

Can the agency reclaim its soul?

The EPA's Faustian Bargain

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PRESIDENT RICHARD NIXON CREATED THE Environmental Protection Agency and Congress passed the Clean Air Act in 1970 because the public demanded protection. The pollution that worried voters most was lead in gasoline and its effects on children. The bumper stickers read: "GET THE LEAD OUT."

Congress, in the Clean Air Act, took responsibility for a rule that would eventually reduce lead exposure. The act authorized the EPA to require that new cars made from 1975 onward use only lead-free gas.

Lawmakers' motivation in backing this rule was not, however, to protect children from lead. Congress had decided that auto manufacturers must, from 1975 on, include a pollution-controlling device in their cars. The device of choice, the catalytic converter, cut many pollutants, but not lead — in fact, lead would ruin it. For Congress to require motorists to pay for the device and then let it be ruined by leaded gas would look foolish. So, out of concern for the well-being of catalytic converters and their own reputations, the legislators backed the rule requiring new cars to use only unleaded gasoline.

Congress could not tell voters in 1970 that this rule to protect pollution control devices was sufficient to protect children from lead. Children would still be exposed to lead from gasoline for many years after 1970. The rule did not even take effect until 1975, and when it did, older cars could still use leaded gas and emit lead in their exhaust. In 1975, there would be roughly 100 million leaded gas-burning cars on the road, and many of them would remain there, emitting lead well into the 1980s.

To mollify voters demanding protection for children, Con-

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gress had to do more in 1970. But lawmakers could not simply ban leaded gasoline forthwith; voters also wanted cheap gasoline, and adding lead reduces the cost of refining it. The lawmakers were caught between voters' demands to get the lead out and to keep gas prices down.

When Congress is faced with a controversial choice about pollution, it generally follows a two-step plan that goes like this:

- *Step 1:* Congress announces some lofty goal, but skirts the difficulties of attaining it.
- *Step 2:* Congress orders a government agency to achieve the goal and thus to take the heat for the difficult steps needed to do so.

Congress danced this two-step with lead:

- *Step 1:* Congress announced that a health-based air quality standard for lead must be achieved by May 1976.
- *Step 2:* Congress ordered the EPA to establish the rules to achieve that standard by the deadline.

Here as elsewhere in the Clean Air Act, Congress bestowed its rulemaking power on the EPA. It did so for what seems like a noble reason: Only an expert agency insulated from politics will do the right thing. And the EPA, with the best of intentions, accepted that duty while environmentalists (myself included) cheered.

But the road to hell is paved with good intentions — and dusted with lead.

LEAVING THE LEAD IN

After passing the statute, members of Congress — Democrats and Republicans, liberals and conservatives — lobbied the EPA to do nothing about the leaded gasoline used by the pre-1975 cars. The agency, understandably, went into a stall.

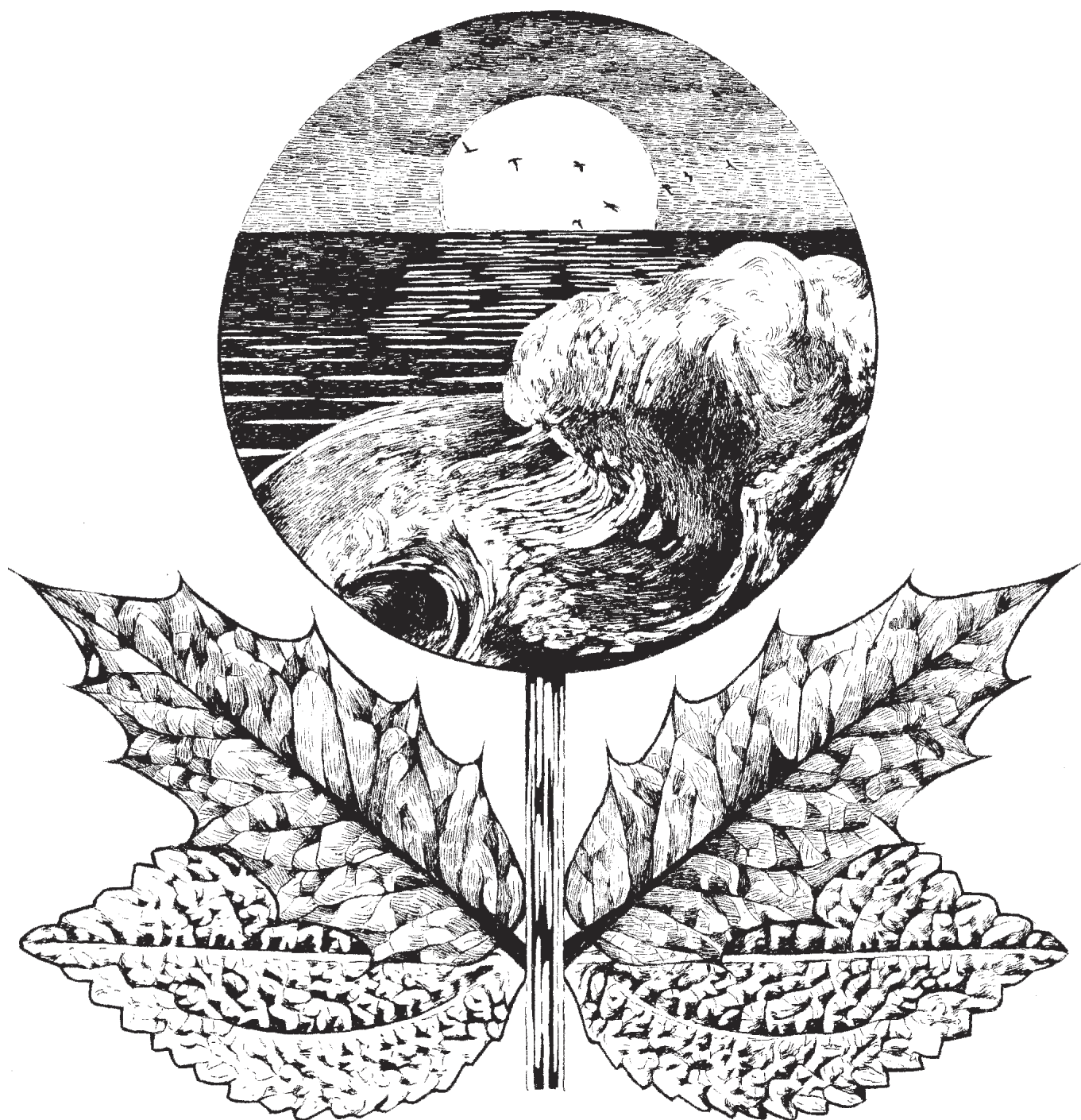
In late 1972, my colleagues and I at the Natural Resources Defense Council sued the EPA and won a decision that prompt-

ed it, at last, to issue a rule to reduce the amount of lead in leaded gas. This victory was followed by many others:

- The courts upheld the new rule.
- Other courts ordered the EPA, against its prolonged resistance, to set a health-based air quality standard for lead.
- In setting the air quality standard for lead, the EPA accepted our argument that it must not consider the cost of compliance in setting such health-based standards.
- The courts upheld the air quality standard for lead.

Yet, those legal victories did not translate into any reductions in lead for many years. In fact, the amount of lead used in gasoline increased slightly from 1970 to 1975. Meanwhile, the May 1976 deadline to protect health was approaching.

When Jimmy Carter won the presidential election in 1976, I thought he would translate his tough campaign talk on the environment into tough action on lead. But President Carter ordered the EPA to relax the broader lead reduction schedule adopted by his Republican predecessors. The administration's justification for the change was to combat the energy shortage of the late 1970s. That made little sense; lead does not let refiners get more gasoline out of a barrel of crude oil. Carter's granting refiners leeway on lead did nothing to shorten the lines at



the gas stations, but it did let him seem to be doing something about them.

Fortunately, lead in gasoline began to decline in the late 1970s, mostly because the pre-1975 cars were gradually being junked. By 1985, so many of the old cars had gone to auto heaven that the large oil companies found it unprofitable to continue distributing leaded gasoline in addition to the unleaded variety. But they did not want to drop leaded gas on their own, for fear of losing market share to small refiners who would still sell it. So Big Oil asked Ronald Reagan's EPA to ban almost all lead in gasoline on the grounds that it is dangerous to health, and the agency complied. The EPA finally got tough on lead, but only after powerhouse corporations, worried about competition, got involved.

A PUBLIC HEALTH CATASTROPHE

What would have happened if, in 1970, Congress had not tried to mollify voters by leaving the lead rulemaking to the EPA? The legislators could not have flatly rebuffed the popular demand to protect the children. They would have had to enact a rule cutting lead in gasoline. That rule would have been a compromise, but it likely would have gotten rid of at least half of the lead over the next several years. The major oil companies would not have been happy, but they also would not have been too unhappy because they all would have been bound by the same rule. There would have been a cost involved, but it would have been small — less than a cent per gallon — and it would have been passed on to motorists. The only ardent opponents to such lawmaking would have been the lead additive suppliers, but they could not have stopped the rule. Their revenues were tiny compared to those of the automakers, and even the automakers

were unable to stop Congress from requiring emissions from new cars be cut by 90 percent in only a few years.

So why did Congress not itself enact a rule to cut lead in the gasoline used by old cars? Because the lawmakers did not want the criticism that would have been heaped on them from all sides. Some voters would have wanted all the lead out right away; others would have complained about the increase in gas prices. Congress's job is to shoulder responsibility, but the legislators instead opted for a solution that let them take credit for protecting health without having to make a controversial decision that might hurt them in the next election.

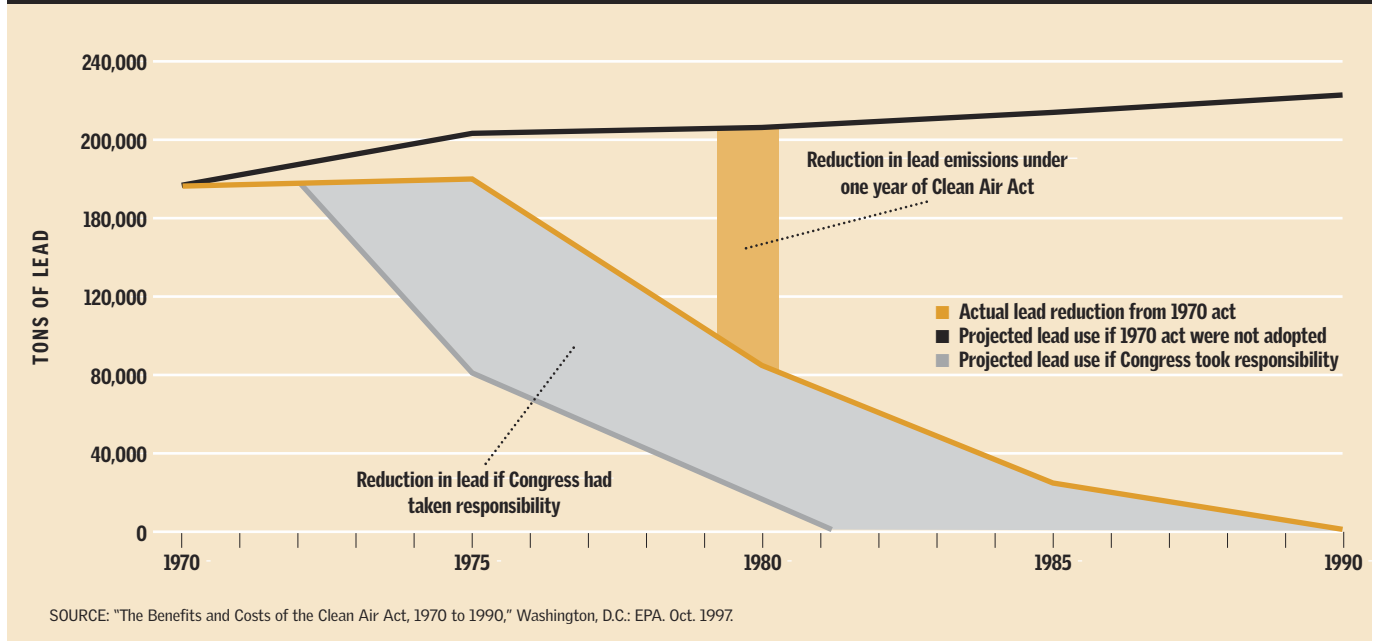
The upshot is that lead came out of gasoline much more slowly than if Congress had made the rule itself. The delay led to most children in the United States experiencing blood lead levels in excess of the 10 micrograms per deciliter of blood ($\mu\text{g}/\text{dL}$) that the Centers for Disease Control now define as the threshold of lead poisoning. In the mid-1970s, the median child in the United States was at $12 \mu\text{g}/\text{dL}$. Many children, of course, had blood lead levels well above the national median. The median child in New York City was at $19 \mu\text{g}/\text{dL}$. And, within New York and other big cities, while children who played on grassy lawns in quiet neighborhoods got only a little lead from gasoline, other children who played near busy streets got huge doses. After the lead came out of gasoline, the blood lead level in the median child in both the nation and New York City receded to $3 \mu\text{g}/\text{dL}$, which is the level found in children high above pollution in the Himalayas.

EPA data give some sense of the health consequences of leaving the lead in. The EPA projects that the reduction of lead exposure in 1980 alone achieved under the Clean Air Act averted 6,960 deaths, 3,090 cases of coronary heart disease, and 2,120 strokes. Moreover, some 20,100 children were spared from hav-

FIGURE 1

Lead Emissions, With and Without Congress Taking Responsibility

Lawmakers' failure poisoned the public



ing their IQs reduced below 70 from lead exposure.

But consider the additional benefits that would have been gained if Congress had itself enacted a rule on the leaded gasoline used by the 100 million old cars. Leaded gasoline would have gone down much more quickly, as illustrated hypothetically in Figure 1. Congress's two-step dance to avoid responsibility killed and maimed people on the scale of American casualties in the Vietnam War.

Those additional deaths and injuries from lead were a public health catastrophe — one that took place on the EPA's watch. But official Washington pretends it did not happen. The agency and politicians choose to present lead as a victory rather than a disaster. As President Clinton stated to an approving Congress in his 1996 State of the Union address, "Lead levels in children's blood has [sic] been cut by 70 percent" through a "generation of bipartisan effort."

THE ENVIRONMENTAL CAPTAIN

The lead catastrophe casts doubt on the assumption upon which the EPA's rulemaking power is based — that "only an expert agency insulated from politics can do the right thing." The EPA was supposed to insulate environmental rules from politics. But it did not; it insulated the politicians from responsibility.

The EPA, moreover, is not necessarily more likely than Congress to reduce pollution. Lead was removed from gasoline mostly because of the rule requiring lead-free gas in new cars, for which Congress did take responsibility.

Lead is no aberration. According to EPA data, the biggest benefits from cutting air pollution came from emission limits on new vehicles. Those limits began at the state level and, after a predecessor federal agency made few demands of its own, Congress stepped in and imposed a series of laws that limited auto emissions an additional 90 percent or more. On acid rain and hazardous air pollutants, the EPA did little from 1970 to 1990, before Congress stepped in to make hard choices. The biggest strides on air pollution at the federal level came from public complaints and difficult decisions by Congress, not from the EPA imposing the "right thing" on a benighted public.

THE EXPERTS? How did so many of us, myself included, get the impression that "only an expert agency insulated from politics" would do the right thing? The Progressives taught that science gives experts right answers to policy questions. But it does not, especially in the case of pollution where the science is full of uncertainties. In any event, most pollutants have some harmful effects at even the lowest levels, yet reducing them to zero is impossible. The upshot is that rulemaking inevitably requires values judgments. (See "Letting Environmentalists' Preferences Count," Fall 2003.)

The environmental movement produced a corollary of the Progressive belief in empowering experts: Because we are all on Spaceship Earth, we must submit to an authoritative, expert environmental captain. The Clean Air Act and subsequent statutes made the EPA's administrator into the captain of the American compartment of Spaceship Earth. His crew is the EPA's staff, and the flight deck includes environmental advocates who make sure the administrator obeys Congress's prime

directive of protecting health.

Implicit in this imagery is the idea that only those of us on the flight deck care enough about the environment, and that ordinary voters do not. Even voters share this view: According to one survey, 68 percent of voters believe that most people do not care enough about environmental quality. Notice the irony of that statistic; it seems that most people care more about the environment than we think. According to the Winter 2005–2006 issue of the Natural Resources Defense Council magazine *OnEarth*, 74 percent of Americans believe that "protecting the environment is so important that requirements and standards cannot be too high and continuing environmental improvements must be made regardless of cost."

HOW CONGRESS CAN DO ITS JOB

Congress should make the rules — not necessarily in all the detail in the Code of Federal Regulation, but at a minimum with the basic choices, such as requiring the 90 percent emissions reduction for new cars. The EPA should have an important role in the rulemaking: providing Congress with technical information and draft statutes, filling in the details on the legislated rules, and enforcing them. But responsibility for the hard choices should fall on the elected members of Congress instead of being shifted to the agency.

That is exactly where responsibility should fall in a democracy. To understand why, consider how environmental advocates would react to a statute in which Congress gave the Department of Interior the power to decide whether to drill for oil in the Arctic National Wildlife Reserve. There would be an outcry, and rightly so, against legislators passing the buck on such a fundamental choice. But that is what the pollution statutes do wholesale.

Putting the responsibility for the pollution rules on Congress is poles apart from the environmental legislation that former Speaker of the House Newt Gingrich introduced as part of his "Contract with America." It would have broadened the EPA's discretion rather than reduced it. It would have been unworkable to boot. I opposed it.

Would Congress have enough time to vote on the pollution control rules? Yes. The EPA promulgates only five major rules in an average year. The agency, of course, also promulgates many minor rules, but there would be many fewer rules if Congress did not unnecessarily grab power from state and local governments while at the same time pushing the resulting work onto the EPA.

HOW CONGRESS CAN LET STATES DO THEIR JOB

Some pollution problems require federal resolution. Those problems fall chiefly under three headings:

- States would fail to control pollution sources that do much of their harm in other states.
- States would fail to protect critical national assets, such as our great national parks.
- State-by-state regulation would substantially burden interstate commerce.

Such problems are only a tiny portion of the EPA's agenda, however. Congress requires the agency to preside over all pollution problems, no matter how local.

The chief rationale for Congress making a federal case of local problems is that the states had bad environmental records before 1970. It is true that many states were real stinkers, but the federal government stunk too. Rachel Carson found as much fault with the feds as with the states in *Silent Spring*. Her book, published in 1962, helped to stimulate citizen concern, and states responded more quickly. As Jimmy Carter's EPA administrator, Douglas Costle, pointed out, the rules that the states imposed in the 1960s, before the EPA was created, did more to cut sulfur dioxide and particulate pollution than those imposed with the EPA in charge in the 1970s.

The EPA's view of state officials would be turned on its head if, instead, the states could adopt a two-step of their own where they would set environmental goals and the EPA had to deliver. In a rare circumstance where the EPA bears the hands-on burden of achieving an environmental goal, cleaning up abandoned waste sites, the EPA has complained that the states ask for too much environmental protection.

Congress should limit the role that the federal government plays in local pollution problems. That role should be to provide information on the quantities of various pollutants emitted by each source, the health impacts at various levels of pollution, and the characteristics of various pollution control techniques. States and localities should get to decide how to respond, without interference from the EPA. As former EPA

If Congress couldn't use EPA as a scapegoat, it wouldn't profit from making local problems into federal cases.

Some states were so active on air pollution that the auto industry and the coal companies appealed to Congress to set up a federal agency as a ploy to slow them down, as former EPA general counsel E. Donald Elliott and Professor Bruce Ackerman have shown. Congress complied in the mid-1960s and the federal agency, a precursor of the EPA, did slow the states by providing industry with the argument that states should leave the problem to the federal agency, by ponderous federal procedural requirements, and by outright preemption.

Today, support among voters for environmental protection is broader than it has ever been, Washington is stalemated, and the states are often in the vanguard.

Another rationale for Congress making a federal case of local problems is that the states "race to the bottom" in their competition to attract jobs that voters want. But states, in fact, do not race to the bottom because voters also want good environmental quality. Resources for the Future scholar Wallace Oates found that the empirical studies "do not provide much overall support for the existence of a race to the bottom. In fact, one can reasonably argue that they point more in the opposite direction — to a race to the top rather than the bottom."

But the EPA has a jaundiced perspective on the states because the EPA's relation to the states is similar to Congress's relationship to the EPA. Much like the two-step that Congress imposes on the EPA, the EPA imposes a two-step on the states:

- *Step 1:* The EPA announces some lofty environmental goal.
- *Step 2:* The EPA orders the states to bear the political and financial burdens for achieving it.

administrator Carol Browner stated in releasing emissions information, "Local residents know what is best for their own communities and, given the facts, they will determine the best course of action to protect public health and the environment." If only the federal government lived by those words.

Some states would be slower in reacting to pollution than I would like. But that is hardly an argument for the EPA to supercede; the agency as a rulemaker is slow everywhere. It takes many years, if not a decade or more, for the agency to respond to new discoveries about the danger of a pollutant by putting stronger emission limits into actual effect. Were the EPA simply to provide information for state policymakers, regulatory responses would come much faster.

The agency's tragically slow response on lead preempted states and localities from protecting their children. In 1971, New York City adopted an ordinance that would have banned the sale of gasoline with more than a trace of lead at the end of 1973. But the ordinance was preempted by the EPA, which did not get nearly that tough until the end of 1985. As a result, children died. Even without preemption, the EPA slows down environmental protection by states: A strong argument for a state to do nothing is that the EPA will someday institute regulations at odds with those the state would impose in the meantime.

WHO BENEFITS?

Why have federal lawmakers mandated a system that is so bad for their constituents? Because it is good for the lawmakers. Congress outsources the rulemaking to the EPA so that the legislators can claim credit for protecting health while the agency bears the inevitable blame for delays, disappointments, and costs. The scheme is so politically profitable for lawmakers that Congress applies it to every pollution problem, no matter how

local. If Congress could not use the EPA as a scapegoat, it would find no political profit in making local environmental problems into federal cases.

This approach also benefits the managers of large corporations. The corporations bear heavy costs for pollution control (much heavier than needed to produce the environmental quality we have), but because the costs generally fall on all businesses, they can be passed on to consumers. Moreover, many corporate managers prefer to do business with one EPA instead of many different state legislatures. Corporate big-wigs also like what they call the “level playing field” of national regulation: protection from competition because of tougher standards for new sources and higher costs for small business. Because competition and small businesses are sparkplugs of the economy, the gain for big business management is a loss for consumers, workers, and people investing for retirement.

National environment groups benefit from this arrangement as well. Their power is strongest in Washington, and that power comes partly at the expense of the thousands of state and local environmental groups as well as the even larger number of neighborhood and civic associations that care about their local environments. Those groups have purchase back home, but the real action is in Washington — and they must work through the national organizations. It is no wonder that the environmentalists at the local level tend to resent their counterparts inside the Beltway. If power over local environmental matters devolved to the state and local levels, the national groups would need to provide financial support to their provincial counterparts, as the American Civil Liberties Union now provides financial support to its state and local affiliates. What keeps the national environmental groups powerful relative to their provincial counterparts is not good for the environment or society.

WHAT IS GOOD FOR THE EPA?

Employees and administrators at the EPA may think the current setup is good for them. After all, they wield considerable rulemaking power that would otherwise be in the hands of Congress and state and local officials.

But that power is severely qualified — and not just by the open decisions of the president and Congress. Acting more quietly, small cliques of legislators insert “requirements” in committee reports on appropriations bills. Single legislators anonymously put holds on nominees until the EPA hews the line. White House staffers whisper in the ears of political appointees. The Office of Management and Budget does its thing. Legislators lean on the agency, as happened with lead. In those and many other ways, various potentates hold sway over the EPA, even though their actions are neither blessed by explicit votes of any elected body nor subject to the check of accountability. The EPA has circumscribed power, but full responsibility.

Voters not cognizant of the ways of Washington accept this arrangement because they have been led to believe that the EPA’s job is simply to impose standards that Congress has enacted — to make rules by applying statutory criteria to scientific fact and then catching and prosecuting those who violate the rules. In this view, Congress has made the policy decisions and now it is the agency’s job to make scientific and prosecutorial decisions.

CONVENIENT LIE Because voters think that the legislators they elect should take responsibility for the broad choices of policy, the chief author of the Clean Air Act, Sen. Edmund Muskie, claimed in introducing the bill in 1970 that it “faces the air pollution crisis with urgency and in candor. It makes hard choices . . .” But it did not.

Consider, for example, the criterion under which the EPA is to set supposedly health-based air quality standards. The criterion assumes that there is some concentration of a pollutant in the air we breathe below which there are no known health effects. This assumption is false and Senator Muskie knew so at the time. As he later admitted: “Our public health scientists and doctors have told us [in 1970] that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the time it was inaccurate, that there is a threshold.” A known inaccuracy is a lie, and in this case, a politically convenient one.

The Clean Air Act calls upon the EPA to determine scientifically the levels at which various pollutants start to harm health. But the agency also must make a broad policy judgment: How much harm to health is acceptable in view of the costs to society of averting that harm? Yet, the agency must deny that it engages in such considerations when setting the ambient air quality standards. Everyone involved knows this is a lie. I knew it would be a lie when I urged the agency to adopt this position in the early 1970s. It was a lie that I wanted the agency to tell because I thought it would help protect children. I now know that the way to protect children would have been for Congress to come clean and make the federal pollution rules itself.

The EPA’s lie helped to cover up Congress’s two-step. Both together advance the myth that Congress makes the policy judgments and the EPA makes scientific ones.

To further this myth, the agency pretends that the science is more certain than it is. Professor Wendy Wagner calls this the “science charade.” According to a Resources for the Future study:

EPA’s norms, staffing patterns, and incentives subordinate science. Instead, EPA is a regulatory agency dominated by a legalistic culture. . . . Communications between scientists and policy makers within EPA are often poor or missing, and scientists do not always have a “seat at the table” when regulatory decisions are being hammered out.

The EPA, moreover, misrepresents its scientific findings to suit political convenience. Its scientists measured dangerous levels of pollution around the World Trade Center after the September 11 attacks, but the agency said the air was safe. If a private firm had done that, it would have been indicted.

For another example, EPA scientists evaluating the PCBs that General Electric had put into the Hudson River found that:

Cancer risks and noncancer health hazards from being exposed to PCB’s in the river through skin contact with contaminated sediments and river water, incidental ingestion of sediments, inhalation of PCB’s in air, and consumption of river water as a drinking

water source are generally within or below [the EPA's] levels of concern.

The agency thus found that it was safe to drink the river water all day, everyday, but its press release deleted those reassuring words. That pivotal information did not get into major newspapers. It was convenient to omit this information because it was politically imperative for the EPA — under both Clinton and Bush, although for different reasons — to support dredging some of the PCBs from the river. Calling into question the need for dredging would have made it harder for the agency to do what was politic.

THE EPA'S SOUL

The EPA cannot justify its power on the basis that it was thrust upon it by Congress. That might have been so when the agency was just born, but that was 36 years ago. Since then, the agency has worked actively with Congress to conceal the true nature of their relationship — that the agency gets some power in return for taking blame that would otherwise fall on Congress. And that blame comes from both sides, for failing to protect health and for high pollution control costs.

The bargain between Congress and the EPA is like the bargain that Faust struck with the Devil. In the legend, Faust is tired of simply being a learned man and wants to wield power. The Devil promises to give some of his power to Faust if Faust will relinquish his soul. In the same way, Congress has given some of its power (and responsibility) to the EPA, but the EPA, in participating in this arrangement, has sold its soul in the bargain.

What a shame this is. The environmental cause went from having practically no political power to having great authority, and that authority was bestowed on it because the public believes it can trust the environmental side. But that perception can change, and with tragic results.

In Goethe's version of the legend, Faust did not irrevocably lose his soul when he made the original deal. Rather, he lost it each day that he let the deal continue. Goethe's Faust avoids hell despite years of wrongdoing by opening his eyes to the emptiness of the power lent him by the Devil and starting to behave honorably.

So too can the EPA reclaim its soul. The agency should make clear that Congress in fact failed to make the policy choices. Here's how: When proposing important rules, the agency should enumerate the policy choices that Congress has left to it and, as Cass Sunstein has suggested, describe the full range of uncertainty in the various science questions involved. The notice should also point out the shape that the rule would take if all the policy choices and uncertainties were resolved in favor of a tougher rule or resolved in favor of a weaker rule.

The EPA, when issuing a rulemaking notice, should also point out that Congress has an opportunity to make the policy choices itself by issuing the rule instead of waiting for the EPA to do so. Voters should be told that they would gain substantial benefits if lawmakers would shoulder their responsibility. Not only would voters be able to hold elected legislators accountable for the policy choices, but rules would be resolved

much more quickly than the years that it now takes the agency to complete the rulemaking process and the subsequent judicial review.

With the prospect that the EPA would act if Congress does not, the course of least resistance would still be for Congress to decline to take responsibility. But the EPA could help its old partner in sin do the right thing by suggesting a change in procedure that would commit Congress in advance to act on important rules. It would be easier for Congress to agree in principle that it should be responsible than for it to be responsible ad hoc. We know this from budget politics, where Congress does sometimes commit itself to process changes that help to constrain budget deficits, even though Congress has little capacity for controlling them ad hoc.

The EPA should propose a statute that calls for the following process: The agency would evaluate comments on a proposed rule and publish a final rule. The rule, however, would not go into effect until enacted by Congress and presented to the president. Justice Stephen Breyer has shown in detail how such a process could be structured to work expeditiously.

Congress may not accept this proposal. But by coming clean, the EPA would at least have saved its soul. Hopefully, it wants to. **R**

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