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## The Polluter's Court: Expanding Polluter Rights While Limiting Pollutee Rights

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**THE POLLUTER'S COURT:  
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POLLUTEE RIGHTS**

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INTRODUCTION

Polluters of the environment have every opportunity to defend their actions before the courts. This may take the form of litigating a citation of violation or, challenging a practice, regulation or statute. This article will focus on several decisions of the U.S. Supreme Court's 1999-2000 term and their impact on environmental law. The examination seeks to ascertain if the Court has expanded the ability of polluters to escape liability, while simultaneously eroding pollutee's rights. Pollutees are the individuals whose health and environment is threatened by the actions of the polluter. They, and their progeny, will be left with the deleterious effects of the polluters' actions, including a debauched ecology, genetic alteration, reduced life span, deteriorated health or diminished personal finances.

Congress, however, has attempted to legislate environmental victims' rights through the mechanism of the citizens' suit.<sup>1</sup> This

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concept is derived from the *qui tam*<sup>2</sup> action in which individuals enforce public rights as “private attorneys general.”<sup>3</sup> This mechanism provides

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1. Most federal environmental statutes have a provision for citizens’ suits. See, e.g., Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2619 (1994); Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g) (1994); Surface Mining Control Prevention and Reclamation Act (“SMCRA”) 30 U.S.C. § 1270 (1994); Federal Water Pollution Control Act (Clean Water Act or “CWA”) 33 U.S.C. § 1365 (1994); Marine Protection, Research, & Sanctuaries Act of 1972 (“MPRSA”), 33 U.S.C. § 1415(g) (1994); Act to Prevent Pollution from Ships (“APPS”), 42 U.S.C. § 300(j)-8 (1994); Noise Control Act of 1972 (“NCA”), 42 U.S.C. § 4911 (1994); Solid Waste Disposal Act (“SWDA”), 42 U.S.C. § 6972 (1994); Clean Air Act (“CAA”), 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9659 (1994); Emergency Planning & Community Right-to Know Act of 1986 (“EPCRA”), 42 U.S.C. § 11046(a)(1) (1994).

2. *Qui tam* is short for the phrase, *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, which means “[w]ho sues on behalf of the King as well as for himself.” BLACK’S LAW DICTIONARY 1251 (6th ed. 1990).

3. See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); Bradford C. Mank, *Is There A Private Cause of Action Under EPA’s Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999); Gilbert Paul Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L.J. 321(1998); Paul A. Alpert, Comment, *Citizens Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?*, 16 B.C. ENVTL. AFF. L. REV. 283 (1988); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Robert B. June, Comment, *Citizen Suits: The Structure of Standing Requirements for Citizens Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761 (1994); Kathleen C. Becker, Note, *Bennett v. Plenert: Environmental Citizen Suits and the Zone of Interest Test*, 26 ENVTL. L. 1071 (1996); Krista Green, Comment, *An Analysis of the Supreme Court’s Resolution of the Emergency Planning and Community Right-to-Know Act Citizen Suit Debate*, 26 B.C. ENVTL. AFF. L. REV. 387 (1999); Carl E. Bruch, Note, *Where the Twain Shall Meet: Standing and Remedy in Alaska Center for the Environment v.*

a means to insure that environmental laws are enforced and not subject to the priorities of changing administrations. These priorities may be influenced by ideological or political forces (campaign contributors or supporters) or the availability of appropriated funds.<sup>4</sup>

This article will survey how the Supreme Court has expanded the ability of polluters to engage in legal subversion of the environmental laws while limiting the ability of pollutees to protect themselves from the depredations of the polluters.<sup>5</sup> The latest Supreme Court explication of standing will be examined first. Next, the barrier

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*Browner*, 6 DUKE ENVTL. L. & POL'Y F. 157 (1996); Phillip M. Bender, Comment, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act § 404 Permit Violations*, 37 ENVTL. L. 245 (1997); Lori May Peters, Comment, *Reloading the Arsenal in the Informational War on Pollution - Citizens as Soldiers in the Fight and How A Lack of "Actionable" Legs on Which to Stand Nearly Forced a Cease-fire*, 10 VILL. ENVTL. L.J. 127 (1999); Denise Marie Lohmann, Note, *The Uncertain Future of Citizen Suits Under EPCRA: Can Citizens Sue For Past Violations of the Statute's Reporting Requirements?*, 30 LOY. L.A. L. REV. 1709 (1997).

4. OFFICE OF MANAGEMENT AND BUSINESS, DEPT. OF VET. AFF., HOUSING AND URBAN DEVELOPMENT, STATEMENT OF ADMIN. POLICY FOR H.R. 4635 (2000), available at [http://www.whitehouse.gov/omb/legislative/sap/2000/hr4635\\_2.html](http://www.whitehouse.gov/omb/legislative/sap/2000/hr4635_2.html) (last visited May 6, 2001). The President is objecting to the appropriations for the Environmental Protection Agency ("EPA") because they are insufficient to enforce the law. *Id.* Environmental laws are expensive to enforce since they often require scientific evidence derived from costly tests. Limiting enforcement funds is a backdoor method of preventing enforcement of the law. It usually happens in the dead of night and the media usually miss the activity. With limited funds, an agency acting in good faith will not be able to adequately enforce the law. Thus, less egregious law breakers will be able to despoil the environment and endanger the public's health. The agency will likely favor enforcement actions against those who pose an immediate threat. Those who kill the citizenry or poison the environment slowly may escape justice.

5. See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000) (examining the Supreme Court's environmental voting record prior to this term).

of the Eleventh Amendment<sup>6</sup> and the related doctrine of Dual (or Concurrent) Sovereignty will be examined briefly.<sup>7</sup> The potential impact of the Administrative Law decisions of *FDA v. Brown & Williamson*<sup>8</sup> and *Christensen v. Harris County*<sup>9</sup> on environmental enforcement will next be discussed. The impact of the four preemption decisions<sup>10</sup> on pollutee remedies as well as their potential to permit polluters to escape state regulation will also be considered. Finally two decisions of some import<sup>11</sup> are examined. Although it is not possible to provide many answers at the time of this writing, many questions have been raised by The Polluter's Court.

### I. Standing

The doctrine of standing has been used to limit a pollutee's access to court.<sup>12</sup> The U.S. Supreme Court has amplified this doctrine in two decisions during the spring of 2000.<sup>13</sup> These two decisions were a follow-on to the Court's decision in a recent term in *Steel Co. v. Citizens for a Better Env't*.<sup>14</sup>

#### A. Friends of the Earth v. Laidlaw Environmental Service

6. David Milton Whalin, *John C. Calhoun Becomes the Tenth Justice: State Sovereignty, Judicial Review and Environmental Law After June 23, 1999*, 27 B.C. ENVTL. AFFAIRS L. REV. 193 (2000) (discussing at length the Eleventh Amendment barrier).

7. *See id.*

8. 120 S.Ct. 1291 (2000).

9. 120 S.Ct. 1655 (2000).

10. *United States v. Locke*, 120 S.Ct. 1135 (2000); *Norfolk S. Ry. v. Shanklin*, 120 S.Ct. 1467 (2000); *Geier v. Am. Honda Motor Co.*, 120 S.Ct. 1913 (2000); *Crosby v. Nat'l Foreign Trade Council*, 120 S.Ct. 2288 (2000).

11. *See* discussion *infra* Part V.

12. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., 3 ADMINISTRATIVE LAW TREATISE § 16.1 (3d ed. 1994).

13. *Friends of the Earth v. Laidlaw Env'tl. Serv.*, 120 S.Ct. 693 (2000); *Vt. Agency of Natural Res. v. United States*, 120 S.Ct. 1858 (2000). *See generally*, DAVIS & PIERCE, *supra* note 12, §§ 16.1-16.16.

14. 523 U.S. 83 (1998).

This doctrinal barrier is grounded in the Constitution<sup>15</sup> and has been recently explicated by the Court as a three-part requirement.<sup>16</sup> Citing *Lujan v. Defenders of Wildlife*,<sup>17</sup> the Court held as follows:

. . . a plaintiff must show (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>18</sup>

The Court also reiterated the “doctrine” of associational standing as explicated in *Hunt v. Washington State Apple Adver. Comm’n*.<sup>19</sup>

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15. U.S. CONST. art. III, § 2; *Laidlaw*, 120 S.Ct. at 703-04.

16. *Laidlaw*, 120 S.Ct. at 704.

17. 504 U.S. at 560-61.

18. *Laidlaw*, 120 S.Ct. at 704. *Accord* *Prestage Farms, Inc. v. Bd. of Supervisors of Noxubee County*, 205 F.3d 265, 266-267 (5th Cir. 2000). In a challenge by a purchaser of swine from contract farmers to a local ordinance establishing a buffer zone around new or expanded swine farms, *id.* at 266-67, the issue was whether Prestage has established injury in fact. *Id.* at 266. Prestage did not show that the ordinance impacted its ability to purchase swine or that striking the ordinance would allow it to purchase additional swine. *Id.* Prestage admitted that it did not engage in swine production in the county and owned no land in the county. *Id.* at 267. The court concluded that Prestage’s injury was too speculative to meet the injury in fact standard. *Id.* at 268. *But cf.*, *The Pitt News v. Fisher*, 2000 U.S. App. LEXIS 12456 (3rd Cir. June 6, 2000). There, the plaintiff challenged a statute which prohibited businesses from advertising in student newspapers. *Id.* at \*1. The court held that the student newspaper had standing for the challenge since the law reduced its revenues but did not have standing to assert the rights of third parties. *Id.* at \*34.

19. 432 U.S. at 343; *Cf. Assoc. Util. Contractors of Md., Inc. v. Mayor & City Council of Baltimore*, 83 F.Supp.2d 613 (D. MD 2000) (providing an example of the general ease with which industry groups may establish associational standing). As will be seen, pollutees have a more difficult burden. *Compare, Am. Wildlands v. Browner*, 94 F.Supp.2d 1150, 1155-1156 (D. CO 2000) (concerning a challenge to the EPA’s approval of Montana’s CWA water standards).

To attain associational standing, the injury in fact must be shown as being suffered by more than one member of the association.<sup>20</sup> Each member must assert the realistic desire to use a particular geographical area (either by living close to the area, previous use of the area at issue, or another “concrete” averment)<sup>21</sup> and that they are individuals whose use of an impacted area is harmed by the action of the polluter.<sup>22</sup> The averment that specified members would use the area at issue, but for the polluter’s activities, was not found to be speculative since the members lived in close proximity to the affected area.<sup>23</sup> The court failed to define the parameters of proximity in the context of associational standing. How many miles is it? Does this formulation ignore the reality of modern transportation? It also ignores the practical consideration that sometimes environmental debauchers have local support sufficient to intimidate local residents who may not support them.<sup>24</sup> Thus, standing

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20. *Friends of the Earth v. Laidlaw Envtl. Serv.*, 120 S.Ct. 693, 704 (2000).

21. *Id.* at 705.

22. *Id.*

23. *Id.* at 705-06. *See also*, *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1239 (11th Cir. 2000) (holding standing was not found when the plaintiff averred that she had taken a cruise and suffered injury and planned to take another cruise on the defendants ship “in the near future”). *But cf.*, *Moreno v. G&M Oil Co.*, 88 F.Supp.2d 1116 (C.D. CA 2000). In *Moreno*, the plaintiff stated that he traveled extensively and visited one of the defendant’s gas stations but did not visit any of the eighty two other gas stations owned by the defendant. *Id.* at 1116-17. The plaintiff did not establish class action status and the statute at issue did not have a “private attorney general” provision. *Id.* at 1117. Thus, there was no basis to assert the rights of others. *Id.* at 1118. The plaintiff’s standing was limited to the one station where he suffered an injury in fact. *Id.* at 1116.

24. *See* Brent Israelsen, *Road Protest May Spark a Big Debate; Elko County Residents Say They Just Plan to Take Back from Feds What is Theirs; Elko Rebels Plan to Rebuild Road*, SALT LAKE TRIB., Oct. 6, 1999, at A1; Jeff Ruch, *Nature’s Guardians Still Face Disrespect*, N.Y. TIMES, Dec. 22, 1999, at A27; Jim Carrier, *Rebels on the Range Nevadans Take on Federal Sovereignty*, DENVER POST, Jan. 21, 2000, at A-01; Evelyn Nieves, *Dispute Over Road in Nevada Rallies Anti-Government Forces*, N.Y. TIMES, Jan. 29, 2000, at A7; Ed Vogel, *People Shovel Support to Road Opening*, LAS VEGAS REV. J., Jan. 30,

may be defeated through intimidation if geographical proximity is a critical element. One must wonder what constitutional necessity is served if intimidation is allowed to close the courthouse door.

The Court did, however, ratify a "subjective" factor in the injury in fact element: illegal pollution discharges may cause nearby residents to curtail use of an area as well as ". . . subject them to other economic and aesthetic harms."<sup>25</sup> The question that the Court may have left open is what level of illegal pollution is sufficient to satisfy this test. Has the Court established a *per se* rule? This question remains unanswered.

The second element of the test is traceability. In this case it was not disputed before the Court that the defendant had made illegal discharges of a pollutant.<sup>26</sup> The defendant alleged that its discharges did not cause harm to the plaintiffs.<sup>27</sup>

The third element under examination was redressability. The defendant asserted that because civil penalties go to the government, and not the plaintiffs, the plaintiffs did not have standing.<sup>28</sup> Although standing must be established for each form of relief sought,<sup>29</sup> the deterrent value of civil penalties to abate the illegal conduct was found to be sufficient to establish redressability.<sup>30</sup> Somewhat unsettling is the court's discourse, admittedly in *dicta*, that available civil penalties, if sufficiently small, may reach a point where they have no deterrent effect and negate a plaintiffs' redressability element.<sup>31</sup> A civil penalty of \$100,000 for example, may have a substantial deterrent effect on a relatively small business, but what deterrent effect would it have on a huge multi-national corporation? Will the financial worth of the

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2000, at B1-8B; David Foste & Scott Sonner, *Nevadans, U.S. Make Much Ado About Old Road; Shovel-Wielding Residents Protest Government's Land Regulations*, CHI. TRIB., Mar. 1, 2000, at 8; Carl Nolte, *Fight to Save a Dead-End Road: Tiny Nevada Town Pitted Against U.S. Forest Service, Environmentalists*, SAN FRANCISCO CHRON., Mar. 6, 2000, available at [www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/03/06/mn104888.dtl](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/03/06/mn104888.dtl).

25. *Friends of the Earth v. Laidlaw Env'tl. Serv.*, 120 S.Ct. 693, 706 (2000).

26. *Id.* at 706.

27. *Id.* at 704.

28. *Id.* at 706.

29. *Id.*

30. *Id.* at 706-07.

31. *Laidlaw*, 120 S.Ct. at 707.



defendant determine redressability by establishing a sliding scale of standing? Does this *dicta* presage an escape hatch based upon wealth? Should not constitutional doctrines be wealth neutral?

The Court may have closed a loophole in *Steel Co.* It asserted that *Steel Co.* “. . . established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit.”<sup>32</sup> In this case, the defendant made what may be characterized as a sweetheart deal with the state to pay a fine.<sup>33</sup> The egregious nature of this conduct apparently led the Court to conclude that the conduct had not abated at the time the suit was filed.<sup>34</sup>

The Court stated that the issue as to whether the defendant’s conduct had abated was not standing, but mootness.<sup>35</sup> This is a fact-based inquiry, and the Court found it significant that the defendant had

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32. *Id.* at 707, (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 106-07); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987).

33. *Id.* at 707, n.2.

34. *Id.* at 707-08. A somewhat similar fact pattern emerged in a CWA decision involving a landfill. *See In re: Southdown, Inc.*, 2000 U.S. Dist. LEXIS 6220 (S.D. Ohio Mar. 13, 2000). Southdown sold the landfill during the litigation. *Id.* at \*13. The court found that the violation need only occur at the time the complaint was commenced. *Id.* at \*15. The court found that cessation went to the issue of mootness. *Id.* at \*16. Since the request for injunctive relief was moot as to Southdown as a result of the sale of the landfill, *id.* at \*19, the remaining issue *vis a vis* Southdown was whether the request for civil penalties was still valid. *Id.* at \*20. The court concluded that under *Laidlaw* standing existed for the imposition of civil penalties since the violation continued at the time suit was commenced. *Id.* at \*25. It should be noted that the court joined the purchasers of the landfill and would consider injunctive relief against the new owners. *Id.* at \*19. This decision may go a bit further than *Laidlaw* since the defendant here had divested the property at issue unlike the defendant in *Laidlaw*. This court prevented the polluter from escaping retribution for its wrongs under an implicit theory that allowing civil penalties served to dissuade the polluter from engaging in environmental debauchery in future activities at another location.

35. *Friends of the Earth v. Laidlaw Env’tl. Serv.*, 120 S.Ct. 693, 708 (2000).

retained its permit.<sup>36</sup> The inference is that action taken by a defendant to abate a violation in response to a potential citizens suit may not defeat standing, but if sufficiently aggressive it may render an action moot.<sup>37</sup> This would appear to require a total cession of the activity with the surrender of all permits with no probability of continuing the activity.<sup>38</sup> This is not stated, but it may be a reasonable inference. It is certain, however, that there will be future litigation on the issue.<sup>39</sup>

*B. Vt. Agency of Natural Res. v. United States*

This decision raises as many questions about standing as it answers.<sup>40</sup> The specific issue confronting the court was whether an individual had standing to bring a False Claims Act (FCA)<sup>41</sup> action

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36. *Id.* at 711.

37. *Cf.*, *Klamath Siskiyou Wildlands Ctr. v. Babbitt*, 2000 U.S. Dist. LEXIS 2269 (D. OR Feb. 15, 2000). Here, the Secretary published final regulation listing six species under ESA during the litigation. *Id.* at \*5. The plaintiffs established representational standing for all species at issue. *Id.* at \*15. Subsequent events cannot eliminate standing if it existed at the time the complaint was filed. *Id.* at \*11. The issuance of the final regulations for all six species at issue, however, rendered the case moot. *Id.* at \*19.

38. *See Adarand Constructors, Inc. v. Slater*, 120 S.Ct. 722, 725 (2000), which was decided the same day as *Laidlaw*.

39. *Mack v. Suffolk County*, 191 F.R.D. 16 (D. MA 2000). The court held that a party asserting mootness had a "particularly heavy burden" when a challenged policy, subsequently changed, was in place at the time suit was commenced. *Id.* at 21. A change in policy is insufficient to establish mootness if there is a possibility it may be reinstated. *Id.* *See also*, *Surdyk's Liquor, Inc. v. MGM Liquor Stores, Inc.*, 83 F. Supp. 2d 1016 (D. MN 2000) (finding that voluntary cession of the disputed practice was an important factor in establishing mootness, but more is needed and continuing a practice after the filing of a complaint obviates the persuasive impact of a subsequent voluntary cession).

40. *See* discussion *infra* Part V (discussing another aspect of this decision).

41. 31 U.S.C. §§ 3729-3733 (1994).

against a state.<sup>42</sup> The Court found as a matter of statutory interpretation that a state was not a person within the ambit of the FCA.<sup>43</sup> One could question why the issue of standing needed to be addressed at all,<sup>44</sup> but it was addressed. Under the FCA, an individual may bring an action against a party who allegedly presents a false claim for payment to the United States.<sup>45</sup> The conceptual link with citizens' suits should be obvious: in a citizens' suit the allegation is that a party has violated one of the environmental laws and enforcement of the statute is sought against that party. The citizens are seeking to enforce laws that are not being enforced for whatever reason<sup>46</sup> by the government.

The Court began by reiterating the three factors expounded in *Laidlaw*.<sup>47</sup> The Court rejected the argument that the private party was acting as the agent of the United States, thereby satisfying the standing requirement.<sup>48</sup> Since the private party receives a portion of the recovery, standing must be established for that party independent of the United States.<sup>49</sup> The focus was on the first part of the test concerning injury in fact.<sup>50</sup> The Court rejected that the "bounty" to be received by the private party was sufficient to confer standing as it was too close to its holding in *Steelco* and would undermine that decision.<sup>51</sup>

The Court characterized standing in this instance as follows:

We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact

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42. *Vt. Agency of Natural Res. v. United States*, 120 S.Ct. 1858, 1860 (2000).

43. *Id.* at 1871.

44. *Agency of Natural Res. v. United States*, 120 S.Ct. 523 (1999) (answering the question of standing that was added less than two weeks before oral argument on Nov. 19, 1999).

45. *Agency*, 120 S.Ct. at 1861.

46. The potential reasons are without limit: lack of human or financial resources; not sufficiently egregious to be a priority; political pressure to ignore the violation; apprehension about losing and establishing an adverse precedent; and these are but the more obvious.

47. *Vt. Agency*, 120 S.Ct. at 1861-62.

48. *Id.* at 1862.

49. *Id.*

50. *Id.*

51. *Id.* at 1862-63.

suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim . . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on the respondent Stevens.<sup>52</sup>

The Court also appears to explicitly recognize "representational standing."<sup>53</sup> The Court then examined at some length the history of *qui tam* actions<sup>54</sup> and concluded that such actions were within the ambit of "cases and controversies" as contemplated by the framers of the Constitution.<sup>55</sup> A clear majority, however, reserved the question as to whether a *qui tam* action violated Article II, Section 2 (Appointments Clause) of the Constitution and/or Section 3 (Take Care Clause).<sup>56</sup>

The Appointments Clause<sup>57</sup> may be the potential problem since the FCA plaintiff is self-appointed, although acting pursuant to statute. This particular provision has engendered relatively little litigation and some analysis.<sup>58</sup> Recent litigation (within the past thirty years) that has

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52. *Id.* at 1863.

53. Vt. Agency, 120 S.Ct. at 1863 (citing a variety of decisions which it characterized as "representational standing" without previously using the term).

54. *Id.* at 1863-65.

55. *Id.* at 1864-65.

56. *Id.* at 1865, n.8.

57. U.S. CONST. art. II, § 2.

58. See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 88-89 (1998); Matthew J. Maclean, Note, *Opportunity Lost: Virginia v. EPA and the Authority of the Northeast Ozone Transport Commission*, 17 VA. ENVTL. L.J. 531, 544-550 (1998); Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L.REV. 1103 (1998); Tracey A. Hardin, Note, *Rethinking Independence: The Lack of an Effective Remedy for Improper For-Cause Removals*, 50 VAND. L.REV. 197 (1997); Alexander I. Tachmes, Comment, *Independent Counsels Under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power*, 42 U. MIAMI L.REV. 735 (1996); Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L.REV. 536 (1992).

reached the Court reveals tension between the legislative and executive branches.<sup>59</sup> Since the Court has “invited” litigation on the issue, it is worth some examination.

The gravamen of a challenge would appear to be that one bringing a FCA action is acting as a self-appointed officer of the United States and thus violates the Constitutional provision requiring a proper appointment by the executive branch. There has been some limited litigation before lower courts on the issue.<sup>60</sup> The Sixth Circuit in *General Electric* found that the government retained sufficient control over the litigation and that the provision furthered an important public policy.<sup>61</sup> This court noted, with apparent approval, various citizens’ suits statutory provisions.<sup>62</sup> The Sixth Circuit recently noted that the FCA provisions which give the executive branch a right to approve

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59. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (stating that an organization may be a part of only one branch of government and that an individual controlled by one branch may not perform duties which are the province of another branch); *Morrison v. Olson*, 487 U.S. 654 (1988) (addressing the distinction between inferior and principal officers, as well as the initial appointment of the officer and removal powers); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (holding that Congress may not invest its Members with executive authority); *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that Congress may allow inferior officers to be appointed by the President, heads of departments or the Judiciary and propounded a three part test summarized as follows: a person is an officer of the United States if the individual is “(1) an executive or administrative official (2) serving pursuant to federal law (3) who exercises significant authority over federal government actions”); Maclean, *supra*, note 58, at 546 (citing *Buckley*, 424 U.S. at 123-27).

60. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1994), *reh’g denied*, 1995 U.S. App. LEXIS 1447 (6th Cir. 1995); *Riley v. St. Luke’s Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999), *reh’g en banc granted*, 1999 U.S. App. LEXIS 29845 (5th Cir. 1999), *as revised*, 1999 U.S. App. LEXIS 30391 (5th Cir. Nov. 22, 1999); *United States v. Health Possibilities*, 207 F.3d 335 (6th Cir. 2000).

61. *General Electric*, 41 F.3d at 1041-42.

62. *Id.* at 1041-42, n.9.

settlements<sup>63</sup> demonstrates that the Act insures that a private FCA plaintiff does not act without sufficient controls. This would appear to bring the statute within the ambit of *Morrison*.<sup>64</sup>

The Fifth Circuit in *Riley*, however, has found an infirmity. The *Riley* court did not reach the Appointments Clause issue.<sup>65</sup> This court, however, found a violation of the Take Care Clause where the government does not intervene.<sup>66</sup> The court found that the FCA does not provide for Constitutionally sufficient control over the litigation.<sup>67</sup> The court explicated the four-factor test it found in *Morrison*.<sup>68</sup> The Fifth Circuit concluded that all four *Morrison* factors were absent in this case<sup>69</sup> and it rejected the Ninth Circuit's analysis on the net effect wherein that circuit found the test was met.<sup>70</sup>

The potential impact on environmental citizens' suits should be obvious. Citizens' suits to the extent they seek to enforce permit requirements or violations of law are comparable to FCA actions. It should be expected that a polluter with proper counsel will challenge a citizens' suit on the basis of a violation of the Appointments Clause or the Take Care Clause. The gravamen of an Appointments Clause action would be to allege that the private party is not under the "control" of an appropriate executive branch official and thus does not have the status to conduct litigation that may only be conducted by the executive branch. The thrust of a Take Care challenge would be that the

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63. Health Possibilities, 207 F.3d at 341-42.

64. *Morrison v. Olson*, 487 U.S. 654 (1988).

65. *Riley*, 196 F.3d at 531.

66. *Id.*

67. *Id.* at 525-31.

68. *Id.* at 527-28, The test is "(1) the Attorney General retains the power to remove the counsel for 'good cause,' . . . ; (2) [n]o independent counsel may be appointed without a specific request by the Attorney General, and the . . . decision not to request appointment . . . is . . . unreviewable . . . ; [t]he Act thus gives the Executive a degree of control over the power to initiate an investigation . . . ; (3) . . . the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General; and (4) once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not 'possible' to do so." (citing *Morrison*, 487 U.S. at 696).

69. *Id.* at 528.

70. *Id.* at 529.

individuals bringing the action are not sufficiently under the control of the President or his/her subordinates, so that no executive branch official is in a position to insure that he/she can take care that the laws are faithfully executed. Under either Constitutional provision, there is now a new avenue of attack. It takes little imagination to assume that both will now be raised.

In any event, the Court has expressly recognized representational standing for the time being.

### C. Conclusions

What the Court “gave” with one hand in *Laidlaw*, it may have taken away in *Vt. Agency*. *Laidlaw* closed the potential *Steelco* loophole by indicating that standing for the purposes of civil damages ceases if the violation has ceased at the time of suit.<sup>71</sup> Abatement after the commencement of suit goes to the issue of whether the action has become moot.<sup>72</sup> The inquiry is fact-based and apparently the party pleading mootness has a substantial burden of demonstrating not only that the violation has ceased, but also that there is no possibility of it recurring.<sup>73</sup> The Court, however, in *dicta*, asserted that a civil penalty, if sufficiently small, may have no deterrent effect and negate a plaintiff’s redressability element of standing.<sup>74</sup> If the Court means what it says, then the financial balance sheet of a polluter will determine whether a plaintiff has standing.

*Vt. Agency* is potentially more troubling. The conceptual link between citizens’ suits and FCA actions was discussed. The FCA plaintiff has standing as the assignee of the United States.<sup>75</sup> The Court went on to explicitly recognize “representational standing.”<sup>76</sup> It may be possible to distinguish this in the instance of citizens’ suits by the nexus required between the plaintiffs and the illegal activity of the polluters. Such a distinction, however, only serves to reduce the “pool” of

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71. *Friends of the Earth v. Laidlaw Env'tl. Serv.* 120 S.Ct. 693, 707 (2000).

72. *Id.* at 708.

73. *Id.* at 711.

74. *Id.* at 707.

75. *Vt. Agency of Natural Res. v. United States*, 120 S.Ct. 1858, 1863 (2000).

76. *Id.*

citizens' suit plaintiffs. Far more troubling is the majority's apparent willingness to consider challenges under the Appointments Clause and the Take Care Clause.<sup>77</sup>

It is apparent that these two decisions provide the polluter with avenues to escape justice at the hands of the pollutees.

## II. ELEVENTH AMENDMENT LIMITATION

The Court has expounded a doctrine limiting Congressional authority through the mechanism of the Eleventh Amendment.<sup>78</sup> The impact of this doctrine upon environmental law has already been extensively explicated,<sup>79</sup> and so this part will focus upon the limitations imposed on pollutees. It is rather common for Federal environmental statutes to allow states, upon application by that state, to administer a program through authority delegated from the appropriate Federal agency.<sup>80</sup> Many of these same statutes also have a specific provision for citizens' suits.<sup>81</sup> Thus, a limitation upon the pollutees' ability to vindicate their rights may have a significant impact. It should also be noted that many of the federal environmental statutes that authorize citizens' suits explicitly preserve a state's Eleventh Amendment immunity.<sup>82</sup>

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77. *Id.* at 1865, n.8.

78. U.S. CONST. amend XI.

79. Whalin, *supra* note 6.

80. *See, e.g.*, Federal Insecticide, Fungicide, & Rodenticide Act (FIFRA), 7 U.S.C. § 136(t)-136(v) (1994); TSCA, 15 U.S.C. § 2627 (1994); Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. § 1379 (1994); ESA, 16 U.S.C. § 1535 (1994); Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA), 16 U.S.C. § 4724 (1998); SMCRA, 30 U.S.C. §§ 1235, 1253-1255 (1994); CWA, 33 U.S.C. §§ 1342(b), 1244(g)(1) (1994); Public Health Service Act (PHSA), 42 U.S.C. §§ 300g-2, 300h-300h-8 (1994); SWDA, 42 U.S.C. §§ 6926-6929, 6931-6933, 6941-6948 (1994); CAA, 42 U.S.C. §§ 7410-7411, 7424, 7428, 7661a (1994); CERCLA, 42 U.S.C. §§ 9604(c)(3)&(d), 9621(f) (1994).

81. *See supra* note 1.

82. *See, e.g.*, TSCA, 15 U.S.C. § 2619(a)(1) (1994) (11th Amendment not abrogated); ESA, 16 U.S.C. § 1540(g)(1)(A) (1994) (11th Amendment not abrogated); SMCRA, 30 U.S.C. § 1270(a)(1) (1994) (11th Amendment not abrogated); CWA, 33 U.S.C. § 1365



A. *The Court's Doctrine*

The Court began with *Seminole Tribe of Florida v. Florida*<sup>83</sup> to explicate its doctrine and has explained its parameters in four subsequent decisions.<sup>84</sup> The Court has stated unequivocally that the Eleventh Amendment is a limitation upon Article III of the Constitution jurisdiction, which may only be abrogated through powers delineated in the Fourteenth Amendment.<sup>85</sup> The Court also held that Congress had no power to abrogate a state's immunity solely pursuant to Article I of the Constitution.<sup>86</sup> Congressional power to abrogate is only found in the Fourteenth Amendment.<sup>87</sup> The Eleventh Amendment bar goes to the Constitutional jurisdiction of a federal court.<sup>88</sup>

When faced with a jurisdictional objection pursuant to the *Seminole Tribe* doctrine, two threshold questions emerged: is there an unequivocal expression of Congressional intent to abrogate the states' Eleventh Amendment immunity and whether that abrogation was enacted pursuant to a valid exercise of power.<sup>89</sup> The Court has

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(1994) (11th Amendment not abrogated); MPRSA, 33 U.S.C. § 1415(g) (1994) (11th Amendment not abrogated); APPS, 42 U.S.C. § 300(j)-8(a)(1) (1994) (11th Amendment not abrogated); NCA, 42 U.S.C. § 4911(a)(1) (1994) (11th Amendment not abrogated); SWDA, 42 U.S.C. § 6972 (1994) (11th Amendment not abrogated); CAA, 42 U.S.C. § 7604(a)(1) (1994) (11th Amendment not abrogated).

83. 517 U.S. 44, 76 (1996).

84. *Alden v. Maine*, 119 S.Ct. 2240, 2246-47 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2223-24 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199, 2205 (1999); *Kimel v. Florida Board of Regents*, 120 S.Ct. 631, 650 (2000). See also *Whalin*, *supra* note 6, at 195-212.

85. *Seminole Tribe*, 517 U.S. at 65-6.

86. *Id.* at 65; *College Savings*, 119 S.Ct. at 2224; *FL Prepaid*, 119 S.Ct. at 2205; *Alden*, 119 S.Ct. at 2246; *Kimel*, 120 S.Ct. at 643.

87. *Seminole Tribe*, 517 U.S. at 58-9; *College Savings*, 119 S.Ct. at 2223; *FL Prepaid*, 119 S.Ct. at 2205; *Kimel*, 120 S.Ct. at 643.

88. *Seminole Tribe*, 517 U.S. at 73.

89. *Id.* at 55; *College Savings*, 119 S.Ct. at 2222; *FL Prepaid*, 119 S.Ct. at 2202; *Kimel*, 120 S.Ct. at 640.

answered the first question in the affirmative in the cases it has decided.<sup>90</sup> The Court has unequivocally stated that Article I of the Constitution does not provide a basis to abrogate the states' Eleventh Amendment immunity.<sup>91</sup> The more problematic question is whether there exists a valid power within the ambit of the Fourteenth Amendment. It should be noted that in all the decisions thus far the Court has yet to find a valid abrogation.<sup>92</sup> The Court has held that the activity of doing business and using assets to make a profit is not Fourteenth Amendment property, even though the underlying asset utilized is property.<sup>93</sup> In another decision, the Court found for abrogation (patent infringement),<sup>94</sup> but abrogation was not appropriate since Congress had inadequate evidence of states' wrongdoing.<sup>95</sup> In other words, evil must be rampant before Congress may act; anticipatory prophylactic measures do not meet its test. The Court in *Kimel* stated that if the conduct were unconstitutional, then Congress may abrogate immunity.<sup>96</sup> Other conduct, if within the ambit of a Fourteenth Amendment interest, must be "significant" before Congress may act.<sup>97</sup> The availability of state statutes allegedly providing a remedy may also preclude Congressional action.<sup>98</sup> The limitations upon

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90. *Seminole Tribe*, 517 U.S. at 57 (fact that statute provided that states were the only defendants found sufficient); *College Savings*, 119 S.Ct. at 2222 (statute explicit); *FL Prepaid*, 119 S.Ct. at 2201 (statute explicit); *Kimel*, 120 S.Ct. at 640 (abrogation "clearly demonstrate[d]").

91. *Seminole Tribe*, 517 U.S. at 72-3; *Alden*, 119 S.Ct. at 2246; *College Savings*, 119 S.Ct. at 2224; *FL Prepaid*, 119 S.Ct. at 2204; *Kimel*, 120 S.Ct. at 643.

92. *Seminole Tribe*, 517 U.S. at 66; *Alden*, 119 S.Ct. at 2246; *College Savings*, 119 S.Ct. at 2226; *FL Prepaid*, 119 S.Ct. at 2210-11; *Kimel*, 120 S.Ct. at 650.

93. *College Savings*, 119 S.Ct. at 2225; *Whalin*, *supra* note 6, at 206-07, 229-33.

94. *FL Prepaid*, 119 S.Ct. at 2208.

95. *Id.* at 2204-05; *Whalin*, *supra* note 6, at 210-211.

96. *Kimel*, 120 S.Ct. at 648.

97. *Id.* at 650.

98. *Id.*

the Fourteenth Amendment's enforcement clause have led to a "quagmire."<sup>99</sup>

A state may consent to be sued.<sup>100</sup> The receipt of federal funds alone, however, is insufficient to establish consent.<sup>101</sup> The constructive waiver doctrine of *Parden v. Terminal Railroad of Alaska Docks Dept.*<sup>102</sup> has been explicitly overruled.<sup>103</sup> The Court stated the proposition as follows:

In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed-and the voluntariness of waiver destroyed-when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.<sup>104</sup>

The Court has not addressed the nature of a valid consent and has never found consent.

### *B. Some Recent Lower Court Explications*

States have failed to establish consent in some lower courts. The relevancy for environmental law is that many states administer

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99. See, e.g., Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000) (offering a four part framework for determining whether Congress has abrogated state sovereignty immunity by providing a cause of action under section five of the Fourteenth Amendment).

100. *Seminole Tribe*, 517 U.S. at 58-9.

101. *Id.*

102. 377 U.S. 184 (1964).

103. *College Savings*, 119 S.Ct. at 2228.

104. *Id.* at 2231 (referring to conduct that was characterized as engaging in interstate commerce). The clear inference is that a state may engage in interstate commerce with only some limitation upon its actions. See, *Reno v. Condon*, 120 S.Ct. 666 (2000) (holding that restricting the sale or lease of driver's personal information is a proper exercise of Congressional authority to regulate interstate commerce). The apparent inconsistency with *College Savings* was not addressed.

Federal environmental programs under delegated authority.<sup>105</sup> This doctrine impacts the ability to bring a citizens suit against a state for not enforcing the law. By the same token, a polluter may seek to plead that a state is an indispensable party under Federal Rules of Civil Procedure Rule 19, and, when the state pleads the Eleventh Amendment, seek dismissal of the entire action. The author has previously discussed the foregoing.<sup>106</sup>

Recently, some circuit courts<sup>107</sup> have held that state agencies which operate Federal regulatory programs under delegated authority, may not successfully plead the Eleventh Amendment. The state agencies voluntary participation constitutes consent,<sup>108</sup> or in the alternative they are parties under the doctrine of *Ex parte Young*.<sup>109</sup> The question not addressed by those decisions is whether the explicit non abrogation clauses in the primary environmental statutes<sup>110</sup> overcome the question of consent and the *Ex parte Young* doctrine. Given the explicit non abrogation provisions, it will be quite difficult to establish consent, which similarly argues against utilizing the *Ex parte Young* doctrine.<sup>111</sup>

### C. CONCLUSIONS

The Eleventh Amendment appears to pose an insurmountable barrier to suing a state, that is a regulator under delegated authority, in

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105. See statutes cited *supra*, note 80.

106. Whalin, *supra* note 6, at 233-38.

107. Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F.3d 862 (6th Cir. 2000); MCI Tel. Corp. v. Pub. Serv. of UT, 216 F.3d 929 (10th Cir. 2000); MCI Tel. Corp. v. IL Bell Tel. Co., 222 F.3d 323 (7th Cir. 2000).

108. Pub. Serv. Of UT, 216 F.3d at 938-39; IL Bell Tel. Co., 222 F.3d at 343-44.

109. Michigan Bell Tel. Co., 202 F.3d at 867-68; Pub. Serv. of UT, 216 F.3d at 939-40; IL Bell Tel. Co., 222 F.3d at 348. For an exploration of the *Ex parte Young* doctrine also see, Whalin, *supra* note 6, at 219-21.

110. See statutes cited *supra*, note 82.

111. The author has not found a recent decision (post June 23, 1999) in which a court has considered this precise issue.

Federal court for violation of Federal environmental statutes. The unanswered question is whether an action may be maintained against a state, or an arm of the state,<sup>112</sup> as a polluter. The question is whether a state consents to being sued when it engages in activities as a polluter. The CWA, for example, seeks to make states liable in such a situation.<sup>113</sup> The issue is whether Congress has conferred as "gratuity" which was the basis of the finding of consent noted above<sup>114</sup> or whether a refusal to waive brings the state within the ambit of the coercive waiver doctrine of *College Savings*,<sup>115</sup> that would negate CWA § 505(e).<sup>116</sup> The successful invocation of the coercive waiver doctrine seems more probable, especially when one remembers that in *College Savings* the state was acting in a manner indistinguishable from that of a private party.<sup>117</sup> This leaves the pollutee with only the *Ex parte Young* remedy noted above. *Seminole Tribe* limits the invocation of this doctrine to those instances where Congress has not enacted a more limited statutory scheme. It is irrelevant that this statutory scheme is unavailable for being found unconstitutional.<sup>118</sup> In five decisions the Court has yet to find this remedy available, and it is unlikely to be available for environmental statutes since the alternative remedial scheme is for the United States to bring an enforcement action.<sup>119</sup>

### III. ADMINISTRATIVE LAW

The Court issued two decisions affecting Administrative law. *FDA v. Brown & Williamson Tobacco Corp.*<sup>120</sup> concerned the ability of an agency to promulgate regulations on a topic for which there had been no regulatory action for many years, after years of declination of action and subsequent legislative action on the topic. *Christensen v. Harris County*<sup>121</sup> defined when the Chevron Doctrine<sup>122</sup> applies in the specific

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112. See Whalin, *supra* note 6, at 213-19, for a discussion of what constitutes an arm of the state.

113. CWA § 505(e), 33 U.S.C. § 1365(e) (1994).

114. See cases cited *supra*, note 107.

115. 119 S.Ct. at 2231.

116. 33 U.S.C. § 1365(e) (1994).

117. *College Savings*, 119 S.Ct. at 2226.

118. *Seminole Tribe*, 517 U.S. at 74-6.

119. See Whalin, *supra* note 6, at 199, 212, 219-21, 233-38.

120. 120 S.Ct. 1291 (2000).

121. 120 S.Ct. 1655 (2000).

instance of interpretive rules.<sup>123</sup> Since most, if not all,<sup>124</sup> Federal environmental statutes are implemented through the processes of Administrative Law, the potential impacts should be obvious even at this point.<sup>125</sup> This section will examine the Court's decisions and the implications for environmental law.

A. *FDA v. Brown & Williamson Tobacco Corp.*

Simply stated, *FDA* concerned whether jurisdiction existed to promulgate a regulation “. . . intended to reduce tobacco consumption among children and adolescents.”<sup>126</sup> The importance of this decision lies with its examination of external legislation and other post enactment “history” to determine if the agency may regulate. The Court found that the evidence adduced by the agency required it to prohibit the marketing

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122. See generally, KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE VOL. I, § 3.5, 119-23, 3RD ED. (1994 & 1999 SUPP.) (analyzing the scope of *Chevron v. NRDC*, 467 U.S. 837 (1984)).

123. *Id.* at § 6.3, 233-48 (1994) (describing the distinction between legislative and interpretive rules).

124. The author has been unable to find an environmental statute which does not have implementing regulations.

125. It should be noted that the Court will hear two cases concerning two significant Administrative law issues. One on Nondelegation [*see generally*, Davis & Pierce, § 2.6-2.7, 66-89 (1994)], *Browner v. American Trucking Association*, 175 F.3d 1027, *reh'g granted in part and denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S.Ct. 2003 (2000), will decide whether EPA exceeded its delegated authority in a CAA regulation; the other which arose out of the same litigation will consider whether EPA is required to consider compliance costs when promulgating a CAA regulation, *American Trucking Association v. Browner*, 175 F.3d 1027, *reh'g granted in part and denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S.Ct. 2193 (2000) to be heard in tandem with *Browner v. American Trucking Association*. Oral argument is schedule for both for two hours on November 7, 2000. [http://www.supremecourtus.gov/oral\\_arguments/-argument\\_calendars.html](http://www.supremecourtus.gov/oral_arguments/-argument_calendars.html) (last visited Apr. 6, 2001). The court upheld EPA, *Whitman v. American Trucking Association*, 121 S. Ct. 903 (2001).

126. *FDA*, 120 S.Ct. at 1297.

of tobacco products, not regulate that marketing.<sup>127</sup> The Court found it significant that the agency stated that it did not have authority to regulate tobacco product marketing because it would have to ban them.<sup>128</sup> It also found significant that Congress had prevented removal of tobacco products from the market and had regulated these products through numerous other laws.<sup>129</sup> It found that the agency had made too good a case: there was no possibility that tobacco products could be considered safe, a critical statutory standard, within the ambit of the statute at issue.<sup>130</sup> It must be emphasized that the Court was not considering any legislative history of the statute at issue when the original statute was enacted. Its citations were exclusively to post enactment statements, hearings, and legislation as an examination of the citations within the decision will amply demonstrate.

The Court went on to pose the question again as to “. . . whether Congress has spoken directly to the FDA’s authority to regulate tobacco . . .”<sup>131</sup> by examining “. . . in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years.”<sup>132</sup> The Court then engaged in a more extensive examination of post enactment “legislative history.”<sup>133</sup> It concluded that the post enactment legislative history coupled with agency statements “ratified” the absence of jurisdiction to regulate.<sup>134</sup> The Court also gave *Chevron* deference to agency pronouncements before the promulgation of the regulation at issue,<sup>135</sup>

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127. *Id.* at 1303.

128. *Id.* It must be noted that these pronouncements to which the Court gave much significance included Congressional testimony, advisory committee reports, and agency reports. Furthermore, in no instance was the pronouncement subjected to the rigors of a legislative rule, and it stretches credulity to the breaking point to characterize Congressional testimony (the last frontier of primitive creative fiction) even as an interpretive rule.

129. *Id.* at 1303-04.

130. *Id.* at 1305.

131. *Id.* at 1306.

132. FDA, 120 S.Ct. at 1306.

133. *Id.* at 1306-13.

134. *Id.* at 1313.

135. *Id.* at 1314-15. *Contra* Christensen v. Harris County, 120 S.Ct. 1655, 1662 (2000). (holding that only legislative rules were entitled to *Chevron* deference). *See also* Solid Waste Agency of N. Cook Co. v. Army Corps of Engineers, 2001 U.S. LEXIS 640 (2001)

but it neglected to note that the only agency pronouncement at issue was the product of rulemaking. The Court did state, in *dicta*, that an agency's post enactment pronouncements are "not carved in stone."<sup>136</sup>

The dissent expressed that post enactment legislative history was "unpersuasive."<sup>137</sup> Its examination of the pre-enactment legislative history provided ample leeway to promulgate the regulation.<sup>138</sup>

Where does this leave the prospective environmental litigant? One had always thought that the key to statutory interpretation was reference to pre-enactment legislative history to determine if an agency's interpretation was within statutory parameters.<sup>139</sup> Now it appears that extrinsic post enactment agency statements, that were not made pursuant to a rulemaking, as well as statutorily extrinsic post enactment legislative activities, must also be considered.

A precise example may suffice. The author has previously advocated that the CWA requires that an NPDES permit is necessary to introduce nonindigenous aquatic species into the waters of the United States.<sup>140</sup> The threshold issue was whether an aquatic nonindigenous species was a pollutant and that required an examination of pre-enactment legislative history, as well as the meager case law.<sup>141</sup> Prior to *FDA*, this would have been sufficient. Now it appears that post enactment legislative activities must be examined because EPA had never acted to so regulate. Congress has acted legislatively on the issue by enacting NANPCA. Does this legislative action coupled with EPA's

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(finding it significant that an agency's pronouncement was made without following the notice and comment procedures and refused to give it Chevron deference). *Solid Waste Agency* is consistent with *Christensen* in part, but is inconsistent with the holding here. In *Solid Waste Agency*, the promulgation at issue was a clarification to an existing regulation, that should be at least as authoritative as Congressional testimony.

136. *Id.* at 1313.

137. *Id.* at 1317.

138. *FDA*, 120 S.Ct. at 1317-19.

139. NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION, 48:20. [Successor to SUTHERLAND ON STATUTORY CONSTRUCTION.]

140. David Milton Whalin, *The Control of Aquatic Nuisance Nonindigenous Species*, 5 ENVTL. LAW. 65, 89-101 (1998). [Hereinafter *Aquatic*.]

141. *Id.* at 89-94.



failure to act preclude CWA regulation? In this precise instant probably not since NANPCA § 1101(b)(2)(C)<sup>142</sup> specifically preserved CWA regulation.<sup>143</sup> This jurisdictional preservation was reiterated in National Invasive Species Act (NISA) sections 2(b)(2) and 1101(b)(2)(C).<sup>144</sup> It is also of some note that the Committee which produced NANPCA and NISA also had jurisdiction over the CWA.<sup>145</sup> Absent this “savings provision,” it would appear that under *FDA* a challenge would be in order against an attempt by the EPA to invoke the CWA in this area. Such a challenge would appear to be enhanced when there is a long established statute with room to regulate, there has been no regulatory activity and/or there has been extrinsic legislative activity. There are several statutes regulating various aspects of chemicals such as FIFRA, TSCA, RCRA and CERCLA. Does an attempt to begin a regulatory activity under one of the statutes, that appears to be within its ambit based upon pre-enactment legislative history, now preclude that activity as a result of other legislative and/or regulatory activity under a different statute? *FDA* would appear to make it problematic.

One environmental case is on its way towards appellate review which may illuminate the issue.<sup>146</sup> *Pronsolino* is a challenge to the authority of EPA to promulgate Total Maximum Daily Load<sup>147</sup> standards.<sup>148</sup> At oral argument the plaintiff raised the question as to whether *FDA* precluded EPA’s action.<sup>149</sup> The court distinguished *FDA* by noting that although EPA had been “exceedingly slow to implement the TMDL requirements,”<sup>150</sup> it had not made contrary post enactment statements to Congress and had not been inconsistent in its TMDL position.<sup>151</sup> The court found that TMDL requirements were “plainly authorized in 1972,” although ignored for years.<sup>152</sup> *Pronsolino* makes an extensive examination of pre-enactment legislative history which

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142. 16 U.S.C. § 4711(b)(2)(C) (1994).

143. *Aquatic*, *supra* note 140, at 91.

144. 16 U.S.C. § 4711(b)(2)(C) (1994).

145. *Aquatic*, *supra* note 140, at 91-2, n.220.

146. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000).

147. Clean Water Act § 303(d), 33 U.S.C. § 1313(d) (1994).

148. *Pronsolino*, 91 F. Supp. 2d at 1338.

149. *Id.* at 1354, n.17.

150. *Id.*

151. *Id.*

152. *Id.* at 1355.

may be useful for review.<sup>153</sup> A second TMDL decision does not examine *FDA* implications, which should come as no surprise since the plaintiff is seeking TMDL action, but it contains an extensive examination of the provision's history.<sup>154</sup>

Until the implications of *FDA* are fully litigated, one seeking to promote or defend pollutee interests must now consider post enactment agency pronouncements in all forums, as well as Congressional extrinsic activities. Declination of authority in non-legislative rulemaking contexts is now a basis for narrowing a statute. It is certain that those promoting polluter interests will do so. It will also be necessary that one promoting environmental legislation should insure that a savings clause, such as that in NANPCA and NISA be included so as to prevent regulatory preclusion of a previously enacted statute.

### *B. Christensen v. Harris County*

The relevant issue in *Christensen* is fairly straight forward: what agency interpretations of its own statute are due *Chevron* deference<sup>155</sup> by a court? The Court characterized this doctrine as follows: "a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."<sup>156</sup> At specific issue was whether an "opinion letter" issued by the U.S. Department of Labor ("DOL") qualified for *Chevron* deference.<sup>157</sup> The regulation did not address the specific issue which was subject to the dispute.<sup>158</sup> DOL asserted that its opinion letter, which interpreted the regulation, was due *Chevron* deference.<sup>159</sup> It is implicit in the Court's decision that if DOL is accorded deference to its interpretation of its regulation, then Harris County loses. Here, the Court distinguishes between interpretations issued after "a formal adjudication or notice-and-comment

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153. *Id.* at 1349-55.

154. *NRDC v. Fox*, 93 F. Supp. 2d 531, 533-34 (S.D.N.Y. 2000).

155. *Supra* note 121.

156. *Christensen v. Harris County*, 120 S.Ct. 1655, 1662 (2000).

157. *Id.*

158. *Id.* at 1663.

159. *Id.*

rulemaking”<sup>160</sup> from those contained in documents that do not undergo such procedures.<sup>161</sup> The latter interpretations are characterized as such promulgations including policy statements, agency manuals and enforcement guidelines.<sup>162</sup> If a regulation is ambiguous, then an interpretive document is apparently entitled to deference.<sup>163</sup> The regulation here was characterized as unambiguous and silent on the issue in dispute. In this instance, the interpretation is not entitled to deference.<sup>164</sup>

Consequently, a “bright line” between legislative rules and interpretive rules has emerged.<sup>165</sup> Legislative rules are those which are the subject of an adjudication or notice -and-comment rulemaking.<sup>166</sup> An interpretive rule is an agency pronouncement interpreting or applying its statutes and/or regulations that has not undergone these “formal” procedures.<sup>167</sup> A court will apparently accord an interpretive rule respect based upon its “potential power to persuade”<sup>168</sup> as distinguished from *Chevron* deference to “a reasonable interpretation of an ambiguous statute.”<sup>169</sup> To put it simply, if one is challenging a legislative rule, then there is the substantial burden of convincing a court that the agency’s interpretation is not reasonable; if the challenge is to an interpretive rule, then the burden is to convince a court that one’s interpretation is more persuasive and that the regulation is not ambiguous.

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160. *Id.* at 1662.

161. *Id.*

162. Christensen, 120 S.Ct. at 1662. The question is whether this is consistent with *Solid Waste Agency*. *Supra* note 134. It is consistent with *Christensen* to the extent that deference is not given to an interpretive rule, but it conflicts with *Christensen* dicta cited here that clarifications of ambiguous rules are entitled to deference.

163. *Id.* at 1663.

164. *Id.*

165. *See supra* note 122.

166. Christensen, 120 S.Ct. at 1662; Davis & Pierce, *supra* note 122, at 233-34.

167. Davis & Pierce, *supra* note 122, at 234.

168. *Id.* at 243.

169. Christensen, 120 S.Ct. at 1662.

There has been some litigation on this issue. In most instances, excluding one aberrant situation,<sup>170</sup> the agency has lost. Revenue Rulings by the Internal Revenue Service were only due “respect,” but were given no respect since the court found them to be contrary to the statute’s plain language and legislative history.<sup>171</sup> A court held that a DOL interpretive bulletin published in the Federal Register concerning a published rule was entitled to respect,<sup>172</sup> but found it unpersuasive in one instance<sup>173</sup> and only instructive in another.<sup>174</sup> Another court gave no deference and found unpersuasive an EPA CAA Background Document and witness testimony on the meaning of a particular term.<sup>175</sup> In another EPA decision concerning the CWA, the court applied *Christensen* “narrowly”<sup>176</sup> finding that a “strategy” document containing an interpretation was subject to “some deference, but only to the extent that it is a persuasive interpretation of the statute.”<sup>177</sup> After an exercise in statutory interpretation,<sup>178</sup> the court found for the EPA.<sup>179</sup> Another court found that guidelines consistent with prior regulations were persuasive.<sup>180</sup>

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170. *Moore v. Apfel*, 216 F.3d 864 (9th Cir. 2000). Wherein the plaintiff accurately alleged that the agency violated its interpretive rule in the form of a procedures manual. *Id.* at 866, 868-69. This agency argued that it did not have to follow its own interpretive rules. *Id.* at 868. The court agreed citing *Christensen* and did not consider the matter further. *Id.* at 869. This decision is aberrant to the extent the agency repudiated its own rules; this contrasts sharply with the position taken in the other decisions to be discussed.

171. *Dominion Res., Inc. v. United States*, 219 F.3d 359, 365 (4th Cir. 2000).

172. *Russian v. RJR Nabisco, Inc.*, 223 F.3d 286, 297 (5th Cir. 2000).

173. *Id.* at 298.

174. *Id.* at 300.

175. *United States v. Alcoa, Inc.*, 98 F. Supp. 2d 1031, 1036 (N.D. Ind. 2000).

176. *Id.*

177. *Id.*

178. *Id.* at 1036-39.

179. *Id.* at 1039.

180. *Aleman v. Glickman*, 217 F.3d 1191, 1196-97 (9th Cir. 2000).

The National Park Service's "Draft Policies" and litigation position was not given deference,<sup>181</sup> although well reasoned draft policies before they become finalized are to be treated as interpretive rules with the power to persuade.<sup>182</sup> This case was remanded to the district court with the instruction that if the draft policies became a final legislative rule, then *Chevron* deference was in order,<sup>183</sup> otherwise they only had persuasive relevance.<sup>184</sup> Another court found that the *Chevron* deference standard, rather than the *Christensen* power to persuade standard, applied to an agency adjudication.<sup>185</sup> A changed position of an administrative agency received no deference and no respect when a court required that a permit be obtained by a Federal agency.<sup>186</sup> An agency's interpretation of its regulation in a legal brief was given respect since it was consistent with a court's interpretation, especially when that brief reflected long standing agency practice.<sup>187</sup> Where an agency advocates inconsistent interpretations of a provision relatively contemporaneously, not only does the agency receive no deference, it receives no respect.<sup>188</sup>

It appears that courts will use *Christensen* to examine agency interpretive rules with a far more jaundiced eye. This will allow the challenger to an agency action, or non action, to better persuade a court of one's position. How will this impact the pollutee? It depends on whether the agency is seeking aggressive enforcement. In such an instance, this provides the polluter with the opportunity to challenge an agency's interpretation. Since polluters usually have the financial wherewithal to litigate, this is another arrow in their quiver. It gives courts a "hunting licence" to question agency interpretations.

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181. *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000).

182. *Id.*

183. *Id.* at 828-29.

184. *Id.*

185. *Gonzalez v. Reno*, 215 F.3d 1243, 1244-45 (11th Cir. 2000), *cert. denied*, 120 S.Ct. 2737 (2000).

186. *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 887-88 (D.C. Cir. 2000).

187. *Bigelow v. Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000).

188. *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Comm'n*, 212 F.3d 1301, 1304 (D.C. Cir. 2000).

### C. Conclusions

This past term the Court has provided new avenues to attack environmental regulation. *FDA* allows the polluter to attack regulations through examination of post enactment legislative activity as well as stated agency positions in all forums, even if such explications are contrary to the pre-enactment legislative record. Many environmental statutes originated twenty to thirty years ago. What one considered settled is no longer settled. In order to preserve long-enacted statutory provisions, it will probably be necessary to provide savings clauses similar to NANPCA, in future legislation. *Christensen* may be much less of a threat. Its "doctrine" is consistent with principal treatise<sup>189</sup> in this area. Its danger is that it will provide courts hostile to environmental regulation with a justification to question and overturn agency environmental protection efforts. It needs no citation to assert that much of the environmental enforcement details are found in interpretive rules. As was previously noted,<sup>190</sup> *FDA* gave deference to interpretive rules that *Christensen* precluded. Time will tell if the author's misgivings are warranted.

### IV. PREEMPTION DECISIONS

The Court decided four cases<sup>191</sup> which further clarify when state law is preempted. Why should this matter since most environmental regulations are Federal? Preemption may be used by polluters to preclude state and/or local regulation which may be more protective of the environment by contending that weaker Federal laws preclude more stringent state laws.<sup>192</sup> This section will examine the Court's actions and

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189. *Supra* note 122.

190. *Supra* note 134.

191. *United States v. Locke*, 120 S.Ct. 1135 (2000); *Norfolk S. Ry. v. Shanklin*, 120 S.Ct. 1467 (2000); *Geier v. Am. Honda Motor Co.*, 120 S.Ct. 1913 (2000); *Crosby v. Nat'l Foreign Trade Council*, 120 U.S. 2288 (2000).

192. Express preemption is only necessary to prevent a court from limiting or expanding Congressional intent. Article VI of the U.S. Constitution preempts state law. Following is a list of the major

attempt to determine the current parameters of preemption as it relates to environmental law.

*A. United States v. Locke*

This was a unanimous decision.<sup>193</sup> At issue were state statutes to prevent oil spills in navigable waters by water-borne vessels.<sup>194</sup> A critical factor in this decision was the Congressional authority to regulate navigation and international trade.<sup>195</sup> The dominant navigational servitude of the federal government puts a state in a “junior” position when regulating activities impacting navigable waters.<sup>196</sup> State law, otherwise validly enacted, must yield to federal

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environmental statutes which expressly preempt state law. Where there is a provision which seeks to “save” (or preserve) more stringent state remedies, it is noted within the section cited, unless otherwise noted. FIFRA § 24, 7 U.S.C. § 136v (1994); TSCA § 18, 15 U.S.C. § 2617 (1994) (limited savings clause); ESA § 6(f), 16 U.S.C. § 1535(f) (1994) (limited savings clause); SMCRA § 505, 30 U.S.C. § 1255 (1994) (savings clause); CWA § 510, 33 U.S.C. § 1370 (1994) (savings clause); MPRSA § 106, 33 U.S.C. § 1416(d) (1994) (savings clause); Organotin Antifouling Paint Control Act of 1988 (OAPCA) § 11, 33 U.S.C. § 2410(b) (1994) (savings clause); Shore Protection Act of 1988 (SPA) § 4202, 33 U.S.C. § 2622(a) (1994) (savings clause); Oil Pollution Act of 1990 (OPA) § 1018, 33 U.S.C. § 2718 (1994) (savings clause); PHS § 1411, 1413, 1423(h), 42 U.S.C. §§ 300g, 300g-2, 300h-2(a) (1994) (savings clause); SWDA § 3009, 42 U.S.C. § 6929 (1994) (savings clause); CAA §§ 116, 209, 42 U.S.C. §§ 7416, 7543 (1994) (limited savings clause); CERCLA §§ 114, 309, 402, 42 U.S.C. §§ 9614, 9658, 9672 (1994) (savings clause); EPCRA § 321, 42 U.S.C. § 11041 (1994) (savings clause).

193. *United States v. Locke*, 120 S.Ct. 1135, 1140 (2000).

194. *Id.* at 1142. The regulatory scheme was more complex than the simple statement would indicate, but it is sufficient for this discourse.

195. *Id.* at 1143.

196. *See United States v. Rands*, 389 U.S. 121, 123 (1967); *Federal Power Comm’n v. Niagra Mohawk Power Co.*, 347 U.S. 239, 249 (1954).

statutes or treaties.<sup>197</sup> At issue here were “a series of [federal] statutes pertaining to maritime tanker transports and . . . international agreements on the subject.”<sup>198</sup> The court examined the federal statutes and treaties at issue,<sup>199</sup> but at this stage of the case the court found it unnecessary to examine the preemptive impact of the treaties and international agreements since the federal statutes and regulations were determinative.<sup>200</sup>

A threshold issue was the impact of “savings clauses” in the federal statutes which the state asserted allowed it to regulate in this area.<sup>201</sup> The Court stated that such clauses were to be read narrowly especially when there was a “careful regulatory scheme established by federal law”<sup>202</sup> and where the area of federal regulation was not in a field traditionally occupied by the states.<sup>203</sup> The Court went on to state that “where there has been a history of significant federal presence” the “assumption of nonpreemption” is not triggered.<sup>204</sup> Title I of the statute at issue did allow state activity, but the Court reasoned that it should be examined to determine if it conflicted with federal statutes and regulations utilizing the “doctrine” of “conflict preemption.”<sup>205</sup> Under conflict preemption, the inquiry is not limited to whether there is active federal regulation which conflicts with state efforts, but also whether the federal agency which had authority to act declined to do so.<sup>206</sup> To make this latter point more explicit, a decision by a federal agency not to act in an area precludes state regulation in that area under conflict preemption.

Title II of the act at issue contained elements which were subject to “conflict preemption” as well as “field preemption.”<sup>207</sup> Field preemption refers to whether the federal statutory/regulatory regime occupied the regulatory field which the state seeks to regulate. The

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197. Locke, 120 S.Ct. at 1143.

198. *Id.*

199. *Id.* at 1144-45.

200. *Id.* at 1145.

201. *Id.* at 1145-46.

202. *Id.* at 1147.

203. Locke, 120 S.Ct. at 1147.

204. *Id.*

205. *Id.* at 1148.

206. *Id.*

207. *Id.* at 1149.



threshold inquiry is whether this is a field in which states have traditionally acted.<sup>208</sup> In the particular context of field preemption *vis a vis* regulation of navigation, the inquiry is to the extraterritorial impact of the state regulation and whether there is minimal risk of noncompliance.<sup>209</sup> The requirement of a local pilot within a port is a traditional example.<sup>210</sup> A reporting requirement which affects a vessel operator's out-of-state activities is precluded under this analysis.<sup>211</sup>

This decision attempts to create a "bright line" where there is an area of traditional federal dominance. A State's efforts at regulation are subject to conflict preemption and appear to operate under a "presumption" of preemption, since even a decision by a federal agency, which has the power to regulate, to decline to regulate has preemptive effect. The nature of what constitutes such a declination decision is not clear. Is the inquiry limited to whether the agency has authority and, if it has authority, there is not a regulation "on the books?" Must one examine the regulatory record to determine if regulation in the area at issue was proposed by a commenter and then not included in the final regulation? Must one depose the agency's staff to determine if regulation in the area was contemplated but not included in the published proposed regulation to determine a declination? Must there be an affirmative declination that further regulation is not needed to preempt state efforts? There is nothing in *Locke* to state or infer that an explicit affirmative declination is required.

An additional question is also left ambiguous: although it appears "clear" that conflict preemption applies to navigable waters, what are the extent of the navigable waters? The CWA<sup>212</sup> jurisdictional reach is determined by the definition of "navigable waters" as meaning "waters of the United States."<sup>213</sup> The author has previously questioned whether the authority of the CWA extends all the way up the waterway chain.<sup>214</sup> The two principle decisions by the Supreme Court<sup>215</sup>

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208. *Id.* at 1150.

209. *Locke*, 120 S.Ct. at 1150.

210. *Id.*

211. *Id.* at 1152.

212. 33 U.S.C. §§ 1251-1387 (1994).

213. *Id.* at § 1362(7).

214. Whalin, *supra* note 6, at 222-23. The Court may delineate the Constitutional jurisdictional reach of the Clean Water Act. See *Solid Waste Agency of N. Cooke County v. Army Corps of Eng'gs*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S.Ct. 2003 (2000), 2001

concerned waters which were clearly navigable.<sup>216</sup> The Court has indicated, in what may be properly regarded as *dicta*, that Congress intended that any water draining into a navigable water, as well as adjacent wetlands, was within the jurisdictional reach of the CWA.<sup>217</sup> The question raised is whether the Court's holding of reserved sovereignty in *Alden v. Maine*<sup>218</sup> placed a limit on Congressional authority.<sup>219</sup> A further question is where along the waterway chain, if anywhere, does conflict preemption end and field preemption begin? If the waters are navigable in fact,<sup>220</sup> then *Locke* appears to hold that

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U.S. LEXIS 640 (2001). The court avoided directly addressing the question when it held that the statute at issue did not authorize the regulatory interpretation at issue. *Id.* at \*27.

215. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

216. Whalin, *supra* note 6, at 222.

217. *Id.* (citing *Riverside*, 474 U.S. 137-39).

218. 119 S.Ct. 2240, 2246-47 (1999).

219. Whalin, *supra* note 6, at 223. *See also* *Solid Waste Agency of N. Cooke County v. Army Corps of Eng'rs*, 2001 U.S. LEXIS 640 (2001). The misgivings of the author on this matter previously expressed have been enhanced by the Court's recent decision in *Solid Waste Agency*. *See* Whalin, *supra* note 6, at 222-23. Although *dicta*, the Court clearly stated that isolated "ponds and mudflats" were beyond the Constitutional jurisdiction of Congress in Article I of the Constitution. *Solid Waste*, 2001 U.S. LEXIS at \*24-26. The dual sovereignty doctrine of *Alden* (that interestingly was not cited by the Court) has clearly been enhanced by the *dicta* just cited in *Solid Waste Agency*. The characterization of environmental protection as "land and water use" is especially troubling since many environmental statutes could be similarly characterized. *Id.* at \*26.

220. Prior to the CWA there was much litigation on what constituted navigable waters. *See* *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 380 (1940) (holding that navigable waters are waterways that are susceptible to navigation in interstate commerce use, with improvements at any time in the past if those improvements were economically feasible at some point even if never made). *See also* *Economy Light & Power Co. v. United States*, 256 U.S. 113, 117-18 (1921). The fact that a river had not been used as a navigable waterway for almost 100 years is not relevant; only that at some point it was navigable or susceptible of being navigable in interstate commerce.

conflict preemption applies. Where the waters are not navigable in fact, does field preemption apply?<sup>221</sup> This is an important distinction since a declination to regulate by the federal agency has significant consequences under conflict preemption, as contrasted with field preemption.

*B. NORFOLK S. RY. V. SHANKLIN*

This decision concerned whether a railroad crossing constructed with federal funds, whose design was federally approved, preempted state tort claims against a private party.<sup>222</sup> At issue here was whether field preemption applied.<sup>223</sup> The federal preemption statute must “substantially subsume the subject matter of the relevant state law” for field preemption to apply.<sup>224</sup> The allegation was that state tort law imposed an additional duty of care upon a railroad not within the federal regulation governing the construction by a state of a federally funded crossing.<sup>225</sup> The Court held that once the devices were installed in accordance with federal regulations and approval they were deemed to provide an adequate measure of safety for the purposes of state tort law.<sup>226</sup> The dissent noted that this decision displaced state tort law, but did not replace it with a substantive federal standard of care.<sup>227</sup>

The question becomes whether this applies beyond the railroad crossing. There is no answer, but the possibilities are troubling. The courts which have considered the issue post *Shanklin* indicate a cause for concern. In one decision concerning the standard of care under the Federal Employers’ Liability Act (“FELA”),<sup>228</sup> the court considered whether the standard under state law was superseded by a separate

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221. *Solid Waste*, at least in dicta, clearly indicates that the Congressional jurisdictional reach does not include isolated “ponds and mudflats.” *Id.* at \*24-\*26. Thus, it may be asserted that field preemption applies to those areas within the ambit of the isolated wetlands at issue in *Solid Waste*.

222. *Shanklin*, 120 S. Ct. at 1473.

223. *Id.*

224. *Id.*

225. *Id.* at 1475.

226. *Id.* at 1477.

227. *Id.* at 1478.

228. 45 U.S.C. § 51 *et seq* (1994).

Federal statute.<sup>229</sup> The precise issue was whether compliance with the standards of a separate and distinct Federal statute precluded negligence claims under FELA.<sup>230</sup> The court held that compliance with standards set by the separate statute precluded general negligence claims under FELA.<sup>231</sup> In the two instances for which negligence was alleged there was a promulgated standard for each allegation.<sup>232</sup> Although this is not a preemption decision since another Federal statute was concerned, the court cited *Shanklin* to hold that federal common law and statutes on these issues are necessarily displaced.<sup>233</sup> The analysis used by this court appears to coincide with that of conflict preemption though it is unstated. This decision clearly infers that specific regulatory health and safety (implicitly environmental) standards displace (preempt) negligence standards, whether in Federal statute, common law or state law, and it may be characterized as the specific controlling the more general. This should call into serious question the efficacy of any provisions purporting to preserve state laws from preemption where there is Federal activity on the subject.

In another decision,<sup>234</sup> a state enacted legislation regulating railroads after an environmentally disastrous toxic chemical spill.<sup>235</sup> The core issue was to what extent the state statute was preempted by various Federal railroad safety statutes.<sup>236</sup> The court utilized a field preemption analysis and stated that it was utilizing a strong presumption against preemption.<sup>237</sup> After finding several items preempted by various statutes, the court examined whether any were preempted by the dormant commerce clause (Article I, Section 8, Clause 3 of the Constitution).<sup>238</sup> The court held that some provisions were preempted

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229. *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 775 (7th Cir. 2000).

230. *Id.* at 775.

231. *Id.* at 777.

232. *Id.* at 776-77.

233. *Id.*

234. *Union Pac. R.R. Co. v. Cal. Pub. Utilities Comm'n*, 109 F. Supp. 2d 1186 (N.D. Cal. 2000).

235. *Id.* at 1190.

236. *Id.* at 1192-93.

237. *Id.*

238. *Id.* at 1213.

under its analysis.<sup>239</sup> The court was willing to examine each provision individually, rather than examine them collectively. A collective examination may have resulted in all provisions failing.

One recent decision<sup>240</sup> found that the specificity of a savings clause in a Federal safety statute preserved state workmen's compensation and state tort claims from preemption<sup>241</sup> utilizing a field preemption analysis.<sup>242</sup>

If a private party is acting within the parameters of a federal environmental permit, does this establish a standard of care that preempts state laws that impose a higher standard? CWA Section 510<sup>243</sup> seeks to preempt state law, but also preserves state/local/interstate authority that is at least as stringent as federal regulation. State tort law is not specifically mentioned in this section, but it does use the term "standard of performance."<sup>244</sup> In the instance of the CWA, this implies that more stringent standards of any variety are preserved to the states. As has been discussed in *Locke*, there is a presumption of preemption where navigable waters are concerned and a general savings clause is strictly construed in favor of preemption if it would upset the federal regulatory scheme.<sup>245</sup> *Shanklin* implies that where there is compliance with federal regulations there is also a presumption of preemption. CWA Sections 201-219<sup>246</sup> and Sections 601-607<sup>247</sup> establish a program which results in grants or loans for the construction of treatment works. Under *Shanklin*, does compliance with federal regulations preclude liability under state law which may set more stringent standards, or does the general savings clause noted above allow liability? If a project is funded with federal funds, there is no savings clause, the terms of the federal grant are met, and the project

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239. *Union Pac.*, 109 F. Supp. 2d at 1218-19. The regulation of railroads are long-standing feature of Federal jurisdiction. One may speculate that a less receptive court could utilize these four decisions to preclude all state regulation under this particular statute.

240. *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160 (E.D.N.Y. 2000).

241. *Id.* at 163.

242. *Id.* at 162.

243. 33 U.S.C. § 1370 (1994).

244. *Id.*

245. *United States v. Locke*, 120 S.Ct. 1135, 1147 (2000).

246. 33 U.S.C. §§ 1281-1299 (1994).

247. 33 U.S.C. §§ 1381-1387 (1994).

results in environmental harm under state law, is liability precluded under *Shanklin* against a private party who causes environmental harm while using that project? *Shanklin* infers that liability is precluded.

*C. Geier v. American Honda Motor Company, Incorporated*

The third preemption decision concerns whether state common law tort remedies are preempted by a Federal safety standard notwithstanding the existence of a savings clause.<sup>248</sup> The Court first analyzed whether the statutory preemption of state safety standards<sup>249</sup> preempts state common law tort remedies, state statutory remedies and standards, but for the savings clause.<sup>250</sup> The statute's savings clause, however, only "saved" "liability at common law."<sup>251</sup> This limited the clause only to actions at common law and did not include any remedies created by state statute.<sup>252</sup>

Notwithstanding the intent to "save" particular state remedies, the Court went on to consider whether the remedies saved by Congress were precluded by the Court's explication of conflict preemption.<sup>253</sup> One conclusion is obvious from this and the two decisions previously discussed: savings clauses will be construed against preserving state remedies where there is extensive Federal regulation, although the Court stated that where the Federal standard established a minimum standard, the state remedy imposing a higher standard would not be preempted.<sup>254</sup> The practical impact of this *dicta* is somewhat dubious given the Court's emphasis on a "careful regulatory scheme"<sup>255</sup> or where the state standard would impose a "special burden."<sup>256</sup> Although the Court is not specific as to the boundaries of "special burden," it appears that where

248. *Geier v. Am. Honda Motor Co., Inc.*, 120 S.Ct. 1913, 1916-18 (2000).

249. The Court found it unnecessary to distinguish between "standards" and "requirements." *Id.* at 1918.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1919.

254. *Geier v. Am. Honda Motor Co., Inc.*, 120 S.Ct. 1913, 1919 (2000).

255. *Id.*

256. *Id.* at 1922.

the state standards frustrate national uniformity, which will be the case where any state standards are involved, then there appears to be an unstated presumption that they run afoul of conflict preemption.<sup>257</sup>

The Court made this a bit more explicit when it concluded that the imposition of conflict preemption did not require an explicit statement of preemption, either in the statute or in the implementing regulations.<sup>258</sup> The Court creates the presumption that neither Congress nor the implementing agency intends to permit a "significant" conflict.<sup>259</sup> This decision appears to establish that savings clauses are to be narrowly construed and that they may be overcome by conflict preemption.

It must be noted that the Court has decided against an individual seeking redress from an entity operating nationally and/or internationally. There appears to be an underlying theme that such entities are to be subject to only one set of national rules, notwithstanding Congressional efforts to preserve state standards in some instances. In this decision, Congress attempted to explicitly, at least in the author's opinion, preserve particular state remedies. The Court, however, still found this effort unavailing. If the aggrieved party had not been an individual, would the result have been different?

Somewhat at odds with the foregoing analysis is a recent decision<sup>260</sup> concerning a personal injury action about defective labeling of a chemical<sup>261</sup> which the defendants alleged was preempted by FIFRA.<sup>262</sup> The court proceeded under a conflict preemption analysis<sup>263</sup> and distinguished *Geier* because FIFRA did not have a savings clause.<sup>264</sup> The court found it significant that the EPA limited its

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257. *Id.* at 1921.

258. *Id.* at 1927.

259. *Id.* The Court provided no explication as to what constituted "significant." Given the tenor of this decision, it is not certain that it is more than a peppercorn.

260. *Lucas v. BIO-LAB, Inc.*, 108 F. Supp. 2d 518 (E.D. Va. 2000).

261. *Id.* at 519.

262. *Id.*

263. *Id.* at 520.

264. *Id.* at 525. The author must question this assertion because *Geier* stated that state tort remedies were preempted but for the savings clause under an express preemption analysis. *Geier*, 120 S.Ct. at 1918. Since the only remedies saved were those at common law, the Court the

regulation of pesticide packaging to require child-resistant packaging.<sup>265</sup> The court concluded that state remedies were not preempted.<sup>266</sup> This court read the FIFRA preemption clause very narrowly.<sup>267</sup> The court also found the preemption argument pursuant to FIFRA registration requirements<sup>268</sup> to be unavailing since it imposed no packaging requirements other than child-resistant packaging.<sup>269</sup> The court found great significance in the EPA's "obvious" decision not to require more extensive requirements even though it had the power to impose them.<sup>270</sup> This is quite inconsistent with *Locke's* holding that declination had significant preemptive effect.<sup>271</sup>

*D. Crosby v. National Foreign Trade Council*

In *Crosby*, a state sought to bar the purchase of goods or services by the state from any entity doing business with a particular country.<sup>272</sup> Shortly after the state enacted its sanctions, Congress passed legislation

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went on to examine whether the remedies saved fell under conflict preemption. *Id.* at 1919. The absence of a savings clause should strengthen the basic analysis of *Geier* in this case.

265. *Id.* at 524.

266. *Lucas v. BIO-LAB, Inc.*, 108 F. Supp. 2d 524, 525 (E.D. Va. 2000). This conclusion conflicts somewhat with *Locke* (which was not addressed by this court) which held that conflict preemption inquiry includes whether the federal agency had authority to act but declined. *Locke*, 120 S.Ct. at 1148. The fact that EPA limited its packaging regulation leads to a "*Lockean*" conclusion that EPA decided that this was all the regulation which was appropriate and state additional standards were preempted, especially when one considers the pervasive regulatory scheme of FIFRA.

267. *Id.* at 528-29.

268. *Id.* at 526-27.

269. *Id.* at 528.

270. *Id.* at 529.

271. *Locke*, 120 S.Ct. at 1148. *Cf.*, *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 794 (10th Cir. 2000) (finding that the Federal statutory provision specifically preserved state standards where the Federal statute and implementing regulations were silent).

272. *Crosby v. Nat'l Foreign Trade Council*, 120 S.Ct. 2289, 2291 (2000).



enacting a scheme of sanctions upon the same country.<sup>273</sup> The Federal statute did not have a preemption of state law provision.<sup>274</sup> The issue before the Court was to what extent, if any, state law had been preempted.<sup>275</sup>

The Court restated that the absence of express statutory preemption was unpersuasive since field and conflict preemption inquiries were available.<sup>276</sup> The Court proceeded to utilize a conflict preemption analysis and stated that it would inquire whether the state statute was an obstacle to the accomplishment of the "full purposes and objectives" of the Congressional enactment.<sup>277</sup> The Court went on to explain the "test" as follows:

what is a sufficient obstacle is a matter of judgement, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished-if its operation within the chosen field must be frustrated and its provisions be refused their natural effect-the state law must yield to the regulation of Congress within the sphere of its delegated power.<sup>278</sup>

This is a rather broad hunting license for a court. It would appear that a state statute on the same subject as a Federal statute, absent express savings clauses, triggers conflict preemption under this test.

Although the Court stated that it did not reach the issues concerning foreign affairs powers and foreign commerce powers,<sup>279</sup> it is apparent to even a casual reader that this was an underlying theme of

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273. *Id.*

274. *Id.* at 2301.

275. *Id.* at 2293.

276. *Id.* at 2293-94.

277. Crosby, 120 S.Ct. at 2294.

278. *Id.* [Citations omitted].

279. *Id.* at 2294 n.8.

the Court's analysis. Should this expansive test be limited to state actions that implicate foreign affairs and/or foreign commerce? The answer is probably. The Court cited national security powers,<sup>280</sup> impacts upon Presidential flexibility in international affairs,<sup>281</sup> the ability of the President to speak for the United States with one voice,<sup>282</sup> protests of foreign nations,<sup>283</sup> the filing of trade complaints under international treaties,<sup>284</sup> complicating dealings with foreign nations,<sup>285</sup> and nuances of foreign policy which are a prerogative of the executive branch.<sup>286</sup> This litany leads one to conclude that the test in *Crosby* should be limited to state laws, whether statutes or common law, which impact upon the foreign policy interests of the United States where there is a Federal statute on the general issue. Not answered by this decision is whether the same analysis would apply in the absence of a Federal statute.

Assuming the limited nature of this decision, what environmental law impacts will there be? The obvious one is in the area of international trade that was specifically cited by the Court.<sup>287</sup> If a state, or locality for that matter, enacts a provision which may impact international trade such as ecolabeling,<sup>288</sup> recycling requirements, requirements to plant trees, to lessen global warming, does this decision make it probable that such an effort would be preempted if there is a Federal statute somewhat on point? This decision certainly leads to the conclusion that state/local activity is severely circumscribed. This decision provides an incentive for a polluter to allege that activities subject to state proscription which impact upon the ability to do international business (reduce profits or require different product or business standards in the state as compared to a foreign jurisdiction for example) preempts state law if the polluter can point to a Federal statute

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280. *Id.* at 2295.

281. *Id.* at 2296.

282. *Id.* at 2298.

283. *Crosby*, 120 S.Ct. at 2299.

284. *Id.*

285. *Id.* at 2300.

286. *Id.* at 2301.

287. *Id.* at 2299-2301.

288. Examples are wood products produced by sustainable yield forestry practices, dolphin-safe tuna, and coffee grown under natural forest cover.

somewhat on point. The expansive language of the test indicates that the polluter may have a reasonable chance of success unless there is a savings clause explicitly on point in the Federal statute.

### *E. Conclusions*

Is it possible to ascertain intelligible principles from these four decisions or should each be considered to constitute its own body of preemption law? Litigation subsequent to these decisions does not illuminate the question.<sup>289</sup> It is worth remembering that in each of the four decisions, the Court found preemption of state laws. Where there is a traditional Federal interest such as navigation and international trade as in *Locke*<sup>290</sup> or foreign policy and national security concerns as in *Crosby*,<sup>291</sup> it is obvious that the Court is most willing to find preemption. Does the principle in *Crosby* that the entire scheme of the federal statute, including what is implied, be considered in deciding conflict preemption have application outside its area? If so, then many state remedies are at risk. *Shanklin* preempted a state's wrongful death action against a private party that was not a party to a Federal construction project.<sup>292</sup> Although wrongful death actions are a traditional area of state activity,<sup>293</sup> the Court held that the Federal activity established a safety standard that preempted state law.<sup>294</sup> It appears that *Shanklin* infers a broad reach in field preemption analysis. *Geier* appears to hold that savings clauses are to be narrowly

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289. See, e.g., *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322 (N.D. Ga. 2000); *James v. Mazda Motor Corp.*, 222 F.3d 1323 (11th Cir. 2000); *Davis v. Nissan Motor Corp. in the U.S.A.*, 2000 U.S. Dist. LEXIS 7851 (N.D. Il. June 5, 2000); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377 (7th Cir. 2000).

290. *Locke*, 120 S.Ct. at 1143.

291. *Crosby*, 120 S.Ct. at 2295-96, 2298-99.

292. *Shanklin*, 120 S.Ct. at 1473.

293. FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS*, VOL. 4, § 24.1 (2d ed. 1986); PROSSER & KEETON *ON THE LAW OF TORTS*, § 125A (5th ed. 1984).

294. *Shanklin*, 120 S.Ct. at 1477.

construed<sup>295</sup> and that such clauses must withstand analysis under conflict preemption.<sup>296</sup>

Where does this leave state remedies in the area of environmental law? Where navigable waters<sup>o</sup> are concerned, *Locke* clearly implies that state regulation has a substantial burden to overcome. Despite *dicta* in *Geier* approving of state regulation where the Federal regulation establishes a "floor,"<sup>297</sup> one must question whether this supersedes the preemptive presumption in *Locke*.<sup>298</sup> One example may assist with illuminating the conundrum. Ballast water is the primary inoculation vector for aquatic nonindigenous species.<sup>299</sup> If it is possible to trace inoculation to a specific vessel, will a state common law action for damages or other relief be preempted?<sup>300</sup> NANPCA and its amendments establish a regulatory scheme for ballast water.<sup>301</sup> Since a tort remedy would establish an additional requirement for vessels in foreign commerce, *Locke* would appear to preclude use of this remedy.

The pervasive nature of most Federal environmental statutes appears to present a presumption in favor of preemption unless the statute has a very explicit savings clause. If the "*Lockean*" doctrine, that preemption inquiry includes agency silence where it had authority to act<sup>302</sup> applies beyond navigable waters, then the existence of more stringent state regulation even when authorized is substantially in doubt.

## V. MISCELLANEOUS DECISIONS

There are two decisions which deserve some examination and which did not fit into one of the previous categories although one was discussed earlier. *Vt. Agency* may provide an opportunity for a pollutee

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295. *Geier*, 102 S.Ct. at 1918.

296. *Id.* at 1919.

297. *Id.*

298. *Locke*, 120 S.Ct. at 1147.

299. *Aquatic*, *supra* note 140, at 83-7.

300. *Id.* at 115-19, which discusses this remedy as well as articles cited in notes to those pages.

301. *Id.* at 119-24.

302. *Locke*, 120 S.Ct. at 1148.

to bring an action under the FCA<sup>303</sup> against a polluter where the polluter has proffered a request for payment with Federal funds.<sup>304</sup> There is no case law on this point, and therefore, the inquiry will proceed with hypotheticals. Assume that the statute and/or regulations and/or contract under which the polluter is seeking payment contains a provision that the party has complied with Federal laws and that the provision can be construed to include environmental laws. Filing a claim for payment under such a circumstance where the claimant is in violation of such statutes runs afoul of the FCA. What constitutes a claim which may meet this hypothetical? Defense contractors, Medicare reimbursements (hospitals generate hazardous waste daily), and requests for payments by farmers are but a few of the possibilities. The question becomes whether the environmental violation must be an integral part of the activity for which payment is claimed. There is no answer, although there may well be a reluctance by courts to impose liability where the activity giving rise to the environmental violation is unrelated to the activity for which payment is claimed. The advantage to this approach is that the standing difficulties for a plaintiff are far less. Under *Vt. Agency*, if one has a valid FCA claim one has standing. This is a potentially powerful tool to vindicate pollutee rights.

*Village of Willowbrook v. Olech*<sup>305</sup> concerned whether there could be a class of one which could invoke the Fourteenth Amendment's equal protection clause.<sup>306</sup> The court found this was permissible,<sup>307</sup> but Justice Breyer cautioned that the decision if read broadly could be construed to bring all zoning decisions within the ambit of the Fourteenth Amendment.<sup>308</sup> He noted that a critical element was the evidence of vindictive acts by the Village.<sup>309</sup> The *Per Curiam* opinion,<sup>310</sup> however, did not make this an explicit condition of establishing a class of one. It all depends.

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303. 31 U.S.C. §§ 3729-3733 (1994).

304. *Vt. Agency of Natural Res. v. United States*, 120 S.Ct. 1858, 1860-61 (2000).

305. 120 S.Ct. 1073 (2000).

306. *Id.* at 1074.

307. *Id.* at 1075.

308. *Id.*

309. *Id.*

310. *Id.* at 1074.

## CONCLUSION

The common thread through each of these diverse decisions is that in all but *Laidlaw*, the Court has held against protecting the less powerful from the powerful.<sup>311</sup> The polluter has been provided with new weapons to evade responsibility for debauching the environment and the pollutee has had its ability to seek redress either through regulatory action by a governmental entity or through the mechanism of the citizens' suit eroded.

Although the Court in *Laidlaw* established a "bright line" that abatement after the commencement of suit does not deprive a plaintiff of standing, but only raises the issue of whether the action is moot,<sup>312</sup> it also indicated that the redressability element of standing could be negated. This element could be negated if the civil penalty was not sufficient to deter a defendant's future conduct.<sup>313</sup> The court implied that the geographical proximity of the plaintiffs to the location of the illegal pollution was an important factor in establishing the injury in fact element.<sup>314</sup>

*Vt. Agency* has provided a road map for polluters to challenge a citizens' suit on the grounds that it violates the Appointments Clause and/or the Take Care Clause.<sup>315</sup> A majority of the Court is apparently willing to entertain such a challenge. If successful, this will deprive the pollutee of the major weapon, circumscribed though it may be, to protect human health and the environment from the depredations of the polluter.

The Eleventh Amendment expostulations of the Court have provided a safe haven for states who are polluters, as well as provided a method to defeat a citizens' suit against a polluter if a court can be

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311. Although the plaintiffs prevailed in *Laidlaw* against the polluter, the Court raised more questions than it settled and, as was noted, provided new opportunities for the polluter to evade justice.

312. *Laidlaw*, 120 S.Ct. at 708.

313. *Id.* at 707. This *dicta*, assuming the Court meant what it said, serves to absolve the wealthier debauchers of the environment. If the penalty is affordable to the defendant, then the redressability element is defeated, assuming the Court meant what it said. The powerful win again.

314. *Id.* at 705-706.

315. *VT Agency*, 120 S.Ct. at 1865, n.8.

persuaded that a state is an indispensable party. Even more troubling is its carving out a doctrine of state sovereignty<sup>316</sup> which may act to limit Congressional ability to address environmental protection.<sup>317</sup> This line of cases also evinces a predilection to go beyond traditional inquiries and ask why Congress acted and whether Congress had sufficient evidence to make its decision.<sup>318</sup> Again, these decisions were adverse to the less powerful and have implications which provide a basis for the polluter to escape deserved retribution.

The administrative law decisions continued the decisional march against the less powerful: children and adolescents in one instance,<sup>319</sup> and workers seeking pay for working overtime in the other.<sup>320</sup> FDA has now opened a new avenue of attack upon environmental laws by including post enactment expressions of Congress and the agencies as determinative of Congressional intent.<sup>321</sup> The Court also opened the door to allow extrinsic, post enactment legislation to determine the parameters of the original statute.<sup>322</sup> Confusing the mosaic, the Court gave *Chevron* deference to agency pronouncements before the promulgation of the regulation at issue,<sup>323</sup> none of which were legislative rules. The only legislative rule promulgated on the subject matter pursuant to the statute at issue was not even accorded respect. This is contrary to the subsequent decision in *Christensen* in which the Court stated that *Chevron* deference was only to be accorded legislative rules<sup>324</sup> and that interpretive rules were only entitled to respect and limited to their power to persuade.<sup>325</sup> There are two conclusions from

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316. Alden, 119 S.Ct. at 2246-47; Whalin, *supra* note 6, at 201-04, 222-23. The Court's recent decision in *Solid Waste* has given the author's misgivings about the direction of the Court even more substance. *Supra* note 219.

317. Whalin, *supra* note 6, at 222-23. *See also* United States v. Morrison, 120 S.Ct. 1740 (2000) (although not addressed in this article, it and *Solid Waste* are the latest in a line of decisions limiting Congressional authority).

318. Whalin, *supra* note 6, at 227-29.

319. FDA, 120 S.Ct. at 1297.

320. Christensen, 120 S.Ct. at 1659.

321. FDA, 120 S.Ct. at 1313.

322. *Id.* at 1306.

323. *Id.* at 1314.

324. Christensen, 120 S.Ct. at 1662.

325. *Id.* at 1663.

this contradiction: interpretive rules get deference when they further the Court's predilection; legislative rules which assist the less powerful may not receive respect.<sup>326</sup> Polluters have additional weapons with which to challenge environmental regulation.

The preemption decisions continue the mosaic of absolving the powerful. In each instance, the Court held against more stringent regulation of the powerful. Even if a statute has a clause purporting to "save" more stringent state regulation, that clause will be construed as narrowly as possible and the state law will still be preempted under conflict or field preemption, if there is extensive federal activity in the area. General savings clauses will have little effect. It is unlikely that any of the environmental savings clauses will withstand preemption. Agency declination to regulate also has preemptive effect. This doctrine of declination is also implicit in *FDA*.

*Willowbrook*, as Justice Breyer noted, raises the real possibility that zoning decisions may have direct pipeline to Federal court.<sup>327</sup> If Justice Breyer is correct, then this will provide developers with a powerful tool to use against efforts to limit sprawl.

Difficult to reconcile is the extreme solicitude for "states' rights" evinced in the Eleventh Amendment decisions with the opposite predilection to preempt any state law which "intrudes" into an area of Federal regulation in the Preemption Decisions. The one "intelligible principle" common to all nine decisions is that in each the less powerful loose.

The past thirty years has seen a growing awareness of the importance of protecting our ecology from degradation and much progress has been made in reversing the results of degradation. In spite of this progress, the Court this past term has provided the polluters with additional methods of frustrating environmental protection while at the same time diminishing the tools the pollutee has for self-help. A majority has clearly earned the title of The Polluter's Court.

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326. Solid Waste strengthens this conclusion. *See supra* notes 134 and 163.

327. *Willowbrook*, 120 S.Ct. at 1075. Justice Breyer's concern may be compounded by the *dicta* in Solid Waste that infers that land use matters (that may well include Federal environmental protection) are beyond the authority of article I of the Constitution. *Supra* note 219.



