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TO : House Committee on Interior and Insular Affairs

FROM : American Law Division

SUBJECT : Comments on Department of the Interior Memorandum of September, 20, 1985 Entitled "Protection of National Park System Units from the Adverse Effects of Air Pollution"

You have asked for CRS review of the above-captioned memorandum regarding the Department of the Interior's authority under existing law to protect air quality in National Park System (NPS) units. The memorandum concludes that "[v]arious laws may be utilized by the Department of the Interior to some extent to protect NPS units from the harmful effects of air pollution. None provides complete protection." Laws discussed in the memorandum consist of the Clean Air Act (especially prevention of significant deterioration and visibility protection), National Park Service Organic Act, constitutional property power, Surface Mining Control and Reclamation Act, and federal and state common law.

Our response to the Interior memorandum takes the form of selected comments rather than exhaustive, point-by-point evaluation. ALD attorneys contributing to this memorandum were Robert Meltz (Clean Air Act), Pamela Baldwin (National Park Service Organic Act and other park management authorities), and George Costello (common law).

Clean Air Act

The Interior memorandum quite appropriately notes the statutory limits in the Clean Air Act's (CAA) program for protecting air quality in the national parks. To recapitulate, limits in the prevention of significant deterioration (PSD) system include the following.

1. It is restricted to only two pollutants: particulates and sulfur dioxide. EPA has ignored the express requirement in CAA section 166 that PSD regulations be promulgated for hydrocarbons, carbon monoxide, ozone, and nitrogen oxides by 1979, and for lead by 1980.
2. No NPS units created after August 7, 1977, can be "mandatory class I". Such units will start out as Class II, and, if they do not meet the criteria in CAA section 164(a)(1)-(2), can be downgraded by states to Class III. NPS units that can be downgraded to Class III include 224 out of the total 337 units. (In fact, however, the redesignation process has rarely been used.)
3. Federal land managers play only an advisory role in redesignation; states may act independently of and inconsistently with the federal recommendation. ^{1/}
4. The PSD system confers no relief from the emissions of existing sources -- i.e., those in existence before the first application for a PSD permit in the area is received from a "major emitting facility." A facility must emit a considerable amount of pollution (100 tons/yr, or 250 tons/yr, depending on the source) before it is deemed "major."
5. The "affirmative responsibility" imposed on the Secretary of the Interior to protect "air-quality related values" is limited to Class I areas. Yet Class II areas, notes the Interior memorandum, "comprise the bulk of NPS units." Moreover, the process through which this responsibility is to be exercised -- part of the review of applications for construction permits, submitted for proposed major emitting facilities seeking to locate in PSD areas -- is a cumbersome,

^{1/} CAA § 164(b)(2). See *Kerr-McGee Chemical Corp. v. Dep't of the Interior*, 709 F.2d 597 (9th Cir. 1983).

highly complex one and is unlikely to be invoked often. A state governor may grant variances from maximum allowable increases of SO₂ concentrations, despite the opposition of the Secretary, if the President finds the variance to be in the national interest.

6. The preconstruction review process noted in the preceding paragraph does not even apply if the proposed source's site is not within a PSD area, even if the NPS unit it might adversely affect is within a PSD area. ^{2/}
7. The visibility protection scheme in the CAA is limited to mandatory class I areas (48 out of the total 337 units in the NPS), and the Secretary of the Interior is given solely an advisory function.

In sum, the PSD tools conferred by the CAA for protection of NPS air quality are confined to only certain NPS units, to certain pollutants, and to certain emission sources proposed for certain locations.

Even where the Secretary of the Interior's PSD authorities do come into play, the Act does not specify what, if any, enforcement tools the Secretary possesses. For example, could the Secretary sue to invalidate a state permit for construction of a major emitting facility, granted on the basis of a questionable determination by the state that the proposed source will not cause concentrations exceeding the maximum allowable increases? The Act is silent on such questions, providing an explicit enforcement role only for EPA, the states, and citizens (per the citizen suit provision).

It is an interesting question, apparently as yet undecided, whether the Department of the Interior could use the citizen-suit provision

^{2/} Alabama Power Co. v. Costle, 636 F.2d 323, 368 (D.C. Cir. 1979).

in the CAA ^{3/} as authority to enforce the Act's PSD requirements, or indeed to enforce any emission limitations imposed on sources under state implementation plans. A literal reading of the provision does suggest its availability -- any "person" may bring a citizen suit, and the Department is included within the CAA's definition of "person." ^{4/} Yet a court could well interpret the key enforcement section of the CAA, ^{5/} which speaks of enforcement only by EPA, as reflecting a congressional intent that EPA be the sole voice of the federal government in matters of CAA enforcement.

Where the threat to national-park air quality stems from pollution sources that are (a) numerous, and (b) out-of-state, the CAA provides no effective mechanism for forcing abatement of emissions from such sources. Section 110(a)(2)(E) does require state plans to --

prohibit any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any ... national ... ambient air quality standard, or (II) interfere with [required PSD measures in the downwind State's implementation plan].

However, the language of this provision, with its focus on individual sources, suggests the difficulty of invoking it to deal with regionwide pollution sources. The principal interstate-pollution provision in the CAA, section 126, is also geared to threats from individual out-of-state

^{3/} CAA § 304.

^{4/} CAA § 302(e).

^{5/} CAA § 113.

sources, a fact attested to by the failure to date of efforts to use section 126 for abatement of regional emissions causing acid rain. In any event, section 126 can be invoked only by states and their political subdivisions, not federal agencies, and only for ensuring maintenance of ambient standards, not PSD increments.

There is, finally, an inherent tension in the institutional arrangement created by the CAA. In the realm of air quality, the federal agency specially charged with protecting the national parks (Interior) has, for the most part, only a consultative role. The federal agency with all the enforcement authority (EPA) has a broad spectrum of air-quality concerns, of which national-park air quality is but one. States, too, have their own priorities and economic needs, with which national-park air quality must often compete. Indeed, which PSD areas should be mandatory class I, whether states should have sole redesignation authority, etc., were issues closely watched by states during enactment of the 1977 CAA amendments.

National Park Service Organic Act and Other Park Management Authorities

Congress created the National Park Service in 1916 to promote and regulate the parks "by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."^{6/}

^{6/} Act of August 25, 1916, ch. 408, 39 Stat. 535, as amended; 16 U.S.C. § 1 et seq.

The General Authorities Act of 1970^{7/} articulated some of the values for which units were added to the NPS, defined the system, and clarified certain park management authorities. As will be discussed further in the part of this memorandum on common law actions, it is a well-established principle that the United States may bring suit to protect its property, in much the same way as any other property owner can. This authority seems to have been implicit in the park laws since the purposes of parks were set out in 1916. In 1978, Congress amended the 1970 Act by elaborating further on the management of the NPS in language that expressly mentioned protecting System lands:

Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 2 of this Act, shall be consistent with and founded in the purpose established by the first section of the Act of August 25, 1916, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

The intent and necessity for this language has generated controversy. The language was part of legislation that was primarily designed to provide greater protection to the Redwood National Park in California. That park had been es-

^{7/} Pub. Law 91-383, 84 Stat. 825.

^{8/} established in 1968, but logging activities on lands outside the park but within the same watershed were threatening the trees within the park.

The 1968 legislation establishing the park had authorized the Secretary to acquire interests in lands by donation, or to "enter into contracts and cooperative agreements with owners of land on the periphery of the park and on watersheds tributary to streams within the park designed to assure that the consequences of forestry management, timbering, land use, and soil conservation practices conducted thereon, or of the lack of such practices, will not adversely affect the timber, soil, and streams within the park as aforesaid."^{9/} The new park was to be managed in accordance with the 1916 legislation. However, these measures did not prove adequate to protect the redwoods from the erosion and sedimentation that resulted from timbering on lands within the watershed of the park, the Secretary of the Interior did not undertake any other actions, and hence Congress considered various means to secure greater protection.

H.R. 3813 was introduced on February 22, 1977. The bill as reported with amendment by the House Committee on Interior and Insular Affairs reflected the proposed draft submitted by the administration that strengthened the authority of the Secretary in several significant respects. In addition to including additional acreage within the Redwood National Park, the bill also expanded the authority of the Secretary to enter into contracts and cooperative agreements with landowners and other entities outside the park. Section 1(a)(6) authorized the Secretary to review state regulatory provisions applicable to zones critical

^{8/} Pub. Law 90-545, 82 Stat. 931.

^{9/} 16 U.S.C. § 51(e).

to protection of the Park and, if they were insufficient, directly regulate the use of the lands: "the Secretary is authorized to promulgate and enforce reasonable regulations of and restrictions on harvesting of timber and land rehabilitation and management practices within such zones, necessary to provide continuing protection to the lands and other resources within the park"

Furthermore: "The Secretary is further directed to request the Attorney General of the United States to initiate an action for injunctive relief to prohibit any violation or anticipated violation of regulations adopted hereunder or to otherwise require the rehabilitation of privately owned lands or to require other land use practices necessary for the protection of the interests of the United States through action of law. Such an action will lie upon a showing of present or likely damage to established park resources without regard to any other provision of law or standard of conduct."

Section 1(b) contained the language amending the 1970 Act, regarding protection of the parks.

In sum, the bill contained three devices by which activities on private lands outside the park boundaries might be controlled: zones within which the Secretary could regulate; authority for suits to enforce any such regulations or "to otherwise require the rehabilitation of privately owned lands" or to "require other land use practices necessary for the protection of the interests of the United States"; and authority (in the new language amending the 1970 Act) for actions to "protect" parks.

The transboundary effects of the regulatory zones and judicial actions to enforce such regulations are express and clear. The transboundary effects

of authorizing suits to abate or control land use practices on private land even aside from the existence of an express federal regulatory program also is expressly stated, but the underlying reasoning in support of the provisions would certainly be of interest as the express stating of authority for such suits was definitely noteworthy.

The intended transboundary applicability of the 1978 amendment of the 1970 Act is not clear on its face. The language could have been intended only to guide actions of the Secretary within parks -- perhaps to emphasize that activities to "promote" the parks under the 1916 Act must also always be protective of park values and purposes. It could also possibly apply to all actions of the Secretary in his capacity as the administrator responsible for management of the NPS, and in his other capacities relating to federal lands (e.g., as administrator of the federal mineral-leasing program). It could also refer to actions of the Secretary and of all federal entities. It could also refer to protective actions of the Secretary to be taken even as to activities on nonfederal lands that threatened NPS units.

The House committee report focused primarily on the new authority to regulate private lands within the critical zones, and indicated that these provisions had been approved by both the Solicitor's Office at the Department of the Interior and the Department of Justice.^{10/} This legal analysis is not available to us at this time. The report further notes that "a similar approach has previously been adopted by the Congress with regard to fires on areas surrounding National Forest lands; with regard to mining in various National Park Ser-

^{10/} H.R. Report 581, 95th Cong., 1st Sess., 25-26 (1977).

vice areas; and, with regard to surface mining activities on certain private lands. "It is with this background that the Committee adopted the regulatory provisions in H.R. 3813."^{11/}

The regulatory provisions were those submitted by the Administration. In its report on the proposal, the Department of the Interior related the provisions authorizing the Secretary to request the Attorney General to seek injunctive relief only to violations of the Secretary's regulations in the special zones. The report did not comment on the remainder of the broad suit provisions. As to the regulatory authority, the report stated: "We do not however, view such authority as setting a precedent for Federal Regulation of private lands adjacent to other parks in the absence of equally exceptional circumstances."^{12/}

The report did not illuminate whether the amendment to the 1970 Act was intended to have transboundary effects, saying only:

The proposed legislation also provides for an amendment to the General Authorities Act of 1970 to further define the Secretary of the Interior's duties and limitations with regard to the administration of the National Park System. This provision provides that the protection, management and administration of the various areas of the system, as previously defined, must be consistent with those high purposes originally established by Congress with the creation of the National Park Service in 1916. While this standard of decisionmaking should be self evident, we feel that the continued pressure upon the National Park System today makes a restatement and reinforcement of these basic premises very appropriate. ^{13/}

^{11/} Id. at 27.

^{12/} Id. at 33.

^{13/} Id.

When the legislation was considered on the floor, an amendment in the nature of a substitute became the focus of the debate. Congressman Philip Burton, a sponsor and member of the Committee on Interior and Insular Affairs, noted that the provisions for regulatory authority had been deleted in the substitute:

More particularly, if the members of the committee will recall, the subcommittee bill carried a provision for regulatory authority, which I thought was justified given the circumstances. Along with that regulatory authority went certain injunctive authority for the Attorney General and other collateral legal tools. The Senate, in facing this matter, decided that the potential risk of the precedent perhaps outweighed the justification of this proposal. So, the Senate, in adopting the same basic 48,000-acre design that the House developed -- that was also the design of the administration -- substituted for the regulatory authority certain abilities of the Secretary to acquire land in a 30,000 acre park protection zone, and as a result then dropped the variety of legal tools that the House committee recommended in its bill.

It appeared to me that this compromise achieved essentially the protection of the Redwood Creek Basin Because we can achieve an equivalent result, I thought it wise to accept the Senate views, with a refinement, in that respect. 14/

It is interesting to note that in his remarks, Rep. Burton linked the authorization of injunctive suits with the authority of the Secretary to have promulgated regulations controlling uses on private lands within the designated

14/ 124 Cong. Rec. 2910 (1978) (emphasis added).

zones, even though the language was not so limited and the provision amending the 1970 Act was retained. The Congressman's remarks may imply, therefore, that an ability to enjoin activities on private lands is not intended to be conferred by the 1970 Act amendment language. On the other hand, perhaps his remarks referred only to that part of the injunction language that was related to the regulatory authority, and were not addressed to the rest of the language; language that perhaps was seen as merely restating the existing authority of the Secretary.

The remainder of the House debate did not return to these issues.

The Senate version, S. 1976, was introduced on August 1, 1977 by Senator Cranston. As introduced, the Senate bill also initially reflected the suggestions of the Department of Interior.

In setting out the original administration-suggested provisions affecting private lands, Sen. Cranston said:

Furthermore, the bill enhances the authority of the Secretary to protect the resource value of Redwood National Park by authorizing him to carry out a land rehabilitation program on lands upstream and adjacent to the park. Contracts or cooperative agreements would be authorized to initiate, develop, and implement such a program on lands contributing significant sedimentation because of past land use practices and to reduce risk of further damage to streamside areas adjacent to Redwood Creek. The Secretary is also authorized to establish zones where regulations are needed to protect the park resources from activities and interference occurring on non-Federal lands, and to enforce reasonable timber harvesting, land rehabilitation, and management practices where the existing State of California regulations are found insufficient to achieve the necessary protection. Secretary Andrus, in his transmittal letter to the Congress, noted in this regard that these steps were considered necessary because of the extraordinarily fragile ecology of the Redwood Creek watershed, particu-

larly the Tall Trees Grove. The Secretary further noted, however, that this grant of authority would not be viewed as establishing a precedent for Federal regulation of private lands adjacent to other parks in the absence of equally exceptional circumstances. 15/

The Committee on Energy and Natural Resources, to whom the bill was referred, deleted the provisions on the regulatory zones, and injunctions, but retained the language amending the 1970 Act. The committee report notes that the regulatory authority was a "new approach" and that authority for the Secretary to acquire additional lands in a critical zone if harmful uses were occurring would better solve the problem. However, the Committee report also seemed to indicate that the reiteration of the high value of National Park lands contained in the amendment to the 1970 Act could serve as a basis for judicial intervention in uses of private lands detrimental to parks:

It is the sense of the committee that there will be a continuing need to protect the expanded Redwood National Park from actions on private lands located within the same ecological units as the park.

In part this need can be met by the exercise of the authorities provided by existing section 3(e) of the 1968 Act. The Committee intends that the authorities provided therein will be exercised as necessary to protect the park.

In part, this need can also be met by the initiation of legal action against activities that threaten the park . . .

15/ 123 Cong. Rec. 25847 (1977).

In this regard, the committee strongly endorses the Administration's proposed amendment to the Act of August 18, 1970, concerning the management of the National Park System, to refocus and insure that the basis for decisionmaking concerning the System continues to be the criteria provided by 16 U.S.C. § 1 -- that is . . . [report quotes 1c] This restatement of these highest principles of management is also intended to serve as the basis for any judicial resolution of competing private and public values and interests in the areas surrounding Redwood National Park and other areas of the National Park System.

The committee recognizes, however, that neither section 3(e) nor legal action have been totally successful in protecting park resources. It also recognizes that Secretary Andrus has strongly testified that the acquisition of the additional 48,000 acres will not, by itself, protect these expanded park resources. The administration proposed a standby regulation approach to this problem. It is the sense of this Committee that the situation at Redwood National Park is one where a standby acquisition, or protection, zone is more appropriate.

The regulation concept is recognized to be a new approach to these adjacent land type problems for National Park Service areas. We believe the problems at Redwood National Park are too urgent to place reliance on such a new concept.

Accordingly, the committee has deleted the regulation provisions of S. 1976 and, in lieu thereof, has substituted a "Park Protection Zone" . . . 16/

In the section-by-section analysis of the report, it again is noted that the committee deleted the provisions requested by the administration for standby regulatory authority in favor of standby acquisition authority as set forth in the explanation on committee amendment 2.

16/ Sen. Report No. 528, 95th Cong., 1st Sess. 7-8 (1977) (emphasis added).

In discussing the amendment to the Act of 1970, the report indicates that the committee was concerned that:

Litigation with regard to Redwood National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park Service.

Accordingly, this provision suggested by the administration would appear to be particularly appropriate. The Secretary is to afford the highest standard of protection and care to the natural resources within Redwood National Park and the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided. ^{17/}

In explaining the committee's deletion of the regulatory authority and the addition of new acquisition authority, Sen. Abourezk stated: "I believe the Secretary possesses sufficient authority to protect our national parks under current law. I urge the Secretary to use the acquisition authority in the park protection zone judiciously. If retained in the final bill, I would say the content is clear that the authority given is not a regulatory club, but rather a last resort to prevent physical damage to park resources."^{18/}

This explanation is somewhat contradictory in that if the current law provides sufficient authority for the Secretary to protect our national parks by somehow abating harmful actions on private lands, it is difficult to see why the power to condemn those lands was necessary. Or, if condemnation authority was necessary because it was not the policy of the federal government

^{17/} Id. at 14.

^{18/} 124 Cong. Rec. 1563 (1978).

to control uses of private lands, then it is difficult to understand in what way current law, lacking as it does specific management directives, is sufficient to protect the parks. The floor discussions do not shed further light on the understanding of how current authority and the new language amending the 1970 Act related to the Secretary's ability to protect the parks from activities on private lands outside park boundaries.

The conference report provides no additional clarification.^{19/}

On balance, although the issue is not free from ambiguity, it appears the 1978 Amendment of the 1970 Act was intended to clarify that the values and purposes for which the NPS System was established were intended to provide the basis for their management and protection, including protection from external threats. This was undoubtedly implicit in the 1916 and 1970 acts. Therefore, when Congress reiterated that the "high public value" of these lands should guide all activities associated with their management and protection, Congress arguably was attempting to prod the Secretary into more vigorous action. The references in the legislative history to the adequacy of current law and to the indications of "blurred responsibility" revealed by the Redwood National Park (RNP) litigation (discussed below) appear to indicate that the intent may have been to precipitate more suits to protect the parks from harmful outside activities. This interpretation is quite harmonious with the deletion of the express authority for the Secretary to directly regulate private lands outside the

^{19/} H.R. Report 931, 95th Cong., 2d Sess. (1978).

parks and to sue for enforcement of such regulation. Congress could have considered the indirect control of private land use through judicial injunction of harmful practices much more acceptable in that in the latter situation the federal government would be acting much as any other landowner. Given the reluctance of the Department to pursue such actions in the past, one may question the adequacy of the spare and general language chosen. However, the sufficiency of the language is an issue separate from its intent.

In the litigation surrounding the RNP that was referenced in the legislative history of the 1978 Act, environmental groups had filed suit to compel the Secretary to take action to protect the Park from harmful logging activities on nearby lands. In three stages of the same case, the federal district court for the northern district of California found the Secretary's performance of his duties to manage the NPS to be judicially reviewable, that he had failed to carry out those duties,^{20/} but that ultimately he had complied with the order of the court to do so.^{22/}

In its discussion of the three stages of the litigation that preceded the 1978 legislation, the Interior memorandum makes several statements as to the reasoning and conclusions reached by the court that do not appear warranted from the cases.

^{20/} Sierra Club v. Department of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974).

^{21/} 398 F. Supp. 284 (N.D. Cal. 1975).

^{22/} 424 F. Supp. 172 (N.D. Cal. 1976).

The Interior memorandum at 14-15 correctly notes that in case 1, the court cited both the National Park Service Organic Act of 1916 and the RNP Act as empowering the Secretary to protect the Park, but focused on the RNP Act to discern specifically enforceable duties. At trial in the second case, the memorandum at 15 states that "while once again citing both the Organic Act and the RNP Act in support of its general conclusion, the court's order setting forth the specific 'reasonable steps' that the Secretary might be obliged to take within a reasonable time to acquit his statutory responsibilities included only those actions identified in the 'unique' Redwood park enabling legislation" Yet the court's opinion makes it clear that the Secretary should exercise all powers vested in him by law, and particularly those detailed in the RNP Act; and that he should perform all the duties imposed by law including in particular those specific ones set out in the RNP Act^{23/} -- a very different emphasis. Perhaps the court was merely indicating, and properly so, that it would not speculate as to the precise nature of the actions the Secretary might be obligated to take under the general statute if the Secretary also had failed to carry out specifically enumerated statutory duties.

Similarly, the Interior memorandum at 16 indicates that in stating that the Secretary might seek clarification of the situation from Congress, the court had "implicitly acknowledged that additional Congressional action would be necessary before the Secretary would be empowered to do anything to that end not specified in the Redwood legislation." As to the third case, the memorandum states at 16 that because the Secretary "had neither

^{23/} 398 F. Supp. at 293 (emphasis added).

funds nor authority to take the other actions proposed by the court in its second opinion -- the court purged the Secretary of his previously found failure Thus it would seem clear that the Redwood cases did not support the notion that the Organic Act endows the Secretary with extensive extra-territorial jurisdiction which would allow him to protect NPS units from threats originating on lands without them. To the contrary, the clear implication of these cases is that the Secretary's extra-territorial power is limited to that expressly identified by Congress." (Emphasis added.)

This conclusion does not necessarily follow from a reading of the cases in question, which in fact indicate the contrary. At the time of the second case, the Secretary was supported by the general park management authorities and the specifics of the RNP Act, which at that time authorized him to modify the boundaries of the Park and negotiate agreements with the logging companies. Neither of the latter efforts was productive, in part because of lack of effort by the Secretary and in part because of lack of funds. No actions had been taken to attempt to carry out the general duties of the Secretary. By the time of the third case, it was quite clear that the Secretary had attempted to reach agreements with the timber companies and that those efforts had failed because the companies had not cooperated. It was also clear, however, that the Secretary had undertaken other measures that could only be under his general authorities to accomplish park purposes in general and those of the RNP in particular. The Secretary had, for example, recommended alternative courses of action that required additional funding, which OMB had declined to request, and which therefore the Secretary could not implement. Interior also indicated it requested new additional regulatory power over peripheral timber operations to solve the problem of

the logging activities without additional federal monies.^{24/} There is a significant difference between requesting legislation because one lacks authority altogether and requesting legislation because one lacks the funds to carry out existing authority. The third case also indicates that Interior had by that time recommended to the Justice Department that litigation be instituted to restrain peripheral timber practices which imminently endanger the Park, a recommendation that was "under consideration."^{25/} There was no elaboration as to the nature of the suits recommended, but since the Secretary had so few specific powers under the RNP Act, it appears reasonable to assume that such suits would be based on his more general management and protection duties under either the RNP Act or the 1916 and 1970 Acts. In either case, the Secretary was not returning to Congress because he was powerless to act at all under current authorities, but rather because certain of the actions he by then sought to pursue were stymied for other reasons, e.g., that litigation on behalf of the Department is conducted through the Justice Department, which may or may not proceed.

Therefore, it is not clear that the Redwood cases do not support the notion that the Organic Act endows the Secretary with some extra-territorial jurisdiction. That power may not be "extensive", but the cases do not indicate that it is limited to that expressly identified by Congress. While the Secretary may not have authority to zone and directly regulate private lands uses of which are harmful to parks, he does appear to have both the duty and the power to seek judicial intervention to abate such uses.

^{24/} 424 F. Supp. at 174.

^{25/} Id.

The Interior memorandum does correctly note that another district court has found the Secretary's duty to be quite clear and that that duty could require the assertion of federal rights in judicial proceedings --^{26/} for example, by bringing trespass or nuisance actions if appropriate. Whether these common law causes of action would be available for relief from air pollution originating outside the parks is discussed in the following section.

Common Law

The Department of the Interior memorandum appropriately concludes that "substantial doubt exists as to the availability of federal or state common law actions . . . as a means to protect NPS units from the adverse effects of air pollution generated outside those units." The memorandum also notes that different principles apply to application of federal common law as opposed to state common law. The argument that federal common law cannot apply is strong; applicability of state common law is more open to dispute.

The Supreme Court's decisions in City of Milwaukee v. Illinois ("Milwaukee II")^{27/} and Middlesex County Sewerage Authority v. National Sea Clammers Association^{28/} stand for the broad proposition that there is no room for application of federal common law to supplement remedies authorized by a comprehensive federal

^{26/} 487 F. Supp. 443 (D.D.C. 1980).

^{27/} 451 U.S. 304 (1981).

^{28/} 453 U.S. 1 (1981).

statutory scheme of regulation. The Supreme Court's rationale was that ordinarily "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."^{29/} The question is whether Congress through the statute has addressed a problem, not whether the particular regulatory controls applied by the administering agency are deemed by the court to be adequate. There can be little question that the PSD controls in the CAA address the problem of air quality in national parks in a manner that defeats the argument that an "interstice" exists to be filled by federal common law.^{30/} If, as Sea Clammers suggests, all that is required is that Congress has addressed "the area of [air] pollution" comprehensively, then the same conclusion would be drawn.^{31/} Milwaukee II has been applied to hold that the CAA is so comprehensive as to preempt federal common law remedies.^{32/}

While there is a presumption that federal statutory law does preempt federal common law, the presumption is that federal law does not preempt state statutory or common law. As the Court in Milwaukee II expressed it, the starting point for determining whether state law has been supplanted by federal law is "the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."^{33/}

^{29/} Milwaukee II, 451 U.S. at 317.

^{30/} See Milwaukee II, 451 U.S. at 324-25 n. 18 (district court in applying federal common law "was not 'filling a gap' in the regulatory scheme, it was simply providing a different regulatory scheme").

^{31/} See 453 U.S. at 22.

^{32/} See United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982).

^{33/} 451 U.S. at 316.

Although case law is sparse, there may be reasons for not applying the presumption against preemption of state law in the context of the Secretary of the Interior's authority to protect national parks. One reason is that the rationale for the presumption may be inapposite. The question here is whether protection of federal land by federal officials falls within the purview of the "historic police powers of the States" protected by the presumption. This is a moot point. It is also arguable that application of state law to in-state pollution (some air pollution affecting national parks has crossed state boundaries; some has not) may be preempted by federal law under rationales developed in the federal common law cases. Finally, there is a related argument that even if the air pollution in question is intrastate in origin, the federal interest in protecting the parks is such that a federal rather than a state rule of law should apply.

Support for these arguments that federal rather than state law should apply can be found in a decision of a federal district court in United States v. Outboard Marine Corp.,^{34/} dismissing a claim by the United States based on the state common law of products liability. The United States claimed that its sovereign interest in the nation's navigable waterways was injured by a PCB manufacturer's failure to warn purchasers of the dangers of spills into waterways. The district court determined that "a suit by the United States to protect navigable waterways from pollution requires a federal rule of decisions under Milwaukee I [Illinois v. Milwaukee, 406 U.S. 91 (1972)]

^{34/} 549 F. Supp. 1032 (N.D. Ill. 1982).

and a statutory rule of decision under Milwaukee II."^{35/} When the Supreme Court authorized Illinois to pursue federal common law remedies in Milwaukee I, it cited both the nature of the action (water pollution) and the character of the parties. The district court in Outboard Marine reasoned that, while some water pollution cases might not require a federal rule of decision, "the federal interest is at its strongest [when] the United States is suing to protect its sovereign interest in the nation's waterways."^{36/} Similarly, it might be argued that a federal rule of decision should be required when the United States is suing to protect its interest in public lands from air pollution.

There are several countervailing arguments relating to preemption of state law remedies. First, it can be argued that the United States, when acting as a property owner, should not be denied any remedies available to other property owners within a state. If property owners are permitted under state law to maintain nuisance or other common law actions to abate air pollution not controlled by federal or state air pollution regulation, then the United States should also have this right. Secondly, there is the question of the Clean Air Act's relationship to the Park protection authorities noted above, viz., does the Clean Air Act limit the general statutory authority to protect national parks from external threats?

That the United States may sue in state courts under state law to protect its property is a well-established principle. See, e.g., Cotton v. United States,^{37/}

^{35/} Id. at 1034-1035.

^{36/} Id. at 1034.

^{37/} 52 U.S. (11 How.) 232 (1850).

holding that the United States could bring a trespass action in state court for damages against someone who had unlawfully cut and removed timber from public land. More recently, but before Milwaukee II, a federal district court held that this proprietary right of the United States to sue to protect its property was not eliminated by the Clean Air Act.^{38/} The district court relied on the general principle that statutes will not be held to divest the sovereign of existing rights and remedies unless there is a clear expression or indication of intent to do so. A contrary intent, to preserve federal remedies, was found in CAA § 310, which provides that the Act "shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law . . . of . . . any other Federal officer." While this case did not distinguish between federal and state common law, it is arguable that its rationale is still valid as applied to federal utilization of state law remedies.

As discussed above, the general park protection authorities have been interpreted as including the discretion to bring "trespass or nuisance actions if appropriate."^{39/} It is arguable that application of Milwaukee II principles to the air pollution context would not affect whatever authority exists to utilize state common law trespass and nuisance actions as a means of exercising this broad authority to protect the parks. Looked at in this light, the issue is whether the Clean Air Act circumscribes the general park protection authority

^{38/} United States v. Atlantic-Richfield Co., 478 F. Supp. 1215 (D. Mont. 1979).

^{39/} Sierra Club v. Andrus, 487 F. Supp. 443, 448 (D.D.C. 1980).

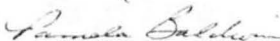
in the field of air pollution, and not whether strictly common law remedies have been preempted.

Because park protection language was strengthened in 1978, the 1977 Clean Air Act Amendments, containing the PSD protections for parks in Part C, cannot be said to have repealed by implication the 1978 changes. Any such argument would have to establish that the 1977 CAA repealed by implication the then-existing park protection authority (to the extent that it might go beyond PSD regulation), and that the 1978 amendments, although general, did not change the status quo with respect to air pollution. Repeals by implication are disfavored, CAA Part C is silent as to relationship to other federal laws, and CAA § 310, supra, suggests that other federal remedies are preserved. Nonetheless, there must be some doubt as to whether the very general park protection authority may be invoked to extend regulation beyond what is permitted by Part C, a regulatory scheme addressing the specific problem of damage to public lands by air pollution. There is a possible analogy to Sea Clammers, supra, where the Court closed the door tightly not just on federal common law actions, but also on the alternative remedies sought under the civil rights laws (42 U.S.C. § 1983) and under the theory of implied rights of action.

If application of state law is not precluded by the nature of the action (by application of Milwaukee I and Outboard Marine principles) and if no "clear and manifest" congressional purpose to preempt can be found, there would still

be the question of whether state law (common or statutory) would permit imposition of controls stricter than those required by the Clean Air Act. And there is the additional question of whether a state would permit common-law remedies to supplement remedies available under its air pollution control statute. What rule individual states would apply in these situations is beyond the scope of this analysis.^{40/}


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^{40/} Committee staff have informed us that air pollution problems exist in NPS units located in at least four states. Staff has asked that we determine whether state common-law remedies for air pollution appear to be preserved in those states in the face of state statutory programs dealing with air pollution, with particular reference to claims of the Department of the Interior.

All four states have included in their air pollution statutes a savings clause that seems to preserve common-law remedies. Cal. Health & Safety Code § 41509(d); Me. Rev. Stat. Ann. tit. 38, § 581; Tenn. Code Ann. § 68-25-114; Wash. Rev. Code Ann. § 70.94.370. The cited provisions appear in each case to reach common-law actions brought by federal agencies. See Cal. Health & Safety Code § 39047 (e); Me. Rev. Stat. Ann. tit. 38, § 582.9; Wash. Rev. Code Ann. § 70.94.030(3). Thus, whatever common-law rights are afforded the Department of the Interior in these states would appear unimpaired by state statutory efforts to control air pollution.