Note, *Interstate Agreements*].

39. See Lutz, *supra* Note 5, at 579 n.18.

40. See Curlin, *supra* note 38.

41. See Hirsh & Abramovitz, *supra* note 2; Weakly, *supra* note 38; Note, *Interstate Agreements*, *supra* note 38.

42. See Tobin, *The Interstate Metropolitan District and Cooperative Federalism*, 36 TUL. L. REV. 67 (1961).

mental problems,<sup>43</sup> but the federal approval process is slow and has all too often proven to be unavailing. For example, federal approval of interstate environmental compacts dealing with air pollution control has been guided by the following strict compact criteria issued by the Senate Subcommittee on Air and Water Pollution:

- a. Only the states in a designated air quality region should participate in the compact. A compact should provide for participation by all states encompassed by a given air quality region.
- b. Federal representatives should serve but not vote on the compact commission.
- c. Each participating state should have one vote on the compact commission.
- d. The compact commission should have broad air monitoring, standard setting and enforcement powers.
- e. The meeting by the states of obligations imposed by the federal air pollution legislation should be enhanced by the compact.<sup>44</sup>

Accordingly, federal approval of interstate environmental compacts has been routinely denied when one or more of the following perceived defects exists in compact proposals: (1) inadequate standard-setting and enforcement procedures; (2) limited prevention action; (3) absence of federal representation altogether; and (4) excessive federal representation, that is, voting power.<sup>45</sup> Hence, it is apparent that the interstate compact power could become an effective approach to interstate environmental regulation, but that Congress is not willing to replace its Federal Coercion approach with interstate compacts unless the states relinquish corresponding degrees of autonomy to the compact enforcement mechanism. States must consciously seek to avoid the "tragedy of the commons" by making their interstate compacts more than mere formalizations of their pre-existing relations.

### REPRESENTATIVE MODELS OF THE THREE APPROACHES TO INTERSTATE ENVIRONMENTAL LAW

#### Federal Coercion Programs: The Clean Air Act

So much has been written about the Clean Air Act<sup>46</sup> and its implications

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43. The Clean Air Act and Clean Water Act (Federal Water Pollution Control Act) explicitly approve of such compacts, though congressional approval is still required. *See* Clean Air Act § 102, 42 U.S.C. § 7402 (1982); Federal Water Pollution Control Act § 103, 33 U.S.C. § 1253 (1982). *See also* similar provisions in the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021d(a)(2)(A) (1982), and Solid Waste Disposal Act, 42 U.S.C. § 6904 (1982).

44. *See* Hirsh & Abramovitz, *supra* note 2, at 99; *Hearings on Air Pollution Compacts Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Work*, 90th Cong., 2d Sess. 464 (1968).

45. *See* Hirsh & Abramovitz, *supra* note 2, at 99.

46. 42 U.S.C. §§ 7401-7642 (1982).

for interstate environmental law that only a brief review of the structure of the Act is necessary here.<sup>47</sup> The main focus of this discussion is on the effectiveness of the Act in dealing with interstate air pollution. The general consensus is that the Act, as administered by the Environmental Protection Agency (EPA), has proven in this regard to be inadequate in a number of respects.

Section 110(a)(2)(E) of the Clean Air Act requires that each state develop a State Implementation Plan (SIP) for achieving nationally uniform ambient air quality standards and for implementing Prevention of Significant Deterioration (PSD) measures.<sup>48</sup> No SIP will be approved unless it contains provisions preventing any stationary air pollution source in the state from interfering with the attainment or maintenance by any other state of the air quality standards and PSD measures.<sup>49</sup> Section 126 of the Act<sup>50</sup> requires each state to notify all nearby states of major existing stationary sources that may contribute to violations of the standards and measures by those states. Any new sources or modifications of existing stationary sources that would affect nearby states must be identified to those states as well.<sup>51</sup> Thus, to the extent the Act addresses interstate air pollution from stationary sources, the approach is clearly one in which the federal government has attempted to coerce the states into dealing with interstate pollution and planning regulation.

The Act ostensibly provides mechanisms for enforcing its interstate pollution provisions and for resolving disputes between states. Section 126 of the Act allows states and local governments to petition the EPA for a finding that an existing or proposed major stationary source in another state emits or will emit air pollutants that will interfere with the state or local government's SIP. If EPA makes a finding to that effect, the state from which the air pollution is migrating is charged with a violation of its SIP.<sup>52</sup> A compliance schedule can be established requiring the offending state to eliminate the interstate pollution within three years.<sup>53</sup>

Commentators charge the Section 126 petition procedure with suffering

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47. For a more extensive discussion, see Lutz, *supra* note 5, at 586-94; Ostrov, *Interboundary Stationary Source Pollution—Clean Air Act Section 126 and Beyond*, 8 COLUM. J. ENVTL. L. 37 (1982); Lee, *Interstate Sulfate Pollution: Proposed Amendments to the Clean Air Act*, 5 HARV. ENVTL. L. REV. 71 (1981); Silverstein, *Interstate Air Pollution: Unresolved Issues*, 3 HARV. ENVTL. L. REV. 291 (1980); Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978); Hirsh & Abramovitz, *supra* note 2.

48. See 42 U.S.C. § 7410(a)(2)(E) (1982).

49. See 42 U.S.C. § 7410(a)(2)(E)(i)(I) (1982).

50. 42 U.S.C. § 7426 (1982).

51. See § 7426(a) (1982).

52. See § 7426(b) (1982).

53. See § 7426(c) (1982).



from two major defects: (1) the EPA is limited to enforcement against the *offending* state only, and (2) the procedure only protects against violations of the *national* standards.<sup>54</sup> As the discussion of the "tragedy of the commons" effect illustrates, in most cases it would be more appropriate to require both the emitter and receiver states to reduce their respective intrastate emissions and share the corresponding economic sacrifices. When the full impact can be placed on only the emitter state, the EPA is less likely to implement Section 126 unless the interstate pollution is drastic, and the emitter state is likely to be recalcitrant in its approach to EPA's orders. Moreover, because the threshold levels for Section 126 implementation are the national uniform standards, interstate pollution is essentially not recognized as a problem until that threshold is met. This makes it difficult to interpret how the petition procedure is to be implemented. For example, if a state emits no pollution itself, can an adjoining state's interstate pollution "use up" that state's threshold level? Or, if a state is only marginally within the national standard, does the adjoining state's *de minimus* interstate pollution contribution cause a violation of the interstate pollution provisions? The Act is unclear on how to resolve the petition procedure in such instances, because interstate pollution is not recognized except as a function of the national standards.<sup>55</sup> Therefore, at the very least, the Act must be modified to define the permissible parameters of *interstate* pollution, regardless of its effect on the receiving state's SIP.<sup>56</sup>

The defects of the Clean Air Act illustrate the pitfalls of the Federal Coercion approach. Interstate pollution must be dealt with as a discrete element of pollution. Nationally uniform standards do not address interstate pollution adequately, and a focus only on the source of the interstate pollution disregards the equitable considerations involved in any interstate problem. Because of the potential for preemption and the political ramifications, the states are not likely to go any further to address interstate pollution once the federal government purports to address it. Thus, if the Federal Coercion approach is taken, the federal scheme must be complete, which includes dealing head on with interstate pollution and resource planning effects. Whether such completeness is politically feasible at the federal level is a more difficult question, but the problem cannot be adequately solved by halfway measures. Political interests therefore must

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54. See, e.g., Lutz, *supra* note 5, at 590-91; Lee, *supra* note 47, at 82.

55. See Post, *Federal Common Law Suits to Abate Interstate Air Pollution*, 4 HARV. ENVTL. L. REV. 117, 121 n.42 (1980).

56. See, e.g., S.B. 316 and S.B. 321, *supra* note 31; see generally Lee, *supra* note 47, at 83-88. Recently, some states have taken an aggressive approach under the Clean Air Act, suing EPA in order to force action on interstate air pollution problems. See, e.g., Wisconsin v. Thomas, No. 87-C0395 (E.D. Wis.) (suit filed Apr. 1, 1987).

learn to adjust to the necessities of the problem by recognizing that effective measures cannot treat all states equally, or else learn to live with it, which ultimately may prove even more politically disastrous.

### **Interstate Cooperation Approach: Interstate Water Quality Control Compacts**

The interstate effects of water pollution have been recognized and understood for a much longer time than those of air pollution.<sup>57</sup> Moreover, because of strong state concerns for water management,<sup>58</sup> many state institutional arrangements for dealing with interstate water pollution have developed. The interstate compact process has proven to lend itself to this process, though perhaps more as a "paper tiger"<sup>59</sup> than as an effective enforcement mechanism.

A number of interstate compacts now in operation refer to water pollution control as a subject regulated by the agreement.<sup>60</sup> Such agreements typically establish a commission having express powers granted by the agreement, and federal representation on the commission has proven essential for federal approval. To regulate interstate water pollution, most commissions are authorized to establish water quality standards and to enforce them.<sup>61</sup> Alternatively, the water quality standards may be enforced directly in the courts.<sup>62</sup> Ideally, a compact covering interstate water pollution should contain all of these features.

However, only a few interstate water quality control compacts exhibit strong commitment by the member states in practice. The Ohio River Valley Water Sanitation Compact<sup>63</sup> is probably the best example of an effective interstate compact. The interstate agency established by the compact is authorized to monitor stream water quality, maintain warning procedures, investigate citizen complaints, and patrol the river waters.<sup>64</sup> But many compacts fail to live up to their stated purposes, and the federal government is partly to blame for this. The Federal Water Pollution Control Act pays only lip service to the compact process,<sup>65</sup> and the federal

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57. See generally Lutz, *supra* note 5, at 594.

58. See 33 U.S.C. § 1151(b) (1972) (current version at 33 U.S.C. § 1251 (1982)), recognizing "the primary responsibilities and rights of the states in preventing and controlling water pollution"

59. Curlin, *supra* note 38, at 354.

60. See *id.* at 345 (providing examples).

61. See *id.* at 345-52 (providing examples).

62. See *id.* at 352-53 (providing examples).

63. See *id.* at 353.

64. See *id.*

65. See 33 U.S.C. § 1253(b) (1982), which provides the consent of Congress "to two or more states to negotiate and enter into agreements or compacts . . . for the prevention and control of pollution," but which also provides that "[N]o such agreement or compact shall be binding or obligatory upon any state a party thereto unless and until it has been approved by the Congress."

approval process is burdensome. States are equally to blame for not charging the interstate commissions with adequate regulatory and enforcement powers. Overall, neither the states nor the federal government have utilized the compact process to its full potential for addressing interstate water pollution problems. And the compact process has proven no more effective in dealing with air pollution or land development.<sup>66</sup> Nor have other informal arrangements been entered into to any widespread degree. Hence, the Interstate Cooperation approach faces the same pitfall as the Federal Coercion approach—lack of completeness due to lack of commitment.

### **The Federal Coordination Approach: The Intergovernmental Cooperation Act**

A number of metropolitan areas include counties from more than one state or have suburban fringes spilling over state boundaries. The “expansion of metropolitan areas has occurred without regard for arbitrary political boundaries. In the course of this dynamic growth many state borders have been crossed, leaving numerous metropolitan communities divided by the most formidable of all domestic political barriers, the state line.”<sup>67</sup> Nevertheless, land remains the most locally-managed resource. “[L]and use regulations are the least likely to be made the subject of interstate efforts initiated by states or the federal government, despite indications that land policies in one jurisdiction have the potential for environmental spill-over effects in neighboring areas.”<sup>68</sup> Interstate agreements establishing regional resource development planning agencies thus should be actively encouraged by the federal government and used by the state governments.<sup>69</sup>

The federal role in interstate resource development planning has been largely passive, however. This may be because the local grip on land planning has remained tight. But with the growth of the federal grant

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66. See *supra* notes 41-42.

67. Tobin, *supra* note 42, at 67.

68. Lutz, *supra* note 5, at 585. For a discussion of how interstate groundwater and nonpoint source water pollution is exacerbated by treating land use regulation as a “purely local concern,” see Note, *State and Federal Land Use Regulation: An Application to Groundwater and Nonpoint Source Pollution Control*, 95 YALE L.J. 1433 (1986).

69. See Tobin, *supra* note 42, at 68. Indeed, the author in Note, *supra* note 68, contends that a federal coercion approach should be taken whereby “[t]he EPA should develop guidelines for state programs; if a state does not comply, the EPA must take enforcement measures.” *Id.* at 1456. However, by also calling for “[f]ederal guidelines . . . promoting uniformity among the states,” *id.*, and the promulgation of “appropriate ambient standards” *id.* at 1457, the author appears to conceive of a program much like the Clean Air Act in operation, which would not adequately address interstate pollution effects. Moreover, the author’s focus on federal encouragement of individual state programs would perpetuate the current neglect of region-wide approaches.

machine in areas of land use and other planning functions, the federal government might have been expected to have relied on the Federal Coercion approach to interstate resource development planning. This has not come to be. Instead, the federal commitment to interstate resource development planning never surpassed the Federal Coordination approach, and has in recent years receded even from that level of participation.

The history of federal involvement in interstate resource development planning can be traced to the Intergovernmental Cooperation Act of 1968,<sup>70</sup> which provides for federal promulgation of "regulations governing the formulation, evaluation, and review of United States government programs and projects having a significant impact on area and community development" so as to ensure the "sound and orderly development of urban and rural areas."<sup>71</sup> The regulations are to encompass such planning objectives as land use, natural resource conservation, transportation, recreation, open space, historic areas, public utilities, and design standards.<sup>72</sup> "To the extent possible, all national, regional, state and local viewpoints shall be considered in planning development programs and projects,"<sup>73</sup> and federal "assistance for development purposes shall be consistent with and further the objectives of state, regional, and local comprehensive planning."<sup>74</sup> Finally, federally-required planning must be coordinated with and made part of comprehensive local and area-wide development planning.<sup>75</sup>

The history of the implementation of the Act provides an example of the shifting emphasis between federal and state coordination of resource development planning.<sup>76</sup> Potentially, the Cooperation Act could have served as the source for a strong Federal Coercion or Federal Coordination approach to national planning, for the President is vested with the power to make "assistance for development purposes"<sup>77</sup> contingent upon coor-

70. 31 U.S.C. § 6506 (1982).

71. *Id.* § 6506(b).

72. *See id.* § 6506(b)(1)-(7).

73. *Id.* § 6506(c).

74. *Id.* § 6506(d).

75. *See id.* § 6506(e). Section 207 of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3334 (1982), requires that applications for federal loans or grants for assistance in planning or construction in metropolitan areas be submitted "to any areawide agency which is designated to perform metropolitan or regional planning for the area within which the assistance is to be used." Section 3334(a)(1). The areawide agency is required to comment upon the application to assist the federal government in reviewing the application. Rules for the implementation of this coordination requirement are authorized and have been promulgated in conjunction with rules for the Intergovernmental Cooperation Act.

76. *See Osbourn, The Federal Interest in Metropolitan Regional Governance* (1984) (Testimony Before the Senate Subcommittee on Intergovernmental Relations in written submission form); Advisory Commission on Intergovernmental Relations, Information Bulletin No. 82-3, Appendix C, *Intergovernmental Consultation Changes Provide Alternatives* (1982) [hereinafter Bulletin].

77. 31 U.S.C. § 6506(d) (1982). Because of the substantial involvement of the federal government in providing financial assistance to state and local development, tying such assistance to participation in interstate resource development planning processes could provide the basis for an effective Federal Coordination or Federal Coercion approach. *See Note, supra* note 68, at 1456-58.

minated local planning. However, the federal program for implementing the Act never transcended beyond a weak concept of Federal Coordination and, indeed, it recently has slipped into a state of minimal Federal Coordination commitment. As one commentator has concluded: "In the 1980s the Federal Government appears to be withdrawing interest in and support for metropolitan regional institutions. The institutions themselves seem to be surviving, but their orientation has changed."<sup>78</sup>

The initial positive reaction to the Cooperation Act is recounted in this history of interstate planning:

[t]he federal government encouraged the creation of metropolitan planning agencies in areas where none previously existed and began supporting both established and new ones financially so that they could help fill this gap. Later, as metropolitan coordination began to take hold, nonmetropolitan areawide clearinghouses and state clearinghouses were added to the system to help facilitate coordination of federally-aided and direct federal activities nationwide. State, regional, and local comprehensive planning was specified in the act—along with national objectives and the viewpoints of state and local officials—as a prime factor to be considered in coordinating these federally-supported activities and in making reasoned choices among conflicting projects.<sup>79</sup>

The Office of Management and Budget, the agency delegated the responsibility for promulgating rules under the Act, issued OMB Circular A-95 in 1968 to establish a uniform process by which consultations under the Act could take place.<sup>80</sup> Circular A-95 set up "clearinghouses"—essentially, areawide and state agencies established to facilitate state and local reviews as provided by the Act. Six hundred such clearinghouses were designated, with such responsibilities as (1) receiving information about projects, plans, and proposals to be reviewed, (2) notifying affected parties at the level of government where the clearinghouse operates, (3) collecting comments from notified parties, (4) making their own reviews of the proposed projects, plans, and activities, (5) transmitting all comments to the applicant and/or federal agency responsible for acting on the reviewed proposal, and (6) being notified of the subsequent federal decision and the reasons for any federal actions contrary to advice from the state and local officials.<sup>81</sup>

Ultimately, Circular A-95 covered 300 federal programs. Most significantly, the Circular A-95 process was designated the method for implementing Section 102(2)(c) of the National Environmental Policy Act,<sup>82</sup>

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78. Osbourn, *supra* note 76, at 2.

79. Bulletin, *supra* note 76, at 25.

80. Circular A-95 was issued pursuant to the Memorandum of Nov. 8, 1968; 33 Fed. Reg. 16487 (Nov. 13, 1968).

81. See Bulletin, *supra* note 76, at 22.

82. 42 U.S.C. §§ 4321-4370a (1982).

which requires consultations with local officials regarding draft environmental impact statements.<sup>83</sup> As one commentator reports, however, the Circular A-95 superstructure quickly became top-heavy:

The four prime difficulties have been that it has generated too much paperwork, cost too much, been funded inadequately in light of all that has been expected and not had enough effect on federal agency decisions.

Some A-95 clearinghouses have been so discouraged by these problems that they retreated to a largely perfunctory performance of their notification duties—adding no substantive analysis of their own and caring little whether others do either. This reaction has been especially noticeable at the state level where at least two statewide clearinghouses have ceased functioning altogether and several others are barely alive.<sup>84</sup>

Some proposals for streamlining the process followed, but no modifications were implemented.<sup>85</sup>

Increased federal funding would have helped counter the Circular A-95 program's practical flaws and would have exhibited a federal commitment to the process. But perhaps the greatest defect on the federal government's part was a lack of commitment to the outcome of the process. States could not be expected to devote resources to the process if they felt that the federal decisionmaking process would remain largely unaffected. Federal decisionmakers should have been required to achieve results consistent with state plans, much like the Coastal Zone Management Act is *supposed* to work.<sup>86</sup> The federal response was just the opposite, however.

Federal commitments to interstate planning were stalled in the 1970s. Indeed, after several legislative setbacks, the federal policy took a reversal. Circular A-95 was revoked on July 16, 1982, by Executive Order 12372.<sup>87</sup> Although ostensibly it seeks to foster an "intergovernmental partnership and a strengthened federalism,"<sup>88</sup> Executive Order 12372 terminated the clearinghouse system set up by Circular A-95 and encouraged states to replace federal planning mechanisms with their own. Federally-funded planning organizations are specifically discouraged.<sup>89</sup> While

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83. See Bulletin, *supra* note 76, at 22.

84. *Id.* at 23.

85. See *id.*

86. See 16 U.S.C. § 1456 (1982). The Coastal Zone Management Act was intended to coordinate federal and state development affecting the coastal zones of the states. Observers have criticized the federal response in recent years as falling short of these coordination objectives. See, e.g., 18 Env't Rep. (BNA) 468-69 (May 29, 1987); see generally Finnell, *Intergovernmental Relationships in Coastal Land Management*, 25 NAT. RES. J. 31 (1985).

87. Executive Order 12372, 47 Fed. Reg. 30959 (July 14, 1982).

88. *Id.* (introductory comments).

89. See *id.* §§ 2(d) and 2(f).

the new scheme does require federal officials to explain the basis for any decision inconsistent with state concerns,<sup>90</sup> it is clear that not much is required of the federal officials in that regard. There is no reason to believe that states will view Executive Order 12372 as signaling strengthened federal commitment to the "consistency" concept, and thus states may now be even less committed to the processes prescribed by the Act. Many states may simply opt out of the greater part of the Act's scope by implementing the provision of Executive Order 12372 allowing states to exclude certain federal programs from review and comment.<sup>91</sup>

Because of its disregard for the "tragedy of the commons" effect, Executive Order 12372 is premised on faulty reasoning. The message of its scheme is that states should be allowed to tailor the federal involvement in interstate resource development planning to their needs and desires. That approach would be realistic if there were any reason to believe that the states themselves are committed to a federal-state or state-state partnership in interstate planning. With no national policy requiring their participation in such a partnership, the focus of state planning efforts is bound to turn inward. Lack of commitment to the coordinating role by the federal government therefore can render the Federal Coordination approach a meaningless ritual rather than the positive force it potentially could be with active federal participation.

## CONCLUSIONS

### Pollution and resource development affect the interstate environment

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90. See *id.* § 2(c).

91. See *id.* § 3(b). Further expression of the federal government's benign role in coordination of such interstate planning issues is found in President Reagan's recent proclamation on Federalism, Executive Order 12612 (Oct. 26, 1987), 52 Fed. Reg. 41685 (Oct. 30, 1987). EO 12612 purports to "restore the division of governmental responsibilities between the national government and the States." 52 Fed. Reg. at 41685. However, coordination of interstate planning is not a subject of EO 12612. Indeed, the basic thrust of the proclamation is to discourage any federal role in interstate planning, as expressed in Section 3(b) of the document:

Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem in national scope. For the purposes of this Order:

- (1) It is important to recognize the distinction between problems of national scope (which may justify federal action) and problems that are merely common to the States (which will not justify federal action because individual States, acting individually or together, can effectively deal with them).
- (2) Constitutional authority for the federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting federal action, and the action does not encroach upon authority reserved to the States.

*Id.* at 41686. Plainly, EO 12372 provides no impetus for states to turn to the federal government for a coordinating role; now, however, EO 12612 removes any impetus the federal agencies may have had for adopting meaningful actions under a Federal Coordination approach.

substantially. Responses to these problems must be equally as substantial. As much as politicians may want to deal with these problems through state-level regulation, no serious approach to interstate environmental law can avoid relying on *interstate* mechanisms for the regulation of the interstate environment. Leaving the task of interstate environmental regulation to the states only invites paper tiger responses. Hence, unless state or federal governments approach interstate environmental regulation with new-found commitment, the interstate environment will suffer from benign neglect.

Three methods of approaching interstate environmental regulation have been reviewed. Each approach has great potential for dealing with particular problems. For example, when interstate pollution presents problems of national scope, as in the case of air pollution, extensive federal regulation is an appropriate means of inducing state behavior. But the Federal Control mechanism must have plenary authority, or else the nuances of interstate relations will present obstacles to enforcement. On the other hand, when the subject resource is associated principally with local interests, as in the case of water, but nevertheless is capable of transmitting interstate effects, Interstate Cooperation approaches may provide an effective response. But again, no interstate compact or similar device will be useful unless it establishes an interstate authority with at least as much power as might be expected to be vested in a federal agency under the Federal Coercion approach. Lastly, when the subject resource is inextricably tied to local interests, as with land development, interstate management can be achieved through a Federal Coordination approach by encouragement of state and interstate planning bodies. Centralized coordination thereby fosters decentralized cooperation. Cooperation will not come about, however, if the coordination measures go only halfway or rely purely upon voluntary participation.

Each of the three representative programs discussed herein—the Clean Air Act, interstate water quality compacts, and the Intergovernmental Cooperation Act—illustrates the potential pitfalls of interstate environmental management. The greatest negative force on these programs seems to have been a failure to transcend the political pressures caused by state protectionist policies and interstate competition. The necessities of interstate environmental management do present some painful political questions, but sacrifices will have to be made if effective solutions are sought. The problem essentially is not one of outmoded approaches, it is one of outmoded politics.