2005

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Recommended Citation
Scott Josephson, This Dog Has Teeth... Cooperative Federalism and Environmental Law, 16 Vill. Envtl. L.J. 109 (2005).
Available at: http://digitalcommons.law.villanova.edu/elj/vol16/iss1/6

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THIS DOG HAS TEETH . . . COOPERATIVE FEDERALISM AND ENVIRONMENTAL LAW

I. INTRODUCTION

"Federalism is boring," or so certain law students say.1 The federal regulatory state has been growing largely unchecked for the past thirty years, leaving a strong national authority and a relatively weak state program in terms of environmental programs.2 Federalism, however, is still an important factor in deciding many current environmental issues.3

The Clean Air Act (CAA) is described as an "experiment in federalism" because it gives the states a role in regulating air pollution.4 In fact, what many consider to be federal environmental policies, are in reality state environmental policies.5 However, in the past decade, the United States Supreme Court has slowly been overturning federal statutes on the grounds that the power conferred in them is best left to the states.6 This indicated that the Court revived the federalism doctrine, which could be problematic for the Environmental Protection Agency (EPA) and its quest for full state implementation of the CAA.7

In January 2004, the Court decided Alaska Department of Environmental Conservation v. Environmental Protection Agency (Red Dog)8 following a number of other major federalism cases.9 In those

2. See id. at 1184-85 (noting various federal environmental acts that have been passed over past thirty years, and their effects on state programs).
3. See id. at 1185 (discussing fights between EPA and states over implementation of current environmental laws).
4. See Michigan v. EPA, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (discussing origins of Clean Air Act and what its intentions were).
9. See Charles Lane, Justices Decide EPA Can Overrule States; Bar to Zinc Mine Expansion is Upheld, WASH. POST, January 22, 2004 at A12 (discussing how Court
cases, a majority of the Court recognized that the Constitution created a limited federal government, and reserved most rights to the states. In *Red Dog*, the Court upheld a law similar to those it previously overturned.\(^\text{10}\)

The erratic nature of the Supreme Court in recent federalism jurisprudence is having a profound impact on environmental law.\(^\text{11}\) Most federal environmental laws rely in some degree upon the states for their implementation, but the states are not always willing to cooperate.\(^\text{12}\) Many federal statutes contain inducements for the states to follow federal law, allowing the federal government to set policy for the states.\(^\text{13}\) Therefore, any constitutional jurisprudence restricting the ability of Congress to set such policy limits would inevitably upset the delicate balance between the federal and state governments with respect to environmental policy.\(^\text{14}\)

This Comment reviews *Red Dog* in the context of the Supreme Court's recent federalism jurisprudence and assesses its impact on environmental law.\(^\text{15}\) Section II provides a brief historical overview of the federal-state relationship in the environmental context and the Supreme Court's recent federalism decisions.\(^\text{16}\) Section III applies *Red Dog* to earlier circuit court cases and discusses its impact on cooperative federalism.\(^\text{17}\) Lastly, Section IV suggests that the nation's interests would be better served with a federal environmental plan that works in conjunction with the states.\(^\text{18}\)

\(^{10}\) See id. (noting dissent's argument that this case disagreed with previous Supreme Court federalism jurisprudence).

\(^{11}\) See Adler, supra note 5, at 574 (discussing possible positive environmental effects of Supreme Court decision in *U.S. v. Printz*).

\(^{12}\) See id. at 573 (discussing possible positive environmental effects of Supreme Court decision in *U.S. v. Printz*).

\(^{13}\) See id. at 575 (noting that states are often reluctant to follow federal law without inducements).

\(^{14}\) See id. (discussing delicate balance between federal and state governments and how it has ability to fall apart if law regarding it is ruled unconstitutional).

\(^{15}\) For a discussion on cooperative federalism and Supreme Court jurisprudence, see infra notes 19-95 and accompanying text.

\(^{16}\) For a discussion of *Red Dog*, see infra notes 96-117 and accompanying text.

\(^{17}\) For a discussion of *Red Dog*'s application to current environmental policy, see infra notes 120-69 and accompanying text.

\(^{18}\) For an analysis of cooperative federalism, see infra notes 157-69 and accompanying text.
II. BACKGROUND

A. Federalism

Federal funding of environmental research and state level pollution control efforts began largely in the late 1940s. Originally, federal environmental regulations generally dealt with issues such as keeping waterways unobstructed. Beginning in the early 1960s, with the publication of the book, *Silent Spring*, environmental issues began to take more precedence on the national level. This book, coupled with a number of highly visible environmental disasters, led to an explosion of federal environmental regulations beginning in the early 1970s, including the CAA in 1970. These laws established national standards, but also strongly encouraged and sometimes coerced state cooperation.

While the early laws were successfully implemented, concerns arose about the ability of a nationalized regulatory system to address local environmental problems. For example, in 1995 the National Academy of Public Administration concluded, "EPA and Congress need to hand more responsibility and decision making authority over to the states." Many feel that federal environmental regulation is "bloated and overly bureaucratic," and needs improvement. It is in this framework, as "national environmental policy has surged to the forefront of contemporary federalism debates," that recent Supreme Court decisions concerning regulatory federalism have had an impact on environmental law.

19. See Adler, supra note 5, at 576 (discussing history of state and federal environmental statutes and their funding).
20. See id. (discussing general purpose of most environmental standards during this period).
23. See Adler, supra note 5, at 576-78 (discussing enforcement of federal laws at state level).
24. See Dwyer, supra note 1, at 1195-96 (stating that local entities reserve substantial power under various environmental regulations).
25. See Adler, supra note 5, at 577 (citations omitted) (discussing ways EPA can become more efficient).
26. See id. (noting that Congress and EPA's environmental plans resemble "Soviet-style planning").
27. See id. at 577 (citations omitted) (noting recent Supreme Court rulings have had effect on environmental law).
1. Cooperative Federalism

Federal laws that do not directly give oversight agencies the authority to regulate state programs generally follow a model of "cooperative federalism." Fe28 The EPA must approve state attempts to implement federal environmental statutes.29 If a state does not cooperate with the EPA it can be subject to penalties, such as losing federal funds.30 Each state has the flexibility to create environmental programs that suit its needs, but the programs must be within federal law if they want to receive federal funds. Some commentators have noted that cooperative federalism is a "partnership between the state and federal governments, albeit an unequal one."32

Without cooperative federalism, states would risk a complete nationalization of their environmental programs.33 Various statutes employ cooperative federalism, such as the CAA, the Clean Water Act, the Resource Conservation and Recovery Act and the Surface Mining Control and Reclamation Act.34

There are generally three reasons given for using cooperative federalism.35 First, if the federal government managed environmental policy it would be cost prohibitive and greatly inefficient.36 Since the inception of these programs in the late 1960s and early 1970s, numerous analysts have noted that without state cooperation, a centralized federal environmental program is doomed to fail.37 This is because of the vastly different landscapes around the

28. See id. at 578-79 (explaining cooperative federalism model).
29. See Red Dog, 124 S. Ct. at 983, 991 (discussing system EPA has where it can overrule state regulatory agency decisions).
30. See Robert V. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. Rev. 1141, 1166 (1995) (citations omitted) (discussing that using its spending power Congress can attach conditions on states' receipt of federal funds). Congress may do this if the conditions "bear some relationship to the purpose of federal spending". See id. at 166.
31. See Adler, supra note 5, at 578 (discussing state plans to implement environmental policy and how they are subject to federal approval).
32. See id. (discussing state/federal government relationship in context of environmental federalism).
34. See id. (discussing various federal acts that employ cooperative federalism).
35. See id. (discussing three reasons for cooperative federalism).
36. See Adler, supra note 5, at 579 (noting problems if federal government completely controlled environmental policy without state support).
country and the inordinate cost associated with an exclusively national program.38

Second, environmental issues vary in each state.39 As former Representative Thomas "Tip" O'Neil (D-MA) once famously said, "[a]ll politics are local," and the same seemingly goes for the environment.40 Additionally, John Dwyer noted "the knowledge necessary to administer any air pollution control program . . . can only be found at the local level."41 Each state's environment is different, so environmental policies are necessarily going to be different in Los Angeles than they are in Bismarck.42

The third issue is local politics because environmental programs can rarely be implemented without inconveniencing someone, so they invariably cause strife.43 Without local political support, implementing environmental policy can be extremely difficult, if not impossible.44 If local support is gained, however, it will be easier to implement federal environmental programs, and if problems arise local politicians can always blame the "great federal bureaucracy."45

While cooperative federalism is not perfect, it is considered the best available method.46 Other alternative methods, such as federal preemption or federal coercion, are more controversial and constitutionally suspect.47 On the other hand, cooperative federalism has already been approved by the Court.48

38. See id. (discussing problems associated with federal government mandating state functions in environmental context).
39. See id. (discussing how environmental issues vary given divergent political and economic landscapes of each state).
41. See Adler, supra note 5, at 579 (citing Dwyer, 54 Md. L. Rev. at 1218) (noting how solutions to environmental problems are found at state level).
42. See id. (noting how pollution levels vary between U.S. regions).
43. See id. (discussing how environmental regulations invariably effect land use, lifestyles and economic situation).
44. See id. (noting effect from lack of local political support).
45. See Adler, supra note 5 at 579-80 (discussing what happens when local cooperation for environmental policy is gained).
46. See id. (discussing cooperative federalism).
47. See id. (discussing alternatives to cooperative federalism and how they may or may not actually be successful).
48. See id. (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289). This case discusses the Supreme Court's endorsement of cooperative federalism. See id.
2. Problems of Cooperative Federalism

State and local governments have fiercely resisted federally imposed environmental programs, despite the federal government's efforts to try and maintain a closer federal-state relationship. Environmental standards have caused hostility between the federal and state governments, especially due to unfunded mandates. State and local governments must comply with unfunded mandates. However, the states often do not receive federal funding to implement the mandates, thereby forcing state funds to be spent on federal programs.

In 1994, Governing Magazine noted that there were nearly "four hundred separate subsections of the Code of Federal Regulations involving environmental matters which applied to local governments, and many were unfunded mandates." Congress attempted to deal with the problem with the Unfunded Mandates Reform Act of 1995. This law, however, has proven to be "more symbolic than substantive." It set up procedures for creating new mandates while doing "nothing to limit or reduce those mandates already in existence."

Another problem of cooperative federalism is that the federal government thinks in "black and white terms." This means the government is seen as too rigid, often insisting that a rule be followed a certain way, whether it is sensible for a state to do so or not. One commentator noted, "[m]any states resented the

49. See id. (noting limits of state-federal cooperation).
50. See Adler, supra note 5, at 580-82 (discussing problems of unfunded mandates).
51. See id. at 580 (noting that unfunded mandates have long been problem between state and federal governments).
52. See id. (discussing how states often lack funds to comply with federal mandates).
53. See id. (citations omitted) (noting that state officials often have wary relationship with EPA).
54. See id. at 581 (citing Rena I. Steinzor, Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?, 81 MINN. L. REV. 97, 99-100 (1996) (noting that unfunded mandate reform may not have anticipated effect of lowering number of unfunded mandates now required by Congress).
55. See Adler, supra note 5, at 581 (citations omitted). Here Adler discusses the value of unfunded mandates and the need to streamline the process. See id.
56. See id. (discussing unfunded mandates).
57. See id. at 582 (noting rigidity of federal government in interpreting laws).
58. See id. (discussing state official and American public's views of federal control).
[EPA]'s attempt to subject them to a uniform policy regarding civil penalties and some flatly refused to abide by its terms."  

B. Federalism and the Supreme Court

1. Background

While the political pressure has grown to give states more autonomy over environmental matters, the Supreme Court has only recently reopened the long dormant idea of federalism. Beginning in 1976 with *National League of Cities v. Usery* (*Usery*), the Court invalidated a Congressional attempt forcing state and local governments to comply with the wage provisions of the Fair Labor Standards Act. In his majority opinion, Justice Rehnquist noted that the Supreme Court has never doubted "that there are limits upon the power of Congress to override state sovereignty," and this case was an example of those limits. The Supreme Court set up a test to determine whether a state was immune to federal regulation. The test created was whether the governmental function in question was an integral or traditional state function. If the function was integral or traditional, then the state function was immune from the reach of federal law. Following *Usery*, numerous other attempts to challenge federal laws on the grounds they infringed upon state sovereignty failed.


60. See Adler, *supra* note 5, at 582 (discussing recent resurgence in federalism related cases before Supreme Court).

61. See *National League of Cities v. Usery*, 426 U.S. 833 (1976) [hereinafter *Usery*] (noting Congress' power under Commerce Clause could be invalidated if it interfered with state sovereignty).

62. See id. at 855 (stating Congress may not use Commerce Clause to force states into choices about how they run their own governments).

63. See id. at 842 (discussing history of Tenth Amendment and Supreme Court's interpretation of it).

64. See id. at 852 (discussing Supreme Court's test to determine whether state was immune from reaches of federal law).

65. See id. (discussing Court's test).

66. See *Usery*, 426 U.S. at 852-53 (noting results of Supreme Court's test).

67. See Adler, *supra* note 5, at 584 (discussing various cases where states attempted to argue that federal law was intruding on traditional state matters, but Supreme Court rebuffed them).
In *Garcia v. San Antonio Metropolitan Transit Authority (Garcia)*, the Supreme Court reversed the *Usery* ruling. The Supreme Court held it was a legislative function to determine areas of state sovereignty, rather than a judicial function. The dissent claimed that this decision would cripple the Tenth Amendment, and effectively leave Congress unchecked when it came to using the Commerce Clause power. In 1988, the Supreme Court reaffirmed *Garcia* in *South Carolina v. Baker*.

2. Revival of Federalism

Beginning in the early 1990s the Supreme Court revived the federalism doctrine. In *New York v. United States (New York)*, the Supreme Court invalidated various provisions of the Low-Level Radioactive Waste Policy Act, which required states to either accept ownership of waste created within their own borders or regulate it according to federal law. The Court held these provisions infringed on state sovereignty because the federal government was usurping a traditional state function. This decision proscribed the methods that Congress may use to set national policy goals for the states. However, it also allowed for "cooperative federalism," because Congress could give states a choice between administering a program in accordance with federal standards or allowing for federal preemption of state programs.

68. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) [hereinafter *Garcia*] (holding that city transit authority was not immune from Act's minimum wage and overtime requirements).

69. See id. at 531 (stating that *Usery* ruling has been unworkable in practice).

70. See Adler, supra note 5, at 585 (citing *Garcia*, 469 U.S. at 560) (noting that Congress is proper body to determine this issue, rather than judiciary).

71. See *Garcia*, 469 U.S. at 560 (Powell, J. dissenting) (stating that majority was giving Congress too much power regarding Commerce Clause).


73. See Percival, supra note 28, at 1165-66 (discussing hostility of Congress and Supreme Court to federal regulation and Court's changing view of state sovereignty).

74. See *New York v. United States*, 505 U.S. 144 (1992) [hereinafter *New York*] (discussing how Low-Level Radioactive Waste Policy Act's "take-title" provision, requiring states to accept ownership of waste or regulate according to federal regulations was invalid in face of Tenth Amendment).

75. See id. at 145 (stating that Congress cannot coerce states into taking ownership of waste within state borders).

76. See id. at 145-47 (noting reasons why "take-title" provision of law fails).

77. See Adler, supra note 5, at 587 (discussing effect of *New York* decision).

78. See id. (citations omitted) (discussing possible Congressional programs that would pass Constitutional muster).
The Supreme Court's new found support of federalism flourished throughout the 1990s. Following *New York*, the Court in 1995 decided *United States v. Lopez* (*Lopez*).\(^79\) In *Lopez*, the Court invalidated the Gun-Free School Zones Act as an illegal assertion of Congress' Commerce Clause power.\(^80\) While this decision would seemingly only affect Congress' Commerce Clause power, it also reinforced the idea of "dual sovereignty" between the state and federal governments.\(^81\) In his concurrence, Justice Kennedy noted that if the federal government was allowed to regulate non-economic situations under the Commerce Clause then, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."\(^82\) This idea was later reaffirmed when the Supreme Court struck down the Violence Against Women Act in *United States v. Morrison* (*Morrison*).\(^83\) In *Morrison*, the Court noted that interstate commerce power may not be extended to embrace effects "so indirect and remote" that it would effectively obliterate the distinction between national and local authority.\(^84\)

Following *Lopez*, the Court overturned portions of the Brady Handgun Violence Prevention Act in *Printz v. United States* (*Printz*).\(^85\) The Court noted that the Constitution established a system of dual sovereignty where the states relinquished some rights, but retained residuary and uninfringeable sovereignty.\(^86\) Further, the Court noted that while Congress had the power to prohibit some acts, the Constitution does not authorize the federal government to compel states to implement federal regulatory programs.\(^87\)

\(^79\). See generally *United States v. Lopez*, 514 U.S. 549 (1995)[hereinafter *Lopez*] (stating that Gun-Free School Zones Act, which made it federal offense to bring a firearm into a school zone exceeded Congress' Commerce Clause authority).

\(^80\). See id. at 549-50 (discussing how carrying gun into school zones had little or anything to do with interstate commerce).

\(^81\). See Adler, *supra* note 5, at 588 (noting *Lopez* simply reinforces cooperative federalism).

\(^82\). See id. at 589 (citations omitted) (noting Justice Kennedy's dissent).


\(^84\). See id. at 598 (saying that Commerce Clause power can only reach to things that are directly effected by interstate commerce).

\(^85\). See *Printz v. United States*, 521 U.S. 898 (1997)[hereinafter *Printz*] (striking down portions of Brady Bill requiring state agents to conduct background checks on gun purchasers).

\(^86\). See id. at 899 (noting power of states with regards to some areas has not been diminished and is protected).

\(^87\). See id. at 899-900 (noting Congress may not compel states to implement federal programs).
Another issue in Printz was one of political accountability. Jonathan Adler noted that Printz undermined the structural balance between the federal and state governments that the Framers sought to make. He noted that there should be two lines of political accountability: one between citizens and the federal government and another between citizens and their state governments.

Following Printz, there was concern that the Supreme Court would strike down federal environmental laws requiring states to follow certain federal regulations. The federal law that appeared to be in the most danger was the CAA. The Act itself sets air standards for state and local governments, as well as schedules for compliance. Failure to reach standards can result in federal penalties, including the loss of highway funds. The CAA does offer the states a cooperative model, where they can allow the federal government to take over their programs, but such a takeover comes at a tremendous cost to the states.

III. THE RED DOG DECISION

A. Facts

The CAA's Prevention of Significant Deterioration Program bars constructing any major air pollutant emitting facility not equipped with the best available control technology (BACT). The BACT is "an emission limitation based on the maximum degree of pollutant reduction ... which the [state] permitting authority, on a case-by-case basis determines is achievable for the authority." The CAA generally authorizes the EPA, when it finds

88. See Adler, supra note 5, at 606 (noting that under Brady Act, Congress passes most of burden of implementing federal program to states). The states then are forced to take on a large financial burden, while Congress can say that it has solved a problem. Id.

89. See id. (stating that political accountability was key in Printz decision).

90. See id. (discussing lines of political accountability).

91. See id. at 609 (noting how Printz decision could force major reorientations of environmental policy, especially where federal government relies upon states to follow federal law).

92. See id. at 617 (discussing contentious nature of CAA and how it sparked fierce criticism).


95. See Adler, supra note 5, at 619 (noting costs that would be inflicted on state if they were to allow for federal takeover under CAA).


a state in noncompliance with the BACT requirement, to “take such measures necessary” to prevent constructing a facility that does not comply with the EPA’s standards.98

In 1998, the Red Dog Mine applied to the Alaska Department of Environmental Conservation (ADEC) to increase the amount of nitrogen oxide, a regulated air pollutant, released from its generators.99 The mine proposed to use “Low NOx” as the BACT for its generators.100 The “Low NOx” procedure is a process of high combustion air temperatures that better atomized toxic particles, reducing the amount of nitrogen oxide released.101 The ADEC, however, determined that Selective Catalytic Reduction (SCR), a process where exhaust is mixed with ammonia and combined with a catalyst to reduce emissions would be the proper BACT for the mine.102 In response, the mine amended its application, proposing to install the less costly “Low NOx” process on all its generators instead of installing the SCR process on one generator.103 The ADEC approved the mine’s amended application in May 1999.104

The EPA determined that the ADEC’s approval of the mine’s application was unacceptable because the CAA does not allow the use of something less than the BACT, even if equivalent emissions reductions are obtained by imposing new controls on other units.105 In December 1999, the EPA issued a Finding of Non-Compliance Order, stating that the ADEC plan for Red Dog Mine violated the CAA.106 The ADEC responded by granting the mine’s permit and the EPA issued orders preventing the mine from constructing and installing the new equipment.107

99. See Halfpenny, supra note 7 (discussing history of Red Dog case).
100. See id. (noting mine’s proposal to use more “Low NOx” related technology).
101. See id. (describing Low NOx).
102. See id. (saying ADEC found alternative process to “Low NOx” it believed would be good for Red Dog Mine).
103. See id. (noting that “Low NOx” process was less costly). Red Dog Mine offered to use the “Low NOx” process more to meet the ADEC concerns. Id.
104. See Halfpenny, supra note 7 (stating ADEC approved Red Dog’s mine permit application).
105. See id. (discussing EPA reaction to ADEC approval of Red Dog Mine’s plan for emissions control).
106. See id. (discussing how EPA found ADEC to be in non-compliance of CAA).
107. See id. (noting EPA had put in orders to prevent Red Dog Mine from going ahead after ADEC approved their permit).
In response to the EPA’s orders, the ADEC petitioned the Ninth Circuit for review arguing that the EPA had exceeded its authority and that the state had acted within its discretion regarding the BACT. The Ninth Circuit ruled in favor of the EPA, finding that while the state has discretion to make the BACT determinations, the EPA has the “ultimate authority” to decide whether the state has complied with the CAA’s BACT requirements. The ADEC then appealed the case to the Supreme Court.

B. The Majority Decision

In Red Dog, the Supreme Court ruled that the CAA authorized the EPA to issue stop construction orders based on a finding that the state determinations did not comply with BACT requirements. The Court noted that while states are given great leeway in making determinations about BACT, the EPA may nonetheless interfere to make sure that the CAA’s statutory requirements are honored. The Court noted that the state is not forbidden from altering its original BACT decision. Rather, the state is free to revisit the permit process to meet the EPA’s standards.

C. The Dissent

Justice Kennedy believed that the majority allowed the EPA to usurp a traditional state role. He felt the majority’s reasoning would allow other federal agencies to claim ultimate decision-making authority, relegating the states to the role of “mere provinces.” Justice Kennedy further noted, “if cooperative federalism is to achieve Congress’ goal of allowing state governments to be accountable to the democratic process in implementing environ-

108. See Alaska Department of Environmental Conservation v. EPA, 298 F.3d 814 (9th Cir. 2002) [hereinafter ADEC] (discussing petition by ADEC to Ninth Circuit).
109. See id. at 820 (noting EPA has final say with regard to state decisions regarding BACT).
111. See id. at 991 (noting that Congress gave EPA sweeping powers when making BACT determinations as required to prevent significant deterioration).
112. See id. at 1003 (stating that EPA has limited, but vital role, and EPA’s actions here were consistent with that role).
113. See id. at 990 (noting state is free to revisit permit process).
114. See id. at 1009 (emphasizing ADEC can reconsider BACT).
115. See Red Dog, 124 S. Ct. at 1018 (Kennedy, J. dissenting) (noting that CAA relies on federal-state partnership).
116. See id. (Kennedy, J. dissenting) (discussing how states will go from being co-equal sovereigns to puppets of federal government).
mental policies, federal agencies cannot consign states” to performing minimal tasks, while reserving the real power for themselves.\textsuperscript{117}

IV. IMPACT

While cooperative federalism is far from dead, \textit{Red Dog} appears to be contrary to the Supreme Court’s recent federalism jurisprudence in that it allows a federal agency to intrude on what is generally seen as a state function. Cooperative federalism, however, remains the ideal, as it already has the blessing of the Supreme Court, while more coercive measures have been struck down.\textsuperscript{118} As illustrated in \textit{Red Dog}, a state still has great leeway to determine its environmental policies, but it appears that the EPA will have the ultimate authority to accept or reject a state’s environmental policies.\textsuperscript{119}

A. Pre-\textit{Red Dog} Circuit Decisions

Before \textit{Red Dog}, several circuits had in fact limited the EPA’s ability to overturn state decisions, saying that the CAA’s version of cooperative federalism granted the states more authority, rather than less as the Supreme Court later suggested.\textsuperscript{120} While \textit{Red Dog} only dealt indirectly with some of the issues brought forth in these cases, the decision appears to challenge the prior circuit holdings granting the states more power under the CAA.\textsuperscript{121}

1. The D.C. Circuit

In \textit{American Corn Growers v. EPA (American Corn)},\textsuperscript{122} the D.C. Circuit held that the EPA exceeded its authority under the CAA by requiring states to engage in regional, rather than source-by-source, analysis when making Best Available Retrofit Technology (BART) determinations concerning air pollution.\textsuperscript{123} In their \textit{per curiam} decision, the judges held that the EPA regulation “impermissibly re-
strained state authority” in an area where Congress intended the states to have discretion. Further, the D.C. Circuit held that the CAA, in this area, intended the states to have more authority that was allowed by the EPA regulation.

2. The Fifth Circuit

In Florida Power & Light Co. v. Costle (Florida Light), the Fifth Circuit held that the EPA had abused its discretion in trying to force Florida to accept its revisions to its state implementation plan (SIP) for sulfur emissions. The Fifth Circuit noted that the CAA left numerous responsibilities to the states while restricting the EPA’s authority.

In addition, the Fifth Circuit held that Congress intended the CAA to strike a “balance” between federal and state governments, with both working together to achieve their goals. Further, it was noted that the EPA had no discretion in its view of what Florida state law required, especially when the state of Florida claimed a different interpretation. Also, the EPA plays a “circumscribed” role under the CAA, and in this case the state should be given deference.

3. The Seventh Circuit

In Bethlehem Steel Corp. v. Gorsuch (Bethlehem Steel), the Seventh Circuit held that the EPA could not change Indiana’s SIP pro-

124. See id. at 8-9 (holding states have discretion when it comes to BART determinations).
125. See id. at 7 (noting finding that CAA gave states general grant of authority in relation to BART).
126. See Florida Light & Power v. Costle, 650 F.2d 579 (5th Cir. 1981) [hereinafter Florida Light] (holding that EPA abused its discretion in finding that it could assume control of state implementation plan once it had already been approved).
127. See id. at 587-88 (holding that EPA was wrong to try and require state to change its already approved SIP plan).
128. See id. at 588 (observing that Congressional intent most likely did not include idea that EPA could gain control of SIP plans after EPA had already approved them).
129. See id. at 581 (discussing purpose of CAA and role states and federal government were to play).
130. See id. at 588 (holding EPA has no discretion in its interpretation of state law, and that EPA cannot point to any sources to back up its interpretation).
131. See Florida Light, 650 F.2d at 579-81 (describing EPA’s role in CAA).
132. See Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984) [hereinafter Bethlehem Steel] (holding EPA could not require more stringent plan for state without following proper CAA procedures).
gram under the guise of partial approval. The Seventh Circuit found that while the EPA had the power to accept parts or all of a state's SIP, it could not alter the SIP to require a state to accept stricter pollution standards. Further, the Seventh Circuit held the EPA's actions were in danger of violating the federal-state relationship Congress created in the CAA.

The Seventh Circuit found that the CAA gave the states broad discretion to create SIPs that met national standards, and EPA could not change the SIP programs without going through all the proper administrative procedures. Under the CAA, the EPA does have the authority to change state plans, such as SIPs, if it can show the state is attempting to weaken its current environmental standards.

B. Public Policy Arguments

How the Red Dog decision will eventually affect future policy is unknown, but as has been noted previously, the states still need the federal government and the federal government still needs the states. In fact, commentators have made strong arguments for increasing the state role in environmental policy while still allowing the federal government to play its role as well.

1. Spillovers

The possibility of spillovers, or cross-boundary pollution, has been an argument made for keeping a national environmental policy. While having a national policy might serve well for large Superfund-style pollution sites, most spillovers are small and tend to require a local response. Cooperative federalism allows for this,
in that it gives the states more say over localized matters as opposed to letting a large national bureaucracy dictate policy for regions where it might not fully understand the local situation.\textsuperscript{142}

2. The Need for State Input on the Federal Level

Another argument that has been made is that it is both impractical and unnecessary for the federal government to set environmental policy without state input.\textsuperscript{143} The federal government no longer has the ability to direct environmental policy without seeking help from the state and local level.\textsuperscript{144} The converse is true as well.\textsuperscript{145} State and local officials are often directed by local political and economic interests and could not possibly be expected to take on local environmental concerns without federal intervention.\textsuperscript{146}

In addition to this, because many environmental problems are local in nature, local knowledge is needed.\textsuperscript{147} A federal policy of "one-size-fits-all could easily become one-size-fits-nobody," leaving the states to be governed by a non-responsive federal policy.\textsuperscript{148}

3. The People

America has changed since the CAA was passed.\textsuperscript{149} While support for environmental protection remains high, the definition of what it means to be an environmentalist has been in a state of flux.\textsuperscript{150} No longer does support for the environment mean support

\begin{itemize}
  \item \textsuperscript{142} See id. at 628 (discussing benefits of having more state control over smaller environmental issues).
  \item \textsuperscript{143} See id. at 628-30 (noting states are now much better prepared to deal with environmental problems than in past years).
  \item \textsuperscript{144} See Percival, supra note 27, at 1178-79 (stating federal government cannot function in environmental arena without state and local help).
  \item \textsuperscript{145} See id. at 1179 (stating local politicians come under pressures that are best handled at national level).
  \item \textsuperscript{146} See id. at 1179-80 (finding that politics often plays large role when it comes to environmental issues).
  \item \textsuperscript{147} See Adler, supra note 5, at 629 (relaying practical nature of local control over local matters).
  \item \textsuperscript{148} See id. (discussing how local communities end up suffering under nationalized environmental policies).
  \item \textsuperscript{149} See id. at 632 (noting while strong environmental policy remains priority for Americans, things are changing). It is noted that while people support environmental protection, it does not necessarily mean they support the current government model. \textit{Id.}
  \item \textsuperscript{150} See id. (discussing evolving definition of environmentalist). An environmentalist can be someone who wishes to conserve the environment, someone who wishes to preserve the environment or a host of other definitions. \textit{See id.}
\end{itemize}
for government policy.\textsuperscript{151} When voters were given a choice on who they best think should direct environmental policy, nearly two-thirds of those surveyed felt that the local government would do a better job than the federal one.\textsuperscript{152} However, merely giving states greater responsibility over environmental matters will not ensure a better performance than the federal government.\textsuperscript{153} Historically speaking, this may have the opposite effect.\textsuperscript{154} So to try and satisfy both state and federal officials, cooperative federalism seems to be the best answer.

C. \textit{Red Dog's Effect on the CAA}

After \textit{Printz}, scholars thought the CAA would be gutted under the Supreme Court's federalism jurisprudence, but instead \textit{Red Dog} has strengthened the CAA.\textsuperscript{155} Instead of invalidating the EPA's power to block a state's decision with regard to BACT, the Court upheld the EPA action.\textsuperscript{156} Further, the Court maintained that while states have the initial responsibility to determine BACT, the EPA maintained the supervisory authority to overturn arbitrary state decisions.\textsuperscript{157}

Through \textit{Red Dog}, the Supreme Court has reaffirmed the EPA's authority under the CAA, but the Court also emphasized the state's important role in shaping environmental policy.\textsuperscript{158} While \textit{Red Dog} may seem to shift the power over environmental policy to the federal government, it in fact emphasizes the CAA's main purpose, which is for the states and federal government to work together to craft a manageable environmental policy.\textsuperscript{159}

151. See id. (noting support for environment does not necessarily translate into support for government policies). The states on their own have been making breakthroughs in environmental regulation. See id.

152. See Adler, supra note 5 at 632 (citations omitted) (discussing results of Polling Co., National Survey of Attitudes on Environmental Policy).

153. See Dwyer, supra note 1, at 1180 (noting state oversight of environmental policy does not necessarily mean things will change positively).

154. See id. (stating states do not always end up promoting environmental policy in beneficial ways).

155. See Halfpenny, supra note 7 (observing Ninth Circuit decision in \textit{Red Dog} was likely to be overturned). Halfpenny believed that given the Ninth Circuit's high reversal rate and precedent indicating otherwise, the Supreme Court would surely overturn the Ninth Circuit. Id.


157. See id. at 988 (holding EPA has authority to act in cases where state authority's have arbitrarily determined BACT).

158. See id. at 986-90 (discussing state and federal role in CAA).

159. See id. at 992 (noting how state must submit implementation plan to EPA for approval).
V. Conclusion

In the 1970s, the federal government initially took more control over environmental policy, but currently the states are taking a more expansive role in shaping policy. Because the states have taken a greater role in environmental policy, the federal and state governments must cooperate to create and implement environmental policies. This is because cooperation is beneficial to both parties.

Cooperative federalism allows both the state and federal governments to have a voice in environmental policy. Congress may assist the states in creating environmental programs the federal government could not handle on its own because of the uniqueness of each state’s terrain. In addition, the most politically sensitive environmental programs generally occur at the state level, and federal regulators who ignore state political and economic concerns do so at the risk of losing support of their constituents and the state governments.

While it appears that Red Dog has shifted the balance of power in environmental policy to the federal government, it would be a mistake to assume cooperative federalism has outlived its usefulness. Red Dog reasserted the valuable role states play in determining environmental policy. Red Dog made it clear that if the CAA is to obtain its full benefit, the states and federal government must cooperate. While Red Dog limited state authority in favor of

160. See Dwyer, supra note 1, at 1216-19 (discussing inevitability of more state autonomy in environmental protection).
161. See id. (noting various reasons why state and federal governments should work together on environmental policy).
162. See id. (stating reasons why cooperation is beneficial to state and federal governments).
163. See Percival, supra note 30 at 1144 (observing that Congress often allows states to set their own policies on environmental issues but allows for federal oversight).
164. See Dwyer, supra note 1, at 1218 (noting how diverse state environments are, and difficulty of federal government trying to set national policy without state assistance).
165. See id. (stating that when federal regulators run roughshod over state concerns they lose local support and find their environmental projects much more difficult to put into effect).
167. See id. (noting role state plays under CAA). The state has the initial responsibility in deciding whether an entity has complied with the BACT rules. Id.
168. See id. (discussing CAA role in giving responsibilities to state and federal government).
greater federal authority, it reaffirmed the need for cooperation between the state and federal government. 169

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169. See id. (discussing state and federal role in implementing BACT rules).