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I. INTRODUCTION

The fact that the United States has prevailed thus far as a matter of law in the Smithfield Foods case does not answer the larger policy questions that have arisen in this matter. Judge Smith's opinion provides a clear and compelling vindication of the U.S. Environmental Protection Agency's (EPA) legal authority to act in this case,¹ and if the EPA's legal authority to act in this case,¹ and if the EPA’s legal authority to act in this case,¹

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¹ See United States v. Smithfield Foods, Inc., 965 F. Supp. 769 (E.D. Va. 1997). The judge’s opinion is a comprehensive analysis of the liability issues in the case. First, the court granted partial summary judgment for the United States for the violations of Smithfield’s National Pollutant Discharge System (NPDES) permit, including late reporting, document destruction, false reporting and the effluent limits for phosphorus, ammonia-nitrogen, total Kjeldahl nitrogen (TKN), fecal coliform, minimum pH, cyanide, oil and grease, carbonaceous biochemical oxygen demand (CBOD), biochemical oxygen demand (BOD), and total suspended solids (TSS). In assigning liability for the permit effluent limit violations, the court stated that the Discharge Monitoring Reports (DMRs) submitted by Smithfield could be accepted as true and, thus, could be used as admissions to establish liability. Second, the court found that Smithfield’s permit did not incorporate, nor was it conditioned, revised, or superseded by the Consent Special Orders issued to the company by the Virginia State Water Control Board (the Board). See discussion, infra notes 301-409. In making this ruling, the court rejected Smithfield’s contention that it should have been able to rely on the statements of the Board without fear of being subjected to a federal enforcement action. Third, the court rejected the company’s claim that the United States’ action was barred by estoppel and/or laches, finding that the United States had not engaged in any affirmative misconduct as required to prevail in an estoppel claim. Fourth, the court ruled that the United States’ claims were not barred by the provision of the Clean Water Act (CWA or “the Act”) which bars federal civil penalty action in situations where “a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection.” CWA § 309(g)(6)(A)(ii), 33 U.S.C. § 1319(g)(6)(A)(ii)(1994). The court held that Virginia’s law was not “comparable” to CWA § 309(g)(6) because the State did not have unilateral
authority were the only issue to consider, then the judge's opinion would have satisfied all questions. The judge's legal opinion, however, does not address the central policy question of this case: why did the EPA take the extraordinary measure of intervening between an approved sovereign and a violating facility when that sovereign was pursuing its own administrative remedy? The answer to this question is even more pressing given that the United States did not seek environmental clean up with its action since its claims for injunctive relief were satisfied before trial; i.e., the company ceased discharging to the Pagan River. The corollary policy question is why couldn't Smithfield simply have relied on the State's administrative orders to determine their appropriate course of action? If only state law were involved, the answer to this latter question authority to impose administrative penalties, and the State enforcement process, at the time of the issuance of the Consent Special Orders, failed to provide adequate procedures for public participation. Finally, the court rejected Smithfield's claim that the United States' action was barred by § 510 of the Act, which provides, in relevant part "nothing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation . . . or (B) any requirement respecting control or abatement of pollution" that is equally or more stringent than those prescribed by federal law. See also United States v. Smithfield Foods, Inc., 972 F. Supp. 338 (E.D. Va. 1997) (outlining the rationale used by the judge to set the penalty amount ($12.6 million) in this case).

This situation is commonly referred to as "overfiling." See Relationship Between the Federal and State Governments in the Enforcement of Environmental Laws, 1997: Hearing Before the Committee on Environment and Public Works, 105th Cong. 202, at 161-62 (1997) [hereinafter 1997 Hearing Before the Committee on Environmental and Public Works] (statement of Steven A. Herman) [hereinafter Herman Statement]. Federal overfiling is the initiation of a federal enforcement action, either administrative or civil, following a State enforcement action . . . . Statistics show that overfiling is in fact a rare event. As reported by a state-by-state survey conducted by ECOS, the agency overfiled on about 30 cases or 0.3 percent of all Federal enforcement action during fiscal years 1992 through 1994. During fiscal years 1994 and 1995, the agency overfiled on a total of 18 cases or about 0.1 percent of State enforcement cases. From October 1995 through September 1996, there was a total of four overfiling cases.

would be simple—they could have. However, the federal nature of the Clean Water Act (CWA)\(^4\) alters the complexion of the analysis. This article addresses these policy questions and provides a rationale for why the public interest was served by the federal government’s intervention in this case.

The EPA did not take this action simply because it had a right to do so. There are risks in any action before a court, and the risk of an adverse legal opinion forces the EPA to be careful when it exposes its programs to the interpretation of the judiciary.\(^5\) Moreover, if the EPA had acted only for the sake of flexing its legal muscles then it would have damaged the credibility of the regulatory programs that it administers and enforces. Nor did the EPA take this action simply to protect sensitive environmental resources or values.\(^6\) Enforcement is often seen as a means to achieve environmental restoration, but it is not designed, and should not be used, as the primary means to achieve the environmental objectives outlined in the CWA.\(^7\) That purpose is rightfully served by control mechanisms such as permits, issued to facilities subject to CWA jurisdiction. Even though the United States’ claims for injunctive relief were satisfied before trial, the case still served a variety of public policy functions that could not be furthered by any means other than enforcement.

The evidence at trial proved that Smithfield violated the CWA for a period of several years.\(^8\) Because Smithfield was not required by the Commonwealth of Virginia to comply with the water quality-based effluent limitations for phosphorus in its permit (as well as other permit conditions), it was not required to install appropriate treatment for the pollutants in its discharges in a timely fashion.\(^9\) As a result, Smithfield was allowed to discharge insufficiently treated wastewater from its

\(^5\) Conversely, however, it is also true that courts are reticent to impose their wills on Executive Branch programs. See William N. Eskridge, Jr. & John Ferejohn, The Elastic Commerce Clause: A Political Theory of American Federalism, 47 VAND. L. REV. 1355, 1362 (1994) (“Federal courts are politically vulnerable institutions that have powerful reasons to be cautious in imposing restrictions on the other branches of the national government.”).
\(^6\) However, there was an important environmental component to its rationale in pursuing this action, even though its request for environmental injunctive relief was satisfied before the trial in this case. See discussion infra notes 460-480.
\(^7\) See discussion infra notes 93-172.
\(^9\) See id. at 772-81.
industrial operations, and by doing so, it was able to avoid or delay the cost of treatment for the entire time that it was in violation. By evading compliance with the law, therefore, Smithfield contributed to the significant degradation of the Pagan River and, potentially, the Chesapeake Bay. The company also gained a substantial financial benefit from its illegal discharges.

The State’s administrative action in this case was inappropriate simply because it allowed Smithfield to continue discharging inadequately treated wastes in violation of federal law for a period of several years, and it did not impose any penalty on Smithfield to offset the competitive advantage enjoyed by the company as a result of their noncompliance. The EPA took its action to ensure that an economically powerful and politically influential company could not evade compliance with federal

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10 See id.
11 The Pagan River flows into the James River, which is a tributary to the Chesapeake Bay.
13 See discussion infra notes 482-524. But see generally Fuhrman & Traylor, supra note 12.
14 See generally Robert Little, Luter Insists He Didn’t Seek Special Favors From Allen, He Says He Gave PAC $100,000 Because He Liked Governor’s Views, THE VIRGINIAN-PILOT, Oct. 28, 1995, at A1, available in 1995 WL 8991471

Smithfield Foods Inc. Chairman Joseph W. Luter III decided to give $100,000 to Gov. George F. Allen’s Republican campaign committee after a private dinner with Allen last winter at the Governor’s mansion. The two talked about Virginia politics and the difficulties that the state’s environmental regulations have posed over the years for businesses like Smithfield Foods, Luter said Friday.

Id. See also Surprise Inspection at Smithfield Foods, This is New, THE VIRGINIAN-PILOT, Dec. 21, 1996, at A18, available in 1996 WL 10873553 (“the Allen administration’s handling of Smithfield Foods’ environmental violations might best have been described as gentle or friendly”); Scott Harper, Court Orders Smithfield Foods to Control Wastes, THE VIRGINIAN-PILOT, Dec. 14, 1996, at B1, available in 1996 WL 10872835

The report by the Joint Legislative and Audit Review Commission, or JLARC, pointed out allegations that DEQ administrators had blocked a request to fine Smithfield Foods $278,000 last year for past pollution violations. At the time, Smithfield Foods was Allen’s biggest political contributor, giving the governor’s political action committee $125,000 during negotiations over the penalties for those past violations.

Id.
law and thereby gain an inequitable competitive advantage.\textsuperscript{15} In addition, this federal action was necessary to prevent the state from modifying or superseding federal permit requirements using a state administrative action without appropriate public participation.\textsuperscript{16} For these reasons (among others, explored in detail below), the EPA initiated its action against Smithfield, even though the Commonwealth of Virginia was already pursuing their own administrative remedy in this case.

This article examines the nature of the relationship between the principal parties of this enforcement triangle: the federal government, represented by the Environmental Protection Agency (EPA) and the Department of Justice (DOJ), the Commonwealth of Virginia, represented by its State Water Control Board (SWCB or the Board) and its Department of Environmental Quality (DEQ), and Smithfield Foods (Smithfield). Further, it will document and evaluate the positions taken by the respective sovereigns as they proceeded with their independent enforcement actions in this case, and, ultimately, it will provide a rationale for why the EPA chose to intervene in this matter.

Part II of the article examines the CWA’s statutory mandate for achieving water quality improvement and pollution control and outlines the Act’s directives relating to the federal/state partnership in administering the Act’s permit program. This Part also discusses two competing theories of environmental enforcement and explains how these competing philosophies are at the center of the conflict often experienced between the federal government and the various states approved to administer the federal program. In addition, this Part analyzes the EPA’s policy for taking direct enforcement action in approved states. Part III provides a detailed chronology of events in this complex enforcement action. It explains the actions taken by the Commonwealth of Virginia and Smithfield in the period prior to the EPA becoming involved in the

\textsuperscript{15} This statement should not be understood to mean that the EPA takes into account the economic status or political influence of a company \textit{per se} when determining the appropriate course of action against a violating facility. The EPA does not consider the financial or political status of a company when evaluating a company’s violations or deciding to initiate a case. Smithfield’s economic importance had no intrinsic impact on the EPA’s decision to initiate civil judicial proceedings against the company, nor was the existence of political contributions a factor in the EPA’s decision to enforce. However, a premise of this article is that Smithfield’s economic and political influence was of paramount importance to the state when they determined their course of action. The EPA considered the state action to be inadequate given the nature of the case, thus creating the conflict that ensued with the dual actions.

\textsuperscript{16} See CWA § 101(e), 33 U.S.C. § 1251(e).
case and it provides an account of the interactions between Virginia and
the EPA as the action proceeded to its ultimate conclusion. Part IV
explains why it was important for the federal government to intervene in
the state’s administrative enforcement action against Smithfield.

Finally, the article analyzes the general state of our current
cooperative federalist structure in environmental regulation using the
specific details of the Smithfield case as a guide. The essential conclusion
reached is that the Smithfield case vindicates the reciprocal nature of
federalism’s protections to individual liberty and social welfare. The
several states exist to countervail the tendency to accumulate political
power within the central government, and thus, to prevent tyranny; and the
federal government is designed, at least in part, to prevent the capture of
states by factions.\textsuperscript{17} The Smithfield case demonstrates federalism at its
best by documenting the need for the federal government to check the
tendency of the states to accommodate economic interests at the expense
of national public policy goals designed to produce or preserve
environmental goods (as opposed to “economic goods;” i.e., items that are
“properly valued as commodities and properly produced and exchanged in
accordance with market norms”).\textsuperscript{18}

II. THE CLEAN WATER ACT AND THE FEDERAL/STATE RELATIONSHIP

A. The National Pollutant Discharge Elimination System (NPDES)
Permit Program

The NPDES permit program is the centerpiece of the CWA’s water
pollution control effort.\textsuperscript{19} It is the principal mechanism through which the
environmental goals of the nation, as defined by the CWA, are achieved.\textsuperscript{20}
The foremost environmental objective of the Act is to “restore and
maintain the chemical, physical, and biological integrity of the Nation’s
waters.”\textsuperscript{21} To achieve this overarching objective, the Act enumerates a
series of specific goals and policies, the most conspicuous of which is “the
national goal that the discharge of pollutants into the navigable waters be

\textsuperscript{17} See Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991); James Huffman, \textit{Governing
\textsuperscript{18} ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 143 (1993).
\textsuperscript{21} CWA § 101(a), 33 U.S.C. § 1251(a) (1994).
eliminated." A more immediate goal of the Act is "the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." These goals and objectives are national in scope and form the foundation of the Act's implementation strategy. As such, they provide the fundamental underpinnings of the national effort to control water pollution. Each NPDES permit is designed to implement the national environmental goals outlined in Section 101(a) of the Act, since each permit is designed to work toward the goal of eliminating the discharge of pollutants into navigable waters or, in the interim, achieving the goal of fishable/swimmable waters.

One of the fundamental premises of the Act is the illegality of a discharge from a "point source" in the absence or in violation of a

22 CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1). It is important to keep in mind the importance placed on the elimination of pollution by the Congress during its debates in 1972, the year the CWA was passed. Senator Muskie, in particular, summed up the seriousness of the challenge in the following remarks:

[I]n the face of facts which could not be more stark, in the face of a threat to life that could not be more real, in the face of cries from our cities and States that could not be more desperate—in the face of all these things, there are still those in high places who question whether we can afford to spend this money. Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself?

118 CONG. REC. 33,693 (1972), reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 164 (1973) [hereinafter LEGISLATIVE HISTORY]. With respect to the goals outlined in the body of the paper, Senator Muskie further opined: "these are not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the Nation." Id. The fact that we have come so far in our efforts to reduce pollution often diminishes our appreciation of the problems which we have overcome and the challenges that remain.


24 See id.


27 CWA § 502(14), 33 U.S.C. § 1362(14) ("point source" means 'any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal
This basic premise provides the other essential function of the NPDES permit: it is the vehicle that translates the environmental goals of the Act into specific requirements on individual dischargers. Therefore, the permit is the primary enforcement mechanism in the Act. The discharge of pollutants is a privilege, not a property right, and the permit program is the only means by which industry and sewage treatment plants can be authorized to discharge pollutants into navigable waters. Without such authorization, any discharge of pollutants from a facility is illegal. The permit, beyond providing the legal mechanism for authorizing the discharge of pollutants, makes such a discharger accountable to the public for its actions, since the nature of the facility's discharge and any violations of the requirements of the permit are publicly available. This information can be used by private citizens to enforce the feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

28 See CWA § 301(a), 33 U.S.C. § 1311(a).
29 See National Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374 (1977) ("The NPDES permit program established by § 402 is central to the enforcement of the FWPCA."). See also Arkansas v. Oklahoma, 503 U.S. 91, 101, 112 S. Ct. 1046, 1054 (1992) ("The primary means for enforcing these limitations and standards is the NPDES [permit program].").

Underlying the CWA approach was the adoption of the principle that no one has the right to pollute the nation's waters. This principle or ethic translated into the congressional mandate that any person who discharges without a NPDES permit, or in violation of an existing NPDES permit, is strictly liable under the CWA. This mandate places the burden of pollution control on the individual polluter, who must internalize the cost of pollution reduction.

Hodas, supra, at 1565-66.

31 See generally CWA § 502(12), 33 U.S.C. § 1362(12) (defining the term "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source" or "to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft").
32 See generally CWA § 502(7), 33 U.S.C. § 1362(7) (defining the term "navigable waters" as the "waters of the United States, including the territorial seas"). See also § CWA 301(a), 33 U.S.C. § 1311(a) (making discharge of pollutants presumptively illegal except when in compliance with the Act).
33 See CWA § 301(a), 33 U.S.C. § 1311(a).
provisions of the permit.35

The NPDES permit, therefore, is also central to Congress' stated policy for public participation in implementing the Act.36 The CWA "represents a pact with the public"37 and the permit is an important means by which the public can participate in the process of pollution control, since it can be issued only after an extensive public notification and comment process.38 As such, it is the "face" which is shown to the public in the government's attempt to address the pollution problems facing the nation's waters. The permit cannot be amended, modified or altered without the input of the public,39 unless such an alteration meets the criteria of a "minor" permit modification, e.g., to correct typographical errors that do not affect the substantive content of the permit.40 Nor can the permit be "modified" in private simply by the administering agency refusing to enforce its conditions.41 The regulations concerning the modification of NPDES permits "ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities."42 This concern was central to the federal government's motive in addressing the permit violations in the Smithfield case.

The NPDES permit program has been described as "breathtakingly ambitious"43 and rightly so. The CWA regulates approximately 100,000 separate sources of pollution through the NPDES permit program. The

36 See CWA § 101(e), 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.").
37 Hodas, supra note 30, at 1577.
39 See 40 C.F.R. §§ 122.62, 124.5(c), 123.25.
40 See 40 C.F.R. § 122.63.
41 See Hodas, supra note 30, at 1577 ("The CWA's pact with the public is that the government may only issue a permit via a public process, and the Act may not be de facto amended by the secret, nonpublic means of simply not enforcing it."). See also Citizens for a Better Env't—Cal. v. Union Oil Co. of Cal., 83 F.3d 1111, 1120 (9th Cir. 1996) (holding that a state order could not modify a NPDES permit because it did not comply with the regulations governing modifications of NPDES permits).
42 Id.
permit, in each instance, specifies all of the conditions with which the permittee must comply in order to discharge, including monitoring, record keeping and reporting requirements, and effluent limitations. The effluent limitations are either technology-based or set based on water quality goals defined by the States. The technology-based limits are established either from the national effluent limitations guidelines (set by the EPA on an industry-by-industry basis) or by the permit writer using Best Professional Judgment (BPJ). Permit writers, however, are required to evaluate the impact of every proposed discharge on the water quality goals of the water body. These water quality goals are defined by each State in the form of water quality standards. If technology-based limits are not sufficient to meet the water quality standards, then permittees must be required to comply with limits derived from the more stringent water quality standards established by the State. Therefore, any applicable water quality-based limits take precedence over the generally less stringent technology-based control, which are set without considering the quality of the receiving water.

In the past twenty-five years, the successes achieved as a result of the NPDES program have been impressive. Many people today can remember a time when Lake Erie was pronounced “dead” and the Androscoggin River in Maine was labeled as “too thick to paddle and too thin to plow.” The Connecticut River was derisively described as “the best-landscaped sewer in the country” and the salmon perished in the Willamette River in Oregon. Perhaps the clearest example of progress, however, is that rivers like the Cuyahoga in Ohio no longer catch on fire. These waters are well on their way to recovery at present, with many other waters being described as thriving centers of healthy communities.

See id. § 304(b), 33 U.S.C. § 1314(b).
See id.
See CWA § 402(b), 33 U.S.C. § 1342(b).
See id. § 303, 33 U.S.C. 1313.
See id. § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).
Id. at 2.
See id.
See id. at i.
See id.
The principal reason for this success is the CWA and its NPDES permit program.\textsuperscript{56}

B. Cooperative Federalism—The CWA Construction

The CWA is a modern federal law. As such, it creates a delicate but essential balance between the need to define national water quality objectives and goals and the desire to have a decentralized implementation apparatus. The Act strives for consistency in its overarching principles, yet appears to undermine that very consistency by allowing entities as disparate as California and Virginia the opportunity to interpret its mandates. Even though the primary responsibility for administering the Act lies with the Administrator of the EPA,\textsuperscript{57} Congress specifically recognized and preserved the rights of states "to prevent, reduce, and eliminate pollution . . . ."\textsuperscript{58} Congress was careful, however, to preserve a significant federal oversight role in states with approved programs.\textsuperscript{59}

As stated above, the principal mechanism for controlling water pollution is the NPDES permit program.\textsuperscript{60} The NPDES permit program is also an entry point for states into the federal water pollution control effort. Under section 402, states that want to administer the federal program can petition the EPA for approval of their own permit program to control the discharge of pollutants into waters under the jurisdiction of the state.\textsuperscript{61} Each approved state administers the program under state law, but the goals of the federal law accomplish two functions: 1) they guide each approved

\textsuperscript{56}See id. See also supra notes 24 to 34 and accompanying text.

\textsuperscript{57}See CWA § 101(d), 33 U.S.C. § 1251(d) (1994) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.").

\textsuperscript{58}CWA § 101(b), 33 U.S.C. § 1251(b). See also Hodas, supra note 30, at 1555 (1995) ("Although the objectives, goals and policies of the CWA are national in scope, Congress envisioned that the responsibility for meeting these national ends would be shared by the federal government and the states, which would have the primary responsibility to prevent, reduce, and eliminate pollution."). (quoting CWA § 101(b)).


\textsuperscript{61}See CWA § 402(b), 33 U.S.C. § 1342(b) ("[T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law.").
state when they develop their state clean water laws, and 2) they direct the content of the state-issued NPDES permit. By setting the overall objectives which drive the permit program, Congress intended to create consistent requirements for the regulated facilities subject to a NPDES permit, no matter where those facilities may be found.

The permit program was administered initially by the EPA exclusively, but it was the intent of Congress that states "play a major role in this program." This sentiment is outlined clearly in the legislative history of the Act:

The Committee believes that, after a transition period during which the State program and capability will be upgraded, the [NPDES permit] program should be administered by those States with programs which meet the requirements of this Act. Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his [permit issuance] activity in such State under the Federal permit program.

Only by meeting the requirements of the federal CWA can a State be approved to administer the program. The Act, however, creates an affirmative duty on the part of the EPA to approve any state program that meets the federal criteria. At the present time, forty-two states have been approved to administer the program.

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[N]ationally uniform standards . . . create a ‘level playing field’ for geographically scattered industries . . . . Because . . . a steel plant sited on Puget Sound is subject to the same level of controls as a steel plant located on a Virginia stream; the steel plant in Washington does not gain a market advantage over the Virginia plant as a result of environmental compliance costs and Virginia is freed from the worry that its plant will relocate to Washington on the basis of more lax standards alone.

Id.
65 Id.
66 See CWA § 402(b), 33 U.S.C. § 1342(b).
67 See id. § 402(b), 33 U.S.C. § 1342(b) ("The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist.").
approved by the EPA to administer the NPDES permit program, including the Commonwealth of Virginia. These states have the lead responsibility not only to issue permits, but also to conduct inspections, review reports from regulated facilities, ensure that each permitted facility complies with the requirements in their permit, and report to the EPA on their progress in implementing the federal program. Even though approved states take the lead responsibility to implement the federal program in their jurisdictions, the EPA continues to oversee the state’s activities, especially with regard to permit issuance and enforcement.

Even in states approved to implement the federal program, the EPA retains concurrent enforcement authority and its primary responsibility to implement the Act under section 101(d). Therefore, the EPA assumes an oversight role in approved NPDES states mandated by the Act that it cannot relinquish. On the other hand, once the NPDES permit program has been "delegated," the EPA cannot dictate to the State how it should implement its approved program. This has caused what has been described as “EPA’s tightrope walk between the need for national consistency and state flexibility in implementing” the national

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68 See id. One non-state jurisdiction, the Virgin Islands, has also been approved to administer the federal NPDES permit program. See id.

69 See id. § 402(b), 33 U.S.C. § 1342(b); CWA § 305(b), 33 U.S.C. 1315(b).

70 See § 402(d)(1), 33 U.S.C. § 1342(d)(1) (“Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.”).

71 See CWA § 402(h), 33 U.S.C. 1342(h).

72 See CWA §§ 101(d), 309, 33 U.S.C. §§ 1251(d), 1319.

73 The term “delegation” is often used to describe the process of approving a State permit program, but it is a misleading misnomer that should not be confused with the EPA providing authority to a state. When the EPA approves a State program, it does so after reviewing the authority granted to a State agency (or group of agencies) under State law. The EPA does not “delegate” authority to a state, it only approves a State program based on the authority contained in State law as per the requirement of § 402(b). This article will use the term “approved” to describe State programs with primary jurisdiction to implement the federal program.

74 See James R. Elder, Regulation of Water Quality: Is EPA Meeting its Obligations or Can the States Better Meet Water Quality Challenges?, in 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,029. See also Hodas, supra note 30, at 1574 (“Heavy reliance on state enforcement is a double-edged sword. When we ‘deputize’ the states to implement national environmental laws, we shift the government’s discretionary enforcement power to state and local officials, who may not be interested in, or able to carry out, federal goals.”)
mandates of the CWA.  
By creating this structure, Congress affirmed one of the most “enduring centerpieces of American constitutional and political history”—the concept of federalism. Our federalist structure grew out of conflict. 

Our Constitution and the structure of government it established were the product of compromise between proponents of a powerful national government and advocates of broad state sovereignty. The system of dual sovereignty established by the Constitution has been hailed as a unique political achievement. Yet, federalism is the one structural element in the Constitution whose meaning and contours have been fraught with the most uncertainty.

This uncertainty can turn to downright hostility when the federal government and the various states disagree on the normative commitment to federally mandated goals. This federalist tension lies at the heart of water pollution control in this country and arose, in part, out of a history of state failure to enforce water quality standards prior to the adoption of the Federal Water Pollution Control Act Amendments of 1972.

Prior to 1972, the states held almost exclusive control over water quality regulation. The exclusive reliance on state authority failed to protect water quality in large part because the states lacked the will to antagonize powerful political constituencies by enforcing environmental standards. The dilemma faced by states was stated clearly by Governor

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75 Elder, supra note 74, at 10,029.
77 See Percival, supra note 43, at 1141.
78 Id. at 1143 (citation omitted).
80 See Percival, supra note 43, at 1142.
82 A second reason for the failure of water pollution control under the previous federal statutes is not related to the reliance on State authority. The first comprehensive federal statute addressing water pollution control was the 1948 Water Pollution Control Act. See Act of June 30, 1948, ch. 758, 62 Stat. 1155 (1948) (superseded by the Federal Water Pollution Control Act Amendments of 1972). Despite the attempts of Congress to
I suggest there is one insight which should be shared with you. I suggest that every Governor in the country knows what is the greatest political barrier to effective pollution control. It is the threat of our worst polluters to move their factories out of any State that seriously tries to protect its environment. It is the practice of playing one State against the other. It is the false but strident cry of the polluter that clean air and water mean fewer jobs.

Every Governor in this country knows that when he tries to put some teeth into his State's anti-pollution laws, his efforts will be met by precisely these sort of threats.

My message to you today is this: the answer to threats is uniformity. The only way to stop polluters from political intimidation is to prevent them from raising the alternative of moving to a place where pollution is allowed.
There should be no such place in this country.  

The tendency to centralize environmental regulation at the federal level crystallized around the failure of states to address the problem. As we have seen, however, Congress was not willing to cede total control of water quality regulation to the federal government. States continue to play a significant role in this effort, but, as the Smithfield case demonstrated, they still confront the same political pressures identified by Governor Anderson in his remarks.

The system which has evolved from the statutory construction of the CWA, and which is present in most federal environmental statutes, has been called “cooperative federalism.” States are not required to adopt the federal water pollution control program. They have a choice either to adopt the program (i.e., to submit a program package for approval to the EPA) or to allow the EPA to administer the program directly in their state. States can choose to adopt the federal mandate, or they can choose to ignore the federal mandate. What Congress may not do is “commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”

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83 LEGISLATIVE HISTORY, supra note 22, at 472-73.
84 See Percival, supra note 43, at 1172.
85 See United States v. Smithfield, Inc. 965 F. Supp. 769 (E.D. Va. 1997). Political pressure within states to be lax in environmental enforcement is a very real problem. See generally Engel, supra note 63 (analyzing the so-called “race to the bottom”). Critics contend that such a race was going on in Virginia prior to Smithfield. See, e.g., Letter from W. Michael McCabe, Regional Administrator, Region III, Environmental Protection Agency, to Thomas C. Hopkins, Director, Virginia Department of Environmental Quality 1-3 (Sept. 19, 1996) (citing Virginia’s weak environmental enforcement record and interference with federal enforcement efforts); Wishy-Washy on Water Pollution, Wash. Post, Dec. 20, 1996, at A1 (“Virginia Gov. Allen . . . had best not mention the waters of the Commonwealth where his administration has had a certifiably poor record in enforcing environmental laws.”).
86 See LEGISLATIVE HISTORY, supra note 22, at 472-73.
89 See Sarnoff, supra note 79, at 236-38. See also Percival, supra note 43, at 1166; Stafford, supra note 87, at 691 (“As long as states have the real choice to deny the federal mandate and accept the consequence, the cooperative federalism approach is not in danger of constitutional challenge.”).
"As long as it is acting within the powers granted it under the Constitution, it may impose its will on the States" by regulating in areas traditionally regulated by the states. Once approved, however, the State is intended to become the "primary front-line delivery agent" for the federal program while the EPA maintains its statutory role of ensuring that states implement the Act's mandates appropriately.

C. Enforcement of Environmental Law—Theories of Environmental Protection

Perhaps the most compelling issue in the state/federal partnership arises in the arena of enforcement. Whereas the relationship between the states and the federal government is relatively straightforward with respect to permitting, considerable discretion is introduced as the focus shifts to enforcing the requirements of the law. Unlike the statutory stipulations for issuing NPDES permits, where the EPA is generally precluded from issuing permits in an approved state, the EPA retains its authority to enforce all NPDES permits, even in states which have been approved to administer the program. This simultaneous enforcement presence can create a clash of conflicting priorities as each sovereign attempts to enforce the NPDES program according to its particular perspectives. This conflict can originate from two distinct yet related sources. The first is the inherent tension created by our federalist political structure, while the second can stem from a general philosophical difference between the

94 See CWA § 402(c). In limited circumstances, the EPA may issue a NPDES permit in an approved state. See id. § 402(d)(4). The EPA, however, always has the authority to veto permits proposed by approved states. See id. § 402(d)(2).
95 See CWA § 402(i) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.").
The primary conflict between the States and the federal government in environmental regulation arises from one of the psychological foundations of the U.S. Constitution: the fear of concentrated power. As a check on national power, "State and local governments are strong and fiercely battle every federal intrusion onto their turf." Congress recognized from the start that the dual enforcement scheme contemplated in the CWA had the potential to create a degree of confusion and conflict. True to expectation, enforcement has become the single most important focal point for conflict between the states and the federal government in CWA regulation. The CWA is a strict liability statute. Therefore, there need not be any intent to violate for liability to attach to the noncompliant discharge or to the person creating the discharge. Once liability is established, however, the administering agency has considerable latitude in choosing what kind of remedy to impose, whether it be injunctive relief or civil sanction. The discretionary nature of CWA enforcement throws fuel on an already combustible relationship between the federal government and the states.

The second conflict between the federal government and the States in CWA enforcement can arise from a difference in perspective regarding the use and function of civil penalties. There are two broad ways of viewing environmental enforcement. One way emphasizes the use of...
punitive damages such as civil penalties, i.e., a sanctioning perspective, and the other way stresses the need to obtain compliance and achieve desired environmental objectives, i.e., a compliance-assistance strategy. These differing approaches to environmental enforcement can be used (and often are used) as complementary tools within an overall enforcement scheme, since they are not incompatible in a broad enforcement strategy; but they cannot be used simultaneously in a given case. The conflict emerges when both systems of enforcement are brought to bear on a single defendant.

Many states are reticent to pursue a sanction-based approach to enforcement, eschewing it in favor of a more cooperative strategy which seeks compliance with national environmental objectives as its ultimate goal. The most important policy goal sought in this approach is to achieve the environmental quality objectives of the CWA. Proponents of this approach assert that the success of an environmental enforcement program should be measured not by the number of actions taken or the amount of penalties obtained (the derisive term for this is “bean counting”) but by the environmental bottom line, i.e., the benefits to the environment achieved by the action. In this view, the larger goal of environmental policy is to improve the environment. Enforcement, as a tool of overall environmental policy, is used to ensure compliance with national environmental quality goals and standards. The emphasis of this approach is to use enforcement to get environmental results and is not concerned with the “typical ‘bean counting’ exercises that continue to

106 See id.
107 See 1997 Hearing Before the Committee on Environment and Public Works, supra note 2, at 188 (statement of Mark Coleman, Executive Director, Oklahoma Department of Environmental Quality); Hodas, supra note 30, at 1568. See, e.g., Tulou Statement, supra note 101 (“In Delaware, we work with violators to get them back into compliance as quickly as possible. Using compliance assistance as an option of first choice, we can usually achieve that goal much faster, cheaper, and with...far greater goodwill than through aggressive enforcement.”).
108 See 1997 Hearing Before the Committee on Environment and Public Works, supra note 2, at 188 (statement of Mark Coleman, Executive Director, Oklahoma Department of Environmental Quality).
110 See 1997 Hearing Before the Committee on Environment and Public Works, supra note 2, at 200 (statement of Patricia S. Bangert, Director of Legal Policy, Attorney General’s Office, State of Colorado).
111 See id. at 199.
112 See Tulou Statement, supra note 101.
characterize traditional enforcement."  

Cooperation is the centerpiece of this approach. Those who adopt this approach tend to be more "conciliatory in style."  

They view their task as:

bringing the specific violator into compliance with the law [more] than with either punishing violators or deterring future violations with civil penalties and other sanctions. Adherents to the compliance perspective tend to be adjudication averse, preferring ongoing working relationships with violators over adversarial interaction. They utilize private negotiations with violators that result in extended incremental advances that accommodate the economic interests of the regulated community.

The proper role of government, in this view, is to work with a facility to make sure that they return to compliance as soon as possible. The exercise of a sanction-based enforcement system, in this context, is considered a failure, or at best a provocative challenge, instead of a success.

Under a compliance-assistance philosophy, penalties do not play a significant role. It is not surprising, then, that penalties imposed by states adopting this philosophy are generally far lower than those obtained by the federal government. The reluctance to use penalties stems from a fear that using such sanctions will force businesses to leave the state in search of more congenial business climates. In this relationship, states are dependent on the mobile source of capital, i.e., industry, for jobs and

113 1997 Hearing Before the Committee on Environment and Public Works, supra note 2, 192-93 (statement of Becky Norton Dunlop, Secretary of Natural Resources, Commonwealth of Virginia) [hereinafter Dunlop Statement].
114 Hodas, supra note 30, at 1567.
115 Id.
116 See Dunlop Statement, supra note 113; Tulou Statement, supra note 101. See also Michael M. Stahl, Enforcement in Transition, Envtl. F., Nov.-Dec. 1995, at 21 ("There is a paradox in counting as a 'success' an enforcement action that penalizes and returns to compliance a facility that has been a failure in living up to its obligations.").
117 See Hodas, supra note 30, at 1615.
119 See Engel, supra note 63, at 290; Hodas, supra note 30, at 1615.
economic welfare. The economic considerations, possibly more than anything else, lie at the heart of the divergence between a sanction-based enforcement perspective and a compliance assistance-based enforcement strategy. The conflict between the federal government and many States in environmental enforcement mirrors this divergence, since economic threats do not affect the federal government to nearly the same degree experienced by states.

It was in response to this situation that Congress directed the federal government to impose uniform minimum national standards on industry and other sources of pollution so that companies would be less inclined to shop around for states willing to forego environmental protection in favor of economic development. The CWA pre-empts the states as the primary environmental standard setters. In doing so, Congress achieved two purposes. First, it elevated pollution control and the resulting environmental improvement to the level of a right. Second, Congress prevented states from using the environmental standard-setting forum as a means to compete for industry with rival states. The conventional wisdom is that states, in pursuing their individual economic self interest, compete for industry by providing the incentive of lax pollution control standards, resulting in a devolving spiral labeled a “race-to-the-bottom,” i.e., a race to laxity in environmental protection and a reduction in social welfare. Even though this conventional wisdom has been challenged with regard to its effect on social welfare, there is wide

See Engel, supra note 63, at 294.
See id. at 294-95.
See id. at 290.
See id. at 294.
See id. at 291.
See id. at 288-89.
See id. at 291.

This Article challenges the accepted wisdom on the race to the bottom. It argues that, contrary to prevailing assumptions, competition among states for industry should not be expected to lead to a race that decreases social welfare; indeed, as in other areas, such competition can be expected to produce an efficient allocation of industrial activity among the states.
agreement that such competition between states takes place.\textsuperscript{129} Therefore, states are placed in the difficult position of regulating facilities on which they depend for their economic well being.\textsuperscript{130}

Using a compliance assistance-based enforcement approach is designed to achieve the environmental quality goals of the statute and, for many enforcement situations, this is an adequate and appropriate response. However, if it is used as the sole enforcement strategy, it cannot address the inequities created by companies that violate the law when compared to timely compliance by law-abiding facilities and it fails to influence the behavior of recalcitrant or recidivist violators.\textsuperscript{131} The EPA, therefore, adopts a more expansive focus in its enforcement program.\textsuperscript{132} While the ultimate goal of the EPA's enforcement program is compliance with the law and achieving our environmental objectives, the use of the EPA's enforcement powers is also designed to serve a variety of other policy objectives.\textsuperscript{133} Inevitably, achieving these other policy objectives involves the use of penalties and the purpose for which a penalty is desired.\textsuperscript{134}

The most important policy goals that the EPA seeks to achieve with its enforcement program are: 1) to protect public health and the environment and 2) to guarantee equity.\textsuperscript{135} The first prong of the EPA's enforcement program is designed to compel compliance with the law so that the environmental goals set by statute can be realized.\textsuperscript{136} The environmental goals of the CWA are broad declarations of intent, but such

\textsuperscript{129} \textit{See} Engel, \textit{supra} note 63, at 283 ("Professor Revesz is claiming not that states fail to relax their standards as a result of interstate competition, but that the relaxation of standards does not occasion any lessening in social welfare.").

\textsuperscript{130} \textit{See id.} at 274.

\textsuperscript{131} \textit{See Stahl, supra} note 116, at 20.

\textsuperscript{132} \textit{See id.} at 21.

\textsuperscript{133} \textit{See} Engel, \textit{supra} note 63, at 284.

\textsuperscript{134} \textit{See} GAO, \textit{WATER POLLUTION: MANY VIOLATIONS HAVE NOT RECEIVED APPROPRIATE ENFORCEMENT RESPONSE, GAO/RCED-96-23}, at 12 (1996) ("[P]enalties play a key role in environmental enforcement by ensuring that regulated entities are treated fairly and consistently so that no one gains a competitive advantage by violating environmental regulations.").

\textsuperscript{135} \textit{See U.S. ENVTL. PROTECTION AGENCY, CORE EPA ENFORCEMENT AND COMPLIANCE ASSURANCE FUNCTIONS} 1 (1996). The goal of the Agency enforcement program is outlined in the following manner, "to assure the protection of public health and the environment, and to assure that polluters do not gain a competitive advantage over those regulated entities that comply with federal environmental requirements." \textit{Id.}

\textsuperscript{136} \textit{See id.}
declarations do not achieve results by themselves. Only by complying with the law's mandates can we accomplish the nation's larger environmental goals. Violating environmental requirements frustrates our ability to achieve the environmental results envisioned by the law. The primary thrust of the EPA's enforcement program, therefore, is to ensure a base threshold of compliance with the law. Accordingly, the EPA's enforcement strategy incorporates the compliance assistance-based perspective in its entirety and uses it as the initial premise for its enforcement approach.

The EPA's enforcement program, however, does not end there. The EPA uses punitive enforcement measures in those instances where assistance efforts or informal enforcement are not successful in achieving compliance. This second prong of the EPA's enforcement program is designed to achieve the public policy objective of ensuring equity in the imposition of environmental requirements. Equity is served by ensuring that "law abiding businesses have a level economic playing field on which to compete." Facilities that comply on time need to have the assurance

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137 See Hodas, supra note 30, at 1553 ("[L]aws by themselves do not accomplish any of these [environmental] goals; only widespread compliance with the law can bring about the desired ends.").
138 See id. at 1554.
139 See id. at 1557 n.25.
140 Indeed, the EPA has organized its enforcement office—the Office of Enforcement and Compliance Assurance—to incorporate both functions. See generally Memorandum from Carol M. Browner, Administrator, Environmental Protection Agency, on New Strategic Enforcement Organization (Oct. 12, 1993) (on file with the author). See also Herman Statement, supra note 2.

In partnership with industry, academic institutions, environmental groups, other Federal agencies, and the States, EPA has established its national Compliance Assistance Centers. The purpose of the centers is to improve compliance by increasing awareness of the pertinent Federal regulatory requirements and providing information that will help to achieve compliance. The centers accomplish this by serving as the first place that businesses, trade associations, and other interested parties can go to get comprehensive, easy to understand compliance information.

Id.
141 See id.
142 See 1997 Hearing Before the Committee on Environmental and Public Works, supra note 2, at 61 (statement of Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice).
143 Herman Statement, supra note 2.

[T]he public expects the regulated community to obey the law and fully
that in doing so they are not placing themselves at a competitive disadvantage. Complying with environmental regulations usually costs money. If it didn’t, there would be far less need for an enforcement program because there would be no disincentive to comply. Unfortunately, treatment technologies or other capital expenditures are often needed to produce the necessary effluent quality required by the NPDES permit and these technologies involve costs: both initially, in the form of capital investment, and over time, in the form of annual or other continuing expenses. These expenses are unlikely to yield any direct economic benefit to the company. Instead, investing in such equipment diverts funds that could be used by the firm for other income-producing activities. This creates a strong disincentive to comply with the effluent limits established in the facility’s permit.

The use of penalties, therefore, is an essential component of an equity-driven enforcement program, where the violations being addressed by the enforcement action have resulted in an economic benefit to the violator. If no such benefit exists, the pre-eminent goal of the enforcement action is to achieve compliance as quickly as possible so that any environmental damage caused by the violations is minimized. The EPA’s enforcement program, therefore, is largely predicated on the use of penalties to address violations of the Act which could result in an economic advantage being gained by the violator. In such instances, “the Agency uses its penalty authority to remove or neutralize the economic incentive to violate environmental regulations.” If the penalty comply with applicable regulations and also expects EPA to take tough, but fair action against those who fail to do so. We also know that regulated entities that comply with environmental requirements expect, and rightly so, EPA to hold noncomplying entities accountable for violations that may place the violators at a competitive advantage.

Id.

144 See id.

145 In some cases, however, the company may experience an economic benefit from compliance. In the Smithfield case, the company actually generated income (in excess of its costs for that portion of the system) from the solids produced by its waste treatment system once it was finally installed. See discussion infra notes 481-523.

146 See GAO, supra note 134, at 12.

147 See Stahl, supra note 116, at 22.

148 See Diamond, supra note 109, at 10,252 (“EPA has relied almost exclusively on punitive enforcement to encourage compliance.”). Traditional enforcement approaches, however, have recently begun to be questioned, not just by states, but by officials within the EPA. See e.g., Stahl, supra note 116, at 19.

149 U.S. ENVTL. PROTECTION AGENCY, BEN: A MODEL TO CALCULATE THE ECONOMIC
is set correctly, it ensures the equitable imposition of regulatory requirements across all facilities because it prevents any competitor from getting an unfair cost-saving by virtue of its illegal conduct.\textsuperscript{150} According to this view, simply compelling compliance with the law is insufficient if it allows protracted delays that may create a significant economic advantage for the noncompliant facility.\textsuperscript{151} The longer a company is allowed to delay, the greater the benefit accrued.\textsuperscript{152} Therefore, where delayed compliance has resulted in a substantial economic benefit, the use of a penalty is vital to redress the resulting inequity.\textsuperscript{153}

Beyond these primary policy objectives (i.e., concerns for compliance and equity), the EPA views its enforcement program as serving a variety of salutary purposes.\textsuperscript{154} It "punishes wrongdoers, deters potential violators, brings actual violators into compliance, and can ensure that damage to the environment is rectified."\textsuperscript{155} The use of penalties is capable not only of creating an equitable imposition of requirements, it can also punish individuals who violate the law, and it can provide an incentive to comply in the future.\textsuperscript{156} If a penalty is set simply at the level where the violator is economically indifferent between compliance and noncompliance, then there is an incentive for the company to continue its attempts to evade the law because being caught only places it where it should have been if it had complied.\textsuperscript{157} Therefore, there is a need to set the penalty beyond the economic benefit of noncompliance to account for the seriousness of the violation and to create a deterrent effect.\textsuperscript{158} Deterrence is vital because it is not possible to address every instance of noncompliance individually.\textsuperscript{159} By using well-publicized punitive enforcement actions, the government can obtain compliance based on fear

\textsuperscript{150} See id.
\textsuperscript{151} See id.
\textsuperscript{152} See id.
\textsuperscript{153} See id.
\textsuperscript{154} See id.
\textsuperscript{155} Herman Statement, supra note 2.
\textsuperscript{156} See id.
\textsuperscript{157} See 1997 Hearing Before the Committee on Environment and Public Works, supra note 2, at 186 (Statement of Nikki Tinsley, Acting Inspector General, EPA).
\textsuperscript{158} See id.
\textsuperscript{159} See Tull v. United States, 481 U.S. 412, 422 (1987) ("The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties.").
of detection and sanction. These concepts form the bedrock of the EPA's settlement penalty calculations and are a core element of the federal government's CWA environmental enforcement program.

Furthermore, it is inevitable that enforcement agencies encounter individuals who, for a variety of reasons, believe that they do not need to follow the requirements of the law. They may believe that the law is unjust, or that it is simply too burdensome, or, more commonly, they will purport to have sufficient, self-serving reasons not to comply, i.e., moral or other reasons that place the individual's self-interest above the public policy goals of the law. When the issue is environmental regulation, these self-regarding reasons are almost always economic in nature and are used to justify "trumping" the legitimate mandates of duly-enacted laws. Such recalcitrant or recidivist violators will never be persuaded to comply on their own without the threat of punitive sanction.

A basic public policy premise of the Act is that the person who creates the discharge of pollutants must take responsibility for those pollutants. The CWA presumes a state of compliance with its mandates, since the discharge of any pollutant from a point source not in accordance with its directives is illegal. Therefore, if a discharger cannot comply with the requirements of the law, a viable option is to cease its discharge of pollutants. If the violations are continuing and severe, and if the discharger chooses to ignore the requirements of the law, then punishment becomes a valid enforcement option. This reality of the law has

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160 See U.S. ENVTL. PROTECTION AGENCY, INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY 2 (1995) [hereinafter INTERIM PENALTY POLICY] ("This Policy is drafted so that violators whose actions, or inactions, resulted in a significant economic benefit and/or harmed or threatened the public health or the environment will pay the highest penalties.").
161 See id.
163 See NONCOMPLIANCE-USERS MANUAL, supra note 149, at 5.
164 See id.
165 See INTERIM PENALTY POLICY, supra note 160, at 2.
166 See CWA § 301(a), 33 U.S.C. § 1311(a) (1994). See also supra note 28 and accompanying text.
167 See Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d. 1128, 1141-42 (11th Cir. 1990) ("There was one simple and straightforward way for Tyson to avoid paying civil penalties for violations of the Clean Water Act: After purchasing the plant, Tyson could have ceased operations until it was able to discharge pollutants without violating the requirements of its NPDES permit.").
168 See id. at 1142 ("Tyson chose not to do this and it must not now bear the consequences of that decision.").
prompted one court to conclude that "[t]he CWA is strong medicine," but pollution control and punishment continue to be viable interests of federal enforcement policy because they serve a basic sense of justice. In the absence of a vigorous environmental enforcement program, the requirements of the law can become merely symbolic. Without effective enforcement, achieving the law’s objectives becomes impossible no matter how stringent the laws may be.

D. The EPA/State Relationship in CWA Enforcement—The Statutory and Policy Framework

Given the conflicts that exist in the dual enforcement scheme of the CWA, a series of important questions arise. The simplest and most fundamental question is when should the EPA enforce the CWA directly against a violating facility in an approved state? Beyond this basic situation lies an even more intriguing and complicated inquiry: if the EPA decides to enforce the CWA directly in an approved state when that state is already acting on its own, which jurisdiction’s authority prevails; and under what circumstances would the EPA pursue such enforcement in the first place?

Section 309(a), interestingly, begins with a specific case: a violation of a permit issued by an approved NPDES state. From this

169 Texas Municipal Power Agency v. EPA, 836 F.2d 1482, 1488 (5th Cir. 1988).
170 See Daniel C. Esty, Revitalizing Environmental Federalism, 95 Mich. L. Rev. 570, 576 (1996) (“Our sense of justice and fairness thus is offended when pollution harms go uncompensated or uncontrolled.”). See also Michael J. Sandel, It’s Immoral to Buy the Right to Pollute, N.Y. Times, Dec. 15, 1997, § op. ed. (“If a company or a country is fined for spewing excessive pollutants into the air, the community conveys its judgment that the polluter has done something wrong.”).
171 See Hodas, supra note 30, at 1558 n.29.
172 See id. The experience of the former Soviet Union is a classic example of this tendency. See id. (citing Murray Feshbach & Alfred Friendly, Jr., Ecocide in the USSR: Health and Nature Under Siege 1-14).

On paper, the Soviet Union had extensive, stringent environmental laws and regulations, but there was no enforcement of those laws. . . . Without enforcement, there also has been no compliance with the environmental laws, which are now a sham, ‘a false front over grubby reality.’ . . . As a result, Russia suffers from widespread, severe, even catastrophic environmental contamination.

Id.
perspective, it outlines the EPA’s enforcement responsibility.\footnote{174} It is, perhaps, an indication of the central importance of this issue that Congress chose to introduce the discussion of CWA enforcement with the case of federal enforcement in an approved state. In such a situation, the statute provides two courses of action for the Administrator.\footnote{175} The first course recognizes that federal enforcement power is concurrent with State enforcement authority and allows the Administrator to proceed directly either to issue an order requiring compliance under section 309(a)(3),\footnote{176} or to initiate a civil action for appropriate relief under 309(b).\footnote{177} Under this option, the Administrator is not required to await State enforcement action.\footnote{178} The second course of action is to notify both the person alleged to be in violation and the approved state.\footnote{179} If this option is taken, the

\begin{quote}
Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator’s notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.
\end{quote}

\footnote{id}{174} See id.
\footnote{id}{175} See id.

\begin{quote}
Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.
\end{quote}


\begin{quote}
Whenever on the basis of any information available to him the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator’s notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.
\end{quote}

\footnote{id}{177} See CWA § 309(b), 33 U.S.C. § 1319(b) ("The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.").

\footnote{id}{178} See id.
\footnote{id}{179} See id.
statute requires that the approved State be given thirty days to initiate “appropriate” enforcement action. If that State fails to commence such an action, the Administrator is obliged either to issue an order for compliance or to institute civil proceedings. In the former case, the EPA is not constrained in its ability to enforce against violations of a permit issued by an approved state. In the latter case, the statute creates an implied deference to State action in approved states. This ambiguity is not resolved by an appeal to the legislative history.

Congress struggled with the idea of apportioning enforcement responsibilities between the states and the federal government. On the one hand, the legislative history states that “[s]ection 309 requires the Administrator to provide notice to a polluter and the State upon discovering a violation of any effluent limitation.” On the other hand, the history states that “[t]he Administrator also is required to issue a compliance order or to bring a civil suit against the polluter.” These are incompatible directions. Congress clearly expected the EPA to provide a strong enforcement presence and stated that “[t]he Administrator must issue an abatement order whenever there is a violation of the terms or conditions of a permit.” But the general expectation was that the EPA would rely for the most part on State enforcement:

Consistent with the general tenor of the Act, the Committee expects that the Administrator will rely to the maximum extent possible upon the enforcement actions of the individual States. The Committee in providing for federal enforcement does not intend to replace enforcement by the States. The provisions of section 309 are supplemental to those of the State and are available to the Administrator in those cases where local, State, or interstate enforcement agencies will not or cannot act expeditiously and vigorously to enforce the requirements of the Act. The Committee clearly intends that the greater proportion of

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180 See id.
182 See id.
183 See id.
184 See LEGISLATIVE HISTORY, supra note 22, at 314.
185 Id.
186 Id.
187 Id. at 163.
This situation, however, raises the following question: when should the EPA use its enforcement authority against violators of permit conditions in an approved state?

To answer this question, the EPA promulgated a policy that addresses these issues and guides the Agency's actions when it encounters situations where direct federal enforcement is contemplated in an approved state. The Policy Framework for State/EPA Enforcement Agreements (the Policy Framework) was developed in conjunction with the states, and it provides the blueprint for the state/federal enforcement relationship. This policy directs the EPA and the states in situations where dual enforcement authority exists, i.e., in approved State programs. It does so by defining the overall objective of environmental enforcement and by laying out the respective "roles and responsibilities" of each party. The overall objective of the Policy Framework is to achieve and maintain "a high level of compliance with environmental laws and regulations." Beyond that, the Policy Framework reinforces the conviction that the states have the primary responsibility for performing compliance and enforcement activities within approved programs, but it also reiterates a need for the EPA to ensure the "fair and effective enforcement of federal requirements, and a credible national deterrence to noncompliance." The policy clearly recognizes that the EPA may need to use its enforcement authority to "support the broad national interest in creating an effective deterrent to noncompliance beyond what a State may need to do to achieve compliance in an individual case."

The Policy Framework cannot, and does not, dictate to the states what their enforcement program should be. Rather, it has more of an oversight function and it encourages states to adopt enforcement principles used by the EPA, such as deterrence and equity, i.e., the use of penalties to

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188 Id. at 802.
189 See generally POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96.
190 See id.
191 See id. at 1.
192 Id. at 21.
193 Id. at 1.
194 Id.
195 Id.
recover the economic benefit of noncompliance. However, there is wide discretion granted to the states to construct and implement their enforcement programs as they see fit. The policy goal of the State/EPA enforcement relationship is for the states to have the primary responsibility for initiating enforcement action. The presumption of the Policy Framework, however, is for the EPA to take direct enforcement action in those situations “where a state is ‘unwilling or unable’ to take ‘timely and appropriate’ enforcement action.”

EPA’s policy is to take direct enforcement action in the following types of cases: 1) where the state requests EPA action; 2) where a state enforcement response is not timely and appropriate; 3) where there are national precedents, either legal or programmatic; and 4) where there is a violation of an EPA order or consent decree. When the EPA decides to initiate an enforcement action to address one of the four items outlined above, it considers the following factors: 1) cases which are specifically designated as nationally significant, e.g., situations of significant noncompliance (SNC) as defined by national policy, or involving explicit national or regional environmental priorities; 2) cases where there is significant environmental or public health damage; 3) instances where some significant economic benefit has been gained by the violator; 4) where there are interstate issues, such as environmental impacts transgressing state boundaries; and 5) if there have been repeat patterns of violations and violators “where the state response is likely to prove ineffective given the pattern of repeat violations and prior history of the State’s success in addressing past violations.”

The EPA will generally decline to exercise its enforcement authority when the approved State has taken or will take “timely and appropriate” enforcement action. In order to determine whether an

196 See id. at 8.
197 See id. at 5.
198 See id. at 21.
199 Id.
200 See id. at 21.
201 Significant Noncompliance in the NPDES program is defined by the magnitude and/or frequency of violations of the permit’s effluent limitations, as well as the nature of the pollutant parameters being violated. See 40 CFR § 123.45, app. A (Criteria for Noncompliance Reporting in the NPDES Program). See also CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1) (1994).
202 POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 21-22.
203 See id.
approved state is taking timely and appropriate enforcement action, the EPA has developed a reporting system that each approved state must follow.\textsuperscript{204} This reporting is triggered by a facility’s designation as being in SNC.\textsuperscript{205} Once a facility is in SNC, it must be reported to the EPA by the approved NPDES State on a report called the quarterly noncompliance report (QNCR).\textsuperscript{206} As the name implies, this report is issued every three months and identifies facilities with the most serious violations of the CWA.\textsuperscript{207} By the time a facility is listed on the QNCR, the administering agency (whether the EPA or an approved state) is expected to have already initiated an enforcement action to achieve compliance. Prior to the facility appearing on the subsequent QNCR, however, the facility is expected either to be in compliance with its permit or the administering agency is required to take a “formal”\textsuperscript{208} enforcement action.\textsuperscript{209} This is considered to be a timely response.\textsuperscript{210}

The appropriateness of the action taken is evaluated from three perspectives.\textsuperscript{211} The first is whether compliance will be achieved and the

\begin{footnotesize}
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\item \textsuperscript{204} See id. at 31.
\item \textsuperscript{205} See U.S. ENVTL. PROTECTION AGENCY, REVISIONS OF NPDES SIGNIFICANT NONCOMPLIANCE (SNC) CRITERIA TO ADDRESS VIOLATIONS OF NON-MONTHLY AVERAGE LIMITS (1995) [hereinafter REVISIONS OF NPDES SIGNIFICANT NONCOMPLIANCE CRITERIA].
\item \textsuperscript{206} See 40 CFR § 123.45(a) (1997). See also Elder, supra note 74, at 10,030.
\item \textsuperscript{207} See Revisions of NPDES Significant Noncompliance Criteria, supra note 205, at 1.
\item \textsuperscript{208} U.S. ENVTL. PROTECTION AGENCY, NATIONAL GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS 166 (1987) [hereinafter NATIONAL GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS]. “A formal enforcement action is defined as one that requires actions to achieve compliance, specifies a timetable, contains consequences for noncompliance that are independently enforceable without having to prove the original violation, and subjects the person to adverse legal consequences for noncompliance.” Id. at 166 n.7.
\item \textsuperscript{209} See id. at 164.
\item \textsuperscript{210} See id. at 165.
\item \textsuperscript{211} See POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 22.
\end{itemize}
\end{footnotesize}
second is whether the schedule for compliance is unduly extended.\textsuperscript{212} The third broad area of evaluation relates to the penalty and whether it is appropriate to the nature of the illegal conduct.\textsuperscript{213} The presumption is that the EPA can take action if the remedies obtained by the state (i.e., injunctive relief and penalties) are clearly inappropriate to the violation.\textsuperscript{214} The remedy must correct the violation and cannot be extended indefinitely through compliance schedules.\textsuperscript{215} In terms of the penalty, the Policy Framework indicates that it is appropriate for the EPA to pursue penalties if the State has not assessed a penalty or if the “[S]tate penalty is determined to be grossly deficient.”\textsuperscript{216} To evaluate whether the State penalty is “grossly deficient,” the policy evaluates the relationship of the state penalty to the seriousness of the violation, the economic benefit gained as a result of the noncompliance, and any other special, applicable factors.\textsuperscript{217} These principles uphold the sanction-based perspective of enforcement.\textsuperscript{218} States are often quick to criticize this sanction-based focus on the grounds that the federal government is forcing the states to become “branch offices of EPA.”\textsuperscript{219}

Clearly, the enforcement relationship between the states and the EPA, as laid out in the Policy Framework, is predicated on the twin pillars of obtaining compliance and a belief in punitive enforcement.\textsuperscript{220} The presumption is that the states will implement enforcement programs that achieve high levels of compliance (thus ensuring that the national environmental goals of the CWA are met) and that further the national enforcement policy goals of equity and deterrence.\textsuperscript{221} The EPA’s oversight of state enforcement programs, therefore, is based on an assumption that the states will act to curtail violations in a similar manner as the federal government.\textsuperscript{222} This posture is anathema to many states.\textsuperscript{223} Many State

\textsuperscript{212} See id. at 22-23.
\textsuperscript{213} See id. at 22-23.
\textsuperscript{214} See id.
\textsuperscript{215} See id.
\textsuperscript{216} Id. at 23.
\textsuperscript{217} See id.
\textsuperscript{218} See id.
\textsuperscript{219} See Dunlop Statement, supra note 113.
\textsuperscript{220} See POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 1.
\textsuperscript{221} See generally id.
\textsuperscript{222} See 1997 Hearing Before the Committee on Environment and Public Works, supra note 2, at 199 (statement of Patricia S. Bangert, Director of Legal Policy, Attorney General’s Office, State of Colorado).
officials would prefer to have the EPA restrict itself to the role of providing technical assistance, setting national standards, conducting research, and facilitating national data collection efforts. In this role, the EPA should not be concerned with “how a State handled each individual enforcement matter.” Rather, the states would be left to perform their lead duties in direct program implementation and enforcement as they see fit, bringing in the EPA as needed to resolve particular issues or problems and to ensure overall program integrity. Within this state view of the state/EPA enforcement relationship, there is a strict demarcation between the respective party’s roles, with neither party seeking “to pick off choice plums from the other’s role.”

The uneasy nature of the federal/state enforcement relationship is nowhere better represented than in the United States’ case against Smithfield Foods. All of the elements of conflict are present in this action: an economically (and, therefore, politically) powerful, private constituent with long-standing violations of the conditions of its NPDES permit; a significant economic benefit gained as a result of such noncompliance; a State agency with an enforcement philosophy emphasizing a cooperative relationship between the administering agency and regulated entities; environmental impacts that do not respect state boundaries; and the federal government seeking to achieve the twin goals of equity and deterrence with its enforcement action. The interplay between these forces comes to life as we examine the rationale used by the federal government in its action to address this complex enforcement action. But first we must set the stage to explain this rationale by outlining the chronology of events in this intricate case.

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223 See id. at 198 ("EPA’s perspective appears to be that they own the ranch and that we, the states, are the hired ranch hands.").
224 See 1997 Hearing Before the Committee on Environment and Public Works, supra note 3, at 190 (statement of Mark Coleman, Executive Director, Oklahoma Department of Environmental Quality).
225 Id. at 189.
226 See id.
227 Id. at 190.
229 See generally id.
III. United States v. Smithfield Foods Inc.—A Chronology

A. The Approval of the Commonwealth of Virginia to Administer the Federal NPDES Permit Program

The Commonwealth of Virginia was approved to administer the federal NPDES permit program on March 31, 1975. In transmitting its approval of the program, the EPA simultaneously enclosed its approval of the Memorandum of Understanding (MOU) executed between the two parties as part of the program approval process. The purpose of the MOU is to define mutually agreed upon “responsibilities in the area of water quality control within the Commonwealth of Virginia.” This document describes the respective roles of the EPA and the State in general terms in various areas of program implementation, including enforcement actions. The enforcement section is a very broad statement of responsibility. It enumerates the respective roles in these terms: “the State Water Control Board shall be the primary enforcement agency with respect to permits issued under the NPDES program, and the Regional Administrator shall assume a strong supporting role.” From these modest beginnings, a twenty-two year enforcement relationship between Virginia and the EPA has evolved.

B. The Development of the Commonwealth of Virginia’s Water Quality Standards: VR 680-21-00

The course of events which ultimately led to the United States’ action in the Smithfield case was triggered in May 1988 when Virginia...
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adopted its definition of “Nutrient Enriched Waters”\textsuperscript{237} and its “Policy for Nutrient Enriched Waters”\textsuperscript{238} (the Nutrient Policy). This action precipitated the initial conflict between Smithfield Foods and the state, and it established the subsequent tenor of the relationship between these two parties.\textsuperscript{239} Virginia’s definition of “nutrient enriched waters” and its Nutrient Policy are part of the state's overall water quality standards.\textsuperscript{240} Virginia developed its water quality standards in accordance with the requirements in section 303(c)\textsuperscript{241} of the CWA, which requires states to define the water quality goals of a given water body by designating the use or uses to be made of the water and by setting numeric criteria necessary to protect those uses.\textsuperscript{242} The State Water Quality Control Board (SWCB or the “Board”) of Virginia developed its water quality standards, in part, to address situations of eutrophication (i.e., conditions of excess nutrients which can create excessive phytoplankton growth and a consequent increase in turbidity and a decrease in the water's oxygen concentration).\textsuperscript{243} The presence of nutrients in sufficient quantities is recognized by the State as “contributing to undesirable growths of aquatic plant life in surface waters.”\textsuperscript{244}

The impetus for developing these regulations was the 1987 Chesapeake Bay Agreement (CBA).\textsuperscript{245} The CBA was initiated by the legislatures of Virginia and Maryland in 1980 when they established the Chesapeake Bay Commission.\textsuperscript{246} Pennsylvania joined the Commission in 1985, and by 1987, the District of Columbia and the EPA had “formally agreed to a cooperative approach” for “managing the Chesapeake Bay as

\begin{footnotes}
\item[241] See CWA § 303(c), 33 U.S.C. § 1313(c) (1994).
\item[242] See U.S. ENVTL. PROTECTION AGENCY, WATER QUALITY STANDARDS HANDBOOK, EPA-823-B-94-005a, 1-1 (2\textsuperscript{nd} ed. 1994).
\item[243] See Elder, supra note 74, at 10,029 (“the states are supposed to decide on their state standard for that pollutant, through their scientific and political processes”).
\item[244] Definition of Nutrient Enriched Waters, supra note 237, at 1649.
\item[245] See CHESAPEAKE BAY COMMISSION, CHESAPEAKE BAY AGREEMENT 1 (1987) [hereinafter CHESAPEAKE BAY AGREEMENT].
\item[246] See id.
\end{footnotes}
an integrated ecosystem." 

Further, the signatories to the CBA committed to "specific actions" that included, among other things, a forty percent reduction in nutrient (i.e. phosphorus and nitrogen) discharges into the Chesapeake Bay by the year 2000. In signing this agreement, the EPA and the other signed parties identified the control of nutrient discharges into the Chesapeake Bay as a significant regional environmental priority. To meet its commitment, Virginia's water quality standards designate certain waters as being nutrient enriched, based on "chlorophyll 'a' concentrations, dissolved oxygen fluctuations, and concentrations of total phosphorus." At the point where the Smithfield Foods discharges occur, the Pagan River, a tributary to the Chesapeake Bay, is designated as enriched under the state's water quality standard. 

The discharges from Smithfield Foods contribute to eutrophication because of the nature of the facility's operations and the resulting wastewater produced by the company's manufacturing process. Smithfield is a hog slaughtering and processing facility with an average kill rate of approximately 8,000 hogs per day. The plant operations include blood and hair collection, viscera handling, and edible and inedible rendering. Blood from the kill floor is collected and pumped to processing facilities where it is centrifuged to separate the plasma from the blood solids. The plasma is discharged into the sewer while the blood solids are dried and disposed of separately. Hair is collected and hydrolyzed (i.e., chemically decomposed) and then dried for disposal. Stomachs are pumped and then scalded to be sold for edible consumption. Chitterlings and casings are saved with the contents

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\section*{References}

\bibitem{247} Id.
\bibitem{248} See id. at 5-6.
\bibitem{249} See id.
\bibitem{250} Definition of Nutrient Enriched Waters, \textit{supra} note 237, at 1649-56.
\bibitem{251} See \textit{id.} at 1650 ("Tidal freshwater James River from the fall line to the confluence of the Chickahominy River (Buoy 70) including all tributaries to a distance five river miles above their fall lines that enter the tidal freshwater James River.").
\bibitem{252} See \textit{WELLS ENGINEERS ENVIRONMENTAL, INC., STUDY AND REPORT: PHOSPHORUS REMOVAL: SMITHFIELD FOODS, INC., SMITHFIELD, VIRGINIA 1} (1990) [hereinafter \textit{WELLS ENGINEERS ENVIRONMENTAL STUDY}].
\bibitem{253} See \textit{id.} at 2.
\bibitem{254} See \textit{id.}
\bibitem{255} See \textit{id.}
\bibitem{256} See \textit{id.}
\bibitem{257} See \textit{id.}
\end{document}
pumped and discharged to the sewer. A variety of rendering operations exist at the plant, both for edible and inedible solids. These rendering processes produce grease-bearing wastes that are treated at the plant. In addition to the wastes from processing the carcasses, there are animal wastes from the holding pens that are collected and pumped to a catch basin for treatment. The nature of the plant process, from the kill floor to cutting and processing, is such that “nearly every operation within the plant contributes nutrients” to the total waste flow. Phosphorus, in particular, comes from the blood, meat processing and renderings at the plant.

The state’s Nutrient Policy outlines the consequences for Smithfield of the Pagan River being designated as enriched. The Nutrient Policy requires the State to reopen the NPDES permits of facilities discharging to waters designated as enriched and to impose water quality-based effluent limitations on the nutrients (principally phosphorus) in those discharges in order to address eutrophication in the Chesapeake Bay. Thus, the Nutrient Policy required the State to reopen Smithfield’s existing NPDES permit (which had been issued on May 13, 1986) and to impose a monthly average total phosphorus effluent limitation of 2.0 milligrams per liter (mg/l). Smithfield was required to comply with that limit “as quickly as possible and in any event within 3 years following modification of the NPDES permit.” For the first time, Smithfield was faced with the prospect of treating the phosphorus in its discharges, a requirement which would entail the installation of expensive treatment technology that had hitherto been unnecessary, since no limit for phosphorus existed prior to the State developing its water quality standard.

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258 See id.
259 See id.
260 See id.
261 See id.
262 See id.
263 See CH2M HILL, PHOSPHORUS REMOVAL STUDY: SMITHFIELD FOODS, INC. 2-1 (1991) [hereinafter CH2M HILL STUDY].
265 See id. at 1649.
266 See id.
267 Id.
268 See Petition for Appeal, supra note 239 (“Smithfield will be required to make substantial modifications in its subsidiaries’ treatment plants to comply with these permit modifications.”).
C. Smithfield's Appeal of the Commonwealth's Water Quality Standards and the Associated NPDES Permit Modification

Smithfield's response to the state's adoption of the definition of "nutrient enriched waters" and the Nutrient Policy was to challenge these regulations in state court.\textsuperscript{269} This appeal was commenced in June 1988.\textsuperscript{270} The fundamental premise of Smithfield's challenge of the regulations was their cost.\textsuperscript{271} The SWCB had determined that compliance with the 2.0 mg/l limit could be achieved, but the range of costs necessary to achieve the limit varied widely depending on the type of treatment needed to comply.\textsuperscript{272} The Board had estimated the cost of compliance from all regulated sources to be in the range of $27.5 to $228 million.\textsuperscript{273} From Smithfield's perspective, the least expensive treatment alternative, biological phosphorus removal (BPR), was insufficient to achieve compliance with the 2.0 mg/l limit.\textsuperscript{274} According to Smithfield, "[t]he evidence in the record shows that BPR: (a) can reliably reduce effluent phosphorus to a concentration of 4 mg/l on a monthly basis, but (b) cannot reduce effluent phosphorus concentrations to 2 mg/l on a monthly basis, as required, without supplementary chemical addition, which substantially increases compliance costs."\textsuperscript{275}

In its appeal of the state's water quality standard before the state court, Smithfield contended that it could not:

achieve compliance through application of the relatively inexpensive BPR technology. Worse, Smithfield may not even be able to achieve compliance by installing supplementary chemical addition. It is likely that Smithfield would have to add another very expensive unit process to the end of its existing wastewater treatment plants to achieve compliance.\textsuperscript{276}

\textsuperscript{269} See generally id.
\textsuperscript{270} See id.
\textsuperscript{271} See id. at 2.
\textsuperscript{272} See id. at 7.
\textsuperscript{273} See id.
\textsuperscript{274} See id. at 8.
\textsuperscript{275} Id. (emphasis in original).
\textsuperscript{276} Id. at 11.
The issue, therefore, was not compliance, but the cost of achieving compliance with the limit.\textsuperscript{277} The principal conclusion drawn by Smithfield was that "[t]hese increased costs [would] place Smithfield at a competitive disadvantage" with other meatpackers not subject to the rule.\textsuperscript{278} To avoid these costs of compliance, Smithfield continued to pursue its legal challenges to the regulations and the required permit modification.

In October 1989, while its appeal of the state regulations was pending, Smithfield initiated a Petition for Formal Hearing before the Board to challenge the permit modifications required by those regulations, even though Smithfield's permit had not yet been modified.\textsuperscript{279} In this preemptive Petition, Smithfield reiterated its objection to the adopted regulations, stating its allegation that the regulations were developed with municipal wastewater treatment plants in mind and that Smithfield's wastewaters were "fundamentally different" due to their elevated concentration of phosphorus.\textsuperscript{280} Smithfield claimed that requiring the proposed level of pollutant reduction would result in costs of compliance for Smithfield "many times greater, on a unit volume basis, than those imposed on municipal plants."\textsuperscript{281} The claim was one of equity. To impose these effluent limitations would, in Smithfield's opinion, be "unnecessarily burdensome and unfair" since they were not developed with Smithfield's wastewater characteristics in mind and would impose treatment costs incommensurate with those facilities for whom the limit was developed.\textsuperscript{282} However, it is important to remember that water quality-based effluent limitations, such as those at issue in the Smithfield challenge, differ from technology-based limitations in that they generally are not intended to consider the technological feasibility or cost of compliance, but instead are designed to protect the receiving water from the adverse effects of pollution.\textsuperscript{283} They are intended to achieve directly levels of water quality which are not satisfied by the application of technology-based standards.\textsuperscript{284} Furthermore, they are designed to address

\begin{footnotes}
\textsuperscript{277} See id. at 12.
\textsuperscript{278} Id. at 11.
\textsuperscript{279} See In re Modification of VPDES, Permit No. VA0059005 (State Water Control Board 1989).
\textsuperscript{280} See id. at 3.
\textsuperscript{281} Id. at 4.
\textsuperscript{282} See id. at 3-4.
\textsuperscript{283} See CWA § 304(b), 33 U.S.C. § 1314(b) (1994).
\textsuperscript{284} See id. § 301(b)(1)(c), 33 U.S.C. § 1311(b)(1)(c). The water quality standards
existing water quality problems.\textsuperscript{285}

The State Board (SWCB or Board) responded to Smithfield’s Petition in October, 1989, denying the request for a hearing because “no final action has been taken by the Board regarding the permit,”\textsuperscript{286} i.e., there was no basis for an appeal because the state had not taken any action for which an appeal could be brought. Instead, the Board scheduled an informal public hearing for December 4, 1989, “to receive comments on the proposed issuance or denial of the modification of a Virginia Pollutant Discharge Elimination System (VPDES) Permit”\textsuperscript{287} for Smithfield Foods. The meeting was held, but no comments were received from the public, which left Virginia with comments only from the company (in the form of their appeal and Petition) regarding the permit reissuance.\textsuperscript{288} The SWCB explicitly acknowledged the history of comment by Smithfield on the proposed permit, but approved the modification of Smithfield’s VPDES permit, i.e., the Board explicitly approved the inclusion of the 2.0 mg/l limit as required by the state’s Nutrient Policy in spite of the objections voiced by the company.\textsuperscript{289}

On December 11, 1989, the Board reopened and modified Smithfield’s existing VPDES permit to include the 2.0 mg/l total phosphorus effluent limit required by the Nutrient Policy.\textsuperscript{290} This

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devolved by states are based on the desired water quality characteristics of the water body, as specified by the State in its designated use classification, i.e., the State could designate the use of the water body as a public water supply, or it could specify the use of the water body as fishable/swimmable. The designated use is designed to achieve the national goals for water quality stated in § 101(a) of the Act. By setting the designated use, the State determines the stringency of the associated limit derived from the standard, i.e., the more pristine the designated use, the more restrictive is the limit. Telephone Interview with Rob Wood, Office of Science and Technology, U.S. EPA (Jan. 22, 1998). In setting the designated use, the state must take into account a variety of factors, including whether the standard will result in “substantial and widespread economic and social impact.” 40 CFR § 131.10(g). It seems unlikely that Smithfield’s challenge of the state’s water quality standard would have prevailed based on economic considerations alone.

\textsuperscript{286} Letter from Richard N. Burton, Executive Director, State Water Control Board, Commonwealth of Virginia, to James Ryan, Esq., Mays and Valentine (Oct. 26, 1989).
\textsuperscript{287} Notice of Public Hearing, State Water Control Board (attached to the Oct. 26, 1989 letter).
\textsuperscript{288} See Memorandum from the Director of OWRM to the Executive Director of the State Water Control Board (Dec. 22, 1989).
\textsuperscript{289} See id.
\textsuperscript{290} See id.
modification became effective on January 4, 1990, and imposed a schedule for Smithfield to comply with the phosphorus standard.\footnote{See Permit No. VA0059005, State Water Control Board (1989) [hereinafter 1990 VPDES Permit].} The permit stipulated that Smithfield was to achieve compliance with the phosphorus limit within approximately thirty-five months after the permit’s modification, although no definitive compliance date was specified.\footnote{See id. The permit required Smithfield to achieve compliance with the total phosphorus limitations by completing the following performance objectives within the specified timetable: 1) initiate design of facilities within 30 days after the modification date of the permit; 2) submit plans to the SWCB within 90 days from (1); 3) commence construction within 30 days of approval of the plans; 4) complete construction within 29 months of (3); and 5) achieve compliance with final effluent limitations 30 days after completion of construction. See 1990 VPDES Permit, supra note 291. This schedule does not provide a final date certain for compliance but sets up compliance dates contingent on previously completed activity. See id.}

Smithfield responded quickly to this action on two fronts: the first was to initiate a series of attacks on the standard in the news media, with an accompanying threat to leave the State to escape the phosphorus requirement.\footnote{See e.g., Bill Geroux, Bay Plan Touches Southside: Smithfield May Move Plants, RICHMOND TIMES-DISPATCH, Jan. 21, 1990, at 1.} Specifically, upon learning of the new permit limit for phosphorus, Joseph Luter, III, president of Smithfield Foods, stated that the company’s operations in Norfolk, Suffolk, and Smithfield, Virginia could be moved to a 1,000 acre facility which had already been built by Smithfield in Bladen County, North Carolina if Virginia forced the company to comply with the phosphorus limit for its wastewater.\footnote{See Statement of Undisputed Facts and Memorandum of Law in Support of the United States’ Motion for Partial Summary Judgement on Liability and Section 309(g)(6) Issues at ¶ 16, United States v. Smithfield Foods, Inc. (E.D. Va. 1997) (No. 2:96cv1204) (citing RICHMOND TIMES-DISPATCH, Smithfield Inc. Ponders Move to Carolina, Dec. 31, 1989) [hereinafter Statement of Undisputed Facts and Memorandum of Law].} In January, 1990, Smithfield’s vice president, Robert Manly stated “[w]e’re as serious as a heart attack. We’re not trying to hold a gun to anybody’s head, but we have to make business decisions.”\footnote{Geroux, supra note 293, at 1.} At this time, Manly stated that the North Carolina facility Smithfield had been building before the phosphorus limit was proposed was large enough to accommodate its Virginia operations, and it did not have the troublesome phosphorus restrictions.\footnote{See Statement of Facts and Undisputed Memorandum of Law, supra note 294, at ¶ 17 (citing to RICHMOND TIMES-DISPATCH, Smithfield Inc. Ponders Move to Carolina, Dec.}
The second front pursued by Smithfield was to resurrect the company’s request for a public hearing. The Board now granted this request because the actual permit modification created a ripe issue for a hearing. The date for this hearing, however, was delayed pending the outcome of negotiations between the state and Smithfield which took the form of a Consent Special Order on the administrative proceedings designed “to facilitate an agreed resolution to their dispute.” Upon a motion by Smithfield, the state court had entered an order postponing final argument on Smithfield’s June 1988 appeal of the state’s water quality standard pending a formal evidentiary hearing with the Board on the permit modification. The Consent Special Order became the forum through which the state and Smithfield resolved their differences regarding the permit modification, thus negating the requirement for a judicial suit or other public meeting.

D. The Commonwealth of Virginia’s First Consent Special Order—March 21, 1990

The first Consent Special Order related to the state’s water quality standard for phosphorus became effective on March 21, 1990. It

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298 Id.; Smithfield Foods, Inc. v. Commonwealth of Virginia, In re Adoption of State Water Control Board Regulations (Isle of Wight Co. Cir. Ct. 1990) [hereinafter Adoption of State Water Control Board Regulations].

299 See Adoption of State Water Control Board Regulations, supra note 298.

300 See generally Consent Special Order, March 1990, supra note 297. The Consent Special Orders were publicly noticed and written comments from the public could be submitted, but there was no right by the public to challenge in court the ultimate decision of the Orders. See id.

301 Consent Special Order, March 1990, supra note 297. For a summary of the state’s Consent Special Orders in the Smithfield case, see Table III-1.

302 See id. at 3. See also Statement of Undisputed Facts and Memorandum of Law, supra note 294, at vi n.1.

The State Water Control Board had previously issued two special orders dealing with total Kjeldahl nitrogen limits in the Permit. Specifically, the May 1986 Permit VA0059005 issued to Smithfield Foods for Outfalls 001 and 002 imposed stricter total Kjeldahl nitrogen limits on Smithfield Foods than the prior permits governing these outfalls. Stating that ‘the Board and Smithfield recognize that
accomplished three basic objectives.\footnote{See Consent Special Order, March 1990, supra note 297, at 1-2.} First, it clarified the schedule for compliance with the phosphorus standard outlined in the permit.\footnote{See id. at 1.} The permit did not have a certain date by which Smithfield had to comply with the limit. The Consent Special Order specified January 4, 1993, as the date by which Smithfield had to comply with the phosphorus standard.\footnote{See id. ("Smithfield is further required to attain full compliance with the phosphorus limitation by January 4, 1993.".}) Second, Smithfield agreed to study what technologies were available to attain compliance with the 2.0 mg/l phosphorus standard, the associated costs involved, and any other phosphorus limitations that Smithfield could reasonably and practicably attain.\footnote{See id. at 1-2.} Third, the Consent Special Order introduced the idea of Smithfield studying the feasibility of connecting its wastewater discharges to the Hampton Roads Sanitation District (HRSD) sewage treatment system as a means to comply with the phosphorus limit.\footnote{See id. at 2} The purpose for enumerating these two alternative methods of compliance was to allow Smithfield the opportunity to "compare the costs of the different treatment options" and to make a decision on which alternative they would choose based on which method was the most cost effective solution for the company.

Smithfield's VPDES permit was due to expire on May 13, 1991, and they were required by law to submit a permit application for the reissued permit at least 180 days prior to this date.\footnote{Id.} By November 13, additional water quality data on the Pagan River would be of benefit in confirming the model prediction used to set the stricter total Kjeldahl nitrogen limits, the Board imposed 'interim limits' on nitrogen that were less strict than those set forth in the Permit. In return, Smithfield Foods was required to submit water quality data and modelling [sic] information. Special Order (May 13, 1986).... This special order was amended by the State Water Control Board on January 25, 1988, when the State Water Control Board imposed a schedule for the submission of new data and the construction of treatment equipment to meet the total Kjeldahl nitrogen standards. Special Order (Jan. 25, 1988)....
1990, therefore, Smithfield was required to submit its application for permit reissuance and, according to the Consent Special Order, they were also required to inform the Board of their choice for complying with the phosphorus standard. Smithfield submitted an initial permit application package which was received by the State on November 11, 1990 and supplemented this package with further information on December 21, 1990 and January 16, 1991. A complete permit application was not received by the State until January 30, 1991.

Throughout this process, Smithfield retained its right to request a less stringent phosphorus limit through the mechanism of the formal hearing (which had been delayed by the adoption of the Consent Special Order) and the Board agreed to issue a draft permit after the November 13, 1990 application deadline with "an appropriate phosphorus limitation." If Smithfield did not accept the proposed effluent limit for phosphorus in the draft permit and did not choose to hook into the HRSD system, then the formal hearing on the permit limit would be scheduled. At this point in the process, Smithfield had four options: 1) hook into the HRSD system; 2) accept the existing phosphorus limit of 2.0 mg/l; 3) continue its legal challenge to the limit through a formal hearing on the permit or, further, a judicial appeal of the state's water quality standard (which had already been initiated in June 1988); or 4) leave the state. The Consent Special Order process was designed to avoid these last two alternatives.

In accordance with the requirement of the Consent Special Order, Smithfield contracted with Wells Engineers Environmental, Inc. (Wells Engineers) "to assess technologies, costs and reliability in attaining compliance with the present 2.0 mg/l effluent phosphorus standard." Wells Engineers canvassed the forty-eight contiguous states to determine the extent of state-developed phosphorus limitations and to identify facilities comparable to Smithfield to evaluate the success of such

311 See Memorandum from Permits Program Manager, OWRM, to Executive Director, State Water Control Board (Dec. 23, 1991) (on file with the author and the William and Mary Environmental Law and Policy Review) [hereinafter Memorandum from Permits Program Manager].
312 See id.
314 See id.
315 See id.
316 See id.
317 WELLS ENGINEERS ENVIRONMENTAL STUDY, supra note 252, at 1.
companies in meeting their limitation. Further, they provided cost estimates of the various systems used to treat phosphorus in the real-life examples contained in the report. This information was submitted to Smithfield in October 1990, approximately one month prior to the deadline for Smithfield to decide its course of action.

The basic conclusion of the study was that various existing treatment systems could provide effluent characteristics for phosphorus in the range of 0.86-0.95 mg/l on a monthly average basis, but that no system accomplished this removal efficiency consistently. The facility most similar to Smithfield in the study had violated its phosphorus limit in three of the previous twelve months. The report concluded that this particular system could achieve a higher degree of pollutant removal with the addition of a more extensive phosphorus treatment system, but that even with this more elaborate system, the expected maximum phosphorus concentration on a monthly average basis would be 4.5 mg/l. The cost of this more elaborate system for Smithfield’s two outfalls was estimated at $8,690,000 in initial capital expenditure and $1,940,000 in annual operation and maintenance costs. Wells Engineers did not evaluate the cost of hooking up to the HRSD system.

E. The Amendment to the March 21, 1990 Consent Special Order

On November 6, 1990, through an amendment to the Consent Special Order, the Board postponed until February 15, 1991, the date by which Smithfield was required to decide either to hook up to the HRSD system or construct facilities to comply with the existing VPDES phosphorus limit. This delay, which amounted to a three-month extension, allowed further time for Smithfield to receive cost estimates from HRSD concerning their potential hook up.

318 See id. at 12.
319 See id. at 93.
320 See id. at cover.
321 See id. at 98.
322 See id. at 97-98.
323 See id. at 97.
324 See id. at 93.
325 For a summary of the state’s Consent Special Orders in the Smithfield case, see Table III-1.
326 See Commonwealth of Virginia, State Water Control Board, State Water Control Board Enforcement Action: An Amendment to a Special Order Issued to Smithfield Foods, Inc. (Nov. 6, 1990) [hereinafter 1990 Special Order Amendment].
F. The Commonwealth of Virginia’s Second Consent Special Order—May 9, 1991

On May 9, 1991, a new Consent Special Order was entered into by the State and Smithfield as a result of Smithfield’s request for “additional time to further evaluate biological phosphorus removal technology to comply with their phosphorus limitation.” In this new Order, Smithfield was given a further time extension until June 15, 1991 to notify the State of its commitment to connect to the HRSD system or to upgrade its treatment facilities to comply with the 2.0 mg/l standard. This second Order introduced three new elements to the ongoing negotiation process. First, it set a schedule by which Smithfield would have to hook up to HRSD if they chose this option. This schedule was expressed as “within three months of its notification by HRSD that a sewer line is available for the collection of Smithfield’s wastewater.” Second, it required Smithfield to petition the State Circuit Court to dismiss, without prejudice, its pending appeal of the phosphorus standard. Third, it contained the following clause: “[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in VPDES Permit No. VA0059005.”

The evaluation of biological phosphorus removal technology sought by Smithfield was initiated in the form of a contract with the consulting firm CH2M Hill. Their final report was issued in May 1991. The basic purpose of this study was to “determine if biological nutrient removal (BNR) is a feasible treatment alternative” for the removal of total phosphorus and “to develop comparative costs of discharge” to HRSD. The study evaluated the following alternatives: 1) the addition of new chemical treatment facilities at Smithfield followed by the existing

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327 For a summary of the state’s Consent Special Orders in the Smithfield case, see Table III-1.
329 See id.
330 See id.
331 Id.
332 Id.
333 See CH2M HILL STUDY, supra note 263.
334 See id. at 1-1.
335 Id.
biological treatment facilities at the plant, either for directly discharging to the Pagan River (which would require compliance with the 2.0 mg/l limit) or for treating the wastes prior to discharging to HRSD; 2) discharging to HRSD without any additional treatment of the waste stream (which would, nonetheless, involve capital costs to Smithfield in the form of a new interceptor sewer, as well as operating and management costs and periodic surcharge fees from HRSD); and 3) the addition of new biological treatment units, either for direct discharge to the Pagan River or for treatment prior to discharging to HRSD.\textsuperscript{336}

The study identified several risks associated with Smithfield continuing to discharge to the Pagan River.\textsuperscript{337} The basic conclusion of the report was that Smithfield could comply with the 2.0 mg/l limit within the time frame established by the permit, assuming proper operation and maintenance of new wastewater treatment facilities, but such facilities would require “rigorous process control.”\textsuperscript{338} Without such process control, Smithfield faced the prospect of continuing noncompliance and the associated risk of fines.\textsuperscript{339} The clear implication of the report is that such rigorous process control would be attainable in practice but would be costly to maintain over time, i.e., in terms of personnel and equipment.\textsuperscript{340} Moreover, if the State developed additional nutrient limits (e.g., for nitrogen), additional capital and operating and management (O&M) costs would accrue.\textsuperscript{341} The report recommended that “the overall most cost-effective alternative for Smithfield Foods, when considering both plants together, is to discharge to HRSD,”\textsuperscript{342} since this was, by far, the most cost-effective solution to the phosphorus dilemma and would transfer responsibility for wasteload reductions to HRSD.\textsuperscript{343}

Smithfield’s VPDES permit, meanwhile, was being processed by the State and was forwarded to the EPA’s Region III office on May 21, 1991 in accordance with the MOU.\textsuperscript{344} The permit which the EPA reviewed contained effluent limitations for a variety of pollutant parameters and the limits were developed using a variety of different

\textsuperscript{336} See id. at 1-2.
\textsuperscript{337} See id.
\textsuperscript{338} See id. at 6-2.
\textsuperscript{339} See id.
\textsuperscript{340} See generally id.
\textsuperscript{341} See id. at 6-2.
\textsuperscript{342} Id. at 6-1.
\textsuperscript{343} See id. at 5-1.
\textsuperscript{344} See MOU, supra note 231, at 3-8.
sources and methodologies. The limits for total suspended solids (TSS), oil and grease, and fecal coliform were derived from the federal effluent guidelines,\textsuperscript{345} while the limits for carbonaceous biological oxygen demand (CBOD), pH, total residual chlorine, and ammonia were developed from water quality standards and/or the best professional judgment of the permit writer.\textsuperscript{346} For phosphorus, the permit contained the January 4, 1993, schedule for compliance and monitoring requirements for the period prior to that date.\textsuperscript{347} Beyond the schedule date, the permit required compliance with the 2.0 mg/l limit as outlined in the state’s Nutrient Policy.\textsuperscript{348} The EPA was given thirty days to object to the conditions in the permit or, in the absence of any comment, the permit would be deemed acceptable to the EPA and submitted for public notice.\textsuperscript{349} The EPA did not object to the permit, and it was subsequently submitted to Smithfield and the public for comment.\textsuperscript{350}

On June 6, 1991, Smithfield and the state submitted a joint agreement to the Circuit Court of Isle of Wight County to dismiss Smithfield’s pending appeal of the state’s phosphorus water quality standard.\textsuperscript{351} This dismissal was without prejudice and was initiated to comply with the Consent Special Order issued by the Board on May 9, 1991.\textsuperscript{352} The dismissal of Smithfield’s pending appeal did not affect the permit issuance process, however, which continued on August 2, 1991, when the state disseminated a public notice of the proposed permit for Smithfield.\textsuperscript{353} This permit was the same as the one forwarded to the EPA, in that it contained all of the limits derived from the state’s Nutrient Policy.\textsuperscript{354} Smithfield responded that they could not meet the proposed

\textsuperscript{345} See 40 CFR § 432.22.
\textsuperscript{347} See id.
\textsuperscript{348} See id.
\textsuperscript{349} See MOU, supra note 231, at 6-7.
\textsuperscript{350} See Memorandum from Permits Program Manager, supra note 311.
\textsuperscript{352} See id.; Consent Special Order, May 1991, supra note 328, at 76.
\textsuperscript{354} See 1992 VPDES Permit, supra note 346.
compliance schedule since they had agreed “to abandon plans to upgrade our existing facilities and tap onto HRSD when it [became] available.”

Smithfield objected to the fact that the proposed permit continued to include the January 4, 1993 compliance date for phosphorus and requested that “some documentation or letter be provided by the State Water Control Board stating that alternative compliance will be maintained with Smithfield’s agreement to connect to HRSD as soon as it becomes available regardless of the time frame in which this occurs.”

The State, through its DEQ, responded to Smithfield’s request with a letter dated October 10, 1991. In this letter, the State averred that “any special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence over the VPDES Permit.” This letter, however, also indicated that the “draft permit is a separate document from the current Consent Special Order issued to Smithfield in May 1991.” Furthermore, the letter stated that “[t]he compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations.”

The letter, therefore, could be interpreted as establishing the Consent Special Order and the permit as two separate tracks. Smithfield, however, interpreted this letter to mean that the VPDES Permit issued by the state was superseded by the Consent Special Orders, which allowed Smithfield the opportunity to choose a hook up to HRSD in lieu of installing additional treatment to comply with the phosphorus limit. It is important to keep in mind that the EPA was neither consulted on, nor a party to, the preparation of this letter and its interpretation of the effect

355 Letter from Lawrence D. Lively, Director, Environmental Affairs, Smithfield Foods, Inc. to Ms. Debra Thompson, State Water Control Board (Oct. 1, 1991) (on file with author) [hereinafter Letter from Lawrence D. Lively to Ms. Debra Thompson]. See also Memorandum from Permits Program Manager, supra note 311 (stating that Smithfield had sent the State a letter dated June 7, 1991 to notify the State of its intent to cease discharge and hook up to HRSD).
356 Letter from Lawrence D. Lively to Ms. Debra Thompson, supra note 355.
358 Id.
359 Id.
360 Id.
362 See generally id.
of the state’s Orders on the federal permit requirements. The federal VPDES permit, however, was issued unmodified after a public comment period which produced no comments other than those submitted by Smithfield. The permit’s effective date was January 3, 1992, and it contained the compliance deadline of January 4, 1993, to which Smithfield had objected, along with the phosphorus limit of 2.0 mg/l established under the state’s water quality standards.

G. The Entry of the Environmental Protection Agency into the Smithfield Case—Quarterly Enforcement Meetings Between the DEQ and the EPA

The narrative, thus far, has concentrated on the relationship between Smithfield and Virginia largely because the EPA’s involvement to this point was limited to its review of the proposed VPDES permit, for which it had no comment since it contained all the limits and conditions required by the federal NPDES program. This quiescence on the part of the federal government, however, was about to end.

The Commonwealth of Virginia’s Department of Environmental Quality (DEQ) and the EPA’s Region III hold quarterly meetings between the enforcement staffs of the respective agencies. The purpose of these meetings is to review the compliance and enforcement activities of the State and to discuss particular facilities that are reported on the Quarterly Noncompliance Report (QNCR). The QNCR is a management tool used by approved NPDES states and the EPA to identify the most serious violating facilities so that appropriate enforcement action can be taken to address the situation. Smithfield was first reported to the EPA on the QNCR for the quarter ending June 30, 1994. Smithfield was listed as being in violation of an interim limit established in the May 9, 1992 VPDES Permit, supra note 346, at 2.

See id. at 3.

See Memorandum from Permits Program Manager, supra note 311, at 2.

See id. at 3. See Memorandum from Permits Program Manager, supra note 311, at 2.


See generally U.S. ENVTL. PROTECTION AGENCY, QUARTERLY NONCOMPLIANCE REPORT—COMMONWEALTH OF VIRGINIA (Sept. 2, 1994) [hereinafter QUARTERLY NONCOMPLIANCE REPORT (Sept. 1994)].


1991, Consent Special Order for total Kjeldahl nitrogen (TKN),\(^{369}\) not for violations of the phosphorus limit (or the TKN limit) in their permit.

By the subsequent quarterly meeting on November 29, 1994, the State indicated to the EPA enforcement staff that Smithfield had returned to compliance with the interim limits for TKN,\(^{370}\) but Smithfield continued to appear on the QNCR for September\(^ {371}\) and December 1994,\(^ {372}\) for violations of the state's Consent Special Order.

H. The Amendment to the May 9, 1991 Consent Special Order\(^ {373}\)

At around this time, Smithfield and the State negotiated another amendment of the May 9, 1991, Consent Special Order—this one effective on November 8, 1994.\(^ {374}\) This order explicitly allowed Smithfield to comply with the VPDES permit limits for CBOD, total cyanide, and ammonia by connecting to the HRSD system.\(^ {375}\) Furthermore, the order held "in abeyance"\(^ {376}\) the effluent limits for those pollutant parameters. Therefore, the state, using its prosecutorial discretion, determined that the best environmental remedy for Smithfield to pursue was to hook up to the HRSD system, even though Smithfield violated its NPDES permit limits for ammonia in thirteen separate months and violated its permit limits for cyanide in four separate months.\(^ {377}\)

By the February 15, 1995, quarterly enforcement meeting, the EPA staff were notified that Smithfield had experienced two months of TSS violations greater than forty percent of their limit.\(^ {378}\) These violations were

\(^{369}\) See QUARTERLY NONCOMPLIANCE REPORT (Sept. 1994), supra note 367.

\(^{370}\) See Reynolds, supra note 368 (Aug. 23, 1994).

\(^{371}\) See U.S. ENVTL. PROTECTION AGENCY, QUARTERLY NONCOMPLIANCE REPORT—COMMONWEALTH OF VIRGINIA (Dec. 4, 1994) [hereinafter QUARTERLY NONCOMPLIANCE REPORT (Dec. 1994)].

\(^{372}\) See U.S. ENVTL. PROTECTION AGENCY, QUARTERLY NONCOMPLIANCE REPORT—COMMONWEALTH OF VIRGINIA (Mar. 6, 1995) [hereinafter QUARTERLY NONCOMPLIANCE REPORT (Mar. 1995)].

\(^{373}\) For a summary of the state's Consent Special Orders in the Smithfield case, see Table III-1.

\(^{374}\) Commonwealth of Virginia, State Water Control Board, An Amendment to a Special Order Issued to Smithfield Foods, Inc. (Nov. 8, 1994) [hereinafter 1994 Special Order Amendment].

\(^{375}\) See id.

\(^{376}\) Id.

\(^{377}\) See id.

\(^{378}\) See Lorraine H. Reynolds, U.S. EPA-Region III, Handwritten notes from quarterly enforcement meeting between EPA and the Commonwealth of Virginia (Feb. 15, 1995)
added to the TKN violations on the QNCR, but their status was subsequently reported to the EPA as "resolved pending,"\textsuperscript{379} i.e., their compliance status was resolved pending the completion of the state's administrative enforcement actions. In addition to these violations, at this enforcement meeting the EPA learned of "huge fecal and solids violations"\textsuperscript{380} at Smithfield and fecal coliform contamination in the Pagan River, although it was unclear at the time if these fecal coliform levels were caused by Smithfield or some other source of pollution.\textsuperscript{381}

In February 1995, at the SWCB meeting, the state DEQ planned to recommend an enforcement action against Smithfield.\textsuperscript{382} This action, however, ultimately was not approved by management within the DEQ.\textsuperscript{383} Soon thereafter, in the spring of 1995, a compliance auditor with the state DEQ contacted the EPA's Region III office requesting that the federal government become involved in the Smithfield case because the state was reluctant to act.\textsuperscript{384} This unsolicited contact from a staff person at the state DEQ alerted the EPA to violations at the Smithfield facility other than those officially reported on the QNCR and was a factor in the EPA's decision to pursue civil judicial enforcement against Smithfield.\textsuperscript{385} The EPA's initial response upon learning of the noncompliance by Smithfield was to defer to the state DEQ.\textsuperscript{386} The DEQ, however, chose not to initiate timely and appropriate enforcement action; eventual connection to the local sewage treatment plant was sufficient to satisfy the state in this matter.\textsuperscript{387}

\footnotesize{(on file with the author).}

\textsuperscript{379} See, e.g., U.S. ENVTL. PROTECTION AGENCY, QUARTERLY NONCOMPLIANCE REPORT - COMMONWEALTH OF VIRGINIA (Sept. 1, 1995) [hereinafter QUARTERLY NONCOMPLIANCE REPORT (Sept. 1995)]. All facilities listed on the QNCR which are under current enforcement orders (e.g., administrative and judicial orders or consent decrees) must continue to be listed on the QNCR until those orders have been satisfied in full and the facility is in compliance with its permit. If the facility is in compliance with the enforcement order, but has not achieved full compliance with its permit, then its compliance status must be listed as "resolved pending." \textit{See} 40 CFR § 123.45(a)(2)(B).

\textsuperscript{380} Reynolds, \textit{supra} note 378 (Feb. 15, 1995).

\textsuperscript{381} \textit{See id.}

\textsuperscript{382} Interview with Lorraine Reynolds, U.S. EPA-Region III (March 30, 1998) (on file with the author).

\textsuperscript{383} \textit{See id.}

\textsuperscript{384} \textit{See id.}

\textsuperscript{385} \textit{See id.}

\textsuperscript{386} \textit{See id.}

\textsuperscript{387} \textit{See id.}
<table>
<thead>
<tr>
<th>Date</th>
<th>Document</th>
<th>Conditions</th>
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| March 21, 1990     | 1st CSO           | 1) Allowed Smithfield to study the costs of compliance with the phosphorus standard.  
2) Allowed Smithfield to study the feasibility of connecting to HRSD.  
3) Required Smithfield to notify the Board by November 13, 1990 of its compliance decision. |
| November 6, 1990   | Amendment to 1st CSO | 1) Allowed Smithfield to continue its study of connecting to HRSD.  
2) Required Smithfield to notify the Board by February 15, 1991 of its compliance decision.                                                |
| May 9, 1991        | 2nd CSO           | 1) Set interim limits (different than the permit limits) for TKN.  
2) Allowed Smithfield further time to evaluate options.  
3) Required Smithfield to notify the Board of its compliance decision by June 15, 1991.  
4) Required Smithfield to connect to HRSD within 3 months of availability if this option is chosen.  
5) Required Smithfield to submit a schedule to comply with the phosphorus standard if HRSD option is not taken.  
6) Required Smithfield to dismiss its appeal of the phosphorus standard. |
| October 10, 1991   | Letter from DEQ   | 1) Declares that any special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence over the VPDES Permit.”  
2) States that the draft permit is a separate document from the current Consent Special Order.” |
| January 3, 1992    | NPDES Permit      | Pollutant Parameters:  
Phosphorus, Ammonia, BOD, TKN, CBOD, Fecal Coliform, Oil and Grease, Cyanide, Total Suspended |
Summary of Smithfield’s NPDES Permit and Consent Special Order (CSO) Conditions

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<thead>
<tr>
<th>Solids.</th>
<th>Compliance Dates:</th>
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<tbody>
<tr>
<td>Phosphorus</td>
<td>January 4, 1993</td>
</tr>
<tr>
<td>Ammonia, CBOD, Cyanide</td>
<td>May 13, 1994</td>
</tr>
<tr>
<td>BOD, TKN, Fecal Coliform, Oil and Grease, and Total Suspended Solids</td>
<td>January 4, 1992</td>
</tr>
</tbody>
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<tr>
<th>November 8, 1994</th>
<th>Amendment to 2nd CSO</th>
</tr>
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<tbody>
<tr>
<td>1) Held in abeyance the NPDES permit effluent limits for CBOD, ammonia, and cyanide.</td>
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</table>

During the May 31, 1995, enforcement meeting, the company was listed as being in compliance for the entire previous quarter, but by the September 13, 1995, enforcement meeting, the EPA indicated to the state its interest in seeing civil penalties assessed against Smithfield for its history of violations. At this time, however, a criminal investigation of the company was being conducted by the United States with the cooperation and assistance of the state. This proceeding ultimately led to the criminal conviction of an employee of Smithfield for report falsification and records destruction. As a result of this criminal investigation, the United States and the Virginia DEQ agreed that no civil enforcement against Smithfield would be initiated during the early stages of the criminal investigation. In February 1996, however, the United States notified the DEQ that no further delay in pursuing civil enforcement was necessary.

Smithfield was not on the agenda for the November 1995, the February 1996, or the June 1996 enforcement meetings, nor was it

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390 See id.
392 See Reynolds, supra note 389 (Sept. 13, 1995).
393 See Statement of Undisputed Facts and Memorandum of Law, supra note 294, at x.
discussed at these times, even though Smithfield remained on the QNCR without any variation in its status from March 1995 through September 1996. On April 8, 1996, however, the DEQ sent a letter to Smithfield identifying a series of violations of the facility’s VPDES permit for BOD, TSS, pH, oil and grease, and fecal coliform, and alleging violations of the interim limits for TKN contained in the state’s Consent Special Order. This letter was the culmination of a series of Notices of Violation (NOV) issued by the DEQ beginning in September 1994, soon after the facility was first identified on the QNCR and, thus, raised to the attention of EPA management. The NOV is an informal enforcement response which simply enumerates the violation but does nothing further to compel compliance, i.e., it is not independently enforceable and creates no obligations of its own on the company. Therefore, such actions do not rise to the level of “formal” enforcement as defined by the EPA in its Policy Framework and would not satisfy the criteria of timely and appropriate action. The State had issued nine such NOVs to Smithfield prior to the letter from the DEQ. The letter stated that “[b]ecause of these ongoing alleged violations, we intend to recommend to the State Water Control Board at its May 22, 1996 meeting that the Board consider requesting the Attorney General to seek injunctive relief and civil penalties against Smithfield Foods.”

At this meeting, Smithfield’s counsel addressed the Board, and the Board’s subsequent instruction to the DEQ was not to take any enforcement action against Smithfield until the DEQ had met with the

394 See Agenda for Quarterly Enforcement Meeting (Nov. 29, 1995), (Feb. 20, 1996), and (June 7, 1996) (on file with the author).
395 See, e.g., QNCRs from Mar. 6, 1995; Sept. 1, 1995; Dec. 15, 1995; Mar. 7, 1996; June 3, 1996; and Sept. 4, 1996 (on file with the author).
397 See id.
398 See QUARTERLY NONCOMPLIANCE REPORT (Sept. 1994), supra note 367.
399 A Notice of Violation is a term of art used in the EPA’s enforcement program. NOVs can take on a wide variety of forms; they can be phone calls, letters, or any other communication where a person is put on notice of a violation.
400 See NATIONAL GUIDANCE FOR OVERSIGHT OF NPDES PROGRAMS, supra note 208 and accompanying text.
401 See supra notes 206-208 and accompanying text.
403 Id. at 2.
company and then reported back to the Board. At the June 11 Board meeting, counsel for Smithfield indicated that the company "had spent considerable money attempting to comply with the Board's permit requirements over the years and that all they were seeking was a little flexibility on the part of HRSD and DEQ." The counsel for the company indicated that they would hook up to the HRSD system "as soon as possible" but that the June 25, 1996 deadline "might be exceeded by 1-2 weeks." The Board recommended at the end of this meeting to "release [DEQ] staff to pursue full enforcement of the 1991 Consent Special Order with Smithfield Foods, if circumstances require enforcement actions by the Commonwealth of Virginia, including possible referral to the Attorney General's Office." But no enforcement action was approved for the violations identified in the April 1996 letter.

I. The EPA's Civil Judicial Referral to the Department of Justice and the Proposed Civil Judicial Action by the Commonwealth of Virginia

At the August 23, 1996, quarterly enforcement meeting, the EPA indicated to the State that it had referred its civil enforcement case to the Department of Justice (DOJ) for filing. The state's initial reaction was to question why such a referral was prepared and sent to DOJ without notification to the state. This query was even more urgent, from the state's perspective, given the fact that the State claimed it was preparing to "diligently prosecute this case to resolve all the actionable violations at

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404 See E-mail from Amy Clark, Commonwealth of Virginia, DEQ, to Leonard Nash, U.S. EPA-Region III. (May 31, 1996) (on file with the author).
406 Id.
407 See id. The HRSD system became available three months prior to this date, on March 25, 1996, and, according to the state's Consent Special Order, the deadline for hook up was three months following notification that the system was available.
408 Id. at 1.
409 Id. at 2.
411 See id. at 3.
Smithfield Foods."\(^{412}\) The question, from the EPA’s perspective, was what did the state consider to be diligent prosecution and what was “actionable” under the state case. The tension between the EPA and Virginia was manifest on two fronts. First, the nature of the cases and the violations envisioned by the two sovereigns were radically different. The EPA’s case rested on a foundation of effluent violations, with the preponderance of violations involving the permit’s phosphorus limit.\(^{413}\) In the fifty months between January 1993 and March 1997, the EPA alleged that Smithfield violated its phosphorus permit limit in forty-six of those months.\(^{414}\) The state, when confronted with these alleged continuous violations, claimed that “throughout this period, the phosphorus discharges were fully in compliance with a Virginia enforcement Order.”\(^{415}\) Furthermore, the violations of TKN alleged in the EPA’s referral were similarly identified by the State as being “in full compliance with the Order,”\(^{416}\) except for “one of the average and two of the maximum violations cited.”\(^{417}\) It is important to remember, however, that the state had not provided any opportunity for public participation on the terms of the Consent Special Orders, as is required for a permit modification.\(^{418}\) Nor had the EPA been given an opportunity to comment on the terms of the Consent Special Orders.\(^{419}\) Furthermore, the state did not attempt to revise the actual terms of Smithfield’s NPDES permit, which therefore remained in effect and enforceable by the federal government.\(^{420}\)

The proposed State case relied on allegations of violation for fecal coliform, pH, TSS, BOD, oil and grease, and TKN.\(^{421}\) These violations were also cited by the EPA in their action, but the frequency of the violations cited in the state’s case paled in comparison to the allegations of

\(^{412}\) Id. at 3-4

\(^{413}\) See U. S. Department of Justice, Summary of Exceedences of Discharge Limitations Contained in Permit VA0059005. (Pl. Exh. 5) (on file with the author) [hereinafter Summary of Exceedences of Discharge Limitations].

\(^{414}\) See id.

\(^{415}\) Letter from Thomas L. Hopkins to W. Michael McCabe, supra note 410, at 2.

\(^{416}\) Id.

\(^{417}\) Id.


\(^{420}\) See id. at 778-79, 787-88.

\(^{421}\) See Bill of Complaint, Thomas L. Hopkins v. Smithfield Foods, Inc., (Cir. Court, Isle of Wight County) (No. 96-125) [hereinafter Bill of Complaint].
phosphorus violations in the EPA's case. Furthermore, the EPA's case included a variety of permit violations that were never considered for prosecution by the state. The EPA's case, while resting on the foundation of the phosphorus violations, also alleged (and ultimately proved) violations of reporting requirements, including late reporting, false reporting, and records destruction by the company. Smithfield stipulated that it submitted false Discharge Monitoring Reports on fifteen occasions, and they did not dispute that they submitted various reports late. Furthermore, in July, 1994, the chief operator of Smithfield's wastewater treatment plants, witnessed by two other Smithfield employees, dumped Smithfield's pre-1994 laboratory analysis records and bench sheets into a dumpster. The court found that such violations were serious because of their effect to "undermine the Act" since the CWA relies on self-reporting by the permittee for program oversight.

As the State indicated, however, the existence of the Consent Special Orders precluded the State from pursuing violations of the phosphorus, cyanide, ammonia, and most of the TKN violations alleged by the United States. As a result, the State was left with a small percentage of the violations alleged by the federal government. Taken as a whole, the state's proposed case excluded almost ninety-five percent of the days of violation alleged in the United State's case against Smithfield Foods. In the opinion of the State, the fact that the United States pursued violations of the Permit which were in full compliance with the State's enforcement Order struck "a grievous blow to EPA's credibility and to federal-state cooperation in environmental enforcement." From the State's perspective, the EPA's action undermined its use of such Orders.

422 See Summary of Exceedences of Discharge Limitations, supra note 413.
423 See id.
425 See id.
426 See id.
429 See Letter from Thomas L. Hopkins to W. Michael McCabe, supra note 410, at 2.
430 See id.
431 See id.
433 Letter from Thomas L. Hopkins to W. Michael McCabe, supra note 410, at 3.
434 See id.
According to Virginia, "[i]f DEQ cannot issue enforcement Orders with the understanding that compliance with the Order will protect the owner from further enforcement action, then DEQ cannot, in good faith, issue the Orders at all, even though they are our most effective enforcement tools." 434

The issue of protecting owners of violating facilities from enforcement by other parties, including the federal government, is at the heart of the second tension between Virginia and the EPA. 435 One of the state's principal objections to the EPA's referral of its action was the secrecy in which it was prepared. 436 According to the State, "[n]ot only did EPA fail to disclose this referral to DEQ, the lead enforcement agency on the case, EPA actively concealed the pendency of the Referral from DEQ." 437 To understand why the referral was prepared without the consultation of the state, however, it is important to recognize the perception of the EPA's Region III office with regard to Virginia's enforcement philosophy. From the perspective of the EPA, the Commonwealth of Virginia had

a history of initiating enforcement once EPA informs the Virginia Department of Environmental Quality (DEQ) of its intentions to pursue federal action. . . . In each case, the actions taken by the Commonwealth and the penalties collected were much less than EPA believes were appropriate. Moreover, in each action the Commonwealth made it clear that its motive in pursuing the actions was to forestall federal enforcement. 438

The three enforcement actions cited by the EPA in this context were referred to as their "dead referral collection,"439 i.e., cases which have been mooted as a result of a race-to-the-courthouse with the State that the EPA

434 Id.
435 See id.
436 See id.
437 Letter from Thomas L. Hopkins to W. Michael McCabe, supra note 410, at 3.
The EPA's contention was that the State had not indicated at any of the quarterly enforcement meetings any intention of pursuing an action to recover civil penalties against Smithfield.

On August 27, 1996, four days after the regularly scheduled quarterly enforcement meeting between the State and the EPA (where the State learned, for the first time, of EPA's referral to DOJ), both parties engaged in a telephone call to discuss the pending EPA referral. During this call, the EPA invited the state to join the federal case as a co-plaintiff, and the EPA faxed a copy of the table of violations being alleged in the federal case. The state declined to join the federal case. Furthermore, the state filed its own Bill of Complaint against Smithfield, dated August 30, 1996, alleging the violations previously cited. This action prompted the EPA to conclude that the State "responded as it has in the past, i.e., as soon as DEQ was informed that EPA intended to initiate enforcement measures, a quick action was taken by the Commonwealth in an attempt to block the federal process." This conclusion is supported by an internal audit conducted by a joint commission of the Virginia General Assembly. This internal audit described the state's relationship with the federal government with regard to the Smithfield case. Specifically, it described how the Attorney General's Office filed suit against Smithfield as soon as it was notified of the EPA's intent to file its own suit. When the state Board questioned the DEQ about why the referral did not follow customary channels, the response was terse and to the point—"to beat the feds."

This chronology of events provides the framework to understand the interaction between the EPA and the Commonwealth of Virginia and the EPA's ultimate decision to intervene in this particular case. It is to this specific rationale that the discussion now turns.

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See id.
See Letter from W. Michael McCabe to Thomas C. Hopkins, supra note 438, at 2.
See id.
See id.
See id.
See id.
See Bill of Complaint, supra note 421.
Letter from W. Michael McCabe to Thomas C. Hopkins, supra note 438, at 2-3.
See id.
See id.
Id. at 125.
IV. THE UNITED STATES V. SMITHFIELD FOODS—A RATIONALE

The policies developed by the EPA serve a critical public policy function. They advise the public prospectively of the manner in which the agency proposes to exercise some discretionary power granted by a statute. The EPA’s enforcement authority is discretionary, especially as it relates to violations occurring in states approved to administer the NPDES program. As a discretionary power, therefore, the EPA’s enforcement strategy in approved states is appropriately prescribed by policy. The EPA’s rationale for initiating its civil judicial enforcement action against Smithfield Foods was based on the agency’s policy for taking direct enforcement action in approved NPDES states, i.e., the action was based on the direction given in the Policy Framework. The implications of the action, however, extend well beyond the Agency’s policy into the heart of the federalist character of our government’s structure.

A. Elements of the EPA’s Enforcement Rationale in the Smithfield Case

1. Timely and Appropriate Enforcement

The most critical determinant of whether the EPA will initiate direct enforcement action in a state approved to implement the federal NPDES permit program is whether the state has or will take “timely and

451 See POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 1.
453 See Ringbolt Farms Homeowners Assoc. v. Town of Hull, 714 F. Supp. 1246, 1252 (D. Mass. 1989) (“A review of the statute and the legislative history behind it indicates that Congress did not contemplate any remedy under the statute against the states for failure to enforce the provisions of the FWPCA other than the denial or withdrawal of approval.”).
454 See POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96.
455 See supra note 96 and accompanying text.
appropriate\textsuperscript{456} enforcement for violations meeting the definition of SNC.\textsuperscript{457} This determination is the threshold the EPA must satisfy when it considers initiating a direct enforcement action in an approved state.\textsuperscript{458} In the case of Smithfield Foods, Virginia’s enforcement action against the facility was neither timely nor appropriate.\textsuperscript{459}

a. Timeliness

On June 7, 1991, Smithfield chose to pursue its hook-up to the HRSD system as the means to comply with the state’s Consent Special Order.\textsuperscript{460} The facility’s permit compliance date for phosphorus was January 4, 1993.\textsuperscript{461} As a result of its choice to use HRSD as the means to dispose of their wastes, Smithfield “ceased all attempts to comply with the phosphorus limits by upgrading its treatment facilities.”\textsuperscript{462} It is not surprising, then, that Smithfield violated its permit effluent limit for phosphorus continuously from January 1993 through its eventual hook up to HRSD.\textsuperscript{463} In addition to these violations, Smithfield did not comply with various other pollutant parameters established by its permit, including: total Kjeldahl nitrogen (TKN), ammonia, fecal coliform, pH, total suspended solids (TSS), cyanide, and oil and grease.\textsuperscript{464} Table IV-1 provides a visual representation of the effluent limit violations alleged by the United States in its action against Smithfield.\textsuperscript{465} The table is arrayed chronologically with various columns reserved for particular permit effluent limit parameters.

\textsuperscript{456} Id. at 22.
\textsuperscript{457} See id. at 21-22.
\textsuperscript{458} See id. at 21-25.
\textsuperscript{459} See Letter from W. Michael McCabe to Thomas C. Hopkins, \textit{supra} note 438.
\textsuperscript{461} See id. at 776.
\textsuperscript{462} See id.
\textsuperscript{463} See Summary of Exceedences of Discharge Limitations, \textit{supra} note 413.
\textsuperscript{464} See \textit{Smithfield}, 965 F. Supp. at 783.
\textsuperscript{465} See Summary of Exceedences of Discharge Limitations, \textit{supra} note 413.
### Summary of Smithfield Foods Effluent Limit Violations

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The state's Consent Special Orders addressed various of these pollutant parameters, including: phosphorus, ammonia, TKN, and cyanide; but as a matter of law, the permit governed the discharge of these parameters even in the face of conflicting direction from the state's orders. The Consent Special Orders purported to hold "in abeyance" the limits for cyanide and ammonia during the pendency of the Orders and established interim effluent limits for TKN. The effect of the Orders on phosphorus is ambiguous, but their practical effect was to place all of these pollutants under a protective umbrella while Smithfield was working toward its connection to HRSD.

The administrative enforcement actions taken by Virginia were not timely for two reasons: 1) they did not address all the effluent limit violations which rose to the level of SNC (e.g., fecal coliform) and 2) the Orders, at least as to phosphorus, pre-date the violations and allow them to occur. The only violations reported to the EPA on the QNCR were for TKN and TSS. The underlying violations for phosphorus and ammonia were never reported to the EPA on the QNCR and, from the EPA's perspective, there was never any formal enforcement action addressing these violations. In addition, the Orders were not responsive to the

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467 See 1994 Special Order Amendment, supra note 374; supra notes 374-376 and accompanying text.
468 See supra notes 374-379 and accompanying text.
469 The positions taken by the state with regard to the phosphorus limitation applicable to Smithfield appears to be contradictory in that the state indicates that the permit conditions continue to apply but that the Consent Special Orders supersede the permit conditions.
471 See id. at 778-79.
472 For a discussion of QNCRs, see supra notes 365-409 and accompanying text.
actual violations for phosphorus. They anticipated proactively these violations and allowed the permit to be violated while the interceptor sewer was constructed to carry Smithfield’s wastes to HRSD. Virginia’s administrative actions against Smithfield were taken prior to the company being in violation for the pollutant parameters covered by the Orders which allowed the facility to elude the established mechanism for reporting and tracking significant violators. Furthermore, by September 1994, Smithfield was in SNC for ammonia. This occurred just two months prior to the effective date of the amended Consent Special Order which held the ammonia limit in abeyance. But for the existence of this amendment, the state would have been required to report the facility on the QNCR for this pollutant parameter. For these reasons, the administrative enforcement actions taken by the State in response to Smithfield’s permit violations were not timely. Once the State action was determined not to be timely, it was necessary to evaluate if the state’s action was “moving expeditiously to resolve the violation in an ‘appropriate’ manner.”

b. Appropriateness

The appropriateness of a state enforcement action should be viewed from three different perspectives. The action taken by the approved state should be evaluated to determine if: 1) the remedy sought is sufficient to correct the violation; 2) compliance schedules are not unacceptably extended; and 3) there is an appropriate penalty or other sanction. In the case of Smithfield, the nature of the remedy sought by the state and the use of compliance schedules are inextricably interwoven and must be considered simultaneously.

The stated objective of the Commonwealth of Virginia in pursuing

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474 See id. at 784.
475 See id.
476 See id. at 778.
477 See Summary of Exceedences of Discharge Limitations, supra note 413, at 7.
479 In fact, the state was required to report the facility for ammonia, even given the existence of the Consent Special Order, but they did not do so as required by federal regulation. See 40 CFR § 123.45 (1998).
480 POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 22.
481 See id. at 23.
its administrative remedy against Smithfield was "to secure compliance with the state water quality standards." The purpose of the Consent Special Orders, therefore, was to achieve the larger environmental objective of compliance with national water quality goals, as implemented through the state’s water quality standards. However, as implemented, the Orders did not address the environmental harm being created by Smithfield’s discharges or the economic benefit accrued by the company as a result of their noncompliance. This approach to enforcement represents a compliance assistance-based enforcement strategy as the sole enforcement philosophy. In fact, the Commonwealth of Virginia’s actions with respect to Smithfield are quintessential examples of such a non-confrontational approach to environmental enforcement even when the circumstances call for more stringent action.

Virginia in recent years has been an unusually strong proponent of working with companies to achieve environmental results through a compliance-based environmental enforcement scheme. The state’s position on these issues was stated clearly by Becky Norton Dunlop, the Secretary of Natural Resources for the Commonwealth of Virginia under Governor Allen:

Virginia’s legislature and Virginia’s Governor have, in many important ways, established that policies which focus on compliance with environmental laws are better for the natural resources than policies which focus on enforcement. Virginia has demonstrated leadership in putting the proper emphasis on the purpose, goals and objectives of environmental policy, which, of course, is to improve the quality and condition of the air, water, soil, flora and fauna resources which make up the environment.

This stated attitude, however, is at odds with the facts in the Smithfield

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483 See discussion infra notes 481-523 and accompanying text.
484 See Hodas, supra note 30, at 1567 and accompanying text.
485 See supra notes 113-122 and accompanying text.
486 See Dunlop Statement, supra note 113.
487 Id.
Smithfield had the ability to comply with the state's 2.0 mg/l water quality standard for phosphorus within the time frame outlined in its permit (January 4, 1993). The only thing that would have been required was a financial commitment on the part of the company and "proper design and operation of treatment facilities." Therefore, Smithfield was allowed to continue its discharges in violation of the state's water quality standards for the sole reason that it was economically more advantageous for them to do so.

This situation is at odds with Virginia's claim that they are "compliance enthusiasts" and supports the opposing claim that "[t]he state government has a predisposition to work with industries to solve problems rather than to lose the economic base that would result from shutting them down." This sentiment was succinctly stated by former Governor Allen in the following remarks: "I guess what they would prefer, these people who are carping and whining, is we just shut down these businesses, run them out of the state, and all the people who work for them lose their job." If the goal of the state had truly been environmental improvement, the state should have pursued both short-term and long-term benefits by requiring initial treatment to comply with the permit effluent limit and then pursuing the option of the hook up to HRSD. Furthermore, if the issue for Smithfield had truly been the cost of compliance, why did Joseph W. Luter, chairman and chief executive officer of Smithfield, describe the $12.6 million penalty levied against the company in the following terms: "[b]ottom line is, I view it as a bump in the road that isn't going to have a substantial effect on our company." The cost of

489 See id. at 784 (Smithfield claimed they could not afford the HRSD connection and the phosphorous compliance).
490 CH2M HILL STUDY, supra note 263, at 6-1.
491 Scott Harper and David M. Poole, EPA Letter Says State Lax on Enforcement; DEQ Retorts That State is Doing Its Job; It's the EPA That is at Fault, THE VIRGINIAN-PILOT, Oct. 2, 1996, at A1. The deputy director of the DEQ, T. March Bell commented that "We have a successful record on enforcement because we stress compliance. We're compliance enthusiasts. We see enforcement as a tool to improve the environment, not to put a trophy on the wall." Id.
494 Akweli Parker, A Bump in the Road The Company's Optimism, Like its Stock, Hasn't
compliance for Smithfield would have been significantly less than this penalty amount, so the question arises—why did Smithfield resist its obligation to comply, since the cost of such compliance could not have been more than a “bump in the road”?

The state, through negotiations of the Consent Special Orders with the company, presented two compliance options to Smithfield: connection to public service through the HRSD, or upgrading the treatment facilities at Smithfield’s plants to comply with the state’s water quality standard for phosphorus outlined in the permit.495 The choice of which option to be selected, not inappropriately, was left “at the company’s discretion.”496 The most cost-effective solution for Smithfield, as detailed in their consultant’s report to the company, was to hook into the HRSD system.497 Not surprisingly, this was the option ultimately chosen by the company.498

However, since the construction necessary for Smithfield to avail itself of its chosen option took several years,499 the effect of the orders (in addition to providing the company economic relief) was to extend, for an indeterminate period of time, the permit’s compliance date for phosphorus. The principle at issue here is not necessarily the chosen option for compliance, but the fact that this option allowed Smithfield to continue to violate its permit conditions with impunity for a period of at least four years.

The Consent Special Order which enabled Smithfield to choose between compliance with their permit limits and a hook up to the HRSD stated that the deadline for hook up would be “within three months of its notification by HRSD that a sewer line is available for the collection of Smithfield’s wastewater.”500 There was no certain date by which Smithfield was required to comply with the state’s Consent Special Order, since the order created an open-ended requirement.501 If the hook up had

495 See supra notes 298-308, 328-329 and accompanying text.
497 See CH2M HILL STUDY, supra note 263, at 6-1.
498 See 1994 Special Order Amendment, supra note 374, at 1.
499 In uncontested testimony at trial, the United States’ expert witness, Garry Edward Stigall, testified that wastewater treatment sufficient to comply with the phosphorus limit would have taken “a matter of months” instead of the several years it took to construct the HRSD hook up. See Transcript of Proceedings (testimony of Garry Edward Stigall), supra note 482, at 102:8.
500 Consent Special Order, May 1991, supra note 328 and accompanying text.
501 See generally id.
never become available, it would have been impossible to violate the order. Instead, it would have been necessary for the State to renegotiate the order with the company. As it turned out, Smithfield was allowed to violate the water quality standards contained in its permit for approximately four years, even though it had the technical and financial ability to comply with those limits by the date specified in its permit.\textsuperscript{502} Furthermore, compliance with the permit conditions was consistent with the planned environmental benefits obtained through their hook up to HRSD.\textsuperscript{503} It was possible for Smithfield to pursue initial treatment and its ultimate hook up. It did not do so because of cost.

Virginia relied on the nature of the ultimate environmental remedy in its enforcement action against Smithfield, and there it ended.\textsuperscript{504} The state's action did not focus on the environmental damage created by the facility's discharges during the pendency of the Orders or the economic benefit accrued by Smithfield as a consequence of those discharges. The enforcement strategy followed by the state in the Smithfield case was an inappropriate use of a compliance assistance-based enforcement scheme because it allowed Smithfield to dictate compliance with its permit requirements based on an analysis designed to further the economic interests of the company, regardless of the effect on the environment or other regulated entities.\textsuperscript{505} This takes a fundamental premise of the CWA, mandatory compliance with the law as a pre-condition of discharge, and turns it on its head. Smithfield had five years between the time the state's water quality standard for phosphorus was adopted and the compliance date for phosphorus established in its permit.\textsuperscript{506} This allowed the company ample time to assess its compliance options and select an appropriate course of action. The responsibility for compliance rested with the company, but the enforcement strategy adopted by Virginia had the effect of skewing this responsibility at least as much toward the government and away from Smithfield. By implication, using a compliance assistance-based system of enforcement as the sole response to violations presumes


\textsuperscript{503} See id.

\textsuperscript{504} See supra notes 301-364 and accompanying text.

\textsuperscript{505} See supra notes 303-308 and accompanying text.

\textsuperscript{506} See supra notes 237-242 and accompanying text (Virginia adopted its definition of Nutrient Enriched Waters and its Nutrient Policy in May 1988). See also supra notes 290-292 and accompanying text. Smithfield's permit was modified to require compliance with the new standard within three years of January 1990, almost a full five years from the adoption of the State's water quality standard. See id.
that it is the government that fails when a facility violates the law because it is the government who has not provided the proper incentive or assistance to the regulated facility.

The state's administrative remedy, however, did eliminate Smithfield's discharge to the Pagan River entirely, something which probably would not have been achieved through traditional compliance with the permit. Smithfield has argued, therefore, that the state's remedy achieved a long-term environmental result superior to that which could have been obtained with simple compliance with the permit. This argument, however, ignores the fact that Smithfield has not eliminated any of its discharges. Instead, they have simply diverted that discharge to HRSD, which, in turn, discharges to a separate tributary of the Chesapeake Bay. The remedy exacted by the State obviated the need for a NPDES permit for the facility, but it did not reduce the amount of pollutants that enter the Chesapeake Bay because the treatment by HRSD is not likely to reduce the amount of pollutants being discharged to a greater degree than could have been achieved by Smithfield with its own treatment system. Even if this argument were true, however, it is still not appropriate to allow the regulated entity the ability to flaunt legally imposed requirements for economic reasons, particularly where both the short-term and long-term environmental benefits could have been achieved. The principle at risk in this situation is clear: "the observance of laws duly enacted by Congress is not left to the discretion of a regulated entity, after consultation with its accountant."

The fact that the State allowed this situation to exist is exacerbated by the fact that the State at no time indicated any intention of offsetting the economic advantage obtained by

507 The permit would not have eliminated the discharge, but merely reduce the amount of pollution emitted.
509 Smithfield, however, is still subject to CWA requirements through the National Pretreatment Program (NPP) implemented under sections 402 and 307 of the Act. See CWA §§ 402(8), 307(d), 33 U.S.C. §§ 1342(8), 1317(d) (1994). The NPP regulates the introduction of pollutants by industry into Publicly Owned Treatment Works (POTWs) to prevent those pollutants from causing water quality impacts to the receiving stream of the POTW. See id. Therefore, Smithfield is still subject to regulation, but instead of the State being the primary administering agency for the regulatory program (as it was under the NPDES program), Smithfield is now subject to regulation by a local governmental agency. In this instance, that local agency is the Hampton Roads Sanitary District (HRSD).
Smithfield from its illegal discharge by imposing a civil penalty. This was the final, and perhaps most important, consideration of the appropriateness of the state's enforcement action.

The use of penalties to address violations is an important component of the Policy Framework, but the policy also recognizes the discretion available to the administering agency in assessing penalties. The Policy Framework states that the "EPA generally will not consider taking direct enforcement action solely for recovery of additional penalties unless a state penalty is determined to be grossly deficient." The Policy Framework provides general guidance to determine when a penalty is grossly deficient. The EPA is directed to look at whether the penalty "bears any reasonable relationship to the seriousness of the violation" as well as "the economic benefit gained by the violator." In terms of the Smithfield case, the state did not indicate any intention of bringing an action to recover a civil penalty until it became aware of the EPA's referral to the Department of Justice. The state's Consent Special Orders did not impose a penalty of any kind on Smithfield. Therefore, the state's administrative actions bore no reasonable relationship to either the seriousness of the violations or the economic benefit gained by the violator. In the case against Smithfield, the state adopted a "helpful servant" posture that sought to protect the economic interests of the company in the face of competing public interests, e.g., environmental protection.

Based on the above analysis, the EPA concluded that Virginia's Consent Special Orders were inappropriate responses to the violations at issue. Determining whether an approved state has taken timely and appropriate enforcement, however, is but the first level of analysis required before initiating direct enforcement action in an approved

511 See POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 23.
512 Id. (emphasis added).
513 See id.
514 Id.
515 Id.
516 See Letter from W. Michael McCabe to Thomas C. Hopkins, supra note 85, at 1-3.
517 See generally Consent Special Order, March 1990, supra note 297; 1990 Special Order Amendment, supra note 326; Consent Special Order, May 1991, supra note 328.
519 See Letter from W. Michael McCabe to Thomas C. Hopkins, supra note 85, at 1-3.
Once the EPA has ascertained that a state’s action is not or will not be timely and appropriate, the Policy Framework requires a further analysis before the agency should act on its own. The EPA must evaluate if its direct enforcement action will address any one of five overriding factors: 1) instances of significant economic benefit gained by the violator; 2) violations which cause significant degradation to a national or regional environmental priority; 3) interstate issues, such as pollution effects which transgress state boundaries; 4) repeat patterns of violations or violators “where the state response is likely to prove ineffective given the pattern of repeat violations and prior history of the State’s success in addressing past violations;” and 5) cases where there is significant public health damage. In reviewing these factors, direct federal enforcement action was warranted to address at least the first four of the described factors, each of which is elaborated on below.

2. Instances of Significant Economic Benefit Gained by the Violator

Smithfield Foods is a profit-making company. As a result of the violations of its permit requirements, Smithfield was able to enjoy even greater profits than it would have been able to achieve if it had complied with the law in a timely fashion. This is the essence of the United States’ claim that Smithfield garnered an economic benefit from its noncompliance and it is the foundation of the EPA’s decision to seek civil penalties. The principal purpose of civil penalties, in this instance, was to ensure that Smithfield did not realize a competitive advantage over similar companies facing similar environmental regulation. But what was the extent of Smithfield’s economic benefit that made it necessary for the United States to intervene?

Smithfield was permitted to gain an economic benefit from two sources: delaying the expenditure of capital necessary for wastewater treatment, or avoiding totally the costs associated with timely compliance.

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520 See POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 21.
521 See id. at 21-22.
522 Id. at 22.
523 See id.
524 See generally Parker, supra note 494.
526 See id.
527 See id.
of the permit's effluent limits. These concepts are mutually exclusive. Either you delay the installation of treatment or you avoid its installation. You cannot do both. In the delayed expenditure scenario, Smithfield was able to put off the installation of certain capital equipment which would have been necessary to comply on time with the permit effluent limits (particularly for phosphorus). In the avoided cost scenario, Smithfield was actually able to avoid completely the expenditure of certain funds which would have been necessary to comply with the permit conditions in a timely manner. To understand these concepts better, it is useful to apply them directly to the situation Smithfield faced in its decision of how to comply with its permit requirements.

The first thing to keep in mind when trying to understand the extent of Smithfield's economic benefit is the nature of the Smithfield plant. It is, in fact, two plants that operate simultaneously and continuously. Therefore, there are two separate outfalls from which Smithfield discharged its wastes to the Pagan River. One plant is referred to as Smithfield Packing, and the other plant is referred to as Gwaltney. The Smithfield Packing plant completed the installation of wastewater treatment equipment in 1996 (in anticipation of pretreatment requirements for their discharge into the HRSD), three years after the compliance date for phosphorus in their permit. This constituted a delayed cost scenario since they did install the necessary equipment, but it was installed three years later than it should have been installed. By Smithfield's own estimate, the total on-time capital cost for the equipment installed at Smithfield Packing was $2,121,449. This capital expenditure, however, was not the entire extent of the costs associated with compliance at Smithfield Packing. In addition to these delayed capital costs, there were also the avoided costs of operating and maintaining (O & M) the facilities in the intervening three years.

528 See Transcript of Proceedings (testimony of Robert Harris), supra note 482, at 364:1.
529 See id. at 364:6.
530 See id.
532 See id.
533 See id.
535 See Id. See also supra notes 528-530 and accompanying text.
536 See Transcript of Proceedings (Testimony of J. Willis Sneed), supra note 482, at 438:9.
537 See Transcript of Proceedings (Testimony of Robert Harris), supra note 482, at 377:1.
three years of O & M costs constituted avoided costs for Smithfield. The company's estimate of the O & M costs at the Smithfield Packing plant is $49,000 per year.\footnote{See Transcript of Proceedings (Testimony of J. Willis Sneed), \textit{supra} note 482, at 438:22.}

The Gwaltney plant, unlike the Smithfield Packing plant, had not installed any of the necessary wastewater treatment facilities to comply with its permit limits for phosphorus.\footnote{See United States v. Smithfield Foods, Inc., 972 F. Supp. 338, 348 (E.D. Va. 1997).} Therefore, from the Gwaltney side, Smithfield avoided completely the capital expenditure necessary to comply with its permit. The total on-time capital cost of the facilities necessary for compliance at Gwaltney were estimated by the company to be $2,443,299.\footnote{See Transcript of Proceedings (Testimony of J. Willis Sneed), \textit{supra} note 482, at 443:24.} The irony of the Gwaltney plant is that there are no O & M costs associated with compliance. The reason for this is that the costs associated with O & M are more than offset by the expected profits Smithfield could have achieved from recovering the solids of their manufacturing process and selling these solids on the open market.\footnote{See Transcript of Proceedings (Testimony of Robert Harris), \textit{supra} note 482, at 378:7.} The profits Smithfield could have generated from their wastewater treatment at the Gwaltney plant was estimated by the company to be $278,000 per year.\footnote{See \textit{NONCOMPLIANCE-USERS MANUAL}, \textit{supra} note 149, at 1-6.}

This analysis, however, doesn't give us the information we need to evaluate Smithfield's economic benefit of noncompliance. Clearly, the sums of money being discussed are substantial, but it is not possible to compare directly cash flows that occur in different years, e.g., it is not possible to compare directly the relationship between the $2,443,299 Smithfield should have spent in 1993 with the money they actually spent in 1996 at the Smithfield Packing plant.\footnote{See Transcript of Proceedings (Testimony of J. Willis Sneed), \textit{supra} note 482, at 449:12.} The economic maxim at work in this analysis is, "a dollar today is worth more than a dollar a year from now," because today's dollar can be invested immediately to earn a return over the coming year."\footnote{Id.} Therefore, the earlier a cost is incurred, the greater the impact of that cost on the entity spending the money.\footnote{\textit{See id.}} We need to account for this "time value of money" by converting all estimated
future cash flows to their "present value."\footnote{Id.} This commonly used economic technique is called discounting.\footnote{See id.} To determine the economic benefit from the delayed and avoided cost scenarios presented above, it is necessary to compare the present value of the cash flows associated with on-time compliance with the present value of the cash flows associated with delayed compliance, including the costs of replacing pollution control equipment at the end of its useful life.\footnote{See id at 1-5 to 1-6.} The difference between these two present values is the economic benefit of noncompliance.\footnote{See id.} In the case of Smithfield Foods, the court found this economic benefit to be approximately $4,200,000.\footnote{See United States v. Smithfield Foods, Inc., 965 F. Supp. 769, 773, 796 (E.D. Va. 1997).}

This sum constituted "significant economic benefit gained by the violator" and formed a substantial basis of the EPA's decision to initiate direct enforcement action in this case.\footnote{Policy Framework for State/EPA Enforcement Agreements, supra note 97, at 21.} Forcing Smithfield to pay a civil penalty in at least the amount of the economic benefit of noncompliance eliminated any economic incentive for Smithfield to violate the law. Furthermore, imposing such a penalty protected other companies who had complied with the law in a timely fashion from being placed at a competitive disadvantage by those who violate the law.

3. Violations Which Cause Significant Degradation to a National or Regional Environmental Priority

The 1987 Chesapeake Bay Agreement begins as follows: "[t]he Chesapeake Bay is a national treasure and a resource of worldwide significance."\footnote{Chesapeake Bay Agreement, supra note 245, at 1.} By signing this Agreement, the U.S. EPA, as well as Virginia, Maryland, Pennsylvania and the District of Columbia, accepted this declaration recognizing the bay's critical importance to the ecological and economic health of the nation.\footnote{See generally id.} Further, the signatories committed to "managing the Chesapeake Bay as an integrated ecosystem" and pledged

\footnotesize{\begin{itemize}
\item \footnote{Id.}
\item \footnote{See id.}
\item \footnote{See id at 1-5 to 1-6.}
\item \footnote{See id.}
\item \footnote{See United States v. Smithfield Foods, Inc., 965 F. Supp. 769, 773, 796 (E.D. Va. 1997).}
\item \footnote{Policy Framework for State/EPA Enforcement Agreements, supra note 97, at 21.}
\item \footnote{Chesapeake Bay Agreement, supra note 245, at 1.}
\item \footnote{See generally id.}
\end{itemize}}
their “best efforts to achieve the goals in this Agreement.” As an articulated national environmental priority, the Chesapeake Bay and its tributaries fall squarely within the Policy Framework’s environmental factor for the EPA to consider when deciding whether to initiate a direct enforcement action in an approved state. Violations of permit conditions which cause or contribute to the significant degradation of the Chesapeake Bay, therefore, may be considered significant from a national perspective. If the EPA determines that the violations have created such an environmental effect, then there is a presumption in favor of direct action. In the case of Smithfield Foods, the EPA determined that Smithfield’s violations of its permit limits were responsible for the significant degradation of a nationally important environmental and economic resource.

The Smithfield outfalls were the largest source of nitrogen and phosphorus to the Pagan River prior to their diversion to the HRSD. From 1993 through 1995, the combined effluent discharges from Smithfield accounted for between 128 to 233 thousand pounds of phosphorus per year and between 422 to 852 thousand pounds per year of nitrogen into the Pagan River estuary. What is striking about these numbers is that during those same years, an average of 160,000 pounds of the loading of phosphorus to the Pagan River was the direct result of Smithfield’s permit violations alone. The loading of nitrogen from Smithfield’s permit exceedences amounted to approximately 13,000 pounds per year. Between 1993 and 1997, Smithfield experienced continuous noncompliance of its permit limitation for phosphorus and significant violations of its permit limits for ammonia, TKN, fecal coliform, cyanide, pH, TSS, and oil and grease. During this time period,

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554 Id.
555 See id. at 1; POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 21-3.
556 See POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, supra note 96, at 21-23.
557 See id.
558 See id.
559 See Dr. Jeffrey B. Frithsen, An Assessment of Environmental Impacts in the Pagan River Estuary Resulting From Smithfield Food, Inc. 6 (May 19, 1997) (unpublished report on file with the author).
560 See id.
561 See id. at 8.
562 See id. at 8.
563 See supra Table IV-1.
Smithfield contributed a cumulative loading of pollutants to the Pagan River as outlined in Table IV-2.\footnote{The values in the table are derived from the expert report of Dr. Jeffrey Frithsen. See Frithsen, supra note 559.}

### Table IV-2

<table>
<thead>
<tr>
<th>Pollutant Parameter</th>
<th>Loading (in lbs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Phosphorus</td>
<td>691,000</td>
</tr>
<tr>
<td>Total Nitrogen</td>
<td>2,739,000</td>
</tr>
<tr>
<td>Total Suspended Solids</td>
<td>570,000</td>
</tr>
<tr>
<td>Oil and Grease</td>
<td>66,000</td>
</tr>
</tbody>
</table>

The discharge of these nutrients is the driving force behind eutrophication—the overstimulation of primary productivity in an aquatic ecosystem; and eutrophication is directly related to such water quality impacts as increasing turbidity, undesirable algal blooms, and decreasing levels of dissolved oxygen.\footnote{See id. at 8.} These water quality impacts have wide-ranging effects on the aquatic ecosystem.\footnote{See Dr. William A. Richkus, An Evaluation of Consequences to Living Resources of Smithfield (Smithfield Food, Inc., Smithfield Packing Co., Inc., and Gwaltney of Smithfield, Ltd.) Discharge Violations, 7 (May 19, 1997) (unpublished report on file with the author).} They can alter the species composition of an aquatic ecosystem by triggering the displacement of desired aquatic species, such as submerged aquatic vegetation (SAV) and the species which depend on SAV for habitat and food.\footnote{See id.} In addition, low dissolved oxygen conditions, which exist over large portions of the Chesapeake Bay, can “eradicate benthic communities”\footnote{See id.} making the waters uninhabitable for desirable fish species, such as striped bass.\footnote{Id.}
The presence of SAV provides vegetative cover for fish species, especially in their juvenile stages, enabling such species to avoid predation at critical early ages. The Chesapeake Bay Program has set certain target goals for water quality to promote the re-establishment of SAV in the Bay. Those goals are 0.01 mg/l of phosphorus for mesohaline (moderately salty) waters and 0.02 mg/l of phosphorus for tidal fresh and oligohaline (less salty) waters. The Pagan River exceeds these water quality criteria for the restoration of SAV. It is not surprising then that "the mainstream of the Pagan River is absent of SAV." The effect of this is to limit the ability of the aquatic ecosystem to support viable communities of "fish, crabs, waterfowl and other aquatic organisms."

The existence of impaired waters in the Chesapeake Bay prompted the Chesapeake Bay Commission to conclude that "[t]he improvement and maintenance of water quality are the single most critical elements in the overall restoration and protection of the Chesapeake Bay." The CBA recognizes that the reduction of nutrients is essential to meet its overall environmental objectives. Therefore, the Agreement established the goal of achieving, by the year 2000, a forty percent reduction of nutrients entering the main stem of the Bay. Given the loadings from the Smithfield plants, if the company had simply complied with their effluent limit for phosphorus in 1993 (as required by their permit), it would have been "equivalent to about eleven percent of Virginia's total James River point source phosphorus reduction goal." Clearly, Smithfield's discharges, particularly its discharge of nutrients, severely impacted the Pagan River and contributed to the degradation of the Chesapeake Bay. For this reason, among others, the EPA concluded that its intervention in this case was warranted.

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570 See id.
571 See Frithsen, supra note 559, at 11.
572 See id.
573 See id.
574 Richkus, supra note 566, at 3.
575 Id. at 7.
576 CHESAPEAKE BAY AGREEMENT, supra note 245, at 4.
577 See id.
578 See id. at 5-6.
579 Richkus, supra note 566, at 9 (emphasis in original).
4. Interstate Issues—Pollution Effects Which Transgress State Boundaries

The federal government is uniquely positioned to address pollution effects between proximate states. The Chesapeake Bay is a resource shared by three states and the District of Columbia, and its estuarine and tidal characteristics create conditions which distribute pollutants throughout its entire extent.\[^{580}\] Therefore, even pollutant discharges created near the mouth of the Bay, such as those created by Smithfield prior to its diversion to the HRSD, can be carried by tidal forces “upstream” into the jurisdictions of Maryland, the District of Columbia and even Pennsylvania. Such pollution imposes external costs on these jurisdictions without any meaningful way for them to participate in the decisions related to the discharge of such pollutants.\[^{581}\] The Policy Framework recognizes this as a possibility and provides the ability of the EPA to intervene with direct enforcement action when violations of permit conditions create pollution externalities in jurisdictions unable to participate directly in the decisions related to the pollutant discharge.\[^{582}\] Doing so discourages states from furthering economic or other state interests by using lax enforcement against facilities that create real or potential harm to people in nearby states.

In the case of Smithfield, the company’s considerable discharges of nutrients, as well as other conventional and toxic pollutants, entered the Chesapeake Bay through the James River.\[^{583}\] From there, they could be dispersed to virtually any point within the Bay’s system.\[^{584}\] The pervasive ecological effects of eutrophication caused by the overabundance of nutrients was a persuasive consideration with respect to Smithfield.\[^{585}\]

\[^{580}\] See Chesapeake Bay Agreement, \textit{supra} note 245, at 1.

\[^{581}\] One way adjoining states can participate in the NPDES permit issuance decision-making process is through the section 401 certification process outlined in the CWA. \textit{See} CWA § 401, 33 U.S.C. § 1341. But in the case of Smithfield Foods, it wasn’t the permit conditions which were at issue, it was noncompliance with duly enacted permit conditions. Therefore, like the EPA, adjoining jurisdictions probably would not have objected to Smithfield’s permit conditions under the 401 certification process because the permit imposed the appropriate limitations for phosphorus and other pollutant parameters as developed by Virginia under their state water quality standards.

\[^{582}\] \textit{See Policy Framework for State/EPA Enforcement Agreements, \textit{supra} note 96, at 21-24.}

\[^{583}\] The Pagan River discharges to the James River which in turn discharges to the Chesapeake Bay.

\[^{584}\] \textit{See} Chesapeake Bay Agreement, \textit{supra} note 245, at 1.

\[^{585}\] \textit{See supra} note 582-583 and accompanying text.
fact that the effects of eutrophication could be shared by other states, and in particular Maryland, created a condition ripe for federal action because Maryland otherwise would have limited recourse to address Smithfield's permit exceedances directly, yet could suffer the deleterious consequences of Smithfield's violations. Our federal system was designed specifically to arbitrate such conflicts between states without the need for direct conflict between the individual jurisdictions. The EPA, as the ultimate arbiter of the CWA's regulatory programs, was particularly well placed to act against Smithfield in this instance due to the potential for harm created by Smithfield's discharges in political jurisdictions with little ability to affect Smithfield's behavior.

5. Repeat Patterns of Violations or Violators

Smithfield is not new to the arena of CWA enforcement. The company has a history of violations of the CWA which have been the subject of extensive judicial proceedings. Smithfield Foods, Inc. acquired the Gwaltney plant from the ITT Continental Baking Co., and they assumed the responsibility for the wastewater discharges from the facility under ITT's existing NPDES permit as of October 27, 1981. The violations at issue in the complex course of litigation which followed occurred between October 27, 1981 and May 15, 1984. During this time frame, Gwaltney reported more than 150 violations of its NPDES permit for the following pollutant parameters: fecal coliform, chlorine, total suspended solids (TSS), total Kjeldahl nitrogen (TKN), and oil and

586 See id.  
587 See supra notes 76-79 and accompanying text.  
591 See Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 692 (4th Cir. 1989).
The violations themselves were never at issue during the rounds of litigation. The issues at law in this case related to standing, subject matter jurisdiction, and the maximum penalty liability faced by the company for its violations. Every pollutant parameter alleged to be in violation during this litigation was also the subject of the United States' current action against the company, with the notable exception of phosphorus, which did not become an issue for Smithfield until the State adopted its water quality standards in 1988 because no limit for phosphorus existed prior to 1988.

In addition to the violations which occurred during the early 1980s, the United States' case against Smithfield Foods was prompted by the need to address the long history of permit violations by the company which occurred subsequent to the litigation history outlined above. The current violations experienced by the company constitute repeat violations of the Act and place the company in the position of knowing the CWA's requirements but operating its plants in violation of those requirements. The repeat nature of the violations at issue in the United States' action exposed the company to greater scrutiny under the Policy Framework, and created an additional factor for the EPA to consider in determining the appropriate course of action against the facility.

The discussion thus far has focused on the factors for initiating enforcement action in approved states established in the EPA's Policy Framework. This analysis, however, does not tell the entire story. The Smithfield case was of critical importance because it went well beyond the traditional scope of the factors outlined in the EPA's Policy. It is to this expanded analysis that I now turn.

V. BROADER POLICY CONCERNS—PUBLIC PARTICIPATION

Beyond the policy concerns addressed by the EPA's Policy

594 See supra notes 237-240, 265 and accompanying text.
595 See Summary of Exceedences of Discharge Limitations, supra note 413.
596 See POLICY FRAMEWORK FOR STATE/EP A ENFORCEMENT AGREEMENTS, supra note 97, at 21.
Framework, the Smithfield case was important because of the effect which the state's Consent Special Orders had on public participation. The Consent Special Orders utilized by Virginia in the Smithfield case were "cooperative" enforcement measures negotiated between the state and the company to address prospective permit violations, i.e., violations of the permit which had not yet happened but would happen in the future. Importantly, at the time the Orders were negotiated and issued, there was no requirement under Virginia law for a public hearing if the violator consented to the issuance of the Order. In each of the Orders issued by the State to Smithfield, the company consented to the Orders, and therefore, there was no requirement for a hearing and no opportunity for the public to request a hearing. Furthermore, under state law, the public had no ability to challenge the conditions of the Order in court.

In contrast, a modification to the conditions contained in a state-issued federal permit requires substantial public notice and EPA review and comment. These procedural requirements for permit modification are not mere technicalities; they preserve the EPA's oversight role and the public's right to participate in the pollution control process. Both of these goals are central to the CWA's overall scheme. In similar contrast, Congress' stated policy for public participation in the protection of the nation's waters led to prominent public participation requirements in many aspects of the EPA's enforcement program. For example, the EPA's administrative penalty authority requires the EPA to give the public notice of and an opportunity to comment on a proposed administrative penalty assessment. The public is also guaranteed an opportunity to request a hearing, to participate in a hearing, and to appeal an administrative penalty assessment in federal District Court. From Virginia's enforcement perspective, the Consent Special Orders

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597 See generally Consent Special Order, March 1990, supra note 297; 1990 Special Order Amendment, supra note 326; Consent Special Order, May 1991, supra note 328.
598 See Statement of Undisputed Facts and Memorandum of Law, supra note 294, at 25.
599 See id. at 25-26.
600 See id at 26.
601 See supra notes 39-42 and accompanying text.
602 See Brief for Appellee, supra note 424, at 19-20.
603 See id. at 20.
604 See CWA § 101(e), 33 U.S.C. § 1251(e) (1994); CWA §§ 309(g)(4), 309(g)(8), 33 U.S.C. §§ 1319(g)(4), 1319(g)(8).
605 See CWA §§ 309(g)(4), 309(g)(8), 33 U.S.C. §§ 1319(g)(4), 1319(g)(8).
606 See id.
superseded the terms and conditions of the federal permit.\textsuperscript{607} This created the anomalous situation of a facility being simultaneously in compliance (with the State Order) for state enforcement purposes, and out of compliance (with the state-issued federal permit) for federal enforcement purposes.\textsuperscript{608} This situation should have been addressed by the simple process of following the appropriate public procedures to modify the permit to incorporate the terms of the Consent Special Order.\textsuperscript{609} If Smithfield had followed these procedures, it would have obtained a definitive answer that would have bound the EPA and the public.\textsuperscript{610} To do so, however, would have given the public a say in the matter and the EPA veto power over whether to eliminate the phosphorus limitation.\textsuperscript{611} Thus, Smithfield may not have received the answer it wanted.

The above discussion has answered the primary policy question of this case: why did the EPA choose to intervene with its own action? But the article has only hinted at the answer to the second policy question presented at the outset; i.e., why couldn’t Smithfield simply have relied on the state’s administrative orders to determine its appropriate course of action? A corollary question to this is: why did the state resist, and nearly obstruct, the appropriate and intended role of the federal government in enforcing the CWA? What should be clear from the above discussion is that “[t]he holder of a state NPDES permit is subject to both federal and state enforcement action for failure to comply” with the conditions of its permit, even when those conditions are imposed solely pursuant to state law (such as water quality standards).\textsuperscript{612} Therefore, in the Smithfield case, even though the phosphorus standard was developed pursuant to state law, it was enforceable by the federal government because it was placed in the company’s NPDES permit. Furthermore, Smithfield did not attempt to have that permit modified to relieve itself of its duty to comply with the phosphorus standard.\textsuperscript{613} Therefore, from a purely legal standpoint,

\textsuperscript{608} See id. at 783-85.
\textsuperscript{609} See id. at 783 n.19 (stating Smithfield “should have sought a Permit modification, and approval of the EPA, once it was clear they could not meet the deadlines in the Permit”).
\textsuperscript{610} See 40 C.F.R. § 123.25 (1997).
\textsuperscript{611} See id.
\textsuperscript{613} See Smithfield, 965 F. Supp. at 787.
Smithfield was subject to enforcement from both the state and the federal government by virtue of its permit conditions, which is one reason the company could not simply rely on the state’s directions under the Consent Special Orders.614

This answer, while compelling from a legal standpoint, fails to address a significant policy argument for the importance of federal action in this case. That policy argument relates to the federal nature of the CWA’s requirements and the federalist structure of our governmental system. Ultimately, the policy argument for why Smithfield could not simply rely on the state’s direction relates to how our federalist structure preserves individual rights and social welfare.

The importance of the Smithfield case transcends the policy analysis taken up by this article thus far since it has implications well beyond the EPA’s policy for taking direct enforcement action in approved NPDES states. The Smithfield case provides a unique opportunity to examine the workings of the Constitution’s federalist structure more than 200 years after the Framers put the basic system in place. In particular, this case allows us to see how federalism continues to play a vital role in a world where the compass of state sovereignty appears to have dwindled with respect to the federal government and where national and international markets have developed in ways that could not have been imagined at the time of the Constitutional Convention.615 The fact that federalism continues to protect individual liberty and social welfare in a world which is startlingly different from its ancestral environment is a testament to the brilliance of the Constitution’s design.

VI. FEDERALISM AND THE SMITHFIELD CASE

Federalism is “perhaps our oldest question of constitutional law.”616 The question continues to arise because, like the Constitution itself, the concept of federalism is continually adapting to the evolving social, economic, and political conditions in this country. There is no objectively “correct” position to take with respect to the relative and proper division of authority between the federal government and the states.

Certainly, no single answer has satisfied the constituent elements of our

614 See id. at 787-88, 788 n.24.
government over the course of our history. Given this reality, are we simply cast adrift with no meaningful foundation upon which to proceed? Absolutely not. What principles can we use, then, if not the actual language of the Constitution (which provides little guidance to resolve this issue)?

There are two fundamental precepts which should inform our debate about federalism. First, we should focus on the authority granted to government, state or federal, by the true sovereigns, "We the People of the United States . . . ." Second, we should consider the purpose for which the people delegate authority to government, i.e., what is it that the people want the government to accomplish? The first consideration is the ultimate bedrock of our analysis because it does not change over time, but the second precept, by necessity, is malleable and responds to the changing perceptions of what constitutes the welfare of our citizens. Because of this adaptability, we have a vital system of government which can respond to changing needs instead of a moribund and anachronistic polity bereft of relevance.

The Constitution cannot respond to or specify solutions to problems which were unanticipated at the time of its framing. This does not mean that government should not address these issues or that government is restricted to issues and perceptions that existed in 1789. The genius of the Constitution is that its framework has been sufficiently flexible over the past 200 years to allow the government to respond to conditions which could not have been imagined at our country’s outset. The federal government currently regulates activities which would have been unimaginable to the Framers, but Congress has only pursued such regulation because of an articulated social need. The nature and magnitude of interstate commerce and the range of commonly accepted

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617 See id. at 159.
618 See James Huffman, Governing America’s Resources: Federalism in the 1980's, 12 ENVTL. L. 863, at 870 (1981-1982) ("The document that was finally agreed upon offers little express guidance to those who seek to define the relative powers of the state and national governments.").
620 See Huffman, supra note 618, at 882. ("In the 1980’s federalism should be viewed as a mechanism for assuring that government does what we want it to do . . . .").
621 See id. at 866-67 ("The document of 1789 cannot specify solutions to problems unanticipated at the time of its framing.").
623 See id. at 157-58.
objects of government regulation have indeed mushroomed in the last two centuries, and the regulatory authority of Congress has grown commensurately.\textsuperscript{624} The economic conditions arising from the industrial revolution and the expansion of interstate commerce have prompted Congress to respond in a number of areas of social welfare impacted by our economic apparatus, including: child labor, occupational health and safety, and environmental protection.\textsuperscript{625} Using the Commerce Clause, the Federal Government has extended both its reach and its willingness to exercise power within the confines of the Constitution, but at the same time, the apparent authority of the states has correspondingly diminished as the federal government’s expanding authority has encroached on areas where states have had exclusive domain.\textsuperscript{626} Therein lies the crux of the debate.

Critics of the federal government’s enforcement action in the Smithfield case object to the federal government’s expanded authority and willingness to regulate in areas traditionally controlled by the states.\textsuperscript{627} Their fear is that “there is scarcely any human activity—with the possible exception of daydreaming—that the central government does not attempt to manage, to regulate, in a word, to control.”\textsuperscript{628} This expanded ability to regulate is seen as “a usurpation of power” on the part of the federal government which intrudes into the rights of the states to govern without hindrance within their jurisdictions.\textsuperscript{629} This perspective has been expressed most clearly by Governor George Allen of the Commonwealth of Virginia:

[Two centuries ago], the challenge to the liberties of
the people came from an arrogant, overbearing monarchy
across the sea. Today, that challenge comes from our own
federal government—a government that has defied, and that

\textsuperscript{624} See id.


\textsuperscript{626} See id.

\textsuperscript{627} See Dunlop Statement, supra note 113 (“Unfortunately, the federalism built into the Constitution and spelled out so explicitly by the 10th amendment [sic] has been under relentless attack for at least the last 60 years. Americans have grown accustomed to a Big Nanny central government taking the lead, issuing orders, and doling out benefits.”).

\textsuperscript{628} Id.

\textsuperscript{629} See id. at 5-6.
now ignores, virtually every constitutional limit fashioned by the Framers to confine its reach and thus to guard the freedoms of the people.\textsuperscript{630}

In making this claim, these critics highlight a prevalent view of our federalist structure.\textsuperscript{631}

The current debate in federalism has been cast almost exclusively in terms of states' rights and the preemption of traditionally held state prerogatives.\textsuperscript{632} The original anti-Federalists opposed the newly developed Constitution for fear that it granted too much power to the federal government.\textsuperscript{633} The modern anti-Federalists have resurrected a version of this argument cast in the form of states' rights and the prerogatives preserved to the states under the Tenth Amendment.\textsuperscript{634} In the states' rights view, the federal government is seen as a "mistrusted agent of the states,"\textsuperscript{635} with the role of the various states to protect their respective citizens from the actions of the federal government.\textsuperscript{636} States, according to this perspective, are set against the federal government and seek to preserve their perceived authority through nullifying "federal . . . laws that would otherwise frustrate state prerogatives."\textsuperscript{637} In this view, the source of political authority is the people of the various states (who represent the "real" governments of the people), not "We the People of the United States."\textsuperscript{638} Modern anti-Federalists argue that "We the People" are "engaged in a power grab, tilting the balance of power too far in favor of the federal government."\textsuperscript{639} This misses the point. This view takes an unduly limited view of the federal government’s role, and more importantly, it creates an antagonism between the federal government and the states that need not exist.

Framing the debate in this manner, as has been the trend in recent

\textsuperscript{630} Id.

\textsuperscript{631} See id. at 6.

\textsuperscript{632} See Huffman, supra note 618, at 866 ("To the extent that our discussions of federalism focus on states' rights, as they invariably have throughout our history, we have lost the perspective on the issue before us.").


\textsuperscript{634} See id. at 111-12.

\textsuperscript{635} Reynolds & Kates, supra note 619, at 1762.

\textsuperscript{636} See id.

\textsuperscript{637} Id.

\textsuperscript{638} Id. See also Sullivan, supra note 633, at 112.

\textsuperscript{639} Sullivan, \textit{supra} note 633, at 112.
years, leads us astray by creating the presumption that the various levels of
government have inherent rights which can be usurped by its competitor. This trend is unfortunate. Governmental power is not a
competitive zero sum game, where one level of government wins in a
power struggle to the exclusion of the other. The focus of the debate
should be on the purpose of government, which is to secure the liberties of
the people being governed and to provide for “the welfare of the
individuals whose lives are to a greater or lesser degree controlled by those
governments.” The proper way to evaluate any governmental action is
first to assess whether that action is consistent with the authority that the
people delegate or whether that action surpasses such authority and is
therefore *ultra vires*. Secondly, we should determine if the action does
what the people (not political or business leaders) want it to do. To
speak in terms of states’ rights, or federal rights, is to develop “theories
that justify the aggrandizement of power by one government or another,
rather than theories that justify government authority over individuals in
the interests of those individuals.”

If there is one central truth which drove the Framers, it could be the
following: power is always the rival of power. To manage this
tendency, the Framers constructed a government that would naturally
check the accumulation and exercise of unchecked power, i.e., power for

640 See Huffman, supra note 618, at 866 (“The very idea of states’ rights (or federal
rights) has no place in debates over the structure of American government, unless one
believes that there are arguments to be made for government power for its own sake.”).
See also id. at 884 (“To the extent that we perceive that the states and federal
governments have rights in relation to each other, history demonstrates that we will lose
sight of the more basic proposition that individuals have rights in relation to the
government, whether state or federal.”).
641 See id. at 875-76 (“The dominant approach . . . has focused on the state and national
governments as competitors for the exercise of a finite array of governmental powers.”).
See also Sullivan, supra note 633 (The Constitution is “not a winner-take-all contest for
sovereignty between the federal government and the states.”).
642 Huffman, supra note 618, at 867.
643 See Reynolds & Kates, supra note 619, at 1762.
644 See Huffman, supra note 618, at 867.
645 Id. at 867-68.
rival of power, the general government will at all times stand ready to check the
usurpations of the state governments, and these will have the same disposition towards
the general government.” Id. (quoting THE FEDERALIST No. 28, at 180 (Hamilton)
(Clinton Rossiter ed., 1961)).
its own sake absent any public purpose or control. In this regard, the Federalist structure of state and federal sovereigns mimics and complements the separation of powers between the various branches of the federal government. Each structure (the federal structure of separate branches and the federalist structure of state and federal sovereigns) is designed to regulate the exercise of power to prevent abuse. It is crucial to keep in mind that the federalist system is reciprocal in effect. Not only do the several states counteract the tendency of the central government toward tyranny, the central government acts in like fashion with respect to the states.

Instead of characterizing federalism in terms of a competitive usurpation of power, a different way to conceptualize the federalism debate focuses on the intellectual argument in favor of federalism. This argument identifies four distinct values which the federalist structure provides to the ultimate sovereigns of this nation—"We the People of the United States." Those values include: 1) providing checks against the concentration of irresponsible governmental power at either the state or national level; 2) promoting republican values by allowing citizens the opportunity to participate in public and political life; 3) providing for political competition among jurisdictions, both vertically between the national and state governments and horizontally among state and local governments; and 4) promoting diverse social environments and community cultures. The current debate concerning federalism moves away from these values and focuses on the relative powers to be exercised by the respective governments, instead of the purpose for instituting those

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647 See id. at 458-59.
648 See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government . . . will reduce the risk of tyranny and abuse from either front.").
650 See id.
652 Id. at 917-18. See also Amar, supra note 649, at 1232 ("Both sets of limited sovereigns must be kept within the limitations imposed on their sovereignty by the ultimate Sovereign—We the People of the United States who ordained and established those limitations.").
653 See Stewart, supra note 651, at 917-18.
governments.\textsuperscript{654}

The "constitutionally mandated balance of power" between the States and the Federal Government was designed to secure "our fundamental liberties."\textsuperscript{655} The issue, however, is not to decide an arbitrary division of sovereignty between the federal government and the states,\textsuperscript{656} but rather to discern the proper relationship between the people and government (whether federal or state) and the proper role each respective level of government should play in securing and providing for the basic liberties and welfare of its citizens, no matter what state they inhabit. We have a polity which secures our fundamental liberties, not because of the allocation of jealously guarded enumerated powers between the levels of government, but because of the existence of autonomous federal and state political processes (not autonomous sovereignty) and the ability of the judiciary to police congressional intrusion into those autonomous state processes; i.e., the prohibition against "commandeering" state legislative processes for federal purposes.\textsuperscript{657} This autonomy of process between political jurisdictions accomplishes two of the primary goals of federalism: it diffuses effectively political power, and it provides for meaningful local participation in our republican form of government. The diffusion of power in our federal system ensures that no level of government exercises unrestrained authority, and it guarantees the continued liberty of our citizens.

The concept of social welfare, unlike our federalist structure, however, has changed over time. What is striking in our system of government is that our changing conception of social welfare can be accommodated by appropriate governmental response without impacting our government's stability. We have a stable polity because of the separation of powers within the federal government and because of the autonomy of state and federal political processes guaranteed by the Tenth

\textsuperscript{656} See 1997 Hearing Before the Committee on Environment and Public Works, supra note 2, 192-93 (statement by Becky Norton Dunlop, Secretary of Natural Resources, Commonwealth of Virginia, March 5, 1996) ("The very essence of federalism consists in reserving a certain degree of sovereignty for each of government's parts.").
Amendment. For us to continue to have a relevant polity, however, it is important that the government be able to respond to the needs of the people as they change over time. If we carve out arbitrary areas of state sovereignty which are immune from federal intrusion, then we may forestall the ability of the government to address to its fullest possible extent vital social and economic problems. It is critical that we be willing to call on whatever level of government is best positioned to enhance or further that conception of welfare.

This view of federalism is more appropriate than the traditionally held states' rights view of government because: 1) it focuses on the interests of the people of the United States, not on the interests of abstract political entities; and 2) it avoids creating a situation of inherent conflict between the federal and state governments, in which each is fighting to get as great a share of power as possible in a zero sum game. Rather, the level of government more appropriately positioned to act in given situation to protect the public interest is the level of government that should act.

This is exactly what happened in 1972 with the landmark legislation of the CWA. In this instance it was the federal government that was called on to address an area of social welfare which had previously resisted solution under state government control. Prior to federal regulation of water pollution, states allowed (or prohibited) pollution as they saw fit. The ability of state governments to prohibit or restrict pollution discharges, however, was undermined by a fear that businesses would move from any state attempting vigorous regulation. Furthermore, to attract industry from neighboring jurisdictions, states competed for this mobile capital by providing lenient pollution laws, or lenient enforcement of those laws. The consequence of this inaction was clear: gross pollution abounded. Smog pervaded our cities, closings of beaches and shellfish beds were well publicized and waterways caught

660 See id. at 206-10.
661 See Stewart, supra note 651, at 919 ("The ability of state and local governments effectively to regulate multistate businesses is undermined by . . . fear that corporate investment may shift away from any state or locality attempting vigorous regulation.").
662 See supra notes 123-130 and accompanying text.
663 See supra notes 51-55 and accompanying text.
The problem of pollution seemed overwhelming, and its impact on aggregate social welfare was recognized for the first time. The public was willing to accept, and indeed demanded, that the federal government intervene. The message conveyed by Congress in 1972 (and which is currently operative today) is that the control of water pollution using national minimum standards is necessary to improve the social welfare of citizens and to secure the right of each person to clean water.

The Smithfield case illustrates the continuing influence exerted by powerful economic constituencies on state governments and the effect which that influence can have on environmental regulation. In this case, the Commonwealth of Virginia appropriately imposed effluent limitations based on water quality standards. These standards reflected a commitment to improve the water quality in the Chesapeake Bay and to further the environmental goals of the federal CWA. The Commonwealth of Virginia made this commitment when it signed the CBA and when it took over implementation of the federal NPDES permit program. Once the standards were placed in Smithfield’s NPDES permit, however, the company threatened to leave the state to evade the requirements. As soon as this threat was made, the state entered into cooperative consent orders negotiated with the company, with the state using its prosecutorial discretion to address Smithfield’s concerns in the most economically advantageous way for the company. Virginia’s goal was to prevent the company from leaving the state and taking the economic base it had created to another jurisdiction. This action had the effect of allowing Smithfield to continue its discharges into the Pagan River without the benefit of the treatment necessary to comply with the

664 See id.
666 See Stewart, supra note 651, at 920 (“[F]ederal regulatory and social service programs march under the banner of rights . . . . Federal regulatory and social programs are justified politically as securing rights . . . .”).
667 See supra notes 237-242, 265-267 and accompanying text.
668 See supra notes 248-250, 241-242 and accompanying text.
669 See supra notes 230-236, 245-250 and accompanying text.
670 See supra notes 290-294 and accompanying text.
671 See supra notes 301-308, 325-332 and accompanying text.
limits. In effect, Smithfield's influence with the state allowed it to circumvent certain environmental "rights" espoused under the federal CWA in favor of economic interests benefiting a small minority of people.

The Smithfield case is a classic example of the basic conundrum faced by environmental public policy makers in the process of regulating economic activity. The problem is how to reconcile the market's first principle of "one-dollar/one-vote" within a political democracy whose first rule is "one-person/one-vote." The issue is to determine the proper boundary of market principles, especially when those market principles impinge on the democratic political principles of our governmental system. The problem is one of factions, and whether powerful economic factions can gain private political advantage by knocking on the door of the government. The purpose of our federal system is not to give such factions a second bite at the apple; its purpose is "to help limit the responsiveness of government to particular factions at the expense of others." In the instant case, federalism served the basic public policy function of upholding specified environmental "rights" of the people by preventing the abuse of such rights by the state government under the guise of prosecutorial discretion.

The federal government's enforcement action prevented one powerful minority faction from using its considerable influence on the state government to gain private advantage at the expense of the larger public good. The issue in this case is not whether the federal government (through "We the People") had the right to regulate the conduct in question. The issue is when should the federal government, through its considerable enforcement power, interject itself to serve the larger public policy goals mandated by law. The Smithfield case is a good example of when it is important for the federal government to act to restrain the ability of states to accommodate economic interests (i.e., minority factions) at the expense of others.

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673 See generally Consent Special Order, March 1990, supra note 297; 1990 Special Order Amendment, supra note 326; Consent Special Order, May 1991, supra note 328.
674 ROBERT KUTTNER, EVERYTHING FOR SALE 4 (1997).
675 See id. at 4, 328-29.
676 See id. at 4, 345-46.
677 Huffman, supra note 618, at 881.

Madisonian factions will knock on the door of one government, and if there is no answer, they will knock on the door of another government. But the federal system does not exist to give factions a second chance, it exists to help limit the responsiveness of government to particular factions at the expense of others.

Id.
expense of the environmental "rights" established for all people by law. In
the Smithfield case, our federal system, through the intervention of the
federal government, worked appropriately to limit the responsiveness of
the state government to a minority faction at the expense of securing the
basic right of the people of the region to clean water.

VII. CONCLUSION

The state's administrative actions in response to Smithfield's
violations were never intended to compel Smithfield to pay any civil
penalty for its violations, thus allowing the company to generate profits in
excess of what it could have achieved if it had complied with the law.678
Furthermore, the state's orders allowed Smithfield to continue violating
the water quality-based effluent limits in its permit for a period of
approximately four years (almost ten years after the initial promulgation of
the standards),679 creating significant environmental harm to the Pagan
River and, potentially, to the Chesapeake Bay, in contradiction to the
state's expressed commitment to further the environmental goals of the
Chesapeake Bay Agreement and the explicit commitment (through its
status as an approved NPDES jurisdiction) to further the environmental
goals of the federal CWA.680 Additionally, the violations of Smithfield's
permit created the potential for negative externalities to be imposed on
adjacent political jurisdictions, even though those jurisdictions were not
part of the decision-making process which allowed the violations to
occur.681 Beyond this, Smithfield's apparent lack of regard for the
requirements of the CWA, as evidenced by its familiarity with the Act's
requirements and its recalcitrant insistence on violating the Act for
economic reasons, formed a basis for the EPA to determine that direct
enforcement action by the federal government was warranted in this
case.682 Taken collectively, the factors presented above provided a strong

1997).
679 See supra notes 237-240 and accompanying text (Virginia adopted its water quality
standards in May 1988); Brief for Appellants at 13, United States v. Smithfield Foods,
the Gwaltney plant finally took place on June 24, 1996 and for the Smithfield plant on
August 4, 1997).
680 See supra notes 57-92, 237-268 and accompanying text.
681 See supra notes 580-587 and accompanying text.
682 See supra notes 451-596 and accompanying text.
incentive for the U.S. EPA to intervene in the state's administrative enforcement action by requesting the Department of Justice to initiate a civil judicial referral against the company. Indeed, the federal government's enforcement action in the Smithfield case was an example of federalism working at its best to protect the public interest by preventing the state from accommodating a powerful economic faction by allowing it to impinge on the rights of the people without the ability of the people of the state to challenge the state's conduct.