

2010

Resistance, "Revolution," and Reassessment 1981 - 1997

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Recommended Citation

Finkmoore, Richard J. (2010). Resistance, "Revolution," and Reassessment 1981 - 1997. In *Environmental law and the values of nature* (pp. 477-586). Durham, N.C. Carolina Academic Press.

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CHAPTER FIVE

Resistance, “Revolution,” and Reassessment 1981 - 1997

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Section A. Introduction

By the late 1970s, it seemed environmental protection was widely accepted by the public and most leaders as a proper goal of government. Concern about degradation of the environment appeared to be a permanent part of the political landscape at the federal level and, in the larger states and in urban areas, at the state and local levels of government as well. Environmental activists had become an established and influential presence in national policymaking.

However, the evolution of US environmental law has not been one of triumphal advance. The law has achieved major successes, particularly in decreasing pollution levels and in safeguarding some natural lands and species. But the pace of environmental damage continued to accelerate, many environmental problems remained unsolved, and the environmental regulatory apparatus became mired in rigidity. Environmental policymaking at the federal level was stymied by political gridlock. Overall, during the period 1981 to 1997, the goal of environmental protection became more uncertain and disputed.

Indeed, a coherent anti-environmental movement developed in step with environmental successes. Hostility to environmental aspirations has existed throughout American history, for example, in the mining and timber industries. In the modern era, as noted in Chapter 4, the conservative backlash began in the 1970s. In the words of one historian: “Opposition to environmental objectives has been continuous and intense. It evolved from separate and at times sporadic reactions into a more integrated and coherent opposition. That opposition was persistent, profound, and effective. It succeeded in turning back, muting, [or] restraining many an environmental effort.” Samuel P. Hays, *BEAUTY, HEALTH, AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985*, 10 (1987).

Corporate interests affected by environmental laws – manufacturers, agriculture, commodity producers, and others – not only lobbied legislatures effectively and used litigation to challenge new statutes and government regulations, but also set about to change public attitudes about environmental protection. Conservative leaders created new think tanks to support these business efforts, such as the Heritage Foundation, the Cato Institute, and the American Council on Science and Health. (Recent publications of the Cato Institute include *Two Cheers for the 1872 Mining Law*, *Out of Bounds*, *Out of Control: Regulatory Enforcement at EPA*, and *Why We Shouldn't Worry about Global Warming*.) Politically conservative foundations also funded law firms to compete with Environmental Defense Fund and the Natural Resources Defense Council, most notably the Mountain States Legal Foundation and the Pacific Legal Foundation. In addition, at the urging of Henry Ford III, the Ford Foundation ended funding for the public-interest organizations it helped established in the early 1970s. Pro-business foundations, such as the Olin and Mellon Foundations, sponsored sympathetic research and scholarship.

One attack on the basic premises of the environmentalism was *Resourceful Earth: A Response to Global 2000*, published in 1984. Edited and in part written by Julian L. Simon, a business professor who later became a senior fellow at the Heritage Foundation, and Herman Kahn, a futurist, the book was a direct challenge to the views presented in the Carter administration's 1980 report, briefly excerpted in Chapter 4, Section E.

A Response to Global 2000

JULIAN L. SIMON AND HERMAN KAHN, *THE RESOURCEFUL EARTH* 1 - 3 (1984)

The original 1980 *Global 2000 Report to the President* is frightening. It received

extraordinarily wide circulation, and it has influenced crucial governmental policies. But it is dead wrong. Now *The Resourceful Earth*, a response to Global 2000, presents the relevant reliable trend evidence which mainly reassures rather than frightens. . . .

To highlight our differences as vividly as possible, we restate [the first two paragraphs of Global 2000] . . . with our submissions in italics:

If present trends continue, the world in 2000 will be *less crowded* (though more populated), *less polluted, more stable ecologically, and less vulnerable to resource-supply disruption* than the world we live in now. Stresses involving population, resources, and environment *will be less in the future than now* . . . The world's people will be *richer* in most ways than they are today . . . The outlook for food and other necessities of life will be *better* . . . life for most people on earth will be *less precarious* economically than it is now.

The high points of our findings are as follows:

- (1) Life expectancy has been rising rapidly throughout the world, a sign of demographic, scientific, and economic success. This fact – at least as dramatic and heartening as any other in human history – must be fundamental in any informed discussion of pollution and nutrition. . . .
- (3) Many people are still hungry, but the food supply has been improving since at least World War II, as measured by grain prices, production per consumer, and the famine death rate.
- (4) Trends in world forests are not worrying, though in some places deforestation is troubling.
- (5) There is no statistical evidence for rapid loss of species in the next two decades. An increased rate of extinction cannot be ruled out if tropical deforestation is severe, but no evidence about linkage has yet been demonstrated. . . .
- (10) Water does not pose a problem of physical scarcity or disappearance, although the world and U.S. situations do call for better institutional management through more rational systems of property rights.
- (11) The climate does not show signs of unusual and threatening changes. . . .
- (13) There is no persuasive reason to believe that the world oil price will rise in coming decades. The price may fall well below what it has been. . . .
- (17) Threats of air and water pollution have been vastly overblown; these processes were not well analyzed in *Global 2000*.

We do not say that all is well everywhere, and we do not predict that all will be rosy in the future. Children are hungry and sick; people live out lives of physical and intellectual poverty, and lack of opportunity; war or some new pollution may do us in. *The Resourceful Earth does* show that for most relevant matters we have examined, aggregate global and U.S. trends are improving rather than deteriorating.

In addition we do not say that a better future happens *automatically* or *without effort*. It will happen because men and women – sometimes as individuals, sometimes as enterprises working for profit, sometimes as voluntary non-profit making groups, and sometimes as governmental agencies – will address problems with muscle and mind, and will *probably* overcome, as has been usual throughout history.

We are confident that the nature of the physical world permits continued improvement in humankind's economic lot in the long run, indefinitely.

Notes and Questions

1. Did *Resourceful Earth* accurately predict the state of the world today? Consider, for example, the current facts regarding species loss, food and oil prices, freshwater supplies, poverty, and climate change. Information about most of these is set forth in Chapter 10.

2. *Resourceful Earth* is part of a long tradition in American environmental thought, sometimes referred to as the “cornucopian” view. A more recent version of a similar perspective – that “[o]ur doomsday conceptions of the environment are not correct” – is offered in BJORN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD* (1998). This book received wide attention and generated considerable controversy. Among the many critiques of Lomborg's work is *Symposium on Bjorn Lomborg's THE SKEPTICAL ENVIRONMENTALIST*, 53 CASE WESTERN RESERVE LAW REVIEW 249 (2002).

This chapter describes a period with a recurring theme – opposition to environmental protection or the methods proposed to achieve it – but one marked by divergent trends. Describing the period 1981 to 1997 as a sort of natural ebb and flow of differing viewpoints is much too mild. Chapters 3 and 4 related how environmental policy became politicized. In this chapter it becomes apparent why changes in control of the three branches of government are pivotal events in U.S. environmental affairs. Further, we will see how environmental policy is caught up in the broader struggle between supporters of strong government and those who seek to reduce the authority and capability of the federal government. An overview of the conflicts between environmentalists and their opponents is contained in the following reading.

Environmental Politics

Samuel P. Hays, *Three Decades of Environmental Politics*,
 in MICHAEL J. LACEY, ED., GOVERNMENT AND ENVIRONMENTAL POLITICS:
 ESSAYS ON HISTORICAL DEVELOPMENTS SINCE WORLD WAR TWO 43-49(1991)

. . . [A] drama . . . lay in the intensity of debate over rival claimants for public policy: those who wanted to expand material production rapidly and those who wanted to expand the environmental benefits of the advanced consumer society. A striking case of that drama lay in the Rocky Mountain West, where the old and the new competed vigorously for a claim to turf. The traditional developmental institutions there, such as stockraising, lumbering, and hard rock mining, were now augmented by a range of new energy activities. But that region now expressed some of the strongest environmental objectives in the nation. The new order made claims of its own for wilderness, wildlife, environmental forestry, outdoor recreation, cleaner water and air, and in-stream water flows; it contributed much to the defeat from within the region of both the Sagebrush Rebellion and the Reagan administration's asset management program. The old order fought back with its own claims, seeking to use the power of the federal government to restrain the environmental forces from within the West.

One can chart the environmental opposition through confrontations in state and federal legislatures, administrative agencies, and the courts. The fight was intense and persistent. Many have sought to argue that the passage of federal environmental legislation reflected fundamental agreement on public environmental values and objectives and that disagreement was secondary and concerned with differences over implementation of goals rather than of goals themselves. This view is more of an argumentative contrivance than a faithful recording of the facts. Many decisions by administrative agencies and courts expressed fundamental disagreements over objectives. Often it was the debate within the agencies and the courts that revealed most fully the intensity of the controversy. The opposition to environmental objectives in each arena of politics was more than relentless; it constituted a strategy of maximum feasible resistance and minimum feasible retreat. . . .

A major strategy of containment by the environmental opposition was to restrict both in numbers and in geographical territory the identification of natural resources that were valuable environmental assets subject to potential management for environmental objectives. Mere listing of specific areas of high environmental value, such as wilderness, wetlands, barrier islands, estuaries, parks, and wildlife species, became crucial, because such listing could well be the first step toward action. Hence, classification of wilderness under the three wilderness inventory programs, or state inventories of "areas of critical environmental concern" in the coastal zone, became targets of contention. By the same token, pollution sources sought to restrict the identification of sources of harm, such as toxic waste dumps or chemical carcinogens, in order to minimize the range of environmental controls to which they might be subject. As was the case with [pollution] standards, identification of environmental assets or environmental problems involved fundamental debates over goals. They were not simply issues of implementation of agreed-on policies. . . .

It is important to emphasize the high degrees of success enjoyed by the environmental opposition. The main theme of recent environmental history has emphasized the environmental triumphs. A careful assessment calls for a mixed review. There were significant, though less publicized, failures, which in the customary legislative record are forgotten. Significant attempts to add to the range of publicly owned and managed natural environment areas were turned back: a program of national estuarine areas as extensive as the lakeshore and seashore program was transformed into a small set of research areas; the drive to protect barrier islands in a similar manner . . . was restricted to control of federal activities on such islands; the marine sanctuary program advanced at a snail's pace; purchase of inholdings within the national parks moved equally slowly; the drive for urban national parks met little success beyond the initial choices in the early 1970s. . . .

Two subtle but vastly important realms of success for the environmental opposition have been little noticed. One was the degree to which it was able to shape the terms of environmental debate. There was hardly a realm of public thought in which those who feared and struggled against environmental action did not take the initiative to dominate the definition of environmental issues. In doing so they described environmental affairs in terms of what they were not rather than what they were: antitechnology, bad science, single-issue politics, adversarial strategy, the environment versus the economy, no-risk philosophy, hostility to cost-benefit and cost-effective analyses, housewives' data, pollutant of the week, elitism, and populism. These words and phrases and the ideas they implied often structured the way in which the public media and the professional media defined the discussion. Most of the intellectual efforts of the environmentalists, therefore, were channeled into acts of self-defense defined by their opponents rather than into positive initiatives they themselves had shaped. This gave the opposition considerable leverage with the nation's political intelligentsia.

The opposition's second success was a marked shift in the drift of scientific opinion and assessment toward an acceptance of the demand for higher levels of proof of harm. In the 1960s, scientific experts were more likely to talk approvingly about the need to act in the absence of full knowledge, to work in terms of "reasonable anticipation of harm," to bring frontier knowledge more quickly into the realm of public policy. Much of the early pollution control program in air and water was worked out under the assumption of a forceful role for this kind of scientific inference. But over the years, pollution sources demanded higher levels of proof and singled out frontier scientists for special – and often massive – attack. Scientists have seen the professional careers of a number of their colleagues severely damaged Most scientists have not been willing to take such professional risks. In the face of such criticism, often sharpened by attempts from the environmental opposition to define all such issues in terms of "good science versus bad science," the self-images of scientists have worked a powerful influence on those less self-confident. A special focus of this growing influence of the demand for higher levels of proof of harm was the weakened role of the "margin of safety," that nebulous area of plausible inference that is the heart of every decision about standards. While the "margin of safety" still remained by 1984, over the years it had become severely bruised and battered.

The response of traditional production sectors to the environmental impulse was not uniform. Agriculture, for example, had played a major role in the earlier conservation

movement; when the issue now could be defined either as soil erosion or as the loss of productive cropland, some of the older players reached a common ground with environmentalists. Nevertheless, a host of issues about farming methods – from pesticides to commercial fertilizers, from the destruction of fence rows to the use of no-till agriculture, from non-point water pollution to field burning, as well as land use planning and the use of the countryside for recreation – all served to divide farmers from environmentalists. Within the states, rural legislators provided the strongest environmental opposition, objecting both to carving out natural environment lands and programs within the countryside and to imposing on rural areas pollution controls really meant, they argued, for the cities. Only when it came to siting large-scale industrial and waste facilities in rural areas, or the massive impacts of raw materials extraction, did farms and environmentalists reach common ground. . . .

Cooperation between environmental groups and organized labor was more frequent. In this case, one must distinguish between the construction unions and the industrial unions. The former were often at odds with environmentalists over siting and federal funding for large-scale projects. With industrial unions it was different; they had joined with environmentalists in the early 1950s in opposing the construction of the Echo Park dam in western Colorado. The United Steelworkers of America held the first nationwide citizen conference on air pollution in Washington, D.C., in 1969. As the 1970s wore on, environmental ties with the Industrial Union Department of the AFL-CIO grew on such joint interests as occupational health, community air pollution, toxic chemicals, and the “right to know.” There were major controversies between environmentalists and the steel workers over such issues as the bottle bill, and though coal miners joined the antinuclear drive, they still sided with the coal companies on sulfur dioxide control and (especially) acid rain. The relationships were mixed, but in general they provided more opportunities for cooperation than for conflict.

With industry, in contrast, such opportunities for cooperation were limited; industry provided most of the leadership and the resources for the environmental opposition. There was nothing mysterious about this; the two groups had mutually exclusive interests. Lands managed as wilderness were not available for mining and lumbering. Waste treatment added new production costs. Chemical companies wanted to increase the use of pesticides, and environmentalists wanted to reduce them. These normal conflicts between those who produce and those who consume, those who adversely affect others and those adversely affected by them, ran through much of the economy. Many such conflicts could be resolved by adjusting prices in the private market, but others inevitably led to public action. This was especially the case where the resource itself was widely shared or publicly owned, such as the public lands, water in streams or lakes, or air. . . .

All the actors in the environmental opposition came together on one objective: to slow down the pace of environmental advance. Attempts to enhance natural environment management should be restricted; there was already too much wilderness, there were too many parks, there were too many protected wetlands, those that existed were too restricted as to use. “Multiple use” became the battle cry of those who sought to enhance development on environmental lands. The drive for pollution control had gone too far; more time should be spent on accepting the existing levels of pollution – they were not harmful at all – and on

protecting human and biological life from the impact rather than on preventing emissions in the first place. Light technologies should not be allowed to impede the growth of more important heavy ones. Notions about limits to physical resources were simply either a result of misinformation or a result of preoccupation with the future. There was a distrust of the expanded influence of the public on environmental decision making, and especially on scientific and technical questions about which only the better-informed were capable of making sound judgments. As the environmental opposition grew in numbers and political strength throughout the 1970s and into the 1980s, it attacked on a wide front. Its influence rose in the latter years of the Carter administration, and with the Reagan presidency, it succeeded beyond its wildest hopes. The alacrity with which it took advantage of the new opening backfired, but even with the adjustments that the administration made in response to political protests from environmentalists, the opposition still scored high. Despite its growth in numbers and resources, by 1984 the environmental movement could maintain little more than a holding action against its opposition.

The rather long and decidedly mixed era of Resistance, “Revolution,” and Reassessment may be divided into three phases, each of which is described in more detail in succeeding sections of this chapter. During **the first phase, from 1981 to 1989**, President Ronald Reagan and his appointees waged a broad assault on environmental law. Reagan and his supporters considered environmental laws and institutions to be the paradigm of government overreaching and agency regulations to be excessive and a threat to economic growth. While many Reagan administration anti-environmental efforts became high-profile controversies, many others were low-level, indirect attacks. One such action, and the legal bookmark for the beginning of the period covered in this chapter, was *the issuance of Executive Order 12,291 in February 1981, which mandated that many proposed agency regulations be subject to cost-benefit analysis* and review by the Office of Management and Budget.

Reagan’s attempts to roll back environmental gains largely failed, however. Ironically, several environmental laws were strengthened during his administration, such as RCRA in its 1984 amendments and CERCLA through the Superfund Amendment and Reauthorization Act of 1986 (SARA). Before Reagan’s own judicial appointments had a noticeable impact on the federal judiciary, other Reagan policies were successfully challenged in court. For example, in *Environmental Defense Fund v. EPA* (1983) the District of Columbia Circuit reinstated the hazardous-waste permit program under RCRA.

In the second phase, the years from 1989 to 1994 marked a relative lull following the attempted Reagan “revolution.” Some reinforcement of environmental law did occur, notably the ambitious Clean Air Act Amendments of 1990 and enactment of the Oil Pollution Act (OPA) in the same year. George H. W. Bush (1989 - 1993) famously campaigned to be “the environmental president,” for example, pledging to adopt a policy of “no net loss” of wetlands. Upon taking office, Bush appointed the then-president of the World Wildlife Fund, William

Reilly, to be EPA Administrator and declared large areas of the Outer Continental Shelf off-limits to oil and gas development. In the end, however, President Bush apparently concluded that the political benefits of his environmental policies were not sufficient to risk alienating his core business constituency, and his positions changed accordingly. For example, in his last two years in office, George H. W. Bush proposed opening the Arctic National Wildlife Refuge to oil and gas exploration and supported his vice president's Council on Competitiveness review of environmental regulations for detrimental impacts on the regulated community.

During this phase, the two decade pattern of regular and extensive amendments to the major environmental statutes ended. With the exception of the CAA Amendments and OPA mentioned above, and the modest Pollution Prevention Act of 1990, there were only minor statutory amendments of any federal environmental laws during the 1990s.

With Bill Clinton's election in 1992, the Democrats controlled the executive branch for the first time in twelve years. Clinton chose as his running mate Senator Al Gore, the author of *Earth in the Balance: Ecology and the Human Spirit* published earlier in the election year. In it Gore wrote:

. . . [W]e must not forget the lessons of World War II. The Resistance slowed the advance of fascism and scored important victories, but fascism continued its relentless march to domination until the rest of the world finally awoke and made the defeat of fascism its central organizing principle from 1941 through 1945. . . .

The world is once again at a critical juncture. A relentless advance is again claiming victims throughout the world, and again courageous men and women are standing in the path of destruction and calling upon the rest of the world to help stop the invasions. But this time we are invading ourselves and attacking the ecological system of which we are a part. As a result, we now face the prospect of a kind of global civil war between those who refuse to consider the consequences of civilization's relentless advance and those who refuse to be silent partners in the destruction. More and more people of conscience are joining the effort to resist, but the time has come to make this struggle the central organizing principle of world civilization. . . .

. . . Our ways of thinking and perceiving, our desires and behaviors, our ideologies and traditions – all are inherited in significant measure from our civilization. We may suffer the illusion from time to time that we are going to go our own way, but it is genuinely hard to break out of patterns of thought and action that are integral in our culture. Meanwhile, civilization now rushes ahead with tremendous momentum, and even the individual who believes we are on a collision course with the global environment will find it difficult to separate his or her course from that of the civilization as a whole. As always, it is easier to see the need for change in the larger pattern than to address the need for it in oneself.

Nevertheless, with personal commitment, every individual can help ensure that dramatic change does take place.

I have therefore come to believe that the world's ecological balance depends on more than just our ability to restore a balance between civilization's ravenous appetite for resources and the fragile equilibrium of the earth's environment; it depends on more, even, than our ability to restore a balance between ourselves as individuals and the civilization we aspire to create and sustain. In the end, we must restore a balance within ourselves between who we are and what we are doing. Each of us must take a greater personal responsibility for this deteriorating global environment; each of us must take a hard look at the habits of mind and action that reflect – and have led to – this grave crisis.

The need for personal equilibrium can be described in an even simpler way. The more deeply I search for the roots of the global environmental crisis, the more I am convinced that it is an outer manifestation of an inner crisis that is, for lack of a better word, spiritual. As a politician, I know full well the special hazards of using “spiritual” to describe a problem like this one. . . . But what other word describes the collection of values and assumptions that determine our basic understanding of how we fit into the universe? . . .

When considering a problem as large as the degradation of the global environment, it is easy to feel overwhelmed, utterly helpless to effect any change whatsoever. But we must resist that response, because this crisis will be resolved only if individuals take some responsibility for it. By educating ourselves and others, by doing our part to minimize our use and waste of resources, by becoming more active politically and demanding change – in these ways and many others, each one of us can make a difference. Perhaps most important, we each need to assess our own relationship to the natural world and renew, at the deepest level of personal integrity, a connection to it. And that can only happen if we renew what is authentic and true in every aspect of our lives. . . .

AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 12, 294, 366 (1992).

As president, Clinton initially seemed willing to assert strong environmental positions and gave Gore more authority than most other vice presidents. Clinton also appointed prominent environmental advocates to key policymaking positions in his administration, notably Florida environmental protection chief Carol Browner as EPA Administrator, former Arizona Governor Bruce Babbitt as Interior Secretary, former Senator Tim Wirth as Assistant Secretary of State for Environment, and former Wilderness Society President George Frampton as an assistant secretary in the Interior Department. Clinton promised and in 1993 successfully negotiated an “environmental side agreement” – the North American Agreement on Environmental Cooperation – to supplement the North American Free Trade Agreement (NAFTA). Although U.S. environmental groups split over the adequacy of the side agreement, it did mark the first time that environmental obligations and procedures were made explicitly a part of an

international trade accord.

In order to promote energy conservation and reduce the federal deficit, President Clinton proposed a broad-based tax on energy use (which he quickly withdrew in the face of strong congressional opposition), ordered federal agencies to purchase energy-efficient and recycled products, and launched an initiative to promote innovation and exports of “green” technology. Clinton also offered legislation to make the EPA a cabinet-level department (which was blocked by Congress). His administration launched several negotiation processes to address high profile environmental controversies, one on federal grazing management, another on the old-growth forests of the Pacific Northwest, and a third on habitat conservation plans for endangered species. Two of these efforts to reach consensus among the various stakeholders are explored in other chapters, habitat conservation planning under the ESA and Chapter 6 and the Northwest forest planning effort in Chapter 7. Interior Secretary Bruce Babbitt and the department’s Solicitor, John Leshy, took significant and highly controversial actions to reform federal mining laws administratively.

The third phase within the larger period, 1994 to 1997, begins with the election of the 104th Congress and the resulting dramatic political realignment. For the first time in forty years, the Republican Party held majorities in both the House and Senate, markedly changing the political playing field in environmental policymaking. The 1994 election also brought to power an extraordinarily ideological group of new members whose radical anti-government views were most often directed at environmental programs. The Republican Congressional leadership proposed “reforms” intended to make it more difficult to promulgate environmentally protective regulations and the “devolution” of more environmental responsibility to state governments. These proposals were opposed by virtually all environmental organizations.

Section D in this chapter details such efforts, including Congress’s increased use of anti-environmental “riders” attached to budget bills. One of the most notorious was a provision that suspended the National Forest Management Act, the ESA, and “[a]ll other applicable Federal environmental and natural resource laws” in order to increase timber harvesting in the national forests. This *“Timber Salvage Rider” expired by its own terms on September 30, 1977*, and was not renewed by Congress; its expiration is the legal bookend which closes this period.

President Clinton faced a storm of public protest for signing the appropriations bill containing the Timber Salvage Rider. But such legislative maneuvers continued, often denying funds to existing environmental programs or partially rolling back environmental laws. Both out of conviction and sensing political opportunity, Clinton and his top officials all publicly condemned Congress’s attempts to undermine public health and environmental protection. For example, at a press briefing by Al Gore and Bruce Babbitt in September 1995, the Vice President said:

. . . I would like to announce today that if Congress sends the President the Fiscal 1996 Interior Appropriations bill as approved by the Conference Committee, he will veto it. This bill takes dead aim on this nation’s most cherished natural resources, [and] it will benefit special-interests at the great

expense of taxpayers.

Since the bill does not include the administration-proposed moratorium on hard rock mining patents, it gives away billions of dollars in federally-owned land and mineral deposits to a single industry. . . .

The bill would allow logging to occur in some of the most environmentally sensitive areas of the Tongass National Forest in Alaska. This bill also includes a sneak attack on the newest addition to the national park system – California’s incomparable Mojave National Preserve – by transferring funding and responsibility for the preserve from the National Park Service to the Bureau of Land Management, and completely undermining implementation of the 1994 California Desert Protection Act.

In addition, the bill would cut 47 percent from the President’s request for energy conservation and efficiency programs that would save more oil than could be obtained by drilling in the Arctic National Wildlife Refuge. Congress is also proposing to block an important project . . . in the Columbia River Basin This shortsighted action would threaten the protection of salmon and other endangered species and would guarantee more endless court battles and gridlock for years to come.

The White House, Office of the Press Secretary, *Press Briefing by the Vice President and Secretary of the Interior, Bruce Babbitt* (September 22, 1995). Rather than sign such budget legislation, Clinton allowed the federal government to shut down twice due to lack of funds.

The American public responded with hostility to any weakening of the environmental laws. Rather suddenly, the “reforms” advanced in the 104th Congress were discredited. Their repudiation prompted the Clinton administration to push a range of new environmental initiatives. At EPA, Carol Browner strengthened CAA regulations for particulates and ozone. In 1998, Clinton announced a major effort to address water pollution from agriculture and urban storm water, the TMDL program described in Chapter 4, Section B. 3. Under the leadership of Forest Service Chief Michael Dombeck, the administration instituted new national forest planning regulations and banned roads and other development in currently roadless areas of the national forests. Both of these developments are examined in Chapter 7. Perhaps the most lasting environmental legacy of the Clinton presidency was brought about by Secretary Bruce Babbitt. Babbitt’s insistent prodding persuaded the president to protect millions of acres of public lands as national monuments, including the Grand Staircase-Escalante National Monument in southern Utah which was considered in Chapter 2.

During this time, international environmental law continued to develop; the U.S. sometimes contributed to its progress and at other times was an obstacle. President Reagan opposed multilateral policy making in general and international environmental lawmaking in particular. He completely disregarded the Carter administration's *Global 2000* report and rejected the proposed Law of the Sea Convention. The United States was the only nation to vote

against the U.N. World Charter for Nature in 1982; the charter is excerpted in Chapter 9. One important exception was the Reagan administration's constructive role in formulating the international regime to protect the ozone layer which led to the Montreal Protocol in 1987.

Early in the administration of George H. W. Bush, the U.S. endorsed the 1990 London amendments to the Montreal Protocol and allowed the EPA and other federal agencies to promote research and technical cooperation on climate change. Later, however, Bush equivocated on whether or not he would even attend the 1992 Earth Summit in Rio de Janeiro. Ultimately he did attend but refused to sign the Biodiversity Convention approved by other nations at Rio and led opposition to binding targets and timetables for cuts in greenhouse gas emissions. The U.S. also sided with the opponents of binding international forest protections. At Rio, the senior Bush also refused to commit financial support for the new Global Environmental Facility created to provide multilateral funding for action on ozone depletion, biodiversity conservation, and climate change.

In marked contrast, President Clinton signed both the Law of the Sea Convention and the Biodiversity Convention shortly after his inauguration. (Neither of these treaties had been ratified by the U.S. Senate as of early 2008.) In pursuance of the Rio Declaration – considered in Chapter 10 – he appointed a high level President's Commission on Sustainable Development to produce recommendations for advancing sustainable development domestically. Under the leadership of Vice President Al Gore, the United States was instrumental in negotiating the 1997 Kyoto Protocol, which committed developed countries to reducing greenhouse gas emissions by five percent below 1990 levels by 2012. Clinton signed the Kyoto Protocol despite fierce political opposition, but he declined to submit it to the Senate where it faced certain rejection. (The international climate change regime is examined in Chapter 9 section B. 2). In February 1998, Clinton proposed \$6.3 billion in funding for tax incentives and research to reduce greenhouse gas emissions through increased energy efficiency, but this proposal was vigorously attacked by Republicans in Congress as well.

In retrospect, the most significant outcome of the 1980s and 1990s was that environmental law endured. It largely survived repeated and fervent challenges. While the goal of the environmental protection persisted, the law did not keep pace with accelerating environmental harm and emerging environmental problems. Much time was lost.

Section B. Resistance in the West

The Property Clause U.S. Constitution, Article IV, § 3, cl. 2.

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States

As noted in Chapter 1, federal land policy gradually shifted during the 20th-century from disposition to permanent retention and management. The result was that the federal government remained the owner of about one-third of the nation's surface area as of the 1960s. Today, that figure is 28.8 percent for the nation as a whole, but these lands are concentrated in the western states and Alaska. For example, slightly less than fifty percent of Wyoming and slightly more than fifty-two percent of Oregon is owned by the federal government. The figures for Idaho and Utah are sixty-two percent and sixty-four percent respectively. When Alaska became a state in 1959, it was almost entirely federal land. Following the passage of the Alaska Native Claims Settlement Act of 1971, millions of acres were granted to Alaska Natives and the State of Alaska. As a result, federal lands now comprise sixty-eight percent of the state. This leaves Nevada with the highest percentage of federal ownership of any state – eighty-three percent.

The Sagebrush Rebellion

John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*
14 U.C. DAVIS LAW REVIEW 317, 341-348 (1980)

The “sagebrush rebellion” burst onto the Western scene in 1979, when the Nevada legislature began considering a bill to claim ownership of the “unappropriated” federally controlled public lands in the state. Since that measure was enacted in June 1979, other Western states have passed similar bills. Thus the stage appears to be set for a legal test of continued federal management of much of the land in the West. . . .

Although it might be argued that the rebels have, by spurning the legislative for the judicial remedy, chosen to forego raising the ownership issue in Congress, at least a few congressmen have proposed to have that body address it. Therefore, let us briefly examine that issue on its policy, as opposed to its legal merits. The first thing to note is that only recently has Congress addressed the issue of federal public land policy once more, resolving it in favor of continued federal retention and management of most public lands, while at the same time setting forth uniform standards and procedures by which some lands may be sold.

If a single development may be said to have triggered the rebellion, in fact, it is Congress' enactment of the Federal Land Policy and Management Act of 1976. That Act was the culmination of a congressionally inspired re-evaluation of federal public land management given impetus by the report of the Public Land Law Review Commission (PLLRC) six years earlier. . . .

It is especially worth noting, in the current climate of rebellion, that the primary proponents and shapers of both the PLLRC and the FLPMA were Westerners. The region that would most feel the impact of the law thus played the biggest role in writing it.

What, then, are we to make of the sudden rise of the sagebrush rebellion so soon after this latest national debate appeared to have determined, once and for all, that the bulk of the remaining public lands should be retained in federal ownership and managed in the national interest? Did the PLLRC and the Congress misread Western public sentiment on the issue so seriously that a grassroots “rebellion” spontaneously arose to protest this alleged “selling out” of Western interests? I think not. Instead, I suggest that the rebellion has several disparate roots which are not easily reconciled with each other, but which can teach us several things about politics and values in the modern West.

First, the rebellion obviously feeds at the trough of national disaffection with government regulations and bureaucracy. With its extensive landholdings giving it a highly visible, pervasive presence throughout the West, the federal government naturally feels the brunt of anti-government feeling there. Moreover, the FLPMA goes well beyond mere retention of the public lands. It and other recent laws have placed new restrictions on the private exploitation of the public lands, especially their forage and minerals. As the reality of such restrictions has become apparent, those most affected – graziers and miners – have begun to chafe at this reduction in their freedom of exploitation. . . .

Also at work here is the increasing realization that man’s abilities to make nature over in his own image are not unbounded. Natural limitations in the West, most obviously its aridness, have long been obstacles to development. But in many areas they have been, at least for the time being, successfully surmounted by man’s ingenuity, often aided by federal funds. But now Westerners find themselves facing resource shortages which are not only fractious but, more important, appear to defy the solutions of the past. Part of the frustration provoked by that realization has undoubtedly tarnished the image of the federal government as problem-solver. At the same time, ironically, the resources of federal lands are increasingly being viewed as providing a safety net to help solve local or regional problems in the West.

Another factor is an idea long basic to the Western system of values – that man not only can but *must* exploit and tame nature into submission in order to survive and prosper in the sometimes harsh Western environment. Part of the FLPMA’s regulatory scheme is designed to achieve environmental restoration and protection on all the public lands and, beyond that, to preserve parts of the public lands in their natural condition. This does not go down easily with those who, by experience or cultural inculcation, regard the natural environment as their enemy.

A fourth root of the rebellion is found in the greatly increased competition for public lands and resources. “Multiple use” is the well worn phrase which describes the fundamental management principle for most public lands in this country. Yet until recently, overt competition for use of specific areas of public lands was the exception rather than the rule. Livestock graziers, miners, lumbermen, hunters and fishermen generally coexisted peacefully, and few other demands were placed on these lands. Now, however, growing numbers of off-road vehicle fanciers, wilderness advocates, endangered species and other wildlife protectionists, white-water enthusiasts, cultural and archaeological resource investigators, hikers, campers, skiers, photography buffs and rockhounds have combined with the sometimes increasing demands of more traditional users (especially those seeking to exploit domestic energy resources) to place

unprecedented strains on the poor land managers who must give concrete meaning to the lordly dictate of “multiple use.” Increasing competition inevitably means increasing regulation and red tape for all public lands users, most dramatically illustrated, perhaps, by the increasing need to require permits for foot access into wilderness areas. Needless to say, such regulation does not please those whose private pursuits are regulated in order that the public’s resources may be preserved for use by others, including future generations. It takes a certain maturity or breadth of perspective to appreciate the common good which flows from this kind of regulation, and at least the initial reaction to its imposition is likely to be hostility. In this sense the current rebellion once again shows how history tends toward repetition, since earlier efforts to strip the federal government of much of its remaining land holdings were also sparked by increasing federal regulation.

Another factor which explains why the rebellion has advanced as far as it has and as fast as it has is the lag between demographic changes and political power shifts. Many are surprised to learn that the modern West has become, by generally accepted standards of measurement, the most urban region in the country. The availability of nearby public lands for recreation and the value that open spaces provide the human spirit are important parts of the lifestyle that most Westerners lead from their urban oases. Recreation and tourism are major sectors in the economies of most Western states, sometimes even outstripping more traditional pursuits such as mining, grazing and farming. But in many areas of the West, the interests of urbanites and suburbanites have not yet been effectively translated into political power in state legislatures. Where public lands are concerned, traditional agricultural, stock-raising and mining interests still tend to hold sway, though the situation is changing.

Related to this lag in the shift of political power is the generally perceived weakness in the rebels’ legal claim, for the rebels’ political case in the state legislatures might well have been considerably weaker if their legal case had been stronger. Many may have voted for the bills not so much out of belief in the wisdom of the program to transfer lands out of federal ownership, more because the measure was a legally ineffective, and therefore harmless, gesture of displeasure against Washington.

Finally, the rebellion partakes of the current movement to return to states and localities greater responsibility over their affairs. While that movement extends far beyond federal land management policies, it has certainly been felt in that area. . . .

The County Supremacy Movement

Robert L. Glicksman, *Fear and Loathing on the Federal Lands*,
45 UNIVERSITY OF KANSAS LAW REVIEW 647-649, 653-655, 659-661, 663-665 (1997)

On July 4, 1994, Dick Carver, a rancher and a Commissioner of Nye County, Nevada,

climbed aboard his twenty-two-ton D-7 Caterpillar and began bulldozing open a road in the Toiyabe National Forest. The county had asked the United States Forest Service, an agency within the Agriculture Department responsible for managing the national forests, to reopen a former stagecoach trail, but the agency said an archaeological survey was needed first. Without waiting for Forest Service approval, and with the consent of his fellow Commissioners, Carver drove the bulldozer to the road and began plowing a roadbed outside the existing right-of-way. In front of him stood an armed agent of the United States Forest Service, who held a hand-lettered sign ordering Carver to halt. The agent stumbled to his hands and knees, but Carter drove on, waving his pocket-sized copy of the United States Constitution, as his son-in-law stood by and sang the national anthem. Spurred on by a local rancher who argued that the United States had been won by "fighting men and bloodshed," and that peaceful solutions were no longer sufficient, a crowd of about 200 onlookers, many waving guns, cheered. The Nye County Commission subsequently requested that criminal charges be brought against the two Forest Service employees.

This story is not unique. Similar incidents have occurred in other parts of the West in recent years. The most recent example took place on lands in Utah, which, in the fall of 1996, President Clinton included within the newly established Staircase-Escalante National Monument. Officials of the Bureau of Land Management (BLM), while conducting an inventory in October 1996 of undeveloped lands inside the national monument for possible wilderness designation, noticed that hundreds of miles of trails had been bulldozed and graded without agency approval. It turned out that the counties in which the lands are located, which asserted ownership of the graded roads, ordered the bulldozing in an attempt to disqualify the areas from further consideration as wilderness. They did so despite warnings by the BLM that they lacked the authority to engage in those acts on lands under the BLM's jurisdiction. Instead of resorting to legal means of resolving the dispute first, the counties began leveling. They stopped only when the federal government filed suit alleging trespass by the counties and a federal district court issued an injunction to stop the unauthorized work. Even after the suit was filed, Garfield County officials declared that they would "not be beholding" to the federal officials who brought suit. One Utah rancher's response to the creation of the national monument may have summarized the feelings of many when he declared that he would "like to secede from the nation. I'd like to go to war."

Recent dissatisfaction with ownership and management of the federal lands has manifested itself in more ominous forms as well. Pipe bombs have appeared in the Gila Wilderness in New Mexico. An unknown assailant shot at a Forest Service biologist in California. A bomb was thrown onto the roof of the BLM's state headquarters in Nevada on Halloween night in 1993. School children have been beaten because their parents work for the Forest Service. In August 1995, the family van of a forest ranger in Carson City, Nevada, was blown up while parked in his driveway. That episode marked the second time within a year in which violence was directed at the ranger, who previously supervised Forest Service lands in Nye County.

Incidents of civil disobedience involving the disruption of lawful activities on the federal lands have not been confined to those who oppose restrictions on development that stem from

environmental and natural resource protection laws. Radical environmentalists, for example, have spiked trees and otherwise sought to disrupt logging in the national forests. The difference between those protests and the ones [discussed here] is that only the latter have occurred under the sponsorship of local governments. . . .

The successor to the Sagebrush Rebellion was the Wise Use Movement, born around 1988 in reaction to the increased emphasis placed on preservation of federal lands and resources. The movement's adherents argued that federal land management policy should subordinate recreational and preservation-oriented uses to economic and commodity uses of public resources. The Wise Users focused on the threats posed to western communities by environmentalists and the need for stronger protection of private property rights. Their goal, like that of the Sagebrush Rebels, was the transfer of undeveloped federal lands in the West to the private sector for commercial exploitation.

At some point, the former Sagebrush Rebels and their ideological allies realized that large-scale transfer of federal lands to state or local ownership might be financially disastrous for the western states. Counties with substantial federal land holdings, for example, typically receive greater federal revenue sharing and other aid than counties without such lands. The same private interests who steadfastly oppose federal land ownership and management are often the ones who protest most vociferously even modest steps to reduce the availability of these kinds of government-sponsored benefits. Robert Glennon captured the schizophrenic attitude of many westerners toward the federal government most succinctly in describing their plea as: "Get out! And give us more money!" The upshot was a revised strategy, often labeled the County Supremacy Movement, whose aim was to reap the benefits of controlling allocation of federal lands and resources without being subjected to the burdens of ownership.

The County Supremacy Movement was born in Catron County, New Mexico, which in 1991 passed the first so-called "custom and culture" ordinance. It purported to require that the federal government coordinate and consult with the county and consider its custom and culture before making management decisions concerning federal lands within its borders. At least thirty-five counties in Arizona, New Mexico, Nevada, and California have since declared themselves to be in control of federal lands within their boundaries. The ordinances adopted by these counties typically require that current levels of grazing, farming, and timber harvesting on federal lands continue and that the federal land management agencies refrain from taking any action that would make those activities financially infeasible. Some ordinances purport to place control over these activities in the hands of the county and prohibit implementation of federal land use management plans or acquisition or disposition of federal lands without county approval. They may prohibit the government from designating federal lands as wetlands or wilderness, override federal statutory provisions that require a permit to dredge or fill wetlands, or require county approval of plans to protect endangered species. The ordinances often criminalize violations, which explains the criminal charges brought by Nye County against the Forest Service employees who stood in Dick Carver's way.

The County Supremacy Movement has justified these custom and culture ordinances primarily on the basis of the so-called equal footing doctrine. The initial premise is that all states

admitted to the Union are entitled to the same rights of sovereignty as the original thirteen. The eastern states were permitted to retain title to the unappropriated dry land within their borders. By retaining a large percentage of land in the western states, the United States has improperly relegated these states to second-class status. As a result, the government's ownership of lands in these states is unconstitutional. . . .

The recent attacks on federal land ownership and management policies are part and parcel of a broader effort to scale back the regulatory powers of the federal government. This effort to decrease the role of the federal government is a significant component of an ongoing re-evaluation of environmental policy that is taking place in Congress, the administrative agencies, the courts, and the halls of academia. The movement has borne legal fruit in the form of a Supreme Court decision that, for the first time in decades, invalidated a federal statute as beyond the scope of the Commerce Clause.¹ Thus far, similar attacks on the laws that govern federal land and resource management have not succeeded.

Even where federal power undoubtedly exists, those who oppose its exercise have contended that it is less "democratic" than the exercise of state or local authority. The Unfunded Mandates Reform Act of 1995 is an example of recent reforms that are designed to restore governmental accountability. The County Supremacy Movement obviously builds on the notion that governmental authority exercised at the local level is somehow more legitimate than power wielded by federal bureaucrats. Proponents of custom and culture ordinances claim that their purpose is to promote the "American tradition of self-government" by reducing bureaucracy and increasing economic stability.

Another prominent theme in the recent movement to reform environmental policy is the charge that the exercise of federal regulatory power results in unwarranted infringements on private property rights. Hostility to regulatory constraints on the use of private property is particularly strong in some areas of the West. Nye County, for example, has no zoning laws. Advocates of enhanced protection of private property have introduced legislation that would require the federal government to compensate private property owners when regulation results in a decline in the market value of their land. A slew of lawsuits have been filed in which property owners have charged that the implementation of federal environmental and natural resources legislation has taken their property, entitling them to the payment of just compensation under the Fifth Amendment's takings clause. Some of these lawsuits have been financed by the same interests responsible for the Wise Use and County Supremacy Movements. If the federal government is required to compensate regulated property owners to a much greater extent than has been the case to date, either because of new legislation or an expansive reading of the takings clause by the courts, the result is likely to be a greater reluctance on the part of the land management agencies to use the regulatory tools at their disposal. . . .

The federal government has provided a convenient scapegoat for . . . pent-up frustrations.

¹ See *United States v. Lopez*, 115 S. Ct. 1624, 1934 (1995) (declaring the Gun-Free School Zones Act of 1990 unconstitutional). . . .

Westerners have provided a receptive audience for the steady stream of incendiary, anti-government rhetoric that comprises the third factor responsible for the more volatile forms of protest represented by the Nye County incident. The Chairman of the Resources Committee of the House of Representatives has referred to environmentalists as a self-centered, despicable, "waffle-stomping, Harvard-graduating, intellectual bunch of idiots." More to the point, he has accused the National Park Service of engaging in Gestapo tactics. A member of Idaho's congressional delegation seems to direct a torrent of inflammatory bombast at the federal land management agencies, their resource allocation policies, and the values these policies reflect. Environmental policies, she has declared, "are driven by a kind of emotional spiritualism that threatens the very foundation of our society, by eroding basic principles of our Constitution." They amount to "a war on the West," of which the President's policy on resource-allocation issues like salvage timber sales is "only one of the battles that we will fight, but we will fight. I can tell you, Mr. Speaker, the West was not settled by wimps and faint-hearted people, and we will not give it up easily." The custom and culture ordinances backed by the County Supremacists clearly echo these sentiments. One Oregon county's ordinance stated that: "Federal and state agents threaten the life, liberty, and happiness of the people of Klamath County. They present a clear and present danger to the land and livelihood of every man, woman, and child. A state of emergency prevails that calls for devotion and sacrifice."

These diatribes have been enthusiastically received in some corners of the West because of a combination of resentment over the disappearance of longstanding traditions and practices and fear of what the future will bring. Until fairly recently, those who wanted to use the federal lands typically did so without opposition by federal land managers. Issuance of permits to ranchers who wanted to graze on land managed by the BLM, for example, was virtually automatic. It also was cheap, as grazing fees were set far below market value, and relatively condition-free. But as federal land managers belatedly began to impose constraints on federal land use (such as reduced animal unit months for grazing allotments) to protect the environment, these historic users found access to federal resources to be more difficult and costly. One source attributes Catron County, New Mexico's trend-setting custom and culture ordinance to the influence of local cattlemen, "angered by threatened reductions in grazing allotments on federal lands," who "saw their traditional control over the local United States Forest Service and the [BLM] slipping away." The traditional consumptive users also now face more competition for the right to use the federal lands than they did previously. Recreational use of the federal lands by hikers, campers, hunters, and boaters is heavier than ever before. Westerners such as ranchers who want to graze their animals on federal lands and developers incensed about restrictions placed on their access to water are simply fed up with federal "intrusion" into their lives and livelihoods.

The upshot is that "economic dislocation in the rural West is now more widespread [and] more persistent" than it has been in the past. Some of this dislocation has nothing whatsoever to do with the policies of the federal government that dictate use of the federal lands. It has instead been induced by changes in the national economy that have made it more difficult for small, marginally successful users of public resources, such as ranchers, to compete with larger corporate conglomerates, and that have contributed to a shift in the economies of many western states away from resource extraction and toward tourism. The West, surprisingly, is now the most urbanized section of the country, and traditional industries such as farming, mining,

ranching, and logging contribute less to state economies than they used to do. But the federal land management agencies provide a convenient target for the unhappiness, confusion, and rage that sometimes accompanies such changes.

Notes and Questions

1. *More on the “Wise Use” Movement.*

With \$1 million in industry backing, People for the West has formed dozens of groups in 13 Western states. One of many efforts to “put people back into the environmental equation,” . . . the campaign is a sign of the changing tenor of environmental controversy. . . .

. . . [A]t a recent national conference of the “wise use” movement in Denver. . . organizers claimed that more than 25 million people were represented by the sponsors, including trade groups for miners, loggers, farmers, ranchers, dirt-bikers, and oil-drillers, as well as lobbying groups like the National Rifle Association and conservative think tanks like the Mountain States Legal Foundation. . . .

[Chuck] Cushman heads the Multiple Use Land Alliance, a newly formed network of some 1.2 million holders of permits to use public lands for cabins, wood gathering, mining and grazing livestock. . . .

“I see our role as a tactical guerrilla force on the side of the ranchers and other federal land users,” Cushman said. . . .

“Preservationists are like a new pagan religion. They worship trees and sacrifice people,” said . . . Cushman. “What we’re facing is a holy war between fundamental religious differences.”

Jon Christensen, *People for the West Launches a ‘Holy War’ Against Enviro*s, HIGH COUNTRY NEWS 3 (June 3, 1991).

GEORGE, Chief Judge.

Plaintiff United States of America renews its motion for partial summary judgment (#87) (Plaintiffs Renewed Motion) on Counts I and IV of its complaint. In its complaint, the United States alleges that it owns and has authority to manage certain public lands within Nye County. By statute, Defendant State of Nevada claimed ownership of this public land in 1979. In late 1993, Defendant Nye County passed Resolution 93-48, declaring that Nevada owns the disputed public lands in Nye County and that only the state and the county have authority to manage the land. At the same time, Nye County, passed Resolution 93-49 asserting that, with limited exceptions, Nye County owns the rights-of-way for all roads and corridors crossing the public lands. Importantly, Nye County acted upon its denial that the United States owns and has authority to manage the public lands. On July 4, 1994, Nye County reopened the Jefferson Canyon Road, straying from the right-of-way onto national forest land, ignoring an order of a forest service agent to stop. Following this action, a Nye County Commissioner filed an affidavit against the federal officer, stating that the officer lacked any jurisdiction. In Count I, the United States seeks a declaration that it owns and has authority to manage the disputed public lands within Nye County, Nevada. Pursuant to Count IV, the United States seeks a declaration that Resolution 93-49 is preempted to the extent it purports to apply to roads and corridors for which no valid right-of-way exists. As Nevada and Nye County have filed their oppositions, this matter is submitted for consideration. The court also requested and received supplemental memoranda, and heard oral arguments. . . .

Background

On February 2, 1848, following the Mexican American War and pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, Mexico ceded lands, including the area comprising present day Nevada, to the United States. On March 21, 1864, the United States Congress enacted the Nevada Enabling Act, 13 Stat. 80 (1864), authorizing a convention to draft a state constitution for ratification by the residents of the Nevada Territory. As a condition of statehood, the Nevada Enabling Act required that the convention adopt an ordinance agreeing and declaring that Nevada would “forever disclaim all right and tide to the unappropriated Public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States.” *Id.*, at § 4. In July 1864, the convention adopted the Nevada State Constitution and passed the Ordinance of the Constitution disclaiming all right and title to unappropriated public lands. The President of the United States, Abraham Lincoln, then proclaimed Nevada admitted to the Union on October 31, 1864. *See* 13 Stat. 749.

Presently, the United States asserts ownership of nearly 87% of the lands in Nevada. In Nye County, the United States’ assertion of ownership increases to nearly 93% of the lands. These federal lands include portions of the Humboldt and Toiyabe National Forests (administered by the Forest Service, Department of Agriculture), a portion of the Death Valley National Monument, a part of the Nellis Air Force Range (Department of Defense), most of the Nevada Test Site (Department of Energy), and the Meadows National Wildlife Refuge. The remaining federal lands are public lands administered by the Bureau of Land Management, Department of the Interior, pursuant to the Federal Land Policy and Act of 1976 (FLPMA), 43 U.S.C. § 1701. The FLPMA formally ended the policy of transferring federal lands to private

ownership and adopted a policy of retention of these lands by the federal government.

In 1979, and in response to enactment of the FLPMA, Nevada enacted a series of statutes declaring ownership of and control and jurisdiction over all “public lands” within Nevada. Nev.Rev.Stat. §§ 321.596-321.599. As used in these statutes, “public lands” excludes land located in congressionally authorized national parks and monuments, national forests, wildlife refuges, lands acquired by the consent of the legislature, and lands controlled by the Department of Defense and Department of Energy.

Nye County is a political subdivision of the State of Nevada, administered by an elected Board of Commissioners. Nye County has claimed that the United States does not own and that it lacks authority to manage public lands within its exterior boundary. . . . In claiming that the public lands belong to Nevada, however, Nye County asserts that Nevada owns more land than Nevada itself has claimed by statute. For example, while Nevada does not claim ownership of the national forests, Nye County has asserted that Nevada owns the lands managed by the Department of Agriculture, which manages the national forests. . . . Rather, Nye County excludes, from the public lands, only the land ceded by Nevada to the federal government or post offices and federal buildings, and the land within the Nevada Test Site [for testing nuclear weapons]. . . .

In addition to passing Resolution 93-48 declaring that Nevada owns all public lands, Nye County passed Resolution 93-49. This resolution declared that “all ways, pathways, trails, roads, country highways, and similar travel corridors across public lands in Nye County, Nevada, whether established and maintained by usage or mechanical means, whether passable by foot, beast of burden, carts or wagons, or motorized vehicles of each and every sort, whether currently passable or impassable, that was [sic] established in the past, present, or may be established in the future, on public lands in Nye County, are hereby declared Nye County Public Roads.” The resolution further declared that “All rights of way . . . across public lands that are declared Nye County Public Roads are the property of Nye County as trustee for public users thereof.”

In June 1994, Nye County, through Commissioner Richard Carver, the Vice-Chairman of the Nye County Board of Commissioners who acted with authority for and on behalf of Nye County, declared that the Jefferson Canyon Road in the Toiyabe National Forest was a Nye County Public Road. . . . As the Jefferson Canyon road had been washed out in 1983, this letter further notified the district ranger that Nye County Board of Commissioners intended to reopen and maintain the road. On July 4, 1994, Commissioner Carver accomplished the intent of the Board by using a county-owned bulldozer to reopen the Jefferson Canyon Road. Significantly, the United States has offered uncontroverted evidence establishing that, in grading the road, Commissioner Carver strayed from any possible right-of-way onto national forest land. After Commissioner Carver strayed from the right-of-way, Forest Service Special Agent Dave Young stood directly in the path of the bulldozer and displayed a sign ordering the Commissioner to stop. Although Young continued to display the sign while the bulldozer was on national forest land, Commissioner Carver did not stop his activities. On July 6, 1994, Commissioner Carver filed an affidavit with the County Sheriff requesting criminal charges be brought against Young and another Forest Service employee. The Commissioner asserted that the Forest Service employees lacked any jurisdiction in Jefferson Canyon, which is clearly within the bounds of the

Toiyabe National Forest. The County Sheriff forwarded the affidavit to the Nye County District Attorney, who has not yet acted upon the request for criminal prosecution.

In August 1994, Nye County informed the Bureau of Land Management by letter that the BLM could not enforce its Final Multiple Use Decisions for the Razorback and Montezuma Grazing Allotments because the BLM has not provided proof of ownership of the public lands or proof of constitutional jurisdiction. . . .

In August 1994, Nye County, again acting through Commissioner Carver, informed the Forest Service that the San Juan and Cottonwood Canyon Roads, which were previously closed by the Forest Service and which are located in the Toiyabe National, Forest, were Nye County Public Roads. . . . In October 1994, the Nye County Board of Commissioners voted to reopen the San Juan and Cottonwood Canyon Roads. . . . On October 15, Commissioner Carver again used a county-owned equipment to reopen San Juan Road.

The United States brought this suit against Nye County. . . .

Ownership of the Public Lands within Nye County

The parties do not dispute that, prior to Nevada's statehood, the United States held title to the public lands within the territory that was to become Nevada. Nye County argues that it does not assert a claim of title to public lands, Nye County Opposition at 4, and thus its authority to manage public lands derives from and is limited to the claim of title by the State of Nevada. By statute, Nevada has claimed title to all public lands within Nevada, and thus within Nye County, excluding land located in congressionally authorized national parks and monuments, national forests, wildlife refuges, lands acquired by the consent of the legislature, and lands controlled by the Department of Defense and the Department of Energy. Nev.Rev.Stat. §§ 321.596-321.599. Although Nye County has claimed that Nevada also owns certain of these excluded lands, it has not offered any argument suggesting that Nevada has made that claim. Accordingly, there is no dispute that the United States owns the lands within the national parks and monuments, the national forests, the wildlife refuges, the lands acquired by the consent of the legislatures, and the lands controlled by the Department of Defense and the Department of Energy. The remaining question that this court must decide is whether title to the remaining public land within Nye County passed to Nevada. The court concludes that title did not pass to Nevada, but remains within the United States.

As noted earlier, while Nevada has statutorily claimed the public lands within Nye County, it now concedes that this claim is constitutionally untenable. While this concession is tantamount to a consent to judgment, the court also concludes that the statutory claim is unsupported, unconstitutional, and fails as a matter of law.

Equal Footing Doctrine

In claiming ownership of the public lands within its outer boundaries, the Nevada legislature asserted that title to the unappropriated lands passed from the federal to the state government under the equal footing doctrine. Nev.Rev.Stat. § 321.596(2). "The equal footing

doctrine ensures that each state shares ‘those attributes essential to its equality in dignity and power with other states.’” *Nevada v. Watkins*, 914 F.2d 1545, 1555 (9th Cir.1990). According to findings embodied in Nevada’s statute, Nevada asserts that the original states obtained ownership of the unappropriated dry land as an attribute of their sovereignty at the time of the Revolution. Since Nevada was admitted on an equal footing to the original thirteen states, title to all unappropriated lands necessarily transferred from the federal to the state government as an attribute of local sovereignty.

The Supreme Court has long recognized that certain types of property – specifically lands submerged by navigable or tidal waters – must pass to the states as a circumstance of sovereignty.

Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against the separation from sovereignty must be indulged, in construing either grants by sovereign of the lands to be held in private ownership or transfer of sovereignty itself. For that reason, upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.

United States v. Oregon, 295 U.S. 1, 14 (1935). The question before this court, however, is not the lands submerged by navigable waters passed to the states pursuant to the equal footing doctrine, but whether the dry lands also passed to the states pursuant to the equal footing doctrine. . . .

“[T]his rule represents the American decision to depart from what it understood to be the English rule limiting Crown ownership to the soil under tidal waters.” *Id.*, (emphasis added). Thus, states do not gain title to lands submerged by waters that are navigable-in-fact because the original thirteen states gained those lands at the time of the revolution. The original states could not have gained title to these lands as an attribute of sovereignty since this American rule was not developed until after the revolution. Instead, all states gained title to lands submerged by navigable waters because the Supreme Court decided that this was an appropriate extension of what it understood to be the English rule of sovereign rights to submerged lands.

Briefly looking to the Supreme Court’s decisions indicates that it has held that tidal and navigable waters pass to the states because it understood that, under the English common law, the sovereign owned these lands as a public trust. . . .

The Court extended this holding to the new states in *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). At issue in *Pollard’s Lessee* was whether, subsequent to Alabama’s admission, the federal government could transfer title to lands that had been submerged by navigable waters at the time of statehood. Citing *Martin v. Waddell’s Lessee* for the proposition that the original thirteen states owned the submerged lands for common use in their character as sovereigns, the Court held that Alabama was also entitled to this attribute of sovereignty. *Id.*, 44

U.S. (3 How.) at 229. As this attribute of sovereignty, and its concomitant, title to the submerged lands, transferred to the new states upon their admission, the federal government could not subsequently transfer the underlying title to the submerged lands. As in *Martin v. Waddell's Lessee*, the Court's conclusion arose from its interpretation of the public trust imposed on the sovereign, a trust requiring the sovereign to hold the navigable waters and submerged lands open for public access.

In sum, these cases identify a coherent principle set forth by the Supreme Court that this court must acknowledge. Specifically, the attribute of sovereignty that is so identified with title to submerged lands, the attribute of sovereignty that passed to the original thirteen states, is the public trust to these lands. . . .

At least as important as this general principle underlying the Supreme Court's decisions, however, is that the Supreme Court has held that, title to lands that are not submerged navigable-in-fact or tidal waters, including dry and fast lands, did not pass to the states upon admission. In addition to holding that "if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new state," *United States v. Oregon*, 295 U.S. at 14, the Supreme Court expressly held that title to dry lands does not pass to states upon admission in *Scott v. Lattia*, 227 U.S. 229 (1913). . . .

As in *Scott*, the dry lands within Nye County are neither submerged by navigable nor tidal waters. Nye County has failed to offer any evidence suggesting that, at the time of statehood, lands within Nye County were submerged by navigable or tidal waters. The Court has not held that the ownership of drylands, or lands submerged by non-navigable and non-tidal waters, was an attribute of the original thirteen states' sovereignty. Rather, it has held that these lands do not pass to states upon admission. In sum, the entire eight of the Supreme Court's decisions requires a finding that title to the federal public lands within Nye County did not pass to the State of Nevada upon its admission pursuant to the equal footing doctrine. . . .

More recently, the Supreme Court reaffirmed the broad power of the federal government to retain and regulate public lands in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). In that matter, the Court stated that "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that the power over the public land thus entrusted to Congress is without limitations." *Id.*, at 539, (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). Given this interpretation, the court must conclude that such a broad power to regulate land owned by the United States necessarily includes the power to own the regulated public lands.

Authority to Manage the Public Lands

Prior to this suit, Nye County denied that the United States had any authority to manage the public lands within its boundaries. . . . All parties, including Nye County, now agree with the Supreme Court that

[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact

legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

Kleppe, 426 U.S. at 543. . . .

Nye County argues, however, that merely recognizing that the local and federal governments have concurrent jurisdiction of public lands is virtually meaningless. The court would tend to agree but for Nye County's actions establishing that, prior to this suit, Nye County refused to acknowledge the holding of *Kleppe*. Those actions indicate that, as to Nye County, a declaration is required to establish that the federal government has jurisdiction over the public lands. For example, Commissioner Carver, acting in his official capacity, filed an affidavit to support a criminal complaint against the forest service employees, alleging that they lacked any jurisdiction at a location within the boundaries of a congressionally-established national forest. On another occasion, the Nye County Board of Commissioners required the BLM to offer proof that the federal government owns and has authority to manage public lands. At the Jefferson Canyon road reopening, Commissioner Carver drove the county bulldozer outside of the right-of-way, damaging plant-life, disrupting the national forest, and ignoring the direct order of a federal employee to stop. That Nye County now voluntarily concedes that the federal government has authority over this land is insufficient to moot a question created by Nye County's conduct, although the court will consider the concession as tantamount to a consent to judgment. Accordingly, a declaration that the federal government has power to manage and regulate the public lands within Nye County, just as it has power to regulate the public lands within New Mexico, will not be meaningless. Rather, it will resolve a dispute initiated by Nye County despite clear law to the contrary. . . .

Constitutionality of Resolution 93-49

In Count IV, the United States seeks a declaration that Nye County Resolution 93-49 is unconstitutional and preempted to the extent it applies to roads and other corridors for which no valid right-of-way exists under federal law. Nye County opposes the claim, asserting that Resolution 93-49 is nothing more than a statement of opinion by the Board of Commissioners of Nye County creating neither legal rights, duties nor obligations. . . .

Although Nye County now asserts that Resolution 93-49 created neither legal rights, duties nor obligations, Nye County plainly intended that the resolution would have the effect of law. As an attempt to formally express the opinion or will of the Board of Commissioners, the resolution offers only an example of poor writing. Other than its title, the resolution does not use any language suggesting it is an opinion, view, idea, or but employs language attempting to create a legal right of Nye County in public roads. It declares all ways, trails, roads, and highways on public lands in Nye County to be Nye County Public Roads, declares the rights-of-way for these Nye County Public Roads to be the property of Nye county, requires that the width of all roads be as established by other ordinances, ratifies historic practice as a method of establishing roads, and precludes any action against Nye County or its officers for damage suffered on unmaintained roads. And other than the last sentence indicating an ordinance would follow, the resolution lacks any language of future intent or will.

Neither is the subject of the resolution simply an alteration of administrative rules, a censure, a vote of thanks, or a note of recognition, or an expression of intent to take future actions. Rather, the subject of Resolution 93-49 is one of general applicability, declaring County ownership of existing federally recognized rights-of-way and declaring County ownership of new rights-of-way that are not federally recognized.

In addition, Nye County has relied upon Resolution 93-49 in its chosen field of battle: the reopening of roads. On July 4, 1994, Commissioner Carver used a County-owned bulldozer to reopen Jefferson Canyon road within the national forest. A month prior to the reopening, Commissioner Carver, apparently on behalf of Nye County, informed the forest service: "As you know, on December 7, 1993 the Board adopted Resolution 93-49 which declares certain public travel corridors across public lands within Nye County as Nye County roads. Jefferson Canyon Road is one of the roads considered to be a Nye County public road." . . . This statement and Commissioner Carver's later actions to reopen the road on behalf of the County strongly show that the County did not intend Resolution 93-49 to be merely a statement of opinion. . . .

IT IS ORDERED that Plaintiff United States of America's Renewed Motion for Summary Judgment is GRANTED as to Count I and as to Count IV;

IT IS DECLARED that, as set forth, in this Court's decision, the United States owns and has the power and authority to manage and administer the unappropriated public lands and National Forest System lands within Nye County, Nevada.

IT IS FURTHER DECLARED that Nye County Resolution 93-49 is invalid and unenforceable to the extent, and only to the extent, it applies to ways, pathways, trails, roads, county highways, and similar public travel corridors across public lands in Nye County, Nevada, for which no valid right-of-way exists or is recognized under federal law.

Notes and Questions

1. Place yourself in the position of a rancher who has a grazing allotment on BLM land in Nevada and a CEO of a mining company with an unpatented mining claim within a national forest in Colorado. How would you feel about privatizing these federal lands?

2. ***Preemption of State Law.*** *Kleppe v. New Mexico*, relied upon by the judge in the Nye County case, involved a state challenge to the constitutionality of the federal Wild Free-Roaming Horses and Burros Act of 1971. The statute declares that unbranded and unclaimed wild horses and burros are "an integral part of the natural system of the public lands" and that their management was necessary for "achievement of an ecological balance on the public lands." 16 U.S.C. § 1331. The act protects such animals on public lands of the U.S. from capture,

harassment, and death. After receiving a complaint from a rancher that numerous burros were interfering with his livestock operation conducted on BLM land under a permit issued pursuant to the Taylor Grazing Act of 1943, the New Mexico Livestock Board rounded up 19 burros on federal land and sold them at public auction. In upholding the 1971 act in *Kleppe*, the Supreme Court said:

The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those laws are in conflict with the Wild Free-Roaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear: the state laws must recede.

What development in the evolution of public land policy portends the result in *Kleppe*? After *Kleppe*, under what circumstances can states establish hunting seasons and require licenses for hunting deer and ducks on federal lands within their borders?

2. Collaborative Efforts

The shortcomings of litigation as a means of resolving environmental disputes spurred a wide range of alternative approaches. A very common one is place-based collaboration. Such undertakings have numbered in the hundreds and ranged from semiformal grassroots groups to government-sponsored advisory councils. While such efforts are quite diverse, almost all seek to reach a consensus solution through deliberations that involve all stakeholders who are equally empowered and fully informed.

For example, the Willapa Alliance is a nonprofit organization formed in 1992 to achieve sustainable economic development of Washington State's Willapa Bay; its board includes timber interests, anglers, members of the Shoalwater Tribe, and environmentalists. The Animas River Stakeholder Group was formed in 1994 to address toxic contamination of the Animas River in southwestern Colorado; its members include representatives of mining corporations, federal, state and local agencies, landowners and water users. The New Mexico Water Dialogue is a network of water management councils that grew out of a state directive to use local expertise in water planning; representatives from Indian tribes, industry, private water companies, and utilities sit on the Dialogue's board.

Many of the collaborative efforts concern public lands management. The Applegate Partnership in Oregon, the Flathead Forestry Project in Montana, and the Ponderosa Pine Partnership in Colorado are notable examples.

The following selections present divergent views on such consensus-based efforts.

Questioning Collaboration

Michael McCloskey, *The Skeptic: Collaboration has its Limits*,
28 HIGH COUNTRY NEWS 7 (May 13, 1996)

A new dogma is emerging as a challenge to us. It embodies the proposition that the best way for the public to determine how to manage its interest in the environment is through collaboration among stakeholders, not through normal governmental processes.

Further, it proposes to do this at the community level through a consensus process. Advocates of this notion believe collaboration must be place-based, preferably at the scale of natural units such as watersheds. This idea is being applied both to managing natural resources (national forests) and in determining allowable levels of pollution from industrial plants. . . .

Many community activists like these proposals; they see them as empowering. Many academics praise them, too. And industry likes them. They prefer dealing with community representatives to having to duel with EPA experts at the national level, or with representatives of national environmental groups. One company spokesman recently told an audience: "I don't want bureaucrats telling me how to run my business; I would far prefer to take my chances with people from the community."

At a recent conference I attended on this subject, I heard community activists from Oregon's Rogue River Valley complain bitterly that the national environmental groups were cold-shouldering this process and missing a great opportunity. Apparently we [the Sierra Club] stayed out of the Applegate Partnership because of concerns over the implications of adaptive management proposals for the national forest there. But of six case studies examined, the Sierra Club was not formally involved in any, nor were most other national environmental groups.

There are reasons for this. Industry thinks its odds are better in these forums. It is ready to train its experts in mastering this process. It believes it can dominate them over time and relieve itself of the burden of tough national rules. It has ways to generate pressures in communities where it is strong, which it doesn't have at the national level.

Some academics see the situation differently. They draw a contrast between what they call "solution-oriented" community groups that welcome this trend, and the national-level environmental groups that they call "concern-oriented" groups, which they see as disagreeing and holding back. Obviously they imply that we resist solutions and only want to perpetuate conflicts.

Enthusiasts make the case for reliance on stakeholder collaboration in these terms: Community-based stakeholder collaboration, they claim, will produce more creative and acceptable solutions. Participants will have a superior understanding of local site conditions and will bargain with each other to produce "win/win" solutions. Thus, they will overcome problems with government by remote control, "one-size fits all" prescriptions, and unimaginative bureaucratic responses. By actively participating in finding solutions, buy-in by the community

will be obtained; the ideas they forge will have political momentum. This, they assert, adds up to empowerment of communities that were formerly kept in a submissive position by agency bureaucracies.

By moving beyond “failed adversarial approaches,” they argue, polarization and stress in communities will be reduced and working relationships improved. Trust among sectors of the community will be increased. Agencies will act more as facilitators and come to be trusted more, too. Community environmental activists also believe that the solutions will be better and more sustainable.

However, many in our ranks have a different take on the impact of moving too far in this direction. They want to know whether these collaborators are acting in an advisory role with respect to public resources or whether they are being given power. The literature is obscure on this key point. The situation may be quite different where we are talking more about private land (which timber companies don’t want to talk about).

A fundamental problem also lies in the disparate geographical distribution of constituencies. This re-distribution of power is designed to disempower our constituency, which is heavily urban. Few urbanites are recognized as stakeholders in communities surrounding national forests. Few of the proposals for stakeholder collaboration provide any way for distant stakeholders to be effectively represented.

While we may have activists in some nearby communities, we don’t have them in all of the small towns involved. It is curious that these ideas would have the effect of transferring influence to the very communities where we are least organized and potent. They would maximize the influence of those who are least attracted to the environmental cause and most alienated from it.

Even in places where local environmentalists exist, they are not always equipped to play competitively with industry professionals. There may be no parity in experience, training, skills or financial resources; parity is important both during negotiations and in follow-on phases focusing on watchdogging agreements. And we should all be mindful of the fact that these processes are very time-intensive; they consume huge amounts of time, wear people down, and leave little for regular environmental activism.

It is troubling that such processes tend to de-legitimate conflict as a way of dealing with issues and of mobilizing support. It is psychologically difficult to simultaneously negotiate and publicly attack bad proposals from the other side. This tends to be seen as acting in bad faith. Too much time spent in stakeholder processes may result in demobilizing and disarming our side.

And, instead of hammering out national rules to reflect majority rule in the nation, transferring power to a local venue implies decision-making by a very different majority – in a much smaller population. But it gets worse. By then adopting a consensus rule for that decision-making, small local minorities are given an effective veto over positive action. Thus, the process has the effect of disempowering both national as well as local majorities. Those not

represented by any organized interest in a community may be totally disempowered, and if the status quo is environmentally unacceptable, this process gives small minorities a death grip over reform. Any recalcitrant stakeholder can paralyze the process and defy the popular will. Only lowest common denominator ideas survive the process.

The Limits of Confrontation

Ed Marston, *Squishy-soft Processes – Hard results*,
32 HIGH COUNTRY NEWS 9 (August 28, 2000)

In Nye, Mont., and in Paonia, Colo., two difficult disputes were recently resolved by people sitting together at a table. In Montana, the fight was about hardrock mining and 1,000 jobs. In Colorado, it was about coal mining and several hundred jobs. Each dispute involved tens of millions of dollars in investment capital, public land and ways of life.

This is hardball stuff. But an approach usually portrayed as squishy-soft – collaboration – resolved the conflicts without lawsuits. Moreover, the settlements added to the prestige and clout of the two relatively small, local environmental groups that signed the agreements.

Coincident with these agreements, former executive director and chairman of the Sierra Club, Michael McCloskey, now retired, has warned again, in recent talks and papers, that widespread adoption of collaboration would betray democracy. He said in one talk that wide use of collaborative processes “would effect a massive transfer of power, a repudiation of the progress of the past century, a collapse in environmental gains, and a grievous wound to the practice of democracy.”

He says that collaborative processes also try to paper over what he sees as a vast chasm between urban and rural people. “It (the Sierra Club) knows that the rural-urban split has not gone away – that the views, interests and aims of rural and urban populations will diverge sharply. It is not ready to surrender national interests in the environment to rural, local interests.”

These attitudes do not just come from national groups. The July 2000 newsletter of the very local, very grassroots Hells Canyon Preservation Council also attacks collaboration. . . .

McCloskey and the Hells Canyon group both see loggers, miners and ranchers using the Trojan Horse of collaboration to grab control of the West. . . .

What did the [two collaborations mentioned above] . . . just achieve? In Montana, politics prevents state environmental agencies from protecting water quality. In Colorado, the federal Bureau of Land Management and the Forest Service lacked the will to deal with railroad noise and road blockage and other problems caused by underground coal mining. In response to this failure of government, two different environmental groups worked out direct agreements

with the mining companies. Both are hard-nosed contracts involving bonds, extra expenditures by the companies, and long-term monitoring.

The mining companies didn't lightly incur the added expense and the anger of their fellow corporations. They signed because they otherwise faced costly delays from appeals or lawsuits brought by these groups based on state and federal laws.

But financial pain wasn't enough to bring the two sides together. These agreements were possible because the environmentalists were worried not just about air and water and wildlife, but also about jobs for those they live among. In both cases, environmental passion was intertwined with broader community concerns.

Despite the fact that local needs were met, no national or state laws were undercut, and if anything, democracy was strengthened. In Montana, the environmental standards were raised by the contract between the four-decade-old Northern Plains Resources Council and a palladium mining company. (Palladium is used in automobile catalytic converters.) In Colorado, the Western Slope Environmental Resource Council negotiated an agreement with two coal companies to ameliorate the off-site impacts. (The coal in question is very low in sulfur, and therefore desirable under air-quality standards.)

But legalities are not the only issue here. McCloskey and the Hells Canyon group also charge that collaboration undercuts the desires of the national owners of the federal lands. They have a point. Most members of environmental groups, whether local or national, would probably prefer to see no mining. They want the federal lands to be pristine, as shown by the Sierra Club vote demanding an end to logging on federal land. This is probably where the urban-rural divide is deepest, and where local environmental groups trying to bridge the divide still find the most difficulties. In addition, for ease of communication, it is easier for some groups to paint rural Westerners as all straining at the federal leash that prevents them from cutting down the last trees, damming the last streams and overgrazing the last public grasslands.

...

But there are also places where local environmental groups have learned what they can and cannot win from warfare. They also have a somewhat different view of the Interior West than most of those who are only able to visit. They understand that little of the rural West is "pristine"; most of it, even beautiful places, has been burned and grazed and logged and plowed in the past. And because they live here, and have become attached not just to the land but also to their neighbors, they are probably more willing to strike a different balance than those who love the region but who do not live here.

So there's an element of ingratitude. For decades, local groups depended almost solely on the national clout wielded by the major environmental organizations. And now a few of them, operating under the umbrella of this protection, are making their own arrangements.

It may be ungrateful, but it is also very healthy. It means the West is maturing. It is no longer everywhere split into two warring camps where solutions can come only from Congress or courts or the White House. Agreements are possible on the ground. One can argue over the

details of those agreements. But it's a mistake to raise the stakes by saying that extractive interests are grabbing control of the West, that environmental gains are being lost, and that democracy is in peril. Instead, in a few Western communities blessed with local leadership and the right circumstances, citizens and companies have overcome personal and ideological antipathy to strike an agreement well within our laws and practices and values.

Notes and Questions

1. Which of the two views on collaborative processes, McCloskey's or Marston's, is more persuasive to you?

2. ***The Quincy Library Group.*** Perhaps the best known of all the collaborative efforts is one that began at the local library in Quincy, California, in the early 1990s. Environmental lawsuits to stop timber sales on national forests throughout the Sierra Nevada led to the adoption of new forest management guidelines to protect the California Spotted Owl. The guidelines reduced timber harvests and seriously impacted the timber-dependent economy of the Quincy area. Local environmentalists, a county supervisor, and Sierra Pacific Industries – the largest private landowner in the state – gathered to hammer out an agreement. The U.S. Forest Service sent observers to meetings of the Quincy Library Group, but was not invited to participate in the negotiations. National environmental groups, such as the Natural Resources Defense Council and The Wilderness Society, were also absent. Timothy P. Duane, *Community Participation in Ecosystem Management*, 24 *ECOLOGY LAW QUARTERLY* 771 (1997).

Since the Forest Service did not agree to QLG's final plan for management of the affected national forests, it was necessary for Congress to act. But the bill reported out of the House Resources Committee included a provision not anticipated by the QLG: it exempted logging on 2.5 million acres from most federal environmental laws, including the National Forest Management Act and the Endangered Species Act. When Congressman George Miller (D-CA), a strong environmentalist, objected, this "sufficiency language" was deleted.

Reportedly, the Quincy Library Group did not know about this effort to significantly change their plan. One leader, attorney Michael Jackson, was quoted as saying, "We just started with a Republican bill because the Republicans control Congress." One veteran political reporter responded as follows:

Assuming sincerity, this betrays extraordinary naivete. Miller, who has been around Capitol Hill for a while, said there was nothing improvised about the way the bill went through committee. "It was a very carefully drafted piece of legislation," he said. According to Miller, the folks who put it together didn't intend for it to be amended on the [House] floor. They intended to pass it as it came out of committee.

So Michael Jackson and his allies are the collaborationists who had to go to Congress because they couldn't collaborate, who when they got to the big city

were almost snookered out of their BVDs by the sharpies, who finally got their behinds saved by the folks who annoy them most, and who haven't yet figured that out.

Jon Margolis, *How a Foe Saved the Quincy Library Group's Bacon*, 115 HIGH COUNTRY NEWS 13 (Sept. 29, 1997).

3. A participant in the complicated San Francisco Bay-Delta negotiations has observed, "[C]onsensus works best when fear is equitably distributed." Often the necessary "fear" is generated by a species listing under the Endangered Species Act of 1973, examined in Chapter 6. One study of 105 instances of cooperative ecosystem management found that 81 percent involved a listing of a local species under the ESA that generated uncertainty and a strong incentive to reach agreement. STEVEN L. YAFFEE, ET AL., ECOSYSTEM MANAGEMENT IN THE UNITED STATES: AN ASSESSMENT OF CURRENT EXPERIENCE 7 (1996).

4. Often these collaborations utilize negotiation or mediation. One author has pointed out the shortcomings of these methods for the environmental stakeholder as follows:

One of the most seductive aspects of environmental mediation is its apparent straightforwardness. Negotiations give the appearance of being something that any relatively intelligent person can do well. In reality, negotiating is a highly sophisticated and complicated art.

For the inexperienced, it is easy to get the impression that negotiation simply involves sitting at a table and trading concessions with one's opponents in a relatively civilized manner. In fact, however, good negotiators often view the process as something akin to a long military campaign, where the side with the most resources and the best strategies and tactics will come out the winner. Importantly, experienced negotiators have at their disposal a large number of negotiating tricks and ploys designed to encourage their opponents to make poor decisions.

On balance, environmental mediation is a process that should be approached with much caution and skepticism. In spite of the extravagant claims, mediation's potential is modest and its problems are many. It is an intensely political phenomenon – it contains its own political biases and it is inseparably linked to all the power-plays and struggles over principles and values that characterize environmental politics as a whole.

The fundamental flaw underlying any attempt to rely on dispute resolution to resolve public policy conflicts is that such well-meaning efforts ultimately rest on a false understanding of what politics is all about. Politics is not simply about communication, it is also about power struggles. It is not only about common interests, but about conflicting interests as well. And it not only involves horse-trading, but competition between conflicting values and different moral visions.

DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987)

Section C. The Reagan Assault

The Reagan Antienvironmental Revolution

SAMUEL P. HAYS, BEAUTY, HEALTH, AND PERMANENCE:
ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985, 491 - 494, 497 (1987)

The presidential administration of Ronald Reagan brought a new era in environmental affairs. . . . Earlier Democratic and Republican administrations had responded to environmental objectives with some degree of favor. But the Reagan administration began with a pervasive and determined commitment to turn the environmental tide. Environmentalists were rejected as legitimate participants in the give-and-take of public affairs. The administration set out to undo the environmental work of the preceding two decades of Republican and Democratic leadership.

Implicit in this radical thrust was an assumption that environmental objectives were not deeply rooted in American society and politics but were the demands of a few environmental leaders rather than of the greater public. The environmental phenomenon, it was thought, could be swept aside by vigorous presidential leadership. The resulting drama tested the strength of popular support for environmental objectives, which proved to be much greater than the administration had anticipated. . . .

The direction of the Reagan antienvironmental drive became clear in the last few months of 1980. During the presidential campaign Reagan had made some strong antienvironmental remarks that his campaign managers feared would alienate a substantial portion of the voting public. An advisory committee was formed of Republicans who had been prominent environmental leaders in the early 1970s, many of them officials in the Nixon administration. Among them were Russell Train, who had been head of both the Council on Environmental Quality and the Environmental Protection Agency; Nathaniel Reed, who had been assistant secretary of the interior in charge of the national parks and the U.S. Fish and Wildlife Service; and William Ruckelshaus, whom Train had succeeded as EPA administrator. This group provided the Republican campaign with a more positive environmental image. It advised the campaign managers and, after the election, started to shape an environmental program for the new administration.

But the Reagan victory brought to the fore a set of advisers, who looked forward to an opportunity to make extensive changes in public policy. They viewed these former Republican environmental leaders as “radical extremists,” turned aside their recommendations, and established a new committee to redirect the future administration’s policies. The new advisers

cut off relationships not only with the leaders of citizen environmental organizations but with these “moderate” Republican leaders as well. Only later, after the new policies had created a vigorous backlash, did Reagan’s advisers turn to them again.

There were three closely related aspects of the Reagan antienvironmental revolution: ideology, the business community, and executive power. The administration spoke through an ideology intended to reduce governmental action and enhance the private economy. The most extensive expressions of this view came from the private enterprise “think tanks,” the American Enterprise Institute and the Heritage Foundation. Regulatory activity and public landownership, for example, were to be sharply reduced in order to promote private enterprise as a matter of principle. It would be difficult to identify in the American past so thorough an attempt on the part of a presidential administration to apply a political ideology directly.

The business community was an equally important ingredient in the administration’s antienvironmental drive. For two decades it had led the opposition to environmental policies, but it had been frustrated by the persistence of environmental objectives. It had been galvanized especially by the favorable environmental attitudes of the Carter administration, so that by 1981 it was primed to carry out a counteroffensive. As the administration leaders clarified their antienvironmental attitudes, leaders of the business community rushed to take advantage of the opportunity. The haste led to actions that generated a political backlash against business. By 1984, opinion studies indicated that the public considered the business community to be less reliable than environmentalists as a source of information and public policy. Leaders in Washington ranked business groups far below environmental ones in their effectiveness.

Enhanced executive power was also central in the Reagan antienvironmental revolution. If the administration were to forge rapid and fundamental change, it would do so not through Congress or the courts but through executive action. New policymakers would bring about new policy and enhance executive authority in the face of the courts, Congress, and the agencies. One of the least observed of the changes in governance during the Reagan administration was the growth of the power of the Executive Office of the President vis-à-vis other branches of federal and state government. The key to that change was the Office of Management and Budget, which lay beyond the reach of agencies, courts, and Congress and sought to change policy by both budgetary and nonbudgetary means.

The central strategy in this drive was to change policy by changing policymakers. Hence Reagan’s advisers insisted that new appointees in the environmental agencies share in the administration’s ideology. In this they often relied on advice, and even lists of favorable and unfavorable candidates, provided by those sympathetic to their objectives, such as a Heritage Foundation and the U.S. Chamber of Commerce. . . .

While the Reagan administration attacked on a wide front in attempting to change environmental policies, the central focus of its actions was the Office of Management and Budget (OMB). This agency had, over the years, been modified from an instrument largely to shape budget presentations to Congress into a general tool of executive authority. . . . The OMB came to exercise approval over proposals to gather information, annual reports, initial recommendations for agency action, and final regulatory proposals. Although its actions were

related to federal expenditure in some way, in a broader context they served primarily to provide more centralized executive control.

. . . Throughout the Reagan administration, the implication of this remarkable long-term constitutional change aroused some concern and comment in Congress and the media but did not lead to major public debate. Yet it constituted one of the most significant elements of the Reagan antienvironmental revolution.

1. Presidential Appointees and Policies

Law is, of course, critically important in protecting and restoring the environment. But the effectiveness of the statutes depends greatly on the individuals chosen to implement them. The next selection describes some of these officials who held positions in the first two years of the Reagan presidency. The second excerpt, by Professor Richard Lazarus, recounts their legacy.

The Counterrevolution

PHILIP SHABECOFF, A FIERCE GREEN FIRE:
THE AMERICAN ENVIRONMENTAL MOVEMENT 203-210 (1993)

Whatever his motives, however, Reagan's policies and especially his appointments constituted the most organized, sustained, and virulent opposition ever encountered by the environmental movement. In effect, he gave a free hand to the many political appointees in key positions throughout his administration who regarded environmental laws and values as an impediment to the free-market system. The tradition of bipartisanship in protecting the nation's environment was brought to an abrupt halt, at least in the executive branch – Congress for the most part continued to cling to the environmental values it had discovered in the 1970s. The democratization of public lands and resources that had begun with Theodore Roosevelt and the Progressive movement was thrown into reverse. The counterrevolution had found its leader.

The Reagan environmental counterrevolution was made manifest in . . . one James Gaius Watt. . . . Appointed by the newly elected President Reagan as Secretary of the Interior, Watt had led a right-wing legal foundation [the Mountain States Legal Foundation] that represented businesses in fights against government regulation. He quickly became the leader and symbol of the new administration's efforts to halt and roll back federal activism in protecting the environment. . . . [H]e introduced policies aimed at transferring control of public lands and resources to private entrepreneurs at a rate that had not been seen since the great giveaways of the nineteenth century.

Like the administration he represented, Watt described himself as a conservative but acted as a radical – radical since his actions marked a sharp departure from the national policies

of previous decades. Environmentalists, he frequently asserted, had caused the “pendulum” of public policy to swing too far toward conserving and away from making efficient use of the nation’s resources. He questioned their motives, suggesting at one point that their real goal was to overthrow the political system of the United States. To assure continued economic growth and protect national security, he repeatedly insisted, it was necessary to inventory all public holdings and then transfer potentially productive holdings to the private sector so they could be developed for the good of the nation. . . .

Mr. Watt, a Christian fundamentalist . . . was serenely confident that he was carrying out the bidding of the Almighty. Testifying before the House Interior Committee about why he was speeding development of public lands and resources, he replied that there was no point in conserving resources for posterity because “I do not know how many future generations we can count on before the Lord returns.” To members of another congressional panel he asserted that he was changing land and resource policies so drastically because “failure to know our potential, to inventory our resources, intentionally forbidding proper access to needed resources, limits this nation, dooms us to shortages, and damages our right as a people to dream heroic dreams.” . . .

Aggressive, bold to the point of recklessness, and clothed in impregnable self-righteousness, Watt did not seek to build a consensus for his policies Within weeks of taking office in 1981, he announced that he would open the entire billion acres of the Outer Continental Shelf to bidding, exploration, and drilling by oil companies. He offered millions of tons of publicly owned coal to mine operators at what an investigative commission later determined were giveaway prices. He did little to enforce the strip-mine law. He tried, unsuccessfully, to open wilderness areas to energy development and encouraged economic activity in the federal wildlife refuges. Consistent with his views that property is best used in private rather than public hands, he declined to spend money authorized by Congress to buy additional land for the National Park System. He tried to make the National Park Service subservient to political control and sought to give the private concessionaires who ran the hotels, restaurants, and gift shops increased authority in operating the parks and making park policy. He pitched in enthusiastically to make a success of President Reagan’s “privatization” program – an effort to sell off as much as 30 million acres of public lands as well as other property in order to raise billions to lower the national debt. When real estate operators made it clear that they did not want so much property dumped on the market, and the privatization effort foundered, Mr. Watt said he had never been in favor of the program. He purged the Interior Department of civil servants he considered ideologically out of step and boasted that he was forcing the bureaucracy to “yield to my blows.”

. . . Watt’s agenda was also Reagan’s agenda. His policies were faithfully tailored to carry out the President’s plans for shifting the balance of power away from the public interest to the private interest. But Watt’s provocative style brought him wide notoriety and made him the focus of much of the unhappiness and anger generated by the Reagan administration’s environmental policies. Within months, the National Wildlife Federation, the biggest and one of the most cautious of the national conservation groups, whose membership included a large proportion of Republicans, was calling for his resignation. The Sierra Club and Friends of the Earth circulated a nationwide petition for his removal, which attracted millions of signatures. . . . Although he had allies among the big western mining, ranching, and energy interests – the

Sagebrush Rebels – and was supported by some western state governments, and although he was popular among the ultraconservatives of the Republican Party, it was soon clear that Watt was a political liability to the President. By October 1983, he was forced by the White House to resign amid a fire storm of criticism.

James Watt was only one of many Reagan appointees who had represented the interests of the very industries they were intended to regulate and were ideological or financial allies of those industries. The environmentalists repeatedly charged that the President's environmental appointees were "foxes guarding the henhouse."

As head of the EPA, Reagan installed Mrs. Anne M. Gorsuch – later Anne Burford after she married Robert Burford, a rancher and mining engineer who came to Washington at the same time to take over the Interior Department's Bureau of Land Management. Both had been members of a clique, self-styled "the crazies," within the Colorado state legislature, which consistently fought against federal environmental regulation. Both of them, along with Watt, were recommended by Joseph Coors, the Colorado brewer, a friend of Reagan's who had extensive mining and energy interests in the West that made use of federal resources. Coors was a founder of the Mountain States Legal Foundation, which Watt had headed before taking over the Interior Department.

A bright, articulate, and attractive woman with a manner that projected no-nonsense efficiency, Mrs. Burford came to Washington with firm ideas about changing the environmental policies of the federal government but virtually no knowledge about how the federal government operated. "She had no management experience, no experience in Washington, D.C., and no in-depth knowledge of environmental policy," said J. Clarence (Terry) Davies, an officer of the Conservation Foundation who later became assistant administrator of the EPA for policy during the Bush administration. Upon assuming command of the EPA, Burford proclaimed that her function would be to help advance the Reagan administration's goal of "industrial revitalization." She said that she wanted to ease the regulatory "overburden" that the environmental laws had placed on industry and that she was not interested in how many cases the agency filed against violators of the law because that amounted to no more than "bean counting."

Mistrustful of the career professionals on the agency's staff, Mrs. Burford surrounded herself with political appointees, many selected by the White House, who shared her ideological perspective and, in many cases, came straight out of the industries the agency was intended to regulate. They included Robert M. Perry, who came from the Exxon Corporation, as general counsel, and Frank A. Shepherd, a lawyer who represented General Motors, as associate administrator for enforcement. As special assistants she had Thornton Field and James Sanderson, both lawyers who had represented the Coors interests. Rita Lavelle, who had worked as a public affairs executive for Aerojet General Corporation, which the agency was supposed to be requiring to clean up its toxic wastes, was named assistant administrator in charge of the agency's toxic waste programs. Many of the experienced career officials in the agency quit in disgust or were forced to resign. Those who remained hunkered down and tried not to do anything that would arouse the ire of the political executioner. A hand-lettered sign hanging in the back of the office of a middle level official summed up the prevailing mood. It said: "No

Good Deed Goes Unpunished.”

Burford eventually came to appreciate the talent and dedication of the civil servants at the EPA By the time she did, however, it was too late. Ideological arrogance, indifference to due process, favoritism to industry, and the political appointees’ antagonism to regulation soon led the agency into deep trouble. Participants in a meeting in Burford’s office reported that she had intimated to executives of an oil-refining company that they would not be prosecuted if they ignored the rules requiring a reduction of lead in gasoline. The agency planned to suspend a regulation forbidding hazardous liquid wastes in landfills, allowing the disposal of such wastes to continue, particularly in a landfill outside Denver which was heavily used by the Coors Company to dump hazardous wastes.

In 1982, Congress began a series of investigations into the agency’s operations, most of them concerning the Superfund law. It found evidence of cronyism with industry, illegal private meetings with representatives of regulated companies, and sweetheart deals in which chemical waste dumpers were allowed to settle with the agency at a small fraction of what it would cost to clean up the dangerous mess they had created. When Mrs. Burford, acting on instructions from the White House Office of Legal Counsel, refused to turn over documents sought by congressional investigators, she was cited for contempt of Congress.

To borrow a phrase from the Watergate years, Mrs. Burford was left by the White House to twist slowly, slowly in the wind. The Justice Department told her it would not represent her in the contempt proceedings, even though she had incurred the wrath of Congress by following the orders of the President. In March 1983, she resigned, at least temporarily broken in spirit. More than twenty other political appointees of the agency had to quit. Rita Lavelle was sentenced to six months in prison for lying to Congress, although of all the Reagan appointees at the agency she was probably the most naive. Burford and Lavelle both suspected that they bore the brunt of the scandal because they were women.

By the time Burford departed, morale at the EPA was shattered. Much of the professional talent had left. Its programs were in shambles. Its credibility with Congress, the media, and the public had evaporated. The agency had certainly been taken off the back of industry.

But the dismantling of the environmental agency also produced a strong reaction from Congress and from the American public, which continued to support environmental protection even while it accepted other Reagan administration initiatives to reduce the size and scope of government. The scandal at the EPA proved to be the most serious political threat faced by Reagan during his first term. He was forced to bring William D. Ruckelshaus, the first EPA administrator, back to the agency to restore order. Ruckelshaus, who had resigned as Deputy Attorney General rather than fire Watergate special prosecutor Archibald Cox during the 1974 “Saturday Night Massacre,” enjoyed a reputation for integrity and independence. He managed to bring a measure of stability to the agency and to reduce public distrust. But serious, perhaps permanent damage had been done to the EPA and its reputation.

Two years after she was forced from office, Anne Burford, still smarting from the shabby

treatment she had received at the hands of the White House, said that the Reagan administration “has no commitment to the environment and no environmental policy.”

It was not just the EPA. In the Reagan years, most of the federal offices responsible for the environment became foxes’ dens for profitmaking special interests. These political foxes did not have to sneak into the henhouses through a hole in the floor. They were handed the key to the front door and turned loose on the chickens. . . .

But it was the President’s power over the purse that proved most potent in bringing environmental reform to a near standstill. The Office of Management and Budget, presided over in the early years of the Reagan administration by David Stockman, the “*Wunderkind* of budget-cutting conservatives and mastermind of environmental deregulation,” enthusiastically set about bleeding the already demoralized and undernourished EPA and conservation programs at other agencies. Denying the environmental regulators money and workers was sufficient to render them weak and ineffective without changing the laws.

So enthusiastic was the budget office about slashing funds for the EPA that Anne Burford, hardly a big-spending New Dealer, protested to the President. In 1981, as the Reagan administration was drawing to the end of its first year, Stockman and company proposed to hack off more than a third of the environmental agency’s funds. This was after Congress had just given the agency a major new antipollution program to administer when it passed the Superfund law. Burford complained that a cut of that size would leave the agency incapable of carrying out the programs mandated by statute and throw it into disarray. By the end of Reagan’s first term, the EPA budget, after discounting for inflation, was about where it had been a decade earlier despite a much heavier work load required by new laws. . . .

The Reagan Revolution That Wasn’t

RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 102 - 105 (2004)

Quite surprisingly at the time, the otherwise very popular President Reagan achieved very little of his regulatory reform agenda in the area of environmental law. . . .

. . . Secretary Watt no doubt accomplished more of his agenda [than did Anne Burford] at EPA. He had previously worked at Interior and, therefore, knew how to accomplish bureaucratic change more quickly. Watt also knew that a secretary of the interior has a distinct policymaking advantage over an EPA administrator because the relevant statutes had historically conferred on the secretary considerable discretionary authority as manager of the nation’s public lands. Secretary Watt could accomplish substantial change without congressional agreement and often in a less politically visible, decentralized fashion. From this position, Watt expanded oil and gas leasing on the outer continental shelf, accelerated mineral leasing of public lands, reduced land acquisitions for national parks, and transferred more authority to private ranchers for the management of federal rangelands.

Watt did not achieve his more sweeping proposed reforms, however, because he failed to anticipate the extent to which public land law had gradually changed during the decades preceding his tenure, incrementally reducing the secretary's discretionary authority. By the time Watt became secretary, the position no longer enjoyed virtually unchecked authority to manage the public lands. During the 1970s, Congress had added significant procedural and substantive requirements to many public land laws, and the federal judiciary had displayed a willingness to oversee the enforcement of those requirements. As a result, although Watt certainly accomplished more at Interior than [Burford] did at the EPA, his accomplishments, too, had a surprisingly brief impact. . . .

Even more important, Congress enacted none of the Reagan administration's proposals to reduce the various federal environmental and natural resource laws. Nor were any of the administration's formal efforts to reduce the reach of the environmental protection laws through administrative and regulatory change enduring. Many of these initiatives were so poorly received when proposed that they were abandoned as soon as they were challenged. Many other policies resulted in lawsuits by environmental organizations and were ultimately struck down by the courts. The federal courts, especially in the years before Reagan's own appointments to the federal bench rose in their influence, included many judges generally sympathetic to the goals furthered by the environmental laws of the 1970s. These judges stood ready to guard against the misdirection of environmental policies by the executive branch, striking down what they perceived to be the Reagan administration's flouting of federal environmental statutory mandates.

To be sure, some of President Reagan's proposed reforms survived political controversy and formal legal challenge. There was increased exploitation of natural resources on public lands and on the outer continental shelf, and there were administrative changes to environmental protection programs, including regulatory flexibility under the Clean Air and Clean Water Acts. The administration redefined the meaning of "source" under the Clean Air Act in a way that permitted major sources of pollutants to increase some emissions without triggering the strictest control requirements. And the U.S. Army Corps of Engineers expanded the use of "nationwide permits" under the Clean Water Act to allow for more development within wetlands in the absence of individual permitting proceedings. . . .

Ironically, it might well be that more reforms intended to increase environmental law's flexibility and cost sensitivity would have been successfully adopted and implemented in the absence of a Reagan presidency, because those measures could have been debated without the tremendous political controversy surrounding Reagan's environmental policies. Even some supporters of President Reagan have openly speculated that his environmental appointees managed to retard any possible reform effort by discrediting their own initiatives. . . .

Simply put, officials in the Reagan administration struggled to sell any meaningful reforms, regardless of their actual merits. The mere association of the reform with the administration tended to destroy its credibility, as both Watt and [Burford] further polarized debates surrounding environmental matters. No doubt for this reason, the harshest critics of the early Reagan environmental policies were conservatives who had supported the significant reforms that the administration itself had discredited.

For these reasons, much of the last six years of the Reagan administration and the first two years of the subsequent Bush administration, closing the 1980s, were marked by efforts on the part of those administrations to distance themselves from the debacle of the first two years of the decade. To restore the credibility essential to the working of the EPA, President Reagan was effectively compelled to turn to William Ruckelshaus in 1983. . . . While Ruckelshaus was with the timber industry when asked to return to the agency, he still possessed the stature and credibility necessary for the position based on his successful term as the EPA's first administrator. When Ruckelshaus quietly left the agency just before Reagan's second inauguration in January 1985, he was replaced by his deputy, Lee Thomas. Thomas was not nearly as well known as Ruckelshaus nationally, but he brought to the position a similar reputation as a professional, nonideological administrator committed to responsible implementation of the agency's statutory mandates.

Secretary Watt's successor, William Clark, was not nearly as well received as either Ruckelshaus or Thomas, but he took care during his tenure at Interior to avoid the political landmines both laid and set off by his predecessor. The rhetoric of the Sagebrush Rebellion that had dominated the 1980 campaign and the Reagan administration's first heady months all but disappeared. Indeed, except as mere political rhetoric, such extravagant proposals lacked substantial support even among many Republicans in the western United States. Most westerners enjoyed the substantial recreational opportunities offered on the public lands; those opportunities, however, were at risk if those public lands either went into private ownership or were managed pursuant only to state laws that lacked the kind of protection for recreational interests found in federal law. In addition, there was reason to believe that the federal government's selling off grazing lands might lead to *less*, not *more* grazing, because environmental and recreational interests might be able to outbid ranchers for the property. Somewhat paradoxically, therefore, selling the public rangelands could have left ranchers worse off, as they lost not only the subsidy of federal management, but even any possible right of access.

Notes and Questions

1. In your view, do the accounts by Shabecoff and Lazarus describe politics as usual – or something more?

2. ***The Land and Water Conservation Fund in the 1980s.*** The Land and Water Conservation Fund Act of 1965 was introduced in Chapter 1, Section C. The following selection describes how it fared under the Reagan administration.

. . . [T]he Fund is experiencing hard times. Shortly after taking office in early 1981, then Secretary of the Interior James G. Watt declared a moratorium on spending moneys appropriated from the LWCF for further acquisitions, despite a large backlog of tracts to be acquired pursuant to congressional

authorization. At the same time, the Reagan Administration unsuccessfully proposed legislation to divert LWCF receipts into rehabilitation of park facilities. During 1983, the Administration continued its attempts to bar the states from using any Land and Water Conservation funds and the moratorium confined federal agencies' use of appropriated moneys to a limited range of emergency-like situations. In fiscal year 1983, the Department of the Interior failed to use \$34.4 million that Congress had appropriated for purchase of national park lands alone. The Department's actions apparently fit a pattern of Reagan Administration hostility to federal land ownership for public purposes.

Shortly after James G. Watt resigned as Secretary of the Interior in November 1983, his successor, William P. Clark, announced that he was altering the moratorium on acquisitions with LWCF money, but he did not repudiate it. Secretary Clark stated that he would request Congress to authorize spending \$100 million to acquire national park inholdings and \$57 million for national wildlife refuges and wetlands. The Secretary's brief announcement notwithstanding, the available evidence indicates that the moratorium remains substantially in effect. Most notably, Secretary Clark has announced renewed acquisition activity for only two of the four federal land systems that qualify for funds under the LWCF Act, and then only for inholdings, although the LWCF can be used for additions to existing units and for new units. Moreover, the Secretary made no mention of matching LWCF grants to the States, a major function of the LWCF program before 1981.

Robert L. Glicksman and George Cameron Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUMBIA J. ENV'TL L. 125-127 (1984).

2. Executive Office Oversight of Federal Agencies

The rapid growth of environmental regulation in the early 1970s prompted the Nixon administration to institute a program to review federal agency rulemaking. Every president since has done so as well, and the breadth and stringency of such review has increased over time. These review programs consistently have been entrusted to the Executive Office of the President, not the executive branch agencies themselves (although the latter may also have separate internal review processes). Under President George W. Bush, regulatory review reached an unprecedented level. Concerns have mounted that such oversight injects political and ideological considerations into the process of rulemaking, thereby thwarting environmental agency initiatives and congressional mandates requiring environmental protection.

To a greater or lesser extent, each president's executive review program incorporated

cost-benefit analysis (CBA). Cost-benefit analysis is widely used in public and private decisionmaking and has been used for decades to evaluate projects and programs that have environmental consequences, such as federal water resources projects. Simply put, CBA attempts to weigh the costs a policy, a proposed development project, or administrative rule is likely to impose against the probable benefits of the policy, project or rule. Under this framework, those doing the evaluation rely on markets and hypothetical markets to put monetary values on environmental and other affected resources.

Each administration has given its own name to its version of regulatory review. President Nixon sought to reassure the business community that environmental regulations would be adopted only with its input. In April 1970 – even before he formally proposed creation of the EPA – Nixon issued an executive order creating the National Industrial Pollution Control Council, comprised of sixty-three top corporate executives. The Council was intended to allow business to regularly communicate with the President, the new CEQ, and other officials concerning environmental matters. The Council regularly lobbied the White House to block or weaken environmental regulatory proposals.

Nixon also created the Office of Management and Budget (OMB), renaming the former Bureau of the Budget and assigning it the new role of conducting oversight of agencies. He established a “Quality of Life” (QOL) review program coordinated by the OMB that required agencies to submit their proposed regulations for review by other federal agencies before publication as draft rules. The purpose was to ensure that consideration was given to the economic impact of new regulations. Although QOL review was supposed to apply more broadly, only EPA regulations were actually subjected to such oversight. President Ford continued the QOL review program and, concerned about growing inflation in the economy, broadened the type of analysis required to include “inflation impact statements.”

Under President Carter, the QOL program was discontinued. It was replaced by a more comprehensive regulatory review program established by Executive Order 12,044 issued in March 1978. This order required all executive branch agencies to prepare a “Regulatory Analysis” for major regulations (usually those which would have an economic impact of \$100 million or more). OMB was given responsibility to ensure that agencies complied. In contrast to the QOL program, the Carter review process was designed to respect the rulemaking procedures required by each agency’s statutory directives and the Administrative Procedure Act. Furthermore, under Executive Order 12,044, reviews occurred after publication of the proposed regulation and summaries were available to the public. The Carter administration program emphasized consideration of alternatives – not unlike NEPA. It encouraged agencies to choose the least onerous regulatory approach, but did not mandate formal cost-benefit analysis.

In 1980, Congress enacted two statutes designed to reduce regulatory burdens on business. The Paperwork Reduction Act required that OMB review and approve all information collection requests by agencies and created an Office of Information and Regulatory Affairs (OIRA) within OMB. The Regulatory Flexibility Act sought to reduce the impact of regulations on small business.

Beginning with the Reagan Administration, executive office oversight of agencies

expanded dramatically. The following selection describes this more rigorous attempt to control and reduce environmental and other regulation.

Checks without Balance

Robert V. Percival, *Checks without Balance*:

Executive Office Oversight of the Environmental Protection Agency

54 LAW & CONTEMPORARY PROBLEMS 127, 148-152 (1991)

. . . [Some observers] argue that the Reagan Administration's hostility to federal regulation was motivated by two principal ideas. First, regulatory relief was perceived as a way to stimulate the economy. Second, President Reagan viewed government regulation as an unwarranted intrusion into private conduct. As a result, while previous regulatory review programs had been motivated by concern for improving the quality of regulations, the Reagan Administration's principal objective was far more radical: to eliminate as much regulation as possible.

On his first working day in office, President Reagan announced the formation of a cabinet-level Task Force on Regulatory Relief chaired by Vice President George Bush. The Task Force was charged with developing a program to review new regulatory proposals, reassessing existing regulations that were particularly burdensome to industry, and developing legislative proposals "to codify the President's views on the appropriate role and objectives of regulatory agencies." Less than a week after its formation, the Task Force announced it was suspending nearly 200 pending regulations. Vice President Bush sent a letter to corporate executives throughout the country asking them to identify existing regulations that were unduly burdensome. The Task Force used these responses during the next two years to develop a "hit list" of 119 existing regulations identified as candidates for reconsideration.

On February 17, 1981, President Reagan issued an executive order that established the basic structure of [his] regulatory review program Executive Order 12,291 require[d] executive agencies to submit all proposed rules and final regulations to OMB for prepublication review. Major rules, defined as rules with an annual effect on the economy of \$100 million or more, [were required to] be accompanied by a detailed cost-benefit analysis, known as a regulatory impact analysis (RIA). Agencies . . . submit[ed] RIAs and notices of proposed rulemaking to OMB at least sixty days prior to publication of major rules. For nonmajor rules, all notices of proposed rulemaking and final rules [were] to be submitted to OMB at least ten days prior to publication. . . .

The Reagan program significantly departed from its predecessors in several important respects. First, it centralized power in OMB to an unprecedented degree. Unlike previous programs that authorized review only of selected regulations, the Reagan program required that *all* proposed and final regulations be submitted to OMB for prepublication review. Even more significantly, the Reagan program purported to give OMB the authority to block publication of regulations for an indefinite period of time while review was pending. Unlike . . . reviews [under President Carter's program], which were conducted during the course of public

rulemaking proceedings, the Reagan program directed agencies to “refrain from publishing” any rule until OMB had completed its review.

Another significant feature of the Reagan program was that it established substantive criteria for agencies to use in setting regulatory standards. The criteria dictate that agencies should not issue regulations unless their benefits exceed their costs, that agencies should choose regulatory alternatives that involve “the least net cost to society,” and that regulatory priorities should be set to maximize “aggregate net benefits to society.” Unlike Reagan’s program, the Carter Administration’s regulatory review program had encouraged agencies to develop cost-effective regulations but had repeatedly emphasized that cost-benefit tests were *not* required.

Finally, the Reagan program was the first to attempt to effect a comprehensive relaxation of existing regulations. Agencies were instructed to suspend or postpone the effective date of rules that already had been promulgated but not yet put into effect. The majority of the 119 existing regulations on the “hit list” of regulations designated for reconsideration were environmental or health and safety regulations.

Even more significant than the structure of the review program was the type of people President Reagan appointed as agency officials responsible for implementing the “regulatory relief” campaign. By appointing persons philosophically hostile toward regulation, the President ensured that his goal of “regulatory relief” would be zealously pursued. It soon became apparent that the new regulatory review process was well-designed to facilitate this goal because it gave OMB unprecedented power over agency decisionmaking.

Despite the vigorous denials of its officials, OMB . . . acquired virtual veto power over regulations

Like the QOL preview process, the Reagan program sought to shield regulatory reviews from public view. By directing OMB to conduct its review prior to publication of proposed regulations, the executive order deprived the public of an opportunity to learn the unfiltered views of the agency. Unlike the . . . [Carter] program, which produced public reviews, under the Reagan program documents reflecting OMB’s reviews were not incorporated into the public record, even in rulemakings under the Clean Air Act where Congress had explicitly required it. . . .

The Reagan Administration’s regulatory review program was, at the least, highly controversial. Former EPA Administrator Anne Gorsuch Burford, originally an enthusiastic promoter of the program, later testified that while presidential oversight of rulemaking is appropriate, “there were some serious abuses” by OMB. The Reagan Administration’s single-minded emphasis on regulatory relief is now widely viewed as a critical mistake that forfeited a rare opportunity for achieving truly beneficial regulatory reform.

Critics of the Reagan program charge that it illegally delayed EPA promulgation of regulations, displaced EPA decisionmaking authority, subverted statutory standards, and excluded the public from full participation in the regulatory process. These and other criticisms contributed to the atmosphere of scandal that surrounded EPA, culminating in the mass

resignation of agency officials, including Administrator Burford, in 1983. Burford was replaced by former EPA Administrator William Ruckelshaus.

In response to questions submitted during the confirmation hearings for his return to EPA, Ruckelshaus emphasized that OMB would not interfere with his ultimate decisionmaking authority. While Ruckelshaus is generally credited with restoring some measure of public confidence in EPA, he did not succeed in insulating EPA from OMB's substantial influence. For example, Ruckelshaus's plan to propose a modest acid rain control program was vetoed after OMB Director David Stockman ridiculed it by arguing that it would cost several thousand dollars per pound of fish saved.

While continuing opposition to new regulatory initiatives, the Reagan Administration gradually abandoned its ambitious plans for regulatory relief. On August 11, 1983, the Task Force announced that it was disbanding, claiming that its actions would save business, government, and consumers more than \$150 billion over ten years. Although the Task Force announced that the Reagan Administration would not concentrate on changing the regulatory statutes, the administration subsequently failed to pursue significant changes in the environmental laws. Later that year, an omnibus regulatory reform bill that would have codified regulatory review procedures passed the Senate but died in the House. This ended the administration's hopes for legislation endorsing its regulatory relief objectives.

Early in his administration, President Bill Clinton revoked the two Reagan-era executive orders. In September 1993, Clinton issued Executive Order 12,866 establishing a new and less intrusive process for regulatory review. This order limited OIRA's review to "economically significant" regulatory measures (those with an impact on the economy of \$100 million or more), rules which were inconsistent with action taken or planned by another agency, rules which materially altered the budgetary impact of grants, loans, or entitlements, and rules that raised novel legal or policy issues. Under the Reagan orders, OIRA reviewed between 2000 and 3000 rules per year; under the Clinton order, it reviewed between 500 and 700 per year.

Executive Order 12,866 also streamlined agency rulemaking by requiring that OIRA generally complete its review within 90 days. The Clinton order also increased transparency in the regulatory process by requiring both regulatory agencies and OIRA to disclose certain information about the conduct of reviews.

The web of requirements governing federal regulatory processes expanded in the 1990s through congressional action. The Small Business Regulatory Enforcement Fairness Act of 1996 amended the Regulatory Flexibility Act, noted above, by requiring EPA and the Occupational Safety and Health Administration (OSHA) to create review panels to assess the impact of major rulemaking on small business; the panels include representatives from OMB and the Small Business Administration. Also in 1996, Congress enacted the Congressional Review Act, which created a mechanism for Congress to veto new agency regulations. Finally, the so-called Stevens Amendment to the 1997 Treasury and Postal Appropriations Act directed OMB to

submit to Congress an annual report on the total costs and benefits of federal regulatory programs and to detail the impact of the rules on the private sector in all levels of government. OMB was also required to identify for Congress regulations it deemed ineffective.

During the administration of George W. Bush, the presidential role in managing agency rulemaking increased significantly. In January 2007, Bush issued Executive Order 13,422, which substantially amended President Clinton's 1993 order. The Bush order requires that agencies identify in writing a specific "market failure" or other problem that warrants each new regulation, mandates that the regulatory review office in each agency be headed by a presidential appointee to ensure that the president's views are reflected in rulemaking, and requires agencies to provide their best estimate of regulatory costs and benefits of all the rules they expect to call promulgate during the coming year. A bulletin issued at the same time expanded OIRA review to include for the first time thousands of "significant guidance documents" issued by agencies each year. The Bush initiatives are debated in the following excerpt.

Perspectives on the Bush Executive Order

That Regulatory Review Order: Who Benefits, and at What Cost?

Environmental Law Institute, THE ENVIRONMENTAL FORUM 46, 48-49 (March - April 2007)

Paralysis: Real Consequences, for Real People by Gary D. Bass, Executive Director of OMB Watch, a nonpartisan, nonprofit government watchdog organization in Washington, D.C.:

More than just a power grab, the changes President Bush implemented with his newest amendments to Executive Order 12866 and his bulletin requiring the Office of Management and Budget to review agency guidance documents have larger consequences. The requirement to conduct market failure assessments adds more layers of analysis for agencies – a paralysis by analysis. The requirement to have political appointees oversee all steps in the regulatory process allows politics to trump science and shape-shift the regulatory process in ways that can benefit regulated interest. The requirement for OMB review of thousands of agency guidance documents means massive delay in providing advice to regulated industries and further shifts agency discretion to the White House. Each of these actions upsets the constitutional balance between Congress and the presidency, in pursuit of the administration's goal of a "unitary executive."

Congressional delegation of regulatory powers to agencies puts Congress in the role of overseeing the implementation of legislation. OMB's review process is already so cumbersome that the only real effect of requiring guidance documents to go through the same process is to delay implementation and usurp congressional mandates by allowing OMB to decide which actions go forward.

The same impact results from placing presidential appointees in agency positions with the power to quash regulations. This also raises an interesting separation of powers question: should these people be subject to Senate confirmation if they no longer report to the agency heads but to OMB and thus the White House?

Strikingly, the president is requiring a market failure analysis when agencies contemplate whether to regulate, even though Congress has not required such criteria. In fact, Congress often imposes other criteria, such as best available technology. While [in mid-2007] we must wait to see what guidance OMB provides to agencies on how to implement this requirement, it is clear that this will be one more barrier to issuing sensible safeguards.

We, the people, are the ones hurt most by this regulatory chokehold. In the end, less regulation means less protection. Instead of having a regulatory cop on the beat, we will have none. Instead of addressing regulatory gaps, we will operate based on whether these gaps have political consequences. This will worsen an already untenable situation, where government doesn't act until there is national news about people being hurt, or even worse, dying.

There is real danger to our constitutional system from this arrogation of power. Equally significant, however, is the danger to the American public from the delay or refusal to regulate dangerous activities. Every year, foodborne illnesses kill an estimated 5,000 people and sicken 76 million. Nearly 6,000 workers die from injuries on the job, with an additional 50,000 to 60,000 killed by occupational disease. And asthma – linked to air pollution – is rising dramatically, afflicting 17 million, including six million children.

There are real consequences from regulatory action and inaction. Our government should be doing more, not less, to protect the public. The executive order amendments and good guidance directive move us in the wrong direction.

Down with the Divine Right of Bureaucrats! by Bill Kovacs, Vice President, Environment, Technology & Regulatory Affairs, at the U.S. Chamber of Commerce in Washington, D.C.:

President Bush's executive order on guidance review draws hysterical cries from the so called "public interest groups" who claim the nation's chief executive is somehow abusing his authority by interfering with the decisions of EPA to protect health and safety. Moreover, by exercising greater control over agency rules they reason somehow that democratic decisionmaking is being harmed. Such reasoning ignores the fact that we elected the president to be our chief executive office and neither our Constitution nor laws provide veto power to bureaucrats.

For decades the president through executive order and Congress through numerous statutes have tried (and largely failed) to gain some control over the federal agency regulation mill, which has spewed out over 110,000 regulations and 4,000 new regulations annually – and hundreds of thousands of guidance documents. The people who elected the president and Congress have to deal with this massive amount of detail. Imagine being a small business and having every day to deal with hundreds of new pages of the *Federal Register* and worrying about incomprehensible regulations, covering health care, pensions, environmental and labor standards, the transportation of product, privacy, immigration, and taxes to name only a few areas of federal regulation. The bureaucrats have seized this mass of detail, claim it as their domain, and along with their interest group supporters cry foul if an elected official attempts to override their decision.

If anything is a threat to democracy it is a legal system that is incomprehensible, for it puts Kafka type powers in the hands of unelected persons and grossly distorts the nation's ability to prioritize the use of our resources to provide the greatest amount of health and safety. When all risk is equal and regulations so numerous and complex, we squander our resources on trivial pursuits.

The president's executive order merely requires employees of the federal government, before issuing a new regulation, to identify the specific problem they intend to address and the cost of the regulation and all other regulations issued by that agency, so as to enable the president to assess if the new regulation is warranted. And yes, the president is appointing a regulatory policy officer for each agency to ensure that his executive order and guidance requirements are carried out as he has set forth.

Last checked, our Constitution provides for an elected president to execute the laws of the United States, including the appointment of inferior officers to help him execute the laws. The election of the president is a political process, and once elected the chief executive uses the bureaucracy to execute the laws, which is a discretionary process, since it involves human events. For public interest groups to somehow claim that executive orders pervert the political system implies that bureaucrats have some policymaking power that the president cannot control. This nation fought a revolution to eliminate the Divine Right of Kings and now is not the time to establish the Divine Right of Bureaucrats.

Notes and Questions

1. Who do you think makes the better argument, the director of OMB Watch or the vice president of the U.S. Chamber of Commerce, and why?

2. Referring to OMB's Office of Information and Regulatory Affairs during the George W. Bush Administration, a Senior Attorney with the Natural Resources Defense Council has said, "OIRA may be the most antidemocratic institution in government." ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE* 59 (2004). What is the basis for this claim?

3. Cost-benefit analysis is a standard part of most environmental policy decisions today. For example, CBA is at the center of EPA decisions to ban products that contain asbestos or to reduce the amount of lead in gasoline, U.S. Army Corps of Engineers proposals to build a dam or navigation improvements, and Forest Service land management planning.

Yet cost-benefit analysis has been criticized for decades. The principle critique is capsulized as follows:

The basic problem with narrow economic analysis of health and environmental protection is that human life, health, and nature cannot be meaningfully described in monetary terms; they are priceless. When the question is whether . . . to destroy a natural resource . . . [and] when harms stretch out over

decades or even generations . . . then we are in the realm of the priceless, where market values tell us little about the social values at stake.

. . . [T]here are many useful insights about these questions from the field of economics. But there is no reason to think that the rights answers will emerge from the strange process of assigning dollar values to human life, human health, and nature itself, and then crunching the numbers.

FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 8 (2004).

Professor Jim Salzman and others have described the various methodologies used in cost-benefit analysis to place a price on things not directly exchanged in markets:

. . . These include contingent valuation (asking how much people would be willing to pay for various environmental goods and services, hedonic pricing (assessing how particular environmental amenities, such as proximity to a wetland, affect market prices), replacement cost (how much it would cost to replace the degraded ecosystem service, etc. All of these methodologies have shortcomings. In contingent valuation studies, for example, how the question is framed can significantly change the values given and, more fundamentally, when respondents are asked their willingness to accept a payment to degrade a resources instead of their willingness to pay to protect the resource, the value for willingness to accept is higher Thus while all of these techniques provide numbers, there is considerable debate over whether the numbers are accurate

JAMES RASBAND, JAMES SALZMAN, AND MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY 20 (2004).

In late 2000, Congress quietly enacted the following statute as a two-paragraph rider concealed in an appropriations bill.

The Information Quality Act of 2000
44 U.S.C. § 3516, note

(a) In General. – The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines . . . that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of . . . the Paperwork Reduction Act.

(b) Content of Guidelines. – The guidelines under subsection (a) shall –

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and

(2) require that each Federal agency to which the guidelines apply –

(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and

(C) report periodically to the Director – (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency and; (ii) how such complaints were handled by the agency.

The Origins and Implementation of the IQA

THOMAS O. MCGARITY, SIDNEY A. SHAPIRO, RENA I. STEINZOR,
JOANNA GOGER AND MARGARET CLUNE, TRUTH AND SCIENCE BETRAYED:
THE CASE AGAINST THE INFORMATION QUALITY ACT
Center for Progressive Regulation Publication #502, 2-3, 5-8, 10 (March 2005)

There were no hearings on [the IQA] . . . and no one referred to them during the debate on the larger bill. The terse statutory language and absence of legislative history support the conclusion that Congress did not intend the IQA to serve as a kind of “uber statute” providing OMB with the overarching authority to deflect agencies from their statutory responsibilities to implement the country’s health, safety and environmental laws.

In February 2002, OMB issued guidelines to agencies regarding how to implement the Act. Even though the only explicit congressional directive was a mandate to issue guidelines on agency implementation of data correction procedures, OMB read these ministerial responsibilities extremely broadly, creating out of whole cloth a lengthy set of guidelines defining terms, mandating that agencies adopt or adapt standards for risk information used for purposes of the Safe Drinking Water Act for all health, safety, and environmental information, providing assumptions about peer review, providing criteria for handling information deemed “influential,” and creating an agency appeal procedure that is nowhere mandated in the statute. After seeking public input, agencies adopted their own guidelines to implement the rider.

The IQA was sponsored by Representative Jo Ann Emerson (R-8th MO), but was the brainchild of Jim Tozzi, a former OMB-official who parlayed an intimate knowledge of the regulatory process and a willingness to advance the interests of risk-producing corporations in the tobacco, plastics, and paper industries into a multi-million dollar conglomerate of consulting firms and tax-exempt nonprofit “public interest” groups. Tozzi frequently brags that he was the author of the Act and has also publicly acknowledged broad industry support for its provisions, which industry values as an effective mechanism for slowing or stopping expensive regulation.

. . . Over last two decades, [Tozzi’s] clients have included a broad spectrum of industries who share a combined interest in reigning in regulatory agencies, including tire and auto manufacturers, the lead industry, the plastics industry, the pharmaceutical industry, pollution equipment manufacturers, and, most lucrative of all, the tobacco industry.

. . . After Congress passed the 1995 Paperwork Reduction Act Amendments and the 1996 Congressional Review Act, Tozzi created the Center for Regulatory Effectiveness (CRE) to serve as a “shadow OMB”

[Tozzi prepared a data quality ruled that, after he sent to OMB after clearing it with his client, the Phillip Morris Co.] . . . [However, t]he Clinton Administration’s OMB had no interest in Tozzi’s rather officious attempt to prod it into unnecessary action. Undeterred, Tozzi began at the outset of the 2000 election year to press the initiative further, hoping that a new administration would likely be more sympathetic if the Republican Party regained control of the White House. In a letter to Phillip Morris, Tozzi laid out a schedule for implementing this strategy. CRE would initiate discussions with industry stakeholders in February and with federal agencies in July. In December, the industry group would initiate discussions with the “Transition Team of the New Administration” in anticipation of presenting new regulations to the new OMB by February, 2001. By July 2001 OMB would have adopted regulations or CRE would begin “initiation of judicial action.”

Tozzi could, of course, greatly enhance his chances of success, whether or not the Republicans won the election, by persuading sympathetic congressperson to include in the appropriations bill for FY 2001 language explicitly requiring OMB and the regulatory agencies to promulgate data quality guidelines and providing for a petitions process. Tozzi did exactly that. He persuaded Rep. Jo Ann Emerson (R-Mo.) to insert language almost identical to the language in the House Report for the 1999 appropriations bill itself. Sandwiched between a property acquisition appropriation for the Gerald R. Ford Museum and a provision relating to the nonforeign area cost-of-living allowances, the so-called Information Quality Act came into being.

President Clinton signed the appropriations bill on December 21, 2000. Armed with statutory language, . . . and looking forward to a much more sympathetic hearing from a new Administration, Tozzi proceeded forward on almost precisely the schedule he had recommended to Philip Morris and his other clients at the end of February the preceding year. Tozzi probably did not anticipate, however, the enthusiasm with which the new Administration would embrace his brainchild. As these suspicious origins reveal, the IQA was developed at the behest of industry by an individual who founded an organization that now routinely files petitions under

the Act.

Tozzi and his industry clients pushed for data quality legislation because of what they perceived as a worrisome movement towards “regulation by information,” whereby government agencies provide access to information on the activities of regulated entities through the Internet and other media. These concerns are best exemplified by the tobacco industry’s concerns . . . that OSHA, other government entities, and even private entities would take measures to ban smoking in public places as a result of the release of EPA’s risk assessment on second-hand smoke. According to CRE’s Legislative Working Papers maintained on its website, “[f]ederal information dissemination has the potential to act as a type of indirect regulation by persuading citizens and non-Federal political entities to take political action based on such information. Tozzi described the dissemination of information through the internet as a “backdoor Federal Register,” and he proposed the IQA to ensure that risk assessments and other agency disseminations would not improperly influence the regulatory process.

. . . [T]he Information Quality Act legislation was also viewed as a means to attack new or cutting edge science, assumptions about uncertainty, and policy judgements that are unfavorable to industry. Directives to agencies regarding how to regulate in the face of uncertain or incomplete information are contained in our health, safety, and environmental laws, but direct attempts to weaken these statutes as well as efforts to pass legislation requiring peer review of regulatory information and mandating other procedural requirements for agency decisionmaking have failed in recent years. Thus, the IQA was viewed as a necessary view called to challenge the preventative assumptions set forth in our environmental, health, and safety laws and attempts to take on those statutes directly or to impose other procedural hurdles have failed. . . .

A Solution in Search of a Problem

At the time of its enactment, there was not, by any stretch, a consensus that the IQA was necessary. There was no evidence that existing mechanisms for the correction of information were inadequate, nor was there any extensive evidence that agency information was flawed and in need of correction. In addition, the lack of any debate, hearing, or discussion regarding the legislation make it impossible to suggest that members of Congress had reached any type of consensus that the legislation was necessary. The use of the best available data and analysis by the federal government is crucial, especially when the government is disseminating information to the public. However, a statute that purports to achieve such a goal when there is a proven need and where existing mechanisms are in place to ensure reliable information is, at best, redundant and, at worst, another tool to limit public access to critical information and to stymie efforts to protect health, safety, and the environment. . . .

In its own IQA Guidelines, EPA described the extensive pre-existing procedures it had in place to ensure information quality. EPA’s eight-step Agency-wide Quality System “helps ensure that EPA organizations maximize the quality of environmental information, including information disseminated by the Agency.” This system extends to EPA contractors and other government agencies receiving assistance from EPA through interagency agreements. Furthermore, to ensure that their scientific assessments are competent, EPA and other agencies

already had mechanisms in place for both internal and external peer review. . . . EPA also has an established mechanism for error correction. Through this mechanism, called the Integrated Error Correction Process, members of the public can notify EPA of potential errors in data disseminated by the agency, including data on EPA's website. This process appears to be working well, and has received few reported errors in agency information. . . .

In addition to the fact that there existing mechanisms in place for the correction of information, there is very little evidence that poor-quality science has been used to support regulation. According to Professor [Wendy] Wagner, "despite the thousands of public health and safety regulations promulgated annually, there are surprisingly few examples of EPA using unreliable science or using science inappropriately to support a final regulation." Studies commissioned by the EPA over the last decade including *Strengthening Science at the U.S. Environmental Protection Agency*, have identified very few problems with the quality of agency science. . . .

Finally, agency decision-making with respect to rulemaking has since 1946 been governed by procedures set in place by the Administrative Procedure Act (APA). Under the APA, agencies are required to provide the basis for proposed rules, including any scientific basis, to provide notice and an opportunity for comment, and to respond to those comments when a final rule is adopted. The involvement of the courts in reviewing rulemakings and ensuring that the public has an opportunity to comment adds an additional layer of oversight of agency dissemination of information. As CPR Scholar [and Professor] Sidney Shapiro . . . explains, with these protections in place for regulatory information used in the rulemaking process, the IQA is redundant. . . .

OMB's Grand Implementation Scheme

In the two years since IQA petitions began to stream into federal agencies, industry and trade organizations have expansively interpreted the rider, arguing that it provides an open-ended remedy to them for government information that they believe to be of insufficient quality. Indeed, industry groups have used the new procedures in a strategic manner to slow, or even stop, the release of information that is embarrassing or politically inconvenient to them. The vague nature of the legislation and OMB's efforts to fill that void with its guidelines invite such challenges. As a result, the Act has become a vehicle for industry and their allies to circumvent the mandates set forth in our substantive environmental, health, and safety laws and to challenge basic assumptions about protection and precaution that are established in those statutes. Rather than seeking the correction of factual information, the majority of petitioners are seeking to challenge policy decisions and judgements. . . .

The guidelines issued by OMB under the IQA in February 2002 are much broader than the language of the statute allows. Even more disturbing, the guidelines create mandates on federal agencies that are found nowhere in the language of the Act, nor could they be found in the non-existent legislative history for the Act. Moreover, OMB has used the IQA as the basis for mandating government-wide peer review procedures, despite the fact that the IQA makes no mention of peer review. Indeed, Congress has explicitly rejected attempts to pass legislation mandating government-wide peer review.

Broad Definitions

The OMB guidelines set out to define many of the terms that are used, but not defined, in the Act itself. The Guidelines define “information” in a way that includes almost anything disseminated by the agency except for “someone’s opinion[s],” thus taking a broad interpretation that extends well beyond data and facts.

Borrowing Restrictive Language

In its guidelines, OMB established additional data quality requirements for information determined by the agency to be “influential,” meaning that the information “will have or does have a clear and substantial impact on important public policies or important private sector decisions.” With respect to this “influential” category of information, the guidelines require that the information be presented with sufficient transparency to ensure that qualified third parties can reproduce it. In addition, OMB established more onerous and detailed requirements for analyses of risks to human health, safety and the environment maintained or disseminated by agencies. With respect to this category of risk information, the OMB guidelines require that agencies “adopt or adapt the quality principle applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act Amendments of 1996.” Nowhere does the IQA suggest or require that such separate categories of information be established, or that such categories be subjected to more rigorous data quality requirements. Nevertheless, this requirement for risk information had been on [OMB Director] John Graham’s agenda since the beginning of his tenure with the Bush Administration, and the IQA became the vehicle that Graham could eventually use to impose such a requirement. In a September 20, 2001 Memorandum from Graham to the President’s Management Council, Graham recommended “that each agency consider adopting or adapting [SDWA] standards for judging the quality of scientific information about risk it uses and disseminates.” Graham ultimately used the IQA guidelines as the vehicle for making this recommendation mandatory despite the lack of Congressional authority for such a requirement in the IQA itself.

Peer Review

The OMB Guidelines also provide a rebuttable presumption that information that has been subjected to formal, independent, external peer review will “generally be presumed to be of acceptable objectivity.” Using its IQA Guidelines, OMB issued in September 2003 a set of prescriptive procedures for the conduct of peer review by federal agencies that would require an additional layer of review for a broad range of scientific information and assessments. The proposal was revised in April 2004 in response to criticism by environmental and public health advocates as well as scientific organizations. The *Final Information Quality Bulletin for Peer Review*, issued in December 2004, remains a concern because of its breadth and potential to delay the regulatory process. The IQA says nothing about peer review, and efforts to impose such broad requirements across federal agencies have repeatedly failed in Congress throughout the last decade. Nonetheless, through its IQA Guidelines and associated bulletins, OMB has created this additional and potentially onerous burden for broad categories of scientific information disseminated by federal agencies. While peer review of scientific and technical information supporting regulation is a part of our regulatory process in certain circumstances,

including for example, EPA's Clean Air Scientific Advisory Committee which reviews EPA's National Ambient Air Quality Standards under the Clean Air Act, OMB's broad mandate would seek to impose these processes in a manner that could result in delays for efforts to protect health and the environment.

Several petitions have already sought to invoke the peer review guidelines recently proposed by OMB. CRE's recent petition challenging the proposed listing of diisononyl phthalate, a chemical used in plastics, on the Toxics Release Inventory (TRI) invokes the peer review guidelines and requests external peer review of the technical review underlying the proposal. In response, EPA indicated that as part of an ongoing revision of the hazard assessment process (initiated before receipt of the petition), it had conducted an internal peer review and planned to subject the revised hazard risk assessment for the chemical to external peer review in accordance with its peer review policy and the Information Quality Guidelines. Similarly, a recent petition filed by a law firm representing the National Paint and Coatings Association and Sherwin-Williams challenging information underlying a Model Rule for Volatile Organic Compounds (VOCs) in industrial coatings was accompanied by a separate request that the Model Rule be subjected to the specific peer review process prescribed in OMB's recent bulletin.

Notes and Questions

1. Assume you are an attorney in the EPA's Office of General Council. Prepare a checklist of legal requirements and procedural steps involved in promulgating a regulation under Executive Order 13,422 and the IQA Guidelines.
2. Looking carefully at the language of the statute above, do you think the IQA creates a right to correct information?

Consider the following example. In May 2003, the Salt Institute and the Chamber of Commerce of the United States filed a petition under the Information Quality Act with the National Heart, Lung, and Blood Institute (NHLBI) seeking correction of information which stated that reduced sodium consumption will result in lower blood pressure in *all* individuals. NHLBI published the findings of two studies (funded in part by NHLBI grants) in news releases, on its website, and in at least one report. The petition for correction asserted that the studies' findings do not meet the standards for data quality set out in the IQA and claimed that, to meet the IQA's standards, those findings had to be qualified according to such factors as race, history of hypertension, sex, age, body-mass index, and education level. The Salt Institute and Chamber of Commerce maintained that lowering sodium intake reduces blood pressure for only certain groups of Americans, *not* for all Americans. The petition requested that NHLBI make publicly available the raw data that supported the studies' findings in order to allow appellants to test their validity for different groups of individuals. The Secretary of Health and Human Services concluded that appellants had no such right under the IQA and denied the petition seeking

information and correction. Did the Secretary act properly in doing so? See *Salt Institute v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006).

3. A Judicial Realignment

The first steps toward a remaking of the federal judiciary were taken in the 1980s and the results became manifest in the 1990s. Conservative judicial appointments by Presidents Reagan and George H. W. Bush replaced federal judges sympathetic to environmental concerns with judges hostile toward environmental laws. The following selection describes the consequences.

The Changing Nature of the Federal Judiciary

RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 132-137 (2004)

The most portentous of the judicial rulings of the 1990s were those of the U.S. Supreme Court. In a series of decisions arising in a host of constitutional contexts, a bare majority of five justices actively promoted a view of the federal constitution that systematically unsettled the constitutional foundations of many of modern environmental law's most distinctive features. In form, environmental law is classic New Deal regulatory legislation – it rests on expansive notions of congressional power under the Commerce Clause, presumes the need for significant governmental restrictions on market transactions and private property rights, and anticipates the need for judicial review. Modern environmental law, like many of those New Deal laws that preceded it, also presumes a dominant preemptive role for federal law at the expense of substantial state autonomy over public welfare, including enlisting the machinery of state government in furtherance of federal programs.

. . . [E]ach of these features is endemic to environmental law. Each is a direct, not incidental, expression of the nature of the problem environmental law seeks to address. The physical nature of the problem promotes a national, rather than state-by-state, approach to solutions, yet the dual-sovereign framework contemplated by the Constitution makes the federal government dependent upon partnerships with the states for full implementation and enforcement. The Fifth Amendment provides that private property may not be taken for public use without just compensation, but environmental law unavoidably and constantly limits private property rights to address problems seen only in broad temporal and spatial spillovers. Finally, Article III of the Constitution limits the jurisdiction of federal courts to lawsuits where plaintiffs can allege imminent and concrete injury, but the complexity of ecological cause and effect frequently makes it difficult for environmental plaintiffs to make such showings.

In earlier decades, the Supreme Court appeared to avoid rigid application of constitutional doctrines that would stand as obstacles to comprehensive federal environmental law, environmental restrictions on private property, or broad citizen suit standing in environmental litigation. The 1990s were decidedly different. Both in environmental and

nonenvironmental cases, the Supreme Court began to rethink certain presumptions of U.S. constitutional law and thereby unsettled some precepts upon which modern U.S. law rested.

In 1992, the Court in *Lucas v. South Carolina Coastal Council* ruled in favor of a landowner who claimed that environmental restrictions on his use of coastal property without compensation amounted to an unconstitutional taking. It was not so much the result in that particular case as the Court's reasoning that called into question environmental restrictions. The Court in *Lucas* held that land use restrictions that deprived land of *all* economic value as the determinative touchstone of a law's constitutionality was troubling because it seemed to accept too easily the precept that the economically profitable exploitation of a natural resource is somehow constitutionally guaranteed or at least preferable. The teaching of the modern environmental statutes regarding the propriety of government's restricting uses of natural resources based on the related spatial and temporal spillovers – “the economy of nature” – was rendered a second-class concern. So too was the importance of nondevelopmental values of preserving natural resources that are not readily translated into market or economic value.

At least as troubling was the *Lucas* Court's ruling that the only exception to the *per se* taking rule occurs when the environmental restriction merely codifies “background principles of law,” such as the common law of nuisance. The premise of much modern environmental law has been that such common law doctrines, especially nuisance law, have failed to deal with environmental issues. A nuisance standard that makes the lawfulness of an activity turn on its “reasonableness” does not give a court any meaningful guidance in resolving the multiplicity of complex factors that must be weighed in deciding how much environmental law evolved beyond those principles to fill the gap with detailed standards and regulatory controls. Therefore, to have the constitutionality of environmental restrictions turn on the extent to which those restrictions merely codify preexisting law places a constitutional obstacle in the path of the law's evolution that environmentalists would argue is both necessary and proper. . . .

The Court's decisions regarding the proper sphere of federal legislation were even more unsettling for their implications for environmental law. The federal environmental statutes rest on decades of judicial precedent that endorsed expansive notions of congressional Commerce Clause power. The Court's long-standing test of Commerce Clause authority had been strikingly broad: as long as the activity being regulated bore some, even minimal, relation to interstate commerce, it fell within Congress's Commerce Clause regulatory authority, even if the activity was noncommercial and occurred wholly within a single state.

Largely prompted by Congress's insatiable appetite for expanding federal criminal jurisdiction (and thus the workload of the federal judiciary), the Court finally rebelled during the 1990s by announcing a more restricted scope of congressional Commerce Clause authority. The new test seemingly required that the activity being regulated be “economic” in character and bear a substantial relationship to interstate commerce. The problem for environmental law was that the jurisdictional bases for environmental regulation in existing federal statutes did not anticipate that new test's analytic framework and therefore did not neatly reflect it.

To be sure, much environmental regulation does, in fact, apply to economic activity that bears a substantial relationship to interstate commerce. Virtually any industrial activity, such as

those involved in the production and sale of paper, steel, and agricultural products, would constitute a class of “economic activity.” But that fact does not, by itself, necessarily satisfy the Court’s constitutional test. The constitutional inquiry seems under the Court’s current formulation to turn on how the statute itself defines its jurisdiction, not how the statute might be amended to define its jurisdictional bases. The jurisdictional provisions of the federal environmental statutes, however, are not uniformly couched in terms of the economic nature of the activity to be regulated.

For example, the actual terms of federal environmental statutes such as the Clean Air, Clean Water, and Endangered Species Acts do not turn at all on whether a particular activity to be regulated is economic in nature or possesses some interstate commercial nexus. They turn exclusively on a finding that the activity pollutes the air or the water or harms an endangered species or its habitat. Such activity need not be commercial in origin and can occur within a single state’s boundaries. These are laws that, at bottom, seek their justification not in their relationship to commerce, but in their promotion of a system of values in which commerce is no longer government’s principal, let alone exclusive, legitimate end. This is particularly true of the Endangered Species Act, which would seem to be especially vulnerable to the new constitutional standard. Although it might be fairly easy in theory to recast those jurisdictional provisions of the Endangered Species Act to focus on the commercial character of the regulated activities, the political hurdles to passage of such curative legislation would likely be substantial. At the very least, environmentalists would have to be prepared to agree to the significant substantive compromises that would be called for in forging the political alliances necessary to achieve such legislation.

As the 1990s came to a close, the extent to which a majority of the justices would be willing to take the logic of their Commerce Clause precedent outside of the criminal law arena to strike down major public welfare laws, such as environmental laws, remained unclear. It was clear, however, that those in the federal government and the environmental community who defended the constitutionality of Congress’s passing environmental laws could no longer confidently rely on the single fact that pollution and its reduction have substantial implications for the national economy. Those defenders would instead have to try to develop legal arguments that coincided with the Court’s new analytic framework. The opportunity to develop those arguments soon presented itself when a series of plaintiffs, prompted by the Supreme Court’s recent pronouncements, attacked in the lower courts the constitutionality of several environmental statutes based on legal theories that would have been completely unthinkable in either the 1970s or 1980s.

The shift in judicial attitude was not, however, confined to the Supreme Court. The lower federal courts do not respond only to the Supreme Court’s precise holdings. Federal district court and court of appeals judges also read beyond those holdings and frequently anticipate in their own decisions where they believe the Court is going. The lower courts, accordingly, more regularly denied standing to environmental plaintiffs and the federal government lost more cases in which it was defending its authority to promulgate and enforce strict environmental protection requirements, especially under the Superfund law.

The 1990s, in short, witnessed an extraordinary shift in the federal judiciary’s treatment

of environmental law. In the 1970s, federal judge Skelly Wright famously wrote in . . . [*Calvert Cliffs Coordinating Committee v. AEC*, excerpted in Chapter 2, Section D. 1] that it was the court's "duty . . . to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." In the 1990s, Supreme Court justice Antonin Scalia directly challenged Wright's characterization of the judicial function. Writing even before his appointment to the Court [in the *Suffolk University Law Review*], Scalia decried the judiciary's apparent "long love affair with environmental litigation." And taking direct issue with Judge Wright, Scalia made quite explicit his view that "it would be a good thing, too" to have policies such as those furthered by federal environmental protection laws get "lost and misdirected in the vast hallways of the federal bureaucracy. . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change." By the end of the decade, the constitutional foundations of environmental law may have been far from eroded, but those foundations were certainly destabilized.

Section D. "Reform" and Gridlock in Congress

In the years immediately following the "environmental decade" of the 1970s, Congress did not undertake any new initiatives in environmental policy. In fact, the major federal programs were kept in place only through continuing appropriations measures and short-term extensions of the existing acts. For the most part, there was not sufficient agreement in Congress to formally reauthorize them. During the 97th Congress, for example, eight comprehensive environmental programs were due for reauthorization; only two of them were.

The Democrats regained control of the Senate following the 1986 election, and the newly elected members of both the House and Senate were more environmentally-oriented. Yet despite a highly productive new Congress, several major pieces of environmental legislation failed not only in the 99th Congress (1984-86) but in the 100th Congress (1987-89) as well. These measures included renewal of the Clean Air Act and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) – the principal pesticide control act – as well as new legislation to control acid deposition. On the whole, environmentalists were disappointed by this limited progress.

Congress's inactivity on environmental issues continued in the 101st and 102nd Congresses (1989-92) during the first President Bush's administration, with some important exceptions. Congress and George H. W. Bush were able to agree on the momentous Clean Air Act Amendments of 1990. This success was particularly significant because for thirteen years the CAA symbolized Congress's inability to reauthorize controversial environmental programs. Congress was able to approve the 1990 amendments to the act for several reasons: improved scientific research, reports of worsening ozone in urban areas – which helped to reduce opposition by key interest groups such as the Chemical Manufacturers Association – and a realization by members of Congress that the public would tolerate no further delays in acting on

air quality problems. Congress and the senior President Bush also reached agreement on the Energy Policy Act of 1992, a notable, if modest, step that promoted energy conservation and restructured the electric utility industry to encourage greater competition and efficiency.

Unfortunately, enactment of the 1990 CAA Amendments was not an indication that a new era of cooperative and bipartisan policymaking on the environment was at hand. Bill Clinton's election in 1992 also saw control of both houses of Congress returned to the Democrats. Most of the major federal environmental statutes were again up for reauthorization. Despite an emerging consensus on renewing the Clean Water Act, the Safe Drinking Water Act, CERCLA, FIFRA, and others, the 103d Congress remained far too divided to act on these measures.

The 1994 Congressional election, however, ushered in a sea change in environmental lawmaking, as discussed in the following selection.

The 104th Congress

Michael E. Kraft, *Environmental Policy in Congress: From Consensus to Gridlock*
in NORMAN J. VIG AND MICHAEL E. KRAFT, ENVIRONMENTAL POLICY:
NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 129-130, 134-135 (4th ed. 2000)

Few analysts had predicted the astonishing outcomes of the 1994 midterm elections, even after one of the most expensive, negative, and anti-Washington campaigns in modern times. Republicans captured both houses of Congress, picking up an additional fifty-two seats in the House and eight in the Senate. They also did well in other elections across the country, contributing to their belief that voters had endorsed the Contract with America, which symbolized the new Republican agenda.

The contract had promised a rolling back of government regulations and a shrinking of the federal government's role. There was no specific mention of environmental policy, however, and the document's language was carefully constructed for broad appeal to a disgruntled electorate. For its policy recommendations, the contract drew heavily from the work of conservative and probusiness think tanks such as the Heritage Foundation, Cato Institute, and Competitive Enterprise Institute. For years they had waged a multifaceted campaign to discredit environmentalist thinking and policies and to shift public opinion on these issues. Those efforts merged with a carefully developed GOP plan to gain control of Congress to further a conservative political agenda.

There is little persuasive evidence, however, that the Republican victory in November conveyed a public mandate to act on the contract's provisions related to environmental programs. Surveys indicated that voters were largely unaware of the contract and its provisions even as late as April 1995, and studies of voting behavior in the November election found no substantial basis for a voter mandate on the issues. . . . [V]oters continue to prefer a strong governmental role in environmental protection. Thus at best, one could read into the election results a *general* preference for less government and less regulation.

Whatever might be said about the meaning of the 1994 election, the political result was clear enough. It put Republicans in charge of the House for the first time in four decades and set the stage for an extraordinary period of legislative action on environmental policy characterized by exceptionally bitter relations between the two parties. Republican members were so accustomed to serving in a minority party capacity that initially they adopted an aggressive “take-no-prisoners” strategy that rejected political compromise with their ideological foes. Led by a determined Speaker, Newt Gingrich, and with many new members arriving on Capitol Hill without prior legislative experience, Republicans would struggle during the 104th Congress to learn the skills required for building broad support and governing Congress. Deep conflicts within the party between conservatives and moderates, on other issues as well as environmental protection, exacerbated that challenge.

The resulting environmental policy gridlock should have come as no surprise. . . .

Regulatory Reform

Regulatory reform has been a central theme in U.S. environmental policy since the late 1970's, and it was of special interest during Ronald Reagan's presidency. There is no real dispute among students of environmental policy on the need to reform agency rulemaking that has been widely faulted for being too inflexible, intrusive, cumbersome, and adversarial, and sometimes based on insufficient consideration of science and economics. Much disagreement exists, however, over precisely what elements of the regulatory process need to be reformed and the most legitimate way to institute such changes to be sure that they work as intended.

The Republican majority favored separate, “omnibus” regulatory reform legislation that would affect all environmental policies by imposing broad and stringent mandates on bureaucratic agencies, especially for the conduct and use of cost-benefit analysis and risk assessment. They also wanted to open agency technical studies and rulemaking to additional legal challenges to help protect the business community against what they viewed as unjustifiable regulatory action. Opponents argued that such impositions and opportunities for lawsuits would wreak havoc within agencies such as the EPA that already faced imposing procedural hurdles in developing regulations and frequent legal disputes over them. They preferred more limited changes that would be considered as each statute came up for renewal. They also sought to give agency professionals more discretion in considering how to weigh pertinent evidence and set program priorities.

The most notable attempt at regulatory reform occurred in the house early in 1995, with similar legislation considered in each subsequent year. Members were eager, in the words of the Contract with America, to “free Americans from bureaucratic red tape,” which they saw in environmental, health, and safety regulations, and to spur economic growth. They also objected philosophically to a strong government role in regulation.

In pursuit of such goals, the contract's authors wanted to require “every new regulation to stand a new test: Does it provide benefits worth the costs?” Those ideas found expression in the Job Creation and Wage Enhancement Act of 1995, which mandated extensive cost-benefit analysis and risk assessments as part of the regulatory processes used by agencies such as the

EPA to implement environmental policies. The act also would likely have thrown many contested decisions into the already crowded federal courts.

The final legislative package, HR 9, also included a “takings” provision that required compensation to landowners when regulations under certain laws reduced property values by 20 percent or more. In a telling comment about legislative politics in 1995, debate on the bill’s provisions appeared to be anchored far more in colorful anecdotes of alleged regulatory abuses and pleas for relief for the business community than in scientific or economic facts.

This act and its counterpart in the Senate, strongly supported by Bob Dole, R-Kan., then the Senate majority leader [and the Republican presidential nominee in 1996], reflected intense lobbying by business groups that sought to reduce the cost of complying with environmental, health, and safety regulation. The business community’s concerns were genuine, yet their political tactics were controversial and unlikely to succeed. Short-term economic relief might be gained, as it was in the Reagan administration, but at the expense of the more important goal of long-term reform of environmental statutes.

Despite serious misgivings about the bill by economists, scientists, policy analysts, and administration officials who favored *some* economic analysis of environmental proposals, the House overwhelmingly approved HR 9 by a vote of 277 to 141 in March 1995. But parallel measures in the Senate fared poorly. Senator Dole tried three times to bring a companion bill to the Senate floor, but he failed to gain sufficient votes to end a filibuster by opponents who thought the legislation would jeopardize public health, safety, and the environment. In July 1995, Dole pulled the key bill from the Senate floor, signaling the GOP’s retreat on sweeping regulatory reform legislation.

GOP leaders were successful, however, in gaining approval of several less ambitious reform measures. One of those was the Unfunded Mandates Reform Act of 1995, which Congress approved and the president signed in early 1995. The act erected new procedural barriers to keep Congress from approving statutes likely to impose unfunded federal mandates (requirements for action) of \$50 million a year or more on state and local governments.

On other regulatory reform issues, Republicans remained too divided to act. The business community also was split, although at least some leaders signaled a strategic shift that recognized popular support for environmental protection. Those who worked closely with the President’s Council on Sustainable Development announced that modest reforms of existing statutes might be better after all than the drastic changes they sought in 1995.

In the 105th Congress in 1997, Senators Fred Thompson, R-Tenn., and Carl Levin, D-Mich., teamed up to draft a comprehensive regulatory reform measure (S. 981) that was less radical than the one rejected in 1996, but with similar goals of mandating cost-benefit analysis and risk assessment and expanding judicial review of agency actions. These efforts drew support from both parties and a broad coalition of business groups. But they were opposed by labor unions, environmentalists, consumer groups, and the Clinton administration, who argued that they would undermine critical environmental, health, and safety protections. Conservative Republicans, led by Senate majority leader Trent Lott, R-Miss., objected that the measure did

not go *far enough* in placing limits on regulatory agencies; they still favored the approach that was rejected in 1995. These disagreements prevented adoption of any regulatory reform package in the 105th Congress. The Thompson-Levin bill was reported out of committee but never reached the Senate floor. Several minor and more targeted regulatory reform initiatives also were introduced in the 105th Congress, but they failed to gain sufficient support to move forward.

Appropriation Politics: Riders and Budget Cuts

Perhaps the most striking element of the Republican strategy in the 104th and 105th Congresses was its use of the budget process to institute changes in policy as an alternative to enactment of new statutes. The Reagan administration used a similar approach in the 1980's with considerable short-term success. One of the most avid revolutionaries in the GOP freshman class, Rep. David McIntosh, R-Ind., explained the approach's logic: "The laws would remain on the books, but there would be no money to carry them out. It's a signal to the agencies to stop wasting time on these regulations."

Appropriation Riders. The specific action to which McIntosh referred was the use of "riders" – legislative stipulations attached to appropriation bills – to achieve policy goals such as restricting, remaking, or even eliminating federal programs. In the 104th Congress, more than fifty antienvironmental riders were included in seven different budget bills, largely with the purpose of slowing or halting enforcement of laws by the EPA, the Interior Department, and other agencies until Congress could revise them. In one of the most controversial cases, seventeen riders were appended to the EPA appropriations bill in 1995 in an attempt to prohibit the agency from enforcing certain drinking-water and water quality standards and to keep it from regulating commercial development in wetlands and toxic air emissions from oil and gas refineries, among many other provisions. The EPA was told flatly that it could not spend any money on these activities.

Such a legislative strategy is attractive to its proponents because appropriation bills, unlike authorizing legislation, typically move quickly and Congress must enact them each year. Many Republicans and business lobbyists also argue that use of riders is one of the few ways they have to rope in a bureaucracy that they believe needs additional constraints. This is because they are unable to address their concerns through changing the authorizing statutes themselves, a far more controversial and uncertain path to follow. . . .

Cutting Environmental Budgets. Despite the setback on appropriation riders, GOP leaders tried in 1995 and 1996 to capitalize on the momentum of their electoral success by representing the steep reductions they proposed for environmental spending as part of their larger – and broadly supported – effort to balance the federal budget. Their opponents argued that the depth of the cuts and the way they were targeted on enforcement actions suggested a quite different purpose. Indeed, House Budget Committee chair John Kasich, R-Ohio, a leading player in the new budget politics, acknowledged as much: "We're going to fund programs that we think are important and not fund the programs that we think are not important."

Initial actions on the budget in the House in 1995 were surprising in light of public support for environmental policy. For fiscal year 1996 House members voted to cut the

president's recommended EPA budget by 34 percent overall, proportionately the largest reduction for any major federal agency. The appropriations subcommittee that recommended the cuts explained why it favored deregulating the environment in this way: "The agency was headed in the wrong direction, for the wrong reasons, and in a manner that can impose unnecessary costs on American industry."

The Senate was less drastic than the House but still harsh on the EPA. A House-Senate conference committee moved closer to the Senate's position. It reduced the EPA's overall budget by 22 percent, safe drinking-water grants to states and localities by 45 percent, and EPA's enforcement programs by 24 percent. As he had threatened, President Clinton vetoed the bill in mid-December 1995, saying the cuts were unacceptably large. Proposed reductions in other environmental agency budgets were generally smaller but nonetheless significant.

Irreconcilable differences between budgets that the president and the GOP Congress were willing to accept led to a period of prolonged stalemate in late 1995 and early 1996 and to two partial government shutdowns as money to operate agency programs ran out. The Republicans received the brunt of the public's wrath for the budget wars, which voters saw as yet another illustration of irresponsible gridlock in government.

By early 1996 Congress began to backtrack on its fiscal demands, and by late April 1996 it agreed to reinstate many of its earlier cuts in the EPA's budget as part of a broader compromise with the White House on the fiscal year 1996 budget. Although conflict continued in the 105th Congress over budget riders, spending levels were no longer targeted as they were in the previous Congress. There were some notable exceptions, such as the elimination of U.S. funding for the United Nations Population Fund in the fiscal year 1999 budget, which reflected a continuing conflict between the parties on population policy. Yet in 1998 the Clinton administration managed to gain full funding for its \$1.7 billion Clean Water Action Plan (a five-year initiative to deal with polluted runoff from cities and farms), a 23 percent boost for programs to protect rare and endangered species, and a big jump in spending on global climate change research.

Reauthorizing Environmental Statutes

For most of the 104th Congress members were absorbed in regulatory reform and budgetary battle and made little progress on the legislative front. Severe disagreements over the direction of environmental policy contributed to the lack of action. Partisan divisions were especially strong. The League of Conservation Voters (LCV) reported that for 1995, for example, votes on the environment showed the greatest disparity ever between the two parties. House Republicans averaged 15 percent on the league scorecard (supporting the LCV position on the selected votes 15 percent of the time) while Democrats averaged 76 percent. The ratios were similar in the Senate – 11 percent and 89 percent, respectively, for Republicans and Democrats. For the 105th Congress, the partisan differences remained much the same.

Partly because of such disagreement between the two parties, Congress was unable to act on renewal of the Clean Water Act, Endangered Species Act, Superfund, or Resource Conservation and Recovery Act. Where the House was prepared to move ahead, the Senate

often blocked legislation that weakened environmental protection. For example, in May 1995 the House passed a revision of the Clean Water Act that the press and environmentalists promptly labeled the “dirty water act” for provisions that significantly weakened protection of wetlands and eased or revoked some of the law’s requirements. The Senate’s Environment Committee, chaired by John Chafee, R-R.I., chose not to move on similar proposals in the Senate.

The same outcome characterized action on most of the major environmental laws. In October 1995 the House Resources Committee approved a rewrite of the Endangered Species Act (ESA) backed by Rep. Don Young, R-Alaska, the committee’s chair, and Rep. Richard W. Pombo, R-Calif. The Young-Pombo bill required greater consideration of property owners and economic impacts. Opponents argued that the bill would gut the ESA to appease small landowners and corporate developers, and they vowed to fight it. As a result of these conflicts, neither house approved a final bill in the 104th Congress. Deadlock continued in the 105th Congress even though broad bipartisan agreement was reached on an ESA bill in the Senate, sponsored by Senators Dirk Kempthorne, R-Idaho, and Chafee; that bill also was endorsed by the Clinton White House.

In both the 104th and 105th Congresses, members were unable to build consensus for revision the Superfund hazardous waste cleanup program despite long-standing concerns about its cost and effectiveness. The Senate Environment and Public Works Committee completed work on a bill in March 1998, but the committee split along party lines and the measure went no further. Two different bills were considered in the House, but neither made it out of committee. Environmentalists, most Democrats, and the Clinton White House objected that the measures would let polluters off the hook and weaken cleanup standards.

Section E. Alternatives to Conventional Regulation

Dissatisfaction with traditional "command and control" environmental programs, such as those under the Clean Air Act, generated proposals for new ways of protecting the environment that allowed more flexibility, particularly for the regulated business community. By far the most celebrated of these alternative approaches is found in the 1990 amendments to the CAA which address the problem of acid rain.

This section describes, first, the concept of emission trading and how it operates in the CAA's acid rain program. Then the section provides an overview of the "reinvention" of environmental programs undertaken during the Clinton Administration.

Consequences of Acid Rain
U.S. Environmental Protection Agency, *Acid Rain*
(www.epa.gov/acidrain/what/index.html visited October 11, 2007)

“Acid rain” is a broad term referring to a mixture of wet and dry deposition (deposited material) from the atmosphere containing higher than normal amounts of nitric and sulfuric acids. The precursors, or chemical forerunners, of acid rain formation result from both natural sources, such as volcanoes and decaying vegetation, and man-made sources, primarily emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x) resulting from fossil fuel combustion. In the United States, roughly 2/3 of all SO_2 and 1/4 of all NO_x come from electric power generation that relies on burning fossil fuels, like coal. Acid rain occurs when these gases react in the atmosphere with water, oxygen, and other chemicals to form various acidic compounds. The result is a mild solution of sulfuric acid and nitric acid. When sulfur dioxide and nitrogen oxides are released from power plants and other sources, prevailing winds blow these compounds across state and national borders, sometimes over hundreds of miles.

Wet deposition refers to acidic rain, fog, and snow. If the acid chemicals in the air are blown into areas where the weather is wet, the acids can fall to the ground in the form of rain, snow, fog, or mist. . . . The strength of the effects depends on several factors, including how acidic the water is; the chemistry and buffering capacity of the soils involved; and the types of fish, trees, and other living things that rely on the water.

In areas where the weather is dry, the acid chemicals may become incorporated into dust or smoke and fall to the ground through dry deposition, sticking to the ground, buildings, homes, cars, and trees. Dry deposited gases and particles can be washed from these surfaces by rainstorms, leading to increased runoff. This runoff water makes the resulting mixture more acidic. About half of the acidity in the atmosphere falls back to earth through dry deposition.

Acid rain causes acidification of lakes and streams and contributes to the damage of trees at high elevations (for example, red spruce trees above 2,000 feet) and many sensitive forest soils. In addition, acid rain accelerates the decay of building materials and paints, including irreplaceable buildings, statues, and sculptures that are part of our nation’s cultural heritage. Prior to falling to the earth, sulfur dioxide (SO_2) and nitrogen oxide (NO_x) gases and their particulate matter derivatives – sulfates and nitrates – contribute to visibility degradation and harm public health.

The ecological effects of acid rain are most clearly seen in the aquatic, or water, environments, such as streams, lakes, and marshes. Acid rain flows into streams, lakes, and marshes after falling on forests, fields, buildings, and roads. Acid rain also falls directly on aquatic habitats. Most lakes and streams have a pH between 6 and 8, although some lakes are naturally acidic even without the effects of acid rain. Acid rain primarily affects sensitive bodies of water, which are located in watersheds whose soils have a limited ability to neutralize acidic compounds (called “buffering capacity”). Lakes and streams become acidic (i.e., the pH value goes down) when the water itself and its surrounding soil cannot buffer the acid rain enough to neutralize it. In areas where buffering capacity is low, acid rain releases aluminum from soils into lakes and streams; aluminum is highly toxic to many species of aquatic organisms.

Many lakes and streams examined in a National Surface Water Survey (NSWS) suffer from chronic acidity, a condition in which water has a constant low pH level. The survey

investigated the effects of acidic deposition in over 1,000 lakes larger than 10 acres and in thousands of miles of streams believed to be sensitive to acidification. Of the lakes and streams surveyed, acid rain caused acidity in 75 percent of the acidic lakes and about 50 percent of the acidic streams. Several regions in the U.S. were identified as containing many of the surface waters sensitive to acidification. They include the Adirondacks and Catskill Mountains in New York state, the mid-Appalachian highlands along the east coast, the upper Midwest, and mountainous areas of the Western United States. In areas like the Northeastern United States, where soil-buffering capacity is poor, some lakes now have a pH value of less than 5. One of the most acidic lakes reported is Little Echo Pond in Franklin, New York. Little Echo Pond has a pH of 4.2.

Streams flowing over soil with low buffering capacity are as susceptible to damage from acid rain as lakes. Approximately 580 of the streams in the Mid-Atlantic Coastal Plain are acidic primarily due to acidic deposition. In the New Jersey Pine Barrens, for example, over 90 percent of the streams are acidic, which is the highest rate of acidic streams in the nation. Over 1,350 of the streams in the Mid-Atlantic Highlands (mid-Appalachia) are acidic, primarily due to acidic deposition. . . .

Emissions from U.S. sources also contribute to acidic deposition in eastern Canada, where the soil is very similar to the soil of the Adirondack Mountains, and the lakes are consequently extremely vulnerable to chronic acidification problems. The Canadian government has estimated that 14,000 lakes in eastern Canada are acidic.

Acid rain causes a cascade of effects that harm or kill individual fish, reduce fish population numbers, completely eliminate fish species from a waterbody, and decrease biodiversity. As acid rain flows through soils in a watershed, aluminum is released from soils into the lakes and streams located in that watershed. So, as pH in a lake or stream decreases, aluminum levels increase. Both low pH and increased aluminum levels are directly toxic to fish. In addition, low pH and increased aluminum levels cause chronic stress that may not kill individual fish, but leads to lower body weight and small size and makes fish less able to compete for food and habitat.

Some types of plants and animals are able to tolerate acidic waters. Others, however, are acid-sensitive and will be lost as the pH declines. Generally, the young of most species are more sensitive to environmental conditions than adults. At pH 5, most fish eggs cannot hatch. At lower pH levels, some adult fish die. Some acid lakes have no fish. . . .

. . . [R]esearchers now know that acid rain causes slower growth, injury, or death of forests. Acid rain has been implicated in forest and soil degradation in many areas of the eastern U.S., particularly high elevation forests of the Appalachian Mountains from Maine to Georgia that include areas such as the Shenandoah and Great Smoky Mountain National Parks. Of course, acid rain is not the only cause of such conditions. Other factors contribute to the overall stress of these areas, including air pollutants, insects, disease, drought, or very cold weather. In most cases, in fact, the impacts of acid rain on trees are due to the combined effects of acid rain and these other environmental stressors. . . .

Early Efforts to Address Acid Rain

Arnold W. Reitze, Jr., *State and Federal Command-and-Control Regulation of Emissions from Fossil-Fuel Electric Power Generating Plants*
32 ENVIRONMENTAL LAW 369, 402-407 (2002)

Use of Dispersion Techniques to Meet CAA Standards

Under the CAA of 1970, EPA permitted states to allow the use of tall stacks and other dispersion techniques in lieu of emission limitations. The EPA's policies concerning smokestack parameters encouraged long distance transport of acid-producing chemicals emitted from stationary sources. . . . In *Train v. Natural Resources Defense Council, Inc.*, [421 U.S. 60 (1975)], one of the first air pollution cases to reach the United States Supreme Court, the Court allowed each state to select whatever mix of controls it desired and held that a state has considerable freedom to design a [State Implementation Plan] SIP as long as it provides for attaining . . . [air quality standards]. The Court, however, was ambiguous on the use of dispersion techniques, such as tall smokestacks. . . .

On January 6, 1976, EPA promulgated guidelines on the role of tall smokestacks, allowing their use where [Best Available Control Technology] BACT was used or where not using tall smokestacks would be economically unreasonable or technologically unsound. Industry had already opted to construct tall smokestacks to avoid the need to install more effective, but more expensive, air pollution controls. In 1970, there were only two smokestacks in the United States higher than five hundred feet. By 1985, there were more than 150, with 23 over 1000 feet in height. Moreover, industry adopted the practice of venting more than one combustion unit to a smokestack, which increased the exhaust gas temperature and consequently, the height of the stack plume.

In 1977, Congress expressed antipathy to . . . the use of high smokestacks. . . . For purposes of SIP development, high smokestacks were not banned, but a new section 123 limited the height of a smokestack to a height consistent with "good engineering practice" and prohibited crediting SIPs with benefits derived from dispersion techniques. . . .

EPA issued . . . final regulations on February 8, 1982. The National Resources Defense Council (NRDC) and the Sierra Club challenged these regulations. The D.C. Circuit held that, based on the legislative history of the CAA, Congress had limited the . . . credit for excessive stack height and dispersion techniques. Three reasons were set forth:

First, dispersion techniques do not reduce the amount of pollution . . . but merely spread it . . . to other areas Second, the long-range transport of certain pollutants was . . . limited to the formation of "acid rain" Third, intermittent control systems, which are dependent on synchronizing plant operation with weather conditions, were thought to be unreliable and virtually impossible to enforce.

. . . The court upheld some provisions of the stack height regulations, but reversed others, and remanded still other provisions to EPA for further action. The end result was that the tall stacks constructed before the change in the law avoided meaningful regulation.

On July 8, 1985, EPA promulgated new final regulations for CAA section 123. Seventeen years after CAA section 110 presented issues concerning the use of tall stacks to avoid air pollution controls, and more than ten years after CAA section 123 was enacted, NRDC sued again. Once again, some aspects of the regulations were remanded, although most of the rule was upheld. . . .

The use of tall smokestacks, which resulted in an increase in the adverse affects of air pollution, should never have been approved by EPA. Congress tried to curb the use of tall stacks in 1977, but a decade later the regulations were still tied up in litigation. The importance of stack heights has been reduced by the 1990 CAA Amendments, especially CAA subchapter IV. Controls are now to be imposed on all sulfur emissions from electric power plants. As a result, EPA has not promulgated new regulations.

International Air Pollution

Tall stacks led to the long distance transport of air pollutants, which has an adverse effect on Canada. CAA section 115 deals with international air pollution. If the EPA Administrator finds that air pollution may reasonably be anticipated to endanger public health or welfare in a foreign country, and the Administrator determines that the foreign country has essentially the same air pollution limits as are applicable in the United States, then EPA must promulgate rules to prevent the harm.

In 1985, Northeastern states and national groups sued in D.C. district court to prevent emissions that caused acid rain in Canada, basing their suit on CAA section 115. In *New York v. Thomas (Thomas I)* the court granted summary judgment and ordered EPA to issue SIP revision notices to force states to act to protect Canada from the effects of acid rain. The D.C. Circuit upheld the lower court decision. However, the district court had said EPA could make a new determination of reciprocity. In October 1985, EPA's Administrator Lee M. Thomas found that reciprocity continued to exist. The D.C. Circuit reversed, holding that the original findings of endangerment and reciprocity by the prior Administrator, Douglas Costle, were rules under 5 U.S.C. section 551(4) of the Administrative Procedure Act (APA), and, therefore, notice and comment procedures were required to change them. The D.C. Circuit required the plaintiffs to file rulemaking petitions with EPA before they could bring a lawsuit to compel EPA to reduce emissions. A petition for rulemaking was filed with EPA in April 1988 and was denied in October 1988. EPA based its denial on a claimed lack of knowledge as to whether U.S. emissions are causing acid rain in Canada. Nine states, the province of Ontario, and environmental groups brought suit in federal court in November 1988 seeking to remove EPA's decision.

In 1990, the D.C. Circuit once again upheld EPA's unwillingness to protect Canada, saying that EPA was not obliged to promulgate endangerment and reciprocity findings until it was able to determine specific pollution sources. The court was willing to accept EPA's claim

that the endangerment could not be correlated to sources of pollution. . . .

Emissions Trading in the U.S.

A. DENNY ELLERMAN, PAUL JOSKOW, AND DAVID HARRISON, JR.,
EMISSIONS TRADING IN THE U.S.: EXPERIENCE, LESSONS, AND CONSIDERATIONS FOR
GREENHOUSE GASES (Pew Center on Global Climate Change) 1-6, 8-12 (May 2003)

Overview of the Concept of Emissions Trading

The basic rationale for emissions trading is straightforward. By giving firms the flexibility to reallocate (trade) emissions credits or allowances among themselves, trading can reduce the compliance costs of achieving the emissions target.

A simple numerical example illustrates how emissions trading can reduce control costs relative to a traditional approach that is based upon setting uniform emissions standards (i.e., traditional command-and control). . . . [The following example is] a typical situation that could face facilities complying with a single uniform emission standard. In reducing emissions to meet the standard, [Plant I] incurs a cost of \$500 for a ton of emissions reduced, while [Plant 2] spends \$3,000 for a ton reduced. These two facilities might be different plants within the same company, plants owned by different companies in the same sector, or plants in completely different sectors. The particular emissions standards that are compared to the trading approach might be based upon a common regulatory standard or on completely separate regulations.

Clearly, the same overall reduction in emissions could be achieved at lower compliance costs by tightening controls at Plant I and relaxing them at Plant II. Initially, loosening controls at Plant II by one ton saves \$3,000, whereas tightening controls by one ton at Plant I would raise cost by only \$500, for a net savings in compliance costs of \$2,500 per ton to achieve the same level of emissions. One way to achieve the cost savings would be to set different standards for the two sources, but such adjustments would be controversial (particularly if the facilities were competitors). Moreover, setting facility-specific standards would require that the government develop enormous amounts of facility-specific information to determine the cost-minimizing emissions reduction levels. These decisions are best left to the firms that operate these facilities, since they presumably have the best information about the cost of control alternatives and can use that information most effectively.

Emissions trading provides a means of achieving these cost savings without the need for regulators to collect such detailed compliance cost information for different sources. The two sources, knowing their own individual compliance costs, could trade emissions credits or allowances among themselves at the market price and determine whether it is profitable to control more and sell allowances to others or to control less and buy allowances to cover the additional emissions. The trading mechanism allocates emissions reductions among sources in the most cost-effective manner, relying on individual information and self-interest – rather than

administrative regulation – to determine compliance decisions by each individual source.

Suppose in the previous numerical example that the market price of an emissions credit or allowance was \$2,000 per ton, and that the two facilities were initially allocated allowances consistent with the individual emissions levels required under the emissions standard. . . .[E]ach of the sources would gain from the market. Plant I (low-cost seller) gains by reducing its emissions further than the standard requires and selling the allowances it no longer needs to Plant II; it receives \$2,000 for the allowance but pays only \$500 to achieve the reduction, for a net gain of \$1,500. On the other side of the transaction, Plant II (high-cost buyer) is able to buy the allowance for \$2,000 and reduce its compliance cost by \$3,000, for a net savings of \$1,000. Thus the total savings in compliance costs of \$2,500 per ton is split between the buyer and the seller, with both gaining from trading.

This simple example illustrates both how emissions trading operates – through exchanges between buyers and sellers of the right to emit a ton – and the major cost-savings achieved. . . .

Three Basic Types of Emissions Trading Programs

Three broad types of emissions trading programs have emerged: reduction credit, averaging, and cap-and-trade programs. Although all share the feature of tradability, the three differ in important respects.

Reduction credit programs provide tradable credits to facilities that reduce emissions more than required by some pre-existing regulation (or other baseline) and allow those credits to be counted towards compliance by other facilities that would face high costs or other difficulties in meeting the regulatory requirements. (These programs sometimes are referred to simply as “credit-based.”) Reduction credits are created through an administrative process in which the credits must be pre-certified before they can be traded.

Averaging programs also involve the offsetting of emissions from higher-emitting sources with lower emissions from other sources, so that the average emission rate achieves a predetermined level. Like reduction credit programs, averaging programs provide flexibility to individual sources to meet emissions constraints by allowing differences from source-specific standards to be traded between sources. The primary difference between averaging and reduction credit programs is that reduction credits are created (or “certified”) through an administrative process, whereas the certification is automatic in averaging programs.

Cap-and-trade programs operate on somewhat different principles. Under a cap-and-trade program, an aggregate cap on emissions is set that defines the total number of emissions “allowances,” each of which provides its holder with the right to emit a unit (typically a ton) of emissions. The permits are initially allocated in some way, typically among existing sources. Each source covered by the program must hold permits to cover its emissions, with sources free to buy and sell permits from each other. In contrast to reduction credit programs – but similar to averaging programs – cap and trade programs do not require pre-certification of allowances; the allowances are certified when they are distributed initially. Also, cap-and-trade programs limit

total emissions, a contrast to reduction credit and averaging programs that are not designed to cap emissions.

A trading program might include more than one type of trading mechanism. As discussed below, the Acid Rain trading program . . . include[s] reduction credit supplements to the basic cap-and-trade program. In addition, a cap-and-trade program might provide for early reduction credits, which allow firms to get credits for voluntarily reducing emissions prior to the introduction of a cap-and-trade program. The credits allocated can be used to meet requirements once the cap-and-trade program goes into force.

All three types of emissions trading rely on certain factors that constitute preconditions for a successful program. First and most importantly, all three forms assume that an emissions control requirement has been put in place that requires emissions to be reduced to levels below what they otherwise would be. For credit and averaging programs, the requirement will typically be a source-specific standard (e.g., a maximum emissions rate). In a cap-and-trade program the requirement will take the form of an aggregate cap on emissions combined with the provision that each source surrender allowances equal to its emissions. Second, the cost savings achieved by all three forms of trading depend upon variability in the costs of reducing emissions among emissions sources. Differences in emission control costs across emissions sources create the opportunity to reduce costs through trading. Finally, in all three types of trading programs, the requirements must be both enforceable and enforced. A corollary to this precondition is that there must be accurate measurement of actual emissions or emissions rates - otherwise it would be impossible to enforce the requirements because it would be impossible to determine whether sources were in compliance.

Other Features of Emissions Trading Programs

There are many features that must be specified in an emissions trading program, some of which do not apply to all of the three basic emissions trading types. The following is a list . . . that categorizes the major features of emissions trading programs into two major categories: design issues and implementation issues.

Design Issues. These include the decisions that arise as the program is designed and turned into a specific regulatory program

Allocation of initial allowances. This issue is only relevant in cap-and-trade programs. Some method is required to distribute the initial allowances. Basic methods include various formulas to distribute initial allowance to participants on the basis of historical information (“grandfathering”) or on the basis of updated information (“updating”) as well as auctioning of the initial allowances.

Geographic or temporal flexibility or restrictions. This includes the possibility of restricting trades among different parts of the geographic range of the program. It also includes the possibility of banking (i.e. reducing emissions more than required in a given year and “banking” the surplus for future internal use or sale) or borrowing (i.e., reducing less than

required in a given year and thus “borrowing,” with the borrowed amount made up by reducing more than required in subsequent years).

Emissions sources that are required or allowed to participate. This includes specification of the universe of sources that must participate in the trading program. It also includes the possibility of allowing additional sources to opt-in to the program.

Institutions established to facilitate trading. This includes the possibility of encouraging third parties (e.g., brokers) to participate in trading as well as the possibility of setting up an ongoing auction or other institutions to increase liquidity and establish market prices.

Implementation Issues. A number of decisions come into play as the program is implemented.

Certification of permits. This decision applies to reduction credit programs, which require that emission reductions be certified before they can be traded.

Monitoring and reporting of emissions. Methods must be designed to monitor and report emissions from each participating source.

Determining compliance and enforcing the trading program. These decisions relate to the means of determining whether sources are in compliance and enforcing the program if sources are out of compliance.

Maintaining and encouraging participation. This relates to decisions made to keep sources in the program and encourage participation of sources whose participation is optional (e.g., those given the opportunity to opt-in). . . .

EPA Emissions Trading Programs (EPA ET)

Starting in the mid-1970s, the U.S. EPA and the states developed four limited emissions trading programs to increase flexibility and reduce the cost of compliance with air emissions standards for stationary sources under the Clean Air Act.

1. *Netting.* Netting allows large new sources and major modifications of existing sources to be exempted from otherwise applicable review procedures if existing emissions elsewhere in the same facility are reduced by a sufficient amount.

2. *Offsets.* The offset policy allows a major new source to locate in an area that does not attain a given National Ambient Air Quality Standard – a non-attainment area – if emissions from an existing source reduced by at least as much as the new source would contribute (after installation of stringent controls).

3. *Bubble.* The bubble policy allows a firm to combine the limits for several different sources into one combined limit and to determine compliance based on the aggregate limit

instead of from each source individually. The name alludes to an imaginary “bubble” placed over the several sources.

4. *Banking*. Under banking, firms that take actions to reduce emissions below the relevant standard can accumulate credits for future internal use or sale.

These four programs – collectively referred to as EPA Emissions Trading or EPA ET – are related by the common objective of providing sources with flexibility to comply with traditional source-specific command-and-control standards while maintaining environmental objectives focused primarily on local air quality.

Reliance on these early EPA ET programs has been limited mostly as a result of implementing burdensome regulations that take up 47 pages of multi-column fine print in the *Federal Register*. In general, the regulations have restricted substantially the applicability of the programs in response to regulatory concerns that the programs would compromise environmental objectives by encouraging “paper credits” or “anyway tons” – credits for emissions reductions that would have been made without the incentives provided by the emissions trading program. Credits must meet detailed criteria to be certified as eligible for trading. Offsets can only be used in certain geographic areas and any “trades” using them are not one-for-one, since the regulations require emissions reductions at the source proving the credit to be greater than the expected increase in emissions by the source using the credit. Potential applications of the bubble policy initially faced even greater hurdles because proposed bubbles had approved as revisions to an applicable State Implementation Plan (SIP), lengthy administrative process that discouraged their use. These and other EPA regulations made efforts to identify and create trading opportunities expensive and uncertain.

The result of this process for creating and approving tradable credits, often called certifications, is that the EPA ET programs have yielded relatively few trades and low cost savings relative to their potential. The combination of pre-approval requirements and need to construct customized arrangements for each trade has created substantial transactions costs-often exceeding the market value of the credits. These transaction costs – in effect the result of the lack of a well-defined and standardized commodity to be traded – have been the primary obstacle to more widespread participation in these programs. . . . [Two of the programs are noted below.]

Lead-in-Gasoline Program

The averaging program used to regulate lead in gasoline during the mid 1980s provides an example of a much more successful trading program than the early EPA ET programs. The averaging program for lead grew out of EPA’s efforts to reduce the lean content of gasoline starting in the early 1970s. Through 1982, lead limits were enforced on a refinery-by-refinery basis, with each refinery allowed to average lead concentration across its total gasoline production. In 1982, the rules were changed to allow trading across refineries and refining firms. Under the new rules, a refinery could use lead in its gasoline above its usual limit if it purchased an equivalent number of rights from other refineries that had reduced their own lead

content below their usual limits. It was possible to implement nationwide trading because the wide geographic distributions of gasoline from any given refinery removed the local concerns that had limited the scope of trading in the early EPA ET programs. In 1985 EPA promulgated a new rule to reduce the lead limit more than ten-fold in two phases: in mid-1985, from 1.1 grams per leaded gallon (gplg) to 0.5 gplg, and then, in January 1986, to 0.1 gplg. As part of this new phase-down rule, EPA allowed refiners to “bank” lead reductions: If they reduced ahead of schedule during 1985, they could save the excess rights for use or sale in 1986 and 1987.

The 1980s lead program is widely regarded as a success with respect to the initial trading opportunities permitted in the 1983-85 period and the addition of banking in the 1985-87 period. . . . From mid-1983 (when the new rules took effect) until early 1985 (when further phase-down began), an increasingly vigorous market in rights developed. In a typical quarter, over half of all refineries participated in the market, and up to one-fifth of the lead rights were traded. In 1985 when provisions for banking were added and the restrictions were tightened, an even larger fraction of lead was bought and sold on the market.

The banking components of the Lead Trading Program appear to have been particularly successful. The EPA had predicted that refiners would bank seven to nine thousand tons of lead. . . . [T]he level of banking was even higher than predicted: refineries banked a total of 10.6 thousand tons, almost 17 percent higher than the upper end of the predicted range. Thus, it seems likely that the actual [dollar] savings were higher than the EPA estimate. In addition, the use of banking led to a faster reduction in lead emissions than might otherwise have occurred.

The Lead Trading Program also marked an innovation in regulation by using the refinery-specific limit as the baseline for establishing credits without worrying about whether the lead content of gasoline from a specific refinery might have been lower anyway. This innovation avoided the need for case-by-case review to certify tradable credits. Differences between the refinery-specific average limits and the refinery’s average lead content – and thus credits and debits – could be calculated easily. Monitoring for purposes of calculating credits and debits involved no additional costs beyond those required to enforce command-and-control requirements. This streamlining of the process for measuring compliance and certifying tradable credits had characterized all of the successful trading programs. In effect, the owner of refineries that reduced lead content below the average were automatically issued credits that could be used at other facilities. . . .

Acid Rain Trading Program

The largest best known and most successful experience with emissions trading is the sulfur dioxide (SO₂) cap-and-trade program created by Title IV of the 1990 Clean Air Act Amendment. . . . Because of its large scale and high profile, the success of the Acid Rain Program has contributed more than anything else to the change in attitude towards emissions trading in the 1990s, and it is often cited as an example for other applications, including GHG emission reductions.

The Current Acid Rain Program
Debra Jezouit, *The Acid Rain Program*,
in ROBERT J. MARTINEAU, JR. AND DAVID P. NOVELLO, EDs.,
THE CLEAR AIR ACT HANDBOOK
423-428, 436-437, 440 (2d ed. American Bar Assoc. 2004)

Title IV of the Clean Air Act (CAA) was enacted to reduce atmospheric loading of sulfur dioxide (SO₂) and nitrogen oxides (NO_x), the two principal precursors of acid rain by restricting emissions of these pollutants from electric utilities. . . .

At the same time, Title IV represents an attempt to employ market-based principles to achieve these emission reductions. The title also was intended to encourage the use of energy conservation, renewable energy, and alternative technologies for emissions reductions.

The CAA provides for a 10-million ton reduction in SO₂ emissions from electric utilities from 1980 levels. Title IV implements this goal in two stages, referred to as Phase I and Phase II in the CAA. Phase I, which began on January 1, 1995, required the biggest and dirtiest (primarily coal-fired) utilities to make a preliminary reduction in SO₂ emissions. In Phase II, which began on January 1, 2000, the Phase I units were required to make further reductions in SO₂ emissions, and all remaining affected units, including new units, were required to comply with the Phase II limits, which are designed to cap annual utility SO₂ emissions at approximately 8.95 million tons.

Due to the use of a market-based program, it is possible for some affected units to comply with the SO₂ limits without actually reducing emissions. To achieve the SO₂ reductions, Title IV authorizes the EPA administrator to allocate “allowances,” a major feature of the legislation. One allowance entitles the holder to emit one ton of SO₂. The CAA specifies the number of allowances that the EPA administrator is to allocate to each utility unit on an annual basis. The number is based on the amount of emissions that would result from each unit if it operated at a certain baseline fuel consumption and a specified rate. In the case of Phase I allowances, the number of allowances was identified in a statutory list, and for Phase II, the number of allowances were determined by various equations. As long as a utility unit has enough allowances to cover its emissions, it is in compliance with the CAA. The program allows utility units to trade allowances so that a utility unit may purchase extra allowances to cover its emissions rather than reducing its emissions to meet its statutory allowance allocation. In contrast, utility units with extra allowances may sell them or bank them for use in future years.

A utility unit is likely to purchase extra allowances if it costs less to buy the extra allowances than to install emission controls. Since the EPA administrator allocates a finite number of allowances each year, extra allowances are available only if another unit is emitting at a level below what is permissible under the CAA, or has banked allowances from previous years. Since Title IV is concerned with overall emissions of SO₂ and not with regional emissions, which are addressed by the National Ambient Air Quality Standards (NAAQS), state

implementation plans (SIPs), and new source review nonattainment and prevention of significant deterioration (PSD) provisions, the emission reduction requirements of the title are achieved using the most cost-effective means.

Title IV also provides for a reduction in emissions of NO_x by approximately 2 million tons from 1980 levels by requiring the installation of “low NO_x burner technology” (LNBT) on coal-fired utility boilers. Unlike the SO₂ program, the NO_x program does not allocate NO_x allowances to coal-fired boilers. Instead, under Section 407, all coal-fired utilities must comply either during Phase I or Phase II, depending on the type of boiler at issue with technology-based emissions limitations set by the EPA. These emissions limitations were to be based either on LNBT, for certain types of boilers, or for other boilers, on the best system of emission reduction technology identified by the EPA as being comparable in cost to LNBT. A utility unit that is unable to meet the applicable emission limitation may apply for an alternative emission limitation or may average its emissions with commonly owned or operated utility units and meet the standard on an averaged basis. The statute also provides incentives for using clean coal technology.

The SO₂ and NO_x requirements established by Title IV and by the EPA administrator through regulations are enforced through a permit program. In Phase I, the permit program was run by the administrator but, beginning in Phase II, is being administered by the states. Acid rain permits are subject to the requirements of Title IV and also of Title V, the operating permits program.

Lastly, Title IV requires accurate emissions monitoring and imposes penalties and other requirements for noncompliance with the SO₂ and NO_x emission reduction requirements. Title IV also provided incentives for the use of energy conservation measures and renewable energy during Phase I. . . .

Sulfur Dioxide Program

Statutory Provisions

Sections 403, 404, and 405 of the CAA are the principal provisions establishing the SO₂ program. Other provisions are found in Sections 409 (repowering), 410 (opt ins) and 416 (auctions and sales of allowances). In addition to the creation and allocation of marketable allowances, the Title IV SO₂ provisions provided incentives for the use of alternative technologies and energy conservation during Phase I. . . .

Applicability

The SO₂ program applies to new and existing utility units in the forty-eight contiguous states and the District of Columbia. This can be determined, however, only upon a review of various sections of Title IV. Section 401 states that the purpose of the title is to reduce emissions of SO₂ and NO_x from “affected sources” in the contiguous United States. As defined in Section 402, an “affected source” is a source comprised of one or more “affected units.”

Affected units are defined as those units that are subject to emission reduction requirements under Title IV, which are “existing utility units” and “new units.”

A “unit” is a fossil fuel-fired combustion device, and an “existing” unit is one that commenced commercial operation before November 15, 1990, the date of enactment of the CAA amendments. . . . A utility unit is a unit that serves a generator that produces electricity for sale, or that did so in 1985, and includes certain cogeneration units. The SO₂ program also applies to units that opt into the program under Section 410.

Allowances

Title IV imposes limits on SO₂ emissions through a system of marketable allowances. Section 403 contains the basic provisions regarding the allowance system. Pursuant to this section, the EPA administrator is to issue allowances to the designated representative of each existing affected unit. The designated representative is the individual who represents the owner or operator of a utility unit in the various activities undertaken under Title IV, such as allowance transactions, permit applications, and compliance plan submittals. Most utilities have appointed an official of the company or a plant manager as the designated representative, but they are not required to do so. . . .

The EPA administrator issues one allowance for each ton of SO₂ that the unit is allowed to emit, as specified in Sections 404, 405, 406, 409, and 410 of the CAA. New units do not receive allowances, except for those that commenced operation before December 31, 1995, as specified in Section 405(g), but are required to have allowances to cover their SO₂ emissions beginning in Phase II. New units must therefore purchase allowances for existing units, which in turn requires the existing units to reduce their emissions. This preserves the SO₂ emissions cap.

The EPA administrator was required to ensure that, by Phase II, no more than 8.9 million allowances could be allocated per year, with the exception of allowances allocated pursuant to Section 405(a)(2) (bonus allowances), Section 405(a)(3) (extra allowances for certain big high-emitting units), Section 409 (allowances for repowering extensions), and Section 410 (allowances for units that opt into the SO₂ program). The administrator was required to reduce the basic Phase II allowance allocations pro rata to ensure that the limit was not exceeded.

The number of allowances that each Phase I affected unit received during Phase I is listed in Section 404 of the CAA. The number of allowances that each affected unit receives in Phase II was not specified in a list; instead, Section 405 contains numerous formulas for determining the number of allowances that each unit receives. Section 403(a) required the administrator to publish a final list of Phase II allowance allocations by December 31, 1992. . . .

Section 403(b) provides that allowances may be freely transferred among designated representatives of affected units or any holder of allowances. (Purchases of allowances are not restricted to utilities and, in fact, there are allowance brokers). Transfers become effective upon the EPA administrator’s receipt and recordation of a written certification of the transfer. Allowances may be transferred before they are issued (since utilities know in advance how many

allowanced they will be allocated each year), but they may not be used before the year for which they are allocated. Compliance is always determined at the end of the calendar year, under Section 403(d)(2), so that emissions may go above or below the allocation for a unit during the year as long as the unit has enough allowances at the end of the year to cover its emissions. The administrator was required to promulgate, pursuant to Section 403(d)(1), a system for issuing, recording, and tracking of allowances and allowance transactions.

Phase I Requirements

Section 404 identifies the units that became affected units beginning in Phase I and specified the number of allowances that each unit was to receive. The list in Table A of Section 404 includes 110 units, all of which are 100 megawatts or greater and had SO₂ emission rates greater than 2.5 pounds per million British thermal units (lb/mmBtu). In general, the number of allowances allocated to each unit was based on an SO₂ emission rate of 2.5 lb/mmBtu applied to a baseline amount of fossil fuel consumed by the unit, determined by averaging the annual amounts of fuel consumed in 1985 to 1987. . . .

Phase I Compliance Options

Although Section 404 identified the specific units that became affected in Phase I and the number of allowances they were to be allocated, the statute provided several options to allow the Phase I units to postpone or reassign their SO₂ affected unit to receive a two-year “extension” of the Phase I compliance date if it used a qualifying Phase I technology or transferred its emission reduction obligations to a unit using such a technology, that is, a technology that would achieve a 90 percent reduction in SO₂ emissions. A unit granted an “extension” was provided more allowances, allowing it to emit more SO₂ for a two-year period. . . .

Second, pursuant to Section 404(b), utility units could postpone these SO₂ emission reduction requirements by reassigning their Phase I SO₂ reduction requirements to another unit under the control of the same owner or operator. . . .

Third, a Phase I unit could comply with the SO₂ emission reduction requirements during Phase I by reducing utilization of or shutting down a unit. . . .

Energy Conservation and Renewable Energy

Under Section 404(g), units could receive allowances for each ton of SO₂ emissions avoided through the use of qualified energy conservation measures or qualified renewable energy. A qualified energy conservation measure is defined as “a cost effective measure,” as identified by the EPA administrator in consultation with the secretary of energy, “that increases the efficiency of the use of electricity provided by an electric utility to its customers.” Qualified renewable energy is defined as “energy derived from biomass, solar, geothermal, or wind as identified by the administrator in consultation with the Secretary of Energy.”

Pursuant to Section 404(g), the EPA administrator allocated allowances from a reserve of

300,000 allowances withheld from Phase II allocations if the utility met various requirements specified in Section 404(f)(2)(B), including that the utility was paying for the measures; that the utility had adopted and was implementing a least-cost energy conservation and electric power plan, and, in the case of qualified energy conservation measures, that the state regulatory authority with jurisdiction over the utility's rates had established rates and charges to ensure that the utility's net income after implementation of the measures was at least as high as if the measures had not been implemented. . . .

Phase II Requirements

Beginning in 2000, all existing utility units became subject to the SO₂ requirements and have been allocated allowances, pursuant to Section 405, based on an emission rate of 1.2 lb/mmBtu multiplied by the baseline fuel consumption. These basic allowances are supplemented by various bonus allowances, specified in Sections 405(b), (c), (d) and 406, and taken from a Phase II reserve. The bonus allowances have been allocated for the first ten years of Phase II. . . .

Nitrogen Oxides Program

. . . The provisions pertaining to NO_x control are contained in Section 407 of the CAA. The section established technology-based emission limitations and does not employ the same market-based incentives as the SO₂ provisions. . . . [The section] applies to coal-fired units only . . .

Permits

Statutory Provisions Regarding Permits

Acid rain permits are issued pursuant to Section 408 for a period of five years. They were issued by the EPA administrator during Phase I and are being issued by the states during Phase II. . . .

Each permit application must be accompanied by a compliance plan, which must cover all the affected units that comprise the affected source. In general, the compliance plan for most units will be very simple. For the SO₂ program, since the alternative methods of compliance are no longer available, all the permit applicant needs to do is check a box on the form to indicate that the unit will hold sufficient allowances by the allowance transfer deadline to cover the unit's SO₂ emission for the applicable compliance year. For the NO_x program, the unit must check the box on the form agreeing to meet the applicable emission limitations, or provide more detailed information if an emissions averaging plan is chosen for compliance. More detail also is required for opt-in sources. The permit application and compliance plan are binding on the designated representative and the owner or operator and are enforceable in lieu of a permit until the permit is issued.

Notes and Questions

1. Explain in your own words how the acid rain program works.

1. ***The politics of the CAA Amendments of 1990.*** An illuminating account of the passage of the 1990 legislation is GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990 AND ITS IMPLEMENTATION* 113 (2d ed. 1995):

The free flow of money helped stiffen the opposition of some members to a more stringent clean air bill. Members of the House Energy and Commerce Committee, for example, were the recipients in 1989 (a non-election year) of nearly \$612,000 from political action committees (PACs) formed by industries interested in the bill. As many as 154 PACs were identified as having a “significant stake in the outcome of the clean-air bill.” About 5 percent of all money raised by all members of Congress in 1989 came from PACs interested in securing passage of clean air legislation – an average of \$14,570 per member. Republican members averaged more than \$17,278 in contributions; Democrats averaged \$12,729. The PAC money from clean air interests constituted as much as one-third of all PAC money received by some members. The most generous contributors were the electric utilities, who gave more than \$150,000 to members of the House Energy and Commerce Committee. They were followed by the oil, natural gas, automobile, and chemical industries; gas utilities; coal and steel industries; diversified energy companies; construction; and farm equipment manufacturing. Although the amount of PAC money contributed to members supporting clean air was relatively small in terms of total PAC giving, it is illustrative of the way campaign spending chases hot legislative issues. For members such as Rep. Al Swift (D-Wash.), receiving PAC money was not a problem: “There is so damn much money out there that anybody who gives anybody anything for it is an idiot.” For industry, PAC contributions have become a cost of doing business, a prerequisite for ensuring that its voice will be heard in committee decision making.

Campaign contributions raised fears that industry lobbying might weaken key provisions of the bill. In October 1989, the House Subcommittee on Health and the Environment passed by a 12-10 vote, an amendment to weaken a provision in the bill mandating the use of alternative fuels, an amendment for which the auto and oil industries had vigorously lobbied. The twelve members who voted in favor of it received an average of \$6,021 from oil and auto industry PACs; the ten members who voted against it took an average of \$2,755 from these PACs. Some PAC contributions, of course may be nothing more than a recognition of the already established policy views of members. But many observers and participants alike agree that they pose profound problems for the legislative process.

The U.S. Environmental Protection Agency (EPA) launched its regulatory “reinvention” efforts in 1995 when President Clinton, Vice President Gore, and EPA Administrator Carol Browner announced an agenda “to make environmental programs work more fairly, efficiently, and effectively for the nation.” It came at a time when many diverse parties with environmental interests and responsibilities were calling for change – and promptly after the 1994 elections. The broader effort was comprised of several programs, including Environmental Performance Partnerships with the states, a cooperative undertaking with industry called the Common Sense Initiative, and most prominently Project XL (for “Excellence”). The following excerpt describes the development and nature of each.

Reinvention

U.S. ENVIRONMENTAL PROTECTION AGENCY,
REINVENTING ENVIRONMENTAL PROTECTION, 1998 ANNUAL REPORT,
13-14, 26-29, 44-47, 48-50 (1999)

The demand for change [in the environmental regulatory system in the 1990s] can be traced to a growing and common desire for improvements to the nations’ environmental protection system. Over the last three decades, this system, comprised of environmental programs, regulations, and policies at the federal, state, and local level, is widely recognized as having dramatically improved conditions throughout the United States. Today, our air, land, and water are safer and visibly cleaner even with significant economic expansion and population growth. And yet, even with this progress, serious problems, such as polluted runoff to our rivers and streams and emissions linked to global warming, still exist. The remaining problems reflect gaps and limitations within the current system, and they underscore why we must work to improve it.

Other factors point to the need for change, too. New scientific and technological advances make it possible to detect and prevent environmental threats in ways that were simply not possible when many environmental requirements were first adopted. Our citizens, accustomed to living in an information age, want better environmental information. And as they become better informed, they also expect a more prominent role in decisionmaking. Environmental expertise and management capabilities have grown more sophisticated. Today, state and local governments often need less federal assistance and oversight in managing environmental responsibilities, and American industries typically have their own professional environmental staffs or consultants. Finally, the basic concept of environmental protection has evolved beyond pollution control to include broader objectives, such as pollution prevention, sustainability, and environmental justice. All of these factors create pressure for change and they challenge EPA to constantly rethink how the Agency pursues environmental and public health protection goals.

To guide our efforts, in 1998, the Agency developed a strategic framework for

reinvention. . . . On one level, it calls for EPA to improve functions, such as environmental permitting, monitoring, or reporting, that represent the core of the nation's environmental protection system. Streamlining environmental reporting and similar improvements to environmental programs can free businesses, communities, and regulatory agencies from unnecessary paperwork, allowing them to cut costs and focus on higher priorities and risks.

On another level, the framework calls for EPA to test innovative approaches that can bridge gaps within the current system and advance protection capabilities to new levels. We understand the difficulties and limitations of the current system. "One-size-fits-all" mandates don't always work and some problems aren't being addressed under the current regulatory structure. That is why the Agency is working to find more custom-tailored strategies that better address today's problems and that offer more flexibility for those that implement them

Working with the States

Of all our partnerships, the most critical is our relationship with the states, who share responsibility for implementing environmental programs. Under many federal laws, we rely on states to monitor environmental conditions, issue permits, and enforce requirements. To strengthen this partnership, EPA signed an agreement with the states in 1995 to form the National Environmental Performance Partnership System (NEPPS).

Under this system, states and our 10 Regional offices create tailored Performance Partnership Agreements (PPAs) to define the goals in each state and how each partner will work to reach them. States also may combine some or all of their federal grants into Performance Partnership Grants (PPGs), giving them additional flexibility in managing and spending federal dollars. By the end of 1998, the Agency had PPAs with 33 states, and 43 states had PPGs.

EPA and the states created this new system to focus programs more on environmental results and to provide more flexibility in how environmental problems are solved. We also sought more involvement by the public in planning and priority-setting. Although such changes are sometimes difficult, we achieved progress on several fronts during 1998.

Top priority was given to refining a set of core performance measures that would allow us to jointly evaluate the results from environmental programs. In the past, federal and state agencies have typically measured progress in terms of program activities, such as the number of permits issued or enforcement actions taken. While these actions are important, they tell us little about actual conditions. During 1996 and 1997, we focused on developing more meaningful measures so we could do a better job of benchmarking progress, reporting results to the public, and identifying the problem most in need of attention. These early measures have been incorporated into PPAs – at the same time we have continued working to refine them. Refinements made in 1998 will enable EPA and states to measure and report on progress even more effectively in the future. . . .

As the Agency has worked more closely with the States in recent years, it has gained a better understanding of many different issues. An increasingly important one has been many

states' interest in pursuing environmental regulatory innovations. Because they are on the front lines implementing many environmental programs, state officials are often in the best position to see what works well and what does not. These realizations create interest in finding ways to achieve desired results more efficiently and effectively. EPA understands, shares, and strongly supports this interest. The challenge is to find ways to innovate without jeopardizing the national baseline of protection that federal requirements provide.

After more than a year of negotiating how state and federal interests could be accommodated, in April [1998], EPA and the states agreed on a process that clears the way for states to pursue regulatory innovations that promise equal or better protection. The agreement was signed by Administrator Browner and the Environmental Council of the States (ECOS), the national organization representing state environmental agencies' interests. It is based on seven shared principles: a willingness to experiment, improved environmental performance, smarter approaches to solving environmental problems, stakeholder involvement during design and evaluation, measuring and verifying results against agreed-upon goals and objectives, ensuring appropriate accountability and enforcement, and promoting state-EPA partnerships.

The agreement allows innovations to be tested in a way that does not compromise protection provided through federal requirements. It encourages the states and EPA staff to use existing options for providing regulatory flexibility to a degree we have never done before, as long as doing so makes environmental and economic sense. These options can include exercising the variances provided under some environmental programs, or writing rules that allow innovative projects to be tested and perfected under limited circumstances, such as at a single facility. EPA developed guidance for its Regions, who will take the lead in working with the states under this agreement. . . .

An Industrial Sector Approach to Environmental Protection: What We Learned from the Common Sense Initiative

One of EPA's earliest and most ambitious efforts to reinvent environmental protection began in 1994 when Administrator Browner announced the Common Sense Initiative (CSI). This experimental program was designed as an inclusive forum for testing a fundamentally different approach to environmental protection. For more than 4 years, diverse interests representing the Agency, state and local governments, environmental and other public interest groups, worked to create a more integrated environmental protection system. Their goal was to move the current system beyond the compartmentalized structure that has evolved under the nation's separate environmental laws and to find ways to make the system work more effectively for specific industry sectors and other stakeholders. In all, more than 300 individuals came together to analyze problems, test solutions, and make recommendations for improving environmental management capabilities.

Six industry sectors were chosen to represent a broad array of environmental management challenges facing American industries. Automobile manufacturing, iron and steel, and petroleum refining represented three large, highly regulated industries with long, and sometimes controversial, relationships with EPA. The metal finishing and printing sectors were

chosen to represent the challenges facing small businesses. And the computers and electronics industry was selected because of its relative newness and rapid growth; many of its processes were not in existence when environmental laws were written and basic requirements set years ago. When CSI was launched, these sectors comprised 11 percent of the U.S. gross national product; employed more than four million people; and accounted for more than 12 percent of toxic releases reported by industry.

One of the less tangible, but more important results from CSI was the improved understanding and cooperation that was gained among participants. Individuals who were more accustomed to interacting as adversaries worked together to achieve consensus on complex, controversial issues. The process was slow, sometimes tedious, and always challenging. But it forced participants to listen to others' views and to consider others' special needs and priorities. Over time, it opened minds and spawned ideas that will affect the way that we as regulators and industry do business in the future. Several examples are discussed below.

Metal Finishing Sector

The most dramatic results from CSI can be seen in the metal finishing industry. In January 1998, EPA joined the industry and other stakeholders in launching the National Metal Finishing Strategic Goals Program, a sector-based environmental stewardship program. Under this program, participating facilities voluntarily pledge to meet new environmental performance goals within 5 years. These goals, which will be pursued through innovative pollution prevention opportunities, include reducing hazardous air emissions by 90 percent, utilizing 98 percent of metals on products (thereby reducing metal wastes), cutting water use by half and energy use by a quarter. In addition, the industry pledged to achieve compliance with all environmental requirements at all of its facilities and to support tough enforcement action against facilities that routinely fail to meet their regulatory obligations.

EPA, along with other stakeholders who worked with the industry in developing the program, committed to certain strategic actions to support them in reaching their goals. For EPA, these actions included offering special incentives and tools to encourage environmental improvements and removing regulatory and other barriers that can hinder their improvement efforts. For example, we are now taking regulatory action to improve metal finishers' waste management options under the Resource Conservation and Recovery Act. During CSI discussion, EPA and other participants learned that current regulations discourage recycling and inadvertently lead most operations to choose land disposal for disposal needs. Under a new proposal just issued in February 1999, metal finishers would be allowed to accumulate waste for 180 days – twice as long as before. The extension would allow them to generate waste in volumes sufficient for cost-effective recycling and it would help them avoid expensive costs associated with transporting and disposing relatively small volumes to an offsite location.

In the Great lakes area, where many metal finishing firms are concentrated, environmental officials at all levels see this program as a major opportunity to promote recovery of metals from waste water. Studies show that the region's more than 2,000 metal finishing shops contribute 50 percent of all metal waste flowing into sewage plants for treatment. As part

of their commitment under the program, officials in Chicago are working with local stakeholders to consider tax credits, public recognition, and other incentives for metal finishing firms striving to meet waste water and other environmental performance goals.

The core of the Strategic Goals Program is the metal finishers' strong commitment to pursuing innovative pollution prevention opportunities, matched by regulatory officials and other stakeholders' willingness to take action that directly support the industry's efforts. As this flexible, sector-based program expands to include more facilities, states, and localities, it will provide a replicable model for promoting voluntary stewardship across an entire industry. . . .

Computer and Electronics Sector

The computer and electronics sector found a solution to a major solid waste management challenge for its industry – how to handle mounting volumes of outdated computer and electronics equipment. In the past, recycling this equipment has been difficult because the cathode ray tubes used in most display monitors and televisions typically contain lead. Because of this content, the components fall under the hazardous waste regulations required by the Resource Conservation and Recovery Act. This means they must be transported and processed as a hazardous waste. In June [1998], we committed to change this rule so that the glass can be recovered and reused as raw material in cathode ray tubing manufacturing. In addition to cutting costs and reducing regulatory burden, this change will prevent lead releases into the environment. . . .

Project XL Offers Alternatives to Current Regulation

“If you have an idea that offers better results than what would be achieved under current requirements, then we will work with you and other interested parties to put those ideas to the test.” This unprecedented offer, which EPA made to industry in 1995, is breaking new ground for environmental regulatory reform. In 1998, we approved innovative tests at two more companies and a state agency. To date, 10 projects are being tested, and negotiations on additional proposals are underway with 20 more potential project sponsors.

One innovative project, and the first with a state sponsor, tests self-certification procedures as an alternative to traditional environmental permitting. In Massachusetts, the Department of Environmental Protection developed the Environmental Results Program to streamline permitting and reporting requirements for up to 10,000 small businesses in the state. This program uses industry-wide performance standards and self-reporting compliance with specific criteria as an alternative to permits for individual facilities. Each year, top managers at each business must certify that their facilities are in compliance; those not in compliance must specify specific actions and milestones to get there. By shifting their focus from specific permit requirements to broader industrywide performance standards, facility managers will be in a better position to recognize and act upon opportunities for environmental improvement. As a result of the new standards, participating industries have already achieved significant environmental benefits – the photo processors are cutting waste-water discharges of silver by 99 percent while the dry cleaners are reducing their air emissions of perchloroethylene by 43

percent. State officials believe that after an evaluation and revision phase, this permitting alternative could be transferrable to other industry sectors in Massachusetts and other states.

Another project is investigating how regulatory flexibility might be increased for facilities with strong environmental management systems (EMS). . . . [A]n EMS provides a company with a framework for managing all of its environmental responsibilities so they become more efficient and more integrated into overall business operations. Lucent Technologies has a system in place that has been certified by a third party to conform with international EMS standards. In June [1998], we signed an agreement under Project XL that will allow Lucent to use its system as a basis for simplifying permitting, recordkeeping and reporting requirements at these facilities. The agreement provides a mechanism for evaluating EMS features and results and investigating whether certain benefits and incentives should be offered to facilities that have a high quality EMS in place.

In West Virginia, a project is allowing a specialty chemical manufacturer to test the environmental benefits that can be gained by giving a facility more flexibility in how environmental goals are met. Under the agreement, OSi Specialties, Inc. agreed to install equipment to control toxic organic air pollutants well ahead of what is required under current Clean Air Act requirements. As an incentive, we agreed to defer new controls of toxic organic air emissions from the facility's hazardous waste surface impoundments, which are required under RCPA. The new installation will allow OSi to eliminate 98 percent (by weight), or 309,000 pounds, of the toxic organic compounds from its productions. This result is better for the environment, as similar reductions would not be expected from controlling emissions from the surface impoundments.

Reengineering Project XL

In 1998, EPA worked to simplify the process for approving innovative testing under Project XL. When the Administration announced this precedent setting program in March 1995, it set a goal of testing 50 projects that would reveal ways to improve environmental regulations. But there were no models to draw upon. All of the parties involved – EPA staff, project sponsors, states, and stakeholders – had to “learn by doing.” After gaining experience with projects, the Agency had a more specific concept of what a quality proposal should contain and how decisions that affect regulatory flexibility should be made. Aided by reengineering expertise from two companies that have participated in Project XL, Union Carbide and Dow Chemical, we developed a new process that is now faster, more predictable, and more effective for all parties involved. The Agency expects this new process should allow agreement to be reached on most projects in 6 months to a year, compared to 18 months or longer under the old process. Evidence of an improved process has already been seen in several projects currently under development. The Atlantic Steel project in Atlanta, Georgia, for example, is on track to have a final project agreement signed 8 months after initial project discussions began.

Notes and Questions

1. Was the Clinton-Gore “reinvention” of environmental regulation just window dressing or did it have substance?

Section F. The Variety of Environmental Movements

While it is common to speak of “the” environmental movement, in reality there is not just one. The media typically uses the term “environmentalists” to refer to the mainstream Washington, D.C.-based organizations. But people who consider themselves environmentalists hold a wide range of views and often disagree. Even within a particular category of environmental groups – for example, “mainstream,” “grassroots,” or “radical” – there is great diversity. This section provides an overview of this heterogeneity.

1. The Mainstream Organizations

A CEO Culture

Robert Gottlieb, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 170-175* (Revised ed. 2005)

. . . [The dynamics among the largest environmental groups at the end of the 1970s] included the incessant and fierce competition for funds, recognition, and overall political legitimacy, as well as the lack of cooperation among the heads of the national groups. Even though groups had met together before, they had not developed any ongoing relationship or strategic division of labor concerning issues and organizational resources. Instead, competition often created pettiness and, sometimes, personal tension. Without a forum to create linkages, disputes between groups and leaders periodically developed and sometimes “festered,” as one of the leaders put it. Though increasingly professionalized in their composition and outlook, the groups had still failed to construct a coherent, movement-wide, institutional framework commensurate with their role in establishing a policy nexus in Washington. As leaders of disparate groups still searching for self-definition, some heads of mainstream organizations had become more willing to entertain the notion that their relationship needed restructuring, perhaps in ways similar to their industry antagonists.

One model available was the gathering of corporate chief executive officers that was established during the 1970s, in part because of environmental issues. At the national level, this gathering took place under the aegis of the Business Roundtable; at the regional level, it was

structured through such groups as the California Business Roundtable and the Western Regional Council. Audubon's Russell Peterson, a former official at DuPont, was especially attracted to the idea. . . .

During the next months, the quarterly CEO gatherings continued, with agendas and chairs rotated among the ten participants. An air of informality prevailed, though discussion sometimes focused on particular topics, such as the Clean Air Act. While several of the CEOs had wanted the group to remain nameless (and without a specified agenda or set of projects), the name "Group of Ten" began to be used by both participants and staff members of the groups involved. By the end of the group's first year of meetings, the name had begun to stick, providing an important identity to this experiment in forming a coordinated institution. . . .

. . . [One] project involved the . . . ambitious task of identifying a common agenda. . . . *An Environmental Agenda for the Future* was published in 1985, when the Group of Ten was becoming a much more visible entity.

With the one significant exception of nuclear issues, the areas reviewed by *An Environmental Agenda for the Future* duplicated or reinforced earlier ad hoc agendas by "building upon the strategies of the past two decades," as the document put it. What made the Ten's efforts most distinctive was the mainstream movement's dramatic clash with the Reagan administration that characterized much of Reagan's first term.

This conflict with the Reaganites, it turned out, also reinforced the movement's institutionalization process. On the one hand, it created a common focus for the Ten, with easily identifiable targets such as Secretary of the Interior James Watt and the EPA's director Anne Gorsuch Burford, dramatizing the conflict with the Reaganites and enhancing the organizational effectiveness of the Ten. Audubon, for example, with only limited success in direct-mail campaigns up to the Reagan period, shifted its appeal to a direct attack on the Reagan administration and raised more than ten times its largest previous total. At the same time, while most groups benefitted enormously from these symbols of confrontation, a few of the Ten, most notably the Izaak Walton League and the National Wildlife Federation (NWF), had substantial internal conflicts concerning the battles with the Reaganites. Watt especially targeted the NWF, hoping to separate hunting/sportsmen interests from both the traditional conservationists and the new environmental policy experts. Though Watt himself largely failed to create such divisions, perhaps because of his temperament and divisive rhetoric, the NWF leadership under its new CEO, Jay Hair, maintained an ambivalent posture toward the Reaganite confrontation and the value of the Group of Ten process. . . .

By the mid-1980s, as confrontations with the Reaganites began to lessen in intensity, the Group of Ten became more secure in its defense of – and efforts to extend – existing environmental policies. Overtures were made to establish a dialogue with corporate leaders. This included a series of meetings with the heads of six chemical companies: DuPont, Exxon Chemical, Union Carbide, Dow, American Cyanamid, and Monsanto. The Group of Ten process was also becoming more routinized, increasingly seen by its participants as a successful effort at establishing a common frame of reference for the mainstream environmental organizations.

Despite Jay Hair's [ambivalence] and the reluctance of some staff, particularly in groups such as the Sierra Club and the Environmental Defense Fund, to give much credence or prominence to the Group of Ten idea, the "CEO gathering" concept continued to suggest ways in which the groups were tending to converge. By seeking consensus through its published agenda and related activities, such as press conferences and other media efforts, the Group of Ten pursued its search for a common denominator. The process of attempting to achieve such unity itself became one more basis for the institutionalization of the movement. Even when the formal organization of the Ten collapsed at the end of the decade, due to misgivings about possible negative associations for such groups as Friends of the Earth and the Sierra Club, the name "Group of Ten" continued to be used by its critics as *the* symbol of mainstream environmentalism. Strengthened initially by the Reaganite confrontation, forced to locate a common environmental identity amid potentially differing positions and constituencies, the Ten, in existence for less than a decade, had effectively redefined mainstream environmentalism less as a movement and more directly as an adjunct to the policy process.

Increasing Numbers

Robert Cameron Mitchell, Angela G. Mertig, Riley E. Dunlap,
Twenty Years of Environmental Mobilization: Trends Among National Environmental Organizations, in RILEY E. DUNLAP AND ANGELA MERTIG, EDS., *AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT 1970-1990*, 15-16 (1992)

Any lingering doubts about the continuing viability of the environmental cause were erased when the Reagan administration's attacks on environmentalism stimulated a new influx of members in the 1980s. . . . [T]he organizations most closely identified with [conservation] reaped the greatest harvest, thanks to the motivational appeal of wildlife and wilderness issues and the high visibility of James Watt's alleged mis stewardship of the nation's resources as President Reagan's first Secretary of the Interior. The Wilderness Society grew by a phenomenal 144% between 1980 and 1983, the Sierra Club by 90%, and the Defenders of Wildlife and Friends of the Earth by about 40% each. Subsequent growth [was also] strong, so that by 1989 these organizations counted a total membership of more than 2,700,000.

The most recent surge in membership occurred at the turn of the decade (1990), stimulated by the visibility of ecological problems ranging from toxic wastes, beach contamination, the Exxon Valdez oil spill, ozone destruction, and global warming, as well as by the substantial mobilization efforts these organizations made in conjunction with the twentieth Earth Day celebration. Total membership for these organizations grew substantially from 1989 to 1990, and exceeded 3 million by the twentieth Earth Day anniversary. . . .

Two factors seem to account for the national lobbying organizations' substantial growth in memberships. The first is the high level of public concern about their issue agenda, which created the potential for mass mobilization on behalf of environmental protection. Public

opinion polls have recorded strong support, albeit with some ups and downs, for environmental protection from 1970 to 1990. Views that were once shared by a relatively small number of environmental activists before the first Earth Day have apparently diffused to the public at large. Of particular importance is the fact that environmental concern cuts across socioeconomic and political categories. The result is that tens of millions of Americans with at least some college and with upper-middle-class incomes (the optimal target group for environmental direct mail lists) are sufficiently sympathetic to the organizations' goals that it is profitable to include them in "prospect lists" for direct mail campaigns.

The Environmental Movement in the 1980s

Michael McCloskey, *Twenty Years of Change in the Environmental Movement: An Insider's View*, in RILEY E. DUNLAP AND ANGELA MERTIG, EDs., *AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT 1970-1990*, pages 81-85 (1992)

Strategies

. . . [T]he strong hostility of the Reagan administration, which persisted for 8 years (although the hard edge was taken off at the end of the first term), stunned the movement. Not only did the federal government no longer propose new initiatives, it no longer even tried to maintain the programs of the past. Reaganites schemed to undo and dismember pollution and public lands programs. Normal diplomatic relations [between environmental groups and] . . . administration figures virtually ceased. The movement lost any incentive to temper its criticisms because it knew that the administration was in the hands of ideological opponents who were not only unsympathetic but antagonistic. Adversarial relations became normal.

However, the barrage of criticisms that the movement unleashed toward the administration had unexpected results. First, the movement came to expect less and less as normal, which lowered the threshold for acceptable performance. And second, the criticisms not only hit the Reagan appointees but the federal government itself. The anger and frustration over the federal government's abandonment of environmental programs spilled over to attach to the career bureaucracy and allied institutions. The career people in agencies such as the Environmental Protection Agency (EPA) were seen as not having kept the faith and as having been subverted by notions such as EPA is a risk-assessment agency instead of a pollution-reduction agency. Other natural resource agencies were seen as lacking the will to do anything right anymore and as being in a perpetual state of war with the public they served. None of the federal agencies was seen as caring about the views of the constituencies who had created them.

This very frustration also created the tension implicit in the performance gap. Public anger over the default of the federal government expressed itself in polls showing incredibly high levels of demand that something positive be done. There was a tremendous gap between what the public wanted and what it was getting. The public felt so strongly because the federal

government had turned its back on their demands, injuring its status in the eyes of the public. Disillusionment with the federal government may have been exactly what the Reaganites were seeking to engender, but it posed a problem for a movement that had always placed so much emphasis on the federal role. Would its constituents continue to rally to calls for new federal programs?

In the meantime, a slow reversal had occurred with regard to the roles of state and local government. When the movement began, state and local government was [sic] seen as largely in the hands of those with little sympathy for environmental goals. However, by the end of the 1970s this had begun to change, with environmentally sympathetic administrations coming to power in many states and localities. Now the movement came to see these jurisdictions as places to innovate and set the pace and to outflank federal intransigence. Industry, in turn, came to hope the federal government would preempt the field with weak standards and prevent states from setting higher standards. This reversal in attitudes, however, reflected falling expectations with regard to what could be accomplished at the federal level.

It also highlighted the confusion over where to go to seek solutions. From the outset the movement had been caught in the conflict between its philosophy and what was happening in the world with respect to decentralization. Its Earth Day era philosophy favored decentralization and breaking institutions into smaller units, which were more understandable and could be more responsive. However, as the world economy became more interconnected and technology introduced greater complexity, the environmental movement found itself chasing after new sets of problems, such as global warming and damage to the ozone layer. Dealing with such problems called for more centralized planning and international treaties and for ever greater complexity in the scale of organization. The scale of the problems demanded commensurate solutions, but that led away from decentralization, at least in the short run, and took the movement even further from its grassroots and policies its supporters could relate to.

This problem, moreover, exemplified what was happening as time passed after Earth Day. Connections to the philosophy that gave birth to Earth Day were becoming more and more tenuous, and the broad visions of that time (1970) were seldom articulated anymore. Few would see what all the solutions could add up to or where the amelioristic solutions of the pragmatists were heading. Indeed, pragmatists found reasons for not projecting too far ahead for fear of alienating would-be allies on given issues and for fear of being wrong on the scientific basis of newly emerging problems. However, by the same token, this lack of utopian vision left the new recruits, who were mobilized by the anti-Watt wars and the seriousness of the new threats, unsure of what flag they were following. They knew that the condition of the environment should be improved, but they could not tell what kind of society could best provide that improvement.

Tactics

Over some 20 years, the environmental movement has steadily improved the toolbox of techniques it can use to influence public policy.

. . . Computerized membership lists were broken down by Congressional districts; phone banks routinely prompted calls to Congressional offices; mail-grams to thousands of members could be generated by an electronic signal. Waves of constituents were brought in to lobby Congress, and flyers went out almost with every mail. If anything, the process became almost too routine. Congressional offices were deluged with mail and began to need to see more mail to feel moved. Moreover, the mail needed to hit after “their” mail had arrived, and the impact of mail wore off quickly. Members of these organizations dragged in for lobbying rounds often felt like cannon fodder.

So many last-ditch campaigns were run by the Sierra Club that campaigns lost their sense of being special. This was especially true with the spate of reauthorizations of pollution laws. None of them was final; there would always be another one. Lobbying campaigns lost their intensity and sense of drama as history in the making. Memories of major efforts faded quickly. More ominously, few organizations other than the Sierra Club were even trying to mount major campaigns anymore. The campaign that involved a large budget, great specialization in terms of staff roles, mass publicity, and continuing constituency mobilization became rarer and rarer.

Faith began to wane that major lobbying efforts had much payoff anyway. Surely, the movement could still get statutes enacted, and it could win lawsuits over government refusal to implement them. But could we get them implemented properly in the final analysis? As in the adage, we could lead a horse to water, but could we force it to drink? Litigation and Congressional oversight could move a recalcitrant executive branch only so far; they could never force it to implement a law as well.

By the end of the 1980s there was a sense that environmental regulatory programs were a shambles, with much of the promise of environmental statutes reduced to dead letters. Inconvenient environmental language was simply ignored or treated as Congress’s opinion. EPA programs seemed to be all input and virtually no output. What was the point of great lobbying campaigns in Congress if so little came of the enactments in the end?

How the National Organizations . . . Changed

. . . Fewer and fewer chief executive officers (CEOs) were hired from within environmental organizations or even out of the ranks of environmental experts. Most were hired from the outside because of their abilities in public relations, work with funders and donors, and management experience. They had not learned the environmental business on the firing line. They have no institutional memory on which to draw (and, with turnover, few are left with this memory in many organizations).

Such environmental CEOs were loath to question accepted ways of doing business and have largely been content to keep things going as they have been, at least with regard to strategies and issues. As managers, many have put emphasis on putting management procedures in place, on working through channels, and on staying within the budget. This has added to the rigidity of the organizations and has made it harder for them to innovate and to evaluate which approaches are most productive. . . .

[As of 1992], groups with little sense of vision are prospering simply because of the fund-raising talents of those working for them and because of the receptivity of the market. The same direct-mail consultants often have contracts with a number of organizations, and their copywriters' skills bring in membership for them all. But this success does not necessarily mean that the organizations are running successful environmental programs. The success speaks more for the skills of the consultants and the hunger of the public for hope. A crisis lurks behind this facade: Do these organizations know how to deliver what the public thinks it is getting – a better environment?

Many of the organizations are very good at certain things: the Sierra Club in mobilizing its large cadre of grassroots activists; the Wilderness Society at research and public relations; the Nature Conservancy at habitat surveys; the National Wildlife Federation in reaching middle-class and working-class people with an environmental message; the NRDC in mastering the complexities of federal programs; the Audubon Society in running sanctuaries; and the Sierra Club Legal Defense Fund [since renamed Earthjustice] in litigating. Nevertheless, these strengths do not necessarily add up to success for a movement, particularly as times change. None of these organizations, for instance, has shown any great expertise in lobbying administrative agencies, although NRDC knows how to talk to agency specialists.

2. Grassroots Environmentalism and Other Alternatives to the Mainstream

Beginning in the 1970's, a new environmental movement emerged at the local level, one often highly critical of the concerns and strategies of the mainstream national organizations. Though often created as a response to environmental pollution, many of these groups focus on biodiversity conservation, watershed protection, forest management, and similar issues.

The Antitoxics Movement

ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 170-175* (Revised ed. 2005)

The first significant indication of the limits of the new waste policies emerged at Love Canal [New York] shortly after the passage of RCRA and TSCA. The dramatic events at Love Canal (which involved such issues as the nature and evaluation of risk and the role and responsibility of industry and government regulators) became a staging ground for the development of a new movement that was primarily about community empowerment. The sequence of events that took place – the casual dumping of highly toxic industrial chemicals by Hooker Chemical over several decades, the leasing of the waste site for one dollar for construction of a school on the site, the discovery of widespread health impacts on local residents and their continuous battle with agencies such as the State Health Department to

acknowledge such impacts, and the residents' ability to mobilize effectively and use certain forms of confrontation to force public officials to respond – has since become part of the folklore of the antitoxics movement. A number of the tactics employed, such as the community-initiated health survey, the willingness to challenge rather than just lobby politicians, and a flair for the dramatic symbolized by the hostage-taking of EPA officials, have also become the signature of the antitoxic groups.

The Love Canal events were also significant in demonstrating that new forms of environmental leadership were capable of addressing complex technical issues related to the nature of the contamination and assessment of the risks involved. The Love Canal Homeowners' Association – consisting of nonprofessional lower-middle-class and middle-class family members, especially women – and its leaders, including Lois Gibbs, who emerged as a kind of Everywoman in her appearance and style, belied the traditional profile of environmental organization and advocacy. The Homeowners' Association and Gibbs did effectively use outside scientists and even environmental groups such as the EDF to help situate and buttress their arguments and familiarize themselves with the language and application of technical information. But it was the community residents and their leaders who devised the tactics, framed the strategies, and established their bottom line – in the case of Love Canal, the group's insistence that homes on or adjacent to the dump site had to be purchased by the government, since the contamination had become too extensive and intrusive in its impacts on daily life.

. . . In terms of the people who became involved and the spontaneous agendas they developed, Love Canal ultimately prefigured a new way of defining what it meant to be an environmentalist.

Yet the label “environmentalist” did not come easy to this new movement. Many of the community groups quickly became wary of the language, style, and agenda of the mainstream groups. At the same time, the mainstream groups responded to the Love Canal events not by seeking to restructure their approach toward toxics policy but by extending existing environmental policy to deal with the problem of contaminated hazardous waste sites. But it was the threat that additional Love Canals were waiting to be discovered and that loud and intractable community groups were waiting to be formed, more than the lobbying of the mainstream groups, that pushed Congress to fast-track legislation to establish new cleanup procedures. This resulted in the December 1980 passage of the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA), better known as Superfund.

Instead of drawing community-based groups and mainstream organizations closer together in terms of its stated intent to clean up waste sites, Superfund only served to accentuate their differences. Like RCRA, CERCLA established an elaborate waste management system. This included complex organisms for identifying a site, placing it on a National Priorities List, creating mechanisms to name the parties responsible for the contamination, attempting to secure payments to help pay for the effort, and eventually selecting the cleanup technology to be used. The legislation revealed the environmental policy system at its most technically complex and unsuccessful. Each step of the process was subject to challenge, overly bureaucratized, slow to develop, and unable to meet its objectives. Superfund also became vulnerable to political

maneuvering due to its high visibility, high costs, and high-stakes outcomes. And while many of the mainstream environmental groups sought to monitor and influence the course of Superfund and RCRA and other toxics and waste-related legislation passed during the 1980s, a significant faction of the movement, led by the National Wildlife Federation and the Conservation Foundation, called for cooperation with industry and the substitution of voluntary initiatives for the unwieldy regulatory framework that had been established.

For this new community-based antitoxics movement, the focus by the mainstream groups on the regulatory system and the push for voluntarism reinforced their perception that they were a movement apart from these kinds of environmental activities and agendas. As groups sprang up in places such as Jacksonville, Arkansas, or Nantoches, Louisiana, their focus on the plight of their own communities and the sense of urgency they brought to their actions led to immediate – and often dramatic – confrontations that rivaled the Love Canal events. Lois Gibbs herself became a central figure in giving shape and definition to that process. Having relocated to Arlington, Virginia, after her house was bought out, and after achieving even greater visibility with the airing of a television movie about the Love Canal events that focused on her role, Gibbs found herself constantly sought after by local groups for both advice and inspiration. With a few of her allies and advisors from the Love Canal fight and an organizer who had been involved with the Saul Alinsky-initiated Industrial Areas Foundation, Gibbs established the Citizen's Clearinghouse for Hazardous Waste in 1981 to consolidate and extend her rapidly expanding networking activities. Other antitoxics networking groups formed in this period, most prominently the National Toxics Campaign Fund, and spinoff of Massachusetts Fair Share, a Nader-like citizen-action organization. Together, the groups involved with the toxics issue, including Citizens for a Better Environment (CBE), Clean Water Action, the PIRG groups, Greenpeace, and hundreds of community-based associations, helped shape the beginnings of a new social movement.

By the mid-1980s, the number of community groups dealing with toxics and waste-related issues had increased dramatically. Their focus extended beyond existing hazardous waste sites to deal with a range of other waste issues, such as solid waste landfills and new waste-management facilities, including solid waste, medical waste, and hazardous waste incineration.

The Radical Wing

Michael McCloskey, *Twenty Years of Change in the Environmental Movement: An Insider's View*, in RILEY E. DUNLAP AND ANGELA MERTIG, EDS., *AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT 1970-1990*, pages 78-79 (1992)

From about 1972 on, the environmental movement was remarkably free of stress over ideology. However, this changed again by the mid-1980s when a new radical wing emerged in the environmental movement. This new radical wing was something more than a revival of the old lifestyle wing. It had many more strands and was characterized by a strong critique of the

conventional methods of the pragmatists. To some extent, this new radicalism embodied a reaction against the anti-environmental radicalism of the Reagan administration. It reflected a determination to go as far as possible in the opposite direction. . . .

Some of the new radicals were radical in their demands, and others were radical in the means they used. The deep ecologists, the bioregionalists, and the residue of the lifestyle camp wanted sweeping changes in society and living patterns but were largely apolitical. Their demands were radical, but their means did not shock people. Also radical in their demands (but less so) and not shocking in their means were those organizing green party units, followers of Barry Commoner, social ecologists, and local radical activists such as groups mobilized around toxics issues and neighborhood “not in my backyard” (NIMBY) groups.

Some groups had demands that were not at all radical, but they used direct-action techniques of protest that seemed radical in their confrontational style. Groups such as Greenpeace prospered in using these techniques, and smaller groups such as the Rainforest Action Network did too. In a sense, this was really a continuation of the approach pioneered by the nuclear protesters, and indeed, Greenpeace began protesting nuclear explosions.

Finally, groups such as Earth First! and the Sea Shepherd Society actually used radical means, resorting to sabotage and other illegal techniques, although their demands for changes in public policy were not always radical. It is interesting, too, that these groups were still concerned with public policy and often addressed rather conventional issues of preserving forests, whales, and other wildlife.

Most of the radicals took pains to distinguish themselves from the mainstream, pragmatic groups. They broke the long-standing rule of not speaking ill of their brethren; they did not see themselves as brethren but as stern critics pointing out the error of the ways of the mainstream groups. These latter groups were attacked for being wrongheaded in placing their faith in a government that had betrayed them. Many radicals wanted to attack the basic system of industrialism and consumerism, and the mainstream groups did not. The mainstream groups were attacked for not getting the job done – for being complacent, co-opted, bureaucratic, distant, arrogant, interested only in professional “perks” and money, and for being too conservative. Needless to say, these attacks, which were largely not reciprocated, ended any sense of comity or unity in a common cause.

Less pronounced, but nonetheless clear, was another split on the other end of the spectrum. Fred Krupp, the executive director of the Environmental Defense Fund, had announced in the mid-1980s that the era of confrontation was over. He predicted that a new era was beginning in which industry and environmentalists would work together harmoniously; this would be a time of accommodation. These accommodators would look less to the heavy-handed governmental regulation favored by the reformers and more to market-like mechanisms to achieve their ends. This rationale gave more establishment-oriented groups such as the Conservation Foundation, Resources for the Future, the World Wildlife Fund, the Nature Conservancy, and the World Resources Institute a nicely articulated ideological niche.

3. Environmental Justice

While definitions of “environmental racism” and “environmental justice” do vary, the following capture the concerns of the movement:

Environmental racism is racial discrimination in environmental policy-making. It is racial discrimination in the enforcement of regulations and laws. It is racial discrimination in the deliberate targeting of communities of color for toxic waste disposal and siting of polluting industries. It is racial discrimination in the official sanctioning of the life-threatening presence of poisons and pollutants in communities of color. And, it is racial discrimination in the history of excluding people of color from the mainstream environmental groups, decisionmaking boards, commissions, and regulatory bodies.

Benjamin F. Chavis, Jr., *Forward*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3* (Robert D. Bullard ed., 1993).

[A] singular focus on the distribution of pollution harms and risks has been criticized by environmental justice advocates as missing their point. To activists, environmental justice is a much more holistic concept that includes the right to a safe, healthy, productive, and sustainable environment for all. In this context, the “environment” is considered to include the ecological, physical, social, political, aesthetic, and economic environments. Environmental justice thus refers to the conditions in which such a right can be freely exercised, whereby individual and group identities, needs, and dignities are preserved, fulfilled, and respected in a way that provides for self-actualization and personal and community empowerment.

Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place in Environmental Regulation*, 26 *HARVARD ENVIRONMENTAL LAW REVIEW* 1, 19 (2002).

The Early Evidence

COMMISSION FOR RACIAL JUSTICE (UNITED CHURCH OF CHRIST),
TOXIC WASTES AND RACE IN THE UNITED STATES xi-xv, 13 (1987)

Issues surrounding the siting of hazardous waste facilities in racial and ethnic communities gained national prominence in 1982. The Commission for Racial Justice joined ranks with residents of predominantly Black and poor Warren County, North Carolina in opposing the establishment of a polychlorinated biphenyl (PCB) disposal landfill. This opposition culminated in a nonviolent civil disobedience campaign and more than 500 arrests. As a result of the protests in Warren County, the [General Accounting Office, since renamed the

Government Accountability Office (GAO)] studied the racial and socio-economic status of communities surrounding four landfills in southeastern United States. It found that Blacks comprised the majority of the population in three of the four communities studied.

Previous to the Warren County demonstrations, racial and ethnic communities had been marginally involved with issues of hazardous wastes. One reason for this can be traced to the nature of the environmental movement which has historically been white middle and upper-class in its orientation. This does not mean, however, that racial and ethnic communities do not care about the quality of their environment and its effect on their lives. Throughout the course of the Commission for the Racial Justice's involvement with issues of hazardous wastes and environmental pollution, we have found numerous grassroots racial and ethnic groups actively seeking to deal with this problem in their communities. . . .

Having observed these developments, the United Church of Christ Commission for Racial Justice decided, in 1986, to conduct extensive research on the relationship between the location of sites containing hazardous wastes and the racial and socio-economic characteristics of persons living in close proximity to those sites. The Commission for Racial Justice employed . . . a New York-based research firm, to assist in these investigations. It was hoped that these studies would lead, for the first time, to a comprehensive national analysis of the relationship between hazardous wastes and racial and ethnic communities.

“Hazardous wastes” is the term used by the EPA to define by-products of industrial production which present particularly troublesome health and environmental problems. Newly generated hazardous wastes must be managed in an approved “facility,” which is defined by the EPA as any land and structures thereon which are used for treating, storing or disposing of hazard wastes (TSD facility). Such facilities may include landfills, surface impoundments or incinerators. A “commercial” facility is defined as any facility (public or private) which accepts hazardous wastes from a third party for a fee or other remuneration.

“Uncontrolled toxic waste sites” refer to closed and abandoned sites on the EPA's list of sites which pose a present and potential threat to human health and the environment. The problem of human exposure to uncontrolled hazardous wastes is national in its scope. By 1985, the EPA had inventoried approximately 20,000 uncontrolled sites containing hazardous wastes across the nation. The potential health problems associated with the existence of these sites is highlighted by the fact that approximately 75 percent of U.S. cities derive their water supplies, in total or in part, from groundwater.

Major Findings

This report presents findings from two cross-sectional studies on demographic patterns associated with (1) commercial hazardous waste facilities and (2) uncontrolled toxic waste sites. The first was an analytical study which revealed a striking relationship between the location of commercial hazardous waste facilities and race. The second was a descriptive study which documented the widespread presence of uncontrolled toxic waste sites in racial and ethnic communities throughout the United States. Among the many findings that emerged from these

studies, the following are most important:

Demographic Characteristics of Communities with Commercial Hazardous Waste Facilities

- Race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities. This represented a consistent national pattern.
- Communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents. In communities with two or more facilities or one of the nation's five largest landfills, the average minority percentage of the population was more than three times that of communities without facilities (38 percent vs. 12 percent).
- In communities with one commercial hazardous waste facility, the average minority percentage of the population was twice the average minority percentage of the population in communities without such facilities (24 percent vs. 12 percent.)
- Although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant. This remained true after the study controlled for urbanization and regional differences. Incomes and home values were substantially lower when communities with commercial facilities were compared to communities in the surrounding counties without facilities.
- Three out of the five largest commercial hazardous waste landfills in the United States were located in predominantly Black or Hispanic communities. These three landfills accounted for 40 percent of the total estimated commercial landfill capacity in the nation.

Demographic Characteristics of Communities with Uncontrolled Toxic Waste Sites

- Three out of every Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites.
- More than 15 million Blacks lived in communities with one or more uncontrolled toxic waste sites.
- More than 8 million Hispanics lived in communities with one or more uncontrolled toxic waste sites.
- Blacks were heavily over-represented in the populations of metropolitan areas with the largest number of uncontrolled toxic waste sites. These areas include: Memphis, TN (173 sites); Cleveland, OH (106 sites); St. Louis, MO (160 sites);

Chicago, IL (103 sites); Houston, TX (152 sites); and Atlanta, GA (91 sites).

- Los Angeles, California had more Hispanics living in communities with uncontrolled toxic waste sites than any other metropolitan area in the United States.
- Approximately half of all Asian/Pacific Islanders and American Indians lived in communities with uncontrolled toxic waste sites.
- Overall, the presence of uncontrolled toxic waste sites was highly pervasive. More than half of the total population in the United States resided in communities with uncontrolled toxic waste sites.

Major Conclusions and Recommendations

The findings of the analytical study on the location of commercial hazardous waste facilities suggest the existence of clear patterns which show that communities with greater minority percentages of the population are more likely to be the sites of such facilities. The possibility that these patterns resulted by chance is virtually impossible, strongly suggesting that some underlying factor or factors, which are related to race played a role in the location of commercial hazardous waste facilities. Therefore, the Commission for Racial Justice concludes that, indeed, race has been a factor in the location of commercial hazardous waste facilities in the United States.

The findings of the descriptive study on the location of uncontrolled toxic waste sites suggest an inordinate concentration of such sites in Black and Hispanic communities, particularly in urban areas. This situation reveals that the issue of race is an important factor in describing the problem of the uncontrolled toxic waste sites. We, therefore, conclude that the cleanup of uncontrolled toxic waste sites in Black and Hispanic communities in the United States should be given the highest possible priority.

The Existence of Environmental Racism

Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*,
in ROBERT D. BULLARD, ED., *CONFRONTING ENVIRONMENTAL RACISM:
VOICES FROM THE GRASSROOTS* 17-19 (1993)

Whether by conscious design or institutional neglect, communities of color in urban ghettos, in rural “poverty pockets,” or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation. Clearly, racial discrimination was not legislated out of existence in the 1960s. While some significant progress was made during this decade, people of color continue to struggle for equal treatment in many

areas, including environmental justice. Agencies at all levels of government, including the federal EPA, have done a poor job protecting people of color from the ravages of pollution and industrial encroachment. It has thus been an up-hill battle convincing white judges, juries, government officials, and policy makers that racism exists in environmental protection, enforcement, and policy formulation.

The most polluted urban communities are those with crumbling infrastructure, ongoing economic disinvestment, deteriorating housing, inadequate schools, chronic unemployment, a high poverty rate, and an overloaded health-care system. Riot-torn South Central Los Angeles typifies this urban neglect. It is not surprising that the “dirtiest” zip code in California belongs to the mostly African-American and Latino neighborhood in that part of the city. In the Los Angeles basin, over 71 percent of the African-Americans and 50 percent of the Latinos live in areas with the most polluted air, while only 34 percent of the white population does. This pattern exists nationally as well.

Income alone does not account for these above-average percentages. Housing segregation and development patterns play a key role in determining where people live. Moreover, urban development and the “spatial configuration” of communities flow from the forces and relationships of industrial production which, in turn, are influenced and subsidized by government policy. There is widespread agreement that vestiges of race-based decisionmaking still influence housing, education, employment, and criminal justice. The same is true for municipal services such as garbage pickup and disposal, neighborhood sanitation, fire and police protection, and library services. Institutional racism influences decisions on local land use, enforcement of environmental regulations, industrial facility siting, management of economic vulnerability, and the paths of freeways and highways.

People skeptical of the assertion that poor people and people of color are targeted for waste-disposal sites should consider the report the Cerrell Associates provided the California Waste Management Board. In their 1984 report, *Political Difficulties Facing Waste-to-Energy Conversion Plant Siting*, they offered a detailed profile of those neighborhoods most likely to organize effective resistance against incinerators. The policy conclusion based on this analysis is clear. As the report states:

All socioeconomic groupings tend to resent the nearby siting of major facilities, but middle and upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeconomic strata neighborhoods should not fall within the one-mile and five-mile radius of the proposed site.

Where then will incinerators or other polluting facilities be sited? For Cerrell Associates, the answer is low-income, disempowered neighborhoods with a high concentration of nonvoters. The ideal site, according [to] their report, has nothing to do with environmental soundness but everything to do with lack of social power. Communities of color in California are far more likely to fit this profile than are their white counterparts.

Those still skeptical of the existence of environmental racism should also consider the fact that zoning boards and planning commissions are typically stacked with white developers. Generally, the decisions of these bodies reflect the special interests of the individuals who sit on these boards. People of color have been systematically excluded from these decisionmaking boards, commissions, and governmental agencies (or allowed only token representation). Grassroots leaders are now demanding a shared role in all the decisions that shape their communities. They are challenging the intended or unintended racist assumptions underlying environmental and industrial policies.

Underlying Causes

Vicki Been, *Locally Undesirable Land Uses*

in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?

103 YALE LAW JOURNAL 1383, 1384-92, 1406 (1994)

The environmental justice movement contends that people of color and the poor are exposed to greater environmental risks than are whites and wealthier individuals. The movement charges that this disparity is due in part to racism and classes in the siting of environmental risks, the promulgation of environmental laws and regulations, the enforcement of environmental laws, and the attention given to the cleanup of polluted areas. To support the first charge – that the siting of waste dumps, polluting factories, and other locally undesirable land uses (LULUs) has been racist and classes – advocates for environmental justice have cited more than a dozen studies analyzing the relationship between neighborhoods’ socioeconomic characteristics and the number of LULUs they host. The studies demonstrate that those neighborhoods in which LULUs are located have, on average, a higher percentage of racial minorities and are poorer than non-host communities. That research does not, however, establish that the host communities were disproportionately minority or poor at the time the sites were selected. Most of the studies compare the *current* socioeconomic characteristics of communities that host various LULUs to those of communities that do not host such LULUs. This approach leaves open the possibility that the sites for LULUs were chosen fairly, but that subsequent events produced the current disproportion in the distribution of LULUs. In other words, the research fails to prove environmental justice advocates’ claim that the disproportionate burden poor and minority communities now bear in hosting LULUs is the result of racism and classes in the *siting process* itself.

In addition, the research fails to explore an alternative or additional explanation for the proven correlation between the current demographics of communities and the likelihood that they host LULUs. Regardless of whether the LULUs originally were sited fairly, it could well be that neighborhoods surrounding LULUs became poorer and became home to a greater percentage of people of color over the years following the sitings. Such factors as poverty, housing discrimination, and the location of jobs, transportation, and other public services may have led the poor and racial minorities to “come to the nuisance” – to move to neighborhoods

that host LULUs – because those neighborhoods offered the cheapest available housing. Despite the plausibility of that scenario, none of the existing research on environmental justice has examined how the siting of undesirable land uses has subsequently affected the socioeconomic characteristics of host communities. Because the research fails to prove that the siting process causes any of the disproportionate burden the poor and minorities now bear, and because the research has ignored the possibility that market dynamics may have played some role in the distribution of that burden, policymakers now have no way of knowing whether the siting process is “broke” and needs fixing. Nor can they know whether even an ideal siting system that ensured a perfectly fair initial distribution of LULUs would result in any long-term benefit to the poor or to people of color.

[T]he existing research . . . is insufficient to determine whether the siting process placed LULUs in neighborhoods that were disproportionately minority or poor at the time the facility was opened, whether the siting of the facility subsequently drove host neighborhoods to become home to a larger percentage of people of color or the poor than other communities, or whether both of these phenomena contributed to the current distribution of LULUs. . . . [M]arket dynamics may play a significant role in creating the disparity between the racial composition of host communities and that of non-host communities. In [one study], LULUs initially were sited somewhat disproportionately in poor communities and communities of color. After the sitings, the levels of poverty and percentages of African-Americans in the host neighborhoods increased, and the property values in these neighborhoods declined. Accordingly, the study suggests that while siting decisions do disproportionately affect minorities and the poor, market dynamics also play a very significant role in creating the uneven distribution of the burdens LULUs impose. Even if siting processes can be improved, therefore, market forces are likely to create a pattern in which LULUs become surrounded by people of color and the poor, and consequently come to impose a disproportionate burden upon those groups. [A] smaller study, on the other hand, finds a correlation between neighborhood demographics and initial siting decisions, but finds no evidence that market dynamics are leading the poor or people of color to “come to the nuisance.”

The siting of a LULU can influence the characteristics of the surrounding neighborhood in two ways. First, an undesirable land use may cause those who can afford to move to become dissatisfied and leave the neighborhood. Second, by making the neighborhood less desirable, the LULU may decrease the value of the neighborhood’s property, making the housing more available to lower income households and less attractive to higher income households. The end result of both influences is likely to be that the neighborhood becomes poorer than it was before the siting of the LULU.

The neighborhood also is likely to become home to more people of color. Racial discrimination in the sale and rent of housing relegates people of color (especially African-Americans) to the least desirable neighborhoods, regardless of their income level. Moreover, once a neighborhood becomes a community of color, racial discrimination in the promulgation and enforcement of zoning and environmental protection laws, the provision of municipal services, and the lending practices of banks may cause neighborhood quality to decline further. That additional decline, in turn, will induce those who can leave the neighborhood – the least poor and those least subject to discrimination – to do so.

The dynamics of the housing market therefore are likely to cause the poor and people of color to move to or remain in the neighborhoods in which LULUs are located, regardless of the demographics of the communities when the LULUs were first sited. As long as the market allows the existing distribution of wealth to allocate goods and services, it would be surprising indeed if, over the long run, LULUs did not impose a disproportionate burden upon the poor. And as long as the market discriminates on the basis of race, it would be remarkable if LULUs did not impose a disproportionate burden upon the poor. . . .

. . . [I]f the disproportionate distribution of LULUs results from market forces which drive the poor, regardless of their race, to live in neighborhoods that offer cheaper housing because they host LULUs, then the fairness of the distribution becomes a question about the fairness of our market economy. Some might argue that the disproportionate burden is part and parcel of a free market economy that is, overall, fairer than alternative schemes, and that the costs of regulating the market to reduce the disproportionate burden outweigh the benefits of doing so. Others might argue that those moving to a host neighborhood are compensated through the market for the disproportionate burden they bear by lower housing costs, and therefore that the situation is just. Similarly, some might contend that while the poor suffer lower quality neighborhoods, they also suffer lower quality food, housing, and medical care, and that the systemic problem of poverty is better addressed through income redistribution programs than through changes in siting processes.

Even if decisionmakers were to agree that it is unfair to allow post-siting market dynamics to create disproportionate environmental risk for the poor or minorities, the remedy for that injustice would have to be much more fundamental than the remedy for unjust siting *decisions*. Indeed, if market forces are the primary cause of the correlation between the presence of LULUs and the current socioeconomic characteristics of a neighborhood, even a siting process radically revised to ensure that LULUs are distributed equally among all neighborhoods may have only a short-term effect. The areas surrounding LULUs distributed equitably will become less desirable neighborhoods, and this may soon be left to people of color or the poor, recreating the pattern of inequitable siting. Accordingly, if a disproportionate burden results from or is exacerbated by market dynamics, an effective remedy might require such reforms as stricter enforcement of laws against housing discrimination, more serious efforts to achieve residential integration, changes in the processes of siting low and moderate income housing, changes in programs designed to aid the poor in securing decent housing, greater regulatory protection for those neighborhoods that are chosen to host LULUs, and changes in production and consumption processes to reduce the number of LULUs needed.

Information about the role market dynamics play in the distribution of LULUs would promote a better understanding of the nature of the problem of environmental injustice and help point the way to appropriate solutions for the problem. Nonetheless, market dynamics have been largely ignored by the current research on environmental justice.

Executive Order 12898
Federal Actions to Address Environmental Justice in Minority Populations
and Low-Income Populations, 59 FEDERAL REGISTER 7629 (February 11, 1994)

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1-101. To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

Section 1-102(a). Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency or the Administrator's designee shall convene an interagency Federal Working Group on Environmental Justice ("Working Group"). . . .

Section 1-103(a). [E]ach Federal agency shall develop an agency-wide environmental justice strategy . . . that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. . . .

Section 1-103(e). Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group.

Section 2-2. Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin. . . .

Section 3-301(a). Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority

populations, low-income populations and workers who may be exposed to substantial environmental hazards. . . .

Section 5-5(b). Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

Section 6-606. Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.

Section 6-607. Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

Section 6-609. This order is intended only to improve the internal management of the Executive Branch and is not intended to nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

Louisiana Energy Services in 1989 sought a license from the Nuclear Regulatory Commission (NRC) to build the Claiborne Enrichment Center (CEC), a nuclear fuel production facility. The proposed site lay between the communities of Forest Grove and Center Springs, with a combined population of 250 – ninety-seven percent of whom are African-American – in one of the poorest regions of the United States. Citizens Against Nuclear Trash was permitted to intervene in the proceeding. The NRC’s Atomic Safety and Licensing Board concluded that the proposed facility met all applicable licensing requirements, and in the excerpt below ruled on the citizens group’s environmental justice claims.

In the Matter of Louisiana Energy Services, L.P.
(Claiborne Enrichment Center)
No. LBP-97-8 (NRC Atomic Safety and Licensing Board 1997)

Before MOORE, Chairman, COLE, and SHON.

It is the NRC’s position that, as an independent regulatory agency, the NRC is not mandatorily subject to Executive Order 12898. Nevertheless, on March 31, 1994, the then

Chairman of the Commission wrote the President stating that the NRC would carry out the measures in the Executive Order. . . . By voluntarily agreeing to implement the President's environmental justice directive, the Commission has made it fully applicable to the agency and, until that commitment is revoked, the President's order . . . applies to the NRC to the same extent as if it were an executive agency. . . .

Racial Discrimination in Site Selection

Executive Order 12898 requires that the NRC conduct its licensing activities in a manner that "ensures" those activities do not have the effect of subjecting any persons or populations to discrimination because of their race or color. . . .

In the circumstances presented in this licensing action, . . . by limiting its consideration to a facial review of the information in the Applicant's [environmental report], the [NRC] Staff has failed to comply with the President's directive. . . . [A] thorough Staff investigation is needed not only to comply with Executive Order 12898, but to avoid the constitutional ramifications of the agency becoming a participant in any discriminatory conduct through its grant of a license.

Racial discrimination in the facility site selection process cannot be uncovered with only a cursory review of the description of that process appearing in an Applicant's environmental report. If it were so easily detected, racial discrimination would not be such a persistent and enduring problem in American society. Racial discrimination is rarely, if ever, admitted. Instead it is often rationalized under some other seemingly racially neutral guise, making it difficult to ferret out. Moreover, direct evidence of racial discrimination is seldom found. Therefore . . . if the President's nondiscrimination directive is to have any meaning a much more thorough investigation must be conducted by the Staff to determine whether racial discrimination played a role in the CEC site selection process. . . . [T]he Staff must lift some rocks and look under them. . . .

Substantial evidence presented by the Intervenor . . . demonstrates why it is imperative that the Staff conduct such a through investigation. . . . [T]he Intervenor's evidence . . . is more than sufficient to raise a reasonable inference that racial considerations played some part in the site selection process A finding that the selection process was tainted by racial bias is far too serious a determination, with potentially long lasting consequences, to render without the benefit of a thorough and professional Staff investigation aided by whatever outside experts as may be necessary. . . .

Intervenor's statistical evidence presented by Dr. Bullard . . . shows that as the site selection process progressed and the focus of the search narrowed, the level of minority representation in the population rose dramatically. . . . Of the 78 proposed sites . . . the aggregate average percentage of black population within a 1-mile radius of each of the sites . . . is 28.35%. After the initial site cuts reduced the list to 37 sites . . . the aggregate percentage of black population rose to 36.78%. Ultimately, the process culminated in a chosen site with a black population of 97.1% within a 1-mile radius . . . which is the site with the highest percent black population of all 78 examined sites. This statistical evidence very strongly suggests that

racial considerations played a part in the site selection process. . .

Disproportional Impacts

. . . Executive Order 12898 is [also] concerned with . . . disparate impacts . . . [and] instructs the [NRC to identify and address] disproportionately high and adverse human health and environmental effects on minority and low income populations as part of its licensing activities. . . .

Intervenor . . . asserts that the [NRC Staff analysis] is deficient because it fails to address the impacts of closing Parish Road 39, which currently bisects [the proposed Claiborne Enrichment Center (CEC) site] and joins the communities of Forest Grove and Center Springs. . . . According to Dr. Bullard, it is apparent that the Staff did not even consult with any of the residents of Forest Grove and Center Springs . . . for if it had, the Staff would have found that Forest Grove Road is a vital and frequently used link between the two communities, with regular pedestrian traffic. . . .

Staff witnesses . . . asserted that the relocation of Parish Road 39 should not affect . . . residents who attend church services . . . although driving distances will be slightly increased, . . . [suggesting] that the road relocation may require residents of the communities to adjust carpools. . . . The Staff . . . does not discuss Forest Grove Road's status as a pedestrian link between Forest Grove and Center Springs and the impacts of relocation on those who must walk the distance between the communities on this road. . . . [T]he staff calculates how much additional gasoline it will take to drive between the communities when the road is relocated and the added travel time the road relocation will cause for various trips. . . .

[A] significant number of the residents of these communities have no motor vehicles and often must walk. Adding 0.38 mile to the distance between the Forest Grove and Center Springs communities may be a mere "inconvenience" to those who drive, as the Staff suggests. Yet, permanently adding that distance to the 1- or 2-mile walk between these communities for those who must regularly make the trip on foot may be more than a "very small" impact, especially if they are old, ill or otherwise infirm. . . .

Conclusion

[W]e conclude that a thorough Staff investigation of the CEC site selection process is essential to determine whether racial discrimination played a role in that process. . . . Additionally, . . . we conclude that the Staff's treatment . . . of the impacts of relocating Parish Road 39 on the communities of Forest Grove and Center Springs is inadequate. . . .

[T]he Applicant's requested authorization for a . . . license is hereby denied.

Epilogue. The full Nuclear Regulatory Commission affirmed the portion of the Atomic Safety and Licensing Board decision in *Louisiana Energy Services* directing the NRC staff to reexamine the disparate impacts on pedestrians. On the issue of racial discrimination in the site selection process, however, the NRC reversed the Board's conclusion that the NRC must staff engage in a thorough analysis:

What the Board in this case seemed to envision is a free-ranging NRC Staff inquiry into the motives of [Louisiana Energy Services] (and perhaps state and local) decisionmakers, with only the broad instruction that the Staff should "lift some rocks and look under them." With no clear legal basis or clearly discernible objective, the Board's approach cannot in our view be sustained, notwithstanding the worthy intentions that motivated it. . . .

[T]he Board's effort to enforce what it saw as a "nondiscrimination directive" in the Executive Order was misplaced. The Executive Order, by its own terms, established no new rights or remedies. Its purpose was merely to "underscore certain provision[s] of *existing* law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment" (emphasis added).

The only "existing law" conceivably pertinent here is NEPA, a statute that centers on environmental impacts. The board's proposed racial discrimination inquiry goes well beyond what NEPA has traditionally been interpreted to require. Despite nearly 30 years of extensive NEPA litigation on countless putative impacts and effects of federal actions we are unaware of a single judicial or agency decision that has invoked NEPA to consider a claim of racial discrimination. . . .

In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center), 47 N.R.C. 77, 58-65 (April 3, 1998).

4. The Present and Future of American Environmentalism

Where Things Stand

PHILIP SCHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT*
138-139 (Revised ed. 2003)

In the more than thirty years that have passed since Earth Day 1970, American society has been quietly transformed by environmental values. An impressive body of environmental law has been enacted, new institutions have been created to carry out those laws, the courts have been opened to environmental causes, and environmental law has become the fastest growing

arm of the legal profession. Environmental laws and regulations have made a significant imprint on the national economy and altered the attitudes of powerful corporations and unions. Our science, medicine, education, mass communications, and even religion have changed in response to this environmental phenomenon.

Arising out of the transcendental and utilitarian streams of the old conservationism, the search for a better quality of life by affluent Americans in the post-World War II period, the demands for social justice that exploded in the 1960s and 1970s, the fear and anger of citizens whose health and families and property are threatened by pollution or rapacious development, and out of a slowly changing understanding of the relationship between humans and the natural world, the new environmentalism is helping create a new society.

But what about the American people? A social revolution cannot be built only by reforming laws and institutions – it must have the firm support of the public. Many well-informed observers still question the depth of Americans' commitment to environmentalism. They cite the failure of environmentalism to influence electoral politics, particularly at the presidential level, as a telling indication of how superficially it has been adopted by voters.

My own view as a journalist who has observed environmental politics in the country for many years is that a large part of the American people, probably a majority, have become imbued with environmental values. Those values, however, have yet to make a profound difference in the political behavior of most Americans. Until recently I believed that in a relatively few years, the environment would be one of the top two or three issues that would decide a presidential election. That has not happened, and the preferences of voters in recent years have been moving in the opposite direction.

New Directions for Pragmatists

Michael McCloskey, *Twenty Years of Change in the Environmental Movement: An Insider's View*, in RILEY E. DUNLAP AND ANGELA MERTIG, EDs.,
 AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT 1970-1990
 86 - 87 (1992)

. . . [T]here is a need for the mainstream component of the movement to rethink its assumptions about getting results through government. Its classic experience with getting the government to set aside public land reserves out of the public domain may have misled it. When it got laws passed to do that, they were almost self-executing. Timber is almost never put up for sale within a wilderness area or a national park once it is established, and a lot of oversight is not needed. But these simple experiences with natural resource protection look more and more like the exceptions. Getting regulatory programs for environmental protection implemented is a different matter entirely. They need endless follow-through and can go wrong in a thousand places. The relevant bureaucracies have minds of their own and very little loyalty to the ideas of those who lobbied the programs through. Although the bureaucracies are somewhat responsive

to Presidential direction, they are not very responsive to outside lobbying and are subject to no self-correcting process if they fail to be productive (the market does not put them out of business when they are unproductive). Moreover, environmentalists do not seem to be having much success in getting Presidents into power who share their view of the world, and cannot look to the presidency to rescue them from unresponsive bureaucracies. The pragmatic reformers thus face a crisis in their faith in governmental action.

At the same time, the grassroots are being radicalized by their experiences of receiving no satisfaction from those in power. The government is increasingly perceived as the enemy. They believe it ignores the laws, suppresses evidence, and tells lies. And it certainly does not protect their interests. Why, they may ask, are we advocating giving it more power so that it can keep anything useful from happening? Not only are the local toxics activists feeling this way but so also increasingly are those dealing with public land issues and wildlife. Local activists across the board feel estranged from the agencies they deal with, whether they be county government or federal agencies. Agencies such as the Forest Service have admitted in their own internal planning reviews that they are rarely pleasing any constituency anymore.

The mainstream movement must face this lack of faith in government head-on. It should ponder the significance of the Alar case in 1989, when NRDC went on national television to denounce use of this chemical on apples. The question about the safety of Alar had been debated for 15 years within EPA, which could not make up its mind about whether to force its withdrawal. After the TV exposé, no customers wanted to buy Alar-treated apples anymore. No supermarkets wanted to sell them. The apple growers pledged to stop using Alar, and the manufacturer of it announced that production was ceasing because the market had collapsed. Even though friends of Alar in industry wanted to continue arguing the case for its safety, the issue had been decided in the marketplace. It did not matter whether EPA banned it; society had decided through other means that its use was unacceptable.

With overwhelming levels of support in public opinion, this kind of action can be repeated. Environmentalists can bypass government in the regulatory field wherever a strong consumer handle exists. Cases can be taken to the public, which can be urged not to buy products produced in damaging ways or containing unsafe ingredients. The most egregious polluters can be the subject of major campaigns to punish them in the marketplace. Boycotts and shareholder actions can become the new stock-in-trade of environmentalists. . . .

The key to success here is information – information on what is in products, what happens in the production processes, and what happens to the product as waste. Fortunately, with the advent of Title III in the new Superfund law, information is becoming available that discloses the names of the companies discharging the greatest amounts of toxics into our air and environment. This information needs to be combined with the information on the frequency of violations of pollution and OSHA laws to provide good measures of corporations' environmental records. State laws such as Proposition 65 in California are providing consumers with information about toxics in products. Better labeling laws are needed, too, to arm people with information that will enable them to make their own informed consumer choices.

Tactics along these lines borrow something from the camps at either end of the environmental spectrum. They acknowledge some of the validity of the critiques from the right with respect to the cumbersomeness of government and the need to use market mechanisms. They also acknowledge the frustration of the radicals with respect to government unresponsiveness and the consequent need for direct action. But the mainstream organizations have something to contribute too. Unlike those on the right, they would encourage the use of market mechanisms directly rather than indirectly (as through regulatory mechanisms that mimic markets). Unlike the radicals, they could organize action in this area so that major resources are brought to bear in pursuit of a well-orchestrated national strategy. This could be a serious, long-term effort with staying power and a systematic focus on consumer education. It would not be an impulsive hit-and-run action. . . .

Direct action in the marketplace and at stockholders' meetings might also help to unify the movement. It would be a strategy that draws on the insights and contributions of all camps and, most importantly, would offer the greatest promise of making major gains in the real world. Quite unexpectedly, it might also tend to relieve some of the pressure on overstressed regulatory agencies such as EPA and FDA. It would not work well for land management agencies, such as the Forest Service and the Bureau of Land Management, but these agencies are now being forced to find a new *modus vivendi* with enraged constituencies in the states where they operate. The Forest Service admits that it needs to start pleasing somebody, someplace, some of the time; it cannot remain at war with everyone.

The environmental movement has not lost its commitment or determination, but it is at a crossroads in terms of knowing how to produce results. The breakup into competing camps reflects this uncertainty. Those at the extremes may care less about getting results than about feeling that they are right. However, the pragmatists in between must care about results, or they have forfeited their reason for existing. They now must bear the burden of rethinking their fundamental goals, strategies, and tactics.

Fortunately, there seems to be an answer. Whether they will see it or find another will tell us much about the continuing vitality of the movement.

Deep Ecology

Bill Devall, *Deep Ecology and Radical Environmentalism*,
in RILEY E. DUNLAP AND ANGELA MERTIG, EDs., *AMERICAN ENVIRONMENTALISM:
THE U.S. ENVIRONMENTAL MOVEMENT 1970-1990*, pages 51-56 (1992)

. . . [D]uring the 1970s, critics within the environmental movement saw [the] major national organizations as less and less responsive to grassroots demands for more rapid change in public policy, too bureaucratized and centralized, and too "shallow" in ideology. The major environmental groups were also criticized for their willingness to settle for reforms in

government policy without changes in our society's basic culture, including the myths of economic growth, progress, belief that technology will save us from environmental problems, and humanism.

Deep ecology was a label put forward in the early 1970s for a philosophical tendency that provided both a critique of reform or shallow environmentalism and a critique of industrial society and the anthropocentric bias of that type of society. . .

The terms *deep ecology* and *deep, long-range ecology movement* were originated by Norwegian philosopher and social activist Arne Naess. In a 1973 article, Naess asserted that shallow and deep ecology can be seen as two aspects of the environmental movement. He defined *shallow ecology* as the "fight against pollution and resource depletion. Central objective: The health and affluence of people in the developed countries." He defined *deep ecology* as a normative, ecophilosophical movement that is inspired and fortified in part by our experience as humans in nature and in part by ecological knowledge. The literature on the deep-shallow distinction and on the historical and philosophical antecedents of the deep ecology movement has been extensively developed since 1973.

The most distinctive aspect of deep ecology is the idea of *ecocentric identification*, which Naess calls the "ultimate norm" of self-realization. Humans are one of myriad self-realizing beings, and human maturity and self-realization come from broader and wider self-identification. Out of identification with forests, rivers, deserts, or mountains comes a kind of solidarity: "I am the rainforest" or "I am speaking for this mountain because it is a part of me."

Naess says that Rachel Carson showed this kind of self-identification combined with ecological understanding. . . .

A second ultimate norm of deep ecology is *biocentrism*, or *ecocentrism* as some call it. In contrast with an anthropocentric or human-centered worldview, an ecocentric worldview suggests that humans are part of the "web of life" – not at the top of creation but equal with the many other aspects of creation. Naess calls this a *total-field image* and suggests that this image encourages respect for natural biodiversity and evolution. Speaking as a philosopher, Naess suggests that in an anthropocentric worldview every action is undertaken to protect present and future generations of humans. In an ecocentric worldview, future generations include generations of *all* living beings and "beings" are broadly defined to include living rivers as well as living species.

The supporters of the deep ecology movement, then, seek ways of living that are best for all living beings. "Do as little harm as possible" might be a slogan of those seeking a deep ecology-based lifestyle. Some taking of life is necessary to satisfy vital human needs, but the integrity, beauty, and stability of the native landscape is respected. . . .

Sensing that some kind of platform or general statement was needed to show the unity among a diversity of deep ecology types of positions, Naess, along with philosopher George Sessions, formulated "8 points" as a modest suggestion for discussion. Naess insists that this

platform is without great pretensions and has the primary function of stimulating dialogue about philosophy and strategies in politics and personal lifestyle decisions.

- (1) The well-being and flourishing of human and nonhuman life on Earth have value in themselves. These values are independent of the usefulness of the nonhuman world for human purposes.
- (2) Richness and diversity of life forms contribute to the realization of these values and are also values in themselves.
- (3) Humans have no right to reduce the richness and diversity except to satisfy human needs.
- (4) The flourishing of human life and cultures is compatible with a substantial decrease of the human population. The flourishing of nonhuman life requires such a decrease.
- (5) Present human interference with the nonhuman world is excessive, and the situation is rapidly worsening.
- (6) Policies must therefore be changed. The changes in policies affect basic economic, technological, and ideological structures. The resulting state of affairs will be deeply different from the present.
- (7) The ideological change is mainly that appreciating life quality (dwelling in situations of inherent worth) rather than adhering to an increasingly higher standard of living. There will be a profound awareness of the difference between big and great.
- (8) Those who subscribe to the foregoing points have an obligation directly or indirectly to participate in the attempt to implement the necessary changes.

Although a wide variety of lifestyles and social policies are potentially compatible with a deep ecology position, the literature on deep ecology suggests that many supporters favor what has been called *green consumerism* (careful awareness both of the quality and quantity of products consumed, based on the principle of least harm to living beings and ecocentric identity), voluntary simplicity of lifestyle that maximizes rich experiences in nature, and bioregionalism or living in place. Supporters of deep ecology also tend to encourage the restoration movement, which seeks to enhance and restore native biodiversity within a bioregional context, and to favor protection of ancient forests, tropical rainforests, and all other types of ecosystems on the planet. . . . Generally speaking, the norm of nonviolence is widely accepted by deep ecologists. . . .

. . . [T]he deep, long-range ecology movement is a philosophical movement with implications for personal lifestyles and public policy as suggested in the platform presented by Naess and Sessions. Yet, deep ecology has increasingly become associated with radical

environmental activism, or the use of tactics such as ecotage, sit-ins, guerrilla theater, demonstrations, and other forms of direct action. . . .

Although radical environmentalism has been stimulated by the failures of reform environmentalism and by the philosophy and spirituality of deep ecology, ultimately “it is based on one simple but frightening realization: that our culture is lethal to the ecology that it depends on.” At root, then, radical environmentalism is a response to our existential condition. In a culture dominated by humanism and technology, radical environmental sensibilities come from a sense of the peril that all beings face because of human intervention in the biosphere. The agenda of radical environmentalism is less and less a reaction to the agenda of reform environmentalism (or the activities of industry and government) and more and more a reaction to the demands of our existence. Its concerns are acid rain, increasing rates of species extinction, the greenhouse effect, ozone depletion, and on and on.

Notes and Questions

1. How much of the “platform” of Deep Ecology do you agree with? What parts of the platform seem to be antithetical to the views held by a majority of Americans?

A Critique of the Movement

MICHAEL SHELLENBERGER AND TED NORDHAUS,
THE DEATH OF ENVIRONMENTALISM 6-11, 32-34 (2004)

Introduction

Those of us who are children of the environmental movement must never forget that we are standing on the shoulders of all those who came before us.

The clean water we drink, the clean air we breathe, and the protected wilderness we treasure are all, in no small part, thanks to them. The two of us have worked for most of the country’s leading environmental organizations as staff or consultants. We hold a sincere and abiding respect for our parents and elders in the environmental community. They have worked hard and accomplished a great deal. For that we are deeply grateful.

At the same time, we believe that the best way to honor their achievements is to acknowledge that modern environmentalism is no longer capable of dealing with the world’s most serious ecological crisis.

Over the last 15 years environmental foundations and organizations have invested hundreds of millions of dollars into combating global warming.

We have strikingly little to show for it.

From the battles over higher efficiency for cars and trucks to the attempts to reduce carbon emissions through international treaties, environmental groups repeatedly have tried and failed to win national legislation that would reduce the threat of global warming. As a result, people in the environmental movement today find themselves politically less powerful than we were one and a half decades ago.

Yet in lengthy conversations, the vast majority of leaders from the largest environmental organizations and foundations in the country insisted to us that we are on the right track.

Nearly all of the more than two-dozen environmentalists we interviewed underscored that climate change demands that we remake the global economy in ways that will transform the lives of six billion people. All recognize that it's an undertaking of monumental size and complexity. And all acknowledged that we must reduce emissions by up to 70 percent as soon as possible.

But in their public campaigns, not one of America's environmental leaders is articulating a vision of the future commensurate with the magnitude of the crisis. Instead they are promoting technical policy fixes like pollution controls and higher vehicle mileage standards – proposals that provide neither the popular inspiration nor the political alliances the community needs to deal with the problem.

By failing to question their most basic assumptions about the problem and the solution, environmental leaders are like generals fighting the last war – in particular the war they fought and won for basic environmental protections more than 30 years ago. It was then that the community's political strategy became defined around using science to define the problem as “environmental” and crafting technical policy proposals as solutions. . . .

Environmentalism as a Special Interest

Those of us who were children during the birth of the modern environmental movement have no idea what it feels like to really win big.

Our parents and elders experienced something during the 1960s and 70s that today seems like a dream: the passage of a series of powerful environmental laws too numerous to list, from the Endangered Species Act to the Clean Air and Clean Water Acts to the National Environmental Policy Act.

Experiencing such epic victories had a searing impact on the minds of the movement's founders. It established a way of thinking about the environment and politics that has lasted until today.

It was also then, at the height of the movement's success, that the seeds of failure were planted. The environmental community's success created a strong confidence – and in some cases bald arrogance – that the environmental protection frame was enough to succeed at a policy level. The environmental community's belief that their power derives from defining themselves as defenders of “the environment” has prevented us from winning major legislation on global warming at the national level.

We believe that the environmental movement's foundational concepts, its method for framing legislative proposals, and *its very institutions* are outmoded. Today environmentalism is just another special interest. Evidence for this can be found in its concepts, its proposals, and its reasoning. What stands out is how arbitrary environmental leaders are about what gets counted and what doesn't as “environmental.” Most of the movement's leading thinkers, funders and advocates do not question their most basic assumptions about who we are, what we stand for, and what it is that we should be doing.

Environmentalism is today more about protecting a supposed “thing” – “the environment” – than advancing the worldview articulated by Sierra Club founder John Muir, who nearly a century ago observed, “When we try to pick out anything by itself, we find it hitched to everything else in the Universe.”

Thinking of the environment as a “thing” has had enormous implications for how environmentalists conduct their politics. The three-part strategic framework for environmental policy-making hasn't changed in 40 years: first, define a problem (e.g. global warming) as “environmental.” Second, craft a technical remedy (e.g., cap-and-trade). Third, sell the technical proposal to legislators through a variety of tactics, such as lobbying, third-party allies, research reports, advertising, and public relations.

When we asked environmental leaders how we could accelerate our efforts against global warming, most pointed to this or that tactic – more analysis, more grassroots organizing, more PR. . . .

Even the question of alliances, which goes to the core of political strategy, is treated within environmental circles as a tactical question – an opportunity to get this or that constituency – religious leaders! business leaders! celebrities! youth! Latinos! – to take up the fight against global warming. The implication is that if only X group were involved in the global warming fight *then things would really start to happen*.

The arrogance here is that environmentalists ask not what we can do for non-environmental constituencies but what non-environmental constituencies can do for environmentalists. As a result, while public support for action on global warming is wide it is also frighteningly shallow.

The environmental movement's incuriosity about the interests of potential allies depends on it never challenging the most basic assumptions about what does and doesn't get counted as “environmental.” Because we define environmental problems so narrowly, environmental

leaders come up with equally narrow solutions. In the face of perhaps the greatest calamity in modern history, environmental leaders are sanguine that selling technical solutions like florescent light bulbs, more efficient appliances, and hybrid cars will be sufficient to muster the necessary political strength to overcome the alliance of neoconservative ideologues and industry interests in Washington, D.C.

The entire landscape in which politics plays out has changed radically in the last 30 years, yet the environmental movement acts as though proposals based on “sound science” will be sufficient to overcome ideological and industry opposition. Environmentalists are in a culture war whether we like it or not. It’s a war over our core values as Americans and over our vision for the future, and it won’t be won appealing to the rational consideration of our collective self-interest.

We have become convinced that modern environmentalism, with all of its unexamined assumptions, outdated concepts and exhausted strategies, must die so that something can live. . . .

Environmental Group Think

. . . The institutions that define what environmentalism means boast large professional staffs and receive tens of millions of dollars every year from foundations and individuals. Given these rewards, it’s no surprise that most environmental leaders neither craft nor support proposals that could be tagged “non-environmental.” Doing otherwise would do more than threaten their status; it would undermine their brand.

Environmentalists are particularly upbeat about the direction of public opinion thanks in large part to the polling they conduct that shows wide support for their proposals. Yet America is a vastly more right-wing country than it was three decades ago. The domination of American politics by the far-right is a central obstacle to achieving action on global warming. Yet almost none of the environmentalists we interviewed thought to mention it.

Part of what’s behind America’s political turn to the right is the skill with which conservative think tanks, intellectuals and political leaders have crafted proposals that build their power through setting the terms of the debate. Their work has paid off. According to a survey of 1,500 Americans by the market research firm Environics, the number of Americans who agree with the statement, “To preserve people’s jobs in this country, we must accept higher levels of pollution in the future,” increased from 17 percent in 1996 to 26 percent in 2000. The number of Americans who agreed that, “Most of the people actively involved in environmental groups are extremists, not reasonable people,” leapt from 32 percent in 1996 to 41 percent in 2000.

The truth is that for the vast majority of Americans, the environment never makes it into their top ten list of things to worry about. Protecting the environment is indeed supported by a large majority – *it’s just not supported very strongly*. Once you understand this, it’s much easier to understand why it’s been so easy for anti-environmental interests to gut 30 years of environmental protections. . . .

A Path for the Crossing

. . . Issues only matter to the extent that they are positioned in ways linking them to proposals carrying within them a set of core beliefs, principles, or values. The role of issues and proposals is to activate and sometimes change those deeply held values. And the job of global warming strategists should be to determine which values we need to activate to bring various constituencies into a political majority.

For social scientists, values are those core beliefs and principles that motivate behavior – from who you vote for to which movie to see. These values determine political positions and political identities (e.g., environmentalism or not, Republican or Democrat, conservative or progressive).

The scientists who study values understand that some values are traditional, like so-called “family values,” others are modern, like “liberal” enlightenment values, and others (like consumer values) fit into neither category. These values inform how individuals develop a range of opinions, on everything from global warming to the war in Iraq to what kind of SUV to buy.

Conservative foundations and think tanks have spent 40 years getting clear about what they want (their vision) and what they stand for (their values). The values of smaller government, fewer taxes, a large military, traditional families, and more power for big business are only today, after 40 years of being stitched together by conservative intellectuals and strategists, coherent enough to be listed in a “[C]ontract with America.” After they got clearer about their vision and values, conservatives started crafting proposals that would activate conservative values among their bases and swing voters.

Once in power, conservatives govern on all of their issues – no matter whether their solutions have majority support. Liberals tend to approach politics with an eye toward winning one issue campaign at a time – a Sisyphean task that has contributed to today’s neoconservative hegemony.

Environmental groups have spent the last 40 years defining themselves *against* conservative values like cost-benefit accounting, smaller government, fewer regulations, and free trade, without ever articulating a coherent morality we can call our own. Most of the intellectuals who staff environmental groups are so repelled by the right’s values that we have assiduously avoided examining our own in a serious way. Environmentalists and other liberals tend to see values as a distraction from “the real issues” – environmental problems like global warming.

If environmentalists hope to become more than a special interest we must start framing our proposals around core American values and start seeing our own values as central to what motivates and guides our politics. Doing so is crucial if we are to build the political momentum – a sustaining movement – to pass and implement the legislation that will achieve action on global warming and other issues. . . .

Environmentalists . . . are so certain about what the problem is, and so committed to their legislative solutions, that we behave as though all we need is to tell the literal truth in order to pass our policies.

Environmentalists need to tap into the creative worlds of myth-making, even religion, not to better sell narrow and technical policy proposals but rather to figure out who we are and who we need to be.

Above all else, we need to take a hard look at the institutions the movement has built over the last 30 years. Are existing environmental institutions up to the task of imagining the post-global warming world? Or do we now need a set of new institutions founded around a more expansive vision and set of values?

The Possibility of Failure

PHILIP SHABECOFF, *A FIERCE GREEN FIRE:
THE AMERICAN ENVIRONMENTAL MOVEMENT*
307-310 (Revised ed. 2003)

Social justice, political power, economic reform, corporate accountability, and technological evolution – these are the building blocks of an ecologically sound society in the United States. But the edifice cannot be raised without a deeper devotion of the American people to environmental goals and values. As former EPA administrator Lee M. Thomas said, our response to the environmental threats that confront us “must involve a personal commitment from each of us to live environmentally ethical lives – not because it is a requirement of law but because it is an essential component of our inherent responsibility to ourselves, our neighbors, our children and our planet. In fact, environmental laws will be not be effective unless they are supported by a widely accepted environmental ethic.”

That time does not yet appear to be at hand. But perhaps it is approaching. A restless, disconnected, increasingly fragmented American people is, I think, groping for new values, a new center to our lives. That center has shifted several times over the course of our nation’s history. The first Europeans came here to plant a garden in the freedom of a fresh new world. That dream was replaced by belief in Manifest Destiny and the optimism and opportunity of the frontier. Then came the industrial revolution, which elevated mass production, consumption, the corporation, and the worship of the machine into a paramount position in our value system.

Consumerism now seems to be growing increasingly stale and dissatisfying as a value around which to build our lives. At the same time we are becoming more and more aware of the peril created by our own works and of how far we have distanced ourselves from nature. Environmentalism has shown us that the world need not be this way. And it is pointing us in a new direction, toward a new set of values that would lead us to live more gently on and harmoniously with this planet.

In *Man and Nature* [excerpted in Chapter 1, Section C], George Perkins Marsh asked, “Could this old world, which man has overthrown, be rebuilt, could human cunning rescue its wasted hillsides and its deserted plains from solitude or mere nomad occupation, from bareness, from nakedness, and from insalubrity, and restore the ancient fertility and healthfulness . . . ?” His answer was that such rebuilding “must await great political and moral revolutions in the governments and people . . .”

More than a century and a quarter later, those political and moral revolutions have yet to take place. But given the grave dangers our current course will impose on our posterity, those changes may yet materialize, although not necessarily in timely fashion. The critics of environmentalism, the Julian Simons and Herman Kahns who contended that we need not fear ecological disaster because human intelligence, resourcefulness, and ingenuity will find the solutions, may have been right – but right in a way they did not intend. Many humans *are* responding to the devastation that human works have created. They are doing it by creating a new system of values and a new cultural movement called environmentalism. In the United States, this movement is advancing – slowly and sporadically – on a broad front. Its ranks are open enough to include radical Earth First! tree huggers and patrician big-game hunters, militant community activists and cool intellectuals cloistered in think tanks, hard-nosed lobbyists and dreamy bird-watchers. It has captured the interest and sympathy of a wide segment of the American public, the pained attention of our business community, and the rhetorical if not actual support of our public officials.

Despite its potential, the environmental movement has yet to exercise its strength decisively. Possibly it may never do so. The forces that oppose it – a minority, to be sure, but one that possesses enormous wealth with which it can exercise control over the nation’s political and economic affairs – have given ample evidence that they will not lightly surrender their power. At the beginning of the new century, that power appeared to be driving back many of the gains made by the environmental revolution.

In a sane world, the values of environmentalism should prevail. The alternatives are clearly unacceptable to a rational and democratic society. If we do not cleanse, replant and rebuild, we bequeath to our children a bleak and dubious future on a crowded, hungry, poisoned, and unlovely planet. . . .

If we are to . . . create not only a cleaner, safer, more pleasant environment but also a sustainable economy, a more just and democratic society, and a safer world, the environmental enterprise will have to succeed. At the beginning of the twenty-first century it confronted the possibility of failure.

Notes and Questions

1. Do you agree with Shellenberger and Nordhaus that environmentalism is “dead”? Why or why not?

2. Is Shabecoff's assessment correct in your view? What has to change to avoid failure?

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